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Labor Law - Supervisors - *University of Chicago v. National Labor Relations Board* - The Seventh Circuit Affirms a National Labor Relations Board-Created Hybrid Employee-Supervisor Category Under the National Labor Relations Act

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LABOR LAW—SUPERVISORS—*University of Chicago v. National Labor Relations Board*—The Seventh Circuit Affirms a National Labor Relations Board-Created Hybrid Employee-Supervisor Category under the National Labor Relations Act.

Legislative enactments are the product of society's attempt to find solutions to the problems facing its citizens. As the situations being dealt with become more complicated, so do the legislative remedies. One method frequently chosen by legislative bodies to solve given circumstances is to categorize the populace and apply restrictions or grant benefits to the resulting groups. Frequently, changing conditions and values outpace corrective legislation. An example is the National Labor Relations Act,[1] which carefully delineates both the individuals included within the Act's protection and those persons excluded from its coverage.[2] The recent decision of *University of Chicago v. National Labor Relations Board*[3] demonstrates the practical difficulties that arise when seeking to apply the Act to a "hybrid employee"—a worker who does not readily fit within any of the Act's enumerated employer-employee categories.

History of the Case

University of Chicago v. National Labor Relations Board resulted from an effort of the National Council, Distributive Workers of America, to organize the 600 professional and nonprofessional employees of the University of Chicago Libraries.[4] In March of 1971, Local 103 filed a representation petition[5] with the National Labor Relations

1. National Labor Relations Act, 29 U.S.C. § 141 *et seq.* (1970) [hereinafter referred to as the Act].
2. For further discussion, see text accompanying notes 39 through 43, 47 and 96 *infra*.
3. 506 F.2d 1402 (7th Cir. 1974) (decision without published opinion pursuant to Seventh Circuit Rule 28, *see* Appendix, at p. 773 *infra*).
4. *See* 205 N.L.R.B. No. 44, 83 L.R.R.M. 1678, 1680 (1970).
5. Petition was filed pursuant to 29 U.S.C. § 159(c)(1) (1970), and regulations thereto.

Board[6] seeking the creation of a bargaining unit comprised of both professional and nonprofessional employees. The Regional Director of the N.L.R.B. dismissed the petition,[7] having determined that supervisors had been involved in the union's organizational compaign.[8] Such supervisory interference tainted the union's showing of support.[9] Local 103 thereafter promptly transformed itself into Local 103A for professional employees, and Local 103B for nonprofessionals.[10]

In December of 1971, Local 103A filed a representation petition,[11] seeking a bargaining unit comprised solely of professional librarians. A hearing was held in which the supervisory status of several professionals was the main issue.[12] Also at issue was whether librarians who supervised only clerical staff, and who would be part of Local 103B, should be excluded from the professional unit.[13] The issues were not resolved at the representation hearing level,[14] because a library employee filed an unfair labor practice charge against the University. This 8(a)(2) charge[15] alleged that the University was in violation of the National Labor Relations Act[16] through its interference with the union's formation, since nine library supervisors were participants in that formulation. The Board reviewed the charge and issued a formal complaint against the University.[17]

Upon the filing of the complaint, the case took an unusual turn. The University admitted all of the substantive allegations in the

6. The National Labor Relations Board is established under 29 U.S.C. § 153 (1970). The Board has authority to make determinations as to the composition of a proposed bargaining unit as well as to provide hearings to resolve representation questions. 29 U.S.C. § 159 (1970).

7. *See* 29 C.F.R. § 102.63 (1974).

8. *See* 205 N.L.R.B. No. 44, 83 L.R.R.M. 1678, 1680 (1973).

9. *See* Carpenter Steel Co., 76 N.L.R.B. 670, 673 (1948).

10. 205 N.L.R.B. No. 44, 83 L.R.R.M. 1678, 1680 (1973).

11. National Labor Relations Board Case No. 13-RC-12404.

12. 205 N.L.R.B. No. 44, 83 L.R.R.M. 1678, 1680 (1973).

13. *Id.*

14. *Id.*

15. 29 U.S.C. § 158(a)(2) (1970). Under this section, it is an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." By Board practice, a violation of section 8(a)(2) results in the disestablishment of the union if employer domination is found, and a new election if "merely" interference is found. *See* Carpenter Steel Co., 76 N.L.R.B. 670 (1948). For purposes of this section, "employer" includes an agent of the employer, 29 U.S.C. § 152(2) (1970), and is not limited to the authorized acts of that agent, 29 U.S.C. § 152(3) (1970); *accord,* International Association of Machinists v. NLRB, 311 U.S. 72 (1940); H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).

To find interference, therefore, as was charged in *University of Chicago,* it was first necessary for the Board to hold that some of the prospective unit members were supervisors.

16. *See* note 1 *supra.*

17. Once the Board issues a complaint, determination of the matter is by an administrative law judge. *See* 29 C.F.R. § 102.15 (1974).

Board's complaint.[18] As a result, in the hearing before the administrative law judge,[19] the positions normally advocated by the parties were reversed. The University argued that the nine individuals were supervisors and, therefore, the University had violated the Act. The union contended that the University was not in breach, since the nine people involved were not supervisors. The Board's General Counsel concurred with the University's contention.[20] A finding was entered that five of the nine librarians acted in a supervisory capacity.[21] However, the judge held that the issues considered during the course of the hearing were more appropriately raised at the representation level, and, consequently, dismissed the complaint.[22]

On appeal, the Board determined that all nine librarians were supervisors—four supervised professional employees and five supervised nonprofessionals.[23] The Board held that the conduct of the latter group was not violative of section 8(a)(2), since the policy of the Act was to protect the employees' jobs from their organizational rights:

> The possibility that the professional librarians would be coerced by the organizational activities of other professional librarians who also, by the nature of their duties, supervise only employees outside of the unit, is too remote to justify limiting the Section 7 rights of such employees. Moreover, where an individual's principal duties are of the same nature as that of other unit employees, the exercise of supervisory authority outside the unit sought does not so ally such an employee as to create a conflict of interest.
>
> The same considerations do not apply to conduct engaged in by [the clerical supervisors] . . . . These four individuals supervise professional librarians, and the possibility is certainly greater that some of the unit employees would be afraid to oppose views expressed by supervisors for fear of antagonizing the people who possess effective control over promotions, raises, and other terms and conditions of their employment.[24]

The concept that supervisors may actively participate in rank-and-file union organizational campaigns is contrary to previous Board decisions.[25]

18. Appendix to Petitioner's Brief to Review and Modify at 8-9, University of Chicago v. NLRB, 506 F.2d 1402 (7th Cir. 1974).
19. 29 C.F.R. § 102.63-.64 (1974).
20. The General Counsel has authority over the Board's legal staff and has final authority to investigate and prosecute unfair labor practice charges. 29 U.S.C. § 153(d) (1970).
21. *See* 205 N.L.R.B. No. 44, 83 L.R.R.M. 1678, 1681 (1973).
22. *Id.*
23. *Id.*
24. *Id.*
25. *See* discussion accompanying notes 120 through 122 *infra.*

Thereafter, the Seventh Circuit denied the University's reversing petition, and granted the Board's cross-application for enforcement of its order.[26] The court affirmed both the holding that all nine were supervisors, as well as the Board's determination that supervisors may be entitled to section 7 rights:[27]

> [T]he Board's conclusion that the activities of the five supervisors who only supervised nonprofessionals did not constitute unfair labor practices was reasonable. The Board's concern was that these five supervisors were also employees and therefore entitled to section 7 rights. 29 U.S.C. § 157. In balancing the Union's need to be free from employer interference with the right of employees to organize, the Board's decision that professional librarians would not be coerced by other professionals who supervise only employees outside the Union is reasonable.[28]

The court thus concluded that under certain circumstances, supervisors and employees could be members of the same bargaining unit.

Proper Place to Raise the Issue

In *University of Chicago*, the question of supervisory status was raised in the context of an unfair labor practice charge. In most cases, that question is raised in the representation hearing.[29]

Once an 8(a)(2) charge is filed, the Board will not begin or continue processing a representation petition.[30] Filing an 8(a)(2) charge while a representation hearing is in progress is, therefore, known as a "blocking charge."[31] The suspension by the Board of the representation hearing is an internal N.L.R.B. policy that has been mandated neither by the Act nor by the courts, and has been criticized by unions as a management tactic to delay recognition of a given union.[32] Such a charge was made by the union in the instant case:

> [T]he real issue herein is not the University's alleged assistance to the Union but the exploitation of the Board's unfair labor practice hearing and appeals process to avoid recognition of the Union.[33]

The statements made by both the Board and the Seventh Circuit appear to leave open the possibility that the supervisory question will

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26. 506 F.2d 1402 (7th Cir. 1974).
27. *See* text accompanying notes 40 through 41 *infra.*
28. *See* Appendix at p. 774 *infra.*
29. *See, e.g.*, Pacemaker Corp. v. NLRB, 260 F.2d 880 (7th Cir. 1958).
30. *Id. See also* cases cited note 39 *infra.*
31. Pacemaker Corp. v. NLRB, 260 F.2d 880 (7th Cir. 1958).
32. *Id.*
33. Brief for Intervenor Distributive Workers of America at 3, University of Chicago v. NLRB, 506 F.2d 1402 (7th Cir. 1974).

be re-litigated in the representation hearing. The Board stated that in reaching its decision no specific findings regarding unit inclusion were being made.[34] The Seventh Circuit similarly limited the effects of its supervisory holding:

> [T]he determination of the supervisory status of the nine individuals is specifically limited to this unfair labor practice proceeding and will not affect any determination of supervisory status in a representation case concerning the University and Local 103A.[35]

The possibility of re-litigation of supervisory status in a new representation hearing raises the point that after 3 years of litigation, the case may be no closer to completion than when it began. Of course, any findings as to the composition of the unit may be appealed as a matter of right through the Board and the courts, although the *Universal Camera* doctrine[36] may serve as a deterrent to such appeals. Nonetheless, as the union contended, there is an inference of delaying tactics involved here. The result in this case seems to imply that future unions should discourage union organizational activities by persons who arguably could be claimed to be supervisors by the employer. Otherwise, the union's organizational campaign could be derailed by the filing of an 8(a)(2) charge.

On the other hand, had the case gone through the representation hearing level first, with a finding that none of the contested people were supervisors, the employer would be placed in an awkward position. If the employer disagreed with those findings, its only recourse would be to refuse to bargain in good faith, as certification of a bargaining unit is not reviewable by the courts.[37] The resulting 8(a)(5) charge[38] filed by the union would then give an opportunity to the employer to air its grievances as to the composition of the bargaining unit. Thus, it is easy to understand why the blocking charge has been criticized,[39] and it is submitted that the Board should review its policy in this area.

Congressional Intent

The key provision of the National Labor Relations Act, section 7,[40]

34. See 205 N.L.R.B. No. 44, 83 L.R.R.M. 1678, 1680 n.4 (1973).
35. See Appendix at p. 774, *infra*.
36. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). See text accompanying note 65 *infra*.
37. *See* AFL v. NLRB, 308 U.S. 401 (1940).
38. Refusal to bargain in good faith is governed by 29 U.S.C. § 158(a)(5) (1970).
39. *See, e.g.*, Templeton v. Dixie Color Printing Co., 444 F.2d 1064, 1068 n.2 (5th Cir. 1971); Surrat v. NLRB, 463 F.2d 378 (5th Cir. 1972).
40. 29 U.S.C. § 157 (1970).

grants employees the right to organize into labor unions and to bargain collectively:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .[41]

This protection is clearly granted only to employees. Other sections of the Act, however, indicate that a supervisor may not be "an employee" within the framework of the Act. Section 2(11)[42] defines supervisors as:

> [A]ny 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.

Section 14(a),[43] while allowing supervisors to become members of labor organizations, does not compel the employer to treat them as "employees." An "employee" is defined by section 2(3)[44] as *not* including "any individual employed as a supervisor . . . ." A reading of these various sections indicates that supervisors do not have section 7 rights. One of the reasons that Congress denied these organizational rights to supervisors, was to insure that group's loyalty to management.

Prior to the 1947 Labor Management Relations Act,[45] confusion existed with regard to the status of supervisors, because the original Wagner Act[46] definitions of "employer" and "employee," overlapped, and there was no separate definition for "supervisor."[47] As a result, the Board vacillated in its interpretation of the definitions and, con-

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41. *Id.*
42. 29 U.S.C. § 152(11) (1970).
43. 29 U.S.C. § 164(a) (1970) reads, in pertinent part: "[N]o employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law . . . relating to collective bargaining."
44. 29 U.S.C. § 152(3) (1970).
45. Ch. 120, 61 Stat. 136.
46. Ch. 372, 49 Stat. 449.
47. Employee was defined as "any employee" excluding agricultural laborers, domestic servants or employees of parents or spouses. While there was no definition of "supervisor," "employer" was defined as "any person acting in the interest of an employer, directly or indirectly . . . ." Thus, an "employee" could act at least "indirectly" on behalf of his employer, while not having any of the authority or other attributes of management. Ch. 372, § 2(3), 49 Stat. 449 (1935).

comitantly, with respect to the breadth of the group protected under the Wagner Act. Thus, in *Union Colleries Coal Company*,[48] supervisors were afforded the protection of the Act; in *Maryland Drydock Company*,[49] they were not; and in *Packard Motor Car Company*,[50] they were again afforded protection. Packard took unsuccessful appeals to both the Sixth Circuit[51] and the United States Supreme Court.[52] Congress disagreed with the Board's interpretation in *Packard*, as evidenced by the 1946 attempt to remove supervisors from the Act's protection.[53] After passage by the Congress, the exclusion died when President Truman vetoed the bill.[54]

During consideration of the Taft-Hartley[55] amendments the following year, supervisory status was again a congressional concern. The Senate Report, in its version of the bill,[56] listed elimination of the "genuine supervisor from the coverage of the Act as an employee" as one of the six major changes to be made in the Wagner Act:

> 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.[57]

In addition, the House Report stated that the intent of the amendment was to remove supervisors from the Act's coverage.[58] The history of

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48. Union Colleries Coal Company, 41 N.L.R.B. 961 (1942).
49. Maryland Drydock Company, 49 N.L.R.B. 733 (1943).
50. Packard Motor Car Company, 61 N.L.R.B. 4 (1945).
51. NLRB v. Packard Motor Car Company, 157 F.2d 80 (6th Cir. 1946).
52. Packard Motor Car Company v. NLRB, 330 U.S. 485 (1947). The Court held that supervisors were not "forbidden the protection of the Act when they take collective action to protect their collective interests." *Id.* at 489. For a detailed discussion of this pre-amendment period, *see* Moore, *The National Labor Relations Act and Supervisors*, 21 LABOR LAW JOURNAL 195 (1970).
53. 92 CONG. REC. 1029 (1946). The wording of the proposed definition was as follows:

> Sec. 12. Supervisory employees: (a) As used in this section the term "supervisory employee" means an employee whose primary duties consist of—
> (1) the direction or supervision of the activities of other employees but who regularly do no productive manual work; or
> (2) the computation of the pay of other employees and does not include persons who are selected by productive workers under established practice; or
> (3) the determination of the time worked by other employees, or the supervision or administration of the factors on the basis of which the pay of other employes is computed. . . .

54. *See* 1946 U.S. CODE CONGRESSIONAL SERVICE at 1686.
55. Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.*, ch. 120, 61 Stat. 136 (1947).
56. S. REP. No. 105, 80th Cong., 1st Sess. 3 (1947).
57. *Id.*
58. H.R. REP. No. 245, 80th Cong., 1st Sess. 13 (1947).

the Board's vacillating position on the subject was discussed by the members of both houses of Congress. Throughout the discussion, Congress considered the desirability of relieving all possibility of a supervisor's "divided loyalty."[59] House minority Congressmen stated:

> The issue of the inability of the supervisory employee, who is unionized, to discharge his functions with loyalty and competency is constantly raised. This issue may be partially met by providing that supervisors are entitled to organize and bargain collectively with their employers provided that they do not belong to the union to which the production employees of the employer belong, or to any union dominated or controlled by the union to which the production employees belong.[60]

It should be noted that members of both houses rejected the concept of supervisory and rank-and-file personnel being contained in the same unit. When Representative Gwinn, speaking on behalf of sponsor Hartley, was asked if section 2(11) would "absolutely prohibit affiliation [by supervisors] with a rank and file union," he replied, "It does."[61] Even a proposal by the Senate Minority to emasculate the proposed supervisory definition prohibited applying the Act's coverage to supervisors "when they also represent rank and file workers."[62]

A reading of the debates on the Taft-Hartley Act discloses that Congress' concern about labor-management problems was limited to those problems in an industrial context.[63] Apparently, no consideration was given either to the "hybrid" employees, who had occasional managerial attributes, or to employees within a university context.

Interpretation of Section 2(11)

The N.L.R.B. has had the opportunity to apply the Act, and the courts have had occasion to decide questions of supervisory status through their power of review.[64] The scope of judicial review, however, is somewhat limited by the *Universal Camera* doctrine[65] which requires affirmance if the Board's finding is supported by substantial evidence viewing the record as a whole. In addition, the Supreme

59. *Id.* at 16; S. Rep. No. 105, 80th Cong., 1st Sess. 5 (1947).
60. H.R. Rep. No. 245, 80th Cong., 1st Sess. 72 (1947).
61. 93 Cong. Rec. 3443 (1947).
62. *Id.* at 4904.
63. *See generally* National Labor Relations Board, History of the Labor Management Relations Act of 1947.
64. *See* 29 U.S.C. § 160(e)-(f) (1970).
65. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1950); *accord*, Warner v. NLRB, 365 F.2d 435 (3d Cir. 1966).

Court has recognized the Board's expertise in the application of the Act to the "complexities of industrial life,"[66] and the respect due to a Board determination.[67]

Shortly after the passage of the Act, the Supreme Court remanded a supervisory question to the Sixth Circuit which had been decided prior to the Act's passage.[68] The lower court held that participation in any of the acts enumerated in section 2(11) would render an individual a supervisor.[69] It was further held that the amendments concerning employees were constitutional.[70] Finally, the court concluded that under the Labor Management Relations Act, employers were free to not only discharge supervisors for joining a union, but could interfere with their union activities.[71]

Strict interpretations of the statutory definition began to erode with *Great Western Sugar*.[72] This early Board decision concerned "hybrid" employees: staff who spent part of their time in supervisory activities and the remainder in rank-and-file. The individuals in question in that case exercised authority full-time during 85 to 120 days a year and exercised no such authority the rest of the year. The Board distinguished this situation from that of partial authority exercised the full year allowing "seasonal supervisors" to maintain full membership in a rank-and-file union. Membership was limited, however, to that which reflected rank-and-file duties.[73] This limitation, it was suggested, avoided the charges of conflict of interest—since there would not be two masters served at the same time.[74] The Board considered irrelevant the fact that both masters would be aware of the dual status, and, therefore, neither side would be trustful of the supervisors.[75] The Board regarded this problem as "commonplace whenever an employer decides to promote a rank-and-file employee."[76] The N.L.R.B. did not consider the fact that the commonplace promotions involved were always followed by demotions, and that as a result the individuals'

66. NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963).
67. *Id.*; *see also* NLRB v. Insurance Agents' International, 361 U.S. 477, 499 (1960).
68. Edward G. Budd Mfg. Co. v. NLRB, 332 U.S. 840 (1947).
69. NLRB v. Budd Mfg. Co., 169 F.2d 571, 575 (6th Cir. 1948). *See also* text accompanying note 42 *supra*.
70. 169 F.2d at 577.
71. *Id.* at 579; *accord*, NLRB v. Brown and Sharpe Mfg. Co., 169 F.2d 331 (1st Cir. 1948).
72. 137 N.L.R.B. 551 (1962).
73. *Id.* at 553.
74. *Id.*
75. *Id.*
76. *Id.* at 554.

loyalties were probably in a constant state of flux. Finally, it was noted that the difficulty was with the determination of the proper individuals, not the proper duties within the unit.[77] *Great Western Sugar* points out the problems confronting the Board when employees cannot be neatly placed within the statutory definition; even earlier, hybrid personnel in the construction industry had been granted similar status.[78] The constant shifting of jobs within that industry, it was noted, led a worker to supervisory duties one week, and nonsupervisory duties the next.

By 1961, an even greater erosion of the strict exclusion of supervisors from rank-and-file bargaining units had begun. In that year, the First Circuit held in *NLRB v. Swift and Company*:[79]

> [G]radations of authority "responsibly to direct" the work of others from that of general manager or other top executive to straw boss are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a "supervisor."[80]

In *Local 636, Plumbing and Pipefitting Industry v. NLRB*,[81] the District of Columbia Circuit supported the Board's practice[82] of allowing a supervisor to retain rank-and-file union membership in the construction industry, even while acknowledging that it was the purpose of the 1947 amendments to prevent the association of supervisors and rank-and-file members in the same union.[83] The court did, however, object to participation by hybrid employees in union bargaining teams.[84]

In 1970, the Seventh Circuit also approved a formula test which allowed supervisors in the same bargaining unit as employees. *Westinghouse Electric Corp. v. NLRB*[85] involved engineers who occasionally became "lead" engineers on various Westinghouse installation projects.[86] Relying on *Great Western*,[87] the Board allowed the engi-

77. *Id.*
78. Nassau and Suffolk Contractor's Ass'n, Inc., 118 N.L.R.B. 174 (1957).
79. 292 F.2d 561 (1st Cir. 1961).
80. *Id.* at 563.
81. 287 F.2d 354 (D.C. Cir. 1961).
82. *See* Nassau and Suffolk Contractor's Ass'n, Inc., 118 N.L.R.B. 174 (1957).
83. *See* Local 636, Plumbing and Pipefitting Ind. v. NLRB, 287 F.2d 354, 361 (D.C. Cir. 1961).
84. *Id.* at 362.
85. 424 F.2d 1151 (7th Cir. 1970).
86. An engineer was classified as a supervisor if 50 percent of the toal working time was spent as a "lead" engineer. *Id.* at 1157-58.
87. See text accompanying note 72 *supra*.

neers in question to be members in the same unit as nonprofessional employees.[88] Although distinguishing between full supervisory status during part of the year and partial supervisory status during the entire year, the Board had thus gone far beyond *Great Western*.[89] The court affirmed this Board-created extension of the supervisory group which was allowed to maintain its rank-and-file union membership:

> [T]he board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the act is intended to protect . . . . We think that the board's formula in the peculiar circumstances here reasonably protects the legitimate interests of the employer and employees.[90]

Westinghouse Electric Corp. v. NLRB[91] represented a change from the Seventh Circuit's earlier opinion that the Board could only enter findings of fact as to whether an employee fell within the statutory definition of the word "supervisor."[92]

UNIVERSITY APPLICATION

University-related cases under the Act are new to the labor scene. Prior to 1970, the Board refused to exercise jurisdiction over colleges and universities because they were nonprofit institutions whose activities were of a noncommercial nature.[93] However, in *Cornell University*,[94] the N.L.R.B. decided that the growth of higher education and the increasingly important federal economic support given to those institutions dictated its exercise of jurisdiction over the area.[95] While the Board had determined cases concerning professionals[96] such as pi-

88. 424 F.2d at 1157.
89. *See* text accompanying note 73 *supra*.
90. 424 F.2d 1151, 1158 (7th Cir. 1970).
91. 424 F.2d 1151 (7th Cir. 1970).
92. NLRB v. Esquire, Inc., 222 F.2d 253 (7th Cir. 1955).
93. *See, e.g.*, Trustees of Columbia University, 97 N.L.R.B. 424, 427 (1951). The Board may decline to assume jurisdiction over various classes of employers if the Board finds that the effect of the labor dispute on commerce is insubstantial. 29 U.S.C. § 164 (c)(1) (1970).
94. 183 N.L.R.B. 329 (1970). For a discussion of the background and effects of the Board's decision to accept jurisdiction over colleges, see Schramm, *Effects of NLRB Jurisdictional Change on Union Organizing in Private Colleges and Universities*, 23 LABOR LAW JOURNAL 572 (1972).
95. 183 N.L.R.B. at 332.
96. A professional is defined by the Act as one engaged primarily in intellectual work, utilizing discretion, having knowledge of an advanced type, and the work output of such an employee cannot be standardized in relation to a given period of time. 29 U.S.C. § 152(12) (1970). A professional loses the Act's protection if that person is also found to be a supervisor. *See* Kahn, *The N.L.R.B. and Higher Education: The Failure of Policy Making Through Adjudication*, 21 U.C.L.A. L. REV. 63, 119 (1970) [hereinafter cited as Kahn].

lots,[97] nurses,[98] architects,[99] and engineers,[100] as far as academia was concerned, the N.L.R.B. recognized that it was travelling upon "uncharted waters."[101]

After *Cornell University*, the Board found in *C. W. Post Center of Long Island University*[102] that full-time professional teaching duties interspersed with quasi-supervisory authority did not render the professors in question supervisors. The 27 librarians involved were included within the unit, as no contention was made that they were supervisors.[103] Excluded from the bargaining unit, however, was the library director who hired and supervised all nonprofessional employees.

Fordham University[104] concerned the creation of a unit of all university professional employees. During the course of its opinion, the Board reaffirmed its position that a faculty member's status was that of a professional, and not a section 2(11) supervisor.[105] However, of greater importance to the hybrid employee considerations of this article was the Board's treatment of the University's contention that the law school librarian's participation in the union's authorization campaign had tainted the union's showing of support.[106] The Board did not even determine whether the librarian was a section 2(11) supervisor, but only that he did not supervise any employees that would be in the proposed bargaining unit.[107] As a result, the Board held that the librarian did not taint the union's showing. No case law was cited to support this finding. Thus, in the first university decision where the status of a hybrid employee was raised, the Board stated, quite perfunctorily, that a supervisor may participate in the same unit as rank-and-file employees, as long as the employees are not under the authority of that supervisor.

New York University[108] was an organizing situation similar to that in *Fordham University*. The employer university contended that all li-

97. *See, e.g.*, Air Line Pilots Ass'n, 97 N.L.R.B. 929 (1951).
98. *See, e.g.*, Doctor's Hospital of Modesto, Inc., 183 N.L.R.B. 950 (1970).
99. *See, e.g.*, Wurster, Bernardi and Emmons, Inc., 192 N.L.R.B. 1049 (1971).
100. *See, e.g.*, Western Electric Co., 126 N.L.R.B. 1346 (1960).
101. Cornell University, 183 N.L.R.B. 41, 44 (1970). *See also* C.W. Post Center of Long Island University, 189 N.L.R.B. 904, 905 (1970); Kahn, *supra* note 96, at 84-85.
102. 189 N.L.R.B. 904 (1970).
103. *Id.* at 906.
104. 193 N.L.R.B. 134 (1971).
105. *Id.* at 136.
106. *Id.* at 134 n.6.
107. *Id.*
108. 205 N.L.R.B. No. 16, 83 L.R.R.M. 1549 (1973), *injunction denied*, 364 F. Supp. 160 (S.D.N.Y. 1973). Under the doctrine of Leedom v. Kyne, 358 U.S. 184

brarians were supervisors because they exercised sufficient supervisory authority.[109] The Board cited *Adelphi University* for the proposition that the supervisor exclusion is aimed primarily at situations where the authority in question is exercised over employees seeking inclusion within the unit.[110] The Board applied a 50 percent test.[111] As a result, only those librarians who supervised other employees who would be within the proposed unit, or those employees who spent more than 50 percent of their time supervising non-unit employees were held to be supervisors.

In deciding *University of Chicago*, the Seventh Circuit relied upon *Adelphi University*.[112] In *Adelphi University*, as in *Fordham University*, the employer university challenged the union's representation petition as tainted by supervisory participation. It was claimed that department chairmen, sequence chairmen[113] and program directors were supervisors within the meaning of the Act. The Board found that the authority possessed by the above personnel to effectively recommend the hiring and firing of part-time faculty and to allocate merit increases rendered them supervisors.[114] However, the Board specifically found that the director of admissions was not a supervisor, noting that the fact that he had a secretary did not render him a supervisor.[115] The focus, rather, was on the scope of the authority exercised by the contested employee.

The court's reliance upon *Adelphi University* in *University of Chicago* is misplaced. In the former decision, the director of admissions was specifically held by the Board not to be a statutory supervisor within the Act. He was held to have lacked authority to assign work to the faculty members involved in the school's admissions effort. In addition, his hire-fire authority over his secretary was held insufficient to cloak him with supervisory authority. In the latter case, all of the nine library workers were specifically found to be supervisors, since they all controlled or directed the acts of other library employees. Thus, the Board's holding as to the admissions director's status in *Adelphi*

(1958), the district courts may review a Board decision when the Board acts, by its own admission, contrary to a specific statutory prohibition. In New York University v. NLRB, 364 F. Supp. at 165, the court found no such admission.

109. 205 N.L.R.B. No. 16, 83 L.R.R.M. at 153.

110. *Id.*

111. *See* text accompanying notes 85 through 86 *supra.*

112. 195 N.L.R.B. 639 (1972).

113. A sequence chairman is a department chairman in the University's School of Social Work. 195 N.L.R.B. at 642.

114. Id. at 643.

115. *Id.*

University does not support the court's determination of the librarians' status in *University of Chicago.*

However, the Seventh Circuit could have safely relied upon another discussion of supervisory status by the Board in *Adelphi University.* The Board noted in that case the concern of Congress as to the possibility of a conflict of interest arising from inclusions of supervisors in the same bargaining unit as their employees but realized:

> [T]his does not mean, however, that a similar conflict of interest is necessarily created whenever persons occasionally exercise some authority over other employees of the employer.[116]

The rationale behind this assertion is that the alliance with the employer, so far as the supervisory duties are concerned, are so nebulous that the hybrid employee is not a supervisor with respect to basic loyalties. Further, the Board recognized the necessity for the avoidance of supervisory isolation on the basis of a "sporadic exercise" of supervisory authority over persons not within the unit.

Adelphi University contains the most thorough discussion by the Board in this area and, perhaps, the most realistic approach to the problem. In 1947, Congress did not consider the problem of the "hybrid" employee, as it had only just recognized the special status of supervisors. Furthermore, that body's labor law contemplations were solely within an industrial context.

As a result, the N.L.R.B. has confronted personnel and situations outside the realm of those 1947 deliberations. The Board's creation of a new class of labor personnel represents a pragmatic approach to the realities of current labor relations. Although it does not follow the wording of the National Labor Relations Act, the Board's interpretation is consistent with the Act's mandate to include as many American laborers within the Act's protection as possible, while assuring the employer of the loyalty of true supervisors. Allowing an employee who only is temporarily clothed with supervisory authority to achieve or maintain membership in a rank-and-file unit is also consistent with the Board's "community of interest" standard.[117]

Careful application of the "hybrid test," however, is required in order to maintain the various protections afforded both to employers and employees by the Act. This strict application was lacking in *University of Chicago.* Until that decision, whenever the Board had dealt with hybrid employees, it consistently permitted supervisory member-

116. *Id.* at 644.
117. *See* Continental Baking Co., 99 N.L.R.B. 777 (1952).

ship in the rank-and-file unit, but only to the extent of the hybrid employees' nonsupervisory duties.[118] In *Local 636, Plumbing and Pipefitting Industry v. NLRB*,[119] the Board objected to active union participation by hybrid supervisors. In *Nassau and Suffolk Contractors' Association*,[120] supervisors were prohibited from serving on a union bargaining team. Yet in *University of Chicago*, the Board did not object to participation in union-management negotiations by two people found to be supervisors of clerical employees.[121]

Prior to this holding by the Board and as affirmed by the Seventh Circuit, the N.L.R.B. followed congressional intent, when dealing with supervisory personnel, of insuring that the loyalty of a supervisor was with management. Permitting supervisors to participate on the union side of a negotiating team is no longer a question of bending strict statutory commands to fit new situations; it is in clear violation of not just the letter, but the intent of the National Labor Relations Act.

CONCLUSION

University of Chicago re-emphasizes the problems facing the Board in nonstandard factual situations. The Board's earlier hybrid employee problems of an industrial nature[122] are greatly magnified when its jurisdiction is expanded, as it has been with universities. The N.L.R.B. has recognized that higher education situations fit neither within the industrial framework, nor within the contemplations of the almost 20-year-old Labor Management Relations Act.

The Board has generally adopted a pragmatic approach in resolving the conflict between the strict wording of the Act and modern labor-management problems. When the Board's decisions go beyond this practical framework, and begin to subvert the intent of the Act as it partially did in *University of Chicago*, congressional review is mandated.

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118. *See* text accompanying notes 73 and 84 *supra*.
119. 287 F.2d 354 (D.C. Cir. 1961); *see* text accompanying note 74 *supra*.
120. 118 N.L.R.B. 174 (1957). In that case involving 29 U.S.C. § 158(a)(2), the Board held that unlawful interference will be found when supervisors serve on a union bargaining team, and the employer does not object to such a composition: "[E]mployees have the right to be represented in collective bargaining negotiations by individuals who have a single-minded loyalty to their interests." *Id.* at 187. This has been extended to situations where supervisors assisted in the collection of union authorization cards; *see* De Wolfe Metal Products Corp., 119 N.L.R.B. 659 (1957).
121. 204 N.L.R.B. No. 44, 83 L.R.R.M. 1678, 1681 (1973).
122. *See* Westinghouse Electric Corp. v. NLRB, 424 F.2d 1151 (7th Cir. 1970); Great Western Sugar, 137 N.L.R.B. 551 (1962).

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Argued: September 11, 1974
October 22, 1974

Before
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

THE UNIVERSITY OF CHICAGO,		
	Petitioner,	) Petition to Review and
No. 73-1788	vs.	) Modify and Cross-
NATIONAL LABOR RELATIONS BOARD,		) Application for
	Respondent,	) Enforcement of an
and		) Order of the National
DISTRIBUTIVE WORKERS OF AMERICA,		) Labor Relations Board.
	Intervenor.	) Case 13—CA—11447

. . . .

III

The parent Union as an interested party to the proceeding below, however, can seek review of the Board's order. It is aggrieved because four persons, who otherwise could participate in union activities, have been classified as supervisors of union members, and are ineligible for such participation.

In reviewing the reasonableness of the order, this court is bound to defer to the Board's judgments in applying the act to union activities. *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). It has long been established that the Board owes no such deference to the Administrative Law Judge's determination. *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 492-496 (1951); *P. R. Mallory and Co. v. N.L.R.B.*, 411 F.2d 948, 952 (7th Cir. 1969); *J. I. Case Co. v. N.L.R.B.*, 253 F.2d 149, 155-156 (7th Cir. 1958. The statutory language places the responsibility of determining what activities constitute an unfair labor practice squarely on the Board. 29 U.S.C. § 160(c).

The findings of the Board are supported by "substantial evidence" (29 U.S.C. § 169(f)) and, therefore, the order will be enforced as written. First, there is ample evidence to support the conclusion that all nine employees in question were supervisors within the statutory definition. 29 U.S.C. § 152(11). Each of the nine controlled or directed the activities of other employees of the University library. A primary duty of the Board is to determine which employees fall within the definition of supervisor. *N.L.R.B.* v. *Swift & Co.*, 292 F. 2d 561, 563 (1st Cir. 1961).

Second, the Board's conclusion that the activities of the five supervisors who only supervised nonprofessionals did not constitute unfair labor practices was reasonable. The Board's concern was that these five supervisors were also employees and therefore entitled to section 7 rights. 29 U.S.C. § 157. In balancing the Union's need to be free from employer interference with the right of employees to organize, the Board's decision that professional librarians would not be coerced by other professionals who supervise only employees outside the Union is reasonable. *See Adelphi University*, 195 N.L.R.B. 639, 643-644 (1972) (a director of admissions who had authority to recruit and hire secretaries nevertheless was entitled to section 7 rights).

Third, the determination that active participation by the other four supervisors in the affairs of Local 103A would violate section 8(1) and (2) is also reasonable. Each of the four supervised other professionals who were members of the Union. The activities of three of these supervisors—picketing, participating as negotiating committee member, and attending a Union national convention as a delegate—constituted interference with the formation and organization of the local. 29 U.S.C. §§ 158(1) and (2). *Nassau and Suffolk Contractors' Ass'n, Inc.*, 118 N.L.R.B. 174, 187 (1957) (improper for supervisors to serve on negotiating committee); *see International Ass'n of Machinists, Lodge 35* v. *N.L.R.B.*, 311 U.S. 72, 79-81 (1940); *accord Power Regulator Co.* v. *N.L.R.B.*, 355 F.2d 506, 508 (7th Cir. 1966); *N.L.R.B.* v. *Employing Bricklayers' Ass'n*, 292 F. 2d 627, 629 (3rd Cir. 1961).

Finally, the University may properly be considered responsible for the interference of its supervisors despite the absence of authorization. *Local 636, Plumbing and Pipe Fitting Indus.* v. *N.L.R.B.*, 287 F.2d 354, 360 (D.C. Cir. 1961).

IV

The Union contends that this court should enter an order directing the Board to proceed with a representation case. We do not have authority to enter such an order. Our comment on the need for or desirability of a representation case would be purely advisory.

In entering a judgment enforcing the order as written, we note that the Board, both in its brief and oral argument, assured us that the determination of the supervisory status of the nine individuals is specifically limited to this unfair labor practice proceeding and will not affect any determination of supervisory status in a representation case concerning the University and Local 103A.

PETITION DENIED. CROSS-APPLICATION FOR ENFORCEMENT GRANTED.