

The Representational Rights of Academic Librarians: Their Status as Managerial Employees and/or Supervisors Under the National Labor Relations Act

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In this article, the author discusses how certain labor relations concepts have been applied to academic librarians. More precisely, the application of the National Labor Relations Act to academic librarians is explored.

This process discloses that academic librarians have frequently been the subject matter of representational litigation. In particular, their status as supervisors and/or managerial employees is an issue that has, on more than a few occasions, occupied the attention of the National Labor Relations Board.

Moreover, the author provides a survey of National Labor Relations Board decisions which pertain to the supervisory/managerial status of academic librarians. Additionally, this article deals with the decision making process of the National Labor Relations Board and the impact that these kinds of determinations have upon the representational rights of academic librarians.



ver forty years ago, Congress passed the National Labor Relations Act (hereinafter the NLRA).¹ The NLRA, while addressing a large number of issues in the area of labor-management relations, deals with one particularly significant matter, the representational rights of employees. In short, Congress, through the NLRA, granted to American workers the right to form, join, and/or assist unions.

The NLRA's coverage is, to say the

least, quite broad. Employees, in private industry, are almost all covered with few statutory exceptions.² Additionally, the National Labor Relations Board (hereinafter the Board) has administratively created jurisdictional tests, related to an employer's dollar volume of business, which exclude certain rather small business entities.

The NLRA is administered, in the first instance, by the Board. Typically, the representational rights of employees are

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brought to the Board's attention in the form of a certification of representative petition, usually referred to as an "RC" petition. This petition, which is presented on a Board supplied form, is, as a general rule, filed by a labor organization. With it, the petitioner must file authorization cards by which at least 30 percent of the affected employees designate the petitioner as their agent for purposes of collective bargaining. The primary purpose of such petitions is to obtain, under Board supervision, an election which will determine whether the affected employees wish to be represented by a labor organization. If the petition does not lead to a voluntarily agreed upon election, a hearing is held wherein issues, such as those discussed in this article, are litigated.³ If, after this litigation process is concluded, the Board finds that the petitioned for bargaining unit is appropriate, an election is held to allow eligible employees to vote on the question of whether or not they wish to be represented by a labor organization for purposes of collective bargaining.

For many years, the Board, using its rather broad discretionary authority, refused to extend its jurisdiction to colleges and universities. In 1970, that all changed. In the *Cornell University* decision the Board held that the nonprofessional employees of that institution were indeed entitled to organize under the NLRA.⁴ Within a year thereafter, in the *C. W. Post Center* case the Board extended this ruling to the professional faculty members of a college.⁵

This does not necessarily mean, however, that an employee, otherwise employed by a covered employer, is entitled to vote for or against membership in a labor organization. The NLRA, by its express terms, does not apply to a "supervisor" as that term is defined by section 2 (11) of the NLRA.⁶ A supervisor, for this statutory purpose, is defined as follows:

(11) The term "supervisor" means any individual having the 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 to effectively recommend such action; if in con-

nection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Similarly, a person deemed to be a "managerial" employee cannot be included in a collective bargaining unit formed pursuant to the NLRA. Here it should be noted that the managerial employee exclusion will not be found in the express terms of the NLRA. Rather, this concept was developed through the processing of individual cases. It appeared as early as 1947.⁷

Simply stated, a managerial employee is one who can formulate and effectuate management policies by expressing and making operative the decision of the employer.⁸ Parenthetically, the Board and the courts were not particularly troubled by the fact that Congress neglected to define this term or, for that matter, even mention it in the NLRA. Instead, its creation through case law was largely justified on the basis that such an exclusion must have seemed so patently obvious to the framers of the NLRA that there was no need to define it specifically.

The remainder of this article will deal with the ways in which the Board has classified professional academic librarians. That is to say, it will explore the circumstances under which academic librarians have or have not been declared managerial and/or supervisory employees under the NLRA.

In preparation for discussing these specific issues, two preliminary matters should be considered. In almost all cases surveyed it was discovered that the employing college or university, rather than the librarians themselves, was the party advancing the argument that librarians ought to be excluded as either supervisors or managerial employees.

Secondly, librarians, in an academic setting, have almost always been placed in bargaining units with other professional faculty members. This does not mean, however, that the Board will not permit academic librarians to form separate units for collective bargaining purposes. Indeed, in several Board decisions, it was held that a librarian-only unit, while per-

haps not the optimum unit, may nevertheless constitute an appropriate unit, especially when the salaries, working conditions, and job duties of the librarians were markedly different than the rest of the faculty.⁹

THE DECISION-MAKING PROCESS AND ITS IMPACT

Before discussing the substantive issues involved with Board decisions, it would be prudent to consider the process by which the Board arrives at its conclusions and the effect that such determinations have. Initially, it should be noted that the proponent of the supervisory/managerial exclusion need not prevail on both issues in order to have an employee excluded from the bargaining unit. That is to say, if a librarian is determined to be either supervisory or managerial, that individual cannot participate in a Board sanctioned election.

Secondly, the Board, in making these kinds of decisions, is primarily interested in the actual day-to-day functioning of the employee. Thus, job titles and descriptions, while certainly relevant, are not by any means conclusive.¹⁰

Thirdly, if it is decided that a given employee or class of employee is managerial or supervisory, it follows that person's or group's right to participate in a Board election has been extinguished. It also means, as a practical matter, that the employee's other rights under the NLRA have been effectively lost. Accordingly, the right to prosecute an unfair labor practice charge, for example, will, for almost all purposes, have been forfeited.

THE SUBSTANTIVE LAW

In virtually all cases reviewed, especially those arising after 1980, the managerial and supervisory issues were raised simultaneously. For that reason, the following discussion will treat these issues in much the same way.

With respect to the managerial employee argument, the Supreme Court's landmark decision in *NLRB v. Yeshiva University* necessarily requires our initial attention.¹¹ To be certain, the managerial exclusion was not new in 1980 when the

Yeshiva decision was rendered. Yet, the breadth of the Supreme Court's decision, a decision that effectively disqualified the entire faculty at *Yeshiva*, deserves special mention. Additionally, because the *Yeshiva* decision was rendered by the United States Supreme Court, its precedential value was conclusive on both lower federal courts and the Board.

In *Yeshiva*, both the supervisory and managerial issues were argued. However, because the Supreme Court ultimately decided the case on the basis of the managerial issue, it did not have to reach the supervisory status exclusion.

In large measure, the Supreme Court's conclusion—that faculty members at *Yeshiva* were managerial employees—was premised upon the finding that the faculty members effectively operated the enterprise.

The Supreme Court, in reaching this broad conclusion, emphasized the fact that faculty members played a significant role in course selection and scheduling, teaching standards and grading policies, admission standards, and tuition changes. These factors, according to the Supreme Court, were the hallmarks of managerial decision making in an academic setting.

To say that the *Yeshiva* decision has generated much comment and controversy would hardly be an exaggeration.¹² In fact the Supreme Court itself was sharply divided as indicated by its 5 to 4 vote. Nevertheless, *Yeshiva* remains as the law of the land and, as we shall see, persistently appears in cases involving academic librarians.

Of perhaps equal importance to this discussion is an earlier line of cases involving the supervisory status of academic professionals. In 1972, the Board, in *Adelphi University*, held that academic professionals shall only be excluded from bargaining units, as supervisors, if they spend more than 50 percent of their time supervising nonunit employees.¹³ This rule, in 1973, was specifically applied to academic librarians in the case of *New York University*.¹⁴

Thus, with the holdings of both *Yeshiva* and *New York University*, we can now re-

view a number of significant cases involving academic librarians.

As to the supervisory status of librarians, it would be fair to suggest that the 50 percent rule, as described above, has clearly benefitted the proponents of librarian inclusion. Illustrative of this point is the Board's ruling in *Bradford College*, a case decided in 1982.¹⁵ In *Bradford*, the employer argued unsuccessfully that the "librarian" and "assistant librarian" were statutory supervisors. The Board, finding that their supervisory tasks took less than 50 percent of their time, ruled in favor of inclusion.

In *Marymount College*, a case decided in 1986, a similar result was achieved.¹⁶ In *Marymount*, the parties were concerned with the status of the reference librarian, the public services librarian, the catalog librarian, and the acquisitions librarian. The Board after concluding that these professionals only sporadically exercised prerogatives, held that they were not supervisors within the meaning of the NLRA.

It should not be inferred from the discussion thus far that the Board's rulings are uniformly in favor of librarian inclusion. In *Northeastern University*,¹⁷ for example, six "assistant librarians" were excluded as supervisors. These same librarians, it is important to note, supervised other professional employees. The Board, moreover, did not seem to be at all concerned with the 50 percent rule under such circumstances.

In a subsequent case, *Mt. Vernon College*, the Board included a librarian because she did not supervise other professionals nor did she spend more than 50 percent of her time supervising nonprofessionals.¹⁸

Perhaps more guidance on the precise application of the 50 percent rule is evident in a second *New York University* decision.¹⁹ In this 1975 ruling, the Board excluded several librarians as supervisors and did so without regard to the proportion of time that they spent supervising nonprofessional employees. That is to say, once having determined that these librarians supervised other professionals, they were excluded without considering whether their supervisory duties took more than half of their time.

From what has been said thus far, several conclusions are very much in order. Academic librarians, if they spend less than half of their time supervising nonprofessionals, are not deemed to be supervisors within the meaning of the NLRA. If, on the other hand, they spend the majority of their time supervising nonprofessionals, or if they supervise other professionals, they will be considered supervisors under the NLRA and will be excluded for collective bargaining purposes.²⁰

As to this latter point, one very practical problem, with significant legal implications, may arise. Often, especially in larger academic libraries, a more senior librarian may be temporarily required to train or act as mentor to a less-experienced librarian. This assignment will usually end once the need for direction has ceased. Under such circumstances, then, the issue may arise as to whether the more senior librarian has effectively become a supervisor because he or she, at least temporarily, exercised supervisory authority over another professional.

The Board, under such circumstances, may view the more senior librarian as a supervisor, but only if these "temporary" assignments occur with some degree of regularity.²¹ Additionally, the Board would look to factors such as use of independent judgment by the more senior librarian, and the actual authority exercised by the directing librarian. Moreover, it is difficult to draw any hard and fast conclusions. It is certain, however, that temporary assignments to positions of apparent supervisory authority can, under the circumstances referred to above, lead the Board to conclude that a librarian is a supervisor.

As to the managerial employee issue, it is equally difficult to draw such precise conclusions. The original *Yeshiva* test is very much alive. As recently as 1987, the Board, applying the standards enunciated in *Yeshiva*, held that the entire faculty at Livingstone College was managerial and therefore ineligible to vote for union representation. In the *Livingstone College* decision, the Board emphasized the role that faculty members played in grading poli-

cies, course content decisions, degree requirements, and scholarship standards.²² Additionally, the Board arrived at its ultimate conclusion even though faculty members did not have significant authority over budgetary, promotional, hiring, or tenure matters.

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Nevertheless, even applying *Yeshiva*, the Board will not declare a professional to be a managerial employee unless it appears that the employee effectively exercises his or her authority on a regular and recurring basis. This crucial point is illustrated rather well in those few cases that have involved academic librarians and that have been decided since *Yeshiva*.

For example, in the *Bradford College* case, cited earlier in this article, the Board ruled that academic librarians were not managerial employees. In doing so, the Board not only stressed the lack of authority of the librarians, but also focused on their inability to recommend or make changes. Thus, the librarians' budget recommendations were essentially ignored by their superiors as were such fundamental matters such as the library's hours of operation.²³

Similarly, in *Marymount College*, a case also referred to in an earlier discussion, the Board determined that the professional librarians were not managerial employees. In *Marymount* the Board once again reviewed the actual authority of the contested employees and concluded that their authority, if any, was effectively subsumed by their superior—in this case the library's director—and that their ability to make, or effectively recommend, managerial decisions was therefore negligible.

CONCLUSION

Clearly, the managerial employee-supervisory issues have and will continue

to play a significant role in cases involving the representational rights of academic librarians decided under the NLRA. It is also clear that these cases, each rising or falling on their own facts, tend to highlight the actual job duties of the professional librarian. Moreover, theoretical authority, seldom used or followed, will probably not cause the Board to disqualify professional librarians.

As noted, it is not likely that either of these issues are going to go away in the near future; both concepts, after all, have been with us for over forty years. As the Board changes, however, as its members, with their varying points of view and biases, come and go, we will almost certainly see inconsistent or even surprising decisions, especially in the marginal cases.

Aside from the legal niceties involved in supervisory-managerial determinations, there is always one very practical consideration facing parties in this kind of litigation. The labor organization seeking representational rights wants ultimately to fashion a bargaining unit most likely to provide a favorable result in a Board-sponsored election. The employer, of course, wants to do exactly the same thing except that the manager wants a "no" vote on election day. This most basic of concerns usually affects, and frequently determines, the position each side takes as to whether an individual is a managerial employee and/or supervisor.²⁴

Moreover, if one side believes that their academic librarians are more likely than not to support their position on election day, that side will almost certainly seek their inclusion in the bargaining unit. The opponent of inclusion, on the other hand, has usually come to the conclusion that the librarian or librarians will not vote in a favorable way. The decision to argue exclusion or inclusion, in summary, involves both legal judgments and very practical electioneering considerations.

Parties making these kinds of decisions should be aware, however, that their pre-election posturing has long-range effects. Position taken in Board election proceedings can affect employee morale and can ultimately lead to an overly broad or fragmented bargaining unit, a unit that the

collective parties may have to live with for many years to come.²⁵

Accordingly, the positions taken and the arguments to be advanced in these

kinds of cases must be carefully weighed lest their long-term impact be miscalculated.²⁶

REFERENCES AND NOTES

1. National Labor Relations Act, as amended. 61 Stat., 136, 73 Stat. 519, 29 U.S.C. 151 et seq (1947).
2. Independent contractors, agricultural workers, federal, state, and municipal employees and domestic employees are not covered by the NLRA. In most cases, however, these excluded groups are covered by appropriate and analogous state legislation.
3. For an authoritative discussion of this topic, see Kenneth McGuiness, *How to Take a Case Before the National Labor Relations Board* (Washington, D.C.: Bureau of National Affairs, 1976).
4. 183 NLRB 329, 74 LRRM 1269 (1970).
5. 189 NLRB 904, 77 LRRM 1001 (1971).
6. 29 U.S.C. 152 (11).
7. Palace Laundry Dry Cleaning, 75 NLRB 320, 21 LRRM 1039 (1947).
8. NLRB v. Bell Aerospace, 416 U.S. 267 (1974).
9. Claremont University 198 NLRB 811, 81 LRRM 1317 (1972); Teachers College, Columbia University, 226 NLRB no. 193, 93 LRRM 1481 (1976).
10. Red Star Express Lines v. NLRB, 196 F.2d. 78 (2d. Cir., 1952).
11. 444 U.S. 672 (1980).
12. John A. Gray, "Managerial Employees and the Industrial Analogy: NLRB v. Yeshiva University," *Labor Law Journal* 33:390-408 (July 1982); Kent Weeks, "Collective Bargaining: After Yeshiva, What?" *Lex Collegii* 4:4 (Fall 1980).
13. 195 NLRB 639, 79 LRRM 1545 (1972).
14. 205 NLRB no. 16, 83 LRRM 1549 (1973).
15. 260 NLRB no. 81, 110 LRRM 1055 (1982).
16. 280 NLRB no. 50, 122 LRRM 1299 (1986).
17. 218 NLRB no. 40, 89 LRRM 1862 (1975).
18. 228 NLRB no. 153, 95 LRRM 1349 (1977).
19. 221 NLRB no. 176, 91 LRRM 1165 (1975).
20. For illustrations of this latter result, see Florida Southern College, 196 NLRB 888, 80 LRRM 1160 (1972) and Fordham University 214 NLRB 971, 87 LRRM 1643 (1974).
21. Canonsburg General Hospital 244 NLRB no. 141, 102 LRRM 1143 (1979).
22. 286 NLRB no. 124, 126 LRRM 1332 (1987).
23. Interestingly enough, on the same day that the Board handed down its decision in the Bradford College case, it also rendered several other decisions wherein it was held that the faculties, including professional librarians, were managerial employees. See Duquesne University 261 NLRB no. 85, 110 LRRM 1046 (1982); Ithaca College 261 NLRB no. 83, 110 LRRM 1059 (1982).
24. For a more thorough discussion of this topic, see Noel Arnold Levin, *Successful Labor Relations* (New York: Law Journal Press, 1978) p.64-66.
25. *Ibid.*, p.67.
26. While this article has concentrated on professional librarians in an academic setting, additional guidance, especially on the supervisory issue, may be obtained in the following cases involving professional librarians in a nonacademic setting. See Arkansas Gazette, 218 NLRB 1219, 89 LRRM 1443 (1975); Father Flanagan's Boys Home, 225 NLRB 782, 93 LRRM 1001 (1976); Capital Times, 234 NLRB 174, 97 LRRM 1124 (1978).