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THE 1974 HEALTH CARE AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT: JURISDICTIONAL STANDARDS AND APPROPRIATE BARGAINING UNITS

I. Introduction

The purpose of the National Labor Relations Act (NLRA)¹ is to ensure the well-being of labor-management relations through the encouragement of collective bargaining, and the prohibition of certain practices by labor unions and employers. The NLRA applies to cases where labor disputes may tend to burden, obstruct or affect interstate commerce.² In such instances, the National Labor Relations Board (NLRB)³ has the authority to act.

The issue of whether the NLRB should have jurisdiction over non-profit hospitals has been controversial. In 1974 Congress attempted to settle the controversy by passing the Health Care Amendments⁴ which placed nonprofit hospitals under NLRB jurisdiction. This Note will examine two problems presented by the amendments: the extent of the NLRB's jurisdiction under the amendments; and the appropriate bargaining units for hospital workers. The jurisdictional question includes considerations of the minimum monetary amount of business which an institution must conduct before the NLRB will assert jurisdiction, and the types of facilities viewed as health care institutions. The question of bargaining units encompasses what types of hospital employees can be grouped together in light of Congress' admonition against the undue proliferation of these units.

II. NLRB Jurisdiction

The issue of whether the NLRB can assert jurisdiction over a

1. 29 U.S.C. §§ 151-68 (1970), *as amended*, (Supp. V, 1975) [hereinafter cited as NLRA]. See *Black Diamond S.S. Corp. v. NLRB*, 94 F.2d 875 (2d Cir.), *cert. denied*, 304 U.S. 579 (1938).

2. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court upheld the power of Congress to enact the NLRA as a valid exercise of its power to regulate "commerce . . . among the several States." *Id.* at 31. See *NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262 (3d Cir.), *cert. denied*, 314 U.S. 693 (1941).

3. The NLRA authorizes the NLRB to effectuate its policies and procedures. 29 U.S.C. § 153 (1970), *as amended*, (Supp. V, 1975).

4. *Id.* §§ 152(2), 152(14), 153(c), 158(d)-(e), 158(g) (Supp. V, 1975), *amending* 29 U.S.C. §§ 151-68 (1970).

charitable hospital was first examined in *NLRB v. Central Dispensary & Emergency Hospital*.⁵ The Court of Appeals for the District of Columbia Circuit upheld the Board's assertion of jurisdiction because it concluded that defendant's activities affected trade and commerce within the meaning of the NLRA.⁶ Although the hospital had argued that the spirit of the Act exempted charitable hospitals from the NLRB's jurisdiction, the court did not agree.⁷ The court reasoned that the charitable status of any hospital was immaterial in deciding whether its activities affected trade and commerce.⁸

Three years after *Central Dispensary*, Congress amended the NLRA to exempt nonprofit hospitals from NLRB jurisdiction.⁹ It accomplished this by deleting the phrase "nonprofit 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"¹⁰ However, Congress did not indicate what considerations compelled this exemption.¹¹

In the post-exemption period, states began applying their own laws to labor management relations in nonprofit hospitals.¹² During this time, many unions sought to increase membership by representing workers in the rapidly growing health care field.¹³ Numerous strikes over representation also occurred.¹⁴ Testifying before a senate committee, representatives from the Service Employees International Union stated that recognition strikes accounted for approximately 95 percent of all strikes in nonprofit hospitals and ac-

5. 145 F.2d 852 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 847 (1945).

6. 145 F.2d at 853. The hospital's activities involved the sale of medical services and supplies amounting to \$600,000 per year. It purchased \$240,000 worth of material per year from commercial houses. It employed about 350 people. *Id.*

7. *Id.*

8. *Id.*

9. Act of June 23, 1947, Pub. L. No. 80-101, § 101(2), 61 Stat. 136 (codified at 29 U.S.C. § 152(2) (1970)).

10. *Id.*

11. See H.R. REP. NO. 1051, 93d Cong., 2d Sess. 3 (1974). The legislative history offers little to clarify the question.

12. See, e.g., *Utah Labor Relations Bd. v. Utah Valley Hosp.*, 120 Utah 463, 235 P.2d 520 (1951).

13. See generally, H.R. REP. NO. 1051, 93d Cong., 2d Sess. 4 (1974).

14. *Id.*

counted for an average of 3,967 idle man days for each struck facility.¹⁵

Perhaps in recognition of the problems created by the exemption, the NLRB attempted to circumvent the new law by extending its jurisdiction to health institutions other than hospitals per se.¹⁶ For example, in *Drexel Home, Inc.*,¹⁷ the NLRB asserted jurisdiction over a nursing home by terming it an "extended care facility."¹⁸ The NLRB adopted the American Hospital Association's definition of an extended care facility as, "an establishment with permanent facilities that include inpatient beds; and with medical services, including continuous nursing services, to provide treatment to patients who require inpatient care but who do not require hospital services."¹⁹ The breadth of this definition is indicative of the NLRB's desire to limit the scope of the nonprofit hospital exemption.

Congress also took notice of the difficulties caused by the exemption.²⁰ In 1974 it passed the Health Care Amendments which removed the exemption for nonprofit hospitals,²¹ and preempted state jurisdiction in the health care field.²² Moreover, the 1974 amendments affected more than just nonprofit hospitals. Congress granted the NLRB jurisdiction over any "health care institution,"²³ thereby precluding the necessity of applying the "extended care facility" label to an institution before the NLRB could assert jurisdiction.²⁴

15. 120 CONG. REC. 12,936 (1974)(remarks of Senator Cranston).

16. *E.g.*, *Drexel Home, Inc.*, 182 N.L.R.B. 1045 (1970).

17. *Id.*

18. *Id.* at 1047.

19. *Id.*

20. H.R. REP. No. 1051, 93d Cong., 2d Sess. 3-4 (1974).

21. 29 U.S.C. § 152(2) (Supp.V, 1975).

22. *New York v. Local 144, Hotel, Nursing Home & Allied Health Servs. Union*, 410 F. Supp. 225 (S.D.N.Y. 1976).

23. 29 U.S.C. § 152(14) (Supp. V, 1975) provides: "The term 'health care institution' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of the sick, infirm, or aged person."

24. The definition is also important because it determines which institutions are subject to the amendments' special procedures. The special procedures which Congress mandated are intended to solve the unique problems of the health care industry. 120 CONG. REC. 13560 (1974). In formulating these procedures, Congress attempted to balance the worker's right to collective bargaining with the public's interest in uninterrupted health care. See Feheley, *Amendments to the National Labor Relations Act: Health Care Institutions*, 36 OHIO STATE L.J. 235, 242 (1975).

III. NLRB Jurisdiction Under the Health Care Amendments

A. Health Care Institutions

An initial problem concerning the NLRB's jurisdiction under the Health Care Amendments involved the definition of the term "health care institution." Legislative history indicated that "health care institutions" were those involved in "patient care" situations as distinguished from "purely health connected facilities."²⁵ The floor debates indicated that an administrative office within a hospital was a "patient care" situation.²⁶ Moreover, Congress considered institutions for the mentally retarded as "patient care" situations,²⁷ but excluded diet clinics or health spas.²⁸

The NLRB has recognized the patient/non-patient care distinction suggested by Congress.²⁹ In *San Diego Blood Bank*,³⁰ the NLRB concluded that a blood bank was not a "health care institution" because it did not involve a "patient care" situation.³¹ However, in *Baker Places, Inc.*,³² the NLRB reasoned that a halfway house for mentally disturbed patients was a "health care institution." The halfway house offered counseling services but it did not offer psychological therapy and it did not have health care professionals on its staff.³³ The NLRB justified its position on the grounds that a halfway house was a substitute for prolonged confinement in mental institutions.³⁴ *Baker Places, Inc.* indicates the NLRB's willingness to define broadly a "patient care" situation.³⁵

25. 120 CONG. REC. 13,559 (1974)(remarks of Senator Taft). Senator Taft stated during the Senate debates that insurance companies specializing in medical coverage were not "patient care" oriented. *Id.*

26. *Id.* Blue Cross and Blue Shield were specifically mentioned as the type of administrative or financial office organization which was not intended to be included within the NLRB's jurisdiction. See 120 CONG. REC. 16,905 (1974)(remarks of Representative Dellenback).

27. *Id.* (remarks of Representative Thompson).

28. *Id.*

29. See *Saint Peter's School*, 90 L.R.R.M. 1285 (1975) (home for abused children); *Sodat, Inc.*, 89 L.R.R.M. 1648 (1975) (drug rehabilitation clinic); *Baker Places, Inc.*, 89 L.R.R.M. 1633 (1975) (halfway house for the mentally disturbed); *Beverly Farm Foundation, Inc.*, 89 L.R.R.M. 1466 (1975) (health care institution for the mentally retarded).

30. 89 L.R.R.M. 1593 (1975).

31. *Id.* at 1594.

32. 89 L.R.R.M. 1633 (1975).

33. *Id.* at 1634.

34. *Id.*

35. See *Chicago School & Workshop for the Retarded*, 93 L.R.R.M. 1052 (1976), where

B. Minimum Monetary Standards of Interstate Business

Although the NLRB has jurisdiction over organizations which affect commerce³⁶ it seeks to limit the number of cases it hears. Before the NLRB will assert jurisdiction, it requires an organization to conduct a minimum amount of interstate business measured by monetary standards.³⁷ A second jurisdictional question presented to the NLRB under the Health Care Amendments concerned the monetary standard it would set before asserting jurisdiction.

Prior to the amendments,³⁸ the NLRB set a \$250,000 limit for proprietary hospitals³⁹ and a \$100,000 limit for nursing homes.⁴⁰ In fixing the jurisdictional amounts after passage of the amendments the NLRB referred to the congressional disagreement over the question⁴¹ and decided that Congress had left the issue to the Board's discretion.⁴² Accordingly, in *East Oakland Community Health Alliance Inc.*,⁴³ the NLRB retained its \$250,000 requirement for hospitals and \$100,000 requirement for nursing homes.⁴⁴ It also set a \$250,000 standard on all other health care facilities.⁴⁵

After the passage of the amendments, the NLRB also reconsidered its established practice of treating organizations which were primarily local in nature as not affecting commerce.⁴⁶ In *Bio-*

the NLRB stated that "[t]his definition [of health care institution] is written in the broadest of terms . . ." *Id.* at 1054.

36. 29 U.S.C. § 159(c)(1) (1970).

37. See *East Oakland Community Health Alliance, Inc.*, 89 L.R.R.M. 1372 (1975). The NLRB has also imposed a rule excluding organizations whose operations are local in nature. See *Alameda Medical Group, Inc.*, 79 L.R.R.M. 1314 (1972).

38. See *Butte Medical Properties*, 168 N.L.R.B. 266 (1967)(hospitals); *University Nursing Home, Inc.*, 168 N.L.R.B. 263 (1967) (nursing homes). This power is recognized in the Labor Management Reporting & Disclosure Act, 29 U.S.C. § 164(c) (1970).

39. See *Butte Medical Properties*, 168 N.L.R.B. 266 (1967).

40. See *University Nursing Home, Inc.*, 168 N.L.R.B. 263 (1967).

41. Senator Taft wanted the NLRB to maintain its standards as set in *Butte Medical Properties*, 168 N.L.R.B. 266 (1967), and *University Nursing Home, Inc.*, 168 N.L.R.B. 263 (1967). See 120 CONG. REC. 13559 (1974) (remarks of Senator Taft). Senator Williams suggested a less restrictive standard. *Id.* at 22575 (remarks of Senator Williams). Representatives Ashbrook and Thompson issued a statement that the committee on the Health Care Amendments did not intend to disturb the NLRB's previous standards or its discretion to change them. *Id.* at E4849-50 (daily ed., July 18, 1974). (remarks of Representatives Ashbrook & Thompson).

42. See *East Oakland Community Health Alliance, Inc.*, 89 L.R.R.M. 1372 (1975).

43. *Id.*

44. *Id.* at 1374.

45. *Id.* at 1375.

46. This exemption was applied in *Cleveland Ave. Medical Center*, 85 L.R.R.M. 1401

Medical Application, Inc.,⁴⁷ the NLRB concluded that the amendments extended its jurisdiction to all "health care institutions" which have a substantial impact on commerce even if they are local in nature.⁴⁸

In summary, the NLRB has used the Health Care Amendments to expand its jurisdiction. This is evident in the broad definition given the term "health care institution," and the elimination of the exemption for operations which are local in nature.⁴⁹ The extension of the NLRB's jurisdiction is probably justified by a congressional desire to create labor-management harmony in the health care field.⁵⁰ Presumably, the uniformity of a national system of regulation and the NLRB's tradition of applying its regulations flexibly will achieve this end.⁵¹ However, the NLRB's extension of jurisdiction may also reflect a belief that most large scale operations are becoming national in their impact. This would explain the Board's readiness to abandon the traditional exemption for nonprofit institutions other than hospitals.⁵²

IV. Appropriate Bargaining Units

The NLRB is authorized to determine appropriate units for collective bargaining.⁵³ The NLRA does not require the NLRB to select the most appropriate bargaining unit.⁵⁴ The statute only requires that the unit be "appropriate" to ensure employees "the fullest freedom in exercising their rights guaranteed by the Act."⁵⁵ Many factors go into an appropriate unit determination.⁵⁶ Several

(1974), and *Alameda Medical Group, Inc.*, 79 L.R.R.M. 1314 (1972).

47. 88 L.R.R.M. 1589 (1975).

48. *Id.* See also *Family Doctor Medical Group*, 93 L.R.R.M. 1193 (1976); *Private Medical Group*, 89 L.R.R.M. 1501 (1975).

49. *Id.* See notes 23-35 *supra* and accompanying text.

50. See *Cornell Univ.*, 183 N.L.R.B. 329 (1970), where the NLRB stated, "we are convinced that assertion of jurisdiction is required . . . to insure the orderly, effective, and uniform application of the national labor policy." *Id.* at 334.

51. *Id.*

52. See, e.g., *Rhode Island Catholic Orphan Asylum*, 92 L.R.R.M. 1355 (1976).

53. 29 U.S.C. § 159(b) (1970). See *Memorial Hosp. v. NLRB*, 545 F.2d 351 (3d Cir. 1976), where the court stated that the NLRA "requires the Board to exercise its discretion as to an appropriate [bargaining] unit in each and every case." *Id.* at 360.

54. 29 U.S.C. § 159(b) (1970).

55. *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 418 (1950), *enforced* 190 F.2d 576 (7th Cir. 1951).

56. See *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134 (1962).

of these are included in the NLRB's community of interest doctrine.⁵⁷ Under this doctrine, the NLRB attempts to combine those employees who share "substantial mutual interests in wages, hours, and other conditions of employment."⁵⁸

Prior to the amendments, the Board decided appropriate bargaining units by considering the individual facts of each case.⁵⁹ After the passage of the Health Care Amendments, the NLRB recognized that Congress wanted it to give due consideration to preventing the proliferation of bargaining units in the health care industry.⁶⁰ Congress recognized that numerous appropriate units could be created out of the many technical fields in the industry.⁶¹ This might be devastating, since a strike by any union could disrupt a hospital's services.⁶² This congressional concern became the basis for a new standard for determining appropriate bargaining units. In order to prevent a proliferation of bargaining units under the Health Care Amendments, the NLRB applies criteria which are stricter than the appropriate unit standard.

Typically, the NLRB had divided health care employees into five units: registered nurses (RNs), licensed practical nurses (LPNs), technical employees, service employees, and maintenance employees.⁶³ In passing the Health Care Amendments, Congress did not specify what size unit would be appropriate. However, both House and Senate Committee reports supported a broad unit rule by approving⁶⁴ the NLRB's decisions in *Four Seasons Nursing Center*⁶⁵ and *Woodland Park Hospital*.⁶⁶ The broad unit rule dictated the combination of several related employee groups into one unit. In *Four Seasons*,⁶⁷ the NLRB rejected a unit consisting solely of maintenance employees because they lacked specialized skill or training

57. FIFTEENTH ANNUAL REPORT OF THE NLRB 39 (1950).

58. *Id.*

59. *See, e.g.,* Butte Medical Properties, 168 N.L.R.B. 266 (1967).

60. *E.g.,* Shriners Hosps. for Crippled Children, 89 L.R.R.M. 1076 (1975); *see* S. REP. NO. 766, 93d Cong., 2d Sess. 5 (1974).

61. *See* 120 CONG. REC. 12,944 (1974)(remarks of Senator Taft).

62. *Id.*

63. *See* Madeira Nursing Center, Inc., 203 N.L.R.B. 323, 324 n.2 (1973).

64. S. REP. NO. 766, 93d Cong., 2d Sess. 5 (1974); H.R. REP. NO. 1051, 93d Cong., 2d Sess. 6-7 (1974).

65. 208 N.L.R.B. 403 (1974).

66. 205 N.L.R.B. 888 (1973).

67. 208 N.L.R.B. at 403.

which would make them a distinct and homogeneous group with interests separate from those of service employees. In *Woodland*,⁶⁸ the NLRB rejected a unit of X-ray technologists because their skills and working conditions could not be distinguished from other technical employees.⁶⁹ The congressional committee reports also approved, but did not necessarily adopt, the Board's decision in *Extencicare of West Virginia*.⁷⁰ In that case, the NLRB found that LPNs should be a separate unit from units of technical, and newly combined service and maintenance employees.⁷¹ Office clericals were also excluded from this unit.⁷²

In a series of eight cases decided in May 1975, the NLRB set the standard for determining appropriate bargaining units under the amendments. The basic test balances the congressional admonition against proliferation of bargaining units⁷⁴ with traditional criteria such as community of interests.⁷⁵ The application of the test modifies the unit standard in health care institutions and reduces the five traditional bargaining units into four new units.⁷⁶

The NLRB first applied its test in *Shriners Hospitals for Crippled Children*.⁷⁷ In that case, the Board concluded that it should place special significance on the high degree of integration of operations in a health care facility.⁷⁸ Accordingly, it rejected a separate unit for stationary engineers, and found a combined unit of service and maintenance employees appropriate.⁷⁹ As noted by the dissent, stationary engineers are a traditional unit in health care facilities.⁸⁰

68. 205 N.L.R.B. at 889.

69. *Id.*

70. 203 N.L.R.B. 1232 (1973).

71. *Id.*

72. *Id.* at 1233.

73. Mount Airy Foundation, 89 L.R.R.M. 1067 (1975); Duke Univ., 89 L.R.R.M. 1065 (1975); Newington Children's Hosp., 89 L.R.R.M. 1108 (1975); Mercy Hosps., Inc., 89 L.R.R.M. 1097 (1975); Nathan & Miriam Barnert Memorial Hosp. Ass'n, 89 L.R.R.M. 1083 (1975); Sisters of Saint Joseph of Peace, 89 L.R.R.M. 1082 (1975); Shriners Hosps. for Crippled Children, 89 L.R.R.M. 1076 (1975); Saint Catherine's Hosp. of Dominican Sisters, Inc., 89 L.R.R.M. 1070 (1975).

74. *E.g.*, Shriners Hosps. for Crippled Children, 89 L.R.R.M. 1076 (1975).

75. *See* text accompanying notes 53-58 *supra*.

76. The four broadly defined units are: service and maintenance employees, technical employees, business office clericals, and RNs. *See* text accompanying note 84 *infra*.

77. 89 L.R.R.M. 1076 (1975).

78. *Id.* at 1079-80.

79. *Id.* at 1080.

80. *Id.* The stationary engineers are not to be confused with the four typical units estab-

Shriners therefore demonstrates the significance which the NLRB attaches to the congressional admonition against proliferation of bargaining units.

The *Shriners* case should be contrasted with *Jewish Hospital*,⁸¹ where the NLRB held that a separate unit for maintenance employees would not be appropriate because it would constitute an undue proliferation of bargaining units.⁸² But after applying the test, the Board noted that a maintenance unit would be appropriate if the employees had a sufficient and separate community of interests.⁸³ *Shriners* indicated the NLRB's concern with proliferation of bargaining units, but *Jewish Hospital* suggests that the Board will not abandon completely its traditional criteria. As a result of the new test, where there had once been five appropriate bargaining units,⁸⁴ now there are four. The units are service and maintenance employees, business office clericals, technical employees, and RNs.

The NLRB considered whether service and maintenance employees could be an appropriate unit in *Mercy Hospitals, Inc.*⁸⁵ The employer operated a long term geriatric care facility and two acute care facilities.⁸⁶ Although service and maintenance employees traditionally have not been combined, the NLRB found a combined bargaining unit appropriate.⁸⁷ Moreover, the Board also included clerical employees in this combined unit because clericals were scattered throughout the hospital and they shared a community of interests with service and maintenance employees.⁸⁸ However, the NLRB excluded business office clericals from this bargaining unit because they shared few interests with the other employees.⁸⁹

The separate unit for business office clericals is another example of the traditional unit criteria outweighing the congressional admo-

lished in *Madeira Nursing Center, Inc.*, 203 N.L.R.B. 323, 324 n.2 (1973), which refers to the broad categories that unions seek to represent.

81. 91 L.R.R.M. 1499 (1976).

82. *Id.* at 1504.

83. *Id.*

84. *See Madeira Nursing Center, Inc.*, 203 N.L.R.B. 323 (1973).

85. 89 L.R.R.M. 1097 (1975).

86. *Id.* at 1098.

87. *Id.* at 1102. For an extensive list of job classifications includable in a service and maintenance unit, see *The Baptist Memorial Hosp.*, 93 L.R.R.M. 1280 (1976).

88. *See* 89 L.R.R.M. at 1102-03.

89. *Id.*

dition against proliferation of bargaining units. The NLRB concluded:⁹⁰

[I]n the health care field, as in the industrial sphere, we shall continue to recognize the distinction between business office clerical employees, who perform mainly business-type functions, and other types of clerical employees whose work is more closely related to the function performed by personnel in the service and maintenance unit and who have, in the past, been traditionally excluded by the Board from bargaining units of business office clerical employees.

The broad unit rule of *Mercy Hospitals, Inc.* suggests that technical employees should be included in the service and maintenance bargaining unit. The NLRB rejected such a unit in *Nathan & Miriam Barnert Memorial Hospital Association*,⁹¹ where the union sought to represent a combined unit of service and maintenance employees and a separate bargaining unit of technical employees.⁹² The employer argued that the technical employees should be included in the service and maintenance unit.⁹³ The NLRB did not agree. It approved a separate bargaining unit for technical employees because their training, skills and certification gave them a different community of interests from the service and maintenance employees.⁹⁴

Technical employees were defined in *Saint Catherine's Hospital of Dominican Sister's, Inc.*⁹⁵ as:⁹⁶

employees who do not meet the strict requirements of the term "professional" employees but whose work may be described as of a technical nature. Such work, involving the use of independent judgment, requires the exercise of specialized training . . . and . . . is often though not necessarily evidenced by fulfillment of certification, licensing, and registration requirements, and the actual achievement of such certification, license, or registration.

The *Saint Catherine's Hospital* definition was applied in *Barnert Hospital*⁹⁷ where an employee who administered electroencephalograms and echoencephalograms was not considered a techni-

90. *Id.*

91. 89 L.R.R.M. 1083 (1975).

92. *Id.* at 1085.

93. *Id.*

94. *Id.* at 1086-87.

95. 89 L.R.R.M. 1070 (1975).

96. *Id.* at 1073.

97. 89 L.R.R.M. 1083 (1975).

cal employee.⁹⁸ The NLRB found that the position required only a high school diploma and that the employee did not have to be licensed by the state or certified or registered by a private organization.⁹⁹ Furthermore, although the employee was able to perform the tests on his own, he was unable to interpret them.¹⁰⁰ The NLRB, therefore, placed him in a unit with service and maintenance employees.¹⁰¹

In the same case, the NLRB concluded that an orthopedic technician was a technical employee.¹⁰² This position also required a high school diploma, but no state license,¹⁰³ and additionally, the employee¹⁰⁴ was required to take a formal course at the hospital. Furthermore, unlike the other employee, he performed treatment, did not require any other supervision in his work, and he had more training in his specialty than most RNs.¹⁰⁵

Although the NLRB has excluded technical employees from the service and maintenance bargaining unit, it decided to include LPNs in the technical unit.¹⁰⁶ Prior to the Health Care Amendments, the NLRB had indicated that LPNs' community of interests entitled them to a separate unit. In *Extendicare of West Virginia, Inc.*,¹⁰⁷ the Board approved a separate unit for LPNs since they had a different community of interests from technical and service employees.¹⁰⁸ Although a separate bargaining unit was also approved in *Drexel Home, Inc.*¹⁰⁹ the NLRB stated that LPNs had a sufficient community of interests with other employees in the hospital to justify their inclusion in a broader unit.¹¹⁰

The inclusion of LPNs in technical units after the amendments is consistent with the balancing test. LPNs were sometimes placed in their own unit before the enactment of the Health Care

98. *Id.* at 1087-88.

99. *Id.* at 1087.

100. *Id.*

101. *See id.* at 1085 n.10.

102. *Id.* at 1090.

103. *Id.* at 1089.

104. *Id.*

105. *Id.* at 1090.

106. Saint Catherine's Hosp. of Dominican Sisters, Inc., 89 L.R.R.M. 1070, 1073 (1975).

107. 203 N.L.R.B. 1232 (1973).

108. *Id.*

109. 182 N.L.R.B. 1045 (1970).

110. *Id.* at 1048.

Amendments; they are now placed in a unit with other employees to avoid the proliferation of bargaining units. RNs, on the other hand, have maintained their separate identity even under the amendments. In *Mercy Hospitals, Inc.*¹¹¹ the NLRB held that RNs were entitled to be represented in a separate unit. Although the Board mentioned several factors as the basis of its decision, it emphasized the RNs' history of separate bargaining and representation.¹¹² Subsequently, the NLRB affirmed the strength of the RNs' community of interests by finding that they could be excluded from a broader professional unit¹¹³ even in the absence of a union seeking to represent them separately.¹¹⁴

The NLRB has singled out two factors which constitute exceptions to the guidelines for bargaining units outlined above. One factor is the parties' prior bargaining history. In *Bay Medical Center, Inc.*,¹¹⁵ a union sought to represent the technical employees, including LPNs, of two hospitals operated by a single employer.¹¹⁶ The LPNs at one hospital were already represented and under contract.¹¹⁷ The NLRB was reluctant to disrupt the stable bargaining relationship between the LPNs and the first hospital by including them in a new unit.¹¹⁸ It found an exception to the rule of including LPNs in technical units and excluded them.¹¹⁹

A prior bargaining history was dispositive in *Saint Joseph Hospital & Medical Center*,¹²⁰ where the NLRB found separate units of maintenance employees appropriate because the Board was reluctant to disturb bargaining units in the health care industry which were mutually agreed upon by parties so long as such units did not

111. 89 L.R.R.M. 1097 (1975).

112. *Id.* at 1100.

113. Professional employees are defined at 29 U.S.C. § 152(12) (1970). Their characteristics include: "1. Varied intellectual work. 2. Consistent exercise of discretion or judgment. 3. Work non-standardizable in terms of time. 4. Study in a specialized discipline ordinarily taught in a university or hospital . . ." [1972] 1 LAB. L. REP. (CCH) ¶ 1,660. Those studying to be professionals are sometimes included in this unit. *Id.* Professionals included histologists, physical therapists, and pharmacists. See *Valley Hosp., Ltd.*, 91 L.R.R.M. 1061 (1975).

114. *Dominican Santa Cruz Hosp.*, 89 L.R.R.M. 1504, 1505 (1975).

115. 89 L.R.R.M. 1310 (1975).

116. *Id.* at 1311.

117. *Id.* at 1312.

118. *Id.*

119. *Id.*

120. 90 L.R.R.M. 1088 (1975).

contravene the Act or established Board policy.¹²¹

The NLRB also makes an exception for stipulated bargaining units. This exception is related to the bargaining history exception. In both instances the Board is deferring to the mutual desires of the parties in the interests of harmony. Thus, in *Otis Hospital, Inc.*,¹²² the NLRB decided to give effect to all stipulated bargaining units which did not contravene the provisions and purpose of the NLRA or Board policy.¹²³ The NLRB stated that its decision was consistent with its policy of giving the parties the broadest possible latitude in defining the context in which collective bargaining was to take place.¹²⁴

V. Conclusion

The broad purpose of the NLRA is to create a harmonious environment for labor-management relations. Traditionally, the NLRB has attempted to accomplish this goal by approaching its duties with flexibility. The Board's designations of appropriate bargaining units are consistent with this tradition. Although the NLRB has acknowledged the congressional admonition against the proliferation of bargaining units as the most effective way of ensuring the delivery of health care services, it has also recognized exceptions to this policy by considering the prior bargaining history and the stipulations of the parties as effective means of preserving collective bargaining stability. Its decisions represent an attempt to balance the traditional community of interests test with the congressional mandate to avoid proliferation of bargaining units.

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121. *Id.* at 1090.

122. 89 L.R.R.M. 1545 (1975).

123. *Id.*

124. *Id.*

