Private University Professors and NLRB v. Yeshiva: The Second Circuit's Misconception of Shared Authority and Supervisory Status

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PRIVATE UNIVERSITY PROFESSORS
AND NLRB V. YESHIVA:
THE SECOND CIRCUIT'S
MISCONCEPTION OF SHARED
AUTHORITY AND SUPERVISORY
STATUS

TERRY A. BETHEL*

I. INTRODUCTION

Until 1970, the National Labor Relations Board1 refused to assert jurisdiction over private universities and colleges.2 The NLRB held in its 1951 Columbia University3 decision that it would not effectuate the purposes of the National Labor Relations Act4 to cover activities which were "intimately connected with the charitable purposes and educational activities of the institution."5 In Cornell University,6 however, noting that private universities had "become involved in a host of activities which are commercial in character,"7 the Board determined that non-academic

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2. The Board has jurisdiction over any questions of representation or unfair labor practices "affecting commerce." See 29 U.S.C. §§ 159(c) & 160(a) (1976). The term "affecting commerce" is defined at 29 U.S.C. § 152(7). The Board has never exercised all of its jurisdiction but covers only those areas which it believes "have, or ... would have, a pronounced impact upon the flow of interstate commerce." Hollow Tree Lumber Co., 91 N.L.R.B. 635, 636 (1950). That policy was approved by Congress in the 1959 amendments to the Act by adding § 14(c)(1), 29 U.S.C. § 164(c)(1) (1976), which provides: The Board, in its discretion, may, by rule of decision or by published rules . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction . . . .


5. 97 N.L.R.B. at 427.


7. Id. at 330.
employees of Cornell and Syracuse Universities could claim the protection of the NLRA to "form, join or assist labor organizations." The Board’s assertion of jurisdiction was neither expressly nor impliedly limited to non-academic employees. Faculties, already bargaining in some public institutions not subject to the NLRA, sought to organize in private colleges as well. Although some universities invited NLRB jurisdiction over non-academic employees, few welcomed such bargaining relationships with their faculties. The NLRB, however, proved receptive to petitions filed by faculty organizations.

The continued existence of faculty collective bargaining has now been threatened by the recent decision of the Second Circuit in NLRB v. Yeshiva University. In refusing to enforce the NLRB’s order to bargain with a unit comprised of full-time faculty members, the court decided that the protections furnished employees by the NLRA simply did not apply to Yeshiva’s faculty. With the former Dean of Fordham University Law School writing the opinion, the court decided that Yeshiva’s faculty members were not employees at all. Rather, they were expressly excluded from coverage by the NLRA as either supervisors or managerial employees.

II. THE NLRA AND THE UNIVERSITY ENVIRONMENT

The task which confronted the NLRB and the Second Circuit in their treatment of the Yeshiva case, and the one which now awaits the Supreme

9. Indeed, it could not have been. The Board asserts jurisdiction over employers, not certain specific employees or disputes. See § 14(c)(1) of the Act, set out in note 2 supra.

Because of its earlier acceptance, and because most collective bargaining relationships exist in public institutions, see E. LADD & S. LIPSET, PROFESSORS, UNIONS AND AMERICAN HIGHER EDUCATION 1 (1973), much of the writing in this area concentrates on public sector problems. Even though differences exist with respect to governance and funding of private institutions, the observations made with respect to public colleges can be useful and will frequently be cited herein.

11. In the Cornell case, for example, the university invited the Board to assert jurisdiction in order to avoid the jurisdiction of the New York Labor Relations Act. See Kahn, The NLRB and Higher Education: The Failure of Policy-making Through Adjudication, 21 U.C.L.A. L. REV. 63, 64-65 & n.2 (1973).
12. 582 F.2d 686 (2d Cir. 1978).
13. Judge William Hughes Mulligan was Dean of Fordham University Law School from 1956 to 1971.
Court,\textsuperscript{14} was the accommodation of a statute designed for the private industrial workplace to an environment not contemplated by its drafters and conceivably not provided for by its terms. The Second Circuit ultimately held that such an accommodation was not possible. In seeking reversal, the NLRB follows a path which has steadfastly upheld the right of faculty members to bargain.

\textbf{A. Problems of Coverage}

However unwavering its conclusion that the NLRA applies to private university faculty, the NLRB's opinions rendered to date reflect its unfamiliarity with what it once called "an unchartered area.\textsuperscript{15} For example, the NLRB regularly determines the scope of an appropriate bargaining unit,\textsuperscript{16} only rarely having its judgment questioned by the courts of appeal which ordinarily are content to rely on the Board's presumed industrial competence.\textsuperscript{17} That familiarity with the industry, however, has been found noticeably lacking in appropriate unit decisions for colleges and universities. The Board has struggled with the inclusion or exclusion of part-time (adjunct) faculty members,\textsuperscript{18} has been criticized for its seemingly inconsistent treatment of department chairmen and other alleged supervisors,\textsuperscript{19} and has created a hybrid (and questionable) election pro-

\begin{itemize}
\item\textsuperscript{14} The United States Supreme Court granted certiorari on February 21, 1979. 99 S. Ct. 1212 (1979).
\item\textsuperscript{15} C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904, 905 (1971).
\item\textsuperscript{16} Section 9(b), 29 U.S.C. § 159(b) (1976), provides that: "The Board shall decide in each case . . . the unit appropriate for the purpose of collective bargaining . . . ." The Board determines, through standards it has developed, which groups of jobs share a sufficient community of interest to constitute a bargaining unit. \textit{See generally} R. GORMAN, \textit{Basic Text on Labor Law, Unionization, and Collective Bargaining} 66-92 (1976).
\item\textsuperscript{17} "[T]he issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491 (1947).
\item\textsuperscript{18} Initially, the Board included part-time faculty in units with full-time faculty relying primarily on industrial precedent. \textit{See}, e.g., C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904 (1971); University of New Haven, Inc., 190 N.L.R.B. 478 (1971). However, in New York Univ., 205 N.L.R.B. 4 (1973), the Board determined that part-time faculty members not employed in tenure track positions do not share a sufficient community of interest with full-time faculty to be included in the same bargaining units. The Board has adhered to this position. \textit{See}, e.g., University of Vermont, 223 N.L.R.B. 423 (1976); University of Miami, 213 N.L.R.B. 634 (1974). It has also received judicial approval. Kendall College v. NLRB, 570 F.2d 216 (7th Cir. 1978).
\item\textsuperscript{19} \textit{See} Kahn, \textit{supra} note 11, at 99-101, 135-45. For a contrary view, \textit{see} Finkin, \textit{The NLRB in Higher Education}, 4 TOL. L. REV. 608, 632-40 (1974). Although the supervisory status of department chairmen is still the subject of much debate, it was not an issue in \textit{Yeshiva} and is beyond the scope of this article which will concentrate on collective faculty authority.
\end{itemize}
cedure for professional school faculty.  

The Board's decisions in these and other areas have prompted criticism of its case by case adjudication method which, according to some, proceeds on insufficient knowledge. Several commentators, and at least one faculty organization, have requested the Board to use its administrative rulemaking power as a means of both increasing its familiarity with the "industry" and establishing a set of workable rules tailored to fit the university environment. Not surprisingly, the Board has proved no more willing to use its rulemaking power for colleges and universities than it has for any other industry.

While the criticism of the Board's appropriate unit decisions mentioned above has some validity, Yeshiva raises quite another, and much more basic, problem. Ever since the Cornell decision university administrators have maintained that collective bargaining is inappropriate for certain mature colleges and universities. Their objections cannot merely be written off to the inventive mind of the management attorney. Selection of a bargaining agent by university faculty can create serious problems not experienced in the industrial setting. For example, in Northeastern University, in the face of a petition by a National Education Association...

20. In Syracuse Univ., 204 N.L.R.B. 641 (1973), the Board ignored the traditional "Globe" election (named for Globe Machine & Stamping Co., 3 N.L.R.B. 294 (1937)) in which craft employees can vote to be represented separately or as part of a comprehensive unit. In Syracuse the Board decided that the law faculty had sufficiently diverse interests from the rest of the university to warrant either inclusion in the campus wide unit, a separate unit, or no representation at all. For an interesting discussion of the Board's treatment of law schools, see Brousseau, Collective Bargaining and Private University Governance: A Look From the Law Schools, 29 U. FLA. L. REV. 625 (1977). See also Menard, Exploding Representation Areas: Colleges and Universities, 17 B.C. IND. & COMM. L. REV. 931, 961-66 (1976).


22. The American Association of University Professors filed a document entitled: Petition to the NLRB for Proceedings for Rulemaking in Representation Cases Involving Faculty Members in Colleges and Universities, on June 18, 1971. See Kahn, supra note 11, at 87.

23. In addition to its adjudicative power, § 6 of NLRA, 29 U.S.C. § 156 (1976), grants the Board the authority to "make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." The Board has exercised its administrative rulemaking power only rarely. Though criticized by the Supreme Court for adopting what amount to rules in case by case determinations, see NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), the Board's operation remains primarily adjudicative rather than legislative. See R. GORMAN, supra note 16, at 15-18.

24. The term 'mature' university is usually used to denote scholarly institutions in which there is some history of shared decision making, as distinguished from "mere teaching institutions" like junior colleges and high schools.

(NEA) affiliate seeking to represent its faculty, the university contended that its faculty senate was a labor organization and its faculty handbook a collective bargaining agreement as a bar to any election. The Board dismissed the contention, holding that, "the faculty senate functions as advisory committees and makes recommendations (which are totally different from bargaining demands that a union would make upon an employer during contract negotiations) to the president." In fact, the senate and its committees consulted "on all policies, propositions and problems of faculty concern."

While the Board was no doubt correct that a faculty senate is not a labor organization for purposes of the National Labor Relations Act, its explanation in Northeastern University may be viewed with some skepticism. In the first place, faculty senates or committees thereof regularly involve themselves in such issues as academic policy, tenure, reappointment, promotion and other matters which clearly seem to be, in the words of the NLRA, "conditions of work." Moreover, the case seems at odds with the Supreme Court's decision in NLRB v. Cabot Carbon Co. which held that the statutory term "dealing with" was broader than "bargaining with" and that an organization need not, therefore, be involved in contract negotiations to qualify as a labor organization.

The Northeastern case ably demonstrates the problems which confront the Board in this relatively new area. Neither the Act itself, nor the Board's thirty odd years of experience, contemplates all of the difficulties created by Cornell. And, as the Board learned in Northeastern University, established statutory interpretation and NLRB precedent are not easily adapted to the university structure. Nor is the effect of collective bargaining upon the university environment likely to have the same impact that it has had in more traditional industry. While the employer in Northeastern was no doubt concerned about the prospect of dealing with a unionized faculty, he might also legitimately have been concerned with the effect that certification of a bargaining representative would have on existing

26. NLRRA § 2(5), 29 U.S.C. § 152(5) (1976), defines "labor organization" as:
[A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

27. A detailed discussion of the Board's contract bar rule is beyond the scope of this article. Generally, the NLRB will not process a petition for an election filed during the term of an existing collective bargaining agreement. See R. Gorman, supra note 16, at 54-59.

28. 218 N.L.R.B. at 248.

29. Id.


32. Id. at 211-12.
faculty governance procedures. That issue certainly troubled the North- eastern faculty, a group of whom requested clarification of "the impact of an affirmative vote upon our collegial system with its shared governance arrangements." Though the Board declined to give an advisory opinion as to what it called "lurking issues," the employer's contention, and the faculty's concern, point out the problems of adopting for private universities and colleges collective bargaining legislation structured to apply to a more typical industrial setting.

B. Difference in Structure

In most industries, as the Board itself has noted, a pyramidal structure exists. The ultimate power is at the pinnacle of the pyramid held by the board of trustees and the chief executive officer. While power is delegated through various levels of management, it stops short of the base. The base is comprised of the workers—those who have no store in the management of the enterprise but instead effectuate the policies of management through production. These workers are clearly "employees" for purposes of the Act and it is from their ranks that unions draw their membership.

Between the pinnacle and the base exist various layers of middle management. From the first line supervisor or foreman to the various vice-presidents, these employees, although concerned with ultimate production, are charged primarily with insuring its completion by supervising or managing the labors of others. Because of the potential for conflict should they be included in a bargaining unit with those they supervise, and because the drafters of the Act thought that management had the right to expect individual loyalty from those who effectuate its policies, supervisors are expressly excluded from the section 7 right to "form, join or assist labor organizations." Stated differently, these workers are not "employees" for purposes of the National Labor Relations Act.

Section 2(11) of the Act defines "supervisor" as:

[A]ny 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 responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise

33. 218 N.L.R.B. at 249.
34. Id.
36. NLRA § 2(8), 29 U.S.C. § 152(3) (1976), provides: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer ... but shall not include ... any individual employed as a supervisor . . . ."
of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.\textsuperscript{39} It is not necessary for an individual to possess all the powers enumerated in section 2(11) to qualify as a supervisor. Indeed, the NLRB has held that the ability to effectively recommend action with respect to any one item is sufficient.\textsuperscript{40} While disputes sometimes arise as to the supervisory status of a particular individual or even an entire classification, only rarely are large numbers of employees involved.\textsuperscript{41} Clearly, those involved in daily industrial production do not possess the authority set out in section 2(11).

In addition to the statutory exclusion of supervisors, the Board has recognized that certain employees, while not qualifying for exclusion by virtue of section 2(11) of the NLRA, nonetheless have no place in the bargaining unit. Thus, the Board has created the implied exclusion of managerial employees who, although having no supervisory power, qualify for exclusion because of their close alignment to management. They are defined as:

those who formulate and effectuate management policies by expressing and making operative the decisions of their employers, and those who have discretion in the performance of their jobs independent of their employer's established policy. . . . [M]anagerial status is not conferred upon rank and file workers, or upon those who perform routinely, but rather it is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management.\textsuperscript{42}

Though managerial employees are typically harder to identify than supervisors, certain vice-presidents, who have no supervisory authority but nonetheless "effectuate management policy," are typical examples.

The difficulty of accommodating the relationship between faculty and administration to the National Labor Relations Act—and the concern of the faculty at Northeastern—becomes readily apparent. Unlike private industry, many colleges and universities are not structured on the pyramidal model discussed above. Though universities typically do have a board of trustees and high ranking administrative officers (presidents, chancellors, provosts, etc.), the similarity ordinarily stops there. If the pyramidal model applied, the rank and file would be the faculty, the production

\textsuperscript{39} Id. § 152(11) (emphasis added).

\textsuperscript{40} See, e.g., Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949); NLRB v. Budd Mfg. Co., 169 F.2d 571 (6th Cir. 1948), cert. denied, 335 U.S. 908 (1949); Clark-O’Neill, Inc., 147 N.L.R.B. 370 (1964).

\textsuperscript{41} In addition to the statutory criteria, the Board has developed certain secondary criteria. Among the factors considered in its determination of supervisory status is the ratio of alleged supervisors to employees. See, e.g., Commercial Fleet Wash Inc., 190 N.L.R.B. 326 (1971); Montgomery Ward & Co., 93 N.L.R.B. 640 (1951).

\textsuperscript{42} Bell Aerospace, 219 N.L.R.B. 384, 385 (1975).
force which busily turns out educated youth under the watchful eye of management. That model, however, has no place in many colleges and universities. While the faculty is, indeed, the production force of the university, unlike the situation in industry, the rank and file of academia often has considerable decision making authority. Depending upon the university, the faculty, or committees elected by the faculty, recommends to the administration such matters as academic policy, course content and offerings, academic calendar, hiring, promotion, retention, tenure, and a multitude of other matters traditionally reserved to management in other industries. It is this system of shared authority—the ability of the faculty to make or effectively influence certain decisions—which has caused many of the problems in the Board’s assertion of jurisdiction over private universities and colleges. It was the ability of the faculty to influence such decisions—through its faculty senate—that prompted the Northeastern University administration to contend that it was already bargaining with a faculty representative about “terms and conditions of employment.” It was the potential effect of collective bargaining on the continued viability of this system which prompted the Northeastern faculty to petition the Board for advice. And it was the collective decision making power of the faculty which ultimately led the Second Circuit to the conclusion that faculty members are not employees at all. At Yeshiva anyway, the court found all of the faculty members to be supervisors.

C. Previous Cases

Though it first gained judicial acceptance in 1978, the contention that private university faculty members are supervisory and therefore ineligible for representation is not new. Indeed, the issue surfaced in the first university appropriate unit case ever decided by the Board. In C.W. Post Center of Long Island University, the Board noted that the faculty enjoyed the right to act, or at least recommend action, with regard to admissions, curriculum and graduation requirements. It also had some responsibility, subject to review by other university officials, for such matters as

43. This article will not attempt a detailed examination of shared governance arrangements. The model of shared authority is found in the Statement on Government of Colleges and Universities, 52 A.A.U.P. Bull. 375 (1966). The Statement was jointly prepared by the American Association of University Professors, American Council on Education, and the Association of Governing Boards of Colleges and Universities.

The literature concerning shared authority and university governance is substantial. E.g., J. Baldridge, Power and Conflict in the University (1971); J. Corsen, The Governance of Colleges and Universities (1975); A. Dykes, Faculty Participation in Academic Decision Making (1968); T. McConnell & K. Mortimer, The Faculty in University Governance (1971); Academic Governance (J. Baldridge, ed. 1971); Governing Academic Organizations (G. Riley & J. Baldridge, eds. 1977).

44. 189 N.L.R.B. 904 (1971).
faculty appointments, promotion, tenure and dismissal. As noted above, ordinarily the ability to act or effectively recommend action with respect to items enumerated in the definition of supervisor exempts an individual from the status of employee, even if he possesses power as to only one such item. The Board observed, however, that no faculty member possessed this power individually. Rather, "the faculty acts as a group, on the basis of collective discussion and consensus." This conclusion may well have been based upon the language of section 2(11) itself which defines as a supervisor an "individual having authority [to act] in the interest of his employer. . . ."

The opinion, however, indicates the Board's understanding that many private university faculties share in decisions thought to be managerial in most industries and demonstrates its unwillingness to strip faculties of representation rights merely because the university structure does not adhere to the industrial norm:

Mindful that we are to some extent entering into an uncharted area, we are of the view that the policymaking and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a group does not make them supervisors within the meaning of Section 2(11) of the Act, or managerial employees who must be separately represented. Accordingly, we find that full-time university faculty members qualify in every respect as professional employees under Section 2(12) of the Act, and are therefore entitled to all the benefits of collective bargaining if they so desire.

After rejecting a similar contention in *Fordham University*, the Board again echoed its difficulty in accommodating the NLRA to academia in *Adelphi University*. The employer in *Adelphi* asserted that certain faculty members serving on university personnel and grievance committees exercised supervisory authority. Both committees were elected by the full-time faculty. The personnel committee made recommendations concerning tenure, hiring, promotions, and terminations, authority which, if possessed by an individual in industry, would clearly be supervisory. The grievance committee considered and effectively recommended adjustment of faculty grievances, ordinarily a clear indication of supervisory status. Although the board of trustees had veto power over committee recommendations, the NLRB was presented with no case in

45. *Id.* at 905.
46. *Id.*
48. 189 N.L.R.B. at 905.
51. *Id.*
52. *Id.* at 647.
53. *Id.* at 647-48.
which it had been exercised in the two years prior to the hearing. Relying on its decision in *C. W. Post*, the NLRB rejected the contention that the fourteen faculty committee members involved were supervisors. Even though the entire faculty in *C. W. Post* possessed power apparently limited to only a small segment of the faculty in *Adelphi*, the Board said:

> [T]he underlying principle is the same. 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 of one's peers or colleagues, does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world. . . .

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 principal is recognized and given some effect.55

The Board also asserted that despite any power inherent in the faculty or its committees, ultimate power rested with the board of trustees. That body, the NLRB held, had not attempted to convert the faculty committees to management tools, but merely used the committees to gather "collective advice" concerning its decision.56

Following the *Adelphi* decision, universities continued to assert that their faculty members were supervisors or managerial employees. In all instances, the Board summarily rejected the contention, relying primarily on its previous decisions in *C. W. Post* and *Adelphi*. In fact, in two of the later cases the universities claimed to have fallen into an exception carved out in *Adelphi*,57 where the Board implied that it would not assert jurisdiction over universities operating under a “genuine system of collegiality,” i.e., presumably one in which the faculty made all relevant decisions without the necessity for administrative approval. In the same case, after observing that university faculty members were neither “fish [n]or fowl” in that they failed to have either true collegiality or the traditional role of supervisor as known in the commercial world, the Board said:

> The delegation by the university to such elected groups of a combination of functions, some of which are, in the typical industrial

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54. Id.
55. Id. at 648 (emphasis in original).
56. Id.
58. 195 N.L.R.B. at 648. See text accompanying note 55 supra.
situation, normally more clearly separated as managerial on the one hand and as representative of employee interests on the other, could raise questions both as to the validity and continued viability of such structures under our Act, particularly if an exclusive bargaining agent is designated. 59

In the first New York University 60 case, the university contended that at NYU a system of true collegial authority existed and relied on the Adelphi language quoted above to assert that the faculty was therefore outside the Board’s jurisdiction. 61 Ultimately, the Board decided that a “true collegial system” did not exist at NYU anymore than it did at Adelphi, noting that faculty actions were contingent upon approval by higher authority. Then, in true Catch 22 fashion, the Board observed that the mere fact of the employer’s opposition to the faculty’s organizational effort demonstrated the lack of a “true collegial system.” Finally, the Board observed that it did not mean to imply in Adelphi that true collegial authority would divest the Board of jurisdiction, though it noted that the Act would be more difficult to apply in that event and went on to conclude that, in fact “representation by a labor organization . . . would appear to be superfluous.” 62

In a still later case, Farleigh Dickinson University, 63 the employer contended that it, too, operated under a “true system of collegiality” and cited Adelphi as authority to exclude its faculty from the Act. Without commenting further on its misgivings, the Board merely found that the faculty did not have sufficient authority in formulating labor policies to be managerial employees. The Board said that while it gave “some effect” to the faculty’s power, final authority appeared to rest in the vice-president for academic affairs, and in any event, “[c]ommittee representatives are not advised to advocate management’s interest in making their recommendations . . . ” 64

In addition to the Board’s opinions, prior to Yeshiva one other circuit court had considered the issue. In NLRB v. Wentworth Institute, 65 the university contended that its faculty members were not employees because of the managerial and supervisory power delegated to them by the university. The university also argued that the assertion of jurisdiction over the faculty would erode academic freedom and substitute an adversarial system for a collegial one. 66 Though it showed some sympathy for the university’s position, the court held that, under a reading of the Act’s definitions, the faculty members were professional employees and neither

59. Id. at n.31.
61. Id. at 5.
62. Id.
64. Id. at 241.
65. 515 F.2d 550 (1st Cir. 1975).
66. Id. at 556.
supervisory nor managerial. The court expressly refused comment on the Board’s Adelphi, New York University, and Fordham University decisions and merely noted that the Wentworth faculty had no real authority and that “there is no evidence of an instance of significant faculty impact collectively or individually on policy or managerial matters. . . .”

D. Yeshiva: The NLRB

The record which confronted the Board and the Second Circuit in Yeshiva was different, however, and for the first time save in the law reviews the Board’s collective action doctrine was under attack. Whatever the real status of faculty power at Yeshiva, the administration did a thorough job of portraying if not what the Board would call “a true collegial system,” at least one in which the faculty had significant impact upon a host of policies and decisions.

As in the other cases, when the Board decided Yeshiva it seemed less concerned with the actual power exercised by the faculty than with the fact that it was exercised collectively. The Board noted that despite a contrary contention by the university, the authority of Yeshiva’s faculty was “not significantly different” from that of the faculties in Adelphi, Post and other similarly decided cases. In any event, the decision making authority was “on a collective rather than individual basis, it is exercised in the faculty’s own interest rather than ‘in the interest of the employer,’ and final authority rests with the board of trustees.”

Also included in the unit were department chairmen, division chairmen, senior professors (who filled a role similar to department chairmen in some departments) and certain faculty elected committee members. While acknowledging that such faculty members had a role to play in hiring, tenure and certain other decisions, the Board said that final authority in those matters was vested in the president or board of trustees. Moreover, the authority of the chairmen was “effectively diffused among the department faculty pursuant to the principle of collegiality,” making such individuals primarily “instruments of the faculty.” Indeed, many of them had been elected to their positions by the faculties they served.

E. Yeshiva: The Second Circuit

Unlike the Board, the Second Circuit paid considerable attention to the actual authority possessed by the faculty. In reviewing the various academic units, the court observed that in virtually every instance the faculty controlled, or effectively influenced curriculum matters, course offerings

67. Id. at 557-58.
68. 221 N.L.R.B. 1053 (1975).
69. Id. at 1054.
70. Id.
71. Id. at 1055-56.
72. Id. at 1054.
and content, admission policies, graduation requirements, academic standards, grading systems and other matters of academic policy. While some deans or other administrators testified that they had veto power over faculty action on such matters, none could recall having overruled the faculty. Indeed, there was testimony that the deans themselves had been persuaded by the faculty to reverse their own decisions.  

In addition to the effective control over academic policy, the court found that the faculty also controlled or heavily influenced such personnel decisions as hiring, promotion, tenure, reappointments and termination. Again, while the university administration had the power to disapprove such recommendations, it was only rarely exercised. The faculty's personnel influence was not confined to its teaching colleagues. As noted above, department chairmen or senior professors were frequently elected by the faculty and, in one school, the faculty had successfully petitioned the president for the removal of the current dean's predecessor. The new dean was appointed only after having obtained a favorable vote from the faculty, and testified that he considered himself "first among equals." 

Finally, the court observed that from time to time the faculty or its representatives had reviewed budget proposals, "discussed" financial and wage policies and made a tuition decision which had "serious budgetary consequences." The court was also influenced by the fact that the faculty had effectively vetoed the director's proposal to remove the Teachers Institute for Women to Brooklyn, opting to have it remain in Manhattan instead.

III. THE COURT'S DECISION

In announcing its decision the court considered, and rejected in turn, the four most commonly advanced Board justifications for denying the supervisory status of university faculty: (a) that the faculty was merely exercising the discretion and judgment of professional employees; (b) that the faculty was non-supervisory because its authority was asserted collectively rather than individually; (c) that the faculty acted in its own interest and not in the interest of the university; and (d) that the faculty's authority was subject to the final approval of the board of trustees.

A. Professors and Professionals

In Yeshiva and similar cases, the Board asserted that faculty authority is not supervisory in nature but is part of the discretion and judgment at-
tendant upon professional employees. The statute itself causes some problems here. As noted earlier, supervisory authority must be such that it is "not of a merely routine or clerical nature, but requires the use of independent judgment." A similar requirement is found in the definition of "professional employee" which requires that the work "involve[e] the consistent exercise of discretion and judgment in its performance." Though the statute indicates an intention to include professional employees within the sweep of the Act, the overlap between the two sections has not been easily reconciled. The discretion and judgment exercised by professionals might also be seen as the exercise of supervisory responsibility. The Yeshiva record, as well as those in most similar cases, discloses substantial authority requiring the independent judgment and discretion of the faculty. Indeed, unlike many cases in which supervisory status is an issue, the existence of the power is not debated. The nature of the power is the issue.

The Second Circuit flatly rejected the Board's determination that the Yeshiva faculty merely exercised the discretion and judgment of a group of professional employees. The court acknowledged that faculty members were professional within the meaning of the Act but held that fact not dispositive of the supervisory issue. The court said that a faculty member might, within the range of his professional competence, determine the content of the course he teaches and the evaluation of his students. When, however, he combined with other members to control curriculum, admissions, course selection and assignment, and other matters of academic policy, he was "no longer simply exercising individual professional expertise." Indeed, according to the court, the faculty is "substantially and per-

78. (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).

81. For an excellent discussion of this problem and the Board's attempts to solve it, see Finkin, The Supervisory Status of Professional Employees, 45 FORD-HAM L. REV. 805 (1977).
82. 582 F.2d at 697.
vasively operating the enterprise.™ The court apparently rejected the notion that the faculty could apply its collective professional acumen to determine curriculum and other matters by observing that when a faculty so acts it is the university. In doing so the court relied on Justice Cardozo's now famous declaration that "[b]y practice and tradition the members of the faculty are masters not servants. . . . They have the independence appropriate to a community of scholars."™

B. Collective Action

The court next addressed the Board's collective action doctrine, first enunciated in C. W. Post and applied by it in every similar case to date. The court observed that the Board's position had some appeal. In the first place, section 2(11) speaks to power of "an individual." Moreover, the faculty members at Yeshiva did not supervise non-professional employees.™ Rather, their actions primarily affected each other, thus creating the "logical difficulty of holding that the supervisory employees supervise other supervisory employees."™ Raising some question as to the proper scope of review,™ the court held that though the Board's position might have some logic, "it is not the only reasonable reading of the language of Section 2(11)."™ The court held that the statute was ambiguous, that the Board had cited no legislative history in support of its collective action rationale, and noted what it called some inconsistent treatment of the issue. Ultimately, however, the court said that it need not resolve the issue since the statutory restriction of "individual" authority did not exist for managerial employees who, in fact, the court said often make group decisions. Thus,

83. Id. at 697-98.
85. The Board has held that the exercise of supervisory authority by professional employees over non-professional employees will not necessarily exclude them from the protection of the Act. Thus, in Adelphi Univ., 195 N.L.R.B. 639 (1972), the Board said that a director of admissions who spent less than 50% of his time supervising non-professional employees was not a supervisor within the meaning of § 2(11). The so-called "50% rule" has also been applied by the Board in other university unit determination cases. See, e.g., Goddard College, 234 N.L.R.B. 169, 97 L.R.R.M. 1998, 1400 (1978); New York Univ., 221 N.L.R.B. 1148, 1151 (1975); New York Univ., 205 N.L.R.B. 4, 8-9 (1973). See also Boston Univ. v. NLRB, 575 F.2d 301, 306 (1st Cir. 1978). Since the resolution of Yeshiva did not turn on application of the 50% rule, 582 F.2d at 694-95 n.8, but upon faculty collective authority, discussion of the rule is beyond the scope of this article.
86. 582 F.2d at 699.
87. Section 10(f) of the NLRA, 29 U.S.C. § 160(f) (1976), provides that any person aggrieved by a final order of the Board may seek review in the court of appeals. As to the scope of review, the section provides, "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."
88. 582 F.2d at 699.
assuming (but not deciding) that the statute supports the Board's collective approach to supervisory designation, the faculty may still be excluded as a group of managerial employees.89

C. Whose Interest?

The third Board rationale examined by the court was again based in part on interpretation of section 2(11). The Board had held that faculties are not supervisory because their collective action is in their own interest and not "in the interest of their employer." Relying heavily on Kenneth Kahn's *The NLRB and Higher Education* 90 (which in fact influences much of the opinion), the court said that faculty "recommendations" were nearly always acquiesced in by the administration; that the faculty's opinion was given more than substantial weight and was often decisive as to the major policy issues; and concluded by observing that there was "no significant divergence between the interests of the faculty and those of the administration...."91

In support of its position that the interest of the faculty and administration were one, the court quoted from the 1966 Statement on Government of Colleges and Universities92 to the effect that the faculty, administration and boards of trustees have "joint authority and responsibility for governing the institution."93 Although the concept of shared authority has recently been called "an ideal rather than a widely developed practice,"94 and although a 1970 survey found actual shared authority practices in American colleges and universities to be "a far cry from the ideals envisaged by the [AAUP Statement],"95 the court, in effect, found the "ideal" to be the practice at Yeshiva.

D. Final Authority

Finally, the court discussed the Board's holding that authority exercised by a faculty is neither managerial nor supervisory because it is subject to the ultimate authority of the board of trustees. The court noted that most private universities are nonprofit corporations and that "every corporation is ultimately responsible to its board of directors."96 The court observed that all the statute required was the power to "effectively recom-

89.  Id. at 699-700.
90.  Kahn, supra note 11.
91.  582 F.2d at 700-01.
93.  582 F.2d at 701.
95.  Id. at 9.
96.  582 F.2d at 701.
mend” action, which the evidence demonstrated existed. The court also said that if the ultimate authority of the board could effectively defeat supervisory status “then it is difficult to contemplate any situation where the statutory and [NLRB]-created exemptions can be applied.”

IV. THE YESHIVA RATIONALE: DEATH KNELL TO FACULTY UNIONISM?

In its analysis of the Yeshiva faculty’s power the court was careful to note that it was not attempting to “examine in vacuo the governance procedures of all four-year private institutions of learning . . . described as ‘mature’ institutions . . . .” While the court noted that many institutions had adopted such “collegial” systems, it was concerned only with the extent of power exercised by the faculty of Yeshiva University. In this regard, one month before the Board sought review by the Supreme Court, Chairman John Fanning of the NLRB told a group of law students at the University of Missouri-Columbia that Yeshiva might be viewed as a “sport” case, not warranting an attempt for certiorari. Apparently, the decision to seek review indicates dismissal of the belief that Yeshiva is a novel or “sport” situation. And well it should. Though generalizations about university governance procedure are likely to be inaccurate, the situation at Yeshiva appears not to be unique. At other universities as well, faculty exercise significant control over both academic policy and personnel matters. And even if the power inherent in other faculties is less than it is at Yeshiva, the result would not necessarily differ.

The Yeshiva faculty did not enjoy what the Board calls “a true collegial system.” Its recommendations were subject to approval by university administration and were, on occasion, overruled. Moreover, there were areas to which its authority did not extend. Its ability to affect salaries, for example (called the most frequently cited reason for faculty unionization), appears weak, if not altogether nonexistent. If Yeshiva does not

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97. Id. at 701-02.
98. Id. at 702.
99. Id. at 696.
100. Id.
101. Chairman Fanning’s remarks were made on October 27, 1978, in conjunction with the 1978 Labor-Management Relations Seminar, Columbia, Missouri, sponsored by the University of Missouri-Columbia School of Law. The Board’s petition for certiorari was filed on November 27, 1978. 47 U.S.L.W. 3392 (U.S. 1978).
102. See Lindeman, The Five Most Cited Reasons for Faculty Unionization, INTELLECT, Nov. 1978, at 85, 86. The other reasons cited in the article are dissatisfaction with the faculty role in governance, the statutory right to bargain, incept administration, and competition for members among the major faculty labor organizations.
103. The court cited three instances of faculty impact on salaries: the evaluation process in Erna Michael College, 582 F.2d at 692; discussion in Belfer Graduate School Faculty Council, id. at 693; and determination of entry rank, id. at 693; and determination of entry rank,
enjoy "a true collegial system" then its distinction from other universities is merely one of degree. Power as extensive as that held by Yeshiva's faculty is certainly not necessary for supervisory status. If the Board's collective action rationale is to be discarded, then a faculty which collectively (and effectively) recommends hiring decisions, (which many of them do) would be supervisory and outside the jurisdiction of the Act. In analyzing the Yeshiva decision, then, it is not sufficient to point to the extensiveness of the power exercised by the faculty. What is really at issue is the power of the faculty to collectively make any decision which might fall within the ambit of supervisory responsibility.

Viewed in that light, the Yeshiva decision represents a significant threat to the continuation of collective bargaining between faculty and administration. In all of the cases discussed above (except possibly Wentworth) faculty power existed to make or influence decisions concerning academic policy or personnel matters. If accepted by the Supreme Court, the Second Circuit analysis will not only spell the end of future collective bargaining on many private campuses, it will significantly jeopardize those bargaining relationships which already exist.¹⁰⁴

A. The Professional Status of Faculty

Although the Second Circuit appeared to reject four distinct arguments against supervisory status, in fact the NLRB's basic position, encompassing all four arguments, is that a faculty's collective authority is the result of its professional standing. Unfortunately, neither in Yeshiva nor in similar cases has the NLRB adequately explained this conclusion. In its treatment of the issue, the court of appeals clearly substituted its judgment for that of the Board. The court, too, failed to analyze the nature of collective faculty action. Instead, it woodenly applied the literal wording of the statute, transplanted precedent developed for the industrial arena, and perhaps most importantly, ignored the purposes of the NLRA. It was not the intent of Congress to brand as supervisory the collective authority exercised by university faculty. The faculty acts collectively as professional employees.

Strictly as a matter of statutory construction, however, the Yeshiva decision might appear valid. At least if one ignores the anomalous conclusion that all faculty members are supervisors (with presumably no one to

¹⁰⁴ Conceivably, a university which has an already established relationship with a faculty representative could refuse to bargain at the expiration of an agreement, thereby prompting a test of the faculty's supervisory status in a subsequent unfair labor practice proceeding.
supervise but each other)\(^{105}\) and concentrates on the power wielded by the group, the decision would seem to turn upon a tight analysis of the statute and be amply supported by Board precedent. Certainly, the faculty at Yeshiva (and elsewhere) exerts influence over or directly controls some of the supervisory criteria set forth in section 2(11). Collective bargaining rights do not exist in a vacuum. In seeking to bargain with their employers, private university faculty members claim the protection of the NLRA. One of the principal tenets of that legislation is the distinction it draws between those who do the work and enjoy the protection of the statute and those who manage the enterprise and are not protected. Because of the faculty's collective power, the court decided that it belongs in the latter group. In the final analysis, it was the fact of faculty authority that motivated the court's decision. The flaw, however, was the court's failure to examine both the reason for the faculty's power and the basic premise underlying the statutory exclusion of supervisors.

B. Nature of Faculty Power

The Yeshiva court acknowledged that individual faculty members are professional employees. It rejected the NLRB's collective action doctrine, however, by deciding that faculty professional judgment could not be exercised collectively. Apparently, the court believes that when the faculty acts collectively, each individual is not, as an individual, exercising professional judgment. Rather, the collective is supervisory or managerial. Again, however, the court failed to give credence to the nature of the faculty's collective authority. Certainly, if an individual, after determining his course content (which the court recognized as a matter of professional judgment), had the further power to determine his department's curriculum and other academic policy matters, he would be a supervisory or managerial employee. No individual, however, has such power. Rather, in matters of academic policy, each faculty member combines his individual expertise with that of his colleagues. In the matter of curriculum, for example, the faculty collectively recommends those courses it believes necessary to the educational objective of the university.

Neither the statute nor the nature of educational expertise prohibits collective professional judgment. Indeed, in an environment with interests as diverse as those found in the modern university, it is doubtful that many academic policy decisions could be made by an individual. While the dean of a college, for example, might be a scholar in a particular discipline, he is almost assuredly without the professional background to establish course and graduation requirements in other disciplines falling under his domain. Instead, he turns to the collective wisdom of the faculty in that department, each of whom brings his special knowledge to bear to influ-
ence its direction. The judgment made by each faculty member is not any the less professional merely because it is made collectively. What is sought is not the opinion of an individual, but the collective wisdom of those claiming expertise in the field. The same thing is true with respect to the personnel decisions made by a faculty. In recommending appointment, tenure, or termination, a faculty collectively exercises its professional judgment. The faculty, with a collective expertise in the discipline, as well as in teaching itself, weighs the credentials, teaching ability and scholarly potential of an applicant or employee and recommends a course of action. 106

Careful analysis discloses the difference between such collective professional judgment and the kinds of supervisory authority described in section 2(11). Supervisors are excluded from bargaining units because the employer is entitled to the undivided loyalty of those who help him manage the business and because of the potential for conflict if supervisors were in-

106. The reasons for such participation are partly historical, with roots running back to early European universities which consisted of substantially autonomous and self-governing communities of scholars. They are also partly grounded on conceptions of the unique competence of academic personnel as resource persons having valuable contributions to make toward sound educational policy. But perhaps the most important reason is the essential functional significance of independence or insulation from control by non-academic interests as a safeguard for academic freedom. . . .

Sands, The Role of Collective Bargaining in Higher Education, 1971 Wis. L. REV. 150, 156 (1971). As explained by the AAUP Statement, supra note 92, at 378, "The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy. Furthermore, scholars in a particular field or activity have the chief competence for judging the work of their colleagues. . . ." See also J. CARSON, THE GOVERNANCE OF COLLEGES AND UNIVERSITIES 237 (1975):

The primary justification is that faculty alone have the minds and degree of qualification essential to the task of the college or university. That "qualification" for a part in the interdependent process of governance is rooted in three facts:

1. Faculty members are experts. They bring to the institution (in varying measures, of course) expertise in their subject-matter fields. They possess the basic stock-in-trade that students seek when enrolling in a college or university.

2. Faculty members are intellectuals—that is, a substantial proportion are. They are learning people, committed to the pursuit of knowledge, and thus are equipped to develop inquiring, reasoning minds. Men and women with a true intellectual bent must be allowed freedom to explore, to voice their findings, and to have them heard.

3. Faculty members are professionals. The hallmark of professionalism is the right to self-direction. For the administration to tell a talented and trained individual how he shall do what he has been trained and experienced to do is both foolhardy and wasteful. The professional anthropologist or zoologist must be given freedom to influence substantially those decisions as to courses, programs, and modes of teaching that are involved in the governance of a college or university.
cluded in a bargaining unit with those they supervised.\textsuperscript{107} It is inherent in the policy that supervisors are, indeed, part of the management structure. Their interests are simply different from the interests of those who do the work. Their job is to insure that management’s production goals are met, thereby effectuating corporate policy. To the extent that supervisors must direct production workers from more agreeable activities to more productive ones, the goals of the supervisors and those of the production workers are diverse.

Unlike an industrial supervisor, a faculty member is a means of production. Indeed, in the university setting, he is the means of production. The work of secretaries, maintenance employees and others (who presumably remain eligible for collective bargaining after \textit{Yeshiva})\textsuperscript{108} is simply ancillary to the work of the faculty. In manner of producing his “product,” however, the university professor differs from the typical industrial worker. While an industrial worker may have little interest (or at least be permitted to have little interest) in the product or the means of production, the same cannot be said of a university faculty member. He not only employs considerable discretion and judgment in the performance of his immediate work, as other professional employees do, but he acts with his colleagues to influence the work of others. Collectively, faculty members determine what work others do, and in many instances have a voice in how, and by whom, that work is to be performed.

Some of these same decisions are made by industrial workers who clearly qualify as “supervisors” under section 2(11). Collective faculty power, however, is exercised neither for the same purpose nor with the same consequences. In exercising his authority an industrial supervisor clearly advocates the interests of his employer. Even if he has professional status and is expected to exercise judgment and discretion, his “product” serves an end established by his employer. He is clearly accountable to management.\textsuperscript{109} His work is intended to foster policies dictated by management and he may be disciplined or otherwise disadvantaged if it does not. Faculty members also may be disciplined for poor work. One who fails to publish, for example, might incur such sanctions as termination or salary adjustment. The supervisory power perceived by the Second Circuit, however, did not inure to any individual. Rather, the faculty’s collective authority was at issue. Therein lies an important distinction from the workers Congress described in section 2(11). Although industrial supervisors, managerial employees, or even groups of industrial managerial employees are accountable to management for their decisions, a faculty, acting collectively, is not. Through its collective authority, a faculty might

\textsuperscript{108} The \textit{Yeshiva} decision would appear to have no effect on the Board’s assertion of jurisdiction over non-profit colleges and universities.
recommend appointment of a candidate or some matter with respect to academic policy. Although the administration may veto the recommendation, it does not have the ability to either discipline the faculty for its action or demand a contrary result. A faculty's authority is not exercised merely as an instrument of management policy:

These definitions [supervisor and managerial employee] assume a hierarchical decision-making structure. Mature colleges and universities, on the other hand, tend to have a dual track decisional system whereby authority in a hierarchical sense is lodged in the administration and ultimately in a lay governing board while a recommendatory authority is lodged in the faculty or bodies representative of it. Thus the distinction must be drawn between the exercise of influence (which, in some instances, may be considerable) over matters of professional concern to academics and the possession of formal, bureaucratic authority.110

The faculty does not make such recommendations to help manage the business or effectuate the basic policies of the administration. Instead, the faculty utilizes its collective expertise as professional educators to influence the creation of an environment in which learning, teaching and scholarship can take place. The administrative hierarchy of the university may accept the recommendations or discard them. In either case, the faculty's recommendation is made to serve personal or professional goals and only coincidentally furthers those of management.

In *Yeshiva* and similar cases the NLRB expressed this argument by merely observing that a faculty acts in its own interest and not, as the statute requires, “in the interest of the employer.” In rejecting the contention, the Second Circuit ignored faculty motivation and concluded that there

110. *Id.* at 615. *See J. BALDRIDGE, POWER AND CONFLICT IN THE UNIVERSITY* 114 (1971):

The university's bureaucracy is not only multilayered but characterized by complicated parallel authority structures. At least two authority systems seem to be built into the university's formal structure. One is the bureaucratic network, with formal chains of command running from the trustees down to individual faculty members and students. Many critical decisions are made by bureaucratic officials who claim and exercise authority over given areas.

The other authority system is a professional network, for at all levels there are formal mechanisms for bringing the expertise of the faculty into the decision-making process. It is fascinating to note how this parallelism is built right into the formal structure of the university. The tangled system of committees, faculty meetings, and faculty councils, which is only hinted at in the organization charts, is really not just “bureaucratic madness.” On the contrary, if it is madness at all, it is “professional madness.” The parallelism between the bureaucratic and professional authority structures ensures that professional goals will have strong advocates in the decision-making councils. Duality of authority and ambiguity of power are the price of ensuring that faculty expertise will have its say.
was "no significant divergence between the interests of the faculty and those of the administration."\textsuperscript{111} The court concluded that "[t]he faculty is the school."\textsuperscript{112}

Concluding that the faculty is the university is a mental exercise which does little to address the basic issue. Certainly, without the faculty there would be no university. That, however, is not persuasive. Without its assembly line workers there would be no General Motors either, but those employees assuredly are not supervisors. A worker's necessity to or identity with the enterprise makes him neither supervisor nor employer. The faculty is a necessary component of the university. But it is not "the school" anymore than is the administration, the students, or the contributing alumni.

With respect to the congruence of interests, one cannot conclude that faculty and administration are one because of basic agreement on certain academic policy and personnel matters. More than that is involved in the administration of a modern university. More importantly, the NLRA does not require antagonistic interests as a precedent to an election. And while faculty members exert more influence as to the direction of the enterprise than do industrial workers, their authority is not supervisory but a matter of professional competence. The receptiveness of the administration to implementation of faculty recommendations is motivated by respect for the professional judgment of the faculty—in their individual as well as their collective capacities—and also by a certain deference to the faculty as valued employees whose suggestions should not be capriciously rejected.

In exercising that judgment, the court may well be correct in its assertion that the faculty acts "in the interest of the employer." Ultimately, performance of an employee's duties either in academia or industry will serve the interest of his employer. Those words in section 2(11), however, cannot logically be read to encompass collective faculty action. The definition of managerial employee may state it best: those employees who have the authority to express or make operative the decisions of their employer. Section 2(11) should be read to convey the same meaning. An industrial supervisor acts in the interest of his employer by carrying out the policies of management. The authority he wields is intended to effectuate or determine that policy. However expressed, neither definition describes collective faculty authority. The key, not well expressed by the Board and ignored by the Second Circuit, is the nature of the faculty's power. Unlike industrial supervisors and managers, faculties do not act to carry out policies developed above or to make operative the decisions of their employers. Both as to matters of academic policy and personnel, the faculty does not exert the authority or have the responsibility of the industrial supervisor. Although it helps determine policy, it is not acting to manage the business for its employer, nor may it be held accountable for doing so. It is a group

\textsuperscript{111} 582 F.2d at 701.
\textsuperscript{112} Id. at 700.
of professional employees, utilizing its knowledge and experience to make an informed and highly discretionary judgment.

C. Ultimate Authority

The NLRB also decided that the existence of an administrative veto power further demonstrated the faculty's professional status. Though the Board did not adequately explain its position, the Second Circuit's summary rejection is also lacking.

Ordinarily, as the Second Circuit observed, the mere existence of a veto power does not negate supervisory status. In *Yeshiva*, however, the court misperceived the effect of the Board's reliance on the ultimate authority of the board of trustees. The fact of a veto power by administrative officials dramatizes the nature of faculty collective authority. The faculty does not make a managerial decision. While it may "effectively recommend" action it does so not as managers, but as professional educators whose advice is needed to direct the enterprise. The fact that the faculty's recommendations are frequently adopted does not make all faculty members managers. It merely reflects a not uncommon congruence of the nonetheless separate goals of the faculty and the administration.

D. Statutory Coverage: Clarification by Rulemaking

At the end of the opinion, the court addresses what may be the real reason for its decision: its view that the Act was never intended to apply to private nonprofit colleges and universities. It is no doubt true that Congress did not foresee the Board's assumption of jurisdiction. However, the legislative history also does not support a conclusion that such bodies were intended to be excluded from the Board's jurisdiction. And, though the

113. *Id.* at 703.

114. See the discussion of the legislative history with respect to non-profit organizations in *NLRB v. Wentworth Inst.*, 515 F.2d 550, 553-56 (1st Cir. 1975). *See also* Note, *The Supervisory Status of Private University Faculty Members Under the NLRA: NLRB v. Yeshiva University*, 43 ALB. L. REV. 162, 163 n.10 (1978).

It is generally acknowledged that in neither the 1935 Wagner Act nor the 1947 Labor Management Relations Act did Congress specifically address private universities or colleges. In the 1974 Health Care Amendments, however, the House Report recognized the extension of jurisdiction to such institutions with apparent approval:

The National Labor Relations Board, initially, extended the Taft-Hartley exemption to a host of other eleemosynary, charitable, educational and similar types of institutions.

Experience indicated, however, that the withholding of the Board's jurisdiction did not cut down on the number of strikes or labor unrest. There was in fact, evidence to the contrary: with the rapid development of the nonprofit hospital industry there were increasing numbers of recognitional strikes.

Accordingly, in recent years the Board began to assert jurisdiction over areas it had formerly left alone. Currently, the only broad area of
structures of the Act are not easily adaptable to universities and colleges, that alone is no reason to deprive a large group of employees from the Act's basic protection. As the Board said in Syracuse University, "[t]he basic interests recognized by the Act remain the same. . . ." And, though the Board noted that unlike industrial workers, a faculty's special allegiances to a discipline "may transcend shared interests in the economic benefits," charitable, eleemosynary, educational institutions wherein the Board does not now exercise jurisdiction concerns the nonprofit hospitals, explicitly excluded by section 2(2) of the Act.


As this issue was going to press, the Supreme Court held in NLRB v. Catholic Bishop of Chicago, 47 U.S.L.W. 4283 (1979), that there are at least some limitations on the NLRB's ability to assert jurisdiction over private schools. In that case a divided Court held that the Board was without jurisdiction over lay faculty at two Catholic high schools. Faced with the contention that application of the Act to church operated schools violated the first amendment, the Court declared that it should, if possible, construe the legislation to avoid the constitutional challenge. Over a strong dissent, the Court declared that it would interpret the Act as not covering such institutions absent "the affirmative intention of the Congress clearly expressed." Id. at 4286. The Court discovered no such intention in the original legislation or any of its amendments.

The decision in Catholic Bishop should have no effect on Yeshiva or similar cases. In the first place, Yeshiva is not a religiously operated school, thereby making the "affirmative intention" doctrine inapplicable. Other private universities, of course, are operated by churches. Even so, the policy which dictated the decision in Catholic Bishop would seem not to apply. In Catholic Bishop the Court was concerned with the effect that unionization of teachers would have on the educational mission of the parochial high school where "we have recognized the critical and unique role of the teacher." 47 U.S.L.W. at 4286. The same danger is not present in higher education. For example, in Lemon v. Kurtzmann, 403 U.S. 602 (1971), the Court upheld a challenge to governmental aid to parochial schools, observing that, "We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education." Id. at 617. Lemon was distinguished in Tilton v. Richardson, 403 U.S. 672 (1971), where the issue was the legitimacy of federal aid to church operated universities and colleges. In discussing the issue of "excessive entanglements" between church and state, the Court distinguished religious universities from religious high schools, noting that the "affirmative if not dominant policy of" . . . pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.'" Id. at 685-86, citing Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970). In church operated universities on the other hand, the Court said, the students are less impressionable and less subject to religious indoctrination. Moreover, the Court said that the dominant mission of a religious college or university is secular.

The same distinction should apply in the assertion of NLRB jurisdiction over church related private colleges and universities. Unlike the situation which the Court perceived in Catholic Bishop as applying to high schools, the dominant policy of church related universities is to provide a secular education. As such, NLRB jurisdiction over university faculty poses no threat to religious freedom.
it concluded that that was "no excuse to justify denying them what economic benefits may be available . . . through collective bargaining."\(^{115}\)

The Second Circuit and some commentators have suggested that the status of university professors as employees, supervisors, or something else could be best defined by legislative amendment.\(^{116}\) While such action would no doubt solve the problem perceived by the Second Circuit in *Yeshiva* and while one seriously interested in faculty collective bargaining could not downplay the need for such action, it is unrealistic to expect it. The 1978 Labor Law Reform Act failed miserably, even though it offered no radical changes in the law and had the full support of organized labor. To expect an amendment which would affect only a comparative handful of workers, especially workers whose relationship to the rest of the work force is slight, if not antagonistic, is sheer folly.

Echoing Kahn, the court observed that in place of legislation "it would seem that an appropriate method to explore fully the special problems created by the Board's assumption of jurisdiction here would be by rule-making."\(^{117}\) The renewed call for rulemaking for this unfamiliar workplace will find no quarrel here. An administrative rulemaking proceeding could help the NLRB understand the problems and the structure of private universities and might provide it with more information than its present case by case approach. Rulemaking, however, would not necessarily solve the problem created by the Second Circuit's *Yeshiva* decision. Rulemaking conceivably could guide the Board on such unit placement issues as part-time employees and department chairmen, on which its record has been less than consistent. But administrative rulemaking cannot overcome the basic problem of Board jurisdiction over a group of employees.

If full-time faculty members are supervisors because of their collective power, then it would seem that no rulemaking procedure could change that result. Certainly, the court is not suggesting that the Board, through its rulemaking power, can provide for jurisdiction over employees found to be supervisory. That would be tantamount to statutory amendment, and whatever the scope of the Board's power, it does not extend that far. All the Board could really do with rulemaking is decide, on the basis of the information available to it, that a faculty's collective action does not amount to supervisory responsibility.

Concededly, an administrative rulemaking procedure could furnish the Board with more information upon which to base that conclusion. For example, faculty organizations might be better able to explain the need for

\(^{115}\) 204 N.L.R.B. 641, 643 (1973).

\(^{116}\) 582 F.2d at 703. *See also* Kahn, *supra* note 11, at 166-67; *Note, supra* note 114, at 184-88.

\(^{117}\) 582 F.2d at 703. *See also* Kahn, *supra* note 11, at 167-75; Menard & DiGiovanni, NLRB Jurisdiction Over Colleges and Universities: A Plea for Rulemaking, 16 WM. & MARY L. REV. 599 (1975).
collective professional judgment in such matters as curriculum and personnel evaluation. However, on the basis of what appears to be a substantial record in \textit{Yeshiva}, the Board has already ruled, under its adjudicatory power, that faculty members are \textit{not} supervisors, based upon their collective authority. If the Second Circuit is correct when it holds that result to be precluded by the literal wording of section 2(11), the same result would inevitably follow a similar conclusion reached by the Board in rulemaking.

E. Conflicts of Shared Authority Among the Faculty, the Union, and the Administration

Perhaps inherent in the court's assertion that the Act was never intended to apply to private universities is concern regarding the impact of a structured, typically adversarial relationship on the collegial atmosphere of the university. As noted previously, the Northeastern faculty was sufficiently worried about the potential effect to petition the NLRB for advice. Commentators and university administrations alike have urged that collective bargaining is simply inconsistent with the kinds of shared authority structures found at \textit{Yeshiva}.\footnote{118} These beliefs find ample support in NLRB precedent.

Under established doctrine a university might plausibly assert that following selection of a representative it is not only without obligation to deal with faculty committees and senates but, in fact, is precluded from doing so. The university might well argue that due to the principle of exclusive representation, its obligation is to deal solely with the union, the faculty's exclusive representative. And, while certain personnel and academic policy matters might be debated with that representative, the university could claim the protection of established NLRB precedent and refuse to discuss other matters formerly within the domain of the faculty, including faculty governance arrangements.\footnote{119} Even though the extent of

\footnote{118}: See, e.g., Mason, \textit{Faculty Unionism and Faculty Governance}, in \textit{Encountering the Unionized University} 5 (J. Schuster ed. 1974) (summary of those who fear the effect of bargaining on shared authority).

\footnote{119}: Section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1976), provides that: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." Section 8(a)(5), 29 U.S.C. § 158(a)(5) (1976), provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a)." Read together, the sections have been interpreted to mean more than that an employer must deal with the representative selected by his employees; with respect to the mandatory subjects for bargaining, he must deal with \textit{only} that representative. Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); J. I. Case Co. v. NLRB, 321 U.S. 332 (1944). \textit{See also} K. \textsc{Mortimer} & T. \textsc{McConnell}, \textit{Sharing Authority Effectively} 3 (1978) (reporting the

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the obligation to bargain about matters of management policy remains somewhat vague, such basic decisions as what is produced, how it is produced, and who will be employed to produce it are generally not thought to be mandatory subjects for bargaining.

While such predictions find support in industrial cases, the same result need not follow in the college and university area. There is, indeed, at least a hint that the NLRB will decide otherwise. In making appropriate unit determinations, the Board has excluded part-time faculty members due to lack of a community of interest with full-time faculty. In support of this conclusion the Board argues, in part, that part-time faculty have no voice in faculty governance procedures. Thus, one might conclude that the Board views faculty governance procedures differently than similar power possessed by workers in other industries. That is, if faculty governance were beyond the range of collective bargaining, presumably the inability of part-time faculty to share in those decisions would be to no avail. Obviously, the Board has not directly addressed this issue and there is danger inherent in the above analysis. What is ultimately required, of course, is a matter of statutory interpretation. In construing the statute, however, industrial precedent may not be decisive.

The Act describes the mandatory subjects for bargaining in such general terms as "wages, hours, and other terms and conditions of employment . . ." or "pay, wages, hours of employment, or other conditions of employment . . ." Though the terms "pay" and "hours of work" have prompted some litigation, obviously the more ambiguous requirement is to bargain with respect to "other terms and conditions." In industry, the mandatory subjects for bargaining have generally increased the power of the employee. Virtually powerless before 1935, since that time an employee has been able to act in concert to influence some aspects of his working environment, including the still ambiguous Fibreboard obligation of management to discuss certain matters of basic policy.

lodging of an unfair labor practice charge under state legislation by a union after university administrators at Pennsylvania State University discussed matters of academic governance with the faculty senate rather than with the union).

120. See, e.g., New York Univ., 205 N.L.R.B. 4, 6 (1973). The doctrine was expressly approved by the Second Circuit in Yeshiva, 582 F.2d at 694 n.8.


124. In Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964), the Supreme Court decided that an employer was obligated to bargain with the representative of his employees regarding his decision to subcontract certain maintenance work. The Court held that such an issue was within the literal meaning of "terms and conditions of employment," that bargaining would reduce industrial strife and therefore effectuate the purposes of the NLRA, that bargaining was supported by industry practices, and that requiring an employer to bargain would not significantly abridge his freedom to manage his business.

In a separate opinion, Justice Stewart cautioned that the Court's opinion...
Because of the differences in structure previously discussed, some university faculty enjoy opportunities to influence decisions unknown to nonunionized (or even unionized) industrial workers. Although such shared governance arrangements are alien to the industrial mode for which the Act was designed, the NLRB nonetheless might determine that they are an established "term and condition of employment," about which the university is obligated to bargain.125

Finally, several commentators have urged that even were faculty senates to remain,126 they would become impotent bodies incapable of effectively representing faculty interests.127 Because of the difficulty inherent in parceling out authority between union and senate, such predictions may well be valid.128 As such, however, they furnish no reason to con-
clude that collective bargaining is inappropriate for the university. The potential effect of collective bargaining upon established governance procedures, administrative practices or collegial atmosphere furnishes no excuse for straining to exclude faculty from coverage by the Act. The NLRA was not intended to preserve the status quo of any workplace. Rather, its purpose was to provide employees with some measure of protection in seeking to influence their conditions of employment. The Act certainly provoked changes in industrial management practices. In unionized workplaces, management no longer has a free hand, at least with respect to the mandatory subjects for bargaining. It is therefore not sufficient to assert that bargaining by faculty will change existing practices in the university. Indeed, change may be just what the faculty desires. One of the most frequently cited reasons for faculty unionization efforts is dissatisfaction with existing faculty governance arrangements. The mere existence of those structures should not exclude faculty from the protection afforded other workers under the Act. Although their workplace may bear little similarity to industry, the Act's basic policy of promoting industrial peace is fostered by allowing faculty and administration to settle their differences at the bargaining table. When effectuation of that policy is combined with a proper perception of the faculty's power as professional rather than managerial, no sound reason exists for excluding them from coverage by the Act.

V. CONCLUSION

It was conceded at the outset that the Second Circuit's decision in *Yeshiva* finds support in the literal wording of the statute. Clearly, the application of existing labor legislation to university structures provokes problems not encountered in industry and not easily reconciled with Board precedent. The easy tactic is to decide the case as did the Second Circuit: section 2(11) says that supervisors make certain decisions and since the faculty makes some of those decisions, it is supervisory. That result is emi-

timer & McConnell indicates that in Pennsylvania's state college system, two colleges dissolved their senates shortly after negotiation of an agreement, four play only a social or clerical role, and the remaining eight have substantially reduced roles. K. MORTIMER & T. MCCONNELL, SHARING AUTHORITY EFFECTIVELY 83 (1978).

129. See, e.g., Lindeman, supra note 102, at 85. A 1973 study prepared for the Carnegie Commission on Higher Education indicates that desire for governance reform is not confined to institutions in which the faculty possesses little power: "What is most striking . . . is that support for governance reform is greater at upper-tier schools—where objectively the situation is better in the sense that decisions are more collegial and less hierarchial—than at colleges of the lower range. . . . Support for unionism is greater at the lesser places . . . , but there is not as strong a sense of need for governance reform at these schools as at major universities." E. LADD & S. LIPSET, PROFESSORS, UNIONS AND AMERICAN HIGHER EDUCATION 19-22 (1973). See also K. MORTIMER & T. MCCONNELL, SHARING AUTHORITY EFFECTIVELY 55 (1978).
nently unsatisfactory. The only workers in the university who could then organize would be those who have nothing to do with the university's educational mission. While application of the Act to the "unchartered area" of the university may be difficult, in the absence of amendment or rulemaking, the Act can be accommodated by bearing in mind Judge Hand's admonition that "there is no more likely way to misapprehend the meaning of language . . . than to read the words literally, forgetting the object which the document as a whole is meant to secure."³¹

130. Central Hanover Bank & Trust Co. v. Comm'r, 159 F.2d 167, 169 (2d Cir. 1947).