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Cover Page Footnote

Barnett Horowitz has been employed by the NLRB since 1975, starting in Milwaukee and transferring to Region Three's Albany office in 1977 where he now fills the position of Resident Officer. He is a graduate of Cornell's ILR school, holds a masters degree in Industrial Relations from the University of Wisconsin and has been past president of the Capital District Chapter of LERA. He has lectured frequently on a wide range of subjects implicating the NLRA and its evolution, including on the juncture of social media and the law as well as the Act's reach on the college campus. The following Article represents the opinions and views of the author alone, and does not constitute, nor should it be construed as, representing the views of the National Labor Relations Board, its General Counsel or any of its Regional offices

The Matriculation of the Micro-Unit on the College Campus

Barnett L. Horowitz¹

On August 23, 2016, the National Labor Relations Board in *The Trustees of Columbia University*, 364 NLRB No. 90 issued its long-anticipated ruling as to whether graduate students with compensated instructional or research responsibilities were employees under Section 2(3) of the statute.² This holding swung wide open the organizational door that had heretofore been shut since the *Brown University* decision in 2004.³

It did not take long for a union to walk through. Six days after *Columbia*, UNITE-HERE Local 33 simultaneously filed petitions seeking to represent not one, not two, but 10 discrete bargaining units of graduate students at Yale University on a department-by-department basis. The units all had identical inclusions⁴ and were for the following departments: East Asian Languages & Literatures, Math, Geology and Geophysics, History, History of Art, Comparative Literature, Political Science, Physics, English, and Sociology.⁵ The units by the Union's accounting ranged from as small as six employees in East Asian Languages to 66 in Physics.

Yale has opposed the attempt to carve out these department-only bargaining units contesting their appropriateness over 17 days of hearing and roughly 2,500 pages of transcript. It has taken a more holistic view that the departments are not distinct entities, but rather are financially and administratively inseparable from Yale as a whole with limited autonomy and

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² Section 2(3) states in relevant part that "The term "employee" shall include any employee, ... but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act ... or by any other person who is not an employer as herein defined."

³ 342 NLRB 483(2004). In *Brown* the Board ruled the graduate assistants were not statutory employees as they had a primarily educational and not economic relationship to the university. *Brown* itself overruled an earlier decision, *New York University (NYU)*, 332 NLRB 1205(2000).

⁴ Graduate students who were teaching fellows, graders, part-time acting instructors and associates.

⁵ On October 14, the petition for the Comparative Literature Department was withdrawn.

authority.⁶ According to Tamar Gendler, Dean of the Faculty of Arts and Sciences, departments as individual units have limited administrative and budgetary oversight. Furthermore, she argued, departments are “permeable,” “interconnected” and thus not distinct units.⁷

This argument certainly has a surface appeal assuming such are the facts. That said it is the legal context which controls, and an explanation of that context is the limited focus of this paper. More particularly the Union strategy rests on a seminal 2011 Board case, *Specialty Health Care*, 357 NLRB 934, and its holding that clarified the standard for finding an appropriate unit.⁸ *Specialty Healthcare*, and its enabling of what now is commonly referred to as the micro-unit, allowed the Union to make its case that each of the petitioned for units standing alone is an appropriate one. Whether it is slim reed or sturdy platform for resting an argument is the subject here.

Before deconstructing *Specialty Healthcare*, to say that the Union’s strategy raised eyebrows would be gross understatement. At Columbia for example, the unit sought was “all student employees who provide instructional services.”⁹ At Cornell where in May, 2016 the parties entered into a code of conduct agreement governing prospective representation in the event the Board found for employee status, the unit was again wall to wall including all graduate, research, and teaching assistants.¹⁰ In an agreement reached at Harvard in October, 2016 to seek an NLRB election the parties likewise sought an all-inclusive graduate student unit.¹¹ At NYU, the one private university prior to the *Columbia* decision where the graduate students enjoyed representation, the unit is also broadly defined save for exclusions in the School of Medicine, the School of Business, and seven selected departments.¹²

⁶ Schick, Finnegan and Wang, Victor, “Yale Challenges Local 33 Petitions in Court”. *Yale Daily News* (September 13, 2016).

⁷ Ibid.

⁸ Rose, Michael. “Yale Opposes Departmental Units for Grad Assistant Union.” *Bloomberg BNA*. (September 14, 2016).

⁹ In an election that concluded on December 9, these employees at Columbia voted in favor of the union, the United Autoworkers, 1602 to 623.

¹⁰ See the Cornell Graduate Student Union website for a copy of the accord.
<https://cornellgsu.files.wordpress.com/2016/05/code-of-conduct-tentative-agreement-signed.pdf>

¹¹ The unit also included undergraduate teaching fellows. Yared, Leah. “Harvard Reaches Formal Agreement with Graduate Student Union Effort, Schedules Union Election.” *Harvard Crimson* (October 19, 2016). At the time of this writing the votes had not been fully tabulated given the large number of challenged ballots.

¹² These include Biology, Chemistry, Neural Science, Physics, Mathematics, Computer Science and Psychology. See the 2014 to 2020 collective bargaining agreement at <http://www.makingabetternyu.org/gsocuaw/read-it/>

At Yale, UNITE-HERE has obviously gone in a different direction. Graduate School Dean Lynn Cooley observed their approach was hardly inclusive where the petitions collectively added up to fewer than 300 graduate students or a mere 10-11% of those enrolled at the Graduate School.¹³ Arguing Yale's position on the record at the NLRB hearing, its counsel observed the calamitous results that could obtain if all 56 departments were organized in this fashion.¹⁴ Based on some public comments by various Union representatives, it could be inferred that tactical considerations contributed to the Union's decision. Union Chair Aaron Greenberg was quoted right after the petition submission to the effect "We are really excited to file in 10 departments that have a very strong desire to unionize,"¹⁵ and Union Counsel Kristin Martin similarly stated as to the small units "if there are small pockets within the university where graduate teachers have expressed greater support for unionization, let's test this out on a small scale."¹⁶

Tactical or otherwise, the purpose of this tract is to frame the legal authority for deciding the question. Even assuming the departments where the petitions were filed track Union support and Section 9(c)(5) of the National Labor Relations Act provides that "the extent to which the employees have organized shall not be controlling," extent of organization can be one factor in the determination as long as it is not the only basis for seeking the unit. *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442 (1965). It will not be 9(c)(5), therefore, that will drive this discussion but a reading of Section 9(a) which references designation of representative only in "an appropriate unit" and Section 9(b) with its first principle of the Board making unit determinations "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act."

Which leads the discussion to *Specialty Healthcare*. In that matter, the union sought a unit of solely the certified nursing assistants (CNAs) working in a nursing home. The employer contested arguing for a more traditional service and maintenance grouping including cooks and dietary employees, activity assistants and various clerks. Acknowledging a service and maintenance grouping had been found in prior cases to be an appropriate unit for purposes of

¹³ Schick, Finnegan and Wang, Victor. "Ten Grad Departments File for Union Elections." *Yale Daily News* (August 29, 2016.)

¹⁴ I have paraphrased counsel's position as set forth in the hearing transcript from the testimony on September 13 at p. 175-176. The transcript is a public document though obtainable only under a Freedom of Information Act request. For this reason I have relied on more readily available contemporaneous media accounts where possible.

¹⁵ Schick, Finnegan and Wang, Victor. "Ten Grad Departments File for Union Elections." *Yale Daily News* (August 29, 2016.)

¹⁶ Rose, Michael. "Yale Grad Assistants File 10 Petitions for Union Elections." *Bloomberg BNA*. (August 29, 2016)

collective bargaining,¹⁷ the *Specialty Healthcare* majority made clear that did not mean it was the only appropriate unit.¹⁸ To facilitate a determination of an appropriate unit, the Board identified the focus as being whether the employees shared a community of interest applying traditional standards.¹⁹

Once determined that the unit sought by a petitioner is readily identifiable and employees in that unit share a community of interest, the Board will find the unit to be appropriate “despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned for unit.” 357 NLRB at 945-949. Such a determination would require that there “is no legitimate basis upon which to exclude certain employees from” the larger unit because the traditional community of interest factors “overlap almost completely.” *Id.*, 943-945 and fn. 28 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008)).

Using this analysis, what is now popularly known as the micro-unit was born. Of course, the facts of *Specialty Healthcare* could not have been better to establish the Board’s point. The CNAs in this nursing home could be distinguished with relative ease from the other classifications in that they did primary, hands-on patient care with unique job duties, wore distinctive uniforms, had separate supervision, were State certified with mandated training requirements, had a different wage scale, and there was no evidence of any significant overlap of duties or transfers to or from the CNA position. Whether using this CNA unit to set the general principle was a good idea can be debated, but it places a not insignificant burden on the Employer that seeks a more comprehensive unit.

The burden is not insurmountable, and in a handful of reported cases to date, the Board has found that the overwhelming community of interest standard has been met (e.g. *Odwalla*,³⁵⁷ NLRB 1608, 1611 (2011), the petitioned-for unit did not follow any lines drawn by the employer, such as classification, department, or function and “no rational basis” for excluding the merchandisers from the unit; *Bergdorf Goodman*, 361 NLRB No. 11 (2014), woman’s shoe sale associates from two separate departments are not an appropriate unit where they do not track administrative or operational boundaries and do not share specialized skills or common

¹⁷ See, e.g., *Jersey Shore Nursing & Rehabilitation Center*, 325 NLRB 603(1998).

¹⁸ The Act does not require a petitioner to seek representation in the most appropriate unit but only in *an* appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996).

¹⁹ It cited by way of example *United Operations, Inc.* 338 NLRB 123 (2002) and its criteria of whether employees are organized into a separate departments; have distinct skills and training; have distinct job functions and perform distinct work including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment and are separately supervised.

supervision). These decisions are far outweighed, however not just by cases where the Board grants review and engages in full blown discussion²⁰ but by the numerous examples where it denies review of a Regional Director's decision that had rejected the overwhelming community of interest employer argument.²¹

What does all this mean for higher education and the Yale case especially where it appears the overwhelming community of interest hurdle has received widespread endorsement in the courts.²² *Columbia*, interestingly, had its own *Specialty Healthcare* moment but stood on its head. There the Employer argued that the broad unit sought should not include undergraduate teaching assistants as petitioned for, and argued that in the event the teaching assistants were found employees, the unit should be limited to graduate students. The Board, applying *Specialty Healthcare*, rejected this argument where all assistants, undergraduate and graduate, performed similar functions in similar settings. In *Seattle University*, 19-RC-122863 (April 17, 2014), a case involving adjunct professors, the Regional Director found that the contingent faculty constituted an appropriate unit where they shared similar skills, duties, supervision, and terms and conditions of employment. The unit sought was essentially all adjuncts though the Regional Director agreed with the Petitioner that the School of Nursing, School of Law, and Clinical Faculty should be excluded over the Employer's objections where these faculty formed their own rational, easily identifiable groups.²³

The Board, albeit in a pre-*Yeshiva*²⁴ era, on multiple occasions certified separate elections for law school faculty members. *University of Miami*, 213 NLRB 634 (1974); *Syracuse*

²⁰ See *DPI Secuprint, Inc.*, 362 NLRB No. 172 (2015) (offset press employees did not have overwhelming community of interest with petitioned for unit where they worked in separate department, had greater skills, different hours and shifts and limited interchange); *Macy's, Inc.*, 361 NLRB No. 4 (2014) (cosmetics and fragrance employees readily identifiable group working in the same selling department with the same supervision, are functionally integrated and have only incidental contact with other employees); *DTG Operations, Inc.* 357 NLRB 2122 (2011) (rental car service agents job functions and duties, skills, uniforms, incentives, schedules and supervision were different from all other employees with whom they lacked an overwhelming community of interest).

²¹ A *Westlaw* search shows that of the approximately 100 cases where *Specialty Healthcare* is mentioned to date the majority are denials of Employer request for review of a micro-unit finding.

²² *Specialty Healthcare* enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *NLRB v. FedEx Freight, Inc.*, 2016 WL 4191498 (3rd Cir., August 9, 2016); *Macy's, Incorporated v. NLRB*, 824 F. 3d 557 (5th Cir., June 2, 2016); *Nestle's Dreyer Ice Cream v. NLRB*, 821 F.3d 489, (4th Cir., April 26, 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir., March 7, 2016); *Fed Ex Freight, Inc.*, 839 F. 3d 636 (7th Cir. 2016); *Constellation Brands v. NLRB*,---F. 3d---WL 6832986 (2d. Cir., November 21, 2016, 2016).

²³ The Board has recently issued a lengthy decision in this case at 364 NLRB No. 84 (August 23, 2016) but as to other issues and allowed the unit to stand in relevant part.

²⁴ *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) where the Court held that all full-time faculty members at that university were managerial and thereby excluded from the Act. *Yeshiva* effectively ended organization at what the Court referred to as "mature" private universities where authority was shared between a central administration and

University, 204 NLRB 641 (1973); *Catholic University of America*, 201 NLRB 929 (1973); *Fordham University*, 193 NLRB 134 (1973). Of course, these law schools were administratively separate, regulated by various accrediting and legal bodies, with a faculty “with intellectual interests more nearly aligned with those of their brethren in practice than with their academic colleagues of the faculty.” *Syracuse University*, supra, at 643. In other words a law school is not a perfect template for reaching conclusions as to the appropriate unit status of single academic departments.

A review of the general positions advanced by the parties at hearing²⁵ show the anticipated arguments. The Petitioner rests heavily on *Specialty Health Care*'s emphasis as to only an appropriate unit being the test.²⁶ It interprets the evidence as showing that the employees within each department constitute a readily identifiable grouping with discrete community of interests. The Employer counters these are fractured units established contrary to industry patterns,²⁷ especially where department lines have blurred over the years, all of which would lead to undue proliferation to destabilizing effect.

Without carefully weighing the facts as developed across the 2,500 pages of transcript or the legal arguments as briefed, it would be a fool's errand to speculate where the Regional Director will come out on this question, let alone the Board in response to a request for review. That said, even if each department constituted what would otherwise be an appropriate unit, I find the proliferation question could present the greatest obstacle here. It is true that there is no statutory prohibition or Board policy, except in the healthcare industry, regarding proliferation of bargaining units.²⁸ Yet the concerns expressed by the dissent in *DPI Secuprint, Inc.*, supra, as to unit proliferation have a certain resonance. In that matter, Board member Johnson raised the specter of potential instability stemming from, *inter alia*, “the costs and burdens of multiunit bargaining and the administration of multiple separate contracts (including, for example, separate benefit plans), from conflicting or irreconcilable demands from separate units, and from the potential that one unit will disrupt production with unique demands that burden all employees.”²⁹

one or more collegial bodies. 444 U.S. at 680. While the Board recently refined the manner in which it will Yeshiva in *Pacific Lutheran University*, 361 NLRB No. 157 (2014) it is yet unclear how that translates absent any subsequent case law.

²⁵ At the time of this writing the legal briefs had not been submitted.

²⁶ “Procedurally the Board examines the petitioned-for unit first. If that unit is appropriate the Board looks no further.” *Specialty Health Care*, 357 NLRB at 941.

²⁷ The Employer's evidence as to private sector higher education units largely involved adjunct instructors.

²⁸ *AVI Foodsystems, Inc.*, 328 NLRB 426 (1999).

²⁹ Slip op. p. 12.

Member Johnson's jeremiad perhaps could be ignored in that case where the petitioned for unit would include more than half the 20 employees employed in a small shop. The concerns, he raises, though certainly have more traction at Yale where the Union's approach carried to its theoretical end could result in more than 50 units with the attendant possibilities of disruption. In assessing the arguments here, the promotion of labor relations stability is obviously in tension with the Section 7 right of the employees to select a bargaining representative. In one notable case, also in the field of higher education, the Board in *Northwestern University*, 362 NLRB No. 167, slip op. at 1(2015) resolved this tension in favor of the Employer. Without passing on whether the college football players at issue in an organizing campaign were statutory employees it declined to take jurisdiction because doing so "would not serve to promote stability in labor relations."

Northwestern may offer a clue as to just how micro a unit can be, and private universities with paid graduate instructors or researchers will be closely watching as to what degree the micro-unit will be matriculating on campus.