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JUDICIAL INTERFERENCE WITH THE NLRB:
YESHIVA UNIVERSITY AND THE DEFINITION
OF "MANAGERIAL"

JANE CLARK CASEY*

ON FEBRUARY 20, 1980, the United States Supreme Court, in NLRB v. Yeshiva University, decided that the full-time faculty members of Yeshiva University are managerial employees excluded from the coverage of the National Labor Relations Act. The decision was an affirmation of the Second Circuit Court of Appeals and a rejection of the position taken by the National Labor Relations Board. This paper reviews judicial interference with National Labor Relations Board decision-making generally, comments on the merits of the Yeshiva decision, and assesses the particular significance of the Court's interference with the National Labor Relations Board definition of "managerial."

I. STATUTORY MANDATE

When Congress enacted the National Labor Relations Act in 1935, its expressed purpose was to "diminish the causes of labor disputes." The responsibility for enforcement of the Act was confided to the National Labor Relations Board, with only limited provision for judicial review.

Very early, the Supreme Court acknowledged and more extensively articulated the purpose of the Act, the ills it was designed to eliminate, and the importance of construing the statute liberally to accomplish its ends:

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1 444 U.S. 672 (1980).
2 582 F.2d 686 (2d Cir. 1978).
6 Pub. L. No. 74-198, § 6(a), 49 Stat. 452 (current version at 29 U.S.C. § 156 (1976)). The NLRB had actually been created by Executive Order No. 6763, June 29, 1934, pursuant to Public Resolution 44, 48 Stat. 1183 (1934). The same Executive Order abolished the National Labor Board (the Wagner Board) appointed by the President on August 5, 1933. However, Congress first delegated responsibilities to the Board with the passage of the Wagner-Connery Act.
7 The Act provided: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Pub. L. No. 74-198, § 10(e) 49 Stat. 454, (current version at 29 U.S.C. § 160(e) (1976)). Such limited review was not new with the NLRA. The Federal Trade Commission had already been given the same protection from judicial interference, and similar finality had been given to other administrative agencies through judicial construction. See Fraenkel, Judicial Interpretations of Labor Laws, 6 U. CHI. L. REV. 577, 595 (1938).
The Act, as its first section states, was designed to avert the "substantial obstructions to the free flow of commerce" which result from "strikes and other forms of industrial strife or unrest" by eliminating the causes of that unrest. It is premised on explicit findings that strikes and industrial strife themselves result in large measure from the refusal of employers to bargain collectively and the inability of the individual workers to bargain successfully. . . .

... [I]t cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils that statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the specific situation.

...[T]he broad language of the Act's definitions . . . leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classification. 8

By 1946, the National Labor Relations Board had so successfully shifted the balance of power in employer-employee relations that industry-wide strikes threatened to cripple the national economy. 9 During the first week of the 1946 congressional session, more than 200 bills dealing with labor relations were introduced, 10 and in 1947 Congress cut back the Act's coverage with the passage of the Taft-Hartley Act. 11 Even then, however, the stated purpose was to avert industrial strife, 12 and the limitation on judicial review of Board decisions remained. 13

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II. JUDICIAL INTERFERENCE

What courts have said about the authority of the National Labor Relations Board is in marked contrast to what they have done. This passage from an early Supreme Court decision is typical of the deference expressed for Board decisions:

Everyday experience in the administration of the statute gives it [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers.

... ... [W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. ... [T]he Board's determination ... is to be accepted if it has "warrant in the record" and a reasonable basis in the law.14

But those same courts have been as quick to overrule Board decisions as they have been to set out their reticence to do so.15 In the earliest cases, this was primarily interference with the remedies ordered. Despite the extremely broad remedial powers given the Board by the original Act,16 the courts of appeals immediately began to restrict those powers and over-

15 This problem was recognized from the outset and shared with other administrative agencies. See Fraenkel, Judicial Interpretation of Labor Laws, 6 U. CHI. L. REV. 577 (1938). Fraenkel states that the finality given the Board's findings of fact "was given by Congress in the belief that specialists are better able to reach a correct decision on the facts than are reviewing judges. Yet the courts have thwarted Congressional will in a variety of manners." Id. at 593. According to Fraenkel, those manners include finding that an administrative agency cannot with finality pass on the facts necessary to establish its own jurisdiction and finding a "lack of substantial evidence" (a term which first appeared in ICC v. Union Pac. R.R. Co., 222 U.S. 541, 547 (1912) and came into common use with Florida v. United States, 292 U.S. 1, 12 (1934) and its progeny).
16 The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise. National Labor Relations Act of 1935, Pub. L. No. 74-198, § 10(a) 49 Stat. 453 (1935) (current version at 29 U.S.C. § 160(a) (1976)). The Act goes on to give the Board power "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." Id. § 10(c), 49 Stat. 454 (1935) (current version at 29 U.S.C. § 160(2) (1976). As one early commentator noted, (see 1939 Ws. L. R. 132, 133-34) this was a marked increase over even the powers delegated to the Federal Trade Commission in the Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717 (current version at 15 U.S.C. §§ 41-51 (1976). The additional power, according to the House Report, was to enable the Board to adapt orders to the needs of the individual case. H.R. REP. No. 1147, 74th Cong., 1st Sess, 18, 24 (1935).
turn Board-ordered remedies. In *NLRB v. Carlisle Lumber Co.*, the Ninth Circuit declared that the Board's remedial powers were to be exercised to protect only the public interest, not private interests, though individuals might incidentally benefit from Board proceedings. In *Remington Rand, Inc. v. NLRB*, the Second Circuit added that the Board's powers were remedial only and not punitive. In *Consolidated Edison Co. v. NLRB*, the Supreme Court reversed a Board order invalidating certain collective bargaining agreements found to have been formed under employer duress. The Court concluded the evidence was not sufficient to establish coercion; hence the contracts were not such as would "thwart the purposes of the Act." In reinstating the contracts, the Court thus ignored both the limitations on a reviewing court's reversal of factual findings and the fact that the Board was the body authorized to determine what remedies "will effectuate the policies" of the Act.

This pattern of compliments to the Board, coupled with reversal of its decisions, has continued steadily throughout the intervening years.

17 94 F.2d 138 (9th Cir. 1937).
18 94 F.2d 862 (2d Cir. 1938).
19 305 U.S. 197 (1938).
20 Id. at 236.
21 See note 16, *supra*.
22 In *NLRB v. Hopwood Retinning Co.*, 98 F.2d 97, 99 (1938), the Second Circuit again interfered with a Board remedy, this time an order to a company not to employ a certain individual "for the purpose of evading the obligations under the Act." By ignoring the limited scope of the Board's order, which only prohibited employment of this individual "for the purpose of evading the obligations under the Act," the court was able to characterize this as an issue of Board interference with the employer's right to choose its own representative. In fact, no such issue was even raised, but the sweeping pronouncements of the Second Circuit undercut the Board's potential for deciding, in proper circumstances, that the actions of a particular individual have been so repressive and have so tainted the company's position that further employment of that individual would in and of itself inhibit the employees and their representatives.

In *Mooresville Cotton Mills v. NLRB*, 94 F.2d 61 (4th Cir. 1938), and *NLRB v. A.S. Abell Co.*, 97 F.2d 951, 959 (4th Cir. 1938), the Fourth Circuit Court of Appeals reversed NLRB orders to companies to post notice they would cease and desist from unlawful practices. In *Abell*, the court aggravated the injury by announcing that the purposes of the Act would be fully met by a lesser remedy, thus succinctly usurping the Board's statutory authority "to take such affirmative action . . . as will effectuate the policies of this Act."

In *Fansteel Metallurgical Corp. v. NLRB*, 98 F.2d 375, 388 (7th Cir. 1938), the Seventh Circuit set aside a Board order reinstating discharged workers, not only reversing the Board's finding that the affected individuals were "employees," but also questioning the Board's decision that their reinstatement effectuated the purpose of the Act.

In *NLRB v. Algoma Plywood & Veneer Co.*, 121 F.2d 602 (7th Cir. 1941) the court of appeals reversed a Board finding of refusal to bargain despite substantial evidence supporting the Board's decision. Similarly, in *Boeing Airplane Co. v. NLRB*, 140 F.2d 423 (10th Cir. 1944), the court of appeals rejected the Board's findings of interference, restraint and coercion of employees despite a substantial amount of evidence supporting the charges; and in *Wayside Press, Inc. v. NLRB*, 206 F.2d 862 (9th Cir. 1953), it was a finding of employer domination and interference with the independent union that fell after court review of disputed facts.

In *NLRB v. Coats & Clark, Inc.*, 231 F.2d 567 (5th Cir. 1956), the court of appeals agreed with the Board's finding that the employer had engaged in unfair labor practices,
III. Yeshiva University

If judicial intrusion into decisions best made by the Board is so long-standing and pervasive, why single out Yeshiva for special attention? When the Second Circuit decision was issued in July of 1978,23 it generated a flurry of law review articles24 that were critical of the opinion if not necessarily of the result. Why so much interest in one case?

In part, the Second Circuit decision commanded attention by virtue of the sheer incongruity of the result. In finding “the full-time faculty” of Yeshiva University to have managerial status, the court effectively stated that, among the professionals at Yeshiva University, there is no rank and file. There are no workers, no one to be managed, no one to be involved in the age-old conflict of employer against employee. That, in turn, must mean that there are no workers at Yeshiva “subject, as a matter of economic fact, to the evils that statute [the NLRA] was designed to eradicate.”25 Yet

but rejected a related finding that an employee had been wrongfully discharged in violation of section 8(a)(3). Again, the record contained substantial testimony in favor of the Board’s decision.

In NLRB v. Insurance Agents, 361 U.S. 477 (1960), where the Board found the union’s activities to constitute failure to bargain collectively, the Supreme Court reversed the Board’s cease and desist order on the grounds that no specific restrictions on employee actions appear in the Act.

In NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169 (2d Cir. 1968), the court of appeals relieved the Board of its authority to decide at what point an individual’s responsibilities take him over the line from employee to supervisor, and did so even after reiterating the great deference to be given Board findings:

Inasmuch as infinite variations and gradations of authority can exist within any one industrial complex and any drawing of the line between the personnel of management and the rank and file workers may require some expertise in evaluating actual power distributions which exist within an enterprise, the Board’s findings relative thereto are entitled to great weight.

Id. at 1172. It is almost as though the court feels it can make up for its failure to yield to the statutory mandate by assuring the reader of its familiarity with that mandate.

In NLRB v. Scott Paper Co., 440 F.2d 625 (1st Cir. 1971), the First Circuit acted in the same vein, holding, despite a Board decision to the contrary, that for purposes of deciding whether individuals were supervisors, actions which had the effect of furthering both the individual’s interest and that of the company should be seen as taken in the interest of the company. Note that in Scott the court does not question the standards used by the Board for distinguishing between supervisors and employees, but rather concludes that the facts there did not establish the requisite standards.

In NLRB v. Monroe Tube Co., 545 F.2d 1320 (2d Cir. 1976), the Second Circuit reversed a Board order to the employer to cease and desist from interference with the employees’ decision to unionize. Though the Board had determined that a key instigator was a supervisor within the meaning of the Act, so that his coercive activities could be imputed to the employer, the court brushed that determination aside, disregarding the Board’s right to have its factual determination upheld if supported by the evidence.

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


the Yeshiva University Faculty Association, an association chosen by a “substantial margin” in a Board-conducted election, was to act as bargaining agent for individuals who obviously felt themselves to be in need of a formal bargaining agent and a written contract. Who was to tell them they were already members of the hierarchy from which they had asked for protection?

Beyond the incongruous result, Yeshiva was also of great general interest because of its potentially widespread impact on collective bargaining at universities throughout the country. Though the Second Circuit carefully explained that the decision dealt only with one university, one unique fact situation, its broad attack on the criteria used by the Board to evaluate whether professionals at institutions of higher education are managerial called that attempted limitation into question. How could the result be limited to Yeshiva University when the opinion cut the foundation out of the prior higher education cases?

Despite the volume and eloquence of the attacks on the Second Circuit’s decision, the Supreme Court affirmed, elaborating on, but in no significant way changing, the analysis. The Court found the full-time faculty members of Yeshiva University to be managerial employees excluded from the coverage of the National Labor Relations Act, thereby affirming the Second Circuit’s refusal to enforce the Board-ordered bargaining. Yeshiva is the law of the land; there will surely be much discussion about how thoroughly

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26 NLRB v. Yeshiva Univ., 582 F.2d 686, 689 (2d Cir. 1978).
27 Id. at 696, 701, 703.
28 As a number of writers have noted, the court’s rejection not just of the Board’s factual determination in this case but of the bases it has used to make that factual determination clearly raises specters well beyond Yeshiva. There are many other universities where faculty enjoy significant control over the same policy decisions found significant in both the Second Circuit and Supreme Court decisions in Yeshiva. See Bethel, supra note 24. See also 43 ALB. L. REV. 162, 183 (1978), noting that, if the Supreme Court is right, even a school which always rejects faculty suggestions could still call the faculty managerial under Yeshiva. The impact of Yeshiva is discussed further in the concluding sections of this article.
29 In rejecting the notion of collective versus individual action, the court undercut the Board’s holding in C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904 (1971) and in Fordham Univ., 193 N.L.R.B. 134 (1971). In rejecting the “ultimate power of the Board of Trustees” test, it undercut Adelphi Univ., 195 N.L.R.B. 639 (1972), which in part rested also on the individual versus collective distinction. Goddard College, 234 N.L.R.B. 1111 (1978); Northeastern Univ., 218 N.L.R.B. 247 (1975); Univ. of Miami, 213 N.L.R.B. 634 (1972); Manhattan College, 195 N.L.R.B. 65 (1972); and New York Univ., 205 N.L.R.B. 4 (1973), all turned on those same criteria. In holding that faculty members’ interests are coextensive with those of the Board of Trustees, so that there can be no meaningful inquiry into whether they act in the interest of themselves or of management, the court threatened Fairleigh Dickinson Univ., 227 N.L.R.B. 239 (1976), which in its turn depended to some extent on the “ultimate power” doctrine. Finally, in rejecting the notion that the faculty, as professionals, had been specifically included by the 1947 revisions and hence could not be considered outside the coverage of the Act, the court called into question the soundness of the holding in NLRB v. Wentworth Inst., 515 F.2d 550 (1st Cir. 1975).
30 444 U.S. 672 (1980).
collective bargaining in higher education has been decimated.\footnote{Just after the Supreme Court decision in Yeshiva, the Wall Street Journal noted that a dozen private colleges had broken off bargaining with organized professors and quoted "an expert" who had once predicted 80% of the professors would join unions by 1985, but had revised his estimate to 50% to 60% in the wake of Yeshiva. The article further noted that the case might hurt public college organizing by retarding the spread of public-sector bargaining laws. (Wall Street Journal, May 20, 1980). The National Education Association, which represents professors at widespread public institutions of higher education and a handful of private institutions, devoted the cover story of its April/May higher education newsletter to Yeshiva. Though the point of the article was clearly to head off post-Yeshiva panic, NEA's general counsel was quoted as saying that consideration had been given to amending the National Labor Relations Act as an antidote to Yeshiva and that post-Yeshiva strategy was being carefully coordinated with the American Association of University Professors and the American Federation of Teachers, both of which represent professors at various public and private institutions of higher education. (NEA Advocate, April/May 1980, 4-5).}

To date, discussion of Yeshiva has, however, focused on the "rightness" or "wrongness" of the decision. My concern is not with whether the Court made the "right" decision, but with whether the Board's decision should have been reassessed by the Court at all. That is, was the Court right to review, criticize, and ultimately discard the Board's criteria for determining managerial status?

IV. THE MANAGERIAL EXCEPTION: HISTORICAL DEVELOPMENT

To understand why it is particularly inappropriate for the Court to have interfered with the Board's interpretation of the managerial exception, one has to look back at the legislative history, or, more properly, the lack of legislative history, concerning that exception.\footnote{In enacting the 1947 amendments, Congress appears to have been, at least in part, reacting to Packard Motor Co. v. NLRB, 330 U.S. 485 (1947), in which the Supreme Court said supervisory employees were entitled to the rights guaranteed by the Act. In response to Packard, Congress amended the definition of "employee" to include professionals but to exclude supervisors and independent contractors. 29 U.S.C. §§ 152(3) and (12) (1976). One writer observed:

The statutory exclusion of "supervisors" did not cover confidential or managerial employees. The legislative history indicated that Congress thought that the Board had excluded confidential employees from the scope of the Act and would continue to do so. The congressional debates never mentioned managerial employees, and their status remained uncertain.


Later, the Supreme Court, viewing this history, made other assumptions about the 1947 reenactment that may have some relevance here. In Beasley v. Food Fair of N.C., 416 U.S. 653 (1973), the Court had this to say about the addition of the supervisory exclusion: This history compels the conclusion that Congress' dominant purpose in amending §§ 2(3) and 2(11), and in enacting § 14(a) was to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests.

(Emphasis added). 416 U.S. at 661-662.} The Court is particularly inappropriate for the Court to have interfered with the Board's interpretation of the managerial exception, one has to look back at the legislative history, or, more properly, the lack of legislative history, concerning that exception.\footnote{In Ford Motor Co. v. NLRB, 441 U.S. 488 (1979), the Court, reviewing a dispute...
“managerial” exception in the National Labor Relations Act when it was enacted in 1935, nor has one been added since. Rather, the notion that such individuals should be excluded from the bargaining unit is one developed by the Board in an attempt to further the purposes of the Act. To the extent there may be said to be any “legislative history,” that history is merely the reenactment, with amendments, of the NLRA as part of the Taft-Hartley Act in 1947.\footnote{32}

Unfortunately, the exception was still poorly defined as of 1947 and such definition as existed may have little application today. During the early part of the 1940's, the Board excluded supervisory, managerial, and confidential employees from rank-and-file bargaining units. The implication of the decisions, however, was that all these employees were protected by the Act and free to form units of their own. Unfortunately that question was not directly addressed during any proceedings.\footnote{33} This is an important distinction, since it means that the Board, in determining which employees were managerial, was apparently assuming that those employees, though not grouped for bargaining purposes with the rank and file workers, would

over subjects of bargaining, noted that Congress in 1947 had resisted an attempt to list the subjects of bargaining and had instead left the language general. The Court's conclusion was that Congress intended thereby to leave the discretion to decide with the Board. At the very least, it can be said that Congress, failing in 1947 to define “managerial” even though that term had been raised by the cases, intended to leave that definition as well to the Board. At best, one could argue that the specific incorporation in 1947 of “professionals” as covered employees shows that Congress wanted the Board to keep moving in the direction of extending protection to a broad group of employees, even those with considerable discretionary authority.

Thus it should be the Board’s decision to determine when to exclude managers as supervisory. Whatever their level of authority, should not the root question be whether giving them the protection of the Act will lead to service of two opposed masters?

\footnote{32} Interestingly, there may be one further, albeit slim, clue to Congress' attitude toward the Board's interpretation of “managerial,” a clue particularly salient in cases involving professional employees, as all sides concede the professors in Yeshiva to be. In its recent extension of the National Labor Relations Act to nonprofit hospital employees, Congress resisted pressure specifically to exclude health care professionals from the definition of supervisor, not because it desired to mandate their inclusion, but because of its confidence in the Board to decide such questions accurately on a case-by-case basis. In the Report of the Senate Committee on Labor and Public Welfare, the reporters praised the Board's exercise of discretion in differentiating between "professional activities requiring direction of other employees and those truly reflective of supervisory status":

The Committee notes that the Board has carefully avoided applying the definition of “supervisor” to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.

The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determination.\footnote{33 See, e.g., Dravo Corp. 54 N.L.R.B. 1174, 13 L.R.R.M. 222 (1944).}

\footnote{33}
still enjoy the protections of the Act. To suggest that an employee is either managerial or non-managerial, and that the definition should be the same whether managerial employees are excluded altogether or simply put in units of their own, is to miss one of the underlying tenets of the Act, one identified by the Supreme Court itself: that the Act is to be interpreted "broadly in doubtful situations, by [reference to] underlying economic facts, rather than technically and exclusively by previously established legal classifications," and that "it cannot be irrelevant . . . [whether] particular workers . . . are subject, as a matter of economic fact, to the evils that statute was designed to eradicate." Thus it could well be that the Board would have adopted a much narrower definition of "managerial," both prior to and following adoption of the Taft-Hartley Act, if it believed placement in that classification meant not merely separation from other employees for bargaining purposes but exclusion from the protection of the Act. Similarly, the "hands off" attitude Congress took toward the managerial exception might have been altered if the Board had been excluding all managerial employees from coverage.

How had the Board defined these so-called managerial employees prior to 1947? The first case mentioning them appears to be *Vulcan Corporation*, where in 1944 a timber cruiser log buyer was excluded from a rank-and-file unit not because he supervised anyone but because the responsibility of his position and his peculiar relationship with management was thought to give him interests different from those of other employees. In 1943 and 1944, the Board had excluded expediters from proposed units, in the first case because they were "closely related to management," and in the second because their "authority . . . to exercise their discretion in making commitments on behalf of the Company stamps them as managerial." By 1946, in *Ford Motor Company*, the Board was excluding "executive employees who are in a position to formulate, determine, and effectuate management policies." This definition evolved over the years, emerging in *Palace Laundry Dry Cleaning Corp.*, after enactment of the Taft-Hartley Act, as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employers." In that same case, the Board noted that store managers would not be viewed as managerial

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35 Id. at 127.
40 Id. at 1322, 17 L.R.R.M. at 395.
42 Id. at 323 n. 4, 21 L.R.R.M. at 1039.
unless "their interests are identified with management rather than with employees."43

Even after enactment of the Taft-Hartley Act, which specifically excluded "supervisors" from the Act's coverage, the Board vacillated on whether those classified as managerial, rather than supervisory, were excluded or simply required to form separate units.44 That question culminated in Bell Aerospace Co.,45 where the Board succinctly stated that managerial employees who did not fall within one of the other exclusions would not be deprived of the Act's protection unless they were involved in the formulation or implementation of labor relations policies. The effect of the Board's decision was to avoid joining, for bargaining purposes, those who lacked a community of interest, to allow management the allegiance of employees actually assisting it in its disputes with bargaining units, and yet to preserve a liberal construction of the Act to protect, as nearly as feasible, all those subject to the "evils the statute was designed to eradicate."

With the Supreme Court's reversal of Bell Aerospace46 came a new urgency to distinguish between managerial and non-managerial employees. Now, to call an employee managerial was to leave him with only such bargaining power as his own individual expertise and usefulness to the company might exact. He would be stripped of the protections of the Act and consequently of the right to band together with his peers for bargaining purposes.

During the same period, the Board was being asked to distinguish, in an increasing number of cases, between managerial and "professional" employees. Since the 1947 amendments had expressly included "professional" employees among those covered by the Act,47 it was apparent that some

43 Id. at 323, 21 L.R.R.M. at 1039.
44 In Swift & Co., 115 N.L.R.B. 752, 753-54, 37 L.R.R.M. 1391, 1393 (1956), the Board held that managerial employees were outside the scope of the Act. Yet in North Ark. Elec. Coop., Inc., 185 N.L.R.B. 550, 75 L.R.R.M. 1068, enforcement denied, 446 F.2d 602 (8th Cir. 1971), the Board held that managerial employees did have a right to representation unless a legitimate reason for denying them representation could be advanced. Throughout this period, the circuit courts were generally accepting the Board policy of excluding managerial employees from rank-and-file bargaining units. Whether the circuit courts considered such employees covered was less clear, though there was dictum in some cases suggesting that managerial employees were not protected at all. See, e.g., Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1115 (7th Cir. 1970), cert. denied, 400 U.S. 831 (1970); Illinois State Journal Register, Inc. v. NLRB, 412 F.2d 37 (7th Cir. 1969); Retail Clerks Int'l Ass'n. v. NLRB, 366 F.2d 642 (D.C. Cir. 1966).
46 29 U.S.C. § 152(12) (1976) "Professional Employee" as:
(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced 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
individuals whose work involved the exercise of discretion and judgment were nevertheless covered by the Act. The Board saw itself as forced to distinguish between true managerial employees and those who "routinely made competent professional and administrative [decisions] in the ordinary course of their employment." 48 The conclusion it reached was that, in view of the Act's history and the more than three decades of Board and court decisions, "managerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management." 49 Inherent in that conclusion are at least three assumptions about managerial employees: first, that they are distinguishable from the rank and file; second, that they are closely aligned with management; and third, that they represent management to someone. 50

To understand why the Board would make such assumptions, we must go back to the rationale behind the Board's definition of managerial employee that was accepted by the Supreme Court in Bell Aerospace: "one who is formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties." 51 What courts, including the Supreme Court, have failed to keep in mind is that the formula is Board-devised, developed in an attempt to secure what may be called the underlying purposes of the Act, and good only so long as it produces results consistent with those purposes. Those purposes are to protect the rank-and-file unions from managerial control and to ensure that management has the loyalty of those in a posi-

49 Id.
50 General Dynamics is especially interesting when considered in connection with Yeshiva, since in that case, as in Yeshiva, the alleged supervisory/managerial employees really had no one to manage except their peers. The Board said in considering whether the senior engineers were supervisors:
In our view, true supervisory authority is not vested in the senior engineering and administrative employees vis-a-vis the nonsenior employees in their work groups, nor is it vested in themselves as equals who, for indeterminate periods of time, "supervise" co-equals who, in turn, later "supervise" their equals while simultaneously being "supervised" by their coequals.
Id. at 859, 87 L.R.R.M. at 1715. Yet that is precisely the situation that is used in Yeshiva to justify categorizing the faculty as managerial. While there is presumably some basis for distinction between supervisory and managerial status, nothing in the history of Board or court decisions gives a clear idea of what that is. General Dynamics raises the question: Representing management's interests to whom?
tion to effectuate policy. Thus, there can be no significant discussion of a “managerial” distinction if there is no rank and file to protect. Neither is there any reason to worry about managerial control of the rank-and-file unions unless those alleged to be exercising control are closely aligned with management, nor need management worry about the “loyalty” of those effectuating policy unless they effectuate policy in the name of management, that is, unless they act as management’s representatives to some other person or entity.

To adhere to the formula and lose the spirit of the Act is the worst kind of formalism, and the Board has long resisted rule-making which might lock in formulas. As one writer has said:

The indicia of managerial alignment . . . vary according to the type of employee and authority structure under consideration. The professional or artistic employee’s influence on company policy does not necessarily reflect managerial authority. A member of lower-level management might not be primarily aligned with the employer in a large corporation. Thus . . . the Board has found it necessary to make case-by-case determinations regarding managerial status and has been unable to articulate any firm rules applicable to the various types of employees who seek to exercise bargaining rights.

There were, then, at least two areas where the Board had difficulty drawing the line between managerial and non-managerial employees: professional employees and those who might be considered, at most, lower-level management. The trek into what the Board has called the “uncharted area” of higher education has brought both areas quickly and decisively into the forefront of decisionmaking.

See 43 ALB. L. REV. 162, 164 n. 12 (1978) for a discussion of the two purposes and for the legislative history behind them.

As the Board said in Westinghouse Electric Corp., 113 N.L.R.B. 337, 340, 36 L.R.R.M. 1294, 1295 (1955):

To justify the exclusion of individuals otherwise qualified for inclusion in a professional unit upon the ground that they are too closely allied to the Employer to be regarded as employees under the Act, we believe it must be established that the individuals have interests and duties not shared by the other professionally engaged employees.

See Kahn, The NLRB and Higher Education: The Failure of Policy-making Through Adjudication, 21 UCLA L. Rev. 63 (1973). See also: Menard & DeGiovanni, NLRB Jurisdiction Over Colleges and Universities: A Plea for Rulemaking, 16 WM. & MARY L. Rev. 599 (1975). Shortly after the Board asserted jurisdiction over higher education, the American Association of University Professors petitioned for rulemaking. Petition to the NLRB for Proceedings for Rule-making in Representation Cases Involving Faculty Members in Colleges and Universities, June 18, 1971. See also the First Circuit’s suggestion that some of the problems arising in higher education cases might best be handled by rule-making. Trustees of Boston Univ. v. NLRB, 575 F.2d 301 (1st Cir. 1978).

Carr, supra note 31, at 435.

NLRB coverage of professionals has posed problems generally, not just in higher education. See id. at 441-52, where the author summarizes the dilemma posed by attorneys, engineers, hospital personnel, and faculty.

C.W. Post Center of Long Island Univ. 189 N.L.R.B. 904, 905, 77 L.R.R.M. 1001, 1003 (1971).
V. UNIVERSITY CASES

Though the Board first asserted authority over a university in Cornell University\(^\text{68}\) in 1970, it was not until C. W. Post Center of Long Island University\(^\text{59}\) in 1971 that a faculty unit was involved. There followed a series of faculty cases,\(^\text{60}\) in the course of which the Board concluded:

[T]he industrial model cannot be imposed blindly on the academic world as though there were a one-to-one relationship. The basic interests recognized by the Act remain the same, but their interrelationships, the employer-employee relationship . . . does not squarely fit the industrial model. . . . Rarely, if ever, does industry present a situation where employee interests outside the economic sphere assume major importance.

. . . .

For that reason we are forced to conclude that reliance on industrial models alone is not appropriate and cannot serve all the legitimate interests of employees in what, until recently, was terra incognita for the Act and for the Board.\(^\text{61}\)

The search for a model that would be "appropriate and . . . serve all the legitimate interests of employees" eventually led the Board to develop four criteria for determining which faculty members would be employees, rather than managers, for purposes of the Act:

1) Is the individual a "professional" within the section 152(12) definition?

2) To the extent that he exercises authority which in other contexts might be considered managerial, does he exercise that authority collectively with his peers rather than individually?

3) Does he, in exerting that authority, act in his own interest rather than that of management?

4) Are his decisions subject to reversal by a higher authority?\(^\text{62}\)

Affirmative answers were indices that an employee was rank and file, rather than managerial. They were not substitutes for the definition approved in Bell Aerospace, but rather touchstones to guide the court in deciding, within the university context, which employees fell outside that definition.


\(^{60}\) It would serve no purpose to cite all the higher education cases. Typical and frequently cited are: Northeastern Univ., 218 N.L.R.B. 247, 89 L.R.R.M. 1862 (1975); Univ. of Miami, 213 N.L.R.B. 634, 87 L.R.R.M. 1634 (1974); Syracuse Univ., 204 N.L.R.B. 641, 83 L.R.R.M. 1373 (1973); Fordham Univ., 193 N.L.R.B. 134, 78 L.R.R.M. 1397 (1971).


\(^{62}\) The development of these criteria has been traced in a number of articles and does not bear repeating here. See 28 CATH. U. L. REV. 663 (1979); 47 FORDHAM L. REV. 437 (1978); 13 GA. L. REV. 313 (1978).
The *Yeshiva* Court and legal commentators have criticized the Board for its failure to cite "authority" for the derivation of these criteria, but the criticisms are ill-founded. The authority for the criteria is the Act's mandate to avert "industrial strife and unrest" and the long-established right of the board to construe the Act liberally so as to accomplish that end. Indeed, no other authority is possible. No managerial definition appears in the Act, nor were there any higher education cases prior to the 1970's. If the Board is justified in insisting upon a case-by-case determination as to which employees are managerial, and no court has yet denied it that right in spite of frequent cries for the rule-making, then there is no controlling authority beyond the Act itself. This is not to say there is no such thing as precedent in determining which employees are managerial, but rather that the usefulness of any one decision is narrowly limited by its applicability only to closely-related fact situations in similar hierarchical models. Formulas, while useful in a proper context, have to be avoided.


See notes 5 and 12, supra.

65 See the material from NLRB v. Hearst Publications Inc. quoted in the text accompanying note 8, supra. For an interesting postulation as to how the criteria were derived, see 43 ALB. L. REV. 162, 167-68 (1978).

66 See note 54, supra.

67 Indeed, though the Court in *Yeshiva* is critical of the Board for its failure to cite authority, the authority the Court cites is of questionable relevance. Citations to other court decisions are of little help, since it is the Board and not the courts that has been entrusted with authority to define "managerial". The Court expressly acknowledged definition to be a Board responsibility in NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974). Citation to earlier Board decisions for formulae implemented in different factual situations and in different industries is also of little help. In addition, the denial of managerial status on the basis of actual power to influence company policy would leave the Act applicable "solely to the most powerless and uninfluential employees." Finkin, The NLRB in Higher Education, 5 U. TOLEDO L. REV. 608, 617 (1974).

The Finkin article suggests a number of troublesome questions about distinguishing managerial from non-managerial employees. Should need for a union ever be a factor? Is it an individual's basic job that must be considered in weighing his status, or may we consider the trappings of power developed as adjuncts to that job? Where an institution has a well-developed committee system exerting substantial influence on the direction of the institution, are we to assume that committee policy necessarily equals managerial policy? Is institutional policy the same thing as managerial policy, or is it possible in a given instance that employee policy may, through dint of collective strength, displace managerial policy?

The Court owes an explanation as to the specific basis for its rejection of the Board's factual finding, since a defensible construction of the statute may not be rejected merely because the Court might prefer another view. Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979).

68 Indeed, even the Court acknowledges that the Act was drawn for and is best suited for the typical pyramidal hierarchies of private industry, not the decentralized authority structure of the typical university. NLRB v. Yeshiva Univ., 444 U.S. 672, 680 (1980). See Baldridge, POWER AND CONFLICT IN THE UNIVERSITY 114 (1971) for a discussion of these contrasting structures. As another writer has noted, while the faculty is the production force in higher education, it is not really the floor of the pyramid, as are the rank and file in industry. Thus the production force, or rank and file, in higher education has considerable shared authority. Bethel, supra note 24, at 429.
where their effect is to lead the Board (or the court) away from the under-
lying purposes of the Act. 69

While the decision whether a particular employee is "managerial" is one of fact, applying an undefined term to varying factual situations necessarily raises a mixed problem of fact and law as a definition is ham-
mered out. When the Court, in *NLRB v. Bell Aerospace*, approved the Board's two-part definition of managerial, 70 it greatly reduced the "legal" component in any decision as to managerial status of an employee. The problem became one of answering a few factual inquiries:

Does the employee formulate, determine or effectuate policy? Does he do so on behalf of his employer, rather than in his own interest? Does he have discretion in the performance of his duties? If so, is that discretion independent of his employer's established policy?

In *Yeshiva*, it was undisputed that the faculty formulated policies and exercised discretion in the performance of its duties. The Board had only to decide whether it formulated policies on behalf of its employer, rather than in its own interest, and whether its discretion in the exercise of its duties extended beyond established policy.

Admittedly, determining whether the faculty formulates policy in its own interest or that of the university is a thorny problem. That problem is compounded when one confuses the question of policy formation with that of discretion in the performance of duty. In *Yeshiva*, the Court, while puzzling over the question of policy formulation, says:

It may appear, as the Board contends, that the professor per-
forming governance functions is less "accountable" for departures from the institutional policy than a middle-level industrial manager whose discretion is more confined. Moreover, traditional systems of collegiality and tenure insulate the professor from some of the sanc-
tions applied to an industrial manager who fails to adhere to company policy. 71

It is one thing to be given a role in formulating the institution's policies;

69 Neither can it be said that the Board is straining the *Bell Aerospace* formula to include a greater and greater number of professionals under the Act. In fact, its treatment of manage-
ment trainees demonstrates that the Board is sensitive to the spirit of the statute, even where that spirit mandates exclusion of one who might otherwise appear to be outside the ambit of the *Bell Aerospace* test. Trainees do not formulate and effectuate management policies, nor do they exercise discretion independent of the employer's established policy. Yet the Board has excluded them from coverage, reasoning that their attitudes will be influenced by their ultimate goal. One who hopes upon completion of a program to be accepted into manage-
ment will, as the Board recognizes, necessarily be inclined to align himself with manage-
ment even before he assumes the responsibilities that will bring him literally within the traditional definition. It would, for instance, be in his interest to win favor with management at the expense of his fellow employees, and hence exclusion of him from coverage is in line with the goal of protecting union activities from the influence of management repre-


71 444 U.S. 672, 689 (1980).
it is quite another to be allowed the discretion, in one's own judgment in
the exercise of one's responsibilities, to deviate from those policies when
that course seems best. While it appears that either honor would qualify
an employee as managerial under the Bell Aerospace definition, the Court's
failure to differentiate the issues is symptomatic of its limited grasp of the
very definition it purports to apply.

In rejecting the Board's conclusion that the faculty formulates policy
in its own interest, the Court complains, "[T]he Board assumes that the
professional interests of the faculty and the interests of the institution are
distinct, separable entities with which a faculty member could not simulta-
neously be aligned." While it may be true that the evidence the Board
had in support of that proposition was thin, the Court goes on to draw its
own conclusion without reference to any evidence at all: "In fact, the
faculty's professional interests—as applied to governance at a university like
Yeshiva—cannot be separated from those of the institution." Since the
issue is one of fact, surely the Court should discuss the evidence on which
it bases its conclusion; its use of the phrase "at a university like Yeshiva"
suggests it is overturning a Board determination as to fact, not on the basis of
the record at all, but rather on the basis of some generalized notion it has
of how universities operate. On the question of whether the faculty exercises
discretion in the performance of its responsibilities independent of institu-
tional policy, there is no discussion at all.

Though the Court long ago conceded that the Board has power to
adapt its interpretation of the Act to changing conditions, Yeshiva turns
precisely on a refusal by the Court to allow just that latitude. "The con-
trolling consideration in this case," says the Court, "is that the faculty of
Yeshiva University exercise authority which in any other context unques-
tonably would be managerial." As a number of commentators have noted,
the problem is precisely that the faculty of an institution of higher educa-
tion does not operate in "any other context." The university's hierarchical

72 Id. at 688.
73 Id.
74 Whether the interests of any two parties are distinguishable is a question of fact. The
"substantial margin" of professionals who chose to bargain in an adversary relationship
with the Board of Trustees is itself testimony to a divergence of interests. Finkin suggests
that the combination of a favorable labor market and strongly-held employee preferences
led to the creation of the powerful committee system that characterizes higher education
generally and Yeshiva University particularly. Finkin, supra note 67, at 640.
75 The use by an administrative agency of an evolutional approach is particularly fitting
. . . . The responsibility to adapt the Act to changing patterns of industrial life is
entrusted to the Board . . . . [T]he Board's construction here, while it may not be
required by the Act, is at least permissible under it, and insofar as the Board's applica-
tion of that meaning engages in the "difficult and delicate responsibility" of reconciling
conflicting interests of labor and management, the balance struck by the Board is sub-
ject to limited judicial review.

76 444 U.S. 672, 686 (1980).
structure is unique in the Board's experience, and the authority exercised by faculty can be evaluated only by reference to the world in which the faculty actually operates. Whether the Board's decision is correct, even given the context in which it had to be made, may remain a subject of debate, but the Court's reversal of the Board on the grounds that its tests for managerial authority within the university were not those used for managerial authority in other contexts is indefensible.

VI. THE AFTERMATH

The irony of Yeshiva is that it threatens collective bargaining at private universities at precisely the moment when the faculty is most in need of the protections of the Act. Declining enrollments, a fall-off in contributions to American colleges and universities, accelerating voter resentment toward public spending, and the glut of teachers on the market have combined to impede an individual professional's ability to bargain successfully. Educators today are in fact subject to the evils the Act was designed to eradicate. In a glutted job market, individual bargaining is a sham. Faculty salaries have declined, not only in the sense that all income has declined in real value because of inflation, but by comparison with other workers. At Yeshiva University itself, the faculty has experienced an increased teaching load, diminished sabbaticals, a lower retirement age, postponed tenure decisions, more part-time personnel, the closing of a graduate school, and the cancelling of courses considered cost-inefficient. The Court's refusal to consider the faculty's actual impotence to bargain individually reveals a substantial disregard for the purpose of the Act.

77 The Court notes, "Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." Id. at 690. The Board presumably agrees with that assertion. The only difficulty is deciding which professionals are "similarly situated." The Court chooses to compare faculty to middle-level industrial management; the Board appears to compare them either to professionals at other institutions of higher education, or perhaps only to other professionals at Yeshiva University. Given the unique hierarchical system of higher education, there is a legitimate question, which the Court largely ignores, whether professionals in any other line are "similarly situated." See 43 ALB. L. REV. 162 (1978) for a discussion of the two-tiered decision-making structure of universities. The author suggests that there are two distinguishable varieties of authority within a typical university, one of which may be characterized as "recommendatory authority over matters of professional academic concern" and the other as "formal bureaucratic authority."


79 In 48 U. CIN. L. REV. 435, 452 (1979) the author notes that Yeshiva may have the effect of excluding faculty from NLRA protections at a time when the real power in universities increasingly is shifting from faculty to the administration. In support of that proposition, the author quotes from the New York Times:

The overshupply of Ph.D.'s has led institutions to treat young faculty members as potentially expensive commodities useful economically at the lower salary levels but better gotten rid of as they approach tenure and the time of significant pay increases. O'Brien, A Generation of "Lost" Scholars, N.Y. Times, Mar. 18, 1979, sec. 6 (Magazine) at 35, 58.

Whether anything is left of faculty bargaining in the wake of *Yeshiva* remains to be seen. The Court's rejection of the idea that collective decision-making ought not be viewed as managerial leaves virtually every faculty exposed to exclusion from coverage, since it is a rare university where decisions as to curriculum, hiring, firing, and promotion are not effectively made by departmental or university-wide committees composed largely or entirely of faculty.82

Having rejected the Board's touchstones for evaluating authority without proffering any of its own, the Court has done much to interject confusion into the question of faculty bargaining, and little to ensure that the purposes of the Act are advanced. Ideally, the criticism directed at *Yeshiva* would lead the Court to rethink its interference with the Board and leave future cases to that body's resolution. To hope for such restraint, however, is to ignore forty years' experience with just such judicial interference. In one of the earliest articles about the National Labor Relations Act, OsmondFraenkel observed:

Yet it remains inevitable that there should be judges who set themselves up as society's mentors and consider themselves entitled to determine what shall be legal and to pronounce what they believe wise. These men, with the most conscientious motives, destroy statutes either by declaring them unconstitutional as against "natural law," or by emasculating them through interpretation when higher authority has barred the other way. Since they exemplify a persistent type of human thinking and feeling, and since judges are seldom chosen for their psychological qualities, it is foolish to hope that we shall ever be without them.83

History appears to have vindicated Fraenkel; whether we will ever be without such judges remains to be seen, but *Yeshiva* is ample evidence they are with us yet.

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82 Bethel, *supra* note 24, at 444.