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NLRB v. Yeshiva University: The Demise of Academic Collective Bargaining?

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NLRB v. Yeshiva University: The Demise of Academic Collective Bargaining?

Although the National Labor Relations Act[1] was enacted into federal law in 1935, the National Labor Relations Board[2] did not extend the Act to cover employees of private, nonprofit universities and colleges until 1970.[3] Shortly thereafter, in a separate but not unrelated decision, the Supreme Court decided *NLRB v. Bell Aerospace Co.*[4], in which it held that *all* managerial employees are ineligible for coverage under the Act. Unknown to either the Court or the Board, the *Bell* decision placed in jeopardy the earlier Board decision to extend jurisdiction over university employees. A clash between the two decisions seemed inevitable and was realized in *NLRB v. Yeshiva University*.[5] In that decision, the Court upheld the refusal by the Second Circuit Court of Appeals to enforce a Board order that Yeshiva University negotiate with the bargaining agent of its faculty on the ground that all members of the faculty were exempt from the Act because they qualified as managerial employees. Although the Court in *Yeshiva* narrowly limited its decision to the facts of the case,[6] the decision may be viewed as signaling the beginning of the end for collective bargaining in higher education. Hence, the purpose of this note is to determine the accuracy of that observation.

The primary objective of the Act is to provide for the peaceful resolution of labor disputes which otherwise might disrupt commerce.[7] The Act attempts to do this by equalizing the bargaining power between employees and employers over the terms and conditions of employment.[8] As

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1. The present National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), had its beginning with the National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935). The 1935 Act was amended by the Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, 61 Stat. 136. The Act was further amended by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 257, 73 Stat. 519. A final amendment was the Act of July 26, 1974, Pub. L. No. 360, 88 Stat. 395. All subsequent references will be to the "NLRA" or "Act" unless otherwise specified.
2. National Labor Relations Act § 3, 29 U.S.C. § 153 (1976). All subsequent references will be to the "Board."
3. Cornell Univ., 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970).
4. 416 U.S. 267 (1974).
5. 444 U.S. 672 (1980).
6. *Id.* at 690-91 n.31.
7. National Labor Relations Act § 1, 29 U.S.C. § 151 (1976).
8. *Id.*

originally enacted, the Act provided coverage to all employees except agricultural laborers, domestic servants, and individuals employed by their parents or spouses.[9] The Board soon realized, however, that the interests of certain employees—the supervisory,[10] confidential,[11] and managerial[12] employees—were more closely aligned with management than with the rank-and-file workers. Consequently, unless these employees were either excluded from the Act or prohibited from membership in the bargaining units containing the rank-and-file employees, serious conflicts of interest could arise.[13]

During the 1940's, the Board adopted a policy of excluding these types of employees from the rank-and-file bargaining units.[14] In 1947, the Supreme Court held in *Packard Motor Co. v. NLRB*[15] that foremen and supervisory personnel could constitute an appropriate unit for collective bargaining. Reaction of Congress was swift and negative. It responded by passing the Taft-Hartley Act,[16] which redefined "employee" to specifi-

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9. National Labor Relations (Wagner) Act § 2(3), Pub. L. No. 198, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 152(3) (1976)):

> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

10. Supervisors were defined as those employees who have the ability to hire and fire and those employees associated with management. Douglas Aircraft Co., 50 N.L.R.B. 784, 787, 12 L.R.R.M. 254, 255 (1943).

11. Confidential employees are defined as those employees who have access to information involving the employer's labor policies. Creamery Package Mfg. Co., 34 N.L.R.B. 108, 111, 8 L.R.R.M. 356 (1941).

12. Managers were defined as those executive employees who are in a position to formulate, determine, and effectuate management policies. Ford Motor Co., 66 N.L.R.B. 1317, 1322, 17 L.R.R.M. 394 (1946); Vulcan Corp., 58 N.L.R.B. 733, 737, 15 L.R.R.M. 66 (1944).

13. Possible conflicts of interest were foreseen as arising between the employee as a union member and the employee as a representative of management from the undue managerial influence exercised over the rank-and-file employees within the unit, and conversely, the undue union influence over the managerial employee. Divided loyalties were to be avoided. *See* Note, *Labor Law-Organizational Rights of Managerial Employees*, 53 N.C. L. REV. 809, 814-15 (1975).

14. Spicer Mfg. Corp., 55 N.L.R.B. 1491, 14 L.R.R.M. 112 (1944); Mueller Brass Co., 39 N.L.R.B. 167, 10 L.R.R.M. 8 (1942). *See* cases cited at notes 10, 11, and 12 *supra*.

15. 330 U.S. 485 (1947). Justice Douglas, dissenting, criticized the majority for extending the federal protection of unionization to all levels of the industrial hierarchy and further noted that the majority opinion tended to "obliterate the line between management and labor." *Id.* at 494.

16. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 101, 61 Stat.

cally include professional employees[17] and to exclude supervisors[18] and independent contractors.[19] The statutory exclusion of supervisors, however, did not contain any reference to confidential or managerial employees. The legislative history shows that Congress thought the Board had excluded confidential employees from the scope of the Act and would continue to do so.[20] The history also shows that there was no discussion concerning the treatment of managerial employees.[21]

Following the passage of the Taft-Hartley Act, the Board continued to exclude managerial employees from the rank-and-file units[22] and, with

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17. 29 U.S.C. § 152(12) (1976).

(12) The term "professional employee" means:

(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 or 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 specialized intellectual instruction and 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 (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

18. National Labor Relations Act § 2(11), 29 U.S.C. § 152(11) (1976).

(11) The term "supervisor" means 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 to 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 use of independent judgment.

19. The definition of "employee," *supra* note 9, was amended to exclude "any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined." National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1976).

20. *See* H.R. REP. No. 510, 80th Cong., 1st Sess. 35, *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1135, 1141.

21. *See* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, (1948).

22. At that time, the Board defined managerial employees as those employees who formulate and effectuate management policies by expressing and making operative the decisions of their employer, or who have discretion in the performance of their jobs independent of the employer's established policy. Eastern Camera and Photo Corp., 140 N.L.R.B. 569, 52 L.R.R.M. 1068 (1963); Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 21 L.R.R.M. 1039 (1947). This definition was upheld by the federal courts. Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151 (7th Cir.), *cert. denied*, 400 U.S. 831 (1970); Retail Clerks Int'l Ass'n

the exception of one decision,[23] the Board never declared whether these employees were entitled to bargaining rights under the Act. Finally, in 1970, in an attempt to clarify their status, the Board held in *North Arkansas Electric Co-Op*[24] that only those managerial employees involved in the formulation, determination or implementation of labor policies should be excluded from the Act.

The Board also applied the same new definition in *Bell Aerospace Company*[25] to find that the buyers in the employer's purchasing and procurement department were nonmanagerial. On review, however, the Second Circuit[26] refused to endorse the new definition of managerial em-

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v. NLRB, 366 F.2d 642 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967); International Ladies Garment Workers' Union v. NLRB, 399 F.2d 116, (2d Cir. 1964).

23. Swift & Co., 115 N.L.R.B. 752, 37 L.R.R.M. 1391 (1956).

> The Petitioners in their alternative request seek a unit of procurement drivers who we have found are representatives of management. We are of the opinion that such a unit is not appropriate. It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act. Accordingly, we reaffirm the Board's position that representatives of management may not be accorded bargaining rights under the Act, and deny the Petitioners' alternative request.

Id. at 753-54, 37 L.R.R.M. at 1392 (footnotes omitted).

24. 185 N.L.R.B. 550, 75 L.R.R.M. 1068 (1970), *enforcement denied*, 446 F.2d 602 (8th Cir. 1971). Actually, the Board's proposed definition of managerial employee was identical with that suggested by Justice Douglas in his *Packard* dissent. *See supra* note 15; Barney, *Bell Aerospace and the Status of Managerial Employees Under the NLRA*, I INDUS. RELA. L.J. 346, 352-53 (1976).

On review, however, the Eighth Circuit Court of Appeals refused to ratify the Board's new definition. NLRB v. North Ark. Elec. Coop., Inc., 446 F.2d 602 (8th Cir. 1971).

25. 190 N.L.R.B. 431, 77 L.R.R.M. 1265 (1971), *enforcement denied*, 475 F.2d 485 (2d Cir. 1973), *aff'd in part, rev'd in part, and remanded*, 416 U.S. 267 (1974). In light of the circuit court's decision in *North Ark.*, the employer in *Bell* requested the Board to reconsider its decision. Disagreeing with the Eighth Circuit's opinion and maintaining the position it had taken, the Board denied the employer's request. In defense of its position, the Board stated:

> But throughout any attempted analysis must run the common thread of an examination as to whether the duties and responsibilities of any managerial employee or group of managerial employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization. That is the fundamental touchstone.

Bell Aerospace Co., 196 N.L.R.B. 827, 828, 80 L.R.R.M. 1099, 1101 (1972).

Subsequently, the employer refused to bargain with the union representing the buyers and the Board issued an order charging the employer to bargain. In response, the employer appealed to the Second Circuit Court of Appeals for review of the Board's order claiming that the employer had refused to bargain with the union. Contemporaneously, the Board cross-petitioned the court for enforcement of its order.

26. Bell Aerospace Co. v. NLRB, 475 F.2d 485 (2d Cir. 1973).

ployee, and the Board petitioned the Supreme Court for certiorari. Granting certiorari, the Court in *NLRB v. Bell Aerospace Co.*[27] affirmed the judgment of the Second Circuit and held, in a 5-4 decision, that all managerial employees, not simply those with conflicts of interest, are to be excluded from the provisions of the Act.[28]

During the time that the Board was attempting to redefine its managerial employee exclusion, it was also recognizing, for purposes of coverage under the Act, the employees of private, nonprofit universities and colleges. In 1951, the Board was requested to assume jurisdiction over a bargaining unit of nonacademic (clerical) employees at Columbia University. The Board declined to assert jurisdiction.[29] In 1970, the Board reversed earlier policy and extended jurisdiction over bargaining units of nonacademic (clerical and blue collar) employees at Cornell and Syracuse Universities.[30] However, because of the Board's preoccupation with meeting the jurisdictional issue and the fact that the units seeking federal protection were composed of nonacademic employees, the Board failed to fathom the consequences of its decision.[31]

Immediately following its decision in *Cornell University*, the Board was

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27. 416 U.S. 267 (1974).

28. *Id.* at 289. In reaching its decision, the Court emphasized the early Board decisions, the Congressional reaction to the *Packard* decision, the Board's own *Swift* decision and the Congressional inaction in response to that decision. *Id.* at 274-89.

Actually, the Court affirmed the decision of court of appeals in part and reversed it in part. Expressing no opinion as to the status of the buyers, the Court remanded the case to the Second Circuit with directions to further remand it to the Board in order for the Board to apply the proper legal standard in determining the status of the buyers. The Court reversed the Second Circuit's holding that the Board was required to proceed by rule making rather than by adjudication in determining the status of the buyers. *Id.* at 294.

29. Trustees of Columbia Univ., 97 N.L.R.B. 424, 29 L.R.R.M. 1098 (1951). Although the Board found the activities of the university affected commerce sufficiently to satisfy the requirements of the statute and the standards established by the Board, it refused to assert jurisdiction on the ground that the school activities were noncommercial in nature. *Id.* at 425-27, 29 L.R.R.M. at 1098-99.

30. Cornell Univ., 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970). There were several reasons why the Board changed its position: college activities were increasingly having a greater impact and effect upon interstate commerce; college matters had become matters of federal interest; and states had failed to recognize adequately and to legislate labor relations affecting these institutions and their employees. (For example, while New York had the equivalent of the Wagner Act, the law contained no remedies for unfair labor practices which had been committed by the unions.) *Id.* at 333-34, 74 L.R.R.M. at 1274.

31. *See* Finkin, *The NLRB in Higher Education*, 5 U. TOL. L. REV. 608, 610 (1974); Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. REV. 63, 91-95 (1973); Moore, *The Determination of Bargaining Units for College Faculties*, 37 U. PITT. L. REV. 43, 43 (1975).

Nevertheless, the Board soon discovered that, by recognizing jurisdiction, it had entered an "unchartered area." C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904, 905, 77 L.R.R.M. 1001, 1003 (1971).

confronted with the issue of whether a college faculty, *in toto*, is eligible for protection under the Act.[32] Opponents of the *Cornell University* decision argued that, because the Act was designed for application to the structured, hierarchical, blue collar setting of industry, it was not adaptable to the fluid, decentralized framework of academe.[33] Even conceding the possible applicability of the Act, these opponents further argued that, in light of the traditional role played by the faculty in the determination of university academic and personnel policies, the faculty should be deemed either supervisory or managerial and therefore outside the scope of the Act.[34] Aware of the fact that the university setting differs significantly from the industrial setting for which the Act was devised,[35] the Board developed, piecemeal and without any supporting analysis or citation, what has become known as the "independent professional judgment" argument to counter the supervisor/manager argument.[36] Accordingly, a faculty is never deemed supervisory or managerial simply because it exerts certain control and influence over the governance of the university. This is because the faculty is composed of professional employees

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32. University of Miami, 213 N.L.R.B. 634, 87 L.R.R.M. 1634 (1974); New York Univ., 205 N.L.R.B. 4, 83 L.R.R.M. 1549 (1973); Adelphi Univ., 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972); Manhattan College, 195 N.L.R.B. 65, 79 L.R.R.M. 1253 (1972); Fordham Univ., 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971).

33. *See* cases cited in note 32 *supra*; Stephens Inst. v. NLRB, 620 F.2d 720 (9th Cir. 1980); NLRB v. Mercy College, 536 F.2d 544 (2d Cir. 1976); Goddard College, 234 N.L.R.B. 169, 97 L.R.R.M. 1398 (1978); *See also* Finkin, *supra* note 36, at 608-20; Kahn, *supra* note 36, at 66-84.

34. *Id.*

35. Adelphi Univ., 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972). In an attempt to distinguish the two environments the Board noted:

> The difficulty both here and in *Post* may have potentially deep roots, stemming from the fact that the concept of collegiality, wherein power and authority is vested in a body composed of all one's peers or colleagues, does not square with the traditional authority structure with which this Act was designed to cope in the typical organizations of the commercial world. The statutory concept of "supervisor" grows out of the fact that in those organizations authority is normally delegated from the top of the organizational pyramid in bits and pieces to individual managers and supervisors who in turn direct the work of the larger number of employees at the base of the pyramid.
>
> Because authority vested in one's peers, acting as a group, simply would not conform to the pattern for which the supervisory exclusion of our Act was designed, a genuine system of collegiality would tend to confound us. Indeed the more basic concepts of the organization and representation of employees in one group to deal with a "management" or authoritarian group would be equally hard to square with a true system of collegiality. Nevertheless, both here and in *Post*, the collegial principle is recognized and given *some* effect.

Id. at 648, 79 L.R.R.M. at 1555-56 (emphasis in original).

36. The label "independent professional judgment" seems to have been coined by Justice Powell in his *Yeshiva* opinion. 444 U.S. at 684.

who act in a collective manner for their own interest and whose decisions and actions are subject to the ultimate authority of the university administration or board of trustees.[37] Thus, although the Board has frequently found that certain individual faculty members display sufficient supervisory or managerial attributes to exclude them from coverage, the Board has never excluded a faculty, *en masse*, from the Act.[38]

Although the Court in *Bell* held that all managerial employees should be excluded from coverage under the Act, it left to the Board the task of defining who is a managerial employee. Consequently, the Board adopted the Court's "suggested" definition that managerial employees are those employees who formulate and effectuate the employer's policies and who exhibit sufficient discretion in the performance of their duties to indicate that they are not merely following their employer's established policy.[39] In contrast, professional employees, who are specifically covered by the Act, are statutorily defined as those employees who are "engaged in work

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37. As discussed by the Court in *Yeshiva*, the test contains four arguments that the Board utilized to support its claim that the faculty members are neither managerial nor supervisory employees. First, because the faculty members are professional employees they are eligible for coverage under the Act. *Id.* at 697-98. (*See* note 17 *supra* for the definition of professional employee.)

Second, the faculty members participate in collegial governance, usually through faculty senates or committees, on a collective rather than individual basis. Without explanation, the Board claimed that such collective action excludes a finding of either supervisory or managerial status. *Id.* at 698-700.

Third, the faculty members are simply acting in their own professional interest rather than the interest of the university when participating in the determination of academic or personnel policies at the university. Since they are acting in their own interest, they cannot be properly classified as supervisors because the statutory definition of supervisor requires that the individual act in the "interest of the employer." *Id.* at 700-01. (*See* note 18 *supra* for the definition of supervisor.)

Finally, faculty decisions are best characterized as advisory because they are subject to the authority of the university administration or board of trustees. This argument, similar to the previous argument, attempted to distinguish professional from bureaucratic authority. *Id.* at 701-02. As noted by Member Kennedy in his dissenting opinion in *Northeastern Univ.*, professional authority is acquired through expertise and consists of the exercise of influence over professional matters and is insufficient to confer managerial status. In contrast, according to Kennedy, managerial status requires administrative authority which derives from the employee's position in the institutional hierarchy in which formal authority is transferred vertically from top to bottom. 218 N.L.R.B. 247, 257, 89 L.R.R.M. 1862, 1873-74 (1975).

38. *See* cases cited *supra* note 32; University of Vermont, 223 N.L.R.B. 423, 91 L.R.R.M. 1570 (1976); Fairleigh Dickinson Univ., 205 N.L.R.B. 673, 84 L.R.R.M. 1033 (1973); C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904, 77 L.R.R.M. 1001 (1971).

39. The suggested definition was not new and had been used by the Board prior to its decision in *North Ark.* Subsequent to the *Bell* decision, the Board used the older definition to find that the buyers still did not qualify as managerial employees. Bell Aerospace Co., 219 N.L.R.B. 384, 386, 89 L.R.R.M. 1664, 1666 (1975).

. . . involving the consistent exercise of discretion and judgment in its performance."[40] Technically, it is possible to classify all professional employees as managerial employees. Hence, because of the similarity in the two definitions, the Board has found it difficult to determine whether certain professional employees are protected by the Act as professional employees or are exempt as managerial employees.

Despite this difficulty, the Board continued, after *Bell*, to find that university faculties were not managerial,[41] and until 1978, this policy was not subjected to judicial review.[42] At that time, the policy came under the scrutiny of the Second Circuit Court of Appeals in *NLRB v. Yeshiva University*.[43]

In 1974, the Yeshiva Faculty Association (Union) petitioned the Board for certification of a bargaining unit consisting of the full time faculty at ten of the thirteen schools of Yeshiva University (University).[44] Opposing the certification, the University argued that all faculty members were either supervisory or managerial employees and therefore not entitled to coverage under the Act. In the alternative, the University would permit a unit consisting of all full time and regular part time faculty with the exclusion of certain faculty members as either managerial or supervisory. Finding that all members of the faculty were professional employees and that none qualified as managerial or supervisory employees, the Board concluded that a unit consisting of all full time faculty members was an appropriate bargaining unit.[45]

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40. 29 U.S.C. § 152(12) (1976). The relevant provision is quoted in note 17 *supra*.

41. Fairleigh Dickinson Univ., 227 N.L.R.B. 239, 94 L.R.R.M. 1044 (1976); New York Univ., 221 N.L.R.B. 1148, 91 L.R.R.M. 1165 (1975); Northeastern Univ., 218 N.L.R.B. 247, 89 L.R.R.M. 1862 (1975).

42. The First Circuit Court of Appeals did have the opportunity to review the Board's policy in NLRB v. Wentworth Institute, 515 F.2d 550 (1st Cir. 1975). There, however, the Institute argued that not only its faculty, but also all other college faculties fell outside the Act's statutory definition of employee. Although sympathetic to the argument, the court did not accept it because of its obvious broadness. The court did note, nonetheless, that faculties with different responsibilities are not necessarily included under the Act and that the determination must vary, depending upon each particular institution. Here, the court could find no evidence in the record of significant faculty impact on policy or managerial matters. Thus, the court did not examine the Board's newly developing rationales for faculty inclusion and expressly refused to comment upon their validity. *Id.* at 556-57.

43. 582 F.2d 686 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980).

44. 221 N.L.R.B. 1053, 91 L.R.R.M. 1017 (1975), *enforcement denied*, 582 F.2d 686 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980).

45. *Id.* at 1057, 91 L.R.R.M. at 1021. After five months of hearings conducted before a hearing officer during which time 4600 pages of transcript were generated and 200 exhibits introduced, the case was transferred to the Board for decision. 444 U.S. at 696 n.5 (Brennan, J., dissenting).

The Board excluded from the unit two faculty members who had been hired primarily to perform research activities under a research grant. 221 N.L.R.B. at 1057, 91 L.R.R.M. at

An election was held in which the Union won by a substantial margin. Soon thereafter, the Union was certified by the Board as the exclusive bargaining representative of the employees in the unit. However, the University refused to bargain with the Union, and the Board issued a complaint against the University under charges filed by the Union. In its answer to the complaint and subsequent motion for summary judgment, the University questioned the validity of the Board's unit determination.[46] The Board dismissed the objection as having already been settled in the representation proceeding and found the University in violation of sections 8(a)(5) and (a)(1) of the Act.[47] Accordingly, the Board granted summary judgment against the University and directed it to bargain collectively with the Union.[48] The University refused to comply with the Board's order and the Board requested the Second Circuit to enforce the order.[49]

In support of its decision that the faculty members were neither managerial nor supervisory employees, the Board argued before the Second Circuit that the faculty members were professional employees who acted in a collective manner for their own interest and whose decisions and actions were subject to the ultimate authority of either the University administration or board of trustees.[50] Reviewing the Board's Decision and Direction of Election, the Second Circuit determined that the Board had summarily rejected the University's claim and, therefore, the court performed its own fact finding.[51] After conducting an extensive review of the actual role played by the faculty in the operation and governance of the University, the court rejected conclusively the Board's findings and argument and held instead that all faculty members were managerial employees.[52]

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46. 231 N.L.R.B. 597, 96 L.R.R.M 1601 (1977).

47. 29 U.S.C. §§ 158(a)(5), (a)(1) (1976).

48. 231 N.L.R.B. at 600, 96 L.R.R.M. at 1602.

49. NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978).

50. *Id.* at 689.

51. *Id.* at 696.

52. While it agreed that professional employees are specifically included within the Act's coverage, the court held that this fact alone did not preclude such employees from being classified as either supervisory or managerial employees ineligible for inclusion in a bargaining unit. The court found that the faculty had extensive control over what courses were taught, who would teach them, the number of teaching hours required, and the rank, salary, and tenure status of faculty members. In addition, the court was impressed with the crucial role the faculty had in the determination of academic policies concerning, for example, curriculum, admissions, graduation requirements, and tuition. In the court's view, the faculty members were not merely exercising individual professional expertise but were, in effect, "substantially and pervasively operating the enterprise." *Id.* at 696-98.

In response to the Board's assertion that the collective nature of faculty activity precludes

Dissatisfied with the Second Circuit's decision, the Board petitioned the Supreme Court for certiorari. Granting certiorari,[53] the Court, in a brief, terse opinion by Justice Powell, affirmed the Second Circuit's decision.[54] In its summary of the facts, the Court noted that, because the Board had made no findings of fact[55] respecting the University's contention that its entire faculty was managerial, it had been necessary for the Second Circuit to examine the record and to relate the circumstances in considerable detail. Adopting the lower court's findings, the Court agreed that the power exercised by the faculty over University policies did not merely characterize individual professional expertise but rather indicated managerial authority. The Court conceded that the lower court had found a central administrative hierarchy that, with the approval of the board of trustees, formulated general University-wide policies concerning teaching loads, salary scales, tenure, sabbaticals, retirement, and fringe benefits.[56] But the lower court had also found the individual schools within the University to be controlled and operated by the faculty members of that school. Whether meeting informally or formally, in committee or mass

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supervisory or managerial exclusion, the court found it insignificant that employee involvement in policymaking was on a collective rather than individual basis. While conceding that it was disturbed by the fact that the statutory definition of supervisor is stated in terms of an individual manifesting the enumerated indicia of supervision over other employees, the court noted that the collective nature argument had never been utilized by the Board in the industrial setting in which group action occurs frequently in corporate decisionmaking. The court determined that it need not resolve this point, however, since there was no such "individual" statutory restriction in the Board's own concept of "managerial employee." Furthermore, the court argued that, aside from the inconsistent application of the supervisor exclusion by the Board, the Board had offered no satisfactory explanation for treating collective faculty action differently in determining supervisory or managerial authority. *Id.* at 699.

The court next found the Board's contention that the faculty acted in its own interest rather than the interest of the University insupportable in view of the fact that the administration and board of trustees had rarely interfered with faculty decisions. Such noninterference indicated that the interests were coextensive. In further support of its finding that the Board's "interest of the faculty" analysis was inapplicable, the court noted the wide acceptance of the principles of shared authority within the university setting. *Id.* at 700-01.

Finally, the court found particularly unconvincing the Board's argument that the faculty was not managerial or supervisory because it was subject to the ultimate authority of the administration or board of trustees. The court quickly dismissed this argument as contrary to the statutory definition of supervisor and in complete disregard for the character of a corporate charter. According to the court, the definition of supervisor denotes review by some higher authority and a corporate charter always requires a board of trustees or directors. In short, there is always an ultimate authority. Moreover, the court had found no evidence that the board of trustees had in fact regularly reviewed and rejected the faculty recommendations. *Id.* at 701-02.

53. NLRB v. Yeshiva Univ., 440 U.S. 906 (1979).

54. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

55. *Id.* at 679.

56. *Id.* at 677.

assembly, it was obvious to the Court that the faculty members at each school effectively determined that school's academic and personnel policies.[57]

Prior to its discussion of the managerial employee exclusion, the Court endeavored to characterize the relationship between the Act and academic collective bargaining. Stating there was no evidence to indicate that Congress intended to provide coverage under the Act to the employees of private, nonprofit universities, the Court acknowledged the authority of the Board to exert such jurisdiction.[58] However, the Court noted that the Act was not intended to accomodate the system of shared authority existing between the faculty and the administration in the typical, private, mature university, but rather, the Act was intended for "the type of management-employee relations that prevail in the pyramidal hierarchies of private industry."[59] Hence, the Court admonished, those principles developed and applied in the industrial sector could not be blindly imposed upon the academic world.[60]

While it conceded that faculty members of a university could qualify for coverage under the Act as professional employees, the Court declared that such status did not automatically guarantee protection; professional employees might also be excluded from the Act because they qualified as either supervisory or managerial employees.[61] These two exclusions, the Court observed, arise from the same concern that employers are entitled to the undivided loyalties of their representatives.[62] Nevertheless, because the Court agreed with the Second Circuit's determination that the managerial employee exclusion was applicable, the Court stated that it would restrict its discussion to that exclusion.[63]

Adopting the definition of managerial employee that it had mentioned in *Bell*, the Court defined these employees to be those who "formulate and effectuate management policies by expressing and making operative

57. *Id.* at 676.

58. *Id.* at 679-80.

59. *Id.* at 680.

60. *Id.* at 680-81 (*quoting* Syracuse Univ., 204 N.L.R.B. 641, 643, 83 L.R.R.M. 1373, 1375 (1975)).

61. *Id.* at 682. The Court cited three Board decisions arising outside the university setting, in which individual professional employees were deemed to be managerial employees: Sutter Community Hosp., 227 N.L.R.B. 181, 94 L.R.R.M. 1450 (1976); General Dynamics Corp., 213 N.L.R.B. 851, 87 L.R.R.M. 1705 (1974); Westinghouse Elec. Corp., 113 N.L.R.B. 337, 36 L.R.R.M. 1294 (1955). 444 U.S. at 682 n.14. The Court seemed to overlook the fact, however, that the issue here did not concern the status of individuals, but rather, a *group* of professionals.

62. *Id.* at 682.

63. *Id.* Furthermore, the Court emphasized that the relevant consideration in the determination of supervisory or managerial status is not final authority but rather effective recommendation or control. *Id.* at 683 n.17.

the decisions of their employer."[64] In addition, "managerial employees must exercise discretion within or even independently of established policy *and* must be aligned with management."[65] The Court acknowledged that the Board had not established any rigid guidelines for determining when an employee might be considered in alignment with the employer, and declared that "normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy."[66]

Turning to the instant case, the Court recognized that the Board had not claimed that the faculty influence over University matters was insufficient for a finding of managerial status.[67] Rather,the Board had argued that the managerial exclusion could not be applied in a "straightforward" fashion to these professional employees because while they often appeared to be exercising managerial authority they were merely performing routine job duties.[68] In short, the Board's argument was that the faculty did not meet the second requirement necessary for managerial status—alignment with management. This was because the faculty were expected to exercise independent professional judgment when participating in University governance and because they were neither expected to abide by management policies nor judged according to their effectiveness in executing these policies. Hence, there was no danger of divided loyalties, and there was no need for the managerial exclusion.[69] The Board argued further that the exclusion of the faculty, *in toto,* would frustrate the national labor policy in favor of collective bargaining.[70]

The Court quickly dismissed the Board's "independent professional judgment" argument on the ground that the Board had not applied it originally in resolving the University's claim.[71] In the Court's view, the Board had simply rejected the claim by relying exclusively on previous decisions for both legal and factual analysis.[72] According to the Court, these decisions, while they contained the various subarguments that constituted the independent professional judgment argument, were justified by neither adequate explanation nor precedent.[73]

Overwhelmed by the findings of fact, the Court concluded that in any

64.. *Id.* at 682 (*quoting* NLRB v. Bell Aerospace Co., 416 U.S. 267, 289 (1974)).
65. *Id.* at 683 (emphasis added).
66. *Id.*
67. *Id.*
68. *Id.* at 683-84.
69. *Id.* at 684.
70. *Id.*
71. *Id.* at 684-85.
72. *Id.*
73. *Id.* at 684-85 nn.18, 19, 20, & 21.

other context the power of this faculty would have been considered managerial. In support of its conclusion, the Court enumerated some of the decisions made by the faculty in determining academic policies: deciding what courses would be offered, when they would be offered, to whom they would be offered, what teaching methods, grading policies, and matriculation standards would be used, and what students would be admitted, retained, and graduated.[74] In the Court's estimation, the "faculty determine[d] within each school the product to be produced, the terms upon which it [would] be offered, and the customers who [would] be served."[75]

Nevertheless, the Court recognized that "some" tension might exist between the Act's managerial employee exclusion and its professional employee inclusion.[76] Aside from the Court's rejection of the Board's independent professional judgment argument on the ground that the Board had failed to utilize the argument in deciding the case, the Court refused to accept the argument because the Board could cite no authority for its support.[77] In addition, the Court cited other Board decisions, outside a university setting, to show that the Board had previously classified professional employees as managerial employees without inquiring as to whether the employees' decisions were based on management policy or professional expertise.[78] Finally, the Court warned that approval of the Board's argument, without restricting it to university faculties, would, in effect, overrule this body of Board precedent and would result in the possible reclassification of professional employees that were supervisory or managerial employees.[79]

Rather than completely avoid the Board's independent professional judgment argument, the Court addressed what it considered the only viable subargument contained therein—that the faculty members, while exercising discretionary authority, were acting primarily in their own interests and not those of the University. Immediately, the Court found this argument to be contrary to the Board's objective of ensuring that conflicts of interest (divided loyalties) did not arise between employee and

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74. *Id.* at 686.

75. *Id.* The Court noted the influence that the faculty had over personnel decisions and concluded that these decisions "clearly have both managerial and supervisory characteristics." *Id.* at 686 n.23. The statement suggests that the Court might have found supervisory status had the question been presented to it.

76. *Id.* at 686.

77. *Id.* at 686-87 & n.24.

78. *Id.* at 687 & n.25. *See* note 60 *supra*, and cases cited therein. Again, the Court emphasized the dual nature of the managerial employee: not only must he exercise discretionary authority but he must exercise it within the range of the employer's policies. 444 U.S. at 687 n.25.

79. 444 U.S. at 687.

employer.[80] The Court construed the argument to rest on the assumption that the interests of the faculty and the University were not and never could be the same.[81] In contrast, the Court considered the interests of the faculty and the University to be identical and inseparable; by furthering their own interests, the faculty also furthered the interests of the University. "[T]here can be no doubt that the quest for academic excellence and institutional distinction is a 'policy' to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal."[82] Furthermore, the Court could not understand how the interests could be different. "The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy."[83] Hence, the Court concluded that there was no validity to the Board's claim that the interests were different.

In its final comment on the professional-managerial employee conflict, the Court stated that it was not suggesting that all professional employees be deemed managerial, thereby making them ineligible for protection under the Act.[84] It recognized that this policy would clearly contradict the intentions of Congress. Thus, because the distinction between the two types of employees is slight and subtle, the Court suggested, on the basis of past Board decisions, "Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management."[85] The Court immediately qualified this advice, however, by noting that it was only the starting point for determining whether professional employees were managerial.[86]

With the exception of Yeshiva University, the Court's decision makes no progress towards resolving the issue of whether the members of a university faculty, who as professional employees are entitled to protection under the Act, may be reclassified *en masse* as managerial employees. While the Court dismissed in a swift and neat manner the various arguments contained within the Board's independent professional judgment test, it failed to provide any guidelines for the Board to apply in future cases raising the same issues. The Court's final comment on distinguishing professional from managerial employees is the only suggestion that

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80. *Id.* at 687-88.
81. *Id.* at 688.
82. *Id.*
83. *Id.* at 689. In reply to the related argument that the faculty members, unlike industrial managerial employees, were not accountable for their actions, the Court simply stated that that was one area in which the analogy between industry and academe was incomplete and insufficient. *Id.*
84. *Id.* at 690.
85. *Id.*
86. *Id.* at 690 & n.31.

could possibly be considered a guideline. Ironically, that suggestion is modified within the text of the opinion[87] and in an accompanying footnote to be considered as a "starting point only, and . . . other factors not present here may enter into the analysis in other contexts."[88] The vagueness and ambiguity did not stop, however, for the footnote continued: "There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit . . . . But we express no opinion on these questions, for it is clear that the unit approved by the Board was far too broad."[89]

Other contradictions within the opinion lessen its persuasiveness and create more, not less, confusion. One of the most pervasive is the Court's use of the industry analogy. Recognizing that the framework of governance in academia differs considerably from that of the typical industry for which the Act was designed, the Court explicitly warned against any hasty, blind application of the principles developed in the industrial sector to the university setting.[90] Thereafter, completely ignoring its own warning, the Court, in dismissing the Board's arguments, cited previous Board decisions for support—decisions which were made in the context of industry. The analogy with industry is even more obvious in the Court's conclusion that the faculty members were managerial employees: "the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial . . . . the faculty determine within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served."[91]

Moreover, while rejecting the Board's argument as insupportable because of inadequate explanation or citation, the Court hinted that the independent professional judgment test may be valid if it were restricted to university faculty cases.[92] On the other hand, the Court also noted that it might have determined that all faculty members at the University were supervisory employees had the question been presented.[93]

In addition, the Court's adoption of the facts raises a procedural question. It is true that the language of the Board's Decision and Direction of Election did not indicate whether the Board actually reviewed the facts in responding to the University's contention that all of its faculty members were either supervisory or managerial employees.[94] Consequently, both

87. *Id.* at 690.
88. *Id.* at 690-91 n.31.
89. *Id.*
90. *See* note 59 *supra*, and accompanying text.
91. 444 U.S. at 686.
92. *See* note 77 *supra*, and accompanying text.
93. 444 U.S. at 683 n.17, 686 n.23 & 688-89 n.27.
94. 221 N.L.R.B. at 1054, 91 L.R.R.M. at 1018.

the Second Circuit and the Supreme Court construed this language to mean that the Board had simply side-stepped the University's contention by referring the University to previous cases decided by the Board in which it had rejected the argument.[95] As a result, the Second Circuit reviewed the facts and made its own findings which the Supreme Court adopted. Because fact finding is not normally within the jurisdiction of these courts, it is arguable that either court should have remanded the case to the Board for additional fact finding or clarification of its findings in light of its decision.[96]

Aside from these criticisms, and of greater significance, is that the Court's decision rested upon the assumption that the medieval principles of shared authority (although somewhat modernized) are widely accepted within the academic community.[97] The essence of shared authority is that the faculty and the administration share equal authority over the control and operation of the university. In distinguishing the university framework from that of industry, the Court noted: "In contrast, authority in the typical 'mature' private university is divided between a central ad-

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> In contending that no faculty bargaining unit can be appropriate because all faculty members—by virtue of their group participation in faculty governance—are supervisory or managerial and are, thereby, not employees within the meaning of the Act, the Employer requests that the Board reconsider its previous decisions on this issue. The Employer urges, further, that, in any event, the Board reach a contrary result herein on the ground that this particular faculty has authority which is different from and more extensive than the authority vested in the faculties which were the subjects of the earlier cases.
>
> *We find from our examination of the record,* however, that the role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different from what they were in the cited cases wherein the same arguments were rejected.

Id. (footnotes omitted)(emphasis added).

95. 582 F.2d at 696; 444 U.S. at 678.

96. Section 9(e) of the Act specifically states, "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 159(e) (1976). It seems apparent in this case that the Board's decision was based on substantial evidence in the record considered as a whole. Nevertheless, the Second Circuit and the Supreme Court thought otherwise.

In connection with this point, Justice Brennan argued in the dissenting opinion that the Board's decision should not be disturbed.

> Through its cumulative experience in dealing with labor-management relations in a variety of industrial and nonindustrial settings, it is the Board that has developed the expertise to determine whether coverage of a particular category of employees would further the objectives of the Act. And through its continuous oversight of industrial conditions, it is the Board that is best able to formulate and adjust national labor policy to conform to the realities of industrial life.

444 U.S. at 693 (footnote omitted).

97. 444 U.S. at 680.

ministration and one or more collegial bodies."[98] This asumption is questionable.[99] and but for its adoption, the Court would have been unable to conclude that all faculty members at the University were managerial employees. Without this assumption, the Court would have been unable to overcome the Board's argument that the faculty exercises discretionary authority in its own interests and not those of the University. Hence, the Court would have been unable to find the alignment between faculty actions and University policies necessary for managerial status.

As previously discussed, managerial status requires that employees not only have discretionary authority, but that they also exercise that authority in alignment with the employer's policies. There is no denial that faculty members exercise discretionary authority—this is inherent in the definition of a professional employee. There is also no disagreement with the premise that some faculty members exercise their authority in the interest of the university.[100] The issue here, however, is whether all faculty members, while exercising discretionary authority in their professional capacities, are acting in conformity with the University's policies. The Court answered in the affirmative, at least whenever the issue arises within the context of a typical "mature" private university. And as defined by the Court, a typical mature private university is one in which the principles of shared authority are practiced. But, even this narrow holding is qualified by footnote 31.[101]

In conclusion, *Yeshiva* appears to restrict considerably the federal rights of university faculties to bargain collectively. While vehemently maintaining its position in *Bell* that all managerial employees are exempt from coverage under the Act, the Court in *Yeshiva* further refined the definition of managerial employee to include a collective element. There is nothing significant about this refinement in itself. But when coupled with the concept of shared authority, it makes disastrous consequences for academic bargaining. Nevertheless, because of the numerous inconsistencies contained within the opinion, the effectiveness of *Yeshiva* is doubtful and the issue of whether a faculty can be deemed managerial, for all practical purposes, remains unsettled.

KEITH DENSLOW

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98. *Id.*

99. The issue of whether shared authority is alive and well on the university campus or is being displaced by corporate, hierarchial-type systems is by no means settled. Both the majority and dissenting opinions cited reputable commentators and authorities to support their respective positions. The dissenting opinion even cited the same authorities as the majority opinion to support a contrary position. *Id.* at 702-03 n.14.

100. *See* note 37 *supra*, and accompanying text.

101. 444 U.S. at 690-91 n.31.