Recognition and Bargaining Units

Any meaningful discussion of recognition and bargaining units must include general aspects of the National Labor Relations Act (NLRA) and reference to specific provisions, policies and procedures which have a significant, if indirect, impact on the subject.

The first consideration is: When does the act apply? The phrase "assert jurisdiction" is of primary importance here. The statute itself, in its definitions, excludes as employers the United States or any wholly-owned government corporation, or any Federal Reserve Bank, or any state or political subdivision thereof, or persons subject to the Railway Labor Act. By decision of the National Labor Relations Board, with court approval, jurisdiction was at one time not asserted over certain industries or enterprises such as hotels, noncharitable hospitals, nonstate-owned educational institutions or professional sport organizations, although the statute did not exclude them. But in time, again under court approval, the board extended its jurisdiction over these enterprises, among others. By amendment of the statute, the board was given jurisdiction over the U.S. Postal Service and over charitable, nonstate hospitals. The board, however, still does not assert jurisdiction over race tracks, sheltered workshops, and some other enterprises.

In addition, and probably more relative to libraries, on September 23, 1974, the board announced that it was considering declining jurisdiction over private secondary and elementary schools and preschools. Interested parties were invited to submit comments, views or arguments within thirty days.

Before jurisdiction is asserted, after having been extended to a class of enterprises by statute or discretion, it must appear that the particular employer unit involved (and this may entail a number of employers banded together in an acknowledged bargaining unit), meets stated annual dollar standards. These standards may be either gross, as in the case of retail operations, or in terms of interstate inflow or outflow, in the case of various nonretail operations.
The work of the board lies primarily in two areas: (1) handling charges of unfair labor practices against employers or unions, or both, and (2) handling representation or bargaining agent election cases. In any type of case, before the board may act, it must appear that the employer involved is subject to the jurisdiction of the board. This is true if the charge is against a union or an employer, or in a representation case.

If these qualifications are not met, regardless of the other elements of the case, no action will be taken on the charge or petition. Thus, the phrase "assert jurisdiction" truly applies to the situations at hand. Employees working for noncovered employers, e.g., a state university, do not have the rights set out in Section 7 of the act, nor can the board processes protect them. The board cannot conduct representation elections if the employer is one over whom jurisdiction is not asserted, nor can it act against a labor organization, if the employer, being only indirectly involved, is likewise one over whom jurisdiction is not asserted.

However, knowledge of the NLRA, its procedures, and its policies can be of significant value to employers, trade union officials and employees, whether or not the enterprise involved is one over which jurisdiction would be asserted. If a covered employer is involved, such knowledge will point to the legal limitations, rights and available avenues of procedure. If the enterprise is not subject to the act, following the policies enunciated under the act can lead to better employer-employee relationships. If a union is a bargaining agent, it can lead to more productive, meaningful handling of industrial relations problems. Further, many states have, or may soon have, labor relations laws or executive orders which would apply to noncovered employers, and these are generally modeled after the NLRA.

Assuming that the employer is covered under the act, how are librarians affected? First, not all librarians are employees. Section 2(3) of the act, in defining employee excludes supervisors. Section 2(11) defines supervisor, and if an individual falls within that definition, he does not enjoy the rights guaranteed in Section 7, nor, except in rare cases, can a remedy be afforded him for discrimination by an employer or restraint or coercion by a union. Further, on April 23, 1974, the Supreme Court, in NLRB v. Textron Inc., found that employees properly classified as managerial are excluded from protection of the act. While the court did not define managerial, it cited with approval the board’s definition which recognized as managerial executives who formulate and effectuate management policies by expressing and making the operative decisions of their employers. Further, the board has deemed to be managerial buyers those who regularly and to a substantial degree make substantial purchases for the employer.

Relevant to the supervisory status of professionals is the problem of whom they supervise. In the University of Chicago case (205 NLRB 220),
decided on August 3, 1973 (and, by chance, concerning librarians), the board
decided that professional librarians who supervise other professional librarians
are supervisors within the meaning of the act, but that professional librarians
who supervise only clerical (nonprofessional) employees are not supervisors
within the act's meaning. This decision was affirmed on October 22, 1974, by
the U.S. Court of Appeals for the Seventh Circuit.

The third, and perhaps most cogent, consideration is whether librarians
are professional within the meaning of Section 2(12) of the act. If they are
professional (and not supervisory or managerial), they possess all the rights of
nonprofessional employees. They are, however, accorded special treatment in
representation cases to the following extent: under Section 9(b) it is provided
that the board shall not decide that any unit is appropriate for the purposes
of collective bargaining if such unit includes both professional employees and
employees who are not professional employees unless a majority of such
professional employees vote for inclusion in the unit.

The National Labor Relations Act includes the following definition of
"professional employee":

(a) any employee engaged in work (i) predominately intellectual, 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 paragraph
(a), and (ii) is performing related work under the supervision of a
professional person to qualify himself to become a professional
employee as defined in paragraph (a). ¹

The board has had many occasions to apply the definition to a particular case.
Recognizing that the definition speaks in terms of the work performed, the
board did not pass on the individual qualifications of each employee involved,
but rather upon the character of the work required of them as a group.² But
the background is examined to decide whether the work of the group satisfies
the "knowledge of an advanced type" requirement of the statute.³ The
requirement that professionals possess "knowledge of an advanced type," does
not mean that such knowledge must be acquired through academic training
alone; it is the character of the work required that determines professional
status.⁴
The board makes its findings independent of other governmental decisions. For example, a Wage and Hour Act finding that employees are nonprofessional does not affect a board finding of professional status, nor does the fact that the persons acting need not be licensed to practice their profession in the state.

With the foregoing distinctions noted, the act applies equally to librarians as to other employees. Section 7 of the act provides: "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities."

To protect these rights, Congress declared certain activities by employers and by unions to be unfair labor practices. Free speech without threat of reprisal or force is not a violation of the act: "the expressing of views, arguments or opinion, or the dissemination thereof ... shall not constitute or be evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force or promise of benefit." When speech contains a threat of reprisal, force, or promise of benefit, dependent upon the employees' union sympathy or concerted protected activity, it becomes violative of Section 8(a)(1), by an employer, or 8(b)(1)(A), by a labor organization. Employers may not question employees about their union activities or membership in such circumstances as will tend to restrain or coerce them, may not spy on union gatherings, may not grant or withhold wage increases deliberately timed to defeat self-organization among employees, and may not make or promulgate rules restricting employees in solicitation for or against unions on nonworking time or distribution of union or anti-union literature in nonworking areas on nonworking time.

Under Section 8(a)(2), an employer violates the law if he dominates or interferes with the formation or administration of any labor organization, or contributes financial or other support to it, such as taking an active part in organizing a labor organization or a committee to represent employees, bringing pressure upon employees to join a union, or showing favoritism to one of two or more unions which are competing to represent employees.

Section 8(a)(3) forbids an employer to discriminate against an employee "in regard to hire or tenure of employment ... [or] to encourage or discourage membership in any labor organization" (emphasis added). Under this section, preferential or closed shops are prohibited, while union shops are permissible but not mandatory.

Section 8(a)(5) and Section (d) bar an employer from refusing to bargain in good faith concerning wages, hours and other conditions of employment with the representative chosen by a majority of employees in a group appropriate for collective bargaining.
How does the duty to bargain arise? An employer, faced by a demand for recognition as bargaining agent by a labor organization which he has in no way assisted, and in the absence of any evinced interest in such representation by another labor organization, may accord such recognition if the claiming labor organization represents an uncoerced majority of the employees in the proposed bargaining unit. This voluntary recognition is permissible, but not mandatory. Or, the employer must recognize a union if it obtains a majority in an election conducted by the board, a state agency or a neutral third party, with substantial adherence to the board's election procedure. Finally, if a union, in the absence of any other union claiming to represent any of the employees involved, makes a claim to represent the employees, and the employer refuses to recognize that union, he may be ordered to bargain with that union, without an election, or in the face of a lost election which has been set aside upon objections properly filed, provided that (1) the union in fact represents an uncoerced majority of the employees, and (2) the employer has committed such unfair labor practices as to make the holding of a fair election impossible.

However the duty to bargain arises, it entails various obligations upon the employer and the union. The employer (and the bargaining agent union) must (1) be willing to meet at reasonable times and places; (2) have present a representative with sufficient authority to engage in bargaining; (3) not refuse to meet because of whom the other party has designated as its bargaining representative; (4) upon request, bargain about (but not necessarily agree upon) subjects within the scope of wages, hours and conditions of employment; and (5) upon request, furnish information reasonably necessary to the bargaining process.

Unions, in addition to what has gone before, are also subject to limitations. Section 8(b)(2) prohibits a union from causing, or attempting to cause, an employer to discriminate against an employee in violation of Section 8(a)(3). For example, a union may not ask the employer to discharge an employee because he is running for union office or has failed to pay a fine or assessment, nor may it ask that he make a contract which provides that seniority (or other benefits) shall be dependent on union membership.

Under Section 8(b)(3), in addition to the obligations of the employer under 8(a)(5), the union does not fulfill its obligation to bargain if, for instance, it insists upon the inclusion of an illegal provision, such as a closed shop, or strikes to compel changes in an existing contract either without giving proper notice or during the term of such contract. Under Section 8(b)(4), unions may not engage in secondary boycotts or jurisdictional strikes, or other prohibited strikes.

One other aspect of the proscriptions against strikes deserves note—the ban on strikes for recognition under certain conditions, e.g., when another
union has been lawfully recognized, when the employees have voted (and rejected a union) within the preceding twelve months, or where the union pickets for recognition for more than thirty days without a formal petition being filed for an employee representation election. By statute, there are variations on some of the foregoing for health care facilities.

The National Labor Relations Board cannot act upon its own motion. Only when a charge of unfair labor practices is filed may investigation be made. If no merit is found, the case is dismissed, absent withdrawal. Appeal from a regional dismissal may be taken to the General Counsel, who has final authority in denying the appeal or reversing the regional dismissal. If the case has merit, either upon original investigation or upon General Counsel’s reversal of a regional dismissal, settlement is sought. If no settlement is effected, a complaint issues and a public hearing is held before an administrative law judge. When he issues his decision, the board may review the case and issue a decision and order. The board’s decision is subject to review or enforcement by the U.S. Court of Appeals, and by the Supreme Court. In meritorious cases, injunctive relief may be sought.

The other major aspect of the board’s work is in the determination of collective bargaining representatives. This arises only when a petition has been filed by a union seeking certification as bargaining agent, by an employer upon whom a union has made a claim to represent (or continue to represent) his employees, or by employees seeking to decertify an incumbent union bargaining agent.

When such petition is filed, investigation is made of the following questions: Is the employer subject to the NLRA? Is the union named a labor organization within the meaning of the NLRA? Is the petition properly supported? (In the case of a union or employee petition, 30 percent of the employees must support the petition; in the case of an employer petition without an incumbent union, proof of claim made by the union is required; and in the case of an employer petition with an incumbent union, the employer must show he has objective reasons to believe that the union no longer represents a majority of the employees involved.) Is the unit involved appropriate for collective bargaining? (In employee petitions the unit must be coextensive with the unit represented.) Is the petition timely? (Petitions may not be filed during the year following certification of a union as bargaining agent, during ten months after an election in which no bargaining agent was selected, or in the face of a valid collective bargaining agreement except during the period sixty to ninety days prior to the expiration of such contract—not to exceed three years in length.) The remaining issue is that of majority, which, in a representation case, can only be determined by an election.

In 80 percent of the cases, the parties agree to the election. If the
questions are all answered in the affirmative, but parties who are entitled to
do so refuse to consent to the election, a public hearing is held, and the
regional director either directs an election, dismisses the petition, remands the
case for further hearing, or refers it to the board in Washington for decision.
Any party dissatisfied with the regional director's decision may request the
board to review it, and the board's decision is final.

Once the election is held, if the number of challenged votes cannot
affect the results, and if the parties file no objections within five working
days, a certification of representative or a certification of results will issue.
However, if the number of challenges could determine the results, or if timely
objections are properly filed and served, an investigation will be made of the
eligibility status of the challenged voters, the facts surrounding the alleged
objectionable conduct, or, in some cases, both.

If there are no objections, the challenges will be disposed of. If the
election is so close that the challenged votes could affect its outcome, a
sufficient number of these are ruled on to render the results definitive. If
merit is found to the objections, the election will be set aside and a new
election directed. If the objections are found to have no merit, the results of
the election will be certified.

Under Section 9(b) of the act, the board is empowered to: "decide in
each case whether, in order to assure the employees the fullest freedom in
exercising the rights guaranteed by this subchapter, the unit appropriate for
the purposes of collective bargaining shall be the employer unit, craft unit,
plant unit, or subdivision thereof." When the parties agree to the unit,
provided the unit could be appropriate, although it is not the only, ultimate,
or most appropriate unit, the board will accept such agreement. However,
where there is disagreement as to the unit, the board must resolve the
differences, which can be of various kinds.

As to the width of the unit, presumably the plant unit is appropriate,
but a narrower unit, e.g., a craft unit, or a wider unit, e.g., two or more
plants of the same employer, or in some cases, several employers, may be
appropriate. Of prime consideration is the community of interest and
duties of the employees involved. Functional integration, common supervision,
various employee skills, interchangeability and contact among employees, the
work situs, general working conditions and fringe benefits are determinative of
the community of interest. In other words, one might ask: Does the
proposed unit include all employees sharing this community of interest and
does it exclude those employees who do not share such community of
interest?

When there is a disagreement as to the unit, the board will give weight to a
successful valid history of bargaining, but will not consider establishing a con-
tested unit solely on the basis of extent of organization of the union involved.
Once the width of the unit has been decided, so long as more than one employee is in that unit, the number of employees is not a factor, nor are such items as the mode of payment, age, sex, race, union membership, or the union's territorial or work jurisdiction. The desires of the employees, while not controlling, may be a factor in craft severance cases, and certainly are in the case of professional employees.

In all cases, the board must observe the statutory exclusions. The act does not apply to agricultural laborers or individuals employed by their parent or spouse, nor to independent contractors. Briefly, when faced with a contention that certain individuals are independent contractors and therefore not employees, the board applies a "right-of-control" test. If the employer retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment, but if the right of control is only as to the result sought, the relationship is that of independent contractor.

Disagreements tend to occur most frequently in the designation of supervisors. Guided by the language in Section 2(11) of the act, the board considers these criteria: "the term 'supervisor' means 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 to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The board, however, also takes into account such factors as substitution for supervisors, training for supervisory positions, ratio of supervisors to supervised employees, varying terms and conditions of employment, and ostensible authority.

As to professional employees and their supervisory status, I have alluded to the pending University of Chicago case, concerning professionals as supervisors, and have discussed the board's approach to professionals in general. As to specific cases concerning librarians or libraries, in the recent case of Queens Borough Public Library the board, reviewing the history of the establishment and the statutory authority under which it operated, decided that because "the nexus between the library and city of New York, is such that without city support, the library would cease to exist," it would not effectuate the policies of the act to assert jurisdiction over the library.

Some of the later cases concerning librarians deserve mention. In CW Postcenter, L.I.U. (189 NLRB 904) the petitioning union sought a unit of all professionals, including librarians. The employer would exclude the librarians, among others, but the board, finding that the twenty-seven librarians who served all the libraries (except that of the graduate center) were professionals and had sufficient community of interest with the other professionals, included them.
The board excluded the library director, who hired and supervised all nonprofessional employees for the libraries. The decision is silent on whether he supervised professional librarians, a question which has thus far been answered by the board in the University of Chicago case and the Catholic University case to which I will refer later.

In Fordham University (193 NLRB 134) one union sought an overall professional unit including professional librarians but excluding the law school faculty. Another union sought a unit of the law school faculty. The employer contended that all faculty members were supervisors, a contention the board denied, and found two separate units, as requested. Finding some librarians not to be professional, the board excluded them. As to the professional librarians, the board noted that the record was insufficient to decide their supervisory status and permitted them to vote under challenge.

Tusculum College (199 NLRB 28) involved a disagreement as to the unit placement of, among others, the library staff, consisting of a librarian, an assistant librarian, and an assistant to the librarian. The board, citing the Fordham case, found the librarian and the assistant librarian to be professionals and included them with other professionals, but excluded the assistant to the librarian as being a clerical employee.

Catholic University (201 NLRB 929) concerned itself with a law school faculty unit. Disagreement arose as to the status of the head librarian, whom the board found to be a professional. As to his supervisory status, since his duties in this regard were minor supervision over one full-time assistant librarian and four part-time student assistants, the board found him not to be a supervisor, and included him in the unit.

What has been set out thus far is, at best, a fundamental framework on which 214 volumes of board decisions and 18 volumes of court decisions must be consulted to elaborate and explicate the nuances and variations of such basic principles.

I would propound a caveat: When one has occasion to consider a board case, he should not rely upon the august pronouncements of self-styled oracles who rarely are properly informed, more infrequently objective, and even less frequently direct their comments at the proper target. If one who is in the daily arena of industrial or labor relations reads the law and the actual board decision, is aware of whether the law as Congress passed it or the board’s interpretation is at issue, and regards the decision as to its effect on the total industrial community, he can provide a meaningful evaluation of the decision. The board, as shown in the proposed rule change regarding jurisdiction over private secondary and primary schools, welcomes and is guided by such significant viewpoints.

Finally, the board’s regional offices and Washington offices are available for general or specific inquiries. While no official or interlocutory judgment
can be made in the absence of a pending case, board personnel can acquaint people with board policies or status of cases. They will not, of course, suggest what course to follow. They also may, under appropriate circumstances, refer people to other agencies. The board also has various informational pamphlets which could be of help, and hopes that people feel free to use these services.

REFERENCES

4. Ryan Aeronautical Co., 132 NLRB 1160 (1961); Chrysler Corporation Space Division, 154 NLRB 352 (1965); and Robbins and Myers, 144 NLRB 295 (1963).
8. Ibid., 158(c).
9. Ibid., 158(a)(3).
10. Ibid., 159(b).
22. Western Nebraska Transport Service Division of Consolidated Freightways, 144 NLRB 301 (1963); and Pure Seal Dairy Co., 135 NLRB 76 (1962).
30. See also University of Miami, 213 NLRB No. 54 (1974).