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Will the Real Managerial Employees Please Stand up

Andrew J. Stites

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WILL THE REAL MANAGERIAL EMPLOYEES
PLEASE STAND UP?*

Q - In your testimony, you made the statement that the buyers in your opinion are professional. Are you claiming they are professional in this hearing? Are you taking the position they are managerial or are you taking the position they are professional employees?
A - I said they are considered like professional employees in the company.
Q - You are not taking the position these buyers are professional?
A - I'm not taking any position. I'm saying they are managerial as far as what they do. The type of work they perform is managerial in nature.

I. INTRODUCTION

The courts and the National Labor Relations Board2 have used the terms “managerial” and “managerial employee” to describe a wide variety of both employment characteristics and individual employees since the Wagner Act3 was passed in 1935. Without attempting to specifically define managerial employee, a sharply divided Supreme Court recently held that employees properly found to be managerial are not protected by the National Labor Relations Act (the Act).4 The forty-year judicial, administrative, and legislative history leading to this decision, as well as its immediate and potential ramifications upon American labor relations, are the subject of this Comment.

II. PRE-TAFT-HARTLEY DEVELOPMENTS

The Wagner Act defined “employee” broadly.5 The only classifica-

* The student author is a Field Examiner with the National Labor Relations Board. The opinions expressed herein are entirely those of the author, and do not reflect the views of the National Labor Relations Board, Office of General Counsel, or any member thereof.
2. Hereinafter the Board.
5. Section 2(3) of the 1935 N.L.R.A. provided:
The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and
tions specifically excluded by statute were agricultural workers, domestic servants and members of the employer's immediate family. However, not all workers who fit the statutory definition of employee were included in every unit. Through the years the size, scope, composition, and number of units came to depend upon a myriad of factors. Since the

shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

Once an employee, then certain rights accrued:

Section 7 of the 1935 N.L.R.A. provided:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

So too certain protections from interference with those rights by employers or their agents exist:

Section 8 of the 1935 N.L.R.A. provided:

It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this title.

6. Of course those employed by "non-employers" under section 2(2) were not "employees." Section 2(2) of the 1935 N.L.R.A. provided:

The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization . . . .

7. The term "unit" refers to that group of employees who will be represented by a union should a majority of the employees voting within that group so choose.

Section 9(b) of the 1935 N.L.R.A. provided:

The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

The Board's discretion is indeed broad. The unit need not be the most appropriate, but only appropriate enough to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." Morand Bros. Beverage Co., 91 N.L.R.B. 409, 418 (1950). See also NLRB v. Hearst Publications, 322 U.S. 111, 134 (1944); Pittsburg Plate Glass Co. v. NLRB, 313 U.S. 146, 165-66 (1940); Parsons Inv. Co., 152 N.L.R.B. 192, 193 n.1 (1965).
union seeking to represent a unit of employees was not required to seek
the largest possible unit,\textsuperscript{8} practical politics\textsuperscript{9} as well as the desires of the
petitioner\textsuperscript{10} were always relevant, unless clearly contrary to established
Board policy.\textsuperscript{11} Also relevant to unit determination were the employees'
desires,\textsuperscript{12} the collective bargaining history,\textsuperscript{13} and most significantly, the
community of interest of the employees.\textsuperscript{14} Thus, few statutory limits
were placed on the Board's ability to determine unit appropriateness.\textsuperscript{15}
All other exclusions of employees were based upon the Board's own
policy in the circumstances of each case. It is in this broad category of
"policy" exclusions that the term "managerial employee" had its genesis.

A. Exclusion of Supervisors by the Board

Within its first two years, the Board had developed a policy of
excluding individuals connected with management from units of rank
and file employees.\textsuperscript{16} Broadly classified as "supervisors," these individu-
als were excluded because they lacked a community of interest with
other employees.\textsuperscript{17} Among the indicia of supervisors were their ability to
hire and fire\textsuperscript{18} and their association with management.\textsuperscript{19} The "associa-

\textsuperscript{8} Such is the current state of the law. See, e.g., Purity Food Stores, Inc., 160 N.L.R.B.
651 (1966); Bamberger's Paramus, 151 N.L.R.B. 748 (1965); P. Ballantine & Sons, 141

\textsuperscript{9} An unspoken but critically important element in every argument for either exclu-
sion or inclusion under section 9 is how the individual employee at issue will vote. Note,
however, that section 9(c)(5) of the present statute prohibits unit determination merely
on the basis of extent of organization: "In determining whether a unit is appropriate for
the purposes specified in subsection (b) the extent to which the employees have organ-
ized shall not be controlling." 29 U.S.C. § 159(c)(5) (1970). See also Quality Food

\textsuperscript{10} See, e.g., Glosser Bros., 93 N.L.R.B. 1343 (1951).

\textsuperscript{11} See, e.g., Marks Oxygen Co., 147 N.L.R.B. 228, 230 (1964).

\textsuperscript{12} See, e.g., Ideal Laundry Dry Cleaning Co., 140 N.L.R.B. 1112 (1963), vacated,
330 F.2d 712, 717 (10th Cir. 1964), on remand, 152 N.L.R.B. 1130 (1965).

\textsuperscript{13} See, e.g., Great Atl. & Pac. Tea Co., 153 N.L.R.B. 1549 (1965); West Virginia

\textsuperscript{14} Community of interest is still the overriding consideration in unit determination
and is itself predicated upon a multiplicity of factors: functional organization of the
plant, International Paper Co. (So. Kraft Division), 96 N.L.R.B. 295, 298 n.7 (1951);
functional integration, Transway, Inc., 153 N.L.R.B. 885 (1965); common supervision,
Maybee Stone Co., 129 N.L.R.B. 487 (1960). See 1 NLRB ANN. REP. 116 (1936) and
cases cited therein.

\textsuperscript{15} See notes 5 & 6 supra and accompanying text.

\textsuperscript{16} 2 NLRB ANN. REP. 136 (1937).

\textsuperscript{17} Id. at 137 and cases cited therein.

\textsuperscript{18} These characteristics were later adopted by Congress in its definition of supervisor
infra.

\textsuperscript{19} See note 35 infra.
tion with management" factor was the precursor of the present manage-
rial status controversy.20

Due in large part to the broad scope of the section 2(3) employee
under the Wagner Act,21 the Board's policy of exclusion from units in
the years between the Wagner and Taft-Hartley Acts was marked by
cautions, uncertainty, and abrupt change. In the early years the Board
found itself excluding diverse workers, usually deferring to the desires of
the incumbent or petitioning union or to a compromise negotiated
between rival unions. In this fashion, supervisors were excluded at the
request of almost any bona fide union where it could be established that
they lacked a community of interest with other unit employees.22 In
addition the Board, acting on its own, often excluded certain categories
of workers.23 Thus the wishes of the parties, especially the unions, were
usually, but not always, the determining factor as to what employees
would make up the unit or units in any given plant.

In time, the Board began defining with greater precision the terms
which it used to classify employees. As early as 1941, a definition of
confidential employee appeared but applied only to those employees
having access to matters bearing on labor relations.24 In 1943, a policy
definition of supervisor appeared which substantially paralleled the def-
nition Congress would adopt in 1947.25 The term "managerial," how-
ever, continued in use without clear definition.

B. Exclusion of Managerials by the Board

Intense production in the mid-war years gave rise to a rash of
organizing among foremen. This provided fertile ground for litigation of

20. See 2 NLRB ANN. REP. 137 (1937). See also note 35 infra and accompanying
text.
21. See note 5 supra.
22. See 4 NLRB ANN. REP. 93-94 & nn.84-85 (1939). In addition, the following
categories were also excluded at the behest of unions: maintenance employees, watch-
men, timekeepers and factory clerks; outside employees such as salesmen, clerical and
office workers; technical and professional employees such as doctors and nurses, labora-
tory workers and engineers. Id. at 95 & nn.90-96.
23. Watchmen, time keepers, factory clerks, stenographers, technical and professional
employees were excluded. Id. at 95 & nn.97-99, 1.
25. As a general rule, it is our policy to exclude from the appropriate unit employ-
ees who supervise or direct the work of employees therein, and who have authority
to hire, promote, discharge, discipline, or otherwise effect changes in the status of
such employees, or whose official recommendations concerning such action are ac-
corded effective weight.
note 51 infra.
the managerial issue. In 1942, the expression "closely related to management" became a basis for excluding time study men. By 1943, the term "managerial function" was used, but usually in conjunction with descriptions of supervisory authority and confidential relationships to management. The three terms confidential, managerial and supervisory were frequently used interchangeably and the concomitant confusion persists to this day. The year 1944 was a banner year for "managerial" proliferation. In January, assistant buyers who possessed no authority to hire, fire, or discipline were excluded from employee units as supervisors because their "interests . . . [were] identified with management." February witnessed managerial exclusions for executives who "deal with matters relating to labor relations and determine labor relations policy," and for buyers and expediters because of the higher degree of skill and responsibility entailed in their jobs. March provided a distinction between confidential employees and buyers closely allied with management. In April, the Board actually used the term "managerial" twice to exclude those who could commit the employer's credit. Yet in October, the Board considered the same trait an indicator of supervisory status without mentioning the term "managerial." Throughout 1945 and 1946, the use of the term "managerial" in conjunction with those of "supervisory," "confidential," and "administrative" continued and the attendant connotations mushroomed.

27. See Consolidated Vultee Aircraft Corp., 54 N.L.R.B. 103, 107, 110 (1943).
28. See notes 35 & 144 infra and accompanying text.
31. Dravo Corp., 54 N.L.R.B. 1174, 1176-77 (1944). The notion that an employee with a high degree of skill is thereby properly denied the protection of the Act is hardly logical.
34. See Vulcan Corp., 58 N.L.R.B. 733, 736 (1944); See also Micamold Radio Corp., 58 N.L.R.B. 888, 890 (1944).
35. See, e.g., Barrett Div., Allied Chem. & Dye Corp., 65 N.L.R.B. 903, 905 (1946) (assistant buyers "function closely allied to management"); Westinghouse Air Brake Co., 64 N.L.R.B. 547, 553-55 (1945) (commercial engineers found to be "managerial employees"); Aluminum Co. of America, 61 N.L.R.B. 1066, 1075-78 (1945) (senior account clerks, administrative assistants, material clerks, department planners, sales administrators, found to be "managerial administrative employees"); Murray Ohio Mfg., 61 N.L.R.B. 47, 55-57 (1945) (time study men found to be "managerial employees bearing a confidential relationship to the company"); Yale & Towne Mfg. Co., 60
ly, in *Ford Motor Co.*, the Board attempted to distinguish among the terms and defined managerial employees as executive employees who are in a position to formulate, determine, and effectuate management policies. These employees we have considered and still deem to be "managerial," in that they express and make operative the decisions of management. Such categories as supervisors, and others, were to be excluded from units of rank and file employees. Confidential employees were confined to the limited classification of "those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations."

C. Rights of "Managerials" and Supervisors to Organize

The exclusion of certain classes of employees from units as a matter of Board policy prompted such excluded employees to pose the related question of whether or not they had any right to organize into units of their own. With respect to fringe groups of "miscellaneous employees," the Board normally permitted organization into separate units. The Board's position with respect to supervisors, though, vacillated. Taking one position, it certified a separate unit of supervisors who sought representation by a union independent of that representing the rank and file workers. It then changed its approach and approved a

N.L.R.B. 626 (1945) (time study men found to have "interests and functions sufficiently akin to those of management").

36. 66 N.L.R.B. 1317 (1946). A footnote stated somewhat cryptically that "[S]upervisory personnel have also been excluded from units of rank and file employees." Id. at n.11. The Board found that time-study workers were not managerial.

37. Id. at 1322 (footnote omitted).

38. Such high level employees would also be supervisors but at this time the Board does not clearly distinguish the two. Id. at 1322 n.11.

39. The Board continued to exclude office clericals and technical employees. See 11 NLRB ANN. REP. 32 (1946) and cases cited therein.


41. See, e.g., 6 NLRB ANN. REP. 69 (1941).

42. See, e.g., Todd Shipyards Corp., 51 N.L.R.B. 1211 (1943) (separate unit of timekeepers); Armour & Co., 49 N.L.R.B. 688 (1943) (separate unit of plant clerks); Chrysler Corp., 44 N.L.R.B. 881 (1942) (separate unit of guards).

43. In Union Collieries Coal Co., 41 N.L.R.B. 961 (1942), the Board certified a unit of supervisors noting the countless court decisions entitling them to protection under section 8(3) of the Act. The Board also relied on parallel legislation in Congress, namely the Railway Labor Act where Congress had described those entitled to the protection of that Act as "an employee or subordinate official." Id. at 966 n.4.
unit of supervisors represented by the same union as that representing the rank and file.\textsuperscript{44} Within a year a divided Board reversed itself again in \textit{Maryland Drydock Co.},\textsuperscript{45} and decided as a matter of policy that no unit composed of supervisors could be appropriate, notwithstanding the protection that supervisors enjoyed as “employees” before the Board and the courts under sections 2(3), 7 and 8 of the Act. Thus, the state of the law following \textit{Maryland Drydock} was that some classifications of workers, such as agricultural employees, were denied the right to organize by statute.\textsuperscript{46} Others, though entitled to organize by statute, were limited, as a matter of Board policy, to units distinct from those of other employees.\textsuperscript{47} Finally, though supervisors enjoyed the protections of statutory employees before the Board and the courts, this protection was hollow since the Board’s policy effectively precluded their ability to organize.\textsuperscript{48}

The status of confidential and managerial employees during this period was uncertain. Since most of those defined as confidential employees were executive secretaries, there was rarely a sufficient number of confidential employees in any one plant to merit consideration of whether or not a unit of confidential employees would be appropriate.\textsuperscript{49} As to managerials, the Board in one case implied that such employees were entitled to the protection of the Act and might be appropriately certified in a separate unit, but since separate units of expediters and buyers were seldom at issue, none were certified.\textsuperscript{50}

\textsuperscript{44} See Godchaux Sugars, Inc., 44 N.L.R.B. 874 (1942).
\textsuperscript{45} 49 N.L.R.B. 733 (1943).
\textsuperscript{46} See notes 5 & 6 supra.
\textsuperscript{47} See note 42 supra.
\textsuperscript{48} The Board noted that certain circuit courts of appeals at the time considered supervisors statutory employees entitled to the Act’s protection. \textit{Maryland Drydock Co.}, 49 N.L.R.B. 733, 738 & n.3 and cases cited therein. The dissent emphasized the custom of collective bargaining among supervisors in the maritime and railroad industries. \textit{Id.} at 743 n.3.
\textsuperscript{49} In one of the few cases to present the issue, the Board held that a unit of confidential employees would be inappropriate. The decision is subsequent to NLRB v. \textit{Bell Aerospace Co.}, 416 U.S. 267 (1974), but the Board makes no mention of it. The employees are “excluded from participation in a representation election.” The Board is careful to avoid saying that such employees are not “employees” within the meaning of the Act. \textit{Pullman Standard Div. of Pullman, Inc.}, 214 N.L.R.B., No. 100, slip 5, 87 L.R.R.M. 1370, 1371 (1974). \textit{See also} notes 122 & 124 infra.
\textsuperscript{50} \textit{Dravo Corp.}, 54 N.L.R.B. 1174, 1177 (1944). At issue was the status of employees known as buyers and expediters. These categories were later classified as managerial by the Board, although clearly outside the limited scope of the \textit{Ford Motor} definition, which was limited to high level executives involved in labor relations. \textit{See} note 37 supra.
Within another year the Board did another about-face on the supervisory question, once again certifying a unit of foremen and then successfully litigating in the Sixth Circuit and the Supreme Court an unfair labor practice against the employer for its refusal to bargain with that unit. The Board and the courts were sharply divided on the subject of supervisors. The decisions usually split along the lines of those who felt bound by the broad unlimited congressional definition of employee, which did not specifically exclude supervisors, and those who deemed it an inherent conflict of interest that supervisors be permitted to organize into units with their subordinates.

III. TAFT-HARTLEY CLARIFICATION

A. The Congressional View

The 1947 Taft-Hartley Amendments resolved the status of most classes of employees with the exception of managerial employees. The term managerial fails to appear even once in the 1680 page legislative history. The definition of employer was modified slightly. The term

53. Id. See also Packard Motor Car Co., 61 N.L.R.B. 4 (1945). Few subjects were as avidly discussed in the legal journals of the day. See, e.g., Cooper, Status of Foremen as "Employees" under the National Labor Relations Act, 15 Ford. L. Rev. 191 (1946); Cox, The LMRA 1947—Some Aspects of the Labor Management Relations Act, 1947 (pts. 1-2), 61 Harv. L. Rev. 1, 274 (1947); Iserman, Unionization of Supervisors; Against the Legality of the NLRB Ruling, 32 A.B.A.J. 875 (1946); Rothenberg, Foremen—The Industrial Question Mark, 51 Dick. L. Rev. 211 (1947); 59 Harv. L. Rev. 606 (1946); 32 Iowa L. Rev. 595 (1947); 21 Tul. L. Rev. 492 (1947); 95 U. Pa. L. Rev. 802 (1947); 33 Va. L. Rev. 214 (1947); 1947 Wis. L. Rev. 415. Or in Congress, Hearings on H.R. 992, 1728, 1742, 2239 Before the Subcomm. on Full Utilization of Manpower of the House Comm. on Military Affairs, 78th Cong., 1st Sess. (1943). Following Union and Godchaux, H.R. 4908, 79th Cong., 2d Sess. (1946) was introduced. Popularly known as the “Case bill,” it would have excluded supervisors from the protection of the Act. It passed both houses, but failed to overcome a veto by President Truman. 92 Cong. Rec. 6674-78 (1946).
55. 29 U.S.C. § 152(2) (1970) provides:
The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. (Italics indicate new provision).
“employee” came to exclude supervisors and independent contractors in addition to agricultural laborers, domestic workers, and those employed by parents or spouses. Supervisor was defined much as the Board had defined it in earlier decisions. Professional employees were defined, and special provision was made for the certification of separate units of professional employees and guards.

The congressional debate preceding the enactments of the amendment provides some insight into the legislative intent with respect to

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56. 29 U.S.C. § 152(3) (1970) provides:
The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

( Italics indicate new provision).

57. 29 U.S.C. § 152(11) (1970) provides:
The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

See also note 25 supra and accompanying text.

58. 29 U.S.C. § 152(12) (1970) provides:
The term “professional employee” means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of subparagraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in said paragraph (a).

59. 29 U.S.C. § 159(b) (1970) provides in pertinent part:

... Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; ... (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.
some of those who might broadly be considered managerials under the Ford Motor "executive employee" criterion, but no sound conclusions follow. The original house bill defined supervisors in three broad categories: (1) those, as defined in the 1946 Case bill, who had the authority to hire and fire; (2) those involved in personnel and labor relations; and (3) so-called "confidential employees," although the use of the term was much broader than that defined by the Board in Ford Motor. In reporting the bill, the committee majority voiced its displeasure with the "expertness" of the Board in defining "employee" and castigated the Supreme Court for crediting the Board with so much expertise. The Report then attempted to justify the use of its broader

60. See note 37 supra & note 112 infra and accompanying text.
63. H.R. 3020, 80th Cong., 1st Sess. § 2(12) (1947) provided:
   The term "supervisor" means any individual—
   (A) who has authority, in the interest of the employer—
      (i) to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward or discipline any individuals employed by the employer, or to adjust their grievances, or to effectively recommend any such action; or
      (ii) to determine, or make effective recommendations with respect to, the amount of wages earned by any individuals employed by the employer, or to apply, or to make effective recommendations with respect to the application of, the factors upon the basis of which the wages of any individuals employed by the employer are determined, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment;
   (B) who is employed in labor relations, personnel, employment, police, or time-study matters or in connection with claims matters of employees against employers, or who is employed to act in other respects for the employer in dealing with other individuals employed by the employer, or who is employed to secure and furnish to the employer information to be used by the employer in connection with any of the foregoing; or
   (C) who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.
See notes 36 & 37 supra and accompanying text.
64. An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of National Labor Relations Board v. Hearst Publications, Inc. (322 U.S. 111 (1944)), the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be "employees". The people the merchants hired to sell the papers were "employees" of the merchants, but holding the merchants to be "employees" of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors". "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work,
definition on the grounds that in addition to executives who were already excluded from the Act, Congress should also see to it that those with access to trade secrets and competitive information be excluded. The vitriolic House Majority Report was bitterly denounced by the House Minority and coldly received in the Senate. The Senate opted

and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board’s expertise, has approved, the bill excludes “independent contractors” from the definition of “employee”.


65. (12) “Supervisor”: In the discussion of the definition of the term “employee,” the reasons for excluding from that definition persons who act for employers in the employer’s dealings with labor have been fully set forth. The substantive language of section 2(12) of the present bill is consistent with that of the Case bill, which passed Congress last year. The only important change concerns confidential employees. These are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. Most of the people who would qualify as “confidential” employees are executives and are excluded from the act in any event.


66. The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these. But protecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees. The bill therefore excludes from the definition of employees persons holding positions of trust and confidence whose duties give them secret information. The bill does not forbid these people to organize. It merely leaves their organizing and bargaining activities outside the provisions of the act.


67. 5. Supervisors

Section 2(12) purports to define the meaning of “supervisor”; actually, supervisors play only a minor role in this definition, which clearly includes all persons having only slight authority such as pushers, gang bosses, leaders, second hands, and a host of similarly placed persons with no actual supervisory status. It is sufficiently broad to cover a carpenter with a helper. In addition, it would include time-study men, many types of pay-roll and plant clerks, plant guards, inspectors, and other [sic] who have quite as much need of trade-union organization as other rank-and-file employees. To deny to this large group of employees the protection of the law, to give the employer the unlimited right to discharge them for union activities and otherwise to interfere with their rights, is to penalize those employees who have shown the most skill and conscientiousness in the performance of their duties. The provisions of the bill are so broad that employers would be encouraged ostensibly to place many employees in these categories in order to deprive them of their rights under Federal legislation.

It is estimated that there are between 4 and 5 million men and women working in supervisory jobs in this Nation’s industry. The right of these employees to organize and bargain collectively in a manner which is insured to other workers will be materially impaired by the proposed bill. The recognition of the necessity for organization by workers as a means of achieving a fair share of the country’s wealth
for a narrower definition of supervisor similar to that in the Case bill and this definition prevailed. The House Conference Report demonstrated the nature of the compromise that emerged: the more limited Senate definition would apply, and other categories, such as managerial employees, would be left once again to the discretion of the Board for definition.

While the Board had excluded some employees from units of rank and file production and maintenance units, it had certainly not considered such employees “outside the scope of the Act” as the Conference is the gravamen of the National Labor Relations Act. The rejection of this principle in the case of supervisory employees can be considered only in terms of discrimination against such employees.

Id. at 71.

68. In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. In other words the committee has adopted the test which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank-and-file. (Bethlehem Steel Company, Sparrows Point Division, 65 N.L.R.B. 284 (expediters); Pittsburgh Equitable Meter Company, 61 N.L.R.B. 880 (group leaders with authority to give instructions and to lay out the work); Richards Chemical Works, 65 N.L.R.B. 14 (supervisors who are mere conduits for transmitting orders); Endicott-Johnson, 67 N.L.R.B. 1342, 1347 (persons having the title of foreman and assistant foreman but with no authority other than to keep production moving).


70. The conference agreement, in the definition of “supervisor,” limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provisions, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the Act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conference to alter this practice in any respect.

Report stated.\textsuperscript{71} If the limited Senate definition of supervisor was the only one to be applied, it is not clear whether the rest of the language of the Report, regarding the Board's prior treatment of those in labor relations, was intended as strict congressional mandate or as mere rhetorical salve to make the political realities of the Senate's restricted position more palatable to the House, in order to speed passage.\textsuperscript{72}

B. The Board's View

Following enactment of the amendment, the Board's task of determining units was less discretionary, but nonetheless difficult. Questions involving supervisors, professional employees, guards and most of the other classifications which had caused so many problems for the Board as matters of policy had been resolved by Congress. Now the principle policy basis on which the Board would exclude employees from particular units was that of "lack of community of interest."\textsuperscript{73} Confidential and managerial employees continued to be excluded from units of other employees as a matter of policy.\textsuperscript{74} While the Board specifically re-affirmed the limited definitions of confidential and managerial employees that it had set forth in \textit{Ford Motor},\textsuperscript{76} it used the terms to describe a broad spectrum of employees whose interests were aligned with management: relatives of management;\textsuperscript{77} representatives of management;\textsuperscript{77} top level executives who, like those in \textit{Ford Motor}, "formulate, determine

\begin{itemize}
\item \textsuperscript{71} \textit{Id}. \textit{See also} note 50 \textit{supra} and accompanying text.
\item \textsuperscript{72} The Senate's position was more moderate and generally better reasoned. The House had to accept this position to ensure passage over the certain presidential veto. \textit{See Millis & Brown, supra} note 64, at 363-92. \textit{See also} note 53 \textit{supra}.
\item \textsuperscript{73} 13 \textit{N.L.R.B. Ann. Rep.} 36 (1948).
\item \textsuperscript{74} \textit{Id}. at 40.
\item \textsuperscript{75} 66 \textit{N.L.R.B.} 1317, 1322 (1946). \textit{See} notes 36 & 37 \textit{supra} and accompanying text.
\item \textsuperscript{77} Fresno Auto Auction, Inc., 167 \textit{N.L.R.B.} 878 (1967); ACF Indus., Inc., 145 \textit{N.L.R.B.} 403 (1963); Armour & Co., 119 \textit{N.L.R.B.} 122 (1957); Gulf States Tel. Co., 118 \textit{N.L.R.B.} 1039, 1041 (1957); General Tel. Co. of Ohio, 112 \textit{N.L.R.B.} 1225, 1229 (1955); New England Tel. & Tel., 90 \textit{N.L.R.B.} 639, 644 (1950); Northwestern Bell Tel. Co., 79 \textit{N.L.R.B.} 549, 555 (1948); Continental Can Co., Inc., 74 \textit{N.L.R.B.} 351, 354 (1947).
\end{itemize}
and effectuate management policies;\(^{278}\) buyers and purchasing agents and others who could commit the employer's credit;\(^{279}\) and those whose interests were found to be more closely related or aligned with management than with the interests of the unit employees.\(^{80}\)

While the Board, as a matter of policy, uniformly excluded employees whom it classified as managerial or confidential from collective bargaining units, only rarely did it go so far as to imply that managers were not employees at all within the meaning of the Act under section 2(3).\(^{81}\) In one decision, *Swift & Co.*,\(^{82}\) the Board specifically held that

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81. See note 56 *supra*.

82. *Swift & Co.*, 115 N.L.R.B. 752 (1956). *Swift* was the single most troublesome
managerials were not entitled to any of the protections of the Act.

In Swift, the petitioner sought to represent a unit of production and maintenance employees including the procurement drivers, or in the alternative, a separate unit of the drivers. The employer contended that the inclusion of a separate unit of the drivers was inappropriate because they lacked a community of interest with the production employees.\(^8\) The issue, then, in its origin, was not whether the drivers were managerial employees, but rather, whether they shared a sufficient community of interest with the other employees so as to be included in the same unit.

The drivers purchased poultry and eggs from sundry independent suppliers. As part of their duties, they were constantly trying to find new sources of supply. In ferreting out new business, they had the power to raise the price in order to overcome competition and insure a steady supply to the plant. The Board determined that in so doing, they exercised independent judgment, and therefore, their community of interest was different from that of the other employees. In so holding it upheld the position of the employer who likewise urged exclusion based on a lack of community of interest only:

The fundamental duty of the procurement drivers in this case is to make purchases of produce for the Employer. In so doing they exercise a managerial prerogative. Accordingly, we find that the interests of the procurement drivers are allied with management and exclude them from the production and maintenance unit herein found appropriate.\(^8\)

Had the Board limited its holding at this point, the exclusion might still have been limited to one based upon community of interest. Not content to leave the exclusion so limited, however, the Board noted:

It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act.\(^8\)

Whether this statement was intended or merely a poor choice of language, the result was that managerial employees were not "employees"

\(^8\) 115 N.L.R.B. at 752.

\(^8\) Id. at 753. But see text accompanying notes 164-68 infra.

\(^8\) Id. at 753-54 (emphasis added & footnotes omitted).

 precedent for the Board during the circuit litigation leading up to the Bell decision. The Board finally overruled it but too late. See notes 94, 99 & 100 infra and accompanying text. Note that since that time the Board's language is more carefully chosen when dealing with a unit of confidential employees. See note 49 supra and accompanying text. The Board will only go so far as to say that confidential employees cannot be certified in a separate or any other unit. This time the circuits will have to eliminate them as employees altogether. But see note 122 infra.
within the meaning of section 2(3) of the Act, thus shifting the basis for the exclusion from one of policy to that of one mandated by statute. In so doing the Board left little doubt what its position was with respect to at least those managerial employees who could commit the employer's credit. The Board fashioned for itself a precedent which it would later regret.

C. The Circuit Courts' Views

The circuit courts generally followed the Board's policy of excluding managerial employees from bargaining units of rank and file employees, but only in dicta did they go so far as to deny them all protection under the Act.

The Business Agents are not "Managerial Employees." Although the Act makes no special provision for "managerial employees," under a Board policy of long duration, this category of personnel has been excluded from the protection of the Act.

The District of Columbia Circuit in Retail Clerks International Association v. NLRB, fashioned a two-way test to determine managerial

86. See note 56 supra.
87. See notes 94, 99 & 100 infra and accompanying text.
88. Generally the Board seeks enforcement of its final orders in the circuit court having jurisdiction over the parties as provided in section 10(e) of the Act. It should be noted that determinations made by the Board under its discretion in section 9 as to the appropriateness of any unit are not directly reviewable. Instead, the party seeking review of the unit determination must refuse to bargain and the Board will take the matter to the circuit for enforcement as an unfair labor practice under section 8(a)(5) or 8(b)(3), where the party will be bound by the evidence adduced in the section 9 proceeding in attacking the appropriateness of the unit. Pittsburg Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); 29 C.F.R. §§ 102.67(f), 102.69(c) (1974).
89. See, e.g., International Ladies' Garment Workers' Union v. NLRB, 339 F.2d 116 (2d Cir. 1964).
90. Id. at 123. The Board is required to take jurisdiction over labor organizations acting as employers. Office Employees Int'l Union v. NLRB, 353 U.S. 313 (1957). Ironically, many of the early circuit decisions involved the bizarre turn of events where labor organizations themselves, cast in the role of employers, tried to block the organization of their own staffs of representatives, business agents, and organizers, by relying on the managerial exclusions. They were largely unsuccessful because in these cases the Board placed little significance on the fact that the employees in question could commit the credit of the employer, a factor of paramount importance in the earlier Swift decision. See, e.g., Retail Clerks Int'l Ass'n v. NLRB, 366 F.2d 642 (D.C. Cir. 1966), cert. denied, 386 U.S. 1017 (1967). In American Fed'n of Labor, 120 N.L.R.B. 969 (1958), the Board rejected arguments that the business agents could commit the employer's credit, worked without supervision, represented the employer to the public, and could bargain and sign agreements for the employer; holding that those indicia alone were not sufficient to exclude them as managerial employees, and stressing that they did not establish policy, but followed it.
91. 366 F.2d 642 (D.C. Cir. 1966).
status: The position was managerial if (1) the position with the employer presented a potential conflict of interest between the employer and the workers, or (2) the workers were those who formulate, determine, and effectuate an employer's policies and have independent discretion in the performance of their job. This approach was followed in the Seventh Circuit.

At no time, however, had either the Board or the courts been forced to face the question squarely of whether or not those excluded from bargaining units as a matter of policy still were entitled to protection under other sections of the Act.

IV. FACING THE DILEMMA: IS A "MANAGERIAL" AN EMPLOYEE WITHIN THE ACT?

A. The Board's Approach

The Board reluctantly confronted this dilemma in a series of cases entitled North Arkansas Electrical Cooperative, Inc. Under consideration was an employee classified as an "electrification advisor" who had been discharged for not remaining neutral in an election campaign. Both the trial examiner at the administrative hearing and the Board in its review of the matter, decided that the employee in question was not managerial and that the employer had violated section 8(a)(3) of the Act by discharging him and ordered the employee reinstated with back pay. The Eighth Circuit denied enforcement and held that the employee in question was managerial. It left to the Board on remand, however, the critical question of whether or not the discharge of a managerial employee was a violation of the Act; that is, whether a managerial employee was protected by the Act.

92. Id. at 644-45 (employee not required to meet both tests).
96. North Ark. Elec. Cooperative, Inc., 168 N.L.R.B. 921 (1967). Interestingly, no Board determination had been made prior to this as to whether or not electrification advisors were to be included in the unit. The employer contended, off the record, that such employees should be excluded as managerial employees and apparently the union agreed. The employee in question did not vote. Id. at 922 n.2.
97. 412 F.2d 324 (8th Cir. 1969).
98. Id.
On remand, the Board seemed to define anew the elusive "managerial employee," with a three-fold test embodying elements of the District of Columbia Circuit Court test:

[1] [T]here is nothing in the record to suggest that he participated in the formulation, determination, or effectuation of policy with respect to employee relations matters. [2] Nor is there any indication that his status in the Cooperative's organization was such as to lead any employee reasonably to believe that Lenox had substantial responsibilities in this area so that views which he might express would be taken as a reflection of the considered position of the Cooperative. [3] Finally, insofar as we can determine there is nothing in this record to suggest an inconsistency or conflict of interest between Lenox's proper performance of his job and the concerted activity.99

It held that those such as managerial and confidential employees excluded from units as a matter of Board policy because of their lack of community of interest under section 9, were nonetheless employees within the meaning of section 2(3) and therefore entitled to protection from unfair labor practices under section 8. It overruled Swift to the extent that it was contrary, implying that anyone not specifically excluded as an employee in section 2(3) of the Act could not be denied the protection of the Act.100

B. The Circuit Courts' Response

While the North Arkansas cases were progressing, a parallel development in the Second Circuit added to the complexity. The Board had determined that a unit of buyers at Bell Aerospace, whether or not one consisting of managerial employees, constituted a unit appropriate for purposes of collective bargaining,101 and later certified United Auto Workers Local 1286 as the agent for collective bargaining, after it had obtained a majority of the valid votes cast at the election.102

On the same day that the certification was issued, the Eighth Circuit again denied enforcement of the Board's second North Arkansas order, holding that managerial employees were not "employees" within the meaning of section 2(3) of the Act.103 With this, Bell sought reconsideration from the Board of its decision. The Board denied the

100. Id. at 551 n.8.
motion, stating its disagreement with the Eighth Circuit. Bell then refused to bargain with the newly certified unit's representative and when the Board sought enforcement of an order in the Second Circuit to compel bargaining, enforcement was denied. The Second Circuit not only agreed with the Eighth Circuit that managerial employees were not employees within the meaning of section 2(3) of the Act, but held that the Board had erred in changing its policy without resorting to "rule-making" as provided for in the Administrative Procedure Act. The Supreme Court granted review to settle the issue.

V. THE SUPREME COURT DECISION

A. The Majority View

A unanimous Court held that the Board could proceed with a case by case ad hoc adjudication rather than via rule making as had been so frequently urged by commentators and critics. It divided, however, five to four on the issue of managerial employees, holding that they were not employees within the meaning of the Act.

107. Id. at 494.
111. 416 U.S. at 289-90.
The majority generally followed the rationale of the Second and Eighth Circuits in arriving at its conclusion that managerial employees were not entitled to the protection of the Act. In its interpretation of the pre-Taft-Hartley Board decisions involving managerial employees, for example, the majority viewed the Board's policy of excluding managers as closely related to the exclusion of supervisors.\textsuperscript{112} In fact, however, almost all exclusions prior to Taft-Hartley (including those of supervisors) were based on the lack of community of interest between the excluded class and those in the unit sought.\textsuperscript{113} The majority made much of the checkered judicial history of supervisors prior to Taft-Hartley and gave great weight to the legislative history of that Act in arriving at its conclusion that Congress intended to exclude supervisors and therefore, managerial employees.\textsuperscript{114}

While the Court's review of the legislative history is fundamentally accurate, its conclusions are in many ways disquieting. Having established congressional interpretation of prevailing Board policy as a model for construction,\textsuperscript{115} the Court first acknowledged that Congress was mistaken as to prevailing Board policy in 1947,\textsuperscript{116} and then assumed that even though Congress did not say anything specific about "managerial employees," such employees must have been nonetheless included in an undefined class of "impliedly excluded" employees since the specific

\textsuperscript{112} More significantly, the majority itself becomes enmeshed in the forty years of confusion in the use of the terms managerial, supervisory, and confidential, and fails itself to properly define or distinguish among them. Prior to excluding managerial employees as an implicit function of the "congressional will," the majority properly observed that the House report construed the Board interpretation of confidential employee as including most executives. The majority felt that such an interpretation was probably broader than the recent Board policy, but that the clear intent of Congress was to exclude confidential employees under the broader definition. But the majority completely misconstrued the definition of confidential employee posited by the \textit{Ford Motor} decision. According to the majority, the Board limited confidential employees to "those who exercised 'managerial' functions in the field of labor relations." \textit{Id.} at 283-84 n.12.

The actual \textit{Ford} holding was much narrower:

\begin{quote}
It is our intention to limit the term "confidential" so as to embrace only those employees who \textit{assist and act in a confidential capacity to persons who exercise "managerial" functions in the field of labor relations.}
\end{quote}

\textsuperscript{66} N.L.R.B. at 1322 (emphasis added).

Thus the definition of confidential employee was much narrower than the \textit{Bell} majority thought and those in a "managerial" status did appear to be limited under \textit{Ford} to those involved with policy matters in the labor relations area.

\textsuperscript{113} See 416 U.S. at 299 (White, J., dissenting); 13 NLRB ANN. REP. 36 (1948); cf. Swift & Co., 115 N.L.R.B. 752 (1956).

\textsuperscript{114} 416 U.S. at 277-84.

\textsuperscript{115} \textit{Id.} at 274-75.

\textsuperscript{116} \textit{Id.} at 283-84 n.12.
exclusions in the Act "assuredly . . . did not exhaust the universe of such excluded persons." It then granted managerial employees admission into this open-ended category. "We think the inference is plain that 'managerial employees' were paramount among this impliedly excluded group." The fact that supervisors were expressly excluded while manageerals were not mentioned should suggest the opposite result: manageerals were intended to be included within the purview of the Act.

In the final analysis, the Court's conclusion is sound as it appears to approve a narrow definition of "managerial" which would almost require a finding of supervisory status in any case thereby merging the two into one exclusion. It is the Court's reasoning, or rather its adoption of that of the Second and Eighth Circuits, which is the principal flaw of the decision. The majority opinion assumed that one is an employee only if included in a unit pursuant to section 9, and ignored the fact that section 2(3) confers employee status. Thus the Court emphasized that the Board in its entire history had never certified a separate unit of "managerial employees," and, therefore, concluded that such employees had no standing under the Act. In order, then, to have the protection of the Act, one must either be included within a unit of employees at a given plant, or at least have the realistic potential of being assimilated into a separate but appropriate unit. The effect, of course, would be

117. Id. at 283.
118. Id. at 283-84.
119. The Court speaks repeatedly of "executives" in its discussion of "managerial employees." Id. at 284 n.13, 289 n.18. Though in the latter the court draws a line between executives and section 2(11) supervisors, it is not clear how anyone so highly placed could not be a supervisor. It is more probable that such non-supervisory executives would be professional employees. For recent Board discussion of the distinctions see Lockheed-California Co., 217 N.L.R.B. No. 93, 89 L.R.R.M. 1289 (Apr. 29, 1975); Flintkote Co., 217 N.L.R.B. No. 85, 89 L.R.R.M. 1295 (Apr. 22, 1975); General Dynamics Corp., 213 N.L.R.B. No. 124, 87 L.R.R.M. 1705 (1974).
121. 416 U.S. at 287-88.
122. Though the Bell decision does not mention it, both the Second and Eighth Circuits relied substantially on the reasoning of the Fourth Circuit in NLRB v. Wheeling Elec. Co., 444 F.2d 783 (4th Cir. 1971). In that case, a confidential secretary, as defined by the Board, was fired for honoring a picket line. The reasoning of the Wheeling Court is instructive:

It strikes us as nonsense for the Board to exclude Mrs. McConnell from membership in the bargaining unit and then extend to her the same protection for the same concerted activity that she would have enjoyed if a union member. If Mrs. McConnell is committed to the union cause to the extent she joins the strike by refusing to cross the picket line, it would seem to matter little to the company that she is not technically a union member. A confidential secretary who plights her troth with the union differs in form, but not in substance, from one who holds a union card. Since she cannot formally join the unit, there is nothing incongruous in holding that she cannot "plight her troth" with the unit. Indeed, it seems more incon-
to leave countless numbers of employees uncertain of the Board's protection until a determination is made as to their status; also, it could leave statutory employees who are alone and excluded from the bargaining unit stripped of all protection. This decision also leaves unsettled the status of employees relegated to separate units by statute. Finally, the Bell majority failed to provide any guidance as to how the Board and

sistent to say that if she cannot act in concert by participating in the unit, then she cannot act in concert on an informal basis, or more accurately, that if she does so, it will be without the protection of the Act. Management is entitled to security of its confidential information and may insist upon the loyalty of those employees who have access to it. For this reason, confidential employees cannot be granted the protection afforded ordinary employees under the Act. Like supervisors, "such loyalty cannot be secured if [they] are psychologically allied with, or subject to the pressures of, their union on behalf of the rank and file."

Id. at 788 (footnotes omitted) (emphasis in original).

Although the Fourth Circuit fails to make any distinction between protected concerted activity on the one hand and union activity on the other, it does not appear to feel obligated to do so in view of its original finding that any employees consistently excluded by the Board and denied bargaining rights in a unit are not section 2(3) employees, and thus do not have any protection. This view, though not adopted by the Fifth Circuit (NLRB v. Greyhound Lines, 426 F.2d 1299, 1301 (5th Cir. 1970)) has been approved in the Seventh (Peerless, Inc. v. NLRB, 484 F.2d 1108, 1112 (7th Cir. 1973)). The latter defines confidential employees as section 2(11) supervisors.


124. See 29 U.S.C. § 152(12) (1970) and note 58 supra. Consider, as an illustration, the status of a guard who is fired for attending a union meeting for rank and file employees. Section 9(b)(3) of the Act clearly establishes that guards are employees within the meaning of section 2(3) of the Act. Yet by virtue of section 9(b)(3), the union which he is supporting cannot be certified to represent him since it also represents non-guards. Of what practical value then are his rights to assist such a labor organization? True, the employer might voluntarily recognize a hypothetical unit without being required to do so under the statute, but is the situation different from that when an employer fires a supervisor for joining a union which the employer might also recognize voluntarily but to which he owes no such obligation under the Act? Under the rationale of Bell, the guard, at least in this case, is not an "employee."

In just such a case, the Fourth Circuit had a difficult time reconciling its decision to enforce the Board's order of reinstatement of this statutory employee with the sweeping pronouncement it had made earlier in refusing to do so in Wheeling. See NLRB v. Bel-Air Mart, Inc., 497 F.2d 322 (4th Cir. 1974). Thus, whereas it had earlier seemed eager to deny the protection of the Act to employees which Congress had not specifically excluded from the Act, the Fourth Circuit seems less eager to exclude those clothed with specific congressional "employee" status, despite its own inconsistency of reasoning.

In view of such developments, the Board recently denied certification to a unit of employees it classified as "confidential," but it did not say that such employees had no protection under the Act. The language is of interest:

We therefore conclude, based on evidence regarding the access to and nature of information shared by all employees in the proposed unit, that these employees are "confidential" and should be excluded from participation in a representation election under the Act.

the courts should distinguish between managerial and professional employees. Such a distinction is needed because Congress expressly gave to professional employees specific "employee" status under the Act. In a passing footnote, the majority asserted in purely conclusory language that "professional employees, however, are plainly not the same thing as 'managerial employees.'" If this proposition is correct, it remains to be seen how the Board and the courts will show that attorneys, accountants, engineers, nurses, and doctors do not "formulate, determine and effectuate management policies."

B. The Minority View

Speaking for the dissenting four Justices, Justice White stressed the plain meaning of the statute. He noted first that section 2(3) granted the Board's protection to "any employee," and second, that the specific exclusions for supervisors were narrowly drawn in section 2(11). He did not shrink from highlighting the "professional employee"—"managerial employee" dilemma that the majority had sired.

Reviewing the history of the problem, the dissent found that the Board's past exclusion of managerial employees was based upon the community of interest theory. While admitting to the uneven course which the Board had charted with respect to supervisors, the dissent emphasized that at no time during this period of vacillation did the Board hold that supervisors were not entitled to the protections of the Act. The inconsistency of permitting the protections of the Act to be accorded to professionals but not to managerials was thus crystallized in the dissent, if not in the majority.

Consistent with its narrow interpretations of the statute, the dissent adhered to a stricter interpretation of the legislative history as well. Thus, for it the significance of the Conference Committee report was the absence of any need to amend the report to exclude managerials, because the Board had always excluded labor relations and confidential employees without feeling the need to group them together under the

126. 416 U.S. at 283-85 n.13.
127. See note 144 infra and accompanying text.
130. 416 U.S. at 297-98.
131. Id. at 299.
132. Id. at 300.
"managerial" heading.\textsuperscript{133} The majority's analysis of congressional intent first came under fire with regard to the congressional view of "confidential" executives. White stressed that the application of congressional interpretation will always require a finding of supervisory indicia within section 2(11). To define confidential employees by the application of supervisory indicia would create an unnecessary step of analysis because the Act specifically excluded supervisors.\textsuperscript{134} Thus it was unnecessary to determine whether or not employees were confidential since they would be excluded if they fit the supervisory indicia.

The logic of the minority's position is less certain, however, in the wake of its rush to approve the limited "labor relations touchstone" test upon which the Board had come to rely so recently.\textsuperscript{135} Noting that such a narrow exclusion is more consistent with the \textit{Packard Co. v. Labor Board} dissent,\textsuperscript{136} which concerned itself principally with those formulating labor policies, the minority appeared to agree that the exclusion of such employees, at least as managerial employees, is consistent with congressional intent.\textsuperscript{137} The four dissenting Justices appear to have misinterpreted the reach of the majority's position. The majority had discreetly left to the Board on remand the application of the managerial question to the facts at hand.\textsuperscript{138}

In its enthusiasm to embrace the Board's community-of-interest rationalization explaining the forty-year history of managerial exclusions, the minority conveniently passed over the \textit{American Locomotive Co.}\textsuperscript{139} and \textit{Swift}\textsuperscript{140} decisions as mere ancient anomalies which the Board in its discretion was wholly entitled to overrule.\textsuperscript{141}

With respect to the majority's contention that the 1959 congressional

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{133} Id. at 303-04.
\item \textsuperscript{134} Id. at 307 n.3.
\item \textsuperscript{135} Id. at 303-05. Especially noteworthy is the argument of the dissent that Congress intended to narrowly define any exclusions from the Act. Notice the status of some of the other employees which the House originally had intended to exclude, such as time-study personnel and guards, but to which Congress ultimately accorded the protection of the Act. \textit{Id.} See text accompanying note 66 \textit{supra}.
\item \textsuperscript{136} 330 U.S. 485, 493 (1947).
\item \textsuperscript{137} The minority notes that the conference committee exclusion of those involved with labor relations is a much narrower class of employees than those whom the Board had come to exclude under the managerial label. 416 U.S. at 303-04.
\item \textsuperscript{138} 416 U.S. at 289-90 & nn.19-20.
\item \textsuperscript{139} 92 N.L.R.B. 115, 116-17 (1950) (buyers not included in unit or permitted in unit of their own). The majority opinion cited the case as more proof of managerial exclusion by the Board. 416 U.S. at 286-87.
\item \textsuperscript{140} \textit{See} note 82 \textit{supra}.
\item \textsuperscript{141} 416 U.S. at 309-10.
\end{itemize}
\end{footnotesize}
silence in amending the Act is tantamount to approving *Swift*. The dissent noted that the main purpose of the Landrum-Griffin amendments was to extend protection against secondary boycotts. Although the amendment did not deal with employee classifications at length, the debates did contain substantial discussion regarding revisions of the definition and classification of supervisors.

VI. THE NEW MANAGERIAL EMPLOYEES

Not surprisingly, since *Bell*, the Board has restricted the concept and use of the term "managerial" to high level executives whose status would qualify them to be supervisors within the meaning of section 2(11). This it has done with admirable consistency, but not without dissent and confusion among the members. The definition of managerial employee was set forth in a Board decision soon after *Bell* as follows:


143. 416 U.S. at 310. See LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (1959). Amendments were introduced to include communications assistants in the telephone industry as supervisors. *Id.* at 429-30, 452, 580-81, 1048-49, 1065-66, 1071, 1262, 1273, 1290. The House amendment contained no such provision, *id.* at 1361, and the amendment was dropped in conference. *Id.* at 1383. The original Kennedy-Ervin bill attempted to restrict the definition of supervisor from "authority ... responsibly to direct employees ..." to "one ... whose principal function is responsibly to direct other employees." *Id.* at 986. A final irony: a bill was introduced in the House to restore protection under the Act to foremen to "[free them from] the shackles that bind the foremen of America in managerial bondage ...." *Id.* at 1466 (emphasis added).


Clearly the most revealing decision to date is General Dynamics Corp., 213 N.L.R.B. No. 124, 87 L.R.R.M. 1705 (1974). With over 1600 employees in approximately 85 highly technical classifications, the Board walked a rhetorical tightrope in distinguishing between managerial employees and professional employees. Samples of the language are instructive:

Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, professional employees are clearly not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction. Likewise, technical expertise in administrative functions which may involve the exercise of
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The Board has generally sought to exclude from employee units those employees who, while not supervisory, were so closely allied or identified with management that their interests warranted exclusion from the protection of the Act. Those employees who formulate, determine, and effectuate an employer's policies, and who exhibit sufficient discretion in the performance of their duties to indicate that they are not merely following established employer policy have been held by the Board to be managerial employees. And unlike the term "supervisor," which has consistently been interpreted to apply in the disjunctive, the new definition has only been applied conjunctively; that is, a finding of all of the elements combined, not merely one, is required.

 Judgment and discretion does not confer executive-type status upon the performer. A lawyer or a certified public accountant working for, or retained by a company may well cause change in the company direction, or even policy, based on his professional advice alone which, by itself, would not make him managerial. See also Lockheed-California Co., 217 N.L.R.B. No. 93, 89 L.R.R.M. 1289 (Apr. 29, 1975); Flintkote Co., 217 N.L.R.B. No. 85, 89 L.R.R.M. 1295 (Apr. 22, 1975). If all supervisors are management people, would it follow that all managerial are supervisors? Will the Board complete the truism? Is the classification of new managerial employees being carved out by the Board so narrow as to include only those who also fall within the congressionally approved supervisory exclusions under section 2(11)?

Yet, as in the cases before *Bell*, the circuits will be the final arbiters of the question of who is a managerial employee. Even though the Board enjoys broad discretion in its determinations of such status, confusion over the use of the terms, especially in the area of media employers, has already produced a conflict among the circuits.

VII. THE EFFECTS OF BELL

If the recently developed and much narrower Board definition of "managerial" withstands the scrutiny of the courts, the *Bell* decision will sink into obscurity. If not, only a congressional remedy will settle the status of a new class of employees that grows each day with the advance of American technocracy. Consider, for example, the following hypothetical:

Noah Count, employed as a buyer and office assistant at Ready Office Supply, gathers together some disgruntled office employees at Ready and suggests that a union is the solution to their many problems. As a former member of Local 123 of the Association of Blue Collar Workers, Count goes down to the union hall and gets some authorization cards. The next day at lunch he has most of the office people and inside sales people at Ready sign the cards in his presence. He returns them to the Association, which then files a petition with the Board. Count has none of the indicia of a section 2(11) supervisor, but he can pledge the Employer's credit when he makes purchases in amounts up to $5000, provided he follows established procurement guidelines.

The day after the petition arrives at the store, Count is called into the office by the district sales manager and the store manager and is asked if he knows anything about the petition, and which employees signed cards. They then tell him that he will lose his job when the petition

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149. Westinghouse Broadcasting Co. v. NLRB, 503 F.2d 1055 (2nd Cir. 1974) (*per curiam*), enforcing 203 N.L.R.B. No. 91 (1973) (television staff producers held non-managerial); Wichita Eagle & Beacon Publishing Co. v. NLRB, 480 F.2d 52 (10th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974) (editorial writers held non-employees). The decision used the term "confidential" broadly and added a first amendment dimension by providing the media with a constitutional shield against unionization.

reaches the main office. At the same time, they brief the next senior employee and Count's fellow organizer about coming events. Two days later, Count is discharged for "failing to properly manage," and a former co-organizer is promoted to Operations Manager.

The employer demands a representation hearing and Count files charges against the employer alleging violations of section 8(a)(1) and (3) of the Act. What result?

Clearly Count is not a supervisor as defined in section 2(11). In fact, the only quality that he possesses which vaguely resembles that of a managerial employee is his ability to pledge the employer's credit by his signature in a totally non-discretionary fashion in amounts not exceeding $5,000. If he is a managerial employee, under Bell his discharge for union activities, which the other employees clearly associate with him as the principal organizer, will not have been a violation of the Act, and Count goes without remedy since he is not an employee. If under Bell managerial employees are also section 2(2) employers and section 2(11) supervisors, then another probable result is that the organizational effort will be abruptly halted when the petition is dismissed with prejudice because of the tainted showing of interest caused when a managerial employee influences the signing of the cards.

If managerial employees are section 2(2) "employers," then the employer is responsible for their conduct, both in unfair labor practice and representation matters, whether or not he knows of or ratifies their acts. This would apply, for example, to threats, interrogations, or

151. See note 5 supra & note 177 infra.
152. See note 57 supra.
153. See note 79 supra and accompanying text.
155. See note 55 supra.
156. See notes 57 & 144 supra.
158. On the subject of agency see Aircraft Plating Corp., 215 N.L.R.B. No. 88, 87 L.R.R.M. 1208 (1974) and cases cited therein. See also section 2(13) of the Act:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.
other interference by managerial employees, during organizing drives, pre-election campaigns, and the election itself.\(^{159}\)

**VIII. THE REMAND DECISION—ROUND II?**

The Board handed down its remand decision in July, 1975,\(^ {160}\) and while changing its rationale slightly, it retained the original effect. The three member panel\(^ {161}\) comprised of Chairman Murphy,\(^ {162}\) and members Fanning and Jenkins found the buyers in question to be employees within the meaning of the Act, and reaffirmed its earlier bargaining order.\(^ {163}\) Interestingly, the Board found but did not specifically state that the buyers were not managerial employees. It took its cue from dicta in both the Second Circuit\(^ {164}\) and Supreme Court\(^ {165}\) decisions which implied that on the facts of the case the buyers in question were not managerial employees.\(^ {166}\) The Board set forth what it considered the

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For a discussion of employer liability for interrogation by a managerial employee see Beckett Aviation Corp., 218 N.L.R.B. No. 37, 89 L.R.R.M. 1341 (June 5, 1975).

159. If a low level managerial employee gave support to the union it is doubtful that an election would be set aside, even if the individual was a supervisor. See Turner's Express, 189 N.L.R.B. 106 (1971); Stevenson Equip. Co., 174 N.L.R.B. 865 (1969). Though there is no per se rule prohibiting the use of supervisors as observers at elections, the practice is frowned upon. Howard Cooper Corp., 121 N.L.R.B. 950 (1958); Owens-Park Lumber Co., 107 N.L.R.B. 131 (1953). It is doubtful that the Board would allow its processes to be abused by permitting punishment of those who testify or file charges. Leas & McVitty, 155 N.L.R.B. 389 (1965); Dal-Tex Optical Co., 137 N.L.R.B. 1782 (1962). The managerial employee dilemma cuts in many directions. In certain cases unions might be violating the Act by interfering with or attempting to discipline managerial employees. This is so with respect to discipline of member supervisors. Florida Power & Light Co. v. I.B.E.W., 417 U.S. 790 (1974); Daily Racing Forms, 216 N.L.R.B. No. 147, 88 L.R.R.M. 1384 (Mar. 6, 1975); Hammond Publishers, Inc., 216 N.L.R.B. No. 149, 88 L.R.R.M. 1378 (Mar. 6, 1975).


161. 29 U.S.C. § 153(b) (1970) provides in pertinent part: "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise . . . ."

162. Betty Southard Murphy became the first woman Chairman of the Board on February 5, 1975. BNA News and Background Information, 88 LAB. REL. REP. 113 (1975). Ms. Murphy prefers the usage of the title “Chairman.”


164. Bell Aerospace Co. v. NLRB, 475 F.2d 485, 494 (2d Cir. 1973).


166. On the merits of the case the court found that there was substantial evidence that the Company's buyers were not sufficiently high in the managerial hierarchy to constitute true managerial employees. It then added that, on proper proceedings, the Board would not be precluded from determining that buyers or some types of buyers were not true managerial employees covered by the Act.

Supreme Court's view to be regarding the correct legal standard for defining managerial employees, namely, "those who formulate, determine, and effectuate an Employer's policies." This is consistent with the restrictive position taken by the Board in its decisions since Bell.\(^{168}\)

While the holding itself comes as no surprise, other portions of the decision are troublesome. Not content to merely note the purely discretionary functions performed by the buyers, the Board seems compelled to return to its old haunts of "community of interest" and "conflict of interest."\(^{169}\)

The "community of interest" analysis is curious. The Board points out that the buyers share many traits common to other white collar employees already organized in other bargaining units. For example, their pay, fringe benefits, and lunchroom facilities are similar to those of other white collar employees in other bargaining units.\(^{170}\) But the community of interest test is normally used as a basis for including employees in the same unit as that in which employees with the same community of interest work. It has not been used to create separate and fragmented units among employees sharing the same interests.\(^ {171}\) Followed to its logical conclusion it would seem that the Board's reasoning would serve to establish the buyers as an "accretion"\(^ {172}\) to an already existing bargaining unit of white collar workers.

The Board's continued preoccupation with "conflict of interest" is ominous. It was the new "conflict of interest" touchstone that triggered the wrath of the Second Circuit before,\(^ {173}\) and was instrumental in contributing to the continuing confusion over the exact definition of managerial employees.\(^ {174}\) The Supreme Court did not specifically disapprove of the "conflict of interest" analysis, and it even implied that on

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171. See note 14 supra and accompanying text.
172. "Accretion" is a term of art referring to an addition to an established bargaining unit. Cf. CF&I Steel Corp., 196 N.L.R.B. 470 (1972).
remand the Board should give serious consideration to reopening the record to afford the parties an opportunity to adduce further evidence, if any, of conflict of interest. The Board declined to reopen the record, and it would seem that the Board is merely paying lip service to the “conflict of interest” analysis while holding firm to its narrow “supervisory” definition.

A break with the confused past of managerial employees would be welcome, as the earlier hypothetical illustrates. The question, however, is whether or not the Board and the courts will allow the new definition and overlook earlier decisions such as Swift and the many-faceted rationales that preceded them. One can only speculate as to what the Second and other circuits will do with Bell and its progeny.

175. 416 U.S. at 290 n.20.
176. Chairman Murphy felt the employer was estopped to revive the conflict of interest issue because it had failed to challenge the unit on any ground other than managerial status. Bell Aerospace Co., 219 N.L.R.B. No. 124, at slip 9 n.11, 89 L.R.R.M. 1664, 1666 n.11 (July 23, 1975).

Two cases issued around the Bell remand point to an opposite conclusion, namely, that the Board is still casting about, applying the managerial employee tag to a broad variety of lower level employees. In Beckett Aviation Corp., 218 N.L.R.B. No. 37, 89 L.R.R.M. 1341 (June 5, 1975), the Administrative Law Judge held the employer liable for unlawful interrogation of its employees by a buyer whom the judge had concluded was a managerial employee. The Board reversed the judge because the interrogation had occurred beyond the six months statute of limitations (29 U.S.C. § 160(b) (1970)). It did imply, however, that the employee in question was managerial. 218 N.L.R.B. at slip 3, 89 L.R.R.M. at 1342. See note 159 supra and accompanying text.

In Curtis Noll Corp., 218 N.L.R.B. No. 222, 89 L.R.R.M. 1417 (June 30, 1975), a full five member panel with only member Fanning dissenting at length (see id. at slip 4-10, 89 L.R.R.M. at 1417-20) held that management trainees were managerial employees, even though they possessed no criteria of such at the time of the decision and had only an expectation of becoming managers. The employees involved were discharged during an organizing campaign in the office clerical unit where the trainees were employed. The trainees did the same work as the other employees in the office clerical unit. In finding that the trainees had no remedy under the Act, the Board relied once again on “conflict of interest” language. There is no discussion of the effect of the discharges on the organizational drive. See note 157 supra and accompanying text.

178. Swift & Co., 115 N.L.R.B. 752 (1956). That decision was overruled by the Board in North Ark. Elec. Cooperative, Inc., 185 N.L.R.B. 550, 551 n.8 (1970), but on the ground that the employees in question were entitled to the protection of the Act notwithstanding their status as managerial employees.

179. It is probable that the Second Circuit would grant enforcement in view of the broad hint to the Board that the buyers are not managerial employees as traditionally defined: “[T]here was substantial evidence that Bell's buyers were not sufficiently high in the hierarchy to constitute 'managerial employees' . . . .” Bell Aerospace Co. v. NLRB, 475 F.2d 485, 494 (2d Cir. 1973).
IX. CONCLUSION

The Board appears to be putting the long saga of the managerial employee to rest by adhering to a restricted definition of managerial employee. Under this definition only high level executives who would likewise be supervisors under the Act would qualify as managerial employees. Under this analysis, the use of the managerial employee exclusion would apply only as a subcategory to those already excluded as supervisors.

If such an approach withstands the scrutiny of the courts, the Bell decision will have little significance since no new group of employees will have been excluded from the rights and protections of the Act. If, however, the courts disapprove of the new definition, or out of confusion, broaden its application, then the status of the law will remain unsettled, needless litigation will follow, and the numbers of employees unprotected by the Act will continue to grow unless Congress defines more precisely those employees entitled to the protection of the Act.

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180. A final result of the Supreme Court decision which seems clear is that confidential employees are likewise excluded from the protection of the Act. The legislative analysis applied to managerial employees will apply a fortiori to confidential employees. See notes 122 & 124 supra and accompanying text. Of special interest is the dissenting opinion of member Kennedy in Flintkote, 217 N.L.R.B. No. 85, 89 L.R.R.M. 1295 (1975).

181. The California Supreme Court recently adopted the Bell rationale for cases arising under California law only. Fire Fighters Local 1186 v. City of Vallejo, 12 Cal. 3d 618, 526 P.2d 978, 116 Cal. Rptr. 514 (1974). The exclusion of managerial employees is not specifically mentioned in the recent Agricultural Labor Relations Act, but precedents under the Act are binding by statute. CAL. LABOR CODE § 1140 et seq. (West Supp. 1975).