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Collective Bargaining—Faculty Status Under the National Labor Relations Act—NLRB v. Yeshiva University, 582 F.2d 686 (2d Cir. 1978), cert. granted, 99 S. Ct. 1212 (1979)

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COLLECTIVE BARGAINING—FACULTY STATUS UNDER THE NATIONAL LABOR RELATIONS ACT—*NLRB v. Yeshiva University*, 582 F.2d 686 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 1212 (1979).

Yeshiva University (Yeshiva) is a private institution in New York City.[1] Its full-time faculty enjoys a substantial role in the governance of the school. Acting collectively, they make recommendations on a broad range of policy and personnel matters.[2] Their recommendations are almost invariably adopted by Yeshiva's administration.[3]

In 1974 the Yeshiva University Faculty Association (Union) petitioned the National Labor Relations Board (Board) for certification of a bargaining unit composed of Yeshiva's full-time faculty.[4] The Board found the proposed unit appropriate[5] and directed an elec-

1. Situated on four separate campuses, Yeshiva is composed of more than a dozen undergraduate and graduate schools and programs. Yeshiva Univ., 221 N.L.R.B. 1053, 1053 & n.1 (1975).

2. Recommendations come from various faculty committees, from departmental or schoolwide meetings of the faculty, or from departmental chairpersons or senior professors acting principally as spokesmen for the faculty. NLRB v. Yeshiva Univ., 582 F.2d 686, 690–94, 696 n.11 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 1212 (1979).

The subjects over which the full-time faculty exercises recommendatory power are not identical at all of Yeshiva's several schools. For example, only at Yeshiva's Teacher's Institute for Women has the faculty influenced a decision regarding the physical location of the school. *Id.* at 692. Generally, however, full-time faculty members at most or all of Yeshiva's schools make recommendations on admissions requirements, curriculum, and other academic policies, and on the hiring, promotion, and tenure of their full-time and part-time colleagues. *Id.* at 690–94. The full-time faculty at some of Yeshiva's schools recommends the level of tuition and the extent of faculty workload and salaries. *Id.* A universitywide faculty committee has jurisdiction over faculty grievances and is authorized to recommend appropriate action to Yeshiva's president. *Id.* at 694.

3. *Id.* at 690–94. For example, the dean of Yeshiva's Ferkauf Graduate School testified that he accepted "98 percent" of the faculty's hiring recommendations. *Id.* at 693.

4. *Id.* at 688. The proposed unit embraced "all faculty appointed to the University in the titles of professor, associate professor, assistant professor, [and] instructor with a full-time teaching load or the equivalent." Yeshiva Univ., 221 N.L.R.B. 1053, 1053, 91 L.R.R.M. 1017, 1018 (1975). Among those omitted were part-time faculty and faculty at a few of Yeshiva's several schools, including, for example, the medical school. *Id.*

5. Yeshiva Univ., 221 N.L.R.B. 1053, 1057, 91 L.R.R.M. 1017, 1021 (1975). There was one exception to the Board's approval of the proposed unit. The Union had sought inclusion of faculty members applying for and administering research grants. The Board found these members to be supervisors and therefore excluded them from the unit. *Id.* at 1056–57, 91 L.R.R.M. at 1021.

The Board detailed the composition of the approved unit as:

> All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans, but excluding faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University

tion.[6] The Union won handily.[7] It was thereafter certified as the exclusive bargaining representative of its members.

Yeshiva, however, refused to bargain. The Board found Yeshiva to be in violation of the National Labor Relations Act[8] (NLRA) and ordered it to bargain.[9] Yeshiva's continued refusal to bargain prompted the Board to petition for judicial enforcement of its order.[10] The petition was denied on the ground that Yeshiva's faculty are supervisory or managerial employees and thus excluded from the protective ambit of the NLRA. *NLRB v. Yeshiva University,* 582 F.2d 686 (2d Cir. 1978), *cert. granted,* 99 S. Ct. 1212 (1979).

Supervisors and managerial employees were originally excluded from the NLRA's protections to solve problems caused by the unionization of decisionmakers working in the hierarchy of business organizations.[11] Decisionmaking at Yeshiva, however, as in much of higher education, is organized on a non-hierarchical, collective basis.[12] The *Yeshiva* court implicitly assumed, despite the University's non-hierarchial decisionmaking structure, that the policies underlying the exclusion of supervisors and managerial employees would be served by denying faculty the right to bargain collectively. This note tests that assumption. It examines the extent to which the purposes for excluding supervisory and managerial personnel from the NLRA's protections are served by denying Yeshiva's faculty the right to form a bargaining unit.

I. BACKGROUND

The NLRA only protects the collective bargaining rights of those who

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funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians, research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and supervisors as defined in the [NRLA].

Id. at 1057, 91 L.R.R.M. at 1021.

6. *Id.* at 1057.

7. The vote was 90 to 50 in favor of the Union. Brief for the American Federation of Teachers, AFL-CIO as Amicus Curiae at 10, NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978).

8. 29 U.S.C. §§ 141–187 (1976). An employer's refusal to bargain with the certified representative of its employees constitutes an unfair labor practice. 29 U.S.C. § 158(a)(1), (a)(5) (1976).

9. Yeshiva Univ., 231 N.L.R.B. 597, 96 L.R.R.M. 1601 (1977), *enforcement denied,* NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978), *cert. granted,* 99 S. Ct. 1212 (1979).

10. NLRB v. Yeshiva Univ., 582 F.2d at 689.

11. *See* note 19 and accompanying text *infra.*

12. *See* notes 21–24 and accompanying text *infra.*

meet its definition of "employee."[13] "[A]ny individual employed as a supervisor," as the term is defined by section 2(11) of the NLRA,[14] is expressly excluded from the protected class of employees.[15] Although the NLRA makes no explicit reference to managerial employees, they have been barred from the NLRA's benefits as a matter of longstanding Board policy.[16] The category of managerial employees embraces those "who formulate and effectuate management policies by expressing and making operative the decisions of the employer."[17] An alternative, overlapping formula defines as managerial those employees who are closely aligned with or related to management.[18]

The definitions of "supervisor" and "managerial employee" were initially formulated in response to problems arising from the unionization of decisionmakers working in the hierarchical authority structure of commerce.[19] They identify employees situated in the middle of the hierarchy, thus excluding from the NLRA's protections any individual sandwiched between the employer above and the rank and file below. But since much of higher education fails to conform to the hierarchical organization of

13. 29 U.S.C. § 157 (1976). The NLRA's protections are also limited to employees working for non-governmental employers. 29 U.S.C. § 152(2) (1976). Thus, the collective bargaining rights of faculty at public universities are governed by state labor laws.

14. Section 2(11) defines "supervisor" as follows:

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

29 U.S.C. § 152(11) (1976).

For the most part, § 2(11) calls for a disjunctive reading. NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169, 1173 (2d Cir. 1968); Ohio Power Co. v. NLRB, 176 F.2d 385, 387 (6th Cir. 1949). Its conjunctive elements are the exercise of authority in the interest of the employer, the use of independent judgment, and performance of at least one of the listed functions. NLRB v. Security Guard Serv., Inc., 384 F.2d 143, 147 (5th Cir. 1967).

15. 29 U.S.C. § 152(3) (1976). The NLRA does not prohibit the unionization of supervisors or managerial employees. 29 U.S.C. § 164(a) (1976). Such unions are, however, denied statutory protection. *Id.* References herein to faculty unions or faculty unionization are to unions or unionization within the protection of the NLRA.

16. NLRB v. Bell Aerospace Co. Div. of Textron Inc., 416 U.S. 267, 285 (1974); International Ladies' Garment Workers' Union v. NLRB, 339 F.2d 116, 123 (2d Cir. 1964).

17. Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4, 21 L.R.R.M. 1039, 1039 (1947).

18. *See* Swift & Co., 115 N.L.R.B. 752, 753, 37 L.R.R.M. 1391, 1392 (1956).

19. In Adelphi Univ., 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972), the Board observed that the statutory concept of supervisor was designed to cope with problems in the pyramidal organizational structure of business. *Id.* at 648, 79 L.R.R.M. at 1555–56. The managerial employee exemption was first applied in Vulcan Corp., 58 N.L.R.B. 733, 736, 15 L.R.R.M. 66, 67 (1944), a case clearly involving a hierarchically organized business.

the business sector,[20] efforts to transplant the definitions of supervisory and managerial employees into the academic setting have led to conceptual difficulty.

At roughly a quarter of America's universities a mode of governance exists which has been aptly described as the "shared authority" system.[21] On any given question, primary decisionmaking authority within this system is vested in one of three groups: the board of trustees, the administration, or the faculty.[22] Typically, faculty members exercise decisive influence over decisions on such matters as hiring, promotion, and tenure of their colleagues, curriculum, and admissions requirements.[23] Their decisions take the form of authoritative recommendations and are usually reached on a collective basis, as by a vote of the faculty senate or a faculty committee.[24]

The management prerogatives of faculty members under the shared authority system would seem to place them squarely within the definitions of supervisory and managerial personnel. The Board, however, has announced three reasons for its contrary conclusion. The first reason, which has come to be known as the "collective authority" doctrine,[25] emerged from the Board's initial bout with the question of faculty unionization.[26] Apparently relying on the reference to "any *individual*" in section 2(11)'s definition of supervisor,[27] the Board determined that "the policymaking and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a *group* does not make them supervisors . . . or managerial employees."[28]

20. *See* notes 21–24 and accompanying text *infra*.

21. AMERICAN ASSOCIATION FOR HIGHER EDUCATION, FACULTY PARTICIPATION IN ACADEMIC GOVERNANCE 15–16 (1967). The medieval origins of the shared authority system are described in McHugh, *Collective Bargaining With Professionals in Higher Education: Problems in Unit Determination*, 1971 WIS. L. REV. 55, 63–67.

22. American Association of University Professors, American Council on Education, Association of Governing Boards of Universities and Colleges, *Statement on Government of Colleges and Universities*, 52 AM. A. U. PROFESSORS BULL. 375 (1966).

23. *Id.* at 376, 378.

24. *See id.* at 378–79.

25. NLRB v. Yeshiva Univ., 582 F.2d at 699.

26. C. W. Post Center of Long Island Univ., 189 N.L.R.B. 904, 77 L.R.R.M. 1001 (1971). The Board's first assertion of jurisdiction over a nonprofit educational institution came in Cornell Univ., 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970), a representation proceeding involving only nonteaching employees. Following *Cornell* the Board promulgated a rule that it would assert jurisdiction only over private, nonprofit universities and colleges with gross annual revenues of one million dollars or more. 29 C.F.R. § 103.1 (1978).

27. 29 U.S.C. § 152(11) (1976) (emphasis added); *see* note 14 *supra*. *See also* Tusculum College, 199 N.L.R.B 28, 30, 81 L.R.R.M. 1345, 1347 (1972).

28. C. W. Post Center of Long Island Univ., 189 N.L.R.B. 904, 905, 77 L.R.R.M. 1001, 1003 (1971) (emphasis added). The collective authority doctrine of *C. W. Post* was conceived by the Board without the benefit of argument on the possible status of faculty members as managerial or

The Board's second reason for extending the NLRA's protections to faculty is its belief that they exercise their decisionmaking authority in their own interest,[29] not in the interest of their employer.[30]

As a third reason for its conclusion, the Board points to the retention of ultimate decisionmaking power by the boards of trustees at private universities.[31] According to the Board, this reservation of authority relegates faculty to an advisory role.[32] The Board apparently believes that such a role does not bestow the authority to "effectively recommend" which is required for supervisory status.[33]

By the time the Board was called upon to determine whether Yeshiva's faculty could compel bargaining under the NLRA, substantial Board precedent had developed in favor of finding faculty bargaining units appropriate.[34] Yeshiva nevertheless challenged the proposed unit, arguing that its faculty members were managerial or supervisory employees.[35] The Board rejected Yeshiva's argument with a well-rehearsed statement of its three reasons for concluding that faculty are within the NLRA's protected class of employees: "[F]aculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the board of trustees."[36]

II. THE COURT'S REASONING

Despite the Board's decision, Yeshiva refused to bargain with its newly certified faculty union.[37] A subsequent Board order commanding

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supervisory employees. Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. Rev. 63, 95–101 (1973).

It has been accurately observed that "the Board has tended to blur the distinction between [supervisors and managerial employees] in its treatment of the challenges in [faculty representation] cases." Finkin, *The NLRB in Higher Education*, 5 U. Tol. L. Rev. 608, 614 (1974).

29. *See, e.g.*, New York Univ., 221 N.L.R.B. 1148, 1149, 91 L.R.R.M. 1165, 1169 (1975).

30. The exercise of authority in the interest of the employer is a prerequisite to supervisory status under § 2(11). *See* note 14 *supra*.

31. *See, e.g.*, Northeastern Univ., 218 N.L.R.B. 247, 250, 89 L.R.R.M. 1862, 1867 (1975).

32. Adelphi Univ., 195 N.L.R.B. 639, 648, 79 L.R.R.M. 1545, 1556 (1972).

33. *Id.* Section 2(11) requires that a supervisor at least be empowered to make effective recommendations. *See* note 14 *supra*.

34. *E.g.*, Manhattan College, 195 N.L.R.B. 65, 79 L.R.R.M. 1253 (1972); Fordham Univ., 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971); Long Island Univ. (Brooklyn Center), 189 N.L.R.B. 909, 77 L.R.R.M. 1006 (1971).

35. Yeshiva Univ., 221 N.L.R.B. 1053, 1053–54, 91 L.R.R.M. 1017, 1018 (1975).

36. *Id.* at 1054, 91 L.R.R.M. at 1018 (footnote omitted). Language identical to that quoted in the text appears in other Board decisions. *E.g.*, University of Miami, 213 N.L.R.B. 634, 634, 87 L.R.R.M. 1634, 1637 (1974).

37. *See* note 8 and accompanying text *supra*.

Yeshiva to bargain was ignored.[38] In denying the Board's petition for enforcement of its order,[39] the *Yeshiva* court rejected, *seriatim,* the three reasons[40] the Board had advanced for overlooking the Yeshiva faculty's substantial role in university governance. Turning first to the Board's collective authority doctrine, the court conceded that some ambiguity was created by inclusion of the words "any individual" in section 2(11)'s definition of supervisor.[41] Nevertheless, the doctrine was held indefensible. The court noted that neither precedent nor legislative history sanctioned it;[42] indeed, the doctrine had not been followed in several of the Board's own decisions.[43] But the court did not insist upon its reading of section 2(11) "since there is no such 'individual' statutory restriction in the Board's own concept of 'managerial employees.' "[44] The court could discern no legitimate reason for holding that the collective nature of faculty decisionmaking bars a finding that faculty members are mana-

38. *See* note 9 and accompanying text *supra.*

39. *See* note 10 and accompanying text *supra.*

40. The court erred in assuming that the Board considered faculty members' status as professional employees to be a fourth independent reason for finding that they are not managerial or supervisory personnel. The NLRA defines "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 learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
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> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

29 U.S.C. § 152(12) (1976). Professional employees are entitled to the NLRA's protections. *Id.; id.* § 157 (1976). The Board has characterized faculty members as professional employees. C. W. Post Center of Long Island Univ., 189 N.L.R.B. 904, 905, 77 L.R.R.M. 1001, 1003 (1971). But the Board certainly has not held that a faculty member's professional status precludes his exclusion as a supervisor. *See* note 5 *supra.* In *C. W. Post* the Board found department chairpersons to be supervisors and therefore excluded them from the bargaining unit although the realm of their authority was similar to that of the faculty. 189 N.L.R.B. 904, 906, 77 L.R.R.M. 1001, 1003–04 (1971). The only apparent basis for the differential treatment was the chairpersons' individual, as opposed to collective, authority to make recommendations. In Fordham Univ., 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971), the Board found that department chairpersons acted collectively with the faculty in making recommendations and therefore included them in the faculty unit. *Id.* at 137–39, 78 L.R.R.M. at 1181–83. Nevertheless, the Board's holding in *C. W. Post* shows that despite a faculty member's professional status he will be excluded as a supervisor if effective recommendatory authority is vested in him individually and not as part of the collective.

41. NLRB v. Yeshiva Univ., 582 F.2d at 699.

42. *Id.*

43. *Id.*

44. *Id.*

gerial employees.[45] Thus, while section 2(11) could conceivably be read to limit supervisors to those who make decisions on an individual basis, no such restriction inheres in the Board's definition of managerial employee.[46]

Rejection of the Board's second reason for allowing faculty bargaining—that faculty members act in their own interest—was predicated on a finding that the interests of faculty and University are actually "co-extensive."[47] The Yeshiva administration's adoption of virtually all faculty recommendations evidenced an identity of interest between faculty and university-employer that could not meaningfully be separated. This identity demonstrated to the court "the inapplicability of the 'interest of the faculty' analysis" in the context of Yeshiva's shared authority system.[48]

The reservation of ultimate authority by Yeshiva's trustees was considered a "particularly unconvincing" reason for the Board's decision that Yeshiva's faculty could compel bargaining under the NLRA.[49] Section 2(11) defines as supervisors those empowered to make effective recommendations, without regard to whether those recommendations are reviewed by a higher authority.[50] The court concluded that "[i]f [the ultimate review authority of Yeshiva's trustees] is to preclude full-time faculty members from assuming managerial or supervisory status . . . then it is difficult to contemplate *any situation* where the statutory and Board-created exemptions can be applied."[51]

III. ANALYSIS

As the *Yeshiva* court recognized, a Board determination that an individual is within the NLRA's protected class of employees should be sustained on review if it has warrant in the record and a reasonable basis in the statute.[52] The court concluded that the Board had failed to advance "any persuasive rationale" for its finding that Yeshiva's faculty are not supervisory or managerial employees.[53] To this extent, the decision is correct.[54] Arguably, however, the *Yeshiva* opinion is flawed by its com-

45. *Id.* at 699–700.
46. *Id.*
47. *Id.* at 700.
48. *Id.*
49. *Id.* at 701.
50. *Id.* at 701–02.
51. *Id.* at 702 (emphasis in original).
52. *Id.*
53. *Id.*
54. *See* notes 63 & 64 *infra*. *See also* Note, *Full-Time Faculty Held Not To Be "Employees" Under the National Labor Relations Act*, 47 FORDHAM L. REV. 437 (1978). *But see* Note, *The Super-*

plete failure to consider the policies underlying the exclusion of supervisors and managerial employees from the NLRA's protections. In light of the ambiguity of section 2(11)'s definition of supervisors,[55] if excluding faculty members does not serve any of these policies, a reasonable statutory basis exists for upholding the Board's decision to enforce faculty bargaining.

The legislative history of section 2(11)[56] reveals that its exclusion of supervisors from the NLRA's coverage serves at least three purposes. First, it preserves the supervisor's undivided loyalty to his employer by withdrawing him from a situation where he might face a conflict between the interests of his employer and the interests of the employees he supervises.[57] Second, it prevents supervisors from dominating the unions of employees protected by the NLRA.[58] Finally, the exclusion of supervisors ensures a clear line of demarcation between labor and management.[59] The purposes of the managerial exclusion, as delineated by the Board and the courts, are virtually identical to those underlying section 2(11).[60]

A. *Faculty Unionization and the Problem of Divided Loyalty*

The preservation of supervisors' loyalty dominated the attention of Congress when, in 1947, it amended the NLRA to include section 2(11).[61] Congressional concern focused on evidence showing that when

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55. *See* note 41 and accompanying text *supra*. *See also* Illinois State Journal-Register, Inc. v. NLRB, 412 F.2d 37, 41 (7th Cir. 1969) (noting the ambiguity in the Board's concept of managerial employee).

56. S. REP. No. 105, 80th Cong., 1st Sess. 3–5 (1947), *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 93d CONG., 2d Sess., LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 409–11 (Comm. Print 1947) [hereinafter cited as HISTORY OF ACT]; H. R. REP. No. 245, 80th Cong., 1st Sess. 13–17 (1947), *reprinted in* HISTORY OF ACT at 304–08; H. R. CONF. REP. No. 510, 80th Cong., 1st Sess. 35–36 (1947), *reprinted in* HISTORY OF ACT at 539–40.

57. *See* notes 62–63 and accompanying text *infra*.

58. *See* notes 76–77 and accompanying text *infra*.

59. *See* notes 81–82 and accompanying text *infra*.

60. *See* notes 63 & 84 *infra*.

61. The original version of the NLRA was the Wagner Act of 1935. The Wagner Act contained no express exclusion for supervisory employees. In 1947, the United States Supreme Court, in Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), affirmed the Board's decision that managerial employees were entitled to bargain under the NLRA. The *Packard* decision prompted the enactment of § 2(11)'s supervisory exemption in the Taft-Hartley Act of 1947. *See* R. GORMAN, BASIC TEXT ON LABOR LAW 1, 33–34 (1976).

supervisors were allowed to unionize their loyalty divided between the employer and the workers. When supervisors organize, "even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them."[62] Thus, unionization meant supervisors were being forced to act in the interest of the employees beneath them in the business hierarchy, thereby depriving employers of the undivided loyalty to which they are entitled.[63]

In light of this congressional policy behind the exclusion of supervisors, application of section 2(11) requires an employment situation in which the interests of the employer conflict with the interests of those employees who are subject to the supervisor's authority. The *Yeshiva* court's conclusion that the interests of the faculty and the university-employer are always coextensive[64] is based on the unexamined assumption that faculty supervision of its own members is not such an employ-

62. H. R. REP. No. 245, 80th Cong., 1st Sess. 14 (1947), *reprinted in* HISTORY OF ACT, *supra* note 56, at 305. It is important to note Congress' perception of how the rank and file unions were able to "boss" the unions of their "bosses."

> The evidence shows that foremen's unions are, and must be, wholly dependent upon rank-and-file unions and under constant obligation to them. The foremen cannot strike without the support of the rank and file and its agreement not to do the work of striking foremen. . . .
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> . . . [R]ank-and-file unions tell the foreman's union when the foremen may strike and when they may not, what duties the foremen may do and what ones they may not, what plants the foreman's union may organize and what ones it may not.

H. R. REP. No. 245, 80th Cong., 1st Sess. 15–16 (1947), *reprinted in* HISTORY OF ACT, *supra* note 56, at 306–07.

63. Eliminating the divided loyalty resulting from unionization of management personnel is also a central purpose of the Board-created exemption for managerial employees. There are two tests of managerial status. *See* notes 17–18 and accompanying text *supra*. The first test classifies as managerial those employees who are so aligned with management that allowing them to unionize would open the door to a conflict of interest in labor relations. NLRB v. Bell Aerospace Co. Div. of Textron Inc., 416 U.S. 267, 290 n.20 (1974); Illinois State Journal-Register, Inc. v. NLRB, 412 F.2d 37, 41 (7th Cir. 1969). In the interest of simplicity, the divided loyalty problem is discussed herein only with reference to § 2(11)'s exclusion of supervisors. The analysis, however, is also applicable to faculty members' possible status as managerial employees.

This brief sketch of the divided loyalty problem supports the *Yeshiva* court's rejection of the Board's collective authority doctrine. The ability of rank and file unions to undermine the loyalty of supervisors and managerial employees would not be impaired by the happenstance that supervisory authority is exercised by a group rather than an individual.

64. With one caveat, the court's conclusion that faculty and university-employer share an identity of interest seems correct. It is doubtful that the interests of the particular faculty member being supervised are identical to those of his faculty supervisors and the university-employer. The supervised member's personal stake in the outcome of any decision directly affecting his future at the university is sufficient, it would seem, to generate a self-interest divergent from the interests of the university and its faculty supervisors.

The only decisions on point hold that despite an identity of interest between the employer and employees with supervisory authority, § 2(11)'s exclusion applies. NLRB v. Scott Paper Co., 440 F.2d 625, 630 (1st Cir. 1971); Deaton Truck Line, Inc. v. NLRB, 337 F.2d 697, 699 (5th Cir.

ment situation. The interests of faculty supervisors, supervised faculty, and the university-employer being identical, a conflict of interest is impossible.[65]

It seems more accurate, however, to assume that the personal stake of a faculty member affected by a decision of the supervising faculty will generate a conflict between the interests of the affected member and the mutual interests of the university-employer and its faculty supervisors.[66] Once this conflict is recognized, the critical inquiry becomes whether unionization will cause the supervising faculty to be disloyal to the interests they share with the university-employer. If there is an unequal distribution of power among members of the faculty union, disloyalty seems possible. Occasions will arise when those at the pinnacles of union power will be the subjects of faculty supervision. Their disproportionate share of power in the union may enable them to influence their faculty supervisors to render a decision favorable to them, yet adverse to the interests of the university-employer.

It is also possible that faculty supervisors' decisions on such matters as hiring, promotion, and tenure will be influenced by a desire to advance union interests. An occasional tenure denial as punishment for refusing to join in a strike, or for other disloyalty to the union, is hardly inconceivable.[67]

1964), *cert. denied*, 381 U.S. 903 (1965). Because the divided loyalty problem exists even where the interests of the employer and supervisor are identical, it is incorrect to argue that, since "the protected loyalty is that owed to oneself," fears of "sacrificed faculty loyalty are unrealistic." Note, *A University Faculty With a Record of Managerial Activity May Be Managerial Personnel and Therefore Excluded From The Coverage of The National Labor Relations Act*—NLRB v. Yeshiva University, 13 GA. L. REV. 313, 321 (1978).

65. Section 2(11) excludes only those individuals who supervise "employees." *See* note 14 *supra*. The *Yeshiva* court was aware of the "logical difficulty" of its holding that faculty supervisors supervise other faculty supervisors. NLRB v. Yeshiva Univ., 582 F.2d at 699. Unfortunately, the court's acknowledgment of this ambiguity did not prompt any analysis of policy considerations underlying the apparent requirement that supervisory authority be exercised over the non-supervisory class of "employees."

66. *See* note 64 *supra*.

67. Congress apparently never considered the possibility of unionized supervisors subordinating their loyalty to the employer to the interests of the union. The legislative history of § 2(11) reveals that Congress envisaged only one kind of conflict of interest problem with supervisors' unions—a conflict between the employers' interests and the interests of the rank and file unions. *See* notes 62–63 *supra*. It seems, however, that whether the subordinating influence is exercised by those being supervised or by the union itself is inconsequential. Either way the employer loses the supervisor's undivided loyalty. It is this loss that § 2(11) was designed to prevent. *Id.*

Because the union itself can be a subordinating influence, the policy of preserving undivided loyalty is served by excluding supervisors where they supervise other supervisors. Therefore, when § 2(11) requires that a supervisor supervise "employees," the word "employees" should be read to include any persons employed by the employer, including a supervisor. *See* note 65 *supra*. *Contra*, Illinois State Journal-Register, Inc. v. NLRB, 412 F.2d 37, 44 (7th Cir. 1969) ("employees" should be read to mean "employees" as defined by the NLRA, thus excluding supervisors, but this part of

Faculty unionization also presents a potential conflict of interest arising out of the full-time faculty's supervision of their part-time colleagues.[68] A separate union of part-time faculty,[69] with interests different from those of the university-employer, could influence unionized full-time faculty in the same way that unions of the industrial rank and file were able to influence their supervisors.[70]

Several factors reduce the danger that the influence of part-time faculty would divide the loyalty of their full-time faculty supervisors. Aside from the question whether a part-time faculty union would even be appropriate,[71] it is unclear whether part-time faculty members have the enthusiasm for unionization,[72] the kind of conflicting interests,[73] or the numerical strength[74] necessary to undermine the loyalty of their faculty supervisors to the university-employer. Nevertheless, it is impossible to say with certainty that the danger of divided loyalty is entirely absent.[75]

Thus, there inheres in faculty unionization at least the potential for subjecting faculty supervisors to a conflict between the interests of their

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the opinion is dictum and does not consider the special problem of supervisors supervising other supervisors).

68. "[I]n many of Yeshiva's schools the full-time faculty also supervise collectively the activities of the part-time faculty." NLRB v. Yeshiva Univ., 582 F.2d at 699. *See also* note 2 *supra*.

69. Beginning with its decision in New York Univ., 205 N.L.R.B. 4, 83 L.R.R.M. 1549 (1973), the Board has consistently excluded part-time faculty from bargaining units including full-time faculty.

70. *See* notes 62–63 and accompanying text *supra*.

71. That question remains open. New York Univ., 205 N.L.R.B. 4, 8 n.12, 83 L.R.R.M. 1549, 1553 n.12 (1973). *See also* Goddard College, 216 N.L.R.B. 457, 458–59, 88 L.R.R.M. 1228,1230 (1975).

72. Board approval of part-time faculty units is rarely sought. *See* Head & Leslie, *Bargaining Unit Status of Part-Time Faculty*, 8 J.L. & Educ. 361, 376 (1979).

73. It is not entirely clear that the interests of Yeshiva's part-time faculty conflict with those of the university-employer and the full-time faculty. *See* Brief for Respondent at 81–83, NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978); Brief for the National Labor Relations Board at 43, NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978).

74. Yeshiva's full-time faculty members outnumber the part-time faculty by 209 to 150. NLRB v. Yeshiva Univ., 582 F.2d at 690.

75. The Board has established a clear-cut rule for resolving the problem of *individual* faculty supervision of such persons as part-time faculty members, research assistants, and support personnel. If the faculty member's supervision of non-unit personnel occupies less than 50% of his time, such supervisory authority does not render him a supervisor. Fordham Univ., 214 N.L.R.B. 971, 974, 87 L.R.R.M. 1643, 1648 (1974); Adelphi Univ., 195 N.L.R.B. 639, 645, 79 L.R.R.M. 1545, 1551–52 (1972). The "50% rule" has received at least limited judicial acceptance. Trustees of Boston Univ. v. NLRB, 575 F.2d 301, 306 (1st Cir. 1978). One commentator has spoken in its defense. Finkin, *The Supervisory Status of Professional Employees*, 45 Fordham L. Rev. 805 (1977). Not all members of the Board concede its validity. Fordham Univ., 214 N.L.R.B. 971, 978, 87 L.R.R.M. 1643, 1652 (1974) (Member Kennedy, dissenting). The *Yeshiva* court expressly reserved judgment on the matter. NLRB v. Yeshiva Univ., 582 F.2d at 694 n.8. In terms of the policy of § 2(11), the 50% rule is probably indefensible. Whether a supervisor spends 40 or 80 percent of his time supervising would appear to have little or no bearing on the likelihood that he will face a conflict of interest upon joining a union.

employer on the one hand, and the interests of their union and their part-time colleagues on the other. Perhaps it is cynical to envisage this conflict leading to an actual reduction in faculty loyalty to the university-employer's interests. Arguably, the faculty's interest in bettering the school is strong enough to resist the conflicting influences of part-time faculty and the pressure to advance the interests of the full-time faculty union. Yet when it comes down to the real life situation—to the moment, for example, when faculty supervisors must decide whether or not to promote a deserving professor who has obstinately objected to every proposed union contract—it is impossible to dispel all doubt about the adverse effect of unionization on faculty loyalty.

B. *Faculty Unionization and the Problems of Domination and Demarcation*

Although the primary purpose of section 2(11) is to preserve for employers the undivided loyalty of their supervisors, Congress also expressed a number of subordinate purposes. One of these was to "assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities."[76] Although there is little elaboration on this point in the legislative history of section 2(11), Congress apparently believed that the authoritative positions of supervisors would enable them unduly to influence, on behalf of the employer, the rank and file's decisions on union matters.[77] This belief presupposes that an unequal distribution of decisionmaking power in the workplace carries over into the union. To the extent that supervisory authority is spread evenly over university faculty, the fear of domination seems unwarranted. At Yeshiva, however, some faculty members wield more authority than others. This inequality is strikingly exemplified by the participation of some full-time faculty members on hiring and promotion committees.[78] The small number of full-time faculty members on these committees have virtually unrestricted authority over matters within their jurisdiction. Upon unionization, there is a possibility that faculty committee members will use their disproportionate supervisory authority as a tool to dominate union affairs in the interest of the employer. Similarly,

76. H. R. REP. No. 245, 80th Cong., 1st Sess. 14 (1947), *reprinted in* HISTORY OF ACT, *supra* note 56, at 305.

77. NLRB v. Florida Agricultural Supply Co., 328 F.2d 989, 991 (5th Cir. 1964).

78. NLRB v. Yeshiva Univ., 582 F.2d at 691, 693–94.

if both full-time and part-time faculty unionize,[79] there is a risk that the former will dominate the latter, for part-time faulty at Yeshiva exercise considerably less supervisory authority than their full-time colleagues.[80]

Another purpose of section 2(11) is to draw a "more definite line between management and labor"[81] and to free employers from any compulsion " to accord to the front line of management the anomalous status of employees."[82] In Yeshiva's shared authority system, faculty members play a dual role as managers and employees. When cast in the latter role, faculty members are not unlike industrial production line workers. The product of the university is the educated student, and no one works more closely with that product, handling it on a day-to-day basis, than the faculty. Also, like industrial workers, faculty members have a deep concern for the quality of their work environment. In the role of managers, however, faculty members act as decisionmakers. They largely determine the terms and conditions of employment within the enterprise.

This schizophrenic quality inhering in faculty membership makes unionization of faculty problematic in two respects. First, unionization blurs the division between labor and management, making it necessary to draw a somewhat artificial line between the parties to the bargaining process—the faculty employees and the university-employer. The necessity of clearly differentiating the faculty from the employer for the purpose of bargaining may engender an adversarial relationship between faculty and university administrators.[83] Arguably, replacing the cooperative spirit of the shared authority system with the adversarial quality of collective bargaining will impede the goal of furthering the institution as a house of learning.

A related problem lies in the anomaly of permitting those in substantial control of the terms and conditions of their employment to claim the benefit of a statute designed to protect those who would otherwise be powerless to shape their work environment. The draftsmen of the NLRA were concerned with "[t]he inequality of bargaining power between employees[,] who do not possess full freedom of association or actual lib-

79. *See* notes 71–72 and accompanying text *supra*.

80. Brief for the National Labor Relations Board at 43, NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978).

81. S. Rep. No. 105, 80th Cong., 1st Sess. 5 (1947), *reprinted in* History of Act, *supra* note 56, at 411.

82. *Id.*

83. A simplistic solution to this difficult problem has been proposed. Walker, Feldman, & Stone, *Collegiality and Collective Bargaining: An Alternative Perspective*, 57 Educ. Rec. 119 (1976).

erty of contract, and employers.''[84] Equality of bargaining power is a central attribute of Yeshiva's shared authority system.[85]

IV. CONCLUSION

Although expressly limited to its facts,[86] the *Yeshiva* decision casts an ominous shadow over the developing phenomenon of faculty collective bargaining at private universities.[87] The Board's consistent approval of faculty bargaining units, despite the professoriate's major role in institutional governance, undoubtedly led many faculty members to believe they had a vested right to engage in bargaining under the NLRA. Nevertheless, the policies supporting the exclusions for managerial and supervisory employees provide ample support for the *Yeshiva* decision.

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84. 29 U.S.C. § 151 (1976).

Similarly, the second test of managerial employee status is aimed at weeding out those who, because of their alliance with the employer, do not need the protections of the NLRA. This second test deems managerial those employees empowered to determine and effectuate management policies. *See* note 17 and accompanying text *supra*. The exclusion is grounded "on the theory that [managerial employees] were the one[s] from whom the workers needed protection." Retail Clerks Int'l Ass'n v. NLRB, 366 F.2d 642, 645 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967). This statement of the exclusion's purpose, though often quoted, has never been further elaborated. *See, e.g.*, NLRB v. Bell Aerospace Co. Div. of Textron Inc., 416 U.S. 267, 288–89 n.16 (1974). It could, alternatively, be interpreted as expressing a fear that allowing managerial employees the right to bargain would lead to domination of the workers in their union activities. *See* notes 76–80 and accompanying text *supra* (discussion of the domination problem in the university context).

85. If there is any inequality of bargaining power at Yeshiva it is at least arguable that the faculty wields the larger share. For example, faculty members at Yeshiva's Belfer Graduate School successfully petitioned Yeshiva's President for removal of their dean. NLRB v. Yeshiva Univ., 582 F.2d at 693.

86. NLRB v. Yeshiva Univ., 582 F.2d at 696.

87. The latest tally shows that faculty at 77 private universities have opted for collective bargaining. The Chronicle of Higher Education, June 26, 1978, at 8. The comparable figure for public universities is 523. *Id.*