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THE BARGAINING STATUS OF RELIGIOUS FACULTY AT CHURCH- AFFILIATED UNIVERSITIES*

Collective bargaining by faculty members of private colleges and universities constitutes a relatively new and unsettled area of labor law. Prior to 1970, the National Labor Relations Board (NLRB) declined to exercise jurisdiction over these institutions.¹ The Board reversed its position in *Cornell University*,² however, and opted to assert jurisdiction over colleges and universities whose gross annual revenue exceeds one million dollars.³ As a result of this decision, which has had a significant impact upon campus labor activity, a number of unresolved questions have arisen. For instance, the proper bargaining unit for faculty at religiously sponsored colleges and universities is an issue which has received little treatment by the NLRB and the judiciary.⁴ Recently, however, in *Niagara University v.*

* This article is a student work prepared by Ivy Margules, a member of the St. John's Law Review and the St. Thomas More Institute for Legal Research.

¹ Prior to 1970, the National Labor Relations Board (NLRB) refused "to assert its jurisdiction over a nonprofit, educational institution where the activities involved [were] noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution." Trustees of Columbia Univ., 97 N.L.R.B. 424, 427, 29 L.R.R.M. 1098, 1099 (1951) (footnote omitted). Relying upon this decision, "the Board continued for nearly two decades to decline jurisdiction over institutions of higher learning." Menard, *Exploding Representation Areas: Colleges and Universities*, 17 B.C. INDUS. & COM. L. REV. 931, 933 (1976) [hereinafter cited as Menard]. See, e.g., Leland Stanford Junior Univ., 152 N.L.R.B. 704, 705-06, 59 L.R.R.M. 1161, 1161-62 (1965); University of Miami, 146 N.L.R.B. 1448, 1450, 56 L.R.R.M. 1085, 1086 (1964).

² 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970). In *Cornell University*, the NLRB indicated that it would exercise jurisdiction over those institutions significantly affecting interstate commerce, *Id.* at 334, 74 L.R.R.M. at 1272. This change of position was caused in part by a large nationwide growth of colleges and universities. *Id.* at 332, 74 L.R.R.M. at 1273. In the aftermath of *Cornell University*, the Board has decided a considerable number of cases concerning the appropriate faculty bargaining unit for colleges and universities. See, e.g., New York University, 205 N.L.R.B. 4, 83 L.R.R.M. 1549 (1973); University of New Haven, Inc., 190 N.L.R.B. 478, 77 L.R.R.M. 1273 (1971).

³ 15 B.C. INDUS. & COM. L. REV. 423, 425 (1973). See 29 C.F.R. § 103.1 (1976). One commentator noted that "approximately 80 percent of all private colleges and universities would be covered under this standard." Menard, *supra* note 1, at 934.

⁴ See Menard, *supra* note 1, at 958. The NLRB's authority to determine appropriate bargaining units is contained in section 9(b) of the National Labor Relations Act, 29 U.S.C. § 159(b) (1970), which provides: "The Board shall decide in each case whether, in order to assure to

NLRB,⁵ the United States Court of Appeals for the Second Circuit was confronted with this problem and held that both lay and religious faculty members, including priests belonging to the religious order affiliated with the university, share a sufficient "community of interest" to be joined in one bargaining unit.⁶

Niagara University, a Catholic institution located in northern New York, was founded by the Congregation of the Mission, also known as the Vincentian Order.⁷ Seeking to represent a bargaining unit composed of all full-time faculty employed by the university, excluding those educators who were members of religious orders, the Niagara University Lay Teachers Association (the Union) filed a representation petition with the NLRB in August 1975.⁸ At the representation hearing, Niagara University contended that the bargaining unit should include "all full-time faculty both lay and religious."⁹ The NLRB Regional Director concluded, however, that the religious faculty members "did not share a 'community of interest with the lay faculty,'" and excluded them from the bargaining unit.¹⁰ Thereafter, pursuant to a unit clarification proceeding, the Board amended 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" For the rights guaranteed to employees by the Act see *id.* § 157 (1970). In *Metropolitan Life Ins. Co.*, 156 N.L.R.B. 1408, 61 L.R.R.M. 1249 (1966), the Board, commenting upon its wide discretion to fashion a proper bargaining unit, stated that:

The sole affirmative guide as to what constitutes an appropriate bargaining unit is contained in Section 9(b) of the Act

Under this broad delegation of authority, the Board, in determining whether the unit petitioned for in a particular case is appropriate, has traditionally looked to such factors as the community of interest among the employees sought to be represented; [and] whether they comprise a homogeneous, identifiable, and distinct group

Id. at 1412, 61 L.R.R.M. at 1251. It should be noted that the NLRB is not required to select the most appropriate bargaining unit, but only an appropriate unit. See, e.g., *Szabo Food Serv., Inc. v. NLRB*, 550 F.2d 705, 707 (2d Cir. 1976); *Atlas Hotels, Inc. v. NLRB*, 519 F.2d 1330, 1334 (9th Cir. 1975).

⁵ 558 F.2d 1116 (2d Cir. 1977).

⁶ *Id.* at 1121.

⁷ *Id.* at 1117. Niagara was chartered by the Regents of the University of the State of New York in 1883. *Id.*

⁸ *Id.*

⁹ *Id.* The Regional Director had found that the full-time faculty was composed of 134 lay and 21 religious members. Of the religious faculty, 17 were Vincentian Fathers, Eastern Province, 1 was a Vincentian Father, New England Province, and 3 were nuns from different orders. *Id.* at 1117-18.

¹⁰ *Id.* at 118. The Regional Director allowed two nuns, who were in no way affiliated with the Vincentian Order, to vote in the representation election "subject to challenge." Niagara University, 226 N.L.R.B. No. 154, 94 L.R.R.M. 1082, 1082 (Nov. 17, 1976). The Second Circuit in *Niagara* observed:

In reaching [the] determination [that the Eastern Vincentians should be excluded from the unit], the Regional Director relied on the vow of poverty taken by the Vincentians, their communal living arrangements which meant sharing quarters with some persons who were supervisors, the fact that these men, unlike the lay faculty, did not have written contracts and were not eligible for tenure and that they could be reassigned by their supervisors at any time.

558 F.2d at 1119.

unit to include those religiously-affiliated faculty not actually members of the Vincentian Order, Eastern Province.¹¹

In December 1975, a representation election was held; the Union was approved by a majority of the bargaining unit and subsequently was certified by the NLRB as the exclusive representative of the lay faculty.¹² To obtain judicial review of the Board's determination as to the proper unit,¹³ the university refused to bargain with the Union on the issues of "rates of pay, wages, hours and other terms and conditions of employment."¹⁴ The Union countered by filing an unfair labor practice charge,¹⁵ which led to the issuance of a complaint against Niagara for violations of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (NLRA).¹⁶ In response to this charge, Niagara argued that the bargaining unit improperly excluded full-time religious faculty.¹⁷ The NLRB denied Niagara's petition for reconsideration of the Regional Director's determination, however, and adjudged that Niagara had engaged in unfair labor practices.¹⁸ Shortly thereafter, the school filed a petition for review with the Second Circuit.¹⁹ Concluding that "the Board's order was arbitrary . . . and . . . not supported by substantial evidence,"²⁰ the Second Circuit ordered all full-

¹¹ Niagara University, 227 N.L.R.B. No. 33, 94 L.R.R.M. 1001, 1003 (Dec. 16, 1976).

¹² 558 F.2d at 1118.

¹³ The NLRA provides that an appeal may be taken to any United States Circuit Court of Appeals after the entry of a final order by the Board. 29 U.S.C. § 160(f) (1970). It has been observed that "the bargaining unit determination itself is not usually a 'final order' unless a § 8 claim of unfair labor practices can be substantiated . . ." 15 B.C. INDUS. & COM. L. REV. 423, 426 (1973). An employer therefore must refuse to bargain in order to render a unit determination judicially reviewable. See *Big Y Supermarkets, Inc. v. McCulloch*, 263 F. Supp. 175, 176-77 (D. Mass.), *aff'd*, 377 F.2d 991 (1st Cir. 1967) (remedy is to refuse to bargain with an inappropriate unit, thereby inviting an unfair labor practice complaint).

¹⁴ 558 F.2d at 1118.

¹⁵ *Id.*

¹⁶ Section 8(a)(1), (5) of the NLRA, 29 U.S.C. §§ 158(a)(1), (5) (1970) provides in pertinent part:

- (a) It shall be an unfair labor practice for an employer—
 - (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
 -
 - (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

¹⁷ 558 F.2d at 1118.

¹⁸ Niagara University, 226 N.L.R.B. No. 154, 94 L.R.R.M. 1082, 1083 (Nov. 17, 1976).

¹⁹ 558 F.2d at 1117. The NLRB cross-moved for enforcement of its order. *Id.*

²⁰ *Id.* at 1118. Courts consistently have recognized that judicial review of NLRB unit decisions is quite narrow in scope. In *NLRB v. Solis Theatre Corp.*, 403 F.2d 381, 382 (2d Cir. 1968), the Second Circuit pointed out that a "unit determination necessarily involves the use of a large measure of informed discretion by the Board, and its decision is to be disturbed only if arbitrary and unreasonable." Similarly, the court in *Empire State Sugar Co. v. NLRB*, 401 F.2d 559 (2d Cir. 1968), observed: "The Board has very wide discretion under Section 9(b) in regard to unit determination, and we will not reverse its finding in the absence of an arbitrary or capricious exercise of administrative discretion not present here." *Id.* at 562 (footnote omitted). See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947) (the decision of the Board, if not final, is rarely to be disturbed).

time religious faculty, including the Vincentian Fathers, Eastern Province, included within the general faculty bargaining unit.

In reaching its conclusion, the court, in an opinion written by Judge Mulligan, distinguished the NLRB decision in *Seton Hill College*.²¹ In that case, Seton Hill College was owned and operated by the Order of the Sisters of Charity of Seton Hill which held legal title to the institution's buildings and grounds and leased these facilities to the college for one dollar a year.²² Fifty percent of the individuals serving on the college's board of trustees were members of the Order, as were over one-half of the faculty members.²³ Based upon these facts, the NLRB had found that "the interests of the Order were also those of the" college and therefore excluded members of the Order from the bargaining unit.²⁴ The Second Circuit determined that "the identity of interest that existed in Seton Hill [was] totally different from that existing at Niagara,"²⁵ noting that Niagara University holds title to all real property on the campus and that Vincentian Fathers may comprise no more than one-third of the University's trustees. A more apposite precedent, Judge Mulligan stated,²⁶ is the *D'Youville College*²⁷ decision. *D'Youville* involved a college that had been founded by the Order of Grey Nuns of the Sacred Heart. A board of trustees governed the school and held title to the buildings and property.²⁸ No more than one-third of the board of trustees were permitted to be members of a religious order.²⁹ The NLRB had included four nuns in the *D'Youville* bargaining unit, explaining that "there is no basis for holding in this proceeding that the four nuns are in any manner affiliated with the Employer except in their capacity as faculty members signing a standard employment contract."³⁰ Observing that *Niagara* arose in a factual setting similar to that of *D'Youville*, the Second Circuit found no rational reason for the NLRB's departure from the latter decision.³¹

The *Niagara* court was not persuaded by the NLRB finding³² that the

²¹ 201 N.L.R.B. 1026, 82 L.R.R.M. 1434 (1973). *Seton Hill* overruled *Fordham University*, 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971) (faculty who are members of the Society of Jesus and whose salaries are paid to the Jesuit community included in unit).

²² 558 F.2d at 1119.

²³ *Id.*

²⁴ 201 N.L.R.B. at 1027, 82 L.R.R.M. at 1435.

²⁵ 558 F.2d at 119.

²⁶ *Id.*

²⁷ 225 N.L.R.B. 792, 92 L.R.R.M. 1578 (1976).

²⁸ *Id.* at 793, 92 L.R.R.M. at 1578, 1579.

²⁹ *Id.*

³⁰ *Id.*

³¹ 558 F.2d at 1119.

³² *Id.* at 1120. It was determined by the Regional Director that:

"Under his vow of poverty, a Vincentian Father has a right to ownership but can not use the property without the permission of his superiors. All monies earned by the Vincentian Fathers are given to their Provinces and they in return receive a monthly

Vincentian Fathers contributed all their earnings to the Province.³³ Although the Vincentian Fathers, Eastern Province, who were excluded from the unit, had assigned their paychecks to the Province, which customarily made donations to Niagara,³⁴ Judge Mulligan rejected the argument that this procedure was in effect a “kickback of salary” to the employer university.³⁵ Dismissing the NLRB reliance upon *Seton Hill* as misplaced, the Second Circuit panel pointed out that in *Seton Hill* the Order “was under a contractual obligation to return to the employer college ‘a substantial part of their nominal wages.’”³⁶ In contrast, Niagara University received money from their religious faculty members only by way of gifts, which were made indirectly.³⁷ Judge Mulligan similarly refused to adopt the NLRB’s contention that the vow of poverty taken by Vincentian Fathers serves as a valid basis for excluding them from the lay bargaining unit.³⁸ Finding this position to be in conflict with the Board’s decision in the unit clarification proceeding, the *Niagara* panel was of the opinion that “there [is] no necessary nexus between the vow of poverty and the interest in a pay raise”³⁹

As a final ground for its decision, the court determined that there existed a community of interests between lay and religious full-time faculty, since the terms and conditions of employment for all faculty members were almost identical and both lay and religious faculty received remuneration according to a common wage scale.⁴⁰ Deeming the last factor particularly significant, the *Niagara* panel concluded that “[t]he fact that at Niagara the pay scale of both groups is the same would give some indication that the college faculty who are religious have an interest in maintaining parity with their lay colleagues.”⁴¹

personal allowance. Further, the members of the Order are provided with food, clothing and shelter by their Provinces.”

Id.

³³ *Id.*

³⁴ *Id.* at 1121.

³⁵ *Id.*

³⁶ *Id.* (quoting *Seton Hill College*, 201 N.L.R.B. at 1027, 82 L.R.R.M. at 1435). With respect to this question, the *Seton Hill* Board stated:

[F]aculty members of the Order, unlike the lay faculty, do not receive remuneration directly from the College. In this respect, pursuant to the vow of poverty undertaken by each sister, her wages, less living expenses, are paid directly to the Order. The Order gives each sister \$25 per month. The Order has agreed to return the balance of the salaries to the College in the form of an “annual gift . . . of a percentage of the salaries earned by the sisters . . . such percentage to be agreed upon by the governing Boards of the respective corporations.”

201 N.L.R.B. at 1026-27, 82 L.R.R.M. at 1435. In 1971 the Order returned approximately \$484,000 of its members’ earnings to the College. *Id.* at 1027, 82 L.R.R.M. at 1435.

³⁷ 558 F.2d at 1121 & n.4.

³⁸ *Id.* at 1120-21.

³⁹ *Id.* at 1120.

⁴⁰ *Id.* at 1121.

⁴¹ *Id.* n.5.

The Second Circuit decision in *Niagara University* appears sound and in accord with prior authority. While noting the necessarily narrow scope of review in a case such as this,⁴² Judge Mulligan determined that the Board's decision to exclude the religious faculty members from the bargaining unit was arbitrary. Pointing out that Niagara University was not owned and operated by the Vincentian Fathers, Eastern Province,⁴³ as the NLRB had asserted in its clarification proceeding,⁴⁴ the court found that "this arbitrary assumption by the Board was necessary to support its purported distinction between the Eastern Vincentians and the other religious faculty."⁴⁵ Since the Vincentians did not own or control the University, the Board's decision in *Niagara University* was inconsistent with its prior decision in *D'Youville College*. In *D'Youville*, a lack of ownership and control by the founding Order was considered by the Board to be a crucial factor, eliminating any faculty-employer allegiance, while in *Niagara* the Board completely overlooked the lack of ownership and control on the part of the Vincentian Order. Another consideration ignored by the *Niagara* Board was the similar internal structure of *D'Youville College* and *Niagara University*. In each case the board of trustees was an independent governing body with full power to direct the affairs of the college. Neither board could draw more than one third of its members from the founding religious order, nor was either board answerable to the founders for its actions.

By refusing to accept the NLRB's viewpoint concerning the effect of the vow of poverty, the *Niagara* court wisely avoided an inconsistent result. In the clarification proceeding, the Board had amended the *Niagara* bargaining unit to include three nuns from different orders and one priest of the Vincentian Order, New England Province.⁴⁶ These four religious faculty members had all taken vows of poverty.⁴⁷ The Board had distinguished their situation from that of the nuns in *Seton Hill* who had been excluded from the bargaining unit partly because of the vow of poverty,⁴⁸ reasoning that

[i]n the *Seton Hill* case the nuns' salary was paid directly to their order. In turn, the order paid most of it over to the college, which the order also *owned and operated*. The sisters themselves received only a living allowance. As a result of this arrangement, the sisters could have no real interest in the size of their salaries, for ultimately those salaries amounted to little more than accounting transactions on the college's books. However, Father Lachowski and the sisters here concerned each receive the paychecks from the University and all but Sister Minella send them to their superiors and receive

⁴² *Id.* at 118. See note 20 *supra*.

⁴³ *Niagara University* held title to all the real property on the campus and was "governed by a seventeen member Board of Trustees, of whom not more than one-third [could] be priests" of the Vincentian Order. 558 F.2d at 1118.

⁴⁴ 227 N.L.R.B. No. 33, 94 L.R.R.M. at 1002, 1003.

⁴⁵ 558 F.2d at 1119 n.2.

⁴⁶ 227 N.L.R.B. No. 33, 94 L.R.R.M. at 1003.

⁴⁷ *Id.*, 94 L.R.R.M. at 1002.

⁴⁸ 201 N.L.R.B. at 1027, 82 L.R.R.M. at 1435.

in turn a living allowance. But the size of their paychecks is a matter of objective consequence to them, for the excess over their expense goes to support the various activities of their own orders which include care for sick and retired members, and, in the case of Father Lachowski, maintenance of a preparatory school for indigent boys.⁴⁹

With respect to the faculty members of the Vincentian Order, Eastern Province, the NLRB had let stand the ruling that the vow of poverty prevented their inclusion in the *Niagara* bargaining unit.⁵⁰ This distinction drawn by the NLRB between the Eastern Vincentians and the other religious faculty members seems to be unreasonable. Since the Vincentian Order did not own and operate Niagara University, faculty-member identification effectively was precluded. Moreover, the Vincentian Fathers, Eastern Province, did have an interest in "the size of their paychecks," as not all of their earnings were returned to the University. The Vincentians turned their paychecks over to the Order, which made a voluntary donation to Niagara. Thus, a portion of their salary could be used by the Order to support other charities. It would seem, therefore, that the vow of poverty was not a sound basis for excluding the Eastern Province Vincentians from the bargaining unit.

In reaching its decision, the Second Circuit distinguished *Niagara* from *Seton Hill* on the ground that the Vincentian Order, Eastern Province, was not under a contractual obligation to return any of the religious faculty's salary to Niagara.⁵¹ On the other hand, Judge Mulligan found the Board's decision in *Niagara* to be in conflict with *D'Youville College* on this point,⁵² because in the latter case "the nuns' gift of part of their salary to the employer was similar to the arrangement at Niagara,"⁵³ and there the nuns were included in the unit. This analysis of the applicable author-

⁴⁹ 227 N.L.R.B. No. 33, 94 L.R.R.M. at 1002 (emphasis added). The Board went on to explain: "Sister Minella puts [her paycheck] in a checking account in her order's name but on which she can write checks. She uses what she requires and ultimately sends the remainder to her order's headquarters." *Id.* n.5., 94 L.R.R.M. at 1002 n.5.

⁵⁰ 558 F.2d at 1120. In past decisions, religious employees who had taken vows of poverty and whose Orders had owned and operated the employer were excluded from lay bargaining units on the ground that their economic interests did not coincide with those of the lay employees. See, e.g., *St. Rose de Lima Hosp., Inc.*, 223 N.L.R.B. 1511, 92 L.R.R.M. 1181 (1976) (registered nurses who were members of a religious order which owned and operated hospital excluded from unit); *Catholic Charities of Buffalo*, 220 N.L.R.B. 9, 90 L.R.R.M. 1279 (1975) (members of religious orders excluded from bargaining unit); *St. Anthony Center*, 220 N.L.R.B. 1009, 90 L.R.R.M. 1405 (1975) (members of religious order that owned and operated nursing home excluded from unit); *Carroll Manor Nursing Home*, 202 N.L.R.B. 67, 82 L.R.R.M. 1479 (1973) (licensed practical nurses and nurses' aides who were members of religious order that owned and operated a facility excluded from unit). This is also the position adopted by the NLRB in *Niagara*. 558 F.2d at 1119. The position has no application to the case, however, since there was no ownership or control by the Vincentian Order.

⁵¹ 558 F.2d at 1121.

⁵² *Id.*

⁵³ *Id.*

ity seems compelling. The Vincentian Order, Eastern Province, was not under any legal obligation to return a portion of the salary earned by the religious faculty to Niagara, and could cease doing so at any time. Assuming the gift continued to be made on a regular basis, its amount could vary and might fall far below the earnings of the Eastern Vincentian faculty. In this respect, the *Niagara* factual situation is more analogous to *D'Youville* than *Seton Hill*.

Having refuted the contentions upon which the NLRB decision was premised, the *Niagara* court concluded that a community of interests did in fact exist between the lay and religious faculty members of the university. In so ruling, Judge Mulligan equated community of interest with "terms and conditions of employment."⁵⁴ Observing "that the religious and lay faculty at Niagara have a common wage scale and working conditions," and that "[t]he University's probation, leave, promotion, and academic freedom policies apply to . . . [both] equally,"⁵⁵ the court concluded "[t]he differences that do exist . . . indicate little more than a diversity of immediate interests that would be found in any unit, such as one combining young and old employees."⁵⁶ It seems unreasonable to conclude that the Vincentian Fathers, Eastern Province, would not be as genuinely concerned about their working conditions and those of their fellow employees as would members of the lay faculty. There was no evidence that the religious faculty members were opposed in any way to Union demands, or that they harbored a desire to thwart the Union's goals of better salary, fringe benefits, and working conditions. Moreover, the failure to include the Vincentian Fathers, Eastern Province, in the bargaining unit effectively would preclude the exercise of their right to collective bargaining.

By directing that the faculty members belonging to the Vincentian Order, Eastern Province, be included in the Niagara University bargaining unit, the Second Circuit has prevented a questionable exercise of NLRB power. As indicated by its confused and inconsistent reasoning, the NLRB has yet to fashion a coherent policy concerning the bargaining units of faculty at religiously affiliated universities. Until the Board adopts such a policy, it will risk having its decisions overturned by the federal courts. It is suggested that the Second Circuit's analysis in *Niagara* provides a framework which the Board may utilize in formulating a comprehensive solution to the bargaining unit question.

⁵⁴ *Id.* at 1121-22. The terms and conditions of employment standard often has been utilized in cases involving industrial employees and would seem equally applicable to lay and religious university faculty members. As early as 1938 the NLRB had articulated this test: "Self-organization among employees is generally grounded in a community of interest in their occupations, and more particularly in their qualifications, experience, duties, wages, hours, and other working conditions." 3 NLRB ANN. REP. 157 (1938).

⁵⁵ 558 F.2d at 1121.

⁵⁶ *Id.*