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James R. Anderson

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COLLECTIVE BARGAINING UNITS IN THE HEALTH CARE INDUSTRY AFTER AMERICAN HOSPITAL ASSOCIATION v. NATIONAL LABOR RELATIONS BOARD

INTRODUCTION

Two electricians, working for different employers, both want to join unions. One electrician is employed by a manufacturing company, and the other is employed by a community hospital. These two employers are likely to react differently to union organization. Both employees would like to join a union composed solely of electricians because this composition would be more effective for collective bargaining with their employers. Interestingly, the union attempting to organize electricians at the manufacturing plant would be much more likely to be successful in attaining its goal than the union at the hospital. The ultimate goal for both of these unions is to be in an election conducted by the National Labor Relations Board, thereby gaining the right to represent the workers in collective bargaining.

The electricians who work for the hospital are likely to have a difficult time organizing an electrician-only union. Although they perform exactly the same kind of work as the electricians who work for the manufacturing company, the National Labor Relations Board is unlikely to find that a group consisting solely of electricians would constitute an “appropriate unit” for collective bargaining within a hospital. In order to bargain collectively with the hospital, the union may need to organize not just electricians, but all of the hospital’s non-professional employees. Small wonder that it may be difficult for the community hospital electrician to understand why he is not entitled to have the same representation as his manufacturing plant counterpart.

The above electricians are fictional, but similar stories could be told about other hospital employees: registered nurses, technical employees, maintenance employees, office clerical employees, or skilled craftsmen who have worked for hospitals instead of other employers. Probably very few hospital employees understand why unions consisting solely of electricians or office clerical employees or nurses or boiler operators are perfectly appropriate in other settings but are not appropriate in hospitals.

This Note explains how hospital employees came to be treated differently than their nonhospital counterparts. This Note also explains how a recent

2. See infra notes 38-54 and accompanying text.
Rule, adopted by the National Labor Relations Board, increases the range of choices available to hospital employees because it designates eight groupings of employees which are appropriate for collective bargaining within hospitals. For example, the Rule would not permit electricians to comprise a separate unit for collective bargaining within hospitals, but it would allow them to organize into a unit consisting of various skilled maintenance employees.

Part I of this Note traces the development of federal labor law in its treatment of health care employers and their employees as a result of their involvement with profound societal concerns of caring for the sick and aged. Part I also describes the development of collective bargaining in hospitals, focusing on decisions of the National Labor Relations Board and federal courts. These decisions have held that separate units, consisting solely of registered nurses or skilled maintenance employees, were not appropriate for collective bargaining.

Part II centers on the National Labor Relations Board's decision to develop a rule which dictates that eight, and only eight, units are the prescribed number of units appropriate for collective bargaining within hospitals. Part III recounts the hospital industry's challenge to the Rule: American Hospital Association v. National Labor Relations Board. In that case, the United States District Court for the Northern District of Illinois permanently enjoined the Board's use of the Rule. Part IV analyzes the decision and concludes that the court should have upheld the Rule. This conclusion is based on the Rule's effectuation of congressional intent to promote collective bargaining in hospitals, yet discourage disruptions to patient care. Part V assesses the impact of enjoining the rule, which struck a balance between employers and employees in assuring hospital employees their organizational rights. Additionally, Part V offers legislative proposals to determine collective bargaining units for hospitals if the Rule does not withstand judicial review.

I. BACKGROUND

A. The National Labor Relations Act

1. Historical Developments

American workers have a long tradition of binding together to achieve changes in their terms and conditions of employment. Employers responded to this by resorting to state and federal laws to inhibit labor's efforts to organize...
and engage in collective action during the nineteenth and twentieth centuries. Assisted by the government, employers initially relied upon criminal conspiracy doctrine to prosecute workers for acting in concert to raise wages. When the criminal conspiracy doctrine fell into disfavor, employers turned to other measures such as seeking injunctions. For instance, when confronted with strikes, employers frequently petitioned courts to grant injunctions against striking employees. The courts often responded favorably, finding "either the object or the means used by labor in its concerted activities to be unlawful." State and federal antitrust laws were also used to declare labor strikes, boycotts, and picketing unlawful.

Government leaders gradually recognized that disputes between employers and employees over collective bargaining recognition harmed interstate commerce. Federal labor policy began to change from "suppression" to "tolerance" to "acceptance and encouragement" of collective bargaining. By 1935, Congress recognized that disruptions in interstate commerce, caused by disputes between labor and business, were primarily a result of the inequality of bargaining power between employers and employees. This imbalance in bargaining power was subsequently addressed through legislation.

In response to these concerns, Congress passed the National Labor Relations Act ("NLRA" or "the Act" or "the Wagner Act"). The NLRA stated that it was national labor policy to promote the practice and procedure of collective bargaining. Section 7 of the Act grants and protects employees'
rights to organize, bargain collectively, and engage in concerted activity for mutual aid or protection. Congress also created an agency, the National Labor Relations Board ("NLRB" or "the Board"), to administer the Act.

Congress adopted this policy in response to the "inequality of bargaining power between employees and . . . employers" which resulted in labor disputes with harmful effects on interstate commerce. Id. Congress stated the extension of a statutory right to engage in collective bargaining would help to "restore equality of bargaining power between employers and employees." Id.

The term "collective bargaining" means "a procedure looking toward making of collective agreements between employer and accredited representative of employees concerning wages, hours, and other conditions of employment . . . ." BLACK'S LAW DICTIONARY 238-39 (5th ed. 1979). Collective bargaining also "requires that parties deal with each other with open and fair minds and sincerely endeavor to overcome obstacles existing between them to the end that employment relations may be stabilized and obstruction to free flow of commerce prevented." Id.

The Board acts primarily as a quasi-judicial body, deciding issues raised in representation cases and unfair labor practice cases. See 2 C. MORRIS, THE DEVELOPING LABOR LAW, 1600 (2d ed. 1983); 53 NLRB ANN. REP. 3 (1988). The Board may designate its powers to a panel consisting of three members. 29 U.S.C. § 153(b) (1988). The Board does not act on its own motion. 53 NLRB ANN. REP. 3 (1988). Instead, cases and controversies arise before the Board after action is taken in the Board's regional offices.

The Board also delegates responsibilities to directors of its regional offices to investigate and prosecute unfair labor practice charges. Id. at 37. If the regional director or General Counsel determines that a charge is meritorious, he or she will issue a complaint. See 29 U.S.C. § 160(b) (1988). Unfair labor practice complaints are first heard before an administrative law judge. See id. § 160(c). The administrative law judge issues a recommended decision and order. Parties may file exceptions to the judge's decision and request the Board to review it. Id.; see also R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION & COLLECTIVE BARGAINING 7-9 (1976) (describing the relationship of the Board to the General Counsel in unfair labor practice proceedings).

The Board is also charged with the responsibility of determining whether questions concerning representation exist. See 29 U.S.C. § 153(b) (1988). The Board is "authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate whether a question of representation exists, and to direct an election." Id. The regional director is also empowered to certify the winner of an election or, if there is no union selected, to certify the results. Id. Parties dissatisfied with decisions of the regional director in representational matters may request review by the Board. 29 C.F.R. §
2. The National Labor Relations Board and Employee Representation

Congress authorized the NLRB to implement two primary objectives. First, Congress charged the Board with the responsibility of settling disputes concerning the desires of employees to be represented by a labor organization as their exclusive collective bargaining representative. Second, the Board was empowered to investigate, prosecute, and adjudicate unlawful employer behavior that Congress had designated as “unfair labor practices.” In 1947, Congress separated the prosecutorial and adjudicatory functions of the NLRB by creating the office of the General Counsel of the Board. Congress empowered the General Counsel to investigate and prosecute unfair labor practices. Consequently, the NLRB now acts primarily as a quasi-judicial body, deciding questions concerning representation decisions and unfair labor
Judicial review of Board decisions is limited. In order to hasten the beginning of collective bargaining, Congress declined to authorize direct judicial review of representational issues.\(^{30}\) Congress, however, did authorize judicial review in the federal courts of appeals of final orders in unfair labor practice proceedings.\(^{31}\)

Congress created section 932 of the Act to enable workers to select exclusive collective bargaining representatives through a majority vote in secret-ballot elections supervised by the NLRB.\(^{32}\) If a majority of the employees voting in the election\(^{33}\) select a labor organization to represent them, the labor organization or union "shall be the exclusive representative of all the employees in such

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1983) (en banc) (stating that the Board's standard "in policing [union] elections . . . has changed three times in five and a half years").
30. See Leedom v. Kyne, 358 U.S. 184, 192-93 (1958) (Brennan, J., dissenting) (stating that congressional intent was "firmly against direct review . . . because time-consuming review might defeat objectives of national labor policy" to promote collective bargaining). Nevertheless, representational issues may be raised in the context of judicial review in unfair labor practice proceedings. For a comprehensive discussion of the interplay between the NLRB and the federal courts, see infra notes 206-75 and accompanying text.
31. 29 U.S.C. § 160(e), (f) (1988); see infra notes 206-75 and accompanying text.
33. See id. Although the Act creates election processes to determine collective bargaining representatives, NLRB elections are not the sole route to recognition. Employers may voluntarily recognize unions as exclusive collective bargaining representatives without an NLRB-conducted election. See 1 C. MORRIS, supra note 21, at 488. The Act does, however, require that a labor organization represent a majority of the workers in the selected unit in order to be recognized as the exclusive collective bargaining representative. See 29 U.S.C. § 159(a) (1988).
34. NLRB-conducted elections are scheduled by the regional director, usually within sixty days of the filing of a petition for a consent election or between twenty-five and thirty days after the direction of an election. 2 C. MORRIS, supra note 21, at 1611. Even if a party files a request for the Board to review the decision of the regional director, the filing will not stay the election. Id.

Only those employees belonging to the appropriate bargaining unit "at the end of the payroll period immediately preceding the date of direction of election or a date set out in the consent agreement" are eligible to vote in the election. Id. The employer must furnish the Board with a list of the names and addresses of all eligible voters no more than one week after the date of the "direction of election or execution of the consent agreement." Id. The Board, in turn, furnishes that list to the union (or unions if more than one union is involved in the election). The union may then use the information to contact employees regarding the election. Id. at 1612.

Board agents are responsible for conducting the secret ballot elections which are "ordinarily . . . held on the employer's premises. The ballot lists options for each union claiming majority status in the bargaining unit and for 'no union.'" Id. The employer and the petitioning union or unions are entitled to have observers present; observers may challenge the eligibility of voters but only for "good cause." Id. Those individuals who are challenged may cast votes but the Board agent impounds their votes; they "are not considered further unless their number is sufficient to affect the results of the election." Id.

In order for a union to win the election and become the "certified" exclusive bargaining representative, it must receive a majority of the valid votes cast in the election. Id. The foregoing provides only a brief outline of NLRB election procedures. For a comprehensive discussion of the subject, see FEERICK, supra note 21, at 2-294; 1 C. MORRIS, supra note 21, at 341-411; 2 C. MORRIS, supra note 21, at 1611-14.
unit for the purposes of collective bargaining." 35 The Act imposes a duty 36 on employers to bargain collectively with those representatives by making it unlawful for employers to refuse to do so. 37

Although the NLRB oversees representation proceedings, the Board does not act on its own motion. 38 Instead, employees must trigger the Board's participation by filing a petition for a representation election. This petition must be supported by a showing that they want to be represented by a union. 39 If the employees make the required showing, then the Board investigates to determine what issues are likely to be raised before the election. One major issue concerns classifying employees into categories for purposes of union representation. 40 If the parties consent to an election within a category of employees holding certain job classifications, the Board will conduct an election in that "unit." 41 When the parties do not consent, the Board must determine the appropriate bargaining unit, 42 although the Act provides few guidelines for mak-

35. 29 U.S.C. § 159(a) (1988). The Board shall certify the results of the election to both the labor organization and the employer. Id. § 159(e).
36. See id. § 158(d).
37. Id. § 158(a)(5).
39. Section 9(c)(1)(A) requires the Board to investigate to determine whether a question concerning representation exists if a "substantial" number of employees desire union representation. 29 U.S.C. § 159(c)(1)(A) (1988). The Board, through its rules, requires that at least 30% of the employees must want union representation before it will conduct an election. 29 C.F.R. § 101.18(a)(4) (1989). The NLRB determines the 30% showing through a count of authorization cards signed by the employees indicating their desire to be represented by a union. For a comprehensive description of the election process and procedures, see Feerick, supra note 21, at 75-294.
40. Feerick, supra note 21, at 233, 299-301. The "unit" concept can be misleading and confusing. R. Gorman, supra note 21, at 66. The unit consists of jobs or job classifications "and not of the particular persons working at that time"; the unit does not change merely because an employee leaves or is replaced by another employee. Id. The term "appropriate bargaining unit" is more accurately referred to as "the appropriate election unit since employees represented in different election units may choose to 're-group' as a single larger entity for purposes of conducting actual negotiations." Id. (emphasis in original).
41. 29 C.F.R. §§ 102.62(a), 102.69 (1989). The parties may use one of two types of consent elections that are carried out by the regional office of the Board. "The first, a consent-election agreement ('pure consent') provides for an election with final authority over any disputes vested with the regional director. The second, a stipulation for certification ('stipulation consent') is similar in form except that it vests final determination of any disputes with the Board itself." 2 C. Morris, supra note 21, at 1608.
42. 29 U.S.C. § 159(b) (1988). The Act authorizes the Board to determine a unit appropriate for collective bargaining. Id. The NLRB is authorized to delegate to its regional directors its powers to determine questions concerning representation, determine questions concerning the appropriate bargaining unit, direct elections, and certify results. Id. § 153(b). Parties may appeal decisions of the regional directors to the Board. 29 C.F.R. § 102.67(b) (1989).

The procedure for contesting the classifications in the proposed unit begins with a representation hearing. Id. § 102.63(a). The hearings are nonadversarial in nature and parties are free to call witnesses and admit evidence regarding the classifications in the proposed unit. 2 C. Morris, supra note 21, at 1609. After the close of the hearing, the hearing officer issues a report to the regional director. Id. The regional director may decide to dismiss the petition, or alternatively, to direct an election. If he decides to direct an election, he must specify the appropriate unit. Id.
ing unit determinations. The Board traditionally determines whether employees share a sufficient "community of interest" to warrant inclusion in a given unit. The appropriate bargaining unit decision vitally affects employers, employees, and unions. The selection of unit size, composition, and scope may determine whether there will be any election at all. Additionally, the unit decision may affect whether a particular union will be able to receive a majority of the votes cast to become the exclusive representative for the employees in that unit.

Labor organizations tend to prefer the organization of smaller, homogeneous units of employees. This is a logical preference because it is easier to obtain the required showing of interest in smaller units and win NLRB-conducted representation elections in those units. Employers generally prefer larger and more heterogeneous units because unions are usually less successful in organizing and winning elections in those units. If no union receives a

43. See 29 U.S.C. § 159(b) (1988). The only guidelines are that the NLRB must find a unit appropriate "to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter." Id.

44. For a full discussion of the factors which the Board uses to make unit determinations, including "community of interest," see infra notes 157-60 and accompanying text.


46. Unit composition refers to the type of employees in job classifications to be represented in the unit. ABODEELY, supra note 45, at 277.

47. Unit scope refers to the facility or facilities which will be covered by the proposed unit. Id. For example, in retail facilities there is a presumption in favor of a single-store unit. See, e.g., Frisch's Big Boy Ill.-Mar. Inc., 147 N.L.R.B. 551 (1964), enforcement denied, 356 F.2d 895 (7th Cir. 1966) (holding that a single location is presumptively appropriate). But see NLRB v. Chicago Health & Tennis Clubs, 567 F.2d 331 (7th Cir. 1977) (holding that a multi-location unit is appropriate), cert. denied, 437 U.S. 904 (1978).

48. See Abodeely, supra note 45, at 284. The Act requires the Board to determine that a "substantial" number of employees have indicated their wish to be represented by a labor organization for collective bargaining purposes. 29 U.S.C. § 159(c)(1)(A) (1988). The NLRB has determined there must be a 30% "showing of interest" before it will direct an election. 29 C.F.R. § 101.18(a)(4) (1989). "It is clearly more difficult to get the requisite showing of interest from a large group than from a small one." ABODEELY, supra note 45, at 284.

49. 1 C. MORRIS, supra note 21, at 413. "A union which may have organized a sufficient number of employees within a small unit may not be able to establish its majority in a larger unit. Similarly, the scope and composition of the bargaining unit may determine which of two contending unions gains representative status." Id.

50. ABODEELY, supra note 45, at 284.

51. Id. at 284, 289-90; see also Delaney & Sockell, Hospital Unit Determination and the Preservation of Employee Free Choice, 39 LAB. L.J. 259, 270 (1988) (stating that unions prefer to organize in smaller units because they are more likely to win the election and become the exclusive representative for collective bargaining).

52. Delaney & Sockell, supra note 51, at 270. Employers also favor fewer units because it is easier to bargain with fewer units than many. Id. See generally I. ROTHENBERG & S. SILVERMAN, LABOR UNIONS, HOW TO AVERT THEM, BEAT THEM, OUT-NEGOTIATE THEM, LIVE WITH THEM, UNLOAD THEM (1973) (stating that employers actually would usually prefer to "live without
majority of the votes cast, the employer does not have a statutory obligation to bargain collectively with the employees in that unit. In addition, the employer is free from representation elections in that unit for one year.

3. Hospitals and the National Labor Relations Act

The NLRB first asserted jurisdiction over nonprofit hospitals in 1943. This jurisdiction was proper because, when Congress passed the NLRA, hospitals were not excluded from the definition of “employer.” Only four years later, Congress excluded nonprofit hospitals from the Act’s coverage when it passed the Taft-Hartley amendments. Although there was little debate on the issue, two explanations have been suggested for the exemption. First, Congress considered nonprofit hospitals to be local in nature, with little impact on interstate commerce. Second, Congress may have excluded nonprofit hospitals because they were often charitable institutions.

53. See 29 U.S.C. § 159(a) (1988). Unless a labor organization receives the majority of the votes cast, it cannot become the exclusive collective bargaining representative of the employees in that unit. Id.

54. 29 U.S.C. § 159(c)(3) (1988); see 1 C. Morris, supra note 21, at 352-53 (describing the purpose and details of the one-year election bar on elections in a given unit or its subdivision).

55. Central Dispensary and Emergency Hosp., 57 N.L.R.B. 393 (1943), enforced, 145 F.2d 852 (D.C. Cir. 1944), cert denied, 324 U.S. 847 (1945). Hospitals generally fall into one of three categories. R. Miller, Problems in Hospital Law 16-18 (5th ed. 1986). Proprietary or investor-owned hospitals are hospitals which are privately owned and operated for a profit. Id. at 17. Private, nonprofit hospitals differ because they are privately owned but are not operated for a profit. Id. Public hospitals are created by statute and may be federal, state, county, or municipal institutions. Id. at 16. Public hospitals are exempt from coverage under the Act because of the political subdivision exemption in section 2(2). 29 U.S.C. § 152(2) (1988). The NLRA, as originally enacted, did not exclude either proprietary or nonprofit hospitals from the definition of “employer.” 49 Stat. 450 § 2 (1935).

56. 49 Stat. 449 § 2 (1935). The NLRB may only assert jurisdiction over “employers” and “employees” within the meaning of the Act. 29 U.S.C. § 152(2), (3) (1988). For example, states and political subdivisions are expressly excluded from the definition of “employer,” while agricultural laborers, domestic servants, supervisors, and independent contractors are excluded from the definition of “employee.” Id.


60. Nonprofit hospitals may have been exempted from coverage under the Act because, as Sen-
In the years after the Taft-Hartley amendments, until the 1970's, the health care industry expanded in both its size and its volume of business. In addition, the "charitable nature" of the industry changed. In fact, the NLRB had already asserted jurisdiction over proprietary hospitals, and additionally, over both proprietary and nonprofit nursing homes.

As a result of this physical and financial growth in hospitals, labor unrest arose. Although the NLRA's exclusion of hospitals did not make union organization by nonprofit hospital employees illegal, nonprofit hospital employees found it difficult to organize. The main reason for this difficulty stemmed from the Act's failure to impose a statutory duty to recognize unions as collective bargaining agents. Despite this obstacle, unions began organizational drives among hospital employees during the 1950s and 1960s. The unions

ator Tydings urged:

This amendment is designed merely to help a great number of hospitals which are having very difficult times. They are eleemosynary institutions, no profit is involved in their operations, and I understand from the hospital association that this amendment would be very helpful in their efforts to serve those who have not the means to pay for hospital services.

FEDERAL MEDIATION AND CONCILIATION SERVICE, IMPACT OF THE 1974 HEALTH CARE AMENDMENTS TO THE NLRA ON COLLECTIVE BARGAINING IN THE HEALTH CARE INDUSTRY 12 n.5 (1979) [hereinafter IMPACT] (citing 93 CONG. REC. 4997 (1947)); see also 120 CONG. REC. 12,937 (1974), reprinted in LEGIS. HIST., supra note 57, at 94 (statement of Sen. Williams) (explaining that hospitals were excluded because they were charitable in nature and had slight impact on interstate commerce).

61. See 120 CONG. REC. 12,937 (1974), reprinted in LEGIS. HIST., supra note 57, at 94 (statement of Sen. Williams). In 1973, hospitals employed over three million people, more than ten times the amount of hospital workers employed at the time of the Taft-Hartley amendments. Id. Private, nonprofit hospitals employed nearly "1 ½ million employees, or 56 percent of all hospital employees." Id.

62. Id. The private, nonprofit hospital was identified as a "big business," id., with a substantial impact on interstate commerce. Id. at 12,937, LEGIS. HIST., supra note 57, at 95 (statement of Sen. Williams). The reference to "big business" demonstrates that these hospitals had "outgrown their old status as local charitable institutions." Id.

During the floor debates on legislation, which would ultimately bring private nonprofit hospitals under the NLRA, Senator Williams noted that in nonprofit hospitals the price per bed, the wages and salaries of supervisors and executives, and the ability to participate in business ventures to gain tax deductions were comparable to those in private hospitals. Id.


66. See Comment, Labor Law: Hospital Employees, 3 U. ILL. L.F. 542 (1973) (stating that workers who lack protective legislation for organizing and collective bargaining are unduly hampered in their organizing efforts).

67. Id. at 549. As one commentator has observed, "the right to join a union is virtually meaningless unless it is coupled with the right of recognition." Id. (citing P. SULLIVAN, PUBLIC EMPLOYEE LABOR LAW 36 (1969)).

68. The National Union of Hospitals and Health Care Employees, also known as 1199, and the
organized strikes and pickets to persuade employers to recognize them as collective bargaining representatives. Recognitional strikes were often bitter, and as a result, the strikes frequently worsened employer-employee relations and disrupted patient care.

Congress was slow to respond to labor unrest in nonprofit hospitals. Following the congressional silence, few states passed legislation to bring nonprofit hospitals within the coverage of state labor laws. With little likelihood of


69. Kochery & Strauss, *The Nonprofit Hospital and the Union*, 9 Buffalo L. Rev. 255, 255 (1960). In 1959 and 1960, recognitional strikes lasted forty-six days in New York, eighty-four days in Seattle, and over four months in Chicago, while threatened strikes and organizing occurred in Baltimore, Kansas City, Philadelphia, Miami, Rochester, and Buffalo. Id. n.1 (citing 34 Hosp. 112-14 (1960)); see also Impact, supra note 60, at 50-51 (stating that "labor unrest was also in evidence in at least twenty-six cities throughout the country").

This alternative method was forced upon the unions since they were unable to use the representational procedures of the Act to secure recognition. See 120 Cong. Rec. 12,938 (1974), reprinted in Legis. Hist., supra note 57, at 94-95 (statement of Sen. Williams).

70. 120 Cong. Rec. 12,944 (1974), reprinted in Legis. Hist., supra note 57, at 96. Senator Williams remarked:

The recognition strike is the primary and most disruptive form of labor conflict in nonprofit hospitals. It accounts for 95% of the strikes in these hospitals.

The denial of recognition of a union as the representative of employees in nonprofit hospitals ... erupts in long and wasteful strikes which not only hurt employees and employers, but also disrupts health care for patients.

The long recognition strikes which have plagued the nonprofit hospital industry inevitably result in an atmosphere of bitterness and conflict. Working relationships are never totally repaired. When employees are forced to strike for the basic right of representation, and afterward to settle for unsatisfactory conditions, frustration and bitterness set in. The quality of health services is bound to suffer in such an atmosphere of conflict.


71. A 1979 study by the Federal Mediation and Conciliation Service reported that only twelve states had passed some form of labor law coverage for nonprofit hospitals by 1974. Impact, supra note 60, at 33; see also Comment, supra note 66, at 552-57 (describing state laws excluding and including nonprofit hospitals from protective state legislation).

obtaining uniform, favorable legislation on a state-by-state basis, organized labor shifted its focus from the individual states to Washington in an attempt to persuade Congress to include nonprofit hospitals within the coverage of the NLRA.\textsuperscript{72}

### B. The 1974 Health Care Amendments

#### 1. Hospitals Receive Specialized Treatment Under the NLRA

da. The Thompson Bill

In 1971, Representative Frank Thompson, Jr., responding to requests from organized labor,\textsuperscript{73} introduced a bill in the House of Representatives to repeal the exemption.\textsuperscript{74} After conducting hearings,\textsuperscript{75} the House quickly passed the bill.\textsuperscript{76} During Senate hearings,\textsuperscript{77} however, the hospital industry vigorously opposed the legislation\textsuperscript{78} causing the measure to never be sent to the floor.\textsuperscript{79} Hospital industry representatives insisted that the mere extension of the NLRA to nonprofit hospitals would not serve the public interest of receiving uninterrupted patient care.\textsuperscript{80} The hospital industry, therefore, proposed amendments to minimize disruptions in patient care during labor disputes arising under the

\footnotesize{STAT. ANN. § 179.38 (West Supp. 1972); N.Y. LAB. LAW § 716(2), (3)(a)-(b) (McKinney 1965)).
72. Pointer, supra note 68, at 352; see also IMPACT, supra note 60, at 16-17 (stating that a "state-by-state legislative approach is no longer desirable," and uniform laws are needed throughout the country).
73. See IMPACT, supra note 60, at 16-17 (stating that Service Employees International Union ("SEIU") and the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") urged Representative Thompson to introduce legislation and hold hearings).
75. See Extension of N.L.R.A. to Nonprofit Hospital Employees: Hearings on H.R. 11,357 Before the Special Subcomm. on Labor of the House Comm. on Education & Labor, 92d Cong., 1st and 2d Sess. (1972) [hereinafter Hearings 1].
76. The House passed the bill by a vote of 285-95 in August 1972. H.R. REP. No. 1051, 93d Cong., 2d Sess. 3 (1974), reprinted in LEGIS. HIST., supra note 57, at 270. The Senate then held hearings on H.R. 11,357 during 1972 but no further action was taken during that session. LEGIS. HIST. supra note 57, at 270.
78. IMPACT, supra note 60, at 18-19; Pointer, supra note 68, at 353.
79. After H.R. 11,357 passed the House, it was transferred to the Senate for passage. LEGIS. HIST., supra note 57, at 270. Two studies report that Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, favored passage of the bill and planned to send it directly to the floor without holding hearings. IMPACT, supra note 60, at 19-20; Pointer, supra note 68, at 353. The American Hospital Association and state hospital associations, however, pressured the Senate to refer the bill to committee to hold a hearing. IMPACT, supra note 60, at 18-20. The hearing was intended to be a mere formality as "the committee had planned to mark up the bill . . . and forward it to the floor" for a vote. Pointer, supra note 68, at 353. Two studies have suggested that but for the efforts of the hospital associations to refer the bill to committee, the amendment would have passed. IMPACT, supra note 60, at 18-19; Pointer, supra note 68, at 353.
80. See Pointer, supra note 68, at 353.
The industry's proposed amendments focused mainly on notice requirements to hospitals in order to inform them of any worker instability. Many of the industry proposals included adequate notice to hospitals regarding contract modification or terminations, and mediation and fact-finding procedures. In addition, these proposals required advance notice to the hospital of any planned strike or other work stoppage, in order to enable hospitals to provide continuity of patient care.

The hospital associations also sought to impose limits on hospital employees' abilities to organize for collective bargaining. Industry spokesmen were alarmed by what they perceived as the NLRB's tendency to find appropriate separate units for pharmacists, laboratory technologists, registered nurses, and licensed practical nurses. The industry was even more disturbed by the pattern of representation permitted under state labor laws. New York alone had "[b]alkanized hospitals into [21 separate] bargaining units." The hospital industry predicted that a multiplicity of bargaining units would adversely affect the industry because it would be possible for a small unit of employees to control the hospital. A small group of employees, who perform vital functions, would be capable of shutting down a facility and creating jurisdictional disputes. These employees would also be capable of causing wage competi-
tion among bargaining units that would, in turn, drive up costs of medical care and impose heavy administrative labor relations costs on hospitals.⁹⁰

b. The Taft Bill

During Senate hearings in 1973,⁹¹ Senator Robert Taft, Jr., promptly introduced a new bill⁹² that was not designed merely to extend the NLRA, but instead, to provide specialized treatment for hospitals.⁹³ His bill proposed repealing the exemption and adding a definition of “health care institution” that embraced both proprietary and nonprofit institutions.⁹⁴ The bill also addressed the industry’s desire for additional time, in the event of labor disputes, to protect patient care. The proposal required parties to satisfy three requirements: provide longer notice of intent to modify or terminate contracts,⁹⁵ participate in mandatory mediation,⁹⁶ and provide thirty days notice prior to any strike or work stoppage.⁹⁷

In addition to these modifications, Senator Taft also proposed a new section to the NLRA, section 9(f), to limit the number of appropriate collective bar-

more unions concerning the assignment of or the right to perform, certain types of work.” H. ROBERTS, ROBERT’S DICTIONARY OF INDUSTRIAL RELATIONS 329 (3d ed. 1986).

90. See Hearings II, supra note 77, at 300-01 (statement of David Hitt, American Hosp. Ass'n). These were not trivial concerns. As Senator Dominick, an opponent of extending the NLRA to hospitals, explained: “[h]ospital care is not storable. It is essentially an immediate service to the sick and injured. . . . If the health care nurse . . . and many other . . . specialists are not at or near the bedside . . . the hospital ceases to function and the public interest . . . and welfare [are] endangered.” S. REP. No. 766, 93d Cong., 2d Sess. 39 (1974), reprinted in LEGIS. HIST., supra note 57, at 46 (views of Sen. Dominick (quoting O. Ray Hurst, Texas Hosp. Ass’n)).


93. S. 2292, 93d Cong., 1st Sess. (1973), reprinted in LEGIS. HIST., supra note 57, at 449. One study has suggested that S. 2292 strongly resembled the proposal offered by the hospital industry during the 1972 Senate hearings on H.R. 11,357. IMPACT, supra note 60, at 20.

94. S. 2292, 93d Cong., 1st Sess. 2 (1973), reprinted in LEGIS. HIST., supra note 57, at 450. A health care institution was defined as “any hospital, convalescent hospital, health maintenance organization, nursing home, extended care facility, or other institution devoted to the care of sick or aged persons.” Id. Senator Taft also proposed to exclude physicians from the definition of “employee” in § 2(3) of the Act. See id.

95. S. 2292, 93d Cong., 1st Sess. 3 (1973), reprinted in LEGIS. HIST., supra note 57, at 451. S. 2292 proposed to add § 8(g) to require parties to provide a ninety-day notice of termination or modification of the agreement. See id.

96. S. 2292, 93d Cong., 1st Sess. 4-7 (1973), reprinted in LEGIS. HIST., supra note 57, at 452.

97. S. 2292, 93d Cong., 1st Sess. 6 (1973), reprinted in LEGIS. HIST., supra note 57, at 454.
gaining units in health care institutions. Taft's proposal specified four appropriate units: all professional employees, technical employees, clerical employees, and service and maintenance employees. These four proposed units were in addition to a statutory requirement that there be a separate unit for guards. Section 9(f) would have required that the Board not disturb any pre-existing bargaining units. Section 9(f) also would have permitted employers and labor organizations to agree to units other than the four specified.

Organized labor opposed several features of the Taft bill, particularly the proposed limit on bargaining units. The United States Department of Labor agreed with this concern, stating that "unwise unit determinations could be harmful," but it regarded the safeguard language restricting proliferation to


Section 9(f) was "designed to minimize bargaining unit fragmentation and proliferation, which pose a serious threat to the efficient functioning of health care institutions. Such institutions are particularly vulnerable to the practice of fractionalizing the work force into numerous units, and the NLRB has already shown a dangerous tendency in this direction." LEGIS. HIST., supra note 57, at 110.

Some states have confronted the problems posed by multiple units in public employment by designating appropriate units through statute. See HAW. REV. STAT. § 89-6 (1987) (applying to state employees); ME. REV. STAT. ANN. tit. 26, § 1021 (1985) (applying to state university employees); WIS. STAT. ANN. § 111.825 (West 1988) (applying to state employees and providing that "it is the legislative intent that, in order to foster meaningful collective bargaining, units must be structured in such a way as to avoid excessive fragmentation whenever possible").

99. Section 2(12) defines the term "professional employee" as follows:

(a) any employee engaged in work (i) predominately intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgement 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, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses 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 defined in paragraph (a).


Section 9(b)(1) provides that the NLRB shall not find a mixed unit of professional employees and nonprofessionals appropriate unless a majority of the professionals first vote for inclusion in the mixed unit. Id. § 159(b)(1).

100. S. 2292, 93d Cong., 1st Sess. 10 (1973), reprinted in LEGIS. HIST., supra note 57, at 458.

101. Id. The separate unit of guards is required by the Act so as to avoid any conflict of interest that guards might face in dealing with fellow employees as a result of their position. See 29 U.S.C. § 159(b)(3) (1988).


103. Andrew Biemiller, Director of the Department of Legislation for the AFL-CIO strenuously objected to a statutory limit on bargaining units. See Hearings III, supra note 91, at 565.

104. Id. at 427, 434 (statement of Richard Schubert, Under Secretary of Labor); see also
The Department noted that the Board had "demonstrated sensitivity" to the unit issue, and thus, anticipated the Board would act accordingly if nonprofit hospitals were brought under the Act.

The debate between mere extension of the NLRA to nonprofit hospitals and "specialized treatment" for all health care institutions prevented passage of labor legislation for the health care industry. Shortly thereafter, Senator Taft proposed a compromise measure, and Senator Williams reintroduced the compromise measure as a new bill in order to provide greater support for the compromise.

c. Senator Williams' Bill

In an attempt to encourage passage of the legislation, the Congressmen emphasized two objectives. These objectives were to discourage labor upheavals...
and to install procedural safeguards that would preserve patient care. First, placing nonprofit hospitals under the NLRA would reduce labor unrest in the health care industry because the availability of NLRA representation election procedures would virtually eliminate any need for strikes designed to achieve recognition. They also stressed that encouraging the process of collective bargaining would tend to improve continuity and quality of patient care. Second, since the care of the sick and aged was a great societal concern, they proposed specific procedural safeguards to establish "special machinery" in order to minimize the potential for disruptions to patient care.

The legislation, popularly known as the Health Care Amendments, became effective in August of 1974. The procedural safeguards embodied in Senator Williams' bill were passed by both chambers of Congress. The Health Care Amendments repealed the nonprofit hospital exemption and created a definition for a "health care institution." Section 8(d) of the Act was amended to clarify obligations under this statute. Section 8(d) lengthened the requirements for notice of contract modification or termination in disputes involving health care institutions. In addition, it imposed a duty to engage in mandatory mediation of disputes under the direction of the Federal Mediation and Conciliation Service ("FMCS"). Along with the section 8(d) modificat-

[yet they] make[ ] special provision to safeguard hospital patients") (statement of Sen. Humphrey).

115. Id.
118. The Senate passed S. 3203 on May 7, 1974 and the House passed H.R. 13,678 on May 30, 1974. King, supra note 108, at 157-58. However, because the House version passed with two amendments not contained in S. 3203, a conference committee was formed to resolve the differences between the two bills. Id. at 158. The House and Senate each adopted the conference report. Id. at 159. The conference committee approved the two amendments. The first amendment created a provision that permits individuals with religious convictions to refrain from joining or financially supporting any labor organization. See 29 U.S.C. § 169 (1988). The second amendment created an "emergency disputes" provision, which would be available if the Director of the Federal Mediation and Conciliation Service decided that a dispute would "substantially interrupt the delivery of health care in the locality concerned." 29 U.S.C. § 183(a) (1988). The director is authorized in such circumstances to appoint a Board of Inquiry to conduct fact-finding and make recommendations for settling the dispute. See id.
121. See id. § 158(d)(A).
tions, a new section was added. Section 8(g), the added section, required labor organizations to provide ten days notice to both the FMCS and the health care institution prior to "engaging [in] any strike, picketing, or other concerted refusal to work." Language restricting the number of bargaining units in health care institutions, however, was conspicuously absent from the Health Care Amendments.

2. The "Congressional Admonition" Against Bargaining Unit Proliferation

a. Language in the Senate Report

Despite the efforts of Senator Taft and the hospital industry, Congress did not place a statutory limit on the number of bargaining units in health care institutions. The House and Senate committee reports accompanying the legislation devoted only two sentences to the issue.

The first statement is commonly referred to as the "congressional admonition" against bargaining unit proliferation. This first sentence provides: "Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry." The committee reports did not, however, define either "due consideration" or "proliferation," nor did they describe the manner in which the Board should strive to prevent proliferation.

The reports, however, included a second sentence, which noted the committees' approval of three Board decisions involving unit determinations at proprietary hospitals and nursing homes. In the first decision listed, Four...
Seasons Nursing Center, the NLRB dismissed a petition for a unit of two maintenance employees who performed unskilled work. In the second decision listed, Woodland Park Hospital, the Board overruled a decision by a regional director which granted X-ray technicians a separate unit. Although the House and Senate committees merely cited Four Seasons and Woodland Park, the committees voiced approval of "the trend toward broader units enunciated" in the third decision listed, Extendicare.

In Extendicare, the union sought to represent three separate units of employees: licensed practical nurses ("LPNs"), technical employees, and service and maintenance employees. The Board directed elections in only two units: one unit consisted of the service, maintenance, and technical employees, and the other one consisted of the LPNs. The Board directed an election in the combined unit for two reasons. First, the union was willing to represent a combined unit. Second, the Board reasoned that allowing two separate bargaining units when one would be suitable for collective bargaining would create "unwarranted unit fragmentation," particularly since there were so few technical employees. Despite these concerns, the Board granted the LPNs a sep-
Commentators have suggested that the committees’ qualified approval of 
*Extendicare* referred to their disapproval of the Board’s decision to grant the 
LPNs a separate unit. This suggestion is consistent with the committee’s 
desire to prevent bargaining unit proliferation.

While these cases have frequently been used to discern congressional intent 
regarding the bargaining unit issue, they do not explain fully Congress’ con-
cerns surrounding bargaining unit proliferation. Those concerns are expressed 
in the contemporary congressional debates.

b. Congressional debates surrounding the committee report’s language

Despite the language of the report indicating the committees’ desire to pre-
vent bargaining unit proliferation, few congressmen addressed the issue.

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139. Id. at 1232-33.
140. See, e.g., *King*, *supra* note 108, at 155 n.27 (stating that “it was agreed by the parties 
supporting the legislation that a separate bargaining unit of LPNs was not appropriate. That is 
what is meant by the footnote in the Committee Report in the section discussing bargaining 
units”).
141. See, e.g., *Bumpass*, *supra* note 111, at 888 (stating that disapproval of the separate LPN 
unit would be consistent with the admonition to prevent bargaining unit proliferation). *But see 
Fanning, The Health Care Amendments, supra* note 104, at 209 (stressing that commentators err 
where they construe the committees’ qualified approval of *Extendicare* as disapproval of the 
decision). The only contemporary reference to the qualified approval of *Extendicare* occurred when 
Senator Taft explained during the floor debates that “part of the unit findings in that case . . . 
was overly broad and not consistent with minimization of the number of bargaining units in health 
care institutions.” 120 CONG. REC. 13,559-60 (1974), reprinted in LEGIS. HIST., *supra* note 57, at 
255.

One commentator has suggested that the committees carefully selected these cases to reflect the 
unit principles proposed by Senator Taft “without unduly alarming certain labor organizations or 
professional associations.” *King*, *supra* note 108, at 155; *cf. Fanning, The Course of Health Care 
Decisions: Navigating in Charted Waters*, in AMERICAN BAR ASSOCIATION, NATIONAL INSTITUTE 
ON HOSPITALS & HEALTH CARE FACILITIES, LABOR RELATIONS LAW PROBLEMS IN HOSPITALS & 
THE HEALTH CARE INDUSTRY 56-59 (A. Knapp ed. 1977) (asserting the unit principles in the Taft 
bill were not adopted by the committee reports because they were deemed too inflexible) [herein-
after *Fanning, The Course of Health Care Decisions*].
142. See *Mills v. United States*, 713 F.2d 1249, 1252 (7th Cir. 1983), *cert. denied*, 464 U.S. 
1069 (1984) (stating that committee reports are generally “the most persuasive indicia of Congress-
ional intent (with the exception, of course, of the statute itself)”); *see also Bumpass, supra* 
ote 111, at 886-92 (describing congressional approval of the cases cited accompanying the “ad-
monition”). It is noteworthy that the cases cited do not refer to units consisting of professional 
employees, business clerical employees, skilled maintenance employees, or guards.
143. Only Senator Dominick, an opponent of the legislation, objected to the committee report’s 
language regarding bargaining units. S. REP. No. 766, 93d Cong., 2d Sess. 44-45 (1974), re-
printed in LEGIS. HIST., *supra* note 57, at 51-52. Senator Dominick stressed that the proliferation 
of bargaining units posed such a great threat to patient care that hospitals needed specific statu-
tory language to limit the number of bargaining units. S. REP. No. 766, 93d Cong., 2d Sess. 45, 
reprinted in LEGIS. HIST., *supra* note 57, at 52. The Senator represented Colorado, a western rural
Senator Taft, who earlier proposed such a limit, abandoned the statutory approach and supported the committee report's language admonishing the Board to prevent bargaining unit proliferation. Senator Taft feared that proliferation would lead to wage "leapfrogging" and "whipsawing," thereby increasing health care costs. Even after urging the Board to exercise caution and consider the public interest in making unit decisions, however, the Senator agreed that the Board should be left with flexibility to make unit decisions for health care institutions.

In this ongoing debate, Senator Williams represented the opposite views of Senator Taft regarding bargaining unit proliferation. Senator Williams emphasized that the Board had already shown "good judgment" in making unit decisions in "newly covered industries." The Senator recognized the need for the Board to give "due consideration" to preventing undue unit proliferation. Nevertheless, he further urged the Board to "use extreme caution not state, and was particularly concerned that small units of hospital employees could strike and shut down an entire facility, which would decrease access to health care.

144. See 120 Cong. Rec. 12,944-45 (1974), reprinted in Legis. Hist., supra note 57, at 113-14. He explained that the health care industry was particularly vulnerable to labor unrest: "If each professional interest and job classification is permitted to form a separate bargaining unit, numerous . . . labor relations problems become involved in the delivery of health care." 120 Cong. Rec. 12,944-45 (1974), reprinted in Legis. Hist., supra note 57, at 113.

145. "Leapfrogging" occurs in situations in which an employer bargains separately with several unions and signs a separate agreement with each union. See H. Roberts, Robert's Dictionary of Industrial Relations 380 (3d ed. 1986). When the last union negotiates it may decide to break any pattern set between the employer and the other unions, applying economic pressure if necessary. Id. If the employer agrees to the hold-out union's demands, "the hold-out union has thus leap-frogged over the agreement pattern already set by the other unions, and the other unions leap-frog when they insist upon parity of treatment with the original hold-out union." Id.

146. "Whipsawing" is a strategy whereby employees try to negotiate a wage rate with one employer and then use that rate as "a pattern or base to obtain the same or greater benefits from other employers, under the threat of pressure (including a strike) used against the first employer." Id. at 781.

147. Senator Taft also emphasized that the committee report represented "agreed upon" language, which stressed the need to "reduce and limit" the number of bargaining units in health care institutions. 120 Cong. Rec. 12,944-45 (1974), reprinted in Legis. Hist., supra note 57, at 113. Despite these concerns, however, Senator Taft abandoned the statutory limit.

148. Id.


150. See 120 Cong. Rec. 22,575 (1974), reprinted in Legis. Hist., supra note 57, at 363. Senator Williams emphasized that he expected the Board to act on behalf of the public interest when "exercising its specialized experience and expert knowledge in determining appropriate bargaining units." Id. He noted that the Board had, "as a rule, tended to avoid an unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, particularly where there is such a history in the area or a notable disparity of interests between employees in different job classifications." Id.
to read into this act by implication—or general logical reasoning—something that is not contained in the bill, its report and the explanation thereof.'

Only two other congressmen, John Ashbrook and Frank Thompson, Jr., addressed the bargaining unit issue. The decisions cited in the committee reports were chosen to show that the Board had acted in a "congressionally approved manner." Like Senator Williams, Representative Ashbrook expressed confidence that the Board would balance patient care needs and employee rights in its unit decisions. Agreeing with Ashbrook, Representative Thompson added that the committee reports did not intend to "foreclose the Board from continuing to determine traditional craft and departmental units . . . in the health care field." Representative Thompson was the last congressman to contemporaneously comment on the bargaining unit issue. Shortly thereafter, the Health Care Amendments became effective. As a result, the Board was soon overwhelmed with representation petitions from employees seeking elections to choose collective bargaining representatives. Soon after these developments, the NLRB made its first decisions for the industry.

C. NLRB Health Care Unit Decisions: 1975-1982

1. The "Community of Interests" Test For Unit Determinations

The Act provides little guidance to the Board in selecting an appropriate bargaining unit. The Act does not require "the unit for bargaining be the

151. 120 CONG. REC. 22,575 (1974), reprinted in LEGIS. HIST., supra note 57, at 361. Senator Williams encouraged the Board to remember that the legislation was the "product of compromise." Id.

152. 120 CONG. REC. 22,949 (1974), reprinted in LEGIS. HIST., supra note 57, at 411.

153. See id.

154. 120 CONG. REC. 22,948 (1974). Commentators have observed that Representative Thompson's statement was inserted into the record eleven days after the House adopted the conference report on the Health Care Amendments. Thus, this statement is "post-passage" commentary, which is of dubious value in construing congressional intent. See Bumpass, supra note 111, at 874 nn. 35-36 (citing United States v. Mauro, 436 U.S. 340 (1977) (Burger, C.J. & Rehnquist, J., dissenting)); King, supra note 108, at 159 n.47, 160 (discussing the Board's adherence to the post-passage statement).


157. Section 9(b) requires that the Board "shall decide, in each case whether in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." 29 U.S.C. § 159(b) (1988). Section 9(b)(1) prohibits a unit consisting of professionals and nonprofessionals unless a majority of the professionals first vote to agree to join the combined unit. See id. § 159(b)(1). Section 9(b)(2) permits craft units to sever themselves from larger units. See id. § 159(b)(2). Section 9(b)(3) requires that any unit of guards must consist exclusively of guards, because of the inherent conflict of interest guards would face in a mixed unit in the event of a strike, work stoppage, or other job action. See id. § 159(b)(3).

The only other statutory guideline regarding unit determinations is found in § 9(c)(5)(b) which
only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be 'appropriate.' It must be appropriate to ensure to employees, in each case, 'the fullest freedom in exercising the rights guaranteed by this Act.'

The NLRB developed a "community of interests" test in order to serve two purposes: to identify groupings of employees who shared common interests and attributes; and, to balance the employees' need for effective representation with the need to select a unit which would not undermine the collective bargaining process. In determining whether employees share a sufficient community of interests to comprise an appropriate bargaining unit, the Board looks to factors such as wages, hours, skills, qualifications, working conditions, functional integration, supervision, interchange of employees, physical proximity, and history of organizing. The Board's selection of an appropriate unit vitally affects labor's strategy in organizing drives. Organized labor and health care industry management, therefore, earnestly awaited the NLRB's first line of decisions for the industry.

2. The Mercy Hospitals Line of Cases

When the NLRB issued its lead unit determination cases, on May 5, 1975, health care employers and labor unions received guidance on what types of units would be found appropriate in the industry. In Mercy Hospitals of

states that for "determining whether a unit is appropriate for the purposes of collective bargaining . . . the extent to which employees have organized shall not be controlling." Id. § 159(c)(5)(b).


159. See, e.g., Kalamazoo Paper Box Corp., 136 N.L.R.B. 134, 137 (1962) (holding that the Board must balance employees' desires for organization and collective expression with the need to create a climate in which collective bargaining will flourish).

160. See, e.g., American Cyanamid Co., 131 N.L.R.B. 909, 910 (1961) (holding that an appropriate unit consists of employees "whose similarity of function and skills create a community of interest such as would warrant separate representation"); 15 NLRB ANN. REP. 39 (1951) (stating that the Board's primary concern is to group together only those employees who have substantial mutual interests in wages, hours, and other conditions of employment).

For a complete discussion of the history, application, and critique of the "community of interests" concept, see ABODEELEY, supra note 45, at 11-83, 339-43.

161. See ABODEELEY, supra note 45, at 284. For a discussion of the importance of the unit determination to labor-management relations, see supra notes 45-54 and accompanying text.

162. See, e.g., Fanning, The Health Care Amendments, supra note 104, at 201 (referring to the strong interest in "the initial and long-awaited Board unit" decisions).

163. Mercy Hosps. of Sacramento, Inc., 217 N.L.R.B. 765 (1975), enforcement denied on other grounds, 589 F.2d 968 (9th Cir. 1978), cert. denied, 440 U.S. 910 (1979) (holding that registered nurses, all other professionals, business office clerical employees, and service and maintenance employees are entitled to separate units); Nathan & Miriam Barnert Memorial Hosp. Ass'n, 217 N.L.R.B. 775 (1975) (holding that technical employees warrant a separate unit); St. Catherine's Hosp. of Dominican Sisters, 217 N.L.R.B. 787 (1975) (holding that a separate unit of LPNs is not appropriate); Newington Children's Hosp., 217 N.L.R.B. 793 (1975) (holding that a service and maintenance employees unit excluding technical employees is appropriate); Sisters of
Sacramento Inc., the NLRB addressed its authority to make unit determinations and acknowledged the "congressional admonition" to avoid undue unit proliferation. The Board then applied its traditional "community of interests" test. In doing so, the Board relied on congressional remarks that the Board had the authority to determine appropriate bargaining units. The Board found four units to be appropriate: registered nurses, all other professional employees, service and maintenance employees, and business clerical employees.

Additionally, the Board also expressed its position on union organizing by professional employees in Mercy Hospitals. It rejected a regional director's decision to include registered nurses within a unit of professionals because nurses shared "a greater degree of separateness" than most other professionals. The nature of nurses' duties and a "singular history of separate representation and collective bargaining," entitled nurses to a separate unit. This decision stands for the proposition that representation petitions for units consisting solely of registered nurses are per se appropriate. The Board, however, dismissed a petition for a separate unit of laboratory medical technolo-
gists.\textsuperscript{176} In deciding \textit{Mercy Hospitals}, the Board referred to Senator Taft's remarks that adverse effects might occur if each professional classification were allowed to form a separate unit.\textsuperscript{177} The Board stated that a unit consisting of all professionals, excluding registered nurses, was the only other professional unit it would find appropriate.\textsuperscript{178} The Board explained that to find otherwise might result in an "undue proliferation of bargaining units."\textsuperscript{179}

In \textit{Nathan & Miriam Barnert Memorial Hospital Association}, the Board confronted the issue of granting a separate unit for technical employees.\textsuperscript{180} The Board majority held that a unit consisting of all technical employees was appropriate.\textsuperscript{181} The majority stated that such a unit did not contravene the "congressional admonition" against bargaining unit proliferation.\textsuperscript{182}

The Board, however, indicated its disapproval of smaller, more specialized units by rejecting petitions for separate units of licensed stationary engineers\textsuperscript{183} and telephone operators.\textsuperscript{184} The dissenters asserted that the committee report language approving of \textit{Extendicare} demonstrated a congressional intent favoring broader units.\textsuperscript{185} The dissent would have combined the technical employees with the service and maintenance employees and directed an election in that unit.\textsuperscript{186}

3. \textit{The NLRB Unit Decisions Following Mercy Hospitals}

The NLRB generally followed the five-unit structure outlined by the \textit{Mercy
Hospitals line of cases: nurses, all other professional employees, technical employees, business clerical employees, and service and maintenance employees. In a more recent case, however, the Board departed from the five-unit structure by adding two units: physicians and skilled maintenance employees. In Ohio Valley Hospital Association, the Board announced that physicians occupy a unique role within the industry. The Board reasoned that physicians deserve this separate unit because physicians represent "a class unto themselves," and thus, warrant a separate unit. The Board's second departure from the five-unit structure involves separate units for skilled maintenance employees. In Jewish Hospital of Cincinnati, a unanimous Board agreed that a skilled maintenance unit was appropriate and consistent with the "congressional admonition," provided the employees had a sufficient community of interest to warrant separate representation. On the particular facts of this case, however, the Board dismissed the petition.

The issue of separate maintenance units has frequently divided the Board, with different results occurring in cases that share similar facts. One commentator suggested that the inconsistency can be partly explained by the composition of the Board. Some members stressed that the "congressional admonition" precluded separate units for skilled maintenance employees, but others disagreed with this view. Since decisions frequently turned on the vote of one member, the Board's position on approving skilled employee maintenance units has been inconsistent.

In order to comply with the "congressional admonition," the Board rarely granted petitions for units other than those outlined above. The exception to

188. Id.
189. Id. at 605.
190. 223 N.L.R.B. 614 (1976). One commentator has suggested that the Board's five-unit structure is misleading. See King, supra note 108, at 163 n.68 (noting that the Board has permitted units of guards, boiler operators, pre-existing bargaining units, stipulated units, and has granted comity to state unit decisions, thereby creating "'double digit' unit proliferation") (citations omitted).
191. Jewish Hospital, 223 N.L.R.B. at 616.
192. Id. at 617.
193. See, e.g., Emmanuel, Hospital Bargaining Unit Decisions, in AMERICAN BAR ASSOCIATION, NATIONAL INSTITUTE ON HOSPITALS & HEALTH CARE FACILITIES, LABOR RELATIONS LAW PROBLEMS IN HOSPITALS & THE HEALTH CARE INDUSTRY 200-02 (A. Knapp ed. 1977) (stating that hospital management attorney was unable to discern any significant factual difference between those Board cases finding maintenance units appropriate and those that do not); D'Alba, Health Care Decisions of the National Labor Relations Board Since the 1974 Amendments to the National Labor Relations Act, in AMERICAN BAR ASSOCIATION, NATIONAL INSTITUTE ON HOSPITALS & HEALTH CARE FACILITIES, LABOR RELATIONS LAW PROBLEMS IN HOSPITALS & THE HEALTH CARE INDUSTRY 15, 42-43 (pointing out that five Board decisions with different outcomes in maintenance units yet "the facts . . . are basically the same").
194. See ABODEELY, supra note 45, at 263-64. For a discussion of the composition of Board membership and its impact on Board decisions, see Gregory, supra note 28, at 41-42.
195. ABODEELY, supra note 45, at 261-65.
196. Id. at 263-64 (comparing Board maintenance unit decisions with Board voting patterns).
this rule is when the employer and the union agree to a particular unit. 197 The Board refused to grant separate units for professional employees such as pharmacists,198 medical laboratory technologists,199 and intern and resident physicians.200 In addition, the Board refused to grant a residual unit for nonprofessional employees.201

The Board's unit decisions affected both the available choices to labor in organizing workers in the industry and hospital management's response to such organization.202 Board decisions encouraged industrial unions to organize larger units and discouraged the organization of smaller, more specialized unions.203 Health care employers also opposed the Board's decisions because the decisions, from their perspective, did not adhere to the "congressional admonition."204 As a result, employers often challenged unfavorable decisions in the federal courts of appeals.205

197. Otis Hosp. Inc., 219 N.L.R.B. 164 (1975). The Board announced that its policy to honor stipulations by the parties to an appropriate unit was consistent with the legislative history regarding unit proliferation, noting that even Senator Taft's proposal would have allowed stipulation agreements. Id. at 164-65.

The Board has granted, "under extreme facts," a unit of boiler operators. See Emmanuel, supra note 193, at 191 n.21 (citing St. Vincent's Hosp., 223 N.L.R.B. 638 (1976), enforcement denied, 567 F.2d 588, 592 (3d Cir. 1977)). The proposed unit in St. Vincent's Hospital was made up of four boiler operators who were licensed, highly skilled, geographically set apart employees. 223 N.L.R.B. at 638. These boiler operators had minimal contact and no interchange with all other employees. Id. The board, therefore, granted the boiler operators a separate unit. Id.


200. See Cedars-Sinai Medical Center, 223 N.L.R.B. 251 (1976). The NLRB rejected a separate unit of these physicians not because they found it was inconsistent with the "congressional admonition," but because intern and resident physicians were students and not "employees" within the meaning of the Act. Id. at 251.

201. See Levine Hosp. of Hayward, 219 N.L.R.B. 327 (1975). The Board held that to grant such a unit would contravene the "congressional admonition" against proliferation. Id. at 328.

202. See ABODEELY, supra note 45, at 284-88 (stating that unit determinations have great impact on health care unionization and management's countermeasures).

203. Id. at 284, 288.

204. See, e.g., Emmanuel, supra note 193, at 190-91 (stressing that the Board decisions had "created unit proliferation" in the industry); cf. Fanning, Health Care Labor Relations: Problems and Predictions, in AMERICAN BAR ASSOCIATION, NATIONAL INSTITUTE ON HOSPITALS & HEALTH CARE FACILITIES, LABOR RELATIONS LAW PROBLEMS IN HOSPITALS & THE HEALTH CARE INDUSTRY 240-45 (A. Knapp ed. 1977) (contending that part of management's opposition is also designed to create delay in the representation process and undermine the support of the union before the election occurs) [hereinafter Fanning, Health Care Labor Relations].

205. Section 10(f) of the Act permits persons "aggrieved by a final order" of the Board to seek judicial review in the federal courts of appeals. 29 U.S.C. § 160(f) (1988). Employers cannot obtain direct judicial review of Board orders in representation cases because they are not "final
D. The Courts of Appeals and the Board

1. "Community of Interests" and the "Congressional Admonition" Against Bargaining Unit Proliferation

The central issue between the NLRB and the federal courts of appeals in health care unit decisions has been the Board's compliance with the "congressional admonition" against bargaining unit proliferation. Determinations of the appropriate standard of judicial review and the Board's apparent disregard for judicial precedent have caused the relationship between the NLRB and the courts of appeals to become strained. Federal courts traditionally deferred to the NLRB's unit decisions, which are "rarely to be disturbed," unless the Board's decision amounts to an abuse of discretion. Nevertheless, federal

orders" within the meaning of § 10(f). AFL v. NLRB, 308 U.S. 401, 409-11 (1940). Congress did not authorize direct judicial review of representational issues because it believed that direct judicial review of Board orders in representation cases would frustrate the national labor policy of fostering collective bargaining. See Leedom v. Kyne, 358 U.S. 184, 192-93 (1958) (Brennan, J., dissenting) (stating that congressional intent is "firmly against direct review . . . because of the risk that time-consuming review might defeat the objectives of the national labor policy").

Although employers are barred from obtaining direct review of unit decisions, they may still obtain review by committing an unfair labor practice, typically by refusing to bargain with the certified union. See 29 U.S.C. § 158(a)(5) (1988). If the union files a § 8(a)(5) charge because the employer has refused to bargain, the regional director must investigate and, if he finds that the charge is well founded, he will issue a complaint. See 29 C.F.R. § 101.8 (1989). The General Counsel will then move for summary judgment. In the absence of any new evidence, the Board will grant the General Counsel's motion for summary judgment because the party is not entitled to relitigate issues that were or could have been litigated in the previous representation proceeding. See 29 C.F.R. § 102.67(f) (1989). The Board will then order the employer to bargain with the union. Upon the Board's order, the employer becomes a "person aggrieved" by a "final order" in an unfair labor practice proceeding. See 29 U.S.C. § 160(f) (1988). Any questions concerning the underlying representational issues, that is, the unit determination, may be raised in the unfair labor practice proceedings. Section 9(d) requires that the record in the representation case must be certified, to the federal court of appeals hearing the unfair labor practice case. Id. § 159(d). "Persons aggrieved" may petition for review of the Board's order in the circuit court of appeals where the unfair labor practice occurred, where the person resides or transacts business, or in the United States Court of Appeals for the District of Columbia Circuit. Id. § 160(f).

Section 10(e) authorizes the Board to seek enforcement of its orders in the court of appeals where the unfair labor practice occurred or where the person resides or does business. Id. § 160(e).

206. See, e.g., ABODEELY, supra note 45, at 265-76 (discussing the differing Board and court perspectives on the "congressional admonition").

207. Zimmerman & Dunn, Relations Between the NLRB and the Courts of Appeals: A Tale of Acrimony and Accommodation, 8 EMPLOYEE REL. L.J. 4, 5 (1982). The authors observed that part of the tension between the Board and the judiciary may be attributable to their differences in jurisdiction: "The courts of appeals have limited geographic jurisdiction, while the Board holds a nationwide charter. Thus, the Board often refuses to acquiesce when one or more of the circuit courts disagrees with its interpretation of the National Labor Relations Act. This practice has led to harsh criticism of the Board . . . ." Id.

208. Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491 (1947). "The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed." Id.

209. Id.
courts have deferred less to Board decisions in the health care industry.\textsuperscript{210} The Third Circuit was the one of the first courts of appeals to address a Board unit determination in the health care industry. In \textit{Memorial Hospital v. NLRB},\textsuperscript{211} the court refused to enforce a Board order directing the hospital to bargain with a unit of maintenance department employees.\textsuperscript{212} The court held that the Board should not have granted comity to a previous state labor board decision certifying the unit.\textsuperscript{213} The court reasoned that the “congressional admonition” against proliferation of bargaining units required the NLRB to make its own unit determination; it could not simply rely on the pre-amendments decision of a state labor relations agency.\textsuperscript{214} The Third Circuit again reviewed the meaning of the “congressional admonition” in \textit{St. Vincent’s Hospital},\textsuperscript{215} and denied enforcement of a Board order which required a hospital to bargain with a certified unit of boiler operators.\textsuperscript{216} After reviewing the legislative history, the court decided that the Board’s use of the “community of interests” test did not “comply with congressional intent to treat this unique field in a special manner.”\textsuperscript{217} Following \textit{St. Vincent’s Hospital}, the Board reviewed and restated its unit determination standards.\textsuperscript{218} In \textit{Allegheny General Hospital},\textsuperscript{219} the Board responded to the Third Circuit’s criticisms.\textsuperscript{220} The Board emphasized that Congress had not amended section 9(b) of the Act, which left unit determinations to the expertise of the Board.\textsuperscript{221} The Board asserted that Congress did not expect it to depart from its traditional “community of interest” criteria.\textsuperscript{222} Had Congress intended the NLRB to abandon traditional criteria, “it could

\textsuperscript{210} Compare Zimmerman & Dunn, supra note 207, at 5, 13 (stating that courts are “quick to substitute their own factual findings and legal judgment for that of [the Board]”) with Curley, \textit{Health Care Unit Determinations: The Board Ignores the Mandate of Congress and the Courts of Appeals}, 2 Hofstra L.J. 103 (1984) (stating that courts must be vigilant to make sure the Board does not abuse its discretion in making unit decisions).

\textsuperscript{211} 545 F.2d 351 (3d Cir. 1976).

\textsuperscript{212} Id. at 362.

\textsuperscript{213} Id. By granting comity, the Board had deferred to the pre-Health Care Amendments decision of a state labor relations agency that had certified a maintenance unit. \textit{Id.} at 353-54.

\textsuperscript{214} Id. at 361-62. The court remanded the case to the Board to make its own unit determination. \textit{Id.} at 362.

\textsuperscript{215} St. Vincent’s Hosp. v. NLRB, 567 F.2d 588 (3d Cir. 1977).

\textsuperscript{216} Id. at 593.

\textsuperscript{217} Id. at 592. The court observed that “[p]roliferation of units in industrial settings has not been the subject of congressional attention but fragmentation in the health care field has aroused legislative apprehension. The Board therefore should recognize that the contours of a bargaining unit in other industries do not follow the blueprint Congress desired in a hospital.” \textit{Id.}


\textsuperscript{219} Id. In \textit{Allegheny II} the Board reaffirmed its previous decision in an earlier proceeding of the same case. Allegheny General Hosp. (“Allegheny I”), 230 N.L.R.B. 954 (1976). In \textit{Allegheny I}, the Board granted comity to a certification issued by the Pennsylvania Labor Relations Board that a unit of maintenance employees was an appropriate unit for collective bargaining. \textit{Id.} at 956.

\textsuperscript{220} See \textit{Allegheny II}, 239 N.L.R.B. at 872.

\textsuperscript{221} Id. at 872-73.

\textsuperscript{222} Id. at 873.
have easily amended Section 9(b) to so provide." The Board conducted its own review of the legislative history and concluded that Congress was primarily concerned that unit proliferation in the health care industry not follow the pattern established in the construction industry. The Board majority stated that it must "respectfully disagree" with the court's holdings in Memorial Hospital and St. Vincent's Hospital. The NLRB, therefore, affirmed its decision to extend comity to a state labor relations board decision finding a unit of maintenance employees to be appropriate.

The Third Circuit refused to enforce the Board's order in Allegheny General Hospital v. NLRB. Criticizing the Board, the court held that merely applying traditional "community of interest" criteria did not fulfill the Board's duty to consider the public interest in preventing bargaining unit proliferation. The court rebuked the Board for refusing to abide by the court's analysis in St. Vincent's Hospital when it addressed the need to prevent proliferation.

The Board soon confronted criticism in other circuits, particularly in cases involving maintenance employees and registered nurses. Following the lead of the Third Circuit, the Second Circuit refused to enforce Board orders to bargain with certified units of maintenance employees. The court agreed with the Board that the legislative history of the Health Care Amendments did not preclude separate maintenance units. The court, however, also stated that Board decisions involving maintenance employees were in "disarray." The court rejected the Board's assertion that the "congressional admonition" was aimed at preventing each health care job classification from developing separate units and avoiding the pattern of organization in the construction industry. Instead, the court stressed that Congress wanted the Board to avoid the

223. Id.
224. Id. at 874-75.
225. Id. at 872-73.
226. Id. at 879.
227. 608 F.2d 965, 971 (3d Cir. 1979).
228. Id.
229. Id. at 970. The court stated, "for the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law. Such an order will not be enforced." Id.
230. NLRB v. Mercy Hosp. Ass'n, 606 F.2d 22, 28 (2d Cir. 1979) (holding that a unit of maintenance employees is not appropriate), cert. denied, 445 U.S. 971 (1980); Long Island College Hosp. v. NLRB, 566 F.2d 833, 846 (2d Cir. 1977) (holding that the Board may not grant comity to a state labor relations agency's finding that a unit of maintenance employees was appropriate), cert. denied, 435 U.S. 996 (1978).
232. Id. at 844.
233. Mercy Hosp. Ass'n, 606 F.2d at 27. The construction industry has historically consisted of employees who have organized into units according to specific craft skills, such as plumbers, electricians, carpenters, and other job functions. "If the pattern of the construction industry were used as a model for the health care industry, health care employees would be grouped into units according to 'each professional interest and job classification.'" Allegheny II, 239 N.L.R.B. 872,
“egregious” unit proliferation found in the construction trades, as well as less extreme forms of unit fragmentation. The court instructed the Board to balance its traditional “community of interest” analysis with the public’s interest in preventing fragmentation in the health care field.

Similarly, the Seventh Circuit denied enforcement of Board orders directing hospitals to bargain with certified units of licensed stationary engineers and maintenance employees. In Mary Thompson Hospital, Inc. v. NLRB, the Seventh Circuit criticized the Board for paying “mere lip-service” to the “[c]ongressional admonition.” The court claimed that the Board failed to specify how, or in what manner, the decision reflected the congressional directive. The Seventh Circuit rebuked the Board for failing to follow precedent, stating that the “flagrant disregard of judicial precedent must not continue.” The appellate court also denied enforcement of a Board bargaining order directing a hospital to bargain with a unit of four licensed stationary engineers. Chief Judge Fairchild dissented, emphasizing that because the “admonition” was not a part of the statute, it was not helpful in interpreting the Board’s purported abuse of discretion. Fairchild reasoned that Section 9(b), which covers unit determinations, had not been changed, and therefore, was the authority for unit determinations.

Meanwhile, the Fourth Circuit joined the emerging pattern of court criticism by refusing to enforce a Board bargaining order with a unit of registered nurses. The NLRB’s unit decisions fared better in the First, Fifth, and Sixth Circuits. The First Circuit enforced a Board order which directed the employer to bargain with a unit consisting of all professional employees.

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875 (1978) (emphasis in original). The Board believed that it was this pattern that Congress had in mind when the committees issued their report language regarding bargaining unit proliferation. *Id.*


235. *Id.* (quoting St. Vincent's Hosp. v. NLRB, 567 F.2d 588, 592 (3d Cir. 1977)).

236. Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980).

237. NLRB v. West Suburban Hosp., 570 F.2d 213, 216 (7th Cir. 1978).

238. 621 F.2d 858, 864 (7th Cir. 1980).

239. *Id.* at 863.

240. *Id.*

241. *Id.* at 864.

242. *Id.* at 859.

243. *Id.* at 864.

244. *Id.* Judge Fairchild indicated that the “admonition” might serve a political purpose: the Board might be “courting a statutory change” if it failed to comply with the “admonition.” *Id.* Even so, Judge Fairchild stressed that it was not proper for courts to use the “admonition” in analyzing the Board’s purported “abuse of discretion.” *Id.; see also* Cooper & Brent, *The Nursing Profession & the Right to Separate Representation*, 58 CHI-KENT L. REV. 1053, 1070-71 (1982) (stressing that courts have given too much weight to an admonition that is merely “hortatory” and has no legal effect).

245. Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980) (Fairchild, C.J., dissenting).

246. See NLRB v. Frederick Memorial Hosp., Inc., 691 F.2d 191, 195 (4th Cir. 1982).

247. See NLRB v. Community Health Servs., Inc., 705 F.2d 18, 20 (1st Cir. 1983).
Additionally, the Fifth Circuit upheld a Board order directing a hospital to bargain with a unit including technical, service, and maintenance employees.\(^{248}\) Finally, the Sixth Circuit upheld Board orders with certified units of technical employees.\(^{249}\) Nevertheless, many of the Board's decisions drew sharp criticism from the courts of appeals for both applying the traditional "community of interests" test, and for not heeding the "congressional admonition" to prevent unit proliferation. Although the courts were critical of the Board's decisions, they did not provide any specific guidelines except for the need to consider the public in bargaining unit proliferation.\(^{250}\)

2. The "Disparity of Interests" Test

The Ninth Circuit soon provided the Board with a more specific approach to making unit determinations in the health care industry.\(^{251}\) In *NLRB v. St. Francis Hospital*,\(^{252}\) the court refused to enforce a Board bargaining order which directed a hospital to bargain with a unit consisting solely of registered nurses.\(^{253}\) On remand, the court instructed the Board to eliminate the focus on the community of interests among employees.\(^{254}\) Instead, the court stressed that the focus should be "upon the disparity of interests between employee groups which would prohibit or inhibit fair representation of employees' interests, [so] a balance [could] be made between the congressional directive and the employees' right to representation."\(^{255}\) The court took its "disparity of interests" language directly from Senator Williams' remarks during the floor debates. The court stated that the "disparity of interests" language and the rest of the legislative history required the Board to apply a "disparity of interests" approach to unit determinations.\(^{256}\) In addition, the Ninth Circuit held that the Board's use of an irrebuttable presumption in favor of registered nurses' units was inconsistent with the "congressional admonition."\(^{257}\) This presumption precluded employers from introducing any evidence to rebut the

\(^{248}\) See Vicksburg Hosp., Inc. v NLRB, 653 F.2d 1070, 1073-75 (5th Cir. 1981).
\(^{249}\) See NLRB v. Sweetwater Hosp. Ass'n, 604 F.2d 454, 458 (6th Cir. 1979) (holding that a technical employee unit is appropriate); Bay Medical Center, Inc., v. NLRB, 588 F.2d 1174 (6th Cir. 1978) (holding that, based on bargaining history, a technical unit excluding LPNs is appropriate), cert. denied, 444 U.S. 827 (1979).
\(^{250}\) See supra notes 227-29, 235 and accompanying text.
\(^{251}\) See *NLRB v. St. Francis Hosp.*, 601 F.2d 404 (9th Cir. 1979).
\(^{252}\) 601 F.2d 404 (9th Cir. 1979).
\(^{253}\) Id. at 422.
\(^{254}\) Id. at 419.
\(^{255}\) Id.
\(^{256}\) Id. Senator Williams used the words "disparity of interests" following his comment that the NLRB had generally shown good judgment in making unit decisions in newly covered industries. He noted that the Board had generally "tended to avoid an unnecessary proliferation of bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, particularly where there is such a history in the area or a notable disparity of interests between employees in different job classifications." 120 CONG. REC. 22,575 (1974), reprinted in LEGIS. HIST., supra note 57, at 362-63.
presumption based on individual circumstances surrounding their facilities.\textsuperscript{268}

The NLRB responded to the Ninth Circuit's criticisms in \textit{Newton-Wellesley Hospital}\textsuperscript{268} and abandoned its per se policy favoring units consisting solely of registered nurses.\textsuperscript{268} The Board agreed that per se rules could result in inadequate attention to the "admonition" by allowing separate units of nurses or other employees where the circumstances did not warrant it.\textsuperscript{261} Referring to the "disparity of interests" analysis, the Board suggested the court's disapproval of the "community of interests" analysis "may be largely semantic . . . and . . . one of emphasis or degree, and not . . . a distinction of kind."\textsuperscript{262} An analysis of the disparity of interests among employees was implicit in the Board's "community of interests" analysis.\textsuperscript{262} Furthermore, the Board found no indication in the legislative history that it must abandon the "community of interests" standard.\textsuperscript{264} Regarding the specific facts in the case, the Board held that a unit of registered nurses was appropriate.\textsuperscript{265}

The Tenth Circuit soon challenged the Board's position that the "disparity of interests" standard was simply a difference in semantics.\textsuperscript{266} In \textit{Presbyterian/St. Luke's Medical Center v. NLRB},\textsuperscript{267} the Tenth Circuit refused to enforce a Board order that required the hospital to bargain with a certified unit of registered nurses.\textsuperscript{268} In addition, the appellate court enunciated its view of the proper legal standard to be used in making health care unit determinations.\textsuperscript{269} The court remanded the case to the Board with the following instructions: "The proper approach is to begin with a broad proposed unit and then exclude employees with disparate interests. One should not start with a narrow unit, such as registered nurses, and then add professionals with similar interests."\textsuperscript{270}

The Tenth Circuit has continued to apply a "disparity of interests" standard in health care unit cases,\textsuperscript{271} and this standard was eventually adopted by the

\begin{itemize}
\item \textsuperscript{258} \textit{Id.} The court stressed that it was not foreclosing the appropriateness of units of registered nurses, nor the use of presumptions, but that employers must be given an opportunity to rebut the presumptions. \textit{Id.} at 415-16.
\item \textsuperscript{259} 250 N.L.R.B. 409 (1980).
\item \textsuperscript{260} \textit{Id.} at 415.
\item \textsuperscript{261} \textit{Id.} at 411.
\item \textsuperscript{262} \textit{Id.} at 411-12.
\item \textsuperscript{263} \textit{See id.}
\item \textsuperscript{264} \textit{Id.} at 412.
\item \textsuperscript{265} \textit{Id.} at 413. The NLRB explained that its "community of interests" analysis also embraced an analysis of the disparity of interests among employees: "our inquiry . . . necessarily proceeds to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant establishment of a separate unit." \textit{Id.} (footnote omitted).
\item \textsuperscript{266} \textit{See Presbyterian/St. Luke's Medical Center v. NLRB, 653 F.2d 450 (10th Cir. 1981), modified sub. nom., Beth Israel Hosp. & Geriatric Center, 688 F.2d 697 (10th Cir.) (en banc), cert. dismissed, 459 U.S. 1025 (1982).}
\item \textsuperscript{267} 653 F.2d 450 (10th Cir. 1981), \textit{modified sub. nom.} Beth Israel Hosp. & Geriatric Center, 688 F.2d 697 (10th Cir.) (en banc), \textit{cert. dismissed}, 459 U.S. 1025 (1982).
\item \textsuperscript{268} \textit{Id.} at 457-58.
\item \textsuperscript{269} \textit{Id.} at 457 n.6.
\item \textsuperscript{270} \textit{Id.} at 458 n.6.
\item \textsuperscript{271} \textit{See, e.g.}, St. Anthony Hosp. Systems, Inc. v. NLRB, 884 F.2d 518 (10th Cir. 1989);
\end{itemize}
By 1982, the Board faced constant criticism from the courts of appeals, which repeatedly denied enforcement of Board bargaining orders, particularly with units of registered nurses and skilled maintenance employees. The Second, Third, Fourth, and Seventh Circuits criticized the Board's approach but conceded that "community of interests" criteria could be used. This "community of interests" approach, however, needed to accommodate the public interest in preventing unit proliferation. Further, these circuits wanted the Board to demonstrate, and not merely recite, how its decision was consistent with the "congressional admonition." A split had emerged within the circuits, however, as the Ninth and Tenth Circuits were demanding that the Board apply a new legal standard, the "disparity of interests" test. Aware of court criticism, the Board soon revised its approach for determining appropriate bargaining units in the health care industry.

E. The NLRB Responds to the Courts: The St. Francis Trilogy

1. St. Francis I

The Board fully addressed court criticism and the different approaches to health care unit decisions in *St. Francis Hospital* ("St. Francis I"). In *St. Francis I*, the Board reviewed a petition seeking a separate unit of skilled maintenance employees. The Board acknowledged criticism from the courts of appeals, yet stressed that the legislative history did not suggest any congressional expectation that the Board abandon the "community of interests" test. After reviewing the legislative history and its prior decisions, the Board concluded that it did not merely apply traditional "community of interest" criteria. Instead, the Board claimed that it adhered to the "congressional admonition" against unit proliferation.

Similar to its reasons for sustaining the "community of interests" test, the
Board rejected the argument that there was any legislative intent to compel the “disparity of interests” test adopted by the Ninth and Tenth Circuits.\footnote{281} Claiming this test was not consistent with the Board’s historical approach to unit determinations, the Board characterized the “disparity of interests” test as one that would limit it to finding only two appropriate bargaining units: professionals and nonprofessionals.\footnote{282}

After rejecting the standards advanced by the Ninth and Tenth Circuits, the Board announced a new two-tiered test for unit decisions in the health care industry.\footnote{283} The Board identified seven potentially appropriate units: physicians, registered nurses, other professional employees, technical employees, business office clerical employees, service and maintenance employees, and maintenance employees.\footnote{284} If a petition requested a unit that did not fall within one of those groupings, the Board would, absent extraordinary circumstances, dismiss the petition.\footnote{285} Where the requested unit fits within one of the seven groupings, the Board would apply its traditional “community of interests” test to determine whether the unit was appropriate.\footnote{286} The Board concluded that this approach better implemented the congressional intent to prevent bargaining unit proliferation.\footnote{287} The “community of interests” test consisted of two steps: first, a preliminary screening step, and then, application of the “community of interests” criteria.\footnote{288} Applying its new test to the specific facts, the Board approved a unit of skilled maintenance employees.\footnote{289}

This decision evoked strong dissents.\footnote{290} The dissenters asserted that a “disparity of interests” standard results in fewer units, and thus, better implements the “congressional admonition” against proliferation.\footnote{291} Their approach created a presumption in favor of two “wall-to-wall” units: professionals and nonprofessionals. Any other units were appropriate only if the employees seeking the proposed unit had such “a notable disparity of interests from employees in the larger unit” that placement in that unit prohibited adequate representation.\footnote{292}

\begin{footnotes}
\item[281] Id. at 1030.
\item[282] Id. In rejecting the “disparity of interests” standard, the Board stated that “had Congress intended to work such a radical departure in Board unit determinations, we hardly think it likely that it would have relegated its instructions to a few ambiguous statements in the legislative history.” Id. at 1030-31.
\item[283] Id. at 1029.
\item[284] Id. at 1029, 1031-32. The Board neglected to mention guards in its formulation of the two-tiered test, presumably because guards are entitled to a separate unit under the Act. See 29 U.S.C. § 159(b)(3) (1988).
\item[285] St. Francis Hosp. (“St. Francis I”), 265 N.L.R.B. 1025, 1032 (1982).
\item[286] Id. at 1029, 1031-32.
\item[287] Id. at 1032-33.
\item[288] Id.
\item[289] Id. at 1034.
\item[290] Id. (Van de Water, Chairman, dissenting); id. at 1042 (Hunter, Member, dissenting).
\item[291] Id. at 1040 (Van de Water, Chairman, dissenting); id. at 1046-47 (Hunter, Member, dissenting).
\item[292] Id. at 1040 (Van de Water, Chairman, dissenting); id. at 1047 (Hunter, Member, dissent-
Shortly after St. Francis I was decided, the courts of appeals began rendering decisions more favorable to the Board. The Second, Eighth, and Eleventh Circuits enforced Board bargaining orders and sharply criticized the “disparity of interests” test adopted by the Ninth and Tenth Circuits. The Second Circuit enforced a Board bargaining order with a unit of service and maintenance employees. Rejecting the “rigid ‘disparity of interests’ test” because that test would unduly hamper employees in their abilities to organize, the court found no legislative mandate “requir[ing] the Board to begin its consideration of the appropriateness of a unit with a presumption in favor of wall-to-wall units.” Meanwhile, the Eighth Circuit specifically declined to adopt the “disparity of interests” test when it enforced a Board bargaining order with a unit of technical employees. The Eleventh Circuit also rejected the test and enforced a Board bargaining order with a unit of registered nurses. During this period of change by the courts, the composition of the Board also began to change. New members influenced Board determinations of appropriate health care bargaining units.

293. See NLRB v. Walker County Medical Center, Inc., 722 F.2d 1535, 1539 n.4 (11th Cir.), rehe’g denied, 726 F.2d 755 (11th Cir. 1984); Watonwan Memorial Hosp., Inc. v. NLRB, 711 F.2d 848, 850 (8th Cir. 1983); Trustees of Masonic Hall & Asylum Food v. NLRB, 699 F.2d 626, 641-42 (2d Cir. 1983).

294. Trustees of Masonic Hall & Asylum Food v. NLRB, 699 F.2d 626 (2d Cir. 1983).

295. Id. at 640-42. The Second Circuit was sharply critical of the “disparity of interests” test and characterized it as “taken from the language, if not the thought of Senator Williams.” Id.

296. Id.

297. Watonwan Memorial Hosp., 711 F.2d at 848.

298. NLRB v. Walker County Medical Center, Inc., 722 F.2d 1535, 1539 n.4 (11th Cir. 1984). The Seventh Circuit also enforced a Board bargaining order involving LPNs in a nursing home but did not adopt or reject the “disparity of interests” test. NLRB v. Res-Care, Inc., 705 F.2d 1461, 1472 (7th Cir. 1983).

299. St. Francis I was decided by a full Board, Chairman Van de Water and Members Fanning, Hunter, Jenkins, and Zimmerman. The majority consisted of Members Fanning, Jenkins, and Zimmerman, all appointed by President Carter. See Gregory, supra note 28, at 41. The dissenters, Chairman Van de Water and Member Hunter were then recent appointees of President Reagan. The change of a single vote could result in a reversal of St. Francis I. For a discussion of the impact of changes in Board membership on Board law, see supra notes 193-96 and accompanying text.
2. St. Francis II

The NLRB abandoned the standard developed in *St. Francis I* less than two years after it was adopted and before it was reviewed by the court of appeals. In *St. Francis Hospital* ("St. Francis II"), the NLRB vacated its earlier decision and adopted the "disparity of interests" standard. The Board reasoned that this standard better implemented its statutory obligations and the "congressional admonition" to prevent proliferation. In adopting the "disparity of interests" standard, the Board rejected the two-tiered test because it was "contrary to the intent of Congress." This new standard required "sharper than usual differences (or 'disparities') between the wages, hours, and working conditions, etc., of the requested employees and those in an overall professional or nonprofessional unit." According to this Board, the "disparity of interest" standard did not translate into a per se rule of only two appropriate units of professionals and nonprofessionals. Instead, the Board suggested that the standard judged each petition individually.

Board Member Dennis, concurring, supported the "disparity of interests" test. Dennis suggested that the test might yield four units in large diversified health care institutions: professionals, technical employees, office clerical employees, and service and maintenance employees. Dennis claimed, however, the test only created two units in smaller facilities: professionals and nonprofessionals.

In his dissent, Board Member Zimmerman criticized the Board for failing to state explicitly what factors, if any, might account for "sharper disparities of interests." Responding to the majority's assertion that they were not creating a two-unit standard, Zimmerman criticized the Board for not revealing what employers, unions, and employees "need most to know: what number and kind of bargaining units will generally be found appropriate." He found little basis in the legislative history to support a "disparity of interests" standard,
and claimed the standard was a "gross and unnecessary overreaction" to judicial criticism.\textsuperscript{312} Asserting that the lack of certainty regarding appropriate units had "paralyzed" the Board's representation decisions, the dissent urged the Board to end the debate over the proper legal standard for bargaining units.\textsuperscript{313} Instead of constantly debating the issue, Zimmerman suggested that the Board should either seek Supreme Court review or invoke its rulemaking powers to establish appropriate bargaining units.\textsuperscript{314} Zimmerman gained support for his rulemaking suggestion from Member Dennis, who agreed that the "disparity of interests" standard did not provide the industry with sufficient guidelines, despite her general support for this standard.\textsuperscript{315}

The range of choices available to health care employees seeking to organize smaller units diminished soon after \textit{St. Francis II}. The NLRB reversed earlier decisions of the regional directors that found units of registered nurses appropriate. In these cases, the Board indicated that the only appropriate unit consisted solely of professionals.\textsuperscript{316} The "disparity of interests" test also affected the organization of nonprofessional employees. This impact was caused by the Board's refusal to find a unit of skilled maintenance employees appropriate. In addition to the rejection of this unit, the Board required business clerical employees to be placed in a unit with service, maintenance, and technical employees.\textsuperscript{317}

Nonetheless, the "disparity of interests" test was soon challenged in the United States Court of Appeals for the District of Columbia Circuit.\textsuperscript{318} In \textit{International Brotherhood of Electrical Workers, Local 474 v. NLRB},\textsuperscript{319} the

\textsuperscript{312} Id. at 958.
\textsuperscript{313} Id. at 955.
\textsuperscript{314} Id. at 955, 958.
\textsuperscript{315} Id. at 954-55 (Dennis, Member, concurring). \textit{St. Francis II} attracted commentary. See \textit{Annual Survey of Labor Law: A Second Decade of Health Care Bargaining Unit Litigation: St. Francis II}, 27 B.C.L. REV. 53, 58 (1985) (stating that the NLRB overreacted to criticism from the courts of appeals and should have adopted a balancing approach). \textit{But see} Dyleski-Miller, \textit{Professional Unions in the Health Care Industry: The Impact of St. Francis II and North Shore Hosp.}, 17 LOY. U. CHI. L.J. 383, 420-21 (1986) (approving "disparity of interests" test and urging the Board to apply it strictly to prevent proliferation).
\textsuperscript{316} See Middletown Hosp. Ass'n, 282 N.L.R.B. 541, 541 (1986) (holding that a unit of registered nurses is not appropriate under the "disparity of interests" test; an appropriate unit is one consisting of all professionals); North Arundel Hosp. Ass'n, 279 N.L.R.B. 311, 312 (1986); Keokuk Area Hosp., 278 N.L.R.B. 242, 242 (1986).
\textsuperscript{317} See, e.g., Baker Hosp., 279 N.L.R.B. 308, 310 (1986) (holding that business office clerical employees do not possess sufficient disparity of interests to be excluded from the service, maintenance and technical employee unit); Community Hosp. at Glen Cove, 278 N.L.R.B. 80, 80 (1986) (holding that a separate unit of skilled maintenance employees is not appropriate under the "disparity of interests" test); St. Luke's Memorial Hosp., 274 N.L.R.B. 1431, 1431 (1985) (holding that a separate unit of LPNs is not appropriate under the "disparity of interests" test); cf. Southern Md. Hosp. Center, 274 N.L.R.B. 1470, 1470 (1985) (holding that technical employees possess sufficient disparity of interests to warrant a separate unit).
\textsuperscript{318} International Bhd. of Elec. Workers, Local 474 v. NLRB, 814 F.2d 697 (D.C. Cir. 1987).
\textsuperscript{319} Id.
D.C. Circuit reversed *St. Francis II* and remanded the case to the Board. The court claimed *St. Francis II* was motivated by an erroneous belief that the legislative history containing the "congressional admonition" mandated a "disparity of interests" test. To the contrary, the court suggested that as a result of Congress' failure to modify section 9(b) of the Act, the Legislature "implicitly approved the Board's forty-year construction of section 9 to embody community-of-interest criteria." The court also minimized the weight of the "congressional admonition," noting that committee reports "cannot serve as an independent statutory source having the force of law." Judge Buckley, concurring, attached no significance to the committee reports and declared the admonition "a legal nullity." In remanding the case to the Board, the D.C. Circuit expressed no opinion on whether the Board was authorized to adopt a "disparity of interests" test at its discretion. The court, however, decided that the Board could not adopt the test based on the legislative history alone.

3. *St. Francis III*

On remand, the NLRB again adopted the "disparity of interests" test in *St. Francis Hospital* ("*St. Francis III*"). While acknowledging the D.C. Circuit's criticisms, the NLRB asserted that it did not imply that the "disparity of interests" test was mandated by the legislative history of the Health Care Amendments. In response to the D.C. Circuit's criticisms, the Board, referring to section 9(b) of the NLRA, carefully pointed out that adopting the "disparity of interests" test was within its discretion. The Board asserted

320. *Id.* at 715.
321. *Id.* at 708, 715. The Board objected to this characterization of *St. Francis II*. "The Board did not say, or intend to say, that anything in the 1974 amendments or their legislative history mandates the adoption of a 'disparity of interests' standard." *St. Vincent Hosp.*, 285 N.L.R.B. 365, 367 (1987) (emphasis in original); accord *The D.C. Circuit Review: The D.C. Circuit Struggles with Standards of Reviewability*, 56 Geo. Wash. L. Rev. 960, 965 (1988) (stating that the court misinterpreted the NLRB's "construction of ... congressional admonition as mandating ... disparity of interests standard").
322. *International Bhd. of Elec. Workers*, 814 F.2d at 711.
323. *Id.* at 712 (footnote omitted) (emphasis in original).
324. *Id.* at 718 (Buckley, J., concurring).
326. *Id.* at 715. Three months later, the Third Circuit joined the D.C., Second, Eighth, and Eleventh Circuits by declining to adopt the "disparity of interests" test. *St. John's Gen. Hosp.* v. NLRB, 825 F.2d 740, 744 (3d Cir. 1987). Nonetheless, the Third Circuit noted that all of the circuits except the D.C. Circuit had concluded that the Board must consider the "congressional admonition" in making its unit determinations. *Id.* at 743. The court concluded that the NLRB had given sufficient weight to the "admonition" and enforced the Board's bargaining order. *Id.* at 746.
329. *Id.* at 1306.
that its use of the test was not based solely on the legislative history of the Health Care Amendments, nor did this legislative history mandate the use of this test.\textsuperscript{330} Attracting the attention of organized labor and the health care industry employers, \textit{St. Francis III} demonstrated the NLRB's intention to use rulemaking as a method of determining appropriate collective bargaining units for the health care industry.\textsuperscript{331}

II. THE NLRB ADOPTS RULEMAKING

The NLRB derives its powers from the NLRA.\textsuperscript{332} This statute empowers the Board to adjudicate labor disputes arising under the Act, and promulgate rules and regulations\textsuperscript{333} subject to the Administrative Procedure Act ("APA").\textsuperscript{334} Although section 6 of the NLRA\textsuperscript{335} explicitly authorizes the Board to issue and use substantive rules, the "choice . . . between proceeding by general rule or by individual, \textit{ad hoc} litigation is one that lies primarily in the informed discretion of the administrative agency."\textsuperscript{336}

Section 553 of the APA\textsuperscript{337} establishes the procedures for administrative agencies to use in order to engage in "notice-and-comment" rulemaking.\textsuperscript{338} In notice-and-comment rulemaking, an agency announces its intent to promulgate a new rule and invites public comment before it issues the final rule.\textsuperscript{339} Such rules, sometimes known as "legislative rules," are rules issued by an agency pursuant to an express or implied grant of authority. These rules have

\textsuperscript{330} Id.

\textsuperscript{331} See \textit{id.} at 1306 n.26. The Board initially announced its decision to embark on rulemaking by publishing a notice of proposed rulemaking in the Federal Register and referred to that decision in a case decided only two months before \textit{St. Francis III}. See \textit{St. Vincent Hosp.}, 285 N.L.R.B. 365, 365 (1987) (citing \textit{Collective-Bargaining Units in the Health Care Industry}, 52 Fed. Reg. 25,142 (1987) (codified at 29 C.F.R. \S\ 103)). The Board's decision to engage in rulemaking has been approved by several commentators. See, e.g., \textit{Koziara & Schwartz, Unit Determination Standards—The NLRB Tries Rulemaking}, 14 EMP. REL. L.J. 75, 91 (1988) (approving the Board's decision to try rulemaking and urging an end to the debate over proper bargaining units in the health care industry); \textit{Sharo, Appropriate Bargaining Units in the Health Care Industry}, 5 LAB. L\textsc{aw.} 787, 815 (approving the Board's use of rulemaking and the units established by the Rule).

\textsuperscript{332} 29 U.S.C. \S\S\ 141-166 (1988).

\textsuperscript{333} \textit{id.} \S\ 156.

\textsuperscript{334} 5 U.S.C. \S\S\ 551-559, 701, 706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1988).

\textsuperscript{335} 29 U.S.C. \S\ 156 (1988). This section provides in relevant part that, "the Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of the Act." \textit{id.}


\textsuperscript{337} 5 U.S.C. \S\ 553 (1988).

\textsuperscript{338} \textit{id.}

\textsuperscript{339} The APA states that "'rule' means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. \S\ 551(4) (1988). The APA defines "rule making" as the "agency process for formulating, amending, or repealing a rule." \textit{id.} \S\ 551(5).
the binding force of law and may only be applied prospectively.

The debate between rulemaking and adjudication in formulating agency policy has elicited proponents in favor of each approach. Proponents of rulemaking stress the following advantages of this method of development of agency policy: the process allows "participation by all affected parties", rules "apply prospectively" rather than retrospectively, rules provide "uniformity", and rules present an opportunity for parties to engage in "politicicking" to shape the regulations that will affect them. Advocates of adjudication, however, stress that the adjudication process is more flexible than rulemaking, allows the agency to make case-specific decisions, and allows agencies to respond quickly to "new and unexpected" situations.

Despite its explicit authority to promulgate rules, the NLRB rarely invoked its rulemaking powers, choosing instead to develop substantive rules through case-by-case adjudications. The Board resisted rulemaking primarily because it has viewed the rulemaking process as cumbersome. In contrast, case-by-case adjudication allowed speed and flexibility in responding to constantly changing industrial practices. In recent years, several commentators have urged the Board to make use of its rulemaking powers. One chief advantage of rulemaking is the opportunity for parties to obtain information and participate in the development of legal rules and regulations affecting them.

342. The APA states that "'adjudication' means agency process for the formulation of an order." 5 U.S.C. § 551(7) (1988). "'[O]rder' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." Id. § 551(6). Section 554 of the APA describes the procedures and provisions of adjudications. Id. § 554.
343. See Bonfield & Asimow, supra note 340, at 258-60 (comparing advantages and disadvantages of rulemaking and adjudication).
344. Id. at 259-60; see also Gregory, supra note 28, at 42-46 (urging that the NLRB resist efforts to use rulemaking and continue to use adjudication to develop labor law and policy).
345. See Estreicher, supra note 28, at 179 (stating that the Board has accumulated fifty years of experience making decisional law); Subrin, Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units, 32 Lab. L.J. 105, 111-12 (1981) (stating that the Board has resisted rulemaking in favor of adjudication). The NLRB has, however, established statements of procedure and procedural rules and regulations. See 29 C.F.R. §§ 101, 102 (1989). The Board has also exercised its rulemaking power to establish jurisdictional standards for colleges and universities and the horse racing and dog racing industries. 29 C.F.R. §§ 103.1, 103.3 (1989).
346. Subrin, supra note 345, at 111.
347. Id. at 111-12.
348. See, e.g., Estreicher, supra note 28, at 170 n.29 (stating that rulemaking is particularly well suited for dealing with reversals in agency action and citing commentators who enthusiastically endorse rulemaking); Morris, The NLRB in the Dog House: Can an Old Board Learn New Tricks?, 24 San Diego L. Rev. 9, 27, 41 (1987) (rulemaking "is probably the most important thing the Board can do to . . . advise . . . people who need to know . . . what the law requires" of them). Judges have also suggested that the NLRB might be entitled to more deference if it
Those commentators particularly encouraged the Board to use its rulemaking powers to determine appropriate collective bargaining units.\textsuperscript{349} On July 2, 1987, the NLRB broke with its long-standing history of developing substantive rules solely through adjudication. The Board published a notice of proposed rulemaking for determining collective bargaining units in the health care industry.\textsuperscript{350} The Board supported its decision to engage in rulemaking with both the section 6 grant of rulemaking power, and its discretion in choosing to proceed through either adjudication or rulemaking.\textsuperscript{351} After reviewing its years of experience in the health care industry, the Board stated that none of the tests it implemented in making unit decisions enjoyed widespread judicial acceptance.\textsuperscript{352} The Board recognized that employers, unions, and employees needed clearer guidance,\textsuperscript{353} and therefore, it proposed rulemaking as a more effective vehicle to make unit decisions.\textsuperscript{354} The Board asserted that rulemaking proceedings often provided empirical evidence about the incidence of strikes, sympathy strikes, jurisdictional disputes, and wage competition among health care employees.\textsuperscript{355} These employee tactics motivated the "congressional admonition" against unit proliferation.\textsuperscript{356} The evidence also resulted in more informed Board judgments.\textsuperscript{357} The Board stressed that case-by-case adjudication proved to be costly, laborious, and repetitive, while employees continued to fall into fairly predictable groupings.\textsuperscript{358}

The NLRB proposed six collective bargaining units for large acute care hospitals: (1) registered nurses; (2) physicians; (3) all professionals excluding registered nurses; (4) technical employees; (5) service, maintenance, and clerical employees; and (6) guards.\textsuperscript{359} It proposed only four units for small acute care hospitals. See Continental Web Press Inc. v. NLRB, 742 F.2d 1087, 1093-94 (7th Cir. 1984) (Posner, J.); NLRB v. Majestic Weaving Co., 355 F.2d 854, 859-61 (2d Cir. 1966) (Friendly, J.).

\textsuperscript{349} K. Davis, Administrative Law Text 145 (1972); Koziara & Schwartz, supra note 331, at 83-84; Morris, supra note 348, at 41; Subrin, supra note 345, at 107-09. Two commentators have noted that in 1978 Congress considered requiring the Board to invoke its rulemaking power for bargaining units. Koziara & Schwartz, supra note 331, at 83-84 (citing S. REP. NO. 628, 95th Cong., 2d Sess. 18-20 (1978)).


\textsuperscript{351} NLRB Proposes Rulemaking on Bargaining Units for Health Care Facilities, 4 Lab. L. Rep. (CCH) ¶ 9342, 19,178, 19,182-83 (July 24, 1987) (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)). The NLRB acknowledged this was a new endeavor for the Board, but that several state labor agencies had engaged in rulemaking to determine appropriate collective bargaining units in public employment. Id. at 19,185 n.39 (referring to rulemaking by Florida and Massachusetts labor agencies).

\textsuperscript{352} Id. at 19,179-81.

\textsuperscript{353} Id. at 19,179.

\textsuperscript{354} Id. at 19,181-82.

\textsuperscript{355} Id. at 19,181.

\textsuperscript{356} Id.

\textsuperscript{357} Id.

\textsuperscript{358} Id. at 19,182.

\textsuperscript{359} Id. at 19,187-89.
hospitals and nursing homes: (1) all professional employees, (2) all technical employees, (3) all service, maintenance, and clerical employees, and (4) all guards.\textsuperscript{360} Although stressing that it had a "completely open mind," the NLRB proposed these units based on its adjudication experience.\textsuperscript{363} The Board, however, invited response and comment to these proposals.\textsuperscript{362}

Overwhelmed with responses from both organized labor and the health care industry, the NLRB extended the notice and comment period three times. The hospital industry overwhelmingly opposed the rules while organized labor strongly favored their adoption.\textsuperscript{365} The NLRB issued a second notice of proposed rulemaking on September 1, 1988.\textsuperscript{364} The Board abandoned the distinction between large and small acute care hospitals and removed nursing homes and psychiatric care hospitals from the scope of the rule.\textsuperscript{366} The NLRB proposed a total of eight appropriate units, adding separate units for both business clerical employees and skilled maintenance employees.\textsuperscript{366} The Board stated these would be the only appropriate units. Although the Board created an "extraordinary circumstances" exception, it stressed that it construed the exception narrowly, so as to avoid creating a "loophole" for unnecessary litigation.\textsuperscript{367} The NLRB examined the evidence in the rulemaking record regarding the incidence of strikes, jurisdictional disputes, and wage competition, such as whipsawing and leap-frogging, in order to discern whether they had arisen in the proposed units.\textsuperscript{368} The Board found that the incidence of strikes in the industry was low, and jurisdictional disputes and wage competition rarely occurred.\textsuperscript{369} This low incidence of strikes, disputes, and competition was apparently the result of separate labor markets for physicians, registered nurses, technical employees, clerical employees, and skilled maintenance employees. The Board concluded that these units were appropriate and did not encourage the adverse effects that Congress had associated with proliferation.\textsuperscript{370}

\textsuperscript{360} Id. at 19,189.
\textsuperscript{361} Id. at 19,186.
\textsuperscript{362} Id.
\textsuperscript{363} In a rare instance of agreement both the hospital industry and labor organizations opposed the one hundred bed distinction. Collective-Bargaining Units in the Health Care Industry, 53 Fed. Reg. 33,900, 33,927 (codified at 29 C.F.R. pt. 103) (proposed Sept. 1, 1988).
\textsuperscript{364} Id. at 33,900-35 (1988) (codified at 29 C.F.R. § 103.30) (proposed Sept. 1, 1988).
\textsuperscript{365} Id. at 33,934. The hospital industry and the unions both opposed the one hundred bed distinction, claiming that bed size had little bearing on the appropriate unit issue in various hospitals. Nursing homes and psychiatric hospitals were dropped from the scope of the rule. Id. at 33,927.
\textsuperscript{366} Id. at 33,934. The eighth unit consisted of all nonprofessional employees excluding technical employees, skilled maintenance employees, business office clerical employees, and guards. Id.
\textsuperscript{367} Id. at 33,932. The Board designated eight appropriate collective bargaining units: (1) registered nurses, (2) physicians, (3) all professional employees excluding physicians and registered nurses, (4) technical employees, (5) skilled maintenance employees, (6) business office clerical employees, (7) guards, and (8) all nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards. Id. at 33,934.
\textsuperscript{368} Id. at 33,911-27.
\textsuperscript{369} Id. at 33,908-09.
\textsuperscript{370} Id. at 39,333-34. The Board examined the record and concluded that the incidence of
Seven months later, the NLRB issued its Final Rule ("the Rule"). The strikes in the industry was low, that there was little correlation with the number of bargaining units in health care facilities and the incidence of strikes, that strikes tended to occur more frequently in larger units than in smaller units, and that "strikes in broader units have the greatest impact on health care." Id. at 33,909.

Member Johansen dissented from the decision to engage in rulemaking, preferring to submit the unit proliferation issues to the Supreme Court for resolution. Id. at 33,934-35.

371. The Code of Federal Regulations sets forth appropriate bargaining units in the health care industry:

(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:

(1) All registered nurses.
(2) All physicians.
(3) All professionals except for registered nurses and physicians.
(4) All technical employees.
(5) All skilled maintenance employees.
(6) All business office clerical employees.
(7) All guards.
(8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards. Provided That a unit of five or fewer employees shall constitute an extraordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.

(c) Where there are existing nonconforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

(d) The Board will approve consent agreements providing for elections in accordance with paragraph (a) of this section, but nothing shall preclude regional directors from approving stipulations not in accordance with paragraph (a), as long as the stipulations are otherwise acceptable.

(e) This rule will apply to all cases decided on or after May 22, 1989.

(f) For purposes of this rule, the term:

(1) "Hospital" is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(e), as revised 1988);

(2) "Acute care hospital" is defined as: either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term "acute care hospital" shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is an acute care hospital.
Board stated that the language of the Act did not preclude the Board from promulgating rules to determine collective bargaining units.\textsuperscript{372} The Board maintained that its Rule was entirely consistent with section 9(b) of the Act, despite that section's requirement that the Board determine an appropriate unit in each case.\textsuperscript{373} When parties cannot agree on an appropriate unit, the Board directs a hearing and "ultimately render[s] a decision of the appropriate unit applicable to that particular petition and that particular employer's operation."\textsuperscript{374} Although the Rule established clear guidelines for employers, unions, and employees as to what kinds of units are appropriate, the Board rejected the suggestion to adopt rebuttable presumptions instead.\textsuperscript{375}

The final Rule designated eight units as "the only appropriate units," for acute care hospitals:\textsuperscript{376} (1) physicians, (2) registered nurses, (3) all other professionals excluding physicians and registered nurses, (4) technical employees, (5) skilled maintenance employees, (6) business clerical employees, (7) guards, and (8) all nonprofessional employees excluding technical employees, skilled maintenance employees, business office clerical employees, and guards.\textsuperscript{377} In addition to these units, the Rule provides that various combinations of the proposed units may be appropriate if petitioned for by labor organizations.\textsuperscript{378} The Board announced that any unit consisting of five or fewer employees automatically triggers the "extraordinary circumstances" exception, which requires the Board to decide the appropriate unit through adjudication.\textsuperscript{379} Finally, the Board excluded nursing homes, psychiatric hospitals, and rehabilitation hosp-

\begin{itemize}
\item (3) "Psychiatric hospital" is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(f)).
\item (4) The term "rehabilitation hospital" includes and is limited to all hospitals accredited as such by either Joint Committee on Accreditation of Healthcare Organizations or by Commission for Accreditation of Rehabilitation Facilities.
\item (5) A "non-conforming unit" is defined as a unit other than those described in paragraphs (a)(1) through (8) of this section or a combination among those eight units.
\item (6) Appropriate units in all other health care facilities: The Board will determine appropriate units in other healthcare facilities, as defined in section 2(14) of the National Labor Relations Act, as amended, by adjudication.
\end{itemize}

\textsuperscript{29} C.F.R. 103.30 (1989).
\textsuperscript{373} Id.
\textsuperscript{374} Id. The Board insisted that it could rely upon the Rule, developed through APA rulemaking, just as it had relied upon rules developed in common law fashion through adjudications. Id.
\textsuperscript{375} Id.
\textsuperscript{376} For the statutory definitions of "hospital" and "acute care hospital," see supra note 371.
\textsuperscript{377} 29 C.F.R. § 103.30(a) (1989).
\textsuperscript{378} Id.
\textsuperscript{379} Id. § 103.30(a), (b). The Board also announced that where there are existing nonconforming units it would make decisions on petitions for units embraced in the Rule insofar as it was practicable. Id. § 103.30(a), (c).
On April 21, 1989, the NLRB completed its first effort at substantive rulemaking. The remaining issue facing the Board was whether the hospital industry would accept the Rule or mount a legal challenge.

III. The American Hospital Association v. NLRB Decision

The NLRB waited only hours for an answer. On April 21, 1989, the American Hospital Association ("AHA") filed a complaint in the United States District Court for the Northern District of Illinois seeking preliminary and permanent injunctions against enforcement of the Rule. The AHA proposed three arguments in favor of enjoining the Rule. First, the AHA argued that the Rule violated section 9(b) of the NLRA which states that bargaining unit decisions must be made "in each case." Second, the AHA argued that the Rule violated a statutory mandate that the NLRB prevent proliferation of bargaining units in the health care industry. Third, the AHA argued that the Rule was "arbitrary and capricious." On May 22, 1989 the court issued a preliminary injunction against the Rule. On July 25, 1989 the court addressed the merits and entered a permanent injunction.

The district court began its analysis of the arguments with the language of the Act. The court decided the language of section 9(b), which authorizes the Board to make unit determinations "in each case," and section 6, which gives the Board rulemaking powers, did not give a "definite answer" to the

380. Id. § 103.30(f)(2).
381. Id. § 103.30(e). The Board announced that the Rule would be applied prospectively to any cases decided on or after May 22, 1989. Id.
384. Id.
385. Id.
386. Id. The NLRB moved to dismiss the complaint for lack of subject matter jurisdiction urging that the court of appeals was the proper forum. The court denied the Board's motion because the complaint did not challenge a representational issue under the Rule, but the Board's authority to make the Rule. Id. (citing American Medical Ass'n v. Weinberger, 395 F. Supp. 515, (N.D. Ill.), aff'd, 522 F.2d 921 (7th Cir. 1975)).
387. Id. at 716.
388. Id. at 711.
389. Id.
Board's authority to issue the Rule. Accordingly, the court turned to the legislative history of the NLRA to determine Congress' purposes in enacting section 9(b).

The court examined the legislative history and found strong indicia of congressional intent that the NLRB would make individualized unit determinations. The court rejected the Board's assertion that the "in each case" language was just an amendment added for the "sake of clarity," and declined to accept a construction of the statute which would render the language "superfluous." Furthermore, the court suggested that the phrase should not be read in isolation from the rest of the Act. The court found it more "plausible" that case-by-case determinations would better implement the directive of section 9(b) to assure employees their "fullest freedom" in exercising their rights to organize and bargain collectively under the Act.

Despite these findings, the court did not find the Rule invalid under section 9(b). Indeed, the court observed that individualized unit determinations were not "necessarily inconsistent" with the Board's rulemaking powers under section 6. The court decided to leave the issue of whether section 9(b) limited the scope of the Board's rulemaking powers generally, and turned to the AHA's second argument, that the Rule violated the "congressional admonition" against unit proliferation in the health care industry.

The court reviewed the legislative history surrounding unit proliferation and observed that several courts of appeals had questioned how much weight the

390. Id.
391. Id. at 712. The following passage was particularly relevant: "Section 9(b) provides that the Board shall determine . . . the unit appropriate for the purposes of collective bargaining. . . . This matter is obviously one for determination in each individual case, and the only possible workable arrangement is to authorize the impartial governmental agency, the Board, to make that determination." Id. (quoting H.R. Rep. No. 969, 74th Cong., 1st Sess. (1935), reprinted in II Legislative History of the National Labor Relations Act pt. 1, at 2930 (1935)) (emphasis added by the court).
392. Id. at 712. The original texts of the House and Senate bills did not contain the "in each case" language presently found in § 9(b). Id. at 711. The final version of the Act contained the "in each case" language. The Board tried to place that language in context. The Board relied on the remark by Secretary of Labor Perkins that the amendment was for the "sake of clarity" by suggesting that in context, the language was added only to emphasize that the task of making unit decisions belongs to the Board, not employers or unions. Id. at 712. The court rejected the Board's argument and discounted the value of Perkins' statement because "no significance is to be accorded statements made by nonmembers in a Congressional hearing." Id. (citing Kelly v. Robinson, 479 U.S. 36, 51 n.13 (1986)).
393. Id. The court declined to accept the Board's suggestion that the "in each case" language was simply added to emphasize that the Board must make unit decisions. To accept the Board's reading of the statute would render the meaning of the words superfluous. Id. (citing Zimmerman v. North Am. Signal Co., 704 F.2d 347, 353 (7th Cir. 1983)).
394. Id.
395. Id.
396. Id. at 713.
397. Id.
The court acknowledged that the Seventh Circuit had not defined how much proliferation was "undue," but that it had treated the "admonition" as authoritative.\footnote{The court stated that the Rule mandated "automatic fragmentation" of the health care industry into eight units, without considering the impact of such a rule on particular institutions.\footnote{Moreover, the court suggested that the Rule could, perhaps, coerce workers to organize into the units permitted by the Rule.\footnote{The court reasoned that in order to comply with the "congressional admonition," the Board "must use the means least likely to cause unit proliferation," and that this Rule did not prevent "undue proliferation."\footnote{The court rejected an argument offered by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), participating as amicus curiae.\footnote{The AFL-CIO stressed that the "admonition" should be analyzed as only one of the factors the Board is required to use in making unit determinations.\footnote{The court conceded that the AFL-CIO argument was "compelling," but rejected the invitation to balance the proliferation concerns with section 9(b)'s directive to assure employees their "fullest freedom" to exercise their rights under the Act.\footnote{The court concluded that the AHA had prevailed on the merits, and that the unique concerns of the health care industry warranted a permanent injunction.}}}}}}
IV. Analysis

The American Hospital Association decision prevents the Board from using its most recent and innovative method of determining appropriate collective bargaining units within the health care industry. The court should have upheld the Rule and denied the AHA's request for a permanent injunction for the following two reasons: (1) the Board's authority to use rulemaking is consistent with the "in each case" language of section 9(b) of the Act; and (2) the Rule strikes a proper balance between the statutory requirement to assure employees their "fullest freedom" to organize for collective bargaining purposes and Congress's intent that the Board should strive to prevent bargaining unit proliferation.410

A. The Scope of the Board's Rulemaking Powers

The American Hospital Association court did not decide the issue of whether the "in each case" language of section 9(b) precludes the Board from using its rulemaking authority to determine appropriate collective bargaining units.411 The court decided the case on the basis of the "congressional admonition."412 The Seventh Circuit, however, will need to decide whether the Board acted within its statutory authority in order to ascertain the validity of the Rule.

The Board did not exceed its statutory authority by establishing the Rule.413
The Board's authority to make rules is firmly established by Congress's extensive grant of power in section 6. Section 6 authorizes the Board to make rules and regulations in order to carry out the provisions of the Act.\textsuperscript{414} Section 6 imposes no restrictions on the Board's rulemaking power generally, let alone with respect to determining bargaining units.\textsuperscript{415} As the Supreme Court has established, the Board may, in its discretion, choose to proceed through either rulemaking or adjudication.\textsuperscript{416} Furthermore, the Board may determine collective bargaining units rules established in conformance with the APA without running afoul of section 9(b)'s requirement that the Board make unit determinations "in each case."\textsuperscript{417}

The district court noted that section 9(b) need not preclude the Board from using rulemaking.\textsuperscript{418} The court pointed out that it defies common sense to believe that Congress would charge the Board to make unit determinations because of its experience and expertise, and then, simultaneously, require it to face each contested case \textit{ab initio}.\textsuperscript{419} All that section 9(b) requires is that the Board must make unit determinations "in each case."\textsuperscript{420} Section 9(b) neither prescribes nor prohibits the source of law for the Board to use in making those decisions.\textsuperscript{421} Accordingly, the Board retains its discretion to make unit decisions. The Board may apply rules it has developed through adjudication or through rules established in accordance with the rulemaking procedures required by the APA.\textsuperscript{422}

What the district court failed to emphasize is that the Rule, by itself, does not impose a single unit on any hospital. Hospital employees must first choose to organize.\textsuperscript{423} If hospital employees choose to organize, the Rule eliminates the confusion and uncertainty of the previously used tests by identifying eight appropriate units.\textsuperscript{424} If the hospital and the union agree to an election in one of the units established by the Rule, that is the end of the matter.\textsuperscript{425} Yet in

\textsuperscript{414} 29 U.S.C. § 156 (1988). The rules and regulations must, of course, be developed according to the procedures established by the APA. See \textit{id.}
\textsuperscript{419} \textit{id.} (emphasis in original).
\textsuperscript{420} 29 U.S.C. § 159(b) (1988).
\textsuperscript{421} \textit{id.}; see NLRB Memorandum, supra note 382, at 7.
\textsuperscript{422} NLRB Memorandum, supra note 382, at 7.
\textsuperscript{423} The NLRB does not act on its own motion in deciding representational issues. Issues must first arise through filing petitions for representation elections with the regional offices of the Board. See 53 NLRB ANN. REP. 3 (1988).
\textsuperscript{424} See \textit{NLRB Proposes Rulemaking on Bargaining Units for Health Care Facilities}, 4 Lab. L. Rep. (CCH) ¶ 9342, 19,178, 19,182 (July 2, 1987).
\textsuperscript{425} See supra note 41 and accompanying text.
circumstances where there is a dispute, the Board will conduct a hearing. Hospitals and unions may contest the application of the Rule. Hospitals may seek to avail themselves of the "extraordinary circumstances" exception, and unions may seek various combinations of the units established by the Rule "in each case." The Rule will be expected to settle the unit question on most occasions because of the employer's difficult burden of meeting the "extraordinary circumstances" exception. Therefore, hospitals, by application of the Rule, will receive the unit determinations "in each case," but they have no statutory entitlement to a unit determination solely through adjudication.

The Board, convinced of its statutory powers, turned to rulemaking due to the Board's inability to persuade the courts of appeals to accept its common law standards for unit determinations. The decision was particularly prudent because rulemaking afforded hospitals, unions, and other interested parties access to provide and receive information, as well as an opportunity to shape labor law prospectively, instead of merely reacting to the latest decision by the Board. In the course of the rulemaking proceedings, the NLRB was able to gather industry-wide information about the incidence of strikes, sympathy strikes, jurisdictional disputes, and wage competition among employees. That information enabled the Board to determine appropriate bargaining units so as to meet two objectives: (1) to assure health care employees their fullest freedom in exercising their rights to organize and bargain collec-

427. 29 C.F.R. § 103.30(a)-(d) (1989).
428. The Rule limits bargaining units to the specific units enumerated "[e]xcept in extraordinary circumstances and in circumstance in which there are existing non-conforming units . . . ." 29 C.F.R. § 103.30(a) (1989). The Rule also permits labor organizations to seek combinations of the eight units. See id.
430. Id. at 16,338 n.2. Assuming that the parties do not agree to using one of the Board's established consent procedures, they will be entitled to a hearing. Id. During the hearing the hospital may raise many questions, such as the placement of certain job classifications, supervisory or managerial status, jurisdictional requirements, or try to avail itself of the "extraordinary circumstances exception." Id. Hospitals will still be afforded their unit decision in each case. It is expected, however, that in most circumstances the Rule will be applied because individualized adjudications will be conducted only if "extraordinary circumstances" are found to exist. Id.
431. See NLRB Memorandum, supra note 382, at 11-12.
432. NLRB Proposes Rulemaking on Bargaining Units for Health Care Facilities, 4 Lab. L. Rep. (CCH) ¶ 9342, 19,178, 19,180 (July 2, 1987).
tively under the Act, and (2) to implement Congress' intent that the Board should strive to prevent a proliferation of bargaining units in the industry.

B. Reconciling Competing Objectives: Assuring Employees Freedom of Choice Yet Accommodating the "Congressional Admonition"

1. The Meaning and Effect of the "Congressional Admonition"

a. "Due consideration," not "sole consideration"

The American Hospital Association court enjoined the Board's Rule because it concluded that an eight-unit Rule violated Congress' "admonition" to the Board to prevent proliferation of bargaining units in the health care industry. The center of the court's decision lies in a flawed understanding of the "congressional admonition." The court explained that it understood the "policy" against proliferation to mean that whenever the Board makes a unit decision in the health care industry, it "must use the means least likely to cause unit proliferation." The court's analysis resembles that of the rigid "disparity of interests" test which presumes that there are only two appropriate units for health care institutions, professionals and nonprofessionals. However, nothing in the legislative history of the Health Care Amendments supports that proposition. The "admonition" does not set so high a standard; it does not direct the Board "to find the fewest possible number of health care bargaining units." To appreciate the source of the court's misunderstanding, it is necessary to examine both the text and the context of the "admonition" in order to discern what the "admonition" means and what, if anything, it requires of the Board.

The text of the "admonition" is revealing. "Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry." Former Board Member Zimmerman, dissenting in St. Francis II, remarked that "less than a hundred words of the legislative history warning against the proliferation of bargaining units have sparked a legal debate that has now raged for ten years." The American Hospital Association court's interpretation, that the Board "must use the means least likely" to
cause unit proliferation, is not faithful to the text. The court seems to have understood the “admonition” to mean that the Board must use the means least likely to avoid bargaining unit proliferation—at all costs.

The “admonition” does not require so extreme a result. In fact, it is simply a “cautionary instruction” to the Board to give “due consideration” to preventing proliferation of bargaining units, not “sole consideration,” as the court seems to suggest. The very words “due consideration” imply that the Board must evaluate other factors in addition to preventing proliferation when it determines units for the health care industry.

One factor the Board must apply in unit decisions affecting all industries, including health care, is section 9(b) of the Act. Section 9(b) requires the Board to determine appropriate units so as to “assure employees the fullest freedom” to exercise their rights to organize and bargain collectively under the Act. The Health Care Amendments left section 9(b) intact; the Amendments did not authorize the Board to disregard its 9(b) charge. Accordingly, the words “due consideration” in the committee reports suggest that the Board must balance two interests in making health care unit decisions. The Board must balance the interest of assuring employees their “fullest freedom” in organizing with Congress's intent that the Board strive to prevent bargaining unit proliferation. The court, however, rejected this suggestion, finding that preventing proliferation was more important. The text of the “admonition” does not require either interest, the employees’ “fullest freedom” or the “preventing [of] proliferation,” to be wholly subordinated to the other.

Despite the fact that the Board and the courts of appeals have balanced both interests, a small but significant number of judges and commentators have suggested that the “congressional admonition” should be given “no consideration.” They assert that the “admonition” has no legal effect, and thus, requires nothing of the Board.

445. Cf. AFL-CIO Memorandum, supra note 382, at 17 (stating that the “admonition” does not mean to prevent bargaining unit proliferation at all costs).
447. Cooper & Brent, supra note 244, at 1070 n.74; AFL-CIO Memorandum, supra note 382, at 17-19.
448. Id.; see also Stapp, supra note 292, at 71 n.65, (arguing that the admonition means the Board should balance employee organizational rights with the need to prevent proliferation, not subordinate employee rights in order to prevent proliferation).
450. Id.
454. See supra notes 243-45, 323-24 and accompanying text.
455. Mary Thompson Hosp., Inc. v NLRB, 621 F.2d 858, 864 (7th Cir. 1980) (Fairchild, J., dissenting); accord International Bhd. of Elec. Workers, Local 474 v. NLRB, 814 F.2d 697, 714.
son Hospital," stressed that the "admonition" is not helpful in interpreting the Act because section 9, which governs unit determinations, had not been changed by the Health Care Amendments. Judge Buckley, concurring in International Board of Electrical Workers, Local 474, expressed a similar view. Emphasizing that committee reports are not independent sources of statutory law, these judges stressed that it is not proper for the Board or the courts to attach legal significance to the "admonition."

b. The purpose of preventing proliferation

Despite these important criticisms, the majority of courts, and the NLRB itself, have given weight to the "admonition." Congress did not amend section 9 so as to designate appropriate units, but it did include the statement on bargaining units in the committee reports. Congress feared strikes, jurisdictional disputes, and wage competition might occur and disrupt patient care if each grouping of hospital employees were permitted to organize without any restrictions. Congress, however, did not define what kinds or how many units would result in "undue proliferation." Instead, it left the task of strik-

(D.C. Cir. 1987) (Buckley, J., concurring); cf. NLRB v. Res-Care, Inc., 705 F.2d 1461, 1470 (7th Cir. 1983) (stating that since Congress did not amend § 9(b) "maybe . . . the statement in the committee reports should be given no more weight than any other post-enactment legislation—which is not much") (Posner, J.; see also Cooper & Brent, supra note 244, at 1071 (stating that the "admonition" is purely hortatory and not legally binding upon the Board).

456. 621 F.2d 858 (7th Cir. 1980).

457. Id. at 864 (Fairchild, C.J., dissenting); accord International Bhd. of Elec. Workers, 814 F.2d at 712-13 (D.C. Cir. 1987); id. at 720 (Buckley, J., concurring).

458. See International Bhd. of Elec. Workers, 814 F.2d at 715 (Buckley, J., concurring). The "admonition," they assert, may have been crafted to serve political rather than legal purposes; perhaps the Board may be "courting a statutory change" if it does not heed their "admonition." Mary Thompson Hosp., Inc., 621 F.2d at 864 (Fairchild, C.J., dissenting); see also International Bhd. of Elec. Workers, 814 F.2d at 716 (Buckley, J., concurring) (commenting that the congressional leaders expected the Board to heed the "admonition." "not because it had the force of law but because agencies are not given to ignoring the commands of potentates who control their budgets and oversee their operations").

459. See International Bhd. of Elec. Workers, 814 F.2d at 718 (Buckley, J., concurring); Mary Thompson Hosp., 621 F.2d at 864 (Fairchild, C.J., dissenting).


462. See supra notes 227-42, 252-58, 267-72, 290-92 and accompanying text.

463. See supra notes 163-201, 259-65, 276-89, 300-09 and accompanying text.

464. See, e.g., Trustees of Masonic Hall & Asylum Foods v. NLRB, 699 F.2d 626, 632 (2d Cir. 1983) (balancing traditional community of interest factors with the public interest in preventing bargaining unit proliferation "is the legal standard by consensus of the circuits").


466. See supra notes 143-48 and accompanying text.

467. Failing to define the term "proliferation" has vexed the Board, courts, and commentators for years, with little agreement over its meaning. See Zimmerman & Dunn, supra note 207, at 10.
ing the balance between preserving employees freedom of choice in organizing and avoiding the evils it associated with a proliferation of bargaining units to the expert administrative agency, the Board.468

2. Balancing Through Rulemaking

Rulemaking was particularly well suited to making health care unit decisions. It enabled the Board to gather empirical evidence about the incidence of strikes, jurisdictional disputes, wage "leap-frogging," and "whipsawing" in multiple units.469 These very concerns prompted Congress to insert the "admonition" in the committee reports.470 Armed with that information, the Board carefully selected eight units designed to assure employees their organizational rights while avoiding the evils Congress associated with a proliferation of units in the health care industry.471 The Rule should have been upheld precisely because it addresses both of these concerns. The Rule does not focus solely on preventing proliferation; it balances the purpose behind preventing proliferation, providing citizens with safe and adequate health care, with the employees' freedom to organize.472

A continuing problem has vexed the Board, courts, and commentators since 1974. Neither Congress, the committee reports, nor the statements of individual legislators stated what kinds or how many units would constitute proliferation.473 An analysis of the Board's Rule begins with recognizing that the legislative sources cannot provide an exact answer. Therefore, it is important to keep the "admonition," the cases cited in the committee reports, proposed legislation, and the statements of individual legislators in context and to be mindful of the purposes behind preventing bargaining unit proliferation.474

Labor and management frequently disagree on what Congress meant by the term in 1974. Compare Fanning, Health Care Labor Relations, supra note 204, at 240-41 (stating that proliferation probably referred to theoretically "dozens of units") with Emmanuel, supra note 193, at 192 (stating that the Board's initial unit determinations "by any reasonable definition of the term, . . . constitute[] unit proliferation") (emphasis in original).

468. See supra notes 126-56, 158, 410, 435-36 and accompanying text.
470. See supra notes 125-56 and accompanying text. Congress' concern about proliferation must be linked to the basic premise that "health care is not storable, and is often a life-or-death matter . . . ." Cooper & Brent, supra note 244, at 1073. Despite this fact, Congress did not prohibit strikes by employees of health care institutions. Congress, however, did require increased notice for termination and modification of contracts, mandatory mediation, and ten day notice in advance of strike activity of other work stoppages at health care institutions. See 29 U.S.C. § 158(d)(A)-(C), (g) (1988).
471. See supra notes 143-48, 353-80 and accompanying text.
472. See supra note 158, 410, 435-36 and accompanying text.
473. See supra notes 127-54, 442-43 and accompanying text.
474. See Stapp, supra note 292, at 71 n.65. The author aptly observed that "hospital bargaining unit proliferation is not inherently evil if it does not result in an increased risk of patient care disruptions . . . . To blindly adhere to the congressional admonition . . . ignores the reasoning
Perhaps the most useful reference point to use in analyzing the Rule is Senator Taft's proposed bill. This bill would have permitted four bargaining units in addition to the statutory requirement that guards be placed in their own unit. Although commentators have stressed the hazards of drawing inference from congressional "inaction," Senator Taft's bill is useful because it helps to provide context in determining whether the number and types of units selected in the Board's Rule might have implicated the proliferation concerns in 1974. It is noteworthy that the Board's eight-unit Rule, on its face, would add only three more units. A total of eight units, set against a backdrop in which hospital industry representatives feared multiple units in hundreds of job classifications and complained of dealing with bargaining units in double digits, hardly seems proliferative. The next sections of this analysis will examine the professional and nonprofessional units established by the Board with reference to the historical context in which Congress wrote its "admonition."

a. Nonprofessional employees

The Board's Rule virtually mirrors Senator Taft's proposal for nonprofessional employees. The Rule provides for five units of nonprofessional employees: technical employees, business office clerical employees, skilled maintenance employees, guards, and all other nonprofessional employees. Senator Taft's bill differs in one respect; it would have combined the nonprofessional service employees and skilled maintenance employees in a single unit. Given the historical context, it strains credibility to believe that the addition of a single unit, consisting of skilled maintenance employees, should be deemed proliferative. This section will examine each of the five units with reference behind that admonition, and defeats the purpose of the Act." Id.

477. See Bumpass, supra note 111, at 882-86; King, supra note 108, at 148-49.
478. Compare 29 C.F.R. § 103.30(a) (1989) (the Rule designating eight units: (1) registered nurses; (2) physicians; (3) all professional employees except for registered nurses and physicians; (4) all technical employees; (5) all skilled maintenance employees; (6) all business office clerical employees; (7) all guards; (8) all nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees and guards) with S. 2292, 93d Cong., 1st Sess., § 9(f) (1973), reprinted in LEGIS. HIST., supra note 57, at 457-58 (designating five units: (1) professional employees; (2) technical employees; (3) clerical employees; (4) service maintenance employees; and (5) guards).
479. See supra notes 84-90 and accompanying text.
481. 29 C.F.R. § 103.30 (1989).
483. See AFL-CIO Memorandum, supra note 382, at 16-17 (stating that "none of [the] units permitted by the Rule is the type of specialized or craft unit which the hospital industry and its supporters in 1974 feared").
to the legislative history.

Despite Senator Taft's concerns about proliferation, his bill would have established two of the five units established by the Rule: technical employees and business office clerical employees, in addition to the guard unit required by statute. It seems a fair inference that Senator Taft was satisfied that those units would not implicate proliferation concerns. Senator Taft's bill is the lone congressional reference that mentions separate units of business office clerical employees. It seems a fair inference that he, the most ardent advocate of a statutory limit on units, would not deem that unit would cause proliferation. In addition, while the Senator did not refer specifically to guards, guards are entitled to their own unit under the Act; neither Senator Taft's bill nor the Health Care Amendments altered this long-standing statutory requirement.

The Board's Rule designating these units to be appropriate is bolstered by its finding that separate units of technical employees and business office clerical employees have not resulted in an increased incidence of strikes or jurisdictional disputes. The Board also could find nothing to indicate that wage competition such as whipsawing and leapfrogging had occurred. Apparently this is the result of separate labor markets for these employees. In addition, so few units of guards have been organized that they could barely be said to implicate any of the concerns that had motivated the "admonition."

The Rule's remaining two nonprofessional units include a separate unit for skilled maintenance employees and a nonprofessional employee unit consisting of all nonprofessionals excluding technical employees, business office clerical employees, skilled maintenance employees, and guards. The fundamental difference between the Rule and Senator Taft's bill is that the Taft bill did not provide for a separate maintenance unit. None of the cases cited in the com-

485. See AFL-CIO Memorandum, supra note 382, at 17; see also Fanning, The Course of Health Care Decisions, supra note 141, at 58 (criticizing those who opposed the technical employee unit as constituting undue proliferation; the hospital industry and Senator Taft had themselves endorsed such a unit in their legislative proposals). Furthermore, a technical employee unit would be consistent with the Board's pre-amendment decision in Woodland Park Hosp., 205 N.L.R.B. 888 (1973). The Woodland Park court refused to grant a separate unit to a segment of technical employees, but required all technical employees to be in a single unit. Id. at 889.
486. Furthermore, the business clerical unit was also supported by the hospital industry. See Fanning, The Course of Health Care Decisions, supra note 141, at 58 (remarking that the unit proposals of the hospital industry were eventually embodied in Senator Taft's bill).
488. Id. at 33,909.
489. Id. at 33,908-09.
mittee reports speak directly to the issue of skilled maintenance units. 493 Senator Taft, however, did quite vigorously comment that the hospital industry should not go the way of the construction industry and permit every job classification to have its own unit. 494

A skilled maintenance unit does depart from Senator Taft's bill, nonetheless, it is responsive to many of the concerns he expressed in the floor debates. 495 A separate unit consisting of skilled maintenance employees would place all of the crafts and trades, for example, electricians, carpenters, plumbers, in a single unit. This would avoid separate units for each trade and craft as is common in the construction industry. 496 A single skilled maintenance unit that groups together numerous job classifications, each of which would be entitled to its own unit in other industrial settings, seems responsive to Congress' concerns about proliferation. 497 In addition, the Board's selection of a skilled maintenance unit is supported by its findings that separate units of skilled maintenance employees had shown little incidence of strikes and jurisdictional disputes, and little indication of wage competition, such as whipsawing and leapfrogging. Apparently this is also due to separate labor markets for these employees. 498

In summary, the five nonprofessional units established by the Board's Rule are consistent with congressional intent. Congress intended to extend the organizational rights of the Act to employees of health care institutions in 1974, while avoiding the adverse effects that motivated the "congressional admonition." 499

493. The committee reports did cite Four Seasons Nursing Center, 208 N.L.R.B. 403 (1974), with approval. See S. Rep. No. 766, 93d Cong., 2d Sess. 5, reprinted in Legis. Hist. supra note 57 at 12; H.R. Rep. No. 1051, 93d Cong., 2d Sess. 6-7 (1974), reprinted in Legis. Hist. supra note 57, at 274-75. In Four Seasons, the Board dismissed a representation of two maintenance employees who performed unskilled maintenance work. Id. Thus, Four Seasons does not address the issue of separate units of skilled maintenance employees.


495. See AFL-CIO Memorandum, supra note 382, at 15-17.

496. Id. at 14, 16-17.

497. See id. at 16-17; NLRB Memorandum, supra note 382, at 24-25.


499. See AFL-CIO Memorandum, supra note 382, at 17; Sharo, supra note 331, at 821-22. The preceding analysis of the nonprofessional employee units, supra notes 480-99 and accompanying text, and the following analysis of the professional employee units, infra notes 500-15 and accompanying text, draw heavily on comparisons to the units proposed by Senator Taft in his bill that was not enacted by Congress. Standing alone, the Taft bill cannot be used as an indicator of congressional intent because "[n]o action by a legislative body on proposed or introduced bills provides an extremely unreliable and dubious foundation for drawing inferences." King, supra note 108, at 148. This analysis, however, does not draw on the Taft bill alone. Rather, the bill is useful not as an indicator of congressional intent, but because it helps to provide historical context to those materials that are more probative of discerning legislative intent. These materials include the committee reports and pre-passage statements of individual legislators, particularly those of the author and sponsors of the legislation. See Bumpass, supra note 111, at 682; King, supra note 108, at 148.
b. Professional employees

The Board's Rule stands in sharp contrast to Senator Taft's bill with respect to professional employees. The Rule designates three professional units: physicians, registered nurses, and all other professional employees, whereas Senator Taft's bill would have designated only one all-professional unit. The differences, however, may not be as sharp as they first appear. An often overlooked fact is that the Taft bill would have excluded physicians from the definition of employee, thus divesting them of any rights under the Act. The Senator did not explain why he wanted physicians to be excluded from coverage. It seems a fair inference, however, that if he did want to exclude them, then he did not believe that they shared the same interests or belonged in a unit consisting of all professionals. Therefore, since physicians were not excluded, it seems reasonable that they would have been entitled to their own unit. None of the other legislators addressed the issue of bargaining unit proliferation by health care professionals, nor do the cases in the committee reports address the issue. Only Senator Taft spoke to the issue, urging that "professional interest and job classification" should not be entitled to form

The attractiveness of the Taft bill initially lies in the fact that it provides at least an idea of the number and kinds of units that the Senator and the hospital industry regarded as not implicating the proliferation concerns expressed by Congress. The temptation is to say that the units established by the Board's Rule that mirror those proposed by Senator Taft could not have been deemed proliferative by Congress in 1974. Congress, however, never acted on the bill. Therefore, it would be improper to draw an inference from that failure to act. See King, supra note 108, at 148, 156.

This analysis resists that temptation. Instead it looks to the concerns that prompted Congress to write its admonition—the fears of an increased incidence of strikes, jurisdictional disputes and wage competition among employees—and Congress' decision to treat that concern not through the statute but through the Board. See supra notes 462-68 and accompanying text. That the Board's units in the Rule may mirror some of those that had the approval of Senator Taft and the hospital industry, suggests that they may not have been deemed proliferative at the time; no stronger statement is possible. More importantly, the units established by the Board's Rule are responsive to the "admonition" because they address concerns expressed by Congress. Senator Taft feared that the evils of bargaining unit proliferation might occur "[i]f each professional interest and job classification is permitted to form a separate bargaining unit . . . ." 120 Cong. Rec. 12,994 (1974), reprinted in Legis. Hist., supra note 57, at 113. Therefore, the proper inquiry focuses not merely on the number and kinds of units but also on the purposes of preventing proliferation. See Stapp, supra note 292, at 71 n.65. As the foregoing analysis has shown and the following analysis will further support, the Board's eight units are entirely consistent with the "congressional admonition"; they do not implicate the adverse effects associated with proliferation that Congress hoped to avoid. See supra notes 480-99 and accompanying text; infra notes 500-15 and accompanying text.

500. Compare 29 C.F.R. § 103.30(a) (1989) (the Rule designating the professional units: (1) registered nurses; (2) physicians; (3) all professional employees except for registered nurses and physicians) with S. 2292, 93d Cong., 1st Sess., § 9(f) (1973), reprinted in Legis. Hist., supra note 57, at 457-58 (designating one unit of professional employees).
503. Id. at 450.
their own separate units.\textsuperscript{504} Considering the hospital industry's\textsuperscript{505} fear of potentially dozens of professional units,\textsuperscript{506} allowing only two more units would hardly seem to constitute proliferation.\textsuperscript{507} A review of the Board's decision to establish these professional units will indicate that they have not implicated the proliferation issues that concerned Congress.\textsuperscript{508}

The Board's Rule grants only physicians, who have a unique role in the industry,\textsuperscript{509} and registered nurses, who have a singular history of representation and who would outnumber all other professional employees,\textsuperscript{510} the opportunity to seek separate representation.\textsuperscript{511} Although few "all other professional employees" have been organized, the Board has found it appropriate and necessary to create an all other professional unit to safeguard their organizational rights under the Act.\textsuperscript{512} The Board's Rule is bolstered by its findings that separate units of registered nurses have resulted in little incidence of strikes, jurisdictional disputes, whipsawing, or leapfrogging, the items that motivated the "admonition."\textsuperscript{513} Furthermore, the Board found that there had been so little organizing among physicians and all other professional employees that the recognition of those units had not implicated the proliferation concerns.\textsuperscript{514}

The foregoing analysis demonstrates that the Rule, which establishes eight units, strikes an appropriate balance between preserving health care employees' ability to choose in organizing and avoiding the dangers that Congress associated with a proliferation of bargaining units.\textsuperscript{515} The district judge should
have upheld the Rule precisely because the units established are responsive to both concerns.


The district court focused so heavily on the "congressional admonition" against bargaining unit proliferation that it understated an obvious but important fact. In passing the Health Care Amendments, Congress extended the rights and responsibilities of the Act to employees of nonprofit hospitals. While the committee report language does stress the need to prevent bargaining unit proliferation, the Second Circuit has aptly observed that "the main thrust of the Health Care Amendments was to foster labor organizing under the aegis of the National Labor Relations Board." Instead of emphasizing the primary purpose of the Health Care Amendments, the district court instead stressed that the Rule would encourage "automatic fragmentation" of the hospital industry work force and possibly coerce employees to organize into the units established by the Rule.

The courts suggestion is overstated. First, section 7 of the Act protects employees in their rights to refrain from joining labor organizations and exercising their rights to bargain collectively. Second, the Rule does not compel organizing by hospital employees. The Rule brings certainty and predictability to the hospital industry by informing employers, unions and employees about what kinds and how many units will be appropriate absent "extraordinary circumstances." Concededly, knowing in advance that certain units, such as registered nurses or business office clerical employees, are appropriate will probably encourage unions to organize hospital employees for collective bargaining. The Rule, however, will eliminate much of the delay in representation proceedings because employers will not be able to defeat the "appropriateness" of the unit unless they can show "extraordinary circumstances." To the extent that the Rule encourages organizing and hastens collective bargaining it substantially advances a national labor policy that promotes and encourages collective bargaining.

516. See supra notes 118-25 and accompanying text.
517. Trustees of Masonic Hall & Asylum Food v. NLRB, 699 F.2d 626, 634 (2d Cir. 1983).
520. 29 C.F.R. § 103.30(a), (b) (1989).
522. 29 C.F.R. § 103.30(a) (1989).
A. The Effects of American Hospital Association v. NLRB

The American Hospital Association v. NLRB, decision immediately and significantly affects organization among hospital employees. The immediate effect is caused by the Board’s decision to defer, until the Seventh Circuit decides the appeal, all processing representation petitions of employees seeking units of physicians, registered nurses, office clerical employees, and skilled maintenance employees. Those employees are unduly hampered in their abilities to exercise their rights of organization under the Act. To the extent that any other organization occurs in the acute care hospital industry during the appellate proceedings, the Board indicated that it would process those representation petitions under the “disparity of interests” test. As a growing number of circuit courts recognized, however, the “disparity of interests” test imposes too heavy a burden on employees and the unions. Neither the text nor the legislative history of the Health Care Amendments suggests a presumption in favor of only two units: professionals and nonprofessionals. That result, however, is the immediate and continuing impact of the district court’s decision; employees continue to be unduly hampered in exercising the organizational rights assured by the Act. The Board’s effort to free hospital employees from the shackles of the “disparity of interests” test is frustrated by the permanent injunction against the Rule. If the Seventh Circuit affirms the decision, the injunction will continue to restrict employee organizational rights unnecessarily.

A Seventh Circuit decision that reverses the district court and vacates the injunction, thereby upholding the Rule, affords greater and more meaningful opportunities for health care employees to organize into bargaining units within the Seventh Circuit’s geographic jurisdiction. Those employees would then be free to organize into the eight units established by the Rule. Nonetheless, a favorable Seventh Circuit decision cannot settle the validity of the Rule in all of the circuits. The hospital industry can be expected to challenge
the validity of the Rule in other federal district courts not governed by Seventh Circuit precedent\textsuperscript{531} unless the Supreme Court decides the issue.\textsuperscript{532}

### B. Legislative Proposals

With no assurance that the federal judiciary will resolve the issue, Congress should consider taking steps to determine appropriate collective bargaining units for the health care industry. Congress may address the problem in either one of two ways. First, Congress could amend section 9 of the Act to designate appropriate units for health care institutions within the language of the Act itself, preferably by codifying, and permitting combinations of, the units established in the Board’s Rule. Establishing units by statute is hardly original; Senator Taft offered a proposal to designate four appropriate units as part of his effort to extend the NLRA to the health care industry.\textsuperscript{533} Moreover, a number of states used that approach to address the problem of bargaining unit proliferation in public employment.\textsuperscript{534} An amendment to the NLRA could be structured in such a way so as to include historical bargaining units existing prior to the amendment. This would protect historical unit configurations and ongoing collective bargaining relationships.

Establishing appropriate units through the Act itself provides advantages to all interested parties. Employers, employees, and unions each would know which units were appropriate and could focus their attention on other issues concerning the collective bargaining relationship. Moreover, to the extent that it hastens union organizing and promotes collective bargaining, statutory designation of proper units implements a national labor policy which encourages collective bargaining between employers and their employees.\textsuperscript{535} The disadvantage of determining units through the statute is the lack of flexibility in responding to developments in the industry. Establishing collective bargaining units by statute virtually eliminates the discretion and ignores the expertise of

\textsuperscript{531} See Estreicher, \textit{supra} note 28, at 177 n.56 (stating that “[w]ithout a statutory amendment, centralization of challenges to rule validity in one circuit cannot be guaranteed”).

\textsuperscript{532} Id. The Supreme Court denied petitions for writ of certiorari in cases involving hospital bargaining units many times. See \textit{NLRB} v. \textit{Mercy Hosp. Ass'n} 606 F.2d 22 (2d Cir. 1979), \textit{cert denied}, 445 U.S. 971 (1980); \textit{NLRB} v. \textit{Mercy Hosp., Inc.}, 589 F.2d 968 (9th Cir. 1978), \textit{cert. denied}, 440 U.S. 910 (1979); \textit{Bay Medical Center} v. \textit{NLRB}, 588 F.2d 1174 (6th Cir. 1978), \textit{cert. denied}, 444 U.S. 827 (1979); \textit{Long Island College Hosp.} v. \textit{NLRB}, 566 F.2d 833 (2d Cir. 1977), \textit{cert. denied}, 435 U.S. 996 (1978). Many of these denials were made before the split developed in the circuits between those courts requiring or rejecting the “disparity of interests” test. Given the importance of the issue, the losing parties will likely seek Supreme Court review of the Seventh Circuit decision. Whether the court will grant such a petition is, of course, another matter.


\textsuperscript{534} \textit{See supra} note 71 and accompanying text.

\textsuperscript{535} 29 U.S.C § 151 (1988).
the Board.

The second, and preferred alternative, is an amendment to section 6 of the Act which would require the Board to use rulemaking when determining collective bargaining units for the hospital industry. Requiring the Board to use rulemaking powers when establishing collective bargaining units would undoubtedly end any possible conflict with the "in each case" language of section 9(b) of the Act.\textsuperscript{36} Merely requiring rulemaking, however, would not be enough. Congress must endorse the units established by the Rule, or alternatively, provide guidelines in selecting units. Such action would avoid another decade of litigation over the appropriate legal standard to use in applying the "congressional admonition." For example, Congress could instruct the Board to differentiate between acute care hospitals by size or by specialty. Additionally, Congress could instruct the Board to use rulemaking for other health care institutions, such as nursing homes and rehabilitation hospitals. Another option is codification of the Board's Rule as a rebuttable presumption. Codification would place the burden on the employer to establish that a petitioned unit is not appropriate.\textsuperscript{37} Ultimately, it is absolutely essential that clear guidelines be given to avoid endless discussions of the meaning of the "admonition."\textsuperscript{38}

The idea of requiring the Board to establish units through rulemaking did not originate here. During efforts to pass the Labor Law Reform Bill of 1978, Congress previously considered requiring the Board to use rulemaking when establishing bargaining units.\textsuperscript{39} The primary advantage of establishing units through rulemaking, as opposed to designating units by statute, is the flexibility and freedom retained by the Board in applying the Rule and responding to changes in the industry.\textsuperscript{40} Furthermore, the hospital industry would be free to petition the Board to engage in other rounds of rulemaking through the "no-

\textsuperscript{36} The "in each case" language of § 9(b) does not prohibit the Board from using rulemaking to establish collective bargaining units. See supra notes 409-36 and accompanying text. Nonetheless, the hospital industry argued otherwise and that argument may prevail in some forum. By specifically amending § 6, Congress could end any doubts about the extent of the Board's rulemaking power with respect to unit determinations.

\textsuperscript{37} The hospital industry suggested the use of rebuttable presumptions in response to the Board's notice of proposed rulemaking. See Collective-Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,336, 16,338 (Apr. 21, 1989) (codified at 29 C.F.R. § 103.30). The Board rejected this suggestion, stressing that "painstaking elicitation and examination of the facts of each individual case is, absent extraordinary circumstances, neither helpful nor outcome determinative." Id. at 16,338-39.

\textsuperscript{38} Member Zimmerman, dissenting nearly six years ago in St. Francis II, remarked that "there must be an end to the debate" over the appropriate legal standard to apply in health care unit determinations. St. Francis Hosp. II., 271 N.L.R.B. 938, 955 (1984). That sentiment, even more accurate today, was precisely what the Board hoped to accomplish by establishing appropriate units through the Rule. See supra notes 350-58 and accompanying text.

\textsuperscript{39} See Morris, supra note 348, at 41 n.148 (citing S. REP. No. 628, 95th Cong., 2d Sess. 18-20 (1978); Koziara & Schwartz, supra note 331, at 83-84.

VI. CONCLUSION

The NLRB broke with a long-standing tradition of determining collective bargaining units through adjudication when it used rulemaking to determine collective bargaining units for the hospital industry.\textsuperscript{442} Ironically, the Board turned to rulemaking, as opposed to individualized adjudications, to give more meaning to hospital employees' right to choose collective bargaining representatives. Despite a statute instructing the Board to assure employees "their fullest freedom" when making unit decisions, the Board and some courts of appeals previously read the "congressional admonition" as limiting health care employees to only two unit choices: professionals and nonprofessionals.\textsuperscript{443}

Neither the Act nor the "congressional admonition" require such a result. The "congressional admonition" against bargaining unit proliferation means that hospital employees are not privy to the same range of bargaining unit choices as their industrial counterparts.\textsuperscript{444} Congress feared a multiplicity of units would increase the incidence of strikes, jurisdictional disputes, and wage competition among employees, thereby increasing disruptions in patient care.\textsuperscript{445} In fashioning the Rule, the Board balanced the organizational rights of employees against the public's interest in receiving uninterrupted health care and determined that eight units were enough to meet both objectives.\textsuperscript{446} The Supreme Court and Congress, therefore, should approve the Board's Rule precisely because it meets both of these concerns. Upholding the Rule will end the protracted litigation regarding appropriate health care bargaining units and give more meaning to the rights of hospital employees to organize and bargain collectively through representatives of their own choice.\textsuperscript{447}

VII. POSTSCRIPT: THE SEVENTH CIRCUIT DECISION IN AMERICAN HOSPITAL ASSOCIATION V. NATIONAL LABOR RELATIONS BOARD

On April 11, 1990, the United States Court of Appeals for the Seventh Circuit handed down its decision in \textit{American Hospital Association v. National Labor Relations Board}.\textsuperscript{448} The Seventh Circuit reversed the district court and vacated the injunction "with directions to enter judgment for the

\begin{footnotes}
\footnotetext{542.} See Collective-Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,336, 16,339 (1989) (codified at 29 C.F.R. § 103.30) (stating that the determination of collective bargaining units in the health care industry was the Board's "first venture in major, substantive rulemaking").
\footnotetext{543.} See supra notes 251-58, 266-72, 290-92, 300-06 and accompanying text.
\footnotetext{544.} See supra notes 126-56.
\footnotetext{545.} See supra notes 126-54 and accompanying text.
\footnotetext{546.} See supra notes 351-57, 442-51, 480-515 and accompanying text.
\footnotetext{547.} See Sharo, supra note 331, at 822-33.
\footnotetext{548.} 899 F.2d 651 (7th Cir. 1990).
\end{footnotes}
Board. Using an analysis similar to that proposed in this Note, the court concluded that the Rule was consistent with the “in each case” language of the Act, did not violate the “congressional admonition,” and was neither arbitrary nor capricious.

A. The Seventh Circuit Opinion

Writing for a unanimous court, Judge Richard A. Posner observed that the Board’s standard for determining units in the health care industry through case-by-case adjudication was “widely regarded as a failure.” After recognizing that many courts, including the Seventh Circuit, felt the Board’s use of “substantive rulemaking power is long overdue,” the court examined and rejected each of the three hospital industry arguments in favor of upholding the permanent injunction against the rule.

The court preceded its analysis of the arguments by observing that the Board’s grant of rulemaking power is “explicit and broad.” Additionally, the court found nothing in the Act or in the legislative history of section 9(b) that precluded the board from using its rulemaking powers to determine collective bargaining units. Further, the court rejected the hospital industry’s argument that the “in each case” language mandated determination of the appropriate unit on an individualized, case-by-case basis.

After tracing the history of the Wagner Act, the court emphasized that

549. Id. at 660.
550. Id. at 656.
551. Id. at 659.
552. Id. at 659-60.
553. Id. at 660.
554. Id. at 655 (citations omitted).
555. Id. at 655.
556. Id. at 654. The court recognized the Board’s statutory authority to determine the appropriate bargaining unit and the importance of that decision to employers, employees, and unions. Id. Noting that the Act provides the Board with little direction in making unit decisions, the court emphasized that the Act “can be read to suggest that the tilt should be in favor of unions, and hence toward relatively many rather than relatively few units.” Id. (citing NLRB v. Res.-care Inc., 705 F.2d 1461, 1469 (7th Cir. 1983)).
557. Id. at 655-56. The court observed that “it is probable (no stronger statement is possible) that Congress would have made an explicit exception for unit determination if it had wanted to place that determination outside the scope of the Board’s rulemaking power.” Id. at 656.
558. Id. at 655. Referring to the argument that the Board must determine each “appropriate unit on a case-by-case basis,” the court stated “that such interpretations are regularly rejected in decisions involving challenges to agency rules, such as the Social Security Administration’s ‘grid’ method of deciding entitlement to disability benefits.” Id. at 655-56 (citing Heckler v. Campbell, 461 U.S. 458, 467-68 (1983)).
559. Id. at 656. The court explained that it understood that the phrase may have been inserted “to prevent the Board from bringing about a revolution in unit determinations.” Id. The court recounted the wide variety of potential units available: employer units, craft units, or plant units. The American Federation of Labor primarily consisted of craft unions while the Congress of Industrial Organizations consisted primarily of plant unions. Id. Had there been no “in such case” proviso, the Board was free to rule “that all units would be craft units, or . . . plant units, . . .
the word “case” may have many meanings. The court noted that the term need not refer to “a particular dispute between a particular employer and a particular union at a particular plant or establishment.” The term may refer to a particular industry, for example, health care, “or (as here) a subset or submarket of an industry.” The court continued, noting that the term could just as easily mean a “proceeding,” covering both rulemaking and adjudicative proceedings. In addition, the court suggested that the phrase could mean that whenever the Board is called upon to make a unit decision, rules, like statutes, must be applied case-by-case regardless of whether those rules were developed through adjudications or rulemaking. Since neither the Act nor legislative history indicated that the Board was barred from using rulemaking powers in unit decisions, the court concluded that the Board did not exceed its statutory authority in making the Rule.

Next, the court evaluated the hospital industry’s argument that the Rule violated the “congressional admonition” against bargaining unit proliferation. In recounting the events leading to the passage of the legislation, the court noted the efforts of the hospital industry to resist the extension of the NLRA. “[N]ot having the muscle to defeat the extension,” the industry pressured Congress to require ten days advance notice of any strikes or job actions and a statutory limit on bargaining units. Referring to the Health Care Amendments as a resulting compromise of a “collision of interest groups,” the court noted that the industry secured the ten day notice requirement, but failed to win the limit on bargaining units. The industry did, however, persuade the House and Senate committees to include the “congressional admonition” in their reports accompanying the legislation.

The Seventh Circuit acknowledged that a growing number of courts questioned the value of legislative history including the committee reports, hearings, rejected bills, and floor debates as “illegitimate efforts to influence judicial interpretation.” The court, however, stressed that it did not endorse such literature because “clarity depends on context, which legislative history may illuminate.” Against this backdrop, the court examined the meaning and effect of the “congressional admonition.”

The court began by noting that the “admonition” was not a statute. Instead, the court analogized the admonition to “a committee report that explains a

[and] altered the balance of power between the federations dramatically. The ‘in such case’ proviso forbids the Board to do this.”

560. Id.
561. Id.
562. Id.
563. Id.
564. Id.
565. Id. at 657.
566. Id.
567. Id.
568. Id.
569. Id. (quoting In re Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989)).
newly enacted or amended statute,”570 and hence, it is entitled to some weight in discerning congressional intent.571 Nonetheless, the court carefully pointed out that the “admonition” was not a statute and could not be treated as such.572 “To treat it as one would give the hospital industry something it tried and failed to win from Congress.”573 The court suggested that the admonition was not a command and instead was more like a cautionary instruction.574 It certainly was “not an amendment to section 9(b), decreeing that in the health care industry no more than three separate bargaining units shall be authorized.”575

Recognizing that the “admonition” must be given some weight, the court next examined the Board’s Rule in the context of the legislative history. The court asserted that the cases cited in the committee reports did not speak to the propriety of an eight-unit rule.576 The court found that the term “proliferation,” in context, referred to many more groups than those proposed in the Board’s Rule.577 Drawing on testimony during the Senate hearings, the court noted that New York alone recognized more than twenty-one separate bargaining units under applicable state law.578 “That is proliferation; that is the sort of unit metastasis that ‘due consideration’ could be expected to persuade the Board to disallow.”579

The court then turned to the last argument advanced by the industry in favor of upholding the injunction: that the Rule was arbitrary and capricious.580 The hospital industry argued that the Rule did not adequately account for the diversity of the industry because hospitals having at least six employees in any of the specified units will come under the aegis of the Rule,

570. Id. at 658.
571. Id. Referring to the “admonition,” the court explained:

It accompanied the enactment of substantial amendments. The particular statutory provision to which the admonition was addressed was not amended, but the effect of the amendments was to apply that provision for the first time to the nonproprietary hospital industry. Section 9(b) directs the Board to determine the ‘appropriate’ unit, and what is appropriate may differ from one industry to another—may therefore ‘mean’ something different in one industry from what it means in another. So in changing the domain of application of section 9(b), the 1974 amendments may have changed its meaning without changing its words. The admonition can therefore be regarded as a commentary on the meaning of the 1974 amendments and hence as equivalent to pre-enactment legislative history . . . .

Id.

572. Id.
573. Id.
574. Id.
575. Id.
576. Id. at 659.
577. Id. at 658.
578. Id. (citing Hearings on H.R. 11,357 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess. 300-01 (1972)).
579. Id. (emphasis in original).
580. Id. at 659.
regardless of the size or specialty of the hospital.\textsuperscript{581} Acknowledging that this was an “important criticism,” the court chastised the hospital industry for failing to suggest an alternative that would better serve the industry, yet preserve the virtues of a rule.\textsuperscript{582} The industry suggested that the Board establish a rebuttable presumption in favor of the three units permitted by statute: professionals, nonprofessionals, and guards.\textsuperscript{583} Judge Posner explained that “[s]uch a rule is no rule.”\textsuperscript{584} Under the industry’s plan, unions would have to bear “the burden of persuading the Board to allow more units than the statutory minimum.”\textsuperscript{585} The court rejected this as placing an intolerable burden upon the unions.\textsuperscript{586}

The court recognized that the Rule could not account for all of the diversity of the industry.\textsuperscript{587} The court, however, emphasized that such is the consequence of rules. “A rule makes one or a few of a mass of particulars legally decisive, ignoring the rest. The result is a gain in certainty, predictability, celerity, and economy, and a loss in individualized justice.”\textsuperscript{588} Despite the court’s suggestion that the industry might have avoided some impact of the Rule by raising the minimum to, perhaps, fifteen employees, the industry did not raise the minimum.\textsuperscript{589}

The court concluded that the Rule was not arbitrary and capricious because the Board considered several possibilities in selecting the Rule and gave “plausible reasons for its choice.”\textsuperscript{590} Noting that it was not for the court to “fine-tune the regulatory process by telling the Labor Board that its rule should make slightly more distinctions than it does, or slightly fewer,” the court upheld the rule “without pretending that [they] consider[ed] it Utopia.”\textsuperscript{591}

\textbf{B. Analysis of the Seventh Circuit’s Opinion}

In a brief but powerful opinion, the Seventh Circuit rejected all three arguments advanced by the hospital industry in favor of upholding the injunction. The court squarely answered the issue that the district judge left undecided: whether the Board may use rulemaking to determine appropriate bargaining units without running afoul of the “in each case” language of section 9(b).\textsuperscript{592} Particularly imaginative was the court’s treatment of the word “case.” Drawing on its understanding of American labor history, the court concluded that the word “case” might refer to particular industries or subsets thereof, and

\begin{itemize}
\item \textsuperscript{581} Id.
\item \textsuperscript{582} Id.
\item \textsuperscript{583} Id. at 654, 659.
\item \textsuperscript{584} Id.
\item \textsuperscript{585} Id. at 659.
\item \textsuperscript{586} Id.
\item \textsuperscript{587} Id.
\item \textsuperscript{588} Id.
\item \textsuperscript{589} Id.
\item \textsuperscript{590} Id. at 660.
\item \textsuperscript{591} Id.
\item \textsuperscript{592} Id. at 655-56.
\end{itemize}
need not refer to individualized disputes between specific employers and employees. The court was on even stronger ground when it suggested that the "in each case" language could mean that whenever there are unit disputes, the "rule, like a statute, is applied case by case." That position has been the essence of the Board's arguments since the beginning of the rulemaking proceedings. The Board may apply a Rule, developed through the procedures of the APA, to decide appropriate bargaining units that are consistent with the language of section 9(b), which instructs the Board to make such decisions "in each case."

Perhaps the most controversial and compelling facet of the court's opinion is its treatment of the "congressional admonition" against bargaining unit proliferation. The court placed the proper amount of weight on the "admonition" by looking to the historical context shaping the passage of the Health Care Amendments. Proliferation was an important concern of the hospital industry and Congress in 1974. As observed by the court, however, the term is properly applied to more units than those outlined by the Board's Rule. The court simply examined the Rule on its face in light of the historical context regarding bargaining unit proliferation during 1972-1974. Had the court analyzed each unit, as in this Note, an even more compelling argument could have been made that the eight units do not constitute proliferation.

The court's proliferation analysis, which approves of eight units, will be undoubtedly controversial. This is particularly true because the Board has had a most difficult time persuading the courts of appeals to enforce bargaining orders with two of the eight units; the difficulty arose with units consisting of registered nurses and skilled maintenance employees. The Seventh Circuit's deference to the Board on the bargaining unit issue stands in sharp contrast to its earlier rebukes of the Board. Those decisions, however, arose through the review of Board unit decisions made through adjudication, not rulemaking.

The Seventh Circuit had a unique opportunity among the circuit courts because it was the first to confront the issue of industry-wide bargaining units. Declining to find the Rule arbitrary and capricious, the court indicated that the Board's Rule "was entitled to broad judicial deference," in contrast to its former adjudication. Although the court did not refer specifically to evidence supporting the Rule, the court commended the Board for doing "a re-

593. Id. at 656.
594. Id.
595. See supra notes 371-75 and accompanying text.
596. American Hosp. Ass'n v. NLRB, 899 F.2d 651, 656-59 (7th Cir. 1990).
597. Id.; see supra notes 84-90, 480-515 and accompanying text.
599. See supra notes 475-515 and accompanying text.
600. See supra notes 211-46, 251-58, 266-72 and accompanying text.
601. See Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980); NLRB v. West Suburban Hosp., 570 F.2d 213, 216 (7th Cir. 1978); see supra notes 236-45 and accompanying text.
The Seventh Circuit's decision was hailed as a great victory by labor organizations.\textsuperscript{608} Not surprisingly, the hospital industry was dismayed by the ruling and vowed to challenge the decision.\textsuperscript{608} On July 10, 1990, as expected, the American Hospital Association filed a petition for a writ of certiorari with the Supreme Court of the United States.\textsuperscript{607} In urging the Court to grant certiorari, the hospital association informed the Court that the rule could be litigated in potentially forty-seven states,\textsuperscript{608} unless the Court grants review. The unions and the National Labor Relations Board are expected to join the AHA in urging the court to grant the petition.\textsuperscript{609} \textit{American Hospital Association} presents the Supreme Court with the opportunity to address the matter of appropriate bargaining units in the health care industry. The Court should grant the petition and finally resolve the issue by upholding the decision of the Seventh Circuit, and thus, the validity of the Board's Rule. In that manner, hospital employees will finally be able to exercise a more meaningful choice of selecting representatives for collective bargaining under the Act.\textsuperscript{610}