

weekly earnings of the highest paid strikebreakers.¹¹⁶ The fines, therefore, exceeded the legitimate interest of the union and merely served as retribution.

Despite the desirability of forming standards to judge the reasonableness of fines, it must be noted that there are inherent limitations to the foregoing scheme. The proposed standards are limited in scope and applicability, for they only apply to activities for which a member receives pay.¹¹⁷ Although fining a member for strikebreaking is a common form of union discipline, there are many union offenses which do not involve financial gain for the violator, such as dual unionism,¹¹⁸ refusal to perform picket duty,¹¹⁹ nonattendance at union meetings, or failure to pay dues in a timely manner. In these cases, the size of the fine cannot be measured in terms of the violator's monetary gain. It may be that the reasonableness of a fine imposed for such activities is not susceptible to being judged according to a standard, but rather that judgment must be made on an individual, case-by-case basis. Nonetheless, the impossibility of defining standards for all union violations does not detract from the need for standards as to fines for the serious union offense of strikebreaking.¹²⁰

ELLEN S. HUVELLE

Labor Law—Determination of the Appropriate Faculty Bargaining Unit in a Private University—*New York University*.¹—Petitioner, New York University Chapter, American Association of University Professors, sought a bargaining unit comprised of all full-time faculty members of the university, including professional librarians, as well as half-time faculty in the school of dentistry. The local chapter of the United Federation of College Teachers intervened, seeking to include all regular part-time faculty of the university in the appropriate unit. A second petitioner was the New York Uni-

¹¹⁶ 185 N.L.R.B. at 390 (trial examiner's decision).

¹¹⁷ See Rapore, *supra* note 90, at 736. Due to the limited applicability of a standard, Rapore suggests that the notice given to the member as well as the amount of the fine should be a criterion of reasonableness. He proposes that reasonable notice may require that a member be specifically informed that certain activities will subject him to fines which may be court-enforced. *Id.* at 737. The trial examiner in *Boeing* decided that the notice requirement had not been met since the members were not specifically informed that they would be subject to fines for working during the strike and that they were not informed as to the approximate amount of the fine. 185 N.L.R.B. at 397-98.

¹¹⁸ E.g., *Ballas v. McKiernan*, 74 L.R.R.M. 2647 (N.Y. City Civ. Ct. 1970).

¹¹⁹ E.g., *Minneapolis Star & Tribune Co.*, 109 N.L.R.B. 727, 34 L.R.R.M. 1431 (1954).

¹²⁰ See Summers, *Disciplinary Powers of Unions*, 3 *Ind. & Lab. Rel. Rev.* 483, 489 & n.21 (1950), where the author observes that unions, during the "total war" of a strike, tend to treat any defection which benefits the employer "as clear treason," to be punished by whatever weapons the provisions of a union constitution may allow.

¹ 205 N.L.R.B. No. 16, 83 L.R.R.M. 1549 (1973).

bargaining unit¹¹ and the status of department chairmen,¹² but reverses the policy on the issue of the status of part-time faculty.¹³ While the separate law faculty unit determinations may cause problems in the future,¹⁴ *New York University* is noteworthy primarily because of the part-time faculty issue. This note will examine briefly the history of NLRB jurisdiction in the field of higher education. The holdings and rationale of *New York University* will then be discussed in the light of that history. It will be submitted that, in addition to causing problems of both interpretation and application, the Board's holding in *New York University* fails to consider adequately the issues raised by the two dissenting opinions.

Public institutions of higher education are automatically excluded from the jurisdiction of the NLRB by the definition of "employer" in the National Labor Relations Act (NLRA or the Act).¹⁵ Until 1970, the Board also refused "to assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution."¹⁶ This position was overruled in *Cornell University*,¹⁷ which held that since the Act's definition of employer did not specifically exclude private, nonprofit educational institutions, the Board would no longer decline to assert jurisdiction over those institutions whose operations significantly affect commerce.¹⁸ The Board subsequently adopted the standard of taking jurisdiction over any private, nonprofit college or university with gross annual revenue of over one million dollars.¹⁹

The Board's authority to determine appropriate bargaining units is created by section 9(b) of the Act:

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

¹¹ *Syracuse University*, 204 N.L.R.B. No. 85, 83 L.R.R.M. 1373 (1973); *Fordham University*, 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971).

¹² E.g., *Fordham University*, 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971). See also note 34 *infra*.

¹³ See 205 N.L.R.B. No. 16 at 9, 83 L.R.R.M. at 1552. For previous Board policy, see cases cited in notes 3 and 4 *supra*.

¹⁴ See text at notes 99-103 *infra*.

¹⁵ 29 U.S.C. § 152(2) (1970) provides that "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof"

¹⁶ *Trustees of Columbia University*, 97 N.L.R.B. 424, 427, 29 L.R.R.M. 1098, 1099 (1951) (footnote omitted).

¹⁷ 183 N.L.R.B. No. 41, 74 L.R.R.M. 1269 (1970).

¹⁸ *Id.* at 6, 74 L.R.R.M. at 1272.

¹⁹ In *Cornell* the Board left the development of standards to subsequent adjudication. *Id.* at 13, 74 L.R.R.M. at 1275. Regulations were promulgated on Dec. 3, 1970. See 29 C.F.R. § 103.1 (1973).

for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof²⁰

Thus a major goal of unit determination is to provide employees with the maximum freedom to exercise their rights to self-organization and collective bargaining.²¹ Congress and the courts have given the Board wide discretion in the area of bargaining unit determination;²² only decisions shown to be clearly arbitrary and capricious will be overturned.²³ In addition, the Act provides that appeal of an NLRB decision shall be after the entry of a final order by the Board, in any United States court of appeals.²⁴ Since the bargaining unit determination itself is not usually a "final order" unless a section 8 claim of unfair labor practices²⁵ can be substantiated, appeals of the Board decisions are not frequent and the power of the Board as a final arbiter is enhanced. In the field of higher education, courts of appeals of the United States have not yet been asked to rule on whether the unit determinations of the NLRB are satisfactory.²⁶ This lack of appellate intervention makes Board action particularly important for the future of collective bargaining in a university setting.

*C.W. Post Center of Long Island University*²⁷ was the first case in which the Board was called upon to make appropriate unit determinations in regard to university teaching staffs. The petitioner sought a unit of all professional employees engaged directly or indirectly in student instruction. Determining that the "policymaking and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a group"²⁸ did not necessitate classifying them as supervisors, the Board found that full-time faculty members qualify as professional employees under section 2(12) of the Act²⁹ and are entitled to the benefits of collective

²⁰ 29 U.S.C. § 159(b) (1970).

²¹ See 29 U.S.C. § 157 (1970) for the rights guaranteed to employees by the Act.

²² *NLRB v. Hearst Publications*, 322 U.S. 111, 134, rehearing denied, 322 U.S. 769 (1944). See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

²³ E.g., *NLRB v. Kostel Corp.*, 440 F.2d 347 (7th Cir. 1971); *NLRB v. Ideal Laundry & Dry Cleaning Co.*, 372 F.2d 307 (10th Cir. 1967); *International Ass'n of Tool Craftsmen v. Leedom*, 276 F.2d 514 (D.C. Cir.), cert. denied, 364 U.S. 815 (1960); *NLRB v. Sunrise Lumber & Trim Corp.*, 241 F.2d 620 (2d Cir.), cert. denied, 355 U.S. 818 (1957).

²⁴ 29 U.S.C. § 160(f) (1970). See *Herald Co. v. Vincent*, 392 F.2d 354 (2d Cir. 1968).

²⁵ See 29 U.S.C. § 158 (1970).

²⁶ The Board decision in *C.W. Post Center of Long Island University*, 189 N.L.R.B. 904, 77 L.R.R.M. 1001 (1971), produced an attempted attack on the Board's power. However, both the district court and the court of appeals dismissed the complaint because a final order had not been entered, although in passing the district court did mention the wide discretion given to the NLRB. *College Teachers Local 1460 v. Miller*, 359 F. Supp. 76 (E.D.N.Y. 1972), aff'd, 479 F.2d 1074 (2d Cir. 1973).

²⁷ 189 N.L.R.B. 904, 77 L.R.R.M. 1001 (1971), supplemented by 198 N.L.R.B. No. 79, 80 L.R.R.M. 1738 (1972).

²⁸ 189 N.L.R.B. at 905, 77 L.R.R.M. at 1003.

²⁹ 29 U.S.C. § 152(12) (1970). A "professional employee" is defined as

bargaining if they so desire. The Board was immediately faced with the problem of classifying part-time or adjunct faculty members.

As a fundamental guideline, the Board chose to apply the same rules in making unit determinations in university cases that it had historically used in industry.³⁰ Those rules had been delineated as early as 1938 in the Third Annual Report of the National Labor Relations Board:

Self-organization among employees is generally grounded in a community of interest in their occupations, and more particularly in their qualifications, experience, duties, wages, hours, and other working conditions. . . . The complexity of modern industry, transportation, and communication, and the numerous and diverse forms which self-organization among employees can take and has taken, preclude the application of rigid rules to the determination of the unit appropriate for the purposes of collective bargaining. . . . The precise weight to be given to any of the relevant factors cannot be mathematically stated. Generally several considerations enter into each decision.

. . .³¹

C.W. Post presented a set of facts which the Board measured against such principles to determine whether there existed among part-time faculty members a sufficient community of interest to include them in the unit of full-time personnel. The adjunct faculty members at *C.W. Post* were typical of those at almost any private university. Their educational background was similar and they were involved in the same teaching activities as regular faculty members, but they taught fewer hours and many taught at night. They could not achieve tenure and did not enjoy the fringe benefits of full-time faculty. While they could attend faculty meetings and make themselves heard, they did not have the right to vote in policy determinations, although on occasion some had in fact voted. The annual

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

Id.

³⁰ 189 N.L.R.B. at 905, 77 L.R.R.M. at 1003.

³¹ 3 NLRB Ann. Rep. 157 (1938).

appointment of these professors was dependent upon the availability of work. They were paid twice each semester, rather than on a monthly basis, at rates ranging from one-third to two-thirds of comparative full-time salaries per semester-hour.³² Despite these differences, the Board found that the adjunct faculty were "regular part-time professional employees whose qualifications and chief function, teaching, are identical with those of the full-time faculty."³³ The fact that the university statutes did not permit them to vote on policy matters was not sufficiently significant to require exclusion, and thus the appropriate unit included both full-time and part-time faculty members. As the Board stated: "Under well-settled principles, neither difference in benefits, high ratio of part-time to full-time employees, nor additional employment elsewhere militates against their inclusion."³⁴

In subsequent decisions, the Board built upon the foundation of classifications established in *C.W. Post*. The facts of *University of*

³² 189 N.L.R.B. at 905, 77 L.R.R.M. at 1003.

³³ Id. at 905-06, 77 L.R.R.M. at 1003.

³⁴ Id. at 906, 77 L.R.R.M. at 1003 (footnote omitted), citing Display Sign Service, Inc., 180 N.L.R.B. 49, 72 L.R.R.M. 1577 (1969).

On the question of status of department chairmen, the Board has followed a policy of analyzing the role played by department chairmen in each university setting and determining on a case by case basis whether they should be classified as supervisors. See *Fordham University*, 193 N.L.R.B. 134, 137 n.13, 78 L.R.R.M. 1177, 1181 n.13 (1971). Compare *Syracuse University*, 204 N.L.R.B. No. 85, 83 L.R.R.M. 1373 (1973), and *Adelphi University*, 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972), with *University of Detroit*, 193 N.L.R.B. 566, 78 L.R.R.M. 1273 (1971). Under the NLRA, "supervisor" is defined as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (1970).

The Board found that the librarians at *C.W. Post* were engaged in functions closely related to teaching and shared many of the same benefits as faculty members; therefore, a significant community of interest existed so that it was appropriate to include the librarians in the same unit with faculty members. 189 N.L.R.B. at 906, 77 L.R.R.M. at 1004. However, because the facts showed that deans and department chairmen at *C.W. Post* exercised the authority to make effective recommendations as to hiring and change of status of faculty members and other employees, they were supervisors within the meaning of the Act, and excluded from the unit. Id.

In *Adelphi University*, however, the Board did make a distinction between those faculty members whose duties are primarily supervisory and those who should not be excluded from a faculty unit solely because of "sporadic exercise of supervisory authority over nonunit personnel." 195 N.L.R.B. at 644, 79 L.R.R.M. at 1552. The formula to be applied to determine status is that established in *Westinghouse Elec. Corp.*, 163 N.L.R.B. 723, 727, 64 L.R.R.M. 1440 (1967): professional employees who, although supervising non-professional employees part of the time, had devoted fifty percent or more of their working time to their professional non-supervisory duties during the twelve months preceding the decision were properly included in the professional unit. 195 N.L.R.B. at 644, 79 L.R.R.M. at 1551. For an analysis of the Board's decisions on this issue, see Comment, *The Appropriate Faculty Bargaining Unit in Private Colleges and Universities*, 59 Va. L. Rev. 492 (1973).

*New Haven, Inc.*³⁵ were very similar to those of *C.W. Post*.³⁶ The employer university took the position that adjunct faculty members should be included in the unit, while the labor organizations involved would have included only full-time faculty and excluded part-time employees. The Board held that absent a stipulation of the parties to the contrary,³⁷ only a unit of full-time and regular part-time professional employees is appropriate.³⁸ Because no labor organization was seeking to represent the employees of the university in the appropriate unit, no question concerning representation existed and the Board dismissed the petition.³⁹ In *C.W. Post*, the Board had decided only that it was permissible to include adjunct faculty members in the same unit with full-time faculty members; the *New Haven* decision went farther, declaring that a unit was inappropriate unless part-time faculty were included.⁴⁰ In addition, the Board specifically found that "[a]side from the number of hours involved, *their function [the function of adjunct faculty members]—teaching, the manner in which they perform it, and the conditions under which they operate—appears to be identical to the corresponding work of the full-time faculty.*"⁴¹ It is this analysis that the Board specifically overruled in *New York University* by deciding that part-time faculty *cannot* be included in the unit.⁴²

In *University of Detroit*,⁴³ the Board agreed on the necessity of developing some sort of test to insure that only those part-time faculty members having a substantial and continuing interest in the wages, hours and working conditions of unit employees were eligible to vote.⁴⁴ The standard established defined eligible part-time faculty members as those teaching three or more hours per semester, except in the Schools of Law and Dentistry, where to be eligible the

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

³⁶ In *New Haven*, adjunct faculty members taught from three to twelve hours per week each semester, most teaching less than six. They received no fringe benefits or tenure and most taught at night. Although the rate of turnover was higher than the rate for full-time faculty—thirty percent as compared to six percent—the average length of service for adjunct faculty was five to seven years. Academic rankings within the part-time classification were similar to those of full-time faculty. Part-time faculty were not represented on the Board of Faculty Welfare, but they did hold positions on the University's board of governors. *Id.* at 478, 77 L.R.R.M. at 1274.

³⁷ Board policy is to exclude regular part-time employees from a unit where the parties have stipulated to their exclusion. *Bachmann Uxbridge Worsted Corp.*, 109 N.L.R.B. 868, 870 n.9, 34 L.R.R.M. 1480 (1954). See also text at note 76 *infra*.

³⁸ 190 N.L.R.B. at 478, 77 L.R.R.M. at 1274.

³⁹ *Id.* See 29 U.S.C. §§ 159(c)(1)(B), (2) (1970).

⁴⁰ 190 N.L.R.B. at 478, 77 L.R.R.M. at 1274.

⁴¹ *Id.* (emphasis added).

⁴² 205 N.L.R.B. No. 16 at 9, 83 L.R.R.M. at 1552. There were no dissenting opinions in *C.W. Post* and *New Haven*. *C.W. Post* was heard by the full five-member Board, while *New Haven* was decided by a three-member panel composed of Members Fanning, Kennedy and Brown. Member Brown, whose term expired on Aug. 27, 1971, was replaced by Member Penello, appointed Feb. 22, 1972.

⁴³ 193 N.L.R.B. 566, 78 L.R.R.M. 1273 (1971).

⁴⁴ *Id.* at 567, 78 L.R.R.M. at 1274.

professor had to teach at least one-fourth of the hours taught by a full-time faculty member.⁴⁵ This rule was generally applied by the Board⁴⁶ until overruled in *New York University*.

The question of a separate bargaining unit for a law faculty was first raised in *Fordham University*.⁴⁷ There the Board found that the law school faculty had a separate community of interest which was not "irrevocably submerged" in the broader community of interest shared by all university faculty members, so that a separate unit was appropriate for the law faculty, although the university-wide faculty unit would also be appropriate.⁴⁸ The majority opinion in *New York University* sanctioned this separation, following the rationale of *Fordham* and *Syracuse University*.⁴⁹

New York University cannot be distinguished from the earlier cases on the facts presented;⁵⁰ the Board did not attempt to do so. Instead, the majority simply overruled prior Board reasoning and decided that "there is no real mutuality of interest between the part-time and full-time faculty at New York University because of

⁴⁵ *Id.*

⁴⁶ See, e.g., *Catholic University*, 201 N.L.R.B. No. 145, 82 L.R.R.M. 1385 (1973); *Manhattan College*, 195 N.L.R.B. 65, 79 L.R.R.M. 1253 (1972). But see *Adelphi University*, 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972), where the parties stipulated to the inclusion of all regular part-time employees and defined such an employee as "one who is employed in the current semester and who has been employed at least one semester in each of the last 2 academic years exclusive of summer sessions." *Id.* at 639 n.4, 79 L.R.R.M. at 1547 n.4.

⁴⁷ 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971).

⁴⁸ *Id.* at 137, 78 L.R.R.M. at 1181. The Association of American Law Schools filed an amicus curiae brief in this case, urging the Board to find a separate law school faculty unit appropriate. For the reasoning behind the AALS's decision to file the brief, see Gorman, Goldman, Oberer & Sovern, Report of the Special Committee on Law Faculties in Collective Bargaining Units, in Annual Meeting of the Association of American Law Schools: Proceedings, pt. I, § 1, at 46 (1971). For an analysis of the problem and for varying viewpoints on it, see Faculty Collective Bargaining and the Law Schools—A Panel Discussion, 33 Ohio St. L.J. 743 (1972).

⁴⁹ 204 N.L.R.B. No. 85, 83 L.R.R.M. 1373 (1973).

Elaborating on the rationale for *Fordham University*, the Board said:

[I]t is the alignment of the law faculty with the distinctive traditions and interests of the legal profession that has influenced us strongly to give recognition to the law faculty's preferences as to whether they wish to remain separate, as lawyers, or to be conjoined with their fellows in their other profession—teaching.

Congress commanded us to give professionals full freedom to remain separate from nonprofessionals. It seems to us consistent with that congressional purpose for us similarly to provide like freedom for members of two professions to remain separate, if they wish, from their colleagues in their second profession.

Id. at 11, 83 L.R.R.M. at 1377.

⁵⁰ The facts of *C.W. Post* are given in the text at note 32 supra; the facts of *New Haven* are given in note 36 supra. In *Detroit*, *Manhattan*, *Catholic* and *Adelphi*, the variations from those facts, at least insofar as the duties and remuneration of part-time faculty were concerned, were not significant. Unlike the earlier cases, *New York University* does not contain a detailed presentation of its facts. The Board states only those facts which are necessary to its analysis of why a significant community of interest is not present. For a discussion of the failure of the NLRB to provide adequate factual background in its decisions, see Grooms, *The NLRB and Determination of the Appropriate Unit: Need for a Workable Standard*, 6 Wm. & Mary L. Rev. 13, 24-28 (1965).

the difference with respect to (1) compensation, (2) participation in University government, (3) eligibility for tenure, and (4) working conditions."⁵¹ The rationale used by the Board to substantiate that holding cites only a few important facts. Part-time faculty members receive only a "respectable honorarium" and have a primary interest and income elsewhere. They are excluded from fringe benefits granted to full-time faculty. Because they are excluded from the university senate and the faculty council, they do not share in the development of the institutional policies of the university. Regardless of how long an adjunct faculty member teaches, he is not eligible for tenure. Working conditions of full-time and part-time faculty members are not the same with respect to responsibilities and workload.⁵²

In making the analysis that these differences warrant the exclusion of part-time faculty from the full-time faculty unit, the Board once again looked to "well-established" policies concerning unit determination. Both *Continental Baking Co.*,⁵³ cited in the decision, and *Metropolitan Life Insurance Co.*⁵⁴ stated the guidelines for such determinations. According to the *Metropolitan Life* opinion,

The sole affirmative guide as to what constitutes an appropriate bargaining unit is contained in Section 9(b) of the Act. . . . Under this broad delegation of authority, the Board, in determining whether the unit petitioned for in a particular case is appropriate, has traditionally looked to such factors as the community of interest among the employees sought to be represented; whether they comprise a homogeneous, identifiable, and distinct group; whether they are interchanged with other employees; the extent of common supervision; the previous history of bargaining; and the geographic proximity of various parts of the employer's operation. . . .⁵⁵

But the fact remains that the Board based its prior decisions on basically the same guidelines and reached the opposite result. The Board states that its decision is based on well-established guidelines; however, it is submitted that the very guidelines upon which the Board apparently relies may not justify a finding of exclusion. In fact, applying the criteria stated in *Metropolitan Life*, a case can be made for the proposition that *inclusion* is justified. It may be said

⁵¹ 205 N.L.R.B. No. 16 at 10, 83 L.R.R.M. at 1552.

⁵² *Id.* at 10-11, 83 L.R.R.M. at 1552-53.

⁵³ 99 N.L.R.B. 777, 30 L.R.R.M. 1119 (1952), cited in 205 N.L.R.B. No. 16 at 9, 83 L.R.R.M. at 1552.

⁵⁴ 156 N.L.R.B. 1408, 61 L.R.R.M. 1249 (1966).

⁵⁵ *Id.* at 1412, 61 L.R.R.M. at 1251 (footnotes omitted). See also *Continental Baking Co.*, 99 N.L.R.B. 777, 782-83, 30 L.R.R.M. 1119, 1120-21 (1952); 16 NLRB Ann. Rep. 86 (1951); 15 NLRB Ann. Rep. 39, 43 (1950); 14 NLRB Ann. Rep. 32 (1949); 13 NLRB Ann. Rep. 36 (1948). For the relevant text of the Act, see text at note 20 *supra*.

that the totality of a university faculty comprises a homogeneous, identifiable and distinct group.⁵⁶ Neither full-time nor adjunct faculty can be interchanged with service or clerical employees of the university. The Board of Trustees, through the administrative officers of the university, controls and supervises the activities of both part-time and full-time faculty. Because the Board refused to hear university faculty cases until the 1970 *Cornell* decision, there is rarely any previous history of collective bargaining to consider, and when dealing with part-time and full-time faculty who teach on the same campus, the issue of geographic proximity of various parts of the employer's operation is not relevant. It is clear that a significant community of interest based on these similarities could easily exist.

As pointed out by Member Fanning in his dissenting opinion,⁵⁷ it seems incongruous that the majority found enough community of interest to include professional librarians in the unit of full-time faculty. These individuals, whose duties and relationships with students are substantially dissimilar to those of full-time professors, could be included, while adjunct faculty were denied that right.⁵⁸ The third criterion mentioned by the Board, eligibility for tenure,⁵⁹ was viewed as a very significant factor in the leading state labor board decision, *In re Board of Higher Education*.⁶⁰ The New York Board used tenure as a basis for excluding part-time faculty from the unit of full-time employees. However, that case can be distinguished from *New York University* because the New York Board based its decision, at least partially, on the fact that the City University of New York was unusual because of its high proportion of non-tenured faculty in relation to the total instructional staff. The state board expressed the belief that the independence of the tenured faculty might be compromised by allowing non-tenured personnel, in almost equal numbers, to be included in the unit of faculty rank personnel.⁶¹ The facts of *New York University* do not reveal the presence of any similar threat. In any event, it is doubtful that the proportion of non-tenured to tenured faculty members should be used as a valid criterion for determination of the bargaining unit, for it has little, if any, relevance to the bargaining process itself.⁶²

In an apparent effort to substantiate the conclusions it reached the *New York University* Board added a footnote to explain the policy reversal:

Our abandonment of the New Haven rule is the result of arguments and contentions advanced by the parties in

⁵⁶ See McHugh, *Collective Bargaining with Professionals in Higher Education: Problems in Unit Determinations*, 1971 Wis. L. Rev. 55, 64.

⁵⁷ 205 N.L.R.B. No. 16 at 29, 83 L.R.R.M. at 1557 (dissenting opinion).

⁵⁸ *Id.*

⁵⁹ See text at note 96 *infra* for Member Fanning's discussion of this factor.

⁶⁰ 1 N.Y.P.E.R.B. 407, 3 CCH Lab. L. Rep. [State Laws] ¶ 49,993.84, at 61,181 (1968).

⁶¹ *Id.*

⁶² See discussion in text at notes 92-94 *infra*.

this and other pending cases as to the function, nature, and character of part-time faculty members. We have also been influenced by the Board's inability to formulate what we regard as a satisfactory standard for determining the eligibility of adjuncts in Board elections. See Member Kennedy's dissent in *C.W. Post* [Center] of Long Island University, 198 N.L.R.B. No. 79, 80 L.R.R.M. 1738 [(1972)], supplementing 189 N.L.R.B. No. 109, 77 L.R.R.M. 1001 [(1971)].⁶³

But the footnote does not satisfactorily clarify the reasoning behind the holding. *New York University* does not adequately explain the arguments and contentions on the function, nature and character of part-time faculty members which, according to the footnote, the Board finds so persuasive. The Board has not yet fully stated those arguments in subsequent opinions, for both *Catholic University*⁶⁴ and *Fairleigh Dickinson University*⁶⁵ exclude part-time faculty from the unit of full-time faculty on the basis of the *New York University* holding, without further elaboration. It appears that the Board has decided that a standard of exclusion based on a mathematical formula, as propounded in *University of Detroit*,⁶⁶ is unworkable, for in reality, the difference in interests between a part-time faculty member teaching a course worth three credits and another teaching a course worth only two credits is insignificant. There is thus some logic in either including or excluding *all* part-time faculty members, without regard to the number of hours taught. This conclusion, however, does not follow from Member Kennedy's dissenting opinion in *C.W. Post*, as the Board's footnote would seem to imply. The issue discussed in that dissenting opinion was not the workability of the standard itself, but rather to whom that standard was to be applied.⁶⁷ It would seem that the majority misuses Member

⁶³ 205 N.L.R.B. No. 16 at 9 n.9, 83 L.R.R.M. at 1552 n.9.

⁶⁴ 205 N.L.R.B. No. 19, 83 L.R.R.M. 1548, supplementing 202 N.L.R.B. No. 111, 82 L.R.R.M. 1613, clarifying 201 N.L.R.B. No. 145, 82 L.R.R.M. 1385 (1973). The original decision and its supplement included part-time faculty in the full-time unit. Since there was a challenge to ballots of part-time faculty, the Board retained jurisdiction, so that after reconsideration, and for the reasons stated in *New York University*, it ruled that part-time faculty should be excluded.

⁶⁵ 205 N.L.R.B. No. 101, 84 L.R.R.M. 1033 (1973).

⁶⁶ 193 N.L.R.B. 566, 78 L.R.R.M. 1273 (1971). See text at notes 43-45 *supra*.

⁶⁷ Member Kennedy was not specifically objecting to the inclusion of part-time faculty in *C.W. Post*, nor was he objecting to a formula to determine who should be included. What he did oppose was a procedure which allowed the revision of eligibility rules after an election had been held. He agreed with the hearing officer that adjunct professors when not teaching are not temporarily laid-off employees but rather "non-seasonal employee contractors between jobs." 198 N.L.R.B. No. 79 at 9, 80 L.R.R.M. at 1740-41 (1972) (dissenting opinion), supplementing 189 N.L.R.B. No. 109, 77 L.R.R.M. 1001 (1971). As there is no assurance that adjunct faculty members who taught in the past will teach in the future, only part-time professors who were actually teaching during the semester when the election is directed and held should be eligible to vote. 198 N.L.R.B. No. 79 at 9, 80 L.R.R.M. at 1740-41 (1972) (dissenting opinion).

Kennedy's argument by citing it as supportive of the *New York University* holding.

A major question arising from the *New York University* decision is why the Board considered it necessary to establish a definite standard concerning part-time faculty members. In so doing, the Board seems to disregard its general policy of classifying part-time employees on a case by case basis. Ordinarily, the Board makes individual decisions by comparing the work situation of the employees in question with that of the full-time employees of the employer.⁶⁸ Often the major factor considered is the *regularity* of the employee's participation, not the number of hours worked,⁶⁹ for Board policy has been to include regular, part-time employees.⁷⁰ In contrast to the university faculty cases, a policy of refusing to create a standard definition of regular part-time employees has been sanctioned in other situations, as in *President & Directors of Georgetown College for Georgetown University*,⁷¹ a case involving service and maintenance employees, wherein the Board said: "This holding is . . . based on the facts of this case and is not to be construed as a standard definition of regular part-time employees applicable to all universities or colleges."⁷² A primary example of this general policy appears in the Board's consideration of cases involving student employees: the decision to include or exclude is based on the circumstances of each case.⁷³ Similarly, the Board presently considers the status of department chairmen on a case by case basis.⁷⁴ Thus, while the Board does have broad discretion to establish rules concerning the process of unit determination, it is submitted that the *New York University* decision fails to present any strong reason for the creation of an inflexible standard to be applied toward part-time faculty in this area of Board jurisdiction.

In *New York University*, one of the parties, the New York University Faculty of Law Association, opposed the inclusion of part-time faculty within the full-time unit. An interesting problem would arise, however, if a case were presented to the Board in which the parties stipulated to the *inclusion* of the part-time faculty.⁷⁵ Board policy is to accept stipulations unless the inclusion

⁶⁸ See, e.g., *Delto Co.*, 202 N.L.R.B. No. 145, 82 L.R.R.M. 1725 (1973), where five part-time employees working at different jobs were included in the full-time unit.

⁶⁹ E.g., *Grimaldi Buick-Opel, Inc.*, 202 N.L.R.B. No. 59, 82 L.R.R.M. 1797 (1973).

⁷⁰ 21 NLRB Ann. Rep. 63-64 (1956).

⁷¹ 200 N.L.R.B. No. 14, 82 L.R.R.M. 1046 (1972).

⁷² *Id.* at 7, 82 L.R.R.M. at 1048. The Board accepted the employer's classification of regular part-time employees (those working 20 hours or more per week), and included such employees in the same unit as full-time service and maintenance personnel. But students were excluded from the unit because they were temporary employees working under a different pay scale.

⁷³ Compare *Barnard College*, 204 N.L.R.B. No. 155, 83 L.R.R.M. 1483 (1973), with *Delto Co.*, 202 N.L.R.B. No. 145, 82 L.R.R.M. 1725 (1973).

⁷⁴ See note 28 *supra*.

⁷⁵ See *Adelphi University*, 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972).

or exclusion contravenes the Act or established Board policy.⁷⁶ Assuming that *New York University* now becomes "established Board policy," the Board would deny to employees the right to organize in the manner desired, a right which section 9(b) of the NLRA strives to protect. Even where there are no stipulations, if both part-time and full-time faculty wish to be represented by a single combined unit, Board policy will now frustrate their goals. It would seem that by disregarding the desires of the employees seeking to organize, the Board would be undermining rather than fostering effective collective bargaining.

New York University also fails to discuss the classification of "terminal contract" faculty members—those hired for full-time teaching for only a specific length of time. In *Manhattan College*,⁷⁷ the Board found that

[t]here is no evidence to suggest that those currently on "terminal contract" were hired other than as permanent employees, subject to termination the same as any other employee in the unit. While they remain on the faculty they have a substantial community of interest with their colleagues⁷⁸

Likewise, a comparison of these faculty members to regular full-time faculty, using the *New York University* criteria, would tend to show a significant community of interest. At least in terms of compensation, participation in university government, and working conditions, "terminal contract" faculty are probably closer to full-time faculty than to adjunct faculty. Indeed, tenure may be the *only* distinction which can be drawn to separate these individuals from full-time faculty. In *New York University*, the Board did not indicate whether compliance with all four conditions was necessary in order for an employee to be included in the unit of full-time faculty. If "terminal contract" faculty members are to be included in the unit, the Board will be forced to give a more detailed and satisfactory analysis of its *New York University* holding.

The two dissenting opinions by Chairman Miller and Member Fanning raise additional questions concerning the rationale of the majority opinion. The dissenting opinion of Chairman Miller stresses the problems of fragmentation which he believes will result from the majority holding. The chairman claims that the majority errs both in disenfranchising part-time faculty members and in disallowing a unit which offers the optimum in bargaining stability.⁷⁹ Because he is sure that the part-time faculty members fit the Act's definition of employees, Chairman Miller predicts that separate

⁷⁶ Harvey Russell, 145 N.L.R.B. 1486, 1488, 55 L.R.R.M. 1165 (1964). See also *Delto Co.*, 202 N.L.R.B. No. 145 at 8 n.12, 82 L.R.R.M. 1725, 1727.

⁷⁷ 195 N.L.R.B. 65, 79 L.R.R.M. 1253 (1972).

⁷⁸ *Id.* at 66, 79 L.R.R.M. at 1254.

⁷⁹ 205 N.L.R.B. No. 16 at 22, 83 L.R.R.M. at 1555 (dissenting opinion).

units for such employees will have to be approved, and he sees practical problems in bargaining as a sure result. Chairman Miller's contention is that the units of full-time and part-time faculty will be fighting for the same benefits, each unit at the expense of the other. As university administrators will not be able to satisfy both groups, they will be forced to seek accommodations, which will be exceedingly difficult since the two groups are separate and autonomous, with no one to speak for both.⁸⁰ While Chairman Miller admits that some of the same difficulties arise with the creation of a separate unit for law faculty, he sees that determination as "consistent with the legislative history of the Act, which demonstrates that Congress did not wish us to ignore traditional craft and professional interests, even though the result of recognizing those interests might provide less than optimum industrial relations stability."⁸¹

Chairman Miller is correct in asserting that the creation of two separate units could make the bargaining process itself more difficult, although the struggle between part-time and full-time faculty which he sees as inevitable is not entirely the result of the creation of separate units. In the unusual situation where a university has sufficient assets to meet the needs of both the full-time and adjunct faculty members, it might be said that Chairman Miller disregards "[t]he historic faculty view . . . that the very nature of their work requires that they band together as a community of scholars in order to do their work freely and completely."⁸² Even though they are forced to bargain in a separate faculty unit, part-time faculty do not necessarily seek to improve their position at the expense of full-time faculty members. Many part-time faculty members hope eventually to work into a position as a full-time faculty member; to try to restrict the benefits gained by full-time faculty would defeat their own personal goals. While the part-time unit might attempt to gain added fringe benefits or even a type of modified tenure, such gains would not necessarily be detrimental to full-time faculty. And it seems logical that part-time faculty would not fight against salary increases for full-time faculty, as the part-time salary scales are often based on the same qualifications as full-time scales and then modified on the basis of the number of hours taught.⁸³ However, in the more common situation, where the

⁸⁰ Id. at 21, 83 L.R.R.M. at 1555 (dissenting opinion).

⁸¹ Id. at 22, 83 L.R.R.M. at 1555 (dissenting opinion). The Board has recognized that certain craft groups may be entitled to representation through individual rather than company-wide units. For discussions on the issue of craft severance, see Note, 19 Case W. Res. L. Rev. 327 (1968); Note, 19 S.C.L. Rev. 429 (1967).

⁸² McHugh, *supra* note 56, at 64.

⁸³ This rationale is probably more applicable to the part-time faculty member in the general university, particularly in the field of arts and sciences, than to a part-time teacher in a professional school such as law. The particular interests of a part-time law professor make him different from the average part-time faculty member. A part-time law professor is likely to teach a course in his area of expertise while carrying on a full-time practice in that specialty. It is doubtful that he desires to enter the teaching profession to any greater degree.

university lacks adequate assets and resources, the conflict between full-time and adjunct faculty members over the allocation of those resources may very well be heightened by the division into two bargaining units.

Member Fanning's dissent in essence revolves around one proposition: the reasons upon which the majority relies provide no valid basis for distinguishing between full-time and part-time faculty members. He concludes that "tenure track" is the major factor for the majority, and in his opinion, such a factor should not be decisive. Rather, part-time and full-time faculty belong in the same unit because "[t]heir basic function—teaching—provides the necessary and overriding unifying interest."⁸⁴ Member Fanning suggests that the very factors upon which the majority relies to establish separate units in fact require the establishment of a single unit. As teachers, the essential duties of full-time and part-time faculty are the same. Therefore, the Board's concern should be directed toward the faculty's community of interest in the performance of the function of teaching, and other tangential functions should not be allowed to obscure the judgment.⁸⁵

Member Fanning discusses in detail the four factors upon which the majority premises its decision, introducing much more factual material than does the majority. While the majority states that the pay of part-time faculty is merely a modest sum corresponding to a respectable honorarium,⁸⁶ Member Fanning believes that the amount paid is not disproportionate to the amount of time required for part-time teaching, in comparison to that required of a full-time professor. Therefore, in his opinion, both the work and pay of part-time faculty are sufficiently related to the work and pay of full-time faculty to support the inclusion of both in a single unit.⁸⁷ Member Fanning seems to disregard the added fringe benefits which accrue to full-time faculty members, as he does not even mention any influence those benefits might have on determining whether the compensation granted is equivalent. The majority opinion stresses that the working conditions of full-time and part-time are not the same, largely because of the extra responsibilities, in terms of research and participation in university affairs, which engage the time of the full-time professor.⁸⁸ In rebuttal, Member Fanning states that the faculty are professional teachers, not professional researchers or

His interest in financial rewards is minimal and the probabilities of any organization with his part-time colleagues are almost nonexistent. By excluding part-time law faculty, the Board effectively prevents this professor from obtaining any representation at all. But it is perhaps this very lack of interest which justifies excluding part-time law faculty from the full-time law faculty unit. Nevertheless, that argument has little basis when applied to the situation of a part-time professor in the field of arts and sciences.

⁸⁴ 205 N.L.R.B. No. 16 at 28, 83 L.R.R.M. at 1557 (dissenting opinion).

⁸⁵ *Id.* at 23, 83 L.R.R.M. at 1555 (dissenting opinion).

⁸⁶ *Id.* at 10, 83 L.R.R.M. at 1552.

⁸⁷ *Id.* at 24–25, 83 L.R.R.M. at 1556 (dissenting opinion).

⁸⁸ *Id.* at 11, 83 L.R.R.M. at 1553.

professional citizens. Not all full-time faculty members are involved in such research or university citizenship activities; therefore, that difference should not be given controlling weight.⁸⁹ In the same manner, not all full-time faculty have a voice in university governance, and perhaps even more important, full-time faculty who do participate lack ultimate authority, a factor which Member Fanning says must be weighed in determining the impact of this consideration on unit determination.⁹⁰ In addition, Member Fanning questions whether the role of faculty members in determining university policy should be considered at all in the determination of the bargaining unit.⁹¹ As the majority stated when it quoted from *Kalamazoo Paper Box Corp.*,⁹² in order to foster efficient and stable collective bargaining, unit determination must relate to the factual situation in which the parties must deal.⁹³ The issues which will be decided through negotiations between the bargaining unit and the university administration are the only issues which should be relevant in determining whether a community of interest exists. Thus Member Fanning indicates that only if the Board classifies matters of university policy as necessary items of negotiation between administration and faculty will they affect the community of interest between part-time and full-time faculty members.⁹⁴

Like Chairman Miller, Member Fanning decries the fragmentation which the majority's decision could promote. He claims that in forcing the university to bargain over identical subject matter with the collective bargaining representatives of different factions of the same faculty, the impediments to effective collective bargaining which the majority is trying to avoid will be produced and enhanced.⁹⁵ According to Member Fanning, the majority opinion makes the "tenure track" the basic line of division upon which part-time faculty are excluded from the full-time unit. It would seem then that inclusion necessarily means that the faculty member in question holds a position at least leading to eligibility for tenure. However, Member Fanning notes that not all full-time faculty who

⁸⁹ Id. at 25, 83 L.R.R.M. at 1556 (dissenting opinion). Member Fanning maintains that, in computing the workload of the full-time faculty member, the majority included time spent day-dreaming and lying awake at night. He finds it difficult to understand why, when part-time faculty engage in similar activities, the activities are unrelated to their jobs as teachers, so such time cannot be included in their workloads.

⁹⁰ Id. at 25-26, 83 L.R.R.M. at 1556 (dissenting opinion).

⁹¹ Id. at 26, 83 L.R.R.M. at 1556 (dissenting opinion).

⁹² 136 N.L.R.B. 134, 49 L.R.R.M. 1715 (1962).

⁹³ 205 N.L.R.B. No. 16 at 11, 83 L.R.R.M. at 1553, citing *Kalamazoo*, 136 N.L.R.B. 134, 137, 49 L.R.R.M. 1715 (1962).

⁹⁴ 205 N.L.R.B. No. 16 at 25-26, 83 L.R.R.M. at 1556 (dissenting opinion). For a discussion of whether management's non-labor policies may be mandatory issues of bargaining, see Note, Collective Bargaining and the Professional Employee, 69 Colum. L. Rev. 277 (1969).

⁹⁵ 205 N.L.R.B. No. 16 at 26-27, 83 L.R.R.M. at 1556 (dissenting opinion).

were included in the NYU unit are on a tenure track. Moreover, the fact that a faculty member does hold such a position does not necessarily mean that his interest in the unit is any greater than that of an adjunct faculty member with a continuing association with the university over a period of years.⁹⁶

Overall, the dissenting opinion of Member Fanning appears to be a rational and well-reasoned analysis of the factual situation presented by *New York University*. While Chairman Miller is basically concerned with the same issue, fragmentation, it is Member Fanning who explores the problem in depth, thus establishing what appears to be a viable alternative to the majority stand. Member Fanning's position is greatly strengthened by the fact that the majority fails to show substantial background and reasoning for the decision which is reached. Thus it is impossible to determine exactly how much Member Fanning's interpretation of the facts differs from that of the majority. As a result, one is inclined to join in the viewpoint of the dissent, where facts are given, rather than to rest upon the majority's analysis alone.

It is submitted that in choosing to exclude all adjunct faculty members, the Board has failed to give adequate consideration to the problems raised by the two dissenting opinions, and, in particular, has failed to deal with the problem of fragmentation. A major policy of the Act is to encourage effective collective bargaining.⁹⁷ Since *New York University* does not give any convincing reason why a single faculty unit is not appropriate, it is difficult to see how the policy is being effectuated when employee groups found appropriate become increasingly more numerous and the number of employees represented by each unit decreases. While a unit which gives to employees the greatest degree of bargaining power should not necessarily be favored,⁹⁸ it would seem that some attention should be given to the probable results of establishing multiple units among the employees of one employer. The problem is related to both holdings of *New York University*—the establishment of a separate unit for the law faculty, and the exclusion of part-time faculty from the unit of full-time employees.

In a footnote in *Fordham University*,⁹⁹ the Board recognizes that the factors which made the law faculty unique, thus entitling it to separate representation, could easily be applied to other professional schools, resulting perhaps in multiple fragmentation of a university faculty. In a large university with many professional schools, the process of collective bargaining would therefore be greatly complicated. As former Secretary of Labor W. Willard Wirtz

⁹⁶ Id. at 27, 83 L.R.R.M. at 1557 (dissenting opinion).

⁹⁷ See 29 U.S.C. § 141 (1970).

⁹⁸ *Continental Baking Co.*, 99 N.L.R.B. 777, 782 n.11, 30 L.R.R.M. 1119, 1120 n.10 (1952).

⁹⁹ 193 N.L.R.B. 134, 137 n.11, 78 L.R.R.M. 1177, 1181 n.11 (1971).

has stated, the creation of separate units may affect the entire sphere of university governance.¹⁰⁰ He argues that

the importance of participation of the law faculties in university governance as a whole, and . . . the belief that legal education should be tied more and more closely to the rest of education [lead] to the conclusion that the separate bargaining unit decision is a mistake.¹⁰¹

To a somewhat lesser extent, the same arguments could be made when other professional schools are involved, although it is law faculties which have traditionally played a unique role in university government. In any event, that decision for separate units may have been compelled by "long-established unit determination policies with respect to craft and professional groups,"¹⁰² and thus result in "necessary" splintering.¹⁰³

It is submitted that the fragmentation caused by the exclusion of part-time faculty is harder to justify. In *New York University*, the Board expressly reserved to a later decision the issue of whether a separate unit of part-time faculty members would be appropriate.¹⁰⁴ In *In re Board of Higher Education*,¹⁰⁵ the New York Labor Board found that a separate negotiating unit *was* appropriate for part-time faculty, and as Chairman Miller pointed out, it is difficult to see how, if part-time faculty are "employees" under the Act, they could be excluded entirely from the privileges of collective bargaining.¹⁰⁶ Thus *New York University* appears to have carried the NLRB much further toward the creation of independent bargaining units for separately identifiable disciplines and employee groups. The results of such classifications are not yet known. One possible result may be a tendency on the part of university administrators to try to avoid altogether any connection with collective bargaining under NLRB jurisdiction. University administrators may view as impossible a situation in which they are forced to attempt negotiations over the same problems with numerous representatives. The consequence

¹⁰⁰ Faculty Collective Bargaining and the Law Schools—A Panel Discussion, 33 Ohio St. L.J. 743, 763-64 (1972).

¹⁰¹ *Id.* at 764. See questions and comments, *id.* at 769-80, for additional opinions and analyses of the problem.

¹⁰² *New York University*, 205 N.L.R.B. No. 16 at 22, 83 L.R.R.M. at 1555 (dissenting opinion). See Note, 19 Case W. Res. L. Rev. 327 (1968); Note, 19 S.C.L. Rev. 429 (1967).

¹⁰³ For a state decision which held that a separate unit for medical school faculty members was not appropriate because it would unduly fragmentize the teaching faculty unit, see *In re Wayne State University*, 3 CCH Lab. L. Rep. [State Laws] ¶ 49,998.93, at 61,614 (Mich. Employment Relations Commission 1972).

¹⁰⁴ 205 N.L.R.B. No. 16 at 12 n.12, 83 L.R.R.M. at 1553 n.12.

¹⁰⁵ 1 N.Y.P.E.R.B. 407, 3 CCH Lab. L. Rep. [State Laws] ¶ 49,993.84, at 61,181 (1968). Accord, *In re State Colleges*, 3 CCH Lab. L. Rep. [State Laws] ¶ 49,995.17, at 61,323 (N.J. Public Employment Relations Commission 1969). Contra, *In re Lansing Community College*, 3 CCH Lab. L. Rep. [State Laws] ¶ 49,998.58, at 61,584 (Mich. Employment Relations Commission 1971).

¹⁰⁶ 205 N.L.R.B. No. 16 at 21, 83 L.R.R.M. at 1555 (dissenting opinion).

may be that university officials who might have been quite willing to accept as inevitable the advent of collective bargaining with a single faculty representative will now attempt to prevent the development of any labor organization on the campus.¹⁰⁷ The decision in *Cornell University*¹⁰⁸ served to stimulate widespread faculty organization.¹⁰⁹ In effect, *New York University* may well serve to hinder the continued growth of that movement. If the decision does not discourage collective bargaining on the university campus, the question will become

[w]hether it will be possible to devise meaningful classes of disciplines, such as the professions, the natural sciences, the social sciences, the humanities, the arts, and so on, in order to hedge against an utterly chaotic fragmentation into multifarious bargaining units for all of the separately identifiable disciplines. . . .¹¹⁰

The *New York University* decision itself cannot answer such a question; it can be answered only after the standards of *New York University* are applied to future Board cases.

New York University is an important decision in the field of collective bargaining in a university setting. After *Cornell* sanctioned NLRB jurisdiction in this area, the Board was faced with problems of unit determination which it attempted to solve by using guidelines traditionally applied to industry. Apparently the result of the application of industrial rules to university situations was unsatisfactory to the Board. Thus the Board promulgated a new policy in *New York University*: part-time faculty members do not have a significant community of interest with full-time faculty, and thus they must be excluded from the bargaining unit of full-time faculty. This policy differs in significant respects from Board policy in other fields of employment. Although the new standard ends the need for a case by case evaluation of the status of part-time faculty members, it does cause problems of both interpretation and application, par-

¹⁰⁷ Such a result may perhaps be indicated by the *New York University* situation itself. Pursuant to the Board decision, elections were conducted in November 1973. The university administration strongly supported the position that no agent be elected to represent the faculty members. The law faculty voted in favor of a separate bargaining unit and chose representation by the *New York University Faculty of Law Association*. In the university-wide elections, however, there was no clear majority, the votes having been cast for three possible alternatives: *United Federation of College Teachers, Local 1460* (310), *American Association of University Professors* (255), and *No agent* (299). *N.Y. Times*, Nov. 17, 1973, at 35, col. 2. The AAUP subsequently withdrew its challenges to 48 ballots, so a runoff would be held between the *United Federation of College Teachers* and the *No agent* position in order to obtain the required clear majority. *N.Y. Times*, Nov. 21, 1973, at 37, col. 7.

¹⁰⁸ 183 N.L.R.B. No. 41, 74 L.R.R.M. 1269 (1970).

¹⁰⁹ See Comment, *The Appropriate Faculty Bargaining Unit in Private Colleges and Universities*, 59 Va. L. Rev. 492, 492-94 & nn.6-13 (1973), for a discussion of faculty unionization in response to the *Cornell* decision.

¹¹⁰ Sands, *The Role of Collective Bargaining in Higher Education*, 1971 Wis. L. Rev. 150, 169.

ticularly with respect to "terminal contract" faculty members. In addition, the majority opinion does not seem to present adequate justification for the absolute rule it creates. The dissenting opinions of Chairman Miller and Member Fanning raise substantial criticisms, *e.g.*, that the problem of fragmentation is real and should be given careful consideration when bargaining units are determined. The NLRB has asserted jurisdiction over private colleges and universities in order "to insure the orderly, effective and uniform application of the national labor policy."¹¹¹ Because of the inflexible nature of the Board's opinion in *New York University*, and because the ruling departs from the policies generally followed in other areas of Board jurisdiction, one may question whether this goal has been satisfied.

KATHLEEN E. SHANNON

¹¹¹ *Cornell University*, 183 N.L.R.B. No. 41 at 13, 74 L.R.R.M. at 1274.

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rate law, and other, fields that may have special ramifications in the industrial and commercial sector. It means a thorough *Annual Survey of Labor Law*, as well as frequent special issues, such as our recent issues "The Revenue Act of 1971" and "Recent Developments in Environmental Law," both published this year. In the year to come the *Boston College Industrial & Commercial Law Review* will continue to bring sensitivity, organization and thoroughness to the specific and certain corporate fields of law. In the forthcoming volume there will be two special issues. One will focus on environmental law, including an examination of S.E.C. registration statements — new regulations concerning environmental impact disclosure. Our other special issue will examine developments in labor relations law, and will include the *Review's* thirteenth annual labor law survey, as well as discussion of the Occupational Safety and Health Act and pending pension reform legislation. Aside from these special issues, there will be a number of articles relevant to corporate practice, for ex-

ample, an article by Earl Kintner on international aspects of American antitrust laws, and a detailed examination of the National Labor Relations Board's back pay remedy by N.L.R.B. Regional Director, Robert F. Fuchs.

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