

RETHINKING BARGAINING UNIT DETERMINATION: LABOR LAW AND THE STRUCTURE OF COLLECTIVE REPRESENTATION IN A CHANGING WORKPLACE

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I. INTRODUCTION

Arguably the leading issue for current labor law research is whether the existing system of law based on the Wagner Act model¹ can continue to be relevant and appropriate for the contemporary workplace. Changes in the environment of work during the over half-century since this model was developed have brought pressures for re-evaluation and adaptation of key elements of its structure. Criticism of this system has focused on a number of areas, including: the reliance on the formal grievance procedure and arbitration; the separation of the realms of collective bargaining and business

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1. See National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994). In the United States, the current National Labor Relations Act, is the direct descendent of the initial Wagner Act. In Canada, the federal and ten provincial labor law jurisdictions have based their systems on the Wagner Act. In analyzing the "Wagner Act model" of labor law, references and discussion in this paper will include both the American and Canadian variants of this model. While important variations exist between these labor law systems, the analysis developed here is based on the idea that in the area of bargaining unit determination they share a common underlying structure. As a result, examples and arguments are based on both Canadian and National Labor Relations Act variants of the Wagner Act model with the intention that the analysis, implications, and recommendations are generally applicable to them both.

decision making; the limitations on employee participation in the workplace; and various weaknesses in the protection of the right to organize.² Broad questions have been raised as to whether this system of law can provide reasonable worker access to collective representation, respond to the needs of those who do manage to invoke its protection, or provide an appropriate structure for management of employment in modern organizations. If not, perhaps it should be replaced by some entirely different legal structure.³ However, given the political and institutional impediments and unlikelihood of an imminent wholesale change in the system of labor law, the pressing question remains: to what degree can the current system be adapted and made relevant for the contemporary workplace?

One area that has received relatively little attention in the re-evaluations of the Wagner Act model of labor law is the process of bargaining unit determination. This is a significant weakness in the current literature given the centrality of the bargaining unit to the Wagner Act model as the fundamental collective unit for worker representation. The process of bargaining unit determination especially warrants more detailed analysis given its relevance to a number of the key workplace changes that are occurring. The goal of this article is to analyze the structure of the current process of bargaining unit determination and to consider to what degree it should be modified to respond to the changing industrial relations environment.

The Wagner Act model was developed at the time of the great union organizing drives in the large plants of the automobile, steel, and other manufacturing industries.⁴ That world differs sharply from today's expanded service sector with its organizational structure which often includes many small branches and retail outlets. The financial context of the workplace has also changed with companies becoming increasingly flexible in moving capital investments between different plants or business divisions with major conse-

2. See, e.g., PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR & EMPLOYMENT LAW* (1990); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 *YALE L.J.* 1509 (1981).

3. See generally *Symposium on the Legal Future of Employee Representation*, 69 *CHI-KENT L. REV.* 49 (1993) (presenting a range of different perspectives and critiques of the Wagner Act model).

4. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *MINN. L. REV.* 265, 265-66 (1978).

quences for their workforces. In addition, new forms of organization of production have altered the relationship between different units in the production process. Whereas industrial plants could once have been conceptualized as independent units utilizing and producing generic goods such as the archetypal "widget," contemporary organizations are increasingly tightly linked into and dependent upon their position in relation to other suppliers and customers. Each of these changes has significant consequences for the structure of the collective organization of employment relations. Assumptions about the nature of bargaining unit structure underlying the Wagner Act model, that were developed in its early years, need to be re-examined in light of these changes.

When bargaining unit structure is discussed, it is primarily in terms of centralized versus decentralized bargaining structures. For instance, an important recent development in industrial relations is the decentralization of bargaining that has occurred in a number of countries.⁵ At a more local level, a common tension reflected in bargaining unit determination decisions is between factors favoring more centralized versus more decentralized units.⁶ While the question of centralization versus decentralization is an important issue in unit structure, other deeper tensions exist in the process of bargaining unit determination due to the nature of the Wagner Act model of labor law.

Under this model there exists a dual role of the bargaining unit, as both the electoral district for union certification and the negotiating unit to which bargaining rights and obligations attach, creating a fundamental tension.⁷ The consequences of the relationship between these dual roles of the bargaining unit are central to how labor law, under the Wagner Act model, responds to the changes that are occurring in the workplace. To date, the predominant conceptualization of this relationship in labor law has been to unify these two roles in a common unit that is static over time. However, examples also exist of exceptions to this approach to the relationship between the two roles of the bargaining unit.⁸ These excep-

5. See Harry C. Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, 47 *INDUS. & LAB. REL. REV.* 3 (1993).

6. See *id.* at 4.

7. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 *CHI.-KENT L. REV.* 3, 11 (1993).

8. See, e.g., Katz *supra*, note 5.

tions reflect an alternative model of the relationship, which recognizes the separate considerations in the two roles of the bargaining unit and allows for a dynamic process in which the unit may be altered to reflect changed circumstances. The choice between a unified-static model and a separated-dynamic model of bargaining unit determination has important implications both for access to and the conduct of collective bargaining.

II. STRAINS FROM A CHANGED INDUSTRIAL RELATIONS ENVIRONMENT

A. *Bargaining Unit Structure in the Post-War Industrial Relations System and its Breakdown*

To understand the pressures for change in the process of bargaining unit determination, it is first necessary to examine how this process functioned during the period of stability in the industrial relations system following the Second World War. The inability to sustain that role for the process of bargaining unit determination and transfer it to other contexts in the contemporary workplace is an important element in how the system of labor law has contributed to the failure of the post-war system of industrial relations to provide a more broadly applicable and successful structure for employment relations.

The key to the success of the bargaining unit determination process in the post-war industrial relations system was the ability to combine a legal structure based on certification of plant level bargaining units with a voluntary structure that connected bargaining at broader national and multi-employer levels.⁹ Indeed, the success of this super-structure of broader level bargaining may have contributed to obscuring the significance of the underlying system of bargaining unit determination in labor law during that period. Industrial relations researchers of the period could describe the national union as being the dominant institution for collective bargaining and how labor market structures had expanded in tandem with product markets to the corresponding national level.¹⁰ The paradox is that despite the development of bargaining at a national

9. See Estreicher, *supra* note 7, at 10-11. (noting the characteristic combination of decentralized plant level units and the limitation of broader multi-employer units only being created as voluntary arrangements).

10. See, e.g., LLOYD ULMAN, *THE RISE OF THE NATIONAL TRADE UNION* (1955).

level between employers and national industrial unions, the system of labor law was still able to be grounded on a structure of plant level legal bargaining units. To anticipate the argument that will be presented, with the breakdown and transformation of the post-war system of industrial relations, the loss of the ability to overcome this paradox has become a major impediment to the continued viability of the Wagner Act model of labor law.

The operation of the bargaining unit system in the post-war period can be seen through its paradigmatic example - the system of industrial relations that developed in the automobile industry. A leading contemporary study of this system described it as involving three key features: wage rules; connective bargaining; and job control unionism.¹¹ It is the second feature of this system, connective bargaining, that underlies the viability of a structure of plant level legal bargaining units combined with national level bargaining.

The system of connective bargaining combined the series of collective bargaining relationships between individual plants and the local unions at the level where the legal bargaining units existed, into a stable national level bargaining structure.¹² Collective bargaining in the automobile industry is centered on negotiating rounds at the national level between the United Auto Workers ("UAW") and each of the major automobile manufacturers.¹³ However, as in other industries, certification of legal bargaining units in the automobile industry occurs on a plant level basis.¹⁴ Thus, a company like General Motors, that had negotiated with the UAW as the representative of its workers at a national level for over three decades, could attempt to pursue a strategy of developing non-union plants in the southern United States.¹⁵ The UAW clearly represented a majority of workers within the national level unit of all General Motors' production employees, that in reality was the bargaining structure. In labor law, the bargaining units and hence the units within which representational status was determined, continued to be the individual plants.

11. See HARRY C. KATZ, *SHIFTING GEARS: CHANGING LABOR RELATIONS IN THE U.S. AUTOMOBILE INDUSTRY* 6 (1985)[hereinafter *SHIFTING GEARS*].

12. See *id.* at 29-30.

13. See *id.* at 1.

14. See *id.*

15. See *id.* at 35.

Under connective bargaining, pay and fringe benefits were negotiated in national level collective agreements between the UAW and the company.¹⁶ These national agreements were then supplemented by plant level agreements negotiated by local unions.¹⁷ In addition, the local unions administered at the individual plants, both the national level and the supplemental plant agreements.¹⁸ To make this system function, the UAW and management needed to exert significant control over the plant level agreements and contract administration to ensure that they did not introduce such a degree of variation in work rules or job classifications as to undermine the wage provisions of the national level agreements.¹⁹ As a result, it was important to the maintenance of the national structure of bargaining that standardization between plants be in the interest of both the union and management.²⁰

In *Shifting Gears*, Katz notes both the economic and political functions of connective bargaining that provided this motivation.²¹ An initial union economic motivation for standardization was to prevent the union's wage position from being undercut by management negotiating agreements with local unions in southern automobile plants where, the union's bargaining power was weaker.²² The union could afford to take a strong line against this type of intra-company divergence due to the general expansion of the automobile industry during the 1950's and 1960's, which reduced the danger of resulting job losses.²³ At this time, competition from foreign imports was limited, further reducing the threat of employment reductions.²⁴

Politically, standardization of wages at the national level satisfied workers' equity concerns for comparability of wages, thereby providing support for the national leadership of the union and their bargaining activities.²⁵ In turn, this provided management with protection from the demands of more radical local union leaders

16. See *SHIFTING GEARS*, *supra* note 11, at 22-24.

17. See *SHIFTING GEARS*, *supra* note 11, at 22-23.

18. See *SHIFTING GEARS*, *supra* note 11, at 23-24.

19. See *SHIFTING GEARS*, *supra* note 11, at 36.

20. See *SHIFTING GEARS*, *supra* note 11, at 38.

21. See *SHIFTING GEARS*, *supra* note 11, at 34-38.

22. See *SHIFTING GEARS*, *supra* note 11, at 35.

23. See *SHIFTING GEARS*, *supra* note 11, at 37-38.

24. See *SHIFTING GEARS*, *supra* note 11, at 36.

25. See *SHIFTING GEARS*, *supra* note 11, at 36.

who might exert pressure at plants where the union's bargaining power was stronger.²⁶ Given a stable, expanding national product market for the automobile industry, the maintenance of a national structure of bargaining provided management with the advantage of predictable, stable labor market outcomes at a corresponding national level.²⁷ Thus, the congruence between national product and labor markets supported the voluntary acceptance by management and the union of a national level bargaining structure, despite the underlying legal structure of plant level bargaining units.²⁸

Extensions of the voluntary, single employer, national level bargaining structures to produce common labor market outcomes between different employers were provided in the post-war industrial relations system through the practice of pattern bargaining.²⁹ In the rubber, trucking, and steel industries, this was demonstrated by the creation of more formal multi-employer bargaining structures.³⁰ In the absence of significant threats to product markets from foreign competition, the resulting wage standardization was able to protect workers' wages from labor market competition and provide labor cost stability without threatening competitiveness for management.³¹ Again, the crucial aspect of these arrangements was that they were voluntary practices accepted by management and unions. While the Wagner Act model of labor law allowed these practices to be developed, and to a partial degree, regulated conduct within them, the legal process of bargaining unit determination was not modified to correspond to this actual structure of the bargaining process.³² Thus, when voluntary support for broader based bargaining subsequently eroded, the labor law system did not provide institutional support for the maintenance of these arrangements.

26. See *SHIFTING GEARS*, *supra* note 11, at 38.

27. See *SHIFTING GEARS*, *supra* note 11, at 38.

28. See *SHIFTING GEARS*, *supra* note 11, at 38.

29. See *SHIFTING GEARS*, *supra* note 11, at 33-34.

30. See *SHIFTING GEARS*, *supra* note 11, at 189-90. For more on the decline of industry wide bargaining, see CHARLES R. PERRY, *COLLECTIVE BARGAINING AND THE DECLINE OF THE UNITED MINE WORKERS* (1984); *COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE* (Gerald G. Somers ed. 1979); CHARLES R. PERRY, *DEREGULATION AND THE DECLINE OF THE UNIONIZED TRUCKING INDUSTRY* (1986).

31. See *SHIFTING GEARS*, *supra* note 11, at 36.

32. See *SHIFTING GEARS*, *supra* note 11, at 47.

This erosion of voluntary support for broader based bargaining occurred during the 1970's and 1980's with the convergence of a number of factors. Increasing globalization meant that competition in product markets could no longer be confined to the national level where the labor market bargaining structures had developed.³³ In conjunction with this shift in product markets, management increasingly shifted production to nonunion plants to achieve a competitive advantage through lower labor costs and the utilization of new human resource management strategies.³⁴ Lack of effective legal protection or political support for collective bargaining facilitated this strategy of shifting production to nonunion plants. These changes have justifiably been described as key factors producing a transformation of the industrial relations system.³⁵

In addition to other effects on the industrial relations system, these changes brought about an erosion of voluntary support for broader based bargaining.³⁶ With it no longer being possible to control competition based on labor costs through standardization across a labor market structure that corresponded to a national level product market, the incentive increased for management to try to shift bargaining to the plant level to seek competitive advantages through such changes as work rule modifications, wage reductions, and employee involvement programs.³⁷

A consequence of these changes for the Wagner Act model of labor law is that bargaining has been decentralized back down towards the structure of legal bargaining units.³⁸ As a result, the process of bargaining unit determination has a renewed relevancy and importance in the contemporary industrial relations environment. This was absent in the post-war industrial relations system, where the parties had voluntarily arranged a bargaining structure that did not correspond with, and to a large degree, bypassed the

33. See *SHIFTING GEARS*, *supra* note 11, at 135.

34. See *SHIFTING GEARS*, *supra* note 11, at 35.

35. See THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1986).

36. See *id.* at 144.

37. The recognition of the central role of the negative impact on labor of this loss of the ability to organize all the firms in an industry and "take wages out of competition" has been recognized in a number of discussions on the need for labor law reform. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 *CHI.-KENT L. REV.* 3, 13-14 (1993); see, e.g., Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 *CHI.-KENT L. REV.* 59, 64-66 (1993).

38. See Estreicher, *supra* note 37, at 10.

legal bargaining unit structure.³⁹ While the legal structure of bargaining units may be more important given this transformation of the industrial relations system, that does not imply that this structure is the appropriate one for this new environment. Rather, its increased significance indicates that it is also increasingly necessary to consider how the process of bargaining unit determination should respond to the series of changes that have affected the contemporary workplace.

B. *The Rise of the Service Sector*

One of the major changes in the industrial relations environment as compared to the early period of the Wagner Act model is the shift in the industrial structure toward the service sector.⁴⁰ The shift in the primary location of employment has meant a shift in the type of organizational structure in which people work. Whereas a classic labor law article of the 1950's could state that its "archetype is a large industrial enterprise employing many thousands of organized workers in one or more plants,"⁴¹ such enterprises no longer represent the typical workplace.⁴² This has significant implications for the continued appropriateness of existing models of collective organization and representation.⁴³ What may have been suitable for a work world dominated by large manufacturing plants, may not be suitable for an environment of small service workplaces such as retail branch operations.⁴⁴

39. See Estreicher, *supra* note 37, at 11.

40. See Estreicher, *supra* note 37, at 7, 11-12.

41. Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1002 (1955).

42. See generally Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671 (1992) (discussing changes occurring in modern trends of unionism).

43. See *id.* at 680.

44. Some have argued that the entire Wagner Act model of labor law is outdated given the shift in industrial structure. The Service Employee International Union "Justice for Janitors" campaigns have provided an example of service sector organization outside the structure of the Wagner Act model. See generally Wial, *supra* note 42, at 692-93 (stating the successes that these campaigns have achieved is developing a new model of social or associational unionism that will replace the current workplace centered unionism). While these developments are suggestive of a possible future path, as of yet the "Justice for Janitors" type of campaign has only been utilized by a small section of the union movement in a limited number of cases. Eventually a new model may arise. However, at present the legal and public policy support for the right to collective representation is primarily centered in the structure of the Wagner Act model of labor law. Given this reality, it is worth

Considerations of the relationship between organizing and negotiating units are particularly critical in the service sector because many companies in it are composed of large numbers of small branch or retail operations.⁴⁵ The dilemma for unions in the service sector is that while it is difficult to simultaneously organize workers at a larger number of scattered locations, single location units will generally be lacking in effective bargaining power to negotiate with a large employer.⁴⁶ This dilemma was evident in attempts in the late 1970's to organize workers in the Canadian banking industry.⁴⁷

The banking industry has been historically one of the Canadian industries most resistant to unionization.⁴⁸ Two organizational features of the banking industry have made bargaining unit determination essential to attempts to unionize this industry.⁴⁹ The first feature is that the Canadian banking industry is highly concentrated at a national level; being dominated by the "big five" banks.⁵⁰ As a result, any small bargaining unit will suffer a large imbalance in bargaining power when negotiating with one of the big five banks.⁵¹ The second feature is that the retail side of banking is conducted through a large number of small branch locations.⁵² The workers at each location have common interests and relationships, yet, they have been split into small groups.⁵³ Therefore, organization of these workers is most likely to occur at one small branch at a time.

In 1977-78, the Service, Office and Retail Workers Union of Canada ("S.O.R.W.U.C.") organized a number of branches in the lower

considering to what degree it is possible to respond to the employment situation of service sector workers within the Wagner Act model. In particular, a system of bargaining unit determination is needed that allows these workers the opportunity to organize collectively on a reasonable basis and if they so organize, allows them an adequate degree of bargaining power to negotiate with their employers on a more equal level. *See id.* at 681-85.

45. *See id.* at 694-95.

46. *See generally* Errol Black & Jim Silver, *Manitoba's Experience With Final Offer Selection: A Comment*, 43 LAB. L.J. 318 (May 1992) (explaining that employers have more power than unions when unions consist of small bargaining units).

47. *See S.O.R.W.U.C. v. Canadian Imperial Bank of Commerce* [1977] 2 Can. L.R.B.R. 99.

48. *See C.N.T.U. v. Nat'l Bank of Canada* [1985] 11 Can. L.R.B.R. (NS) 257, 266.

49. *See S.O.R.W.U.C.* 2 Can. L.R.B.R. at 110-11.

50. *See M. Isabel Medina, Note, Regional Interstate Banking - States May Discriminate Against States Outside Their Geographical Regions in Authorizing Interstate Banking Acquisitions*, 61 TUL. L. REV. 196, 213 n.102 (1986).

51. *See Black & Silver, supra* note 46, at 319.

52. *See S.O.R.W.U.C.* 2 Can. L.R.B.R. at 112-13.

53. *See id.* at 119.

mainland of British Columbia.⁵⁴ The bank challenged the branch level units proposed by S.O.R.W.U.C. on the basis that the only appropriate unit for banking was a national level, all-employee unit.⁵⁵ The Canada Labour Relations Board ("CLRB") accepted the union's proposal of a single branch as an appropriate bargaining unit.⁵⁶ In rejecting the banks proposed unit, CLRB noted that single location units had been deemed to be appropriate in the past and that adopting too large a unit in this case would "abort any possibility of collective bargaining ever commencing."⁵⁷ Despite their success in obtaining the branch as the bargaining unit, S.O.R.W.U.C.'s attempt to organize the banking industry was ultimately unsuccessful.⁵⁸ This was partly due to a lack of support from the broader union movement, but a key factor was also the lack of bargaining power of the single branch units when negotiating with the banks. The single branch units that S.O.R.W.U.C. organized as a result proved unable to win significant benefits for their members, crippling the organizing drive.⁵⁹

One approach to resolving the problem of the lack of bargaining power of single branches was to organize on a regional or municipal basis.⁶⁰ The CLRB found that a unit composed of all branches of the National Bank in the municipality of Rimouski was an appropriate unit.⁶¹ However, in Ontario an application for a unit consisting of seven out of thirty-seven branches of National Trust in metropolitan Toronto was ultimately rejected after being accepted at an initial CLRB hearing.⁶² In this decision, the CLRB emphasized that it would not accept as appropriate a bargaining unit that was based solely upon the degree to which the union had organized individual branches.⁶³ However, the key restriction on organizing in the banking industry that S.O.R.W.U.C. had earlier experienced

54. See *S.O.R.W.U.C. v. Canadian Imperial Bank of Commerce* [1977] 2 Can. L.R.B.R. 99, 100.

55. See *id.* at 119.

56. See *id.* at 125-26.

57. *Id.* at 121.

58. See *C.N.T.U. v. Nat'l Bank of Canada* [1985] 11 Can. L.R.B.R.(N.S.) 257, 334.

59. See *id.* at 363-70.

60. See *id.* at 304.

61. See *id.* at 262, 304.

62. See *National Trust (No.1)* [1986] O.L.R.B. Rep. Feb. 250; *National Trust (No.2)* [1988] O.L.R.B. Rep. Feb. 168.

63. See *National Trust (No. 2)* [1988] O.L.R.B. Rep. at 174.

was not the size of the organizing unit.⁶⁴ It was the inability to combine the natural organizing units of individual branches into larger negotiating units that might be able to bargain effectively with the large banks.⁶⁵

Resolution of this conflict between different effective units for organizing and bargaining purposes is central to the question of whether collective bargaining under the Wagner Act model has the potential to be available as a reasonable structure for collective organization of workers in the service sector. The consequences of a failure to address this issue are already becoming evident in moves by some unions in the service sector to organize workers outside of the legal structure of the Wagner Act model.⁶⁶ Most prominently, the S.E.I.U. in their successful "Justice for Janitors" campaign was able to organize workers on an industry-wide basis in different cities in the United States.⁶⁷ This was accomplished without using any of the procedures established by the Wagner Act.⁶⁸ Thus, the question of how to provide a structure for reasonable access to collective organization for service sector workers through the bargaining unit determination process ultimately may not be simply one of whether or not to support availability of collective representation for these workers. Rather, it will depend on whether or not the system of labor law will have any relevancy to the collective organization that will occur in any event. An additional problem that is particularly characteristic of the service sector is the growth of non-traditional forms of employment.⁶⁹ This includes the use of large numbers of part-time, temporary, and contingent employees instead of the predominantly full-time, permanent labor force, characteristic of the large manufacturing employers that were the archetype of the post-war industrial relations system.⁷⁰ This change in the nature of employment creates a

64. See *S.O.R.W.U.C.* 2 Can. L.R.B.R. at 119.

65. See *C.N.T.U.* 11 Can. L.R.B.R. at 363-70.

66. See Wial, *supra* note 44, at 693-94.

67. See Wial, *supra* note 44, at 692-93.

68. See Wial, *supra* note 44, at 697-98.

69. "Low-wage service jobs - jobs in such fields as retail sales, clerical, food preparation and service, non-professional health care, cleaning service, and personal service work, typically located in service-producing rather than goods-producing industries - are a prominent feature of the 'new' American economy." Wial, *supra* note 44, at 671.

70. For instance, Canadian statistics indicate that in 1990 just over 90 percent of part-time employment was in the service sector. See RONALD DAVIS, *THE OLRB POLICY ON BARGAINING UNITS FOR PART-TIME WORKERS* 6 (1991).

problem for the process of bargaining unit determination. A decision must be made whether to allow these non-traditional types of employees to form part of the same units as full-time, permanent employees and perhaps, more importantly, whether the process allows reasonable access to collective representation for all types of employees.

A further element in the issue of the changing form of employment in the service sector is the increasing amount of companies contracting out various organizational functions.⁷¹ Indeed, the contracting out of such functions as janitorial, cafeteria, security, and payroll services by companies in manufacturing and other industries is one cause of the shift to increased service sector employment.⁷² This process of contracting out of services alters the traditional identification of the employer with the owner and manager of the workplace.⁷³ The worker may continue to identify his or her employment with the location where the work is performed and the group of employees who work at that workplace.⁷⁴ However, the employee's contractual relationship of employment may be with a company that provides services to a number of clients at different workplaces, none of which the individual employee may have had any contact with.⁷⁵ The challenge for the process of bargaining unit determination is whether a structure developed in the context of large, stable manufacturing plants can be adapted to this new context.

C. *Multi-Divisional Corporate Forms*

Related issues concerning the relationship between the bargaining unit and the corporate structure are posed by the rise of the multi-divisional corporation as a major type of corporate organization.⁷⁶ Again the key concern is whether the unit determination

71. See Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 679 & n.31 (1992).

72. See *id.* at 680.

73. See *id.* at 679-80.

74. See *id.* at 680.

75. See *id.* at 679-80.

76. See ALFRED D. CHANDLER, JR., *STRATEGY AND STRUCTURE* (1962). Chandler's work is considered a classic analysis of the rise of the multi-divisional corporate form. Despite the decades since its publication, it is only recently that the implications of the multi-divisional corporate structure for employment relations have begun to be more fully analyzed.

process allows the development of a bargaining unit that can bargain effectively. Concerns in this area were advanced in the 1970's with the advent of widespread corporate mergers and conglomerations.⁷⁷ The fear at that time was that bargaining units would be too small to have any effective bargaining power when faced with corporate conglomerates.⁷⁸ The inter-industry and international diversification of investment and risk could reduce the impact of any individual unit's industrial action.⁷⁹ This led to some calls for unit determination to become a mandatory subject of bargaining, with the hope that this would lead to the merger of units creating unit structures large enough to bargain effectively with the corporate conglomerates.⁸⁰ While the conglomerate wave of the 1970's may have faded with the corporate break-ups and sell-offs of the 1980's, multi-divisional corporations have remained an increasingly significant organizational form.

Recent work by John Purcell and Bruce Ahlstrand has provided important insights concerning the impact of the relationship between corporate structure and industrial relations in the context of the multi-divisional corporation.⁸¹ The unitary company functions as an independent unit in external product and capital markets, with its internal organization based upon functional departments, such as sales, production, and marketing.⁸² The multi-divisional company is "organized into divisions and/or business units with business unit managers made wholly or largely responsible for operating decisions and for profit generation."⁸³ Profits earned by divisions in the multi-divisional company are not retained in the division, but rather are returned to central corporate funds.⁸⁴ Senior corporate management is then able to re-allocate capital across the divisions of the company in accordance with the

77. See Charles Craypo, *Collective Bargaining in the Conglomerate, Multinational Firm: Litton's Shutdown of Royal Typewriter*, 29 INDUS. & LAB. REL. REV. 3, 20 (1975).

78. See *id.* at 21 & n.61.

79. See *id.* at 22; see also David C. Rose, *Are Strikes Less Effective in Conglomerate Firms?* 45 INDUS. & LAB. REL. REV. 131 (1991) (developing an equation to test diversification's effect on wages and strikes).

80. See Kenneth O. Alexander, *Conglomerate Mergers and Collective Bargaining*, 24 INDUS. & LAB. REL. REV. 354, 369-70 (1970).

81. See JOHN PURCELL & BRUCE AHLSTRAND, *HUMAN RESOURCE MANAGEMENT IN THE MULTI-DIVISIONAL COMPANY 2* (1994).

82. See *id.* at 11.

83. *Id.* at 2.

84. See *id.*

investment priorities developed through corporate strategy.⁸⁵ While this might appear to be a system that would facilitate the availability of patient capital for long term investments, in practice the reverse has occurred. Senior corporate management has used systems of tight financial controls to increase pressure on divisional managers to maximize short term returns.⁸⁶

An important effect of the establishment of the multi-divisional structure is to produce a split in the level at which company strategy is set.⁸⁷ Three levels of strategy in the multi-divisional company have been described.⁸⁸ First-order strategy concerns the long term direction of the firm: what markets it will be in; how large it will be; and what divisions it will establish.⁸⁹ Second-order strategy concerns the relationship between the different divisions of the corporation, and its internal operating procedures.⁹⁰ Third-order strategy involves the plan for particular areas of functional management, such as operations, human resources and marketing.⁹¹ Within the multi-divisional company, these different levels of strategy are set at different levels of the company.⁹² First- and second-order strategies are set by senior management at the central office.⁹³ Third-order strategy is developed at the divisional level, where implementation of these functional management plans also occurs.⁹⁴ The different levels of strategy are related in a hierarchical manner, such that there are “cascading sets of strategic decisions in which upstream, first-order corporate strategies flow downward into second-order structural decisions and, further downstream, third-order employee relations strategies.”⁹⁵

The key finding from this research concerns the effect of the first- and second-order decision making on employee relations.⁹⁶ Instead

85. *See id.* at 14.

86. *See id.* at 76.

87. *See* JOHN PURCELL & BRUCE AHLSTRAND, HUMAN RESOURCE MANAGEMENT IN THE MULTI-DIVISIONAL COMPANY 42-43 (1994).

88. *See id.* at 43.

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.* at 52.

93. *See* JOHN PURCELL & BRUCE AHLSTRAND, HUMAN RESOURCE MANAGEMENT IN THE MULTI-DIVISIONAL COMPANY 43 (1994).

94. *See id.* at 43.

95. *Id.* at 52.

96. *See id.* at 45.

of employee relations operating autonomously in the environment of the particular operating plant or division, the nature of this environment is, in significant measure, determined by strategies set by senior management at the central corporate offices.⁹⁷ The separation of higher-order strategic planning and financial control from the operational management at the unit or divisional level allows senior management to determine the financial constraints and expectations under which the division will operate.⁹⁸ As a result, Purcell and Ahlstrand suggest "most of the key (strategic) decisions made *within* the human resource sphere (what we refer to as third-order strategy) are, in fact, derivatives of first- or second-order strategy."⁹⁹

These findings are of significance for unit determination policy development. If the policy is designed to promote collective bargaining as a way of allowing employees to bargain over the key decisions affecting the employment relationship, then it is necessary to be able to bargain at the level where those decisions are being made.¹⁰⁰ Merely bargaining at the divisional level where functional management is centered may allow employees to bargain over third-order strategies, such as what the personnel policies will be.¹⁰¹ However, it will not allow effective bargaining over the first- and second-order decisions that set the parameters under which these third-order strategies are developed. The implication from this analysis is that if labor law is to facilitate effective collective bargaining concerning the major decisions affecting employees, it must allow bargaining to occur at a company-wide level where these decisions are taken, not just at a plant or divisional level.

D. *New Forms of Organization of Production*

Among the most important challenges to the traditional system of industrial relations are those resulting from the rise of alternative systems of production.¹⁰² Changing systems of work organization

97. *See id.* at 52.

98. *See id.* at 52-53.

99. JOHN PURCELL & BRUCE AHLSTRAND, HUMAN RESOURCE MANAGEMENT IN THE MULTI-DIVISIONAL COMPANY 63 (1994).

100. *See id.*

101. *See id.*

102. *See* Charles Sabel, *Moebius-Strip Organizations and Open Labor Markets: Some Consequences of the Reintegration of Conception and Execution in a Volatile Economy*, in

and new relationships between firms in networks of production require a re-evaluation of existing institutional structures of industrial relations.¹⁰³ These changes have the potential to fundamentally alter the industrial relations issues that are being regulated in the process of bargaining unit determination.¹⁰⁴ As a result, the regulatory effect of the process of unit determination may in turn be altered.¹⁰⁵ Thus, it is particularly critical to consider the effect of alternative models of unit determination in the context of these changes.

In traditional mass production, independent firms produced standardized products for a general market of interchangeable customers.¹⁰⁶ In many of the alternative production systems that have been developed in recent years, the relationship between firms has been altered such that firms become linked together in supplier and customer networks.¹⁰⁷ For instance, one of the key elements of the lean production system in the auto industry is the close linkage between supplier firms and final assembly plants.¹⁰⁸ By coordinating deliveries with demand, it is possible to reduce inventories and produce the elimination of buffers that is central to lean production's maximization of efficiency.¹⁰⁹ In order to achieve this coordination, the work organization of firms in the network is increasingly tied to that of the central assembly plant.¹¹⁰

A striking example of the effect of changes in the organization of production is provided by the new Volkswagen vehicle assembly plant in Resende, Brazil.¹¹¹ This plant is the leading example of the move toward modular production, in which supplier firms take responsibility for the production of entire subsystems of the vehicle, including their installation on the assembly line.¹¹² As a result of

SOCIAL THEORY FOR A CHANGING SOCIETY 23, 24 (Pierre Boudrieu & James Coleman eds. 1991) [hereinafter *Moebius-Strip Organizations*].

103. See *id.*

104. See JOHN E. ABODEELY ET AL. THE NLRB AND THE APPROPRIATE BARGAINING UNIT 135 (rev. ed. 1981).

105. See *id.*

106. See *Moebius-Strip Organizations*, *supra* note 102, at 27.

107. See EILEEN APPELBAUM & ROSEMARY BATT, THE NEW AMERICAN WORKPLACE: TRANSFORMING WORK SYSTEMS IN THE UNITED STATES 37-39 (1994).

108. See *id.* at 135-37.

109. See *id.* at 34.

110. See *id.* at 37.

111. See Haig Simonian, *Alliances Forged in the Factory*, FIN. TIMES, Nov. 4, 1996, at 16.

112. See *id.*

this organizational structure, most of the workers on the assembly line at Resende are not employees of Volkswagen, the owner of the plant, but of different component system suppliers.¹¹³ Only about twenty percent of the workers at Resende will actually be on Volkswagen's payroll; primarily taking responsibility for supervisory functions such as quality control.¹¹⁴ A similar approach has been applied to the organization of production at the Skoda plant at Mlada Boleslav in the Czech Republic, also owned by Volkswagen.¹¹⁵ While these are but a few isolated examples, owing much to the particular vision of the manufacturer-supplier relationship held by Jose Ignacio Lopez, who as Volkswagen's controversial head of purchasing and production optimization provided impetus to the projects, their potential spread poses significant challenges to existing conceptions of the firm and its relationship to its workers.¹¹⁶

The significance of these types of cases for the process of bargaining unit determination is that they alter the existing conception of where the natural groupings of common interest among workers in different organizations lie. The question that will need to be addressed is whether the structure of bargaining units can be adapted to this and other structures of organization of production that differ from the independent unitary industrial plant. This problem may become increasingly severe if some of the more speculative predictions for the organization of the future come true. One such prediction is that the pressure for flexibility in production will result in the devolution of corporate functions to semi-autonomous units.¹¹⁷ Linkages between firms will develop as local clusters of firms work together on particular projects.¹¹⁸ An increased blurring of corporate boundaries will occur as organizations become like "Moebius-Strips," folding into each other with no end or beginning.¹¹⁹ Corresponding to this will be an increasing mobility of workers.¹²⁰ No longer will a homogeneous group of workers be employed in the same workplace for an extended period of time.

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *See Moebius-Strip Organizations, supra* note 102, at 27-28.

118. *See Moebius-Strip Organizations, supra* note 102, at 29.

119. *See Moebius-Strip Organizations, supra* note 102, at 29.

120. *See Moebius-Strip Organizations, supra* note 102, at 29.

Other types of connections between workers will become more important as the link based upon the office or plant workplace is weakened.¹²¹ This description of the “Moebius-Strip” organization is a speculative extrapolation. However, if firms increasingly do begin to develop some aspects of organizational characteristics such as these, it is important that the law of bargaining unit determination be able to adapt to this development. If organizational and productive flexibility are the key to competitive success, a model of bargaining unit determination based upon large, stable organizational units will be a disadvantage.

III. THE NATURE OF BARGAINING UNIT DETERMINATION AND TWO ALTERNATIVE MODELS

Having considered some of the major changes occurring in the industrial relations environment, it is now necessary to turn to the legal process of bargaining unit determination and examine it in more detail. The legal structure for bargaining unit determination is an amalgam of loose direction from statutes and broad policy construction by labor relations boards.¹²² In this area, the courts have provided less significant review of labor relations board decision making than elsewhere in labor law.

The National Labor Relation Board’s (“NLRB”) discretion in bargaining unit determination is only given loose guidelines by the National Labor Relations Act, (“NLRA”) which provides that “[t]he Board shall decide in each case whether, in order to assure to 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”¹²³ Similarly, the relevant provision of the Ontario Labour Relations Act (“OLRA”) states, “the Board shall determine the unit of employees that is appropriate for collective

121. See *Moebius-Strip Organizations*, *supra* note 102, at 29-30.

122. See National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994); see generally *Airco, Inc.*, 273 N.L.R.B. 348 (1984) (ruling a “plantwide unit of drivers, mechanics, and operators appropriate”); *Metropolitan Life Ins.*, 156 N.L.R.B. 1408, 1412 n.11 (1966) (stating that “[i]n attempting to ascertain the groups among which there is that mutual interest in the objects of collective bargaining which must exist in an appropriate unit,” the Board must take certain factors into consideration).

123. 29 U.S.C. § 159(b).

bargaining”¹²⁴ Provisions in other Canadian jurisdictions have conferred on their respective labour relations boards a very broad discretion in determining the appropriate bargaining unit.¹²⁵

The discretion conferred by legislation allows the labor relations boards broad authority to develop principles and policies concerning bargaining unit determination. Despite this broad grant of discretion, the labor relations boards have rarely enunciated any specific rules or principles governing their decision making in this area.¹²⁶ Instead, they have predominantly emphasized that each case will be decided on its particular circumstances and have offered lists of factors that they will consider in making these decisions.¹²⁷ Under the rather vague standard of whether the employees share a sufficient “community of interest” to make them appropriate as a bargaining unit, the NLRB has considered a list of factors including: the extent of organizing; bargaining history between the parties or in the industry; similarity of skills, duties and working conditions among the employees; structure of the employer’s organization; and the wishes of the employees.¹²⁸ Following the lead of the NLRB, the various Canadian labour relations boards have also all adopted some formulation of the test of whether the employees in the proposed unit share a sufficient community of interest to bargain collectively as a unit.¹²⁹ While the above list of factors helps indicate what considerations the boards will look to, it does not indicate the actual pattern of decision making that has developed over time. Applications of the “community of interest” test have produced a range of decisions concerning different types of workplaces.¹³⁰ However, at a broader level, there are certain common general principles underlying the process of bargaining unit determination that have been largely unexamined.

124. Labour Relations Act, R.S.O., ch. L.2 § 6(1) (1990), amended by ch. 21, 1992 R.S.O. 363 (Can.).

125. See GEORGE W. ADAMS, CANADIAN LABOUR LAW, ¶ 7.300 (2d ed. 1997).

126. See JOHN E. ABODEELEY ET AL., THE NLRB AND THE APPROPRIATE BARGAINING UNIT 134 (rev. ed. 1981).

127. See *id.*

128. See PATRICK HARDIN ET AL., THE DEVELOPING LABOR LAW 449 (3d ed., 1992).

129. See *Island Med. Lab. v. Health Sciences Ass’n of B.C.* [1993] 19 Can. L.R.B.R.(2d) 161, 179.

130. Compare *Allen Servs. Co., Inc.*, 314 N.L.R.B. 1060 (1994) (certifying a unit of maintenance and cleaners with electricians and mechanics), with *Lundy Packing Co., Inc.*, 314 N.L.R.B. 1042 (1994) (refusing to recognize a unit of production and maintenance with technicians as appropriate).

To understand these common principles it is helpful to consider the role of the process of bargaining unit determination in the overall structure of the Wagner Act model.

A. *The Nature of Bargaining Unit Determination*

As noted above, in labor law the bargaining unit is the fundamental collective unit of employees. In thinking about bargaining unit determination, it is useful to consider how another legal entity representing a form of organization, the corporation, has been re-examined in legal theory. One of the major theoretical advances in company law in recent decades was the re-conceptualization of the corporation as a nexus of contracts.¹³¹ In contrast to the reification of the corporation as a legal entity in traditional company law theory, in the nexus of contracts argument, the corporation is viewed as consisting of a set of contractual relationships between the different stakeholders in the corporation.¹³² A key benefit of the nexus of contracts argument is that it counters the idea that the corporation has an inherent, necessary structure.¹³³ Instead, the corporation is viewed as merely a set of rules governing a series of relationships, rules which can be modified as appropriate.¹³⁴ The importance of developing the nexus of contracts argument was that it provided a point of critique for moving away from a focus in company law on the corporate entity and its historical form and toward a re-examination of the regulation of relationships between different actors in the corporation.¹³⁵

While the contractual aspect is less applicable in the labor law context, a point of critique similar to the nexus of contracts argument can be developed when thinking about the bargaining unit. In labor law as in corporate law, there is a danger of viewing legal entities as having an inherent historical form and existence as entities apart from their legal conceptualization. What is referred to in labor law as the bargaining unit is in reality just a collection of rules

131. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310-11 (1976).

132. See *id.* at 311.

133. See William W. Bratton, *The Economic Structure of the Post-Contractual Corporation*, 87 Nw. U. L. REV. 180, 191-93 (1992) (discussing the idea of the nexus of contracts corporation as being a point of critique rather than a normative foundation for a contractual structure of the corporation).

134. See *id.* at 193.

135. See *id.*

governing certain aspects of labor relations. Following from this idea, the bargaining unit can be re-conceptualized as a nexus of rules governing the relationships between the different parties. Instead of establishing an entity described as the appropriate bargaining unit, the labor relations board can be viewed as establishing various rules that impose a set of obligations on the parties and limitations on the parties' actions by making decisions in this area. The bargaining unit is not an entity having an inherent and necessary form.¹³⁶ It is the set of rules that has been developed as part of the changing labor law that can and should be modified as appropriate.

Proceeding from a nexus of rules conceptualization of bargaining unit determination, the next step is to consider where the rules of bargaining unit determination are located in the more general structure of labor law regulation. Katherine Stone has described labor law regulation as having two major facets.¹³⁷ The first is the "constitutive effect" of labor laws.¹³⁸ This first facet reflects the purpose of labor law as allowing employees to organize collectively for bargaining.¹³⁹ Various aspects of labor law reflect this facet by providing for the conditions under which employees are entitled to organize.¹⁴⁰ The second facet is the "power broker effect"¹⁴¹ of the labor laws. Under this facet, labor law contains various rules that determine the relative power of labor and management in dealing with each other.¹⁴² By establishing obligations and limitations on the actions of labor and management, labor law helps provide the basis for the ability of each party to further their respective interests.¹⁴³

Following from Stone's description of the two facets of labor law, we can describe the bargaining unit determination process as having two different roles in the regulation of labor relations. The first

136. See Metropolitan Life Ins. Co., 156 N.L.R.B. 1408, 1412 (1966) ("[I]t is well settled that there may be more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining.").

137. See Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 82 (1988).

138. *Id.*

139. See *id.* at 82-83.

140. See *id.* at 83-85.

141. *Id.* at 82.

142. See Van Wezel Stone, *supra* note 137, at 85.

143. See Van Wezel Stone, *supra* note 137, at 85 & n.42.

role relates to the establishment of the electoral district for organizing purposes. As part of the constitutive effect of labor law, the bargaining unit affects what collective grouping employees can organize. The second role is to establish the scope of the unit to which legal bargaining obligations adhere. In this aspect of the power broker effect of labor laws, the bargaining unit becomes the unit to which legal rights and obligations attach in the bargaining process. This may not, and often does not, correspond to the actual bargaining structure, but it is the legal unit, not the actual structure, that determines how this power broker effect of labor law will be exerted.¹⁴⁴

A related argument has noted that the process of certification does not confer on employees any changes to their substantive terms and conditions of employment, but rather procedural rights to compel the employer to bargain and to utilize the strike weapon in support of bargaining.¹⁴⁵ It is argued that critics of enhancing the protection of the right to collective representation fail to recognize that unions do not have any power as a result of certification to affect conditions in the workplace, only what is won at the bargaining table.¹⁴⁶ Here again, the dual aspects of labor law are evident in the recognition of the separate stages of establishing collective representation and engaging in collective bargaining.¹⁴⁷ Where the argument needs to be extended, however, is in the question of the relationship between the dual aspects of labor law. In particular, the role of law in the construction of bargaining power needs to be examined further. While the legal limitations on the utilization of the strike weapon in support of bargaining have been recognized,¹⁴⁸ the legal system also plays a deeper role in the construction of bargaining power through the process of bargaining unit determination. The unit in which the employees are able to achieve certification of collective representation will affect the unit in which they engage in bargaining, and hence their bargaining power deriving from their ability to engage in collective industrial action. As a

144. See generally Van Wezel Stone, *supra* note 137, at 86-120 (1988) (describing the shifts in NLRB jurisprudence).

145. See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 262 (1990).

146. See *id.* at 263.

147. See Brian A. Langille, *The Michelin Amendment in Context*, 6 *DALHOUSIE L.J.* 523, 539 (1980) (analyzing the conflict in the dual roles of bargaining unit determination).

148. See WEILER, *supra* note, 145 at 263.

result, the relationship between the dual functions of the bargaining unit determination process in the establishment of collective representation and in the regulation of the bargaining process is central to the role of labor law in constructing bargaining power in industrial relations.

The recognition of the law's role in the construction of bargaining power was one of the main contributions of the legal realists to legal theory. Particularly relevant here is Robert Hale's analysis of the roles of contract and property law in determining bargaining power.¹⁴⁹ The ability or inability in law to enforce particular contracts was recognized by Hale as a key factor underlying bargaining power in the market.¹⁵⁰ The recognition by various contemporary labor law scholars of the effect on bargaining power of rules governing the content of the duty to bargain and the ability to engage in strike action parallels Hale's analysis concerning contract law.¹⁵¹ Hale extended his analysis to note the relationship between laws of property and contracts in the construction of bargaining power. Hale's analysis of the law of property focuses on issues such as the legal protection of property from non-property owners and the legal enforcement of the inheritance of property.¹⁵² The law of property establishes the strength of the property entitlements that underlie bargaining power in the market.¹⁵³ A similar analysis can be made of the role of the process of bargaining unit determination in labor law. Like the determination of a property right, the process of bargaining unit determination establishes the initial entitlement in terms of the collective unit to which collective bargaining rights and obligations attach. The consequences of this role of bargaining unit determination in the establishment of initial entitlements that affect the parties' relative bargaining power has significant implications for the Wagner Act model of labor law that will be examined further.

149. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); see, e.g., Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

150. See Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 606 (1943).

151. Compare Hale, *supra* note 150, at 603, with PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990).

152. See Hale, *supra* note 150, at 628.

153. See Hale, *supra* note 150, at 627-28.

B. *Two Alternative Models of Bargaining Unit Determination*

As noted above, the relationship between the dual roles of bargaining unit determination is a key aspect of labor law regulation. Two alternative models for this relationship provide different approaches to the process of unit determination. The Wagner Act model as it has developed involves unifying both roles in a common unit - the appropriate bargaining unit.¹⁵⁴ Such a unified model follows as a logical consequence of adopting a reified model of bargaining unit determination, in which the bargaining unit is conceived of as a legal entity, rather than a set of rules. Under a nexus of rules approach, it might still be appropriate to unify both roles in a common unit, but there is not a necessary presumption that this should be the case. A second characteristic of the current predominant model is that the bargaining unit is a static legal unit.¹⁵⁵ Upon determination of its boundaries, the bargaining unit will remain the same for future events in the absence of unusual circumstances.¹⁵⁶ As a consequence, when the question of the appropriate unit is being initially examined, it is analyzed as if it will be a stable unit for all future bargaining purposes. Combining these two key characteristics, the predominant current process can be described as reflecting a unified-static model of bargaining unit determination.

As noted above, under a nexus of rules approach it is no longer necessary to assume that both roles of the process of bargaining unit determination require a common unit. An alternative model could involve evaluating the appropriate unit as required for each function separately. That is not to say that the unit for the electoral district would then bear no relation to the unit for bargaining purposes. Rather, in initial representation applications, the focus would be on the constitutive facet of labor law, not on the power broker facet. Thus the question for initial representation situations would focus on establishing a unit as an electoral district that would enable employees to initially organize to commence bargaining collectively. In contrast, for situations where the employees had already established collective bargaining, the power broker facet of

154. See, e.g., Langille, *supra* note 147.

155. See Langille, *supra* note 147, at 543.

156. See Langille, *supra* note 147, at 543 (quoting Insurance Corp. of B.C. [1974] 1 Can. L.R.B.R. 403, 406).

labor law regulation would be more important. The key difference in a separated model would be the absence of a presumption that the units in the two situations need be the same. Such a separated system would be complemented by making the system dynamic, allowing the unit, or, under the nexus of rules formulation, the rules governing the relationship, to be modified with changes in the industrial relations context being regulated. These alternatives of having a unified-static or a separated-dynamic model of bargaining unit determination reflect the broader possibilities available under a nexus of rules conceptualization of unit determination. Which model to adopt then becomes a question of the public policy considerations, rather than a function of the form of the legal entity. While the process of unit determination under the Wagner Act model has predominantly reflected the unified-static model of bargaining unit determination, some exceptions to it have come closer to reflecting a separated-dynamic model.¹⁵⁷

Under the Wagner Act model, the predominant current approach to examining bargaining unit issues has reflected the unified-static model of unit determination.¹⁵⁸ This is illustrated by the basic characteristics of how unit determination cases are decided.¹⁵⁹ One characteristic of the predominant current approach is that modification of the unit is only allowed under very limited circumstances; continuity in units is the norm.¹⁶⁰ This is reflected by the strong emphasis on bargaining history in unit determination cases.¹⁶¹ Using bargaining history as a key factor furthers the goal of promoting bargaining stability, but results in a bias toward a static model.¹⁶² As a result, the norm becomes maintaining existing unit structures, and alteration becomes the exception. Additionally, while voluntary alteration of bargaining units by the parties to the relationship has been permitted, taking this issue to impasse in bargaining has not.¹⁶³ The limited use of standard weapons of industrial action inhibits the likelihood that change will occur through

157. See cases cited *infra* note 166 and accompanying text.

158. See, e.g., JOHN E. ABODEELY ET AL., *THE NLRB AND THE APPROPRIATE BARGAINING UNIT* 134-38 (rev. ed. 1981).

159. See *id.* at 134.

160. See *id.* at 135.

161. See *id.* at 134-35.

162. See *id.* at 55.

163. See *Northwood Pulp & Timber Ltd.* [1994] 23 Can. L.R.B.R.(2d) 298, 320 (Can.).

this route.¹⁶⁴ As a result, while in many cases the parties do agree to voluntary unit modification, the rules governing such negotiated change reduce the ability of the parties to press for it in bargaining.¹⁶⁵ Again, this reflects a bias in the unit determination rules toward a static model.

The contrast between the different models of bargaining unit determination is illustrated by two of the leading instances in which labor relations boards moved away from the predominant unified-static model and toward a separated-dynamic model. The first example is the *Libbey-Owens-Ford* cases dealing with the utilization of unit clarification petitions to merge bargaining units.¹⁶⁶ The second example of an exception from the general approach to bargaining unit determination is the development in British Columbia in the *Woodward Stores (Vancouver) Ltd.*¹⁶⁷ of a special rule to overcome obstacles to organizing.

Libbey-Owens-Ford:

The NLRB can modify bargaining units through the mechanism of Unit Clarification (“U.C.”) petitions.¹⁶⁸ These petitions primarily involve issues of changes in job classifications¹⁶⁹ and accretions to existing units.¹⁷⁰ In contrast, in *Libbey-Owens-Ford Glass Co.* a union attempted to use a U.C. petition to combine three existing

164. See Michael H. Gottesman, *In Despair, Starting Over: Imagining A Labor Law for Unorganized Workers*, 69 CHL-KENT L. REV. 59, 66-67 (1993).

165. See 29 U.S.C. § 159(a).

166. See *Libbey-Owens-Ford Co. v. NLRB*, 495 F.2d 1195 (3d Cir. 1974); *Libbey-Owens-Ford Co.*, 202 N.L.R.B. 29 (1973); *Libbey-Owens-Ford Co.*, 189 N.L.R.B. 871 (1971); *Libbey-Owens-Ford Glass Co.*, 169 N.L.R.B. 126 (1968).

167. [1974] 1 Can. L.R.B.R. 114 (Can.).

168. See 29 U.S.C. § 159(c).

169. This issue has been particularly important where there are craft based units within a workplace that may be rendered inappropriate by the advent of a technological change. In industries such as printing, technological change has produced a blending of job function that threatens the traditional structure of representation by narrowly defined craft unions. See *Banknote Corp. of America, Inc.*, 315 N.L.R.B. 1041, 1044 (1994). The telecommunications industry has also experienced this change. As the distinction between local and long distance transmission equipment has disappeared, the need for a separate craft unit for repair technicians has also disappeared. See *U.S. W. Communications, Inc.*, 310 N.L.R.B. 854 (1993).

170. Accretions involve the addition of employees to an existing unit where these employees share a “community of interest” with that unit. Where these employees are unrepresented, the Board has allowed the employees to vote in a self-determination election to determine whether they wish to be a part of that unit. See *NLRB v. Raytheon Co.*, 918 F.2d 249 (1st Cir. 1990); JOHN E. ABODEELY, ET AL., *THE NLRB AND THE APPROPRIATE BARGAINING UNIT* 119 (rev. ed., 1980).

units it represented, encompassing different plants of the same employer, into a single unit.¹⁷¹ One of the existing units included eight plants and the other two were single plant units.¹⁷² The NLRB found that both the existing unit structure and the proposed employer-wide unit structure constituted appropriate bargaining units.¹⁷³ Rejecting the employer's argument that it lacked authority to use a U.C. petition case for this purpose, the NLRB ordered an employee self-determination election concerning the issue of which unit structure the employees wished to be represented in, the existing units or the new merged unit.¹⁷⁴ In the resulting election, the employees voted for the merged unit and a unit clarifying order was issued designating this as the certified bargaining unit.¹⁷⁵

Subsequently, however, the employer refused to bargain with one of the single plants as part of the merged unit.¹⁷⁶ As a result, the union filed unfair labor practice charges alleging a violation of the duty to bargain in good faith.¹⁷⁷ In addressing these unfair labor practice charges, the Board reconsidered its earlier unit clarification decision and reversed itself.¹⁷⁸ Two of its members decided the Board lacked authority under the NLRA to merge existing units based on a U.C. petition.¹⁷⁹ Chairman Miller reversed on the basis that the initial decision went against Board policy.¹⁸⁰ The case was then appealed to the Third Circuit, which found that the NLRB did have authority to grant a merger of units under a U.C. petition and remanded the case to the Board for consideration of whether the merged unit was indeed an appropriate one.¹⁸¹ On remand, the Board upheld its initial decision that the merged unit was appropriate.¹⁸² This Board decision was also appealed, but the Third Circuit affirmed the Board's decision:

171. 169 N.L.R.B. 126 (1968).

172. *See id.* at 126.

173. *See id.* at 127.

174. *See id.* at 128.

175. *See Libbey-Owens-Ford Co.*, 189 N.L.R.B. 871, 871 (1971).

176. *See id.* at 871.

177. *See id.* at 873.

178. *See id.* at 871.

179. *See id.*

180. *See Libbey-Owens-Ford Co.*, 189 N.L.R.B. 871, 872 (1971).

181. *See United Glass & Ceramic Workers v. NLRB*, 463 F.2d 31, 38 (3d Cir. 1972).

182. *See Libbey-Owens-Ford Co.*, 202 N.L.R.B. 29, 30 (1973).

We therefore see no reason to depart from the doctrine that a unit determination by the Board should be disturbed only if it is unreasonable or arbitrary, and that thus the Board may find appropriate the combination of two pre-existing units so long as there is evidence that there is a sufficient community of interest among the workers in the proposed unit to insure that the merged unit will also be a viable one. While we would not necessarily have made the same determination as the Board . . . we cannot say it was beyond the Board's power.¹⁸³

At the same time as the union lodged its duty to bargain in good faith charges, it had attempted to merge another single plant unit into the newly merged ten plant unit.¹⁸⁴ A subsequent petition seeking the merger was dismissed because it was not timely raised.¹⁸⁵ Procedurally, a unit determination decision of the Board cannot be directly appealed to the courts, but rather, it must await an unfair labor practice complaint predicated on the underlying unit determination for review.¹⁸⁶ As a result, this second U.C. decision, while based on the same reasoning as the duty to bargain in good faith decision, was not subject to review by the Third Circuit. Despite the extremely dubious authority resulting from this second U.C. decision, it was later used by the Board to support its subsequent denial of unit clarification petitions seeking to merge existing units.¹⁸⁷ Following the initial *Libbey-Owens-Ford* decision, the Board had refused to grant U.C. petitions seeking mergers of units in similar circumstances.¹⁸⁸ In these and subsequent decisions, the Board placed an emphasis on bargaining history that resulted in a freezing of existing units and denial of the use of U.C. petitions to effect a merger of units.¹⁸⁹ Finally in *Southern California Water Co.*,¹⁹⁰ the Board explicitly confirmed its effective rejection of the reasoning in the initial *Libbey-Owens-Ford* decision, citing in sup-

183. *Libbey-Owens-Ford Co. v. NLRB*, 495 F.2d 1195, 1203 (3d Cir. 1974).

184. See *United Glass & Ceramic Workers*, 463 F.2d at 34 n.5.

185. See *Libbey-Owens-Ford Co.*, 189 N.L.R.B. at 875.

186. See *United Glass & Ceramic Workers*, 463 F.2d at 35.

187. See *Temple Square Bus Ctr.*, 198 N.L.R.B. 1181, 1182 (1972).

188. See *id.*; *Transcontinental Bus Sys. Inc.*, 178 N.L.R.B. 712, 713 (1969).

189. See *Transcontinental Bus*, 178 N.L.R.B. at 715. The Unit Clarification petition aspect of *Libbey-Owens Ford* received some favorable commentary by the Board in *White-Westinghouse Corp.*, 229 NLRB 667, 676 (1997), *aff'd* 604 F.2d 689 (D.C. Cir. 1979). However, in that case the suggested use of the unit clarification petition was to split a multi-plant unit, rather than a merger of units as in *Libbey-Owens-Ford*.

190. 241 N.L.R.B. 771 (1979).

port the second U.C. decision which had not been part of the appeal to the Third Circuit.¹⁹¹

The articulation of the Board's rationale for denying the petitions for merger of units was provided in the second *Libbey-Owens-Ford* decision by Chairman Miller: "[O]ur duty to foster stable collective-bargaining relationships is well discharged by leaving the matter of changes in size of a multiplant bargaining unit to be worked out by agreement of the parties."¹⁹² However, this statement does not acknowledge that the ability of the parties to pursue such an agreement is limited by the designation under the NLRA of modifications to the bargaining unit as a permissive subject of bargaining. More generally, refusing to allow U.C. petitions for merger of existing units reflects the establishment of a process of bargaining unit determination by the Board that is based on a static model.

The initial NLRB *Libbey-Owens-Ford* decision provides an illustration of the alternative of a dynamic model of bargaining unit determination. By allowing merger of units through the mechanism of self-determination elections, the NLRB could have established a process that allowed the bargaining unit to be modified in accord with the growth and development of the collective organization among employees. In this case, there was no question concerning the representational status of the union; it was the certified bargaining representative of the workers in all three bargaining units.¹⁹³ If all the existing units were single plant units, the board might have tried to justify its decision on the basis that there was some labor relations advantage to single plant units. However, in this case there already was a functioning multi-plant unit consisting of eight of the ten plants.¹⁹⁴ Ultimately, the Board relied on Chairman Miller's statement of the reason for rejecting the U.C. petition in this type of case: that the board will not merge existing units, but rather will only allow merger based on the voluntary agreement of the parties.¹⁹⁵ By limiting the creation of broader based bargaining structures to the voluntary agreement of the parties, this approach in labor law accords with the system of voluntary creation of broader based bargaining in the post-war industrial relations sys-

191. *See id.* at 773 & n.11.

192. *Libbey-Owens-Ford Co.*, 189 N.L.R.B. 871, 872 (1971).

193. *See Libbey-Owens-Ford Glass Co.*, 169 N.L.R.B. 126, 126 (1968).

194. *See id.*

195. *See Libbey-Owens-Ford Co.*, 189 N.L.R.B. 871, 872 (1971).

tem. However, by entrenching this approach into the process of bargaining unit determination, the legal structure that is established is one of a static model of bargaining unit determination. As will be examined in more detail later,¹⁹⁶ the limitations on use of the weapons of industrial conflict in support of modification of bargaining units means that, with the end of voluntary agreement on broader based bargaining structures following the breakdown of the post-war industrial relations system, the suggestion of leaving the structure of multi-plant units to bargaining between the parties becomes an inadequate option for establishing broader bargaining structures. Instead, the rejection of the approach of using U.C. petitions to merge units subsequent to *Libbey-Owens-Ford* becomes both an illustration and an affirmation of how the process of bargaining unit determination is based upon a static model.

Woodward Stores:

The *Libbey-Owens-Ford* case dealt with the static versus dynamic aspect of bargaining unit determination and the static nature of the predominant approach. The static and unified aspects are, however, closely linked. The assumption that the unit will not be modified in the future with the development of the collective bargaining relationship affects the analysis process of what the appropriate unit should be in an initial representation application.¹⁹⁷ If the unit is to remain static, establishing a unit that will foster future stability in bargaining will be a more prominent concern than if modification of the unit in the future is an option.¹⁹⁸ The connection between the two aspects of unit determination was a key factor in a modification of the unified-static model that was developed in the province of British Columbia.¹⁹⁹

In British Columbia, labor law went through a period of significant change and innovation during the 1970's with the passage of a new Industrial Relations Act.²⁰⁰ The province's first union-backed New Democratic Party government and the appointment of a reformist labour relations board, chaired by Paul Weiler, reconsid-

196. See discussion *infra* part IV.

197. See Brian Langille, *The Michelin Amendment in Context*, 6 DALHOUSIE L.J. 523, 542-43 (quoting *Insurance Corp. of B.C.* [1974] 1 Can. L.R.B.R. 403, 406 (Can.)).

198. See *id.* at 544.

199. See *generally* *Insurance Corp. of B.C.* [1974] 1 Can. L.R.B.R. 403 (Can.) (outlining the future and present implications of factors in bargaining unit determinations).

200. Labour Code, R.S.B.C., ch. 212 (1979), amended by ch. 82, 1992 S.B.C. 589 (Can.).

ered many areas of the province's labor law.²⁰¹ The new Board expressed a policy that favored large employer-wide bargaining units covering all of the employer's employees in the province.²⁰² While this policy favored stability in collective bargaining and the reduction in the number of strikes, the Board was soon confronted with the issue of how to facilitate organizing in the context of a system based on large stable units.²⁰³

The need to allow a viable unit for organizing purposes was addressed in *Woodward Stores (Vancouver) Ltd.* ("Woodward Stores").²⁰⁴ The union in that case applied for a unit consisting of a single department in one store of the chain.²⁰⁵ Despite its stated preference for employer-wide units, the Board certified the unit applied for on the basis that to do otherwise would prevent organizing in a traditionally hard to organize industry.²⁰⁶ This differed from other certifications of small units due to the inclusion of a specific provision which allowed for the future expansion of the unit as collective bargaining became better established. "If and when the Union organizes the employees at the other locations the Board will enlarge this existing bargaining unit to include them."²⁰⁷ The Labour Board subsequently reaffirmed this position in *Amon Investments Ltd.*²⁰⁸ "Further certification applications . . . will, if the union has the required support, be disposed of by enlarging the existing unit rather than creating a new additional unit."²⁰⁹

In *Woodward Stores*, the British Columbia Labour Relations Board established an explicitly separated and dynamic process of bargaining unit determination.²¹⁰ The bargaining unit for the certi-

201. See, e.g., *Insurance Corp. of B.C.*, 1 Can. L.R.B.R. at 405-06 ("This case is a suitable vehicle in which this Board can begin to explain in some detail the principles which it intends to use in defining an appropriate bargaining unit.").

202. See *id.* at 407.

203. See *Woodward Stores (Vancouver) Ltd.* [1974] 1 Can. L.R.B.R. 114, 117 (Can.) (concerning an application for certification in the largely unorganized department store industry).

204. [1974] 1 Can. L.R.B.R. 114 (Can.).

205. See *id.* at 115.

206. See *id.* at 119.

207. *Id.* at 123.

208. [1978] B.C.L.R.B. No. 39/78.

209. *Id.* at 20.

210. See Brian Langille, *The Michelin Amendment in Context*, 6 DALHOUSIE L.J. 523, 549 (1980) (referring to this issue as the "Amon Principle"). While subsequent decisions have referred to both cases, the author will refer to *Woodward Stores Ltd.* in this article as the primary authority for the principle.

fication application is one appropriate for determining representation for the purpose of initially establishing collective bargaining.²¹¹ The determination of this representation district for certification applications is separated from the determination of a permanent unit for future bargaining obligations through the allowance that as collective bargaining becomes better established, the determination of the unit for future bargaining questions will change.²¹² Thus, the explicitly dynamic nature of the process allows the separation of the two aspects of unit determination. An important limitation to note in the *Woodward Stores* decision, is that it only applies to traditionally hard to organize industries.²¹³ As a result, its utilization is limited to cases where it is possible to introduce evidence about historical difficulties in organizing the industry in which the enterprise operates.²¹⁴

IV. THE UNIFIED-STATIC MODEL AND ITS CONSEQUENCES

A. *The Narrowing of Collective Bargaining*

One effect of the adoption of the unified-static model of bargaining unit determination is to restrict the size of bargaining units and reinforce a limited vision of collective bargaining as dealing with workplace level issues associated with the personnel function in the non-union workplace. In this respect, the unified-static model accords with, and composes part of, the industrial pluralist vision of collective bargaining as establishing a system akin to constitutional government for employment relations in the workplace.²¹⁵ While this industrial pluralist vision provides a clear role for collective

211. See *Woodward Stores* 1 Can. L.R.B.R. at 120.

212. See *id.*

213. See *Island Med. Lab. Ltd. v. Health Sciences Ass'n of B.C.* [1993] 19 Can. L.R.B.R.(2d) 161, 185 (Can.) (suggesting that some blending of the usual community of interest approach with the *Woodward Stores* exception had occurred and was an appropriate development of doctrine). The Board in that case ultimately reaffirmed the limitation of the *Woodward Stores* approach: a relaxed definition of community of interest and provision for subsequent enlargement of the unit to cases where a "traditionally difficult-to-organize circumstance," could be proven. *Id.* at 185. Similarly, when the Ontario Labour Relations Board decided in *U.F.C.W. v. Canadian Tire Petroleum* [1994] O.L.R.B. Rep. April 360, to certify a single gas bar location in a municipal area rather than a more usual municipality-wide unit, it justified the decision as reflecting "the obstacles to organizing in an industry which has not heretofore been organized." *Id.* at 363.

214. See *Island Med. Laboratories* 19 Can. L.R.B.R.(2d) at 185-86.

215. See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981).

bargaining in the industrial relations system, it also limits this role from including broader business issues and corporate strategy.²¹⁶ These areas have been subsequently recognized as crucial to the ultimate outcomes of the system.²¹⁷ The role of the bargaining unit determination model in reinforcing the industrial pluralist vision in labor law derives from how the unified-static model resolves a tension in the interests of unions and management in questions of the appropriate unit.²¹⁸

The dual role of the bargaining unit as both the representation district and the negotiating unit creates a tension in the desires of both the union and the employer concerning what type of unit they would prefer.²¹⁹ For the union, a smaller unit is generally preferable on an initial certification application.²²⁰ It is easier to organize a smaller, usually more homogeneous group of workers.²²¹ After certification, the union would usually prefer as large a unit as possible to maximize its bargaining power at the negotiating table.²²² In contrast, the employer will usually prefer a larger unit for a certification election, so as to make it more difficult for the union to organize.²²³ Whereas after certification, the employer will generally prefer a smaller unit that has less bargaining power and a collective agreement that covers fewer employees.²²⁴ As a result, on applications for certification, a typical case would involve the union arguing for the smaller single plant unit, whereas the employer would be arguing for the larger multi-plant unit.²²⁵ Despite these positions, if certification is obtained, the union would ultimately

216. *See id.* at 1547.

217. *See id.* at 1566.

218. *See* RONALD DAVIS, THE OLRB POLICY ON BARGAINING UNITS FOR PART-TIME WORKERS 23-24 (1991).

219. *See* Brian Langille, *The Michelin Amendment in Context*, 6 DALHOUSIE L.J. 523, 539 (1980).

220. *See* Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI-KENT L. REV. 3, 10-11 (1993).

221. *See id.* at 11.

222. *See* Langille, *supra* note 219, at 539.

223. *See* ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 281 (12th ed. 1996).

224. *See id.* at 281-82.

225. *See, e.g.,* *Island Med. Lab. Ltd. v. Health Sciences Ass'n of B.C.* [1993] 19 Can. L.R.B.R.(2d) 161, 164-65.

prefer a large multi-plant unit, whereas the employer would rather keep the unit restricted to a single plant.²²⁶

The effect of the conflicting interests in questions of representation and bargaining reinforces a bias in decision making by the NLRB toward small, plant level units based upon considerations of the appropriate unit for functions related to personnel administration and direct supervision of operations.²²⁷ Unions are in effect co-opted into the establishment of this structure due to a vicious circle trapping them into a narrow structure of collective bargaining as a result of the unified-static model.²²⁸ In order to maximize their prospects for winning certification elections, unions apply for smaller bargaining units, commonly single plant units.²²⁹ Once these single plant units are accepted as appropriate and collective bargaining has become established, under the unified static-model, the union cannot move beyond this structure of bargaining without either obtaining a change in the unit from the board,²³⁰ or bargaining for the expansion of the scope of the unit.²³¹

Despite the assertion of case-by-case decision making and discretion, the NLRB has increasingly, over time, placed an emphasis on the presumptive appropriateness of the single plant unit.²³² The initial reasoning behind the principle that there should be a presumption in favor of the appropriateness of the single plant unit is somewhat unclear and unconvincing. The precedential authority cited for the principle can be traced back through a series of NLRB decisions into the 1940's, with very limited discussion in the decisions of why the principle was adopted.²³³ An attempt to provide a

226. See Langille, *supra* note 219, at 548-49 (quoting Amon Investments Ltd. [1978] B.C.L.R.B. Dec. No. 39/78).

227. See Dixie Bell Mills, Inc., 139 N.L.R.B. 629, 631-32 (1962).

228. See Estreicher, *supra* note 220, at 11; Langille, *supra* note 219, at 544.

229. See COX ET AL., *supra* note 223, at 273.

230. See 29 U.S.C. § 158(b).

231. See *Douds v. International Longshoreman's Ass'n*, 241 F.2d 278, 282 (2d Cir. 1957).

232. See Dixie Bell Mills, Inc., 139 N.L.R.B. 629, 631 (1962); see also *Temco Aircraft Corp.*, 121 N.L.R.B. 1085, 1088 (1958) (supporting the presumption that a single plant unit is appropriate "unless such plant unit has been so effectively merged with another as to destroy its identity."); *Beaumont Forging Co.*, 110 N.L.R.B. 2200, 2201 (1954) (holding that a single plant unit should "prevail over other unit types not designated in the statute.").

233. See *Haag Drug Co. Inc.*, 169 N.L.R.B. 877, 877 (1968); see also *Frisch's Big Boy III-Mar, Inc.* 147 N.L.R.B. 551, 553 (1964) (stating that a single restaurant constitutes an appropriate bargaining unit which will "assure to employees the fullest freedom in exercising the rights guaranteed by the Act."), *enforcement denied* 356 F.2d 895 (7th Cir. 1966). The citation chain can be traced back through *Dixie Belle Mills, Inc.* 139 N.L.R.B. 629 (1962);

reason for the presumption was offered in *Beaumont Forging Co.*²³⁴ The Board argued that since the plant unit was one of those enumerated in the Act, it must be presumptively appropriate compared to any unit not enumerated in the Act.²³⁵ The problem with this argument arises from the use of the words "or subdivision thereof"²³⁶ in the Act. It might be wrongly assumed that this refers only to units composed of subdivisions of individual plants. Given that there is a comma inserted between the words "plant unit" and "or subdivision thereof,"²³⁷ the provision should be read as indicating that the Act is referring to subdivisions of either employer, craft or plant units. A multi-plant unit will generally either be an employer-wide unit or a subdivision of such a unit. As a result, it clearly would lie within the set of units enumerated in the Act. Therefore, the language of the provision does not indicate that the single plant should be presumptively appropriate in comparison to a multi-plant unit.

Despite this origin, the single plant presumption has become a well accepted part of NLRB policy in bargaining unit decisions.²³⁸ More recently, the NLRB has further emphasized and perhaps expanded the single plant presumption with the suggestion that a "community of interest inherently exists among such employees."²³⁹ To understand what lies behind this acceptance of the single plant unit presumption, it is helpful to turn to the reasoning in decisions that have considered whether to depart from the presumption and find that only a multi-plant unit, not a single plant unit, is appropriate.

The primary test used by the NLRB in determining whether a single plant unit is inappropriate is whether there is such a high

Temco Aircraft Corp., 121 N.L.R.B. 1085 (1958); *Beaumont Forging Co.*, 110 N.L.R.B. 2200 (1954); *In re Hygrade Food Products Corp.* 85 N.L.R.B. 841 (1949); and *In re Standard Brands, Inc.* 75 N.L.R.B. 394 (1947). *Standard Brands* neither cites prior authority for the presumption, nor states it in particularly clear fashion. This dead end is particularly interesting because *Dixie Belle Mills, Inc.* and *Temco Aircraft Corp.* are often cited as the leading decisions supporting the presumption.

234. 110 N.L.R.B. 2200 (1954).

235. *See id.* at 2201-02.

236. 29 U.S.C. § 159(b).

237. *Id.*

238. *See Hamburg Knitting Mills Co.*, 239 N.L.R.B. 1231, 1232 (1979) (stating "that the presumptive appropriateness of the single plant unit has not been rebutted.").

239. *Airco, Inc.*, 273 N.L.R.B. 348, 349 (1984).

degree of “integration or merger of operations”²⁴⁰ between different plants as to negate the identity of the individual plants and make only a multi-plant unit appropriate.²⁴¹ As with “community of interest,” a “high degree of integration” is a concept that requires further definition to provide an informative basis for differentiating between when a single plant unit is appropriate and when only a multi-plant unit is appropriate. On this question, the NLRB has taken the approach of enumerating a list of factors that will be considered in deciding cases on their individual merits. In reaching a decision, the Board will consider “such factors as prior bargaining history; centralization of management, particularly in regard to labor relations; extent of employee interchange; degree of interdependence or autonomy of facilities; differences or similarities in skills and function of the employees; and geographical location of the facilities in relation to each other.”²⁴² With the additional consideration of whether there is a union seeking to represent a broader unit, this set of factors has served as the basis for decisions on whether to override the presumptive appropriateness of the single plant unit.²⁴³

Among the factors listed, the “centralization of management” has been given particular emphasis and further elaboration in some decisions.²⁴⁴ Rather than a broad conception of centralization of management as including common strategic control or lines of managerial authority, the NLRB has looked to the location of direct operational supervision and personnel decision making. As a result, decisions have emphasized the autonomy of immediate

240. *Dixie Belle Mills*, 139 N.L.R.B. at 632.

241. *See id.* at 631; *see also* *Temco Aircraft Corp.*, 121 N.L.R.B. 1085, 1088 (1958) (holding “a single plant unit is generally appropriate for collective bargaining purposes, unless such plant has been so effectively merged with another as to destroy its identity.”).

242. *Trustees of Columbia U.*, 222 N.L.R.B. 309, 309 (1976).

243. *See* *Wescom, Inc.*, 230 N.L.R.B. 1159, 1160 (1977); *Temco Aircraft Corp.*, 121 N.L.R.B. 1085, 1088 (1958) (articulating a list of factors, including the situation in which a union actively seeks a broader unit, that may override the presumption of the single plant).

244. *See generally* *Hamburg Knitting Mills Co.*, 239 N.L.R.B. 1231, 1232 (1979) (holding separate immediate supervision of daily matters is an important factor when deciding whether a plant constitutes a unit appropriate for bargaining); *Wescom, Inc.*, 230 N.L.R.B. 1159, 1160 (1977) (explaining that a substantial degree of autonomy in the daily supervision of employees at the plant and the plant’s management doing its own interviewing and hiring of employees are important factors when deciding whether a plant constitutes a unit appropriate for collective bargaining); *Dixie Belle Mills, Inc.*, 139 N.L.R.B. 629, 630 (1962) (emphasizing that each plant’s intermediate and immediate supervision is separate, and each plant has a personnel director who handles hiring, firing, and promotions).

supervision at the plant in finding a single plant unit appropriate.²⁴⁵ In addition, the ability of plant management to do their own hiring and firing has been used to support the appropriateness of the single plant unit.²⁴⁶ Conversely, in decisions where a single plant unit was held to be inappropriate, the important factor was the centralization of the personnel function and the high degree of functional integration, rather than the mere existence of common managerial control.²⁴⁷

The emphasis on day-to-day, immediate supervision in determination of the appropriate bargaining unit indicates a vision of collective bargaining that focuses on the idea of negotiating and applying rules for the workplace of the type that would be developed unilaterally by the personnel department in a non-union firm. This vision of collective bargaining is particularly evident in the NLRB's 1968 decision in *Haag Drug Co. Inc.*²⁴⁸ That decision confirmed the reversal of an earlier NLRB policy in regard to bargaining units in the retail sector.²⁴⁹ In earlier decisions, the NLRB had not applied the single location presumption for retail chain-store operations.²⁵⁰ Instead, the policy was "to find that an appropriate unit should embrace all the employees within an employer's administrative or geographic area."²⁵¹ This policy was initially modified by the NLRB in *Sav-On Drugs, Inc.*²⁵² While there was some initial

245. See *Hamburg Knitting Mills Co.*, 239 N.L.R.B. 1231, 1232 (1979); see also *Renzetti's Mkt. Inc.*, 238 N.L.R.B. 174, 176 (1978) (emphasizing autonomous supervision at stores as an important factor when determining whether a store constitutes an appropriate unit for bargaining); *Wescom Inc.*, 230 N.L.R.B. 1159, 1160 (1977) (emphasizing the degree of autonomy in the day to day supervision of a plant as a determinative factor in deciding if the single plant unit is appropriate for collective bargaining); *Metropolitan Life Ins. Co.*, 156 N.L.R.B. 1408, 1413-14 (1966) (emphasizing autonomous supervision in offices as an important factor when determining whether an office constitutes an appropriate unit for collective bargaining).

246. See *Wescom*, 230 N.L.R.B. at 1160; *Dixie Belle Mills*, 139 N.L.R.B. at 630 (1962) (handling matters at a plant such as interviewing, promoting, and firing employees supports the appropriateness of the single plant unit).

247. See *Pickering & Co. Inc.*, 248 N.L.R.B. 772, 773 (1980); see also *Cornell U.*, 183 N.L.R.B. 329, 336 (1970) (holding that a single campus was an inappropriate unit for collective bargaining because the university's personnel functions so that such a job classification and the issuance of pay checks were maintained at one campus).

248. 169 N.L.R.B. 877 (1968).

249. See *id.* (quoting *Sav-On Drugs Inc.*, 138 N.L.R.B. 1032, 1033 (1962)).

250. See *Daw Drug Co. Inc.*, 127 N.L.R.B. 1316, 1319 (1960); *Weis Markets, Inc.*, 125 N.L.R.B. 148, 150 (1959); *Safeway Stores, Inc.*, 96 N.L.R.B. 998, 1000 (1951).

251. *Haag*, 169 N.L.R.B. at 877.

252. 138 N.L.R.B. 1032 (1962).

uncertainty over the authority of the change in the Board's policy, *Haag Drug Co.* marked the definitive affirmation that the Board would apply the single plant presumption in the same manner in the retail sector as it had in other cases.²⁵³ In a key passage in the decision, the NLRB provided an important rationale for deeming the single location unit an appropriate unit for bargaining:

The employees in a single retail outlet form a homogeneous, identifiable, and distinct group, physically separated from the employees in the other outlets of the chain; they generally perform related functions under immediate supervision apart from employees at other locations; and their work functions, though parallel to, are nonetheless separate from, the functions of employees in the other outlets, and thus their problems and grievances are peculiarly their own and not necessarily shared with employees in the other outlets.²⁵⁴

In this vision, workers come together as a bargaining unit to respond to the problems and grievances that they share as a group that works together and is subject to common supervision. While under this vision, collective bargaining has the potential to produce joint governance of the day-to-day issues of the workplace, it does not speak to broader common interests of workers who may work in different locations, but are subject to the effect of the strategic decisions of the same ultimate corporate management.

It is important to recognize that it is not simply the presumption in favor of single plant units that is the significant outcome in this process. Indeed, there are particular industries and situations where the NLRB has endorsed other types of units.²⁵⁵ Rather, it is the limitation of the bargaining unit structure to narrower units based on personnel function and direct operational supervision considerations that is the key outcome of this effect of the unified-static model. A similar process has occurred in Canada, where the labour relations boards have generally had a presumption favoring certification of units encompassing all employees of the employer in a municipality, rather than single plant certifications.²⁵⁶

253. See *Haag*, 169 N.L.R.B. at 877. "Our experience has led us to conclude that a single store in a retail chain, like single locations in multilocation enterprises in other industries, is *presumptively* an appropriate unit for bargaining." *Id.*

254. *Id.* at 877-78.

255. See *id.* at 878 n.4.

256. See *Insurance Corp. of B.C.* [1974] 1 Can. L.R.B.R. 403, 407 (Can.).

The recent Ontario case of *Hornco Plastics Inc. v. A.C.T.W.*²⁵⁷ illustrates the same focus on personnel administration issues in the context of a decision that a single plant unit was too small to be appropriate.²⁵⁸ Hornco Plastics Ltd. was a wholly owned subsidiary of Horn Plastics Ltd., which was also a respondent in the case.²⁵⁹ Horn operated a plastic injection molding plant in Pickering, Ontario and Hornco operated a similar plant some ten kilometers away in Whitby, Ontario.²⁶⁰ While the Hornco plant had been established under the ownership of a separate company, the two plants were functionally connected in that the support infrastructure, such as engineering, accounting and sales, for the Hornco plant was provided by the Horn plant.²⁶¹ The union applied to be certified for a bargaining unit consisting of the workers at the Hornco plant only.²⁶² In rejecting the proposed bargaining unit, the Board emphasized the transfer of employees between jobs at the two plants.²⁶³ While employees were assigned to one plant or the other, job openings were posted at both plants.²⁶⁴ Employees frequently transferred between the two plants.²⁶⁵ Given the integration in organization of the plants and the mobility of employees between them, the Board found that the proposed unit would result in a bargaining structure at variance with the organizational structure of Horn and Hornco.²⁶⁶

B. Restrictions on the Expansion of Units Through Bargaining

While initial unit determinations may be based upon factors relating to personnel function and direct operational supervision, it is the restrictions on the subsequent expansion of units that inhibit moving beyond these narrowly based units to establish broader bargaining structures. There are two avenues that might be used to expand bargaining beyond an initial single plant or other narrowly structured unit. First, once the union has organized other plants

257. [1993] 19 C.L.R.B.R.(2d) 201 (Can.).

258. *See id.* at 214.

259. *See id.* at 202.

260. *See id.* at 202, 203.

261. *See id.* at 203.

262. *See Hornco Plastics Inc. v. A.C.T.W.* [1993] 19 C.L.R.B.R.(2d) 201, 206-07 (Can.).

263. *See id.* at 212.

264. *See id.*

265. *See id.*

266. *See id.* at 212-13.

owned by the employer, it could return to the Board to seek a new multi-plant unit to replace the existing single plant unit.²⁶⁷ A second option would be to use the process of negotiation and the normal weapons of industrial conflict that underlie the union's bargaining power to achieve an expansion of the bargaining structure by winning an agreement for such a change from the employer.²⁶⁸ This expansion of the bargaining structure could be achieved formally through agreement on a broader bargaining unit.²⁶⁹ Informally, it can be achieved through linking bargaining at different units and by conducting job action that extends beyond the individual unit.²⁷⁰ Each of these avenues is, however, significantly restricted.

Use of bargaining to achieve broader units is not formally barred.²⁷¹ The NLRB has held that the parties are free to agree to a bargaining unit other than the one specified in the certification.²⁷² The problem with this route to unit change is that changes to the bargaining unit have been classified as a permissive subject of bargaining.²⁷³ This means the union cannot insist on them to the point of impasse and use the strike weapon in support of the demand.²⁷⁴

While it has been held that the parties may agree to consolidate units for purposes of collective bargaining, respect for the stability of industrial relations imported by the Board's determinations has led to the rule that a party may not be forced to bargain on other than a unit basis.²⁷⁵

Some authors have argued that the mandatory-permissive distinction does not affect bargaining outcomes. This is due to the ability of parties to disguise the reason they take a dispute to impasse and to make trade-offs between mandatory and permissive

267. This was the approach that the NLRB rejected in the cases following the initial *Libbey-Owens-Ford* decision.

268. See Wallace E. Hendricks & Lawrence M. Kahn, *The Determinants of Bargaining Structure in U.S. Manufacturing Industries*, 35 *INDUS. & LAB. REL. REV.* 181, 183 (1982).

269. See *id.*

270. See, e.g., *Libbey-Owens-Ford Glass Co.*, 169 *N.L.R.B.* 126, 126 (1968).

271. See 29 U.S.C. § 159.

272. See *Douds v. International Longshoremen's Ass'n.*, 241 F.2d 278, 282 (2d Cir. 1957).

273. The NLRA provides that mandatory subjects of bargaining are wages, hours, and working conditions. See 29 U.S.C. § 159(a).

274. See John Thomas Delaney et al., *Bargaining Effects of the Mandatory-Permissive Distinction*, 27 *INDUS. REL.* 21, 22 (1988); see, e.g., *Oil, Chem. & Atomic Workers v. NLRB* 486 F.2d 1266, 1268 (D.C. Cir. 1973); *Canterbury Gardens*, 238 *N.L.R.B.* 864, 865 (1978).

275. *Oil, Chem. & Atomic Workers*, 486 F.2d at 1268 (footnotes omitted).

subjects of bargaining in order to support demands on permissive subjects.²⁷⁶ Subsequent empirical research supports the existence of effects on bargaining outcomes of the mandatory-permissive distinction.²⁷⁷ While obviously not preventing agreement on such an issue, the classification of changes to the bargaining unit as a permissive subject reduces the bargaining power of the party seeking such a change.

The effects of legal restrictions on bargaining are particularly pronounced in the area of changes to the bargaining structure due to the role of the process of bargaining unit determination in initially establishing the units that will engage in bargaining.²⁷⁸ Since bargaining unit size itself has a substantial effect on bargaining power, a union with low bargaining power, due to the small size of its bargaining unit, is particularly unlikely to be able to win an increase in the size of the unit at the negotiating table.²⁷⁹ Thus, labor law itself constructs and constrains the bargaining power that is used to support changes in the bargaining structure. Here again, Hale's insight that bargaining in the market cannot be conceived apart from the rules of property establishing initial entitlements and the rules of

276. See Wallace E. Hendricks and Lawrence M. Kahn, *The Determinants of Bargaining Structure in U.S. Manufacturing Industries*, 35 INDUS. & LAB. REL. REV. 181 (1982). The authors present data indicating correlations between bargaining structures and factors such as industry concentration and plant size. Their analysis includes the assumption that bargaining structure is an outcome of bargaining and does not account for the effect of the legal process of bargaining unit determination. As noted above, the assumption that the classification of bargaining structure as a permissive subject of bargaining has no effect on outcomes is implausible and contradicted by the empirical evidence. This is not to say, however, that bargaining will not have any influence on bargaining structure. Rather, the legal structure significantly constrains what bargaining does occur. Therefore, the type of correlations that Hendricks and Kahn report should arise as a result of bargaining, even taking into account the effect of the legal restrictions on such bargaining. An additional, and perhaps more fatal problem with Hendricks and Kahn's interpretation of their findings is that their failure to account for the effect of the legal process of bargaining unit determination ignores the degree to which the type of factors that they describe as determinants of outcomes of bargaining over bargaining structure are actually taken into account in the legal process. Labor relations boards can and do consider such factors as plant size in deciding what will be the appropriate bargaining unit. As a result, it is not possible to separate effects of bargaining from the effects of the legal process of bargaining unit determination in their results.

277. See Delaney et al., *supra* note 274; see also John Thomas Delaney & Donna Sockell, *The Mandatory-Permissive Distinction and Collective Bargaining Outcomes*, 42 INDUS. & LAB. REL. REV. 566 (1989) (assessing the distinction between mandatory and permissive bargaining subjects through experiment data).

278. See Hendricks & Kahn, *supra* note 276, at 183-84.

279. See Delaney & Sockell, *supra* note 277, at 568.

contract governing the enforcement of bargains is relevant.²⁸⁰ To account for bargaining outcomes, it is necessary to know the initial entitlements that influence bargaining power.²⁸¹ Under the Wagner Act model of labor law, the process of bargaining unit determination helps establish these initial entitlements.²⁸² As a result, the process of bargaining cannot be viewed as a system separate from the legal process of bargaining unit determination, and thus is not an independent determinant of bargaining structure, but rather must be viewed as an interaction with the legal process in affecting bargaining structure.

While insisting to impasse on an alteration of the bargaining unit is clearly a violation of the duty to bargain in good faith,²⁸³ a more difficult legal question arises in cases of coordinated bargaining. As noted above in the discussion of the industrial relations system of the automobile industry, coordinated bargaining is a procedure in which unions attempt to coordinate the bargaining occurring in different units in order to obtain similar agreements from each set of negotiations.²⁸⁴ In contrast to pattern bargaining, where unions attempt to achieve uniform wage rates through successive settlements with different employers, coordinated bargaining allows unions to achieve an effect similar to an employer-wide bargaining unit in situations where there are a number of different units for the same employer.²⁸⁵ It is permissible for unions to coordinate their bargaining in different units. The problem arises due to the difficulty of determining whether various bargaining tactics are permissible, or whether they are illegal attempts to force an alteration of the bargaining unit.

A key support for the establishment of coordinated bargaining is the right of the employees in the unit to select their own bargaining representatives.²⁸⁶ This has been interpreted to include the right to select employees of other bargaining units of the same employer as

280. See Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 627-28 (1943).

281. See *id.* at 626-28.

282. See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 263 (1990).

283. See *Douds*, 241 F.2d at 283.

284. See *SHIFTING GEARS*, *supra* note 11, at 174-80.

285. See *SHIFTING GEARS*, *supra* note 11, at 174-80.

286. See, e.g., *NLRB v. Indiana & Mich. Elec. Co.*, 599 F.2d 185, 190 (7th Cir. 1979); *General Elec. Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969).

their representatives.²⁸⁷ However, the employer can refuse to meet at a single time and place to bargain with all of its different bargaining units at once.²⁸⁸ Ultimately, the utility of using coordinated bargaining to achieve employer-wide bargaining is limited. In those cases where the evidence indicates the union is attempting to achieve an employer-wide bargaining unit, coordinated bargaining will be found to be an unfair labor practice.²⁸⁹

An alternative tactic for attempting to exert union influence at a broader, employer-wide level is to extend job action, and in particular, picketing beyond the location of the unit. While the Taft-Hartley²⁹⁰ and Landrum-Griffin²⁹¹ amendments to the NLRA severely limit secondary boycotts, it might be imagined that this would not affect job action directed at other employer establishments involved in the dispute. However, in its application of the restrictions on secondary boycotts, the NLRB has confined the scope of union action through a narrow view of corporate control.²⁹²

The test applied in the secondary boycott cases is whether there is sufficient "mutual dependence"²⁹³ between the primary and the secondary employer to make the secondary employer an "ally," subject to legitimate boycott, as opposed to a "neutral," protected by the secondary boycott restrictions.²⁹⁴ Common ownership of two subsidiary businesses is insufficient to invoke the "ally" doctrine.²⁹⁵ Instead, the relevant issue is common control.²⁹⁶ The focus on common control was emphasized in another decision,

287. See *Indiana & Mich. Elec.*, 599 F.2d at 190.

288. See *Oil, Chem. & Atomic Workers v. NLRB*, 486 F.2d 1266, 1270 (D.C. Cir. 1973).

289. See *Utility Workers Local 111*, 203 N.L.R.B. 230, 240 (1973), *aff'd*, 490 F.2d 1383 (6th Cir. 1974); see, e.g., *AFL-CIO Joint Neg. Comm. for Phelps Dodge v. NLRB*, 459 F.2d 374, 377-78 (3d Cir. 1972).

290. Ch. 120, tit. 1, §101, 61 Stat. 136 (1947) (codified in scattered sections of 29 U.S.C.).

291. Pub. L. No. 86-257, 73 Stat. 519 (1959) (current version at 29 U.S.C. §§ 401-531).

292. See *Los Angeles Newspaper Guild, Local 69*, 185 N.L.R.B. 303, 305 (1970).

293. *Miami Newspaper Pressman's Local No. 46 v. NLRB*, 322 F.2d 405, 407 (D.C. Cir. 1963).

294. See *id.* at 408-09.

295. See *id.*

There must be something more in the form of common control, as it is usually phrased, denoting an actual, as distinct from merely a potential, integration of operations and management policies. Two business enterprises, although commonly owned, do not for that reason alone become so allied with each other as to lift the congressional ban upon the extension of labor strife from the one to the other.

Id. at 409.

296. See *id.*

where the “neutral employer” was not even a separate, commonly owned subsidiary company, but rather a different division of the same company.²⁹⁷ In language reminiscent of the single-plant unit versus multi-plant unit decisions, the NLRB focused on the separation of day-to-day operational control as a key factor making the second division a “neutral”:

[a]s to the two divisions here involved, the president of the Corporation appoints their heads and delegates to them the responsibility for the day-to-day operation of the divisions, including the formulation and implementation of labor relations policies. He may remove them for “an unsatisfactory job,” meaning unfavorable earnings.²⁹⁸

The second division was held to be a “neutral” because control “is limited to certain financial matters inherent in common ownership”²⁹⁹ More recently, an extension of this reasoning was used to find picketing of the offices of a holding company that had complete ownership of the primary employer an illegal secondary boycott of a “neutral.”³⁰⁰

The secondary boycott decisions provide a particularly striking illustration of the divergence between the conception of the relationship between corporate structure and bargaining unit structure espoused by the NLRB.³⁰¹ These decisions also implicate the nature of human resource management and collective bargaining in the multi-divisional corporation.³⁰² Central management of multi-divisional corporations are able to retain the ultimate control over human resource issues in the divisions through their control over first- and second-order strategic decision making.³⁰³ The ability to exert financial control over the divisions is crucial to this control over employment relationships that might initially seem to only depend on divisional management, due to the location of third order personnel function decisions at that level.³⁰⁴ The current

297. See *Los Angeles Newspaper Guild, Local 69*, 185 N.L.R.B. 303, 304 (1970).

298. *Id.*

299. *Id.*

300. See *Local 2208, IBEW (Simplex Wire)* 285 N.L.R.B. 834, 839 (1987).

301. See *id.*

302. See JOHN PURCELL & BRUCE AHLSTRAND, *HUMAN RESOURCE MANAGEMENT IN THE MULTI-DIVISIONAL COMPANY* 62 (1994) (discussing the relationship and impact of corporate strategy and personnel management in multi-divisional companies).

303. See *id.* at 62-63.

304. See *id.* at 66.

NLRB approach severely inhibits unions from influencing the key first- and second-order decision making that will affect the long term interests of their members, because bargaining unit structures are linked and largely restricted to the level at which control over direct operational supervision and personnel functions occurs.

In contrast to the NLRB, the Canadian labour relations boards have generally rejected the concept of a distinction between mandatory and permissive subjects of bargaining.³⁰⁵ As a result, it might be expected that it would be acceptable in Canada for the weapons of industrial conflict to be used in support of a change in the bargaining unit. However, the process of bargaining unit determination has been treated as a special case in this regard.³⁰⁶ This was given notable confirmation recently by the decision of the British Columbia Labour Relations Board in *Northwood Pulp & Timber Ltd. v. C.E.P., Local 603*.³⁰⁷

In the British Columbia pulp and paper industry, bargaining had occurred on an industry wide basis for a number of years prior to the *Northwood* case.³⁰⁸ Certifications were held for bargaining units at individual mills by both the Pulp, Paper and Woodworkers of Canada and the Communications, Energy and Paperworkers' Union.³⁰⁹ On the employer side, the Pulp and Paper Industrial Relations Bureau became the accredited employers' organization for industry level bargaining in 1970.³¹⁰ In 1985, however, the Bureau was de-accredited upon the unanimous application of its employer members.³¹¹

De-accreditation was the first step in a movement by the employers away from industry level bargaining. Following de-accreditation, individual employers were no longer required to engage in joint bargaining.³¹² In subsequent bargaining rounds, the employers continued to engage in an industry level bargaining round based on the terms of voluntary protocols negotiated for each round of

305. See *Northwood Pulp & Timber Ltd. v. C.E.P., Local 603* [1994] 23 Can. L.R.B.R.(2d) 298, 314 (Can.).

306. See *id.* at 314-15.

307. [1994] 23 Can. L.R.B.R.(2d) 298 (Can.).

308. See *id.* at 300-01.

309. See *id.* at 299-300.

310. See *id.* at 300.

311. See *Northwood Pulp & Timber Ltd. v. C.E.P., Local 603* [1994] 23 Can. L.R.B.R.(2d) 298, 300-01 (Can.).

312. See *id.* at 301.

bargaining.³¹³ This situation came to an end in 1994, when the employers refused to engage in bargaining at the industry level and demanded that the union locals bargain at the enterprise level, which corresponded to the certified bargaining units.³¹⁴ The unions refused to engage in negotiations at the bargaining unit level and insisted on an industry level format for bargaining.³¹⁵ The employers then filed a failure to bargain in good faith application with the Board.³¹⁶

The Board's analysis centered around the question of whether the format of bargaining could be negotiated at the bargaining table.³¹⁷ In essence, the issue was whether the unions could insist on industry level bargaining and use the strike weapon to support their demands at the negotiating table.³¹⁸ The alternative was for the format of bargaining to be alterable only through a voluntary agreement of the parties, which neither party could use economic pressure to achieve. The Board decided in favor of the employers; holding that for the unions to push the issue of the format of bargaining to an impasse was a failure to bargain in good faith.³¹⁹

It might seem that this decision contradicts the static model of bargaining unit determination. After all, the Board supported the employers in their effort to change the format of bargaining from the industry level to the enterprise level.³²⁰ However, the reasoning behind this decision centered on the idea that the statute gave the Board the discretion to decide the format of bargaining through the process of bargaining unit determination.³²¹ For one of the parties to insist on altering this legal bargaining structure through bargaining to impasse was inconsistent with the scheme of the statute.³²² As a result, the Board ordered bargaining based on the bargaining units determined at the original certification applications, despite

313. *See id.* at 309.

314. *See id.* at 304-05.

315. *See id.* at 305.

316. *See* Northwood Pulp & Timber Ltd. v. C.E.P., Local 603 [1994] 23 Can. L.R.B.R.(2d) 298, 298 (Can.).

317. *See id.* at 309-14.

318. *See id.* at 309.

319. *See id.* at 320.

320. *See id.*

321. *See* Northwood Pulp & Timber Ltd. v. C.E.P., Local 603 [1994] 23 Can. L.R.B.R.(2d) 298, 318-19 (Can.).

322. *See id.*

the intervening decades of industry level bargaining.³²³ This decision represents an affirmation, not a negation, of the static nature of the legal process of bargaining unit determination.

V. ELEMENTS OF AN ALTERNATIVE SEPARATED-DYNAMIC MODEL

A. Unit Merger Provisions

In contrast to the unified-static model which characterizes the current system, a system of bargaining unit determination which is fully based on the separated-dynamic model does not yet exist. However, some of the existing exceptions provide elements of the bargaining unit determination process that are based on a separated-dynamic model.³²⁴ Examining these exceptions provides an indication of possible elements of a process of bargaining unit determination based on a separated-dynamic model.

The first NLRB *Libbey-Owens-Ford* decision allowing a U.C. petition to be used to merge multiple bargaining units of the same employer provides an example of the incorporation of a dynamic element into the process.³²⁵ While this was an isolated decision in the NLRB's jurisprudence, a similar modification was recently introduced on a more general basis through legislative amendment in Ontario.³²⁶

Even though examples of labour relations boards that grant consolidation of bargaining units in circumstances similar to those in *Libbey-Owens-Ford* do exist in Canada,³²⁷ these have not reflected the general practice.³²⁸ Instead, the emphasis in bargaining unit

323. See *id.* at 320.

324. See, e.g., *Libbey-Owens-Ford Glass Co.*, 169 N.L.R.B. 126 (1968); *Toronto Non-Profit Housing Corp. (City of)* [1982] O.L.R.B. Rep. Feb. 280 (Can.); *O.K. Economy Stores*, [1990] 7 Can. L.R.B.R.(2d) 286 (Can.).

325. 169 N.L.R.B. 126 (1968).

326. See Ontario Labor Relations Act, R.S.O., ch. L-2, § 7 (1992) (Can.).

327. See, e.g., *O.K. Economy Stores*, 7 Can. L.R.B.R.(2d) at 291 (allowing an application for consolidation of five bargaining units each consisting of a separate supermarket owned by O.K. Economy Stores Limited); *Starbucks Corp. v. CAW, Local 2000* [1997] B.C.L.R.B. Dec. No. B231/97 (giving industrial stability more weight than community of interest in an application to merge units); *Starbucks Corp. v. CAW, Local 3000* [1996] B.C.L.R.B. Dec. No. B323/96 (citing industrial stability as the key factor in unit determination decisions after an initial unit has been certified).

328. See, e.g., *Toronto Non-Profit Housing*, O.L.R.B. Rep. Feb. at 282 (holding that the Ontario Labour Relations Board does not have the power to order consolidation of existing bargaining units).

determination has been on the bargaining history and stability of existing unit structures.³²⁹ With the absence of a more general move by the labour relations boards toward a dynamic model of union determination, the most significant Canadian development allowing for the freer merger of units took place through legislative initiative.³³⁰

Following the election of a New Democratic Party ("NDP") government in Ontario in 1990, a series of amendments to the OLRA were made with the support of organized labor.³³¹ In the area of bargaining unit determination, "the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same union."³³² While the Board previously could alter existing units as part of its general decision making power, it was not routinely done. In contrast, the enactment of specific provisions for combination of units was interpreted as authority to order the combination of units on a relatively routine basis considering "whether the consolidated unit sought would, at least to some extent, facilitate viable and stable collective bargaining, reduce fragmentation, or cause serious labour relations problems."³³³ More restrictive provisions were included for manufacturing operations.³³⁴ Only the three criteria noted above were relevant, for applications to other industries, whereas for manufacturing operations, the Board was instructed not to combine units where combination would interfere with "the employer's ability to continue significantly different methods of operation or production"³³⁵ or interfere with the "employer's ability to continue to operate those places as viable and independent businesses."³³⁶

329. See *O.K. Economy Stores*, 7 Can. L.R.B.R.(2d) at 290.

330. See An Act to amend certain Acts concerning Collective Bargaining and Employment, R.S.O., ch. 21 § 7 (1992) (Can.).

331. See An Act to amend certain Acts concerning Collective Bargaining and Employment, R.S.O., ch. 21 (1992) (Can.).

332. An Act to amend certain Acts concerning Collective Bargaining and Employment, R.S.O., ch. 21 § 7(1) (1992) (Can.).

333. *IBEW Local 636 v. Mississauga Hydro-Elec. Comm'n* [1993] O.L.R.B. June 523, 532.

334. See An Act to amend certain Acts concerning Collective Bargaining and Employment, R.S.O., ch. 21 § 7(4)(a),(b) (1992) (Can.).

335. An Act to amend certain Acts concerning Collective Bargaining and Employment, R.S.O., ch. 21 § 7(4)(a) (1992) (Can.).

336. An Act to amend certain Acts concerning Collective Bargaining and Employment, R.S.O., ch. 21 § 7(4)(b) (1992) (Can.).

As with the NLRB's temporary move toward a more dynamic model in *Libbey-Owens-Ford*, the Ontario changes were of limited duration. Following the election of a Progressive Conservative government in Ontario in 1995, all of the amendments to the OLRA introduced by the New Democratic Party were repealed, including the bargaining unit combination provisions.³³⁷ Apart from its obvious impact on labour relations in the province at least at the present time, this reversion in the law limits an evaluation of what the wider impact of the combination provisions would have been.³³⁸

B. *Confronting the Representation-Bargaining Tension: The Woodward Stores Approach*

While the unit merger processes examined would introduce a dynamic element into the process of bargaining unit determination, they do not directly respond to the role of the bargaining unit in relation to organizing questions. In contrast, the *Woodward Stores* decision demonstrates the tension between the representation and the negotiating roles of the bargaining unit.³³⁹ The result is the best current example of bargaining unit determination based on a separate and dynamic model.³⁴⁰ As noted earlier, the key elements in that case embodying these principles were: the creation of a representation district based upon a relatively small group of workers representing a reasonable unit for workers who wished to organize in an industry which has traditionally been hard to organize; and the explicit allowance for subsequent alteration of the bargaining unit to create a broader bargaining structure as collective bargaining became better established.³⁴¹

If adopted by the NLRB, the *Woodward Stores* decision presents a question of statutory violation under the NLRA concerning the extent of the organizing process as a controlling factor in unit deter-

337. See Greg Crone, *Bill 40 Dies Amid Controversy*, WINDSOR STAR, Nov. 1, 1995, at A1.

338. See generally Joseph Liberman & Lorne A. Richmond, *Labour: The Legacy of Labour Law Reform Bill 40, One Year Later*, 1994 CAN. BAR ASS'N (discussing the Ontario combination provisions and the concerns it raised over the potential long term impact on bargaining power).

339. See, e.g., *Woodward Stores (Vancouver) Ltd.* [1974] 1 Can. L.R.B.R. 114, 119-20.

340. See Brian Langille, *The Michelin Amendment in Context*, 6 DALHOUSIE L.J. 523, 546, 548 (1980).

341. See *Woodward Stores* 1 Can. L.R.B.R. at 119-20; *Amon Invs. Ltd.*, [1978] B.C.L.R.B. Dec. No. 39/78 (Can.).

mination.³⁴² This restriction was introduced with the Taft-Hartley amendments to the NLRA in 1947.³⁴³ Under section 9(c)(5) of the NLRA, the extent of union organizing could not be controlling of bargaining unit determinations by the NLRB.³⁴⁴ The effect of this provision is somewhat limited, however, because it allows for the extent of organizing to be one of a number of factors in determining the appropriate bargaining unit.³⁴⁵ When considering whether a unit is appropriate there will generally be a range of factors, in addition to the extent of organizing, that the NLRB can look to.³⁴⁶

The Board in *Woodward Stores* carefully stated that it would not “carve out totally artificial units, based solely on the extent of organization by the union [but would] require some reasonably coherent and defensible boundaries around the unit over and above the existing, momentary preference of the employees.”³⁴⁷ This caution is itself a recognition of the degree to which the exception focuses on the organizing aspect of unit determination. However, it would be wrong to view the *Woodward Stores* decision as being based on the actual extent of organizing. Rather, it seeks to determine a reasonable standard for collective organizing in the context of the type of industry involved. The test is not a subjective one based on the extent of organizing by this particular union, but rather is an objective test based on what the Board views as a reasonable unit for the employees to use for purposes of organizing and deciding whether they want to be collectively represented by the union. Thus, the existence of section 9(c)(5) should not bar the NLRB from incorporating the *Woodward Stores* approach into its process of bargaining unit determination.

As noted above, an important limitation on the *Woodward Stores* decision is that it only applies to traditionally hard to organize industries.³⁴⁸ As a result, its utilization is limited to cases where it is possible to introduce evidence about historical difficulties in

342. See 29 U.S.C. §159(c).

343. Ch. 120, tit. 1, §101, 61 Stat. 136 (1947) (codified in scattered sections of 29 U.S.C.).

344. See 29 U.S.C. §159(c)(5); see also *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 437, 442 (1965) (holding that “the provision was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination.”).

345. See *Metropolitan Life Ins. Co.*, 156 N.L.R.B. 1408, 1418 (1966).

346. See *id.*

347. *Woodward Stores*, 1 Can. L.R.B.R. at 119.

348. See *id.* at 118.

organizing the industry in which the enterprise operates.³⁴⁹ A natural question arising from this approach is: why, given that certification occurs on an employer by employer basis, the *Woodward Stores* decision should be limited to cases where there has traditionally been low levels of organization in the industry? If the rule is designed to protect employees' right to organize, its invocation should depend on the situation of the group of employees in question rather than on the historical status of unionization in the industry. In contrast to the existing restriction of the exception to traditionally hard to organize industries, under a more general separated-dynamic model, the *Woodward Stores* approach could be available in all unit determination cases.

Some of the significance of adopting a fully separated-dynamic model of bargaining unit determination based on the *Woodward Stores* approach, as opposed to just the dynamic element introduced through the unit merger systems, is illustrated by the *Hornco* case.³⁵⁰ In *Hornco*, the Board was concerned that a single plant unit would cause problems due to the linkages in personnel administration between the two plants.³⁵¹ In a separated-dynamic system based on the *Woodward Stores* approach, the first issue would be to create an appropriate representation district to permit the workers to organize collectively if they so choose and to promote the initial establishment of collective bargaining. The proposed single plant unit would be appropriate for such a situation. If at a subsequent date both plants were organized, the union could then apply for a unit consisting of all employees at both plants. In contrast, the section 7 combination power that the New Democratic Party amendments incorporated into the OLRA would not necessarily address this situation. Problems may develop if initial representation decisions establish bargaining units that do not correspond to the groups in which workers would reasonably be expected to collectively organize.³⁵² In this case, the structure of individual, physically separated single plant workplaces, significantly diminishes the utility of dynamic unit merger provisions.³⁵³ Absent a structure

349. See, e.g., *Amon Invs. Ltd.* [1978] B.C.L.R.B. Dec. No. 38/78.

350. See *Hornco Plastics Inc. v. A.C.T.W.* [1993] 19 Can. L.R.B.R.(2d) 201, 206 (Can.).

351. See *id.* at 214.

352. See *Liberman & Richmond*, *supra* note 338, at 5-6 (quoting *Mississauga Hydro-Elec. Comm'n.*, [1993] O.L.R.B. Rep. June 523 (Can.)).

353. See *Woodward Stores*, 1 Can. L.R.B.R. at 120.

that allows initial representation, provision for merger of existing units loses its utility. This limitation to the reforms embodied in the section 7 combination provisions indicates the potential problem of relying only on specific legislative changes as opposed to a more general shift in the model of bargaining unit determination underlying the jurisprudence of the labour relations boards.³⁵⁴

VI. CONSEQUENCES OF A SHIFT TO A SEPARATED-DYNAMIC MODEL

Shifting to a separated-dynamic model would alter how the process of bargaining unit determination responds to changes in the industrial relations environment. Questions about the structure of representation and bargaining are implicated in the issues of increased service sector employment, different types of corporate structures, and new forms of work organization, as previously discussed above. The current unified-static model of unit determination creates limitations in the ability of the systems of labor law, based on the Wagner Act, to respond to these issues. In contrast, the elements of a separated-dynamic model that have been examined could provide an alternative way for labor law to respond to these changes which would increase the availability of access to effective collective bargaining in this new environment.

A. *Collective Representation in the Service Sector*

Both the availability of unit merger and a method of achieving representation based on the *Woodward Stores* approach would have an effect on the problem of developing a process for effective collective representation in the context of service sector employment.³⁵⁵ Given the common retail outlet and branch structure of organization in this sector, a crucial question is whether to allow the combination of the more natural workplace level unit for initial collective organization with the broader based structures needed for effective bargaining with large service sector employers.³⁵⁶ A process of bargaining unit determination based on a unified-static model would inhibit this combination, whereas a process based on a separated-dynamic model would facilitate it. The struggles of

354. *See id.* at 120.

355. *See* Langille, *supra* note 340, at 545-46.

356. *See* Langille, *supra* note 340, at 544.

S.O.R.W.U.C. provide a clear example of how a separated-dynamic system might have allowed more effective collective organization of workers in this sector.³⁵⁷ The ability of S.O.R.W.U.C. to organize bank workers at the branch level was appropriately supported by the determination that a branch was an appropriate unit to serve as a representation district.³⁵⁸ However, this should not have prevented the subsequent combination of units to achieve a broader level bargaining unit that would have served as a more effective negotiating structure. The recent organizing drive by the Canadian Auto Workers union among Starbucks coffee shops in British Columbia will serve as a test for the future potential of merged units. The initial unit consisted of four stores in downtown Vancouver.³⁵⁹ The British Columbia Labour Relations Board varied the certification to include additional units.³⁶⁰ In July 1997, a collective bargaining agreement was reached that covered nine of the ninety Starbucks' stores in British Columbia.³⁶¹ This situation illustrates the possibility for successful organizing in the service sector based on a separated dynamic model of bargaining unit determination. An important question for the future will be whether the unit organized on this basis is sustainable and has the potential for continued expansion.

In addition to allowing merger of units to achieve more effective broader based bargaining structures, a shift to a separated-dynamic model of unit determination would address some of the difficulties associated with organizing in the context of the service sector.³⁶² It is significant that *Woodward Stores* itself was a case dealing with workers in a service industry that had traditionally proved hard to organize.³⁶³ In the context of a large department store in *Woodward Stores* the initial process of collective organization by the employees occurred on the basis of the individual department that

357. See Langille, *supra* note 340, at 549.

358. See Langille, *supra* note 340, at 550 (quoting Canadian Imperial Bank of Commerce [1977] 2 Can. L.R.B.R. 99, 123 (Can.)).

359. See *Starbucks Corp. v CAW, Local 3000* [1996] B.C.L.R.B. Dec. No. B231/96.

360. See *id.*

361. See Lisa Pemberton-Butler, *Starbucks, Union OK Wage Pact- B.C. Workers to Vote Monday on Contract*, SEATTLE TIMES, July 11, 1997, at D1.

362. See generally JOHN E. ABODEELY, ET AL., THE NLRB & THE APPROPRIATE BARGAINING UNIT 127-31 (1980) (“[W]here there is an alleged accretion to the existing bargaining unit, the clarification procedure has been valuable. It has provided the flexibility necessary in a dynamic employment relationship.”).

363. See *Woodward Stores (Vancouver) Ltd.* [1974] 1 Can. L.R.B.R. 114, 118 (Can.).

constituted their own work unit.³⁶⁴ While it is possible that given greater familiarity with collective representation, or a broader organizing drive by a union, a unit of all of the employees in the store might have sought collective representation, the question is whether the grouping of employees that did seek representation should be allowed to do so on that basis. A separated-dynamic process of unit determination would allow access to collective representation on this basis, whereas the current unified-static process does not.³⁶⁵

Related issues arise in the context of the expansion of non-traditional forms of employment in the service sector. In dealing with this question, the focus has often been on whether or not these employees should be included in the same bargaining unit as permanent, full-time employees.³⁶⁶ The concerns with combining the two groups include: the prevention of full-time employees having access to collective bargaining, due to their wishes being vetoed by large numbers of casual employees with lesser attachment to the workplace or interest in collective bargaining; dilution of the bargaining strength of the unit due to lack of common interests between the two groups, reducing support for common action; and the danger of the employer's operations being excessively disrupted by industrial action initiated by employees with little long term connection or commitment to the business.³⁶⁷ While these considerations have been used to justify exclusion of part-time and temporary employees from bargaining units, this raises the concern that such exclusions deny these employees access to collective representation, and reinforces the inferiority of their conditions of employment.³⁶⁸ Given the concentration of women in these non-traditional forms of employment, this limitation on their access to collective bargaining helps reinforce the gender inequality in employment and is an indication of the failure of the Wagner Act

364. See *id.* at 117.

365. See *SHIFTING GEARS*, *supra* note 11, at 189-90.

366. See *Canadian Imperial Bank of Commerce v. B.C. Gov't Employees Union* [1991] 15 Can. L.R.B.R.(2d) 86, 87 (Can.) [hereinafter C.I.B.C.].

367. See *id.* at 88.

368. See *RONALD DAVIS, THE OLRB POLICY ON BARGAINING UNITS FOR PART-TIME WORKERS 24* (1991) (critiquing the effect of bargaining unit determination in the context of the Ontario Labour Relations Board's separation of and refusal to consolidate part-time and full-time employee units).

model of labor law to respond adequately to the development of an increasingly feminized workforce.³⁶⁹

One response to the rise of non-traditional forms of employment is to include these employees in the same bargaining units with permanent, full-time employees.³⁷⁰ This route has been taken in some board decisions³⁷¹ and through legislative initiative in Ontario.³⁷² The creation of such all-employee units however, still raises the problem of restriction of access to collective representation for both types of employees.³⁷³ If there are genuine divergences of interests between the two groups, then different concerns and issues could underlie desires for collective representation.³⁷⁴ Thus, the two groups could choose to seek collective representation at different points in time based on these different interests.³⁷⁵ If both groups did choose collective representation, they may or may not subsequently want to combine into a common bargaining unit to negotiate their conditions of employment. A separated-dynamic model of bargaining unit determination could respond to this type of process by allowing such a progression in the development of collective bargaining, through initial certification, based on the groupings of common interest among the employees, with the potential for future merger of the units as the collective bargaining relationship develops.³⁷⁶ In contrast, existing reform efforts based on considerations of an either/or choice between separate or combined units for traditional and non-traditional types of employees reflect a presumption of a unified-static model of unit determination. As a result, the

369. See Judy Fudge, *Fragmentation and Feminization: The Challenge of Equity for Labour Relations Policy*, in *WOMEN AND CANADIAN PUBLIC POLICY* 57, 68-69 (Janine Brodie, ed., 1996).

370. See *id.* (explaining how the extension of collective bargaining rights to the public sector dramatically increased the number of unionized workers and had a profound impact on the unionization of women).

371. See *C.I.B.C.* 15 Can. L.R.B.R.(2d) at 88-89.

372. See An Act to amend certain Acts concerning Collective Bargaining and Employment, R.S.O., ch. 21 § 6(2.1) (1992) (Can.). "A bargaining unit consisting of full-time employees and part-time employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining." *Id.*

373. See DAVIS, *supra* note 368, at 21-24.

374. See DAVIS, *supra* note 368, at 21-24.

375. See DAVIS, *supra* note 368, at 21-24.

376. See *Woodward Stores* 1 Can. L.R.B.R. at 120; see, e.g., CAN. CONST. (Constitution Act 1982) pt. 1 (Canadian Charter of Rights and Freedoms), §15(1); DAVIS, *supra* note 368, (advocating use of the *Woodward Stores Ltd.* approach to address the problem of bargaining units for part-time workers).

existing reform efforts are inadequate to respond to these changing forms of employment.

Following the *Woodward Stores* approach, a separated-dynamic model could also alter how labor law responds to changes in the structure of how the employee relates to his or her workplace in the service sector. This is illustrated by a recent case from British Columbia where the *Woodward Stores* exception was not utilized due to a lack of evidence that the industry in question fell into the “traditionally hard to organize” category.³⁷⁷ *Moonlight Building Maintenance Ltd.* (“Moonlight”) involved an application for certification on behalf of employees of a janitorial services company.³⁷⁸ The employers Moonlight Building Maintenance Ltd. and Dynamic Maintenance Ltd. named in the applications in the case, were closely related companies that employed between 75-100 and 140-170 workers respectively in the lower mainland of British Columbia.³⁷⁹ These companies provided janitorial services for a number of buildings in the lower mainland area.³⁸⁰ Some of its workers were assigned to a particular location on a continuous basis, while others were assigned to different locations on a routine replacement or supplemental basis.³⁸¹

S.E.I.U. applied for certification of a bargaining unit consisting of the employees who worked daily at the Sinclair Centre, providing janitorial services.³⁸² There was a definable group of Dynamic employees whose regular workplace was the Sinclair Centre.³⁸³ There were additional Dynamic employees assigned to work at the Sinclair Centre on an occasional, but routine basis.³⁸⁴ While it is not stated explicitly in the case, the inference can be made that the union had sufficient support within the proposed unit, but not within Dynamic as a whole.

In rejecting the proposed bargaining unit, the Industrial Relations Council emphasized that a “fragmented bargaining-unit approach is inappropriate.”³⁸⁵ As a result of the movement of

377. See *Moonlight Bldg. Maint. Ltd.* [1990] 10 Can. L.R.B.R.(2d) 14, 17 (Can.).

378. See *id.* at 15.

379. See *id.*

380. See *id.*

381. See *id.* at 16.

382. See *Moonlight Bldg. Maint. Ltd.* [1990] 10 Can. L.R.B.R.(2d) 14, 15 (Can.).

383. See *id.* at 16.

384. See *id.*

385. *Id.* at 19.

employees between different locations, the Council concluded that it was not appropriate for collective bargaining to occur on a single worksite basis.³⁸⁶ In other words, the Council rejected the proposed bargaining unit because the initial representation district that the union had proposed did not constitute an appropriate structure for ongoing bargaining.

Moonlight and Dynamic provide examples of the type of employer that has emerged in the service sector who contract out service functions to many companies. Instead of companies having janitors as employees for the buildings they own, janitorial service companies, such as Moonlight and Dynamic, can provide those services. Workers may still identify their work with their work location, but this may no longer correspond to the organizational structure of their legal employer. What should have been recognized in the *Moonlight* case was that the mode in which these janitors grouped themselves was based upon the location where they worked and not based upon the structure of their legal employer. The Board in *Moonlight* argued that other janitorial service companies had been organized and that an all-employee unit was more appropriate in allowing stability of terms and conditions of employment, despite changing service contracts.³⁸⁷ However, viewing the work location unit as inconsistent with an all-employee unit reflects the reliance on the unified-static model in bargaining unit determination. Under a separated-dynamic model it would be possible to allow a work location unit to be certified as an initial unit. After collective bargaining has become established it can be altered to allow an all-employee unit.

It is worth noting again in the context of this discussion that the janitorial service industry has been the site of the recent prominent efforts to organize outside of the NLRA in the S.E.I.U. Justice for Janitors campaign.³⁸⁸ In the absence of legal mechanisms to achieve the broader based bargaining that workers in this type of industry need, it should be no surprise that they have turned to organizing techniques outside of the structure of the Wagner Act

386. See *id.* at 20.

387. See *Moonlight Bldg. Maint. Ltd.* [1990] 10 Can. L.R.B.R.(2d) 14, 20 (Can.).

388. See Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 693-94 (1992).

model.³⁸⁹ While there are other aspects of the NLRA that have also discouraged workers from organizing under its structure, the existing unified-static process of unit determination is one that would provide a reasonable basis for skepticism of its utility to these workers.³⁹⁰

B. *Employer Corporate Structure*

As discussed above, in contemporary multi-divisional companies, many of the crucial decisions affecting workers are products of strategy set at the central corporate level, far from the plant or divisional unit that is the focus of more immediate administration of the employment relationship.³⁹¹ In the absence of bargaining structures which cover all employees in these multi-divisional companies, the danger is that individual plant or divisional units of workers will be relegated to respond to the financial constraints established by central corporate strategy without an opportunity to bargain over the strategy that produces these constraints.³⁹² While other restrictions exist concerning bargaining over issues of business strategy,³⁹³ these problems are compounded when bargaining is not even occurring at the level of management that is making the relevant decisions.³⁹⁴

In comparison to the current unified-static model, a separated-dynamic model of bargaining unit determination could significantly facilitate the establishment of broader bargaining structures in the case of multi-divisional corporate structures. Provisions for unit merger under a separated-dynamic model would directly address the problem of how to combine individual plant or divisional units into multi-divisional company-wide bargaining structures. In addition, a provision for the use of industrial action in support of demands for broader based bargaining structures could also provide a dynamic route for the establishment of these structures.

389. *See id.* at 680 (discussing the special functions of service work and the organizational structures most likely to succeed).

390. *See id.* at 678-79.

391. *See* JOHN PURCELL & BRUCE AHLSTRAND, *HUMAN RESOURCE MANAGEMENT IN THE MULTI-DIVISIONAL COMPANY* 139 (1994).

392. *See id.*

393. *See* 29 U.S.C. §§ 159; *see also* Katherine Van Wezel Stone, *Labor and the Corporate Structure*, 55 U. CHI. L. REV. 73, 78 (1988) (suggesting that attempts by unions to exert power may be illegal under the NLRA).

394. *See* PURCELL & AHLSTRAND, *supra* note 391, at 139.

Similarly, if under a separated-dynamic model industrial action could be used to support demands for changes in bargaining unit structure, it would also follow that the use of coordinated bargaining techniques should not be limited in the cases where they are being used to seek establishment of broader bargaining units. Finally, if the significance of central corporate strategy for employment relations in the multi-divisional corporation is recognized, the line of cases suggesting that the secondary boycott restrictions apply to industrial action against different divisions of the same company should be reversed.

The possible impact of allowing the merger of units to produce broader level bargaining structures can be seen in the recent divergence in trajectories of collective bargaining in the United States' industries covered by the Railway Labor Act ("RLA"),³⁹⁵ as compared to those covered by the NLRA. Differences in the industrial relations context in which the RLA developed, led to a substantially different treatment of bargaining structure than under the NLRA.³⁹⁶ Unlike the NLRA, the RLA was not passed to facilitate unionization in predominantly non-unionized industries, nor to create a new collective bargaining regime.³⁹⁷ When the RLA was passed in 1926, collective bargaining had been well established on the railways for decades.³⁹⁸ Railway workers were already predominantly unionized.³⁹⁹ The RLA was designed "to improve collective bargaining and aid in the resolution of labor disputes."⁴⁰⁰ As a result, the bargaining structures under the RLA reflected this pre-existing unionization.⁴⁰¹ Rather than small, single location units in which unions could organize for certification elections, the RLA's bargaining structure is based on broad, employer-wide craft units.⁴⁰²

395. 45 U.S.C. §§ 151-188 (1994 & Supp. V).

396. See Harry A. Risetto, *The National Mediation Board and the Railway Labor Act in the 1990s*, in AIRLINE LABOR RELATIONS IN THE GLOBAL ERA: THE NEW FRONTIER 116, 116-17 (Peter Cappelli ed. 1995) (discussing the differences between the NLRA and the RLA).

397. See *id.* at 117.

398. See *id.* at 116.

399. See *id.*

400. *Id.* at 117.

401. See Risetto, *supra* note 396, at 117.

402. See Risetto, *supra* note 396 at 122.

Partly due to this structure of employer - wide units, as well as the differences in its bargaining and impasse procedures, unions under the RLA have been more successful in bargaining over corporate level decisions than they have under the NLRA.⁴⁰³ A key result of the difference in bargaining structure between the two jurisdictions is that under the NLRA, employers are unable to confine union influence to individual divisions or plants of the company and thereby avoid bargaining over issues of corporate strategy and investment.⁴⁰⁴ This produced variations in the results in the two jurisdictions in the 1980's.⁴⁰⁵ Employers governed by the NLRA tried to avoid unionization by moving investments or jobs to different plants, while the company-wide structure of bargaining units under the RLA made it far more difficult.⁴⁰⁶ The key problem, however, in adapting the RLA structure to the NLRA is that most of the industries covered by the NLRA are not predominantly unionized.⁴⁰⁷ Company-wide bargaining units lose their utility for employees if unions are unable to organize on that basis and the employees remain without collective representation. Thus, while providing an example of an attractive end result, the structure of bargaining under the RLA is not appropriate for simple transfer en bloc to the NLRA. However, a separated-dynamic process of unit determination would at least allow the opportunity for the development of bargaining structures under a Wagner Act model that would provide some of the advantages of the RLA model of labor law.

Another development relating to the impact of corporate structure on employment relations has been the increasing prominence

403. See Katherine Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485, 1487 (1990).

404. See *id.* at 1500-04.

405. See *id.* at 1526-36.

406. Peter Cappelli, *Introduction to AIRLINE LABOR RELATIONS IN THE GLOBAL ERA: THE NEW FRONTIER* 2-3 (Peter Cappelli ed. 1995).

Thus, moving work and jobs from unionized to non-unionized locations either by closing the unionized facility and opening a new one or, by the mid-1980's, simply moving jobs between existing facilities was legal under the National Labor Relations Act and an extremely common practice in the industries it covered. This practice is not possible in the airlines, however, because the Railway Labor Act establishes bargaining units company wide.

Id.

407. See ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 92-101 (12th ed. 1996).

of the process of corporate restructuring.⁴⁰⁸ If in an era of flexibility, corporations are more likely to be changing their organizational structures, then the question of how bargaining units are altered in response to such changes in organization structure becomes increasingly important. The existing system of unit determination allows some scope for alteration of units by the labor relations boards in response to the reorganization of an employer's operations.⁴⁰⁹ While its general approach to unit determination reflects the static model, the NLRB has accepted that by altering its organizational structure an employer can make existing bargaining units inappropriate.⁴¹⁰ Where there has been a recent change in the employer's organization, a U.C. petition can lead to designation of a new bargaining unit structure.⁴¹¹ Furthermore, an employer can make such a reorganization without negotiating or considering the effect on bargaining structures.⁴¹² If a bargaining unit is no longer appropriate due to a business reorganization, the employer does not commit an unfair labor practice by refusing to bargain with the existing unit.⁴¹³ Despite its previously valid certification, the union is then forced to apply to the NLRB for certification for a new bargaining unit. A significant limitation of this procedure, however, is that it has primarily been used for relatively drastic corporate changes, such as when different plants in a multi-plant unit have been transferred to different companies.⁴¹⁴ While this potentially gives signifi-

408. See Katherine Van Wezel Stone, *Labor and the Corporate Structure*, 55 U. CHI. L. REV. 73 (1988).

409. See, e.g., *Pacific Northwest Bell Tel. Co.*, 253 N.L.R.B. 795, 796 (1980); *Pacific Northwest Bell Tel. Co.*, 207 N.L.R.B. 1, 2 (1973).

410. See *Pacific Northwest Bell Tel. Co.*, 253 N.L.R.B. at 796.

411. See *id.*

412. See *In re Mahoning Mining Co.*, 61 N.L.R.B. 792, 803 (1945).

Since changing conditions in industry necessitate revision of bargaining units which will best effectuate the policies of the Act, the Board has never held that once it has established an appropriate unit for bargaining purposes, an employer may not in good faith, without regard to union organization of employees, change his business structure, sell or contract out a portion of his operations, or make any like change which might affect the constituency of the appropriate unit without first consulting the bargaining representative of the employees affected by the proposed business change.

Id.

413. See *Frito-Lay, Inc.*, 177 N.L.R.B. 820, 821 (1969) (holding that reorganization eliminated the "considerable autonomy" of the bargaining unit, which was the essential factor in the initial determination).

414. See *Rock-Tenn Co.*, 274 N.L.R.B. 772, 773 (1985) (disregarding the bargaining history and separating the bargaining units to conform with new corporate structure).

cant latitude to the employer to unilaterally initiate alteration of bargaining structures, in many instances the employer may not want to take the risk of refusing to bargain without knowing in advance whether the NLRB will find that the existing bargaining unit is no longer appropriate.

Even if unit clarification procedures were to be used more widely for internal corporate reorganizations, it is not clear that as a matter of public policy this would be the most desirable method for dealing with bargaining unit changes in this context. For instance, if the changes in unit structures are ordered by the Board, it removes the possibility of unions achieving trade-offs and concessions in return for cooperation in the reorganization. If a unit modification is sought at the bargaining table, the current designation of the issue as a permissive or illegal subject of bargaining strengthens the position of the party seeking to maintain the status quo. This creates the possibility of especially advantageous concessions being obtained in return for agreeing to unit modifications.⁴¹⁵

Under the current model, bipolar alternative outcomes are created when companies seek to modify bargaining unit structures as part of corporate reorganizations.⁴¹⁶ If the company is able to convince the Board that a unit alteration is necessary given the corporate reorganization, this can then be implemented without the agreement of the union, or any accommodation being reached for the effects of the change.⁴¹⁷ In contrast, if the company is unable, or anticipates it will be unable, to obtain an order from the Board altering the unit, the union is in a very strong position at the bar-

415. Owen Darbshire has described an example of the effect of this structure of regulation on negotiation of unit modification at the U.S. telecommunications company Ameritech. Ameritech was seeking to implement a corporate reorganization from a geographic organization to a business unit organization. As a result of unit modification being a permissive subject of bargaining, Ameritech was unable to insist that the union, the Communications Workers of America ("CWA"), renegotiate the bargaining unit structure. The CWA was able to obtain significant concessions on wage structures and worker rights in return for agreeing to a realignment of the bargaining structure. The system of unit determination in this case did not prevent the restructuring of bargaining sought by Ameritech, rather it set the terms on which the parties engaged in the negotiations. Owen R. Darbshire, *Radical versus Incremental Restructuring: Employment Relations in the Telecommunications Industry* (unpublished manuscript, on file with the *Hofstra Labor & Employment Law Journal*).

416. See *id.* (manuscript at 14).

417. See *In re Mahoning Mining Co.*, 61 N.L.R.B. 792, 803 (1945) (stating that the Board has never held that once an appropriate bargaining unit is established, an employer cannot make changes without first consulting the employees' bargaining representative).

gaining table to either block the change or extract major concessions for agreeing to it.⁴¹⁸ Thus, significant swings in the position of the parties can occur depending on the Board's view of the extent and impact of the corporate reorganization.

As an alternative, the need for alteration of unit structures in response to a corporate reorganization could be dealt with as an ordinary subject of negotiation between the parties.⁴¹⁹ This could be achieved by making it a mandatory subject of bargaining under the NLRA,⁴²⁰ or a legal subject of bargaining in Canada.⁴²¹ In particular, this would allow the use of the normal strike and lock-out weapons in support of unit modification demands.⁴²² Such a rule has been proposed by some academics,⁴²³ however, it has not been adopted in any of the Wagner Act model jurisdictions.⁴²⁴ If one party were adversely affected by the alteration of the unit structure, it would allow concessions to be extracted from the other party in return for agreeing to the unit modification.⁴²⁵ By testing the commitment of the party seeking the unit modification through the bargaining process, a more effective evaluation of the need for it could occur. Unlike the bipolar alternatives of the current system, this alternative could lead to a range of negotiated outcomes depending on the parties' judgment as to the need for modification of the unit structure. This suggests a possible additional dynamic element that could be incorporated into the process of bargaining unit determination.

A final issue to be noted in regard to the impact of multi-divisional corporate structures is the problem of multinational corporate employers. A process of bargaining unit determination that allows the development of broader based bargaining structures may

418. See generally Darbishire, *supra* note 415, (manuscript at 21) (discussing CWA's ability to obtain concessions on wage structures and worker rights for Ameritech workers).

419. See Kenneth O. Alexander, *Conglomerate Mergers and Collective Bargaining*, 24 *INDUS. & LAB. REL. REV.* 354, 369 (1970).

420. See *id.*

421. See *Northwood Pulp & Timber Ltd.* [1994] 23 *Can. L.R.B.R.*(2d) 298, 314 (Can.) (rejecting the mandatory-permissive distinction used in the United States).

422. See Alexander, *supra* note 419, at 371.

423. See Charles Craypo, *Collective Bargaining in the Conglomerate MultiNational Firm: Litton's Shutdown of Royal Typewriter*, 29 *INDUS. & LAB. REL. REV.* 3, 23-24 (1975).

424. See Harry C. Katz, *The Decentralization of Collective Bargaining*, 47 *INDUS. & LAB. REL. REV.* 3 (1993) (discussing the differences in collective bargaining in Australia, Germany, Italy, Sweden, the United Kingdom, and the United States).

425. See Craypo, *supra* note 423, at 19.

respond to the structure of multi-divisional companies if the divisions are within the same jurisdiction; but what if they are located in different countries? Corporations can exert financial control over divisions that operate in different countries due to the international mobility of capital.⁴²⁶ Foreign corporations and ownership of financial resources are generally accorded recognition in different national legal systems.⁴²⁷ However, legal bargaining structures are generally limited to the national level.⁴²⁸ Even in the case of Canada and the United States, where unions have been organized on a binational basis (hence, the perhaps somewhat grandiose title "International" in many union names), bargaining units have remained strictly limited to their national or provincial level jurisdictional basis.⁴²⁹ Recognition of bargaining units that span the two countries might require some integration of labor law administration, but given the increasing economic integration within the NAFTA region, it is a possibility that deserves further consideration. While there are divergences between the Canadian and American versions, they are at least based on the common structure of the Wagner Act model.⁴³⁰ Therefore, it is possible to achieve mutual recognition and the merger of bargaining units in the two countries. It would be difficult to integrate Wagner Act model bargaining unit structures with those in countries that have industry level multi-employer bargaining structures. In this regard, the European Union experiments with multinational works councils provide an instructive example of the potential for creating multinational structures for collective representation.

C. *Changing Organization of Production*

The recent advent of new forms of production organization are also introducing an element of uncertainty into the context of the employment relationship. This altered work organization context has the potential to significantly alter both how workers organize

426. See Craypo, *supra* note 423, at 19.

427. See Craypo, *supra* note 423, at 20-22.

428. See Craypo, *supra* note 423, at 23.

429. See Craypo, *supra* note 423, at 23.

430. Compare *Northwood Pulp & Timber Ltd.* [1994] 23 Can. L.R.B.R.(2d) 298 (Can.) (distinguishing between the American "mandatory-permissive" doctrine and the "illegality" doctrine used in Canadian jurisdictions), with *NLRB v. Wooster Div. of Borg-Warner Corp.*, 113 N.L.R.B. 1288 (1958) (recognizing that the U.S. Supreme Court's ruling respecting the "recognition" clause would be decided the same in Canada).

collectively and the structures within which they bargain. With the development of different linkages between production units in networks of suppliers and customers, the assumptions underlying the existing process of bargaining unit determination are undercut. If what occurs in the workplace is primarily determined by the production network in which it is situated, rather than by independently acting plant or corporate management, then a structure of bargaining units based on independent plant units may no longer be appropriate. At the moment, there is still much uncertainty in the changing organization of production, with no clear single best new system having emerged from the mixture of flexible specialization, lean production, and other models. However, some of the issues that may potentially arise in the context of these changes were illustrated in a recent case in Ontario.⁴³¹

In *USWA v. Shrader Canada Ltd.*,⁴³² the USWA made a certification application to represent employees at a plant which manufactured petrochemical products for use in the automotive industry.⁴³³ A few months before the certification application, Shrader had entered into an arrangement with one of its major customers, Ford, to undertake the receipt, storage and distribution of chemicals for Ford's dealers and agencies throughout Canada.⁴³⁴ The contract for this operation, which Ford had formerly conducted in-house, was handled under a separate business name, "Shrader/Malcolm," though no new corporation was established.⁴³⁵ Though located in the same plant as the main Shrader operations, Shrader/Malcolm operated as its own division with a separate workforce (albeit only three employees) and separate administration.⁴³⁶ Despite this separation, however, the conditions of employment and work experience of the Shrader and Shrader/Malcolm employees were similar in other respects.⁴³⁷

The USWA had applied for certification of a unit consisting of all employees at the plant, including those of Shrader/Malcolm.⁴³⁸ In response, Shrader argued that the Shrader/Malcolm employees

431. See *USWA v. Shrader Canada Ltd.* [1993] O.L.R.B. Rep. Mar. 246 (Can.).

432. [1993] O.L.R.B. Rep. Mar. 246 (Can.).

433. See *id.* at 246, 249.

434. See *id.* at 249-50.

435. See *id.* at 250.

436. See *id.*

437. See *USWA v. Shrader Canada Ltd.* [1993] O.L.R.B. Rep. Mar. 246, 250 (Can.).

438. See *id.* at 248.

should be in a separate unit to avoid the possibility of a strike disrupting its contract with Ford.⁴³⁹ Ultimately, the board decided that the USWA's requested unit was appropriate on the basis that Shrader/Malcolm was not really a separate business, but rather a special arrangement for a valued customer.⁴⁴⁰ However, the Board held open the possibility, which the dissenting opinion would have applied in this case, that if the new line of business was sufficiently distinct, a separate unit would have been warranted.⁴⁴¹ Consequently, neither the majority nor the dissent in this case addressed the employer's main argument, which was not the distinctiveness of the line of the business, but rather the effect of the new business being integrated into Ford's production network.⁴⁴² This context could have an impact on both organizing and bargaining.

Concerning organizing, it is possible to imagine divergent concerns and hence different degrees of interest in collective organization emerging between employees in the same plant who are in departments or divisions tied into different production networks.⁴⁴³ Varying employee attitudes may emerge with experiences in different systems of work organization. Suppose in the *Shrader* case that the Shrader employees were not interested in organizing, but that the Shrader/Malcolm employees had a series of grievances arising from the impact of shipping time pressures put on the business by Ford. In that situation, it would seem appropriate to allow the Shrader/Malcolm employees to organize collectively as a unit even if the Shrader employees did not wish to be represented.

Different considerations could arise in the bargaining context. Suppose both the Shrader and Shrader/Malcolm employees were organized. It is possible that the two groups would share common concerns about working conditions established by the management of Shrader, in which case, bargaining together would make sense. On the other hand, the primary concerns of the Shrader/Malcolm employees might arise from the effect of policies established by Ford. In that case, their common bargaining interests might not lie

439. *See id.* at 251.

440. *See id.* at 252.

441. *See id.* at 252-54.

442. *See* USWA v. Shrader Canada Ltd. [1993] O.L.R.B. Rep. Mar. 246, 251 (Can.).

443. *See* USWA, *The Steelworkers and Work Reorganization* (Feb. 21, 1994) (unpublished summary report of TARP 1 case studies, on file with the *Hofstra Labor & Employment Law Journal*).

with those of the Shrader employees, but with the employees of Ford.

While these possibilities are only speculative in this particular case, they raise the problem of how to deal with issues of organization and bargaining in a context of alternative systems of work organization and networks of production.⁴⁴⁴ What groupings of common interests will lead workers to organize collectively? Where will common concerns lie in bargaining? Suppose a labor relations board was considering an application for a unit consisting of employees of both assembly and parts supplier plants in different firms, but the same production network. The board would have to make judgments about the relationship between the firms and the production network. It is not clear whether there is a simple or single correct answer in such cases. One of the dominant characteristics in the development of alternative work systems is the degree of variation in systems that has occurred. It is not clear whether there is an ideal practice for work organization.

As in the case of corporate restructuring, a separated-dynamic model may be more appropriate for responding to this environment of uncertainty and shifting organizational and production systems.⁴⁴⁵ Allowing normal bargaining over unit structures could provide an economic crucible to test the necessity of unit reorganization in light of changes in the organization of production.⁴⁴⁶ Additionally, under a separated-dynamic model, Boards could combine petitions for merger or modification of units with self-determination elections to allow employees greater opportunity for expression of their interests.⁴⁴⁷ They may lie with the legal entity of the employer firm, with workers in the same workplace, or with other workers in the same production network.⁴⁴⁸

VII. SUMMARY AND CONCLUSION

With shifts in the industrial relations environment, structures of labor law regulation need to be re-evaluated for their continued appropriateness. In this regard, despite its centrality to labor law, bargaining unit determination is a process that has received rela-

444. See *supra* text accompanying notes 90-118.

445. See *supra* text accompanying notes 90-101, 114-18.

446. See *supra* text accompanying notes 107-18.

447. See *Shrader Canada Ltd.* O.L.R.B. Rep. Mar. at 252.

448. See *id.*

tively little attention. To some degree, the emphasis on the case by case treatment of unit determinations may obscure the underlying theoretical structure of the process. Breaking down the concept of the bargaining unit as a legal entity and viewing the unit as a nexus of rules governing different aspects of the labor relationship, provides a point of critique that helps clarify this structure.⁴⁴⁹ In particular, the nexus of rules of conceptualization emphasize the different roles of the bargaining unit in the constitutive and power broker facets of labor law. As part of the constitutive facet, the bargaining unit serves as the electoral district for determining representation.⁴⁵⁰ As part of the power broker facet, the bargaining unit serves as the unit to which legal rights and obligations relating to bargaining adhere.⁴⁵¹ Viewing the bargaining unit as a reified legal entity, it may appear natural to collapse these two aspects of regulation into a single unit entity. The advantage of the nexus of rules conceptualization is that it suggests alternative models of unit determination as plausible policy options.

Two particular alternative models have been developed that describe different approaches to the relationship between the major regulatory facets of unit determination. One model would unify the electoral district and bargaining unit aspects in a single unit that remains static in normal circumstances.⁴⁵² This unified-static model is embodied in the predominant current process of bargaining unit determination.⁴⁵³ This process has produced an emphasis on relatively narrow legal bargaining units that are constructed based on considerations relating to the functions of personnel administration and low level operational management. Collective representation is initially established at this level and then becomes limited to it, due to the unwillingness of labor relations boards under this model to merge units.⁴⁵⁴ Voluntary merger of units, held out by boards as the appropriate mode for unit expansion, may have been effective during the period of labor-management agreement on broad-based bargaining structures in the post-war industrial relations system. However, with the breakdown of that system it has become a false

449. *See supra* text accompanying notes 1-8.

450. *See supra* text accompanying notes 5-6.

451. *See supra* text accompanying notes 5-6.

452. *See supra* text accompanying notes 205-229.

453. *See supra* text accompanying notes 212-214.

454. *See supra* text accompanying notes 212-214.

promise. Instead, the restrictions on use of the normal weapons of industrial conflict in support of bargaining unit alteration and the restriction of those weapons to the realm of existing bargaining units have limited the ability to utilize bargaining power in aid of the establishment or preservation of broader based structures. These elements reinforce the bias towards narrow legal bargaining units under the current unified-static process of unit determination and thus limit the scope and effectiveness of collective representation under the Wagner Act model.⁴⁵⁵

The second alternative model would involve separate evaluation of the initial representation and bargaining regulation aspects of the unit determination process. Such a model would allow for this separation by making the concept of the unit dynamic, being modified over time as the nature of the bargaining relationship changes. While a fully separated-dynamic model of unit determination does not exist at present in any jurisdiction, elements of it can be seen in some departures that have occurred from the predominant unified-static model.⁴⁵⁶ Both labor relations boards and legislative initiatives have experimented with introducing dynamic elements to the process of unit determination by providing for merger of existing bargaining units.⁴⁵⁷ In an even more significant change, the British Columbia Labour Relations Board has developed a process for traditionally hard to organize industries that contains both separated and dynamic elements.⁴⁵⁸ Under this approach, the focus in the initial representation application is on creating a unit with coherent and defensible boundaries for initially establishing collective bargaining.⁴⁵⁹ In particular, there is a recognition that the Board is not necessarily creating a permanent bargaining structure for the firm. The dynamic element is emphasized by the explicit provision that this unit will be modified as collective organization becomes better

455. See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 *Yale L.J.* 1509, 1511 (1981).

456. See generally *Libbey-Owens-Ford Co.*, 202 N.L.R.B. 29, 30 (1973) (affirming the Board's finding "that the single-plant unit and multiplant units constituted equally appropriate units for bargaining"); *Woodward Stores (Vancouver) Ltd.* [1974] 1 Can. L.R.B.R. 114, 119 (determining that collective bargaining is appropriate for those small pockets of employees who want it).

457. See *Woodward Stores* 1 Can. L.R.B.R. at 120.

458. See *id.* at 118 (quoting *Insurance Corp. of B.C.* [1974] 1 Can. L.R.B.R. 403, 407 (Can.)).

459. See *id.* at 119.

established and the bargaining relationship develops.⁴⁶⁰ A more general separated-dynamic model of unit determination could have as its initial foundation, the *Woodward Stores* approach as a basic process available in all types of representation cases, not limited to traditionally hard to organize industries. This could be combined with unit merger provisions allowing the development of larger units, calling for effective bargaining power for units in such contexts as multi-divisional companies. An additional element in an alternative separated-dynamic model could be the elimination of restrictions on bargaining over unit determination questions. This can be accomplished by making it a mandatory subject of bargaining under the NLRA, or by making it a legal subject of bargaining in Canada. The elements of a separated-dynamic element that have been outlined are all within the realm of available labor relations board decision making under present legislation, derived from the Wagner Act model. This is a particularly important consideration in the United States given the political difficulties attendant upon any attempts to amend the NLRA.⁴⁶¹

The significance of adopting such an alternative separated-dynamic model can be seen in its potential role in response to a series of shifts that have occurred in the industrial relations environment in recent years. A separated-dynamic model could facilitate collective organization in the service sector and in the context of new alternative work systems, two areas that depart from the traditional industrial context in which the existing process of bargaining unit determination was developed. Allowing organization on the basis of the scattered workplaces of the service sector, and then merger of units to create negotiating units with effective bargaining power could increase the relevance of the Wagner Act model of unionism in the service sector. In the context of alternative systems of production, a separated-dynamic model could provide a structure for organization appropriate to the diversity of

460. *See id.* at 120.

461. *See* 136 CONG. REC. E3422-02, E3425 (Oct. 24, 1990) (discussing a letter from Elizabeth Dole expressing the Bush Administration's strong opposition to, and impending veto of this 1990 amendment to the NLRA reforming provisions relating to child labor. "[E]nactment of this legislation would not be in accord with the program of the President."); *see also* 142 CONG. REC. H8816-01 (July 30, 1996) (outlining a veto message from President Clinton relating to the Teamwork for Employees and Managers Act of 1995, which would amend the NLRA to allow labor management cooperative efforts that improve economic competitiveness in the United States to continue to thrive).

worker interests created by these production systems. Another policy effect of a separated-dynamic system in the context of multi-divisional companies would be to permit merger of units, allowing the development of broader based bargaining units with greater ability to bargain effectively at a strategic level. In the area of corporate reorganization, allowing a dynamic process of bargaining over unit structures could permit more effective evaluation of the need for bargaining unit alteration in response to corporate reorganization and a negotiated implementation of such unit alteration. Finally, a separated-dynamic model could facilitate adaptation of labor law to emerging structures of economic organization, such as the linking of firms into production networks. While the models of unit determination developed here do not provide a complete response in any of these areas, this analysis indicates the importance of unit determination questions in dealing with these issues. Rethinking the process of bargaining unit determination and the underlying theoretical structure embodied in it may provide additional insights in developing public policy responses for the changing workplace.