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Procedural Cross-Unit Bargaining: An  
Argument in Support of Greater Union  
Solidarity in Labor Negotiations

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**Procedural Cross-Unit Bargaining: An Argument in Support of  
Greater Union Solidarity in Labor Negotiations**

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**The author's name and biographical information do not appear beyond this cover page, which may be removed to preserve anonymity.**

# **Procedural Cross-Unit Bargaining: An Argument in Support of Greater Union Solidarity in Labor Negotiations**

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## INTRODUCTION

The recognized and prospective unions of workers at Yale University have for many years been joined in an alliance that presents a fairly typical example of cross-unit solidarity.<sup>1</sup> This alliance, now known as the Federation of Hospital and University Employees, is comprised of Local 35, representing Yale's service and maintenance workers; Local 34, representing Yale's clerical and technical workers;<sup>2</sup> the Graduate Employees and Students Organization (GESO), which seeks recognition as the bargaining unit for Yale's graduate student teachers;<sup>3</sup> and a group of workers at Yale New-Haven Hospital who seek union recognition.<sup>4</sup>

The reasons for this solidarity are straightforward. The prospective unions feel that their chances of receiving voluntary recognition are greater with the support of Yale's established unions, who might raise the issue of recognition of the prospective

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<sup>1</sup> For a discussion of the history of unions at Yale (with special attention to the prospective union of graduate student teachers), see *WILL TEACH FOR FOOD: ACADEMIC LABOR IN CRISIS* (Cary Nelson ed., 1997).

<sup>2</sup> Locals 34 and 35 are affiliates of the Hotel Employees and Restaurant Employees International Union.

<sup>3</sup> Until 2000, the status of graduate student teachers at private universities as "employees" within the meaning of § 7 of the National Labor Relations Act (NLRA) was uncertain. During a brief golden age from 2000 to 2004, they were employees; now it seems they are not. See *New York University*, 332 N.L.R.B. 111 (2000); *Brown University*, 1-RC-21386 (N.L.R.B. July 13, 2004). For discussion of the issues involved in graduate student unionization, see Neal H. Hutchens & Melissa B. Hutchens, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 GONZ. L. REV. 105 (2003); Joshua Rowland, "Forecasts of Doom": *The Dubious Threat of Graduate Teaching Assistant Collective Bargaining to Academic Freedom*, 42 B.C. L. REV. 941 (2001); Grant M. Hayden, "The University Works Because We Do": *Collective Bargaining Rights for Graduate Assistants*, 69 FORDHAM L. REV. 1233 (2001).

<sup>4</sup> District 1199 of the Service Employees International Union currently represents about 150 dietary workers at the hospital, and is seeking to become the representative of approximately 1,800 other hospital employees. Although Yale New-Haven Hospital and Yale University are independent entities, the hospital has an operating agreement with the university, and several Yale administrators, including its president, serve on the hospital's board of trustees. Employees at both institutions tend to see themselves as part of a single broad community of Yale workers; see the mission statements on the Federation's website at [www.yaleunions.org](http://www.yaleunions.org).

unions in the course of their own contract negotiations with the university. The members of Locals 34 and 35, in turn, believe that an increase in the number of unionized employees at Yale would increase the bargaining strength of all of the unions.

Are such beliefs well founded? To what extent are Locals 34 and 35 really able to assist the prospective unions in their attempt to achieve recognition? And how would the unionization of these additional groups actually benefit the existing unions? Both of these questions involve the issue of cross-unit solidarity – separate unions attempting to stand together in mutual support. How much can be achieved, as a practical matter, from such solidarity? Moral support and encouragement, and perhaps an influence on public opinion, are surely important benefits, and not to be ignored; but can unions actually gain any legal advantage by their solidarity? The answer depends on the extent to which the unions are able to make effective bargaining demands in support of one another without being found to have committed an unfair labor practice for insisting on bargaining beyond the established units.

This essay has five parts. Part I reviews the two categories into which cross-unit bargaining demands are conventionally divided, based on whether a union may or may not legally persist in making the demand to the point of bargaining impasse. Part II proposes an alternative analytical framework that classifies cross-unit bargaining demands into four categories, based on two variables: whether the demand is primarily for the benefit of the union making it or for others; and whether the demand is primarily substantive or procedural (whether it relates to substantive issues of employment or to the bargaining process itself). Part III explores an area of cross-unit bargaining, brought to light by the foregoing analysis, that has been overlooked – procedural cross-unit

bargaining demands, made by one union on behalf of another and relating to procedural issues of bargaining. Such demands have been largely neglected by unions, and have seen little review by courts. Part IV argues for the legality of procedural cross-unit demands, noting that they are able to avoid a legal hurdle that the National Labor Relations Act presents to other cross-unit demands. Part V makes a case for the potential substantive benefits that unions may obtain through the use of procedural cross-unit demands, and examines the possibility that a union might persist in such a demand to the point of impasse without committing an unfair labor practice.

I. THE CONVENTIONAL CATEGORIES: MULTI-UNIT BARGAINING  
AND COORDINATED BARGAINING

Bargaining demands made by separate unions in support of one another, when insisted upon and pursued to the point of impasse, are sometimes acceptable and sometimes an unfair labor practice (as a violation of the union's duty under § 8(b)(3) of the NLRA to bargain in good faith). The labels "multi-unit bargaining" and "coordinated bargaining" have been used by some courts and commentators to distinguish, respectively, illegal and legal cross-unit bargaining demands.<sup>5</sup> Multi-unit bargaining involves attempts by unions to insist on bargaining over issues relating to employees outside the unit or to insist that the employer bargain with several units together. Multi-unit bargaining is an unfair labor practice because courts consider it to be an attempt to alter unilaterally the scope of the bargaining unit, which is a violation of the duty to

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<sup>5</sup> See Milton C. Regan, Jr., *Multi-Unit Collective Bargaining: Autonomy and Dependence in Liberal Thought*, 72 GEO. L.J. 1369, 1370-71 (1984).

bargain in good faith.<sup>6</sup> In coordinated bargaining, on the other hand, unions do not attempt to merge bargaining units. Each unit bargains separately on its own behalf, but some attempt is made to coordinate the outcomes, through such strategies as including members of one union on another union's bargaining committee, or having all the unions bargain separately for the same contract expiration date so as to create the possibility of simultaneous strikes.<sup>7</sup>

The distinction between legal coordinated bargaining and illegal multi-unit bargaining is connected with the distinction between mandatory and permissive subjects of bargaining (those subjects over which the parties *must* bargain, and those over which they may bargain but are not required to). During bargaining, a union or an employer may assume a firm position on a mandatory subject of bargaining and persist in its demand to the point of impasse without committing an unfair labor practice; but an unyielding position on a permissive subject, carried to impasse, constitutes a failure to bargain in good faith, since the other party is not obligated to bargain on that subject. The Supreme Court first established the distinction between mandatory and permissive bargaining subjects in *NLRB v. Wooster Division of Borg-Warner*,<sup>8</sup> and in *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass*<sup>9</sup> the Court articulated a test for determining when a union's bargaining demand concerning workers outside the unit relates to a mandatory subject: the union's demand must represent a direct frontal attack

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<sup>6</sup> See, e.g., *Douds v. Int'l Longshoremen's Ass'n*, 241 F.2d 278 (2d Cir. 1957).

<sup>7</sup> For examples of coordinated bargaining strategies in the automobile industry, see HARRY C. KATZ, *SHIFTING GEARS: CHANGING LABOR RELATIONS IN THE U.S. AUTOMOBILE INDUSTRY* 174-180 (1985).

<sup>8</sup> 356 U.S. 342 (1958).

<sup>9</sup> 404 U.S. 157 (1971).

on a matter that vitally affects its members' job security or the terms and conditions of their employment.<sup>10</sup> Unions engaged in a coordinated bargaining campaign may persist in their demands to the point of impasse without committing an unfair labor practice, provided that each union's demands are limited to subjects that vitally affect that union's employment and are therefore mandatory. But when a union makes a demand that concerns the terms of employment of workers outside its bargaining unit with little effect on those within it, the National Labor Relations Board and the courts are likely to consider that the demand does not relate to a mandatory subject of bargaining for the union that makes it, because it does not vitally affect that union's employment. Such a union has engaged in multi-unit bargaining, by attempting to bargain beyond the scope of the established bargaining unit. Because multi-unit bargaining demands are held to be merely permissive subjects of bargaining, if the employer does not consent to bargain over issues reaching beyond the scope of the unit, the union commits an unfair labor practice by persisting in its demand.

Milton Regan has argued that multi-unit bargaining demands should be considered mandatory subjects, and that unions should therefore be permitted to insist on bargaining beyond their units.<sup>11</sup> He asserts that the Board's determination of the appropriate unit under § 9(b) of the NLRA is made for the purpose of a representation election, and should therefore not be seen as limiting the appropriate scope of the bargaining unit.<sup>12</sup> He further observes that one of the stated purposes of the NLRA is to

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<sup>10</sup> *Id.* at 178-79.

<sup>11</sup> Regan, *supra* note 5.

<sup>12</sup> *Id.* at 1401. For discussion and analysis of the bargaining unit's separate roles in the representation election and in the bargaining process, see Alexander Colvin, *Rethinking Bargaining Unit Determination*:

redress the inequality of bargaining power between employees and their employer, and argues that this requires that multiple unions be permitted to join together in bargaining with their employer, who might otherwise be able to pursue a divide-and-conquer strategy.<sup>13</sup> Another aim of the NLRA, the maintenance of industrial stability, is similarly thwarted by permanently fixing bargaining arrangements that may not remain suitable with the passage of time, rather than allowing units to combine as circumstances suggest.<sup>14</sup> Regan also argues that employees' freedom of choice in selecting bargaining representatives is compatible with treating multi-unit bargaining demands as mandatory subjects.<sup>15</sup> Finally, he notes that under the test established in *Pittsburgh Plate Glass*, multi-unit bargaining demands should ostensibly be considered mandatory subjects when they vitally affect the employment or job security of the members of the union that makes them, and yet courts regularly seem to hold multi-union bargaining to be an unfair labor practice per se, without even reaching the *Pittsburgh Plate Glass* test; they apparently assume that multi-unit bargaining can never satisfy that test.<sup>16</sup> Regan concludes that the legal distinction between multi-unit bargaining and coordinated bargaining continues to be made because of the tension that we feel in a liberal state between the desire for individual autonomy and the practical need for human interdependence.<sup>17</sup> Disallowing multi-unit bargaining permits the law to proclaim its support for bargaining autonomy,

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*Labor Law and the Structure of Collective Representation in a Changing Workplace*, 15 HOFSTRA LAB. & EMP. L.J. 419 (1998).

<sup>13</sup> Regan, *supra* note 5, at 1402.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1403-07.

<sup>16</sup> *Id.* at 1409-11.

<sup>17</sup> *Id.* at 1412-22.

and allowing coordinated bargaining permits it to accept the reality of unit interdependence. Regan suggests that the supposed categorical differentiation between multi-unit bargaining and coordinated bargaining is little more than an artificial distinction that allows the continued simultaneous support of these opposing notions of autonomy and dependence.<sup>18</sup>

Most of Regan's arguments in favor of multi-unit bargaining are concerned with what he believes the law ought to be, not what it is. Only one of his arguments – that it is curious and inconsistent that courts often do not apply the *Pittsburgh Plate Glass* “vitality affects” test to such demands – attempts to support the legality of multi-unit bargaining under the current case law, and even there he suggests that courts should do other than they do. Unlike Regan, I will not attempt in this essay to argue that multi-unit bargaining should be wholly legal, and I will resist making assertions about what courts ought to hold, when they have clearly followed another path.

## II. TOWARD A NEW TAXONOMY OF CROSS-UNIT BARGAINING DEMANDS

In the following pages I will review several cases involving either coordinated bargaining or multi-unit bargaining (depending on whether the Board or court has ruled for the union or against it, respectively). For the sake of this analysis I will momentarily set aside the established labels and categories – mandatory and permissive, coordinated and multi-unit – and will instead ask two basic questions in each case. First, is the union's demand made primarily and directly for the benefit of the members of the union

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<sup>18</sup> *Id.* at 1422.

making the demand, or for someone else? Second, does the union’s demand relate to a substantive contract matter (wages, hours, etc.), or does it instead relate primarily to the bargaining process itself? These two basic questions, each with two possible answers, allow us to construct a simple four-quadrant grid showing the possible combinations of these variables:

	Substantive demand	Procedural demand
For self	<u>Quadrant 1</u>	<u>Quadrant 2</u>
For other	<u>Quadrant 3</u>	<u>Quadrant 4</u>

In each case involving cross-unit bargaining, we may note how the Board or court characterizes the union demand at issue – as a demand for itself or for another, and as relating primarily to a substantive or to a procedural matter – and then we may assign the case to one of the four quadrants. These simple questions are intended to maintain focus on some basic distinctions that can sometimes be obscured by the conventional labels, and to bring attention to an area of cross-unit bargaining demands that unions have largely neglected: those belonging to the fourth quadrant of the grid set forth above, procedural cross-unit bargaining demands.

With regard to the first question, I assume that all union demands are ultimately intended to benefit the union that makes them. It is of course possible that a union might act with purely selfless and altruistic intent, but usually we can see that any demand on behalf of some other group is expected ultimately and indirectly to benefit the union

itself. So the first question, “Is the union’s demand for the union itself, or for another?”, might be rephrased as, “Is the union’s demand intended to benefit the union directly, or indirectly?” I will generally use the “self vs. other” language, with the understanding that some indirect or long-term benefit to the union is typically expected in the “other” cases.

The second question concerns whether a union’s demand relates to the employment relationship or to the bargaining relationship; the former I will call “substantive,” and the latter “procedural.” *Any* demand may of course have some impact on the bargaining process, and some demands may be made more for their value as chips in the bargaining game than for their content; but only demands that directly concern the bargaining process will receive in this essay the label “procedural.” An example of a procedural demand is a union’s insistence that its bargaining committee include members of other unions. Such a demand does not relate to the substantive matters of the employment relationship that are being bargained over; it relates only to the details of the bargaining process itself.

The application of these two questions to various union demands will often reveal a characterization problem: the questions could be answered either way, depending upon how one looks at the demand. For instance, as noted above, almost any union demand on behalf of some other party is ultimately expected to benefit the union itself; sometimes this is so transparent, and the expected benefit so immediate, that it seems appropriate to characterize the demand as being for the union itself, even if it is nominally for someone else. Similarly, unions make procedural demands because they expect them to result ultimately in better substantive employment terms, and when this connection is especially clear and direct, it may seem better to characterize the demand as substantive rather than

procedural. Reading the cases, it is often apparent that different reviewers (the Board and a reviewing court, or a court's majority and the dissent) would not answer these questions in the same way, and that their different answers to these questions are closely connected to their different resolutions of the case.

To start with an easy case, in *Atlas Transit Mix Corp.*<sup>19</sup> the Board held to be a mandatory subject of bargaining a union's demand relating to a "most-favored-nations" clause in its contract. Clauses of this sort provide that if one of the two parties to the contract negotiates with any third party an agreement containing more favorable terms, those terms will be incorporated into the contract. For instance, a most-favored-nations clause in Union A's contract might provide that if the employer settles a contract with Union B or Union C granting more generous wages and benefits, those terms are to be applied in Union A's contract as well. In *Atlas Transit*, the employer had argued that the union's unyielding demand concerning a most-favored-nations clause amounted to an unfair labor practice. The Board did not agree. "Regarding the assertion that the Union insisted on bargaining to impasse on a nonmandatory subject of bargaining, a most-favored-nations clause, this contention is equally without merit.... a most-favored-nations clause, contrary to Respondent's contention, is a mandatory subject of bargaining, and can be insisted on to impasse."<sup>20</sup>

To take up our first question, was the union's demand intended primarily for the benefit of the union itself, or for another? Clearly the former; the union was motivated by the effect that such a clause might have on the terms of its own contract, and the

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<sup>19</sup> 323 N.L.R.B. 1144 (1997).

<sup>20</sup> *Id.* at 1149.

clause could have no direct effect on anyone else's contract. Most-favored-nations clauses, by their very nature, always make reference to other contracts and other parties, but they do not attempt to change the terms of those other contracts or directly affect those other parties. The point of such a clause is of course to alter the terms of the contract in which it appears, and a party making a demand relating to such a clause is concerned with its own contract. The union's demand should therefore be characterized as being on behalf of the union itself. Next, did the demand relate primarily to a substantive matter, or to a procedural one? This second question, again, turns on whether the demand concerns the employment relationship, or the bargaining process. The demand in *Atlas Transit* was plainly substantive; the union's interest in the most-favored-nations clause was due to the effects that it might have on the substantive terms and conditions of the union's employment. Under the *Pittsburgh Plate Glass* test, such a demand would be considered to relate to a mandatory subject of bargaining: it directly affects the employment of the members of the bargaining unit.

The preceding case thus belongs to the first quadrant ("self" and "substantive") of our grid. Such first-quadrant scenarios, in which a union's bargaining demand relates primarily to its own substantive employment issues, are relatively uncontroversial and are not often litigated as cases of cross-unit solidarity. When they do arise, they are typically considered cases of legal coordinated bargaining as opposed to illegal multi-unit bargaining, and the judgment is therefore for the union; demands that relate to a union's own substantive issues are easily seen as involving mandatory subjects of bargaining, and the union may therefore insist on them to impasse without committing an unfair labor practice. In *Pittsburgh Plate Glass* itself, the Board's decision below had held that the

union's demands were of this nature. The Board supported the union's demands on behalf of retirees, on the grounds that the retirees were part of the bargaining unit; but it also argued in the alternative that even if the retirees were not part of the unit, the union in making its demand was essentially trying to protect its own retirement benefits.<sup>21</sup> The Board would thus have described the demand as relating to the union's own substantive employment issues. But the Court disagreed, holding that the union's demand was on behalf of others beyond those in the bargaining unit.<sup>22</sup> Because the Court was not persuaded that the demand directly affected the terms of employment of those in the bargaining unit, it refused to characterize it as relating to a mandatory subject of bargaining.<sup>23</sup> This illustrates the characterization problem mentioned above; the Board and the Court gave different answers to the question "On whose behalf was this demand made?" In terms of our grid, the Board saw this as a first-quadrant demand, but the Court held instead that it belonged to the third-quadrant.

*General Electric Co. v. NLRB*,<sup>24</sup> a landmark coordinated bargaining case, presents an example of a procedural as opposed to a substantive demand. The employer, G.E., objected to the presence on the union's bargaining committee of representatives from G.E.'s other unions. The union, the International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE), continued to insist that its bargaining committee include members of the other unions, and would not yield in this demand. G.E. contended that this was an illegal attempt to force bargaining beyond the scope of the established

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<sup>21</sup> 404 U.S. at 162.

<sup>22</sup> *Id.* at 172-73.

<sup>23</sup> *Id.* at 182.

<sup>24</sup> 412 F.2d 512 (2d Cir. 1969).

bargaining unit; in other words, it was illegal multi-unit bargaining. The Second Circuit Court of Appeals disagreed and upheld the union’s right to make such a demand. Was this demand for the union itself, or for another party? And was it substantive, or procedural? The court answers: “[T]he plain facts are that the IUE proposed negotiating technique... is designed to strengthen IUE’s bargaining position.... it would be nonsense to pretend that IUE’s purpose was not to increase its bargaining strength....”<sup>25</sup> The demand, the court asserts, is on behalf of the union itself (it is its own bargaining strength which the union hopes to increase), and is procedural – that is, it relates not to substantive terms of employment, but to the details of the bargaining process itself. The union aims to achieve a stronger position in the bargaining process, from which it may then bargain over substantive issues. The immediate goal is clearly procedural. This case, then, presents an example of a second-quadrant demand.

It should be noted that *General Electric* does not involve anything like the *Pittsburgh Plate Glass* test for determining when a union’s demand relates to a mandatory subject; indeed, it does not at all discuss the mandatory/permissive question. Rather, the court simply observes that employees have a right under § 7 to bargain collectively through representatives of their own choosing, and that an employer has a duty under § 8(a)(5) to bargain collectively with the representatives of his employees.<sup>26</sup> If the committee had attempted to make substantive demands relating to employees other than those represented by IUE, the analysis would have become more complicated.<sup>27</sup> But

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<sup>25</sup> *Id.* at 519.

<sup>26</sup> *Id.* at 516, 520, 523.

<sup>27</sup> *Id.* at 520.

in fact the committee in this case never tried to bargain for any employees other than those represented by IUE.<sup>28</sup>

In *United States Pipe & Foundry Co. v. NLRB*,<sup>29</sup> three unions of the same employer insisted that all of their contracts have the same expiration date. Each union negotiated with the employer separately, and each bargained only over the expiration date of its own contract, but all demanded the same date. The Fifth Circuit affirmed the Board in upholding the unions' right to make such a demand. This case may also be assigned to our second quadrant: the court notes that each union's demand relates only to itself and its own contract, not to the other unions; and it characterizes the demand as being fundamentally procedural, as relating not to substantive terms of employment but rather to the dynamics of the bargaining process.<sup>30</sup> This case was decided nine years before *Pittsburgh Plate Glass* but the court nonetheless precociously applies a very similar test in determining that the unions' demand involves a mandatory subject:

Under the facts of this case viewed realistically, a common expiration date of all three contracts had a vitally important connection with the "wages, hours, and other terms and conditions of employment" of the employees at each plant.... With a common expiration date, it is obvious that each union might be able to negotiate a more advantageous new contract for the employees represented by that union.<sup>31</sup>

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<sup>28</sup> *Id.* at 522.

<sup>29</sup> 298 F.2d 873 (5th Cir. 1962).

<sup>30</sup> *Id.* at 878 ("[A] common expiration date for all three contracts vitally affects the ability of each union separately to bargain.").

<sup>31</sup> *Id.* at 877.

(Note the similarity of “vitaly important connection” to “vitaly affects.”)

In *Utility Workers Union of America, AFL-CIO*,<sup>32</sup> several unions demanded that their common employer make identical contract offers for all of the units, and withheld final settlement until their demand was met. The Board held that the unions were effectively trying “to force the contract terms negotiated for one unit upon the other units” and had therefore committed an unfair labor practice by bargaining outside of the established units.<sup>33</sup> The Board’s decision suggests that each union’s demand relates primarily not to itself but to other units: a union’s demand that, before it will accept and ratify an offer made to it, identical and concurrent offers must be made to other units, does not primarily affect the terms of its own offer but rather the terms of the other units’ offers. And the Board clearly considers the demand to be substantive in nature, meant to force particular substantive contract terms. Third-quadrant demands of this sort, relating primarily to the substantive terms of another union’s employment, are classic examples of multi-unit bargaining. As Regan warns us to expect, the Board never mentions the *Pittsburgh Plate Glass* test – never considers whether or not each union’s demand might in some way “vitaly affect” the terms of its own employment.<sup>34</sup> The determination that the unions are insisting on bargaining beyond the established units settles the case.

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<sup>32</sup> 203 N.L.R.B. 230 (1973).

<sup>33</sup> *Id.* at 239.

<sup>34</sup> *See supra* text accompanying note 16.

### III. PROCEDURAL CROSS-UNIT BARGAINING: UNEXPLORED TERRITORY

The cases reviewed above involving cross-unit solidarity have illustrated several combinations of answers to our two basic questions (for self or other? substantive or procedural?). We have seen first-quadrant demands on the union's own behalf that relate to terms of employment ("self" and "substantive"); second-quadrant demands on the union's own behalf that relate to the bargaining process ("self" and "procedural"); and third-quadrant demands on behalf of other employees that relate to terms of employment ("other" and "substantive"). Logically, the fourth quadrant ought to produce a demand as well ("other" and "procedural"): a demand made by the union on behalf of other employees that relates to their bargaining process. A basic fourth-quadrant demand might require that the employer negotiate with another group of employees; a union insisting on such a demand to the point of impasse would refuse to settle its own collective bargaining agreement until the employer had also settled one with the other group of employees. There are very few instances of this type of procedural cross-unit demand in the case law, and the legal issue they present appears never to have been properly settled.

*Standard Oil Co. v. NLRB*<sup>35</sup> presents an example of such a fourth-quadrant demand. After a union had reached agreement with the employer on the terms of its own contract, it refused to execute the written contract until another union also reached a contract. This is clearly a fourth-quadrant scenario: the first union's demand was for the benefit of the second union, not for itself; and the demand was not concerned with the

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<sup>35</sup> 322 F.2d 40 (6th Cir. 1963).

substantive terms of the agreement, but merely with its process. The first union did not demand that the second union receive a wage increase, or an improved pension plan; it did not demand that their hours of employment be reduced. All of these matters – wages, hours, etc. – were of course to be governed by the contract which the first union demanded that the employer negotiate with the second union, but the first union’s demand did not relate to any of them and was therefore, by the definition we have been using, not a substantive demand. The demand put pressure on the employer to reach an agreement with the second union, and thus increased the second union’s power in the bargaining process. Demands pertaining to the bargaining process are procedural demands. Even if the second union had not yet been recognized by the employer, so that the first union’s demand that the employer bargain with the second union essentially included a demand that the employer recognize the second union as the bargaining representative for those employees, such a demand should still be considered procedural, because, again, it still relates to aspects (fundamental ones, to be sure) of the bargaining process. A recognition demand is perhaps of a different order than other procedural demands; but nonetheless, it is not a demand about wages, hours, or other substantive issues of employment. It relates only to the process through which those substantive matters will be bargained over.

In *Standard Oil*, the Sixth Circuit held the union’s demand to be an unfair labor practice, agreeing with and enforcing the Board’s decision below. It is important to note, however, that the court explicitly bases its decision on the union’s violation of the duty to execute a written contract after reaching agreement.<sup>36</sup> In other words, after agreement

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<sup>36</sup> *Id.* at 45.

had been reached, any sort of demand from any quadrant, whether substantive or procedural, for self or for other, would have similarly violated the duty to execute a written contract. The decision thus offers little analysis of this particular type of demand, and demonstrates that even where the case law does present a rare example of a fourth-quadrant demand, it provides little insight into how labor law should consider such demands. The *Standard Oil* court distinguishes its case from *United States Pipe & Foundry*,<sup>37</sup> where a coordinated bargaining arrangement had been allowed, by pointing out that the union in *Standard Oil* had failed to bring up its demand at the bargaining table.<sup>38</sup> We cannot infer that the court would have approved of the union's demand that the employer also settle its contract with the other union, if that demand had been made in a timely manner; but at least we can note that the court does not dismiss it merely because it is a demand that relates to another union's bargaining process.

Similarly, in *AFL-CIO Joint Negotiating Committee for Phelps Dodge v. NLRB*,<sup>39</sup> several unions that were engaged in separate simultaneous contract negotiations with their employer demanded simultaneous settlement of all of their contracts. The Board's decision below, against the unions, was based on its belief that what the unions were really trying to do was to merge all the bargaining units and establish a company-wide contract with identical terms for all the unions.<sup>40</sup> Thus the Board did not consider the union's demand specifically as a fourth-quadrant demand, but simply decided that the whole situation smelled of multi-unit bargaining. It held that even if the unions'

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<sup>37</sup> See *supra* note 29 and accompanying text.

<sup>38</sup> 322 F.2d at 45.

<sup>39</sup> 459 F.2d 374 (1972).

<sup>40</sup> *Id.* at 375.

particular demands were all mandatory subjects of bargaining, the overall plan was nonetheless aimed at enlarging the bargaining unit and was therefore illegal.<sup>41</sup> The Third Circuit overturned the Board and held for the unions. However, the court took care to emphasize, more than once, that the posture of the case was such that the scope of its review was limited “to the determination of whether or not the Board’s findings are supported by substantial evidence in the record and have a basis in law.”<sup>42</sup> The court held that the Board’s findings were without such support, because the record indicated that each of the separate bargaining units had conducted separate negotiations with the employer, and that they had not insisted on company-wide terms and conditions of employment.<sup>43</sup> The unions had therefore not committed an unfair labor practice. The posture of the case and the limited scope of review prevented the court from actually considering the legality of the unions’ fourth-quadrant demand. “*Assuming without deciding, as the Board did, that those demands were all mandatory subjects of bargaining, as such the unions may bargain to impasse on each or all of them.*”<sup>44</sup> Neither the Board nor the court in this case actually decided that such demands are mandatory subjects of bargaining. Both were, for different reasons, merely “assuming without deciding” that the demands were mandatory – the Board because it thought it could dispose of the case on more general grounds, and the court because the scope of its review was limited. We are thus again frustrated in our attempt to find real evaluation of fourth-quadrant demands in the case law. As in *Standard Oil*, the court here decided the

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<sup>41</sup> *Id.* at 378 (describing the court’s understanding of the Board’s opinion).

<sup>42</sup> *Id.* at 376, 377.

<sup>43</sup> *Id.* at 378.

<sup>44</sup> *Id.* (emphasis added).

case on other grounds, and we have no indication of the degree of favor, or disfavor, that such demands might receive under labor law.

#### IV. THE LEGALITY OF PROCEDURAL CROSS-UNIT BARGAINING

What would a court say if it were to consider the merits of a fourth-quadrant demand maintained by a union to the point of bargaining impasse? Would the union be participating in legal coordinated bargaining, or would it be guilty of illegal multi-unit bargaining? As with other demands, this question would come down to whether the demand relates to a mandatory subject of bargaining or not; and this should be determined by the *Pittsburgh Plate Glass* test: does the union's demand directly address a matter that vitally affects its job security or the terms and conditions of its employment?

We noted above that Milton Regan has observed that when courts conclude that a union's demand amounts to an attempt to expand the bargaining unit by bargaining over matters relating to employees outside the established unit, they often do not reach the *Pittsburgh Plate Glass* test; instead they simply declare the demand to be multi-unit bargaining and an unfair labor practice.<sup>45</sup> I believe that some insight into the potential legality of fourth-quadrant demands may be gained from a close look at the cases Regan cites, though they are not themselves fourth-quadrant cases. Regan takes issue with the way the cases have been decided, and thinks that courts ought still to apply the "vitally affects" test to demands for multi-union bargaining, arguing that there are clearly situations in which such demands would vitally affect the employment of the union

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<sup>45</sup> See *supra* text accompanying note 16.

making them. Even if it is not possible to defend the legality of all multi-unit bargaining generally under the current practices of courts (as Regan laments), it may be nonetheless possible to support the narrow legality of fourth-quadrant demands specifically, under the current state of the law. Regan, by failing to consider the distinction between substantive and procedural demands, has perhaps painted too bleak a picture of the legality of unions' extra-unit bargaining demands.

Regan cites a number of cases to illustrate that courts rarely apply the *Pittsburgh Plate Glass* test once they have decided that a union is bargaining beyond the scope of its established unit, and if they do apply it, they seem to conclude that multi-unit bargaining can never satisfy it.<sup>46</sup> In *Oil, Chemical & Atomic Workers Int'l Union v. NLRB*,<sup>47</sup> the union had insisted on bargaining over benefit plans on a company-wide basis, demanding that the employer negotiate terms for several bargaining units at once. The D.C. Circuit observed that OCAW's demand called for multi-unit bargaining, and that this was merely a voluntary subject over which the union could not insist that the employer bargain.<sup>48</sup> Similarly, in *Amax Coal Co. v. NLRB*,<sup>49</sup> a mine workers' union had bargained to impasse on its demand for a contract clause that would require the employer coal company to apply the terms of the existing union contract to employees at other mines. The Third Circuit stated that the scope of the bargaining unit is not a mandatory subject, that the clause would require the company to bargain with the union about wages and other conditions of employment of employees in other units, and that the union had therefore

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<sup>46</sup> Regan, *supra* note 5, at 1409-10 and footnotes thereto.

<sup>47</sup> 486 F.2d 1266 (D.C. Cir. 1973).

<sup>48</sup> *Id.* at 1268.

<sup>49</sup> 614 F.2d 872 (3d Cir. 1980).

committed an unfair labor practice.<sup>50</sup> Neither the *OCAW* court nor the *Amax* court considered *Pittsburgh Plate Glass*. In *Sperry Systems Mgmt. Div., Sperry Rand Corp. v. NLRB*,<sup>51</sup> the Second Circuit found that a union's demand that its contract be extended to cover employees at a new facility amounted to an attempt to bargain over the terms of employment of workers outside the unit.<sup>52</sup> The court did invoke the *Pittsburgh Plate Glass* test, but held that the terms of employment at the new facility did not vitally affect the workers represented by the union.<sup>53</sup>

In all of Regan's examples, the guilty unions have attempted to bargain over the substantive terms of employment of employees outside the bargaining unit; there are no examples of demands relating to other employees' bargaining process (i.e., fourth-quadrant demands). We may be tempted to believe that this is due merely to the near total absence of fourth-quadrant cases, and to assume that if there were cases with demands relating to other employees' bargaining process, they would most likely also be condemned by these courts as multi-unit bargaining. This, however, is not certain. The language in which these cases condemn multi-unit bargaining embraces only substantive demands, not procedural ones, and even emphasizes the substantive nature of these extra-unit demands as specific reason to condemn them.

In *OCAW* the D.C. Circuit offers a simple summary of the law's objections to multi-unit bargaining: "Under this framework [of *Borg-Warner*], multi-unit bargaining has long been held a voluntary subject. Allowing a party to insist on bargaining on other

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<sup>50</sup> *Id.* at 884.

<sup>51</sup> 492 F.2d 63 (2d Cir. 1974).

<sup>52</sup> *Id.* at 69-70.

<sup>53</sup> *Id.* at 70.

than a unit basis, it has been thought, would interfere with another provision of the Act. Section 9(a), to which the duty to bargain in good faith is made subject, states....”<sup>54</sup> The court proceeds to quote from § 9(a), which is worth doing here as well:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Here the court helpfully returns attention to the statutory language from which the objections to multi-unit bargaining arise. There are in fact two basic ways that multi-unit bargaining runs afoul of this section. The first we have discussed at length: a union is expected to limit its bargaining to matters relating to the substantive issues of its own employment, and therefore its bargaining demands must somehow directly and vitally affect its own employment conditions (the *Pittsburgh Plate Glass* test). This limits the ability of a union to make demands on behalf of employees outside its bargaining unit. But § 9(a) presents a second obstacle to such demands: representatives selected by employees are to be their exclusive bargaining representatives; no one else can bargain for them. Thus a union has no right to bargain on behalf of employees outside its unit, because only those representatives chosen by those other employees are entitled to represent them. Even if the first obstacle were overcome – even if a union’s demand on behalf of other employees were to satisfy the *Pittsburgh Plate Glass* test – the union’s

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<sup>54</sup> 486 F.2d at 1268.

demand would still run up against this second barrier: only representatives selected by the other employees may bargain on their behalf.

It is this second obstacle, I believe, that prevents courts from reaching the *Pittsburgh Plate Glass* test in cases of multi-unit bargaining; they in fact consider it to be the first obstacle, and do not need to go beyond it in disposing of the matter. If, for instance, Yale University's Local 35 were to insist on bargaining over the wages and hours of Yale's hospital employees, a reviewing court would not need to try to puzzle its way through convoluted explanations of how these matters somehow vitally affect Local 35 under *Pittsburgh Plate Glass*. Rather, the court could simply rule that under § 9(a), only representatives selected by hospital employees are entitled to bargain over their wages and hours, and that Local 35 may therefore not do so. This is one answer to Regan's question why courts do not apply the *Pittsburgh Plate Glass* test to multi-unit bargaining: they are able to decide the matter without it. This may also explain the prejudice and skepticism that Regan notes that courts seem to have when they do apply that test to multi-unit bargaining: the existence of this other obstacle under § 9(a), even when not explicitly mentioned, may lead courts simply to hold by a sort of imprecise legal shorthand that the demand flunks the *Pittsburgh Plate Glass* test.

I suggested above that fourth-quadrant demands might meet with greater success under the current law than other multi-unit bargaining demands. Suppose that Local 35, rather than trying to bargain over hospital employees' wages and hours, demanded instead simply that Yale settle a collective bargaining agreement with its hospital

employees.<sup>55</sup> This would be a fourth-quadrant demand: it is made on behalf of someone other than the union itself, and it relates not to substantive terms of employment but rather to the bargaining process itself.<sup>56</sup> Local 35 would still, of course, have to satisfy the *Pittsburgh Plate Glass* test by demonstrating somehow that a collective bargaining agreement for hospital employees is a matter that vitally affects Local 35's employment; we will return to this point shortly. But note that the obstacle presented by § 9(a) does not arise in this scenario. In our earlier example Local 35 could not bargain over hospital employees' wages and hours because, under § 9(a), representatives chosen by hospital employees "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." In other words, only representatives selected by hospital employees can bargain over their substantive terms of employment, and thus Local 35's substantive demands on behalf of hospital employees are not allowed. But § 9(a), by its very language, applies only to such substantive demands. Local 35's demand that Yale bargain collectively with its hospital employees is not incompatible with the requirement that representatives chosen by the hospital employees shall be the exclusive representatives for bargaining over terms of employment. Local 35's fourth-quadrant demand does not seek to represent hospital employees or to bargain over the terms of their employment.

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<sup>55</sup> In these hypotheticals I assume that the hospital employees will have given some indication of a desire for collective representation. See *infra* text accompanying notes 82-88 for further discussion of how this indication might be expressed.

<sup>56</sup> For recognition demands as procedural rather than substantive, see *supra* text accompanying note 35.

It cannot be said exactly that the case law supports this reasoning, but that is largely because the case law does not offer many examples of fourth-quadrant demands. *Standard Oil* and *Phelps Dodge*, in which unions refused to settle their contracts until other unions also reached contracts, did indeed present fourth-quadrant demands somewhat similar to our imagined Local 35 demand; but in those cases, as we noted, the courts did not pass judgment on the fourth-quadrant demand as such.<sup>57</sup> Thus the legality vel non of fourth-quadrant demands is not entirely settled; and it certainly seems to be the case that a union's demand that its employer voluntarily recognize a separate union of previously non-unionized employees remains a matter of first impression. But if the D.C. Circuit is correct in asserting that demands on behalf of employees outside the bargaining unit are problematic because they violate § 9(a),<sup>58</sup> then that objection applies only to substantive demands relating to terms of employment, and not to procedural demands. This follows from the language of § 9(a), and is supported by the language in which courts condemn extra-unit demands.<sup>59</sup>

To return to our hypothetical, if Local 35 were successful in the argument that its demand (that Yale settle a collective bargaining agreement with representatives of its hospital employees) does not violate § 9(a) in the way that a substantive demand would, the demand would still have to satisfy the *Pittsburgh Plate Glass* test, which it would perhaps face without the prejudice that attaches to substantive multi-unit bargaining demands when they are judged under that test. Local 35 would have to convince the

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<sup>57</sup> See *supra* text accompanying notes 35-44.

<sup>58</sup> See *supra* note 54 and accompanying text.

<sup>59</sup> See, e.g., *Amax Coal*, 614 F.2d at 884 (noting that the offending clauses “would require Amax to bargain about *wages and conditions* of employment of employees in other units”) (emphasis added).

Board that a collective bargaining agreement for hospital employees would be a direct frontal attack on a matter that vitally affects the job security or conditions of employment of Local 35's members. Both of Yale's existing unions clearly believe that this is true. The following excerpt is taken from a 2003 bulletin from the leadership of Yale's unions to their members:<sup>60</sup>

“All our futures are tied together,” Local 34 President Laura Smith told Yale negotiators. “We care about the hospital employees and the Hospital because we care about achieving pensions that will allow us to retire with dignity; because we care about good wages; because we care about improving our workplace today and keeping our jobs tomorrow.” ... Local 35 President Bob Proto reminded Yale of our history together. “Everything we've achieved in our 60 years at Yale has been through unity and strength – our very survival depends on it. Yale has tried to divide and conquer our unions before. But we know that our wages, our security, our pensions and everything else that matters to our members is tied to standing together with all the workers at Yale. We'd much rather think it out and talk it out, but we're prepared to fight it out if you insist.”

Proto has also stated flatly, “What's important for us is to strengthen the number of union members on campus.”<sup>61</sup>

The unions' explanations for their support for the hospital employees seem almost to have been composed with the *Pittsburgh Plate Glass* test in mind. They support other campus unions because they believe that it has an affect on their own job security (“keeping our jobs,” “our security,” “our very survival”) and their own wages and other

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<sup>60</sup> Federation of Hospital and University Employees, *Negotiations Bulletin*, Jan. 28, 2003.

<sup>61</sup> David Dashefsky, *GESO Walkout Results in No Concrete Gains for Union Movement*, Yale Daily News, April 10, 1995.

conditions of employment (pensions, wages, “improving our workplace”). Their support is based less on a desire to improve hospital employees’ employment conditions than to improve their own. These are exactly the sorts of issues that unions are supposed to be concerned with, the substantive terms and conditions of their members’ employment; Locals 34 and 35 believe that those terms and conditions will be improved by an overall increase in the number of unionized workers on campus. They are not making substantive demands on behalf of those other workers, and they are not attempting to add those workers to the existing bargaining units. They have thus managed to steer clear of the usual legal pitfalls of multi-unit bargaining.

#### V. PROCEDURAL CROSS-UNIT DEMANDS AS MANDATORY SUBJECTS OF BARGAINING

Yale’s existing unions have, to this point, raised the issue of union recognition for hospital employees only as a permissive subject of bargaining, which Yale has been free to ignore.<sup>62</sup> What if the unions were instead to insist that Yale recognize a hospital employee union and to condition settlement of their own contracts on that issue? As argued above, a fourth-quadrant demand of this sort would seemingly avoid the most common objections to multi-unit bargaining; but there would be no getting around the *Pittsburgh Plate Glass* test. To convince the Board that this is a mandatory subject as to which they may insist on bargaining without committing an unfair labor practice, the

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<sup>62</sup> A flat declaration by the existing unions that they refuse to bargain further unless Yale recognizes the hospital employees would serve as a clear indication that the unions have decided to treat the matter as a mandatory subject. To date, however, the unions have expressed support for the hospital employees but have never made unionization for the hospital employees a precondition to settling their own contracts; new contracts for Locals 34 and 35 were settled in September 2003.

unions would have to offer a persuasive argument in support of their contention that this matter vitally affects their own employment. Obviously the breathless assertion that “our very survival depends on it” cannot by itself create a mandatory subject of bargaining. The circumstances of negotiation are likely to elicit much inflated rhetoric from all sides, but impassioned press releases are not dispositive of the legal questions. What arguments might the unions make in support of their position?

One possibility is suggested by the fact that coordinated bargaining is legal, as we have seen. Separate unions are free to coordinate with one another their separate bargaining efforts with their employer. They may, for example, demand that their bargaining committees include representatives from other unions,<sup>63</sup> or that all of their contracts have the same expiration date,<sup>64</sup> or that their contracts be modified to incorporate more favorable terms subsequently granted to employees in other units.<sup>65</sup> Such demands have been held to concern mandatory subjects of bargaining, and unions may insist on them without committing an unfair labor practice. Courts have recognized that the purpose and result of coordinated bargaining is to give unions greater bargaining power,<sup>66</sup> which in turn can yield better substantive terms of employment.<sup>67</sup>

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<sup>63</sup> *General Electric Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969).

<sup>64</sup> *United States Pipe & Foundry Co. v. NLRB*, 298 F.2d 873 (5th Cir. 1962).

<sup>65</sup> *Atlas Transit Mix Corp.*, 323 N.L.R.B. 1144 (1997).

<sup>66</sup> *See, e.g., General Electric*, 412 F.2d at 519 (noting that the coordinated bargaining strategy “is designed to strengthen IUE’s bargaining position”); *United States Pipe & Foundry*, 298 F.2d at 878 (observing that “a common contract expiration date for all three contracts vitally affects the ability of each union separately to bargain”).

<sup>67</sup> *See, e.g., United States Pipe & Foundry*, 298 F.2d at 877 (“With a common expiration date, it is obvious that each union might be able to negotiate a more advantageous new contract for the employees represented by that union.”).

So Union A and Union B may therefore engage in these sorts of coordinated bargaining strategies during their negotiations with their common employer, yielding more advantageous contract terms for both unions; courts have declared such strategies to be legal and have acknowledged that better contract terms are the result. Imagine next a slightly different scenario: suppose that the employer has only one recognized union, Union A, and that another group of employees are trying to organize a second union, Union B. Union A, in the process of negotiating a new contract with the employer, demands that the employer recognize Union B and negotiate a collective bargaining agreement with it. Union A argues that the employer's recognition of Union B is a matter that vitally affects Union A's wages and other terms and conditions of employment. The reasoning is as follows: Union A's coordinated bargaining demands vitally affect Union A's employment (as is proved by the fact that coordinated bargaining demands are held to relate to mandatory subjects); bargaining between the employer and Union B is a prerequisite of Union A's coordinated bargaining demands (for otherwise Union A would have no one with whom to coordinate its bargaining); therefore bargaining between the employer and Union B vitally affects Union A's employment.

This argument seems somehow facetious, but its logic is fairly straightforward. If the employer recognizes and bargains with Union B, Union A would be able to take advantage of legal coordinated bargaining strategies and would likely end up with a better contract and more advantageous terms and conditions of employment. For simplicity's sake, this argument involved only two unions, but the same logic would apply if Unions A and B were demanding the recognition of Union C, or if A, B, and C were demanding the recognition of D, etc. The greater the number of parties bargaining

with the employer, the greater the possibilities of coordinating their bargaining. This is precisely what Bob Proto of Local 35 has in mind when he states that it is important to increase the number of union members on campus, and that doing so will result in better wages and pensions for Local 35. He is not under the impression that a collective bargaining agreement for hospital employees will itself provide for improved wages for Local 35; rather, he considers that the addition of another union with whom to coordinate bargaining will produce greater bargaining power and therefore better contract terms. The holdings of the courts' coordinated bargaining cases fully support this idea.

One might object that it seems undesirable to allow Local 35 to force Yale to bargain collectively with other employees. Here we must remember what it means for something to be a mandatory subject of bargain. It means only that a union or employer may insist upon such a demand to the point of impasse without committing an unfair labor practice; it does not mean that the other party must accept the demand. When we suggest that Local 35 should be allowed to insist that Yale recognize the hospital employees, we do not mean that Yale should be forced to grant this, only that Local 35 should be permitted to continue to demand it without having violated the duty to bargain in good faith. Wages, for instance, are a mandatory subject of bargaining, but that does not mean that Local 35 can compel Yale to pay it any amount that the union wishes; if Yale considers the union's demand to be too high, it may reject it and make an offer of its own. Similarly, Yale would be free to reject Local 35's demand that it recognize the hospital employees, and instead come up with its own counteroffer ("Let them rather win a Board election."). My argument is merely that Local 35 should not be guilty of an

unfair labor practice if it continues to insist upon its demand. This may result in impasse, as is true of any mandatory bargaining demand.

Joel Rogers has offered additional evidence that may be pressed into service in support of Bob Proto's assertion that an increase in the number of unionized workers is a matter that vitally affects the terms of employment of the existing unions.<sup>68</sup> Rogers describes two factors that tend to keep unions weak in the United States: the low level of union density (the low percentage of unionized employees out of the total number of employees who could be unionized), and the lack of union centralization (the splintering of unionized employees into many separate bargaining units). He demonstrates that when both of these factors are present, employers have strong incentives to be hostile to unions and to attempt to eradicate them altogether.<sup>69</sup> But these structural incentives change when unions begin to become stronger:

At some point, however, if unions succeed in consolidating themselves, employers' incentives shift markedly – first to enforcement and then containment of a compromise with workers. With growing levels of unionization, likely expressed in increased national political activity as well as increased membership and coordination of the labor movement itself, employers accept the reality of union power. They move from attempting to eliminate its costs to generalizing them.<sup>70</sup>

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<sup>68</sup> Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1.

<sup>69</sup> *Id.* at 40-41 ("With union strength low, a strategy of rollback, or attempted destruction of unions, is pursued.").

<sup>70</sup> *Id.* at 42.

Rogers suggests that because unions are not allowed to insist on multi-unit bargaining, they are unable to overcome their decentralization,<sup>71</sup> and that an increase in the number of unionized workers is of no benefit as long as the unions remain separated.<sup>72</sup> But as we have seen, even though unions cannot engage in full-blown multi-unit bargaining (e.g. by demanding that an employer bargain over wages and benefits with several units at once), courts have ruled that they are nonetheless able legally to coordinate their bargaining demands in a variety of ways that increase their bargaining power with their employer. The unions, for example, in *General Electric* and *United States Pipe & Foundry* were clearly able to overcome to a great extent the problem of decentralization and fragmentation that Rogers describes.<sup>73</sup>

Rogers shows that an increase in the number and coordination of unionized workers makes it less likely for each union that its employer will pursue a strategy of hostility and attempted rollback. If Rogers' arguments are sound, and if we may assume that having their union busted is a problem that vitally affects the terms and conditions of workers' employment, then a demand by a union that its employer bargain collectively with other groups of its employees would seem to be a direct frontal attack on a matter that vitally effects their employment. It would therefore satisfy the *Pittsburgh Plate Glass* test and qualify as a mandatory subject of bargaining. Given that such a demand, as noted above, does not violate the literal language of § 9(a) in the way that demands

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<sup>71</sup> *Id.* at 138 (“The prohibition against efforts to force expansion of the scope of the bargaining unit encourages unions to confine the range of their action to particular bargaining units, tending to fragment workers.”).

<sup>72</sup> *Id.* at 59 (“Elementally, numbers mean little without organization, and organization means little without coordination of those organized. It follows that without coordination increases in membership do not proportionately increase power.”).

<sup>73</sup> See *supra* notes 63-67 and accompanying text.

relating to other employees' substantive issues clearly do, it seems that it might be possible to satisfy the Board or a court that a union should be allowed to insist on such a demand without committing an unfair labor practice. Rogers' work also supplies us with a policy argument in favor of allowing unions to make fourth-quadrant demands. His models show that higher levels of unionization and coordination among unions ultimately lead to a reduction in hostility between unions and management<sup>74</sup> and an increase in social efficiency,<sup>75</sup> a result very much in keeping with the stated policy goals of the NLRA.<sup>76</sup>

The Supreme Court has also offered support for the idea that unions may benefit from the unionization of additional employees in *Eastex, Inc. v. NLRB*,<sup>77</sup> a case that is not itself concerned with cross-unit bargaining, but which contains the germ of a potentially very strong vision of cross-unit solidarity.

In *Eastex* the Court held that a union had a right under § 7 to distribute a newsletter containing not only material relating to that particular union but also material relating to the political interests of organized labor generally. The Court observes that the "mutual aid or protection" language of § 7 was modeled on similar language in the Norris-LaGuardia Act, of which the legislative history indicates that Congress intended to protect the "right of wage earners to organize and to act jointly in questions affecting

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<sup>74</sup> Rogers, *supra* note 68, at 42 ("The possibility of cooperation between unions and employers becomes mutually apparent.").

<sup>75</sup> *Id.* at 34-35.

<sup>76</sup> 29 U.S.C. § 151 (setting forth as policy goals "removing certain recognized sources of industrial strife and unrest" and "encouraging practices fundamental to the friendly adjustment of industrial disputes").

<sup>77</sup> 437 U.S. 556 (1978).

wages, conditions of labor, *and the welfare of labor generally.*”<sup>78</sup> The Court defended statements in the newsletter as “concerted activity for the ‘mutual aid and protection’ of petitioner’s employees *and of employees generally.*”<sup>79</sup> Furthermore, the Court states, “Unions have a legitimate and substantial interest in continuing organizational efforts after recognition. Whether the goal is merely to strengthen or preserve the union’s majority, or is to achieve 100% employee membership... these organizing efforts are equally entitled to the protection of § 7.”<sup>80</sup> This statement comes in the context of a union’s attempts to further organize its own bargaining unit, not to organize other workers generally; but these two statements taken together make a strong case for the interest of unionized employees in the unionization of other employees, and especially other employees of the same employer. Locals 34 and 35 have long asserted that they would be directly strengthened by the unionization of other segments of Yale’s employees, and the Court’s remarks in *Eastex* seem to support their interest in this matter.<sup>81</sup>

In our hypothetical, Local 35 has demanded, as a condition of settling its contract, that Yale also settle a collective bargaining agreement with its hospital employees, and I have suggested that under the current case law, one could argue that such a demand should be considered to relate to a mandatory subject of bargaining. We have not yet,

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<sup>78</sup> *Id.* at 565 n.14 (emphasis added).

<sup>79</sup> *Id.* at 570 (emphasis added).

<sup>80</sup> *Id.* at 575 n.24.

<sup>81</sup> To be sure, the Court is only talking about § 7 rights, and to hold that a thing is protected under § 7 does not necessarily make it a mandatory subject of bargaining; a union’s right under § 7 to organize other employees of the same employer does not at once translate into the union’s right to insist as a bargaining demand that the employer also bargain with those other employees. Nonetheless, the Court’s statements are quite compatible with, and even seem to anticipate, Rogers’ findings, and suggest that the unionization of additional employees can be a matter that satisfies the “vitally affects” test of *Pittsburgh Plate Glass*.

however, considered that it might be the case that most hospital employees do not wish to become unionized, and that this is certainly not a decision that Local 35 can make for them over their opposition. Hospital employees have a right under § 7 to choose their own bargaining representatives, or to choose not to be represented collectively at all; it is a decision that is wholly theirs to make. Interference by Local 35 with the hospital employees' decision concerning representation would be a violation of § 8(b)(1)(A),<sup>82</sup> and acquiescence by Yale in Local 35's demand would be a violation of § 8(a)(1);<sup>83</sup> it is not the place of Local 35 or of Yale to decide if hospital employees are to be represented collectively. This principle emerges directly from the statutory language of §§ 7-8, and has been emphasized by courts faced with situations in which a union desires that other employees be added to its bargaining unit.<sup>84</sup> If the employer opposes the union's demand for bargaining unit accretion, a union's insistence on it will constitute an illegal attempt to expand the scope of the bargaining unit;<sup>85</sup> but even when a demand for accretion meets with the employer's consent, it nonetheless deprives the other employees of the right to decide for themselves whom they wish to have as their bargaining representative, or whether they wish to be represented collectively at all.<sup>86</sup>

Local 35, then, could not simply demand that Yale bargain collectively with the hospital employees without trampling on their § 7 rights; but it could demand that Yale

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<sup>82</sup> 29 U.S.C. § 158(b)(1)(A) ("It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7....").

<sup>83</sup> 29 U.S.C. § 158(a)(1) ("It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.").

<sup>84</sup> *See, e.g.,* Welch Scientific Co. v. NLRB, 340 F.2d 199 (2d Cir. 1965); Sheraton-Kauai Corp. v. NLRB, 429 F.2d 1352 (9th Cir. 1970); Boire v. Int'l Bhd. of Teamsters, 479 F.2d 778 (5th Cir. 1973).

<sup>85</sup> *See supra* note 6 and accompanying text.

<sup>86</sup> *See, e.g.,* Boire, 479 F.2d at 799.

bargain with its hospital employees if a majority of them express a desire for such collective representation. What form would this expression take? One possibility would be a Board election; Local 35 could demand that Yale agree not to appeal the result of such an election, and to bargain with the hospital employees if they win it. Some less formal process might suffice as well. In cases involving bargaining unit accretion, the Board and the courts have indicated that the § 7 rights of the employees who are to be added to the union are not violated if those employees are allowed “the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them.”<sup>87</sup> This “other evidence” can consist of a majority of signatures on union authorization cards, provided that such signatures represent a meaningful expression of intent.<sup>88</sup> In our hypothetical, Local 35 is demanding that Yale recognize a hospital employee union voluntarily (i.e., without a Board election), and so any of the means by which employers typically determine the presence of a majority before granting voluntary recognition would suffice here as well (card count; secret-ballot poll; etc.).

## CONCLUSION

The established classificatory framework for cross-unit bargaining is imprecise and obscures the central reason why most multi-unit bargaining is condemned by the

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<sup>87</sup> *Melbet Jewelry Co.*, 180 N.L.R.B. 107, 109 (1969), followed by, e.g., *Boire*, 479 F.2d at 795-96.

<sup>88</sup> *Cf. Sheraton-Kauai Corp.*, 429 F.2d at 1357 (finding authorization cards to be an inadequate expression of intent because employees “were merely ratifying what they had been advised had already been done,” believing the result to be a foregone conclusion).

Board and the courts: it is typically found to relate to the substantive terms of employment of employees outside the bargaining unit. Remembering that unions make procedural as well as substantive demands, and considering the possibility of procedural bargaining in the cross-unit realm, we find that such procedural cross-unit demands seem to avoid the legal obstacles that confront most multi-unit bargaining, and may allow for greater strategic advantages than are available with conventional coordinated bargaining.