

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**ALBERT EINSTEIN COLLEGE OF MEDICINE
OF YESHIVA UNIVERSITY
Employer-Petitioner (2-RM-2069)**

and

**Case Nos. 2-UC-528
2-RM-2069**

**1199 NATIONAL HEALTH & HUMAN SERVICE
EMPLOYEES UNION, AFL-CIO
Union-Petitioner (2-UC-528)**

**DECISION AND ORDER DISMISSING PETITION IN CASE NO. 2-RM-2069 AND
CLARIFYING UNIT IN CASE NO. 2-UC-528**

Upon petitions filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Geoffrey E. Dunham, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding¹, it is found that:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.

2. The parties stipulated and I find that Albert Einstein College of Medicine of Yeshiva University (herein the Employer), a New York Corporation with an office and place of business located at 1300 Morris Park Avenue, Bronx, New York, is engaged in the business of providing health care services.² Annually, in the course and conduct of

¹ The briefs, filed by Counsel to the Employer and the Union, have been carefully considered.

² The bargaining unit as issue in the instant case was formed in 1967. The Board's Health Care Rule excepts from coverage "existing nonconforming units." The Board

its business operations, the Employer derives gross revenues in excess of \$250,000 and purchases and receives at its New York facility goods and supplies valued in excess of \$50,000, such goods and supplies having originated directly from sources outside of the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that 1199 National Health and Human Service Employees Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) and Section 2(6) and (7) of the Act.

5. On December 5, 1997, the Employer filed the petition in Case No. 2-RM-2069 seeking an election among employees employed in the Research Information Technology Department (RIT). On February 11, 1998, the Union filed the petition in Case No. 2-UC-528 contending that the employees in RIT are an accretion to its existing unit. On February 19, 1998, the cases were consolidated for hearing.

The Union represents a bargaining unit of over 1000 service, technical, and clerical employees employed by the Employer. The term of the most recent collective-bargaining agreement is October 1, 1995 through September 30, 1998. The collective-bargaining agreement, in relevant part, provides that, "[t]he employer recognizes the Union as the exclusive representative for the purpose of collective bargaining for service, technical and clerical employees of the College in the job classifications listed in Stipulation I." Stipulation I includes, but is not limited to, the following positions:

evaluates such units, not under the Rule, but under "traditional representational principles." *Pathology Institute*, 320 NLRB 1050 (1996).

Admissions and Information Assistant, Alcohol Counselor, Photographic Technician, Chartist, Photographer, Projectionist, Computer Graphic Artist, Medical Illustrator, Video Technician, Electronic Technicians, Electronic Engineer, Typesetter, Child Development Specialist, Child Life Worker, Clerk, Cashier, Typist, Telephone Operator, Receptionist, (and numerous other clerical positions), Lab Technician, Lab Technologist, various Technicians, Mental Health Workers, Computer Programmers, Library Assistants, Licensed Practical Nurses, Counselors, Methadone Intake Workers, Pharmacists, Physicians Assistants, Psychologists, Technicians (X-Ray, ultrasound, research), various service positions (including cooks, drivers), Social workers, Special Education and Vocational Counselors, Speech Language Pathologists and Audiologists, Maintenance workers, and Mechanics.

The unit consists of both professional and non-professional employees. Registered Nurses are represented by another union. There are also several classifications of professional employees, e.g. accountants, that are not part of the bargaining unit. It does appear that all non-professional employees of the Employer, other than those specifically excluded by the contract, are part of the Petitioner's bargaining unit.

An election was conducted in this unit in 1967 under the auspices of an independent monitor. Separate votes were taken among the employees employed by the Employer in its clerical, service and technical divisions. While a copy of the original collective-bargaining agreement between the parties does not contain a listing of titles covered by the agreement, Bernie Minter, chair of the 1199 Chapter at the Employer's facility from its formation in 1967 until 1986, testified that the unit has always included both professional and non-professional positions.³

³ According to Minter, professionals voted in the technical unit.

The petition in Case No. 2-RM-2069 seeks an election in a unit consisting of the employees employed in the Employer's Research Information Technology Development. These positions are currently filled by four individuals – 2 Network Systems Specialists (Paul Kalten and Thomas Cavouto), one Network Systems Analyst (Jacek Ponarski) and one Network Services Supervisor (Lawrence Simmons). The Union argues that the employees in RIT do not constitute a separate appropriate unit, but should be placed in its existing unit and the UC petition was filed to accomplish this result.

The Union maintains that the disputed positions are within the scope of its current unit in that the educational requirements, skill levels and terms and conditions of employment of these positions are similar to those for many other unit positions. The Union claims that the Network Service Specialists perform duties previously performed by the Hardware Specialist, which was a bargaining unit position. The Union asserts that the functions of the Network Systems Analyst and Network Services Supervisor positions have evolved with the development of computer networking technology, and their functions, duties, and skill levels are comparable to other unit positions. Finally, the Union maintains that none of the positions are professional as defined by the Act and that the position of Network Services Supervisor is not a supervisory position pursuant to Section 2(11) of the Act.

The Employer maintains that the employees in the four positions in dispute are professional employees. Moreover, the Employer asserts that the Network Services Supervisor is a supervisory position within the meaning of the Act. Further, the Employer disputes that the Network Services Specialist position is a successor position to the Hardware Specialist bargaining unit position, or that any of the disputed positions share a community of interest with the rest of the bargaining unit. With respect to the Network Systems Analyst position, the Employer claims that the parties have specifically excluded this position from the unit by agreement.

The record revealed that the Employer established a computing center in or about 1968.⁴ According to witness Robert Curci, a computer programming employee of the Employer for 35 years, the computing center at its conception was staffed by computer programmers and operators, and they were part of the 1199 bargaining unit. The computing center's focus was called scientific computing. In approximately 1971, a business computing group was established. At that point in time, the original computing group became known as the scientific group, in order to differentiate itself from the business group. The business computing group, according to Curci, performed accounts receivable and payable functions as well as handle all payroll matters.⁵ According to Curci, the business computing group and the scientific group functioned separately and each had their own director. While both were located on the same floor, the scientific group was housed in a separate room. In 1971, each group had approximately 20 employees. The business computing group employed a group of at least three individuals known as "systems analysts," and at least six programmers.

The business computing aspect of the computing center was abolished in March 1973, and all employees performing business computing functions were laid off, except for one computer operator who was retained by the scientific computing group. In 1977, Dr. Robert Lummis⁶ became director of the scientific computing group. It was at that time that the computing center became known as the Scientific Computing Center or SCC.

According to Dr. Lummis, SCC performed four basic functions with respect to the Employer's computer systems – statistical consulting, data processing,

⁴ The Computing Center was initially located in the Employer's "Ulman Building." In August 1971, the Computing center moved to the "Kennedy Building."

⁵ Prior to the formation of the business computing group, Yeshiva University was performing these functions.

⁶ Dr. Lummis holds a Ph. D in Chemical Engineering.

infrastructure- software, and infrastructure – hardware.⁷ SCC operated until 1990. On June 5, 1990, Dr. Lummis, issued a memorandum stating that, “[a]s a result of decisions in the Dean’s Office, most present activities and services of the Scientific Computing Center are to terminate as quickly as practical.” Dr. Lummis stated further that, “ We will have new network-based facilities for handling electronic mail and news available before the [original system] is shut down. We also will have a new system available for searching the DNA and protein sequence databases, although plans for these facilities are not yet firm enough to describe.”

Upon the closing of SCC, a new computer department, RIT opened with Dr. Lummis as its Director.⁸ As indicated by Dr. Lummis’ memo and as the record revealed, at the time SCC closed and RIT opened, the Employer was in the process of evolving from having a mainframe-based system (VAX) to a personal computer network with servers located in RIT. All of the Employer’s computer users were eventually connected by network and now have e-mail and internet access.

Dr. Lummis testified that RIT does not provide all of the services that SCC provided, and he specifically mentioned the data processing aspect that SCC performed for the clinics in this regard. Curci also testified that maintaining the SCC’s large computer and writing custom-made programs was more expensive than using PCs and purchasing software packages similar to the customized ones previously written by programmers.⁹

⁷ According to a 1985 organizational chart, SCC consisted of the following groups: Education and User Services, System Support and Operations, Special Applications, Data Analysis and Administration.

⁸ SCC operated out of two locations – the Kennedy Building and the Belford building. These two buildings are approximately one mile apart. RIT is an office located on the 13th floor of the Belford building.

⁹ Robert Curci testified that his primary function in SCC was to design and write user software. He was classified as a computer “Programmer C” for at least the last 15 years that he worked in SCC. Curci was laid off when SCC closed and is currently employed as a housekeeper and is a member of the 1199 bargaining unit.

Along with Dr. Lummis, Robert Berlinger,¹⁰ a supervisor, Biren Patel, systems analyst, and Lawrence Simmons, computing consultant, moved from SCC to RIT. All other employees lost their positions. Between 1991 and the present, there were additional employees hired in RIT – Casey Kruse was hired as a User Services Analyst, a title which changed to Network Service Specialist in February 1991, and was replaced by Paul Kesselman, who also held the title of Network Service Specialist. Kesselman was replaced by Thomas Cavouto. The following employees currently work in RIT – Robert Lummis, Director RIT, Robert Berlinger, Manager of Network Services, Lawrence Simmons, Network Services Supervisor, Jacek Ponarski, Network Systems Analyst, and Paul Kalten and Thomas Cavouto, Network Services Specialists.

While the record reveals that computer programmers and operators have been included in the bargaining unit at least since 1971¹¹, the positions of “systems analyst” and “hardware specialist” have been the subject of dispute between the parties in the past as is discussed more fully below.

Hillel Cohen was hired as a systems analyst in 1984, and was told that his position was not in the bargaining unit. The Union grieved this determination, and a settlement agreement was reached that provided for Cohen’s inclusion in the bargaining unit with a title of “programmer C.”¹² The settlement agreement, signed by the Union and the Employer on April 26, 1988, provides that, “the positions held by Hillel Cohen and William McGovern shall be deemed to be bargaining unit position of programmers in view of the fact that they spend 50% or more of their time writing programs.” Cohen is still employed in the Employer’s Department of Epidemiology as a Programmer C.

¹⁰ Pursuant to an April 26, 1988, agreement regarding computer positions in SCC, the Employer and the Union stipulated that the position held by Robert Berlinger was supervisory and therefore excluded from the bargaining unit.

¹¹ These positions are listed in Stipulation 1 of the collective-bargaining agreement.

¹² The contract also contains classifications for Programmer A and Programmer B.

The April 26, 1988, settlement regarding Cohen also dealt with the position of Hardware Specialist, held by Neville Edwards who was hired in the SCC in 1986. The Employer did not place Edwards in the bargaining unit and the Union grieved this determination. The April 26, 1988, settlement agreement provided, “[I]n addition to the positions previously included in the bargaining unit, the position of Hardware Specialist occupied by Neville Edwards shall be deemed a bargaining unit classification to be added to the contract at the job rate of \$24,956.82 to cover a position whose basic responsibility is the installation testing and diagnosis of computer telecommunications. Effective with the execution of this Agreement, Neville Edwards shall be represented by Local 1199 and paid such rate.” When SCC closed in 1990, Edwards took a position in the employer’s Department of Substance Abuse.

The settlement also provided that the position of computer liaison would be included in the bargaining unit. Finally, the settlement provided that the “agreement resolves the bargaining unit status of all current employees in computer operations at the College.”

In November 1988, Biren Patel was hired as a systems analyst in SCC, and the Employer contended that it was not a bargaining unit position¹³ and the Union grieved this decision. Patel worked in SCC until 1990 and moved to RIT in 1990 with Dr. Lummis, Robert Berlinger and Lawrence Simmons. When he moved to RIT, his title was changed to a Network Systems Analyst effective January 1, 1991. The grievance over his unit placement was not resolved because shortly after it was filed, SCC closed and RIT opened.

The Union filed another grievance on May 26, 1992, asserting that two positions in RIT (two of the positions at issue here) should be in the bargaining unit – the Network

¹³ Patel originally applied for a programmer position advertised in the New York Times. Patel has programming experience.

Services Specialist (held by Casey Kruse at the time) and a Network Systems Analyst (held by Biren Patel).

According to Employer witness Louise Zuckman, Labor Relations Specialist, the parties attempted to resolve these grievances during the 1992 contract negotiations. According to an agreement signed by the parties on June 7, 1993, the parties resolved the question of other titles, but withdrew the issue of the RIT employees, with the Union reserving its right to arbitrate the issue of their inclusion in the unit. According to Zuckman, the issue of the computer employees in RIT was raised again during the 1995 negotiations, and again the parties could not resolve it. Zuckman testified that the parties agreed to raise the issue "in another forum." The Union asserts that an arbitration regarding the RIT employees, pending since 1992, commenced in September 1997, after which time the Employer filed the instant RM petition.

With respect to the title systems analyst, Curci, who worked in SCC during its entire existence, testified that there were never any employees with the title of "systems analyst" in SCC other than Patel. It does appear, however, that one employee, Dan Shirley, who was employed for less than a year in about 1978, performed functions similar to those performed by the systems analysts that existed in the business computing group. Curci could not recall what Shirley's title was but testified that Shirley was not part of the bargaining unit.

In 1971, the Union and the Employer signed an agreement stating that the Systems Analysts in the Computer Center were managerial and would be excluded, but that the operators and programmers would be placed in the 1199 unit.¹⁴

¹⁴ The Union objected to the admission of this document, arguing that it had never been presented during meetings related to the arbitration regarding the issue of systems analyst. The Employer maintained that the document, signed by a Union official, should have been available to the Union. Neither of the individuals who signed the October 8, 1971 agreement, Jesse Olsen, 1199 Executive Vice President at the time, or I.S. Forman, Director of Personnel, testified at the hearing. The document was received

As noted above, Patel was hired as a systems analyst in SCC, transferred to RIT when it opened, and was the subject of the Union's grievance that asserted that his job should be part of the bargaining unit. Patel's duties were described by the Employer in an October 10, 1988 letter to the Immigration and Naturalization Service in support of the Employer's H-1 visa petition on behalf of Patel. The Employer representative wrote that Patel was "responsible for maintaining proper operations of software applications and programs, operating system software, and common utilities." The letter describes Patel's qualifications as having a B.S. Engineering degree, a M.S. in computer science, and states that Patel has extensive "experience with both the UNIX operating system and the "C" language, and notes that he assisted in the teaching students in the use of "C" and other programming languages.¹⁵ In the H-1 petition, Patel must "develop and maintain proper operation of computer programs for use on scientific computers. Consult with computer users." Patel resigned effective June 30, 1994.

Hillel Cohen, as noted above, currently works in the Employer's Department of Epidemiology and Social Medicine, performing data analysis, statistical analysis, and data management using computers. Cohen holds a Master's in Vital Statistics, and is currently a public health doctoral candidate. Dr. Alderman, Chairman of the Department of Epidemiology and Social Medicine, is the principal investigator of the projects for which Cohen performs research. According to Cohen, there are two aspects of computer programming - administrative and scientific. Administrative relates to the maintenance of the computer systems, whereas the scientific aspect focuses on the

through Zuckman, who testified that the agreement was maintained in a "classification binder" containing letters of agreement between the parties.

¹⁵ The Employer also petitioned the INS on behalf of computer programmer Laxmi Chowdhary. In a 1988 letter which is very similar to the letter written on Patel's behalf an AECOM representative states that Mr. Chowdhary is highly qualified for the job of computer programmer in that he has a B.S. in Engineering, an M.S. in Computer Science, and, "has extensive experience with both the UNIX operating system and the

research data, which is what Cohen's job involves. Most of Cohen's work consists of application work with the "SBSS" programming language. This entails writing programs within a software package. Cohen started out as a data management programmer and his job evolved into a statistical analysis programmer.

Cohen testified that he interacts with RIT, specifically Kalten, Cavouto and Simmons, when he encounters a network problem. Cohen speaks to RIT employees at least once a month, and at times as often as several times a week. Recently, Cohen consulted with RIT as to how to connect to the Employer network from different locations. Cohen's office is on the same floor as the RIT offices.

Cohen testified that, in general, the title of "systems analyst" can either be used to describe an advanced programmer, or it can be used to describe one whose job it is to work with a system as opposed to an application. According to Cohen, a systems analyst often has a higher level of skill than a programmer does. Cohen's benefits are the same as other bargaining unit members and his annual salary is \$43,000.00.

Neville Edwards, hired by the Employer as a hardware specialist in 1986, worked in SCC until it closed in 1990. At that time, Edwards took a temporary grant-funded position guaranteed for one year in the Employer's Department of Substance Abuse (DOSA).¹⁶ Edwards remained in the bargaining unit pursuant to an agreement between the parties, and appears to have officially maintained the title of Hardware Specialist.¹⁷ Currently, Edwards is employed by 1199 National Health and Human Service Employees Union as a Programmer/Network Specialist.

"C" language.." The letter further states that Chowdhary worked in assisting in the teaching of a programming course during college.

¹⁶ DOSA is located on the sixth floor of the "Parker" building.

¹⁷ Steve Frankel testified that titles of employees vary and change. According to Frankel, often, what the Employer says is an individual's title is different than what the employee believes the title to be.

Prior to his employment with the Employer, Edwards attended college and took electronic engineering courses, and worked towards an Associate degree in Electronic Technology. Edwards completed approximately three years of courses, but did not receive bachelors or associate degree.

Edwards testified that his duties in the SCC consisted of maintaining the main computer systems that were housed there. These were "VAX"¹⁸ computers. Edwards was supervised by Glen Marienko. Edwards testified that by the time he left SCC, a campus-wide computer network existed and was expanding. Marienko, assisted by Edwards, was involved in connecting users to the network. This entailed installing a network interface card, loading the proper software into the PC and running cable from the PC to the server. Edwards installed interface cards, but did not load software or run the cable.

Edwards testified that while in SCC he worked on a local area network (LAN) in the lab of Dr. Spitzer, which was a Novell¹⁹ network system. Dr. Spitzer had established a network that was confined to the computer terminals in his office. Edwards testified that he installed network interface cards in the computers in Dr. Spitzer's network, and in a PC room in a Library. Edwards also checked computers for connection problems. Edwards also worked with several network computers in a computer lab by insuring that they were able to print. Edwards played no part in the designing aspect, which was done by Glen Marienko and Robert Berlinger.

Edwards further testified that he did not do a significant amount of electronic bench repair work while at SCC. Edwards testified that when he first started at SCC, RS

¹⁸ "VAX" is a brand name of the computer system. There were approximately 250 terminals connected to the VAX via 88 ports. The VAX did not support networking. Connecting the terminals to the VAX, according to the testimony of Dr. Lummis, took at least 6 months, and was a function performed by Neville Edwards. The cabling system used for the network currently in place is different and electricians now run the cables.

¹⁹ Novell is a brand name.

282 protocol work was a substantial part of his job because that was the only system that existed in SCC. According to Edwards, RS 282 protocol is a signaling scheme used for sending information to one computing device to another. It appears that RS 282 is an outdated system that is not currently used. At least ninety percent of Edwards' job when he started at SCC was spent working on hardware; however, as the computer system evolved, Edwards did less repair work. He had a workbench in his office in SCC and did not have a personal computer. Nor did he have any contact with computer users.

Dr. Lummis testified that Neville Edwards's job was to keep the computer equipment in working order. He installed equipment and transported it to various locations. Edwards spent approximately 50 – 75% of his time performing RS-232 functions, according to Lummis. This consisted of connecting the cables of various terminals to a large piece of switching equipment, which was donated to the Employer. Dr. Lummis testified that Edwards performed some assignments in the library which consisted of running cables to install terminals, and installing a vendor card system (for payment of printing fees), installing a CD jukebox, and connecting a terminal server.

After SCC closed and Edwards obtained his position in DOSA, Edwards testified that he administered DOSA's network. John Buchanon, Edward's supervisor, and he were told by Buchanon when he started that he would be responsible for administering the network, which included setting up users (establishing a user ID and password to the user and making sure that they are attached to a printer) and troubleshooting problems that arose.²⁰ When Edwards started working at DOSA, the Employer arranged for Edwards to take a system network administration course. Edwards did not regularly interact with RIT employees while he worked in DOSA.

Ira Marion, Executive Director of DOSA, testified that Edwards primary function when he started working in DOSA was to insure that computers were connected properly, to help set up new users, and to make sure that the network was functioning properly which entailed maintaining the file server, insuring that the proper software is installed, and “backing up” files at night. The DOSA network consisted of approximately 15 computers and two or three printers shared by employees, and the file server. The computers operated on an MS DOS system. There was no Internet access or e-mail or any other communication with computers outside of DOSA. Marion testified that an outside firm (“GCS”) initially set up the DOSA network. Edwards installed software, as Novell is a software operating system.

Marion testified that Edwards did not have any responsibility in configuring the network, other than deleting a user's name. If a user was unable to print a document, Edwards would attempt to fix it, but if he could not he would contact GCS for assistance. Marion testified that Edwards possessed lower skills in networking than he believed him to have when Edwards came into the department. The Employer sent Edwards to a Novell training course, but according to Marion, his skills did not improve. Marion concluded that Edwards would not stay in the department after the one-year term was completed.²¹ Marion testified that when Edwards transferred to DOSA, he hoped Edwards could be a “Network Manager.”

In regard to the RIT positions at issue herein, Paul Kalten has been employed by the Employer for approximately 3½ years as a Network Services Specialist. Kalten obtained a Bachelor's in Business Administration with a concentration in Management

²⁰ Edwards testified that he assisted with problems such as an inability to print or log-on. At the time Edwards worked in DOSA, there was no interoffice electronic mail or e-mail of any sort, nor was there Internet access. The network in DOSA was a Novell network.

²¹ A positive evaluation of Edwards, completed by Buchanon approximately one month after Edwards started in DOSA stated that he was able to “solve network problems quickly.”

Information Systems (MIS) and computer networking. The MIS Department concentrated in courses focused on the administration of a network, designing and setting up servers,²² and providing for security on the network. Kalten testified that his training did not entail learning about the physical nature of computers such as wiring and installing cards inside of computers. Kalten testified that he plans to attend graduate school at night to study MIS further.

Prior to obtaining his job with the Employer, Kalten worked for approximately one year as an intern for the Board of Education. There, using a Novell system, Kalten testified that he learned the type of network administration involved with his duties with the Employer, such as setting up users, providing for network security, making sure that the applications on the server were running, and helping users with problems. According to Kalten, the Employer was using a Novell system until recently when they switched to Windows NT.²³ Kalten testified that he learned about Windows NT by using it and by reading about the software.

Thomas Cavouto has been employed by the Employer as a Network Services Specialist in RIT for approximately 2 years. He holds a B.S. in management with a concentration in Information Systems and Marketing from Fordham University. The Employer immediately hired Cavouto after his graduation from college. Other than assisting in his college in computer labs, Cavouto had no prior work experience in the computer field. Cavouto testified that he is currently studying to become Windows certified, which involves passing six tests given by Microsoft. The Employer does not require these tests. Cavouto also purchased the study materials for these exams on his

²² A server is a central computer which runs a network operating system.

²³ Kalten only attended one training course during his employment, which was a one or two day course given by the Novell company regarding the upgrade of that system. There was no certificate issued for this training. Microsoft issues a Windows NT Certificate which one can obtain by taking certain tests. According to Kalten, no one in RIT is Windows NT certified.

own. Cavouto has attended some conferences held by vendors in order to keep current with new technology.

Kalten and Cavouto each earn salaries commensurate with those in the Programmer C classification. Their work hours are generally from 9AM to 5PM and there is no additional overtime compensation. The Employer provides a 401K plan with matching funds, and medical benefits. They receive 4 weeks vacation and one sick day per month. Kalten considers Dr. Lummis to be his supervisor, whereas Cavouto testified that his supervisor is Robert Berlinger. Cavouto testified that he rarely works with Lawrence Simmons, Network Services Supervisor. Kalten testified that he occasionally assists Simmons in hooking up new users to the network.

There are approximately 1,500 personal computers as part of the Employer's network, with 2,100 e-mail addresses. The majority of Kalten and Cavouto's time is spent responding to calls from computer users ("users") throughout the campus who have questions or problems with their personal computers.²⁴ When a call comes in, either Kalten or Cavouto may check to see if there is a problem with the server, but otherwise they will either assist the user over the telephone²⁵ or visit the computer with the reported problem to attempt to address the issue. Kalten and Cavouto install software for the network using the directions that accompany the software. They do not assist users in their use of specific software, such as a statistical analysis program.

Kalten testified that he occasionally opens up a computer to install a networking card (a circuit card that allows the computer to communicate with the network), although most new computers have pre-installed cards. The electrical department handles wiring problems. Kalten and Cavouto set up new users on computers. This involves

²⁴ When users call RIT for assistance, the call is listed on a log. Calls are responded to by Kalten or Cavouto without any consultation with Berlinger.

downloading software from the server,²⁶ and possibly installing a network card. It also involves customizing the types of software that a particular individual is interested in. Some users are capable of doing certain functions of this type on their own.

RIT oversees three servers. The Network Services Specialists and the Network Systems Analyst, Jacek Ponarski, are responsible for ensuring that the servers are operating properly, and for backup of the software every night.²⁷

Kalten and Cavouto hold weekly classes to instruct new users on the basics of how to operate the computer software, i.e how to use the e-mail system. Neither Kalten nor Cavouto do any computer programming, and they spend very little time, if any, installing (other than the occasional network card) and/or repairing hardware.

The Employer hired Jacek Ponarski in June 1995 as a Network Systems Analyst. Ponarski was hired to replace Biren Patel. Ponarski obtained a Bachelors of Science engineering degree in computer science and started working for the Employer after graduating from college. Ponarski testified that when he was hired he was told that he would be responsible for the Employer's network and for the main network systems and servers. He was told that he would test and research new equipment and troubleshoot the network. He trained with Robert Berlinger when he started.

Ponarski testified that his primary function is solving network problems. Ponarski also works with the faculty and researchers in assessing their needs with respect to different types of computer systems. He has not done any programming work while employed by the Employer, but he did study programming extensively in college. Ponarski testified that he learns of technological developments through magazines, the

²⁵ Users who are relatively computer literate can often be helped over the telephone. Kalten testified that he assisted a user in reconfiguring his e-mail program over the telephone.

²⁶ This entails using the mouse, accessing the directory and clicking on the desired software.

²⁷ Diagnostic software programs are often run by RIT employees to analyze the network.

Internet, and bulletins from vendors. Ponarski occasionally attends conferences at the Employer's expense. He is not a member of any professional organization. Ponarski interacts primarily with Robert Berlinger during the course of his duties.

Lawrence Simmons testified that he was hired by the Employer in 1987 as a Computing Consultant in SCC. While at SCC, Simmons was promoted to Supervisor of Consulting and Education. According to Simmons, his title again changed in 1991, when the department was reorganized and SCC closed and RIT opened. At that time, his title became Network Services Supervisor. Simmons holds a Bachelors of Arts in Biology and a Masters in Information Systems. While working in SCC, Simmons operated a help desk. During the period of 1987 to 1991, in addition to Simmons, two other SCC employees, computer liaisons and medical student consultants worked at the Help Desk. According to Simmons, the issues arising out of the helpdesk were not network issues, as there was no network at that time. In addition to operating the help desk, Simmons duties in SCC consisted of writing a newsletter and conducting training sessions. When SCC closed and RIT opened, Simmons no longer wrote the newsletter or manned the help desk, and his job became assisting faculty in connecting to the network.

According to Simmons, when RIT first opened, the campus wide network was extended and he assisted in connecting 300 users to the network. After this was accomplished, Simmons helped in designing further extension of the network. Simmons consults with the engineering department regarding the running of cables so that the network can extend to a particular location. In the case of a renovation, Simmons will determine whether the electrical system can accommodate the needs of new installations by consulting with electricians and engineers. According to Dr. Lummis, all RIT employees interact frequently with electricians²⁸ regarding the cabling of computers. Simmons testified that he interacts with other RIT employees regarding new

installations. Simmons also testified that he occasionally assists Kalten and Cavouto with computer training and helps to prepare documents to be distributed at trainings.

Simmons testified that he interviews candidates for positions, but does not have final authority to hire. He has never fired or disciplined any employee. According to Simmons, he occasionally asks Tom Cavouto, Paul Kalten, Jacek Ponarski or Robert Berlinger to perform certain tasks, and that those individuals make similar requests of him. Simmons stated that they are a close knit group that works well together. He testified that he is not involved in evaluating any employees, as there is no formal evaluation system. Simmons does not inspect Kalten and Cavouto's work. Simmons receives the same benefits as Cavouto and Kalten. Simmons has a cubicle within the RIT offices, as do Paul Kalten and Jacek Ponarski. Tom Cavouto has a desk in the same area. Dr. Lummis and Robert Berlinger have separate offices.

According to Simmons, Dr. Lummis makes all final decisions in RIT. Dr. Lummis determines raises of employees, approves purchase orders, and signs time sheets of all employees.²⁹

Simmons earns approximately \$20,000 more than Kalten and Cavouto, and may participate in the Employer's pension plan. He receives four weeks of paid vacation, and also receives health insurance. Simmons is not a member of any professional organization.

Dr. Richard Nemes testified on behalf of the Union as an expert witness. Dr. Nemes has been an Associate Professor of computer science at Pace University since 1989. Dr. Nemes holds a Bachelor's degree in Mathematics from the University of California, Berkeley, a Masters in Mathematics from California State University and a Ph.D. in Computer Science from the State University of New York (SUNY). Dr. Nemes

²⁸ Electricians are included in Petitioner's overall unit.

is a member of various professional organizations in the computer science area such as the Association of Computing Machinery (ACM).

According to Dr. Nemes, there are three tracks of study at Pace in the computer field. Computer Science consists of mostly of computer programming. The Information Systems track, which is less technical than the computer science track, provides virtually no training in programming, rather, students are trained in general concepts in computing and computer data bases.³⁰ There is also a third track at Pace called Office Information Systems, which is of a clerical nature and developed out of an earlier secretarial science department.

Dr. Nemes testified that, based on the testimony of Paul Kalten and Thomas Cavouto, and based upon their employment applications and resumes, they are employees of a low technical level in the computer field. Their job functions, including connecting users to the Employer's network (which involves connecting a terminal to a jack and installing a network card), installing network software, assisting users with e-mail and network card problems, configuring a terminal (which entails clicking a mouse and choosing settings on a PC), and teaching basic computer skills to users does not require knowledge of an advanced type in a field or science customarily acquired by a prolonged course of specialized instruction and study in an institution of higher learning. Dr. Nemes further testified that none of these functions are predominantly intellectual and varying in character, and nor do they involve the consistent exercise of discretion of

²⁹ Simmons testified that one or two times in the past year he has signed time sheets when both Dr. Lummis and Dr. Berlinger were not in the office.

³⁰ According to the testimony of Cavouto and Kalten, other university curriculums are similarly organized. Both Fordham and Iona have separate programs for information systems, focusing on networking, as well as computer science departments which focus on programming. There is also a third track at Pace called Office Information Systems, which is of a clerical nature and developed out of an earlier secretarial science department. Dr. Nemes testified that Pace, because it is a business school, does not have a Computer Engineering program, which involves a strong programming

judgment. It is Dr. Nemes' opinion that no advanced degree or undergraduate degree is needed to work with the type of software that Kalten and Cavouto listed on their resumes and that, in fact, use of this type of software could be self- taught.

With respect to Jacek Ponarski, Dr. Nemes testified that the skills listed on Ponarski's resume indicated that he possesses more advanced skills than Kalten and Cavouto, but that an advanced degree in Computer Science is not required to obtain these skills. According to Dr. Nemes, the functions performed by Ponarski as Network Systems Analysts can be obtained by on-the-job training and by attending courses taught by computer vendors. With respect to one of Ponarski's function – the downloading of patches, Dr. Nemes testified that no advanced training is required to perform this function, and it is possible for one to do this with some familiarity with computers, even without any degree. Regarding Ponarski's functions in diagnostic testing, Dr. Nemes testified that this function does not require any undergraduate or graduate training and the knowledge required to do this can be obtained on the job.

It is Dr. Nemes' opinion that advanced training, i.e. training that is only obtainable in a college or university setting, and leading towards a Bachelor's degree or Masters or Ph.D, is not necessary for the performance of Ponarski's job. According to Nemes, the conferences attended and magazines read by Ponarski are not of a professional nature, rather they consists of vendor information regarding various products. Based on a booklet by ACM, the professional organization to which Nemes belongs, which categorizes and describes job classifications in the computer field, Professor Nemes testified that Ponarski's job is not that of a "systems analyst," "systems designer," "software engineer," although he may perform some of the functions described to be those performed by a "systems integrator."

component as well as the study of the electrical operation of computers such as circuit theory and design.

Similarly, Dr. Nemes testified that the functions performed by Lawrence Simmons do not require knowledge of an advanced type in the field of science or learning, which is customarily acquired by a prolonged course of specialized instruction and study in an institution of higher learning. According to Dr. Nemes, the skills used by Lawrence Simmons can be obtained on the job and through vendor training.

Dr. Nemes summarized the main functions of Kalten and Cavouto as satisfying users needs, the function of Ponarski as keeping the servers up and running efficiently, and the function of Simmons as extending the network as new researchers require connection.

The first issue that must be resolved is whether the UC petition was timely filed. The Employer asserts that the petition is untimely as it raises an issue regarding the work performed by Neville Edwards, an employee who left the bargaining unit in 1991. The Employer further claims that the Board should not entertain a UC petition filed by the Union because the Employer has employed the RIT employees for several years. It appears that the Union's UC petition is based on its claim that certain computer-related positions which currently exist should be included in its overall broad unit, and it is not based on the specific tasks performed by Neville Edwards when he was a bargaining unit employee. Further, the record is clear that the Union has, since the mid-1980's at least, consistently raised through the grievance procedure the Employer's failure to place computer related employees in the bargaining unit. Thus, as noted above, the Union grieved the Employer's failure to place the positions held by Hillel Cohen, Neville Edwards, and other SCC computer employees in the bargaining unit. The April 1988 agreement between the parties placing Cohen, Edwards and others in the unit by its own terms was intended by the parties to resolve the bargaining-unit status of all computer

employees.³¹ The Union grieved the post settlement addition of other computer-related positions in SCC (Lawrence Simmons and Biren Patel, whose job is now performed by Jacek Ponarski). When SCC closed and RIT opened, it maintained an identity as the Employer's computing center with Dr. Lummis and Robert Berlinger remaining in charge. When the Employer transferred other SCC employees from SCC to RIT, the Union continued to grieve the unit placement issue of the same classifications at issue here, and intended to arbitrate the matter. The record revealed that the parties attempted to resolve their unit dispute during contract negotiations in 1992 and 1995, but were unable to do so. They agreed at that time to resolve the matter in arbitration. According to the Union, the Employer's RM petition in the instant matter was filed after the commencement of the arbitration regarding the positions at issue. Thus, it appears that the Union sought to resolve the issue of the computer employees through the agreed upon dispute mechanism established by the parties. However, the parties have been unable to resolve this issue which has become a chronic point of contention between the parties. The grievance and bargaining history between the parties regarding the computer-related employees clearly demonstrates, in my view, that the Union never conceded that those positions were outside the unit. Moreover, it is well established that the Board will permit the processing of a UC petition midterm where it is necessary to resolve a dispute that the parties have been unable to resolve. See *Kirkhill Rubber Co.*, 306 NLRB 559 (1992); and *Brookdale Hospital Medical Center*, 313 NLRB 592 fn. 3 (1993). Here, the record clearly demonstrates that the parties have been unable to resolve the dispute and the UC forum is therefore an appropriate forum to do so.

Turning then to the issue of the status of the computer classifications in dispute, the Employer, contrary to the Union, asserts that the Network Service Specialists,

³¹ This agreement did not only involve SCC computer employees, as it resolved the bargaining unit of Hillel Cohen, a computer employee in the Department of

Network Systems Analyst and Network Services Supervisor are professional employees as defined by Section 2(12) of the Act and should not be included in the existing unit represented by the Union. The Act defines a professional employee as:

- (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced and the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
- (b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

The Act defines a professional employee in terms of the work the employee performs, and it is the work rather than the qualifications which is controlling under the section. *Aeronca, Inc.*, 221 NLRB 326 (1975). However, the background of employees is examined for the purpose of whether the work satisfies the “knowledge of an advanced type” requirement of Section 2(12)(a).

In the instant case, the record establishes that neither the work performed nor the background of those who fill the positions renders the disputed titles professional as defined by the Act. With respect to computer-related employees in general, the Board has held that computer programmers are not professional employees. See *Safeway Stores, Inc.*, 174 NLRB 1274 (1969). The Board has found that computer related positions such as programmers and systems analysts are oftentimes not even technical employees. See *U.S. Postal Service*, 210 NLRB 477 (1974), *Computer Systems, Inc.* 204 NLRB 255 (1973). In *U.S. Postal Service*, the Board found that computer systems

Epidemiology.

analysts and computer programmers were not technical employees despite college level computer science and other experience requirements.

Both Kalten and Cavouto received B.A.s in business degrees with majors in “information systems,” and both were hired directly out of college. Kalten and Cavouto’s testimony indicates that their technological knowledge and skills were primarily learned on-the-job, through vendor training and by self-instruction. Their daily functions of connecting new users to the network, diagnosing network and e-mail problems, and maintaining the servers (backing them up, and running diagnostics) are not predominantly intellectual in nature and do not appear to require the consistent exercise of discretion and judgment. Professor Richard Nemes testified that the technical knowledge and skills required to perform the network administration and user support functions were obtainable through on the job training and vendor training.

The Network Systems Analyst position, held by Jacek Ponarski, is similarly not professional as defined by the Act. Ponarski, who received his position of network systems analyst directly after graduating with a Bachelor’s degree in Computer Engineering, testified that his primary functions involved solving network problems, overseeing the servers, and testing and researching new equipment.

No evidence was adduced to establish that Ponarski’s job skills were obtained through advanced study, nor did the record show that Ponarski’s functions involve the consistent use of judgment and discretion and intellectual thought. Professor Nemes testified that, although Ponarski’s skills were more advanced than Kalten and Cavouto’s, and his education included more computer science than the information systems training that Kalten and Cavouto received, Ponarski’s actual job functions appear to have been learned through on-the-job training, short technical courses provided by vendors and by hands-on experience. Ponarski testified that he has not used his college programming

training while employed by the Employer. Ponarski is not a member of any professional organization.

The record similarly does not establish that Simmons is a professional employee as defined by the Act. Simmons, originally hired as a consultant in SCC, initially worked at a help desk along with computer liaisons who were part of the bargaining unit. At some point, Simmons trained users on the UNIX system (formerly used on SCC) in addition to his user assistance duties. When the Employer was in its transition phase from VAX mainframe system to a PC network, Simmons worked with the engineering department in working on the cabling of the system. Simmons' current function consists primarily of coordinating the extension of the network to new locations. While Simmons has a Masters degree in Information Systems, his undergraduate degree was not computer related. According to Professor Nemes, the undergraduate curriculum in Information Systems is virtually the same as a graduate program.

Based on the foregoing, the record does not establish that Simmons' job skills were obtained through advanced study, nor does the record show that his job functions involve the consistent use of the type of judgment, discretion and intellectual thought required of professional employees. Accordingly, I cannot conclude that this position is a professional position as defined in the Act.

Nor does the record establish that Simmons is a supervisor as defined by the Act. Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off recall, promote, discharge, assign, reward or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgement.

It is well established that Section 2(11) of the Act must be read in the disjunctive and that an individual therefore need only possess one of these powers for there to be a

finding that such status exists. *Concourse Village, Inc.*, 278 NLRB 12, 13 (1985). However, the grant of authority must encompass the use of independent judgment on behalf of management. *Hydro Conduit Corp.* 254 NLRB 433, 441 (1981). The party seeking to exclude an individual as a supervisor bears the burden of establishing that such status, in fact, exists. *Ohio Masonic Home, Inc.* 295 NLRB 390, 393 fn. 7 (1989). Mindful that a finding of a supervisory status removes an individual from the protection of the Act, the Board avoids attaching to Section 2(11) too broad a construction. *Adco Electric, Inc.*, 307 NLRB 1113, 1120 (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993). The Board has noted that, in enacting Section 2(11) of the Act, congress stressed that only persons with “genuine management prerogatives” should be considered supervisors, as opposed to “straw bosses, leadmen And other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677 (1985) (citing Senate Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)), *aff’d* in relevant part 794 F.2d 527 (9th Cir. 1986). Thus, “whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

The record demonstrates that Simmons has not disciplined or terminated any employee, nor has he recommended such action. Although Simmons interviewed Kaltan and Cavouto, Lummis made the final decision to hire them and the record does not establish that Simmons recommendations were sufficient to confer supervisory authority on him. Simmons testified that Lummis makes all final decisions in RIT, including determining and granting raises and approving purchase orders. Lummis signs all RIT employees’ time sheets, although Simmons testified he may have done so once or twice when both Lummis and Berlinger were out. Simmons did not train any of the RIT employees. Simmons testimony that he occasionally asks RIT employees to

perform certain tasks, but that RIT employees ask him to do so as well, is not sufficient to establish that Simmons assigns work to RIT employees. Although Simmons receives a higher salary than the other RIT employees do, he has worked with the Employer for a longer period time. His benefits of four weeks vacation, health benefits and a retirement plan are he same as other RIT employees. Finally, no RIT employee considers Simmons to be his supervisor. Rather, Robert Berlinger or Dr. Lummis are identified as the supervisors of the department. Both Kalten and Cavouto testified that they rarely interact with Simmons. Simmons works in a cubicle similar to other RIT employees, whereas Lummis and Berlinger have enclosed offices. The record evidence establishes that Simmons does not possess indicia of supervisory status as defined by the Act and I so find.

Having found that the employees at issue are not professional employees as defined by the Act, and that Lawrence Simmons is not a statutory supervisor, it must be determined whether the existing unit should be clarified to include the positions of Network Service Specialist, Network Systems Analyst, and Network Services Supervisor.

The Board has defined accretion as “the addition of a relatively small group of employees to an existing unit where these additional employees share a sufficient community of interest with the unit employees...” *Safety Carrier, Inc.*, 306 NLRB 960, 969 (1992). There are several factors considered by the Board when determining whether a group of employees should be accreted to an existing unit including, “integration of operations, centralization of management and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history and interchange of employees.” *Id.* at 969. Applying these factors in the instant case, I find that accretion is appropriate.

The existing unit represented by Petitioner consists of all service, technical and clerical employees of the Employer. Thus, other than the few categories of professional employees not included in the unit such as registered nurses and accountants, the bargaining unit appears to include virtually all other employees employed by the Employer other than those specifically excluded, such as confidential employees and security guards. Having concluded that the classifications at issue are not professional, and based on the fact that all other computer-related employees are part of the bargaining unit, it is appropriate to accrete these four computer-related employees to the existing unit. All of the Employer's employees are employed at the Employer's Bronx location, and some bargaining unit computer related employees are on the same floor as the disputed RIT employees. The record reveals that there are similarities in RIT positions and positions within the unit. Labor relations are centrally controlled. Further, the parties have a 30-year collective-bargaining history regarding virtually all of the Employer's employees.

Units will be clarified where the jobs at issue are similar to jobs in the existing unit. See *Printing Industry of Seattle*, 203 NLRB 818 (1973). Significantly, here, certain computer-related classifications, such as computer programmers and operators, have always been included in the unit. The record reveals that the distinction between a computer programmer and a systems analyst is not always clear and their functions often overlap.³² In the case of Hillel Cohen, he was hired as a systems analyst, but is now classified as a programmer. Other record testimony reveals that titles and classifications in the computer industry are not always clear cut, and a classification of programmer could refer to one who is an advanced systems analyst, or it could simply

³² The Board has recognized as appropriate units which include both programmers and analysts and these units often include titles such as "programmer analyst." See *Pratt and Whitney*, 327 NLRB No. 199 (1999), *Four Winds Services, Inc.*, 325 NLRB No. 99 (1998), *Pierce County Medical Bureau, Inc.*, 289 NLRB No. 61 (1988).

be describing one whose job duties focus on the functioning of the system. There are at least 5 other programmers in the bargaining unit in addition to Cohen.

Significantly, the Employer described the qualifications and duties of Biren Patel, classified as a systems analyst, and those of Laxmi Chowdhary, a computer programmer, in very similar terms in letters to the Immigration and Naturalization Service in support of work visas. In addition, Patel, who originally applied for a programmer position was later hired as a systems analyst.

With respect to interchange, the evidence reveals that the Network Service Specialists have significant interchange with all of the Employer's computer users, (including many bargaining unit members) because the nature of their position is to assist users with computer problems and to educate them as to the various programs. RIT employees have some interchange with other computer employees outside of RIT, Hillel Cohen and, at one time, Neville Edwards. Further, Lawrence Simmons works extensively with bargaining unit electricians and engineers in mapping out computer cabling.

Finally, the terms and conditions of employment of the RIT employees are similar to many employees within the bargaining unit. The salaries of Kalten, Cavouto and Ponarski are comparable to the salaries of other computer employees in the unit, such as Hillel Cohen, and Simmons salary is comparable to other unit members. RIT employees and unit employees all receive four weeks of vacations, health insurance and some type of retirement program.

It is not necessary for me to find that one or more of the disputed RIT employees are clear successor positions to the position held by Neville Edwards, Hardware Specialist, or other bargaining unit computer positions, because I find that the disputed RIT positions as they exist today are an appropriate accretion to the existing unit. However, the record does demonstrate that the disputed RIT positions have evolved

from bargaining-unit positions, including that of Hardware Specialist. It further appears that the disputed positions have developed as they exist today due to changing technology. From the late 1980s until the present, the Employer has converted from using a mainframe VAX system, to a vast network of 1,500 terminals throughout its facilities. The job duties and functions of the computer employees who work to maintain, operate and develop this computer system have changed as technology has changed. SCC operated the Employer's computer systems and assisted users with computer problems. RIT now performs these same functions, albeit with different technology. Although RIT does not perform scientific computing and data processing in the same manner that SCC did, its employees do consult with particular department's scientific computing needs. Further, RIT serves as the Employer's computer center and it is the place users contact for computer assistance. Dr. Lummis and Robert Berlinger, the individuals who headed up SCC operate RIT today. Dr. Lummis' June 5, 1990, memo announcing the closing of SCC made clear that RIT was a continuation of SCC. The SCC Organizational Chart from 1985 indicates that it was primarily the "Systems Support and Operations" segment of SCC that continued in RIT. This group, in 1985, employed Robert Berlinger, the systems analyst, and bargaining unit members. It was the other SCC groups such as data analysis and special applications which apparently became defunct.

Employee Neville Edwards is an example of how changing technology affected a computer employee's job function. Edwards worked primarily on cabling work related to the VAX and fixing computer hardware when he commenced his employment with the Employer in 1986. As the VAX mainframe was phased out, Edwards learned more about PC networks and was hired in DOSA to perform network administration after SCC closed. Ira Marion testified that it was the Employer's intention for Edwards to administer the network, thereby demonstrating that the thought was to use a bargaining unit

employee in this position. The record revealed that some of the DOSA functions and duties of Edward's, a bargaining unit employee, such as assisting users and solving network problems are similar to duties of the disputed RIT positions.

Finally, the Employer's reliance on its 1971 agreement with the Union regarding the exclusion of systems analysts from the unit has no bearing on the issue herein. The record establishes that there were no systems analysts in 1971 in the scientific division of the computing center. Therefore, the agreement necessarily applied to systems analysts in the business computing center, and not to any later-hired systems analysts SCC or other departments. There is no record evidence to indicate that the systems analyst in the business computing department performed the same functions as those later hired in SCC. Further, the 1971 agreement indicates that the business computing systems analysts were excluded based on the fact that the parties agreed that they were managerial. The record is clear that the systems analysts later hired by the Employer in the 1980s and 1990s are not managerial employees. Therefore, I cannot find that this agreement, which by its terms does not apply to the Network Systems Analyst at issue here, would act as a waiver 30 years later of the Union's claim of accretion with respect to this employee.

Based on all of the foregoing, I find that the RIT employees should be accreted to the unit represented by Petitioner. Where the Board finds that the disputed employees are appropriately an accretion to the existing unit represented by Petitioner, it will clarify the unit to so indicate. *International Harvester Co.*, 187 NLRB 739 (1971); *Monsanto Research Corp.*, 195 NLRB 336 (1972); *Printing Industry of Seattle*, 202 NLRB 558 (1973).

Based on the entire record, I conclude that the RM petition should be dismissed as no question concerning representation has been raised, and I find that the job classifications at issue should be accreted to the existing unit. It is also noted that there

has been no demand by the Union to represent these employees in a separate unit. See *United Hospitals*, 249 NLRB 562 (1980). The Board has held that the pursuit of representational rights through the grievance arbitration machinery of a contract does not raise a question concerning representation where the union is merely seeking those rights as an accretion to its contractual unit. See *Woolwich, Inc.* 185 NLRB 783 (1970).

IT IS HEREBY ORDERED that Case No. 2-RM-528 be, and it is, dismissed.

IT FURTHER IS ORDERED that the classifications of Network Service Specialist, Network Systems Analyst and Network Services Supervisor be included in the unit of employees represented by 1199 National Health and Human Service Employees Union, AFL-CIO³³.

Dated at New York, New York
February 1, 2000

(S) *Daniel Silverman*
Daniel Silverman
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

Issues

385-7501-2500
385-7501-2593

³³ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 Fourteenth Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **February 15, 2000**.

