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Diane Wende Bricker

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THE PECULIAR COLLECTIVE BARGAINING STATUS OF HOSPITAL HOUSESTAFF

I. Introduction

In recent years confusion and controversy have existed regarding the eligibility of hospital interns, residents and clinical fellows to bargain collectively. While some state labor relations boards have ruled that these housestaff are employees, and thus eligible to bargain collectively, the National Labor Relations Board (NLRB) has ruled that housestaff in private, non-profit hospitals are primarily students, and thus, ineligible to bargain collectively. The NLRB has further claimed that its ruling on the collective bargaining status of housestaff in private, non-profit hospitals preempts any subsequent consideration of the matter by state labor relations boards.

The conflict over whether state labor relations law or the National Labor Relations Act (NLRA) should determine the collective bargaining status of housestaff in non-profit hospitals did not arise until after 1974. Prior to this time, non-profit hospitals, the employers of housestaff, were exempted from the NLRB's jurisdiction.

Consequently, states applied their own laws to labor-management

1. The term "housestaff" is commonly used when referring collectively to interns, residents and clinical fellows. Generally, interns have just completed medical school and are involved in a one year program; residents are in a longer training program leading to certification in a medical specialty; clinical fellows have completed residencies and are being trained in medical sub-specialties. NLRB v. Committee of Interns & Residents, 566 F.2d 810, 811 (2d Cir. 1977), cert. denied, 46 U.S.L.W. 3541 (Feb. 28, 1978).


6. Congress had amended the NLRA in order to exempt non-profit hospitals from the NLRA's definition of employer: "The term 'employer' shall not include . . . any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual . . . ." Act of June 23, 1947, Pub. L. No. 80-101, § 101(2), 61 Stat. 136 (codified at 29 U.S.C. § 152(2) (1970)).
problems in non-profit hospitals, and a large number of state labor boards concluded that housestaff, as employees, were eligible to bargain collectively. In August, 1974, however, Congress passed the Health Care Amendments, deleting the NLRA exemption for non-profit hospitals, and further extending the coverage of the Act to include any "health care institution."

The NLRB first considered the collective bargaining rights of housestaff in Cedars-Sinai Medical Center. In finding housestaff to be primarily students, rather than employees within Section 2(3) of the NLRA, the NLRB concluded that an organization composed of housestaff was not a labor organization within the meaning of the Act. Accordingly, the NLRB dismissed the housestaff's petition for certification as a labor organization. The NLRB has consistently adhered to this view in cases involving housestaff in hospitals throughout the country. Since this position is contrary to that which many state courts and labor boards have adopted, two interesting questions have emerged: (1) Has the NLRB preempted state control of labor relations of housestaff in non-profit hospitals and (2)
if so, will the majority reasoning of Cedars-Sinai endure, despite the dissatisfaction of state courts and agencies.

II. The Question of Preemption

A. A History of Confusion

A series of recent confrontations in the New York courts between housestaff and hospitals illustrates the existing confusion and uncertainty over whether the state or federal labor relations boards may decide the collective bargaining rights of housestaff.

Prior to the 1974 Health Care Amendments, the State Labor Relations Board of New York (SLRB) determined that housestaff of non-profit hospitals could bargain collectively. The housestaff were ruled employees under the New York State Labor Relations Act, and were held to constitute a union appropriate for the purposes of collective bargaining.

Following the 1974 Health Care Amendments and the subsequent Cedars-Sinai ruling that housestaff could not bargain collectively under the NLRA, New York’s Misericordia Hospital refused to bargain with the previously recognized Committee of Interns and Residents (CIR). As the CIR was bringing an unfair labor practices charge against Misericordia Hospital before the New York State Labor Relations Board, the NLRB reiterated its Cedars-Sinai position in Kansas City General Hospital. The SLRB then expressed confusion about whether it had jurisdiction, and finally dismissed the CIR’s charges in Misericordia Hospital Medical Center. While

18. N.Y. LAB. LAW §§ 700-717 (McKinney 1977): Section 701(12) extends the coverage of the New York State Labor Relations Act to “any person employed or permitted to work by or at a non-profitmaking hospital or residential care center.”
19. For example, the housestaff at Brooklyn Eye and Ear Hospital were found to represent a unit appropriate for purposes of collective bargaining under § 705(2) of the New York State Labor Relations Act. Brooklyn Eye and Ear Hosp., 32 S.L.R.B. 65, 75 (N.Y. 1969).
21. The Committee of Interns and Residents is an organization composed of housestaff working in hospitals as interns, residents and clinical fellows [hereinafter cited as CIR].
22. Kansas City Hosp., 225 N.L.R.B. No. 14, 92 L.R.R.M. 1379 (June 24, 1976), revised, 225 N.L.R.B. No. 14A, 93 L.R.R.M. 1362 (Nov. 8, 1976). In the Kansas City decision, the NLRB also stated that the hospital involved was not even an employer under § 2(2) of the NLRA. This addition was later deleted in the revised opinion, Kansas City II.
23. Misericordia Hosp. Medical Center, 39 S.L.R.B. No. 32 (July 14, 1976). Although the
the CIR was attempting to vacate the SLRB's dismissal of its charges, intervening hospitals sought to remove the action to federal court. The District Court for the Southern District of New York, however, found no federal jurisdictional basis for removal, and remanded the case to the New York State Supreme Court. On remand, the New York Supreme Court carefully considered the Kansas City decision, and concluded that "disputes between the petitioner [CIR] and the intervening hospitals were unaffected by the 1974 amendments to the National Labor Relations Act." Consequently the court held the SLRB should retain the same jurisdiction it had possessed previously.

The NLRB quickly revised its Kansas City opinion in response to the New York Supreme Court decision. In Kansas City II, the NLRB explicitly stated that it had intended, by the Cedars-Sinai opinion, "to find federal preemption of the health care field to preclude states from exercising their power to regulate in this area." The Board explained that the 1974 Health Care Amendments left the resolution of whether housestaff were employees entitled to collective bargaining rights to the discretion of the Board. In the exercise of its discretion, the Board decided that affording housestaff collective bargaining rights would be contrary to the national labor policy. Consequently, the New York Supreme court vacated
its previous determination\textsuperscript{34} that the State Board retained its jurisdiction over housestaff, dismissed the CIR petitions and declared itself bound by the NLRB ruling on preemption in \textit{Kansas II}.\textsuperscript{35}

\textbf{B. Initial Rejection of Federal Preemption Theory}

In the interval between the two New York decisions, one granting the SLRB jurisdiction over housestaff and the other denying it, the NLRB, in an attempt to enforce its preemption ruling, brought an action to enjoin the New York State Labor Relations Board from continuing to assert jurisdiction over housestaff/hospital disputes.\textsuperscript{36} The District Court for the Southern District of New York defined the issue as “whether, given the Board’s ruling that housestaff are not ‘employees’ within the NLRA, the Board’s further ruling in \textit{Kansas City} that the labor relations of housestaff are preempted by the 1974 health care amendments from all state regulation is correct.”\textsuperscript{37} After careful consideration, the court concluded that the NLRA did not preempt the exercise of state power over labor relations of housestaff.\textsuperscript{38} Although the court declined to express an opinion as to the NLRB’s \textit{Cedars-Sinai} determination that housestaff are not employees under the NLRA,\textsuperscript{39} the opinion indicated a need for some type of regulation of labor relations between housestaff and hospitals.\textsuperscript{40} By recognizing this need, and finding state regulation to be more in harmony with national labor policy and congressional intent than no regulation,\textsuperscript{41} the district court attempted to give housestaff the collective bargaining rights denied them by the NLRB.

The crucial issue about which the district court’s reasoning re-

\begin{itemize}
\item \textsuperscript{34} 88 Misc. 2d 502, 388 N.Y.S.2d 509 (Sup. Ct. 1976), \textit{vacated}, 89 Misc. 2d 424, 391 N.Y.S.2d 503 (Sup. Ct. 1977).
\item \textsuperscript{35} 89 Misc. 2d 424, 391 N.Y.S.2d 503 (1977).
\item \textsuperscript{37} 426 F. Supp. at 449.
\item \textsuperscript{38} Before discussing the preemption issue, the court determined both that the NLRB had authority to seek injunctive relief against preempted state action and that the district court had proper jurisdiction over the subject matter. \textit{Id.} at 444-45.
\item \textsuperscript{39} \textit{Id.} at 449.
\item \textsuperscript{40} \textit{Id.} at 453.
\item \textsuperscript{41} \textit{Id.}
\end{itemize}
volved was the original NLRB Cedars-Sinai holding that housestaff are not employees within Section 2(3) of the NLRA. The district court concluded that the NLRB, by making this determination, put housestaff beyond the NLRB's power to control, even though Congress had intended, by the Health Care Amendments to preempt state regulation of the labor relations of such employees. Had the NLRB ruled housestaff to be employees under the Act, labor disputes between housestaff and private, voluntary non-profit hospitals would have been within the Board's exclusive jurisdiction. But since the NLRB made a contrary determination, the general expression of congressional intent to preempt state regulation would not be dispositive.

After determining that the NLRB had no jurisdiction over nonemployee housestaff, the district court focused on whether the factual pattern in the case at hand indicated a need for federal preemption. The court noted three particular factual situations which the Supreme Court has identified as indicating the need for federal preemption, and rejected all three as appropriate precedent for federal preemption in the housestaff controversy.

One of these factual patterns concerned Bethlehem Steel Co. v. New York State Labor Relations Board, in which the Supreme Court upheld the NLRB's refusal to designate foreman's bargaining units as appropriate for bargaining purposes. Preemption was ruled proper where the NLRB declined to exercise its jurisdiction on the grounds that it would not effectuate the policies of the NLRA to do so. The district court, however, distinguished Bethlehem Steel as inapplicable to the housestaff fact pat-

42. The court stated: "The scope of the Board's power to interpret and administer the Act must necessarily be limited by the boundaries of the Act itself." Id. at 450. The court had earlier determined that it is within the power of the NLRB, as agent entrusted with primary responsibility of administering and interpreting the Act, to make the initial interpretation of the employee status of housestaff. Id. at 448-49.
43. Id. at 448.
44. Id.
45. Id.
46. Id. at 447.
47. Id.
48. Id.
50. Id. at 775.
51. Id. at 774-75.
tern. In *Bethlehem Steel* the NLRB had adequate jurisdiction over the foreman involved because the Board termed them employees under the NLRA, whereas housestaff were not recognized as employees under the NLRA.

The district court discussed in considerably more detail a factual pattern that occurs when the activity in question is neither protected nor prohibited by the Act, and when the national labor policy requires the activity to be wholly unregulated and left to the free play of economic forces. Although housestaff and their labor relations activities were neither protected nor prohibited by the Act because of the NLRB's previous rulings, the court found that national labor policy did not require the activity to be wholly unregulated. In rejecting federal preemption under this factual pattern as inapplicable to the housestaff situations, the court focused on two major considerations: (1) congressional intention underlying the Health Care Amendments; and (2) the apparent rationale behind the NLRB's ruling in *Kansas City II*.

In exploring the first consideration, the court found that the general purpose of the Health Care Amendments is "to insure continuity of health care to the community." The Act was actually amended to include non-profit hospitals because their earlier exemption "had resulted in numerous instances of recognition strikes and picketing." Congress believed that with procedures of the Act

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53. At the time of the *Bethlehem Steel* case, the NLRB had concluded that supervisors were employees within the meaning of the Act. It had also concluded as a matter of national labor policy that unions of supervisors should not be given collective bargaining rights under the Act. 330 U.S. at 775.
54. The district court dismissed the third factual pattern quickly as inapplicable to the housestaff controversy. Under this third factual situation preemption is possible only in cases where the activity involved is protected by § 7 (Rights of Employees) or prohibited by § 8 (Unfair Labor Practices), or arguably subject to either. Since housestaff are not employees and therefore, by definition cannot be a labor organization under the NLRA, neither section will apply to the instant case. NLRB v. Committee of Interns & Residents, 426 F. Supp. at 449.
55. Id. at 450.
56. Id. at 453.
57. Id. at 450.
“available to resolve organizational and recognition disputes,” strikes and picketing would no longer occur. The district court consequently concluded that Congress intended labor relations no longer be left to the free play of economic forces. In further support of this conclusion, the court noted that Congress had rejected proposed amendments to the definition of supervisor that would ensure housestaff would not be excluded as supervisors from coverage under the NLRA. Because Congress considered housestaff within the scope of the Health Care Amendments, no special provision was needed to ensure housestaff would not be excluded from the Act.

In exploring the second consideration, the court was apparently influenced by both the Board’s “precipitate” decision to revise the original Kansas City opinion, and the unclear language in Kansas City II explaining the rationale behind the preemption decree. In Kansas City II the Board explained the rationale behind preemption as follows:

"Having exercised its discretion in Cedars-Sinai, by finding residents, interns and fellows to be primarily students and not 'employees' within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy."

The district court interpreted this language to mean that the Board believed that students should not be afforded collective bargaining rights, and should be unregulated by all labor law. After surveying a number of Board cases concerning bargaining rights of students, however, the court concluded that there was no expression of national labor policy requiring students be denied collective bargain-

60. Id.
64. Id. Chairman Murphey and Member John Penello noted in the revised order: "The preemption issue was never raised or litigated by the parties nor was it considered or even contemplated by us in reaching our decision originally. 93 L.R.R.M. at 1364 n.6.
65. 426 F. Supp. at 452.
66. 93 L.R.R.M. at 1364.
67. 426 F. Supp. at 452.
68. Id.
The court noted that the Board itself commented in the Cedars-Sinai decision that students could be included in bargaining units.70

C. Acceptance of Federal Preemption Theory

Writing for the Second Circuit Court of Appeals, Judge Thomas Meskill flatly rejected the two-pronged reasoning of the district court, reversed the court's decision, and held that the NLRB had properly preempted state jurisdiction over collective bargaining rights of housestaff.71 Judge Meskill began his opinion by pointing out that federal preemption in the labor field is particularly broad, and that the case at hand did not fall within any of the few clear exceptions and procedures delineated by Congress whereby the NLRB may cede jurisdiction over labor disputes to appropriate state authorities.72 He then systematically refuted the district court's decision, first stating that the district court had relied upon the distinction between employees and students made in the Cedars-Sinai opinion as the "premise of a faulty syllogism."73 The court of appeals described the district court's syllogism as follows: If housestaff were not employees within the meaning of the NLRA, then the CIR was not a labor organization; since the NLRA applies only to labor organizations the Board has waived its jurisdiction over housestaff.74 Judge Meskill pronounced this conclusion, that the NLRB had waived its jurisdiction over housestaff, to be a conclusion contrary to the intent of both the NLRB and of Congress.75

69. Id. The district court found that the Board, in a majority of cases, has not ruled that students are not employees, but rather found that students did not have a sufficient community of interest with other regular employees to be included in the petitioned-for units. Id.

70. Id. The Board in Cedars-Sinai stated: "We are aware that the Board has included students in bargaining units and, in a few instances has authorized elections in units composed exclusively of students." 223 N.L.R.B. at 253.


72. Id. at 812.

73. Id.

74. Id. The opinion stated the syllogism simply: "If housestaff were not 'employees' as defined in Section 2(3) of the NLRA, 29 U.S.C. Section 152(3), then the CIR was not a 'labor organization' as defined in Section 2(5), 29 U.S.C. Section 152(5). Since the NLRA applies only to a 'labor organization,' he [the district judge] concluded that the Board had waived its jurisdiction over housestaff." Id.

75. Id. at 813.
Judge Meskill first focused on the intent of the NLRB and its power to prevent the states from granting collective bargaining rights to housestaff unions.\textsuperscript{76} Because the NLRA contains explicit procedures by which the NLRB can cede jurisdiction to state labor authorities, the court of appeals refused to assume the NLRB would do "implicitly" what it could have done "explicitly."\textsuperscript{77} As further proof of the NLRB's intentions the court quoted precise language\textsuperscript{78} from the \textit{Kansas City II} decision which held that extending collective bargaining rights to hospital residents and interns would be contrary to the national labor policy.\textsuperscript{79} Thus the court relied on the very language the district court had criticized, and concluded, contrary to the district court, that the NLRB retained jurisdiction over housestaff.\textsuperscript{80}

The court of appeals cited the \textit{Bethlehem Steel}\textsuperscript{81} case as precedent to establish that the NLRB in fact had the power to assert its jurisdiction in the housestaff controversy, and then deny collective bargaining rights to housestaff.\textsuperscript{82} The court of appeals disagreed with the district court's prior interpretation of \textit{Bethlehem Steel} as inapplicable to the housestaff controversy,\textsuperscript{83} stating, "The inquiry is not a narrow or technical one, but rather whether Congress intended to occupy the field. The court must focus on the activity regulated and determine if it has been brought within the scope of federal power."\textsuperscript{84}

Consequently, the court of appeals addressed the congressional intention behind the Health Care Amendments, agreeing with the district court that Congress intended to include all labor relations of voluntary hospitals within the NLRA.\textsuperscript{85} Thus, the court of appeals

\textsuperscript{76.} \textit{Id.}
\textsuperscript{77.} \textit{Id.}
\textsuperscript{78.} See text accompanying note 65 supra.
\textsuperscript{79.} 566 F.2d at 813. The district court had pronounced the \textit{Kansas City II} decision "precipitate" and unclear. See notes 63, 64 supra and accompanying text.
\textsuperscript{80.} 566 F.2d at 813. The court did not discuss the district court's contention that extending collective bargaining rights to students is not contrary to national labor policy.
\textsuperscript{81.} 330 U.S. 767 (1947).
\textsuperscript{82.} 566 F.2d at 813-14. The court concluded that \textit{Bethlehem Steel} was illustrative of state power ousted by agency action taken pursuant to congressional mandate. \textit{Id. at} 814.
\textsuperscript{83.} See notes 49-52 supra and accompanying text.
\textsuperscript{84.} 566 F.2d at 814.
\textsuperscript{85.} \textit{Id. at} 815.
held that Congress intended to occupy this field. When the NLRB, the expert administrative agency to which Congress delegated powers over national labor policy, excluded housestaff from the definition of employee, it also denied them collective bargaining rights under state law.

The district court, in recognizing a need for labor regulation of housestaff, had settled for state regulation of the collective bargaining rights of housestaff. The court of appeals, however, prohibited state regulation under the *Bethlehem Steel* federal preemption theory. Furthermore, the court of appeals stressed that regulations, if any, should be uniform. In keeping with this stated need for uniform regulations, the court of appeals considered the possible effects of a contrary holding, which would allow for varying state regulation of the collective bargaining rights of housestaff. The court of appeals maintained: "If the NLRB erred in its treatment of housestaff unions, the solution is clearly not to create a patchwork of state-governed labor unions." The court envisioned that such a patchwork could lead to at least three potential areas of conflict: (1) conflict between the New York Labor Law which provides for compulsory arbitration in labor disputes, and the NLRA which allows strikes and collective bargaining, (2) conflict between the Health Care Amendments which provide mechanisms for notice to be given by unions with grievances and state law which makes no such provisions, and (3) a jurisdictional conflict between the CIR and a union recognized under the NLRA. The court of appeals then simply concluded that "the Health Care Amendments brought housestaff within national labor policy. Accordingly, the district court's conclusion that the SRLB had jurisdiction over housestaff was erroneous and cannot stand."

86. Id.  
87. Id.  
88. 426 F. Supp. at 453.  
89. 566 F.2d at 816-17.  
90. Id. at 815. Thus, the court of appeals quotes Senator Harrison Williams, chief sponsor of the Health Care Amendments in the Senate: "[T]he general purpose of the National Labor Relations Act, as interpreted by the Board and the courts, is to attempt to establish a uniform pattern of collective bargaining rules nationwide, without local variation." 120 Cong. Rec. 22575 (1974), quoted in 566 F.2d 810, 815.  
91. 566 F.2d at 815-16.  
92. Id. at 816.  
93. Id.  
94. Id. at 816-17.
The court of appeals has ended the years of jurisdictional conflict surrounding the housestaff/hospital management controversy. The court addressed only the jurisdictional issue of preemption, however, and refused to consider the wisdom of the NLRB's Cedars-Sinai decision. The Cedars-Sinai decision denying housestaff certification as a labor organization, in conjunction with the court of appeal's affirmation of the NLRB's power to preempt state control of this field, leaves housestaff ineligible to bargain collectively as a unit under the NLRA. By affirming the NLRB's power of preemption, the court of appeals perhaps properly isolated the original Cedars-Sinai decision as the underlying problem.

III. The Cedars-Sinai Precedent

A. District Court Lacks Jurisdiction to Overturn Cedars-Sinai

In Physicians National Housestaff Association, the CIR recently sought to overturn Cedars-Sinai as an abuse of discretion by the NLRB. The housestaff plaintiffs petitioned the United States Court for the District of Columbia to declare the plaintiffs a labor organization and employees within the meaning of the Act, and to order the Board to assume jurisdiction over the housestaff on that basis. Despite any possible problems with the Cedars-Sinai reasoning, however, the district court declared both itself and the court of appeals powerless to overturn that NLRB decision.

In Physicians National Housestaff Association, the district court first explained that because the case involved representational matters, and not unfair labor practices, the court of appeals could not, within the power granted it by the NLRA, review the decision. Although the NLRA does not provide for any kind of district court review, the Supreme Court has authorized district court review of representational matters in two types of exceptional circumstances: (1) where the suit is not to review but to "strike down an order

95. Id.
96. Id. at 816.
98. Id. at 3.
99. Id.
100. The United States Court of Appeals may review a final order of the NLRB which involves the finding or allegation of an unfair labor practice. 29 U.S.C. § 160(f) (1970).
101. No. 77-358, slip op. at 3.
102. Id. at 5.
of the Board made in excess of its delegated powers and contrary to a specific prohibition of the Act, and (2) when a Board order introduces a question of national import because of its international implication.

The district court found only the first exception relevant, and then rejected its application to the housestaff dilemma. In *Boire v. Greyhound Corp.*, the Supreme Court stated that this first exception was a "narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law." Adhering to the Supreme Court's direction in *Boire*, the district court dismissed the housestaff's request to be recognized as a labor organization under the NLRA for want of jurisdiction. Since the court found no statutory mandate requiring that housestaff be treated as employees within the meaning of the Act, the court reasoned that the NLRB ruling could not be considered contrary to a specific provision of the NLRA. Instead, because such a decision was primarily a factual and definitional one, the court held that it should be left to the discretion of the Board.

Again the district court relied on *Boire* in which the determination of employer status was considered to be a factual one. The district court found no distinction between the determination of employer status and that of employee.

103. Id. at 4 (quoting Leedom v. Kyne, 358 U.S. 184, 188 (1958)).
104. Id. at 5 (citing McCulloch v. Sociedad Nacional de Marineras de Honduras, 372 U.S. 10 (1963)).
105. No. 77-358, slip op. at 5.
107. Id. at 481.
108. No. 77-358, slip op. at 6.
109. Id. at 7, 8.
110. Id. at 8. Plaintiffs here apparently argued that supervisors were not employees within the meaning of the Act, and that housestaff had been excluded from the category of supervisors by Congress. This indicated that housestaff were employees within the Act, and the exclusion could serve as a statutory mandate of the NLRA violated by the NLRB decision. *Id.* The district court found, however, that Congress had left "such a determination" to the Board's case-by-case factual determination. *Id.* at 8 (construing S. REP. No. 93-766, 93d Cong., 2d Sess. 6, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3951).
111. No. 77-358, slip op. at 8.
113. No. 77-358, slip op. at 8.
Despite its holding of lack of jurisdiction, the district court indicated possible disagreement with the Cedars-Sinai decision. The court noted that it could not overturn the NLRB's choice "between two fairly conflicting views, even though the court may have made a different choice originally." Finally the district court implied that the remedy lay with Congress. The court again emphasized that "regardless of the equities of the situation," if no congressional mandate exists stating that housestaff are employees within the meaning of the NLRA, then there is no violation of a mandatory provision of the Act which would allow the district court jurisdiction.

B. Initial State Precedent, Cedars-Sinai, and Subsequent State Reaction

Because the district court declared itself powerless to overturn the Cedars-Sinai decision, it did not analyze the reasoning behind that NLRB holding. Yet the Cedars-Sinai holding, in conjunction with the second circuit ruling that the NLRB has effectively preempted state control of labor relations of housestaff, means that state labor boards in the second circuit are effectively bound by the reasoning of Cedars-Sinai. State rulings, both prior and subsequent to Cedars-Sinai, indicate strong disagreement between state authorities and the NLRB with respect to the collective bargaining rights of housestaff. Whether the solution lies with Congress as Physicians National Housestaff Association implied, or with the courts, the disagreement evidences a need for at least a discussion of the differing viewpoints.

During the jurisdictional confusion, when states were unsure of their power to deal with the housestaff controversy, state labor boards and courts served as a testing ground for the soundness of

114. *Id.* at 9.
115. *Id.*
116. *Id.*
117. *Id.*
118. See notes 70-95 *supra* and accompanying text.
119. See note 2 *supra* and note 122 *infra*.
120. The House Labor-Management Relations Subcommittee recently approved a bill to extend NLRA coverage to medical interns and residents in the medical profession. Under the subcommittee version, housestaff would constitute a bargaining unit separate from any existing unit of hospital employees. See *Lab. L. Rep.* (CCH) No. 295 (Feb. 24, 1978).
the Cedars-Sinai reasoning. Even courts grappling with the collective bargaining status of housestaff at public hospitals discussed the Cedars-Sinai approach. In New York, one federal judge strongly suggested that if "Cedars-Sinai and its progeny survive federal court review" the New York State Labor Board should follow the decision since the New York State Labor Law was copied and adapted from the federal statute. Nevertheless, the nationwide trend indicated state disagreement with the Cedars-Sinai reasoning.

Opposing viewpoints, still unresolved by a federal court due to lack of jurisdiction to review Cedars-Sinai, rose and fell in prominence during the confusion over jurisdiction.

Prior to the 1974 Health Care Amendments and the Cedars-Sinai decision at least two states had ruled housestaff to be employees for the purposes of collective bargaining. In so holding, the New York State Labor Relations Board reasoned that there were more similarities between housestaff and other employees at a private, non-profit hospital than between housestaff and fourth year medical students. For example, the SLRB noted that fourth year medical students must pay tuition, earn grades and are not licensed to practice medicine, while housestaff pay no tuition, earn no grades and are licensed to practice medicine, at least at the hospital to which


122. See note 3 supra. NLRB decisions, although not controlling in certain types of cases, are still considered carefully. House Officers Ass'n for the Univ. of Neb. Medical Center and Affil. Hosps., 198 Neb. 697, 702, 255 N.W.2d 258, 261 (1977). For example, in both Nebraska and Michigan, if housestaff are employed or studying at a public hospital, as opposed to a private, non-profit hospital such as Cedars-Sinai, a special court or agency may determine if the housestaff are employees within the meaning of the appropriate law or Public Employment Relations Act. Regents of Mich. v. Employment Relations Comm'n, 389 Mich. 96, 204 N.W.2d 218 (1973); House Officers Ass'n for the Univ. of Neb. Medical Center and Affil. Hosps., 198 Neb. 697, 255 N.W.2d 258 (1977).

123. Comm. of Interns & Residents v. New York State Labor Relations Bd., 420 F. Supp. 826, 830 (S.D.N.Y. 1976). Judge Charles Brieant made this statement during the controversy between the CIR and various New York hospitals when the hospitals attempted to remove the controversy to federal court. See note 24 supra and accompanying text. It should be noted that the New York State Labor Relations Act was copied and adapted from the 1935 federal statute.

124. See note 121 supra.

125. Both New York and Michigan had taken this position. See note 2 and note 122 supra.

they are assigned. Like other employees, housestaff receive a salary, pay income and social security taxes, receive a paid vacation and regular fringe benefits. While discussing these similarities between housestaff and employees, the Board recognized the control the hospital maintained over the housestaff. Because housestaff were continuing their education while being employed, the state board recognized a dual status of employee and student. According to the SLRB, being a student did not negate the employment relationship already present.

A Michigan court, following a similar line of reasoning, found housestaff of a public university hospital to be employees under the Michigan Public Employment Relations Act, and thus eligible to bargain collectively. The court, however, did suggest the scope of bargaining be limited if the subject matter fell clearly within educational spheres.

The NLRB in Cedars-Sinai came to a contrary determination by emphasizing the primary relationship existing between the housestaff and the hospital. The Board based its decision on what it

127. Id.
128. Id. at 169-70.
129. Id. at 169.
130. Id. at 167.
131. Id. at 168.
133. Id. at 112, 204 N.W.2d at 224-25.
134. Id. at 109, 204 N.W.2d at 224. In Edward J. Meyer Memorial Hosp., the New York Public Employment Relations Board also recognized that the collective bargaining process could be adjusted to accommodate any special problems arising out of the dual capacity of housestaff. In that case, the housestaff, already included in the hospital’s white collar unit, petitioned the SLRB for recognition as the exclusive negotiating representative of the hospital interns and residents. After first recognizing the dual capacity of housestaff as employees and students, the Board noted that any requirements fixed by state and professional certifications bodies could not be negotiated by housestaff to the extent they “were fixed by authorities beyond the employer.” The Board stated, however, that although some educational requirements imposed by the employer as educator might be beyond the scope of collective bargaining, there were duties “within the control of the employer and within the scope of negotiations.” [1976] 9 PUB. EMPL. REL. REP. ¶ 9-3029.
135. 223 N.L.R.B. at 253.
termed a fundamental difference between an employment relationship and an educational relationship, and chose to stress the educational nature of the interns', residents' and clinical fellows' experiences. The Board established the primary educational nature of the housestaff program by examining the structure of the programs, housestaff activities, salaries and tenure.

The Board first established that housestaff attend graduate medical educational and training programs in order to qualify for licensing and specialty certifications. These training programs, governed by the American Medical Association and the National Board of Medical Examiners, in addition to state boards, are usually conducted according to guidelines published by the national organizations. Hospitals running these programs must be accredited by these associations. Often, as at Cedars-Sinai, most of the hospital staff physicians also hold appointments at nearby medical schools. Thus, the Board emphasized the teaching role of the hospital staff physicians. Furthermore, the NLRB characterized the salary paid to housestaff not as compensation for services rendered, but rather as a stipend for graduate study. In addition, the length of the program each individual pursues, rather than any long-lasting employment relationship, governs the tenure policies with the hospital. The Board concluded that the combination of these factors

136. Id.
137. Id. at 251.
138. Id. at 251-54.
139. Id. at 251.
140. Id. at 252. "The standards for internships and residencies are contained in 'Essentials of an Approved Internship' and 'Essentials of Approved Residences,' prepared by the Council on Medical Education and approved by the American Medical Association." Id.
141. Id.
142. Id.
143. Id.
144. Id. The two pamphlets prepared by the Council on Medical Education and approved by the American Medical Association characterize the stipend as a scholarship for graduate study. The Board noted that the amount of the stipend is determined by the housestaff participant's level in the program, rather than by the number of hours worked. Id.
145. Id. at 252-53.
established "an educational rather than an employment relationship." 146

Member (now Chairman) John Fanning, however, in a well reasoned and lengthy dissent, emphasized factors such as those previously detailed in the New York State Labor Board decisions. 147 Again, the dual student/employee status concept was relevant. He stated, "The touchstone has always been whether the 'students' were also employees." 148 Member Fanning acknowledged that the set of hospital guidelines, mentioned by the majority, 149 did urge the hospitals to view the primary effect of housestaff programs as educational. 150 He maintained, however, that the educational effect of the programs had no bearing on the fact that housestaff, as employees, receive compensation in return for performing a service for the hospital. 151 Most importantly, he concluded that neither the language of the statute 152 nor the intent of Congress 153 indicated that house-

146. Id. at 254.
147. See notes 126-131 supra and accompanying text. Member Fanning discussed the employee benefits the housestaff receive, the arduous and time consuming duties of housestaff, and the large size of the stipend awarded specifically as compensation for services. As further evidence of employment he noted that the hospital was liable for the acts of housestaff. 223 N.L.R.B. at 255-56 (Fanning, Mem., dissenting).
148. Id. at 254 (Fanning, Mem., dissenting) (emphasis in original). He noted that "Section 2(3) of the NLRA states that the term 'employee' is meant to 'include any employee . . . unless the Act explicitly states otherwise,' and that 'students' are not listed among the exceptions." Id., quoting National Labor Relations Act 2(3), 29 U.S.C. § 152 (3) (1970).
149. See note 140 supra.
150. 223 N.L.R.B. at 256 (Fanning, Mem., dissenting). He also, however, referred to a memorandum distributed to all teaching hospitals by the American Medical Association on Jan. 13, 1975, requiring that the agreement "'provide fair and equitable conditions of employment for all those performing the duties of interns, residents and fellows.'" Id., (Fanning, Mem., dissenting) (quoting Guidelines for Housestaff Contracts or Agreements, American Medical Association House of Delegates, January 13, 1975).
151. Id.
152. Id. at 257. Member Fanning found that § 2(12) of the NLRA, designed to cover professional employees, covered housestaff specifically. He found § 2(12)(b) to cover individuals who have completed specialized instruction and are performing related work under a professional. Id. at 257-58. Professional is defined in 2(12)(a) as "any employee engaged in work . . . (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 . . . ." 29 U.S.C. § 152(12) (1970). The majority apparently ruled out coverage of housestaff by § 2(12) because § 2(12) initially defines a professional employee as "an employee, who . . . ." 223 N.L.R.B. at 253 n.4. Since the majority found housestaff not to be employees within the general definition of employee in § 2(3) of the Act, then they could not qualify as employees within § 2(12). Member Fanning, however, believed the language in § 2(12) should help define the scope of § 2(3). Id. at 258 (Fanning, Mem., dissenting).
staff should be excluded from coverage by the NLRA.\textsuperscript{154}

Several state courts considered the collective bargaining rights of housestaff after the \textit{Cedars-Sinai} decision, and before the court of appeals decision holding that the NLRB had preempted the field. For example, the Pennsylvania Supreme Court followed the \textit{Cedars-Sinai} reasoning in a decision concerning public employees.\textsuperscript{155} The court ruled that housestaff at a public hospital were not employees under the Pennsylvania Public Employment Relations Act, and consequently were not entitled to bargain collectively under the provisions of the Act.\textsuperscript{156} Of the seven judges hearing the case, however, three vigorously dissented.\textsuperscript{157} Alternatively, the Massachusetts Labor Commission which considered the issue subsequent to the \textit{Cedars-Sinai} decision, flatly rejected the NLRB’s reasoning.\textsuperscript{158} The Massachusetts Labor Commission relied heavily on the dissenting opinion of Member Fanning in \textit{Cedars-Sinai}, and on pre-\textit{Cedars-Sinai} reasoning.\textsuperscript{159}

The Supreme Court of Nebraska, in a recent ruling concerning housestaff at a public hospital, indicated the growing dissatisfaction with the \textit{Cedars-Sinai} reasoning.\textsuperscript{160} In ruling housestaff of the University of Nebraska Medical Center to be employees under

\begin{footnotes}
\item[153.] See notes 61-63 \textit{supra} and accompanying text. Member Fanning advanced an argument similar to that of the district court with respect to congressional intent. He noted that Congress, in response to the suggestion that housestaff would be excluded under the NLRA as supervisors, commented that housestaff did not come within the NLRB’s interpretation of supervisor. Therefore Congress must have intended that housestaff not be excluded from the Act. He also found no mention of the student status of housestaff in the congressional debates bearing on the supervisor issue. 223 N.L.R.B. at 258 (Fanning, Mem., dissenting).
\item[154.] 223 N.L.R.B. at 257-59.
\item[155.] Philadelphia Ass’n of Interns & Residents v. Albert Einstein Medical Center, 470 Pa. 562, 369 A.2d 711 (Pa. Sup. Ct. 1976). Interestingly enough, this same court rejected as moot the question of whether employees of a private, non-profit hospital were employees within the meaning of the NLRA. The court regarded the Health Care Amendments as having preempted housestaff/hospital relationships at private, non-profit hospitals. Id. at 566-67, 369 A.2d at 713.
\item[157.] Chief Justice Michael J. Eagen stated that allowing the subjective motivation underlying the presence of housestaff at the hospital to preclude housestaff from being employees, (as did \textit{Cedars-Sinai} and the Pennsylvania court) would lead to absurd results. Id. at 571-72, 369 A.2d at 716 (Eagen, C.J., concurring & dissenting).
\item[159.] \textit{Gov’t Empl. Rel. Rep. (BNA)} at E-4, E-5.
\item[160.] House Officers Ass’n for the Univ. of Neb. Medical Center and Affil. Hosps. v. Univ. of Neb. Medical Center, 198 Neb. 697, 255 N.W.2d 258 (1977).
\end{footnotes}
state law, and therefore, eligible to bargaining collectively, the court cited many of the same employee indicators that the New York Labor Relations Board and the Cedars-Sinai dissent considered. Although the court referred to the Cedars-Sinai decision, it stated, “The great weight of authority has come to a contrary decision to the Cedars-Sinai case.”

IV. Conclusion

The controversy over whether housestaff should be allowed certification to engage in collective bargaining has degenerated into a war of language technicalities. While an employment relationship between housestaff and hospitals is clearly the passkey to collective bargaining rights, the question has centered around how much of an employment relationship is needed to fit housestaff under the NLRA definition of employee. Although the Cedars-Sinai dissent argued that a dual student/employee role on the part of housestaff was sufficient to bring housestaff within the NLRA’s definition of employee, the majority demanded that the employment relationship be primary to the student relationship.

Both the district court and the court of appeals moved beyond this technical argument in addressing the federal preemption issue to discuss congressional purposes behind the Health Care Amendments. The two courts, however, considered the Amendments primarily in relation to the public need for uninterrupted health care, and not in relation to any possible congressional recognition of the needs of housestaff. Consequently, the court of appeals warned of the potential state/federal conflicts a patchwork system of housestaff unions could cause. Since only the federal preemption issue was before the court, it left the substantive issue to the Physicians National Housestaff Association case then pending before the district court. When the district court dismissed that action for lack of jurisdiction, discussion of the rights of housestaff to bargain collectively failed to move beyond prior technicalities.

Consequently, no federal court has explored why housestaff may

161. Id. at 704, 255 N.W.2d at 259.
162. For example, the court considered the long hours housestaff must work, the income and social security tax they pay, the paid vacations and fringe benefits they receive, and the fact that they work under an employment contract. 198 Neb. at 699-701, 255 N.W.2d at 260-61.
163. Id. at 702, 255 N.W.2d at 261.
need collective bargaining rights. That such a need exists is evidenced by the strong dissent in *Cedars-Sinai* and both prior and subsequent state decisions to allow housestaff bargaining rights. This need should be balanced with the congressionally recognized need of the public to have continuous health care. Clearly the court system under the present NLRA is unable to reconcile these possibly conflicting needs. Ultimately, aid to housestaff may lie with Congress and its power to enact a statutory mandate definitively proclaiming housestaff to be employees within the meaning of the NLRA.

*Diane Wende Bricker*