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## Confidential Employees and the National Labor Relations Act

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## CONFIDENTIAL EMPLOYEES AND THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act<sup>1</sup> gives to approximately half of the American labor force<sup>2</sup> the right to organize, to bargain collectively, and to engage in strikes, picketing and other concerted activities.<sup>3</sup> These rights are extended only to persons defined by the Act as "employees."<sup>4</sup> Individuals employed by certain designated organizations<sup>5</sup> do not receive this protection; also excluded are agricultural workers, domestic servants, independent contractors, supervisors, and persons employed by their parent or spouse.<sup>6</sup> The National Labor Relations Board considered supervisors<sup>7</sup> as being covered by the Act's definition of "employee" until the

<sup>1</sup>49 Stat. 449 (1935), as amended 29 U.S.C. §§ 151-70 (1970). The Act was amended by Title I of the Labor-Management Relations Act (Taft-Hartley Act) PUB. L. NO. 80-101 (1947), as amended 29 U.S.C. § 141 et seq. (1970).

<sup>2</sup>See Rosenthal, *Exclusions of Employees Under the Taft-Hartley Act*, 4 IND. & LAB. REL. REV. 556 (1951).

<sup>3</sup>These rights are specifically enumerated in section 7 of the Act which provides in part:

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

National Labor Relations Act § 7, as amended 29 U.S.C. § 157 (1970). See C. MORRIS, *THE DEVELOPING LABOR LAW 63-65* (1971) [hereinafter cited as MORRIS], for explanation and clarification of these rights.

<sup>4</sup>National Labor Relations Act § 2(3), as amended 29 U.S.C. § 152(3) (1970) states:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . .

<sup>5</sup>National Labor Relations Act § 2(2), as amended 29 U.S.C. § 152(2) (1970) states in part:

The term "employer" . . . shall not include the United States . . . or any Federal Reserve Bank, or any State . . . or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual . . . .

<sup>6</sup>National Labor Relations Act § 2(3), as amended 29 U.S.C. § 152(3) (1970).

<sup>7</sup>National Labor Relations Act § 2(11), as amended 29 U.S.C. § 152(11) (1970) provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances . . . if . . . the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

This provision is to be construed in the disjunctive. *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948). See C. GREGORY, *LABOR AND THE LAW 347-48* (2d ed. 1961) [hereinafter cited as GREGORY]; MORRIS at 204-05.

Taft-Hartley amendments<sup>8</sup> specifically excluded supervisors from the Act's protection. A related category, the confidential employee,<sup>9</sup> is not specifically excluded, and a recent decision in the Fourth Circuit Court of Appeals deals with this employee's status under the Act.

In *NLRB v. Wheeling Electric Co.*,<sup>10</sup> the private secretary to the company's area manager had access to labor relations secrets. The secretary was therefore classified by the clerical workers' union and management as a confidential employee under the Act and excluded from the clericals' bargaining unit.<sup>11</sup> The company's operations workers began an economic strike over the terms of their new collective bargaining agreement. This strike was accompanied by an orderly picket line, and though not a member of any union or bargaining unit, the secretary refused to cross and as a result was discharged. Following this action by the company, the secretary filed a complaint with the National Labor Relations Board<sup>12</sup> alleging a violation of section 8(a)(1)<sup>13</sup> of the Act.

<sup>8</sup>National Labor Relations Act § 2(3), as amended 29 U.S.C. § 152(3) (1970) provides in part:

The term "employee" shall include any employee . . . but shall not include . . . any individual employed as a supervisor . . . .

§ 14(a) of the Act, as amended 29 U.S.C. § 164(a) (1970), states:

[N]o employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

See A. COX & D. BOK, *CASES & MATERIALS ON LABOR LAW* 118 (7th ed. 1969) [hereinafter cited as COX & BOK].

<sup>9</sup>Employees "who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations" are classified by the Board as "confidential employees." *B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956); *accord*, *Westinghouse Elec. Corp.*, 138 N.L.R.B. 778, 779 (1962); *Minneapolis-Moline Co.*, 85 N.L.R.B. 597 (1949). A clerk whose duties necessitate reference to personnel records and to terms of the collective bargaining agreement is not a confidential employee, since he takes no part in labor negotiations or grievance procedures. *Carling Brewing Co.*, 131 N.L.R.B. 441 (1961). If an employee has a job where he happens to overhear conversations relating to labor relations, this does not make him a confidential employee. *Swift & Co.*, 119 N.L.R.B. 1556 (1958). See generally J. JENKINS, *LABOR LAW* § 3.67 (1968); MORRIS at 217.

<sup>10</sup>444 F.2d 783 (4th Cir. 1971).

<sup>11</sup>Such exclusion tends to indicate that this secretary worked extensively in labor relations matters. It has been Board policy not to exclude from a bargaining unit as "confidential employees" personal secretaries to management, who devote 10% or less of their time to industrial relations. *Westinghouse Elec. Corp. v. NLRB*, 398 F.2d 669, 671 (6th Cir. 1968).

<sup>12</sup>Filing of the complaint was probably due in no small part to the fact that the secretary's husband was employed as business manager for another union local not involved. *NLRB v. Wheeling Elec. Co.*, 444 F.2d 783, 784 (4th Cir. 1971).

<sup>13</sup>National Labor Relations Act § 8(a)(1), as amended 29 U.S.C. § 158(a)(1) (1970), states:

The trial examiner held that the company violated section 8(a)(1) by interfering with the employee's right to engage in concerted activity for mutual aid and protection as provided in section 7.<sup>14</sup> This conclusion was based on the reasoning that, although it was Board policy to exclude confidential employees from bargaining units of regular workers, "the Board early stated that the Act does not withhold from confidential employees 'as a class' the right to engage in concerted activities."<sup>15</sup> To the trial examiner, it was evident that a confidential employee is free, as any other employee, to strike and to honor a picket line and still receive the Act's protection against discharge. Adopting these findings the Board ordered the secretary reinstated with back pay.<sup>16</sup>

When the company refused to obey this order,<sup>17</sup> the Board filed a petition for enforcement, and the company filed a cross petition for review. The Fourth Circuit declined to enforce the Board's order, stating that

[o]n the basis of clear legislative intent we hold that "supervisors" within the content of the statute included confidential secretaries so as to leave their concerted activity . . . unprotected by the Act.<sup>18</sup>

Since the secretary was not a protected employee under section 2(3),<sup>19</sup> her refusal to come to work was not concerted activity protected by the Act, and the company was therefore free to discharge her.

In contending that confidential employees are not deprived of the

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . .

For an enumeration of the section 157 rights, see note 3 *supra*.

<sup>14</sup>There was no charge of section 8(a)(3) anti-union discrimination by management against the employee. Employer acts violating subsection 8(a)(1) are sometimes found to violate the more particular subsections such as 8(a)(3) as well. Here, the trial examiner found acts constituting general interference with section 7 rights, but not specifically prohibited by other subdivisions of section 8(a). While motive is the critical element of a section 8(a)(3) violation, this is not so in the case of section 8(a)(1). *Cooper Thermometer Co.*, 154 N.L.R.B. 502, 503 n.2 (1965).

<sup>15</sup>*Wheeling Elec. Co.*, 182 N.L.R.B. 218, 220 (1970).

<sup>16</sup>*Id.*

<sup>17</sup>The Board's orders are not self-executing, since it has no inherent enforcement authority. Enforcement is obtained by application to the proper United States court of appeals for affurance under section 10(e) of the Act. National Labor Relations Act § 10(e), as amended 29 U.S.C. § 160(e) (1970). Until the order is affirmed, there is no penalty for disobeying it. See MORRIS at 873.

<sup>18</sup>*NLRB v. Wheeling Elec. Co.*, 444 F.2d 783, 786 (4th Cir. 1971).

<sup>19</sup>See notes 4 & 7 *supra*.

Act's protection, the Board relied on section 2(3) of the Act,<sup>20</sup> which states in part that "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . ."<sup>21</sup> In the Taft-Hartley amendments,<sup>22</sup> Congress did limit the definition of "employee" when it specifically excluded certain employee categories.<sup>23</sup> However, there is nothing in the amended Act which explicitly indicates that confidential employees are to be excluded from its coverage.<sup>24</sup> Since there is no clear exclusion of these employees, the Board urged that they are still included in section 2(3). Underlying this argument is the idea that if a statute is not ambiguous, it is improper to resort to legislative history to show what Congress might have intended while the legislation was pending.<sup>25</sup> Furthermore, in deciding a question of law, a court may not expand the scope of plain statutory provisions so that the statute is made to cover a category not specifically mentioned.<sup>26</sup> Therefore, the Board contended that it may treat confidential employees as being within the Act but must continue to prohibit them from bargaining in the same units as non-confidential employees<sup>27</sup> in order to avoid a potential conflict of interests.<sup>28</sup>

In holding that a confidential secretary may engage in concerted ac-

<sup>20</sup>Wheeling Elec. Co., 182 N.L.R.B. 218, 218 n.1 (1970).

<sup>21</sup>Note 4 *supra*.

<sup>22</sup>See note 1 *supra*.

<sup>23</sup>See text accompanying note 6 *supra*.

<sup>24</sup>Wheeling Elec. Co., 182 N.L.R.B. 218, 218 n.1, 220 (1970). In formulating their proposed amendments to the Act,

[b]oth the House bill and the Senate amendment excluded supervisors from the individuals deemed to be employees for the purposes of the act. There was a sharp divergence between the House and Senate, however, with respect to the occupational groups which fell within this definition. The Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors. The House had included numerous other classes. [Among these] were . . . confidential employees.

93 CONG. REC. 6442 (1947). The Senate thought it unnecessary to make specific provision for confidential employees, believing that it was already "prevailing Board practice" to treat them as being outside the scope of the Act. 93 CONG. REC. 6371 (1947).

<sup>25</sup>Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947); Wirtz v. Local 191, Teamsters, 321 F.2d 445, 448 (2d Cir. 1963); Ricker v. United States, 396 F.2d 454, 456 (Ct. Cl. 1968). *But cf.* Cox v. Roth, 348 U.S. 207, 209 (1955).

o <sup>26</sup>Packard Motor Car Co. v. NLRB, 330 U.S. 485, 493 (1947).

<sup>27</sup>Wheeling Elec. Co., 182 N.L.R.B. 218, 221 (1970). *See e.g.*, Ladish Co., 178 N.L.R.B. 90 (1969); Westinghouse Elec. Corp., 138 N.L.R.B. 778 (1962); ACF Indus., Inc., 115 N.L.R.B. 1106 (1956).

<sup>28</sup>Retail Clerks Int'l Ass'n v. NLRB, 366 F.2d 642, 645n.7 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967).

tivity, the Board noted its decision in *Southern Greyhound Lines*,<sup>29</sup> a case involving facts similar to those in the principal case. The Board there held that the confidential secretary's refusal to cross the picket line was a protected activity and that her discharge was in violation of section 8(a)(1).<sup>30</sup> However, that decision appears to be completely distinguishable from the principal case by indications that, while before the Board, the parties in effect, stipulated that confidential employees are covered by section 7.<sup>31</sup> This being the case, the Board's decision in *Southern Greyhound Lines*<sup>32</sup> did not involve the central issue litigated before it in *Wheeling*.<sup>33</sup>

In *Southern Greyhound Lines*,<sup>34</sup> the employer refused to obey the reinstatement order;<sup>35</sup> the Board filed a petition for enforcement with the Fifth Circuit Court of Appeals. That court made no mention of the parties' aforementioned stipulation but nevertheless affirmed the Board's order, stating that when the secretary refused to cross the union picket line, she became, in effect, an economic striker. Although she could not belong to the union which represented other secretaries due to her confidential position, "she was not deprived of the protections furnished an employee under the National Labor Relations Act,"<sup>36</sup> and thus she was protected while taking part in the strike. While this Fifth Circuit decision supports the Board's position in *Wheeling*,<sup>37</sup> the *Southern Greyhound Lines* opinion<sup>38</sup> is weakened by a lack of substantial authority. As authority for its holding, the Fifth Circuit cited a Third Circuit case decided before the Taft-Hartley amendments wherein it was held that exclusion of a confidential secretary from a bargaining unit "does not deprive her of the benefits of the Act."<sup>39</sup> However, that court failed to cite authority on the point.

In declining to follow *Southern Greyhound Lines*,<sup>40</sup> the Fourth Circuit

<sup>29</sup>169 N.L.R.B. 627 (1968).

<sup>30</sup>See note 13 *supra*.

<sup>31</sup>*Wheeling Elec. Co.*, 182 N.L.R.B. 218, 221 n.15 (1970). The trial examiner felt, and the parties conceded, that the employee's confidential status did not affect her right to refuse to cross the picket line. *Southern Greyhound Lines*, 169 N.L.R.B. 627, 627 n.2 (1968). This would appear to be a costly concession by the employer. "[A] party cannot be heard to complain in an appellate court of alleged error which he invited in the lower court in a civil case." *Smails v. O'Malley*, 127 F.2d 410, 414 (8th Cir. 1942).

<sup>32</sup>Note 29 *supra*.

<sup>33</sup>182 N.L.R.B. 218 (1970).

<sup>34</sup>Note 29 *supra*.

<sup>35</sup>See note 17 *supra*.

<sup>36</sup>*NLRB v. Southern Greyhound Lines*, 426 F.2d 1299, 1301 (5th Cir. 1970).

<sup>37</sup>444 F.2d 783 (4th Cir. 1971); 182 N.L.R.B. 218 (1970).

<sup>38</sup>Note 36 *supra*.

<sup>39</sup>*NLRB v. Poultrymen's Serv. Corp.*, 138 F.2d 204, 210 (3d Cir. 1943).

<sup>40</sup>Note 36 *supra*.

pointed to what it considered to be the chief weakness in the decision: "Significantly absent in the court's opinion in *Southern Greyhound* . . . is any reference to the legislative history of the 1947 Amendments."<sup>41</sup> Admitting that Congress made no explicit exclusion of confidential employees,<sup>42</sup> the Fourth Circuit looked to the reason for that omission and to the intent expressed in the 1947 legislative history in order to interpret the word "supervisor" as including confidential secretaries.<sup>43</sup> In so construing this part of the statute, the court believed that it was following the "cardinal rule of statutory construction"<sup>44</sup> by reading "text in the light of context . . . to carry out in particular cases the generally expressed legislative policy,"<sup>45</sup> or, as another federal court has said:

Where . . . the statute is completely silent on the point in question, it is necessary to analyze that statute as a whole, and its history and purposes, to ascertain what interpretation must be ascribed to the silence.<sup>46</sup>

The legislative history was critical to the Fourth Circuit's decision in *Wheeling*<sup>47</sup> since it shows congressional intent to exclude confidential employees, not only from bargaining units of rank and file workers, but also from coverage by the Act. In the House of Representatives, the original bill to revamp the Act specifically placed supervisors outside its coverage. This bill also excluded confidential employees by placing them within a broad definition of the term "supervisor."<sup>48</sup> However, the Senate

<sup>41</sup>NLRB v. *Wheeling Elec. Co.*, 444 F.2d 783, 787 n.4 (4th Cir. 1971).

<sup>42</sup>*Id.* at 786.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.* at 787.

<sup>45</sup>SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943); *accord*, *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968).

<sup>46</sup>NLRB v. *Lewis*, 249 F.2d 832, 835 (9th Cir. 1957), *aff'd*, 357 U.S. 10 (1958).

<sup>47</sup>444 F.2d at 784-85 (4th Cir. 1971).

<sup>48</sup>This bill defined "supervisor" to include any individual who is employed in labor relations, or

who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.

H.R. 3020, 80th Cong., 1st Sess. 11 (1947). Reasons for these exclusions were given in the House Report:

*Management, like labor, must have faithful agents.*

. . . [J]ust as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what

bill did not expressly refer to confidential employees,<sup>49</sup> and it was this version which was adopted by the joint conference. Congress explained its adoption of the Senate bill instead of the House bill:

In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House Bill, *since the Board has treated and presumably will continue to treat, such persons as outside the scope of the Act*. This is the prevailing Board practice with respect to such persons as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect.<sup>50</sup>

Thus, there was no apparent need for an explicit exclusion. Though the bill passed both houses of Congress grounded on this assumption,<sup>51</sup> it was nevertheless intended to leave this matter to the Board's discretion; otherwise, Congress presumably would have adopted the House bill.

The Fourth Circuit specifically noted the bill proposed by the House of Representatives, wherein the confidential employee is expressly included in the supervisor category; the court interpreted this to mean that it was Congress' intent that confidential employees should be treated as "supervisors", a category specifically placed outside the Act.<sup>52</sup> However, the court seemingly ignored the clear congressional statement that, under the compromise version of the amendment, the definition of "supervisors" is "limited to bona fide supervisors,"<sup>53</sup> that is, people with those genuine supervisory powers which are not possessed by many confidential employees. In reaching its decision, the court omitted reference to an important clarification of the bill which became law.

The Fourth Circuit also sought to buttress its decision by reference to the Act's "primary purpose of promoting industrial harmony through collective bargaining."<sup>54</sup> In order to be rid of bitter organizational strikes which restrain commerce, Congress in 1935 passed the original Act,

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pay they should receive for it, and to carry on the whole of labor relations. . . .

Other employees handle intimate details of the business that frequently are highly confidential. Some affect the employer's relations with labor. Others affect its relations with its competitors. In neither case should the employee's loyalty be divided.

H.R. REP. NO. 245, 80th Cong., 1st Sess. 16 (1947).

<sup>49</sup>Note 24 *supra*.

<sup>50</sup>93 CONG. REC. 6371 (1947) (emphasis added).

<sup>51</sup>Note 24 *supra*.

<sup>52</sup>Note 48 and accompanying text *supra*.

<sup>53</sup>Note 24 *supra*.

<sup>54</sup>NLRB v. Wheeling Elec. Co., 444 F.2d 783, 788 (4th Cir. 1971).

which prohibited employer antiunion activity.<sup>55</sup> The Act was tempered by the 1947 amendments which, in effect, made it a two-way street by prohibiting unfair labor practices by management and labor alike.<sup>56</sup> The present goal is to "reconcile and, insofar as possible, equalize the power of competing economic forces within the society in order to encourage the making of voluntary agreements governing labor-management relations and prevent industrial strife."<sup>57</sup> It is generally felt that progress toward this goal would no doubt be impeded by requiring management to negotiate with an ordinary unit containing a confidential employee,<sup>58</sup> since inclusion of such an employee in the opposite camp would probably result in the compromise of the company's entire bargaining position.<sup>59</sup> Thus, the Board excludes confidential employees from normal bargaining units.

However, the Fourth Circuit felt that this exclusion was not in itself sufficient. The court thought it necessary to go one step further and excluded confidential employees from protection by the Act itself under the rationale that the Act would better promote industrial harmony if the last trace of the confidential employee's connection with protected labor organizations were eliminated. The Fourth Circuit saw a need to remove the confidential employee from what it perceived as his previously unclear status and to place him totally on the side of management. When this

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<sup>55</sup>GREGORY at 344. National Labor Relations Act § 1, *as amended* 29 U.S.C. § 151 (1970) states in part:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

<sup>56</sup>National Labor Relations Act § 8(a) & (b), *as amended* 29 U.S.C. § 158(a) & (b) (1970).

<sup>57</sup>Pittsburgh Plate Glass Co. v. NLRB, 427 F.2d 936, 946 (6th Cir. 1970); *accord*, NLRB v. North Ark. Elec. Co-op., 446 F.2d 602, 608-09 (8th Cir. 1971).

<sup>58</sup>NLRB v. Wheeling Elec. Co., 444 F.2d 783, 788 (4th Cir. 1971); NLRB v. Quaker City Life Ins. Co., 319 F.2d 690, 694 (4th Cir. 1963).

<sup>59</sup>As the Board stated:

[M]anagement should not be required to handle labor relations matters through employees who are represented by the union with which the company is required to deal and who in the normal performance of their duties may obtain advance information of the company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters.

Hoover Co., 55 N.L.R.B. 1321, 1323 (1944); *accord*, Westinghouse Elec. Corp. v. NLRB, 398 F.2d 669, 670 (6th Cir. 1968).

confidential secretary refused to cross the strikers' picket line, she allied herself with the side in opposition to management; she "plighted her troth" with the unit and showed a commitment to the union cause.<sup>60</sup> In view of the fact that the court had placed her on the side of management, her decision demonstrated such disloyalty as to warrant her discharge.

The court and the Board each acknowledged that the secretary's motive in allying herself with organized labor was personal sympathy toward her husband, that is, her fear of jeopardizing his employment with a union.<sup>61</sup> The Board held that this personal motive was wholly irrelevant and that the only material consideration was "the nature of the activity for which she was discharged."<sup>62</sup> However, on requesting enforcement of its order by the Fourth Circuit, the Board contended that were motive deemed relevant, "the uncontradicted evidence shows that at least one of [her] reasons for refusing to cross was her sympathy for the strikers."<sup>63</sup> This later contention appears weak in view of the secretary's conflicting testimony.<sup>64</sup>

The secretary's personal motive was not a factor in the court's decision in this case. However, based on the Fourth Circuit's holding in *NLRB v. Union Carbide Corp.*,<sup>65</sup> the personal motive factor might have

<sup>60</sup>A confidential secretary who plights her troth with the union differs in form but not in substance, from one who holds a union card. Since she cannot formally join the unit, there is nothing incongruous in holding that she cannot "plight her troth" with the unit. Indeed, it seems more consistent to say that if she cannot act in concert by participating in the unit, then she cannot act in concert on an informal basis, or more accurately, that if she does so, it will be without the protection of the Act.

444 F.2d at 788. *Accord*, *NLRB v. North Ark. Elec. Co-op.*, 446 F.2d 602, 610 (8th Cir. 1971). See generally MORRIS at 65.

<sup>61</sup>In *NLRB v. Wheeling Elec. Co.*, 444 F.2d 783 (4th Cir. 1971), the court stated: "because of personal sympathies (Mrs. McConnell's husband was an official of another union not involved), she refused to cross the picket line . . ." 444 F.2d at 784. "The Board had previously found that the record would afford ample basis for finding that the dominant, if not the sole, reason for McConnell's conduct was a fear of jeopardizing her husband's position." *Wheeling Elec. Co.*, 182 N.L.R.B. 218, 220 n.10 (1970).

<sup>62</sup>*Wheeling Elec. Co.*, 182 N.L.R.B. 218, 220 (1970). This was based on the Board's decision in *Nuodex Div. of Tenneco Chemicals, Inc.*, 176 N.L.R.B. No. 79 (1969), where an office employee was discharged for refusing to cross a picket line established by a union representing the company's production employees. While she claimed that she acted solely out of respect for her husband's wishes, the Board found that her motivation was irrelevant, and that the only material factor was the act itself. The discharge was held unlawful.

<sup>63</sup>Brief for NLRB at 8, *NLRB v. Wheeling Elec. Co.*, 444 F.2d 783 (4th Cir. 1971).

<sup>64</sup>She did attempt to suggest that she had personal sympathy with the strikers but admitted that this testimony was given in response to a suggestion to her by Counsel for the Board that she should "think of some reasons" along this line to "help" her case.

Brief for Respondent at 17, *NLRB v. Wheeling Elec. Co.*, 444 F.2d 783 (4th Cir. 1971).

<sup>65</sup>440 F.2d 54 (4th Cir.), cert. denied, 92 S. Ct. 96 (1971).

been relied on exclusively to deny enforcement of the Board's order. In that case, three nonstriking union employees refused to cross a picket line. Two of the employees refused as a matter of principle, that is, a belief in the strikers' cause. Yet the third employee's refusal was based not on principle but on fear of physical reprisal. While ordering reinstatement of the first two employees,<sup>66</sup> the Fourth Circuit refused to reinstate the third on the ground that such an employee "makes no common cause, and contributes nothing to mutual aid or protection in the collective bargaining process."<sup>67</sup> Though this union employee was covered generally by the Act, his private motive removed his actions from within the scope of protected activity under section 7.<sup>68</sup> This reasoning might well have been applied in the principal case. Even assuming that the secretary was a protected employee under section 2(3) of the Act,<sup>69</sup> her action was not prompted by any deep-felt belief in the strikers' cause. She refused to cross the picket line out of fear of reprisals against her husband.<sup>70</sup> This was not concerted activity for "mutual aid or protection" under section 7.<sup>71</sup> Since her conduct is not protected by the Act, the employer could freely discharge her. The Fourth Circuit's refusal to decide the case on the basis of motive may have been due to possible court feeling that there was a real need to clarify the confidential employee's position with regard to the Act, a question which could have been avoided altogether through use of the rationale in the *Union Carbide*<sup>72</sup> decision.

The *Wheeling* decision rests on the court's use of congressional intent, as expressed in the legislative history, to regulate an area not expressly covered by the amended Act. This reasoning has already been heartily endorsed by the Eighth Circuit Court of Appeals in its recent decision in *NLRB v. North Arkansas Electric Cooperative, Inc.*<sup>73</sup> Furthermore, the

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<sup>66</sup>[I]t now seems to be fairly well established by the most recent authority that nonstriking employees who refuse as a matter of principle to cross a picket line maintained by their fellow employees have "plighted [their] troth with the strikers, joined in their common cause, and [have] thus become . . . striker[s] [themselves]."

*Id.* at 55; *see also* *NLRB v. Difco Laboratories, Inc.*, 427 F.2d 170, 171-72 (6th Cir. 1970); *NLRB v. Southern Greyhound Lines*, 426 F.2d 1299 (5th Cir. 1970).

<sup>67</sup>*Id.* at 56.

<sup>68</sup>Note 3 *supra*.

<sup>69</sup>Note 4 *supra*.

<sup>70</sup>*See* note 61 *supra*.

<sup>71</sup>Note 3 *supra*.

<sup>72</sup>Note 65 *supra*.

<sup>73</sup>446 F.2d 602 (8th Cir. 1971). In this case, a managerial employee was discharged for failing to remain neutral during a union representation election. Since managerial employees are not expressly excluded by the Act, the Board ruled that he was an "employee" under section 2(3), so that the employer violated the Act by discharging him for siding with the union. The Eighth Circuit declined to enforce the reinstatement order,