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RECENT DEVELOPMENT

Labor Law—Full-Time Faculty Held Not To Be “Employees” Under the National Labor Relations Act.—On October 30, 1974, the Yeshiva University Faculty Association filed a petition with the National Labor Relations Board (Board) for certification of a bargaining unit of full-time faculty members at Yeshiva University (Yeshiva).¹ Yeshiva opposed the petition on the ground that its full-time faculty were not “employees” within the meaning of the National Labor Relations Act² (NLRA), but rather were managerial and supervisory personnel and therefore outside of the Board’s jurisdiction.³ After conducting a series of hearings, the Board rejected Yeshiva’s contentions and found that the full-time faculty were professional employees within the coverage of the NLRA.⁴ In the subsequent election held pursuant to the Board’s order, the union won and was certified as the exclusive bargaining representative for the full-time faculty. Yeshiva, however, refused to bargain with the union. The Board then issued a complaint against Yeshiva, found a violation of its statutory duty to bargain in good faith,⁵ and ordered it to negotiate.⁶ When Yeshiva refused to comply with the order, the Board brought a proceeding in the Court of Appeals for the Second Circuit for enforcement of its order.⁷ Yeshiva again raised the argument that its full-time faculty were managerial and supervisory personnel and therefore excluded from the coverage of the NLRA.

1. Section 9(c) of the National Labor Relations Act (NLRA), 29 U.S.C. § 159(c) (1976), provides that employees or a union may file a petition with the Board seeking an election to determine if union representation is desired by a majority of employees in an appropriate bargaining unit. The NLRA requires that the Board determine “the unit appropriate for the purposes of collective bargaining,” *id.* § 159(b), considering the mutuality of interest of the employees involved. *See* Continental Baking Co., 99 N.L.R.B. 777, 782 (1952); R. Gorman, Basic Text on Labor Law ch. 5, § 2 (1976).

2. *See* 29 U.S.C. § 152(3) (1976).

3. The statutory definition of employees does not include “any individual employed as a supervisor.” *Id.* Supervisors, defined as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust their grievances, or effectively to recommend such action,” *id.* § 152(11), are specifically excluded from the coverage of the NLRA. *Id.* § 164(2). Managerial employees, those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer,” *General Dynamics Corp.*, 213 N.L.R.B. 851, 857 (1974), are not expressly excluded by the statute, but have been held to be beyond the NLRA’s scope by decisions of the Board and the federal courts. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-90 (1974); *Eastern Camera & Photo Corp.*, 140 N.L.R.B. 569, 572 (1963).

4. *Yeshiva Univ.*, 221 N.L.R.B. 1053, 1054 (1975). Professional employees are specifically included within the coverage of the NLRA even though they exercise discretion in the performance of their duties. The use of discretion does not automatically warrant exclusion from the category of “employees” as long as that discretion is not exercised in relation to managerial matters. *See* 29 U.S.C. §§ 152(12), 159(b)(1) (1976).

5. Under 29 U.S.C. § 158(a)(5) (1970), it is an unfair labor practice for an employer to refuse to negotiate with a union certified as its employees’ bargaining representative.

6. *Yeshiva Univ.*, 231 N.L.R.B. No. 98, 96 L.R.R.M. 1601 (Aug. 24, 1977).

7. Proceedings to enforce Board orders are generally brought directly to the court of appeals in the circuit where the unfair labor practice occurred. *See* 29 U.S.C. § 160(e) (1976).

The Second Circuit, after a thorough review of the structure of Yeshiva and the part played by the full-time faculty in its system of governance, agreed with Yeshiva's contentions. Rejecting the Board's arguments in favor of employee status,⁸ the court held that, because the full-time faculty made effective recommendations regarding hiring, promotions, salary, tenure, and other matters concerning governance, they played a decisive role in the development of policy at Yeshiva and thus performed managerial and supervisory functions. Enforcement of the Board's bargaining order was therefore denied. *NLRB v. Yeshiva University*, 582 F.2d 686 (2d Cir. 1978).

A Board determination that an individual is an employee under the NLRA is set aside only when the Board's ruling is not warranted by the record and has no reasonable basis in the statute.⁹ Although the *Yeshiva* decision was expressly limited to its facts,¹⁰ it potentially limits the Board's power to assert jurisdiction over a large number of faculty¹¹ at private universities and colleges. The Second Circuit's decision raises questions as to the validity of prior holdings of the Board that faculty members have employee status, and may greatly diminish the availability of the NLRA's protections to faculty unionization attempts in the future.

Prior to 1970, the Board had refused to exercise jurisdiction over most labor disputes at private colleges and universities, regardless of whether the dispute involved faculty members or nonacademic employees.¹² The rationale for the Board's refusal was enunciated in *Trustees of Columbia University*,¹³ a case involving a union's attempt to represent a unit of clerical workers in Columbia University's libraries. In *Columbia*, the Board held that jurisdiction should be asserted over private colleges and universities only in unusual cases.¹⁴ The Board reasoned that, although asserting jurisdiction might be appropriate in cases involving a university's commercial activities,¹⁵ it would not "effectuate

8. For a discussion of the development of the Board's rationale for finding full-time faculty to be employees, see notes 24-34 *infra* and accompanying text.

9. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947). The Second Circuit recognized this, but held that *Yeshiva* was one of the rare cases in which the Board's determination could not be upheld. 582 F.2d at 702; see notes 67-79 *infra* and accompanying text.

10. 582 F.2d at 696.

11. "Faculty" will be used herein to refer to full-time faculty. By the time *Yeshiva* was decided, the Board had established the rule that part-time faculty should not be included in a unit of full-time faculty because of a lack of a community of interest. See *New York Univ.*, 205 N.L.R.B. 4, 6 (1973). Because the Board had excluded part-time faculty from the unit involved in *Yeshiva*, 221 N.L.R.B. at 1054, the Second Circuit did not reach the question of whether part-time faculty are employees under the NLRA. 582 F.2d at 694 n.8. The Board's blanket application of this exclusionary rule, without consideration of differing factual situations, has been criticized. See Pollitt & Thompson, *Collective Bargaining on the Campus: A Survey Five Years After Cornell*, 1 *Indus. Rel. L.J.* 191, 223 (1976).

12. See generally Pollitt & Thompson, *supra* note 11, at 195-98.

13. 97 N.L.R.B. 424 (1951).

14. *Id.* at 427.

15. The Board described such activities as "commercial in the generally accepted sense," and cited examples of a nonprofit institution running an insurance business or a trade school supplying the needs of a business. *Id.* at 425 & n.3 (citing, e.g., *Association Canado-Americaine*, 72 N.L.R.B. 520 (1947); *Henry Ford Trade School*, 63 N.L.R.B. 1134 (1945)).

the purposes of the Act" when the activities involved were "intimately connected with the educational activities of the institution."¹⁶

In *Cornell University*,¹⁷ the Board overruled the *Columbia* decision and reversed its position on jurisdiction over private colleges and universities.¹⁸ Cornell University and Syracuse University had petitioned the Board to hold elections to determine the bargaining representatives for their nonacademic employees. Although the case involved a number of disputes over what constituted appropriate employee bargaining units,¹⁹ the threshold question was whether the Board should assert jurisdiction over the universities in light of its *Columbia* decision. The universities had submitted substantial documentation of out-of-state purchases, numerous employees, large financial investments, and research contracts with government agencies to show the impact of their activities on interstate commerce.²⁰ After reviewing the evidence of the universities' financial activities, the Board held that these activities were so substantial that it was compelled to assert jurisdiction in order to fulfill the

16. *Id.* at 425-26. In declining to exercise jurisdiction in *Columbia*, the Board relied upon the legislative history of the 1947 Taft-Hartley amendments to the NLRA. When this legislation was pending, the issue arose as to whether all nonprofit institutions should be specifically exempted from the definition of an employer. In the House version of the bill, all nonprofit institutions would have been specifically excluded from the NLRA's coverage. H.R. 3020, 80th Cong., 1st Sess. § 2 (1947). As adopted, however, the amendments exempted only nonprofit hospitals, not nonprofit institutions as a class. Labor Management Relations Act, ch. 120, § 2(2), 61 Stat. 137 (1947) (current version at 29 U.S.C. § 152(2) (Supp. V 1975)). The conference report on the Taft-Hartley amendments indicated that all nonprofit institutions had not been specifically exempted because, in the past, jurisdiction had been asserted over these parties by the Board only in cases involving purely commercial activities. H.R. Rep. No. 510, 80th Cong., 1st Sess. 32, reprinted in [1947] U.S. Code Cong. Serv. 1135, 1137; see Trustees of Columbia Univ., 97 N.L.R.B. at 425 n.3. The Board viewed this report as legislative approval of asserting jurisdiction over private colleges and universities only in unusual cases, *id.* at 427, and continued to use this rationale in subsequent cases to decline jurisdiction over private colleges and universities if noncommercial activity was at issue. See, e.g., Leland Stanford Junior Univ., 152 N.L.R.B. 704, 706-07 (1965); University of Miami, 146 N.L.R.B. 1448, 1450 (1964).

17. 183 N.L.R.B. 329 (1970).

18. *Id.* at 334.

19. Cornell desired a statewide unit covering all its nonacademic employees and wanted professionals and supervisors excluded from the unit. The library personnel wanted a separate unit for library employees at Cornell's Ithaca campus. The union favored a separate unit for the School of Industrial and Labor Relations, including professionals and nonprofessionals. *Id.* at 329. The Board in *Cornell* decided that a statewide unit was appropriate and excluded all professionals and supervisors. *Id.* at 336.

20. *Id.* at 329-30. This was an unusual case, in that the universities were asking the Board to assert jurisdiction over them. Because the New York labor laws had been amended in 1968 to extend their coverage to private nonprofit educational institutions, see 1968 N.Y. Laws, ch. 890, § 1 (codified at N.Y. Lab. Law § 715 (McKinney 1977)), the universities would have been subject to the state laws if the Board had declined to take the case. See 29 U.S.C. § 164(c)(2) (1976) (states permitted to exercise jurisdiction when the Board declines it). The universities in *Cornell* apparently preferred federal jurisdiction to that of the state, arguing that "the failure of the States adequately to recognize and legislate for labor relations affecting [universities and colleges] and their employees now justifies the Board in asserting jurisdiction." 183 N.L.R.B. at 329; see Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. Rev. 63, 64 n.2, 93 (1973).

purposes of the NLRA.²¹ Thus, private colleges and universities were declared to be employers under the NLRA and no longer exempt from its application.²²

Because the Board must resolve all labor disputes involving employees of an employer over whom jurisdiction has been asserted,²³ the question of faculty unionization was soon brought before the Board. In *C.W. Post Center*,²⁴ the university argued that the jurisdiction asserted over it should not extend to its faculty, contending that the duties of the faculty were managerial and supervisory. The full-time faculty at C.W. Post formulated admission, curriculum, and graduation requirements, and established rules for honors and grading. They also made recommendations concerning faculty appointment, reappointment, promotion, tenure, and dismissal.²⁵ The Board, however, rejected the university's argument, finding "the usual incidents of the employer-employee relationship," and held that "the policymaking and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a group" did not remove them from the coverage of the NLRA.²⁶ Because the faculty acted collectively instead of individually, they could not be supervisors.²⁷

21. 183 N.L.R.B. at 333-34. The Board stated that "it is no longer sufficient to say that merely because employees are in a nonprofit sector of the economy, the operations of their employers do not substantially affect interstate commerce." *Id.* at 333. The Board noted that the Supreme Court had upheld the constitutionality of extending the coverage of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 (amended 1977)), to nonprofit universities because those institutions are engaged in commerce. *See Maryland v. Wirtz*, 392 U.S. 183, 193-99 (1968), *overruled on other grounds*, *National League of Cities v. Usery*, 426 U.S. 833, 852-55 (1976). Rejecting its *Columbia* reasoning, the Board also held that the exemption for nonprofit hospitals in the Taft-Hartley amendments indicated a congressional desire to leave the question of jurisdiction over other nonprofit institutions to the Board's discretion. 183 N.L.R.B. at 331; *see Labor Management Relations Act*, ch. 120, § 2(2), 61 Stat. 137 (1947) (current version at 29 U.S.C. § 152(2) (1976)). The exemption for hospitals was abolished several years after the *Cornell* decision, thereby removing any basis for continuing the position taken by the Board in *Columbia*. *See Pub. L. No. 93-360*, § 1(a), 88 Stat. 395 (1974) (codified at 29 U.S.C. § 152(2) (1976)).

The Board also reasoned that § 14(c) of the NLRA, 29 U.S.C. § 164(c) (1976), which permits the Board, in its discretion, to decline to assert jurisdiction, implies that the Board has a corresponding discretion to expand its jurisdiction to a previously excluded class of employers whose activities had increased to a level that substantially affected commerce. 183 N.L.R.B. at 331. Another factor in the Board's decision to assert jurisdiction was that most employees of private universities would otherwise be left without statutory protection because only fifteen states had labor legislation at the time. *Id.* at 333-34; *see note 20 supra*.

22. Guidelines for which institutions are sufficiently connected with interstate commerce to be subject to the NLRA were not established in the *Cornell* case. 183 N.L.R.B. at 334. Later that year, the Board formulated the rule that jurisdiction will be asserted over any private nonprofit college or university that has gross annual revenues of one million dollars or more. 29 C.F.R. § 103.1 (1977).

23. *See* 29 U.S.C. §§ 152(3), 164(c)(1) (1976).

24. 189 N.L.R.B. 904 (1971).

25. *Id.* at 905.

26. *Id.* at 904-05.

27. *Id.* at 905. This reasoning was used in subsequent cases in which the managerial-supervisory argument was raised. For example, in *Fordham Univ.*, 193 N.L.R.B. 134 (1971), *overruled on other grounds*, *Seton Hill College*, 201 N.L.R.B. 1026, 1027 (1973), the full-time faculty, through the Faculty Senate, played a major role in determining curriculum, admissions standards, and graduation requirements, and in decisions on appointment, promotion, and tenure

In *Adelphi University*,²⁸ the Board added a second justification for classifying faculty as employees. Adelphi had argued that the faculty members who sat on the university's personnel and grievance committees played a decisive role in policymaking, giving them managerial and supervisory status.²⁹ The Board rejected this argument, noting not only that the faculty, through its committees, acted as a group, but also that the final authority on policy decisions rested with the university's board of trustees. The Board found that there was no attempt to convert the committees into extensions of management, and that the committees served merely to transmit the faculty's advice to the trustees.³⁰ Although the trustees and administration always followed the recommendations of the committees, the recommendations were not binding on them, and thus the faculty could not be considered managerial or supervisory personnel.³¹

In *University of Miami*,³² a case in which faculty played basically the same role in formulating university policy as in previous cases,³³ the Board added a third reason for holding full-time faculty to be employees. Reiterating the concepts of collective action and lack of final authority, the Board also reasoned that, because the faculty acted in their own interest rather than that of the university, they could not be considered supervisors.³⁴

of other faculty members. Two faculty committees handled grievances, and some faculty members administered research grants and employed people to work under these grants. *Id.* at 135. Based on its decision in *C.W. Post*, the Board held that these functions did not make Fordham's faculty managerial or supervisory personnel. Even those serving on the grievance committees or in the Faculty Senate, though they may have had power effectively to recommend policy, were found to be employees because they acted as a group rather than as individuals. *Id.*; *accord*, *Northeastern Univ.*, 218 N.L.R.B. 247 (1975); *University of Miami*, 213 N.L.R.B. 634 (1974); *Manhattan College*, 195 N.L.R.B. 65 (1972).

28. 195 N.L.R.B. 639 (1972).

29. The personnel committee made effective recommendations concerning tenure, hiring, promotion, leaves of absence, suspensions, and dismissal of faculty. The grievance committee heard faculty grievances, determined whether the facts required a more detailed investigation, reported to the administration and the faculty, and recommended adjustments. *Id.* at 647.

30. *Id.* at 648. The Board disregarded the fact that the duties of the grievance committee may have subjected the members to a conflict of interest between their loyalty to the union and their role in adjusting grievances. This power to implement an employer's labor relations policy is one reason for classifying an individual as managerial. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 272 (1974).

31. 195 N.L.R.B. at 648; *accord*, *New York Univ.*, 205 N.L.R.B. 4 (1973) (managerial status rejected because of collective action and lack of final authority). The Board in *Adelphi* also rejected the contention that faculty members who supervised secretaries in addition to their academic duties should be excluded from the bargaining unit because they were not "employees." The Board held that a faculty member who spent less than 50% of his time supervising nonunit employees was not a supervisor within the NLRA's definition of that term. 195 N.L.R.B. at 644. In *New York Univ.*, the Board included librarians in a faculty bargaining unit, subject to a showing that any individual librarian spent more than 50% of his time supervising nonunit employees. 205 N.L.R.B. at 8. The First Circuit has cited the "50% rule" in including department chairmen, who spent 5-10% of their time supervising nonprofessionals, in a faculty unit. *Trustees of Boston Univ. v. NLRB*, 575 F.2d 301, 306 n.4 (1st Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3014 (U.S. July 25, 1978) (No. 78-67). The Second Circuit has expressly declined to rule on the legality of the 50% rule. *NLRB v. Mercy College*, 536 F.2d 544, 550 (2d Cir. 1976).

32. 213 N.L.R.B. 634 (1974).

33. The faculty in *Miami* had a voice in salary, hiring, promotion, and tenure decisions. *Id.* at 634.

34. *Id.* The statutory definition of a supervisor requires that the employee in question be acting

In deciding the faculty unionization cases, the Board applied traditional labor law principles. These principles, however, were stretched far beyond the boundaries established in cases involving nonacademic settings. The Board in *C.W. Post Center* cited no precedent for the rule that supervisory authority exercised collectively does not confer supervisory or managerial status,³⁵ and the issue was never briefed or argued by the parties.³⁶ In subsequent cases, the Board simply cited *C.W. Post* as authority for this principle without any analysis of its validity.³⁷ In an industrial setting, any supervision of employees or exercise of managerial functions is grounds for exclusion from the employee bargaining unit, even if that supervision is exercised collectively.³⁸ The Board offered no discussion of why such collective action does not confer managerial or supervisory status on faculty, and made no attempt to explain why this rule was appropriate for an academic but not an industrial setting.³⁹ It appears that the Board merely formulated this theory for policy reasons in order to allow faculty to benefit from the protections of the NLRA.⁴⁰

The Board's argument that final managerial authority vested in a board of trustees removes faculty from the category of managerial and supervisory employees⁴¹ also has no counterpart in traditional labor law principles. In a corporate setting, employees whose actions may be subject to review have frequently been classified as managerial or supervisory.⁴² Indeed, the statutory definition of a supervisor speaks of an individual with the authority to perform certain actions or effectively to recommend such actions,⁴³ implying the existence of a higher authority that can reject these recommendations as it chooses.

in the interest of his employer. 29 U.S.C. § 152(11) (1976), *quoted at note 3 supra*. Professor Finkin has reasoned that the definition assumes accountability to a higher authority, and because the university subjects faculty members to no personal sanction or control based upon an evaluation of their recommendations, they are therefore not "accountable." Finkin, *The Supervisory Status of Professional Employees*, 45 *Fordham L. Rev.* 805, 818 (1977) [hereinafter cited as *Supervisory Status*].

35. See notes 24-27 *supra* and accompanying text.

36. See Kahn, *supra* note 20, at 121.

37. See, e.g., *Manhattan College*, 195 N.L.R.B. 65, 66 (1972); *Fordham Univ.*, 193 N.L.R.B. 134, 135 (1971), *overruled on other grounds*, *Seton Hill College*, 21 N.L.R.B. 1026, 1027 (1973).

38. See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 270 (1974) (individuals exercising managerial functions as a team held to be managerial personnel and thus excluded from bargaining unit); *Western Saw Mfrs., Inc.*, 155 N.L.R.B. 1323, 1329 n.11 (1965) (employee's service on a board determining employee terminations one factor supporting a finding of supervisory status).

39. In *Adelphi Univ.*, 195 N.L.R.B. 639, 648 (1972), the Board noted that "[a collegial system] would not conform to the pattern for which the supervisory exclusion of our Act was designed," but nevertheless proceeded to apply traditional concepts. See notes 48-53 *infra* and accompanying text.

40. In *C.W. Post*, the Board stated that the faculty is "entitled to [the Act's] benefits." 189 N.L.R.B. at 904; see *University of Detroit*, 193 N.L.R.B. 566, 566 (1971).

41. See notes 28-31 *supra* and accompanying text.

42. See, e.g., *Transformer Eng'rs*, 114 N.L.R.B. 1325, 1327 (1955) (employee with authority to recommend changes in other employees' status). See generally *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). Professor Kahn has noted that it is difficult to reconcile the Board's broad interpretation of the term "supervisor" in an industrial setting with the narrow interpretation used in the faculty cases. Kahn, *supra* note 20 at 125. At least one commentator, however, has supported the Board's rejection of managerial or supervisory status for faculty. See Finkin, *The NLRB in Higher Education*, 5 *U. Tol. L. Rev.* 608, 612-19 (1974) [hereinafter cited as *Higher Education*].

43. 29 U.S.C. § 152(11) (1976), *quoted at note 3 supra*.

The Board's third argument, that faculty act solely in their own interest,⁴⁴ also has little application in an industrial setting. It is difficult to envision a situation in which an employee acting on policy matters in an industrial setting would be considered to be acting in his own interest rather than that of his employer. Even if the Board's three arguments are accepted, however, there would still remain individual faculty members who exercise supervisory authority "in the traditional individual sense"⁴⁵ through supervision of nonunit clericals, teaching assistants, and other nonprofessional employees. These people would be included in the unit unless their individual status was actually litigated. The failure of the Board to define clearly what constitutes managerial or supervisory status has created uncertainty and generated unnecessary litigation.⁴⁶

The problem of faculty unionization cases stems from the application of laws and doctrines developed for industrial labor situations to an academic setting. The NLRA was "primarily aimed at the blue collar workingman and offers little guidance for the special problems faced when professional employees organize."⁴⁷ This problem is compounded when the professionals are faculty members at a college or university because the system of governance of these institutions is radically different from the systems used by private commercial enterprises.

Because of state laws governing nonprofit corporations, the structure of private universities is generally similar to that of business corporations, with power centralized in a board of directors or trustees that delegates authority to the lower-echelon employees.⁴⁸ The similarities, however, often end there. The system of governance at most colleges and universities is based upon the shared authority concept enunciated by the American Association of University Professors.⁴⁹ In this system, faculty, administration, and students all contribute to policy decisions⁵⁰ that, in an industrial context, would be strictly a matter of management prerogative. The faculty are responsible for the product of the university—education—and when decisions concerning that product are made, the faculty's recommendations often prevail.⁵¹ Faculty members may also hold administrative positions on a part-time basis or for fixed periods of time, and department chairmanships⁵² may be filled from faculty ranks on a rotating

44. See notes 32-34 *supra* and accompanying text.

45. Kahn, *supra* note 20, at 129.

46. The result of the Board's case-by-case consideration of individuals has been "to encourage further litigation and to exacerbate the problems of delay, workload and unpredictability." *Supervisory Status*, *supra* note 34, at 827.

47. Kahn, *supra* note 20, at 67 (footnote omitted).

48. *Id.* at 66-67 n.5; see, e.g., N.Y. Not-For-Profit Corp. Law § 701 (McKinney Supp. 1978-1979).

49. *Statement on Government of Colleges and Universities*, 52 AAUP Bull. 375 (1966) [hereinafter cited as AAUP Statement].

50. *Id.* at 376.

51. Kahn, *supra* note 20, at 66-67 n.5.

52. The inclusion of department chairmen in a faculty bargaining unit has been a frequently litigated issue. In virtually identical factual situations, the Board has reached opposite results through the development of "two lines of cases, neither of which appears to acknowledge the other." *Supervisory Status*, *supra* note 34, at 819. Department chairmen have frequently been included in faculty units. See, e.g., *Trustees of Boston Univ. v. NLRB*, 575 F.2d 301, 305-06 (1st Cir. 1978) (department chairmen who acted in faculty's interest included in faculty unit), *petition*

basis.⁵³ All of these factors tend to blur distinctions between management and labor and make a determination of employee status for faculty difficult.

The shared authority concept may also create difficulties once a faculty unit is formed and a bargaining representative is certified. The scope of collective bargaining would presumably include all topics relating to the terms and conditions of employment of the faculty.⁵⁴ The result could be that such subjects as academic policies, normally prerogatives of management, would be a term of employment subject to bargaining.⁵⁵ When faculty and universities have negotiated, the topics of bargaining have included, for example, a faculty voice in personnel matters, including the selection of department chairmen, a voice in academic decisionmaking, affirmative action programs, salaries, benefits, teaching loads, office hours, and class sizes.⁵⁶ This goes far beyond the

for cert. filed 47 U.S.L.W. 3014 (U.S. July 25, 1973) (No. 78-67); *New York Univ.*, 205 N.L.R.B. 4, 9 (1973) (department chairmen who made recommendations concerning appointments, salary, promotion, and tenure included in faculty unit); *Fordham Univ.*, 193 N.L.R.B. 134, 137-39 (1971) (department chairmen who made recommendations on hiring and salary, served on promotion and grievance committees, prepared department budgets, voiced department views to deans, and determined course offerings and schedules included in faculty unit), *overruled on other grounds*, *Seton Hill College*, 201 N.L.R.B. 1026, 1027 (1973). *Contra, e.g.*, *Syracuse Univ.*, 204 N.L.R.B. 641, 641 (1973) (department chairmen who made effective recommendations concerning faculty personnel matters excluded from the faculty unit as supervisors); *C.W. Post Center*, 189 N.L.R.B. 904, 906 (1971) (same). In the cases in which department chairmen were excluded as supervisors, the Board cited only cases supporting exclusion, and in cases in which chairmen were included, only cases supporting inclusion were noted. *See Higher Education, supra* note 42, at 633. The inconsistency of the Board holdings has not, however, gone unnoticed by some Board members. *See Fordham Univ.*, 193 N.L.R.B. at 140 (Member Kennedy, dissenting). For an analysis of the inconsistencies between the *Fordham* and *C.W. Post* decisions, see Kahn, *supra* note 20, at 100.

In addition to the inconsistency of the particular holdings, the Board seemed to apply different standards to department chairmen than those utilized in the cases dealing with faculty status in general. Although the criterion of individual versus collective action may be consistent with the exclusion of some department chairmen from faculty bargaining units, the other two standards applied by the Board to the faculty cases are not. Like other faculty members, department chairmen are also subject to higher authority and may be acting in the interest of the faculty rather than of the employer. The Board, however, failed to apply these theories in cases in which department chairmen were excluded from a faculty unit. This inconsistent reasoning has been criticized. *See, e.g.*, Kahn, *supra* note 20, at 135-44.

53. Kahn, *supra* note 20, at 68-69. Perhaps this fluidity accounts for some of the confusion in the Board's decisions on the supervisory status of department chairmen. *See* note 52 *supra*. The Board may have had some difficulty reconciling the supervisory nature of chairmen's duties with the possibility of particular faculty members moving back and forth between management and the employee bargaining unit.

54. 29 U.S.C. § 158(d) (1970) provides that an employer must bargain with a certified union about "wages, hours, and other terms and conditions of employment." Normally, decisions dealing strictly with business matters are areas of permissive bargaining, and the employer may choose whether or not to negotiate these decisions with the union. In an academic situation, however, the policies of the university may be so germane to the working conditions of the faculty that they become mandatory subjects of bargaining. *Cf. Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964) (permissive topic may become mandatory if it is "a problem of vital concern to labor and management").

55. Kahn, *supra* note 20, at 79-80.

56. Pollitt & Thompson, *supra* note 11, at 247-48. *See generally* Moskow, *The Scope of Collective Bargaining in Higher Education*, 1971 *Wis. L. Rev.* 31, 51.

normal scope of collective bargaining, which traditionally has focused on wages, hours, and benefits.⁵⁷

The Board was not unaware of the inherent difficulties in applying laws developed for an industrial model to an academic setting. In *Adelphi University*,⁵⁸ the Board acknowledged that a true collegial system, with the faculty running the university, "does not square with the traditional authority structures with which this Act was designed to cope,"⁵⁹ but distinguished a true collegial system from the shared authority system, with interdependence among faculty, administration, trustees, and students.⁶⁰ The Board concluded that Adelphi did not have a true collegial system because final authority was vested not in the faculty, but in the trustees.⁶¹

The Board's view that universities are not true collegial models fails to take into account the realities of university governance. Because colleges and universities must abide by state corporation laws, which require final authority to be vested in a board,⁶² it is virtually impossible to operate under the true collegial concept.⁶³ The lack of a true collegial system, however, does not mean that universities operate in the same manner as businesses. The Board's failure to distinguish between the academic and industrial worlds has caused some commentators to criticize the Board for even attempting to apply the NLRA to faculty at private colleges and universities.⁶⁴

The Board's decision in *Yeshiva University*⁶⁵ followed the pattern established in earlier cases. Yeshiva contended that faculty were managerial or supervisory personnel, and the Board rejected the contention summarily, reiterating its prior holdings without any analysis of why they were valid. The Board held that because the faculty at Yeshiva acted collectively, in its own interest, and without any final authority, they were employees.⁶⁶

In denying the Board's request for enforcement of its bargaining order, the

57. See *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973) ("Rarely, if ever, does industry present a situation where employee interests outside the economic sphere assume major importance.").

58. 195 N.L.R.B. 639 (1972), discussed at notes 28-31 *supra* and accompanying text.

59. *Id.* at 648. In *C.W. Post Center*, 189 N.L.R.B. 904 (1971), discussed at notes 24-27 *supra* and accompanying text, the Board recognized the difficulty of applying traditional labor law standards to a true collegial system, but quickly distinguished the shared authority system of government from a true collegial one. *Id.* at 905; see *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973) ("the industrial model cannot be imposed blindly on the academic world")

60. See notes 48-53 *supra* and accompanying text.

61. 195 N.L.R.B. at 648; *accord*, *New York Univ.*, 205 N.L.R.B. 4, 5 (1973).

62. See, e.g., Mich. Comp. Laws Ann. § 450.124 (1973); N.J. Stat. Ann. § 15:1-7 (West Supp. 1978-1979); N.Y. Not-For-Profit Corp. Law § 701 (McKinney Supp. 1978-1979).

63. Kahn, *supra* note 20, at 124-25. Most universities and colleges operate under the shared authority system. *Id.* at 124.

64. See, e.g., Brown, *Collective Bargaining in Higher Education*, 67 Mich. L. Rev. 1067, 1081 (1969) ("Instead of the spirit of cooperation and open communication that infuses the [AAUP Statement], one can foresee each component of the university becoming distant, withdrawn, adversary."); Kahn, *supra* note 20, at 180 (Board should have excluded faculty as managerial or supervisory personnel and left the question of their coverage by the NLRA to Congress); Bunzel, *College Professors: Do They Have Managerial Status?*, Wall St. J., Sept. 29, 1978, at 24, col. 3 (Board's faculty unionization decisions caused undesirable move from the professional atmosphere of a college to the structured system of an industry).

65. 221 N.L.R.B. 1053 (1975).

66. *Id.* at 1054 (footnote omitted).

Second Circuit agreed with Yeshiva that its faculty were both supervisory and managerial personnel.⁶⁷ The court accepted the Board's finding that the faculty at Yeshiva were professionals, but cited Board decisions to support the premise that managerial or supervisory status is not precluded by professional status.⁶⁸ The court viewed the faculty as supervisors because they "without question effectively recommend the hiring, promotion, salary and tenure of the faculty of the University in a manner which can hardly be described as routine or clerical."⁶⁹ The court found managerial status because of the faculty's role in formulating and effectuating university policy, not only through personnel decisions, but also through the formulation of admission standards and grading, curriculum, and graduation requirements.⁷⁰

The court examined the Board's justifications for holding faculty members to be employees under the NLRA and rejected them as inconsistent with traditional labor law principles. In discussing the Board's argument that faculty could not be managers or supervisors under the NLRA because they acted collectively, the court recognized that the statutory definition of a supervisor referred to an "individual" who had certain powers,⁷¹ and that the Board's decisions may have been based upon this definition. The court felt, however, that a broader interpretation of the statute was more reasonable, noting that in the corporate context supervisors often act as a group.⁷² Even if the statutory definition of supervisors were read narrowly, the court observed that there is no such limitation on the concept of managerial employees, and that managerial employees often formulate policy as a team or group.⁷³

The court also rejected the Board's theory that the faculty acted on their own behalf rather than on behalf of Yeshiva. The court found that there was no distinct division between the interests of the faculty and the university because authority for policymaking was shared among the trustees, the administration, and the faculty.⁷⁴ The court held that the faculty acted in the interest of both themselves and Yeshiva, as shown by the fact that Yeshiva accepted the

67. *NLRB v. Yeshiva Univ.*, 582 F.2d 686, 696 (2d Cir. 1978). This was the first instance in which a court of appeals has disagreed with a Board determination that faculty at a private university are employees under the NLRA. The First Circuit had previously upheld a Board determination that faculty at Wentworth Institute were employees on the ground that the faculty had no significant policymaking power except over routine matters, such as scheduling of examinations. The court did note, however, that faculty may play a managerial or supervisory role in some universities. *NLRB v. Wentworth Inst.*, 515 F.2d 550, 556-57 (1st Cir. 1975).

68. 582 F.2d at 697 (citing, e.g., *General Dynamics Corp.*, 213 N.L.R.B. 851, 860-63 (1974)). The court noted that although a professor's control over the content of his courses is professional, control over the courses offered and over other policy matters is managerial. *Id.* at 697-98.

69. *Id.* at 696.

70. *Id.*

71. 29 U.S.C. § 152(11) (1976), quoted at note 3 *supra*.

72. 582 F.2d at 699. The court was also disturbed because the Board had, in one instance, excluded a teaching dean from a faculty bargaining unit because he was on a committee that, acting collectively, made effective recommendations as to the hiring and firing of faculty. *Id.* (citing *Florida S. College*, 196 N.L.R.B. 888, 889 (1972)).

73. *Id.* at 699-700 (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 270 (1974)).

74. *Id.* at 700.

faculty's recommendations almost without exception. If the decisions had not been in Yeshiva's interests, it would have rejected the faculty's recommendations.⁷⁵

The Board's final theory, that the faculty were not managers or supervisors because they were subject to the ultimate authority of the board of trustees, was found to be "particularly unconvincing."⁷⁶ The court concluded that, because the statutory definition of supervisor includes the power to make recommendations,⁷⁷ review by a higher authority is implicit in the definition.⁷⁸ The court found it hard to imagine a situation in which a supervisor would not be subject to a higher authority and, again noting Yeshiva's acceptance of the faculty's recommendations, held that the faculty were supervisors under the Act.⁷⁹

Although the *Yeshiva* decision was limited to its facts,⁸⁰ the Second Circuit clearly rejected the Board's theories for granting employee status to faculty. In future cases, the Board may be able to make factual distinctions between the role played by the faculty at Yeshiva and the faculty involvement at other institutions, and find employee status when the faculty participation is very limited.⁸¹ Indeed, the faculty at Yeshiva had a remarkable amount of power concerning policy decisions. As supervisors, they had an effective voice in making recommendations regarding personnel matters. As managers, they played a substantial role in formulating university policy, setting tuition rates in certain instances, recommending the hiring of deans, and preventing one of Yeshiva's schools from being physically relocated.⁸² It cannot be determined at this point what level of faculty participation in a university's policy decisions will be sufficiently insubstantial for a finding that faculty are employees under the NLRA, but it is clear that the Board can no longer summarily reject arguments that faculty have managerial or supervisory status.

The *Yeshiva* decision may also have an impact on faculty unions already certified under the NLRA and bargaining with their employers.⁸³ Because of

75. *Id.* at 700-01 (citing Kahn, *supra* note 20, at 68).

76. *Id.* at 701.

77. 29 U.S.C. § 152(11) (1976), *quoted at* note 3 *supra*.

78. 582 F.2d at 701-02.

79. *Id.* at 702. The court noted that supervisory status may be denied when the trustees regularly reject faculty recommendations. *Id.*

80. *Id.* at 696.

81. The Second Circuit suggested that the Board use its rulemaking powers to establish guidelines for when faculty are supervisors or managers and when they are not. *Id.* at 703; *see* 29 U.S.C. § 156 (1976) (Board authorized to make rules necessary to carry out the provisions of the NLRA). Commentators have often suggested the use of rulemaking as a method of ensuring that the Board will receive a broad base of opinion from those parties who will be affected. Rulemaking in advance is thought to be preferable to rulemaking by adjudication, in which a limited amount of input often causes the Board to establish precedent based on insufficient information. *See* Kahn, *supra* note 20, at 168-75; Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 *Yale L.J.* 729, 752-61 (1961); Williams, *The NLRB and Administrative Rulemaking*, in *Labor Law Developments 1970*, at 209 (Southwestern Legal Foundation ed. 1970). *See generally* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 *Harv. L. Rev.* 921, 925-41 (1965).

82. 582 F.2d at 696.

83. The case should have no effect on faculties already organized or subject to organization under state labor laws. Kohn, *Yeshiva Wins NLRA Exemption on Recognizing Faculty Union*, *N.Y.L.J.*, Aug. 3, 1978, at 1, col. 3. Colleges and universities over which the NLRB declines to

the decision's potentially limited scope, an employer may not be justified in relying on *Yeshiva* as a basis for refusing to bargain with previously certified faculty unions. If the employer does refuse to bargain, or commits any other unfair labor practice, each case may have to be litigated to determine the faculty's status based upon the unique facts of the situation.

The problem created by faculty unionization cases lies in the application of a statute that was not designed for an academic setting. The NLRA should not be expanded to encompass a group of employees that would be considered managerial or supervisory in any other context. When the role of the faculty removes them from the traditional employee status envisioned by the NLRA, the Board should decline to assert jurisdiction.⁸⁴

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assert jurisdiction because they do not meet the Board's jurisdictional requirements, *see* 29 C.F.R. § 103.1 (1977), will be subject to any relevant state labor laws. *See* 29 U.S.C. § 164(c)(2) (1976). However, because the Board has asserted jurisdiction over colleges and universities that meet the jurisdictional requirement, state labor laws are preempted by federal law from controlling any employees at these institutions. *See generally* R. Gorman, *Basic Text on Labor Law* ch. 5, § 2 (1976).

84. *See* Kahn, *supra* note 20, at 180 (the proper method of inclusion of faculty in the "employee" category is by statutory amendment).