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# The Status of Supervisors Under the National Labor Relations Act

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# COMMENTS

## THE STATUS OF SUPERVISORS UNDER THE NATIONAL LABOR RELATIONS ACT

Since the passage of the National Labor Relations Act (NLRA) in 1935, the proper treatment of supervisory, managerial and confidential employees under the Act has been a problem for the courts and the Congress. In 1947, the United States Supreme Court in *Packard Motor Car Co. v. NLRB*<sup>1</sup> upheld an order of the NLRB granting supervisory employees the right of self-organization.<sup>2</sup> In an effort to overrule *Packard*, Congress enacted provisions as part of the Taft-Hartley Act<sup>3</sup> which excluded supervisors from the coverage of the NLRA and provided protection for the employer from union pressure in the selection of his representatives for grievance adjustment and collective bargaining.<sup>4</sup> However, there is still much controversy surrounding the types of employees intended to be excluded from the Act, the effect of exclusion upon the employer-supervisor relationship and the relationship between the union and the supervisor.

### *Exclusion of Supervisors*

Section 2(3)<sup>5</sup> now expressly excludes supervisors from the definition of employees and thus from the coverage of the Act. Section 2 (11) of the NLRA defines a supervisor as:

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 or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but

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1. 330 U.S. 485 (1947).

2. In a strong dissent, which was frequently quoted during the Congressional deliberations on the Taft-Hartley Act, Justice Douglas declared that the majority's decision tended "to obliterate the line between management and labor." *Id.* at 494.

3. Labor-Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1964).

4. The report of the Senate Committee on Labor and Public Welfare clearly shows the Congressional distaste for *Packard*: "A recent development which probably more than any other single factor has upset any real balance of power in the collective bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise." S. REP. No. 105, 80th Cong., 1st Sess. 1, 3-4 (1947).

5. 29 U.S.C. § 152(3) (1947).

requires the use of independent judgment.<sup>6</sup>

In interpreting this language, the courts have consistently held that to be a statutory supervisor, an employee must (1) have authority (2) to use independent judgment (3) in performing a supervisory function (4) in the interest of the employer.<sup>7</sup> However, the employee does not have to possess authority to exercise all of the thirteen supervisory functions listed in the Act,<sup>8</sup> as the presence of any one of the powers is sufficient to classify an employee as a supervisor.<sup>9</sup>

It is the existence rather than the exercise of supervisory powers that is controlling. For example, in *Ohio Power Co. v. NLRB*,<sup>10</sup> the Labor Board refused to classify a worker who only infrequently exercised supervisory powers as a supervisor under the Act. In reversing the Board's decision, the Sixth Circuit Court of Appeals focused on the existence of the supervisory powers and held that the Act "does not require the exercise of the power described for all or any definite part of the employee's time."<sup>11</sup>

The sporadic *existence* of supervisory power, however, is generally not enough to characterize an employee as a supervisor. In *NLRB v. Quincy Steel Cast Co.*,<sup>12</sup> a production worker acted as superintendent when the regular superintendent was on vacation or otherwise absent from the plant. The First Circuit Court of Appeals held that such "spasmodic and infrequent" assumption of command and responsibility does not transform an otherwise rank and file worker into a supervisor.<sup>13</sup>

The distinction between infrequent exercise and infrequent ex-

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6. 29 U.S.C. § 152(11) (1947).

7. See, e.g., *NLRB v. Security Guard Serv., Inc.*, 384 F.2d 143 (5th Cir. 1967). See also *International Union of Brewery Workers v. NLRB*, 298 F.2d 297 (D.C. Cir. 1961); *Poultry Enterprises, Inc. v. NLRB*, 216 F.2d 798 (5th Cir. 1954).

8. See, e.g., *Amalgamated Local 355 v. NLRB*, 481 F.2d 996 (2d Cir. 1973); *NLRB v. Magnesium Casting Co.*, 427 F.2d 114 (1st Cir. 1970); *NLRB v. Process Corp.*, 412 F.2d 215 (7th Cir. 1969); *Pacific Intermountain Express Co. v. NLRB*, 412 F.2d 1 (10th Cir. 1969); *NLRB v. Little Rock Downtowner*, 414 F.2d 1084 (8th Cir. 1969); *NLRB v. Howard Johnson Co.*, 398 F.2d 435 (3d Cir. 1968); *Filler Prod., Inc. v. NLRB*, 376 F.2d 369 (4th Cir. 1967); *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949).

9. *NLRB v. Roselon Southern, Inc.*, 382 F.2d 245 (6th Cir. 1967); *NLRB v. Elliot-Williams Co.*, 345 F.2d 460 (7th Cir. 1965); *Keener Rubber, Inc. v. NLRB*, 326 F.2d 968 (6th Cir. 1964).

10. 78 N.L.R.B. 1134 (1948), *rev'd*, 176 F.2d 385 (6th Cir. 1949).

11. 176 F.2d at 388. In the more recent case of *West Penn Power Co. v. NLRB*, 337 F.2d 993 (3d Cir. 1964), the power in question had in fact never been exercised, but since the power existed, the worker was held to be a supervisor.

12. 200 F.2d 293 (1st Cir. 1952).

13. *Id.* at 296.

istence of supervisory command is not always easy to draw, but it is essential in understanding the judicial interpretation of section 2(11). To illustrate the distinction, a bus dispatcher with the power to use independent judgment in an emergency by ordering a deviation from the established routes or by sending an inebriated driver home will be found to be a supervisor, even though the vast proportion of his work consists merely of relaying assignments to the drivers and performing other duties not requiring the use of independent judgment.<sup>14</sup> In contrast, an employee who performs routine work and holds supervisory powers only in the absence of the foreman will not be held to be a supervisor, even though because of circumstances he may exercise supervisory powers more frequently than the dispatcher.<sup>15</sup>

The title of the job performed<sup>16</sup> and other factors not mentioned in the Act, such as pay and fringe benefits,<sup>17</sup> are not controlling. However, such factors may be indicative of the employer's view of the position and to that extent point to the existence of supervisory powers.<sup>18</sup> Likewise, the number of persons under an individual's supervision is not itself a determinative factor.<sup>19</sup> In *Amalgamated Local 355 v. NLRB*,<sup>20</sup> the Second Circuit classified a department manager as a supervisor although he exercised control over only two employees, stating that "[i]t is the capability of control rather than the number controlled that is decisive."<sup>21</sup> However, as the number of employees controlled diminishes, the probability of finding one to be a "supervisor" as opposed to an employee exercising limited supervi-

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14. See, e.g., *NLRB v. Gray Line Tours, Inc.*, 461 F.2d 763 (9th Cir. 1972); *Pacific Intermountain Express Co. v. NLRB*, 412 F.2d 1 (10th Cir. 1969); *Eastern Greyhound Lines v. NLRB*, 337 F.2d 84 (6th Cir. 1964).

15. See, e.g., *NLRB v. Whitin Machine Works*, 204 F.2d 883 (1st Cir. 1953); *NLRB v. Quincy Steel Casting Co.*, 200 F.2d 293 (1st Cir. 1952).

16. See *Arizona Public Serv. Co. v. NLRB*, 453 F.2d 1228 (9th Cir. 1971); *NLRB v. Sayers Printing Co.*, 453 F.2d 810 (8th Cir. 1971); *NLRB v. American Oil Co.*, 387 F.2d 786 (7th Cir. 1967); *Red Star Export Lines, Inc. v. NLRB*, 196 F.2d 78 (2d Cir. 1952).

17. See, e.g., *West Penn Power Co. v. NLRB*, 337 F.2d 993 (3d Cir. 1964); *NLRB v. Whitin Machine Works*, 204 F.2d 883 (1st Cir. 1953).

18. See, e.g., *Arizona Public Serv. Co. v. NLRB*, 453 F.2d 228 (9th Cir. 1971).

19. H.R. 4908, 79th Cong., 2d Sess. (1945), commonly referred to as the Case Bill, would have required that an individual must have five employees in his charge to be classified as a supervisor. The bill passed both houses of Congress but was vetoed by President Truman.

20. 481 F.2d 996 (2d Cir. 1973).

21. *Id.* at 1000.

sory authority<sup>22</sup> likewise diminishes.<sup>23</sup>

In order to find that the power is exercised "in the interest of the employer," as required by the Act,<sup>24</sup> it is necessary that the supervisory powers be exercised over employees of the supervisor's employer. For example, in *International Ladies' Garment Workers Union v. NLRB*,<sup>25</sup> the union claimed that since its business agents could recommend the adjustment of grievances on behalf of the employees of various companies, they were therefore supervisors and were not covered by the Act. However, because the employees supervised were not employed by the union, the court held that the business agents were not supervisors.<sup>26</sup>

Because of the difficult factual questions which may arise in classifying various persons as supervisors, the courts accord great weight to the decisions of the Board. For example, the Fourth Circuit has upheld factual determinations by the Board reaching opposite results in two cases<sup>27</sup> involving "quite indistinguishable facts."<sup>28</sup> While the court stated that the Board "ought not to treat similar jobs dissimilarly," it acknowledged that the Board has the authority to make the "ultimate inference of fact."<sup>29</sup> Thus, a Board decision will not be overruled if there is "support for it in the record considered as a whole."<sup>30</sup>

#### *Implied Exclusions from the Act*

In addition to those expressly excluded as supervisors, other classes of employees have been found to be impliedly excluded from coverage of the Act. There is some basis in the legislative history for the exclusion of persons working in labor relations, personnel and employment departments, and those termed "confidential secretaries."<sup>31</sup> Further, a Board-created exclusion which has received consis-

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22. See S. REP. NO. 105, 80th Cong., 1st Sess. 4 (1947): "The committee has not been unmindful of the fact that certain employees with minor supervisory duties have powers which may justify their inclusion in that act. It has, therefore, distinguished between strawbosses, leadmen, set-up men, and other minor supervisory employees on the one hand, and the supervisor vested with such genuine management prerogatives such as the right to hire and fire, discipline or make effective recommendations with respect to such acts."

23. See, e.g., *NLRB v. Brennan's, Inc.*, 366 F.2d 560 (5th Cir. 1966) (service captain controlling two waiters held not to be a supervisor).

24. 29 U.S.C. § 152(11) (1947).

25. 339 F.2d 116 (2d Cir. 1964).

26. See also *Westinghouse Elec. Corp. v. NLRB*, 424 F.2d 1151 (7th Cir. 1970).

27. *Inland Motor Corp.*, 138 N.L.R.B. 516 (1962); *Northern Virginia Steel Corp.*, 132 N.L.R.B. 714 (1961).

28. *NLRB v. Inland Motor Corp.*, 322 F.2d 457, 460 (4th Cir. 1963).

29. *Id.*

30. *Id.* at 458.

31. The following language appears in the report of the House Conferees, explain-

tent court recognition is the class of "managerial employees," a term which appears neither in the Act nor in the legislative history. This class has been defined to include individuals (1) who formulate, determine or effectuate their employer's policies, (2) who have discretion in the performance of their duties, independent of an employer's established policies, or (3) who are so closely related or aligned with management as to place the employee in a position of conflict of interest between his employer on one hand and his fellow workers on the other.<sup>32</sup>

Prior to the passage of the Taft-Hartley Act, "managerial employees" were excluded from bargaining units of rank and file members,<sup>33</sup> but it was uncertain whether they were also excluded from coverage of the NLRA itself. The Board decided this question after passage of the Taft-Hartley Act and declared in *Swift & Co.*<sup>34</sup> that "all individuals allied with management . . . cannot be deemed to be employees for the purposes of the Act."<sup>35</sup> This interpretation was followed until the Board in *North Arkansas Electric Cooperative*<sup>36</sup> and *Bell Aerospace Co.*<sup>37</sup> restricted the class of excluded managerial employees to those involved in shaping or implementing the employer's labor policies. The basis for excluding these employees was the potential for conflicts of interest between the employee's job function and his membership in a union organization. Both the Eighth<sup>38</sup>

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ing the action taken by the Conference Committee concerning proposed versions of the subsequently enacted Taft-Hartley Act: "The conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provisions, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect." H.R. REP. No. 510, 80th Cong., 1st Sess. 30, 35 (1947); U.S. CODE CONG. SERV. 1135, 1141 (1947).

32. *Westinghouse Elec. Corp. v. NLRB*, 424 F.2d 1151 (7th Cir. 1970); *NLRB v. North Arkansas Elec. Cooperative*, 412 F.2d 324 (8th Cir. 1969); *Retail Clerks Int'l Ass'n v. NLRB*, 366 F.2d 642 (D.C. Cir. 1966). *Cf. International Ladies' Garment Workers' Union v. NLRB*, 339 F.2d 116 (2d Cir. 1964).

33. *See, e.g., Ford Motor Co.* 66 N.L.R.B. 1317, 1320 (1946): "We have customarily excluded from bargaining units of rank and file workers executive employees who are in a position to formulate, determine, and effectuate management policies." *See also J.P. Freiz & Sons*, 47 N.L.R.B. 43 (1943).

34. 115 N.L.R.B. 753 (1956).

35. *Id.* at 753-54. *Accord, American Locomotive Co.*, 92 N.L.R.B. 115, 117 (1954). 117 (1954).

36. 185 N.L.R.B. 550 (1970).

37. 190 N.L.R.B. 431 (1971).

38. *NLRB v. North Arkansas Elec. Cooperative, Inc.*, 446 F.2d 602 (8th Cir. 1971).

and Second Circuits<sup>39</sup> disapproved of the Board's restriction and in *NLRB v. Bell Aerospace Co.*,<sup>40</sup> the United States Supreme Court sided with the circuit courts and held that managerial employees were indeed intended to be excluded from the coverage of the Act, rejecting the narrow definition of the class adopted by the Board.<sup>41</sup>

The Court's decision in *Bell* focuses on the legislative history of the Taft-Hartley Act, general principles of statutory interpretation and on the earlier decisions of the Board. The Court found that the legislative history indicated that the categories of exemptions from the Act found in section 2 of the Act were not meant to be exclusive. A report the Court identified as the "Conference Committee Report" was quoted as an indication that Congress did not intend for the Act to cover "confidential employees" as well as persons working in labor relations, employment and personnel departments.<sup>42</sup> Since no explicit exclusion was required for these classes, the Court concluded that Congress intended to exclude other classes which were "so clearly outside the Act that no specific exclusionary provision was thought necessary,"<sup>43</sup> and that "managerial employees were paramount" among these.<sup>44</sup>

Citing *Swift*, the Court noted that prior to the recent decisions, the Board had followed a consistent policy of excluding managerial employees, and this view had "been approved by courts without exception."<sup>45</sup> Therefore, the Court found that in view of the legislative history and the consistent decisions of the Board and the courts, the Board was "not now free" to restrict the meaning of the Act by narrowing the managerial employees' exclusion.<sup>46</sup>

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

40. 416 U.S. 267 (1974).

41. *Id.* at 275.

42. *Id.* at 282. See note 31, *supra*.

43. *Id.* at 283. In reaching this conclusion, the Court relied upon H.R. REP. No. 245, 80th Cong., 1st Sess. 23 (1947) which stated that "[m]ost of the people who would qualify as 'confidential' employees are executives and are excluded from the act in any event." Although there is no indication in any source as to why "executives" were excluded from the Act, the Court concluded that these persons were so clearly managerial that it was inconceivable that Congress would intend for the Board to treat them as employees under the Act. The Court's reliance on this House Report seems somewhat misplaced since the House recommendations were rejected by the Conference Committee. However, the report does indicate a Congressional belief that "executives were not covered by the NLRA, and it is relevant for that reason."

44. 416 U.S. at 284.

45. *Id.* at 288.

46. *Id.* at 289. The Court also relied on the fact that the Board's exclusion was permitted to stand when the Act was amended in 1959. However, as the dissent notes, these amendments dealt with secondary boycotts, picketing, and not with any aspect

The decision of the Court in *Bell* is questionable for several reasons. First, much of the reliance on the legislative history is misplaced. The report cited as a Conference Committee Report is rather a statement by the House Conferees.<sup>47</sup> Since most of the House recommendations were rejected by the full Conference Committee, the report serves primarily to explain why the House members acquiesced in the changes. In view of its status as a minority report of sorts, the cited report should not be regarded as conclusive of the intentions of the full Conference Committee.

In addition, the Court apparently relied on a misquoted version of the report. The report states that the Board practice is to exclude those working in labor relations, personnel and employment departments from the coverage of the Act and that "[t]his is the prevailing Board practice with respect to confidential *secretaries* as well."<sup>48</sup> In the unofficial version of both the majority and dissenting opinions, the Court quoted the report as follows: "[t]his is the prevailing Board practice with respect to such people as confidential *employees* as well. . . ."<sup>49</sup> The misquotation appears to be the basis for the Court's belief that Congress intended that the broad class of confidential employees be excluded from the coverage of the Act, when in fact, the intent of the drafters of the report was to exclude the more narrow category of confidential secretaries. Since the Court's belief that the broad category of confidential employees was impliedly excluded from the Act strongly contributed to its belief that the broad class of managerial employees was similarly excluded,<sup>50</sup> its reasoning with respect to the managerial exclusion is considerably weakened.

Secondly, the Court's reliance on a consistent Board practice to preclude the Board from changing its interpretation of the extent of

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of the exclusion from the Act. *Id.* at 310.

47. H.R. MISC. REP. No. 510, 80th Cong., 1st Sess. 30 (1947); U.S. CODE CONG. SERV. 1135 (1947).

48. H.R. MISC. REP. No. 510, 80th Cong., 1st Sess. 30, 35 (1947); U.S. CODE CONG. SERV., 1135, 1141 (1947) (emphasis added). See note 31, *supra*.

49. 94 S. Ct. 1757, 1766 (1974) (emphasis added). Although the quote itself was corrected in the official report (416 U.S. at 282), it seems clear that the effect of the misquotation continued, as the Court stated, in summarizing the legislative history of the Taft-Hartley Act of 1947: "Among those mentioned as impliedly excluded were persons working in 'labor relations, personnel and employment departments,' and 'confidential employees'." 416 U.S. at 283 (emphasis added). The report remains misquoted in the dissenting opinion in the official report. *Id.* at 303.

50. The majority employs its belief that "confidential employees" are excluded to reach the conclusion that a class of "executives" was excluded, and "paramount among this impliedly excluded group" was the class of managerial employees. 416 U.S. at 283-84. See text at note 44, *supra*.



the class seems undesirable in light of the Board's considerable discretion to implement the policies of the NLRA. The Board's determination in *Bell* that exclusion is justified only when a conflict of interest would be created by inclusion<sup>51</sup> appears to have been a reasonable exercise of that discretion.

### *Effect of Exclusion from the Act*

#### *Employer—Supervisor Relationship*

A determination that an individual is a supervisor has great significance for the employer, as he may be held accountable for the supervisor's action<sup>52</sup> in the interrogation of employees,<sup>53</sup> in soliciting withdrawals from the union,<sup>54</sup> and for making coercive statements.<sup>55</sup> Voting by the supervisor in union elections has been proscribed in a line of cases<sup>56</sup> and participation by a supervisor in collective bargaining on the union's side may constitute employer domination sufficient to set aside the bargaining agreement.<sup>57</sup>

It is the excluded employee, however, who suffers most by being exempted from the protection of the Act. First, he has no bargaining rights and may not vote in representation elections.<sup>58</sup> Second, with a limited exception, he can be discharged by an employer for engaging

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51. 190 N.L.R.B. 431, 432 (1971).

52. The portion of the NLRA dealing with employer unfair labor practices, 29 U.S.C. § 158(a) (1964), proscribes certain activities by the employer and his agents. The finding that a man is a supervisor is normally sufficient to charge an employer with his unfair labor practices. For this reason, many unfair labor practice proceedings involve an inquiry into a man's supervisory status. If one is acting as an agent of his employer, however, it is not necessary that he be a supervisor. *Furr's, Inc. v. NLRB*, 381 F.2d 562 (10th Cir. 1967).

53. See, e.g., *NLRB v. Big Ben Dep't Stores, Inc.*, 396 F.2d 78 (2d Cir. 1968).

54. See, e.g., *Poultry Enterprises, Inc. v. NLRB*, 216 F.2d 798 (5th Cir. 1954).

55. In *NLRB v. Montgomery Ward & Co.*, 242 F.2d 497 (2d Cir. 1957), an alleged supervisor made certain coercive statements to employees. The Board and the Second Circuit found that although the man may have been a supervisor, he was not believed to be one by his fellow employees. For this reason, the Board and the court found that his statements were not considered by the employees to be the views of management, and thus did not constitute "management coercion." However, since the individual in question was in fact a supervisor, his knowledge was attributable to the employer.

56. See, e.g., *NLRB v. Employing Bricklayers' Ass'n*, 292 F.2d 627 (3d Cir. 1961); *Local 636, Plumbing & Pipe Fitting Industry v. NLRB*, 287 F.2d 354 (D.C. Cir. 1961); *Nassau and Suffolk Contractors' Ass'n, Inc.*, 118 N.L.R.B. 174 (1957).

57. See *Nassau and Suffolk Contractors' Ass'n, Inc.*, 118 N.L.R.B. 174 (1957). See also *Mon River Towing, Inc. v. NLRB*, 421 F.2d 1 (3d Cir. 1969).

58. See, e.g., *Ross Porta-Plant, Inc. v. NLRB*, 404 F.2d 1180 (5th Cir. 1968); *NLRB v. North Carolina Granite, Inc.*, 201 F.2d 469 (4th Cir. 1953).

in union activity and has no recourse either under state<sup>59</sup> or federal law.<sup>60</sup> The exception allows supervisors to derive rights from the protected employees.<sup>61</sup> If the Board finds that the discharge of the supervisor tends to restrain or coerce the right of employees in violation of section 8(a)(1) of the Act, it may order the supervisor's reinstatement with back pay.<sup>62</sup> This limited exception should be equally applicable to the other excluded classes.

#### *Union—Supervisor Relationship*

The Act does not prohibit supervisors or managerial employees from joining or retaining membership in unions.<sup>63</sup> In fact, many of these workers are union members and as such may encounter substantial problems in balancing their relationship to the employer and the union. Supervisors in particular, as agents of their employer, may be asked to perform acts contrary to union desires and the union may seek to discourage such action by disciplining the supervisory members. The extent to which such union discipline is allowed under the Act involves a consideration of section 8(b)(1)(B) of the NLRA<sup>64</sup> which states:

It shall be an unfair labor practice for a labor organization or its agents . . . . To restrain or coerce . . . an employer in the selection of his representatives for the purpose of collective

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59. *Beasley v. Food Fair, Inc.*, 416 U.S. 653 (1974).

60. *See, e.g., Beasley v. Food Fair, Inc.*, 416 U.S. 653 (1974); *Retail Clerks Int'l Ass'n v. NLRB*, 366 F.2d 642 (D.C. Cir. 1966); *NLRB v. Leland-Gifford Co.*, 200 F.2d 620 (1st Cir. 1952); *L.A. Young Spring & Wire, Inc. v. NLRB*, 163 F.2d 905 (D.C. Cir. 1947).

61. *See NLRB v. Dal-Tex Optical Co.*, 310 F.2d 58 (5th Cir. 1962); *NLRB v. Better Monkey Grip Co.*, 243 F.2d 836 (5th Cir. 1957); *NLRB v. Talladega Cotton Factory, Inc.*, 213 F.2d 209 (5th Cir. 1954). In *Dal-Tex*, a supervisor was discharged for testifying in a Board investigatory proceeding. The Fifth Circuit stated that although the supervisor was not an employee for the purposes of the Act, he was "clearly protected from discharge or other reprisal . . . where such discharge would restrain or coerce those who are recognized as employees in the exercise of their organizational rights." 310 F.2d at 62.

62. The Fifth Circuit noted in *NLRB v. Talladega Cotton Factory, Inc.*, 213 F.2d 209, 217 (5th Cir. 1954), that the exclusion of supervisors "did not diminish the protection previously accorded ordinary employees," and the award of reinstatement with back pay was permissible when necessary to dissipate the effects of an unfair labor practice.

63. However, since such workers are not protected by the NLRA, an employer may insist that a union member give up his membership before being appointed to a supervisory or managerial position. *See, e.g., Steves Sash & Door Co. v. NLRB*, 401 F.2d 676 (5th Cir. 1968).

64. 29 U.S.C. § 158(b)(1)(B) (1964).

bargaining or the adjustment of grievances.

By its own terms, section 8(b)(1)(B) proscribes union activity which (1) restrains or coerces (2) an employer (3) in the selection of his grievance adjustment and collective bargaining representatives. The prohibition applies to actions restraining an employer<sup>65</sup> and furnishes protection for the supervisor and other personnel<sup>66</sup> only through rights guaranteed the employer. However, under certain circumstances, the section will have the effect of limiting the union's actions with respect to members who perform supervisory functions for the employer. To this extent, section 8(b)(1)(B) governs the union-supervisor relationship. For instance, a union strike for a union shop including supervisors is violative of the Act since such a clause limits the employer's choice of supervisors to union members.<sup>67</sup> The prohibition also protects the supervisor since it prevents the union pressure directed at the employer from limiting his freedom of choice concerning union membership.

In *San Francisco-Oakland Mailers' Union No. 18*,<sup>68</sup> supervisors were disciplined by the union for allegedly violating the collective bargaining agreement as interpreted by the Union.<sup>69</sup> Although in this case union pressure was clearly directed at the supervisor, the Board found that the discipline primarily affected the employer-union relationship since the "underlying question" involved the interpretation of the collective bargaining agreement. The Board reasoned that the union pressure directed toward the supervisors would have the effect of making them accountable to the union in their interpretation of the collective bargaining agreement and that the employer would consequently be forced to change its representatives or acquiesce in their accountability to the union.<sup>70</sup> The discipline of the supervisors

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65. Section 8(b)(1)(B) has been used to prohibit such union pressure against an employer as strikes to force the employer to abandon his use of an employer's collective bargaining association. See, e.g., *United States Tile & Composition Workers' Ass'n, Local 36*, 172 N.L.R.B. 2248 (1968); *Teamsters Local 986*, 145 N.L.R.B. 1511 (1964); *Los Angeles Cloak Joint Board*, 127 N.L.R.B. 1543 (1960).

66. As a practical matter, most personnel possessing § 8(b)(1)(B) duties are supervisors, but the protections of § 8(b)(1)(B) extend to those possessing the protected duties, whether supervisors or not.

67. *International Typographical Union Local 38*, 123 N.L.R.B. 806 (1959), *enforced*, 278 F.2d 6 (1st Cir. 1960).

68. 172 N.L.R.B. 2173 (1968).

69. The alleged violations included the use of an assistant foreman to repair a machine and the permitting of a non-union member to remove newspapers from a bin. These violations involved grievance adjustment and the interpretation of the collective bargaining agreement.

70. *San Francisco-Oakland Mailers' Union No. 18*, 172 N.L.R.B. 2173 (1968).

was thus held to constitute a restraint on the employer's selection of collective bargaining and grievance adjustment personnel in violation of section 8(b)(1)(B).

In subsequent Board and lower court decisions, *Oakland Mailers* was relied upon to justify an expansive reading of the prohibitions of section 8(b)(1)(B). In *Lithographers Union, Locals 15-P & 272*,<sup>71</sup> the Board stated that section 8(b)(1)(B) prohibited union discipline of supervisors "for their conduct in representing the interest of the employer."<sup>72</sup> Similarly, in *NLRB v. Local 361, Sheet Metal Workers' International Association*<sup>73</sup> the Fifth Circuit Court of Appeals stated that section 8(b)(1)(B) operated to proscribe union discipline of supervisory members unless such discipline concerned "a purely internal union matter"<sup>74</sup> and did not in any significant manner affect the employer-union relationship.

The United States Supreme Court rejected the broad interpretations of section 8(b)(1)(B) in the recent case of *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641*.<sup>75</sup> A sharply divided Court<sup>76</sup> declared that the Board was unwarranted in finding that union discipline of supervisory members who crossed a picket line during an economic strike and performed struck work constituted a violation of section 8(b)(1)(B). According to the majority, union discipline of supervisory members violates 8(b)(1)(b) "only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer."<sup>77</sup>

The Board argued before the Court that the union discipline in *Florida Power* must be proscribed to insure the employer the "full allegiance" of his representatives for grievance adjustment and collective bargaining.<sup>78</sup> In the Court's opinion, however, Congress had provided a method to insure allegiance of supervisors by reserving to the employer the right to insist that his supervisors not retain membership in labor unions.<sup>79</sup> It was thus the position of the Court that

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71. 175 N.L.R.B. 1072 (1969).

72. *Id.* at 1080.

73. 477 F.2d 675 (5th Cir. 1973).

74. *Id.* at 677.

75. 417 U.S. 790 (1974).

76. Justice Stewart was joined in the opinion by Justices Douglas, Powell, Brennan and Marshall. Justices White, Rehnquist, Blackmun and Chief Justice Burger dissented.

77. 417 U.S. 790, 804-05 (1974).

78. *Id.* at 807.

79. *Id.* at 808, citing *Beasley v. Food Fair, Inc.*, 416 U.S. 653 (1974).

Congress, having granted the employer the option to prohibit supervisor membership in a union, did not intend to grant the employer a further guarantee of supervisory loyalty through section 8(b)(1)(B).

The Court in *Florida Power* declared that *Oakland Mailers* represented an expansion of section 8(b)(1)(B) and assumed without deciding that the decision came within the outer limits of the Court's present interpretation of the statute.<sup>80</sup> These outer limits, however, have not been clearly set by the Court, and substantial uncertainty remains as to the scope of union discipline of supervisory members permissible under section 8(b)(1)(B). Any union discipline directed at an individual possessing grievance adjustment or collective bargaining duties may conceivably "adversely affect" his zeal in representing the employer's interest in those areas. Yet it is precisely this broad reading of the prohibition in section 8(b)(1)(B) that was overruled in *Florida Power*.

It is suggested that the Court is requiring a direct relation between the conduct which the union seeks to restrain and the duties protected by the Act.<sup>81</sup> For example, the Court's sanction of union discipline of supervisors for performing struck work can be explained by looking to the activities sought to be discouraged by the union. Struck work, being normally performed by ordinary employees, is not part of the supervisor's normal duties and bears no relation to the special duties protected by the Act. As the disciplined conduct becomes more closely related to the protected duties, the likelihood of the Court's finding that the discipline is prohibited by section 8(b)(1)(B) grows. Although the Court in *Florida Power* took a critical view of the progeny of *Oakland Mailers*, its assumption that the decision in that case would fall within the outer limits of the prohibition of section 8(b)(1)(B) seems well taken. Discipline imposed for misinterpretation of the collective bargaining agreement would tend to adversely affect the supervisor's future view of that agreement in his capacity as grievance adjuster or potential collective bargainer. However, in view of the distaste the Court showed for *Oakland Mailers*, it is unlikely that the Court will allow the prohibition of section 8(b)(1)(B) to be extended much beyond the facts of that case.

An issue not yet confronted by the courts involves the relatively

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80. 417 U.S. 790, 805 (1974).

81. The test proposed by Professor William Gould is similar: "The critical question is whether the conduct which the union seeks to restrain . . . is essential or critical to the supervisory function and therefore within management's nonrestrainable rights under Section 8(b)(1)(B)." Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L. J. 1067, 1128.

frequent inclusion of supervisors in union security contracts. Although the employer is not required to allow its supervisors to be union members, much less accede to a union shop, in many cases the strength of the union bargaining position may make this option more theoretical than real. The concessions that a union might expect in return for giving up an inclusive union-security arrangement may make the exercise of the option too costly.<sup>82</sup> If the employer acquiesces in such a clause, he has placed substantial power over his supervisors in the hands of the union. Although section 8(b)(2)<sup>83</sup> limits unions in procuring the discharge of an individual based on expulsion from the union, the limitation only applies to "employees"; consequently, if a union security clause includes supervisors, the union might procure a supervisor's dismissal by expelling him from the union. Such union action clearly seems to violate the spirit of section 8(b)(1)(B). In these circumstances, union discipline for any reason would "adversely affect" the supervisor's performance of the protected duties, as it might cost him his job. Consequently, if an inclusive union security contract exists, the union's power to discipline its supervisory members should be severely restricted by section 8(b)(1)(B).

### *Conclusion*

The breadth of the "third class" of individuals excluded from the NLRA and the place that these individuals hold in labor relations was changed substantially by the 1974 Supreme Court decisions in *Bell* and *Florida Power*. The number of individuals excluded from the coverage of the Act has been increased and the protection available to excluded individuals decreased. These decisions make the third class of workers vulnerable to the power of the union and the employer and thus do not seem to further the remedial purposes of the Act.

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82. As discussed in *Recent Cases, Labor Law*, 87 HARV. L. REV. 458, 465 (1973), the union may expect substantial concessions in other areas of the collective bargaining agreement in exchange for allowing the employer to exercise his option. Additionally, the necessity of compensating the supervisor for lost union benefits will add to the cost of employing non-union supervisors.

83. 29 U.S.C. § 158(b)(2) (1964).