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Recent Development: Comment

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his supervisory duties; rather, he is now protected in the performance of any act that furthers his employer's interest, even if he performs rank-and-file work during a strike. The instant cases, at the very least, reflect a labor philosophy of the D.C. Circuit that tends to promote the individual rights of union members at the expense of union powers of control over its membership. Beyond this, however, the cases may indicate a conscious effort by the judiciary to achieve a proper balance between the rights of the union and the employer, prompted perhaps by the belief that *Allis-Chalmers* and *Scofield* shifted the balance too far in favor of the union. Whatever is the correct characterization of the court's motives, promulgation of the furtherance of interest doctrine has raised serious questions concerning its scope and validity. The most pressing problem is the necessity to establish meaningful limits on the doctrine to determine how far the supervisor-member may go in the name of furthering the employer's interest when his actions are also in derogation of the union's objectives. The resolution of this question will determine the long-range impact of the principle on the ability of the union to maintain its internal membership solidarity. Finally, the logical infirmities in some of the court's arguments and the questionable bases for parts of its reasoning illustrate the dangers of a hasty approach to a complex problem, and, when combined with the ambiguities inherent in the furtherance of interest doctrine, may weaken significantly the union's collective bargaining position.

Labor Law—The National Labor Relations Board Redefines and Restricts the Scope of Managerial Employee Classification

I. INTRODUCTION

The National Labor Relations Act (NLRA)[1] provides that certain classes of employees are excluded from the Act's coverage of bargaining unit formation and employee activity. The National Labor Relations Board has added to this unprotected category two classifications of employees—those who are engaged in management policy formulation or effectuation (managerial employees) and those who assist management in the formulation of labor relations policies (confidential employees)—because of their close affiliation with management. The concept

1. National Labor Relations Act, 29 U.S.C. §§ 151-68 (1970).

of managerial employee, however, has not been defined precisely and thus has given rise to considerable confusion when applied in various factual settings. In two recent Board rulings, *North Arkansas Electric Cooperative, Inc.*,[2] and *Textron Inc.*,[3] the Board has attempted to restrict the scope of the managerial classification to only those employees involved in shaping or implementing management's labor policy, rather than to those involved in effectuating any management policy; this redefinition thus has rendered the managerial employee classification virtually indistinguishable from that of the confidential employee. This Comment will endeavor to analyze the Board's action and to identify its underlying rationale.

II. BACKGROUND

The National Labor Relations Act of 1935 defined an employee in section 2(3) as "any employee" but specifically excluded agricultural laborers, domestic servants, and members of the employer's immediate family.[4] In order to further the purpose of the Act, which was to encourage collective bargaining and to provide labor with bargaining power equal to that of management,[5] the term "employee" has been construed broadly by the courts to cover all employees who do not fall within a specific exclusion.[6] As a result of this congressional and judicial encouragement, between 1935 and 1947 union membership increased from 3,000,000 to 15,000,000, and in industries like coal mining, construction, and transportation, as many as 80 percent of the employees came

2. 168 N.L.R.B. 921 (1967), *on application for enforcement order*, 412 F.2d 324 (8th Cir. 1969), *on remand*, 185 N.L.R.B. No. 83, 75 L.R.R.M. 1068 (1970), *enforcement denied*, 446 F.2d 602 (8th Cir. 1971).

3. 190 N.L.R.B. No. 66, 77 L.R.R.M. 1265 (1971), *motion to reconsider*, 196 N.L.R.B. No. 127, 80 L.R.R.M. 1099 (1972).

4. 49 Stat. 450. The only other main classification found in the NLRA was that of "employer," defined in § 2(2) to include "any person acting in the interest of an employer, directly or indirectly . . . ." Under the NLRA it was recognized that one could occupy a dual status in relation to the definition of employer and employee; *i.e.* in relation to his employer, one might be an employee under the Act, but in relation to the persons under him, one could at the same time he an employer. NLRB v. Armour & Co., 154 F.2d 570, 574 (10th Cir. 1946).

5. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 126, *rehearing denied*, 322 U.S. 769 (1944); *see* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

6. For example, the Supreme Court has included independent contractors within the definition of "employee," NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). In the *Hearst* case, traditional common-law concepts defining the legal relationship of master and servant were rejected and the proper approach was delineated as one that defined "employee" in terms of the history and purpose of the statute. *Id.* at 124. In addition, the Court has construed the term "employee" to include foremen and other supervisory personnel. Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947); *see* American Steel Foundries v. NLRB, 158 F.2d 896, 898 (7th Cir. 1946).

under collective bargaining agreements.[7] When industry-wide strikes threatened to cripple the national economy in 1946, however, antiunion sentiment arose mong the electorate and within Congress,[8] leading to the passage of an amended version of the NLRA in the Taft-Hartley Act of 1947.[9] The amended NLRA abandoned "the policy of affirmatively encouraging the spread of collective bargaining and [attempted to strike] a new balance between protection of the right to self-organization and various opposing claims"[10] by instituting a public labor policy "of modified encouragement coupled with regulation."[11] Although it retained the basic definition of "employee" as set forth in section 2(3), the amended version of the NLRA expressly excluded two classes of employees that the courts previously had considered within the statutory definition: the independent contractor and the employee exercising supervisory authority.[12] This addition thus brought to a total of five the number of specific statutory exclusions from the Act's definition of "employee."

With the NLRA's broad definition of "employee" and its congressional purpose as statutory guidelines, the National Labor Relations

7. ABA SECTION OF LABOR RELATIONS LAW, THE DEVELOPING LABOR LAW 35 (Morris ed. 1971).

8. Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 288-89 (1960-61); *see* Aaron, *Amending the Taft-Hartley Act: A Decade of Frustration*, 11 IND. & LAB. REL. REV. 327, 328 (1957-58). During the first week of the 1946 congressional session more than 200 bills were introduced dealing with labor relations varying in degrees of extremism. ABA SECTION OF LABOR RELATIONS LAW, *supra* note 7, at 36-39; *see* Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 48 (1947).

9. *See* Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136. The basic finding of the LMRA was that the activities of the unions, as well as the activities of the employer, were a potential source of obstruction to the free flow of commerce and a potential source of industrial strife. *See* 23 NOTRE DAME LAW. 238, 241 (1947-48). For a statement of the official congressional findings see 29 U.S.C. § 151 (1970).

10. Cox, *supra* note 8, at 4. Professor Cox directly attributes this change in policy to a belief that unions were so strong that "legislative action was required to redress the balance of power in the collective bargaining process." *Id.* at 44. *See* Reilly, *supra* note 8, at 285.

11. A. SLOANE & F. WITNEY, LABOR RELATIONS 104 (2d ed. 1972).

12. 29 U.S.C. § 152(3) (1970): "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer . . . 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 . . . ." The effect of these additional statutory exclusions was to directly overrule prior court decisions. *See* cases cited note 5 *supra*; NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571 (6th Cir. 1948); L.A. Young Spring & Wire Corp. v. NLRB, 163 F.2d 905 (D.C. Cir. 1947) (2 early cases recognizing the change wrought by the LMRA on the status of supervisors under NLRA).

Board has been delegated the function of determining, on a case-by-case basis, the precise parameters of the term "employee."[13] In making these determinations, the Board necessarily performs a pragmatic function, fusing an appreciation for the economic realities of a particular industry with the implementation of congressional aims.[14] At least in theory, its everyday experience in the administration of the statute gives the Board a familiarity with "the circumstances and background of employment relationships in various industries, with abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers."[15] This experience enables the Board to segregate the communities of interest in working situations on wages, hours, and conditions of employment,[16] and thereby determine the scope of the term "employee" in a given case. The Board, however, has gone beyond its express authorization to proceed on a case-by-case basis, and has isolated and excluded two classes of employees from coverage under the Act because of their close relationship with management: employees who have access to information or assist management in the formulation of employer labor relations policies (confidential employees), and employees who are involved in the formulation or effectuation of management policies (managerial employees). These employees are excluded to the same extent as statutorily excluded employees—all are outside the Act[17] for purposes of the employee rights accorded by section 7[18] (including bargaining unit representation) and denied protection

13. The NLRB is given both judicial and investigatory powers. *See* 29 U.S.C. §§ 153, 160-61 (1970).

14. NLRB v. E.C. Atkins & Co., 331 U.S. 398, 403 (1947); *cf.* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

15. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944).

16. *See* ABA SECTION OF LABOR RELATIONS LAW, *supra* note 7, at 217-18. Professor Morris listed several factors which should go into the process of segregating the community of interests: method of wage computation; hours of work; benefits; common supervisor; qualifications required; training and skills developed; difference in job functions and the amount of working time spent from the plant situs; contact with other employees; history of collective bargaining; and the integration of work functions with other employees.

17. *See* Iowa Indus. Hydraulics Inc., 169 N.L.R.B. 205, 210-11 (1968); Swift & Co., 115 N.L.R.B. 752, 753 (1956); W. WILSON, LABOR LAW HANDBOOK ¶ 216, at 85 (1963).

18. 29 U.S.C. § 157 (1970): "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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . ."

from what otherwise would be unfair labor practices under section 8,[19] despite the lack of any reference to either classification in the language of the NLRA.

Authority for Board exclusion of managerial employees is based on two closely related theories. First, in the process of unit determination authorized by section 9(b),[20] the Board must weigh the "policy of the Act to insure employees the fullest freedom in exercising their rights . . . [with] the interest of an . . . employer in maintaining . . . labor relations."[21] Consequently, the power to exclude a managerial employee, even though not specifically provided for in the statute, could emanate from the discretionary power of the Board to formulate appropriate bargaining units.[22] Secondly, a more cogent rationale suggests that the Board impliedly characterizes managerial employees as "supervisory employees" and brings them within the ambit of a specific statutory exclusion.[23] Although neither of these explanations is entirely satisfactory, the power to exclude managerial employees from coverage of the Act has been exercised by the Board without challenge for the past 37 years.[24]

An examination of Board pronouncements indicates that several standards have been considered in the determination of managerial status. The most frequent formulation of the test for a managerial employee is whether the employee in question is one "whose interests are identified with management, and who may be regarded as a representa-

19. 29 U.S.C. § 158 (1970). This section makes it an unfair labor practice for the employer to interfere with employees in the exercise of § 7 rights, to interfere with the formation of or operation of any labor organization, to utilize hiring or firing techniques to discourage membership in a labor organization, to discriminate against an employee because he has filed charges with the Board, or to refuse to bargain collectively. This section also contains similar caveats with respect to the union organization. It is possible that a managerial employee, even though excluded from the Act, would be afforded some protection in a situation where discrimination against him would have the effect of restraining or coercing other employees in the exercise of their organizational rights. *See* NLRB v. Dal-Tex Optical Co., 310 F.2d 58, 62 (5th Cir. 1962).

The proposition that an employee can be excluded from a bargaining unit but still be included under the protection of § 8 has been rejected as anomalous. Thus in the past, inclusion or exclusion from the Act has been considered total. NLRB v. Wheeling Elec. Co., 444 F.2d 783, 788 (4th Cir. 1971).

20. 29 U.S.C. § 159(b) (1970): "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ."

21. Continental Ins. Co. v. NLRB, 409 F.2d 727, 728 (2d Cir. 1969).

22. *See* International Metal Prods. Co., 107 N.L.R.B. 65, 66-67 (1953).

23. C. MORRIS, *supra* note 7, at 217; *cf.* Ross Porta-Plant, Inc. v. NLRB, 404 F.2d 1180 (5th Cir. 1968).

24. *See* Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947).

tive of management . . . ."[25] A frequent use of this "alignment of interest" phraseology may be seen in situations in which an employee's inclusion in a bargaining unit with rank and file employees may produce a division of loyalties; for example, when the employee must inspect the finished product for quality.[26] Interest alignment has also been utilized when an employee's job entails work independent of the rank and file,[27] or causes the employee to have more contact with management than the average member of the appropriate unit.[28] Secondly, the Board has frequently characterized "those who formulate, determine and effectuate an employer's policies" as managerial employees.[29] Whether an employee formulates, determines and effectuates company policy is determined in most cases by the quantum of discretion exercised by the employee in relation to the pre-existing policy guidelines of management,[30] and the amount of independent judgment exerted in relation to the amount exercised by rank and file members of the unit in question.[31] The exercise of independent judgment alone is not sufficient, because the Board has held that the use of technical or professional

25. J.L. Brandeis & Sons, 54 N.L.R.B. 880, 884 (1944); *see* W. WILSON, *supra* note 17, ¶ 218, at 88.

26. *See* Allis-Chalmers Mfg. Co. v. NLRB, 162 F.2d 435, 439 (7th Cir. 1947); Brooklyn Borough Gas Co., 110 N.L.R.B. 18, 21 (1954).

27. *See* Vulcan Corp., 58 N.L.R.B. 733, 736 (1944).

28. *See* Grocers Supply Co., 160 N.L.R.B. 485, 488 (1966); Cherry & Webb Co., 93 N.L.R.B. 9, 10 (1951); American Locomotive Co., 92 N.L.R.B. 115, 118 (1950). Interest alignment has been alternatively phrased in terms of "whether an individual, because of his relation with a supervisor or officer of the employer . . . [has] a special status as to warrant his exclusion from the bargaining unit." *See* W. WILSON, *supra* note 17, ¶ 218, at 88. In 1966, the D.C. Circuit, in Retail Clerks Int'l Ass'n v. NLRB, 366 F.2d 642, attempted to synthesize into a workable set of standards the Board's prior pronouncements concerning the determination of managerial status. The following 2-part test was set forth in *Retail Clerks*: first, "whether, even if [the employees in question] do not supervise other workers, their position with the employer presents a potential conflict of interest between the employer and the workers"; and secondly, whether the employees "formulate, determine and effectuate employer's policies," or whether they "have discretion in the performance of their jobs" and do not have to "conform to an employer's established policy . . . ." *Id.* at 644-45. This formulation has been utilized with apparent facility by both the Board, *see* Iowa Indus. Hydraulics, Inc., 169 N.L.R.B. 205, 211 (1968), and by the courts, *see* Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir. 1970).

29. *See, e.g.*, International Ladies' Garment Workers' Union v. NLRB, 339 F.2d 116, 123 (2d Cir. 1964), *citing* AFL-CIO, 120 N.L.R.B. 969 (1958); Eastern Camera & Photo Corp., 140 N.L.R.B. 569, 571 (1963); Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947).

30. In Eastern Camera & Photo Corp., 140 N.L.R.B. 569 (1963), the Board stated that "the determination of an employee's 'managerial' status depends upon the extent of his discretion, although even the authority to exercise considerable discretion does not render an employee managerial where his decision must conform to the employer's established policy." 140 N.L.R.B. at 571. *See also* Iowa Indus. Hydraulics, Inc., 169 N.L.R.B. 205, 212 (1968); Kitsap County Auto. Dealers Ass'n, 124 N.L.R.B. 933, 934 (1959).

31. *See* Allis-Chalmers Mfg. Co., 158 N.L.R.B. 670, 674 (1966).

judgment will not make one a managerial employee.[32] Furthermore, it has been held that mere access to information essential for policy determination, and attendance at management meetings do not constitute policy "formulation."[33] Often in applying these standards the Board has focused on the particular job function of the employee; for example, if an employee is in a position to extend the credit of his employer,[34] he is managerial.[35]

The test for confidential employee classification has remained relatively unchanged since 1946,[36] when the Board determined that confidential status depended not only on "access to . . . data bearing directly upon employees' labor relations," but also upon whether the employee

32. Iowa Indus. Hydraulics, Inc., 169 N.L.R.B. 205, 211-12 (1968). In this case, the Board set forth what it considered basic areas of managerial decision making: investment of capital; choice of goods to be manufactured; selection of customers and suppliers; and the establishment of pricing and credit policies. *Id.* at 211. *See* Yale & Towne Mfg. Co., 60 N.L.R.B. 626, 628-29 (1945) (the job of a time-study employee gave him a "controlling role in the setting of wage rates," a "function of management," with the result that the employee should be excluded).

33. Newark Stove Co., 143 N.L.R.B. 583, 586-87 (1963).

34. *See* Kearney & Trecker Corp., 121 N.L.R.B. 817, 822 (1958); Mack Trucks, Inc., 116 N.L.R.B. 1576 (1956); Girdler Co., 115 N.L.R.B. 726, 729 (1956). *Contra*, St. Cloud Rendering Co., 116 N.L.R.B. 1069, 1072 (1952).

The following are broad job classifications that consistently have been viewed as managerial by employers and generally found to be so by the Board: employees with the power to pledge the employer's credit, Grocers Supply Co., 160 N.L.R.B. 485 (1966); Eastern Camera & Photo Corp., 140 N.L.R.B. 569 (1963); Kearney & Trecker Corp., 121 N.L.R.B. 817 (1958); Peninsular Metal Prods. Corp., 116 N.L.R.B. 452 (1956); Swift & Co., 115 N.L.R.B. 752 (1956); Girdler Co., 115 N.L.R.B. 726 (1956); Curtiss-Wright Corp., 103 N.L.R.B. 458 (1953); American Locomotive Co., 92 N.L.R.B. 115 (1950). *Contra*, Continental Ins. Co. v. NLRB, 409 F.2d 727 (2d Cir. 1969); Oscar Ewing Co., 124 N.L.R.B. 941 (1959); Kitsap County Auto. Dealers Ass'n, 124 N.L.R.B. 933 (1959); St. Cloud Rendering Co., 116 N.L.R.B. 1069 (1956). Time checkers and time study personnel, Yale & Towne Mfg. Co., 60 N.L.R.B. 626 (1945); Oliver Farm Equip. Co., 53 N.L.R.B. 1078 (1943); Bendix Aviation Corp., 47 N.L.R.B. 43 (1943). *Contra*, Ford Motor Co., 66 N.L.R.B. 1317 (1946). Unit managers, department managers, and local representatives, Garden Island Publishing Co., 154 N.L.R.B. 697 (1965); General Tel. Co., 112 N.L.R.B. 1225 (1955). *Contra*, Eastern Camera & Photo Corp., 140 N.L.R.B. 569 (1963); Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320 (1947). Assistant Managers, J.L. Brandeis & Sons, 54 N.L.R.B. 880 (1944). *Contra*, Newark Stove Co., 143 N.L.R.B. 583 (1963). Work expediters, ACF Indus. Inc., 145 N.L.R.B. 403 (1963); Bendix Aviation Corp., 47 N.L.R.B. 43 (1943). Engineers, NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169 (2d Cir. 1968); American Locomotive Co., 92 N.L.R.B. 115 (1950); Consolidated Vultee Aircraft Corp., 54 N.L.R.B. 103 (1943).

35. These "credit" cases seem to rely on the idea that the pledging of credit is in itself a "managerial prerogative," rather than upon a consideration of the amount of credit pledged or the amount of discretion involved. *See* Swift & Co., 115 N.L.R.B. 752, 753 (1956). *Contra*, Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir. 1970). The Board has also determined that possession of trade secrets, which if disclosed would be injurious to the employer, will not alone cause one to obtain managerial status. *See* Allied Chem. & Dye Corp., 116 N.L.R.B. 1649, 1652 (1956); Oliver Farm Equip. Co., 53 N.L.R.B. 1078, 1081-82 (1943); *cf.* Yale & Towne Mfg. Co., 60 N.L.R.B. 626, 628, (1945).

36. *See* Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946).

must "assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations."[37] The exclusion of confidential employees from the coverage of the Act is consistent with the Act's primary purpose of promoting industrial harmony through collective bargaining,[38] in that the employee should not be placed in a position involving a potential conflict of interest, and management should not be forced "to handle labor relation matters through employees represented by the union with which the company is required to deal . . . ."[39] Thus, in contrast to its application of a broad managerial classification standard to all areas of management policy determination, the Board has precisely defined the confidential employee classification and narrowly limited its scope to labor relations activities.[40]

Once the Board has determined that either managerial or confidential status exists, judicial review is limited. The courts employ the standard of "substantial evidence"; the Board's determination cannot be overturned if it is "supported by substantial evidence on the record considered as a whole," with special cognizance of the "infinite variations and gradations of authority [that] can exist within any one industrial complex," and the Board's expertise in dealing with these determinations.[41]

III. The Board and the Eighth Circuit: Recent Conflict Over the Managerial Employee

In *North Arkansas Electric Cooperative*,[42] the employer, North Arkansas, had dismissed one of its employees, an electrification advisor named Lenox, for failure to obey a request to remain neutral during a union certification election. The employer argued that this action did not constitute an unfair labor practice under section 8(a) of the Act

37. This definitional test for confidential status was expressly reaffirmed in 1956, in B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956), and the modern formulation requires essentially the same standard: whether one "assists and acts in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations . . . ." *See* Westinghouse Elec. Corp. v. NLRB, 398 F.2d 669, 670 (6th Cir. 1968).

38. NLRB v. Wheeling Elec. Co., 444 F.2d 783 (4th Cir. 1971).

39. Westinghouse Elec. Corp. v. NLRB, 398 F.2d 669, 670 (6th Cir. 1968); *see* NLRB v. Wheeling Elec. Co., 444 F.2d 783, 788 (4th Cir. 1971).

40. *See* Westinghouse Elec. Corp. v. NLRB, 398 F.2d 669, 670-71 (6th Cir. 1968).

41. NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169, 1172-73 (2d Cir. 1968).

42. 168 N.L.R.B. 921 (1967). The employee, Lenox, was classified as a manager on the employer's wage schedule, was paid a salary on a monthly basis within the range of a manager's salary, was given travel insurance as were other managers, made recommendations, attended management meetings, was given an advertising budget, handled customer complaints, and represented North Arkansas before civic organizations. *Id.* at 922-23.

because Lenox was a managerial employee.[43] In opposition, the General Counsel argued that (1) Lenox's position was not managerial, and (2) even if it were, he should nevertheless be protected from unfair labor practices.[44] Having rejected the General Counsel's second contention, the trial examiner found no exercise of discretion by Lenox outside limits set by his employer, and no potential conflict of interest from his inclusion in the bargaining unit; consequently, the examiner concluded that Lenox was not a managerial employee. The Board adopted the trial examiner's determination, stating that the Act is "remedial in character" and should be "broadly construed to accomplish its purpose" of protecting the organizational activities of employees, and therefore concluded that Lenox was an "employee" within the meaning of section 2(3) and that his discharge constituted an unfair labor practice.

On the Board's application for enforcement, the Eighth Circuit reversed,[45] finding that the determination of nonmanagerial status was "neither warranted by the record nor supported in law."[46] The court felt that the Board's finding might have been unduly influenced because the case involved an unfair labor practice question rather than a bargaining unit determination, and emphasized that this factor should have no bearing on the determination of managerial status.[47] The court, however, remanded for a specific determination whether a managerial employee can nevertheless be protected by the Act against employer practices that would constitute unfair labor practices if directed against employees covered by the Act.

Although the question presented by the Eighth Circuit had been answered negatively in dicta on the first hearing of *North Arkansas*,[48] the Board on remand undertook to reformulate the definition and scope of the managerial employee exclusion.[49] Recognizing that no precise formulation of the term "managerial employee" had ever been successfully attempted, the Board declared that standards used in unit determination cases were not "genuinely relevant" to cases involving unfair labor practices. For unfair labor practice cases, the Board stated that

43. The testimony indicated that Lenox had attended a meeting at which the union had been discussed, and had made remarks concerning the IBEW. NLRB v. North Arkansas Elec. Cooperative, Inc., 412 F.2d 324, 325 n.1 (8th Cir. 1969).

44. 168 N.L.R.B. at 924.

45. NLRB v. North Arkansas Elec. Cooperative, Inc., 412 F.2d 324 (8th Cir. 1969).

46. *Id.* at 327-28.

47. *Id.*

48. 168 N.L.R.B. at 924.

49. North Arkansas Elec. Cooperative, Inc., 185 N.L.R.B. No. 83, 75 L.R.R.M. 1068 (1970).

managerial status should turn on whether one has "either real or apparent authority to speak as an 'employer' in a labor relations or employee relations context."[50] In other words, the Board proposed to apply old standards of managerial status only in unit determination cases and to employ a narrower definition of managerial employee in unfair labor practice situations: one might be a managerial employee in the sense that he lacked the requisite community of interest necessary to be included in a proposed unit but still be entitled to the Act's protection against unfair labor practices. Applying its new standard, the Board found no support for the premise that Lenox "participated in the formulation, determination, or effectuation of policy with respect to employee relations matters," or that any other employee was led to believe that Lenox had "substantial responsibilities in this area" to the extent that his views would be considered those of North Arkansas, or that there was any conflict of interest in Lenox's performance of his job and potential union activity.[51] The Board again found "employee" status and that the discharge was an unfair labor practice.

On a second petition by the Board for an enforcement order, the Eighth Circuit again reversed,[52] holding that managerial employees are not protected from unfair labor practices under the National Labor Relations Act. In rejecting the Board's new position, the court relied on both the legislative history of the 1947 amendments and prior Board policies. Within the legislative history, the court found "nothing . . . to indicate Congress intended the word 'employee' to have one definition for the purpose of determining a proper bargaining unit and another definition for the purpose of determining which employees are protected from being fired for union activity." Furthermore, the court perceived an implied congressional intent that the pre-1947 Board practice of excluding managerial employees was intended to be continued, because Congress specifically excluded from the Act's coverage supervisory personnel, who previously had been considered as employees by the Board,[53] but did not expressly extend coverage of the Act to managerial personnel, who previously had been excluded by the Board.[54] The Court also found support for its holding in the Board's own prior interpretation of the legislative history, which identified the congressional intent

50. 75 L.R.R.M. at 1069.
51. *Id.*
52. NLRB v. North Arkansas Elec. Cooperative, Inc., 446 F.2d 602 (8th Cir. 1971).
53. *See* Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).
54. 446 F.2d at 607-08.

as exclusion of "all individuals allied with management,"[55] and in the long-standing Board policy excluding managerial employees from coverage under the Act. The court therefore found that protection against unfair labor practices should be afforded to only those employees properly included in a bargaining unit, and concluded that the Board's redefinition would improperly limit "the class of employees not protected by the Act."[56]

Before the Eighth Circuit delivered its second *North Arkansas* decision, however, the Board had expanded its redefinition of the managerial employee exclusion to unit determination questions in the case of *Textron, Inc.*[57] There, the union sought to create a unit of all employees in Textron's Purchasing and Procurement Department or, if a separate unit was inappropriate, to include those employees in an existing unit. The employer argued that neither unit was appropriate, because the buyers were managerial employees, and under the Board's second *North Arkansas* rationale, managerial employees were within the Act's coverage only for unfair labor practice purposes and then only when not involved with labor relations policy formulation. The Board stated, however, that under its *North Arkansas* doctrine, managerial employees are presumptively covered by the Act, and consequently, are entitled both to protection from unfair labor practices and to "the right to be represented for the purposes of collective bargaining . . . unless there is some cogent reason for denying such representation."[58] The employer then asserted that such a "cogent reason" existed, because the employee buyers had authority to extend the company's credit and, if unionized, would be confronted with a conflict of interest when deciding whether to purchase union or nonunion products.[59] In response, the Board noted that employee discretion was limited to employer-established guidelines, so that with strict enforcement by the employer the claimed conflict of interest could be avoided. The Board therefore concluded that the appropriate unit should include the employees in question.[60]

55. 446 F.2d at 608, *citing* Swift & Co., 115 N.L.R.B. 752, 753-54 (1956).

56. 446 F.2d at 609-10.

57. 190 N.L.R.B. No. 66, 77 L.R.R.M. 1265 (1971).

58. 77 L.R.R.M. at 1266.

59. *Id.*

60. The Board noted that the ability to extend the company's credit was bounded by company-established guidelines, and the fears concerning "make or buy" decisions and a union purchasing bias could be alleviated through the establishment of other guidelines, especially since the buyers could not go above a $5000 limit without company approval. 77 L.R.R.M. at 1266. *But see* Federal Tel. & Radio Co., 120 N.L.R.B. 1652, 1653-54 (1958) (buyer who could extend up to $2500 was determined to be managerial).

Textron then sought reconsideration by the Board in light of the Eighth Circuit's rejection of the Board's new definition for managerial employee in the second *North Arkansas* decision.[61] In denying the motion, the Board took issue with the Eighth Circuit's view of the relevant legislative history, by stating that congressional silence with respect to managerial employees does not indicate either approval or disapproval of Board policy in this broad area, and does not suggest that Congress considered any facet of this problem other than the Board's treatment of personnel associated with the formulation and implementation of the labor relations policies.[62] The Board recognized the inconsistency of its prior holdings with its present position, but nevertheless determined that the critical question in the determination of managerial employee status is "whether there is a basis in the statute or in common sense for denying statutory protection and representational rights to all employees who have *any* discretion in the formulation, determination, and effectuation of *any* employer policy."[63] The Board found a basis for exclusion only in the labor relations area because the potential for conflict of interest is greatest among managerial employees whose job functions are connected with this field. Thus the Board declared that the "fundamental touchstone" of future analysis should be whether a conflict of interest exists between the decision-making function of the managerial employee's job and his membership in the labor organization. If the likelihood of such conflict is small, the employee should be accorded full protection under the Act.[64]

In sum, the Board has indicated forcefully in *Textron* that the classification of an employee as managerial under prior standards does not now automatically exclude him from coverage under the Act. Under the Board's view, a second analytic step must be taken—the allegedly managerial employee must be found to be involved with labor relations policy formation. This second step is identical to the "confidential" employee classification in that both focus on an involvement of the employee with management labor policy, but the confidential class requires only "contact" with labor policy to trigger exclusion, while the initial step in the managerial classification necessitates involvement with management policy formulation or effectuation before exclusion will apply. Consequently, it does not seem necessary to go through the motions of applying previous standards for determining managerial em-

61. Textron, Inc., 196 N.L.R.B. No. 127, 80 L.R.R.M. 1099 (1972).
62. 80 L.R.R.M. at 1100.
63. *Id.* at 1101.
64. *Id.*

ployee status, since the employee will in effect be excluded or not on the basis of the confidential employee test. Thus the Board's present approach apparently has destroyed the separate identity of the managerial employee classification by means of a merger with the defining criteria applied to the confidential employees.

IV. THE NEW MANAGERIAL EMPLOYEE: AN ANALYSIS

In discharging the responsibilities placed on it by Congress under the NLRA, the Board necessarily attempts to construe the broad language of the statute to effectuate the congressional purpose in light of the underlying industrial circumstances. As a result, a change in economic conditions may lead to an alteration of the legal consequences of the statutory language of the NLRA.[65] Thus, constant reappraisal of old standards and definitions is the inevitable result of the Board's unique role in national labor policy formulation. In *Textron* and *North Arkansas*, this reappraisal has effected an apparent coalescence of the managerial and confidential employee classifications.[66] The courts, however, have yet to approve the Board's new approach and additional employer challenges are almost certain to force further litigation before the Board and courts over the managerial employee classification. To prepare for this event, it will be necessary to isolate the underlying factors that motivated the Board's change in position, and to identify the obstacles that threaten to impede judicial acceptance of the Board's new position.

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65. One commentator has noted that "[i]nflation, rising unemployment, growth of corporate enterprises, and mergers are the source of . . . new and different issues—both in the representational area and in the unfair labor practice area. Prominent among these are unit issues (citations omitted), where hitherto settled lines of authority are being reexamined . . . ." Ordman, *The National Labor Relations Act: A Current and Prospective View*, N.Y.U. 23d ANN. CONF. ON LABOR 3 (1971). The Supreme Court also has indicated that economic changes that produce "[i]nequality of bargaining power in controversies over wages, hours, and working conditions may as well characterize the status of one group [of employees] as of [another]." NLRB v. Hearst Publications, Inc., 322 U.S. 111, 127 (1944).

66. The Board's process of reevaluation in *North Arkansas* and *Textron* is not without precedent. In International Metal Prods. Co., 107 N.L.R.B. 65 (1953), the Board's policy of automatically excluding from the bargaining unit relatives of management who were not statutorily excluded under § 2(3) was reexamined, and as a result, the Board determined that employees should not be excluded from coverage when the familial relationship did not negate the mutuality of interest the employee shared with his fellow employees. *Id.* at 66-67. Similarly, in Quaker City Life Ins. Co., 134 N.L.R.B. 960 (1961), the Board changed a policy that had declared statewide units to be appropriate for insurance agency personnel. Since statewide units had not developed as originally forecast, there was "no longer any rational basis [from the Board's point of view] for applying different rules of organization to the insurance industry than are applied to other industries." *Id.* at 962. Major realignment of Board policy is not a frequent occurrence, but should continue to be an accepted means of effectuating changes in national labor policy.

The Board did not articulate the reasons behind its adoption of a new definition of managerial employee except to state that it was attempting to restore a common-sense approach to the plain meaning of the statute.[67] In the past, criticism has been leveled at the Board for its failure to set out operative standards by which the courts could judge managerial status.[68] By limiting the area of concern to employee participation in labor policy formulation, the Board's new test seems to offer a reasonably workable guideline for the courts. More importantly, the Board's new position implies that its attitude is changing toward the relationship of lower level management personnel to their employers. Just as the foreman's drive for unionization in 1946 might have been a reaction to the failure of management to recognize and deal with the foreman's interests,[69] the Board may now sense a deterioration of the community of interest that has been thought to exist between an employer and a managerial employee. Under prior standards, a managerial employee was viewed as one who exercised a certain amount of discretion in the formulation or effectuation of management policies and thus was management oriented.[70] Recently, however, accelerated corporate growth and a rapid advance in technology have given rise to a greater concentration of economic power on the side of management[71] and a concomitant bureaucratization of jobs that involve discretionary activities. For example, in white collar occupations the jobs are increasingly being made routinely bureaucratic, and involve less supervisory duties, public contact, and upward mobility.[72] Thus many white collar workers' individuality and sense of alignment with management will tend to deteriorate.[73] Furthermore, even if there had not been any decline in the managerial employee identification with management, the Supreme Court has stated in dicta that identification with management for the proper discharge of one's job duties is not necessarily incompatible with identification with a union in labor relations matters.[74] The Board apparently has employed this view in the context of the managerial employee problem by balancing the competing interests of the employer in employee loyalty with the statutory assurance of full freedom of

67. Textron, Inc., 196 N.L.R.B. No. 127, 80 L.R.R.M. 1099, 1101 (1972).

68. *See, e.g.*, Retail Clerks Int'l Ass'n v. NLRB, 366 F.2d 642, 644-45 & n.5 (D.C. Cir. 1966).

69. Cox, *supra* note 8, at 4-5.

70. *See* notes 25-35 *supra* and accompanying text.

71. Ordman, *supra* note 64, at 3.

72. *See* A. SLOANE & E. WITNEY, *supra* note 11, at 17-18.

73. *Id.*

74. NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).

association and collective effort for all employees within its scope.[75] The result of this balancing has been the narrowing of potential exclusion from the Act's coverage by a narrowing of the function in terms of which the managerial classification is defined—a narrowing that brings administrative interpretation more closely in line with the plain meaning of section 2(3).

Another factor appears to have played a significant role in the Board's action. In *North Arkansas*, the Board was confronted with a situation in which equitable considerations may have indicated a need for protection of the employee, while the nature of the employee's job dictated a managerial classification and thus exclusion from the Act's coverage. Initially, the Board tried to skirt the issue by classifying the employee as nonmanagerial, but the Eighth Circuit immediately rejected this conclusion. Thereupon, the Board began to alter the effect of a managerial classification so that managerial status no longer would dictate an automatic exclusion from coverage under the Act. The old managerial test is now only part of the question that determines an individual's status; the focus is now on whether the employee is involved in labor relations policy formulation. Because the latter test is more precise and, in the Board's view, better able to effectuate the purpose of the NLRA, the Board thus may be able in the future to achieve more equitable results in both unit determination and unfair labor practice situations.

Although the rationale behind the Board's action appears persuasive, there remains the obstacle of the Eighth Circuit's assertion in *North Arkansas* that the legislative history of the 1947 amendments reveals a congressional intent to completely exclude managerial employees, as defined under the Board's previous standards, from coverage under the Act. It should be noted, however, that immediately after passage of the Taft-Hartley Act, Professor Cox warned against heavy reliance on legislative history in interpreting the Act since the turmoil surrounding the passage of the Act was so feverish.[76] Furthermore, even if legislative history is relied upon, the Eighth Circuit's analysis is not persuasive and, if anything, supports the Board's position. The legislative history relied upon by the court made only one clear reference to the Board's policy of excluding certain classes of employees: that labor relations personnel and employees in employment divisions would continue to be excluded by the Board.[77] Since the Board's *Textron* position

75. *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1966).
76. Cox, *supra* note 8, at 48.
77. NLRB v. North Arkansas Elec. Cooperative, Inc., 446 F.2d 602, 605-06 (8th Cir. 1971).

appears to follow this legislative guideline exactly, the court's reliance on the same language to reverse the Board seems clearly misplaced. In addition, the implied congressional intent argument used by the court—that a congressional intent to ratify the Board's past exclusion of managerial employees could be found from both the statute's specific exclusion of supervisors, a category previously included by the Board, and its silence concerning managerial employees, a category previously excluded—has been rejected as a method of statutory construction by the Supreme Court.[78] When these considerations are added to the court's own admission that no clear proof of congressional intent can be gleaned from the legislative history because no specific reference to the term "managerial employee" can be found in any bill or report,[79] the court's use of legislative history does not seem warranted. On the contrary, these factors at least demonstrate that the legislative history does not indicate a congressional intent contrary to the Board's action in redefining the concept of managerial employee.

78. *See, e.g.*, Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431-33 (1955).
79. 446 F.2d at 608.