

Yeshiva University and Yeshiva University Faculty Association. Case 2-CA-14697

August 24, 1977

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND MURPHY

Upon a charge filed on February 4, 1977, by Yeshiva University Faculty Association, herein called the Union, and duly served on Yeshiva University, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint and notice of hearing on February 22, 1977, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on or about December 29, 1976, following a Board election in Case 2-RC-16662 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about January 7, 1977, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 7, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 21, 1977, and on April 1, 1977, respectively, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and issuance of Decision and Order and a further petition for summary judgment and Decision and Order. Subsequently, on April 8, 1977, Respondent filed a statement in opposition to petition for summary judgment. On April 12, 1977, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause entitled "Further Statement

in Opposition to Petition for Summary Judgment and Response to Notice To Show Cause."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, opposition to the Motion for Summary Judgment, and response to the Notice To Show Cause, Respondent essentially attacks the Board's unit determination in the underlying representation case and, accordingly, the validity of the certification of the Union as the exclusive bargaining representative of the employees in that unit. The General Counsel contends, in effect, that the denials and affirmative defenses set forth in Respondent's answer raise no issues which have not been litigated and determined by the Board in the prior representation proceeding, Case 2-RC-16662, and that there are no issues requiring a hearing. We agree with the General Counsel.

Our review of the record herein, including that in the representation proceeding, Case 2-RC-16662, shows that, following a hearing before a Board Hearing Officer on the status of certain faculty personnel, the case was transferred to the Board for decision. Respondent and the Union filed with the Board briefs in support of their respective positions. On December 5, 1975, the Board issued a Decision and Direction of Election² in which it concluded, *inter alia*, that the unit consisting of all full-time faculty members, excluding part-time faculty and certain other faculty classifications, was appropriate, as they were neither supervisors nor managerial employees but professional employees. Accordingly, the Board directed an election in that unit. An election by mail and manual balloting was conducted between November 16 and December 20, 1976. A majority of the eligible voters cast ballots for the Union and, in the absence of objections to conduct affecting the election results, the Union was certified by the Regional Director on December 29, 1976.

In its submissions, Respondent contends that the Board's Decision and Direction of Election disregarded uncontroverted evidence, countenanced abnormally high supervisory ratios, applied an unjustified "ultimate authority" and "shared responsibility" rationale and a baseless quantitative 50-percent test

¹ Official notice is taken of the record in the representation proceeding, Case 2-RC-16662, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26

(C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

² 221 NLRB 1053.

to the qualitative definition of supervisor embodied in Section 2(11), and ignored the principles dealing with managerial employees enunciated in *Textron*,³ in ruling, *inter alia*, that all full-time faculty members, department chairmen and related titles, committee members and other miscellaneous supervisors are not managerial or supervisory personnel under Section 2(11) but are professional employees under Section 2(12) of the Act. Further, Respondent alleges that, by permitting the participation of supervisory and managerial personnel in the election, the Board itself destroyed the laboratory conditions thereof; that the Board allowed the extent of organization to be controlling when it excluded regular part-time faculty members from the appropriate bargaining unit in violation of Section 9(c)(5) of the Act; that by so excluding the regular part-time faculty members without first conducting a rulemaking proceeding pursuant to the Administrative Procedure Act the Board violated its obligations under that act; and that the Board abused its discretion by including terminal faculty members in the bargaining unit. We find no merit in these contentions.

Except for the contention that the Board should have engaged in rulemaking before excluding from the unit regular part-time faculty, Respondent is attempting to raise again and relitigate issues which were, or could have been, raised and litigated in the representation case⁴ and this it may not do. Further, we find no merit in Respondent's contention that the Board contravened the Administrative Procedure Act by excluding regular part-time faculty members from the appropriate unit without first conducting a rulemaking proceeding pursuant thereto. It is well established that adjudicated cases may serve as precedent, and that the Board may apply those precedents⁵ to the parties in an adjudicatory proceeding.⁶

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.⁷

All issues raised by Respondent in this proceeding were or could have been litigated in the prior

representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.⁸ We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a private institution of higher education chartered under the State of New York. It maintains offices and educational facilities in the city and State of New York, Borough of Manhattan. During the past year, a representative period, Respondent derived gross revenues from its operations in excess of \$1 million from sources other than donations and restricted contributions, of which amounts in excess of \$50,000 were derived directly from sources located outside the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Yeshiva University Faculty Association is a labor organization within the meaning of Section 2(5) of the Act.

³ *N.L.R.B. v. Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974).

⁴ The Board found that the arguments raised by Respondent in the representation case proceeding were similar to those considered and rejected by the Board in several earlier decisions. *Northeastern University*, 218 NLRB 247 (1975); *University of Miami*, 213 NLRB 634 (1974); *New York University*, 205 NLRB 4 (1973); *Adelphi University*, 195 NLRB 639 (1972); *Fordham University*, 193 NLRB 134 (1971); *C. W. Post Center of Long Island University*, 189 NLRB 904 (1971); *Yeshiva University*, 221 NLRB 1053, 1054, fns. 5 and 6 (1975).

⁵ *New York University*, *supra*, and *University of San Francisco*, 207 NLRB 12 (1973).

⁶ *N.L.R.B. v. Wyman-Gordon Co., et al.*, 394 U.S. 759 (1969).

⁷ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

⁸ Respondent has denied the allegations of the complaint concerning the request and refusal to bargain. Attached to the General Counsel's further petition are Exhs. K, L, and M which show that by letter dated January 5, 1977, received on January 7, 1977, the Union requested Respondent to bargain and that previously, by letter dated December 27, 1976, Respondent expressed its intention to obtain legal review of the Union's certification in the courts. The contents of these exhibits which are uncontroverted establish, and the Board finds, that on January 7, 1977, the Union requested and Respondent refused to bargain. See *Paramount General Hospital, Inc.*, 223 NLRB 1017, 1019, fn. 8 (1976).

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

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 who are employed by the Employer at its Campus, exclusive of 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 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 all supervisors as defined in Section 2(11) of the Act.

2. The certification

On December 20, 1976, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 29, 1976, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about January 7, 1977, and at all times thereafter, the Union has requested Respon-

dent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about January 7, 1977, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.⁹

Accordingly, we find that Respondent has, since January 7, 1977, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (C.A. 5, 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

⁹ See fn. 8, *supra*.

CONCLUSIONS OF LAW

1. Yeshiva University is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Yeshiva University Faculty Association is a labor organization within the meaning of Section 2(5) of the Act.

3. 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 who are employed by the Employer at its Campus, exclusive of 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 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 all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 29, 1976, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 7, 1977, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Yeshiva University, New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Yeshiva University Faculty Association as the exclusive bargaining representative of its employees in the following appropriate unit:

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 who are employed by the Employer at its Campus, exclusive of 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 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 all supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an under-

standing is reached, embody such understanding in a signed agreement.

(b) Post at its offices and educational facilities in New York, New York, copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

¹⁰ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Yeshiva University Faculty Association as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

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 who are employed by the Employer at its Campus, exclusive of 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 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 all supervisors as defined in Section 2(11) of the Act.

YESHIVA UNIVERSITY