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LABOR LAW: DECIPHERING THE WORD FROM DELPHI

MICHAEL L. BRODY*

Of the forty-plus labor law cases handed down by the Seventh Circuit during its 1980-81 term, the vast majority were either routine, factually oriented administrative reviews, or relatively straightforward applications of well-established precedent from the National Labor Relations Board or other courts of appeals.[1] In two cases, however, the court addressed itself to issues that are presently in a considerable state of flux. Because both of these opinions are written in a terse, if not oracular, style, and because both opinions reach holdings of considerable import and dubious validity, an extended discussion of their rationale and likely application is warranted. The two opinions at issue are *Peavey Co. v. NLRB*[2] and *Ryan v. J.C. Penney Co.*[3] In *Peavey*, the court summarily reversed a lengthy and unbroken line of its own decisions applying the so-called "in part" causation test in cases involving

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1. Since these decisions essentially speak for themselves, they are not discussed at length. Still, the following cases may be of interest to Seventh Circuit practitioners: (1) NLRB v. Lyon & Ryan Ford, Inc., 647 F.2d 745 (7th Cir. 1981) (approving award of backpay to unlawfully discharged striker regardless of whether reinstatement had been sought), *cert. denied*, 102 S. Ct. 391 (1981). *See* Abilities & Goodwill, 241 N.L.R.B. 27, *rev'd on other grounds*, 612 F.2d 6 (1st Cir. 1979), in which the Board reversed 30 years of precedent by holding to this effect. (2) LaPorte Transit Co. v. Local 301, Chauffeurs, Teamsters & Helpers, 638 F.2d 1095 (7th Cir. 1981) (dispute between employer and union over proper assignment of work is not a "jurisdictional dispute" for the purposes of §§ 8(b)(4)(D) and 10(k) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(4)(D), 160(k) (1976)), *cert. denied*, 102 S. Ct. 113 (1981). (3) Tinsley v. United Parcel Service, Inc., 635 F.2d 1288 (7th Cir. 1980) (discussing employer's standing to invoke intra-union exhaustion defense in cases involving § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976)), *vacated mem.*, 101 S. Ct. 3072 (1981). (4) Rockford Redi-Mix Co. v. Zipp, 632 F.2d 32 (7th Cir. 1980) (raising, but failing to decide, issue of whether representation election is "valid" so as to effect a bar on recognitional picketing during pendency of § 8(b)(7)(C) "expedited" election, National Labor Relations Act § 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C) (1976)), *cert. denied*, 450 U.S. 929 (1981). *See* Retail Store Employees' Union, Local 692, 134 N.L.R.B. 686, 688-90 & 690 n.11 (1961). (5) F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local 781, 629 F.2d 1204 (7th Cir. 1980) (right of individual employees to intervene for the purpose of appealing district court's order vacating arbitral decision mandating their reinstatement), *cert. denied*, 451 U.S. 937 (1981). (6) Alvey v. General Elec. Co., 622 F.2d 1279 (7th Cir. 1980) (invalidating provision of union constitution prohibiting laid-off employees from maintaining their union membership in good standing where provision effectively barred such employees from voting on alteration of recall rights. Provision held to violate Landrum-Griffin's "Equal Rights" provision, 29 U.S.C. § 411(a)(1) (1976)).

2. 648 F.2d 460 (7th Cir. 1981).

3. 627 F.2d 836 (7th Cir. 1980).

unlawful discrimination against union activists. In *Ryan*, the court waded into the currently blossoming controversy over the rights of "terminable at will" employees. *Peavey* is discussed in the second section of this article. *Ryan* is discussed in the third.

The opening section of the article deals with the sole Seventh Circuit labor law case to be reviewed by the Supreme Court, *Hendricks County Rural Electric Membership Corp. v. NLRB*.[4] In *Hendricks*, the Seventh Circuit held that the NLRA does not apply to "confidential" employees, thus creating enormous problems for the future of white collar unionism. In one of the first decisions of its current term, the Supreme Court reversed the Seventh Circuit decision in *Hendricks*.[5] Because of the decision's considerable practical importance, an extended discussion of *Hendricks*' reasoning is warranted.

SCOPE OF THE ACT: CONFIDENTIAL EMPLOYEES

In *Hendricks County Rural Electric Membership Corp. v. NLRB*,[6] the Seventh Circuit reaffirmed its previously stated view that "confidential" employees are not covered by the National Labor Relations Act. This construction of the Act was first enunciated in 1979, when the court heard an earlier appeal of the *Hendricks* case.[7] Both appeals of the case concern the discharge of Mary M. Weatherman, personal secretary to the general manager and chief executive officer of the Hendricks County Rural Electric Membership Corporation. It was undisputed that the reason for Weatherman's discharge was her decision to sign a petition requesting reinstatement of an injured fellow employee. It was also undisputed, for the purposes of the appeal, that such a discharge would be an unfair labor practice were Weatherman deemed among those entitled to the NLRA's protections. The issue, thus, was the scope of the Act's coverage.

The Board, in a 1978 order,[8] had little trouble concluding that a violation of the Act had occurred and ordered that Weatherman be reinstated. While recognizing that some confidential employees are beyond the Act's purview, the Board had long restricted the scope of this exemption by the application of a "labor nexus" test. That is, the

4. 627 F.2d 766 (7th Cir. 1980), *rev'd*, 102 S. Ct. 216 (1981).

5. NLRB v. Hendricks County Rural Elec. Membership Corp., 102 S. Ct. 216 (1981).

6. 627 F.2d 766 (7th Cir. 1980), *rev'd*, 102 S. Ct. 216 (1981) [hereinafter referred to as *Hendricks II*].

7. Hendricks County Rural Elec. Membership Corp. v. NLRB, 603 F.2d 25 (7th Cir. 1979) [hereinafter referred to as *Hendricks I*].

8. Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616 (1978).

Board had exempted only those employees who possess confidential information concerning labor relations.[9] The Board concluded that Weatherman's confidential knowledge was not of this nature. The Seventh Circuit was less certain. Holding, in *Hendricks I*, that the Board applied the wrong legal standard, the court found that *no* confidential employees are covered by the Act and remanded the case because the Board had failed to consider whether or not Weatherman was protected under this rule of law.[10] On remand, the Board once again found a violation.[11] On appeal, the Seventh Circuit disagreed, this time simply denying enforcement of the Board's reinstatement order.[12] The Supreme Court came to a contrary conclusion.

At issue between the Seventh Circuit, the Board and the Supreme Court was the proper interpretation of the congressional intent behind certain provisions of the Taft-Hartley Act.[13] Prior to 1947, the NLRA did not explicitly distinguish between the protections afforded different classes of employees. Moreover, though the Board had, at various times and for various purposes, differentiated supervisory, managerial and confidential employees from normal rank-and-file workers, it had never adopted any consistent, blanket policy with respect to any of the groups.[14] Consequently, it is not surprising that one of the motives behind the Taft-Hartley overhaul of the Act was a desire to systematize this area of the law.[15] As a result, section 2(3) of the Act was amended to specify that "the term 'employee' shall . . . not include . . . any individual employed as a supervisor . . . ."[16] Section 2(11) was then added to the Act for the purpose of defining the term "supervisor":

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[17]

Because no mention is made of any intent to exclude any confidential employees at all, on its face this statutory language does not even

9. *E.g.*, B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956); Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946).
10. 603 F.2d at 30.
11. Hendrick County Rural Elec. Membership Corp., 247 N.L.R.B. 498 (1980).
12. 627 F.2d at 770.
13. 29 U.S.C. § 152(3), (11) (1976). *See* 627 F.2d at 768-70; 603 F.2d at 28-30.
14. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 275-79 (1974).
15. *Id.* at 275-84.
16. 29 U.S.C. § 152(3) (1976).
17. *Id.* § 152(11).

compel the exclusion of those employees who meet the labor nexus test. Neither, however, does the passage mention managerial employees. Yet, despite the absence of any express statutory authorization, the Supreme Court has read the legislative history behind these provisions as evincing a clear congressional intent to exclude managerial employees from the Act.[18] Relying on the arguably analogous passages in the legislative history that relate to confidential employees, both *Hendricks* panels found that confidential employees are unprotected.

This ruling was, at the least, somewhat surprising, coming as it did in the wake of thirty-five years of consistently contrary Board precedent[19] and a number of equally inhospitable rulings in other circuits.[20] Moreover, as Judge Cudahy, dissenting from *Hendricks II*, pointed out, the decision would have had two notable side effects, both of which caution against enthusiastic adherence. For one thing, the rule proposed by the Seventh Circuit could "strike a major blow at white collar unionism. Many, *if not most*, white collar workers are involved in something which may be argued to be 'confidential' in some general sense."[21] Additionally, the decision has the always unpleasant consequence of transforming a previously well-charted area of the law into potentially anarchic wilderness. In view of these prima facie reasons for doubting the wisdom of the *Hendricks* decisions, it is not terribly surprising that the Supreme Court reversed. The Supreme Court's decision, however, is not without problems of its own. For regardless of the considerable policy arguments in its favor, the Supreme Court's *Hendricks* decision rests on a most dubious reading of the legislative history. Inevitably, the starting point for evaluation of these decisions must be the legislative history of the Taft-Hartley Act.

While the sources of discontent that led Congress to enact Taft-Hartley were multiple, it cannot be denied that among them was a concern over the Board's practice of certifying unions composed of supervisory and managerial personnel.[22] Since it was in connection with this concern over supervisors' unions that the matter of confidential employees arose,[23] it is clear that the issue addressed by the *Hendricks*

18. NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-90 (1974).

19. *See* cases cited note 9 *supra*. *See also* Swift & Co., 129 N.L.R.B. 1391, 1393 (1961); Dohrmann Commercial Co., 127 N.L.R.B. 205, 207 (1960).

20. *See, e.g.*, Union Oil Co. v. NLRB, 607 F.2d 852 (9th Cir. 1979); NLRB v. Allied Prods. Corp., 548 F.2d 644 (6th Cir. 1977); Westinghouse Elec. Corp. v. NLRB, 398 F.2d 669, 670-71 (6th Cir. 1968).

21. 627 F.2d at 722 (Cudahy, J., dissenting) (emphasis in original).

22. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 279 (1974).

23. *See generally* H.R. REP. No. 245, 80th Cong., 1st Sess. 13-17, *reprinted in* I NLRB, LEGIS-

decisions can only be understood if placed in the context of this broader problem. The matter of how to treat supervisors' unions had been an issue of some dispute between the Board and Congress for at least five years preceding the passage of Taft-Hartley. The first Board decision to address the question was not handed down until 1942.[24] It recognized the right of supervisors to organize under the Act's protections and was promptly greeted with a proposal in Congress that foremen be exempted from the Act's coverage.[25] While this legislation was pending in committee, the Board chose to exhibit the better part of valor by reversing its field and holding that collective bargaining units made up of supervisory personnel would not be recognized under the Act except in those trades where organization at this level had been the common practice prior to 1935, the date of the NLRA's passage.[26] There the matter rested for two years until 1945, when the Board, demonstrating the constancy of mind and dedication to principle that has remained a hallmark of its jurisprudence, once again concluded that supervisory and managerial employees were protected by the Act.[27] In a notably lukewarm opinion, and over a vigorous dissent from Justice Douglas, the Supreme Court upheld the Board's authority to recognize units made up of supervisory personnel. The decision, *Packard Motor Car Co. v. NLRB*,[28] placed the onus for action squarely on Congress, arguing that no explicit exemption for supervisory personnel was to be found in the Act as then drafted, and that the sort of policy choice that was entailed in implying such an exemption was a matter properly left to the legislature.[29] In 1946, both houses of Congress, by substantial majorities, passed legislation reversing the *Packard* decision only to see their efforts foiled by President Truman's veto.[30] Taft-Hartley constituted, in part, a renewed and more successful effort to respond to the Court's challenge.

Congress was not secretive about the reasons it disapproved of the *Packard* decision, and the legislative history is emphatically clear in stating two principal objections to the notion of a supervisors' union. The first and most frequently stated theme of discontent was the fear

LATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 304-08 (1948) [hereinafter cited as LEGISLATIVE HISTORY].

24. Union Collieries Coal Co., 41 N.L.R.B. 961 (1942).
25. *See* H.R. REP. NO. 245, *supra* note 23, at 13, LEGISLATIVE HISTORY at 304.
26. Maryland Drydock Co., 49 N.L.R.B. 733 (1943).
27. Packard Motor Car Co., 61 N.L.R.B. 4 (1945).
28. 330 U.S. 485, 488-90 (1947).
29. *Id.* at 493.
30. H.R. REP. NO. 245, *supra* note 23, at 14, LEGISLATIVE HISTORY at 305.

that the Board's policy would effectively rob the nation's employers of any ability to control their work forces. Thus, the various committee reports abound in a variety of horror stories. These include tales of work stoppages that imposed unacceptable risks to production, property and occupational safety.[31] They also include reports that supervisors' unions had become the captives of rank-and-file organizations, and that this sort of incestuous relationship had bred a refusal—sometimes express, sometimes merely implicit—on the part of supervisory personnel to enforce plant discipline.[32] The resulting losses in productivity and increases in work-related injuries were viewed by Congress as intolerable:

> 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.
>
> . . . .
>
> The folly of permitting a continuation of this policy is dramatically illustrated by what has happened in the captive mines of the Jones & Laughlin Steel Corp. since supervisory employees were organized by the United Mine Workers under the protection of the act. Disciplinary slips issued by the underground supervisors in these mines have fallen off by two-thirds and the accident rate in each mine has doubled.[33]

These problems were viewed by Congress as being particularly troublesome because of the second reason given for disapproving of the *Packard* rule: the congressional belief that supervisory and managerial personnel are neither in need, of nor entitled to, the Act's protections. The Taft-Hartley committee reports evidence a very clear sense of the

31. *Id.* at 14-15, LEGISLATIVE HISTORY at 305-06.

32. *Id.* at 15-16, LEGISLATIVE HISTORY at 306-07; S. REP. NO. 105, 80th Cong., 1st Sess. 4-5 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 409-11 (1948).

33. S. REP. NO. 105, *supra* note 32, at 3, 4, LEGISLATIVE HISTORY at 409, 410. To the same effect, *see, e.g.*, H.R. REP. NO. 245, *supra* note 23, at 14, LEGISLATIVE HISTORY at 305:

> The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be "independent" of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them.

purposes that are to be served by the federal labor laws. The reports emphasize the fact that the protections for collective action afforded to rank-and-file employees are meant to alter the position of powerlessness and dependency that such workers would otherwise occupy in their attempt to control any of the most fundamental terms of their on-the-job life. The House Report was particularly explicit in its recognition that the *Packard* rule effected a virtual revolution in the philosophy underlying the federal labor laws. Indeed, the committee's discussion of the *Packard* issue begins by adverting to this very matter: "When Congress passed the Labor Act, we were concerned, as we said in its preamble, with the welfare of 'workers' and 'wage earners', not of the boss. It was to protect workers and their unions against foremen, not to unionize foremen, that Congress passed the Act."[34] Moreover, the fact that supervisors and managers were not among those in need of such protection was made explicit:

> Supervisors are management people. They have distinguished themselves in their work. They have demonstrated their ability to take care of themselves without depending upon the pressure of collective action. No one forced them to become supervisors. They abandoned the "collective security" of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such "security." It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the levelling processes of seniority, uniformity and standardization that the Supreme Court recognizes as being the fundamental principles of unionism.[35]

The point is nowhere better summarized than in Justice Douglas' dissent to the *Packard* opinion:

> The present decision . . . tends to obliterate the line between management and labor. It lends the sanctions of federal law to unionization at all levels of the industrial hierarchy. It tends to emphasize that the basic opposing forces in industry are not management and labor but the operating group on the one hand and the stockholder and bondholder group on the other. The industrial problem as so defined comes down to a contest over a fair division of the gross receipts of industry between these two groups. The struggle for con-

34. H.R. REP. NO. 245, *supra* note 23, at 13, LEGISLATIVE HISTORY at 304.

35. *Id.* at 16-17, LEGISLATIVE HISTORY at 307-08 (citation omitted). The Senate Report was less exercised about this aspect of the *Packard* rule, but it does cite approvingly to Justice Douglas' dissent in the *Packard* case, *see* text accompanying note 36 *infra*, and it does note with horror that "unless Congress amends the act in this respect its processes can be used to unionize even vice presidents . . . ." S. REP. NO. 105, *supra* note 32, at 4, LEGISLATIVE HISTORY at 410.

trol or power between management and labor becomes secondary . . . .[36]

Thus, Congress' disapproval of the *Packard* rule was motivated by a belief that the rule imposed substantial costs on American industry without securing protection for anybody who was in need of it. The question, insofar as the *Hendricks* decisions are concerned is what, if anything, this policy evaluation has to say about the propriety of including "confidential" employees under the Act's protective wing. The answer is: not much.

At the outset, it is important to note that confidential employees, unlike supervisory and managerial employees, are precisely the sort of "workers" and "wage earners" who were intended as the prime beneficiaries of the Act. The mere fact that an employee shares his employer's secrets does not alter the balance of power or the nature of the struggle between them. It is still the employer who hires and fires; who sets wages, and hours, and every other term of employment. Moreover, a personal secretary or a low level engineer or accountant can hardly be said to have "demonstrated . . . [an] . . . ability to take care of . . . [himself] without depending upon the pressure of collective action" merely by accepting a position that entails the possession of some confidential knowledge. Neither is there any reason to view such conduct as implying a desire to "abandon the 'collective security' of the rank and file" for the "opportunities" of a job unencumbered by the "seniority, uniformity, and standardization" that are "fundamental" to unionism. As a result, the balance of policies operative in the case of confidential employees is radically different from the balance that is operative in the case of supervisory employees. Denying supervisory employees coverage under the Act does little to impede the Act from serving the purposes it was intended to serve. Consequently, virtually any adverse consequence that may result from coverage would, on balance, justify an exclusion. In contrast, an exclusion barring confidential employees from the Act's protections would serve to isolate from the Act's processes exactly the sort of worker those processes were meant to serve. This result goes to the very heart of the Act's mission. Accordingly, if the confidential worker is to be properly analogized to the supervisory or managerial employee, it can only be because the employer has such an overwhelming need for the undivided loyalty of such workers that a balance favoring exclusion can be struck.

The version of Taft-Hartley that was originally reported onto the House floor contained a provision expressly excluding confidential em-

36. Packard Motor Car Co. v. NLRB, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting).

ployees from the Act's coverage.[37] The Committee Report endorsing this provision found that employers did, in fact, have an extraordinary need for the loyalty of confidential employees, and that this need derived from the employer's interest in protecting the confidential information to which such employees are privy:

> Other employees [aside from those who can be classified as managerial or supervisory] 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. That which affects the company's relations with its competitors certainly ought not to be open to members of a union that deals also with the firm's competitors.[38]

But this consideration is insufficient as a rationale for excluding confidential employees from the Act's coverage. Employers have always had legal recourse against anyone who appropriates a trade secret for his own use or the use of another.[39] Similarly, well-established common law tort actions exist to secure relief in the event that an employer suffers intentional interference with existing contractual relations or intentional interference with a concrete business expectancy.[40] Thus, it is simply wrong to assume, as the House Committee apparently did, that an employer would be defenseless against a union possessed of his secrets. Moreover, to the extent that the loyalty of a confidential employee is not insured by these common law doctrines—to the extent, that is, that these potential injurious disclosures are not of the sort traditionally recognized as deserving a remedy at law—the question arises as to how seriously the risks of divided loyalty should be taken and why the risks have suddenly become deserving of legal recognition.[41] This is particularly true since the possessors of such confidences, to the extent that their jobs are neither managerial nor supervisory in nature, have a strong claim of entitlement to protection under the Act. In short, the policy considerations which Congress carefully marshalled in

37. H.R. 3020, 80th Cong., 1st Sess. § 2(12)(C) (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 168 (1948).

38. H.R. REP. NO. 245, *supra* note 23, at 16, LEGISLATIVE HISTORY at 307. *See also id.* at 23, LEGISLATIVE HISTORY at 314.

39. RESTATEMENT OF TORTS § 757 (1939).

40. W. PROSSER, LAW OF TORTS §§ 129, 130 (4th ed. 1971).

41. One also has to wonder what sort of line drawing problems might emerge in determining the scope of such a newly protectable realm of confidential information. If an employee is a confidential employee even though he is not possessed of information traditionally deemed "proprietary," does this classification apply to an employee possessed of any non-public information, no matter how trivial? If the value of the secret information to the employer is the touchstone, how long will it take before this new category of confidential information collapses into the old one?

opposition to the *Packard* decision cut little ice in support of the rule proposed in the Seventh Circuit's decision in *Hendricks II*. Indeed, were policy the only issue in the *Hendricks* case, there would be every reason to believe that the Supreme Court's reversal was proper.[42]

The courts, however, are not the governmental institution charged with the formulation of policy; if the legislative history indicates that Congress intended to exclude confidential employees from the Act, however unpersuasive the reasons, then the courts should have little option but to accede to Congress' wishes. It was this sort of reasoning that the Seventh Circuit relied upon, and, the Supreme Court's decision notwithstanding, it is difficult to argue with its conclusions.

The original version of Taft-Hartley was enacted by the House of Representatives. As noted above, that bill's definition of the term "supervisor" included a section which specified that the Act did not protect any employee "who by the nature of his duties is given by the employer

42. Writing in dissent, Justice Powell offered a contrary policy analysis. This analysis begins by emphasizing that the holding of NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), recognized the "clear intent of Congress to exclude from the coverage of the Act *all individuals allied with management*." NLRB v. Hendricks County Rural Elec. Membership Corp., 102 S. Ct. 216, 230 (1981) (Powell, J., dissenting) (emphasis in original). The Board's labor nexus test, he argued, makes some limited sense because it excludes from the Act confidential employees who are so allied:

> But useful as it may be in identifying employees who are allied to management, the "labor nexus" test is but a means to this end. By its rigid insistence on the labor nexus in the case of confidential secretaries, the Board and now this Court, have lost sight of the basic purpose of the labor nexus test itself and of the fundamental theory of our labor laws.

Id. The argument concludes with an assertion that

> it makes little sense to exclude "expediters," "assistant buyers," and "employment interviewers" as managerial but include within the rank and file confidential secretaries who are privy to the most sensitive details of management decisionmaking, who work closely with managers on a personal and daily basis, and who occupy a position of trust incompatible with labor management strife.

Id. at 230-31.

The problem with this argument is its closing factual assertion—namely, the assertion that an employment relationship involving proximity to and the confidence of management personnel necessarily transforms the employee into an "ally" of management. By this logic, any particularly skilled, knowledgeable, or otherwise valuable employee would be an ally of management. In fact, secretaries and other confidential employees are likely to find themselves in direct conflict with management on issues relating to wages and other terms and conditions of employment. The purpose of the NLRA, Justice Powell's views aside, is not to assure that people who work closely together are never brought into conflict. Rather, the Act proceeds from the premise that such people will inevitably have conflicting interests insofar as some are managerial and some are not. The purpose of the Act is to regulate such conflicts in a way that minimizes industrial strife while assuring all parties a fair opportunity to bargain for their point of view. A confidential employee should have as much of a right to benefit from the Act's efforts in this direction as any other nonmanagerial employee.

Moreover, the point of the labor nexus test is not to determine when an employee is an "ally" of management, but rather, to determine when the granting of organizational rights to such an employee would so undermine the employer's ability to maintain shop discipline as to undermine another of the Act's fundamental policies, that of encouraging "the smooth flow" of commerce.

information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use is in the interest of the employer."[43] The House Committee was under the mistaken impression that the Board was already in the habit of excluding such employees from the Act's coverage,[44] but it felt that "protecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the Board . . . ."[45]

The Senate version of the Act, in contrast, made no express mention of confidential employees, and the legislative history in that chamber is equally silent on the subject. Moreover, when the two bills were sent to conference, the Senate version prevailed, and the House's specific exemption of confidential employees was dropped. It is this apparent rejection of the House provision that the Supreme Court gave as its principal reason for believing that Congress had not intended to exclude confidential employees from the Act.[46]

While this construction of the legislative history has an unarguable surface appeal, it does not bear up well after careful scrutiny of the

43. H.R. 3020, 80th Cong., 1st Sess. § 2(12)(C) (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 168 (1948).

44. H.R. REP. No. 245, *supra* note 23, at 23, LEGISLATIVE HISTORY at 314. *But see* Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946).

45. H.R. REP. No. 245, *supra* note 23, at 23, LEGISLATIVE HISTORY at 314.

46. The opinion does offer an alternative reason for reading the legislative history as not intending such an exclusion. This second reason was Taft-Hartley's express inclusion of "professional" employees under the Act's protections. 29 U.S.C. §§ 159(b), 152(12) (1976). Noting that "almost all such persons would likely be privy to confidential business information," the Court stated, "It would therefore be extraordinary to read an implied exclusion for confidential employees into the statute that would swallow up and displace almost the entirety of the professional-employee inclusion." NLRB v. Hendricks County Rural Elec. Membership Corp., 102 S. Ct. 216, 226 (1981). The definition of a professional employee under the Act includes all persons who perform primarily intellectual work involving the consistent exercise of discretion and requiring knowledge customarily acquired by study for an advanced degree. 29 U.S.C. § 152(12) (1976). While it is undoubtedly true that many such employees have confidential knowledge, it is probably also true that many such employees have managerial responsibilities; yet this overlap between the categories was not even mentioned by the Court in *Bell Aerospace* as a reason to avoid excluding managerial workers from the Act. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). Moreover, it is doubtful that "almost all" professional employees are in possession of confidential information. Unless one takes an extraordinarily broad view of the concept of confidential information, it is hard to imagine how such knowledge would tend to come to such professionals as nurses, engineers in well-established fields of technology, accountants responsible for non-secret accounts, in-house attorneys responsible for the defense of slip-and-fall cases or the prosecution of collection cases, and so on. Finally, even if it were a fact that most professional employees are also confidential employees, it is also true that many confidential employees—secretaries, for example, or some highly skilled artisans—are not professionals. Thus, it may be that Congress merely wanted to exclude those confidential employees who are not also professionals, or, alternatively, that the intention was that the Board and courts would be required to strike a balance of some sort in cases where the two categories overlapped.

legislative record. Indeed, the Conference Committee Report makes it clear that the decision to drop the House provision was not intended to slight the House's desire to see such employees excluded. Rather, the conferees indicated that they, like the House Committee, believed that the Board made a practice of excluding confidential employees, and then concluded that the relevant language from the House bill could therefore be omitted as unnecessary:

> In the case of persons working in the 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 people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect.[47]

The Supreme Court opinion sought to avoid the clear thrust of this passage with two arguments. First, it asserted that the implication that Congress misapprehended the Board's actual rule is mistaken. Thus, the Court rehearsed in great detail the pre-1947 Board decisions incorporating the labor nexus test,[48] emphasized that the labor nexus test had expressly been brought to the attention of Congress through the Board's Annual Reports,[49] and concluded that "[c]ertainly the Conference Committee, in approving the Board's 'prevailing practice,' was aware of the Board's line of decisions."[50] From this the Court inferred that the Board practice endorsed by the conferees was the labor nexus test.

This reading of the legislative history, however, simply ignores the passage in the House Report, quoted above, which, in so many words, attributes to the Board the practice of excluding *all* confidential employees, regardless of their involvement in labor relations, from the protection of the Act. The language of the Conference Report, aside from the fact that it is equally unqualified in its reference to the Board practice regarding "confidential secretaries," must be read against the background of these views. This is so for two reasons. First, it is so because these were the views that underlay the provision that the report was addressing. Second, it was necessary to read the Conference Report against the background of the House Report because the members

47. HOUSE CONF. REP. NO. 510, 80th Cong., 1st Sess. 35 (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 539 (1948).

48. NLRB v. Hendricks County Rural Elec. Membership Corp., 102 S. Ct. 216, 223 (1981).

49. *Id.* at 227 n.20.

50. *Id.* at 227.

of the House Committee were also members of the Conference and, as such, co-authors of the Conference Report. Thus, the only fair reading of the report is that it was intended to leave intact a Board policy of excluding confidential employees, even though that policy did not in fact exist.

As an alternative means of avoiding the implication that the conferees thought they were endorsing a Board policy excluding confidential employees, the Court suggests that the Conference Report merely was meant to defer to the Board's expertise in this matter, leaving further development of the law in its hands.[51] Certainly this reading of the Conference Report is strictly consistent with the conferees' language, for all that the Conference Report literally says is that the conferees presume that Board practice would remain constant on this issue, and that they did not intend to "alter . . . [it] . . . in any respect."[52] Moreover, the plausibility of this strict reading is reinforced by the fact that the House Committee had stated that its intent in expressly exempting confidential employees was a desire to eliminate such Board discretion. Thus, it is not at all far-fetched to infer that by eliminating the House provision, the conferees may well have intended simultaneously to reject the House's goal of bridling the Board. The legislative history, however, does make it clear that Congress did not approve of the prospect of unionized confidential employees, and that it was only because Congress believed that the Board shared this view that the Board was given its head. It seems a strained reading of the Taft-Hartley debates to view them as approving a development of the case law which endorses the position that the Board favors today.

These considerations, taken together, strongly suggest that the Seventh Circuit *Hendricks* decisions accurately analyzed the legislative history of Taft-Hartley and that this analysis should have been approved by the Supreme Court. Still, because the blanket exclusion of confidential employees from the protections of the NLRA makes little sense in terms of the Act's underlying policies, the Supreme Court's decision can hardly be viewed with sorrow. At the same time, there can be no doubt that this decision bears little resemblance to the result that Congress thought it had achieved in 1947.

51. *Id.* at 226 n.19.

52. HOUSE CONF. REP. NO. 510, 80th Cong., 1st Sess. 35 (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 539 (1948).

THE "MIXED MOTIVE" PROBLEM

While the *Hendricks* decisions marked an abrupt departure from well-established precedent of the Board and the prevailing rule in other circuits, they did not depart from existing Seventh Circuit case law. In *Peavey Co. v. NLRB*,[53] however, the Seventh Circuit directly overruled a long-standing line of its own decisions.

The issue in *Peavey* was the proper construction of section 8(a)(3) of the NLRA. This portion of the Act establishes that "[i]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."[54] Section 8(a)(3) is often applied in tandem with the prohibition of section 8(a)(1),[55] making it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under the Act. Together, the sections bar employers from purposely taking actions that have the effect of penalizing unionism. The existence of an anti-union motivation, or "animus," behind the challenged conduct has always been elemental to the existence of section 8(a)(1) and section 8(a)(3) violations,[56] but, not surprisingly, it has proven somewhat elusive of an appropriate, easily applied evidentiary standard. This difficulty is particularly preeminent among the legion of "mixed motive" cases—that is, cases where an employer's pleasure at striking a blow against unionism happens to arguably or actually coincide with a legitimate business motivation for the employer's conduct.

Nonetheless, the standard to be applied in these cases has been well-settled in this circuit for some time. Indeed, as recently as February 1981, a panel of this court routinely stated its adherence to the so-called "in part" test: "Our own decisions hold a discharge to be illegal if a 'bad' motive contributes in a significant way to the discharge."[57] In *Peavey*, this rule was abandoned. Relying on the Board's decision in the recent *Wright Line* case,[58] the court held that

> Under the new test the General Counsel must first make a *prima facie* showing that the employee's protected conduct was a motivating factor in the employer's decision to discharge the employee. Once this is established, the burden shifts to the employer to demonstrate that he would have discharged the employee even in the absence of

53. 648 F.2d 460 (7th Cir. 1981).
54. 29 U.S.C. § 158(a)(3) (1976).
55. *Id.* § 158(a)(1).
56. *See* Radio Officers Union v. NLRB, 247 U.S. 17 (1954).
57. Sullair P.T.O., Inc. v. NLRB, 641 F.2d 500, 504 n.4 (7th Cir. 1981).
58. 251 N.L.R.B. 1083 (1980), *aff'd in part, rev'd in part*, 662 F.2d 899 (1st Cir. 1981).

the protected conduct . . . .[59]

The test is meant to echo the standard for liability established by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*,[60] a case involving a mixed motive firing allegedly infringing the plaintiff's first amendment rights. The *Peavey* opinion simply adopts by reference the reasoning of *Mt. Healthy* and *Wright Line* with little additional comment.[61] Because the application of *Mt. Healthy* to the labor law context is not self-evident, and because the *Wright Line* test is not without its ambiguities, a careful evaluation of the test's rationale and significance is clearly in order.

The difficulty in proving unlawful motive in section 8(a)(3) cases derives from the not-surprising fact that very few employers baldly admit that they are engaging in unlawful conduct. As a result, proof of illicit motive has normally turned on the availability of circumstantial evidence, and the Supreme Court has long mandated use of the tort law presumption that "a man is held to intend the foreseeable consequences of his conduct."[62] The question has been how much weight to accord this presumption. In *NLRB v. Great Dane Trailers, Inc.*,[63] the Court attempted to establish a framework within which it would operate. The Court held that where an employer's conduct is "inherently destructive" of employee rights, the conduct "bears 'its own indicia of intent.' "[64] Under these circumstances, and regardless of the legitimate explanations that the employer may offer for his behavior, "the Board may nevertheless draw an inference of improper motive from the conduct itself . . . ."[65] The Board has not, by and large, been bashful about drawing such inferences, and the tendency, indeed the routine,[66] has been to treat conduct that is inherently destructive of employee rights as having been improperly motivated.[67] Thus, the truly difficult cases, insofar as the issue of motivation is concerned, are those where

59. 648 F.2d 460, 461 (7th Cir. 1981).

60. 429 U.S. 274 (1977).

61. 648 F.2d at 461-62.

62. Radio Officers Union v. NLRB, 247 U.S. 17, 45 (1954). *See also* NLRB v. Erie Resistor Corp., 373 U.S. 221, 227-28 (1963).

63. 388 U.S. 26 (1967).

64. *Id.* at 33 (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 231 (1963)).

65. 388 U.S. at 33.

66. *See, e.g.*, Wright Line, 251 N.L.R.B. 1083, 1088 (1980), *aff'd in part, rev'd in part*, 662 F.2d 899 (1st Cir. 1981) where the Board seems to assume that the problem of "dual motivation" does not even arise in the case of "inherently destructive" conduct.

67. This is not, of course, the same thing as saying that such conduct is necessarily unlawful; for once a showing of improper motive is made, the Board must "exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967).

the employer's conduct is not so egregious as to bear "its own indicia of intent." In these cases, where the "harm to employee rights is comparatively slight," the teaching of *Great Dane* is that the tort law presumption applies prima facie, but "an affirmative showing of improper motivation must be made . . . *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct."[68] The difficulty arises when both the employer and the Board have shouldered their respective burdens of proof—when, that is, the employer has adduced evidence of a legitimate business motivation for the conduct and the Board has adduced affirmative evidence of unlawful anti-union animus. In this situation, it is clearly unfair to say that the employer was simply acting out of an unlawful motivation, but, at the same time, it is clearly inaccurate to say that unlawful considerations were totally lacking. It is to this "mixed motive" tangle that *Peavey* and the decisions on which it relies—*Wright Line* and *Mt. Healthy*—address themselves.[69]

Prior to *Wright Line*, the courts of appeals dealt with mixed motive cases by the use of one of two strategies. As noted above, the strategy followed by the Board and in this circuit dictated that a violation be found where the employer's conduct was caused "in part" by an improper motive.[70] In contrast, several other circuits, following the lead of the First Circuit in *NLRB v. Billen Shoe Co.*,[71] have held that a section 8(a)(3) violation can only be found where the General Counsel demonstrates that the employer's illegal motive was "dominant" over his legitimate one:

> When good cause for criticism or discharge [of a union activist] appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one. The mere existence of anti-union animus is not enough.[72]

68. *Id.* at 34 (emphasis in original).

69. A related, but conceptually distinct, problem arises in the so-called "pretext" cases. These are cases where the employer's purported justification either did not exist or was not in fact relied on. In such cases the issue is not evaluating the relative significance of two independent causes of the employer's conduct, but how to recognize that one of the two purported causes does not exist. The pretext case raises the question of what the evidence shows. The dual motive case raises the question of the significance of the established facts. *See generally* Wright Line, 251 N.L.R.B. 1083, 1083-84 (1980), *aff'd in part, rev'd in part*, 662 F.2d 899 (1st Cir. 1981).

70. *Id.* at 1084, 1086 n.8; NLRB v. Gogin, 575 F.2d 596, 601 (7th Cir. 1978).

71. 397 F.2d 801 (1st Cir. 1968).

72. *Id.* at 803. Actually, the tests applied by the various circuits do not fall with precision into these two categories. Thus, for example, some of the "in part" circuits have demanded that the employer's conduct be based "in significant part" on an anti-union motive. *E.g.*, St. Luke's Memorial Hosp., Inc. v. NLRB, 623 F.2d 1173, 1180 (7th Cir. 1980). *Cf.* Pelton Casteel, Inc. v.

The Board in *Wright Line* rejected both alternatives.

The *Wright Line* test has two essential elements. The first is the standard of liability imposed by the test. This branch of the test establishes that no section 8(a)(3) violation will be found if the employer's anti-union sentiments are not a "but for" cause of his anti-union conduct.[73] The second branch of the test establishes a scheme of proof for determining whether or not the standard of liability has been met. The initial burden is placed on the General Counsel. It obligates him to show that an improper consideration was a "substantial" or "motivating" factor giving rise to the challenged conduct. Once this is established, the burden falls on the employer to prove as an affirmative defense that, regardless of his anti-union sentiments, other lawful concerns would have led him to behave as he did in any event.[74]

It is not difficult to see why the Board preferred this scheme of proof to the dominant motive test outlined in *Billen Shoe*; both *Billen Shoe*'s standard of liability and its structure of burdens are problematic. The dominant motive test requires the General Counsel to prove that the employer has "rejected the good cause [for his conduct] and chosen the bad one," a standard of liability which comes perilously close to requiring that the General Counsel prove that the employer's proferred justification for his conduct is a mere pretext. Certainly, where this is the case—that is, where an asserted legitimate justification for anti-union behavior is a mere sham—section 8(a)(3) liability must be found. Still, there is no reason to believe that liability is proper *only* in such cases.

An employer may have perfectly legitimate reasons for disliking an employee which he has not "rejected" at the time he acts to that employee's detriment. Where these views, no matter how genuinely

NLRB, 627 F.2d 23, 30 (7th Cir. 1980) (citing *St. Luke's*, and recognizing a de minimis motivation defense in § 8(a)(3) cases). Similarly, in the years since *Mt. Healthy*, several of the dominant motive circuits have rejected *Billen Shoe*'s requirement that the General Counsel all but establish that the employer's explanation is mere pretext, *see* note 66 *supra*, requiring instead that the General Counsel establish that the unlawful motive was the "but for" cause of the employer's conduct. *E.g.*, NLRB v. Eastern Smelting Corp., 598 F.2d 666, 671 (1st Cir. 1979); Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1259-60 (5th Cir. 1978); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98 (2d Cir. 1978). Finally, some circuits have simply wandered all over the map. *Compare, e.g.*, Allen v. NLRB, 561 F.2d 976, 982 (D.C. Cir. 1977), *with* Midwest Regional Joint Bd. v. NLRB, 564 F.2d 434, 440 (D.C. Cir. 1977). For the sake of explaining the *Wright Line* standard—essentially a "but for" test—this article simplifies the confusion of case law in the manner summarized in the text. For a fuller description of the pre-*Wright Line* state of affairs, see Wright Line, 251 N.L.R.B. 1083, 1084-86 (1980), *aff'd in part, rev'd in part*, 662 F.2d 899 (1st Cir. 1981).

73. Wright Line, 251 N.L.R.B. 1083, 1086-89 (1980), *aff'd in part, rev'd in part*, 662 F.2d 899 (1st Cir. 1981).

74. *Id.*

business-related or how firmly held, would not have led the employer to act as he did, and where the employer reaches the point of action only because of his simultaneous distaste for the employee's union activities, the proferred justifications are not merely pretextual. Still, it seems implausible to refuse to recognize the employer's anti-union animus as the cause of his behavior. Still, because the General Counsel would not, in such an instance, be able to prove that the employer had "chosen" the bad motive and "rejected" the good one, the *Billen Shoe* formula would require that liability not attach.[75] Under *Wright Line*, in contrast, no problem arises in these circumstances. So long as the employer would not have acted as he did "but for" his anti-union sentiments, *Wright Line* is satisfied that a violation has been shown, regardless of any legitimate considerations that may have contributed to the decision.[76]

Equally preferable is *Wright Line*'s treatment of the burden of proof. Under *Billen Shoe*, the burden is on the General Counsel to show that the employer does not have a legitimate explanation for his behavior. Under *Wright Line*, the burden is on the employer to prove that he does. The *Wright Line* scheme is justified by a number of considerations. For one thing, in the true mixed motive case, the employer's business motivations are relevant as an affirmative defense, not as evidence denying an element of the General Counsel's prima facie case. This is so because, where it is established that anti-union animus was a contributing factor in an employer's decision to engage in anti-union conduct, the concurrent existence of a legitimate reason for such behavior does not negate the existence of the unlawful motive. It merely seeks to *justify* behavior consistent with that motive.[77] Since the burden of proving an affirmative defense normally rests with the party asserting the defense, *Wright Line*'s allocation of the burden of proof more closely conforms to traditional evidentiary schemes.[78]

75. *See id.* at 1087 (discussion of Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), to the effect that "efforts to determine what is the 'dominant' or 'primary' motive in a mixed motivation situation are usually unavailing").

76. 251 N.L.R.B. at 1089 n.14.

77. *Id.* at 1084 n.5, 1088 n.11.

78. The fact that an employer's legitimate business interests come into play as an affirmative defense in mixed motive cases also is significant as establishing that the burden on the employer at this point is a burden of persuasion, not merely an obligation to "come forward" with an acceptable explanation for his conduct. *Contra*, NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981). *Cf.* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The *Wright Line* decision is rather clear on this point, Wright Line, 251 N.L.R.B. 1083, 1088 (1980), *aff'd in part, rev'd in part*, 662 F.2d 899 (1st Cir. 1981). This clarity is strongly supported by the language of NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967) ("The burden is upon the employer *to establish* that he was motivated by legitimate objectives.") (emphasis added). This conclusion, of course, does not

A second reason for placing this burden on the employer has to do with the nature of the factual issue. Ultimately, the question of why the employer engaged in the challenged conduct is a matter known only to the employer. Moreover, whatever documentary material may exist in support of the employer's position will be in the employer's control. Under these circumstances, it is not unreasonable to require that the employer be the one to articulate the legitimate reason for his behavior; nor is it unreasonable to require him to be the one who initially marshalls evidence bearing on his claim. Indeed, precisely these considerations were cited by the Supreme Court in *Great Dane* when it approved a scheme of burdens strongly analogous to that set forth in *Wright Line*:

> [O]nce it has been proved [by the General Counsel] that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.[79]

Given these considerations, it is, perhaps, not surprising that *Wright Line* has so far met little opposition in those circuits that had previously held to some variant of the dominant motive test.[80] What is surprising is the Seventh Circuit's simple abdication to the Board on this issue in *Peavey*. The "in part" standard previously adhered to in this circuit reflects a very different estimation of the policies underlying section 8(a)(3) from the attitude implicit in *Wright Line*. Since the values served by the "in part" test are central to the Act in general and section 8(a)(3) in particular, enthusiastic applause for the Seventh Circuit's conversion may well be inappropriate.

The heart of *Wright Line*'s argument rejecting the "in part" test is

relieve the General Counsel of his burden of persuasion on each of the elements of his prima facie case. Thus, the General Counsel remains ultimately responsible for proving by a preponderance of the evidence that anti-union animus was a motivating factor giving rise to the employer's conduct. 251 N.L.R.B. at 1088 n.11. The presence or absence of alternative explanations for the employer's conduct may be as relevant to proof of this element of the prima facie case as it is to proof of the employer's affirmative defense, *id.* at 1088 n.12; still, the burden of proving the prima facie case remains on the General Counsel while the burden of proving the affirmative defense remains on the employer.

79. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967) (emphasis in original). There is also reason to believe that the legislative history supports this allocation of the burden of proof. *See* Wright Line, 251 N.L.R.B. 1083, 1088 (1980), *aff'd in part, rev'd in part*, 662 F.2d 899 (1st Cir. 1981).

80. *See, e.g.*, Statler Indus., Inc. v. NLRB, 644 F.2d 902 (1st Cir. 1981) (adopting *Wright Line*); NLRB v. Permanent Label Corp., 657 F.2d 512 (3d Cir. 1981) (citing *Wright Line* approvingly). *But see* NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981) (endorsing the Board's liability test and the scheme of shifting burdens, but rejecting the Board's analysis of the nature of the employer's burden).

given in a somewhat lengthy passage from the Supreme Court's *Mt. Healthy* decision. The passage is quoted verbatim in the *Wright Line* opinion. For this reason, and because of its centrality to *Wright Line*'s rationale, it is worth including the passage in its entirety here:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court [an "in part" test] is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.[81]

Certainly, the central factual premise of the *Mt. Healthy* argument—that an "in part" test places the employee who engages in protected activity in a better position than the employee who does not—is correct. Moreover, on its face, this consideration makes application of *Mt. Healthy*'s reasoning particularly appealing in the context of section 8(a)(3) analysis. This is so for several reasons.

First, it is clear that the policy of section 8(a)(3) is one of evenhandedness towards the question of unionism. Thus, the section prohibits both discrimination favoring *and* discrimination disfavoring membership in a collective bargaining organization. Moreover, section 8(b)(2) of the Act prohibits a labor organization from "attempt[ing] to cause an employer to discriminate against an employee in violation of subsection 8(a)(3)."[82] It would be anomalous indeed to enforce such a statutory scheme by a standard of liability that inherently gave employees an incentive to engage in union activities while giving employers an incentive to hesitate before dealing harshly with union activists.[83]

81. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977).
82. 29 U.S.C. § 158(b)(2) (1976).
83. The point has been well put by the Second Circuit:

> [I]t is not the purpose of the statute to pressure employees into undertaking organizational efforts. Embodied in the statute is a principle of free choice. Without a "but for" test, we "could place an employee in a better position as a result" of his organizational

Additionally, the fact that an "in part" test permits a finding of anti-union animus even though the employee has given the employer good cause for discipline, seemingly hamstrings the employer in his attempt to maintain control over any unionized shop. The Supreme Court has repeatedly emphasized that, in applying section 8(a)(3) in mixed motive cases, the Board is obligated to strike a reasonable balance between the concerns of employee and employer:

> As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.[84]

The tension between this obligation and the "in part" test is palpable.[85] Moreover, the tension is heightened by the fact that the Supreme Court's recognition of the employer's need to manage his place of business has been all but incorporated into the language of the Act by the 1947 amendment to the provisions of section 10(c): "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."[86]

Finally, there is the Supreme Court's estimation that a "but for" causation test is sufficient to "vindicate" the constitutional principle at stake in mixed motive first amendment cases. Important though the rights guaranteed under the NLRA may be, it would be difficult to argue that they rise to, let alone exceed, constitutional dimensions. Hence, it seems to follow that a standard of liability which suffices to protect employees in the exercise of their first amendment rights is equally adequate to protect employees in the exercise of the rights granted by the NLRA.[87]

> efforts "than he would have occupied had he done nothing." Such a result would actually undermine the purpose of the statute by inducing employers to tread especially lightly when a union activist is involved—thereby violating the Act by encouraging pro-union activity.

Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 99 (2d Cir. 1978) (citation omitted).

84. NLRB v. Erie Resistor Corp., 373 U.S. 221, 228-29 (1963), *quoted in* Wright Line, 251 N.L.R.B. 1083, 1089 (1980), *aff'd in part, rev'd in part*, 662 F.2d 899 (1st Cir. 1981). *See also* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967) (referring to the Board's "duty" to balance).

85. *See* Wright Line, 251 N.L.R.B. 1083, 1084 (1980), *aff'd in part, rev'd in part*, 662 F.2d 899 (1st Cir. 1981).

86. 29 U.S.C. § 160(c) (1976).

87. *See* Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 99 (2d Cir. 1978).

Still, persuasive as these arguments may appear, they all share a common flaw: they all focus on the situation of the individual employee victimized by the employer's conduct without considering the impact of that conduct on the interests of other workers. When an employer discriminates against an employee for having engaged in some form of protected activity, such behavior has two undesirable consequences. First, of course, such behavior effectively punishes an employee for exercising the rights that are granted him under the Act. To tolerate such conduct would effectively emasculate the Act's protections, and that is why section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under the Act. The arguments just recited make it clear that a "but for" causality test is what is required to strike the proper balance between this policy and the employer's interest in retaining control over his work place.

The second undesirable consequence that results when an employer discriminates against an employee for having engaged in some form of protected activity is the message that is sent to other workers. By purposefully discriminating against one union activist, the employer puts his employees on notice that he will be willing to discriminate against other union activists. Thus, not only is one individual punished for having exercised the rights that Congress intended to guarantee him, all employees are "chilled" against exercising those rights. It is, perhaps, for this reason that section 8(a)(3) does not in express terms address itself to discrimination that punishes individuals, but rather to discrimination that generally "encourages or discourages membership in a labor organization."[88] While the "but for" test may well do an adequate job of upholding the principles implicit in section 8(a)(1),

88. That § 8(a)(3) is meant to remedy the indirect, "chilling" effects of employer discrimination as well as its direct, punitive effects, is perhaps nowhere better illustrated than in Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965). In *Darlington* the Board had found as a matter of fact that the employer had liquidated its business rather than accept the union's victory in a representation election. The Court held that if Darlington was an independent entity, then despite the Board's express finding of anti-union animus, no violation of the Act could be found. *Id.* at 273-74. The Court contrasted a bona fide liquidation with a discriminatory lockout or a "runaway shop" by noting that the latter forms of discrimination could be expected to "discourage collective employee activities in the future," *id.* at 271-72, whereas "a complete liquidation of a business yields no such future benefit for the employer." *Id.* at 272. Thus, although a discriminatory liquidation constitutes punishment of employees for their having engaged in protected activities, the Court refused to find a violation of § 8(a)(3) because no chilling effect had been shown sufficient to outweigh the employer's right to terminate his business. A different case would arise, the Court held, if Darlington was more properly viewed as "an integral part" of its parent corporation, Deering Milliken. *Id.* at 274. This would be so precisely because of the chill that could be expected to impede collective activity in other branches of the operation: "[A] discriminatory partial closing may have repercussions on what remains of the business, affording the

there is serious reason to doubt that it suffices to protect against the chilling effect that anti-union discrimination may have on the ability of other employees to exercise their rights.

The chilling message that is sent by anti-union discrimination does not stem from the fact that the employer dislikes unionism, but from the fact that he will *act* on this dislike. So long as the employer's anti-union animus is sufficiently strong on its own to prompt his actions, the threat to other union activists is implicit regardless of whatever other legitimate motivations may have been present. The fact that the legitimate considerations would, standing alone, have sufficed to bring about the same result is irrelevant. Thus, a "but for" test would clearly tolerate anti-union discrimination in certain cases where one of the two policies at the heart of section 8(a)(3) would be disserved by such leniency. This result would not occur under an "in part" standard of causation.[89]

Moreover, this criticism of the "but for" test undercuts the persuasiveness of the arguments previously recited in favor of the *Wright Line* decision. While it is undoubtedly true that an "in part" test puts union activists in a favored position, it is also true that this occurs *only* where an employer has demonstrated his willingness to act upon his anti-union sentiments. Failure to censure such an employer where he would have behaved as he did even if he had had no legitimate grounds for doing so would essentially insulate the conduct of an employer who seized on the shortcomings of one union activist for the partial purpose of inhibiting the activities of others. A rule that permits such conduct is no more "evenhanded" than the "in part" test. Indeed, since one of the avowed policies of the NLRA is a desire to redress the disparity in

employer leverage for discouraging the free exercise of . . . [protected] . . . rights among remaining employees . . . ." *Id.* at 274-75.

89. Of course, broadly construed, the "in part" test would make unlawful conduct that is not wrongful even under this rationale. That is, the "in part" test can conceivably justify liability where the unlawful motive is neither a necessary (but for) nor a sufficient (independent) cause of the employer's conduct. Under these circumstances the *Mt. Healthy* and *Wright Line* criticisms are telling, since a finding of an unfair labor practice would essentially protect the employees against their employer's thoughts. Sensible application of the test, however, should suffice to avoid such results. Where an unlawful motive is not a "but for" cause of the challenged conduct and where it is not one of a number of independently sufficient causes of such conduct, it is difficult to see how it is properly called a "cause" at all. While no circuit has expressly refined application of the "in part" test in this manner, the Seventh Circuit may have been edging towards such a solution prior to *Peavey*. Several cases this term required the Board to show that challenged conduct was caused in *significant* part by an unlawful motive. *E.g.*, St. Luke's Memorial Hosp., Inc. v. NLRB, 623 F.2d 1173 (7th Cir. 1980). Moreover, in several corollary cases, the court held that no section 8(a)(3) violation could arise if the employer's anti-union motivation was "de minimis." Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 30 (7th Cir. 1980); *accord*, NLRB v. Pfizer, Inc., 629 F.2d 1272, 1275 (7th Cir. 1980).

economic bargaining power between employer and employee,[90] the lack of evenhandedness implicit in the "in part" test is probably more consonant with the Act's purposes and structure than the lack of evenhandedness implicit in the "but for" test.

A similar argument can be made with respect to the conflict between the "in part" test and the employer's right to manage his work place. The "in part" test does not entirely bar employers from firing or disciplining incompetent employees. It merely does so when such conduct is intended not only to satisfy the requirements of shop discipline, but also to impede other workers' abilities to exercise the rights granted them by Congress. The employer, it must be emphasized, is not innocent under these circumstances. The only reason his ability to control his work force is limited at all is because of his willingness to act on his desire to abridge the employees' rights. If he were willing to live with the Act's protections, no issue would arise. Still, as *Mt. Healthy* and *Wright Line* point out, the incompetent employee is an equally unsympathetic character. He has, for whatever reason, demonstrated that he is deserving of some sort of sanction. Consequently, if the incompetent employee's punishment were merely a matter between him and the employer, there would be little reason to be particularly sympathetic to either party, and the Act's policy recognizing the employer's right to maintain shop discipline would argue strongly for a "but for" standard. This calculus, however, is altered when rights of other parties are also at issue. The other employees in the shop, employees who have done nothing to warrant punishment, face a clear, if implicit, threat where the employer has acted in part for the purpose of chilling unionism. Though the employer is still hampered in his ability to control the work place by the "in part" test, as between himself and the innocent employees it is unarguable that he is the wrongdoer and that he, not they, should suffer the detriment of his conduct. In short, when all of the policies implicit in section 8(a)(3) are considered, the Board's obligation to balance the interests of employer and employee argues against *Wright Line* and in favor of the "in part" test.[91]

This leaves the contention that the employee rights protected by the NLRA should not be given any greater protection than the protec-

90. 29 U.S.C. § 151 (1976).

91. The language of § 10(c) cited above, *see* text accompanying note 86 *supra*, is consistent with this position. That section merely assures that employers will be permitted to discharge or suspend employees "for cause." The issue in mixed motive cases is precisely whether an employee has been disciplined "for cause" or for having engaged in protected activities. The "in part" and the "but for" tests, as tests of causation, are simply alternative ways of resolving this question.

tions established by *Mt. Healthy* safeguarding the employee rights guaranteed by the first amendment. This argument is particularly telling since first amendment cases often evaluate the indirect chilling effect of a defendant's conduct and since arguments based on that effect are, under certain circumstances, properly asserted by plaintiffs on behalf of absent third parties.[92] The problem with this argument is that *Mt. Healthy* simply does not address the chilling effect issue. The only issue posed in the *Mt. Healthy* case was whether or not the injury to that plaintiff was sufficient to state a cause of action under 42 U.S.C. § 1983 and the first and fourteenth amendments. The opinion is simply silent as to whether a claim could have been stated on the basis of the injury to the defendant school district's other employees. For the reasons discussed above, there are substantial grounds for believing that the Court might have reached a different conclusion had this latter injury been at issue. Thus, while the "but for" test sufficiently vindicates the first amendment rights of employees who are punished for having exercised those rights, *Mt. Healthy* does not establish that this test of causation sufficiently vindicates the first amendment rights of other employees whose liberty may be chilled by the employer's conduct. Therefore, the fact that rights guaranteed under the NLRA do not deserve any greater protections than the rights guaranteed by the Constitution does not, by reason of the *Mt. Healthy* decision, mandate a "but for" test in mixed motive labor cases.

In short, none of the arguments that can be cited in support of the *Wright Line* decision ultimately offer a persuasive justification for adopting a "but for" test of causation in mixed motive cases. Moreover, by ignoring the chilling effect that anti-union discrimination may have on employees not directly victimized by such discrimination, this test actually undermines the ability of section 8(a)(3) to serve the purposes for which it was drafted. Accordingly, the Seventh Circuit's abrupt conversion to the "but for" test in *Peavey* must be viewed as a move of dubious validity.

THE COMMON LAW OF EMPLOYMENT: TERMINABLE AT WILL CONTRACTS

While the traditional focus of labor law practice has been the various federal regulatory schemes, the last several years have witnessed a not-so-quiet revolution in the common law of employment. To a remarkable degree, the alpha and the omega of the common law of em-

92. *See, e.g.*, Laird v. Tatum, 408 U.S. 1, 12-13 (1973), and cases cited therein.

ployment has been the proposition that an employment contract of indefinite duration is terminable at the will of either party.[93] Beginning in the mid-1960's, however, this well-established rule has been eroded from two directions. On the one hand, a number of jurisdictions have begun to hold—sometimes as a matter of tort law, sometimes as a matter of contract law—that even at will employees cannot be fired when their discharge would conflict with well-established principles of public policy.[94] Supplementing these decisions is a line of cases recognizing, as a principle of contract law, that, under certain circumstances, even employment contracts of indefinite duration cannot be terminated except for good cause.[95]

In *Ryan v. J.C. Penney Co.*,[96] the Seventh Circuit was asked to consider the viability of this latter line of attack on the at will rule as a matter of Indiana law. Viewing itself as bound by the *Erie* doctrine[97] to a conservative application of the Indiana precedent, the court refused to hold the defendant employer to a good cause standard in connection with the discharge of an employee hired for an indefinite term. Regardless of its validity as an application of the *Erie* doctrine, *Ryan* is probably not a good prognostication of future developments in the Seventh Circuit jurisdictions. Accordingly, a careful analysis of the relevant state law may provide a better guide for future Seventh Circuit practice than the *Ryan* decision itself.

The plaintiff in *Ryan* had alleged that, at the time she was hired, the defendant had promised that she would be discharged only for just cause. On the defendant's motion for summary judgment, the district court held that a question of fact existed as to whether such a promise had been made and breached, and that breach of such a promise would be actionable as a breach of contract.[98] The matter was certified for interlocutory appeal, and the Seventh Circuit, relying principally on the decision of the Indiana Appellate Court in *Shaw v. S.S. Kresge*

93. *E.g.*, Buian v. J.L. Jacobs & Co., 428 F.2d 531 (7th Cir. 1970) (relying on Illinois law); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975); Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967).

94. This approach has been adopted by two of the Seventh Circuit jurisdictions. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).

95. *See, e.g.*, Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980). *See generally* Comment, *Job Security for the At Will Employee: Contractual Right of Discharge for Cause*, 57 CHI. KENT L. REV. 697 (1981); Comment, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

96. 627 F.2d 836 (7th Cir. 1980).

97. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

98. Ryan v. Upchurch, 474 F. Supp. 211 (S.D. Ind. 1979).

Co.,[99] reversed. The Seventh Circuit found that Indiana law will not enforce a promise of job security where the contract of employment is for an indefinite term and where there is no independent consideration—that is, consideration beyond the mere rendition of services—to support the promise.

As the authorities cited and discussed in *Ryan* make clear, this is not a particularly unusual statement of the law of employment contracts. Still, it is a statement which has been subject to increasing challenge. The leading case rejecting the orthodox view as to the enforceability of promises of job security is *Toussaint v. Blue Cross & Blue Shield of Michigan*,[100] a recent decision of the Supreme Court of Michigan. In *Toussaint*, as well as in its companion case, *Ebling v. Masco, Inc.*, the jury found that the plaintiff had expressly inquired about the security of the job for which he was being hired. In both cases the plaintiff was assured that he would remain with the employer so long as he performed his work satisfactorily. Indeed, in *Toussaint*, this oral reassurance was underlined by reference to the employer's policy manual, a document which was handed to the employee in response to his question and which expressly provided that termination would only be for cause.[101] Finally, in both cases, the evidence clearly showed that this promise of job security was relied upon by the plaintiff in deciding to accept the employment.

The bedrock principle on which the *Toussaint* opinion is built is that of most contract law: the freedom of contract. The court pointed out that to hold that a contract of indefinite duration must always be terminable at will is to deprive the parties of the right to strike an alternative bargain. Hence, unless such contracts are contrary to public policy or inherently in violation of some other canon of contract doctrine, the law's preference for terminable at will agreements should most properly be viewed as a sort of presumption that seeks to effect the actual desires of the parties:

> The "rule" is useful, however, as a rule of construction. Because the parties began with complete freedom, the court will presume that they intended to obligate themselves to a relationship at will.
>
> To the extent that courts have seen the rule as one of substantive

99. 167 Ind. App. 1, 328 N.E.2d 775 (1975).

100. 408 Mich. 579, 292 N.W.2d 880 (1980). Two cases, Toussaint v. Blue Cross & Blue Shield of Mich., 79 Mich. App. 429, 262 N.W.2d 848 (1978), and Ebling v. Masco Corp., 79 Mich. App. 531, 261 N.W.2d 74 (1974), were consolidated on appeal.

101. The only other factual difference between the cases was that Ebling was promised a stock option based on the longevity of his service. By the terms of his contract he was denied his right to exercise this option because he was dismissed before having served three years with Masco.

> law rather than construction, they have misapplied language and principles found in earlier cases where the courts were merely attempting to discover and implement the intent of the parties.[102]

From this recognition, it is but a short step to *Toussaint*'s ultimate holding that the presumption embodied in the at will rule can be overcome by evidence of the parties' actual intent.

The defendants in *Toussaint* argued against this conclusion by asserting that, in fact, an overarching principle of contract law does render promises of job security inherently unenforceable. The problem, according to the defendants, is that an employer who has promised to terminate only for cause is obligated to retain an employee's services so long as the employee desires, while the employee remains free to terminate at will. This discrepancy, it was said, renders such promises void for want of mutuality, because one party can "enforce" the promise, but not the other. Not surprisingly, the *Toussaint* court found this argument unpersuasive. "The enforceability of a contract," the court wrote, "depends on consideration and not mutuality of obligation."[103]

While the court essentially let the matter rest on this observation, it is clear that this was the proper resolution of the issue. There is no reason why a promise of job security is not supported by adequate consideration where the employee merely accepts a job offer including such a promise by beginning work. An employment contract is essentially unilateral in nature. That is, the employer invites the performance of certain services by the employee by promising, for example, to compensate him at a certain rate, promising to supply a safe and clean working environment, promising to demand performance only at certain hours and so forth. It is the employer's choice as to what bundle of promises he will offer as an incentive to attract the services of the employee. Hence, it is his choice as to what promises will be adequately supported by the bargained for consideration of the employee's work. A promise that the employee will not be discharged except for cause is as much a legitimate inducement in this regard as is a promise of four weeks of vacation or six hours a week of overtime. Consequently, when the employee begins performance, a contract including the employer's promise of job security is formed just as surely as if the sole promise had related to wages.[104] Moreover, an employment contract

102. 408 Mich. at 600, 292 N.W.2d at 885.

103. *Id.*

104. 1A A. CORBIN, CORBIN ON CONTRACTS § 152, especially at 16 n.11.20 (1963); RESTATEMENT (SECOND) OF CONTRACTS § 75 & Comment b (1981).

containing a promise of job security is no less mutually enforceable than any other employment contract. An employer hires an employee to perform a certain service, under certain conditions. When the employee fails to perform as promised, the employer may discharge him. The fact that the employee's right of termination is broader than the employer's does not mean that a mutual right of termination does not exist.

While the *Toussaint* opinion seems to make unarguable good sense, the Seventh Circuit's *Ryan* decision makes it clear that *Toussaint* does not accurately state the law as it currently exists in this jurisdiction. The question is whether *Toussaint* or *Ryan* is the more likely harbinger of future Seventh Circuit rulings. In order to answer this question, it is necessary to consider each of the Seventh Circuit jurisdictions in turn.

Indiana

Ryan's construction of Indiana law turned heavily on its reading of the Indiana Appellate Court's decision in *Shaw v. S.S. Kresge Co.*[105] In *Shaw*, the plaintiff alleged that her employer's promise of job security could be found in its employee handbook. The handbook distinguished between "temporary" employees, who worked for "an indeterminate period of time," and "permanent" employees like the plaintiff. Moreover, the handbook specified that permanent employees would only be discharged after having received three warning slips and after being given an opportunity to argue their case before a grievance committee. Finally, the handbook listed certain specified grounds for termination. Plaintiff was allegedly discharged for "chronic absenteeism and tardiness," but she had not been given any warning slips and was never permitted to argue her case to the grievance committee. The appellate court sustained the lower court's dismissal of the complaint essentially on mutuality grounds:

105. 167 Ind. App. 1, 328 N.E.2d 775 (1975). The *Ryan* court cited several other decisions in support of its holding. However, these cases either merely contained earlier statements of *Shaw*'s reasoning, *e.g.*, Montgomery Ward & Co. v. Guignet, 112 Ind. App. 661, 45 N.E.2d 337 (1942) (en banc), or they adopted that decision's holding, McQueeney v. Glenn, 400 N.E.2d 806 (Ind. Ct. App. 1980), *cert. denied*, 449 U.S. 1125 (1981), or they related to promises of "permanent" employment where no specific mention was made to the effect that termination would only be for cause. Haag v. International Tel. & Tel. Corp., 342 F.2d 566 (7th Cir. 1965); Davis v. Davis, 197 Ind. 386, 151 N.E. 134 (1926); Speeder Cycle Co. v. Teeters, 18 Ind. App. 474, 48 N.E. 595 (1897). In these latter cases, the courts held, sensibly enough, that a promise of "permanent" employment should not be construed literally, and that, absent special circumstances suggestive to the contrary, such contracts should be viewed as being of indefinite duration. *Accord*, 1A A. CORBIN, CORBIN ON CONTRACTS § 152 (1963); 3A A. CORBIN, CORBIN ON CONTRACTS § 684 (1960).

> [A]ssuming, *arguendo*, that the handbook relied upon by appellant constituted a part of the contract, in the absence of a promise on the part of the employer that the employment should continue for a period of time that is either definite or capable of determination the employment relationship is terminable at will . . . . There being no binding promise on the part of the employee that he would continue in the employment, it must also be regarded as terminable at his discretion as well. For want of mutuality of obligation or consideration, such a contract would be unenforceable in respect of that which remains executory.[106]

While it cannot be disputed that *Shaw* represents the most recent word of the Indiana courts on the subject, and while the holding in *Shaw* has been cited approvingly in at least one subsequent decision,[107] there is strong reason for believing that *Shaw* was wrongly decided.

As was pointed out by the *Ryan* district court, the mutuality doctrine on which *Shaw* rests has been repudiated in other Indiana cases. In *Seco Chemicals, Inc. v. Stewart*,[108] the plaintiff was hired under a written contract which stated that the term of employment was twenty-five months. When the employer refused to honor this contract, the employee sued. The employer argued that, since the employee was free to leave his employment at any time whereas he (the employer) could not terminate for a period of twenty-five months, the contract was void for lack of mutuality. The court rejected this argument, effectively rejecting along with it the whole mutuality doctrine: "[T]he Indiana rule [is] that there is no mutuality deficiency where one party to an agreement acts upon the promises of the other party and performs his part of the agreement—because the other party becomes bound by that performance."[109] On the basis of this reasoning there was no deficiency in the *Shaw* case, which rests on the mutuality doctrine, or, for that matter, in *Ryan*, which rests on *Shaw*.

Still, because the district court had sustained the plaintiff's complaint largely on the logic of *Seco*, the Seventh Circuit was fully aware of that ruling in *Ryan*. Thus, it is not surprising that, although the *Ryan* opinion ultimately rests on *Erie* grounds,[110] the decision also seeks to distinguish the argument of *Seco*. This attempted distinction is probably unwarranted. The Seventh Circuit emphasized the fact that *Seco* involved an employment contract of definite duration; that is, the

106. 167 Ind. App. at 7, 328 N.E.2d at 779 (citations omitted).

107. McQueeney v. Glenn, 400 N.E.2d 806 (Ind. Ct. App. 1980), *cert. denied*, 449 U.S. 1125 (1981).

108. 169 Ind. App. 624, 349 N.E.2d 733 (1976).

109. *Id.* at 632, 349 N.E.2d at 738.

110. 627 F.2d at 838.

sort of contract that even *Shaw* would recognize as terminable only for cause. While true insofar as it goes, this observation ignores the fact that the issue in *Seco*, as in *Shaw*, was whether or not a contract was enforceable where the employee had the right to terminate at will, but the employer did not. *Shaw* holds that this lack of mirror image consideration destroys "mutuality." *Seco* holds to the contrary. In *Shaw*, the asymmetry arose because the employee could terminate at will but the employer could terminate only for good cause. In *Seco*, the asymmetry arose because that employee could terminate at will at any time but the employer could terminate at will only at the end of twenty-five months. There is no reason suggested in either *Shaw*, *Seco* or *Ryan* why one sort of asymmetry should destroy the contract but the other should not. Accordingly, if *Seco* states the better rule of law—and, for the reasons given above it clearly does—then *Shaw* was wrongly decided.[111] Thus, the greater likelihood is that future Indiana decisions will reject the mutuality doctrine, and enforce bargained-for promises of job security.

Wisconsin

While the courts of Wisconsin have not directly decided whether to recognize and enforce bargained-for promises of job security, they have laid much of the groundwork from which the *Toussaint* court approved such agreements. In *Forrer v. Sears Roebuck & Co.*,[112] the plaintiff had initially resigned his job with the defendant for health reasons and taken up farming. The defendant solicited the plaintiff to return to his old position and the plaintiff, in partial reliance on the defendant's promise of permanent employment, sold his farm and stock and accepted the offer. When the plaintiff was discharged, allegedly without cause, he brought suit. The court found that the defend-

111. *Ryan* also sought to reinforce the distinction between *Shaw* and *Seco* by citation to Corbin's treatise on contracts. 1A A. CORBIN, CORBIN ON CONTRACTS § 152, at 13-17 (1963). In a passage quoted by both *Ryan* and *Seco* and cited by *Shaw*, Corbin states:

> [I]f the employer made a promise, either express or implied, not only to pay for the service but also that the employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable by him "at will" after the employee has begun or rendered some of the requested service . . . .

Id. at 14. *Ryan* apparently infers from this language that any employment contract not definite as to duration is, *ipso facto*, unenforceable. The treatise, however, flatly disowns other judicial attempts to draw such an inference from its teachings, *see id.* at 15-17 & 16 n.11.20. Moreover, in other sections, it acknowledges that "permanent" employment contracts are not necessarily terminable at will, 3A A. CORBIN, CORBIN ON CONTRACTS § 684, at 228 (1960), and that a promise to retain an employee so long as his work is satisfactory may be enforced so long as there is adequate consideration. *Id.* at 229.

112. 36 Wis. 2d 388, 153 N.W.2d 587 (1967).

ant's promise of permanent employment was enforceable on an estoppel theory, but that permanent employment was the same thing as employment at will and that this much had been given.[113]

The Wisconsin court reached the conclusion that it did because, like the *Toussaint* court, it viewed the at will rule as a rule of construction which did not need to be overridden on the facts of the case before it:

> Generally speaking, a contract for permanent employment, for life employment, or for other terms purporting permanent employment, where the employee furnishes no consideration additional to the services incident to the employment, amounts to an indefinite general hiring terminable at the will of either party, and a discharge without cause does not constitute a breach of such a contract justifying recovery of damages. . . . Although not absolute, the above stated rule appears to be in the nature of a strong presumption in favor of a contract terminable at will unless the terms of the contract or other circumstances clearly manifest the parties' intent to bind each other.[114]

The not-so-subtle implication of this view of the at will doctrine is that clear evidence of a contrary intent will override the "strong presumption."

Thus, it is not surprising that, when the facts of the case have so dictated, the Wisconsin Supreme Court has not hesitated to set the at will rule aside. In *Smith v. Beloit Corp.*,[115] for example, the court was faced with a case in which the plaintiff was induced to move from Canada in reliance on the defendant's promise of a job. The parties did not specifically agree to any term of employment, but the plaintiff was told that he would "be given this period of one year before I would be capable . . . of fully performing" the job. Thus, while the court did hold, relying on *Forrer*, that there was no enforceable promise of permanent employment, and hence, no permanent good cause covenant, it also held that there was an implicit promise of employment for a period of one year, and that this promise could not be terminated at will.

113. *Id.* at 395, 153 N.W.2d at 589.

114. *Id.* at 395, 153 N.W.2d at 589-90. Interestingly, reading *Forrer* generously, the court's treatment of the at will rule as a sort of evidentiary presumption appears to explain its adherence to the "separate consideration" exception. That is, where an employer expects to receive consideration above and beyond the services to be rendered, it is fair to assume that he is offering terms of employment above and beyond the traditional at will relationship. As the *Forrer* court points out, however, this alteration in the employer's presumed intent is only plausible where the additional consideration is in the nature of a benefit to the employer. There is no reason to alter one's presumptions about the employer's intent on the basis of a detriment to the employee. *See id.* at 395, 153 N.W.2d at 590.

115. 40 Wis. 2d 550, 162 N.W.2d 585 (1968).

Similarly, in *Matthew v. American Family Mutual Insurance Co.*,[116] the employment contract was silent as to both duration and grounds for termination. Because, however, the contract specified a particular method of termination (ninety-day notice), the court found that the contract was not terminable at will, but only in conformity with the specified procedures.[117]

Finally, and most strikingly, there is the case of *Krug v. Flambeau Plastics Corp.*[118] In *Krug* the written agency contract specified that the relationship could be terminated by either party after the provision of ninety-days notice, and that the employer would retain plaintiff as its sales representative so long as his total sales volume maintained a certain minimum quarterly level. The employer argued that the sales volume clause made the contract a contract of indefinite duration, and hence, terminable at will. The employee, of course, disagreed. The court framed the question before it as one of whether the presumption embodied in the at will rule should be permitted to displace the express contractual language specifying the acceptable grounds for termination: "Does the restriction on the right of the defendant corporation to terminate, except for good cause, make this either a contract for permanent employment or one for an unspecified or indefinite term that thereby becomes terminable at will of either party?"[119] The court recited the rule in *Forrer* as controlling in the case before it and, accordingly, found that the parties' clearly manifested intent made the presumption embodied in the at will rule patently inappropriate:

> Here the defendant corporation first proposed and then agreed to a contractual assurance to its sales representative that if he built up the business to a certain level and maintained that quota of sales it would not exercise its right to terminate on ninety-day notice. To hold that such assurance converted the agreement into an indefinite contract terminable at will of either party, would be contrary to the clear intent of both parties and would make the contractual provision worse than meaningless by substituting termination at will for even a ninety-day notice of cancellation. Such construction is not here required.[120]

116. 54 Wis. 2d 336, 195 N.W.2d 611 (1972).

117. *Id.* at 341, 159 N.W.2d at 613. To the same effect, see Goff v. Massachusetts Prospective Ass'n, 46 Wis. 2d 712, 176 N.W.2d 576 (1970).

118. 62 Wis. 2d 141, 214 N.W.2d 281 (1974).

119. *Id.* at 148, 214 N.W.2d at 284.

120. *Id.* at 150-51, 214 N.W.2d at 285. The court also noted, *id.* at 150, 214 N.W.2d at 285-86, that lack of mutuality was not a problem. This holding, however, is not strictly applicable to the pure *Toussaint* or *Ryan*-type case. The distinction is that in *Toussaint* and *Shaw* the promise of job security was part of a unilateral contract where the only consideration invited in exchange for the employer's promise is the employee's performance of the specified services. In *Krug*, however, the contract was bilateral because the defendant's promises as to the terms of employment were

In short, because it views the at will rule as a principle of construction rather than a doctrine of substantive law, the Wisconsin Supreme Court has had little trouble in limiting the rule's use. Indeed, it has held that the rule does not apply to numerous contracts of employment, even where such contracts are not facially drawn to endure for a specified term, and even though the employer's promise to limit his right of termination is not supported by consideration beyond the provision of the bargained-for services. Thus, like *Toussaint*, Wisconsin law seems to put the actual intent of the parties at a premium and it seems likely that Wisconsin courts will be willing to enforce bargained-for promises of job security.

Illinois

In Illinois, the proposition that an employment contract of permanent or indefinite duration is terminable at will has tended to be offered without any supporting rationale, as a kind of *ipse dixit*. While some Seventh Circuit cases have suggested that the basis for the rule is the mutuality problem discussed above,[121] the Illinois cases themselves are largely free of such arguments.[122] Accordingly, the scope of the Illinois at will rule is best inferred from the cases where the courts have declined to apply it.

Generally speaking, Illinois courts have refused to treat facially indefinite employment contracts as terminable at will where the evidence indicates that the parties intended something different. Thus, for example, where the evidence warrants it, the Illinois courts will find that facially indefinite employment contracts were, in fact, intended to

supported both by Krug's actual rendition of services and by several reciprocal promises, specifically, a non-competition agreement, and a promise to work exclusively for Flambeau should Krug's sales reach a certain level. The court found that, because of these reciprocal promises, the asymmetric rights of termination did not destroy the contract:

> A contract does not lack mutuality "merely because every obligation of one party is not met by equivalent counter obligation of the other party." Mutuality of obligation means sufficient consideration so that one promise of one party to a bilateral contract may support one or more promises of the other party.

Id. at 151, 214 N.W.2d at 285-86 (citations omitted).

121. *See, e.g.*, Buian v. J.L. Jacobs & Co., 428 F.2d 531, 533 (7th Cir. 1970); Meadows v. Radio Indus., Inc., 222 F.2d 347, 348 (7th Cir. 1955).

122. Indeed, at least some of them tacitly recognize that the "problem" of mutuality is really only a problem of the adequacy of consideration. *E.g.*, Carter v. Kaskaskia Community Action Agency, 24 Ill. App. 3d 1056, 1059, 322 N.E.2d 574, 576 (1974). Moreover, it is striking that the principal Illinois case cited by the Seventh Circuit in Meadows v. Radio Indus., Inc., 222 F.2d 347 (7th Cir. 1955), held a "permanent" contract of employment to be terminable at will not for want of mutuality, but because the term "permanent" was too indefinite to permit any other construction. *See* Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 385, 70 N.E. 359, 363 (1904).

have a specifiable duration.[123] Moreover, several Illinois courts have indicated that an employer will not be permitted to use his right of termination at will to render other aspects of the employment contract—most notably promised pension benefits and service bonuses—illusory.[124] Finally, in a case remarkably similar to Wisconsin's *Krug* decision, one Illinois appellate court has held that an otherwise indefinite employment contract will not be terminable at will if a specific ground for discharge is stated.

In *Donahue v. Rockford Showcase & Fixture Co.*,[125] the initial letter concerning a salesman's employment status indicated that the employment relationship would not be terminable except by the mutual consent of both parties. A subsequent letter, however, stated that the salesman would be terminated in the event that his sales fell below $25,000 a year. When the salesman was fired despite having met this minimum sales requirement, he brought suit. The appellate court initially affirmed the circuit court's dismissal of the complaint on the grounds that the mutual consent requirement was tantamount to a promise of permanent employment, and that the contract was therefore so indefinite as to be terminable at will. On rehearing, however, the court reversed its position, reasoning that to do otherwise would effectively defeat the parties' intent:

> [Because] both letters provided for termination by mutual consent, the contract would have been for an indefinite duration and thus terminable at will absent the condition added in the second letter. However, the additional provision did amount to the setting of a condition, upon the happening of which, the contract would have been terminated. The contract was not ambiguous in its expression of duration and, therefore, not subject to construction. . . . In legal effect, the contract specified a definite duration which prevented the defendant from terminating at will.[126]

All of these cases emphasize the impact of an at will right of termination on the parties' intended agreement. In each case, the at will rule yields to the demands of the negotiated bargain. Given this willingness

123. *E.g.*, Grauer v. Valve & Primer Corp., 47 Ill. App. 3d 152, 361 N.E.2d 863 (1977) (implying intent to hire for one year from the fact that employee's salary was to be figured on the basis of annual shipments). The Seventh Circuit, apparently much troubled by the mutuality "problem," has indicated a much greater, and probably inappropriate, hesitancy to infer such an intent. *See* Buian v. J.L. Jacobs & Co., 428 F.2d 531 (7th Cir. 1970).

124. *E.g.*, Criscione v. Sears, Roebuck & Co., 66 Ill. App. 3d 664, 669, 384 N.E.2d 91, 94 (1978); Stevenson v. ITT Harper, Inc., 51 Ill. App. 3d 568, 573, 366 N.E.2d 561, 567 (1977). Both cases recognized that such bad faith conduct would be improper, but held that the pleadings did not state a claim.

125. 87 Ill. App. 2d 47, 230 N.E.2d 278 (1967).

126. *Id.* at 54, 230 N.E.2d at 281-82.

to abandon the at will rule where there is evidence of contrary intent, it seems highly likely that *Ryan* would have come out differently had it been decided under Illinois law. Thus, as in Michigan, Wisconsin and arguably Indiana, one may realistically expect that the Illinois courts will view promises of job security as simply one promise among many made by the employer to prospective employees. The at will rule in Illinois, therefore, can safely be considered a rule of construction and not a rule of substantive law.

Characterizing the Illinois at will rule in this way makes it likely that Illinois courts would be willing to enforce a bargained-for promise of job security, a prediction supported by two relatively recent Illinois cases dealing with the enforceability of statements made in an employer's policy manual. In *Carter v. Kaskaskia Community Action Agency*,[127] the plaintiff was the former manpower director of a community anti-poverty program who had been hired for an indefinite term. He contended that his discharge from this position was unlawful because it contravened the procedures for discharge set forth in the employer's personnel manual. The defendant, not surprisingly, argued that the provisions of the manual were not contractually binding and that the plaintiff was an at will employee. In overturning the circuit court's bench verdict in favor of the defendant, the appellate court noted that the procedures described in the policy manual had only been initiated after negotiations between the agency's executive director and the employees, including the plaintiff. Moreover, the court held that the plaintiff's decision to continue with the agency in the wake of the changes embodied in the manual provided sufficient consideration to support a binding modification of the employment contract:

> It has been determined that, when the term of employment is at the will of the parties, continuing to work not only constitutes assent but also consideration for any modification of the original contract. Thus, it appears that the plaintiff not only assented to a modification of his contract, but he provided sufficient consideration for that modification, thus creating mutuality of obligation.[128]

In short, the *Carter* case directly holds that a terminable at will employee may bargain for an enforceable promise of job security even when the only consideration supporting the promise is the continued performance of the services he was hired to perform.

The emphasis this decision places on the element of bargain in determining the enforceability of a promise of job security is under-

127. 24 Ill. App. 3d 1056, 322 N.E.2d 574 (1974).
128. *Id.* at 1059, 322 N.E.2d at 576 (citations omitted).

lined by the subsequent case of *Sargent v. Illinois Institute of Technology*.[129] Sargent was a security guard at IIT who was dismissed from his job, supposedly for his conduct in connection with the detention of an IIT student. Sargent argued that, in fact, he was discharged by his supervisor in retaliation for having accused the supervisor of appropriating university property for his personal use. Sargent contended that the university's employment manual specified the infractions that would justify dismissal; that dismissal was improper except for these reasons; and that, therefore, his retaliatory discharge was improper. The court was unpersuaded. It noted that the employment manual predated Sargent's arrival at the school. Additionally, there is nothing in the opinion to suggest that the issue of job security was discussed by Sargent at the time of his hiring. Hence, the court concluded that the provisions of the manual were not bargained for as part of Sargent's employment contract, and therefore, any promise of job security implicit in the manual was unenforceable. Moreover, the court distinguished *Sargent* from *Carter* on precisely this ground, emphasizing the absence of those features of the earlier case that had made the provisions of the personnel manual part of an enforceable, negotiated bargain rather than a mere unilateral statement of intent.[130] While the court's analysis of the bargain struck between Sargent and the university might be open to question,[131] the crucial fact about the case, for the

129. 78 Ill. App. 3d 117, 397 N.E.2d 443 (1979).

130. *Accord*, Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976).

131. There are two recent cases which, on somewhat different theories, have held contrary to *Sargent* on this point. In Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980), the majority held that the plaintiff would have been able to enforce the promises made in the employer's personnel manual even if they had not been a subject of explicit negotiation. *Id.* at 613, 292 N.W.2d at 892. The court referred to a series of its previous decisions in which unilateral promises of severance pay, pensions, bonuses and the like had been enforced. *Id.* at 615-18, 292 N.W.2d at 893-94. The opinion argued that such promises, though unilateral, are not gratuitous since they are intended to secure "an orderly, cooperative and loyal work force." *Id.* at 613, 292 N.W.2d at 892. Moreover, by their publication, the opinion added, such promises create a "legitimate expectation" of fulfillment. *Id.* at 619, 292 N.W.2d at 895.

This argument is dubious. The unilateral statements made in a policy manual are just that: unilateral. Indeed, as *Toussaint* itself recognizes, such policy statements are subject to unilateral amendment by the employer. *Id.* at 613, 292 N.W.2d at 892. How such promises can be both contractually binding and subject to unilateral alteration is not explained. Moreover, where such promises are not the product of negotiation it is difficult to understand what, if any, meeting of the minds has occurred. Finally, the mere fact that the employer derives some ultimate benefit from such promises does not differentiate them from most other gratuities. The question for the law of contract is whether this benefit was *bargained for* in exchange for the promise. Put another way, the *Toussaint* opinion seems to suggest that the enforceability of the provisions of a policy manual turns on whether or not any benefit actually flows from them to the promisor. Thus, carried to its logical conclusion, *Toussaint* would dictate that employers with "orderly, cooperative and loyal" work forces would be contractually bound to adhere to their personnel policies, but those with insubordinate, balky and traitorous work forces would not.

At best *Toussaint* might be read as justifying such promises on an estoppel theory. Certainly

purposes of the issue raised by *Ryan* is that the analysis did proceed as an analysis of the bargain and that the court did not foreclose reference to the intent of the parties by invocation of the doctrine of mutuality. In short, as with the other Seventh Circuit jurisdictions, it is likely that Illinois courts will view the at will doctrine as a presumption which can be overridden by clear contrary evidence of the parties' intent.

CONCLUSION

In its 1980-81 term, the Seventh Circuit rendered significant decisions in two developing areas of labor law. In considering the issue of an employer's "mixed motive" conduct under section 8(a)(3) of the National Labor Relations Act, the court adopted the Board's recently articulated *Wright Line* test. In doing so, the Seventh Circuit overruled a

the cases dealing with pensions and bonuses can be fit into this mold. But a promissory estoppel will only arise where, *inter alia*, the promisee has relied to his detriment on the promise he is seeking to enforce. RESTATEMENT OF CONTRACTS § 90 (1932). Where an employee remains in service for an extended period of time and is rewarded for such loyalty with a pension or bonus, it is a fair inference that the promise of such deferred compensation was at least partially relied on by the employee as a reason for remaining with the employer. An employee does not, however, automatically "earn" a right to job security by mere longevity in the same way that he automatically earns a pension. Hence, it is less plausible to infer from the mere fact that an employee remains on his job that he does so in partial reliance on a personnel manual's promise of job security. This inference may change, of course, where, for example, the shop has a seniority system of some sort, *e.g.*, Hepp v. Lockheed-California Co., 86 Cal. App. 3d 714, 150 Cal. Rptr. 408 (1978), or where the employee accepts his job—or rejects a competitive job—because of his desire for security. *E.g.*, Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980). But such special circumstances can be accommodated short of a sweeping enforcement of all such unilateral promises. Moreover, and more importantly, absent such special circumstances, there is no reason to infer the existence of any detriment.

A more plausible theory for enforcing the promises made in personnel manuals was recently offered by the California Appellate Court in Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). There the court noted that all contracts implicitly contain a separate and independent covenant of "good faith and fair dealing." *Id.* at 453, 168 Cal. Rptr. at 727-28. *See generally* Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980). *See also* Criscione v. Sears, Roebuck & Co., 66 Ill. App. 3d 664, 384 N.E.2d 91 (1978). The court concluded that the fact that the employer's policy manual only authorized termination for good cause, when taken in conjunction with this implied covenant and the plaintiff's 18 years of satisfactory service, meant that the employer was "estopped" from terminating the plaintiff at will. 111 Cal. App. 3d at 455, 168 Cal. Rptr. at 729. The problem with this theory is that the covenant of good faith performance is not a sort of free-floating requirement that the parties to a contract behave in a gentlemanly manner. Rather, it is an obligation that they will perform the promises in the contract in a fair, reasonable manner so as to avoid rendering them illusory. *See, e.g.*, Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917). In the case of an employer who ignores promises contained in a personnel manual the issue is not whether he has acted with bad faith—that is an all but forgone conclusion. Rather the issue is whether he has acted in bad faith with respect to a legally enforceable promise. Thus, *Cleary*'s citation to the implied covenant of good faith and fair dealing merely begs the question.

In sum, there is no short cut around the detailed analysis of the facts of each case that appears to be mandated by *Carter* and *Sargent*. Promises in an employment manual should be enforceable only if they are part of the employee's bargained-for consideration or if they fall within the provisions of RESTATEMENT § 90.

long-standing line of its own decisions and failed to protect adequately the interests of innocent employees.

The court considered the rights of at will employees in *Ryan v. J.C. Penney Co*. There is a discernible trend in the states falling within the Seventh Circuit toward recognizing restrictions on an employer's ability to discharge employees having contracts of indefinite duration. Nevertheless, the Seventh Circuit applied the relevant state law conservatively, and arguably incorrectly, to find an employee terminable at will despite an employer's assurance that termination would only be for good cause.

In its only labor decision to be taken to the Supreme Court, the Seventh Circuit held that no confidential employee is protected by the NLRA. While this decision clearly undercuts significant policies underlying the Act, a careful analysis of the legislative history indicates that the decision was consistent with the congressional intent. Despite this, the Supreme Court reversed, finding confidential employees protected by the Act.