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Nlrb Treatment Of Personnel Under The Nlra

NLRB TREATMENT OF PERSONNEL UNDER THE NLRA

The National Labor Relations Act (NLRA or Act)[1] protects workers who qualify as employees[2] under the Act by guaranteeing employees the right to organize and bargain collectively.[3] The Supreme Court has recognized that the definition of "employee" is broad because Congress intended the National Labor Relations Board (NLRB or Board)[4] to inter-

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[1] 29 U.S.C. §§ 151-169 (1976 & Supp. IV 1980). Congress enacted the National Labor Relations Act (NLRA or Act) in 1935. Wagner Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1976 & Supp. IV 1980)). Congress passed the Act to eliminate inequality of bargaining power between labor and management in an effort to minimize industrial strife. *See* 29 U.S.C. § 151 (1976). In 1947, Congress expanded and amended the NLRA by enacting the Labor Management Relations Act (LMRA). Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-197 (1976 & Supp. IV 1980)). Title I of the LMRA encompasses 29 U.S.C. §§ 151-169 (1976 & Supp. IV 1980) and continues to be called the National Labor Relations Act. *See* 29 U.S.C. § 167 (1976).

[2] 29 U.S.C. § 152(3) (1976). Section 2(3) of the Act defines "employee" as any employee and does not limit the term to employees of a particular employer. National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1976). The Act expressly excludes from the definition of employee any individual employed as an agricultural laborer, as a domestic servant, or as a supervisor. *Id.* The Act also excludes from coverage any individual with status as an independent contractor or employed by a parent or spouse. *Id.* Furthermore, the Act excludes employees of employers subject to the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976 & Supp. IV 1980), and employees of persons outside the scope of the Act's definition of employer. National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1976). The NLRA expressly excludes from the meaning of "employer" the United States government, any state or local government, persons subject to the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976 & Supp. IV 1980), and any labor organization. National Labor Relations Act § 2(2), 29 U.S.C. § 152(2) (1976). The Wagner Act contained a definition of "employee" at section 2(3) and the Taft-Hartley Act amended the definition. Wagner Act, ch. 372, § 2(3), 49 Stat. 449, 450 (1935), *amended by* Taft-Hartley Act, ch. 120, § 2(3), 61 Stat. 136, 137-38 (1947) (current version at 29 U.S.C. § 152(3) (1976)). Congress has not amended section 2(3) in relevant part since enacting the Taft-Hartley Act in 1947. Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-197 (1976 & Supp. IV 1980)); *see supra* note 1 (history of NLRA).

[3] 29 U.S.C. §§ 157, 158 (1976). Section 7 of the NLRA guarantees employees the right to organize, bargain collectively, and engage in concerted activities or to refrain from such activities. National Labor Relations Act § 7, 29 U.S.C. § 157 (1976). The Act further provides at section 8(a)(1) that an employer's interference with employees' rights to organize, bargain collectively, and engage in concerted activity under section 7 constitutes an unfair labor practice. *Id.* § 8(a)(1), 29 U.S.C. § 158(a)(1). Concerted activities include strikes, pickets, and other activities in which employees participate for their mutual aid or protection. *See* 29 U.S.C. § 157 (1976); *see generally* Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951).

[4] *See* 29 U.S.C. §§ 153-156 (1976). Congress established the National Labor Relations Board (NLRB or Board) as the administrative agency responsible for enforcement of the Act. *Id.* The Board consists of five members appointed by the President who serve staggered terms of five years each. *Id.* § 153(a). Congress empowered the Board to establish the rules necessary to administer the Act. *Id.* § 156. The Act authorizes the Board to hold hear-

pret and apply the definition[5] in accordance with the congressional policy of promoting collective bargaining in labor-management

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ings and elections regarding union representation and to prevent and remedy unfair labor practices. *Id.* §§ 159, 160.

In an unfair labor practice case, the General Counsel staff of the NLRB investigates the practice and determines if the particular charge warrants issuance of a complaint. 29 U.S.C. § 153(d) (1976); *see* Regulations Relating to Labor, 29 C.F.R. §§ 100.735-2(b), 101.2-101.16 (1982). At the close of the investigation, the Regional Director either recommends withdrawal of charges, dismisses the case, attempts settlement, enters an order, or initiates formal proceedings by filing a complaint specifying alleged violations of the NLRA. *Id.* §§ 101.5-101.9 (1982). The matter proceeds to a hearing before an Administrative Law Judge (ALJ), and the hearing, so far as practicable, adheres to the rules of procedure for the federal district courts. 29 U.S.C. § 160(b) (1976); 29 C.F.R. § 101.10 (1982). The ALJ files with the NLRB a decision of proposed findings of fact and recommendations. 29 C.F.R. § 101.11 (1982). After each party has an opportunity to file exceptions, the NLRB decides the case in light of the entire record. *Id.* § 101.12. Either by a panel of three Board members or by the entire Board, the NLRB issues an order. 29 U.S.C. § 153(b) (1976); 29 C.F.R. § 101.12 (1982). The Board has no inherent enforcement power but may petition an appropriate federal court of appeals for enforcement of any NLRB order. 29 U.S.C. § 160(e) (1976); 29 C.F.R. § 101.14 (1982). Furthermore, any person aggrieved may petition an appropriate court of appeals for relief from a Board order, and the Act provides the petitioner a choice of venue. 29 U.S.C. § 160(f) (1976); *see* 29 C.F.R. § 101.14 (1982).

In addition to granting the Board authority to prevent and remedy unfair labor practices, 29 U.S.C. § 160 (1976), Congress empowered the Board to conduct representation elections for collective bargaining and sets forth procedures by which the Board conducts elections and certifies bargaining representatives. *Id.* § 159. Additionally, the Act gives the Board broad discretion to determine an appropriate unit for collective bargaining and decide which employees properly belong in the unit. *Id.* § 159(b).

The Act sets a standard of judicial review whereby NLRB findings of fact are conclusive "if supported by substantial evidence on the record considered as a whole." *Id.* § 160(e)-(f); *see* NLRB v. Brown, 380 U.S. 278, 291 (1965); Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-91 (1951); *see also infra* note 8 (judicial review of Board decisions).

[5] *See* NLRB v. Hearst Publications, Inc., 322 U.S. 111, 119 (1944) (newsboys were employees covered by NLRA rather than independent contractors excluded from protection). Although Congress later repudiated the *Hearst* finding of employee status, *see infra* note 53 (*Hearst* discussed), the Supreme Court continues to recognize the *Hearst* approach of allowing the NLRB to interpret and apply the Act in accordance with the NLRA goal of promoting collective bargaining. *See* Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 168 (1971). The Court has limited the Board's power to interpret the definition of employee by restricting the definition to an individual who currently works for another for hire. *See Allied Chem.*, 404 U.S. at 166 (Court refused to extend definition of employee to include retired workers); 29 U.S.C. § 152(3) (1976) (definition of employee); *see also infra* note 7 (Board authority to formulate policies to implement Act).

The Supreme Court upholds NLRB determinations of employee status when the facts and law are sufficient to justify the finding. NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416, 431 (1947). The Court gives the Board broad discretion to determine if employees form an appropriate unit for collective bargaining. *Id.* at 422; *see* 29 U.S.C. § 159(b) (1976); *see also supra* note 4 (bargaining units). The Board distinguishes between employees who qualify under the NLRA definition and employees who possess the mutuality of employment interests necessary to form an appropriate collective bargaining unit. *See* New York Univ., 205 N.L.R.B. 4, 5-8 (1973) (part-time faculty members were employees but excluded from bargaining unit comprised of full-time employees because groups lacked necessary mutuality of interest).

relations.[6] Congress empowered the Board to enforce the Act and formulate policies necessary to administer the Act.[7] Furthermore, Congress outlined the role of the courts as policing bodies but limited the courts'

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[6] *See* 29 U.S.C. § 151 (1976). Congress declared the purpose of the Act to be the promotion of the free flow of commerce through the encouragement of employee organization and collective bargaining. *Id.*; *see also* S. REP. No. 1184, 73d Cong., 2d Sess. 10-11 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1099 (1949) [hereinafter cited as S. REP. No. 1184]; H.R. REP. No. 969, 74th Cong., 1st Sess. 6 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2910 (1935) [hereinafter cited as H.R. REP. No. 969]. Writing for the House Committee on Labor, Representative Connery outlined the three goals of the House version of the bill. H.R. REP. No. 969 at 6; *see* H.R. 7978, 74th Cong., 1st Sess. (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2857 (1935) [hereinafter cited as H.R. 7978]. The bill should promote equal bargaining power between labor and management, reduce causes of disputes in labor relations, and create enforcement mechanisms necessary in resolution of labor disputes. H.R. REP. No. 969 at 6.

[7] *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 192-95 (1941). The Supreme Court has approved Board formulation of policies and implementation of procedures to carry out the purposes of the NLRA. *Id.* at 192-95. When the Board acts reasonably within the purposes and goals of the Act, courts generally defer to the procedures and policies the Board outlines. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 10-18 (1976) [hereinafter cited as R. GORMAN]. When the literal provisions of the Act would undermine NLRA objectives, the Board must recognize the objectives and tailor Board action accordingly. Hertzka & Knowles v. NLRB, 503 F.2d 625, 630 (9th Cir. 1974).

A problem arises from the Board's ability to formulate policy because the Board's membership changes from year to year. *See* 29 U.S.C. § 153(a) (1976); *see also supra* note 4 (explanation of Board procedures). A striking example of policy changes due to changes in NLRB membership is in the area of regulation of representation elections. The 1982 case of *Midland Nat'l Life Ins. Co.* represents the Board's fourth position on a single issue. 263 N.L.R.B. No. 24, _____, 110 L.R.R.M. 1489, 1494 (1982). In *Midland* the NLRB held that the Board would no longer regulate the truth and falsity of campaign propaganda, leaving judgment of campaign misrepresentations by union or employer to the employees. *Id.* at _____, 110 L.R.R.M. at 1493. In the first decision of the issue, the Board announced a policy of screening campaign representations. Hollywood Ceramics Co., 140 N.L.R.B. 221, 224 (1962). With a change in membership, however, came a change in policy, and the Board reversed the *Hollywood Ceramics* rule, leaving interpretations of validity of representations entirely to the employees. Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311, 1312-13 (1977). But with another change in membership, the Board reversed *Shopping Kart* and returned to the *Hollywood Ceramics* standard. General Knit, Inc., 239 N.L.R.B. 619, 623 (1978); *see generally* A. COX, D. BOK, & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 159-161 (9th ed. 1981). The *Midland* case in turn rejected the *General Knit* approach and returned to the *Shopping Kart* rule by which the Board will not police election campaigns to the extent of determining the validity of campaign representations. 263 N.L.R.B. at _____, 110 L.R.R.M. at 1494. *Midland* illustrates the Board's latitude in formulating policies to implement the Act.

Practicing labor lawyers have expressed concern over the Board's tendency to change policies, calling for the NLRB to develop consistent and predictable guidelines. *See* Kelly & Fraser, *NLRB Preelection Standards Deemed Inconsistent*, Legal Times, Oct. 11, 1982, at 14, col. 1. Congress likewise has looked critically at the Board's policy-making ability, conducting hearings with respect to the NLRB's role in creating legislation as an administrative agency. *See generally Congressional Oversight of Administrative Agencies (NLRB): Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary U.S. Sen.*, 90th Cong., 2d Sess. (1968).

ability to overturn NLRB action to situations in which the record as a whole does not support Board decisions[8] or in which Board policies do not have a reasonable basis in the Act.[9] Over the years, the NLRB has used the deference Congress granted to define the extent of protection workers receive under the Act.[10] The Board expands or retracts protection of workers through interpretation of the Act or through common-law exceptions to the Act's provisions.[11] Board determinations define NLRA protection and are invalid only when Congress or the courts find that the NLRB overstepped the authority which Congress vested in the Board.[12]

The Act expressly excludes agricultural laborers and independent contractors from employee status and the resulting NLRA protections.[13] In addition, the Board and courts have developed a common-law exclusion for managerial employees.[14] Because Congress intended passage of the NLRA to promote equality of bargaining power,[15] the Supreme Court has agreed with the Board's determination that allowing managerial employees to have status as employees under the Act defeats Congress' avowed purpose.[16] The Board uses similar reasoning to exclude confidential employees from certain protection afforded employees although confidential employees do fall within the NLRA definition of employee.[17] Since access to confidential information of the employer in the area of labor relations would give a bargaining unit unfair advantage in the bargaining process, the Board excludes confiden-

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[8] *See supra* note 4 (discussion of standards of judicial review of Board decisions). The *Universal Camera* and NLRA mandate of court deference to Board decisions based on substantial evidence on the record as a whole applies to findings of fact. Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-91 (1951); 29 U.S.C. § 160(e)-(f) (1976). Furthermore, when the Board has a choice between two fairly conflicting views, each supported by evidence, the Supreme Court requires appellate courts to adhere to the Board's finding. NLRB v. United Ins. Co., 390 U.S. 254, 260 (1968).

[9] *See supra* note 7 (court deference to Board formulations of policies with reasonable basis in NLRA).

[10] *See infra* notes 19-70 and accompanying text (interpretation of employee status of agricultural workers and independent contractors).

[11] *See infra* notes 19-45 and accompanying text (narrow interpretation of agricultural exclusion); *infra* notes 46-70 and accompanying text (independent contractors excluded); *infra* notes 72-89 (common-law exclusion of managerial employees); *infra* notes 106-12 (limited protection of supervisors normally excluded); *infra* notes 153-56 (retracted protection of confidential employees).

[12] *See infra* notes 78-79 (Board formulates policies but courts reject policies that overreach purposes of Act); *see also supra* note 7 (Board ability to determine policies).

[13] *See* 29 U.S.C. § 152(3) (1976); *see also supra* note 2 (definition of employee).

[14] NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974); *see infra* notes 72-77 & 79-82 and accompanying text (judicial exclusion of managerial employees from NLRA coverage).

[15] *See supra* note 6 (purpose of Act).

[16] *See infra* notes 75 & 79-82 and accompanying text (exclusion of managerial employees adheres to purpose of Act).

[17] NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 178 (1981). In *Hendricks* the Supreme Court rejected dictum of the *Bell Aerospace* Court which suggested that confidential employees are outside the consideration of the Act. 454 U.S. at 188;

tial employees with a labor connection from bargaining units of rank-and-file employees.[18]

Congress excluded agricultural laborers from the 1935 NLRA (Wagner Act).[19] The reason for the exclusion is not clear from the NLRA legislative history.[20] In the draft legislation before the houses of Congress, two separate opinions emerged regarding agricultural employees. The Senate viewed as appropriate an exclusion for small-scale farm laborers analogous to the exclusion for domestic and family employment.[21] The Senate rationale noted that the small size of farm operations and the minimal effect of agriculture on interstate commerce justified exclusion of the workers.[22] The House, however, apparently disregarded the impact of large-scale farm operations on interstate commerce and viewed the agricultural exclusion as applicable even to large groups of laborers comparable to industrial groups.[23] The House version of the intent statement prevailed.[24]

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see NLRB v. Bell Aerospace Co., 416 U.S. 267, 283-84 n.12 (1974). The Act itself does not exclude confidential employees from NLRA protection. *See* 29 U.S.C. § 152(3) (1976); *see also infra* notes 148-51 and accompanying text (*Hendricks* discussed).

[18] NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 185 (1981); *see infra* notes 153-57 and accompanying text (exclusion of confidential employees from bargaining units); *see also supra* note 4 (Board authority to determine appropriate bargaining unit).

[19] Wagner Act, ch. 372, § 2(3), 49 Stat. 449, 450 (1935) (current version at 29 U.S.C. § 152(3) (1976)).

[20] *See* R. GORMAN, *supra* note 7, at 13; Dyson, *The Farm Workers and the N.L.R.A.: From Wagner to Taft-Hartley*, 36 FED. B.J. 121, 121-22 (1977); Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939, 1951-56 (1966). In the original proposed version of the Wagner Act, the definition of employee was simply "any individual employed by an employer under any contract for hire." S. 2926, 73d Cong., 2d Sess. § 3(3), 78 CONG. REC. 3443, 3444 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1 (1949). When the bill returned from committee, the accompanying report indicated without explanation that the bill excluded agricultural laborers. S. REP. NO. 1184, *supra* note 6, at 1; *see* Morris, *supra*, at 1952 n.59.

[21] S. REP. NO. 1184, *supra* note 6, at 3; *see supra* note 2 (exclusions from definition of employee). The Senate report accompanying the Senate bill S. 2926, *supra* note 20, explained that the labor board would hear only disputes of a certain magnitude with an effect on interstate commerce, S. REP. NO. 1184, *supra* note 6, at 3; *see also* Dyson, *supra* note 20, at 121-22 (discussion of Senate intent).

[22] *See* S. REP. NO. 1184, *supra* note 6, at 3; *see* Dyson, *supra* note 20, at 122 (legislative history of agricultural exclusion).

[23] *See* H.R. REP. NO. 969, *supra* note 6, at 27-28 (minority view). The minority report from the House Committee on Labor revealed the House attitude that "agricultural laborer" referred to workers on large-scale farms. *Id.* at 27. In urging that the Act should protect agricultural workers, the minority report cited instances of poor working conditions, worker exploitation, and the need for worker organization in certain intensely agricultural areas. *Id.* Though the House bill, H.R. 7978, *supra* note 6, excluded agricultural laborers altogether, the minority view indicated that the House did not identify the agricultural laborer as a small-scale farm hand. *Id.* at 27-28; *see also* Dyson, *supra* note 20, at 122 (discussion of legislative history of agricultural exclusion); Uchtmann and Bertagnolli, *The Coverage of the Agricultural Worker in Labor Legislation: Deviations from the Norm*, 2 AGRIC. L.J. 606, 612 (1981) (legislative history of agricultural exclusion).

[24] *See* R. GORMAN, *supra* note 7, at 31. Commentators have propounded various

The agricultural labor exclusion required the NLRB to determine whether workers were agricultural laborers or employees under the Act.[25] The Board generally construed the exclusion narrowly and found workers to be employees.[26] Agriculture and industry often overlapped,[27] so the Board and courts determined the status of workers by applying a "nature of the work" test.[28] Although the NLRB did not always adhere to

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theories for Congress' exclusion of the agricultural laborer from the Act's protection. One commentator noted that the exclusion represented congressional concessions to agricultural business leaders who resisted having agriculture regulated by the Wagner Act, the Social Security Act, 42 U.S.C. §§ 301-1397(f) (1976 & Supp. IV 1980), or the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. IV 1980), all of which were before Congress in 1935. R. GORMAN, *supra* note 7, at 31; *see* Note, *Agricultural Labor Relations—The Other Farm Problem*, 14 STAN. L. REV. 120, 127-28 (1961) (discussion of agriculture exclusion from NLRA). A common theory is that the local nature of agriculture prevents agricultural work from falling within Congress' authority to regulate interstate commerce. R. GORMAN, *supra* note 7, at 31; *see* Dyson, *supra* note 20, at 122; Morris, *supra* note 20, at 1979. Another possible explanation of the exception is that the perishability of crops and the limited production season precluded inclusion of agriculture in a dispute resolution system that involves delay through collective bargaining between employees and management and through NLRB proceedings. R. GORMAN, *supra* note 7, at 31-32; Dyson, *supra* note 20, at 128. Congress also may have believed that the more intimate relationship between employer and employee in agriculture diminished the need for collective bargaining. R. GORMAN, *supra* note 7, at 32; *see* North Whittier Heights Citrus Ass'n v. NLRB, 109 F.2d 76, 80 (9th Cir. 1940), *enforcing*, 10 N.L.R.B. 1269 (1939). Other commentators state that Congress omitted agricultural laborers from the scope of the NLRA because agricultural unions failed to send representatives to testify that the Act should protect agricultural workers. *See* Dyson, *supra* note 20, at 125; Morris, *supra* note 20, at 1956.

[25] *See* 29 U.S.C. § 152(3) (1976) (definition of employee).

[26] *See, e.g.*, Indiana Mushroom Corp., 60 N.L.R.B. 1065, 1068 (1945) (agricultural work must involve cultivation of soil, harvesting of crops, or management of livestock); American Fruit Growers, Inc., 10 N.L.R.B. 316, 329 (1938) (lettuce packing and shipping is incident to a commercial enterprise and not agricultural labor because packers did not work in fields).

[27] *See* Tovrea Packing Co., 12 N.L.R.B. 1063, 1068 n.4 (1939), *enforced*, 111 F.2d 626 (9th Cir. 1940); *see* Dyson, *supra* note 20, at 132 (industrial nature of agriculture); Uchtmann and Bertagnolli, *supra* note 23, at 612 (agriculture as business). *American Fruit Growers* demonstrates the difficulty the Board has in distinguishing between agriculture and industry. *See* 10 N.L.R.B. 316 (1938). In *American Fruit Growers*, the Board examined the status of farm workers who handled and packed produce after other workers harvested the produce in the field. *Id.* at 320. Although the record clearly indicated that each worker's employment involved the handling of products grown on a farm, the NLRB found only field workers were agricultural laborers outside the purview of the Act. *Id.* at 329. The Board found that packing and shipping of produce was commercial in nature and workers involved in the process were employees the Act protected. *Id.*

[28] *See* North Whittier Heights Citrus Ass'n v. NLRB, 109 F.2d 76, 80 (9th Cir. 1940), *enforcing*, 10 N.L.R.B. 1269 (1939). In *North Whittier*, the Ninth Circuit squarely addressed the question of whether packing house workers were agricultural laborers. 109 F.2d at 80. The court adopted a test based on the nature of the work modified by the method of doing the work. *Id.* The *North Whittier* court found that when the manner of handling produce changed from harvesting to packing, the status of the work involved in the activities also changed. *Id.* The work of the packing house constituted an industry quite distinct from agricultural tasks. *Id.* at 80-81. Thus, the court found that packing house employees were employees whose rights the Act protected. *Id.* at 81.

the standard,[29] the Board distinguished agricultural laborers from employees protected by the Act according to the nature of the work test for several years.[30]

In 1946, Congress answered complaints from agricultural leaders[31] by directing the Board to apply the Fair Labor Standards Act (FLSA)[32] definition of agricultural laborer.[33] The Board adopted the FLSA test and began resolving the status question on the basis of whether the specific work related primarily to agriculture or to industry.[34] Although application of the FLSA definition yielded results inconsistent with the Board's earlier determinations in some situations,[35] the Board continues to construe the agricultural exclusion narrowly to provide protection to the maximum number of agricultural workers.[36]

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[29] *See, e.g.*, Tovrea Packing Co., 12 N.L.R.B. 1063 (1939), *enforced*, 111 F.2d 626 (9th Cir. 1940). In *Tovrea*, the NLRB and the Ninth Circuit departed from the nature of the work test. 12 N.L.R.B. at 1068; *see supra* note 28 (nature of the work test). The Board established a two-part test to determine whether an employee was an agricultural laborer. 12 N.L.R.B. at 1068. The Board held that an agricultural laborer is one who works for the owner or tenant of a farm that produces products in the raw state and one who engages in work that is incident to ordinary farming operations rather than manufacturing or commercial operations. *Id.* In *Tovrea*, a "ranch" that consisted only of a feed lot and slaughter house for livestock did not produce agricultural products in the raw state and the employees, therefore, were not agricultural laborers. *Id.*

[30] *See, e.g.*, Robert Hind, Ltd., 58 N.L.R.B. 99, 100-01 (1944) (employees who bottled milk at a location separate from the milking operation were employees under Act because preparation of milk for shipment to market is commercial rather than agricultural in character); Saticoy Lemon Ass'n, 41 N.L.R.B. 243, 247 (1942) (picking lemons was agricultural task because workers harvested lemons directly from trees); Stark Bros. Nurseries & Orchards, 40 N.L.R.B. 1243, 1251 (1942) (nursery workers were agricultural laborers because character of work was essentially that of growing crops).

[31] Dyson, *supra* note 20, at 121-22 (legislative history of agricultural exclusion discussed).

[32] 29 U.S.C. §§ 201-219 (1976 & Supp. IV 1980). Congress enacted the Fair Labor Standards Act (FLSA) in 1938 to establish minimum wages, to require payment for overtime hours, and to regulate child labor. *See* 29 U.S.C. §§ 206, 207, 212 (1976).

[33] Bayside Enter., Inc. v. NLRB, 429 U.S. 298, 300 (1977); *see* 29 U.S.C. § 203(f) (1976). The definition of agriculture under the FLSA includes cultivating, harvesting, dairying, raising agricultural or horticultural commodities, raising livestock and poultry, and doing other tasks of a farmer or person on a farm incident to farming operations. 29 U.S.C. § 203(f) (1976). The Supreme Court analyzed the FLSA definition as having two distinct parts. Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 762-63 (1949). The Court stated that typical farming activities such as cultivation, tilling, and dairying make up the primary meaning but that a second broader meaning of farming activities includes operations performed incidentally to or in connection with farm operations by a farm worker. *Id.*

[34] Di Giogio Fruit Corp., 80 N.L.R.B. 853, 856 (1948). The NLRB adhered to Congress' directive and concluded that under the FLSA definition of agriculture workers engaged in alteration of farm products by canning or processing in order to increase the value of the products are not agricultural. *Id.* Conversely, those who engage in operations other than field labor but incidental to ordinary farm operations are agricultural workers. *Id.*; *see* John C. Maurer & Sons, 127 N.L.R.B. 1459, 1460 (1960) (packing-shed workers who packed celery that employer grew were agricultural laborers).

[35] *See* R. GORMAN, *supra* note 7, at 33 (discussion of differing results).

[36] *See, e.g.*, Shoenberg Farms, 129 N.L.R.B. 966, 966 (1960) (employer's business, in

In many areas of the nation, agricultural labor is industrial in nature and agriculture is a major business enterprise with great impact on interstate commerce.[37] As the Act's legislative history indicates, agricultural labor may involve small-scale farm operations similar to domestic or family work or may be highly developed large-scale business operations that reach interstate commerce.[38] In the latter case, Congress fell short of accomplishing the purposes of the NLRA by excluding agricultural laborers from the Act's protections.[39] Since the Act seeks to promote the free flow of commerce and reduce labor disputes through bargaining between labor and management,[40] Congress clearly could have included in the definition of employee workers on large-scale farms that affect interstate commerce.[41] Instead of excluding all farm workers from the Act's definition of employee, Congress should have extended the definition to include agricultural laborers on large-scale farms. The Act purports to promote interstate commerce by eliminating labor relations problems and resolving labor disputes, but exclusion of agricultural workers defeats each goal because agricultural laborers are workers the Act should protect and agricultural labor relations problems are often analogous to industrial labor relations disputes.[42] Four

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which farm served as locale for commercial processing of dairy products, was not agricultural though some operations would have been agricultural standing alone), *enforced*, 297 F.2d 280 (10th Cir. 1961); The Valley of Virginia Coop. Milk Producers Ass'n, 127 N.L.R.B. 785, 786 (1960) (bulk tank drivers who transported milk from farms to employer's processing plant but who neither worked on a farm nor for a farmer were not agricultural laborers); Michigan Peat, Inc., 127 N.L.R.B. 518, 519 (1960) (harvesting of peat moss was harvesting of wild commodity rather than agricultural commodity, therefore, employees were not agricultural laborers excluded from Act); The Illinois Canning Co., 125 N.L.R.B. 699, 700 (1959) (employees who maintained farm equipment furnished by employer to other farmers under contract did not perform labor incidental to employer's own farming operations and thus were not agricultural laborers). The Board has determined that the Act entitles workers who do both agricultural and nonagricultural work to protection to the extent that the workers are not agricultural laborers. Olaa Sugar Co., 118 N.L.R.B. 1442, 1443 (1957) (Act protected farm employees who regularly performed some nonagricultural work with respect to nonagricultural portion of work); *see* NLRB v. C & D Foods, Inc., 626 F.2d 578, 581 (7th Cir. 1980) (employees ordinarily thought to be agricultural laborers who perform certain nonagricultural work not excluded as agricultural laborers); Waldo Rohnert Co., 120 N.L.R.B. 152, 154 (1958) (employees covered by Act to extent of nonagricultural work).

[37] *See* H.R. REP. NO. 969, *supra* note 6, at 27-28 (minority view) (in certain intensely agricultural areas working conditions resemble conditions in industrial settings and warrant NLRA coverage); *see also supra* note 23 (minority view of report).

[38] *See supra* notes 21-23 and accompanying text (legislative history of NLRA exclusion of agricultural laborers).

[39] *See supra* note 6 (purpose of Act).

[40] 29 U.S.C. § 151 (1976) (declaration of policy of NLRA); *see supra* note 6 (purpose of Act).

[41] *See* 29 U.S.C. § 152(3) (1976) (agricultural laborers excluded from definition of employee).

[42] *See* 29 U.S.C. § 151 (1976) (declaration of policy of NLRA); *see also supra* note 6 (purpose of Act).

states have recognized the void in protection afforded farm workers who wish to engage in concerted activity[43] by adopting comprehensive agricultural labor relations legislation analogous to the NLRA but designed to provide for collective bargaining and grievance arbitration for agricultural laborers.[44] State legislation of labor relations in the area of agriculture is necessary because of congressional inattention to the needs of agricultural laborers.[45]

Unlike agricultural laborers, Congress did not exempt independent contractors expressly from the reach of the 1935 Wagner Act.[46] The NLRB, however, consistently excluded independent contractors from the Act's protections and privileges.[47] The Board struggled with determinations of whether a person was an independent contractor or an employee[48] and used two distinct theories for finding a worker an

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[43] *See* 29 U.S.C. § 152(3) (1976) (definition of employee, which excludes agricultural laborers); *supra* note 3 (concerted activity defined).

[44] *See* ARIZ. REV. STAT. ANN. §§ 23-1381 to -1395 (Supp. 1982); CAL. LAB. CODE §§ 1140-1166 (West Supp. 1982); IDAHO CODE §§ 22-4102 to -4113 (1977 & Supp. 1981); KAN. STAT. ANN., §§ 44-818 to -831 (1981). The goals of the state agricultural labor acts are to promote organization, concerted activity, and collective bargaining among agricultural laborers that the NLRA excludes. *See* Uchtmann and Bertagnolli, *supra* note 23, at 613-14 (discussion of state legislation).

[45] *See* 29 U.S.C. § 152(3) (1976) (exclusion of agricultural laborers from Act coverage).

[46] Wagner Act, ch. 372, § 2(3), 49 Stat. 449, 450 (1935) (current version at 29 U.S.C. § 152(3) (1976)).

[47] *See, e.g.*, Philadelphia Record Co., 69 N.L.R.B. 1232, 1240 (1946) (distributors were independent contractors excluded from Act's protection); W & W Fruit Co., 60 N.L.R.B. 164, 166 (1945) (box contractor was independent contractor excluded from bargaining unit); East Shore Newspapers, Inc., 55 N.L.R.B. 993, 995 (1944) (correspondents excluded from Act coverage because independent contractors); Field Packing Co., 48 N.L.R.B. 850, 852 (1943) (trucker protected because employee not independent contractor); The Kelly Co., 34 N.L.R.B. 325, 329 (1941) (truckers who were independent contractors were excluded from Act's protection).

[48] *See, e.g.*, Philadelphia Record Co., 69 N.L.R.B. 1232, 1239-40 (1946); Consolidation Coal Co., 63 N.L.R.B. 169, 173 (1945); The Kelly Co., 34 N.L.R.B. 325, 329 (1941). In *Philadelphia Record*, the Board found some characteristics of an employment relationship between the company and newspaper carriers and other characteristics supporting independent contractor status. 69 N.L.R.B. at 1239-40. The Board resolved the conflict between the two possible relationships by finding that the facts supporting status as independent contractors outweighed the evidence of an employment relationship. *Id.* at 1240.

In *Kelly*, the Board found two truckers to be employees and three to be independent contractors. 34 N.L.R.B. at 328-29. The Board identified two truckers as employees because the men were subject to company direction at all times and received weekly wages from the company payroll and Christmas gifts. *Id.* The Board found three other truckers to be independent contractors and excluded the men from the bargaining unit because the truckers were partners, owned the trucks used in the enterprise, and worked for other companies. *Id.* at 329. Furthermore, the company did not list the truckers found to be independent contractors on the payroll but paid the truckers weekly according to the amount of hauling completed. *Id.*

In *Consolidation Coal*, the Board held the company's barbers to be employees, 63 N.L.R.B. at 174, although the company paid the barbers on a commission basis. *Id.* at 173. Crucial to the determination was the fact that the company hired and fired the barbers in the same way the company hired and fired other employees. *Id.*

employee.[49] The Board used the "right to control" test[50] in some instances to determine if a master-servant relationship existed.[51] In other situations, however, the Board found employee status when the Board viewed the relationship between the employer and alleged employee as creating an economic condition that Congress intended the Act to reach.[52] Although the approach extended employee status to personnel otherwise deemed independent contractors, the Supreme Court sustained the Board's "purpose of the Act" approach in the determination of employee status.[53]

Congress reacted to the expansive interpretation of the NLRB and

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[49] R. GORMAN, *supra* note 7, at 29-30 (Board tests for employee status).

[50] *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1957). Among the factors considered under the common-law agency right to control test in distinguishing between servant and independent contractor status are the extent of control the master exercises over the details of the work, the skill required in the task, the duration of the employment, the method of payment, and the intent of the parties. *Id.* Also important are whether the party employed works in a distinct business, whether an employer usually supervises the kind of work, and whether the work is part of the employer's ordinary business. *Id.*

[51] *See, e.g.*, Klement Timber Co., 59 N.L.R.B. 681, 683 (1944) (Board applied the control test and found sawmill workers and loggers employees); Field Packing Co., 48 N.L.R.B. 850, 852 (1943) (trucker who owned truck and drove regularly for company under contract was not independent contractor since company had control over tenure and terms and conditions of employment); Theurer Wagon Works, Inc., 18 N.L.R.B. 837, 870 (1939) (employee who did pictorial and lettering work for company and other businesses was independent contractor because company exercised no control over worker).

[52] Stockholders Publishing Co., 28 N.L.R.B. 1006, 1022-23 (1941). The Board examined the status of newsboys for Los Angeles newspaper distributors and found the newsboys employees of the publishers. *Id.* at 1022-23. Although the Board noted the presence of employer control and direction over the manner and means of distribution, the Board went beyond the right to control test in making the determination of employee status. *Id.* at 1022-23. The Board explained that the primary consideration in determining employee status was whether furtherance of NLRA policies mandated a determination that Congress intended the Act to protect the newsboys. *Id.* at n.33. In *Stockholders*, the Board found that the companies hired newsboys by assignment of sales areas, furnished equipment to be used in sales, required attendance at specific hours, controlled supply, fixed earnings by fixing prices, supervised the manner of sale, and discharged or transferred newsboys at will. *Id.* at 1023. Although the companies did not carry the newsboys on the companies' payrolls, the newsboys were an indispensible part of the distribution system. *Id.* The Board held that the newsboys were the type of personnel the NLRA policies and goals contemplated protecting. *Id.* at 1023 n.33, 1024; *see also* Hearst Publications, Inc., and The Times-Mirror Co., 39 N.L.R.B. 1245 (1942), and Hearst Publications, Inc., and Stockholders Publishing Co., 39 N.L.R.B. 1256 (1942), *aff'd*, 322 U.S. 111 (1944) (Board determinations of status of similar employees of same companies).

[53] NLRB v. Hearst Publications, Inc., 322 U.S. 111, 132 (1944). The Supreme Court affirmed the NLRB decision in *Hearst* to reject the common-law control test and substitute a determination of whether the policies and goals of the NLRA warranted inclusion of newsboys within the definition of employee. *Id.* at 124-25. The *Hearst* newsboys worked continuously and regularly, with newspaper prices and supply fixed by the publisher and the hours of work prescribed and supervised. *Id.* at 131. The Court, therefore, determined that the Board finding that newsboys were employees had reasonable basis in law. *Id.* at 132; *see supra* note 7 (deference to Board policies).

the Supreme Court by amending the Act to exclude independent contractors from NLRA coverage[54] and directing that the common-law control test be the standard.[55] The Board now applies the right to control test,[56] considering factors such as the alleged employer's control over the manner and means of accomplishing the task,[57] hours of work,[58] and method of payment,[59] as well as the employer's regulation of the alleged employee's participation in outside enterprises[60] and the employer's assumption of risks of loss.[61] Whether a person is an employee or an in-

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[54] Taft-Hartley Act, ch. 120, § 2(3), 61 Stat. 136, 137-38 (1947) (current version at 29 U.S.C. § 153(3) (1976)); *see* H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947) [hereinafter cited as H.R. REP. No. 245].

[55] H.R. REP. No. 245, *supra* note 54, at 18. Congress reacted to the Supreme Court's rejection of the common-law right to control test in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), by amending section 152(3) to exclude independent contractors. *See* 29 U.S.C. § 152(3) (1976). The House Report expressed Congress' intent that courts apply the common-law control test to determine whether a person is an employee or an independent contractor. H.R. REP. No. 245, *supra* note 54, at 18. The report presumed that by enacting the NLRA Congress intended that the statutory language be interpreted according to ordinary meanings rather than meanings the NLRB might create. *Id.*

[56] *See, e.g.*, NLRB v. Maine Caterers, Inc., 654 F.2d 131, 133-34 (1st Cir. 1981) (employer authority to control work required determination of employee status); NLRB v. Tri-State Transp. Corp., 649 F.2d 993, 997 (4th Cir. 1981) (court applied right to control test, overturned Board evaluation of employment relationship, and held driver to be independent contractor); Waggoner v. Northwest Excavating, Inc., 642 F.2d 333, 337 (9th Cir. 1981) (owner-operators were independent contractors since employer's only control was providing time cards for recording of hours worked), *vacated*, 102 S.Ct. 1417 (1982); Standard Oil Co., 230 N.L.R.B. 967, 968 (1977) (employer control of manner and means of job performance determinative of status as employee); George Transfer & Rigging Co., 208 N.L.R.B. 494, 496 (1974) (control by employer extended only to results sought, therefore no employment relationship); *see also supra* note 50 (common-law right to control test).

[57] El Mundo, Inc., 167 N.L.R.B. 760, 761 (1967) (newspaper carriers were employees of publisher because publisher controlled means of distribution); National Freight, Inc., 146 N.L.R.B. 144, 146 (1964) (employment relationship existed between company and owner-drivers because company controlled means by which drivers carried shipments); Golden Age Dayton Corp., 124 N.L.R.B. 916, 918-19 (1959) (city distributors of product were employees of company because company controlled manner and means of distribution operation); Albert Lea Coop. Creamery Ass'n, 119 N.L.R.B. 817, 821-22 (1957) (salesmen were employees of company, which controlled manner of conducting sales).

[58] The Kansas City Star Co., 76 N.L.R.B. 384, 386-88 (1948) (one determining factor in finding newspaper carriers independent contractors was that carriers set own hours).

[59] La Prensa, Inc., 131 N.L.R.B. 527, 530-31 (1961) (free lance photographer was entrepreneur not wage-earner because newspaper paid fixed price per photograph rather than salary); The Kansas City Star Co., 76 N.L.R.B. 384, 388 (1948) (carriers who worked for profits rather than wages or salary were independent contractors).

[60] El Mundo, Inc., 167 N.L.R.B. 760, 761 (1967) (publisher forbade carriers to engage in other business or to distribute publications other than employer's newspapers therefore carriers not independent contractors); The Kansas City Star Co., 76 N.L.R.B. 384, 387 (1948) (carriers were independent contractors because of freedom to engage in other commercial activity or to work other jobs).

[61] El Mundo, Inc., 167 N.L.R.B. 760, 761 (1967) (employer rather than employees bore risks of business loss); The Kansas City Star Co., 76 N.L.R.B. 384, 386 (1948) (carriers were independent contractors because they bore losses for papers stolen or damaged).

dependent contractor depends largely on the facts of each case, and no one factor is determinative.[62] Additionally, the Supreme Court requires appellate courts to give great deference to a Board determination of employee status[63] in spite of congressional attempts to have the courts review Board decisions.[64] By limiting the Board's authority to narrow the definition of independent contractor and thereby broaden the scope of the Act's protections,[65] Congress restricted NLRB discretion in the area of independent contractors.[66] The Board is now relegated to making factual determinations under the agency right to control test.[67] Because of court deference to Board findings of fact,[68] however, the Board may shape determinations of employee status to give protection to workers the Board believes Congress intended the Act protect.[69] Thus, Board discretion in the area of independent contractors continues to exist in spite of congressional attempts to limit the Board's power.[70]

Prior to the 1947 amendments to the Wagner Act, the NLRB and the courts excluded independent contractors from coverage under the Act on the basis of common-law doctrines and interpretations of congressional intent.[71] Similarly, the Board and courts exclude managerial personnel from the Act's definition of employee.[72] In cases decided soon after Congress enacted the NLRA, the Board defined a managerial employee as any executive who formulates management policy.[73] Congress expressly

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[62] Golden Age Dayton Corp., 124 N.L.R.B. 916, 918-19 (1959) (distributors found to be employees); Albert Lea Coop. Creamery Ass'n, 119 N.L.R.B. 817, 822 (1957) (salesmen held employees).

[63] *See* NLRB v. United Insurance Co., 390 U.S. 254, 260 (1968). In *United Insurance*, the NLRB examined conflicting facts and determined debit agents to be employees of the company. *Id.* The Supreme Court insisted the courts give deference to the Board's factual finding when the Board chose between two fairly conflicting views after hearing evidence to support each view. *Id.*; *see also supra* note 5 (Board receives deference regarding determinations of employee status).

[64] H.R. REP. No. 245, *supra* note 54, at 18; *see supra* note 55 (Congress intended ordinary interpretations of language of Act).

[65] *See supra* notes 54-55 and accompanying text (exclusion of independent contractors from Act coverage and mandate that Board use agency right to control test in determinations of employee status).

[66] *Id.*

[67] *See supra* notes 56-61 and accompanying text (factors Board considers in applying right to control test).

[68] *See supra* note 63 (deference to Board determinations of fact).

[69] *See supra* note 53 and accompanying text (Board and Court based certain employee status determinations on purpose of Act and workers Congress intended to protect).

[70] *See supra* notes 54-55 and accompanying text (congressional mandate to use right to control test in determinations of employee status).

[71] *See supra* text accompanying note 47 (independent contractors excluded from protection).

[72] *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974); *see supra* text accompanying note 14 (common-law exclusion of managerial employees).

[73] Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946). The Board defined managerial employees as executive personnel who determine and implement management policies. *Id.*

excluded supervisors from the meaning of employee in the 1947 Taft-Hartley amendments to the Wagner Act[74] but never addressed the status of managerial employees. Since the Board's practice of exclusion adhered to the Act's purpose of promoting equal bargaining power,[75] Congress apparently thought exclusion of managerial employees from coverage obvious and statutory expression of the exclusion unnecessary.[76] The Board continued the practice of excluding managerial employees from NLRA coverage until 1970.[77]

In 1970, the Board altered the policy of excluding all managerial employees and decided that the NLRA excluded only managerial employees whose work related to labor relations.[78] The Supreme Court,

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The NLRB noted that the Board customarily excluded managerial employees from bargaining units made up of rank-and-file workers. *Id.* In *Ford Motor*, the Board found that time-study employees were specialized technical training were not managerial. *Id.*

[74] 29 U.S.C. § 152(3) (1976); *see* H.R. REP. No. 245, *supra* note 54, at 14-17; *see also infra* text accompanying notes 90-91 (supervisor exclusion).

[75] 29 U.S.C. § 151 (1976); *see supra* note 6 (purpose of Act was promotion of equal bargaining power).

[76] H.R. REP. No. 245, *supra* note 54, at 16-17; S. REP. No. 105, 80th Cong., 1st Sess. 3-4 (1947) [hereinafter cited as S. REP. No. 105]; *see* NLRB v. Bell Aerospace Co., 416 U.S. 267, 278-79 (1974) (discussion of congressional intent); R. GORMAN, *supra* note 7, at 37. By stating that supervisors were an extension of management and thus deserved exclusion from the NLRA, both the House and Senate committees indicated Congress' belief that exclusion of managerial employees was proper but that an express exclusion was unnecessary in light of the Board's history of exclusion under the Wagner Act. H.R. REP. No. 245, *supra*, at 16; S. REP. No. 105, *supra*, at 3.

[77] *See* American Lithofold Corp., 107 N.L.R.B. 1061, 1062-63 (1954). In *American Lithofold*, the NLRB excluded four employees from the bargaining unit because the Board found the employees were managerial employees. *Id.* The Board excluded one of the four because the employer's interests were more closely allied with management than with other employees. *Id.* The Board excluded two of the employees because the workers were able to bind the employer's credit. *Id.* The Board excluded the fourth employee, a man in charge of production planning, because the employee made production decisions that affected the price of the product, labor costs and the employer's profits. *Id.*; *see also* American Locomotive Co., 92 N.L.R.B. 115, 117 (1950) (buyers were managerial employees because employer authorized buyers to make substantial purchases on behalf of company); Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947) (store managers not managerial because managers' interests not identical to company's interests); Denver Dry Goods Co., 74 N.L.R.B. 1167, 1175 (1947) (assistant buyers with interests more closely identified with management than with employees in bargaining unit were managerial employees). Furthermore, as the Court noted in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974), courts routinely approved the Board practice of excluding managerial employees. *See, e.g.*, Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir.), *cert. denied*, 400 U.S. 831 (1970); Continental Ins. Co. v. NLRB, 409 F.2d 727, 730 (2d Cir.), *cert. denied*, 396 U.S. 902 (1969).

[78] North Arkansas Elec. Coop., Inc., 185 N.L.R.B. 550, 551 (1970), *enforcement denied*, 446 F.2d 602 (8th Cir. 1971). In *North Arkansas*, the NLRB indicated that the Board had never articulated a precise definition of managerial employee. *Id.* at 550. The Board focused attention on whether the employee had authority to speak for the employer in a labor relations context. *Id.* Although the employee in *North Arkansas* embodied several characteristics of a managerial employee according to *Ford Motor Co.* standards, *see supra*

however, rejected the policy change, citing congressional intent to exclude all managerial employees from the purview of the Act.[79] The Court reinstated the Board's previous practice, determining that the exclusion of managerial employees extends to all employees who determine and implement management policies[80] or act as management representatives,[81] as well as those who have interests aligned more closely with the interests of management than with the interests of rank-and-file employees.[82] With the Court's approval, the Board now adheres to the original NLRB standard[83] and determines managerial status by analyzing whether the employee formulates and implements management policies.[84]

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note 73 and accompanying text, the Board found no evidence to suggest that the employee formulated, determined, or implemented policies in the area of employee relations. *Id.* at 550-51. The Board thus held the individual to be an employee under the Act. *Id.* at 551; *see supra* note 7 (Board ability to formulate and change policies).

[79] NLRB v. Bell Aerospace Co., 416 U.S. 267, 290 (1974); *see supra* note 76 and accompanying text (congressional intent). The Board had found *Bell Aerospace* buyers to be appropriate members of a bargaining unit but the Second Circuit denied enforcement of the Board order. *Bell Aerospace*, 416 U.S. at 273. The Supreme Court then held that the Act excludes all managerial employees, not just employees in positions related to labor relations. *Id.* at 290.

[80] *See* Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947) (store managers held employees because interests not identical to management's interests).

[81] *See, e.g.*, Swift & Co., 115 N.L.R.B. 752, 754 (1956) (procurement drivers who daily bought produce from dealers, exercising independent judgment as to supplies, weight, grades, and price of produce, were representatives of company and Board therefore excluded drivers from bargaining unit); Denton's, Inc., 83 N.L.R.B. 35, 37 (1949) (Board excluded buyers and assistant buyers who represented management in purchasing merchandise).

[82] *See, e.g.*, American Lithofold Corp., 107 N.L.R.B. 1061, 1062 (1954) (employees excluded as managerial because interest allied with management); American Locomotive Co., 92 N.L.R.B. 115, 117 (1950) (buyers held managerial and excluded because made purchases for company); *see also supra* note 77 (exclusion cases discussed).

[83] NLRB v. Bell Aerospace Co., 416 U.S. 267, 290 (1974). When an employee has the power to pledge the employer's credit, the Board finds the employee is managerial. Weaver Motors, Inc., 123 N.L.R.B. 209, 216 (1959). Another crucial factor indicating managerial status is the ability of the employee to formulate policies for the employer. Wichita Eagle & Beacon Publishing Co., 480 F.2d 52, 55-56 (10th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974). But when the employee exercises discretion or independent judgment within the employer's established guidelines, the employee is not a managerial employee. NLRB v. Retail Store Employees Union Local 876, 570 F.2d 586, 592 (6th Cir.), *cert. denied*, 439 U.S. 819 (1978); American Radiator & Standard Sanitary Corp., 119 N.L.R.B. 1715, 1717 (1958); Albert Lea Coop. Creamery Ass'n, 119 N.L.R.B. 817, 823 (1957). Two irrelevant factors are job title, *Bell Aerospace*, 416 U.S. at 290 n.19, and job seniority, Shayne Bros., Inc., 213 N.L.R.B. 113, 114 (1974).

[84] *See, e.g.*, Retail Store Employees Union Local 876, 219 N.L.R.B. 1188, 1193-94 (1975) (employee exercising independent judgment subject to review by superiors not managerial employee), *enforced*, 570 F.2d 586 (6th Cir. 1978); Trans World Airlines, Inc., 211 N.L.R.B. 733, 734 (1974) (employees with responsibility for maintenance of food and souvenir supply not managerial because actually supervised and lacked independent authority to formulate prices).

Congress intended the NLRA to equalize bargaining power between labor and management.[85] The Board's exclusion of managerial employees is appropriate in light of the Act's purpose since allowing coverage of managerial employees would give unions inside information belonging to management and an unfair advantage in bargaining.[86] The courts properly rejected departure from this policy[87] because the policy of exclusion had a reasonable basis in the purpose of the NLRA.[88] The Board and courts should continue to exclude managerial employees from the NLRA definition of employee even though Congress failed to enact the exclusion expressly.[89]

Exclusion of managerial employees under the Act is analogous to treatment of supervisors,[90] whom the NLRA expressly excludes from the definition of employee.[91] Unlike managerial employees, however, supervisors receive reinstatement when the Board finds certain unfair labor practices.[92] If the Board finds that termination of a supervisor interfered with, restrained, or coerced employees in the exercise of NLRA organizational rights, the remedy the Board gives employees may result in reinstatement of the supervisor.[93]

Although supervisors are now excluded from NLRA protection,[94] the original Wagner Act definition of employee as any person who acts in an

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[85] 29 U.S.C. § 151 (1976); *see supra* note 6 (purpose of Act was promotion of equal bargaining power).

[86] *See supra* notes 72-76 & 79-82 and accompanying text (exclusion of managerial employees from NLRA protection); *supra* note 6 and accompanying text (purpose of Act).

[87] *See supra* note 79 and accompanying text (Court rejection of Board policy change).

[88] *See supra* note 7 (review of Board policies); *see also supra* note 6 (purpose of Act).

[89] *See* 29 U.S.C. § 152(3) (1976) (definition of employee).

[90] 29 U.S.C. § 152(11) (1976). The Act defines "supervisor" as a person with authority to hire, transfer, suspend, promote, discharge, reward, or discipline employees on behalf of the employer or with authority to direct employees in the work, hear grievances, and recommend action. National Labor Relations Act § 2(11), 29 U.S.C. § 152(11) (1976). Furthermore, the supervisor's authority to act in the employer's interest must include authority to exercise independent judgement. *Id.*; *see* Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 HARV. L. REV. 1713, 1714-18 (1981) (determinations of supervisor status).

[91] 29 U.S.C. § 152(3) (1976) (exclusion of supervisor from NLRA definition of employee).

[92] *Id.* § 158(a)(1). If the Board finds that termination of a supervisor interfered with, restrained, or coerced employees in the exercise of the right to organize, bargain collectively, and engage in concerted activities, the supervisor's discharge constitutes an unfair labor practice. *Id.*; *see infra* text accompanying notes 106-12 (specific instances of supervisor reinstatement).

[93] *See* 29 U.S.C. § 157 (1976); *see, e.g.*, Better Monkey Grip Co., 115 N.L.R.B. 1170, 1171 (1956), *enforced*, 243 F.2d 836 (5th Cir. 1957) (supervisor who testified against employer at NLRB proceeding reinstated because inherent in employee rights is right to seek Board resolution of dispute); Vail Mfg. Co., 61 N.L.R.B. 181, 209 (1945), *enforced*, 158 F.2d 664 (7th Cir. 1947) (supervisors reinstated when discharged for refusing to participate in unfair labor practice against protected employees).

[94] 29 U.S.C. § 152(3) (1976); *see* 29 U.S.C. § 152(11) (1976) (supervisor defined).

employer's interest[95] did not exclude supervisors expressly.[96] The Board had difficulty determining the status of supervisory personnel under the NLRA and reached confusing and often conflicting results when deciding whether the Act applied to a particular individual.[97] In 1947 the Supreme Court sustained an NLRB finding that the term employee included supervisors, thereby resolving the confusion.[98] In part as a reaction to the Court's decision, Congress included in the 1947 Taft-Hartley amendments an explicit exclusion of supervisors from NLRA protection.[99] Congress, recognizing that supervisors are an extension of management and that management has a right to expect the loyalty of supervisors,[100] intended that the Act exclude supervisors when supervisors organize independently or along with rank-and-file employees.[101] Amending the Act to exclude supervisors, Congress demonstrated a belief that the Wagner Act had failed to promote equal bargaining between labor and management because the act protected employees at the expense of management.[102] Recognizing that when supervisors divide

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[95] Wagner Act, ch. 372, § 2(3), 49 Stat. 449, 450 (1935) (current version at 29 U.S.C. § 152(3) (1976)); *see* H.R. REP. No. 245, *supra* note 54, at 13 (definition of employee).

[96] Wagner Act, ch. 372, § 2(3), 49 Stat. 449, 450 (1935) (current version at 29 U.S.C. § 152(3) (1976)). Congress added section 152(11) defining supervisor in 1947 with the enactment of the Taft-Hartley amendments to the Wagner Act. Taft-Hartley Act, ch. 120, § 2(11), 61 Stat. 136, 138 (1947) (current version at 29 U.S.C. § 152(11) (1976)).

[97] *See* S. REP. No. 105, *supra* note 76, at 4. In *Packard Motor Car*, the Board certified a bargaining unit containing foremen, a decision which constituted the Board's second reversal on the issue of whether the Act extended protection to supervisors. Packard Motor Car Co., 61 N.L.R.B. 4, 26 (1945). Previous decisions had excluded supervisors. *See, e.g.*, General Motors Corp., 51 N.L.R.B. 457, 460 (1943); Murray Corp., 51 N.L.R.B. 94, 95 (1943); Boeing Aircraft Co., 51 N.L.R.B. 67, 70 (1943). The Board's original position had allowed certification of bargaining units of foremen. *See, e.g.*, Godchaux Sugars, Inc., 44 N.L.R.B. 874, 878-79 (1942); Union Collieries Coal Co., 41 N.L.R.B. 961, 963-64 (1942).

[98] Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491-92 (1947). The Supreme Court upheld the *Packard Motor Car* Board determination that foremen were properly in a bargaining unit. *Id.* Furthermore, the Court noted that if the legislature disagreed with inclusion of foremen in bargaining units, Congress should amend the NLRA to exclude supervisors expressly. *Id.* at 493.

[99] H.R. REP. No. 245, *supra* note 54, at 14.

[100] H.R. REP. No. 245, *supra* note 54, at 16-17; S. REP. No. 105, *supra* note 76, at 3. The Senate report reflected the belief that supervisors were traditionally part of management and that inclusion of supervisors in the collective bargaining procedure had undermined the purpose of the NLRA. S. REP. No. 105, *supra* note 76, at 3-4. The Supreme Court has recognized Congress' hope to eliminate a perceived imbalance in bargaining power that occurred when inclusion in bargaining units placed supervisors in the position of serving two masters, the union and management. Beasley v. Food Fair, 416 U.S. 653, 661-62 (1974).

[101] H.R. REP. No. 245, *supra* note 54, at 15. Representative Hartley wrote in the report to the House version of the 1947 bill, H.R. 3020, 80th Cong., 1st Sess. (1947), that the continued productivity of American industry required exclusion of foremen from the operation of the NLRA. H.R. REP. No. 245, *supra* note 4, at 15.

[102] S. REP. No. 105, *supra* note 76, at 2. The Senate report to Senate bill 1126 explained the labor committee's belief that the Wagner Act was inherently one-sided, affording protection to employees and unions while denying management relief for undesirable acts by

loyalty between the union and the employer management no longer gets fair representation in the collective bargaining setting,[103] Congress provided that employers lawfully may refuse to bargain with unions whose membership includes supervisors.[104] Congress added the exclusion without expressly prohibiting supervisors from organizing.[105]

In spite of congressional intent to exclude supervisory personnel from the coverage of the NLRA, the Board has, with court approval, created instances in which NLRB protection of employee rights results in reinstatement of supervisors.[106] When the Board finds an employer's action toward a supervisor to be an unfair labor practice by infringing on employee collective bargaining rights, the Board will vindicate the rights of statutory employees and thereby protect the supervisor.[107] The Board allows reinstatement of supervisors discharged for testifying against the employer in a Board proceeding[108] or during the processing of

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organized labor. *Id.* Furthermore, Congress believed the NLRB's practice of including supervisors in bargaining units, which the Court approved in *Packard Motor Car*, unduly heightened the imbalance inherently present in the Act. *Id.*; *see supra* note 98 (*Packard* upheld by Supreme Court).

[103] H.R. REP. No. 245, *supra* note 54, at 15.

[104] *See* 29 U.S.C. § 164(a) (1976). The NLRA does not require an employer to bargain collectively with individuals defined as supervisors by the Act. National Labor Relations Act § 14(a), 29 U.S.C. § 164(a) (1976); Beasley v. Food Fair, 416 U.S. 653, 660 (1974); H.R. REP. No. 245, *supra* note 54, at 16-17; *see also* Stop & Go Foods, Inc., 246 N.L.R.B. 1076, 1078 (1979) (discharge of supervisor violates Act when discharge coerces employers and not because NLRA protects concerted activity by supervisors); Long Beach Youth Center, Inc., 230 N.L.R.B. 648, 650 (1977) (Act did not protect supervisor discharged for siding with employees), *enforced*, 591 F.2d 1276 (9th Cir. 1979).

[105] 29 U.S.C. § 164(a) (1976). The Act provides that supervisors may join labor organizations. National Labor Relations Act § 14(a), 29 U.S.C. § 164(a) (1976).

[106] *See, e.g.*, Belcher Towing Co. v. NLRB, 614 F.2d 88, 92 (5th Cir. 1980) (supervisor reinstated following discharge for refusing to enforce company's no-solicitation rule against union); King Radio Corp. v. NLRB, 398 F.2d 14, 20-21 (10th Cir. 1968) (Board reinstated supervisors disciplined after testifying against employer in Board hearing); Pioneer Drilling Co., 162 N.L.R.B. 918, 923 (1967) (crew chiefs reinstated when discharge was pretext for terminating crews engaged in union activity), *enforced*, 391 F.2d 961 (10th Cir. 1968); *see also supra* note 7 (Board authority to implement policies). The Board has protected supervisors to the extent of granting reinstatement to supervisors discharged or demoted in violation of employee rights under the Act. *See* 29 U.S.C. § 158(a)(1) (1976). The Board, however, has not given supervisors all the protections reserved for workers defined as employees by the NLRA. *See* 29 U.S.C. § 152(3) (1976).

[107] *See* 29 U.S.C. §§ 157, 158(a)(1) (1976); Parker-Robb Chevrolet, Inc., 262 N.L.R.B. No. 58, _____, 110 L.R.R.M. 1289, 1290 (1982) (Board discussion of supervisor reinstatement); Sheraton Puerto Rico Corp., 248 N.L.R.B. 867, 868 (1980) (supervisor reinstated when discharge threatened employee rights), *enforcement denied*, 651 F.2d 49 (4th Cir. 1981).

[108] *See, e.g.*, Better Monkey Grip Co., 115 N.L.R.B. 1170, 1171 (1956), *enforced*, 243 F.2d 836 (5th Cir. 1957). In *Better Monkey Grip*, the Board ordered reinstatement of a supervisor discharged for testifying against the employer's interests in an earlier unfair labor practice proceeding. *Id.* at 1170-71. The Board held that the employer's action toward the supervisor infringed on the right of statutory employees to pursue the remedies the NLRA guarantees. *Id.* at 1171.

an employee grievance.[109] The Board also allows reinstatement of supervisors discharged for refusal to commit unfair labor practices.[110] Additionally, Board practice allows redress when an employer disciplines a supervisor for failure to prevent unionization.[111] The Board further allows reinstatement when a supervisor warns a rank-and-file employee that the employer is compiling a case for the employee's discharge.[112]

Although the courts have approved the exceptions providing limited supervisor protection,[113] the NLRB recently restricted an area of protection the Board had long recognized.[114] Between 1947 and 1982, the Board ordered reinstatement of supervisors whose discharges constituted an "integral part" of the employer's overall plan to impede unionization and interfere with employee rights.[115] In the 1982 decision of *Parker-Robb*

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[109] *See, e.g.*, Rohr Indus., Inc., 220 N.L.R.B. 1029, 1039 (1975) (discharged supervisor reinstated because termination resulted from supervisor's support of worker's grievance); Ebasco Servs. Inc., 181 N.L.R.B. 768, 770 (1970) (foremen reinstated following demotion for giving statements unfavorable to employer during investigation of employee grievance complaint).

[110] *See, e.g.*, Vail Mfg. Co., 61 N.L.R.B. 181, 209 (1945), *enforced*, 158 F.2d 664 (7th Cir. 1947). In *Vail Mfg.*, the employer attempted to classify shift supervisors as operators so the supervisors would be eligible to vote against the union in a representation election. 61 N.L.R.B. at 207. When the supervisors refused the classification that would have constituted an unfair labor practice, Vail discharged the supervisors. *Id.* at 209. The Board held that Vail committed an unfair labor practice by termination of the supervisors. *Id.*; *see* 29 U.S.C. § 158(a)(1) (1976) (interference with exercise of employee organizational rights is unfair labor practice); *see also* Belcher Towing Co., 238 N.L.R.B. 446 (1978) (Board reinstated supervisor discharged for refusing to enforce no-solicitation rule), *enforced*, 614 F.2d 88 (5th Cir. 1980); Inter-City Advertising Co., 89 N.L.R.B. 1103 (1950) (Board reinstated supervisor discharged for failing to report employees' union activities), *rev'd*, 190 F.2d 420 (4th Cir. 1951).

[111] *See, e.g.*, Talladega Cotton Factory, Inc., 106 N.L.R.B. 295 (1953), *enforced*, 213 F.2d 209 (5th Cir. 1954). In *Talladega*, overseers reluctantly interrogated employees about union activities when the company ordered the overseers to break up the union. 106 N.L.R.B. at 296. Talladega discharged the overseers for failing to eliminate the union upon orders of the employer. *Id.* The Board found that the Talladega officials and supervisors had engaged in unfair labor practices and that discharge of the ineffective supervisors on the heels of union victory at the plant demonstrated the employer's determination to thwart the union. *Id.* at 297. Thus, the Board found the company's action interfered with and coerced employees exercising organizational rights and constituted an unfair labor practice. *Id.*; *see* 29 U.S.C. § 158(a)(1) (1976).

[112] *See, e.g.*, Buddies Super Mkts., 223 N.L.R.B. 950, 951 (1976), *enforcement denied*, 550 F.2d 39 (5th Cir. 1977). In *Buddies*, the employer discharged a supervisor for warning an employee that the company was "building a case" against the employer. 223 N.L.R.B. at 950. The Board held that the supervisor's discharge confirmed a pattern of patently unlawful design by the employer and violated the Act. *Id.* The controlling factor was not that the discharge served as an example to other supervisors who failed to cooperate in unlawful conduct but that the supervisor's disclosure exposed the unlawful scheme and prevented a discharge that would have violated the Act. *Id.*

[113] *See supra* notes 107-12 (supervisor reinstatement).

[114] *See* Parker-Robb Chevrolet, Inc., 262 N.L.R.B. No. 58, _____, 110 L.R.R.M. 1289, 1289 (1982); *see also infra* notes 115, 116 (integral part cases and *Parker-Robb* holding).

[115] Krebs & King Toyota, Inc., 197 N.L.R.B. 462, 462 (1972); Pioneer Drilling Co., 162

Chevrolet, Inc., the Board abruptly changed the policy and eliminated the protection formerly afforded supervisors under the "integral part" test.[116]

N.L.R.B. 918, 923 (1967), *enforced*, 391 F.2d 961 (10th Cir. 1968); Miami Coca Cola Bottling Co., 140 N.L.R.B. 1359, 1361 (1963). The Board first articulated the phrase "integral part of a pattern of conduct" in *Miami Coca Cola*. 140 N.L.R.B. at 1361. The company in *Miami Coca Cola* fired a supervisor upon the supervisor's refusal to discharge all union activists. *Id.* at 1360. The Board found the supervisor's termination constituted an unfair labor practice because the discharge was part of the employer's pattern of conduct designed to penalize union adherents and eliminate union activity altogether. *Id.* at 1361.

The NLRB applied the *Miami Coca Cola* rationale to the facts of *Pioneer Drilling* and found discharges of two drillers to violate the Act. 162 N.L.R.B. at 923. The dispute in the *Pioneer Drilling* case arose when the company needed a crew in another location and requested a transfer of two drillers, stipulated to be supervisors, whom the company knew to be involved in union activity with the crews. *Id.* at 921. The Tenth Circuit noted that the crew leaders' own union activities did not motivate the termination. 391 F.2d at 963. Instead, the employer's overall plan to stifle the crews' organization efforts motivated discharge of the crew chiefs. *Id.* Concluding that the discharges violated the Act, the Board noted two facts in particular. 162 N.L.R.B. at 923. The situation necessitating a crew transfer had existed for over a week and the company sought transfers only when union activity began among members of local crews. *Id.* Second, the company requested transfers only of crews engaged in organizing efforts although a new and competent driller not engaged in union activities was available. *Id.* at 924. Recognizing the industry custom by which a driller selects his own crew and that termination of a driller constitutes termination of the entire crew, the Board found that the employer committed an unfair labor practice when the supervisors became a conduit for the employer's unlawful acts toward the rank-and-file employees. *Id.* at 923.

The NLRB again affirmed the "integral part" or "conduit" rationale for finding a supervisor's termination violative of the Act when the Board ordered reinstatement of a body shop supervisor in *Krebs & King Toyota*. 197 N.L.R.B. at 463. In *Krebs & King*, the NLRB held that the plan to squelch union activity violated the Act and ordered the shop and jobs restored. *Id.*

The NLRB made the "integral part of a pattern of conduct" or "conduit" test the basis for reinstatement of supervisors in a number of cases in which the supervisors terminated supported the employees' efforts to organize. *See, e.g.*, D.R.W. Corp., 248 N.L.R.B. 828, 829 (1980); Downslope Indus., Inc., 246 N.L.R.B. 948, 949 (1979), *enforced*, 676 F.2d 1114 (6th Cir. 1982); Nevis Indus., Inc., 246 N.L.R.B. 1053, 1054-55 (1979), *enforced*, 647 F.2d 905 (9th Cir. 1981); Donelson Packing Co., 220 N.L.R.B. 1043, 1043 (1975), *enforced*, 569 F.2d 430 (6th Cir. 1978). In each case of reinstatement, the Board deemed termination of supervisors to be part of the employer's design to eliminate the union from the workplace. *See D.R.W.*, 248 N.L.R.B. at 829; *Downslope*, 246 N.L.R.B. at 949.

[116] Parker-Robb Chevrolet, Inc., 262 N.L.R.B. No. 58, _____, 110 L.R.R.M. 1289, 1290 (1982) (overruling D.R.W. Corp., 248 N.L.R.B. 828 (1980); Nevis Indus., Inc., 246 N.L.R.B. 1053 (1979), *enforced*, 647 F.2d 905 (9th Cir. 1981); Downslope Indus., Inc., 246 N.L.R.B. 948 (1979), *enforced*, 676 F.2d 1114 (6th Cir. 1982); Donelson Packing Co., 220 N.L.R.B. 1043 (1975), *enforced*, 561 F.2d 430 (6th Cir. 1978); VADA of Oklahoma, Inc., 216 N.L.R.B. 750 (1975); Fairview Nursing Home, 202 N.L.R.B. 318, *aff'd*, 84 L.R.R.M. 3010 (5th Cir. 1973)). The *Parker-Robb* decision did not, however, overrule *Pioneer Drilling*, 162 N.L.R.B. 918 (1967), *enforced*, 391 F.2d 961 (10th Cir. 1968), because the Board believed the *Pioneer Drilling* situation unique in light of the unusual industry custom. *Parker-Robb*, 262 N.L.R.B. at ____ n.12, 110 L.R.R.M. at 1291 n.12; *see supra* note 98 (drilling industry custom whereby discharge of driller terminates entire crew).

In *Parker-Robb*, two crew chiefs, admittedly supervisors, attended an organizational

The *Parker-Robb* Board could not reconcile the long-standing "integral part" test with the statutory language of the NLRA.[117] The Board now views reinstatement of supervisors under the "integral part" test as protection of supervisors rather than protection of employees' collective bargaining rights.[118] The *Parker-Robb* Board found that reinstatement is acceptable only if a discharge interferes with employees' collective bargaining rights.[119] The Board's policy of reinstating supervisors discharged for testifying in Board or grievance proceedings or for similar reasons[120] remains in effect,[121] but the Board no longer reinstates supervisors through application of the "integral part" test.[122]

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meeting of union activists and learned that crew chiefs were ineligible for representation in the unit. 262 N.L.R.B. at _____, 110 L.R.R.M. at 1289. During the next day, the company discharged several employees. *Id.* One of the crew chiefs sought an explanation from management personnel, and a sales manager responded that the company had to cut back its staff. *Id.* When the crew chief continued to demand an explanation, the manager fired the crew chief. *Id.* The ALJ in *Parker-Robb* held that termination of the crew chief constituted an integral part of the company's plan to discourage unionization. *Id.* The NLRB, however, rejected the determination and eliminated the integral part test. *Id.* at 1290; *see supra* note 4 (Board procedures).

The concurring NLRB member accepted the majority's refusal to reinstate the supervisor but refused to join the Board decision retreating from the integral part test and overruling the line of cases culminating in *D.R.W. Corp.*, 248 N.L.R.B. 828 (1980). *Parker-Robb*, 262 N.L.R.B. at _____, 110 L.R.R.M. at 1294 (Jenkins, concurring); *see infra* note 124 (rationale of concurring opinion).

[117] Parker-Robb Chevrolet, Inc., 262 N.L.R.B. at _____, 110 L.R.R.M. at 1291. The *Parker-Robb* majority asserted that the "integral part" or "pattern of conduct" line of cases disregarded the Act's express exclusion of supervisors from the definition of employee. *Id.* at _____, 110 L.R.R.M. at 1291.

[118] *Id.* at _____, 110 L.R.R.M. at 1291-92; *see* Downslope Indus., Inc., 246 N.L.R.B. 948, 950 (1979) (Truesdale, concurring), *enforced*, 676 F.2d 1114 (6th Cir. 1982); *see also* D.R.W. Corp., 248 N.L.R.B. 828, 833 (1980) (Truesdale, dissenting).

[119] Parker-Robb Chevrolet, Inc., 262 N.L.R.B. at _____, 110 L.R.R.M. at 1291.

[120] *See supra* notes 107-12 and accompanying text (supervisors reinstated when discharge interferes with exercise of employee rights under NLRA).

[121] *Id.* at _____, 110 L.R.R.M. at 1292; *see* Better Monkey Grip Co., 115 N.L.R.B. 1170, 1171 (1956) (supervisor can testify against employer in Board proceeding without fear of employer redress), *enforced*, 243 F.2d 836 (5th Cir. 1957); Vail Mfg. Co., 61 N.L.R.B. 181, 209 (1945) (supervisor can refuse to commit unfair labor practice without repercussion), *enforced*, 158 F.2d 664 (7th Cir. 1947).

[122] *See, e.g.*, Serendippity-Un-Ltd and Tigerrr, Inc., 263 N.L.R.B. No. 100, _____, 111 L.R.R.M. 1263, 1263 (1982) (discharge of supervisor who participated in strike was not unfair labor practice and supervisor did not receive reinstatement); Boro Management Corp., 263 N.L.R.B. No. 56, _____, 111 L.R.R.M. 1029, 1030 (1982) (employer who discharged supervisor for attempting to enforce collective bargaining agreement did not violate Act even though employer's action had incidental effect on protected employees); Rain-Ware, Inc., 263 N.L.R.B. No. 8, _____, 111 L.R.R.M. 1004, 1004 (1982) (supervisor's discharge not unlawful when result of own participation in union activity); Roma Baking Co., 263 N.L.R.B. No. 4, _____, 110 L.R.R.M. 1523, 1523 (1982) (supervisor discharged for union activity not reinstated); Sahara-Reno Corp., 262 N.L.R.B. No. 95, _____, 110 L.R.R.M. 1544, 1546-47 (1982) (chefs were supervisors whom Act did not protect); Master Food Servs., Inc., 262 N.L.R.B. No. 105, _____, 110 L.R.R.M. 1389, 1390 (1982) (discharge of supervisor who signed authorization card not unfair labor practice.

The result of the earlier "integral part" decisions was to forbid any activity that interfered with the protected class' exercise of statutory rights.[123] The effect of the current Board policy, however, is that any act that does not interfere directly with employees' exercise of organizational rights does not violate the Act.[124] The NLRB no longer looks at the employer's motivation or pattern of conduct.[125] Instead, the Board determines if the specific act of the employer constitutes direct interference with the rights of employees under the Act.[126] Absent direct interference, the Board disregards any secondary effects employer conduct has on employees.[127]

Exclusion of supervisors from the NLRA definition of employee is appropriate in light of the congressional goal of equalizing bargaining power between labor and management.[128] Management deserves the loyalty of supervisors, and exclusion is necessary to maintain fairness and equality in collective bargaining.[129] But the policies of the NLRA also warrant certain instances of reinstatement of supervisors.[130] When an

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[123] *See supra* note 115 (Board ordered reinstatement when supervisor discharge interfered with employee rights).

[124] Parker-Robb Chevrolet, Inc., 262 N.L.R.B. at _____, 110 L.R.R.M. at 1292; *see* Downslope Indus., Inc., 246 N.L.R.B. 948, 950 (1979) (Truesdale, concurring), *enforced*, 676 F.2d 1114 (6th Cir. 1982). The Board's new approach to the integral part cases makes the employer's motivation for alleged misconduct irrelevant in a consideration of the legality of the conduct. *Parker-Robb*, 262 N.L.R.B. at ____, 110 L.R.R.M. at 1291. The concurring opinion in *Parker-Robb* argued that the NLRB should consider the employer's motive for an act before finding the conduct lawful. *Id.* at _____, 110 L.R.R.M. at 1295 (Jenkins, concurring). Before *Parker-Robb*, the Board granted reinstatement when motivation for the discharge was improper or when a legitimate business end did not outweigh reinstatement. Nevis Indus., Inc., 246 N.L.R.B. 1053, 1055 (1979), *enforced*, 647 F.2d 905 (9th Cir. 1981). The earlier cases turned not on whether a supervisor engaged in union activities but on whether involvement in and support of the union was the reason for the discharge. D.R.W. Corp., 248 N.L.R.B. 828, 829 (1980). If union participation was the reason for the discharge, the NLRB found termination lawful. *Id.* at 829-30. If the Board found, however, that the employer's desire to subvert organizational attempts by employees motivated the termination, the discharge was unlawful. *Id.* at 830. Furthermore, instances existed in which an employer discharged a supervisor personally engaged in union activities in violation of the Act. *Id.* Because the employer directed the discharge at employees whose rights the Act protects, the Board found that the employer had an unlawful motivation. *Id.* As the *Parker-Robb* concurrence notes, the key to reinstatement decisions before *Parker-Robb* was the employer's violation of rights of the protected class of employees. *Parker-Robb*, 262 N.L.R.B. at ____, 110 L.R.R.M. at 1295 (Jenkins, concurring).

[125] *Parker-Robb*, 262 N.L.R.B. at _____, 110 L.R.R.M. at 1291.

[126] *Id.*, 110 L.R.R.M. at 1291.

[127] *Id.*, 110 L.R.R.M. at 1291. The *Parker-Robb* majority recognized that termination of a supervisor almost always has a secondary effect on employees when the reason for termination is the supervisor's own union activities or support. *Id.* However, the majority determined that a secondary effect on employees does not warrant affording protection to supervisors under the Act. *Id.*

[128] *See supra* note 6 (purpose of Act).

[129] *See supra* notes 100-05 and accompanying text (rationale of supervisor exclusion).

[130] *See supra* notes 106-12 and accompanying text (instances of supervisor reinstatement).

employer's discharge of a supervisor constitutes an unfair labor practice by violating employee rights guaranteed by the Act,[131] supervisor reinstatement is appropriate and necessary to vindicate employee rights.[132] Since such protection of supervisors has a reasonable basis in the provisions of the Act, the Board acts properly in granting reinstatement.[133] Because the Board receives deference in policy decisions, the recent restriction on reinstatement under the integral part test should withstand judicial scrutiny.[134] Although the change in policy may reflect nothing more than a change in Board membership, future policies likely will continue to depend on the political leaning of the Board majority.[135] As long as formulations of policy have a basis in the Act, however, the Board will continue to receive court deference unless Congress mandates a change in Board procedures.[136]

Like NLRB treatment of managerial employees and supervisors, the Board has formulated a policy toward confidential employees not articulated by the NLRA itself but designed to further the policies underlying the Act.[137] The Board acknowledges that confidential employees are employees by definition[138] but restricts the protection confidential employees receive.[139] Soon after passage of the Wagner Act,

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[131] *See* 29 U.S.C. §§ 157, 158(a)(1) (1976).

[132] *Id.*; *see supra* notes 106-12 (supervisors reinstated when discharges constituted unfair labor practice against employees).

[133] *See supra* note 7 (Board authorized to formulate policies to implement Act and policies sustained when based on Act).

[134] *See supra* notes 116-27 and accompanying text (integral part cases).

[135] *See supra* note 7 (policies may change with change in Board membership).

[136] *Id.* (courts defer to Board in formulations of policies designed to further the Act).

[137] *See* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 171 (1981). Although confidential employees are employees within the Act's definition, *see* 29 U.S.C. § 152(3) (1976), the Board excludes confidential employees from bargaining units but continues to provide other protections under the Act. *Hendricks*, 454 U.S. at 186 n.19; *see, e.g.*, Bethlehem Steel Co., 63 N.L.R.B. 1230 (1945); Southern Colorado Power Co., 13 N.L.R.B. 699 (1939), *enforced*, 111 F.2d 539 (10th Cir. 1940); *see also supra* note 7 (Board authority to formulate policies). Confidential employees continue to receive protection from discrimination in hiring, tenure, or discharge, 29 U.S.C. § 158(a)(3) (1976), protection of right to strike, *Id.* § 163, and access to the Act's resolution and enforcement procedures. *See id.* § 160.

[138] *See* 29 U.S.C. § 152(3) (1976) (employee definition). The Supreme Court recently defined a confidential employee as an employee who assists or acts in a confidential capacity to an individual exercising a managerial function in the field of labor relations. NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 184 (1981); *see* Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946) (Board limited confidential capacity to field of labor relations).

[139] *See* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 179-80 n.11 (1981). Just as the Board held managerial employees to be outside the intended scope of the NLRA definition after NLRB v. Bell Aerospace Co., 416 U.S. 267, 290 (1974), the Board found confidential employees to be outside the class appropriately belonging to bargaining units. *See Hendricks*, 454 U.S. at 179-80 n.11; *see also supra* note 7 (Board power to create policies); notes 72-89 (managerial employees excluded).

the Board confronted the contention that the NLRA definition of employee excluded all employees with access to confidential information of the employer.[140] The Board rejected exclusion of confidential employees, finding that Congress intended to extend coverage of the Act to confidential employees.[141] Rather than exclude confidential employees altogether, however, the Board adopted a labor-nexus rationale and excluded from bargaining units employees with confidential information relating to the employer's labor relations policies.[142] The labor-nexus rationale was similar to Congress' rationale in excluding supervisors.[143] The Board reasoned that the Act should not require management to bargain with units whose membership included employees who in the course of employment obtain confidential information about the employer's intended actions toward the union.[144] The Board routinely applied the labor-nexus test[145] to determine which employees to exclude from bargaining units.[146]

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[140] *See* Creamery Package Mfg. Co., 34 N.L.R.B. 108 (1941) (stenographer with confidential information regarding labor relations excluded while fifteen other employees with confidential information not related to labor relations included in bargaining units); Bull Dog Elec. Prod. Co., 22 N.L.R.B. 1043 (employees in engineering department included in bargaining units), *dismissed*, 25 N.L.R.B. 345 (1940).

[141] *See supra* note 140 (confidential employees given "employee" protection under NLRA).

[142] *See* 29 U.S.C. § 159 (1976). Broad discretion is vested in the Board to determine appropriate bargaining units. *See id.*; *supra* note 4 (Board's determination of bargaining units). The NLRB has formulated policies in which certain individuals receive special treatment. Groups other than confidential employees excluded from bargaining units for policy reasons include relatives of management personnel, clerical employees, and technical employees. 1 J. JENKINS, LABOR LAW § 3.67 (1968). In *Brooklyn Daily Eagle*, the Board held that secretaries to the managing editor and editor of the newspaper were confidential employees. 13 N.L.R.B. 974, 986 (1939). Because management should not have to allow members of the unit to handle confidential management materials, the Board excluded the secretaries from the bargaining unit. *Id.*

[143] *See supra* notes 100-05 and accompanying text (congressional intent to exclude supervisors).

[144] *See* The Hoover Co., 55 N.L.R.B. 1321, 1323 (1944) (employees who prepared reports based on confidential instructions regarding employees' overtime allowances and wage adjustment, handled correspondence between members of management and supervisors, and prepared and handled reports arising from employee grievance investigations were confidential employees excluded from the proposed bargaining unit).

[145] *See, e.g.*, Bethlehem Steel Co., 63 N.L.R.B. 1230, 1234-36 (1945); South Bend Lathe Works, 59 N.L.R.B. 562, 564 (1944); Colonial Broach Co., 53 N.L.R.B. 846, 848 (1943); Bendix Prod. Div., 43 N.L.R.B. 912, 915-16 (1942); *see also* NLRB v. Hendricks County Elec. Membership Corp., 454 U.S. 170, 179-80 n.11 (1981). The Board modified the labor-nexus test in 1946 when in *Ford Motor Co.* the Board limited the confidential capacity to one who exercises a managerial function in labor relations. 66 N.L.R.B. 1317, 1327 (1946).

[146] *See, e.g.*, Brown & Sharpe Mfg. Co., 68 N.L.R.B. 487, 488-89 (1946) (employees performing no confidential functions related to labor relations not excluded); Tennessee Gas & Transmission Co., 67 N.L.R.B. 1375, 1379 (1946) (employees who had function in grievance proceedings excluded from unit); St. Louis Indep. Packing Co., 67 N.L.R.B. 543, 547 (1946) (clerks not excluded as confidential personnel when no duties related to labor relations).

Congress amended the Wagner Act definition of employee in 1947 but did not exclude confidential employees from the meaning of employee.[147] As the Supreme Court noted in *NLRB v. Hendricks County Rural Electric Membership Corp.*,[148] the legislative history of the Taft-Hartley amendments reveal that Congress intended to leave the Board's practice intact.[149] In *Hendricks*, the Supreme Court rejected earlier Court dictum that alluded to congressional intent to exclude confidential employees from NLRA coverage[150] and found that Congress intended to allow the Board to continue the practice of excluding only confidential employees with a labor nexus.[151] The Board has continued to apply the labor-nexus test to distinguish between confidential employees and employees rightfully within the scope of a bargaining unit.[152]

An important question the *Hendricks* Court left undecided is whether the NLRB practice of affording protection to confidential employees while excluding them from bargaining units is proper.[153] But

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Courts upheld Board decisions excluding confidential employees with labor connection from bargaining units. *See* NLRB v. Poultrymen's Serv. Corp., 138 F.2d 204, 210-11 (3d Cir. 1943) (court held Board properly found office workers with no confidential information about labor relations belonged in bargaining unit).

[147] Taft-Hartley Act, ch. 120, § 2(3), 61 Stat. 136, 137-38 (1947) (current version at 29 U.S.C. § 152(3) (1976)).

[148] 454 U.S. 170, 186 (1981). In *Hendricks*, the Supreme Court held that a confidential employee is an employee who acts in a confidential capacity to an individual functioning on behalf of management in the field of labor relations. *Id.* at 181. The case involved two separate fact situations. In one situation, the Court reversed the Seventh Circuit and upheld the Board's finding that the personal secretary to the company's general manager was not a confidential employee because she had no confidential duties related to labor policies. *Id.* at 191. The Court also rejected exclusion of eighteen employees of another company as confidential employees when none of the employees satisfied the labor-nexus test. *Id.*

[149] *Id.* The Court stated that the legislative history of the Taft-Hartley amendments provided no indication that Congress disapproved of Board application of the labor-nexus test to confidential employees. *Id.*; *see supra* notes 142-45 and accompanying text (labor-nexus rationale).

[150] NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 187-88 (1981). In NLRB v. Bell Aerospace Co., 416 U.S. 267, 267 (1974), a case involving managerial employees, the Court stated that Congress clearly thought the NLRA did not cover confidential employees. 416 U.S. at 284 n.12. But the *Hendricks* Court held that the *Bell Aerospace* Court had misinterpreted committee reports. *Hendricks*, 454 U.S. at 186. In fact, the *Hendricks* Court found that Congress knew of the Board's labor-nexus test and made no move to direct a new procedure. *Id.* at 187-88 n.20.

[151] NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 187-88 (1981). The Court affirmed the Board practice of excluding as confidential employees only employees involved in labor relations, personnel, and hiring functions. *Id.*

[152] *See, e.g.*, Stroock & Stroock & Lavan, 253 N.L.R.B. 447, 448-49 (1980) (non-confidential clerical staff employees of law firm excluded from bargaining units where employees not privy to confidential information about labor policies of employer); Swank, Inc., 231 N.L.R.B. 96, 98 (1977) (personnel assistant and personnel department receptionist excluded from bargaining units as confidential employees).

[153] *See* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 185-86

in light of the deference the courts give the Board in identifying appropriate bargaining units[154] and the deference courts give to Board policies when the policies have a reasonable basis in the Act,[155] the Board practice should withstand challenge. Furthermore, in view of the *Hendricks* Court's finding that Congress knew of the Board practice and made no effort to alter it by legislation,[156] the practice probably will continue and confidential employees will remain statutory employees receiving all the protections of the Act except inclusion in bargaining units.[157]

The NLRB makes determinations of employee status to afford the protections of the NLRA to persons deserving protection. The Board decides if a person is an agricultural laborer,[158] an independent contractor,[159] or a managerial employee.[160] If a worker falls into one of these categories, the Board excludes the worker from coverage.[161] Furthermore, if a person is a supervisor, the Act precludes supervisor protection[162] unless the Board finds that the employer's conduct constituted an unfair labor practice and that supervisor reinstatement is necessary to vindicate employee rights.[163] Congress gave the NLRB authority to implement the Act,[164] and the courts have granted the Board broad discretion to formulate policies to further the purposes of the Act.[165] The Board acts within its discretionary power in interpreting the agricultural laborer and independent contractor exclusions narrowly to give a greater number of workers protection under the Act.[166] Since the Act's avowed purpose is to promote collective bargaining, the Board properly extends NLRA protection to workers whom the Board believes Con-

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n.19. The *Hendricks* Court found that the questioned employees were not confidential employees under the labor-nexus test. *Id.* at 186. The Court, therefore, did not decide whether the Board's practice of partial exclusion is acceptable. *Id.* at 185-86 n.19.

[154] *See* Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491-92 (1947) (Court deferred to Board determination that bargaining unit should include foremen); Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 152 (1941) (Court upheld Board's determination of unit comprised of production and maintenance employees); *see supra* note 5 (court review).

[155] *See* NLRB v. United Ins. Co., 390 U.S. 254, 260 (1968); *see supra* notes 7, 56 and accompanying text (deference to Board).

[156] NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 187-88 n.20 (1981).

[157] *See supra* notes 153-56 and accompanying text (confidential employees excluded from bargaining units).

[158] *See supra* notes 19-45 and accompanying text (agricultural laborers).

[159] *See supra* notes 46-70 and accompanying text (independent contractors).

[160] *See supra* notes 72-89 and accompanying text (managerial employees).

[161] 29 U.S.C. § 152(3) (1976); *see supra* note 3 (definition of employee); *see also supra* notes 72-89 and accompanying text (managerial exclusion).

[162] *See* 29 U.S.C. § 152(3) (1976) (supervisors excluded from Act coverage).

[163] 29 U.S.C. § 158(a)(1) (1976) (unfair labor practice defined); *see supra* notes 106-12 and accompanying text (supervisors reinstated when necessary to protect employee rights).

[164] 29 U.S.C. §§ 153, 159 (1976); *see supra* note 4 (NLRB implements Act).

[165] *See supra* note 7 (Board authority to implement NLRA policies).

[166] *See supra* notes 19-70 and accompanying text (agricultural laborers and independent contractors).

gress intended the Act to help.[167] The courts police the Board's policy-making function and restrict application of policies that the courts believe overreach the purpose of the NLRA.[168] The Board has arrived at policies for treatment of managerial employees and supervisors that appear to promote the purposes of the Act.[169] Both groups are excluded from NLRA protection in fairness to management and in an effort to insure equality of bargaining power between labor and management.[170] The Board gives limited protection to certain supervisors when reinstatement is the proper remedy for an employer's unfair labor practice, but the Board refuses to give outright protection to supervisors who wish to engage in concerted employee activity.[171] In this manner the Board furthers the Act's goal of protecting employees' rights to organize and bargain collectively without destroying management's ability to maintain a loyal management staff.[172] Similarly, the Board excepts confidential employees from bargaining units of rank-and-file employees to assure that management is able to prevent union access to confidential labor relations information.[173] Although courts have not ruled on the validity of the Board's practice, the exclusion appears warranted by the Act's purpose of equalizing bargaining power.[174] In light of the apparent basis in the Act's goals, the NLRB policy of excluding confidential employees with a connection to labor matters from rank-and-file bargaining units appears proper.[175]

Congress gave the NLRB broad power to enforce the NLRA and formulate policies necessary to administer the Act.[176] When Board policies have a reasonable basis in the Act's avowed purpose of promoting collective bargaining in labor relations and insuring employee organizational rights,[177] the Supreme Court requires that reviewing courts defer to Board formulations of policies.[178] As long as the Board bases determina-

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[167] *Id.*

[168] *See supra* notes 7, 78-79 (Board formulates policies but courts may reject policies that overreach purposes of Act).

[169] *See supra* notes 71-127 and accompanying text (managerial employees and supervisors).

[170] *See supra* notes 72-77 (congressional intent to exclude managerial employees and supervisors).

[171] *See supra* note 104 (supervisors excluded from protection).

[172] *See supra* notes 106-12 and accompanying text (supervisors reinstated only when necessary to vindicate employee rights).

[173] *See supra* notes 153-56 (confidential employees excluded from bargaining units).

[174] *See supra* notes 6, 7 (Board authorized to make policies in furtherance of purposes of NLRA).

[175] *See supra* notes 153-56 (confidential employees excluded in fairness to management); *supra* note 7 (Board authority to formulate policies); *supra* note 6 (purpose of Act is promotion of equal bargaining power).

[176] *See supra* note 7 (NLRB procedures and powers).

[177] *See supra* note 6 (purpose of Act).

[178] *See supra* note 7 (deference to Board policies).

tions in the areas of agricultural laborers,[179] independent contractors,[180] managerial employees,[181] supervisors,[182] and confidential employees[183] on policies designed to further NLRA goals,[184] NLRB policies likely will withstand challenge in spite of changes in policy which changes in Board membership often cause.[185] Unless Congress mandates a new procedure for implementing the NLRA, the Board will continue to regulate the field of labor relations while receiving deference from reviewing courts.[186]

KATHERINE CARRUTH LINK

[179] *See supra* notes 19-45 and accompanying text (agricultural laborers).
[180] *See supra* notes 46-70 and accompanying text (independent contractors).
[181] *See supra* notes 72-89 and accompanying text (managerial employees).
[182] *See supra* notes 90-136 and accompanying text (supervisors).
[183] *See supra* notes 137-57 and accompanying text (confidential employees).
[184] *See supra* note 6 (purpose of Act).
[185] *See supra* note 7 (makeup of Board and membership changes resulting in policy changes).
[186] *See id.* (deference to Board policies).