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Professional Unions in the Health Care Industry: The Impact of St. Francis II and North Shore University Hospital

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I. INTRODUCTION

In 1935, Congress attempted to reduce the adverse effects of industrial strife by enacting the National Labor Relations Act (the "Act") to equalize bargaining power and establish procedures for the peaceful resolution of labor disputes. The Act gave "employees" the right to organize, to engage in concerted activities and to

2. 29 U.S.C. § 151 (1982). Section 1 of the Act, as amended, provides that the denial by some employers of the right to employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest which have the intent or the necessary effect of burdening or obstructing commerce . . . . Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption . . . .

Id.
3. Section 2(3) in relevant part defines an "employee" as "any employee . . . but not
bargain collectively\(^4\) with their "employers."\(^5\) The Act also created the National Labor Relations Board (the "Board") to enforce the Act's provisions and to resolve questions of representation which affect commerce.\(^6\)

In defining the word "employer," Congress expressly excluded certain types of employers from the coverage of the Act, and thus withheld the Act's protections from "employees" of such employers.\(^7\) Among the employers expressly excluded were the states, political subdivisions and, from 1947 to 1974, nonprofit hospitals.\(^8\)

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4. 29 U.S.C. § 157 (1982). Section 7 of the Act provides that employees shall have the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

_id_.

5. 29 U.S.C. § 152(2) (1982) (definition of "employer"). For a discussion of § 152(2), see infra notes 7, 8 and accompanying text.

6. 29 U.S.C. §§ 159, 160 (1982). The Board has been charged with responsibility for adjudicating unfair labor practice complaints, resolving representation questions, and conducting representation elections. _Id_. Section 10(a) empowers the Board to "prevent any person from engaging in any unfair labor practice . . . affecting commerce." _Id_. at § 160(a). Unfair labor practices include, among other things, an employer's interference with employees in their exercise of rights guaranteed by section 7, discrimination because of union membership, and refusals to bargain collectively. _Id_. at § 158.

Section 9 gives the Board authority to resolve representation questions and to conduct representation elections in units that it finds appropriate for the purpose of collective bargaining. _Id_. at § 159. The Board, however, has statutory jurisdiction only over representation questions and unfair labor practices which "affect commerce." The limit of the Board's jurisdictional authority has been found to be coextensive with Congress' authority under the Commerce Clause. See NLRB v. Fainblatt, 306 U.S. 601, 606-07 (1939); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29-32 (1937). The Board has placed administrative limits upon its jurisdiction and will decline to exercise jurisdiction if the employer does not satisfy the Board's revenue requirements. For a discussion of the Board's administrative standards for declining jurisdiction under section 14(c) based on revenue amounts, see Leedom v. Fitch Sanitarium, Inc., 294 F.2d 251, 255 (D.C. Cir. 1961).

7. 29 U.S.C. §§ 152(2), 152(3) (1982). The Act provides that an "employee" shall not include any individual employed by any person who is not an "employer." _Id_. at § 152(3). In defining the word "employee," Congress also expressly excluded certain other individuals from the Act's protections. See _supra_ note 3.


_The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual . . . ."

_Id_. In 1974, the bracketed language was deleted. See _infra_ note 129 and accompanying text.
Congress believed that such entities should be subject to exclusive local regulation and that their employees should not have the right to strike which is guaranteed "employees" by the Act. In 1974, Congress amended the Act by deleting the nonprofit hospital exemption. Many states had not at that time established an effective mechanism for the peaceful resolution of labor disputes. Recognition strikes were increasing, and it became apparent that public health care services were being disrupted. As a result of this situation, Congress deleted the nonprofit hospital exemption and enacted various safeguards designed to eliminate or mitigate the effects of strikes which occurred in both nonprofit and for-profit health care institutions. One of the most important safeguards was a directive which instructed the Board to avoid the undue proliferation of bargaining units in health care institutions. Underlying this directive was congressional concern that the proliferation of bargaining units could lead to jurisdictional disputes, work stoppages, and other workplace strife.

Since the enactment of the 1974 health care amendments, two issues have prompted considerable disagreement between the Board and the federal appellate courts. The first issue is whether the Board violates the letter and spirit of the Act when it allows professional organizations to represent rank and file employees despite the organizations' admission of supervisors to active membership. The second issue concerns how the Board should fulfill the congressional mandate against undue proliferation of bargaining units while at the same time guaranteeing health care employees placement in a unit which will allow them the "fullest freedom" in exercising their rights under the Act. Two recent decisions have addressed these issues, and have attempted to balance the employees' "fullest freedom" in choosing a bargaining representative with other public and private interests which militate toward some re-

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9. See infra note 125 and accompanying text.
10. See infra note 129 and accompanying text.
12. See infra notes 130-32 and accompanying text.
13. See infra note 132 and accompanying text.
14. Congress and the Board have long recognized that a supervisor's active participation within a labor organization may conflict with the right of employees to have a bargaining representative with the single-minded purpose of representing unit employees' interests, may conflict with employers' interests in the undivided loyalty of their supervisors, and may interfere with the collective bargaining process. See infra notes 33-35, 53 and accompanying text.
15. Section 9(b) of the Act provides that in representation cases, the Board shall choose the appropriate unit in order to "assure employees the fullest freedom in exercising the rights guaranteed by [the Act]." 29 U.S.C. § 159(b) (1982).
strictions upon this freedom. In each of these decisions, the employees' "fullest freedom" was restricted in order to further the Act's paramount goal of encouraging effective collective bargaining and thereby avoiding strikes and the disruption of commerce.

In a recent decision, *NLRB v. North Shore University Hospital,*\(^\text{16}\) the Second Circuit Court of Appeals held that whenever a professional association admits supervisors to active membership, the Board must examine "all relevant circumstances including the governing structure and actual practices of the organization insofar as the participation of supervisors is considered."\(^\text{17}\) The Court determined that only by making such an examination can the Board ensure that bargaining activities are insulated from supervisory interference.\(^\text{18}\)

In *St. Francis Hospital* ("*St. Francis II"),\(^\text{19}\) a case concerning the undue proliferation issue, the Board reconsidered the unit determination test which it had applied since enactment of the health care amendments. The Board abandoned the traditional community-of-interests test, and adopted a disparity-of-interests test which requires a showing that "sharper than usual differences exist" between the employees in the petitioned-for unit and the employer's other employees whenever representation of a unit smaller than all professionals or all nonprofessionals is sought. If this burden is met, the Board will grant the petitioned-for unit. The Board determined that the disparity-of-interests test best fulfills the congressional mandate against undue proliferation of bargaining units.\(^\text{20}\)

This article will analyze each of these decisions in light of congressional intent and will discuss the decisions' potential impact upon health care employees and unions organizing health care workers. First, this article will examine the history and purpose of the amendment which excluded supervisors from the Act's protection. Next, the conflict-of-interest standards applied by the Board in the health care context will be discussed. The article will then analyze the *North Shore University Hospital* decision and its potential impact, and will propose methods by which health care unions...

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17. *Id.* at 275.
18. *Id.* at 273.
19. 271 N.L.R.B. 948 (1984). The Board reconsidered its unit determination test in *St. Francis II* in apparent reaction to increasing criticism by several courts of appeal that it had improperly been ignoring the congressional mandate. See infra notes 160-71 and accompanying text.
20. 271 N.L.R.B. at 954.
can mitigate the effects of the decision without undermining the purposes of the Act.

Turning next to the Congressional mandate concerning non-proliferation of bargaining units, the article will examine the history and purpose of this mandate and the ways in which it was applied by the Board during the first decade after passage of the health care amendments. The *St. Francis II* decision will then be analyzed, and its potential impact assessed.

Finally, this article will evaluate both decisions in light of congressional intent. The article will conclude that the tests announced in *St. Francis II* and *North Shore University Hospital*, when strictly applied, are consistent with the purposes and policies of the Act. Although the tests may have the effect of limiting health care employees' exercise of the "fullest freedom" with respect to organizational rights, the tests strike the proper balance between the sometimes conflicting interests of employees, employers, and the public, thus furthering the overriding goals of the Act.

II. THE SUPERVISORY EXCLUSION

When Congress enacted the Act in 1935, supervisors were not expressly excluded from its rights and protections.21 Thus, the Board was required to interpret the language and intent of the statute to determine whether supervisors were "employees"22 entitled to the organizational rights and protections of the Act.23

A. The History and Purpose of the Supervisory Exclusion

In its early years, the Board generally held that employees and their supervisors should not be included within the same bargaining unit.24 It was not until 1942, however, that the Board squarely confronted the issue of whether supervisors were "employees" under the Act.25 The Board concluded that supervisors were "employees" and that they could be represented in separate bargaining units—even if the union representing them was affiliated with a

21. See generally 2 C. Morris, supra note 11, at 1451-52 (supervisors).
22. See supra note 3.
24. See, e.g., General Motors Corp., 36 N.L.R.B. 439, 443 (1941) (shift operating engineer was included in unit, but assistant and chief operating engineers were excluded); General Motors Corp., 28 N.L.R.B. 793, 796 (1940) (chief engineer excluded from unit because he was a supervisory and confidential employee). See generally 1 C. Morris, supra note 11, at 453.
union that represented the rank and file employees whom they supervised. Congress, for policy reasons, reacted to the Board’s determination by proposing amendments to the Act which, if passed, would have overruled the Board’s decision. The bill died in committee, however, when the Board reversed its policy and held that, except in trades where foremen had organized prior to 1935, units of supervisors would not be found appropriate for the purpose of collective bargaining.

Two years later, the Board again reversed its policy when, in Packard Motor Car Co., it held that supervisors would be allowed to organized and bargain collectively with their employers within the Act’s protections. Congress renewed

28. Maryland Drydock Co., 49 N.L.R.B. 733 (1943) (except in printing and maritime trades, Board no longer find units of foremen appropriate); see also Boeing Aircraft Co., 51 N.L.R.B. 67 (1943); Murray Corp. of America, 51 N.L.R.B. 94 (1943).

In Maryland Drydock, the Board stated that it was reversing its earlier policy because it was persuaded that the “benefits which supervisory employees might achieve through being certified as collective bargaining units would be outweighed not only by the dangers, inherent in comingling of management and employee functions, but also in the possible restrictive effect upon the organizational freedom of rank and file employees.” 49 N.L.R.B. at 740. The Board feared that the establishment of bargaining units composed of supervisors exercising substantial managerial authority would impede the process of collective bargaining, disrupt established managerial and production techniques, and interfere with the goals of the Act. Id. at 741.

29. 61 N.L.R.B. 4 (1945) (finding that general foremen, assistant foremen and special assignment foremen constituted an appropriate bargaining unit). In order to obtain further review of the Board’s representation decision, the employer refused to bargain. In the unfair labor practice proceeding, the employer raised the issue of whether the Board had certified the proper bargaining unit. On review, the Board upheld its previous findings, and the courts enforced the Board’s decision on appeal. Packard Motor Car Co., 64 N.L.R.B. 1212 (1945), enf’d, 157 F.2d 80 (6th Cir. 1946), aff’d 330 U.S. 485 (1947). See infra note 30 for a discussion of the courts’ analyses.

As a general rule, it is necessary for employers to refuse to bargain and commit an unfair labor practice in order to obtain judicial review of issues resolved by the Board in the representation proceeding. Pursuant to § 9(d) of the Act, Board decisions in representation proceedings are generally not reviewable by a court until an unfair labor practice has been committed. 29 U.S.C. §§ 159(c), (d), 160(c) (1982). But see Leedom v. Kyne, 358 U.S. 184, 188 (1958) (permitting immediate review of representation proceeding when Board action is contrary to specific prohibitions of the Act). See generally A. Cox, D. Bok & R. Gorham, Labor Law 311-19 (9th ed. 1981) (discussing procedure for review of Board representation proceedings).

30. The Board stated that the potential dangers inherent in comingling management and employee functions which had concerned the Board majority in Maryland Drydock do not materialize in cases where the petitioning union is independent and remains so. 61 N.L.R.B. at 17.

Upon review of the Board’s Packard decision in the context of an unfair labor practice proceeding arising from Packard’s refusal to bargain with the union, the Sixth Circuit Court of Appeals and the United States Supreme Court upheld the Board’s extension of the Act’s protections to supervisors, and deferred to the Board’s expertise regarding ap-
its earlier proposal and, in 1947, amended the Act to exclude supervisory personnel from the Act's definition of "employees."\(^\text{32}\)

In legislatively overruling \textit{Packard}, the Senate noted that the "successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel [had] upset any real balance of power in the collective bargaining process."\(^\text{33}\) Both the Senate and the House attributed an increase in accidents and strikes and a decrease in discipline and productivity to the Board's policy of permitting supervisors to be members of organizations affiliated with organizations which represented rank and file employees.\(^\text{34}\) By excluding supervisors from the Act's protections, Congress clearly intended to ensure (1) that rank and file employees would have the right to organize and bargain free from undue influence by supervisors, and (2) that supervisors would loyally represent management and direct and discipline rank and file employees.\(^\text{35}\)

Although Congress amended the Act to exclude supervisors from its rights and protections, it expressly allowed supervisors to become and remain members of labor organizations for the purpose of bettering their own working conditions.\(^\text{36}\) Congress clearly recognized, however, that supervisors should not be members of

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section of the Act defines a 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 responsibility 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.


36. Section 14(a) provides that:
organizations that represent rank and file employees.37

B. Board Treatment of the Supervisory Exclusion Issue

Despite this clear expression of Congressional intent, the Board has continued to certify labor organizations as representatives of rank and file employees even though such organizations admit supervisors to active union membership. Although the issue of whether a labor organization should be disqualified because it admits supervisors to membership can arise in any industry, it has since the 1974 amendments arisen primarily in the health care context.38 The American Nurses Association and many of its affiliated state nurses associations have admitted supervisors to membership while increasingly pursuing collective bargaining on behalf of rank and file nurses.39

37. Nothing [in the Act] shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined . . . as supervisors as employees for the purpose of any law . . . relating to collective bargaining. 29 U.S.C. § 164(a) (1982). Apparently Congress recognized that in some industries, supervisory personnel had traditionally formed unions and successfully bargained with management. See 93 CONG. REC. 3556 (daily ed. Apr. 15, 1947), reprinted in LEG. HIST. 1947, supra note 33, at 652 (statement of Mr. Klein); 93 CONG. REC. 4480 (daily ed. May 1, 1947), reprinted in LEG. HIST. 1947, supra note 33, at 1162 (statement of Sen. Murray); H. REP. NO. 245, 80th Cong., 1st Sess. 17, reprinted in LEG. HIST. 1947, supra note 33, at 308.

Section 14(a), however, was probably included in the Act, out of an abundance of caution, to make clear Congress' intent that the amendment should not be construed as unconstitutionally depriving supervisors of their freedom of association. Section 14(a) gives supervisors no greater rights than they would have under the Constitution because unlike "employees," they have no ability or right either to require their employers to bargain or to protect themselves against reprisals for union activities.

38. Congress rejected a proposal which would have deprived supervisors of protection under the Act "only where the circumstances present a real possibility of collusion with organizations of nonsupervisory employees." 93 CONG. REC. 15105 (daily ed. May 9, 1947), reprinted in LEG. HIST. 1947, supra note 33, at 1452 (statement of Sen. Murray). This proposal would have denied labor organizations the protection of the Act where they admitted supervisors and also (1) represented rank and file workers or (2) were affiliated with or controlled by organizations of such workers. Id.

39. See generally 1 C. MORRIS, supra note 11, at 436-38.
Because the nurses associations are professional organizations, the associations—as well as employers—have encouraged all nurses to participate in the associations' professional activities, and the associations have allowed supervisory nurses to retain professional membership. When nurses associations have sought to bargain collectively, however, employers have argued that the associations should be disqualified because the active participation of supervisors gives rise to the "conflicts of interest" which Congress intended to avoid by excluding supervisors from the Act's protections in 1947.

1. The Conflict-of-Interest Doctrine

Since 1954, the Board has refused to certify a union as a collective bargaining representative of rank and file employees whenever it determines that the union has a "disqualifying conflict of interest." Underlying the Board's conflict-of-interest doctrine is the long established principle that employees have the right to be represented in collective bargaining by a union which has the single-minded purpose of protecting and advancing their interests vis-a-vis the employer and there must be no ulterior purpose. Where the union has direct and immediate allegiances which can fairly be said to conflict with its function of protecting and advancing the interests of the employees it represents, it cannot be a proper representative.

In developing the conflict-of-interest doctrine, the Board has identified two types of disqualifying conflicts. The first is a condition that inherently creates a danger of a conflict; the second is a
condition that disqualifies only if the employer can demonstrate that the interest presents a "clear and present danger" of disrupting the bargaining process.\(^45\)

2. Disqualification of Nurses Associations

When employers first began asserting that the Board could not properly certify state nurses associations because the associations were subject to the influence, domination and control of supervisors, the Board announced that it would refuse to certify the associations unless they delegated bargaining authority to autonomous local chapters controlled by nonsupervisory employees.\(^46\) By conditioning certification upon the delegation of bargaining authority, the Board thus avoided addressing directly the conflict-of-interest issue.

As a result of the Board's decision, the state nurses associations attempted to delegate bargaining authority by permitting local units to establish separate unit bylaws, elect unit officers, select negotiating committees from their own ranks, formulate bargaining proposals, and ratify final contract proposals.\(^47\) The state associations, however, through their Economic and General Welfare program ("EGW"), continued to assist the local units in collective

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45. When an interest falls within this second category, the employer must show by direct evidence a likelihood that the conflict will endanger the bargaining process. The two major conflicts of interest in this category are those in which (1) the union has made a loan to the employer or one of its competitors, see, e.g., NLRB v. David Buttrick Co., 399 F.2d 505, 507 (1st Cir. 1968); Bridgeport Jai Alai, Inc., 227 N.L.R.B. 1519, 1520 (1977); or (2) the union admits supervisors employed by a third party to membership. See, e.g., NLRB v. North Shore Univ. Hosp., 724 F.2d 269, 269 (2d Cir. 1983); Apex Tankers Co., 257 N.L.R.B. 685, 685 (1981).


In the early cases, the Board conditioned certification upon the association's delegation of bargaining authority. Such procedures were found to be improper under the Act, and the Board discontinued the practice. N.L.R.B. v. Annapolis Emergency Hosp. Ass'n, 561 F.2d 524 (2d Cir. 1977) (finding conditional certification improper); Sierra Vista Hosp., Inc., 241 N.L.R.B. 631 (1979) (announcing the Board's discontinuance of the practice of conditioning certification).

bargaining.\textsuperscript{48} Employers continued to argue that the associations should be disqualified, despite the delegation of bargaining authority, because of the associations' involvement in the bargaining process through EGW.\textsuperscript{49} The Board, however, routinely certified the state associations and rejected the employers' arguments, holding that the state associations had effectively delegated collective bargaining authority and that the control exercised by supervisory personnel was too indirect to create a conflict of interest.\textsuperscript{50}

3. \textit{Sierra Vista III}

Upon review of the Board's decision in \textit{NLRB v. Annapolis Emergency Hospital Association},\textsuperscript{51} however, the Fourth Circuit Court of Appeals agreed with the employers that the state associations had not effectively delegated bargaining authority because the state associations retained the ability to influence the bargaining activities of the local units. This decision, in conjunction with employers' repeated opposition to supervisor participation in state nurses associations, forced the Board to address the conflict-of-interest issue. In \textit{Sierra Vista Hospital, Inc.} ("\textit{Sierra Vista III}")\textsuperscript{52} the Board clarified its test for determining when participation of supervisors disqualifies a labor organization as a bargaining representative. The Board acknowledged that in certain circumstances a supervisor's membership in a labor organization may create a conflict of interest and compromise the employees' right to effec-

\textsuperscript{48} Through the EGW, the state association usually assigns a professional staff negotiator to assist local units in developing bargaining proposals and in negotiating with their employers. See, e.g., \textit{NLRB v. North Shore Univ. Hosp.}, 724 F.2d 269, 271 (2d Cir. 1983); \textit{NLRB v. Annapolis Emergency Hosp. Ass'n}, 561 F.2d 524, 538-39 (2d Cir. 1977).

\textsuperscript{49} The directors of the state associations promulgate EGW and collective bargaining policies, hire the director of EGW, require the EGW director to make periodic reports, and allocate monies to EGW and its programs. \textit{Sierra Vista Hosp., Inc.}, 225 N.L.R.B. 1086, 1088 (1976).


\textsuperscript{51} 561 F.2d 524 (4th Cir. 1977). The court declined to enforce the Board's order on the grounds that (1) conditional certification was improper as a matter of law, and (2) the Board's finding that the nurses association would have no voice or control in actual collective bargaining lacked substantial evidentiary support. The court concluded that the nurses association had not effectively delegated its bargaining authority to the local because the state association retained the power of the purse, participated in the bargaining process by furnishing the local units with advice and guidance on collective bargaining goals and strategies, participated in bargaining sessions, established rules (including a no-strike policy) which were binding on the locals, and could discipline a nurse for violation of such rules. \textit{Id.} at 538-39. Thus, the court concluded that the independence of the local was more illusory than real. \textit{Id.} at 539.

\textsuperscript{52} 241 N.L.R.B. 631, 632-33 (1979) [hereinafter cited as \textit{Sierra Vista III}].
tive, "single-minded" representation. The Board, however, distinguished cases in which supervisors of the bargaining unit employees are active in the association from those in which supervisors employed by third parties are active. With regard to the former, the Board stated that the role of the supervisor in the association's internal affairs must be examined in order to determine whether the supervisor is subject to divided loyalties which create an inherent conflict of interest. This conflict might compromise the interests of both labor and management.

With regard to the latter scenario, where a third-party supervisor is active, the Board stated that it would not disqualify a nurses association absent a "demonstrated connection" between the third-party supervisor's employer and the employer of the unit employees. Disqualification will be ordered, said the Board, when the "demonstrated connection" gives rise to a clear and present danger of a conflict that may interfere with the collective bargaining process.


54. When a labor organization seeks to bargain with an employer whose supervisors are active in the affairs of a labor organization, a question arises about the labor organization's ability to deal with the employer at arm's length. *Sierra Vista III*, 241 N.L.R.B. at 633. Such active participation by the employer's own supervisors may contravene the employer's interest in having the undivided loyalty of its supervisors as well as the employees' interests in having a representative whose sole concern is for the unit employees' interests. *Id.*

The Board's decisions suggest that the active participation of the employer's own supervisors in bargaining gives rise to an "inherent" conflict. To disqualify a labor organization in such cases, the Board has merely required the employer to establish that its own supervisors are active in negotiations. See, e.g., Apex Tankers Co., 257 N.L.R.B. 685 (1981). The conflict, in fact, is so marked that the Board has not only found the union disqualified, but has also stated that the employer has a duty not to bargain with labor organizations as a representative of the rank and file employees when such situations exist. See, e.g., *Banner Yarn Dyeing Corp.*, 139 N.L.R.B. 1018 (1962); *Nassau & Suffolk Contractors' Ass'n*, 118 N.L.R.B. 174 (1957).

The Board's decisions are less clear with regard to whether the active participation of the employer's own supervisors in the higher echelons of the labor organization gives rise to an inherent conflict of interest. The cases suggest, however, that an inherent conflict will not be found. See, e.g., *Abington Memorial Hosp.*, 250 N.L.R.B. 682, 683 (1980). The Board will therefore examine the role which the supervisor assumes within the organization to determine whether such participation disqualifies the organization as a bargaining representative. *Sierra Vista III*, 241 N.L.R.B. at 631.

55. *Sierra Vista III*, 241 N.L.R.B. at 633. The Board noted that if the employer's own supervisor were present on the opposite side of the bargaining table, the employer would be obligated to refuse to bargain because of the conflict created. *Id.* (citing Welsbach Electric Corp., 236 N.L.R.B. 503 (1978); *Banner Yarn Dyeing Corp.*, 139 N.L.R.B. 1018 (1962); *Nassau & Suffolk Contractors' Ass'n*, 118 N.L.R.B. 174 (1957)).

56. Although the employer's legitimate interest in the loyalty of its supervisors is not in issue when a third party's supervisors are active in the nurses association, the Board has recognized that the presence of such supervisors may impinge upon the employees'
Thus after *Sierra Vista III*, the focus of the Board's analysis shifted from the issue of whether the state association had effectively delegated bargaining authority to the underlying issue of whether the supervisors' activities created a conflict of interest. In practice, however, the final results of the two analyses were identical. Whenever the Board determined that the association had effectively delegated bargaining authority to a local unit of nonsupervisory employees, it also concluded that any influence of supervisors active within the association was too indirect to disqualify the association as a bargaining representative.\(^7\)

Moreover, because the Board jealously guarded the associations' internal affairs against employers' intrusions, it was very difficult for employers to obtain the evidence necessary to demonstrate that a "clear and present danger" to the bargaining process existed as a result of the supervisors' activities. As a matter of course, the Board was unwilling to allow employers to inquire into an association's internal structure without a *prior* showing that the supervisors' activities gave rise to a conflict of interest.\(^5\) Because employers were not permitted to engage in effective discovery, they were generally unable to meet the initial burden or to substantiate their claims that a conflict existed.\(^9\) Only in the clearest case, when the employees' own supervisors were active in bargaining with the employer, could the employer generally prove the requisite conflict of interest.\(^6\)

Furthermore, even in those cases in which the employer was permitted to inquire into the association's internal structure, practices, and policies, it was extremely difficult for the employer to meet the right to a bargaining representative whose undivided concern is for their interests, and may impede collective bargaining. *Sierra Vista III*, 241 N.L.R.B. at 633. The Board, however, noted that even if third-party supervisors were to constitute a majority of a nurses association's board of directors, the association would not necessarily be disqualified unless there existed some other demonstrated conflict of interest which posed a clear and present danger to meaningful bargaining. *Id.* The Board has declined to find that the active participation of a third-party employer's supervisors gives rise to an inherent conflict of interest, and has only recently disqualified a labor organization because of the activities of a third party's supervisors. *See infra* notes 82-86 and accompanying text.

\(^60\). *See, e.g.*, Apex Tankers Co., 257 N.L.R.B. 685, 685 (1981).
very high burden of showing a "demonstrated connection" between it and the third-party employer of supervisors. In order to meet this burden, the employer was required to present evidence of explicit supervisory interference in the particular bargaining unit. Absent such evidence, which was unlikely to exist because of the at-least surface "delegation" of bargaining authority to the local units, it was virtually impossible for employers to demonstrate that a third-party supervisor's activities gave rise to a conflict of interest.

Thus, as a practical matter the Board, despite legislative intent to the contrary, has refused to acknowledge—except in cases where the employees' own supervisors are active in bargaining—that conflicts may result from supervisors' membership in the same union that represents rank and file employees. This position has prompted criticism from the Second Circuit Court of Appeals, which took exception to the Sierra Vista III test, particularly as applied to those cases in which third-party supervisors actively participate in the very union which seeks to represent an employer's rank and file employees.

C. North Shore University Hospital

1. The Second Circuit's Criticism of the Board's Sierra Vista III Test

In North Shore University Hospital, the Board refused to disqualify the New York State Nurses Association (the "SNA") as a collective bargaining representative of the North Shore University Hospital's rank and file nurses. Applying the Sierra Vista III analysis, the Board found that the unit's bargaining activities were sufficiently insulated from interference by supervisors active in the internal affairs of the SNA.

Examining the issue on appeal, however, the Second Circuit Court of Appeals disagreed with both the Board's conclusion and its analysis. The Second Circuit ruled that the Board had erred.

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61. See supra note 56 and accompanying text.
63. See supra note 51 and accompanying text.
66. Id. at 865.
by certifying the SNA as a bargaining representative of the hospital's nurses. The court concluded that the Sierra Vista III test, which limited the conflict of interest inquiry to proof of explicit supervisory interference, "inadequate[ly]... effectuate[d] the policies of the Act in cases of multi-purpose professional organizations representing thousands of employees in numerous bargaining units."

In order to ensure that supervisors do not improperly dominate or interfere with the unit employees' collective bargaining activities, the court reasoned that the Board's inquiry must extend to "all relevant circumstances, including the governing structure and actual practice of the organization... so far as participation by supervisors is concerned." The court concluded that the Board's refusal to examine the general structure and practices of the nurses association served to avoid rather than resolve the complex issues raised by supervisory participation. The appellate court chastised the Board for its cavalier attitude, which deemed irrelevant "some of the most cogent evidence relating to conflict of interest."

The court's statement that the Board must inquire into "all relevant circumstances" was predicated on several factors. First, where both supervisors and rank and file employees participate actively in a professional organization, the supervisors are subjected to conflicting pressures by virtue of their relationships to the employer and the organization. Second, supervisors as a class have interests of their own, and an organization which is itself governed in part by supervisors will tend to reflect those interests. Third, evidence of explicit interference in collective bargaining may not be available even in cases in which the structure of a professional organization leads to pervasive supervisory influence. Fourth,

68. Id.
69. Id. at 273.
70. Id.
71. Id.
72. Id. at 274.
73. Id. at 273. The court stated that since the nurses association and the employer are the two most important entities affecting the supervisor's career, conflicts of interest indisputably occurred both within the organization and on the job. Id.
74. Id. The court noted that the authority of supervisors over rank and file employees is usually a major issue in collective bargaining, and that an organization in which supervisors play a significant governing role will have difficulty reflecting only the views of the rank and file on the issue. Id. The court stated that it is "tunnel vision" to assume that this influence will be of importance only when a supervisor of employees in a particular unit is a member of the board of directors of the certified bargaining representative. Id.
75. Id. The court stated that supervisors active in union affairs may have control not only over rank and file employees' working conditions, but also over the employees' roles
where supervisors are active in the internal affairs of the rank and file employees' bargaining representative, actual violations of the Act attributable to employers appear inevitable.\textsuperscript{76}

Turning to an examination of the governing structure of the SNA and its practices concerning supervisors, the Second Circuit concluded that the influence of supervisors within the SNA was "ubiquitous."\textsuperscript{77} The Court stated that if the SNA were an industrial union its disqualification would be justified as a matter of law\textsuperscript{78} due to (1) the active role of supervisors in the union's governance, (2) the lack of insulation of the bargaining process from that governance, and (3) the lack of any mechanism to assist employers in preventing their supervisors from violating the Act through union activities.\textsuperscript{79} Rather than disqualifying the SNA, however, the court remanded the case to allow the Board to determine appropriate methods for insulating the collective bargaining process from supervisory interference and preventing supervisors from violating the Act through their activities within the professional organization.\textsuperscript{80} The court suggested that on remand some

\textsuperscript{76} Id. at 274. Section 8(a)(2) of the Act declares it unlawful for employers to dominate or interfere with the formation or administration of any labor organization. 29 U.S.C. § 158(a)(2) (1982). The court reasoned that when a hospital's supervisors are active in a labor organization, such activities will lead to systematic violations of section 8(a)(2). 274 F.2d at 274.

\textsuperscript{77} 274 F.2d at 275.

\textsuperscript{78} Id. at 275.

\textsuperscript{79} Id. The court stated that:

Quite apart from the formal structure in which supervisors vote on various matters, status as a senior member of SNA and supervisory authority within a health care facility often go together and it is well nigh inevitable that some of SNA's most active members will also be supervisors. SNA's board of directors, its ultimate governing authority to which the executive director and other staff employees must report, has supervisors as members. The nominating committee, which has great influence in determining who will become an officer or director, was chaired by a supervisor from North Shore Hospital at the time of the election. Little, if anything, has been done to insulate collective bargaining activities from the governance of the organization generally. The staff members who advise organized nurses and negotiate on their behalf serve at the pleasure of SNA's board. Even the EGW advisory council has supervisors as members, as did a task force on SNA's no-strike policy. District 14, which collects information on wages, hours, etc., of nurses, key information in developing bargaining demands, was chaired by a supervisor from North Shore Hospital. Supervisors have used a district meeting to voice opposition to the representation of rank and file nurses by a competing union. Finally, SNA seems quite prepared to refuse to cooperate with employers in seeing that Section 8(a)(2) is not systematically violated by the activities of supervisory nurses in SNA.

\textsuperscript{80} Id. at 275-76.
distinctions between professional associations and industrial unions might emerge to justify separate rules.\textsuperscript{81}

2. The Board's Decision on Remand

The Board on remand declined to establish special rules governing the disqualification of professional associations due to supervisory participation in internal union affairs.\textsuperscript{82} Instead, it stated that it would continue to apply the same standards which it uses to determine whether industrial unions are disqualified because of supervisors' participation.\textsuperscript{83}

Adopting the Second Circuit's reasoning as the law of the case, the Board agreed that the SNA was disqualified as a collective bargaining representative.\textsuperscript{84} It concluded that the active participation of supervisory personnel in the SNA, the lack of insulation of the collective bargaining process from the governance of the organization, and the lack of a mechanism to prevent employer violations of the Act combined to present a clear and present danger of a conflict of interest.\textsuperscript{85} The Board therefore revoked the SNA's certification and vacated its prior decision, in which it had found that the hospital had violated the Act by refusing to bargain with the SNA.\textsuperscript{86}

3. The Impact of the Test

Unfortunately, on remand the Board declined to establish guidelines to assist organizations that wish to admit supervisors to active membership yet avoid disqualification. Furthermore, because the Board has not reviewed any other cases presenting similar issues since \textit{North Shore University Hospital} was decided, the burden has fallen upon regional directors and administrative law judges to determine the extent to which supervisors can participate in a labor organization, and the roles which supervisors may assume within the organization, without disqualifying the organization from bargaining.\textsuperscript{87}

In the absence of any limiting guidelines, the all-relevant-circumstances test has opened the internal structures of professional

\textsuperscript{81} \textit{Id.} at 275.
\textsuperscript{83} \textit{Id.} at ¶ 29,702.
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.} \textit{See generally} 1 \textit{C. Morris, supra} note 11, at 452-54.
labor organizations to public scrutiny. Employers have been given wide latitude to subpoena documents and examine witnesses regarding the innermost workings of the professional organizations. The test has thus achieved the very end which the Sierra Vista III test was designed to avoid—fishing expeditions and protracted representation proceedings which may impair employees' organizational interests.

It is clear that continued application of the all-relevant-circumstances test will necessitate some fundamental changes in the structure of state nurses associations, the manner in which such associations participate in bargaining activities, or both. Moreover, unless nurses associations are willing to expend the time and expense necessary to defend their qualifications in representation and unfair labor practice proceedings under the rigorous and intrusive North Shore University Hospital test, they must elect one of two courses. They must either refuse to admit supervisors to active membership or cease representing rank and file members in collective bargaining activities by delegating actual bargaining authority to the local unit as the certified representative of the union employees. Although neither of these two options may appear desirable in the abstract, the latter may constitute the only effective means of insulating collective bargaining from supervisory interference while preserving other avenues of participation for state associations and preventing intrusion into the associations' internal affairs.

D. Analysis

In excluding supervisors from the Act's protections, Congress recognized that employers deserve the undivided loyalty of their supervisors and that employees should be free from supervisory influence over bargaining activities. Although Congress expressly

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88. In declining to enforce the Board's 1981 North Shore University Hospital decision the Second Circuit Court of Appeals stated that the Board's inquiry "must extend to all relevant circumstances, including the governing structure and actual practice of the organization." North Shore Univ. Hosp., 274 F.2d at 273 (emphasis added). Thus, information to which the Board had previously refused employers access has clearly fallen within the scope of discoverable information. See generally supra notes 58-59.

89. See supra note 54.

90. Sierra Vista III, 241 N.L.R.B. at 635.

91. Some associations that have been willing to defend challenges to their qualifications have sought to amend their constitutions and bylaws in an effort better to insulate collective bargaining activities. Such associations must, however, bear internal scrutiny and the costs of defending their bona fide statuses. See St. Francis Monitor (BNA Mar. 1986); Massachusetts Nurses Ass'n, Constitution and By-laws of 1985.

92. See supra notes 31-32.
stated that supervisors may become and remain members of a labor organization notwithstanding their exemption from the protections of the Act, the legislative history clearly indicates that supervisors should only be members of unions that are "separate and distinct" from those unions representing rank and file employees.

By failing to disqualify nurses associations that admit supervisors to membership, as it did in *Sierra Vista III* and other cases, the Board has compromised the overriding purposes of the Act and violated congressional intent.

1. Supervisors Employed by the Employer

Although the Board in *Sierra Vista III* recognized that a supervisor's activities in a labor organization which has rank and file employees as members may result in a conflict of interest, it stated that whether a conflict in fact existed depended upon the supervisor's role in the association's internal affairs. As a matter of course, the Board found a disqualifying conflict only when the supervisor was active in bargaining. This analysis failed to recognize that the role of the supervisor in the workplace may be compromised as a result of the supervisor's dual loyalties, irrespective of the types of activities in which the supervisor participates within the association.

As the Second Circuit Court of Appeals recognized in *North Shore University Hospital*, the nurses association and the employer are the two most important entities in a nurse's professional career. When a supervisor's loyalties are divided between the employer and the organization representing rank and file employees, employers' interests in maintaining efficiency and discipline in the workplace are compromised. Thus, by focusing merely upon the supervisors' influence over the bargaining process during negotiations, the Board under the *Sierra Vista III* test totally ignored the impact that such divided loyalties may have on the overall bargaining relationship, which includes administration of the terms of the bargaining agreement and the agreement's grievance procedures.

Because supervisors by definition must monitor and discipline,
they play an integral role in the enforcement and administration of
the employer’s policies.99 If their loyalties are divided, however,
supervisors may not be able to administer the employer’s discipli-
nary policies and participate in the grievance and arbitration pro-
cedures as loyal representatives of management. Divided loyalties
may impede the orderly resolution of labor disputes and prompt
the very disruptions that Congress sought to avoid.100

Thus, while the Board has permitted the nurses associations’ ad-
mission of supervisors to membership in order to ensure nurses the
“fullest freedom” in selecting a bargaining representative, this pol-
icy has undermined the overriding goal of the Act and has dis-
rupted the balance of power between employers and employees.
This disruption is evidenced by the increased number of strikes
which have occurred in the health care industry since nurses as-
sociations have expanded their bargaining activities.101 The
Board’s policy has created industrial strife102 and has harmed the
public by contributing to the disruption of health care services.103

To achieve the paramount goal of the Act, the Board should
decline to certify a labor organization as the bargaining representa-
tive of rank and file employees whenever the unit employees’ super-
visor is a member of the labor organization. Only by such a
practice can the Board protect the interests of employers in the
effective management of the workforce while furthering congres-
sional intent and the Act’s goal of achieving industrial harmony.

99. In addition to participating in the grievance and arbitration process when bar-
gaining unit nurses are involved, supervisors may also be active in the administration of
the grievance procedures of employees represented by other unions.
100. See supra note 34 and accompanying text.
101. Between 1974 and 1980, the number of strikes in health care institutions in-
creased from 44 to 99 per year, and the number of idle days per year increased from
263,700 to 565,100. See U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, ANAL-
YSIS OF WORK STOPPAGES (1974-1980). During the same period, the total number of
work stoppages in the United States for all industries decreased by more than one half,
and the number of idle days decreased by one third. U.S. DEP’T OF LABOR, BUREAU OF
LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 409 (June 1985) (strikes involv-
ing more than 1000 workers). After 1980, the Department of Labor ceased collecting
data regarding strikes in health care institutions involving less than 1000 workers. Thus
it is impossible to compare the years following 1980 with the strike trend that occurred
102. The Board’s conduct has led to strikes not only by nurses, but also by other
health care employees due to the conflicts created when nurses supervise non-nurses.
Supervisory nurses may seek to further the nurses association’s interests when discipli-
nating non-nurse employees or participating in grievance procedures. In a grievance involv-
ing job duties, for example, the supervisory nurse’s loyalties may be divided because the
non-nurses’ claim to the work may encroach upon the work jurisdiction of the registered
nurses. 724 F.2d at 274-75.
103. See supra note 101 and accompanying text.
2. Supervisors Employed by Third Parties

As recognized by the Second Circuit Court of Appeals in *North Shore University Hospital*, the conflict of interest problem which arises when supervisors employed by third parties are active in the nurses association are distinct from those which arise when the unit employees’ supervisor is active. Moreover, the conflicts which arise in the third-party situation can largely be avoided by proper insulation of the bargaining process from supervisory influence. Although the *Sierra Vista III* test recognized the unique problems which arise in this context, it failed to allow employers access to the organizations’ internal affairs to obtain evidence regarding the various ways in which supervisors’ activities may affect collective bargaining.

The all-relevant-circumstances test articulated in *North Shore University Hospital* will better effectuate congressional intent by allowing employers to obtain the evidence necessary to demonstrate the ways in which supervisors may be able to influence the rank and file employees’ bargaining activities. The test, however, may impair the organizational freedom of employees. Under the test, employers are given the opportunity to protract representation proceedings, to threaten to petition the Board for revocation of the organization’s certification, and to engage in fishing expeditions which inquire into the inner workings of the labor organization. Thus, although it may be theoretically possible for a nurses association to construct a barrier by which collective bargaining may be insulated from supervisory influence, the organization’s internal structure would nevertheless be subject to continual scrutiny because the barrier could be breached at any time. Although the all-relevant-circumstances test may be necessary to ensure that the presence and activities of supervisors do not undermine employees’ interests in “single-minded” representation, nurses associations may be unable—economically and administratively—to bear the test’s continual scrutiny or to constantly monitor collective bargaining activities in order to ensure insulation from supervisory influence.

3. Achieving the Act’s Overriding Goal

By focusing on the Act’s subsidiary goal of allowing employees

104. 724 F.2d at 273.
105. See supra notes 61-63 and accompanying text.
106. See supra note 90 and accompanying text.
107. See supra notes 88-90 and accompanying text.
the "fullest freedom" in selecting a bargaining representative, the Board, applying the Sierra Vista III test, apparently assumed that the Act's overriding goal of industrial harmony would also be achieved. Between 1974 and 1980, however, the number of strikes in health care institutions more than doubled. This increase is attributable at least in part to the conflicts created by the Board's failure to disqualify labor organizations that admit supervisors to membership.

In examining representation issues, the Board must focus upon the Act's overriding goal and attempt to harmonize it with the subsidiary goal of employees' "fullest freedom." The latter, however, must be viewed only as a means to the ultimate end and may be achieved only in a manner consistent with the Act's overall purposes.

As properly applied, the North Shore University Hospital test will effectuate congressional intent, because it properly recognizes that some limitations must be placed on employees' "fullest freedom" in order to achieve industrial harmony. The test, however, is undeniably intrusive upon the labor organization's internal affairs and, as a practical matter, may (1) deter the organization from pursuing a representation petition if the employer challenges the organization's qualifications, or (2) upset the balance of power between the labor organization and the employer because the employer can threaten to petition to have the organization disqualified if difficulties arise.

Professional organizations should respond to the North Shore University Hospital decision by reevaluating the manner in which they participate in collective bargaining activities on behalf of rank and file members. This article proposes that as a means of harmonizing the competing interests and achieving industrial harmony without allowing wholesale intrusion into the organizations' internal affairs, the nurses associations should delegate bargaining au-

108. See supra note 101.

109. Other factors which contributed to the rising number of strikes include the increasing organizational activities of health care unions and the Board's failure to give due regard to Congress' nonproliferation mandate. See IMPACT, supra note 39, at 394. For a discussion of the nonproliferation mandate, see infra notes 132-34 and accompanying text.

110. Procedurally, the employer would move to revoke the union's certification on the grounds that the union is dominated, influenced, or controlled by supervisors. Pursuant to § 9(c) of the Act, 29 U.S.C. § 159(c) (1982), the Board retains the power to police its certification of bargaining representatives and may revoke certification if it finds the union disqualified as a bargaining representative. See, e.g., North Shore Univ. Hosp., 274 N.L.R.B. at 275-76; R & M Kaufman, 187 N.L.R.B. 134, 135 (1970).
tority to the local employee units and permit the locals to become the certified bargaining representatives of rank and file nurses.

4. The Proposed Solution and Compromise: A Better Way of Harmonizing the Competing Interests

Nurses associations should no longer seek recognition as the certified bargaining representatives of rank and file nurses. While this proposal may at first appear to be a drastic measure, it may be the only way to fulfill the Act’s purposes while avoiding intrusive scrutiny which may undermine employees’ organizational rights. If state nurses associations no longer seek certification as collective bargaining representatives but instead allow local units to seek certification, the associations may be able to insulate the bargaining process from supervisory interference and avoid disqualification, while remaining active in protecting nurses’ interests in collective bargaining.

It is well recognized that a labor organization may receive assistance and counsel from outside advisors.111 Thus, even if the state associations are not the certified representatives of rank and file nurses, they may still act as advisors to individual employee associations in much the same fashion as they currently do. By formally delegating bargaining authority, however, the associations can avoid conflict of interest problems and pervasive internal scrutiny.

Although the state nurses associations may lose some control over the activities of the local associations by delegating bargaining authority, as a general rule the state associations have already given, or have argued that they have given, substantial autonomy to the local bargaining units. Assuming that this is true, the state associations arguably have little to lose by formalizing the arrangement and allowing each employee association to petition for certification as a bargaining representative.

In order to ensure that supervisors cannot exert improper influence over the bargaining activities, however, the local unit must be truly independent and must not exist merely as a front for the state association.112 Otherwise, it may be found that the local is not a “labor organization” but instead merely an organizing committee for the state association. The local unit should establish its in-

dependent existence not only by petitioning to become the certified bargaining representative, but also by: (1) electing officers and stewards, (2) adopting a constitution and bylaws, (3) requiring its members to pay dues, (4) refusing to admit supervisors to membership, and (5) ensuring that only "employees" are active in the internal governance and administration of the local unit.\textsuperscript{113}

Although delegation of bargaining authority to the local unit will not prevent employers from challenging the bona fides of the local as a labor organization, it will achieve at least four goals. First, it will avoid lengthening of representation proceedings. Second, it will avoid scrutiny into both the local unit's and the state association's internal affairs under the \textit{North Shore University Hospital} test. Third, it will insulate bargaining activities from the undue influence of supervisors. Finally this approach will avoid dividing supervisors' loyalties.\textsuperscript{114}

The first goal, avoiding protraction of representation proceedings, will be achieved because the Board has routinely dismissed challenges to an organization's bona fide status as a labor organization when raised at the representation proceeding level.\textsuperscript{115} The Board has reasoned that such challenges are premature because the organization has not been given the authority to bargain on behalf of the petitioned-for unit employees. Generally, the Board requires employers to bargain with the certified representative until it becomes apparent that the local does not meet the definition of a "labor organization" or that it is merely a sham or front for another entity.\textsuperscript{116}

The second goal will be achieved because inquiry into the actual practices and internal structure of the nurses association will be unnecessary. The state association will not be the certified bargaining representative, and inquiry into the actual practices of the local will be unnecessary because the local will not admit supervisors to membership. If the bona fide status of the local is challenged, examination will be limited to whether the local is an independently

\textsuperscript{113} See International Organization of Masters, Mates & Pilots v. NLRB, 351 F.2d 771, 776-77 (D.C. Cir. 1965).

\textsuperscript{114} At the present time, the constitutions of many state associations provide that members who engage in activities inimical to the interests of the association may be disciplined. See, e.g., \textit{North Shore Univ. Hosp.}, 724 F.2d at 275.


functioning entity; in all likelihood only the relationship between the local and the state nurses association, and the basic organizational structure of the local, will be examined. Assuming that the local has a formal organizational structure and that it is not controlled by the state association, it should be able to withstand a challenge to its bona fide status as a labor organization.\textsuperscript{117}

Delegation of bargaining authority will achieve the third and fourth goals by permitting the local to establish its own bargaining policies without supervisory interference and influence. The local will be free from the influence which the state association is presently able to exert through its control of the purse, power of appointment, and establishment of overriding collective bargaining goals. Moreover, if the local is an independent organization, supervisors will not be subject to the divided loyalties which currently exist. Because employees will belong to a separate, independent organization, supervisors will have no allegiances arising from common membership in the professional association. The independence of the local will restore both the labor/management dichotomy and the balance of bargaining power. Thus, the effective delegation of bargaining authority to local units may best serve the interests of all parties and best fulfill the Act’s goal of achieving industrial harmony while assuring employees the “fullest freedom” in selecting a bargaining representative of their own choosing.

III. THE NONPROLIFERATION MANDATE

In addition to the supervisory conflict-of-interest issue, another issue has arisen in the health care labor area since the enactment of the 1974 health care amendments. This issue concerns a congressional directive which instructed the Board to avoid the undue proliferation of bargaining units in health care institutions. The parallels between this issue and the supervisory exemption issue are striking. The nonproliferation issue, like the supervisor issue, is

\textsuperscript{117} The local employee organization and the state association should strive to achieve a true advisory/advocacy relationship analogous to that which exists between an employer and its attorneys. The role of the state association would be similar to the role that other unions have assumed in helping fledgling employee associations to achieve their bargaining goals. In Haverhill Publishing Co., 1-RC-18,123 (1984), for example, the Communication Workers of American (CWA) (1) assisted the Haverhill Publishing Company’s employees in organizing, (2) represented the local unit during the Board representation proceedings, and (3) vowed to assist the local unit during collective bargaining by serving as a member of the local’s negotiating team. Despite the employer’s efforts to demonstrate that the employee association was merely a sham for the CWA, the Board certified the bargaining representative and deemed the sham issue premature because the employee association had not yet had an opportunity to engage in collective bargaining.
marked by a clear expression of Congressional intent followed by Board decisions which at least in part disregarded that intent in order to further employees' "fullest freedom." As was the case in the supervisor exemption area, the Board's proliferation decisions led to much judicial criticism. Moreover, the Board's response to that criticism, as expressed in the St. Francis II decision, has, like North Shore University Hospital, created many problems for health care unions. Following is a discussion of the congressional non-proliferation mandate and the Board's treatment of the issue.

A. The Nonprofit Hospital Exemption

Because the Board has jurisdiction only over representation questions and unfair labor practices which "affect commerce," there arose the issue of whether the Board's jurisdiction extended to nonprofit hospitals. In 1942, the Board determined that its jurisdictional authority extended to virtually all work settings regulated under the commerce clause of the United States Constitution, and that there was no valid reason for denying employees of nonprofit hospitals the benefits of the Act. As a result of the Board's decision, Congress amended the Act in 1947 to exclude nonprofit hospitals from the Act's coverage.

Although the legislative history pertaining to the exemption of nonprofit hospitals is scant, Congressional reports indicate that nonprofit hospitals were exempted from the Act's coverage for three reasons: first, because they frequently assisted local governments in carrying out essential functions; second, because they were not engaged in commerce; and finally, because the precarious financial condition of the health care industry would inhibit health care employers from effectively participating in the Act's

118. See supra note 6 for a discussion of the Board's statutory and discretionary jurisdictional tests.

119. Under current discretionary standards, the Board will not assert jurisdiction over a hospital unless the hospital has a gross annual revenue of at least $250,000. East Oakland Community Health Alliance, Inc., 218 N.L.R.B. 1270 (1975). It will not assert jurisdiction over nursing homes, visiting nurses' associations and related facilities unless the facility has an annual gross revenue of at least $100,000. Id.


121. The 1947 amendment added the following italicized language to the Act's definition of an employer: "the term employer . . . shall not include . . . any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual." H.R. 3020, 80th Cong., 1st Sess. § 2(a), reprinted in LEG. HIST. 1947, supra note 33, at 2 (emphasis added).

122. LEG. HIST. 1947, supra note 33, at 301.

123. Id.
collective bargaining process.\textsuperscript{124} A common thread which underlies each of these reasons is the notion that essential services should not be disrupted by strikes—a right guaranteed employees by section 7 of the Act.\textsuperscript{125} Thus, Congress left the regulation of nonprofit hospitals to the states because the hospitals were deemed to provide "essential" services.\textsuperscript{126}

**B. The Health Care Amendments of 1974**

By 1974, it had become apparent that despite the exemption of nonprofit hospitals from the Act's coverage, recognition strikes at such hospitals were increasing.\textsuperscript{127} As the number of strikes increased, the provision of health services to the public was disrupted.\textsuperscript{128} Congress therefore decided to extend the Act's protections and procedures to nonprofit health care institutions in order to avoid the disruption and industrial strife caused by the lack of any effective mechanism for the peaceful resolution of labor disputes.\textsuperscript{129}

Still concerned about the need to protect the public's interest in undisrupted health care, however, and cognizant that the Act pro-

\textsuperscript{124} Id.


\textsuperscript{127} See supra note 101 and accompanying text.


\textsuperscript{129} LEG. HIST. 1974, supra note 128, at 95, 96, 291. In addition to the increasing number of recognition strikes, the following developments made the nonprofit hospital exemption ripe for reconsideration: (1) the rise in government and private insurance programs financing health care services; (2) the general shift from a manufacturing economy to a service economy; (3) a new surge of trade activity in the federal and public sectors; (4) the organization of low-wage and hospital workers with ties between collective bargaining and the civil rights movement; and (5) the Board's assertion of jurisdiction over other eelemosynary, charitable, and educational institutions including private for-profit hospitals and private for-profit as well as not-for-profit, nursing homes. IMPACT, supra note 39, at 13-14.
tects the employee’s right to strike as a mechanism for equalizing bargaining power, Congress enacted certain statutory safeguards designed to mitigate against strikes and to alleviate their effects should they occur. 130 Moreover, realizing that the threat to public health is present regardless of whether the hospital is for-profit or not-for-profit, Congress imposed the safeguards upon all hospitals as well as upon other health care institutions. 131

In addition to the statutory safeguards, Congress articulated another important safeguard of the public’s interest in the legislative history of the 1974 amendments. It directed the Board to avoid the “undue proliferation of bargaining units” in health care institutions. 132 By issuing this directive, Congress expressed its concern that a proliferation of bargaining units could result in work jurisdiction disputes, interference with health care teamwork, and excessive administrative costs. 133 Congress feared that these problems could, in turn, lead to the closing of smaller hospitals or to strike activity which would disrupt the provision of health care services. 134

130. Provisions added by the 1974 health care amendments included the following requirements: (1) a party desiring to terminate or modify an agreement must provide written notice to the other party at least 90 days prior to the contract’s expiration date (instead of the 60 days applicable to other industries); (2) federal and state mediation agencies must be notified 60 days prior to the contract’s expiration date (instead of 30 days); (3) mandatory mediation must occur during the 60 days prior to the contract’s expiration date (instead of the voluntary mediation required in other industries); and (4) notice must be provided 10 days in advance of a strike and 45 days before a work stoppage or picketing. The amendments also created a board of inquiry to help resolve disputes before they reach the strike stage. 29 U.S.C. §§ 158(d), (g), 213 (1982). See generally IMPACT, supra note 39, at 23-26.


133. S. 3203, 93d Cong., 2d Sess., 120 CONG. REC. 12,944-70 (1974); S. 3203, 93d Cong., 2d Sess., 120 CONG. REC. 12,934-35 (1974). Similar efforts to avoid proliferation have been made in the public sector. It is generally believed that reducing the number of bargaining units in the public sector will best protect the public’s interest in undisrupted services. See generally Rock, The Appropriate Unit Question in the Public Service: The Problem of Proliferation, 67 MICH. L. REV. 1000, 1001-08 (1969).

In an effort to guide the Board's determination of appropriate units, Congress cited with approval several cases consistent with its mandate. Congress also stated that the Board should examine the "public interest" in making its determination. The Board has applied various tests in its effort to fulfill the mandate. Until recently, however, the Board emphasized the interests of health care employees in exercising the "fullest freedom" in selecting a bargaining representative and apparently lost sight of the non-proliferation mandate.

C. Bargaining Unit Determinations

1. The Early Years

After the Act was amended in 1974, the Board initially adhered

135. Although Congress considered a proposal which would have limited the maximum number of bargaining units in health care institutions to four (professional, technical, clerical, and service and maintenance), it decided to leave appropriate unit determination decisions to the Board's expertise. S. 2292, 93d Cong., 2d Sess., reprinted in LEG. HIST. 1974, supra note 128, at 113-14 (statement of Sen. Taft); S. REP. NO. 766, 93d Cong., 2d Sess. 5, reprinted in LEG. HIST. 1974, supra note 128, at 12. Congress, however, directed the Board to avoid the undue proliferation of bargaining units and cited with approval several decisions, including Four Seasons Nursing Center, 208 N.L.R.B. 403 (1974) (dismissing petition seeking unit comprised only of maintenance employees); Woodland Park Hosp., 205 N.L.R.B. 888 (1973) (dismissing petition for unit of x-ray technicians because separate unit would lead to fragmentation of units in the health care industry; appropriate unit consisted of all hospital employees excluding professional and exempt employees); and Extendicare of W. Va., 203 N.L.R.B. 1232 (1973) (cited with reservation because part of the unit findings were overly broad and not consistent with minimization of the number of bargaining units in health care institutions).


Hospitals and other types of health care institutions are particularly vulnerable to a multiplicity of bargaining units due to the diversified nature of the medical services provided patients. If each professional interest and job classification is permitted to form a separate bargaining unit, numerous administrative and labor relations problems become involved in the delivery of health care.


137. See supra notes 76-80 and accompanying text.

138. Since the bargaining unit determination cases decided by the Board between 1974 and 1984 have been comprehensively discussed in other law review articles, this
to the congressional directive against the undue proliferation of bargaining units in the health care industry. In *Shriners Hospital for Crippled Children*, for example, the Board denied separate representation to a group of five stationary engineers employed by a hospital, stating that the engineers did not possess interests sufficiently "separate and distinct" to warrant separate representation. The Board stated that separate units were inappropriate because of the peculiar nature of the health care industry and the high degree of integration of operations performed in health care facilities. Separate units, the Board believed, would frustrate Congressional intent.

Following *Shriners Hospital*, however, the Board's adherence to the congressional directive wavered. The Board began to focus upon whether the petitioning employees shared a "community of interests" rather than upon whether the interests were sufficiently separate and distinct from those of the other employees to warrant separate representation. During 1975, the Board identified at least five basic units appropriate in health care institutions: (1) registered nurses, (2) all other professionals, (3) technicals (including licensed practical nurses), (4) business office clericals, and (5) service and maintenance employees (including non-business office clericals).

Shortly thereafter, the Board found that a separate unit of licensed practical nurses and a separate unit of skilled maintenance employees could also be appropriate in health care facilities.

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139. 217 N.L.R.B. 806 (1975).
140. Id. at 808.
141. Id.
142. See supra note 138 and accompanying text; see also St. Francis Hosp., 265 N.L.R.B. 1025, 1029 (1982) [hereinafter cited as *St. Francis I*].
institutions. The Board then added another unit, physicians, to its list. Thus, by 1977 the Board had found that there were at least eight potentially appropriate units in health care institutions.

2. Judicial Criticism

Several federal courts of appeal attacked the Board’s unit classifications as failing to heed the congressional admonition against undue proliferation. Six of the circuits criticized the Board’s adherence to the community-of-interests standard and stated that the Board should instead focus upon avoiding undue proliferation.

The circuit courts that found the community-of-interests test inappropriate disagreed as to how the congressional mandate against undue proliferation could best be harmonized with the Act’s goal of protecting employees’ organizational interests. These courts divided into the two schools of thought. Some advocated a disparity-of-interests test which begins with a broad proposed unit and excludes employees with interests disparate from the overall group. Other courts rejected the disparity-of-interests test because it subordinates employees’ organizational interests to the public’s interests in nonproliferation. As an alternative, these courts proposed a balancing test which weighs both employees’ interests and the public’s interest.

3. The Board’s Response to the Courts’ Criticism

The Board initially responded to the appellate courts’ criticism by announcing that it had properly taken into consideration the

145. See, e.g., Faulkner Hosp., 242 N.L.R.B. 47 (1979); St. Vincent’s Hosp., 223 N.L.R.B. 638 (1976). In St. Francis Hosp., the Board noted that although there was no reported decision in which a service employees unit was found appropriate, the appropriateness of such a unit could be inferred in the event that a separate maintenance unit was recognized or certified. St. Francis I, 265 N.L.R.B. 1025, 1028 n.28 (1982).
146. See Ohio Valley Hosp. Ass’n, 230 N.L.R.B. 604, 605 (1977); IMPACT, supra note 39, at 112 n.36.
147. See St. Francis I, 265 N.L.R.B. 1025, 1029 n.29 (1982).
148. Id.
149. The primary advocates of the disparity-of-interests test were the Ninth and Tenth Circuit Courts of Appeal. See, e.g., Presbyterian St. Luke’s Medical Center v. NLRB, 653 F.2d 450 (10th Cir. 1981); NLRB v. St. Francis Hosp., 601 F.2d 404 (9th Cir. 1979).
150. See, e.g., NLRB v. Walker County Medical Center, Inc., 722 F.2d 1535 (11th Cir. 1984); Watonwan Memorial Hosp. v. NLRB, 711 F.2d 848 (8th Cir. 1983); Trustees of Masonic Hall v. NLRB, 699 F.2d 626 (2d Cir. 1983).
151. NLRB v. Walker County Medical Center, Inc., 722 F.2d 1535, 1540 (11th Cir. 1984); Trustees of Masonic Hall v. NLRB, 699 F.2d 626, 641 (2d Cir. 1983); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969 (2d Cir. 1979). See generally Stapp, supra note 138, at 63, 77-79.
mandate against undue proliferation. The Board stated that it had erred in its decisions not by failing to heed congressional intent, but rather by failing to explain fully the Board's approach. To support its decisions, the Board stated that it had been applying a two-tiered analysis which safeguarded against the proliferation of bargaining units. Under this analysis, the Board first determined whether the group seeking representation fell into one of the seven groups of employees commonly found within health care institutions. If the group seeking representation did not meet the first part of the test, the Board would dismiss the petition unless "extraordinary and compelling facts" justified the certification of a smaller unit. If the group did meet the first prong, the Board proceeded to the second step of the analysis, applying community-of-interests standards to ascertain if the group constituted an appropriate unit. A majority of the Board reasoned that this screening system limited the number of bargaining units to seven—absent compelling circumstances—and thus satisfied the Board's obligation to protect against undue proliferation.

D. St. Francis II

1. The Board's Decision

In response to mounting criticism, however, the Board in 1984 reconsidered its two-tiered analysis, and formulated a revised approach for determining appropriate health care bargaining units. In St. Francis Hospital ("St. Francis II"), the Board determined that the community of interests approach was contrary to Congres-

153. Id. at 1030.
154. Id. at 1029.
155. The seven groups were: physicians, registered nurses, other professional employees, technical employees, business office clerical employees, service and maintenance employees and skilled maintenance employees. St. Francis I, 265 N.L.R.B. 1025, 1029 (1982). While the Board at one time included licensed practical nurses (LPN's) as a separate unit, it generally included the LPN's in the unit of technical employees. See, e.g., Pontiac Osteopathic Hosp., 227 N.L.R.B. 1706, 1706 (1977) (discussing appropriateness of separate LPN unit).
157. Id.
158. Chairman Van de Water and Member Hunter dissented sharply from the decision. St. Francis I, 265 N.L.R.B. 1025, 1042 (1982) (Van de Water, Chairman & Hunter, Member, dissenting). The dissenters argued that the traditional community-of-interest test was an improper standard for unit determination in the health care industry, and that the disparity-of-interests test was the only method by which undue proliferation could be avoided. Id.
159. 271 N.L.R.B. 948 (1984) [hereinafter cited as St. Francis II].
sional intent. After analyzing the legislative history of the 1974 amendments and the comments of the appellate courts, the Board concluded that Congress, concerned with minimizing the disruption in patient care, could hardly have envisioned the large number of Board-sanctioned units which resulted from the Board's traditional approach. Agreeing with the majority of the circuits, the Board recognized that Congress must have intended that it apply a standard stricter than the traditional community-of-interests test.

The Board, however, declined to adopt either the rigid disparity-of-interests test advocated by the Ninth and Tenth Circuits or the balancing test advocated by the Second, Eighth, and Eleventh Circuits. Instead, it adopted a modified disparity-of-interests test designed to effectuate the Board's "dual obligations of adhering to the legislative intent behind the enactment of the 1974 health care amendments to the Act and guaranteeing the representational interests of health care employees."

Under the Board's new test, the appropriateness of the petitioned-for unit is to be judged in terms of "normal community of interests criteria," but sharper than usual differences between the wages, hours, and working conditions of the petitioning employees

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160. Id. at 952.
161. Id. at 951.
162. Id.
163. The Board rejected the rigid disparity-of-interests test because it would generally result in only two units, professionals and nonprofessionals, ever being found appropriate. Under that approach, a smaller unit would be found appropriate only if the interests of the petitioned-for unit employees were so divergent from those of other employees that fair representation would be prohibited or inhibited if a separate unit were not permitted. Id. at 16 (citing Trustees of Masonic Hall v. NLRB, 699 F.2d 626, 636 (2d Cir. 1983); Watonwan Memorial Hosp. v. NLRB, 711 F.2d 848, 850 (8th Cir. 1983)).

A "professional employee" is defined by the Act as:

(a) any employee engaged in work (i) predominantly intellectual and varied in character . . . (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, . . .; or
(b) any employee who (i) has completed the course of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

164. St. Francis II, 271 N.L.R.B. at 948.
165. "Normal community of interests criteria" include employees' wages, hours, and working conditions; qualifications, training, and skills; frequency of contact and degree of interchange with other employees; frequency of transfer to and from the petitioned-for
and those in an existing unit are required for the Board to approve the smaller unit. The Board reasoned that requiring greater disparities would result in fewer units. It thus concluded that the test would meaningfully apply the congressional mandate against unit proliferation.

The Board did not, however, adopt "what bordered on a per se approach" by invariably establishing large units based solely on professional or nonprofessional status. Stating that the principles announced represented a clear rejection of Board precedent, the Board vowed to reach its unit determinations on a case-by-case basis, focusing upon the differences shown between the petitioned-for unit employees and the other employees and the similarities among the proposed unit members.

Applying the new test to the facts, the Board found that there was not a sufficient disparity of interests between the petitioned-for unit of maintenance employees and other nonprofessionals to justify separate representation. The Board specifically focused upon the similarities between the employees in the petitioned-for unit and the employees in the overall nonprofessional unit. The Board noted, among other similarities, that the petitioning employees had significant and frequent work contact with nearly all categories of health care employees. In examining the disparities between the petitioning employees and the employees in the overall

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166. Id.
167. Id.
168. Id.
169. Id.
170. Id. at 954.
171. Id. at 953, 953 n.39. The majority stated that the courts, always cognizant of the congressional mandate against unit proliferation, have upheld units limited to technical employees and service and maintenance employees. Id. at 953 (citing Watonwan Memorial Hosp. v. NLRB, 711 F.2d 848, 850 (8th Cir. 1983); NLRB v. Hillview Health Care Center, 705 F.2d 1461 (7th Cir. 1983); NLRB v. Sweetwater Hosp. Ass'n, 604 F.2d 454, 458 (6th Cir. 1979); Bay Medical Center v. NLRB, 588 F.2d 1174 (6th Cir. 1978); Trustees of Masonic Hall v. NLRB, 699 F.2d 626, 641 (2d Cir. 1983)). The Board, however, cautioned that no unit would be found per se appropriate and that separate representation would have to be justified by the factual record. St. Francis II, 271 N.L.R.B. at 954.
173. Id. The Board also noted that the service and maintenance employees received the same hourly pay and fringe benefits, that labor relations were centrally controlled, that there was a uniform discipline and discharge system, and that there had been 78 transfers between the service and maintenance departments. Id.
unit,¹⁷⁴ the Board found that they were not sufficient to justify separate representation.¹⁷⁵ The Board did, however, remand the matter to the regional director to allow the parties to present further evidence.¹⁷⁶

2. Reversion to Old Standards under the New Test

In theory, the Board's modified disparity-of-interests test should result in fewer and larger units being found appropriate in health care institutions because the test focuses upon "disparities" and because the party seeking the smaller unit bears the burden of establishing its appropriateness.¹⁷⁷ Recent Board decisions, however, have applied the test in a manner which merely perpetuates earlier findings regarding appropriate units. Although the Board in St. Francis II announced that it was rejecting all of its prior unit determination decisions, it has in fact continued to analyze the appropriateness of the petitioned-for unit with reference to previously established employee groupings—for example, technicals, service and maintenance employees, and professionals.¹⁷⁸ Moreover, as under the previously applied community-of-interests test, the Board has continued to focus upon the similarities among the employees in the petitioned-for unit and their dissimilarities to the overall unit. Despite the test articulated in St. Francis II, the Board has failed to focus upon the similarities between the employees in the petitioned-for unit and other employees.¹⁷⁹ The Board has thus perpetuated preexisting unit determinations.

In Southern Maryland Hospital Center, Inc.,¹⁸⁰ for example, the Board found a petitioned-for unit of all technical employees appropriate, rather than a unit of all nonprofessional employees as requested by the employer. Rather than beginning its analysis without any preconceived notions about appropriate groupings, the Board first grouped together all "technical" employees and applied a strict community-of-interests analysis to assess which employees

¹⁷⁴. Id. The Board noted that the petitioned-for unit employees did not perform functions requiring a high degree of skill. Id.
¹⁷⁵. Id.
¹⁷⁶. Id.
¹⁷⁷. Under the community-of-interests test, the party seeking the larger unit, generally the employer, had the burden of establishing that other employees should be included in the unit. Under the disparity-of-interests test, the burden is shifted to the party seeking the smaller unit, generally the union. See St. Francis I, 265 N.L.R.B. 1025 (1982).
¹⁷⁹. Id.
should appropriately be found “technical” employees as previously defined by the Board. It then compared the dissimilarities between the “technical” employees and those employees traditionally placed in a “service and maintenance” unit. By presupposing the appropriateness of these two basic groupings of nonprofessional employees, the Board highlighted the technical employees’ community of interests in order to demonstrate the disparity of interests between the technical employees and the service and maintenance employees.

If the Board had abandoned its preconceived notions about appropriate employee groupings and had required the union to demonstrate “sharper than usual differences” in order to justify a separate unit for the petitioners, arguably an all-inclusive nonprofessional unit would have been found appropriate. The record demonstrated that the employer’s labor policies, including disciplinary policies, were centralized; that all employees received the same benefits and were subject to the same wage scale; that employees were permanently transferred to other departments on twenty-three occasions in the past several years; and that there was considerably daily interaction between the employees in the petitioned-for unit and other hospital employees because of the use of the team concept of patient care. By narrowly focusing on the differences between the technical employees and the service and maintenance employees, however, the Board was able to justify a separate unit by finding sufficient dissimilarities in wages, qualifications, skills, and training and by finding only minimal interchange between these two groups of employees.

By focusing on the similarities among the petitioned-for unit employees and the dissimilarities between those employees and em-

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181. For example, the Board included a draftsman in the petitioned-for unit, since he met the definition of a technical employee, but it excluded various technicians because they did not meet the definition of a “technical employee.” Id. at ¶¶ 29,713-14.
182. Id. at ¶ 29,713.
183. The Board’s continued willingness to presuppose the appropriateness of separate professional and nonprofessional units is also demonstrated by the recent decision Victor Valley Community Hosp., 274 N.L.R.B. No. 122 (1985). In Victor Valley, the Board stated that the disparity-of-interests test did not change the composition of the all-professional unit and that nonprofessional employees could not appropriately be included in the unit. Id., slip op. at 3.
184. Id., slip op. at 2-3. The Board found that the following disparities justified a separate unit: a 25% to 35% difference in wages between service and maintenance employees and technical employees; differences in qualifications, training and skills between the two groups; the lack of interchange; and few permanent transfers between the two groups.
185. Id.
employees in the overall unit, the Board has in effect continued to apply a community-of-interests analysis. This approach will not necessarily result in the nonproliferation of bargaining units. At best, it will limit the number of bargaining units to those major categories recognized as appropriate prior to St. Francis II. 186

The Board's two most recent decisions, however, suggest that it may have recognized that the failure to abandon preconceived notions about appropriate employee groupings and to properly focus on the similarities and dissimilarities between the smaller unit and the overall unit merely perpetuated prior unit determination decisions. In both of these recent decisions, the Board has properly applied the disparity-of-interests test, and found larger units appropriate.

In North Arundel Hospital Association 187, the Board found that the smallest appropriate unit consisted of all of the employer's professional employees. It rejected the regional director's finding that there were disparities between the interests of registered nurses and other professionals sufficient to warrant the separate unit of registered nurses sought by the petitioning union. By focusing on the similarities and differences between the registered nurses and the employer's other professionals, the Board concluded that the union had failed to establish that "sharper than usual differences existed" between the registered nurses and other professional employees. 188

Similarly, in Baker Hospital, Inc., 189 the Board included service

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186. The Board's decisions suggest that subgroups of these broad groups will generally not be found appropriate. See, e.g., St. Luke's Memorial Hosp., 274 N.L.R.B. No. 202, 1985-86 NLRB Dec. (CCH) ¶ 17,278 (1985) (separate licensed practical nurse unit not appropriate); St. Francis II, 271 N.L.R.B. at 952 (separate maintenance unit not appropriate).

187. 279 N.L.R.B. No. 48 (1986).

188. Id., slip op. at 4-5. The Board relied on the fact that all professional employees were subject to many common personnel policies and procedures, and that there was employee contact and interaction as a result of the employer's team concept of health care delivery and the registered nurses' participation on various hospital committees with other professionals.

Although the Board noted that there was little evidence of interchange of duties, it concluded that such lack of interchange was inherent in the health care industry. In fact, the Board chastised the regional director for relying on distinct job responsibilities and departmental organization to support his finding that a separate registered nurse unit was appropriate. The Board stated that carried to its logical extreme, the Regional Director's rationale could result in separate units for professionals in the pharmacy, physical therapy, radiology/CT/nuclear medicine, laboratory/pathology, patient services, respiratory/pulmonary, and social work departments—a result plainly at odds with the congressional directive against unit proliferation.

Id.

and maintenance employees, technical employees and clerical employees in a single bargaining unit. Although the groups were supervised separately and worked in different departments, the Board found that there was an insufficient disparity of interests to justify separate units. The Board noted that the employees shared significant work-related contact and had many common terms and conditions of employment.\footnote{Factors upon which the Board relied included the following: all of these employees were paid hourly; they punched the same time clock; they received the same cost-of-living adjustments; all were offered the same pension plan; hospital policies, personnel rules and disciplinary procedures were the same for all; and they all shared the same cafeteria, parking facility and bulletin boards.}

Thus, as these recent decisions reflect, the disparity-of-interests test as properly applied will result in Board findings that larger units are appropriate in health care institutions. It will, as a result, better fulfill the Congressional mandate against undue proliferation of bargaining units.

E. Analysis

In 1974, Congress amended the Act to extend its protections to employees of nonprofit health care institutions because labor unrest among hospital employees was leading to recognition strikes and there was no effective mechanism for resolving the disputes.\footnote{See supra note 129 and accompanying text.} In extending the rights secured by the Act to nonprofit hospital workers, however, Congress enacted various procedural safeguards designed to increase peaceful dispute resolution as an alternative to strikes, which were disrupting health care services to the public.\footnote{See supra notes 130-34 and accompanying text.}

The nonproliferation mandate was adopted by Congress as one means of achieving industrial harmony in the health care industry.\footnote{See supra notes 133-34 and accompanying text.} According to Congress, the Board was to consider the public interest when making unit determination decisions.\footnote{See supra note 136 and accompanying text.} Legislative history expressly stated that if each of the employee groups found in health care institutions were permitted to organize into separate units, the public's interest would not be achieved.\footnote{LEG. HIST. 1974, supra note 128, at 12, 274.} Congress was concerned that fragmentation would result in excessive competition among rival organizations, work jurisdiction disputes, whipsawing of health care employees,\footnote{The multiplicity of units can make it difficult, if not impossible, for employers to maintain uniformity in benefits and working conditions. See Rock, supra note 133, at} and the ultimate
breakdown of peaceful bargaining.197

From 1974 until 1984, however, the Board applied traditional community-of-interests standards and, contrary to the intent of Congress, certified virtually every petitioned-for group of health care workers as a separate appropriate unit.198 This failure to heed the congressional admonition contributed to an increase in the number of strikes in the health care industry following the enactment of the 1974 amendments.199 Thus, it is apparent that the community-of-interests test not only violated congressional intent, but also resulted in the very end which the nonproliferation mandate was designed to avoid.

The St. Francis II test, strictly applied, should result in fewer, larger units being found appropriate in health care institutions. It therefore not only fulfills the mandate but also should result in decreased strike activity in the health care industry.200 The laxity with which the Board until most recently applied the test,201 however, will merely perpetuate the Board's prior unit determination findings and the fragmentation of interests which led to strikes in health care institutions over the past twelve years.202

F. Fulfillment of the Mandate Through Strict Application of the Disparity-of-Interests Test

As a general rule, unions prefer to organize smaller units composed of employees with similar skills, interests, and job functions because smaller groups are more easily organized and competing interests more easily harmonized.203 Employers, on the other hand, normally seek the largest possible unit in order to reduce the number of negotiating sessions with different bargaining agents and limit the potential for work slowdowns and disruption.204 The St. Francis II test requires unions to organize larger units—or to

197. See supra notes 133-34 and accompanying text.
199. Id.
200. See supra note 125 and accompanying text.
201. See supra notes 180-84 and accompanying text.
202. See supra note 101 and accompanying text.
204. Note, supra note 203, at 667 n.20 (citing Feheley, supra note 203, at 285-86).
demonstrate that there is such a disparity of interests between the petitioned-for employees and the employees in the all-professional or all-nonprofessional unit that separate representation of the smaller unit is appropriate. The test adheres to the nonproliferation mandate by permitting separate units of employees only when there are “greater than usual disparities” between the wages, hours, and working conditions of the employees in the petitioned-for unit and those of the larger group.

If the mandate is to be fulfilled, however, the Board must (1) abandon its prior unit determination decisions and begin anew to establish appropriate groupings of health care employees, and (2) examine the community of interests and the disparity of interests between the petitioned-for unit employees and the employees in the larger group, rather than examining the similarities among the petitioned-for employees and their dissimilarities to employees in the larger unit. Otherwise, as demonstrated by the Board’s decisions immediately following its announcement of the St. Francis II test, previous unit determination findings will merely be perpetuated and the new test will at most disallow the splintering of groups from the Board’s basic employee units (registered nurses,

205. Although some commentators have interpreted the disparity-of-interests test as merely a more rigid community-of-interests test, the disparity test, properly applied, should have a major impact upon the organizing efforts of health care unions. Under the community-of-interests test, the employer bore the burden of demonstrating that other groups of employees should be included within the unit and that they share a community of interests with the petitioned-for employees. The St. Francis II test reverses this burden, and does not permit the union to organize the smaller unit unless (1) it can sustain the burden of justifying the smaller unit or (2) it is willing to risk dismissal of the petition if it cannot demonstrate a sufficient showing of interest among the employees in the larger unit, which may be found appropriate.

Under the community-of-interests test, health care unions could easily restrict representation to the smallest group because the Act only requires the Board to certify “an” appropriate unit, not “the” most appropriate unit. Because smaller, more homogeneous groups of employees are easier to organize, the community-of-interests test made it easier for unions to gain recognition and to represent the interests of smaller groups of employees.

206. As a result of the breadth of the new units, certain associations which catered to particular employee groups such as licensed practical nurses or registered nurses may have to amend their constitutions in order to represent categories of employees who traditionally were not allowed to become members of the union. Admitting other groups of employees may be unsavory to the nurses unions, which have traditionally undertaken bargaining as only one of many efforts to further nurses’ interests. Following the Board’s decision in North Arundel Hosp. Ass’n, see supra notes 187-88 and accompanying text, a spokesperson for the American Nurses Association stated that the disparity-of-interests test applied in that case set a “dangerous precedent for the rights of nurses around the country, who have been negotiating through unique professional entities since 1974.” Daily Lab. Rep. (BNA) at A-4 (Jun. 3, 1986).

207. See supra notes 180-84 and accompanying text.
other professionals, technicals, business office clericals, and service and maintenance employees).\textsuperscript{208}

In order to encourage the Board to apply properly the \textit{St. Francis II} test, employers should protest union and Board references to employee groups in terms of units found appropriate prior to the \textit{St. Francis II} decision. Moreover, employers should require the Board to examine each separate job classification (both in the petitioned-for unit and in the overall unit) to ascertain whether there are "sharper than usual" disparities of interest among the employees in the various job classifications which warrant the \textit{exclusion} of a particular group from the bargaining unit. Through such an examination, the congressional mandate against proliferation will be fulfilled and appropriate employee groupings may become apparent.\textsuperscript{209} Without careful examination of the particular work functions and employee interrelationships in each health care institution, however, the Board cannot properly fulfill the mandate against undue proliferation.

Until the factors and employee groupings become clear as applied over time, unions will be well advised to seek to organize the largest potentially appropriate unit within the health care institution. Employers have unfortunately been given the opportunity to protract representation proceedings by appealing the regional director's unit determination decision to the Board.\textsuperscript{210} If the union does not wish to undertake the expensive and time consuming task of organizing broader units of employees across various job categories, it risks having an election petition dismissed if the Board finds that a group larger than the petitioned-for unit is appropriate.\textsuperscript{211}

\textsuperscript{208} See \textit{supra} note 155 and accompanying text.

\textsuperscript{209} Over time, for example, the Board may find that licensed practical nurses (generally included in a technical unit), registered nurses (generally included in a separate unit), and social workers (generally included in a residual professional unit) should be included in a single unit because there are not "sharper than usual differences" in their wages, hours and working conditions to justify separate representation.

The Board may also find that particular employee groupings are appropriate in certain types of health care institutions, and that other groupings are appropriate in other types of health care institutions. For example, in a psychiatric hospital which emphasizes "milieu therapy," perhaps a wall-to-wall unit would be appropriate because the employees have frequent daily work contact, similar hours of employment, and similar benefits, and because all employees are involved in the patient care and rehabilitation process. In a large, highly departmentalized acute care hospital, on the other hand, perhaps two or more units would be found appropriate.

\textsuperscript{210} See \textit{supra} notes 88-90 and accompanying text.

\textsuperscript{211} In order for the Board to order an election, the union must have a 30% showing of interest among the employees in the unit found appropriate for bargaining. NLRB, \textit{STATEMENTS OF PROCEDURE} § 101.18. Prior to organizing election drives, health care employers can enhance the likelihood that an all-professional, all-nonprofessional, or all-
Although the *St. Francis II* disparity-of-interests test may make it more difficult for unions to organize health care workers, and may not allow every employee group’s interests to be represented, the test should avoid the undue proliferation of bargaining units. It therefore will achieve the Act’s overriding goal of promoting industrial harmony. Moreover, when properly applied, the test respects employees’ organizational rights by permitting separate representation whenever the disparities between the overall group and the petitioned-for unit outweigh the similarities.

IV. EVALUATION OF *ST. FRANCIS II* AND *NORTH SHORE UNIVERSITY HOSPITAL* IN LIGHT OF THE PURPOSES OF THE ACT AND THE INTENT UNDERLYING THE AMENDMENTS

The *St. Francis II* and *North Shore University Hospital* decisions have caused much turmoil in the health care industry and, at least in the short term, have made it more costly and burdensome for unions to organize health care workers. Professional organizations have been required to reevaluate their internal structures and membership rules, organize larger units of employees, and defend challenges to their qualifications as bargaining representatives of rank and file employees. In many cases, labor organizations have withdrawn representation petitions rather than risking disqualification or bearing the burden and expense of organizing larger, more diverse groups of health care workers.

Although the decisions have caused much upheaval, the purpose of the Act and the legislative history of the 1947 and 1974 amendments suggest that the tests announced in these two decisions further congressional intent. The overriding purpose of the Act is to promote industrial harmony by reducing strikes and other forms of employee unit will be found appropriate by seeking to establish a community of interests among employees in a wide range of job classifications. They can, for example, (1) ensure that employees interact both in patient care duties and on break, (2) establish a uniform wage scale and benefits, (3) subject all employees to the same personnel policies, and (4) where possible, provide for transfers between employee classifications.

212. Compare Massachusetts Nurses Association Constitution and By-laws of 1983 with Massachusetts Nurses Association Constitution and By-laws of 1985.

213. ST. FRANCIS MONITOR (BNA May 1985).

214. Id.

215. In almost one-half of the cases in which the Board’s regional directors have addressed the issue of the appropriate unit, the Board has revoked the union’s certification, dismissed the petition, or allowed the union voluntarily to withdraw its petition due to the inappropriateness of the unit. ST. FRANCIS MONITOR (BNA Mar. 1986). In approximately one-quarter of the remaining cases, the regional director’s unit determination decision was appealed. Id.
unrest which have the effect of burdening and obstructing commerce. As a means to this end, Congress sought to equalize the bargaining power between employees and their employers. The Board's sanctioning of supervisors' participation in rank and file unions and its failure to adhere to the mandate against undue proliferation of bargaining units in the health care industry have upset the balance of power and have undermined the purposes of the Act. The tests announced in North Shore University Hospital and St. Francis II will better equalize bargaining power between employers and employees and will, therefore, better effectuate the Act's ultimate purpose of reducing or eliminating labor unrest.

V. CONCLUSION

In order to achieve the overriding goal of the Act, the Board should strictly apply both the North Shore University Hospital all-relevant-circumstances test and the St. Francis II disparity-of-interests test. Without the reasonable limitations which these tests impose upon health care employees' "fullest freedom," we are likely to see another decade of turmoil and disruption in the health care industry. That would be inimical to the interests of employees, employers and the public, all of whom have much to gain by harmonious labor relations.

216. 29 U.S.C. § 151 (1982); see supra note 2.