In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER, v. YESHIVA UNIVERSITY, RESPONDENT.	No. 78-857
YESHIVA UNIVERSITY FACULTY ASSOCIATION, PETITIONER, v. YESHIVA UNIVERSITY, RESPONDENT.	No. 78-997

Washington, D. C.
October 10, 1979

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Washington, D. C.,

Wednesday, October 10, 1979.

The above-entitled matters came on for oral argument at 2:05 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C.; on behalf of the Petitioner in No. 78-857

RONALD H. SHECHTMAN, ESQ., Gordon & Schechtman, 666 Third Avenue, New York, New York 10017; on behalf of the Petitioner in No. 78-997

MARVIN E. FRANKEL, ESQ., Proskauer, Rose, Goetz & Mendelsohn, 300 Park Avenue, New York, New York 10022; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in National Labor Relations Board v. Yeshiva University and a consolidated case.

Mr. Come, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE PETITIONER

MR. COME: Mr. Chief Justice, and may it please the Court:

This case is here on certiorari to the Second Circuit which denied enforcement in the Board's order requiring Yeshiva University to bargain with the union and Yeshiva University Faculty Association which following a Board election had been certified as the bargaining representative of the university's full-time faculty members.

The question presented is whether a university's faculty members who participate in decision-making regarding the hiring, termination and promotion of faculty and the academic standards of the university are managerial or supervisory employees and thus exempt from the coverage of the National Labor Relations Act, as the Court of Appeals found, or merely professional employees who are protected by the act, as the Board held.

QUESTION: It could be both, couldn't it?

MR. COME: They could be both, and that is why I said merely.

There is no question that the faculty are professional employees. The question is whether they are also managerial.

QUESTION: Right.

MR. COME: Yeshiva University is a private educational institution chartered by the State of New York, facilities located on four campuses in New York City, has approximately 2,500 full and part-time students that attend schools involved in this proceeding, and those schools have approximately 209 full-time and 150 part-time faculty members.

The ultimate policy and decision-making body is the Board of Trustees on which no faculty members sit. The university President, who is the chief executive officer of the university, is a member of the Board of Trustees. The next stratum of the administration consists of the Vice Presidents for Academic Affairs, Business Affairs and Student Affairs.

The chief administrative officer of each of the schools is the dean or director who serves as the liaison officer between the programmatic activities of the school and the central administration and reports and is responsible to the academic vice president and the president. And there

is an Executive Council of the university whose members are appointed by the president, with the concurrence of the Board of Trustees, which consists of the deans of the various schools and the directors of the various administrative divisions of the university.

The administration also has various committees, including a budget committee which is appointed by the President and consists of the Vice President for Business Affairs, the Registrar and the Dean of one of the colleges. The budget committee establishes guidelines which are followed by the deans and directors of the various schools in drafting their budgets. The draft budgets are then submitted to the Vice President for Business Affairs who reviews them with the budget committee and then submits them to the President.

Now, paralleling this administrative or bureaucratic structure is a structure of faculty committees, councils and assemblies which enables the faculty members to share in the governments of the university. Thus the faculty members of the various schools exercise considerable discretion in determining their own curriculum, the grading system, admission and metriculation standards, and course schedules.

QUESTION: Mr. Come, does it vary somewhat among the schools?

MR. COME: It does vary to some extent, but in general this is the picture and the picture that the Board found is typical of most other universities and colleges.

QUESTION: When you say "their own curriculum," you mean the curriculum that the faculty teaches the students, I take it?

MR. COME: That is correct. They also make recommendations -- talking about the faculty now -- which are often accepted, regarding the hiring, reappointment and termination, promotion and tenure of other faculty members.

Now, the court below acknowledged that, as I said before, university faculty members were professional employees within the meaning of 221 of the act and as an incident of that professionalism they could determine the contents of the course and the methods of teaching it and the evaluation of the students' academic performance. The court --

QUESTION: That is, each faculty member with respect to his own course and his own students?

MR. COME: That is correct.

QUESTION: But that alone didn't make them managerial.

MR. COME: That did not. But in the court's view, when the faculty members go beyond that, as they did

here, and exercised the additional powers that I have alluded to, they were no longer simply exercizing professional expertise but really were substantially and pervasively operating the enterprise.

Now, we submit that the court below failed adequately to analyze the basis for the act's exclusion of managerial and supervisory employees and to distinguish between the faculty's influence over matters of professional concern and its actual formal bureaucratic authority.

Supervisors, as this Court is aware, are exempt from the National Labor Relations Act and they are defined as persons who exercise authority over employees in the interest of the employer. The Senate report refers to them as persons who are traditionally regarded as part of management as opposed to rank and file employees.

Similarly, managerial employees, as this Court held in Aerospace several years ago, likewise are exempt from the act and they are defined as executives who formulate and effectuate management policies by expressing and making operative the decisions of their employer. Like supervisors, managerial employees are recognized by their alliance with management as opposed to the rank and file employees.

Now, at the same time that it exempted supervisory and managerial employees, Congress continued the coverage

of professional employees who are defined in section 212 of the act as those who exercise discretion and judgment in the exercise of their work. And although many professional employees are asked for their advice on many important policy questions, they do not become managerial employees merely because their advice has an important influence on the conduct, the ultimate conduct of the enterprise or the institution. It is necessary to show, as this Court pointed out in the Bell Aerospace opinion, that professional employees were acting as representatives of management and implementing management policies. And the reason for this requirement is that there is attention in the act between the exclusion of managerial and supervisory employees and the inclusion of professionals, and you have to accommodate them, the two in such a way that one does not engulf the other.

QUESTION: Of course, the real difficulty in this case is more fundamental, isn't it, Mr. Come? It is the difficulty that is reflected by the rather procrustean effort of transferring the application of this statute, which is tailored to meet the paradigm industrial or commercial setting to an academic institution. That is the basic problem here, isn't it?

MR. COME: That presents a --

QUESTION: I mean that is the difficult problem,

the fundamental problem.

MR. COME: Well, that presents a problem. However, the principle that the Board has applied here is a principle that is well engrained in the statute and is applicable --

QUESTION: Well, originally a college, as the Latin word implies, collegium, was a collection of scholars who went to Oxford or Cambridge or Bologna or Heidelberg or Paris and scholars then came -- students then came to learn from them and the faculty were the university, they were the college, that was it.

MR. COME: There is no question about that. However, we submit that the modern university and college has come a long way from the universal model, and that we submit --

QUESTION: One way, upwards or downwards, but I agree that it has come a long way.

MR. COME: -- is the error of the Court of Appeals. It focused simply upon what went on in the individual colleges and neglected or at least it didn't pay full faith and credit to this parallel and elaborate administrative structure of this university which is typical of most other universities and colleges --

QUESTION: We may both agree that the present-day university is not like Kings College in Cambridge

originally was, but can't we also agree that Yeshiva University is not like General Motors either?

MR. COME: It is not like General Motors. In the --

QUESTION: Or Chrysler.

MR. COME: Or Chrysler -- I'm not so sure that that is so good. In any event, in the typical industrial plant you have what is known as a hierarchical arrangement and it's very easy to spot supervisory and managerial employees from where they stand in the hierarchy.

QUESTION: They give them the title of supervisor. That makes it easy.

MR. COME: Well, it helps but the title, of course, is not necessarily decisive.

QUESTION: Mr. Come, in an industrial setting do they let them have a voice in the selection of their supervisors?

MR. COME: Well, I would say that it is not unusual to at least get recommendations. The administration doesn't have to follow it, it is to their advantage to get someone as a supervisor who, assuming that he is capable of doing the job from the management's standpoint, can work in harmony with the rank and file, and I would say it is good industrial relations.

QUESTION: When Congress passed this legislation,

do you think they gave any thought one way or the other as to whether faculty members of a college were to be included? Is there any evidence that Congress thought about it at all?

MR. COME: Well, certainly at the time they passed the Wagner Act, probably not. I think there was considerable doubt as to the extent of coverage under the Commerce Clause and whether a college or university could meet the definition of interstate commerce.

QUESTION: But then aren't you asking us to decide what Congress would have thought about it if they had given it any thought one way or the other?

MR. COME: Well, that is not an unfamiliar problem in statutory interpretation that this Court has to face. The jurisdictional breadth of the statute is very broad. The exemptions are very limited and they do not exclude colleges and universities; but it is not even that hard because in 1974, when Congress amended the statute to take out the exemption for nonprofit hospitals, one of the basic reasons why Congress did that was that it found that there was no justification for continuing to exclude that limited category of nonprofit institutions and they took note of the fact that the Board had over the years as a result of the increased impact of colleges and universities on interstate commerce, had been asserting jurisdiction over colleges and universities. So I think that we do have

indication here that Congress was aware of the fact that the Board had been interpreting the act to apply to colleges and universities and was asserting jurisdiction.

QUESTION: The first assertion of jurisdiction had to do with people who were conededly employees, janitors and the like, wasn't it?

MR. COME: I believe that is right, librarians and maintenance --

QUESTION: The Cornell case, in other words.

MR. COME: The Cornell case. The first faculty case was --

QUESTION: It did not have to do with faculty.

MR. COME: No, it did not have to do with faculty.

QUESTION: Since I have already interrupted you, in this case does the bargaining unit include department heads?

MR. COME: The bargaining unit did include department heads. And I should say that the Board has included department heads in some universities and not in others, depending upon the facts of the extent of their alignment with management. The Court of Appeals did not reach that question, so presumably if we were to prevail on the basic faculty question, that would --

QUESTION: That would still be open?

MR. COME: That is correct. However, that issue

is involved in the Boston University case which is pending on certiorari.

QUESTION: The bargaining unit did not include deans, did it?

MR. COME: It did not include deans. The Board has consistently found that deans were aligned with management and excluded as such.

QUESTION: Well, deans generally are elected by their colleagues, aren't they?

MR. COME: They are --

QUESTION: Or I suppose they are appointed by the --

MR. COME: They are appointed by the president.

QUESTION: On the recommendation of the faculty.

MR. COME: Yes.

QUESTION: Mr. Come, one thing that struck me about the Court of Appeals opinion was the frequency with which it noted that the administration simply went along with the faculty. There appeared to be an absence of the tensions to which you referred which occurred in ordinary industrial situations.

MR. COME: Well, we submit that the fact that the administration chooses to accord great deference and respect to the judgment of its faculty does not indicate that the faculty is acting as management representatives

when they give their advice. They have the expertise in this area and the administration for that reason chooses to seek their advice. But by the same token, since in our submission the faculty are not accountable to the administration for the worth of their recommendations on these faculty government questions, unlike their performance as teachers or scholars, the administration is free to disregard those recommendations and that to us is the heart of the reason why they are not managerial employees when they exercise their government's functions.

I would like to reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Shechtman.

ORAL ARGUMENT OF RONALD H. SHECHTMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SHECHTMAN: Mr. Chief Justice, and may it please the Court:

Of course, joining the argument of my colleague, Mr. Come, I state the issue of this case as to whether the nature of the authority of the faculty may exercise warrants their exclusion under the act.

As Mr. Justice Stewart indicated, it is indeed a procrustean problem in the application of the statute, but it's a problem whose solution goes to an understanding of what the supervisory and managerial exclusions are based

upon, and that is in the legislative history the repeated statement of the Congress to protect the employers from the conflict of loyalty of those representatives who should be loyal first to management and secondly to maintain a balance of power in the collective bargaining relationship between those employees in bargaining with the employer and its management representatives.

In this respect, I should note, again in response to Mr. Justice Stewart, that when Congress acted in 1974 in amending the statute with the health care amendments, the National Labor Relations Board had decided in 1971 and in 1972 the Adelphi decision and the C. W. Post decision which first dealt with the inclusion of faculty under the National Labor Relations Act.

In fact, as our brief indicates, these cases were brought up before the congressional committees and before the Congress in their consideration of thatlegislation.

QUESTION: Did both of those cases involve what are now referred to in the briefs as mature universities?

MR. SHECHTMAN: I would believe so. They both are institutions with full educational programs, with graduate schools in place, chartered by the State of New York, four-year programs --

QUESTION: And they weren't proprietary or --

MR. SHECHTMAN: No, they are not. They are not for profit chartered institutions also in the State of New York, I might note.

QUESTION: Mr. Shechtman, I take it that the Board thought it critical to find that the faculty operated in its own interests rather than that of the employer?

MR. SHECHTMAN: I think that is the single critical inquiry here.

QUESTION: You were about to get to that, I suppose?

MR. SHECHTMAN: That is correct, Your Honor.

QUESTION: Could you tell me, give me an example that you can find in this record of this faculty operating in its own interest rather than of the employer.

MR. SHECHTMAN: I think in answer to that question, it requires a distinction between their influence rather than their authority and --

QUESTION: Is there some place I can read in the record the evidence to support the Board's conclusion that the faculty operated in its --

MR. SHECHTMAN: Yes, Your Honor.

QUESTION: Do you in your brief give record cites in that?

MR. SHECHTMAN: Yes, Your Honor, in the last point in our brief we make repeated references thereto. One

example would be the recommendations of the faculty in fact with respect to the promotion or even hiring of other colleagues, whether a Victorian rather than Elizabethan English historian might be appropriate, whether one might be more appropriate than the other.

What is shown in this record is notwithstanding such recommendations of promotions, of tenure, even of hiring. The university administration,without input from the faculty, froze promotions.

QUESTION: Well, that isn't quite responsive to my question. Are you asserting that the faculty's recommendations about hiring new personnel are in the interests of the faculty rather than the university?

MR. SHECHTMAN: I think they are in the interests of --

QUESTION: I take it that is the critical point.

MR. SHECHTMAN: I believe so, and it is in the interest of the pursuit of their own professional excellence. It is within their professional competence, within their professional domain to make at least judgments as to whether their department might be improved, their department might be furthered by the --

QUESTION: But you wouldn't say that it was not in the interest of the university, would you?

MR. SHECHTMAN: No. The fact that their interests

does not solve the issue.

QUESTION: But if the university hires somebody to make recommendations to it, isn't the faculty charged with making recommendations in the interests of the university? Wouldn't that be a job description of some faculty committee? It wouldn't say please act in your own selfish interests and not in the interests of the university, would it?

MR. SHECHTMAN: It would be true with the lawyer, doctor or faculty member, with any professional who must make a decision about how to treat a patient, who to appeal a case, how to teach a course. They all comport with the interests of their employers, but then is the effect of this case to say that no professional, because of the nature of decisions he may make --

QUESTION: I am not interested in laywers or doctors, I am interested in these professors. Are you saying that making recommendations for hiring that they are not acting in the interests of the university? And if they aren't, are they breaching their -- are they outside their mission?

MR. SHECHTMAN: I think --

QUESTION: Surely, I can't believe that there is evidence in this record that these committees are free to disregard in making the recommendations, are expected to

disregard the interests of the university.

MR. SHECHTMAN: I am not suggesting that. What I am suggesting is that they do not have any effective authority, that they do not possess the responsibility and authority.

QUESTION: That is a completely different point.

MR. SHECHTMAN: I understand.

QUESTION: Well, let's stick to the point we are talking about, whether they act in their interests or that of the university --

MR. SHECHTMAN: They would act --

QUESTION: -- which is the critical question.

MR. SHECHTMAN: If they possess the authority, Your Honor, I must respectfully differ. I believe that that would then become the question. They do possess the authority with respect to authority and they do act in the interests of the employer.

QUESTION: They make recommendations. Now, do you -- are you telling me that their job -- that the university freely lets them or does not instruct them to act in the interests of the university? Instead, they consistently take recommendations and have committees even though consistently they disregard the interests of the university?

MR. SHECHTMAN: I am not saying that at all. I

am saying there is often a correspondence between their interests and the interests of the university and that they act in both interests, but their action does not possess the authority as to render them either supervisors or managers and that is what this record shows completely and what I believe that the Circuit Court overlooked, and that is where their actions, precisely in the area you referred to, Mr. Justice, have only authority insofar as the university chooses to defer to them.

The record in this case shows, as I indicated, in promotions or tenure decisions, the university will freeze the authority for those. In the non-renewal of a faculty member, when it goes to a grievance committee of faculty, they make a judgment and then say we have no authority to resolve this matter and refer it to their president and to their dean.

QUESTION: Does the record show who has authority to engage professions?

MR. SHECHTMAN: Only the president, Your Honor.

QUESTION: Only the president?

MR. SHECHTMAN: That is correct, with an independent review by the vice president for academic affairs after interviewing by the dean and often in some cases at least with some origination from the faculty.

QUESTION: Is there any evidence in the record

to suggest that the president has ever hired anyone without the approval of the faculty committee?

MR. SHECHTMAN: There is evidence in the record to show that certain faculty or faculty committees have not considered or acted on each person appointed by the president.

QUESTION: What about granting tenure?

MR. SHECHTMAN: The tenure decision is made by the Board of Trustees.

QUESTION: Only on the recommendation of the faculty?

MR. SHECHTMAN: There are cases in the record here that show that certain faculty who were recommended for tenure were never considered by the Board of Trustees or the president because the dean refused to pass up the recommendation under his own choice.

QUESTION: Well, certainly in making tenure recommendations, the university must have some standards and expects the faculty to live up to the university standards rather than to serve the faculty's own parochial interests.

MR. SHECHTMAN: The standards that the faculty --

QUESTION: Is that right or not?

MR. SHECHTMAN: That is correct, but the faculty's interest in those cases would be really again within precisely their professional expertise and competence, not in

the expertise of managerial and --

QUESTION: Furthermore, even if the faculty doesn't have authority and even if the president has the final authority, that is true in the industrial establishment, foremen and admitted supervisors often don't have final authority. Their bosses can overrule them at the drop of a hat.

MR. SHECHTMAN: That is correct here, but the authority here is instead based on again an understanding of the professional identity and the protection they are afforded, the coverage under the act they are afforded as professional employees. Thus it is the faculty who can tell their dean that -- that can best tell their dean about the publications and the writings of their colleagues, and even in some respects the performance in the classroom. But in each case it will then be the dean, it will then be the senior vice president of this institution who independently reviews the facts and circumstances which might warrant or not a promotion or a tenure or any other personnel decision with particular view to institutional priorities and needs about which the faculty cannot speak and about which they do not address.

MR. CHIEF JUSTICE BURGER: Your time is expired, Mr. Shechtman.

MR. SHECHTMAN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Frankel.

ORAL ARGUMENT OF MARVIN E. FRANKEL, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FRANKEL: Mr. Chief Justice, and may it please the Court:

We all seem attracted by the procrustean myth and the procrustean fit, even those of us who can't say it, and I want to say briefly on that subject that we share our friend's view that the act is not a comfortable fit, but we take the position that as nearly as it could be fitted, if you take the principles of the Board's decisions from the industrial area and the commercial area in determining who is managerial ad who is supervisory, then it would follow a fortiorari that the faculty of a General Motors type university is certainly within both of those categories and outside of the definition of employee for that reason.

It has been said in the discussion of this subject that times have changed since the Middle Ages when scholars came together to think collegially. Of course, we all agree on that. But in the sense that it is pertinent here and on the basis of the authorities from the academy on which our friends for the petitioners rely, times have not changed significantly at all.

The American Association for Higher Education in

an important document called, importantly, "Faculty Participation in Academic Governance," which we think really means management, said in the most fundamental sense the university is the faculty. And in the same footnote in our brief where we quote that report, Mr. Bundy, who had some contact with schools, said when it comes to a crunch in a first class university, it is the faculty which decides.

Now, Mr. Shechtman has said that the faculty decides -- and this is undisputed on this record -- in the sense that its decisions on curriculum, on hiring, promotions, tenture and the other fundamentals are almost always followed. He says the faculty decides because the university chooses to let them.

My suggestion with deference is that thought is without serious meaning. It is always true of an organization that those who have the effective power of decision have it because those who might take it away choose to have it reside where it resides.

This record and the literature on both sides cite on the briefs reflect that universities that choose to be distinguished or seek to be distinguished don't let faculties decide merely out of generosity or on suffrance, but because first class faculties would not stay there unless their interests were being heard, in having their

positions on governance followed or respected.

QUESTION: On the other hand, Mr. Frankel, I wouldn't suppose that the university would so regularly follow faculty recommendations if it thought the faculty was acting contrary to the interests of the university.

MR. FRANKEL: Mr. Justice, I think that is right but, of course, one of the central issues -- and now we are told it is the central issue on which there is disagreement between the two sides -- is whether the faculty at Yeshiva or at similar universities does not act in the interests of the university.

QUESTION: The Board concluded that the faculty operated in its own interests.

MR. FRANKEL: Yes, it did, Your Honor, and it concluded that without --

QUESTION: And you don't agree with that, do you?

MR. FRANKEL: No, I very seriously disagree with it.

QUESTION: If you did, I take it if you were right, the Board would conclude otherwise, its bottom line would be different.

MR. FRANKEL: I think if the Board explained to us exactly what it meant, we might know better how to change its mind.

QUESTION: But if the Board agreed with you that

the faculty does indeed act on behalf of the university, it would not hold the faculty to be emplyeess rather than managers?

MR. FRANKEL: I would hope so, Mr. Justice White. The problem that causes me to hesitate in simply saying yes is the difficulty in knowing what the Board is talking about. The Board has struggled heroically with what it has found to be a very difficult subject. But for all the laboring, it has brought forth very little. It has said those words, the faculty acts in its own interests rather than in the interests of the university, but it has failed to tell us what that could mean. And I think with respect to the difficulty with fellow counsel, there may have been some difficulty in answering Your Honor's inquiry as to where you could look in this record to find out why and how the faculty is acting in its own interests rather than in the interests of the university when it says such and such course requirements ought to be added to the degree given by the college, or we need a good person in romance languages to shore up the Yeshiva College program, or we ought to give tenure to "X" or promote "Y" or regrettably we ought not to reappoint "Z."

Now, those things seem to me to be managerial and supervisory decisions of the highest order and they are obeyed. And when you go back to this act and you try

to make it fit and you discover what the Board has done in the settings with which it is familiar, you find that all through industry people with much lower level, much more constricted, narrow, confined responsibilities are held to be managerial or supervisory when they merely recommend decisions of the kind that this faculty is making every day in the week, and the Board never said -- and we found looking through our records that this recommendation to promote an employee was made in the employer's interest. They say we find that this production scheduler, this section chief, this expeditor or whatever is managerial or supervisory because of what this person does. And the Board I think quite properly has assumed that what the person does on the job day in and day out is what is meant to be determinative and unless somebody shows otherwise is in the interests of the employer.

Now, the Board in its brief has tried to shore up, to defend this notion of acting in its own interests. I want to say about that, if the Court please, because I think it is a matter of some consequence, that this subject which has become central on the argument, as perhaps it should be, is only the second of three propositions stated by the Board in one sentence as the basis for its decision in this case. And that whole rationale is found in a single sentence at page 68a of the appendix to the Board's

petition for certiorari. And the Board there says, acknowledging that the faculty engages in what it calls collegial decision-making, it says, "At Yeshiva University, faculty participation in collegial decision-making is on a collective rather than individual basis." And let me stop over that and say that that notion, if one may respectfully call it that, was the only basis for the BOard's first decision holding that faculty members are employees within the meaning of the act, the only basis, and that is the basis given in the C. W. Post case to which reference has been made, and it is a basis, I think it is fair to say, wisely abandoned now by Board counsel and seemingly by the petitioner union as well.

So the Board said, proposition one, it is on a collective rather than individual basis, it is exercised in the faculty's own interests rather than in the interests of the employer -- a subject that we have paid a fair amount of attention to that I will call the second proposition. And third, final authority rests with the Board of Trustees.

Now, I think it is also correct to say that that third thought relegated to a footnote in the Board's brief, is also abandoned and I think again soundly abandoned because it has no visible merit.

So we are left with the second thought, that the

faculty can't be deemed managerial or supervisory because it acts in its own interests. And on that one might argue as a technical matter of the review of an administrative agency's decision, that a three-legged decision of which two legs have been shot away is pretty infirm to begin with.

But in any event, we go to this notion of own interests about which we have been talking, and I want to say some further things about it.

QUESTION: Mr. Frankel, before you do, the Board did make that finding about this university and the Court of Appeals didn't agree, isn't that right?

MR. FRANKEL: Your Honor, it is right that the Board said those words. I would not believe in terms of administrative law concepts about which we I think --

QUESTION: It said those words?

MR. FRANKEL: Yes.

QUESTION: And if you will let me call it a finding just for a moment, I will go ahead. Whatever they said and whatever it is, the Court of Appeals didn't agree with it. So the Court of Appeals turned over the Board, and the Board brought the case here, we took it, what is our posture here? Do we sit as a Court of Appeals or does the Court of Appeals -- or do we have to respect the decision of the Court of Appeals, which was in your favor?

MR. FRANKEL: Your Honor, I think the decision of the Court of Appeals merits the respect that its inherent cogency and persuasiveness imports and not more. That is to say if we go back, I think first of all we are dealing with a question of law and not a question of fact, and that is the only reason I recoil a little from the notion of a finding. The Board, in its response to our brief opposing certiorari, said that the basic difference between the Board and the Court of Appeals is not over the facts but over the legal conclusion to be drawn from those facts. Now, the --

QUESTION: Mr. Frankel, didn't this Court in Pittsburgh Steamship Company say that we don't sit in the same posture in reviewing the Board's findings as the Court of Appeals does, that we must give certain dference to the Court of Appeals and that one Court of Appeals might find one way and one might find another and each might be upheld by this Court?

MR. FRANKEL: Your Honor, that is possible, depending on the nature of the case. I would say respectfully that, again, to look at facts, if the Court of Appeals has found under the Universal Camera doctrine that findings of the agency ought to be overturned for want of the requisite substantial evidence, I think this Court normally would not take the case, and if it did it

might well pay considerable deference to a Court of Appeals.

QUESTION: Well, isn't that what Universal Camera stands for to some extent at least

MR. FRANKEL: Yes, sir.

QUESTION: -- and what cases since then have said?

MR. FRANKEL: I think so, Mr. Justice.

QUESTION: Didn't Universal Camera say unless we can fit it into one of two exceptions of the Universal Camera principle, we can't go beyond that?

MR. FRANKEL: That's right.

QUESTION: And that includes --

MR. FRANKEL: But what I am saying is that this isn't a Universal Camera case. This is not a case where the Court of Appeals set aside fact findings of the Board. I suppose it would be an easier case for us if it were such a case, but I don't think that is the question. I think this is a case -- and here as in some other rare instances we agree with the Board -- where the question is one of law and where Universal Camera, for example, won't be found cited in the Board's brief as it shouldn't be. It is found in the union's brief, but if Your Honors will look at the portions of the brief where it is cited and where this subject is discussed, you will discover that in an odd sort of way Mr. Shechtman is treating the Court of

Appeals decision as though it were an agency decision and is raising the question of whether it is supported by substantial evidence. That is a peculiar reversal of roles, and I think it is not useful to the Court in deciding this case.

QUESTION: Are you saying, Mr. Frankel, that this is a matter of whether the court simply drew different legal conclusions from the findings of fact of the Board, different --

MR. FRANKEL: Yes --

QUESTION: -- different legal conclusions from the Board?

MR. FRANKEL: This is where the court made a different decision on a question of law from facts which as they come to this Court are undisputed. The ultimate finding is about the powers of this faculty, the scope of its authority, the subject on which it decides commonly with finality, all of those things come here undisputed, and the only question --

QUESTION: Can I just get that a little more precisely, because I am interested in what is fact and what is law here. I take it it is fact whether the faculty recommends, say, a new person to be given tenure. But are you saying it is a question of law as to whose interests is served by that recommendation?

MR. FRANKEL: Your Honor, I would say that --

QUESTION: Because they squarely say we find that the faculty's own interest was served on page 68a that you called our attention to.

MR. FRANKEL: I would say that the Board there is giving a conclusion which, however you try to characterize it, has no basis in the record. I think they are using in their own interests as a legal conception because they are taking the words out of section 211 of the act which use those words --

QUESTION: I see.

MR. FRANKEL: -- in order to define supervisory and they are saying these people are not supervisors under 211 because although they do these various things that are the kinds of things supervisors do, they do them in their own interests somehow and not in the interests of the employer.

Now, the trouble with that, whatever you call it, is that there is no way to say what they are talking about to make it rational or coherent or acceptable or meaningful. There is no place you can look in the record to answer the question of how would you know if they were acting in the university's interests or why aren't all these things that are really what the university is about, what the university is in business for, why aren't all of these things as much

the university's interests as a top managerial person's decisions of what model to bring out, what course of production to follow, what schedule to follow, or anything else.

What I am saying is they are words devoid of foundation factually and I think legally. I --

QUESTION: Suppose they made a recommendation on the salaries to be paid to starting professors, would that be in their interest or in the university's interest?

MR. FRANKEL: Insofar as they were not themselves starting professors, which by definition they would not be, then I think it would be in the university's interest.

QUESTION: I suppose the starting professor's salary level would have an impact on their own though.

MR. FRANKEL: This would affect their interests.

QUESTION: Yes.

MR. FRANKEL: There is no question at some point when the chairman of the manufacturing company makes a recommendation to the board that they go into a certain line of endeavor that he thinks is going to be very profitable, and he has stock options that will not be diminished in his view by that course of action, he is furthering his own interests as well. I don't say that you can hermetically seal them, but I think if you look at some of the authority the Board has suggested to us or some of the

conceptions they have suggested to us, you may get a sense, I think the Court will get a sense of how empty of meaning this locution is in this decision.

The Board has said, and Mr. Come has said orally, that the faculty is not looked to for these governing responsibilities. There is no way of saying what that means. If you look in this record, you will find -- and we cited some of the places, though not all of them -- that faculty is expected to serve on committees, faculty is expected to engage in governance, and the performance of faculty in considering matters like promotion and tenure, performance of faculty in these areas is among the factors considered.

They don't do this just because they are permitted to. They are not merely tolerated. They are expected to do it and they expect to be given the power to do it in this relationship.

QUESTION: Mr. Frankel, going back to the University of Bologna, about a thousand years ago, would it be fair to say that what was good for the faculty was good for the university and vice versa? Was that the tradition of that day?

MR. FRANKEL: I think in general that -- it is prior to this act, of course, but I would say in general that would have been true. And as I read and have read

for this case and in some prior incarnations, the writings of the American Association of University Professors and others, I would say basically that is the view of academicians today about the university.

QUESTION: Well, that is consistent with the idea that the university is the faculty, isn't it?

MR. FRANKEL: It is, Mr. Chief Justice.

QUESTION: Mr. Frankel, isn't it possible that the Board could correctly reach one result with respect to Columbia University and another result with respect to a law school which is the seventh proprietary school in a large metropolitan area where each faculty member simply comes in and bargains with the president over what his salary is going to be, and there aren't any faculty committees to recommend anything?

MR. FRANKEL: Mr. Justice Rehnquist, it is possible and I would suggest that this record illustrates in a couple of ways the kind of spectrum -- which is not my word but that of the National Educational Association in its amicus brief -- along which faculties fall.

There is a First Circuit case cited in the breifs in this case involving a school called Wentworth Institute where the faculty worked on one-year contracts, where the faculty had a curriculum committee which the First Circuit noted nobody paid any attention to, where

the faculty had other committees that confined themselves to things like sporting events, the arrangements for sympathetic gifts to people in the institution who became unwell, and things of that nature. And so it was a faculty that did indeed consist of employees who went in and taught, which is a professional task, and perhaps made their course outlines and arranged and managed their own classroom, but did nothing about the running of the institution and were not permitted or expected to do that.

And I would say that the Board, if it corrected its misconceptions as we see them on this subject, might well place a WEntworth Institute at one end of the spectrum that the NEA talks about --

QUESTION: Mr. Frankel, in our review of what the Court of Appeals of the Second Circuit did in this case, does the statement in Universal Camera have any application, whether on the record as a whole as substantial evidence as to support agency findings on the question which Congress has placed in the keeping of the Courts of Appeal? This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied, does that have any relevance here?

MR. FRANKEL: It has relevance, Mr. Justice Brennan, to this degree -- which I must answer somewhat

hypothetically -- insofar as these words that Mr. Justice White and I conversed about, in their own interests. Our thought to import fact finding of some kind and insofar as the Court of Appeals for the Second Circuit in rejecting that statement overturned that fact finding, this might be a Universal Camera case, an extraordinarily rare kind of case.

I must repeat I think in fairness to both sides that it is not the basis on which certiorari was sought. If it had been, one might want to consider whether it might have been improvidently granted, because it is not a good Universal Camera case. Nobody has argued really that the decision of the Second Circuit misconceives or misapplies the Universal Camera test, because that is not what the case was brought to the Court about at all.

QUESTION: Well, what I was thinking wasn't whether the Court of Appeals had misapplied Universal Camera. My question was addressed to whether that limitation upon our review, namely when the standard appears to have misapprehended or grossly misapplied since what the Second Circuit did was refuse to enforce the Board's conclusion, whether that Universal Camera principle limits our review in this case.

MR. FRANKEL: Well, I have frankly, Mr. Justice Brennan, tended to think the answer is probably no, because

I don't think that the Court of Appeals overturned agency fact finding in the sense that I understand Universal Camera to be concerned with. But as has happened, I could be wrong in this, and if Mr. Shechtman's efforts to make this a Universal Camera case is more substantial than we have supposed it to be, then the Court I think would want to reconsider the whole business and decide whether this case belongs here at all -- and I must say on that that a very imperfect cursory scarcely scrutible agency decision with a record where the first time you meet really competent fact findings is in the Court of Appeals rather than in the agency, one might want to conjure that question.

Now, I want to approach an end, as I think I must, by saying another thing or two about the university. There has been a lot of talk in the briefs, amicus, opposing our position about questions of policy, as they are put, speaking of the university frequently as if it consisted in some adversary way of a management, so described, meaning I suppose the administration on one side, and a rank and file faculty, a phrase frequently used by the Board, on the other. And I suppose most of us would not wish to be on or be taught by something called rank and file faculty, and I don't think it is a conception that is used in this kind of university.

But passing that, let me say that what is left

out of those amicus briefs are interests that are critical in today's university, interests of students, of alumni, of trustees, of eve widening publics that have a focused concern with the university. Those interests are what give point and justification to our notions of academic freedom.

Whenever academic freedom is mentioned on the briefs, it seems to consist only of freedom of faculty to resist or oppose or be left alone by the administration. It means much more than that.

Now, those policy questions we believe are mostly not central to this case. They were not central to the Board in its decision. But I do want to say, because I think the setting ought to be clear, that if they were and if this were a question now of legislative policy, we would want to emphasize the view that taken by Sanford Kadish, when he was Professor Kadish, now Dean of -- when he was President of the American Association of University Professors, and when he said in his presidential address, speaking about academic freedom and problems that concern us here, he said the process of collective bargaining raises problems in the university even apart from the strike. In dividing the university into worker professors and manager administrators and governing boards, it imperils the premise of shared authority, encourages the polarization

in interests and exaggerates the adversary concerns of interests held in common.

He went on to say that it causes loss of and peril to the basic conception of the faculty as the primary governor of the university.

I want to add that when Archibald Cox, who stood here very often and who prior to that had earned some repute as a student of labor law, sat on a commission to consider the tragic events in 1968 at Columbia, his commission at the end made a report that has become fairly well known, and as part of that report, in a very few words, Mr. Cox and his distinguished colleagues under took to identify what they called the essential quality of the institution, the university, and they said -- and it sounds medieval, but they said in 1968-69, "The university is a community of scholars, both teachers and students." They said more, but I see the read light and I thank Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Come, you have about two minutes left.

ORAL ARGUMENT OF MORTON J. COME, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. COME: I would like to address myself to this concept in the interest of the university. That is --

QUESTION: I suppose you would say that was a

finding of fact for the Board or not?

MR. COME: That is a legal conclusion by the Board which means not that the faculty is necessarily opposed to the interests of the university but --

QUESTION: But in a Court of Appeals reviewing the Board's conclusion that the faculty acts in its own interests rather than the university, would that be a finding subject to the substantial evidence test?

MR. COME: No, I think that the Court of Appeals misconceived the legal significance of that term. In the interests of the employer, as the Board used it there, means whether or not the faculty was furthering management policies when it was making its judgments on these matters. The faculty, to restate the obvious, is principally engaged in teaching, research and writing. Those are the things on which it is judged for promotion, as is indicated by the Ferkauf guidelines which are in the record here at pages 1441 and 1447.

Now, in its collective professional functions, there is of course a very substantial overlap between the faculty's own interests and the university's, but it makes a judgment in the interest of the university as it sees it, namely from the standpoint of what is best professionally.

Now, the university has to look at that

professional judgment and crank it in with the other considerations that it deems desirable to the welfare of the university as a whole and the --

QUESTION: Are you saying, Mr. Come, that what is good for the faculty is good for the university and vice versa, the question that I tossed to Mr. Frankel?

MR. COME: Well, it may not be always. For example, let us assume that --

QUESTION: If it doubled their salaries, it might not be. If --

MR. COME: Well, it might not be or --

QUESTION: Or it might be.

MR. COME: Let us assume you have a language department that decides that it would be the strongest department and the professors there and the students would get the best benefit from giving tenure to a professor of Greek. They make that recommendation to the dean. The administration has decided that as a matter of policy it would overall benefit the university more to go for younger professors, instructor's assistant professors. They turn down that recommendation. That doesn't mean that the professors who made it are going to be tought of any less or are going to be downgraded when it comes to promotions.

On the other hand, if you had a buyer in an

industrial plant who is given a management directive to buy from the lowest bidder and he went out and bought from the highest bidder, he isn't going to hang around very long. And that is the nub of the difference between the role of the faculty in a university and that of a managerial employee in an industrial plant, and we submit that the Court of Appeals misconceives that in its evaluation of the evidence here.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:04 o'clock p.m., the case in the above-entitled matter was submitted.)

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