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### Student Employees and Collective Bargaining

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# Student Employees and Collective Bargaining

BY MARTIN H. MALIN\*

As the cost of living rises and tuition fees mount, increasing numbers of students are depending upon part-time and summer jobs to finance their education. Employers, faced with rising labor costs, frequently find that hiring student employees enables them to economize.<sup>1</sup> With this influx of students into a broader area of the workforce, it is not surprising that many such student employees have endeavored to assert their collective bargaining rights. Accordingly, student employee unions have become active in varying degrees in many of the more industrial states.<sup>2</sup>

This article will explore some threshold issues involved in the union-organizing activities of student employees. It will consider whether student employees are entitled to collective

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<sup>1</sup> Employers frequently find that they do not have to offer student employees the fringe benefits which they must pay non-students. Students, who are interested primarily in earning money to pay for their education, are not as concerned with long term benefits such as life insurance and pension plans. Other benefits, such as health insurance, frequently are provided by the school.

Employers also find students to be a less expensive source of labor because most students work part-time. Thus, students who work additional hours need not be paid overtime compensation.

<sup>2</sup> Student employees have been actively asserting their collective bargaining rights in Indiana: [1974] Gov't EMPL. REL. REP. (BNA) No. 553 at B-24; Illinois: *The Daily Illini*, Feb. 27, 1975, at 5; Michigan: see notes 163-66 *infra* and accompanying text for a discussion of student activities in Michigan; Minnesota: Bognanno & Suntrup, *Graduate Assistants' Response to Unionization: The Minnesota Experience*, 27 LAB. L.J. 32 (1976); [1974] Gov't EMPL. REL. REP. (BNA) No. 354 at B-20; New York: see, e.g., *Long Island College Hosp.*, 33 N.Y.S.L.R.B. 161; Ohio: [1974] Gov't EMPL. REL. REP. (BNA) No. 553 at B-24; Oregon: *University of Or.* [1970] Gov't EMPL. REL. REP. (BNA) No. 345 at B-2; Pennsylvania: *Philadelphia Ass'n of Interns & Residents v. Albert Einstein Medical Center*, 79 Lab. Cas. ¶ 53,840 (1976); and Wisconsin: Christenson, *Collective Bargaining in a University: The University of Wisconsin and the Teaching Assistants Association*, 1971 Wis. L. REV. 210; Feinsinger & Roe, *The University of Wisconsin, Madison Campus—TAA Dispute of 1969-70: A Case Study*, 1971 Wis. L. REV. 229.

bargaining rights under the National Labor Relations Act (N.L.R.A.) and similar state statutes and will discuss the bargaining unit treatment of such employees.<sup>3</sup> The article suggests that most student employees are entitled to the full protection of federal and state labor laws, that there is generally no objective reason for dividing employees into separate student and non-student bargaining units, and that where bargaining history has resulted in such divisions, student employee bargaining units should be established in a manner that will encourage students to exploit their collective bargaining rights.

### I. STATUTORY FRAMEWORK

Section 2(3) of the N.L.R.A.<sup>4</sup> establishes broad boundaries for the application of national labor policy by defining "employee" to include all employees unless specifically exempted. The N.L.R.A. exempts agricultural laborers, independent contractors, domestics, persons employed by their parents, supervisors, and persons employed by employers who are not covered by the Act.<sup>5</sup> In addition to the statutory exemptions, the National Labor Relations Board (NLRB or Board), with judicial approval, has interpreted the policies behind the N.L.R.A. to require the exclusion of managerial employees.<sup>6</sup>

Section 9(b) of the N.L.R.A. empowers the Board to determine what unit of employees is appropriate for collective bargaining "in order to assure to employees the fullest freedom in exercising their rights guaranteed" by the Act.<sup>7</sup> Super-

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<sup>3</sup> Similar policy problems have arisen in connection with collective bargaining attempts by college and university faculty. See notes 8 and 67 *infra* for further discussion of these problems.

<sup>4</sup> 29 U.S.C. §§ 151-69 (1970). Statutes similar to the N.L.R.A. are in effect in many states. See, e.g., Labor-Mediation-Public Employment-Fair Employment Practices, MICH. COMP. LAWS ANN. §§ 423.1-.254 (1978); New York State Labor Relations Act, N.Y. LAB. LAW §§ 700-17 (McKinney 1973); Public Employees' Fair Employment Act, N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1973); Municipal Employment Relations Act, WIS. STAT. ANN. §§ 111.70-.77 (West 1974); Wisconsin Employment Peace Act, WIS. STAT. ANN. §§ 111.01-.19 (West 1974).

<sup>5</sup> 29 U.S.C. § 152(3) (1970). For example, federal and state governments are employers not covered by the Act.

<sup>6</sup> NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

<sup>7</sup> 29 U.S.C. § 159(b) (1970).

visors,<sup>8</sup> guards,<sup>9</sup> and professional employees<sup>10</sup> are excluded by

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<sup>8</sup> N.L.R.A. § 2(3), 29 U.S.C. § 152(3) (1970). Section 2(11) of the N.L.R.A., 29 U.S.C. § 152(11) (1970) defines supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The purpose of the exclusion is to assure the undivided loyalty to the employer of persons who possess real power in his interest. *NLRB v. Security Guard Serv., Inc.*, 384 F.2d 143 (5th Cir. 1967). Therefore, the duties of a supervisor are read disjunctively, requiring that he possess only one of them, i.e., promotion, suspension, layoff, etc. *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948), *cert. denied sub nom. Foreman's Ass'n v. Edward G. Budd Mfg. Co.*, 335 U.S. 908 (1949). The supervisor, however, must meet all requirements that he: 1) have authority 2) to use independent judgment 3) in performing such supervisory functions 4) in the interest of the employer. *Security Guard Serv.*, 384 F.2d at 147.

In colleges and universities, much controversy has focused on the status of department chairmen. In *C.W. Post Center*, 189 N.L.R.B. 904, 906 (1971), the Board held department chairmen to be supervisors because chairmen had authority to make effective recommendations concerning hiring and promotion of other faculty. Thus, they were excluded from the faculty bargaining unit.

In *Fordham Univ.*, 193 N.L.R.B. 134 (1971), the Board included department chairmen in the faculty unit because they were not exercising their power in the interests of management but were acting in the interests of the faculty group. *See also Boston Univ. v. NLRB*, 575 F.2d 301 (1st Cir. 1978). The Board's subsequent decisions have been inconsistent. For example, in reliance on *Fordham*, department chairmen have been included in the bargaining unit in situations where they were clearly supervisors and, in reliance on *C.W. Post*, have been excluded in almost identical situations. *Compare Syracuse Univ.*, 204 N.L.R.B. 641 (1973) and *Adelphi Univ.*, 195 N.L.R.B. 639 (1973) (department chairmen excluded as supervisors) with *New York Univ.*, 205 N.L.R.B. 4 (1973) (department chairman included in the faculty bargaining unit). The NLRB's lack of experience in dealing with colleges and universities and a resulting confusion on its part regarding the duties of department chairmen have been cited as the primary reasons for this inconsistency. Kahn, *The N.L.R.B. and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. REV. 63, 139 (1973). The result has been described as a "disturbing and perhaps unseemly spectacle of a theoretically expert administrative agency issuing alternatively perfunctory and contradictory decisions based wholly on one or another of two differing precedents on the same question." Finkin, *The N.L.R.B. in Higher Education*, 5 TOLEDO L. REV. 608, 634-35 (1974).

The NLRB's rationale that department chairmen exercise their power in the interest of the faculty rather than in the interest of the administration also has been offered to justify including other faculty members as employees within the meaning of § 2(3). The Supreme Court rejected this rationale in *NLRB v. Yeshiva Univ.*, \_\_\_\_ U.S. \_\_\_\_, 100 S.Ct. 856 (1980), *aff'g* 582 F.2d 686 (2d Cir. 1978), wherein faculty were excluded from the category of employees entitled to collective bargaining under the N.L.R.A. The Court found that faculty members exercised managerial and super-

express statutory command from bargaining units composed of other employees.

Outside the statutory scheme, the Board excludes individuals who lack a community of interest with the other members of the bargaining unit. In determining whether a community of interests exists, the Board seeks to group employees who share interests in wages, hours and working conditions. Among the factors considered are the extent and type of organization; the history of collective bargaining with the employer; the duties, skills, wages and working conditions of the employees; the relationship between the proposed unit and the employer's organization; and the desires of the employees involved.<sup>11</sup> Applying this criterion, the Board has at times excluded retirees,<sup>12</sup> moonlighters,<sup>13</sup> seasonal employees,<sup>14</sup> persons whose inclusion in the unit would create conflicts of interest with their job responsibilities,<sup>15</sup> and persons related to

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visory functions through their authority in academic matters and by their participation in hiring, promotion and other policy decisions by department and committee activities.

State decisions are similarly in conflict. The Michigan Employment Relations Commission (M.E.R.C.) has excluded department chairmen as supervisors. *Henry Ford Community College*, [1969] 3 LAB. L. REP. (CCH) ¶ 49,994.36. The New York Public Employment Relations Board (N.Y.P.E.R.B.) has included them in the faculty unit. *State Univ. of N.Y.*, N.Y.P.E.R.B. ¶ 2-4100 at 4197 (1969). See generally Finkin, *The Supervisory Status of Professional Employees*, 45 FORDHAM L. REV. 805 (1977); Comment, *Bargaining of Academic Department Chairmen*, 40 U. CHI. L. REV. 442 (1973).

<sup>9</sup> N.L.R.A. § 9(b), 29 U.S.C. § 159(b) (1970).

<sup>10</sup> N.L.R.A. § 2(12), 29 U.S.C. § 152(12) (1970) defines professional employees as those whose work involves intellectual and varied tasks, requires exercise of discretion and judgment, cannot be measured in terms of standardized measurements of productivity, and requires advanced knowledge. An employee may also qualify by completing courses of specialized intellectual study and by performing related work under the supervision of a professional employee. Section 9(c) of the N.L.R.A., 29 U.S.C. § 159(c) (1970), permits inclusion of such employees in a unit with non-professionals only if the professionals vote for such inclusion.

<sup>11</sup> NLRB, Thirteenth Annual Report 35-36 (1948).

<sup>12</sup> *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 440 U.S. 157 (1971).

<sup>13</sup> *General Stencils, Inc.*, 178 N.L.R.B. 108, 115 (1969), *modified on other grounds*, 438 F.2d 894 (2d Cir. 1971); *Vaca Valley Bus Lines*, 171 N.L.R.B. 1469 (1968). But see *Westchester Plastics v. NLRB*, 401 F.2d 903 (6th Cir. 1968).

<sup>14</sup> *NLRB v. WGOK, Inc.*, 384 F.2d 500 (5th Cir. 1967).

<sup>15</sup> *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 273 n.20 (1974).

the employer's stockholders, officers or managers.<sup>16</sup>

## II. STUDENTS EMPLOYED IN PRIVATE INDUSTRY

The analysis used to determine student employees' bargaining rights has varied according to the character of the *employer* involved. Two groups of employers have emerged from the decisions: private industry and the schools. While the reasoning employed does not differ with an employer's status as a university or a private business, the results do vary. Student collective bargaining interests receive no protection in the university area but fare somewhat better in the business sector.

Students employed by private industry generally are employed either as summer employees, as workers hired through a cooperative program in their schools, or as year round part-time employees. These students usually have been considered to be "employees" within the meaning of the N.L.R.A. The NLRB views the students' employment responsibilities as derived from their status as employees rather than from their status as students.<sup>17</sup> Consequently, most Board decisions deal not with whether such students are employees but with whether they should be included in the same bargaining unit as non-students.

Frequently the employer and the union have agreed to exclude student employees from the bargaining unit, and such agreements generally have been respected in the final formulation of the unit.<sup>18</sup> But when the employer and union cannot agree, the NLRB must define the bargaining unit. The Board professes to apply its community of interest criterion to resolve issues involving the inclusion of student employees in units composed of non-students.<sup>19</sup> The NLRB has not been consistent, however, in its adherence to this policy.

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<sup>16</sup> I.W. Corp., 239 N.L.R.B. No. 65, (1978); Crystal Tire Co., 165 N.L.R.B. 563, 568 (1967), *modified on other grounds*, 410 F.2d 916 (8th Cir. 1969).

<sup>17</sup> St. Clare's Hosp. & Health Center, 229 N.L.R.B. 1000 (1977).

<sup>18</sup> General Elec. Co., 80 N.L.R.B. 174 (1948); Pittsburgh Plate Glass Co., 76 N.L.R.B. 452 (1948). In colleges and universities, state labor boards have similarly respected such agreements. *See, e.g.*, Colgate Univ., 32 N.Y.S.L.R.B. 313 (1969); Syracuse Univ., 32 N.Y.S.L.R.B. 216 (1969); Sage Dining Halls, Inc., 29 N.Y.S.L.R.B. 178 (1965).

<sup>19</sup> St. Clare's Hosp. & Health Center, 229 N.L.R.B. 1000 (1977).

### A. *Summer Employees*

Seasonal employees are included in a bargaining unit when their employment is regular in nature. Factors used to determine whether the employment is in fact regular in nature include whether there is a consistent pattern of rehire in successive seasons<sup>20</sup> and whether the employees perform duties functionally related to and possess interests closely allied with the year-round employees in the proposed unit.<sup>21</sup> In *Atlantic Refining Co.*,<sup>22</sup> the Board applied these criteria to students employed at sea during their summer vacation. The Board rejected the employer's arguments that the students would return to school after only one or two trips and that they were hired as temporary replacements for permanent employees who were on vacation.<sup>23</sup> The NLRB included the students in the unit because their jobs were functionally related to those of non-students but indicated that the votes of employees who lacked a reasonable expectation of being rehired from year to year would be subject to challenge.<sup>24</sup>

The *Atlantic Refining* criteria for the inclusion of summer employees in the bargaining unit had a short-lived history. In *Brown-Forman Distillers Corp.*,<sup>25</sup> the Board excluded three employees from the bargaining unit: a student employed during the previous summer, a school teacher employed during the previous two summers, and another school teacher employed during the previous four summers. This result was reached although each individual had agreed to work the following summer. The NLRB subsequently interpreted *Brown-Forman* as overruling *Atlantic Refining*,<sup>26</sup> justifying its exclusion of summer employees on the ground that such employees are interested primarily in their school work<sup>27</sup> and,

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<sup>20</sup> Inclusion of seasonal employees in bargaining units of year round employees generally is handled on a case-by-case basis. *NLRB v. Bar-Brook Mfg. Co.*, 220 F.2d 832 (5th Cir. 1955).

<sup>21</sup> *Atlantic Ref. Co.*, 106 N.L.R.B. 1268 (1953).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1271.

<sup>24</sup> *Id.* at 1272.

<sup>25</sup> 118 N.L.R.B. 454 (1957).

<sup>26</sup> *Belcher Towing Co.*, 122 N.L.R.B. 1019, 1020 (1959).

<sup>27</sup> *E.V. Williams Co.*, 175 N.L.R.B. 792, 795 (1969), *aff'd sub nom.* N.L.R.B. v.

therefore, are temporary or casual employees who lack a reasonable expectation of permanent employment.<sup>28</sup> The Board's rigid approach has resulted in exclusion from the bargaining unit of summer employees who had worked for their employers for as many as eight consecutive summers.<sup>29</sup>

### B. *Cooperative Student Employees*

Cooperative students are those employed pursuant to arrangements between the employer and the school whereby the students are eligible for work-study benefits or receive school credit for their employment. In *Parkwood IGA Foodliner*,<sup>30</sup> the Board applied a community of interests approach and included two high school cooperative students in the non-student unit because they were an integral part of the workforce, having substantially the same duties, wages and working conditions as other employees. This decision, however, stands alone. In all other instances, the NLRB has excluded cooperative student employees from the non-student bargaining unit. In cases in which the students alternated periods of full-time employment with periods of full-time schooling, the Board viewed these students as temporary or irregular employees and excluded them from the non-student bargaining unit.<sup>31</sup> In other cases the cooperative students were excluded where they worked regular schedules throughout the year. In excluding these students, the Board noted the close relationship between the school and the employer<sup>32</sup> and observed that cooperative student employees received substantially lower wages than regular employees.<sup>33</sup> The Board also excluded coopera-

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E.V. Williams Co., 432 F.2d 557 (4th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971).

<sup>28</sup> Walgreen La. Co., 186 N.L.R.B. 129, 130 (1970) (medical students employed during the summer as pharmacists); Brown-Forman Distillers Corp., 118 N.L.R.B. 454 (1957).

<sup>29</sup> Home Brewing Co., 124 N.L.R.B. 930, 932 (1959).

<sup>30</sup> 210 N.L.R.B. 349 (1975).

<sup>31</sup> Bulldog Elec. Prod. Co., 96 N.L.R.B. 642 (1951); American Rolling Mill Co., 73 N.L.R.B. 617, 623 (1947).

<sup>32</sup> In *Colecraft Mfg. Co.*, 162 N.L.R.B. 680 (1967), the employer gave the school performance ratings for each of the cooperative students and the school retained the right to remove students from the program in the event that their grades suffered.

<sup>33</sup> Pawating Hosp. Ass'n., 222 N.L.R.B. 672 (1976).



tive students where the arrangement between the employer and the school was informal, where the employer did not report to the school on the students' performances, where the students received no school credit for their work, and where their wages were only slightly less than non-student employees.<sup>34</sup>

The justification common to all Board decisions excluding cooperative students from non-student bargaining units is the employers' willingness to accommodate the students' class schedules and the students' limited tenure as employees.<sup>35</sup> These decisions, however, are impossible to reconcile with *Parkwood IGA Foodliner*, where students who received school credit for their work and whose schedules were adjusted to accommodate their classes were included in the non-student unit.<sup>36</sup>

The NLRB has attempted to distinguish *Parkwood* by noting that the record in that case contained no evidence concerning whether the students remained with the employer after graduation.<sup>37</sup> This distinction is not significant. In *Parkwood* the record revealed that the students received experience in the grocery business which, in conjunction with their course of study, would prepare them for managerial positions but disclosed that none of the students intended to obtain such positions or to otherwise remain with the employer after graduation.<sup>38</sup> Furthermore, the Board has excluded cooperative students where the record revealed that some of the students continued to work for their employer after graduation<sup>39</sup> and has refused to consider an employer's offer of proof that school cooperative office statistics showed that fifty percent of its cooperative students eventually took full-time em-

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<sup>34</sup> Highview, Inc., 223 N.L.R.B. 646 (1976).

<sup>35</sup> "In view of the foregoing, most especially the fact that the student workers' tenure appears of limited duration, we find merit in the Employer's contention that these part-time student employees lack a sufficient community of interest to be included in the requested unit. . . ." *Id.* at 649.

<sup>36</sup> 210 N.L.R.B. at 351.

<sup>37</sup> Pawating Hosp. Ass'n, 222 N.L.R.B. at 673 n.8.

<sup>38</sup> 210 N.L.R.B. at 350.

<sup>39</sup> 222 N.L.R.B. at 673.

ployment with their industry employers.<sup>40</sup>

*Parkwood* thus represents an aberration in Board policy. Apparently the NLRB refuses to apply its community of interest criterion to determine whether cooperative student employees should be included in the bargaining unit and has adopted a policy of excluding all such employees. This position was confirmed in a recent case in which the Board reasoned that the employer acted as a surrogate for the educational institution with respect to these students. Thus, the NLRB has concluded that cooperative students' interest in their employment is primarily educational.<sup>41</sup> Consistent application of this rationale would result in the exclusion of student-employees whose schooling and on the job training were preparing them for regular full-time positions with the employer after graduation. However, such students traditionally have been included in the bargaining unit.<sup>42</sup>

### C. *Year Round Part-Time Employees*

In applying its community of interest criterion to non-cooperative student employees who generally work throughout the school year, the NLRB has included such employees with non-students if they work a substantial number of hours on a regular basis.<sup>43</sup> The degree of regularity required is illustrated

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<sup>40</sup> N.L.R.B. v. Certified Testing Labs., Inc., 387 F.2d 275, 281 (3rd Cir. 1967).

<sup>41</sup> St. Clare's Hosp. & Health Center, 229 N.L.R.B. 1000, 1001 (1977). Although the NLRB has not specifically held that cooperative student employees are not employees within the meaning of the N.L.R.A., its analysis that the employer stands in the place of the school would require that result.

<sup>42</sup> See, e.g., Federal Scientific Instrument Corp., 49 N.L.R.B. 362 (1943) (students employed part-time while attending trade school included in the non-student bargaining unit because of a history of such students remaining with the employer after graduation).

<sup>43</sup> See, e.g., Dick Kelchner Excavating Co., 236 N.L.R.B. 1414 (1978) (students included despite employer scheduling accommodation because the students received the same pay and benefits and were subject to the same supervision as non-student employees); F.P. Packaging, Inc., 236 N.L.R.B. 239 (1978) (student included because he worked a substantial number of regularly scheduled hours per week despite not being eligible for fringe benefits offered non-students); Mount Sinai Hosp., 233 N.L.R.B. 507 (1977) (students included despite history of leaving employer after graduation where they worked regularly scheduled substantial numbers of hours per week); Hickory Farms of Ohio, 180 N.L.R.B. 755, 756 (1970) (same working conditions as non-student employees); Display Sign Serv., Inc., 180 N.L.R.B. 49 (1969)

by *Sandy's Stores, Inc.*,<sup>44</sup> in which the Board's inclusion of a student who worked full-time during the summer and part-time on Saturdays during the remainder of the school year was reversed by the First Circuit Court of Appeals. The court noted the student's twenty percent absence rate prior to summer, as well as her failure to work the last two weeks in September and the first week in October, and concluded that she worked whenever she wished, rather than on a regular basis.<sup>45</sup>

The NLRB also has excluded student employees where their duties or working conditions were markedly different from those of non-students,<sup>46</sup> where they were working for a fixed period of time,<sup>47</sup> and where the students were working for experience only and receiving no pay.<sup>48</sup>

Despite its stated policy, the Board has failed to apply its community of interest criterion in many cases involving part-time student employees. Instead, the Board, on occasion, has treated part-time student employees in the same manner in which it has treated cooperative students. Stating that these students view their employment as merely incidental to their

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(students included because they regularly worked 20 hours per week despite receiving lower wages and being ineligible for fringe benefits); *Florsheim Retail Boot Shop*, 80 N.L.R.B. 1312 (1949) (students included because they performed the same general duties as non-students although they were paid differently); *Amboy Milk Prods. Co.*, 56 N.L.R.B. 294, 295-96 (1944) (students included where they were subject to the same working conditions as non-students although they were paid a lower wage rate).

The NLRB has included students working part-time throughout the year while excluding students employed only for the summer. *Georgia-Pac. Corp.*, 195 N.L.R.B. 258, 258-59 (1972); *Crest Wine & Spirits*, 168 N.L.R.B. 754 (1967); *Giordano Lumber Co.*, 133 N.L.R.B. 205, 207 (1961).

<sup>44</sup> 163 N.L.R.B. 728 (1967), *rev'd sub nom.* *NLRB v. Sandy's Stores, Inc.*, 68 L.R.R.M. 2800 (1st Cir. 1968).

<sup>45</sup> 68 L.R.R.N. 2800 (1st Cir. 1968). *See also* *Simon Bros. Co.*, 173 N.L.R.B. 906, 907 (1968) (two students working 15-20 hours per week included in the bargaining unit, while two others were excluded because they only worked three hours per week distributing beer to fraternity houses at their college).

<sup>46</sup> *Automation & Measurement Div. of Bendix Corp.*, 179 N.L.R.B. 140, 142 (1969); *see also* *Huron Motor Inn*, 1966 M.E.R.C. 568; *cf.* *Lenox Hill Hosp.*, 64 L.R.R.M. 1385, 1386 (1967) (student pharmacist excluded from unit of professional pharmacists because she was not licensed).

<sup>47</sup> *Davison-Paxon Co.*, 185 N.L.R.B. 21, 23 (1970) (students hired for one year period only). *But see* *Red & White Super Mkts.*, 172 N.L.R.B. 1841 (1968) (two students hired for a fixed term excluded but a third student included where the record showed that his employment continued beyond the expiration date of the fixed term).

<sup>48</sup> *Evans Broadcasting Corp.*, 179 N.L.R.B. 781, 782 (1969).

education, that they have no plans to remain with the employer after graduation,<sup>49</sup> and that students receive substantially lower wages and fewer fringe benefits,<sup>50</sup> the NLRB has excluded them from non-student units. This has resulted in the exclusion of students in cases almost identical to those in which students have been included.<sup>51</sup>

Exclusion of students because their employment is incidental to their education is inconsistent with decisions involving other special classes of part-time employees. For example, the NLRB had excluded pensioners who limited their hours to avoid exceeding the maximum earnings consistent with receipt of full Social Security benefits,<sup>52</sup> but the Sixth Circuit Court of Appeals declared this policy to be arbitrary and ca-

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<sup>49</sup> Mack's eligibility is not to be determined solely on the basis of his status as a regular part-time employee. . . . It is abundantly clear in this case that Mack's employment was of a temporary nature and that he lacked a community of interest with the regular employees. While he could theoretically have continued to work for Respondent as long as he wanted to, the expiration of his period of employment was in fact certain, the only uncertainty being the causal event, assignment to work block [program where a student works for a company and receives college credit for graduation] or graduation. Mack admitted he "had no interest in the Union and I paid very little attention about it, because I was just working there to go to Alfred."

Richard V. Stevens, 178 N.L.R.B. 144, 151-52 (1969). While lip service was given to the community of interest standard, the criterion was not meaningfully applied. See also Arrow Specialties, Inc., 177 N.L.R.B. 306 (1969) (student excluded despite being employed on a regular basis because he did not intend to remain with the employer after graduation).

<sup>50</sup> Pawating Hosp. Ass'n, 222 N.L.R.B. 672 (1976).

<sup>51</sup> Compare *Pawating with Mount Sinai Hosp.*, 233 N.L.R.B. 507 (1977). The inconsistency is illustrated by two NLRB decisions. In *National Cash Register Co.*, 95 N.L.R.B. 27 (1951) and 74 N.L.R.B. 1350 (1947), the NLRB was faced with the question of whether to include high school and university students in a unit with other employees. The high school students worked part-time throughout the year, while the university students alternated between periods of full-time employment and full-time study in a work-study cooperative program. The NLRB excluded the university students, not because of the special work-study arrangement, but because they did not intend to remain in their jobs after graduation. In considering the high school students, the Board felt constrained by a prior decision that had included the students in the unit. In that prior decision, the Board gave no consideration to whether the students intended to remain with the employer after graduation but included them in the unit because their duties sufficiently aligned their interests with the other employees.

<sup>52</sup> *Taunton Supply Corp.*, 137 N.L.R.B. 221, 223, (1962), followed in *Red & White Super Mkts.*, 172 N.L.R.B. 1841, 1842 (1968) and *Crystal Tire Co.*, 165 N.L.R.B. 563, 568 (1967).

precious in *Indianapolis Glove v. NLRB*.<sup>53</sup> The court noted that the Board had added age and motivation for working as criteria for determining the regularity of part-time employment and the similarity of duties and working conditions. The court concluded that these factors had no rational relationship to the pensioners' community of interest with other employees.<sup>54</sup> As a result of this decision, the NLRB has changed its policy and includes pensioners with other employees, even though the pensioners seek to limit their hours.<sup>55</sup>

Relying on *Indianapolis Glove*, the Sixth Circuit Court of Appeals held that the community of interest criterion is restricted to consideration of regularity and substantiality of hours and to similarity of duties and working conditions.<sup>56</sup> The court held that a moonlighter was properly included in the bargaining unit despite the part-time employer's constant schedule accommodations to her full-time job.<sup>57</sup>

Arguably, there are certain aspects of student employment that may justify students' exclusion from the non-student bargaining unit. For example, students and non-students are not interested in obtaining the same benefits from collective bargaining. Students, whose employment will last only until they have graduated from school, may not be interested in long range benefits such as pension plans or life insurance. Furthermore, they may not be interested in a benefit such as health insurance because it is provided by their school or by their parents' employers. They may wish to concentrate exclu-

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<sup>53</sup> 400 F.2d 363 (6th Cir. 1968).

<sup>54</sup> The court reasoned that pensioners limiting their hours because of Social Security regulations were no different than other employees who might limit their hours for other reasons such as illness or because they were working only to supplement the family income. *Id.* at 368.

<sup>55</sup> *Holiday Inns of America, Inc.*, 176 N.L.R.B. 939 (1969).

<sup>56</sup> *Westchester Plastics v. NLRB*, 401 F.2d 903, 907-08 (6th Cir. 1968).

<sup>57</sup> *Id.* at 908. The NLRB generally includes moonlighters in the bargaining unit where they meet these criteria. *See, e.g.*, *Leaders-Nameoki, Inc.*, 237 N.L.R.B. 1269 (1978) (moonlighter who regularly averaged four hours per week included even though she was not eligible for fringe benefits and the employer always accommodated her full time work schedule).

At least one administrative law judge, in an opinion adopted by the NLRB, has viewed *Indianapolis Glove* as controlling the issue of student employee inclusion in the bargaining unit. *Skaggs Transfer, Inc.*, 185 N.L.R.B. 662, 666 (1970).

sively on higher wages. Such an argument was rejected, however, when offered to justify exclusion of pensioners<sup>58</sup> and is inconsistent with the inclusion of moonlighters who presumably receive such fringe benefits from their full-time jobs. It is also inconsistent with the inclusion of full-time employees who are covered under insurance plans provided by their spouses' employers. Thus, this argument should not suffice to exclude students from the bargaining unit.

Similarly, the frequent exclusion of student employees from fringe benefit plans and the disparities in wage rates paid student and non-student employees should not justify excluding students from the non-student bargaining unit. Such lower wages and benefits indicate a difference in bargaining power rather than a different community of interests. Similar disparities have not justified exclusion of regular part-time employees.<sup>59</sup> Permitting such exclusions indicates total deference to an employer's classification scheme and allows the employer to dictate who is eligible to vote in a representation election.<sup>60</sup>

The student's tendency to terminate his employment after graduation also does not significantly differentiate him from other part-time employees whose tenure is frequently of

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<sup>58</sup> Counsel for the Board contends that the exclusion of these Social Security recipients was reasonable and well within the Board's discretion in determining the appropriate unit because these employees have different collective bargaining goals than other employees. Specifically, counsel asserts that Social Security beneficiaries will be less interested in obtaining wage increases than regular employees with a growing family to support. Under this reasoning the fact that the disenfranchised employees met the objective tests for determining community of interest—similarity of work, wages, fringe benefits, supervision, and whether the employee works substantial hours per week on a regular basis—became irrelevant and the employees' right to be included in the bargaining unit depends on the Board's speculation as to the collective bargaining goals of employees. The Board's action in excluding these employees from the bargaining unit on the sole basis of the Board's speculation as to their bargaining goals instead of on the basis of objective factors showing a lack of community of interest is totally unreasonable and arbitrary.

*Indianapolis Glove Co. v. NLRB*, 400 F.2d at 368.

<sup>59</sup> *F.P. Packaging, Inc.*, 236 N.L.R.B. 239 (1978); *Display Sign Serv., Inc.*, 180 N.L.R.B. 49 (1969); *Lloyd A. Fry Roofing Co.*, 121 N.L.R.B. 143 (1958); *Amboy Milk Prods.*, 56 N.L.R.B. 294 (1944).

<sup>60</sup> *NLRB v. New England Litho. Co.*, 589 F.2d 29, 36 (1st Cir. 1978).

limited duration.<sup>61</sup> The exclusion of part-time student employees is inconsistent with the Board's general policy of including in the bargaining unit a temporary employee who has no certain date for the termination of his employment.<sup>62</sup> The NLRB has applied this "date certain" rule to include employees whose tenure with the employer appeared to be much shorter than the tenure of many student employees.<sup>63</sup> The test calls for the inclusion of employees in the unit, even though their positions have a history of frequent turnover.<sup>64</sup> In view of these arguments, it is not surprising that Michigan and Massachusetts have rejected criteria which would exclude student employees where the students share similar duties and working conditions with other employees.<sup>65</sup>

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<sup>61</sup> Gannon, *A Profile of the Temporary Help Industry and its Workers*, 97 MONTHLY LAB. REV. 44 (1974).

<sup>62</sup> NLRB v. New England Litho. Co., 589 F.2d 29 (1st Cir. 1978); *Personal Prods. Corp.*, 114 N.L.R.B. 959 (1965).

<sup>63</sup> In *Emco Steel, Inc.*, 227 N.L.R.B. 989, *enforced sub nom.* NLRB v. *Emco Steel Co.*, 95 L.R.R.M. 3011 (2d Cir. 1977), an employee accepted a job with the employer with the understanding that his employment would terminate when a strike at his regular place of employment was settled. The employee received no fringe benefits, took a substantial pay cut, and, unlike the permanent employees, was unable to supply his own tools because they had been left at his regular job site. The NLRB employed its date certain test and included him in the bargaining unit.

In *M.J. Pirolli & Sons*, 194 N.L.R.B. 241, *enforced sub nom.* NLRB v. *M.J. Pirolli & Sons*, 80 L.R.R.M. 3170 (1st Cir.), *cert. denied*, 409 U.S. 1008 (1972), an employee who at the time of his hiring advised the employer that he intended to quit when he secured employment with the state police force and another employee who was hired only to work for the spring were included in the bargaining unit because there was no date certain for their termination.

Employees have been held eligible to vote in representation elections even though they have announced their intention to quit on the date of the election. *NLRB v. General Tube Co.*, 331 F.2d 751 (6th Cir. 1964).

<sup>64</sup> In *Vindicator Printing Co.*, 146 N.L.R.B. 871 (1964), the employer sought to exclude from the bargaining unit four hoppers and two shortage haulers. The record demonstrated that 32 persons had filled the former four positions during a six year period and 10 persons had filled the latter two during a six year period. *Id.* at 878. The NLRB included the employees in the unit because they were hired for an indefinite period and their duties were related functionally to and were a regular and continuous part of the employer's operations. *Id.*

<sup>65</sup> Undoubtedly many of [the student employees], perhaps most of them, will seek a different type of employment when they have completed their formal education. However, it seems to the Commission, that so long as they remain in the Company's employ, they have as much common interest with the full time employees as have the adult part time employees. *Lewando's French Dyeing & Cleansing Co.*, 19 L.R.R.M. 1234, 1235 (1946). *Compare*

The exclusion of students from the non-student employee bargaining unit forces them to organize in a separate unit.<sup>66</sup> Such organization results in two groups competing for the employer's limited resources. This competition will be fierce, particularly where the students have been receiving substantially lower wages and benefits, and the employer will be forced to seek accommodations between the two groups. Such accommodations will be of questionable value, given the lack of a single authority to speak for both groups. If students do not organize, however, they run a high risk that the terms and conditions of their employment will be dictated by the non-student union.<sup>67</sup> This potential turmoil fostered by the NLRB's exclusion of student employees from non-student units contradicts the Board's policy of promoting industrial peace.

### III. STUDENTS EMPLOYED AT THEIR SCHOOLS

The NLRB has transported the rationale that students' interest in their employment is incidental to their interest in

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Saginaw Hosp. 1968 M.E.R.C. 508 (students included where they worked regularly scheduled hours on a year round basis) *with* Harper Hosp., 1966 M.E.R.C. 116 (students excluded where their employment was found to be irregular and indefinite).

<sup>66</sup> Students were granted a separate unit in *Six Flags*, 215 N.L.R.B. 809 (1974).

<sup>67</sup> The abandonment of the objective community of interest tests for subjective criteria created similar problems for part-time faculty. The NLRB initially confronted the issue in *C.W. Post Center*, 189 N.L.R.B. 904 (1971), where it applied traditional industrial criteria and included part-time faculty in the full-time unit. After gaining experience with the issue, the NLRB reformulated its policy, deciding to include part-time faculty in the full-time unit where they carried a teaching load of at least one-fourth the average full-time load and maintained that load during at least one semester of two of the preceeding three years. *Catholic Univ.*, 201 N.L.R.B. 292 (1973). This position was strongly criticized by the American Association of University Professors which urged the NLRB to consider the subjective bargaining goals of full and part-time faculty. The NLRB responded to this criticism by reversing its policy and excluding part-time faculty on the ground that such individuals were not as concerned with faculty input in administrative matters. *New York Univ.*, 205 N.L.R.B. 4 (1978); *see also* *Boston Univ. v. NLRB*, 575 F.2d 301 (1st Cir. 1978). Chairman Miller dissented, urging that the Board's action would create competing groups of employees whose interests could not be accommodated in the absence of a single authority to speak for both groups. *New York Univ.*, 205 N.L.R.B. at 10 (Miller, Chairman, dissenting). Member Fanning believed the decision had gone even further and had placed part-time faculty at the mercy of full-time faculty as to wages, hours and conditions of employment. *Id.* at 12 (Fanning, Member, dissenting).



their education from the private industry setting to the university environment. Initially, the Board adopted this reasoning as a means of excluding students from non-student units. It subsequently extended this idea to justify its conclusion that students employed by their schools are not "employees" within the meaning of the N.L.R.A.

Decisions involving students and their schools have a short history, for the NLRB's assertion of jurisdiction over private colleges and universities is a recent phenomenon. Initially, the Board declined to assert such jurisdiction on the ground that the activities of such institutions were not commercial in nature.<sup>68</sup> Under this rationale, the NLRB also declined jurisdiction over commercial contractors servicing the university.<sup>69</sup> The NLRB reversed this policy in *Cornell University*,<sup>70</sup> reasoning that conditions had changed in the two decades since its decision not to assert jurisdiction. Noting that many universities derive a large part of their income from securities and real estate transactions, that universities make large purchases of food, furniture and supplies across state lines, and that these institutions receive substantial federal funding, the NLRB concluded that the impact of universities on interstate commerce was massive.<sup>71</sup>

Having asserted jurisdiction over private universities, the Board was faced with the issue of whether students should be included in the non-student employee bargaining unit. Initially, the Board applied its community of interest criterion in making this determination. Thus, the NLRB included students who worked regular hours and who were covered under the employer's established wage and benefits program.<sup>72</sup> The Board, however, excluded students who worked for meals instead of wages<sup>73</sup> and whose pay and hours were controlled by the university and diminished by the amount of financial aid

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<sup>68</sup> *Columbia Univ.*, 97 N.L.R.B. 424 (1951).

<sup>69</sup> *Crotty Bros.*, 146 N.L.R.B. 755 (1964).

<sup>70</sup> 183 N.L.R.B. 329 (1970).

<sup>71</sup> *Id.* at 332-34. The Board, however, lacks jurisdiction over public universities because such schools are state operated and thus are not employers within the statutory definition. See note 5 *supra* for a discussion of this point.

<sup>72</sup> *Leland Stanford Jr. Univ.*, 194 N.L.R.B. 1210, 1215 (1972).

<sup>73</sup> *I.T.T. Canteen Corp.*, 187 N.L.R.B. 1 (1970).

received.<sup>74</sup> Along with the community of interest approach, the NLRB suggested that where the students' employment was merely incidental to their academic objectives, this would be a factor for determining whether the students should be included in the non-student unit.<sup>75</sup>

The NLRB's policy regarding the inclusion of students in non-student employee bargaining units was crystalized in *Cornell University*.<sup>76</sup> Cornell employed 3,000 students in various jobs throughout the university, and its student employment program was tied directly to student financial aid. Prior to the fall semester, the university evaluated student financial aid applications and awarded packages consisting of scholarships, loans and part-time jobs. Students receiving such aid were guaranteed a job on campus. A student who quit his job or performed unsatisfactorily jeopardized the remainder of his financial aid package.<sup>77</sup>

The NLRB could have excluded the student employees from the unit because their employment was tied directly to a financial aid package. However, the Board chose to ignore the financial aid program and excluded the students on the ground that their employment was incidental to their academic objectives.<sup>78</sup> This approach became the NLRB's general rationale. Relying on *Cornell*, the Board excluded graduate students working as resident advisors at an undergraduate dormitory, even though they attended universities other than the one at which they worked, were employed on a regular basis under common supervision and were subject to the same general terms and conditions of employment as all other employees.<sup>79</sup> The NLRB also used the *Cornell* rationale to exclude students who were employed as regularly scheduled part-time employees, performing the identical tasks and work-

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<sup>74</sup> Georgetown Univ., 200 N.L.R.B. 215, 216 (1972).

<sup>75</sup> I.T.T. Canteen Corp., 187 N.L.R.B. at 2; see also Scope Assoc., 172 N.L.R.B. 1789 (1968).

<sup>76</sup> 202 N.L.R.B. 290 (1973). Twenty-two other universities and related institutions submitted *amicus curiae* briefs urging the NLRB to adopt a rule excluding students from bargaining units composed of non-student employees. *Id.* at 290 n.1.

<sup>77</sup> Brief for the Employer at 31, 33, Cornell Univ., 202 N.L.R.B. 290 (1973).

<sup>78</sup> 202 N.L.R.B. at 292.

<sup>79</sup> Barnard College, 204 N.L.R.B. 1134 (1973).

ing the same work-year as non-students.<sup>80</sup>

### A. *Students as "Employees"—NLRB Decisions*

Students who have been excluded by their schools from non-student employee units often have attempted to organize into separate bargaining units. These efforts have forced consideration of whether student employees are "employees" within the meaning of the National Labor Relations Act and, therefore, subject to its collective bargaining protections and restraints.<sup>81</sup> Students employed by a private contractor servicing a university have been afforded the protection of the N.L.R.A. and have been granted an election in a separate all-student unit.<sup>82</sup> Students employed directly by their university have not fared as well.

In *San Francisco Art Institute*,<sup>83</sup> thirteen janitors petitioned for a representation election. All but one of the janitors were working part-time while attending the institution as full-

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<sup>80</sup> *Macke Co.*, 211 N.L.R.B. 90 (1974). The Regional Director had relied on *Stanford Univ.*, 194 N.L.R.B. 1210 (1972), and had included the student employees in the non-student unit. Decision of the Regional Director, Region 2, *Macke Co.*, No. 2-RC-16405 (Feb. 27, 1974). Students employed by a private contractor who operated a cafeteria in a dormitory complex at the University of California at Davis were excluded from the non-student unit despite performing the same work, in the same physical area, under the same supervision as non-students. *Saga Food Serv. of Cal.*, 212 N.L.R.B. No. 113 (1974). In *System Auto Park*, 248 N.L.R.B. No. 115, 103 L.R.R.M. 1550 (1980), however, students employed part-time by a concessionaire at Boston University were included in a unit of non-student parking lot attendants.

The NLRB also has excluded graduate assistants from faculty bargaining units on the ground that the assistants were primarily students and, therefore, interested in their studies rather than their wages and conditions of employment. *College of Pharmaceutical Sciences*, 197 N.L.R.B. 959 (1972); *Adelphi Univ.*, 195 N.L.R.B. 639 (1972).

<sup>81</sup> The NLRB initially avoided the issue. In *Barnard College*, 204 N.L.R.B. 1134 (1973), the Board specifically declined to address the issue although it was raised in an *amicus* brief submitted by Wheaton College. *Id.* at 1135 n.5. Subsequent to the NLRB's decision to exclude students from the non-student unit in *Macke Co.*, the union requested reconsideration for the purpose of determining whether a separate unit of students was appropriate. The NLRB summarily denied the request. Telegram from N.L.R.B. to all parties, *Macke Co.*, No. 2-RE-16405 (June 24, 1974).

<sup>82</sup> *Macke Co.*, No. 2-RC-16725 (1975) (not officially reported, but discussed in *St. Clare's Hosp. & Health Center*, 229 N.L.R.B. 1000, 1001 n.13, 1008 (1977) (Fanning, Chairman, dissenting), and *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251, 254 (1976) (Fanning, Member, dissenting)).

<sup>83</sup> 226 N.L.R.B. 1251 (1976).

time students. The record showed that the students were regularly scheduled to work a minimum of twenty hours per week, frequently worked additional hours and that some averaged between thirty-five and forty-five hours per week.<sup>84</sup> The only two students who testified indicated that they had worked for the employer for three and one-half years and two and one-half years respectively.<sup>85</sup> One of these students testified that he intended to remain in the Institute's employ after graduation.<sup>86</sup> The NLRB held that these students were concerned primarily with their studies rather than with their part-time employment and therefore were not employees within the meaning of the N.L.R.A. The Board distinguished its prior cases involving students employed by commercial employers. It reasoned that when a student's employment is at the institution which he attends, the contrast between his primary interest in his studies and his tenuous secondary interest in his employment is brought sharply into focus.<sup>87</sup> The NLRB also has held that graduate research assistants are not employees entitled to the protection of the N.L.R.A.<sup>88</sup>

Most of the Board's decisions concerning whether students are employees within the meaning of the N.L.R.A. have involved hospital residents and interns. In *Cedars-Sinai Medical Center*,<sup>89</sup> the Board concluded that interns, residents and clinical fellows, collectively known as hospital housestaff, were not employees entitled to the protection of the N.L.R.A. The Board reasoned that the housestaff did not participate in internship and residency programs for the purpose of earning a living, but rather participated for the purpose of pursuing a graduate medical education. Upon completing the program, most participants sought employment in private practice, group practice, or with health organizations. Although housestaff were paid a stipend and received substantial fringe benefits, the NLRB considered these to be living allowances rather

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<sup>84</sup> *Id.* at 1251 n.2, 1254 (Fanning and Jenkins, Members, dissenting).

<sup>85</sup> *Id.* at 1251 n.2.

<sup>86</sup> *Id.* at 1252 n.5.

<sup>87</sup> *Id.* at 1252.

<sup>88</sup> *Leland Stanford Jr. Univ.*, 214 N.L.R.B. 621 (1974).

<sup>89</sup> 223 N.L.R.B. 251 (1976).

than compensation.<sup>90</sup> The Board explained that it did not regard "students" and "employees" as mutually exclusive categories but was holding only that housestaff were engaged in graduate educational training rather than in an employment relationship with the university.<sup>91</sup>

The most immediate effect of the *Cedars-Sinai* decision was felt in New York. Prior to 1974, hospitals were not covered by the N.L.R.A. and were subject only to state labor regulations. Unlike the NLRB, the New York State Labor Relations Board (N.Y.S.L.R.B.) had held that housestaff were employees within the meaning of the state's labor law.<sup>92</sup> Following *Cedars-Sinai*, hospitals which had engaged in collective bargaining with housestaff for many years refused to bargain further. The housestaff complained to the N.Y.S.L.R.B. that such actions constituted unfair labor practices and sought orders compelling the hospitals to bargain. The N.Y.S.L.R.B. concluded that the NLRB had pre-empted any state action in this area and dismissed the petitions for lack of jurisdiction.<sup>93</sup>

The union sought review of the N.Y.S.L.R.B. decision in the New York Supreme Court which, following an unsuccessful attempt by the hospitals to remove the action to federal court,<sup>94</sup> reversed the state board. The New York court held that the NLRB had declined to assert jurisdiction over housestaff and that the N.Y.S.L.R.B. accordingly was not pre-empted.<sup>95</sup> The NLRB responded to the New York decision by indicating that it had intended to assert jurisdiction over housestaff. The Board then concluded that affording such per-

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<sup>90</sup> *Id.* at 253.

<sup>91</sup> *Id.*

<sup>92</sup> Long Island College Hosp., 33 N.Y.S.L.R.B. 165 (1967); Brooklyn Eye & Ear Hosp., 32 N.Y.S.L.R.B. 65 (1966).

<sup>93</sup> Albert Einstein College of Medicine, No. SU-49810 (N.Y.S.L.R.B., July 21, 1976), *cited in* Brief of the NLRB at 4 n.5, *NLRB v. Committee of Interns & Residents*, 566 F.2d 810 (2d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The N.Y.S.L.R.B. relied upon an earlier decision in which it had held that its jurisdiction to consider a representation petition at another hospital had been pre-empted by the NLRB, *Misericordia Hosp.*, 39 N.Y.S.L.R.B. No. 32 (1976).

<sup>94</sup> *Committee of Interns & Residents v. N.Y.S.L.R.B.*, 388 N.Y.S.2d 509 (Sup. Ct. 1976).

<sup>95</sup> *Id.*

sons collective bargaining rights was inconsistent with national labor policy.<sup>96</sup> This resulted in New York's reversing its prior holding and affirming the N.Y.S.L.R.B.'s finding of preemption.<sup>97</sup>

Subsequently, the NLRB brought suit in a federal district court to enjoin the N.Y.S.L.R.B. from exercising jurisdiction over housestaff.<sup>98</sup> The court, however, held that the NLRB's finding that housestaff were not employees and that their union was not a labor organization precluded the Board's jurisdiction over housestaff disputes with the hospitals. Thus, the court concluded that the N.Y.S.L.R.B. was free to exercise jurisdiction over such matters.<sup>99</sup> The N.Y.S.L.R.B. responded by reasserting its jurisdiction.<sup>100</sup>

With an appeal to the Second Circuit Court of Appeals pending, the NLRB, in *St. Clare's Hospital & Health Center*,<sup>101</sup> elaborated on its conclusion that affording housestaff collective bargaining rights was inconsistent with national labor policy. The Board reasoned that the students' primary academic interests presented considerations that were foreign to the economic warfare which characterized the typical collective bargaining process, considering academic concerns irrelevant to wages, hours and working conditions.<sup>102</sup> The Board determined that collective bargaining's promotion of equality of bargaining power was inconsistent with the inherently unequal student-teacher relationship.<sup>103</sup> The NLRB expressed concern that affording student employees collective bargaining rights would lead to bargaining on matters of a strictly academic nature, such as hours of study, program advancement, examinations, grading, course content and materi-

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<sup>96</sup> *Kansas City Gen. Hosp. & Medical Center*, 225 N.L.R.B. 108 (1976).

<sup>97</sup> *Committee of Interns & Residents v. N.Y.S.L.R.B.*, 391 N.Y.S.2d 503 (Sup. Ct. 1977).

<sup>98</sup> The NLRB brought this action under the authority of *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971).

<sup>99</sup> *NLRB v. Committee of Interns & Residents*, 426 F. Supp. 438 (S.D.N.Y. 1977).

<sup>100</sup> *Misericordia Hosp.*, 40 N.Y.S.L.R.B. No. 26 (1977).

<sup>101</sup> 229 N.L.R.B. 1000 (1977).

<sup>102</sup> *Id.* at 1002.

<sup>103</sup> *Id.* at 1002-03.

als, program duration, and teaching methods. The Board feared that recognition of these students as employees would result in an undue infringement on traditional academic freedoms and would create substantial impediments to the quality of the educational process.<sup>104</sup>

Without expressing an opinion on whether the NLRB had acted properly in denying housestaff collective bargaining rights, the Second Circuit held that N.Y.S.L.R.B. jurisdiction was pre-empted.<sup>105</sup> This vacillation ended when the Supreme Court denied the housestaff's petition for certiorari.<sup>106</sup>

The NLRB's position denying student employees collective bargaining rights is inconsistent with its prior decisions including full-time students in the same unit as non-students<sup>107</sup> and refusing to exclude from the bargaining unit full-time employees who were also part-time students.<sup>108</sup> It is also inconsistent with the weight of authority among state courts and agencies.<sup>109</sup>

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<sup>104</sup> *Id.* at 1003. The NLRB thus reversed its prior position that the status of "student" would not necessarily be inconsistent with the status of "employee." See note 91 *supra* and accompanying text for a relevant citation.

<sup>105</sup> *NLRB v. Committee of Interns & Residents*, 566 F.2d 810 (2d Cir. 1977).

<sup>106</sup> 435 U.S. 904 (1978). Consequently, a 10-day strike against 12 New York hospitals resulted because hospital housestaff were provided no alternative means of preserving their collective bargaining rights. *Hearings on H.R. 2222, Before the Subcomm. on Labor-Management Relations of the Comm. on Educ. and Labor*, 95th Cong. 1st Sess. 170-71 (1977) (testimony of Murray A. Gordon, General Counsel to the Physicians National Housestaff Association).

<sup>107</sup> *Leland Stanford Jr. Univ.*, 194 N.L.R.B. 1210, 1215 (1972).

<sup>108</sup> The NLRB included employees who were working full-time while taking classes part-time in the non-student unit in *Macke Co.*, 211 N.L.R.B. 90, 91 n.4 (1974) and in *Cornell Univ.*, 202 N.L.R.B. 290, 292 n.10 (1973).

<sup>109</sup> There appear to be only two state decisions which deny student employees the protections of state labor relations acts. In *Teachers Assistants' Ass'n v. University of Wisconsin-Madison*, No. 9261-A (Wis. Employment Relations Comm'n, Oct. 20, 1969), teaching assistants were teachers within the meaning of the Wisconsin State Employment Relations Act and were, therefore, in unclassified civil service and not covered by the Act. Thus, the W.E.R.C. did not face the issue of the dual status of student and employee. With the issue properly before it, W.E.R.C. found student employees to be entitled to collective bargaining rights. *Arrowhead School Dist. and Arrowhead United Teachers Organization*, No. 17213-B [1980] Gov't EMPL. REL. REP. (BNA) No. 877 at 14.

In *Philadelphia Ass'n of Interns & Residents v. Albert Einstein Medical Center*, 79 Lab. Cas. ¶ 53,840 (1976), the Pennsylvania Supreme Court overruled that state's expert administrative agency and held that residents and interns were not employees

## B. *State and Federal Courts' Rationale*

State decisions are particularly significant in this area, since the NLRB has only exercised jurisdiction over universities since 1970 and over hospitals since 1974. Thus, state agencies have had greater experience in applying labor laws to these institutions. State court or board decisions holding that student employees are entitled to collective bargaining rights have considered such rights necessary to fulfill the statutory goal of preventing labor strife.<sup>110</sup> These decisions have emphasized the failure of the legislatures to exclude students while specifically excluding other types of employees from the protection of the state labor acts.<sup>111</sup> The states have relied on analogous cases in which employees who had a dual status with their employers because of other types of relationships were not excluded.<sup>112</sup> Thus, they concluded that being a student is not necessarily inconsistent with being an employee.<sup>113</sup>

State decisions have placed heavy emphasis on the objective indications of employment status. They have recognized that student employees pay federal income tax on their

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entitled to the protection of the Pennsylvania Public Employee Relations Act. The court relied almost exclusively on *Cedars-Sinai*.

<sup>110</sup> City of Cambridge, No. MCR-2163 (Mass. Lab. Relations Comm'n, April 29, 1976). See also *Philadelphia Ass'n of Interns & Residents v. Albert Einstein Medical Center*, 79 Lab. Cas. ¶ 53,840 at 71,853 (1976) (Eagan, J., dissenting).

<sup>111</sup> See, e.g., *Regents of the Univ. v. M.E.R.C.*, 204 N.W.2d 218, 226 (Mich. 1973); *Michigan State Univ.*, 1976 M.E.R.C. 73, 80-81; *Long Island College Hosp.*, 33 N.Y.S.L.R.B. 161, 167 (1970).

<sup>112</sup> The New York State Labor Relations Board, for example, analogized the student employee's dual status to a building superintendent who simultaneously may be an employee and a tenant and to an individual receiving rehabilitative assistance from a charity who may be an employee of the charity as well as a client. *Long Island College Hosp.*, 33 N.Y.S.L.R.B. 165, 168 (1970).

<sup>113</sup> "The fact that the student workers involved in this case are primarily students and are employed by the University as a means of economic survival in order to complete their education does not preclude their being employees within the meaning of PERA." *Michigan State Univ.*, 1976 M.E.R.C. at 81.

The Wisconsin Employment Relations Commission has definitively stated: "We do not agree with the position of the district that merely because the interns are 'primarily students' they should lose all rights to organize and bargain collectively with an entity with whom their relationship is essentially one of employer and employee." *Arrowhead School Dist. and Arrowhead United Teachers Organization*, No. 17213-B [1980] Gov't EMPL. REL. REP. (BNA) No. 877 at 14, 15.



wages,<sup>114</sup> and are considered employees for purposes of workers' compensation<sup>115</sup> and voter residency.<sup>116</sup> Students are assigned and paid on the basis of employer need;<sup>117</sup> they work regular schedules and a substantial number of hours per week,<sup>118</sup> are covered under various employer fringe benefit programs,<sup>119</sup> and must carry employer-issued identification cards.<sup>120</sup> These decisions conclude that student employees form an identifiable workforce that is entitled to collective bargaining rights.<sup>121</sup>

The Board's insistence upon employing subjective criteria has resulted in conflicting positions before the various circuits. The NLRB has indicated to one court of appeals that the

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<sup>114</sup> Residents' and interns' wages generally are subject to the federal income tax. See *Dietrich v. Commissioner*, 503 F.2d 1379 (8th Cir. 1974); *Birnbaum v. Commissioner*, 474 F.2d 1339 (3rd Cir. 1973); *Parr v. United States*, 469 F.2d 1156 (5th Cir. 1972); *Hembree v. United States*, 464 F.2d 1262 (4th Cir. 1972); *Rundell v. Commissioner*, 455 F.2d 639 (5th Cir. 1972); *Wetzberger v. United States*, 441 F.2d 1166 (8th Cir. 1971); *Woodail v. Commissioner*, 321 F.2d 721 (10th Cir. 1963); Rev. Rul. 75-490, 1975-2 C.B. 50; Rev. Rul. 72-469, 1972-2 C.B. 79; Rev. Rul. 68-520, 1968-2 C.B. 58; Rev. Rul. 65-117, 1965-1 C.B. 67; Rev. Rul. 57-386, 1957-2 C.B. 107. *But see* *Leathers v. United States*, 471 F.2d 856 (8th Cir.), *cert. denied*, 412 U.S. 932 (1972). This taxation factor was relied on in *City of Cambridge*, No. MCR-2163 (Mass. Lab. Relations Comm'n, April 29, 1976); *Long Island College Hosp.*, 33 N.Y.S.L.R.B. 161, 170 (1970). See also *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251, 255 (1976) (Fanning, Member, dissenting).

<sup>115</sup> *Nordland v. Poor Sisters of St. Francis*, 123 N.E.2d 121 (Ill. App. 1954) (housestaff eligible); *Brewer's Case*, 141 N.E.2d 281 (Mass. 1957) (student nurse eligible for worker's compensation); *Bernstein v. Beth Israel Hosp.*, 140 N.E. 694 (N.Y. 1923) (housestaff). This factor was relied on in *City of Cambridge*, No. MCR-2163 (Mass. Lab. Relations Comm'n, April 29, 1976); *Long Island College Hosp.*, 33 N.Y.S.L.R.B. 161, 170 (1970).

<sup>116</sup> *Rathbyn v. Smith*, 23 N.Y.S.2d 95 (Sup. Ct. 1940), *relied on in* *Long Island College Hosp.*, 33 N.Y.S.L.R.B. 161, 170 (1970). Student employees such as housestaff are also considered employees for purposes of the re-employment provisions of the selective service statute. *Martin v. Roosevelt Hosp.*, 426 F.2d 155 (2d Cir. 1970).

<sup>117</sup> *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251, 254-55 (1976) (Fanning, Member, dissenting) (analogy to the common law concept of master-servant).

<sup>118</sup> *Michigan State Univ.*, 1976 M.E.R.C. 73.

<sup>119</sup> *Regents of the Univ. v. M.E.R.C.*, 204 N.W.2d 218, 225 (Mich. 1973); *Long Island College Hosp.*, 33 N.Y.S.L.R.B. 161, 170 (1970).

<sup>120</sup> *City of Cambridge*, No. MCR-2163 (Mass. Lab. Relations Comm'n, April 29, 1976); *Long Island College Hosp.*, 33 N.Y.S.L.R.B. 161, 170 (1970).

<sup>121</sup> *Michigan State Univ.*, 1976 M.E.R.C. 73; *Wayne State Univ.*, 1969 M.E.R.C. 670, 671 (M.E.R.C. rejected employer's contention that union composed entirely of students lacks permanence, experience or strength necessary to be a labor organization).

Board's decision that student employees are not entitled to the protection of the N.L.R.A. was based on considerations of national labor policy,<sup>122</sup> while arguing to another court of appeals that the decision was a finding of fact.<sup>123</sup> It has relied on *Cedars-Sinai* as authority for the position that psychology interns are not employees,<sup>124</sup> but refused to follow *Cedars-Sinai* in holding that medical technologist interns are employees within the meaning of the N.L.R.A.<sup>125</sup> Such inconsistencies are not surprising, for they inevitably occur whenever the NLRB deviates from the objective criteria of the workplace and delves into the subjective states of mind of employees of colleges and universities.<sup>126</sup> The NLRB's rejection of these objective criteria was found by a panel of the District of Columbia Circuit to be inconsistent with the 1974 health care institution amendments to the N.L.R.A. Although the panel

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<sup>122</sup> Brief for the NLRB at 11-13, *NLRB v. Committee of Interns & Residents*, 566 F.2d 810 (2d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

<sup>123</sup> Brief for the Appellees at 20 n.12, *Physicians Nat'l House Staff Ass'n v. Murphy*, 100 L.R.R.M. 3055 (D.C. Cir. 1979), *rev'd en banc sub nom. Physicians Nat'l Housestaff Ass'n v. Fanning*, No. 79-1209 (D.C. Cir. July 11, 1980).

<sup>124</sup> *Samaritan Health Servs., Inc.*, 238 N.L.R.B. No. 56 at 18 (1978); *Clark County Mental Health Center*, 225 N.L.R.B. 780 (1976).

<sup>125</sup> *Beecher Ancillary Servs., Inc.*, 235 N.L.R.B. 642 (1976). Member Fanning aptly noted the inconsistency:

In point of fact, the only true differences between the student trainees of this case and the medical interns read out of the Act by my colleagues is, as today's decision unwittingly emphasizes, that the excluded interns and resident doctors do not perform "routine" tasks but do not "have no direct contact with physicians" but are the physicians themselves.

*Id.* at 643 (Fanning, Member, concurring).

<sup>126</sup> In excluding part-time faculty from the full-time bargaining unit, the NLRB has emphasized the subjective interests of full-time faculty members in the management of universities. *See* note 67 *supra*. However, the Board ignored those subjective interests in urging the Supreme Court to review a decision of the Second Circuit Court of Appeals which held that faculty are managerial employees and therefore not covered by the N.L.R.A. Petitioner's Brief for Certiorari at 23-25, *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

Such subjective criteria have no place in national labor policy.

Plainly, the governing issue here is whether they [the student employees] are employees not their reasons for obtaining such employment. Their reason for obtaining employment is an irrelevant consideration. Our task is not to create exceptions to the broad statutory definition of an "employee" based on what are urged to be distinctions in employment motivation.

*Philadelphia Ass'n of Interns & Residents v. Albert Einstein Medical Center*, 79 Lab. Cas. ¶ 53,840, at 71,856 (1976) (Roberts, J., dissenting).

decision was reversed by the court sitting *en banc*, the majority *en banc* opinion failed to reach the merits of the issue, holding instead that the court lacked jurisdiction to review the NLRB's decision.<sup>127</sup>

### C. NLRB Rationale

In carrying out its statutory duties, the NLRB may exclude a particular type of employee, provided such exclusion is based on considerations of national labor policy.<sup>128</sup> The Board's basis for excluding students employed by their schools from the N.L.R.A.'s protection is the concern that a contrary holding will result in bargaining on such academic matters as grades and course content, will infringe upon traditional academic freedoms, and will lower the quality of education.<sup>129</sup> Thus, the Board's conclusion that students are not employees is not founded upon considerations of national labor policy, but upon the NLRB's interpretation of national educational policy. By delving into such matters, the NLRB has intruded into an area in which it has no particular expertise. Consequently, its conclusions should be given little weight.<sup>130</sup>

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<sup>127</sup> *Physicians Nat'l House Staff Ass'n v. Murphy*, 100 L.R.R.M. 3055 (D.C. Cir. 1979), *rev'd en banc sub nom. Physicians Nat'l Housestaff Ass'n v. Fanning*, No. 79-1209 (D.C. Cir. July 11, 1980). The 1974 Health Care Amendments extended the Board's jurisdiction to include nonprofit health care facilities. Attempts to exclude housestaff from the "employee" classification failed, indicating a Congressional intent to extend the Act's coverage to include housestaff. *Id.* at 3059. The D.C. Circuit relied solely on the legislative history of the 1974 amendments relating to housestaff in reaching its decision.

<sup>128</sup> Although the N.L.R.A. does not specifically exclude managerial employees from its coverage, they may be excluded by the NLRB because their inclusion tends to obliterate the dividing line between management and labor. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 278 (1974) (quoting from *Packard Co. v. NLRB*, 330 U.S. 485, 493 (1947) (Douglas, J., dissenting)).

<sup>129</sup> See note 104 *supra* and accompanying text for a discussion of this issue.

<sup>130</sup> There is evidence that collective bargaining by housestaff has resulted in improved patient care. *Hearings on H.R. 2222 Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. and Labor*, 95th Cong. 1st Sess. 83-84 (1977) (testimony of Kevin Kunz, Trustee-At-Large, American Medical Student Ass'n).

The NLRB's view that academic matters should not be the subject of collective bargaining is not shared by commentators who have examined the issue. See, e.g., Note, *Student-Employees and Collective Bargaining Under the National Labor Re-*

Union organizing campaigns and collective bargaining by student employees at state institutions indicate that the NLRB's fears of student misuse of bargaining power are misplaced. Organizing campaigns at the University of Illinois,<sup>131</sup> Ohio University,<sup>132</sup> and Michigan State University<sup>133</sup> stressed traditional economic issues. The first contract ever negotiated between a student employee union and a university occurred at the University of Oregon. This agreement between American Federation of State, County and Municipal Employees Local 1893 and the University dealt with wages, union activity and job security and established a grievance procedure.<sup>134</sup>

Economic issues have predominated in those instances in which student employees sought to engage in academic or political bargaining. After the University of Wisconsin voluntarily recognized a union of graduate teaching assistants, the first issue negotiated was an agreement stipulating that the scope of the bargaining would be limited to conditions of employment.<sup>135</sup> Although the union sought to bargain for greater graduate student participation in educational planning and in decisions regarding course content and teaching methods, the faculty refused to consider such matters during the negotia-

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*lations Act: An Alternative to Violence on American College Campuses*, 38 GEO. WASH. L. REV. 1026 (1970) (proposal that universities treat their students as employees with whom they should bargain on matters of concern to the students). Two states have enacted legislation providing for student participation in faculty collective bargaining negotiations at state universities to facilitate academic bargaining. MONT. REV. CODES ANN. § 39-31-302 (1979); OR. REV. STAT. §§ 243.650-.782, ch. 670(1) (1977). Students in Massachusetts have organized a union for purposes of collectively bargaining with the administration over all facets of university life. The students are also lobbying the state legislature to enact legislation facilitating such bargaining. *University of Mass. Student Organizing Drive at Amherst Campus Underway*, [1976] GOV'T EMPL. REL. REP. (BNA) No. 646 at B-20.

Therefore, it is possible that some states will enact legislation providing for academic collective bargaining at their colleges and universities. The NLRB's rationale for its decision excluding student employees from N.L.R.A. protection could result in the pre-emption of state statutes when applied to private institutions.

<sup>131</sup> The Daily Illini, Feb. 27, 1975, at 5.

<sup>132</sup> [1974] GOV'T EMPL. REL. REP. (BNA) No. 553 at B-24.

<sup>133</sup> Michigan State University students' primary concern was the large disparity in wages paid student employees and non-students for doing identical work. Michigan State Univ. [1976] GOV'T EMPL. REL. REP. (BNA) No. 655.

<sup>134</sup> [1971] GOV'T EMPL. REL. REP. (BNA) No. 415 at B-26.

<sup>135</sup> Christenson, *supra* note 2, at 218.

tions.<sup>136</sup> After a twenty-five day strike and ten months of hard bargaining, the resulting contract contained a no strike agreement, a promise of no employer reprisals, a procedure for binding arbitration of contract disputes, a dues checkoff and a grievance procedure.<sup>137</sup>

The Wisconsin experience demonstrates the fallacy of the NLRB's concern that student unions will misuse the collective bargaining process to the detriment of their educational institutions. Such a concern raises issues regarding the scope of collective bargaining rather than the applicability of the N.L.R.A. to student employees. Such scope issues could be resolved easily. Wages and fringe benefits do not involve questions of academic policy and clearly would be matters of mandatory collective bargaining. Other issues which traditionally have been the subject of mandatory bargaining might be excluded from student employee-university negotiations. For example, unions representing residents and interns could not negotiate whether they would work in the pathology department on the ground that they found such work distasteful. Although normally a union might bargain to discontinue an aspect of a particular job, such housestaff negotiations would intrude into matters of educational policy.<sup>138</sup> State authorities have had little difficulty in delineating the permissible scope of academic collective bargaining. If the parties are unable to agree on whether a particular matter should be subject to the

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<sup>136</sup> *Id.* at 218-20.

<sup>137</sup> [1970] GOV'T EMPL. REL. REP. (BNA) No. 345 at B-13-B-15.

At Wayne State University, the student employee organizing campaign had political overtones. The primary issue was, however, economic: the disparity between salaries paid student employees at W.S.U. and those paid students employed at other Michigan universities. *Compare* The South End, June 6, 1969, at 10 with The South End, May 29, 1969, at 1.

Collective bargaining among housestaff also has been restricted to economic issues. One commentator, after examining several housestaff collective bargaining agreements, concluded that educational and medical issues were readily separated from the subject of bargaining. Comment, *Student Workers or Working Students: A Fatal Question for Collective Bargaining of Hospital Housestaff*, 38 U. PRR. L. REV. 762, 781-83 (1977). See also *Hearings on H.R. 2222 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 167-68, 208-11 (1977) (testimony of Murray A. Gordon, General Counsel, Physicians National Housestaff Association).

<sup>138</sup> *Regents of the Univ. of Mich. v. M.E.R.C.* 204 N.W.2d 218, 224 (Mich. 1973).

bargaining process, the appropriate agency or court may balance the impact of the issue on the terms and conditions of employment against the impact of the issue on matters of educational policy to determine whether it should be a subject of mandatory collective bargaining.<sup>139</sup>

A concern closely related to the fear of academic bargaining is the NLRB's prediction that the Board will be forced to judge the legitimacy of academic decisions through charges of unfair labor practices. Conceivably, a union leader who failed a course might charge the professor and the university with violating section 8(a)(1).<sup>140</sup> The likelihood of this occurring is small due to the independent nature of the faculty. If such

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<sup>139</sup> In colleges and universities, state authorities employing this balancing test have excluded from the list of mandatory subjects of collective bargaining tenure guidelines: *Association of N.J. State College Faculties v. Dugan*, 316 A.2d 425 (N.J. 1974); the college calendar: *Burlington County College Faculty Ass'n v. Board of Trustees*, 311 A.2d 733 (N.J. 1973); student-faculty ratios and budgeting consideration: *Rutgers Council, Am. Ass'n of Univ. Professors v. Board of Higher Educ.*, 312 A.2d 677 (N.J. Super. Ct. App. Div. 1973). State authorities are split over whether student participation in decisionmaking is subject to negotiation. *Compare* *Central Mich. Univ. Faculty Ass'n v. Central Mich. Univ.*, 273 N.W.2d 21 (Mich. 1978) (student evaluation of teaching is a mandatory subject of bargaining) *with* *Board of Higher Educ.*, 7 N.Y.P.E.R.B. 3042 (1974) (student participation on personnel and budget committees of the City University of New York is not subject to negotiation).

The balancing test has also been applied to determine the scope of collective bargaining in the primary and secondary schools. *Kenai Peninsula Borough School Dist. v. Kenai Peninsula Educ. Ass'n*, 572 P.2d 416 (Alaska 1977); *National Educ. Ass'n v. Board of Educ.*, 512 P.2d 426 (Kan. 1973); *Sutherlin Educ. Ass'n v. School Dist.*, 548 P.2d 204 (Or. Ct. App. 1976); *Pennsylvania Labor Relations Bd. v. School Dist.*, 337 A.2d 262 (Pa. 1975). The courts are split also over whether class size is subject to collective bargaining. *Compare* *Seward Educ. Ass'n v. School Dist.*, 199 N.W.2d 752 (Neb. 1972); *Irondequoit Teachers Ass'n v. Helsby*, 315 N.E.2d 775 (N.Y. 1974) *and* *Aberdeen Educ. Ass'n v. Board of Educ.*, 215 N.W.2d 837 (S.D. 1974) (class size not subject to collective bargaining) *with* *West Hartford Educ. Ass'n v. DeCoursey*, 295 A.2d 526 (Conn. 1972); *Boston Teachers Local 68 v. School Comm.*, 350 N.E.2d 707 (Mass. 1976) (class size is a mandatory subject of collective bargaining); *see also* *City of Beloit v. Wisconsin Empl. Rel. Comm'n*, 242 N.W.2d 131 (Wis. 1976) (class size is not negotiable, but the impact of changes in class size on wages and hours must be negotiated). *See generally* Annot. 84 A.L.R.3d 242, 300-13 (1978).

A similar balancing process in private university negotiations is not inconsistent with national labor policy. Although the Supreme Court has upheld the NLRB's expansive interpretation of the duty to bargain, *see, e.g., Ford Motor Co. v. NLRB*, 441 U.S. 488, (1979), it has never considered the scope of collective bargaining for dual status employees, *e.g.,* employee-students.

<sup>140</sup> 29 U.S.C. § 158(a)(1) (1970) prohibits employer interference, restraint or coercion of employees exercising their rights to organize and bargain collectively.

charges were brought, the NLRB's only inquiry would be whether the grade was given in good faith. The Board would be required to probe further only if the evidence indicated that the grade was a sham to cover anti-union sentiment.<sup>141</sup>

A more significant concern is the effect of section 8(a)(2) of the N.L.R.A.<sup>142</sup> on student employees and student groups. This section prohibits employer domination or support of labor organizations. Most universities have many committees composed of students in whole or in part. These groups often are assisted financially by the administration and occasionally include administration members. If such committees or organizations are labor organizations within the meaning of the N.L.R.A., the administration would be violating section 8(a)(2). Such a conclusion, however, is unlikely.

In *N.L.R.B. v. Cabot Carbon Co.*,<sup>143</sup> the employer established a number of employee committees, assisted in drafting their bylaws, and promoted the committees as forums for the consideration of employee ideas and problems.<sup>144</sup> The committees handled grievances and offered suggestions and requests regarding wages and fringe benefits.<sup>145</sup> The Supreme Court held that since these committees were dealing with the employer in matters regarding the terms and conditions of employment, they were labor organizations.<sup>146</sup> Thus, the Court concluded that the employer had violated section 8(a)(2).<sup>147</sup>

In the academic realm, section 8(a)(2) would have a greater potential impact on faculty senates than on typical student organizations. The traditional faculty senate embodies the concept of shared authority regarding educational administration, academic freedom, and faculty promotion and

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<sup>141</sup> See *Michigan State Univ.*, [1976] GOV'T EMPL. REL. REP. (BNA) No. 655 at B-4 (statements by university administrators that unionization of student employees would result in increased room and board fees held to be a good faith prediction and not a threat of employer economic retaliation).

<sup>142</sup> 29 U.S.C. § 158(a)(2) (1970).

<sup>143</sup> 360 U.S. 203 (1959).

<sup>144</sup> *Id.* at 205.

<sup>145</sup> *Id.* at 208 n.6.

<sup>146</sup> *Id.* at 213-14.

<sup>147</sup> *Id.* at 218.

tenure.<sup>148</sup> An analysis of the minutes of the Fordham University Faculty Senate led its author to conclude that the body was a labor organization.<sup>149</sup> The New York Public Employment Relations Board reached the same conclusion.<sup>150</sup> The NLRB has recognized the possible status of the faculty senate as a labor organization but has concluded that such a body is not a labor organization because the senate makes recommendations rather than bargaining demands.<sup>151</sup>

Student organizations are less likely to be considered labor organizations. Although the faculty senate at times may speak for the faculty as professional employees, student councils and organizations speak on behalf of students as students. Employee status generally is not a prerequisite for membership in student organizations. These organizations are designed for increased student input in the making of academic policy. Such matters generally will not be mandatory subjects of collective bargaining. Thus, student organizations will not be considered labor organizations.<sup>152</sup>

Some have argued that extension of collective bargaining rights to student employees will disrupt the university financial aid system.<sup>153</sup> Many schools provide packages of financial aid which include scholarships, loans and part-time employment. If student employee unionization results in large wage increases, some schools may decide to decrease or terminate their funding of scholarships and loans.<sup>154</sup> The argument merely states a truism: increased costs in one area must be balanced by either increased revenues or budget cuts in other

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<sup>148</sup> Kahn, *The N.L.R.B. and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. Rev. 63, 146 (1973).

<sup>149</sup> *Id.* at 147.

<sup>150</sup> State Univ., N.Y.P.E.R.B. ¶ 4010 (1969).

<sup>151</sup> The NLRB mentioned the possibility that the faculty senate might be a labor organization in *Adelphi Univ.*, 195 N.L.R.B. 639, 648 n.31 (1972), but concluded that it was not in *Northeastern Univ.*, 218 N.L.R.B. 247, 248 (1975).

<sup>152</sup> In the only published opinion dealing with the issue, the Michigan Attorney General has advised that the Michigan Public Employment Relations Act is inapplicable to relations between student organizations and university governing boards. [1976] Op. Mich. Att'y Gen. No. 5022.

<sup>153</sup> Brief for Wheaton College as Amicus Curiae at 7, *Barnard College*, 204 N.L.R.B. 1134 (1973).

<sup>154</sup> *Id.*



areas. No reason exists, however, for requiring that these budget cuts come from financial aid programs. Student employees should not be excluded from the protection of the N.L.R.A. because their wage demands may lead to increases in tuition or dormitory fees. The economic consequences of collective bargaining are an inappropriate ground for the resolution of a representation issue.<sup>155</sup>

Educational policy considerations, therefore, do not require the exclusion of student employees from the protections of the N.L.R.A. Thus, the belief that student employees are interested primarily in their studies stands as the sole justification in terms of national labor policy for the Board's holding that students are not employees. To justify this conclusion, the Board must show that student employees are only minimally interested in wages, hours and working conditions.

The union organizing efforts of student employees empirically demonstrate the invalidity of the NLRB's analysis. If students were not interested in wages, hours and working conditions, they would not be attempting to unionize. Where student employees' concerns over scholastic matters and costs outweigh their concerns over wages and working conditions, the students will vote against the union. At Michigan State University, the union was defeated in part due to the university's successful campaign emphasizing that unionization would cause increases in tuition and dormitory fees.<sup>156</sup>

The fallacy of the Board's analysis becomes clearer upon considering that the NLRB has held that only students employed by their universities are not employees within the meaning of the N.L.R.A. The Board has authorized a unit of students employed by a private contractor providing food service to a university.<sup>157</sup> It is inconceivable that the interests of these privately employed students in their wages, hours and working conditions would change if the university decided to take over the food service function itself.<sup>158</sup>

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<sup>155</sup> NLRB v. Weyerhaeuser Co., 276 F.2d 865, 873 (7th Cir.), *cert. denied*, 364 U.S. 869 (1960).

<sup>156</sup> [1976] Gov't EMPL. REL. REP. (BNA) No. 653 at B-20.

<sup>157</sup> See note 80 *supra*.

<sup>158</sup> In attempting to explain away the foregoing decisions in which the

Although there is no justification for the wholesale exclusion of student employees from the coverage of the N.L.R.A., justifications do exist for excluding certain types of student employees. For example, research assistants are provided stipends to facilitate their doctoral dissertation research. Research assistants frequently are free to choose the subject of their research. These stipends, which generally are tax exempt, do not differ significantly from other scholarships. Although research assistants at some institutions are compensated through the employer's regular payroll, the service they provide is not for the employer's benefit. Thus, they do not appear to be employees within the meaning of the N.L.R.A.<sup>159</sup>

Students employed through work-study programs are another appropriate student employee group to which collective bargaining rights should be denied. Regulations of the Department of Education require that work-study students' hours and compensation be limited so that they do not exceed a calculated level of financial need.<sup>160</sup> If the level is exceeded,

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Board held student employees entitled to collective-bargaining representation, our colleagues assert that the interest in employment conditions of students working at the institution they attend is less substantial than that of students working for a "commercial employer." The rationale for this attempted distinction is not explicated nor can we perceive any. Certainly the substantiality of the students' employment interest in its relationship to their right to collective bargaining must be measured by the continuity, regularity, and extent of the work performed and not by the character of their employer.

San Francisco Art Institute, 226 N.L.R.B. 1251, 1254-55 (Fanning and Jenkins, Members, dissenting).

<sup>159</sup> Leland Stanford Jr. Univ., 214 N.L.R.B. 621 (1974). At the University of Minnesota, research assistants and teaching assistants were included in the same bargaining unit. The union was defeated during the representation election due to a heavy "no agent" vote by research assistants, who feared loss of tax exemptions and student visas. Research assistants voted "no agent" because they were not involved in the daily drudgery of teaching. They operated in an informal atmosphere with their professional superiors, had much input into the projects on which they were working and received publication credits which could later benefit them in their careers. Bognanno & Suntrup, *Graduate Assistants' Response to Unionization: The Minnesota Experience*, 27 LAB. L.J. 32 (1976).

<sup>160</sup> 45 C.F.R. § 175.14 (1978). [Editor's Note: At the date of publication, the regulations are still identified by the citations assigned under the former Department of Health, Education, and Welfare. "These regulations will ultimately be redesignated and recodified in Title 34 of the Code of Federal Regulations." 45 Fed. Reg. 30,802 (1980).]

loans or scholarship aid to the student must be reduced.<sup>161</sup> Therefore, the employer does not exercise the control over work-study student employees' hours and wages that it exercises over other student employees. Effective collective bargaining cannot occur in light of the controlling regulations. Thus, work-study students governed by these regulations should be excluded from the coverage of the N.L.R.A.<sup>162</sup>

#### D. *The Appropriate All-Student Bargaining Unit*

If the NLRB recognizes labor organizations containing student employees, it must consider the composition of the appropriate bargaining unit. Unfortunately, little authority exists dealing with the appropriate bargaining unit for student employees. This is due partially to the Board's refusal to extend collective bargaining rights to student organizations. Most state cases dealing with students concern hospital housestaff, where there is little disagreement about unit composition. Only the Michigan Employment Relations Commission (M.E.R.C.) and the Oregon Public Employment Relations Board (O.P.E.R.B.) have considered the bargaining unit for students whose jobs have little or nothing to do with their degree programs.

M.E.R.C. consistently has held that the appropriate bargaining unit for student employees is all employees engaged in clerical, technical, maintenance and food service positions, exclusive of supervisors.<sup>163</sup> The Commission has found the students' common interests to be in earning money to finance their educations<sup>164</sup> and in accommodating schedules during

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<sup>161</sup> *Id.*

<sup>162</sup> *Cf.* Clark County Mental Health Center, 225 N.L.R.B. 780, 781 (1976) (CETA employees excluded from the regular employee bargaining unit); *see also* Detroit Public Schools (McNamara Skill Center), 1972 M.E.R.C. 87 (unemployed trainees receiving allowances paid from unemployment compensation funds excluded). *But see* Rosemont Center, 248 N.L.R.B. No. 163, 104 L.R.R.M. 1046 (1980) (CETA employees included in regular employees bargaining unit); Evergreen Legal Services, 246 N.L.R.B. No. 146, 103 L.R.R.M. 1028 (1979) (CETA employees included in regular unit).

<sup>163</sup> Michigan State Univ. (Kellogg Center), 1974 M.E.R.C. 247; University of Mich., 1973 M.E.R.C. 200; Wayne State Univ., 1969 M.E.R.C. 670.

<sup>164</sup> Wayne State Univ., 1969 M.E.R.C. at 674.

examination periods.<sup>165</sup> M.E.R.C. rejected an effort by students employed at the only hotel and conference center on the campus of Michigan State University to obtain their own bargaining unit. The record established that the hotel was the only university employer of students which catered to an off-campus clientele, resulting in special job classifications unique to the hotel and in widely varied schedules for the students who worked there.<sup>166</sup> O.P.E.R.B. rejected the arguments relied on by M.E.R.C.<sup>167</sup> and directed an election for all part-time students employed by the Erb Memorial Union and Housing Department Food Services Section at the University of Oregon.<sup>168</sup>

Composition of the student bargaining unit can be crucial. Small, fragmented units promote instability in labor relations as each group competes with the other for the employer's limited funds, a problem that is particularly troubling at colleges and universities which are non-profit institutions.<sup>169</sup> However, large campus-wide units are frequently impossible to organize, leaving all employees unrepresented, thus defeating the purpose behind labor relations statutes.<sup>170</sup>

Although the extent of organization may not be the sole basis for determining whether a requested unit is appropriate,<sup>171</sup> it may be a contributing factor to the determination.<sup>172</sup>

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<sup>165</sup> Michigan State Univ. (Kellogg Center), 1974 M.E.R.C. 247.

<sup>166</sup> *Id.*

<sup>167</sup> University of Or., [1970] GOV'T EMPL. REL. REP. (BNA) No. 345 at B-2. The opinion cites *Wayne State*, but declines to follow it.

<sup>168</sup> *Id.*

<sup>169</sup> [P]roliferation of bargaining units would impose an unnecessarily heavy and repetitive collective bargaining burden upon non-profit making and quasi-public colleges and universities which must depend substantially for their income upon the contributions and continued interest of the public. . . . Accordingly, as a matter of general policy and in the public interest, we do not deem it desirable or necessary to compartmentalize educational institutions into numerous small bargaining units any more than is clearly and cogently required by the totality of the facts and circumstances presented.

New York Univ., 32 N.Y.S.L.R.B. 425 (1969) (quoted in Faculty Student Ass'n, State Univ. of N.Y., New Paltz, 32 N.Y.S.L.R.B. 453, 459 (1969)).

<sup>170</sup> Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice*, 18 CASE W. RES. L. REV. 479, 489 (1967).

<sup>171</sup> 29 U.S.C. § 159(b) (1970).

<sup>172</sup> *Foreman & Clark, Inc. v. NLRB*, 215 F.2d 396 (9th Cir. 1954); *Westinghouse*

Recognition of student employee attempts at organization will encourage such employees in their pursuit of collective bargaining rights. Such recognition of smaller groups should not necessarily result in instability or fragmentation. Other units within the university may be added to the original unit as they are organized. In this respect, the O.P.E.R.B. approach is preferable to M.E.R.C.'s *per se* rule which groups all student employees together.

### CONCLUSION

The NLRB has considered the collective bargaining rights of students employed in private industry and at their schools. In both instances the NLRB has considered students' subjective motives for working in deciding whether such students are employees and in determining whether they should be included in the same bargaining unit as non-students. In so doing, the Board has subordinated objective indicia of employee status and objective community of interest criteria. This inquiry into subjective motivation has produced results which are internally inconsistent and which conflict with the goals of national labor policy. Such subjective inquiries must be abandoned. Full collective bargaining rights for student employees is an interest that should no longer be denied.

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Elec. Corp. v. NLRB, 236 F.2d 939 (3d Cir. 1956).