When Confidential Employees Are Not Considered "Confidential"—A Review of the Supreme Court's Decision in *NLRB v. Hendricks County Rural Electric Membership Corp.*

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The relationship and the balance of power between management and labor have, for the most part, been governed in the United States by the National Labor Relations Act (NLRA).[1] The NLRA, enacted in 1935, and popularly known as the Wagner Act,[2] initially provided the philosophical and mechanical framework for resolving issues between management and labor. The NLRA provided that employees have the

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[1] 29 U.S.C. §§ 151-169 (1976). The legislative predecessor to the NLRA was the National Industrial Recovery Act (NIRA), ch. 90, 48 Stat. 195 (1933), which was part of Roosevelt's New Deal legislation. Hill, *The National Labor Relations Act And The Emergence of Civil Rights Law: A New Priority In Federal Labor Policy*, 11 HARV. C.R.-C.L. L. REV. 299, 301-03 (1976). Its purpose was to aid in the nation's economic recovery from the Great Depression. W. OBERER, K. HANSLOWE & J. ANDERSEN, LABOR LAW COLLECTIVE BARGAINING IN A FREE SOCIETY 110 (2d ed. 1979) [hereinafter cited as W. OBERER]. To effectuate its purpose, the NIRA established a fair competition code which was to eliminate competition thereby stabilizing the depressed economy. *Id.* The NIRA met its demise in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). In *Schechter*, the Supreme Court held that the NIRA was unconstitutional because the effect of the various codes of fair competition was to "destroy the distinction . . . between commerce 'among the several states' and the internal concerns of a State." *Id.* at 550.

Despite the fact that the NIRA was declared invalid, and despite its short-lived existence, the NIRA did provide a framework for the NLRA. W. OBERER, *supra*, at 110. Section 7(a) of the NIRA provided in part:

> (1) [t]hat employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interferences, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;
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> (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing. . . .

48 Stat. 198-99. This section was incorporated into § 9 of the NLRA. *See* Madden, *Origin and Early Years of the National Labor Relations Act*, 18 HASTINGS L.J. 571, 576-77 (1967).

[2] National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1976)). The popular name for the Act was derived from its principal sponsor in the Senate. A. MYERS & D. TWOMEY, LABOR LAW AND LEGISLATION 98 (5th ed. 1975).

right to organize and to be represented by labor organizations,[3] to have those unions bargain for them collectively,[4] and to engage in other concerted activity.[5] It protected employees from actions by employers, known as unfair labor practices, which were aimed at obstructing or intimidating employees from forming, joining, or acting on behalf of labor organizations.[6] As further protection, the Act[7] required employers to bargain with the labor organizations which represented a majority of its employees in an appropriate collective bargaining unit.[8]

The Act was amended in 1947 by the Labor-Management Relations Act, which is also known as the Taft-Hartley Act.[9] One of the

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[3] 29 U.S.C. § 157. Before the NLRA was enacted, employees did not have such a right. *See* Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908). In fact, as both *Adair* and *Coppage* point out, an employer could, as a condition of employment, mandate that an employee sign an agreement, popularly known as a yellow-dog contract, that he would not join a labor organization. 236 U.S. at 14; 208 U.S. at 175. The NLRA sought to remedy that situation and to promote a more equal labor bargaining position. W. OBERER, *supra* note 1, at 110.

[4] 29 U.S.C. § 157. *See generally* Comment, *National Labor Relations Act Section 7: Protecting Employee Activity Through Implied Concert of Action*, 76 NW. U.L. REV. 813 (1981).

[5] 29 U.S.C. § 157. These rights accrued to any person who was classified as an "employee" within the meaning of the NLRA. Employee was defined as:

> includ[ing] any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 449, 450 (1935) (current version at 29 U.S.C. § 152(3) (1976)). See *infra* note 39 and accompanying text.

[6] National Labor Relations Act, ch. 372, § 8(1)-(4), 49 Stat. 445, 452-53 (1935)(current version at 29 U.S.C. § 158(a)(1976)).

[7] As used hereinafter, "Act" refers to the NLRA.

[8] National Labor Relations Act, ch. 372, § 8 (5), 49 Stat. 449, 453 (1935)(current version at 29 U.S.C. § 158(a)(5) (1976)).

Exactly what constitutes an appropriate bargaining unit has been the subject of a great deal of controversy. For a comprehensive discussion of the problem, see J. ABODEELY, R. HAMMER & A. SANDLER, THE NLRB AND THE APPROPRIATE BARGAINING UNIT (1981). The Act itself provides that the determination of the appropriateness of such a unit rests with the National Labor Relations Board. National Labor Relations Act, ch. 372, § 9(b), 49 Stat. 449, 454 (1935)(current version at 29 U.S.C. § 159(b) (1976)); *see* AFL v. NLRB, 308 U.S. 401, 405-06 (1940).

[9] Labor-Management Relations Act, 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 151-169 (1976)). One of the reasons which prompted the Amendments was public fear that the original NLRA had given the unions too much power. A. MYERS & D. TWOMEY, *supra* note 2, at 99. It was thought that as a result there would be inflationary repercussions, especially in light of the fact that this country was recovering from World War II. *Id.*

significant changes made by the Taft-Hartley Amendments was the addition of prohibitions against certain coercive unfair practices engaged in by labor organizations.[10] The NLRA was amended again in 1959 by the Labor Management Reporting and Disclosure Act of 1959, also known as the Landrum-Griffin Act.[11] A major change resulting from this Amendment was to protect union members from the possible corruption of union leaders and from other actions which disregarded their rights as union members.[12]

These three major statutes constitute the current NLRA. The purpose of the NLRA is to promote the process of collective bargaining,[13] by providing a vehicle to assist management and labor in reaching amicable resolutions of their problems.[14] Before the bargaining process can commence, however, it is necessary to determine the representative groups on each side of the dispute. The respective management and labor teams need to be clearly delineated. Yet, history has shown that such determinations are not always simple or straightforward, especially in the area of exactly who constitutes an employee. For example, the Wagner Act definition of "employee" did

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[10] Labor-Management Relations Act, 1947, ch. 120, § 8(b), 61 Stat. 136, 141-42 (current version at 29 U.S.C. § 158(b) (1976)). *See generally* Luxembourg & Roberts, *Unfair Labor Practices Under The Taft-Hartley Act—A Comparative Study*, 14 BROOKLYN L. REV. 1 (1948); Schwab, *Union Security Agreements and Title VII: The Scope And Effect Of The New Section 19 Of The National Labor Relations Act*, 17 GONZ. L. REV. 329, 332-33 (1982).

[11] Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401-531 (1976)). This Act contains the infamous "bill of rights" for union members, and seeks to regulate internal union affairs. For discussions of the impact of this Act, see Aaron, *The Labor Management Reporting And Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960); Heyden, *Landrum-Griffin Section 101(a)(4) — Its Impact on Employee Rights*, 7 EMPLOYEE REL. L.J. 643 (1981); McKee, *Section 501(c) of the LMRDA: In Search Of The Elements Of The Offense*, 18 CAL. W.L. REV. 218 (1982); Smith, *The Labor-Management Reporting And Disclosure Act Of 1959*, 46 VA. L. REV. 195 (1960).

[12] Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 101(a)(1), 73 Stat. 519, 522 (current version at 29 U.S.C. § 411 (1976)).

[13] As expressed in its preamble:

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

29 U.S.C. § 151.

[14] Management and labor have not always enjoyed a harmonious existence. Before Congress began to legislate in this area, employers generally had the upper hand in their relationship with employees. A. MYERS & D. TWOMEY, *supra* note 2, at 1-2. The laws enacted by Congress were intended to equalize the respective bargaining positions of management and labor but this is not to say that the legislation always improved the employer-employee relations.

not mention supervisors.[15] In light of this void, the Supreme Court, in *Packard Motor Car Co. v. NLRB*,[16] determined that foremen could join and assist labor organizations.[17] Justice Douglas, in his dissent, eloquently described how this could not logically be the policy of the Act or the intention of Congress.[18] Justice Douglas began by expressing the philosophy behind labor law and the actors who participate in negotiations.[19] He noted that if foremen are in fact "employees," as defined in section 2(3) of the Act,[20] then virtually everyone who works for a company would be considered an employee within the meaning of the Act.[21] If everyone who collected a paycheck from the company were an "employee," then there would be little left of what most thought constituted management.[22] Justice Douglas questioned whether Congress intended "such a basic change in industrial philosophy"[23] when it enacted the NLRA.[24]

The next year, Congress in enacting the Taft-Hartley Act, followed Justice Douglas' lead and amended the definition of "em-

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[15] *See supra* note 5. In this regard, it is important to remember that it is the National Labor Relations Board that determines which employees should be in a certain bargaining unit and therefore, in the absence of statutory guidance, the Board was left to decide whether to include supervisors. *See supra* note 8; *see also* NLRB v. Hearst Publications, Inc., 322 U.S. 111, 134 (1944); Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 165-66 (1940).

[16] 330 U.S. 485 (1947). The foremen involved in the *Packard* case were responsible for ensuring the quality and quantity of the product manufactured in the plant. *Id.* at 487. The foremen wanted to join a union, and the company argued that the NLRA did not compel "it to recognize the union." *Id.* at 487, 490. The Court concluded that Congress did not intend to preclude foremen from unionizing. *Id.* at 490-91. For a short commentary on *Packard*, see Recent Decisions, *National Labor Relations Act—Supervisory Employees Entitled to Representation by Independent Union as Collective Bargaining Unit*, 33 VA. L. REV. 214 (1947).

[17] 330 U.S. at 490-91.

[18] *Id.* at 493-501 (Douglas, J., dissenting). Justice Douglas was joined in his dissent by the Chief Justice and Justice Burton. *Id.* at 493 (Douglas, J., dissenting). Additionally, Justice Frankfurter joined part of the dissent, and expressed no opinion on the other part. *Id.* at 501 (Douglas, J., dissenting).

[19] *Id.* at 493-95 (Douglas, J., dissenting).

[20] See *supra* note 5 and accompanying text.

[21] 330 U.S. at 494 (Douglas, J., dissenting). Justice Douglas maintained that the real dividing line in labor matters is not management versus employees; rather, the line is between "the operating group on the one hand and the stockholder and bondholder group on the other." *Id.* Further, he held that if foremen truly were employees, then the only company workers who were not employees would be the directors of the company. *Id.* Indeed, then "vice-presidents, managers, assistant managers, superintendents, assistant superintendents . . .[even] the president," would be an employee. *Id.*

[22] *Id.*

[23] *Id.* at 495 (Douglas, J., dissenting).

[24] *Id.* Justice Douglas also expressed concern that foremen were also considered employers under the Act. *Id.* at 497 (Douglas, J., dissenting). This confusion, in his opinion, resulted because Congress, at the time of the enactment of the NLRA, had not considered the position which foremen occupy in the workforce. *Id.* at 499-500 (Douglas, J., dissenting).

ployee" so as to exclude supervisors.[25] Aside from individuals explicitly excluded by the Act from the definition of employee, and therefore from appropriate bargaining units, certain other groups of employees traditionally have been excluded by the National Labor Relations Board.[26] Specifically, managerial employees[27] and confidential employees[28] have been excluded by the Board.

The exclusion of managerial employees was upheld by the Supreme Court in *NLRB v. Bell Aerospace Co.*[29] In *Bell Aerospace*, the

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[25] Labor-Management Relations Act, 1947, ch. 120, § 2(3), 61 Stat. 136, 137-38 (current version at 29 U.S.C. § 152(3)(1976)). Supervisors had, prior to the Taft-Hartley Act, at times been excluded from a bargaining unit. 4 NLRB ANN. REP. 93-94 & nn. 84 & 85 (1939). In Douglas Aircraft Co., 50 N.L.R.B. 784 (1943), the Board held that supervisors were generally excluded from a bargaining unit if the supervisors could promote, hire, fire, or discharge others. *Id.* at 787; *see* Comment, *Will The Real Managerial Employees Please Stand Up?*, 9 LOY. L.A.L. REV. 92, 94-95 (1975); Recent Developments, *The National Labor Relations Board Redefines and Restricts the Scope of Managerial Employee Classification*, 26 VAND. L. REV. 850, 851-52 (1973).

Indeed, Congress defined supervisors separately in § 2(11) of the Taft-Hartley Act. Labor-Management Relations Act, 1947, ch. 120, § 2(11), 61 Stat. 136, 138 (current version at 29 U.S.C. § 152(11)(1976)). At the time that Congress was deciding the precise word to use in its definition, there was a fundamental difference between the Senate's version and that of the House of Representatives. *Compare* S. 1126, 80th Cong., 1st Sess. § 2(12)(1947), *reprinted in* 1 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, 41 (1948) (no reference to confidential employees) [secondary source hereinafter cited as 1 LEGISLATIVE HISTORY] *with* H.R. 3020, 80th Cong., 1st Sess. § 2(12)(1947), *reprinted in* 1 LEGISLATIVE HISTORY, *supra*, at 39-40 (confidential employees specifically mentioned). The Senate's version was ultimately enacted. For a more detailed discussion of the differences between the two bills, see *infra* notes 128-32 and accompanying text.

[26] *See infra* notes 27 & 28 and accompanying text. For a comprehensive discussion of the employees traditionally excluded by the Supreme Court, see NLRB v. Bell Aerospace Co., 416 U.S. 267, 275-79 (1974).

[27] Managerial employees were, even prior to the passage of the Taft-Hartley Act, excluded from the bargaining units of rank and file members. *See, e.g.*, Ford Motor Co., 66 N.L.R.B. 1317, 1320 (1946) (Board "customarily excluded from bargaining units of rank and file workers executive employees who are in a position to formulate, determine, and effectuate management policies"); *accord* J. P. Friez & Sons, 47 N.L.R.B. 43 (1943). After passage of the Taft-Hartley Act, the Board declared that all workers, "allied" with management would not be considered "employees" within the meaning of the Act. Swift & Co., 115 N.L.R.B. 753, 753-54 (1956). That interpretation continued until Bell Aerospace Co., 190 N.L.R.B. 431 (1971). *See infra* note 29 and accompanying text.

[28] The Board excluded confidential employees because of its belief that management ought not to be placed in the untenable position of bargaining with employees who have advance knowledge of labor matters. Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946); Bethlehem Steel Co., 61 N.L.R.B. 854, 856 (1945); Hoover Co., 55 N.L.R.B. 1321, 1323 (1944); Western Union Tel. Co., 38 N.L.R.B. 492, 499-500 (1942); Creamery Package Mfg. Co., 34 N.L.R.B. 108, 110 (1941). The House of Representatives' proposed bill defined a confidential employee as a worker "who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for the use in the interest of the employer." H.R. 3020, 80th Cong., 1st Sess. § 2(12) (1947), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 25, at 41. See *infra* note 128 and accompanying text.

[29] 416 U.S. 267 (1974). In *Bell Aerospace*, a union petitioned the Board for a representation election. *Id.* at 269. The bargaining unit was to be comprised of the company's buyers. *Id.* Bell

Court concluded that the legislative history of the Taft-Hartley Amendments, in which Congress assumed that managerial employees were excluded from the Act,[30] and the Board's previous exclusion of managerial employees from bargaining units,[31] mandated the decision that employees were not entitled to the Act's protection once it was determined that they were "managerial."[32] More recently, the Supreme Court dealt with the parameters of the confidential employee exemption in *NLRB v. Hendricks County Rural Electric Membership Corp.*[33]

Whether the Board or courts are dealing with individuals classified as "confidential" or "managerial," the basic policy determination underlying the decision to exclude the employee from the Act's protection and coverage is an attempt to delineate those individuals who should appropriately be on management's team and those who should appropriately be on labor's team.[34] Therefore, individuals whose interests are closely allied with management should not be included within collective bargaining units which could be represented by a labor organization.[35] Management should not be forced to develop

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Aerospace Company opposed the petition, arguing that the buyers were managerial employees and were therefore excluded from the Act. *Id.* The Board determined that the buyers constituted an appropriate unit, in spite of the fact that the Board thought that the buyers were managerial employees. *Id.* at 270-71. The Board certified the union after the union won an election among the buyers. *Id.* at 271.

The same day, however, the Eighth Circuit court decided NLRB v. North Ark. Elec. Coop., 446 F.2d 602 (8th Cir. 1971). The Eighth Circuit held that managerial employees were not "employees" within the meaning of the Act. *Id.* at 604. Thus, Bell Aerospace moved for reconsideration of the Board's decision that the employees constituted an appropriate bargaining unit but the Board denied the motion. 416 U.S. at 272. The Eighth Circuit, however, denied enforcement of the Board's order, and the Supreme Court granted the Board's petition for certiorari. *Id.* at 273-74.

[30] 416 U.S. at 279-84. The Court noted that "[t]he legislative history strongly suggests that there also were other employees, much higher in the managerial structure [than the buyers], who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary." *Id.* at 283.

[31] *Id.* at 275-79; *see supra* note 27 and accompanying text.

[32] 416 U.S. at 290. The Court, however, remanded the case to the Board for a determination of whether the buyers were, in fact, managerial employees. *Id.* at 289-90. It seems that the Board had assumed, without explicitly stating, that the buyers were managerial employees. *Id.* at 270-71. The Court directed the Board to make a factual determination about the status of the buyers, and to discover whether the workers in question were "sufficiently high in the managerial hierarchy to constitute true 'managerial employees.' " *Id.* at 273. On remand, the Board determined that the buyers involved were not managerial employees. Bell Aerospace, Co., 219 N.L.R.B. 384, 387 (1975).

[33] 454 U.S. 170 (1981). See *infra* notes 140-44 and accompanying text.

[34] *See, e.g.*, Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir.), *cert. denied*, 400 U.S. 831 (1970); Retail Clerks Int'l Ass'n v. NLRB, 366 F.2d 642 (D.C. Cir. 1966). *But see supra* note 27 and accompanying text.

[35] *See supra* note 28 and accompanying text.

and implement policies through employees potentially loyal to a union[36] nor should unions be forced to represent employees aligned with management.[37] Establishing the appropriate "teams" raises questions of loyalties and alliances which are not easy to resolve. *Hendricks* was concerned with how the definition of confidential employees should incorporate the concept of alliance, i.e., how narrowly or broadly the exception should be drawn.[38]

The precise question addressed in *Hendricks* was whether an employee, who in the course of employment may have access to information considered confidential by his or her employer is implicitly excluded from the definition of "employee" contained in section 2(3) of the Act,[39] and thus denied all protections under the Act.[40] The

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[36] *See, e.g.*, Denver Dry Goods Co., 74 N.L.R.B. 1167, 1175 (1947); J. P. Friez & Sons, 47 N.L.R.B. 43, 47 (1943); *see also* Note, *"Managerial Employee": A Label In Search Of A Meaningful Definition*, 48 U. CIN. L. REV. 435, 436 (1979), wherein the commentator notes that if managerial employees are protected by the Act:

> The interests of rank-and-file employees also may be adversely affected if employees who share the interests of management are included in units of employees having traditional interests in protecting or improving their terms and conditions of employment. Moreover, many managerial employees already have substantial bargaining power with employers, because of their special expertise and value to the business.

Id. at 436.

[37] *See* Montgomery Ward & Co., 36 N.L.R.B. 69, 73 (1941); *see also supra* note 36 and accompanying text.

[38] 454 U.S. at 171-72; *see infra* notes 41 & 42 and accompanying text.

[39] The current version of the definition of an employee does not expressly exclude confidential employees. *See* 29 U.S.C. § 152(3). In full, it reads:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, *or any individual having the status of an independent contractor, or any individual employed as a supervisor or any individual employed by an employer subject to the Railway Labor Act, . . . as amended from time to time, or by any other person who is not an employer as herein defined.*

Id. (emphasis added).

[40] *See, e.g.*, B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956) ("persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations" not entitled to be in bargaining unit); Hoover Co., 55 N.L.R.B. 1321, 1323 (1944) (employees "who in the normal performance of their duties may obtain advance information of the Company's position with respect to contract negotiations, the disposition of grievances, or other labor relations matters" should not be in unit).

question obviously centers around how broadly the confidential employee exclusion should be drawn.

Most employing entities would argue that all employees who use or even have access to any confidential information of their employer, including financial data, patents or trade secrets, and any other data that the employer would not wish his competitors to know, should be considered confidential and excluded from the Act's protection.[41] On the other hand, one might assert that the confidential employee exclusion should only exclude those employees who have access to information not normally available to a labor organization and which a union could use against management in a collective bargaining situation.[42] Under this latter interpretation, employees with access to confidential business information might not be considered to be confidential employees excluded from the Act's coverage, but could nonetheless be discharged for a knowing breach of confidentiality.[43] In *Hendricks*, the Board argued that the correct definition of confidential employee was the latter, narrow exclusion of employees with a labor nexus to which the Board claimed it had consistently adhered since 1937.[44] The employers, on the other hand, urged that those employees with access to information confidential to the employee's company should be excluded from the protection of the Act and the collective bargaining process.[45]

The *Hendricks* decision was the result of the consolidation of two Seventh Circuit decisions. One involved a personal secretary to the

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[41] *E.g.*, Union Oil Co. of Cal. v. NLRB, 607 F.2d 852 (9th Cir. 1979) (included computer operators); Westinghouse Elec. Corp. v. NLRB, 398 F.2d 669 (6th Cir. 1968) (included secretaries); NLRB v. Quaker City Life Ins. Co., 319 F.2d 690 (4th Cir. 1963) (included insurance agents); Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C., 253 N.L.R.B. 450 (1980) (included clerical and support staff of law firm); Dun & Bradstreet, Inc., 240 N.L.R.B. 162 (1979) (included credit reporters); Pullman Standard Div. of Pullman, Inc., 214 N.L.R.B. 762 (1974) (excluded computer operators).

[42] This formulation is a restatement of the classic "labor-nexus" test. The Board has consistently adhered to this test. Perhaps the most oft-cited definition of the labor-nexus test is embodied in the Board's decision in Hoover Co., 55 N.L.R.B. 1321 (1944). There it was noted: "[M]anagement should not be required to handle labor relations matters through employees who are represented by the union with which the Company is required to deal with regard to contract negotiations, the disposition of grievances, and other labor relations matters." *Id.* at 1323; *see also* B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956); Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946).

[43] *See, e.g.*, International Business Machs. Corp., 265 N.L.R.B. 107 (1982) (knowing dissemination of confidential wage information grounds for discharge and not violative of Act).

[44] 454 U.S. at 173; *see supra* note 43 and accompanying text; *see also* Lederer, *Management's Right to Loyalty of Supervisors*, 32 LAB. L.J. 83, 88-93 (1981); Comment, *supra* note 25, at 95; Note, *supra* note 36, at 436-39; Recent Developments, *supra* note 25, at 853.

[45] 454 U.S. at 186.

general manager of a company;[46] the other involved another company's clerical, technical, and professional employees.[47]

The first case was *Hendricks County Rural Electric Membership Corp. v. NLRB*,[48] in which Mary Weatherman, the secretary to the company's chief executive,[49] was discharged from her job in May, 1971, several days after she had signed a petition. That petition sought the reinstatement of a co-worker and close friend, who had lost an arm while at work for Hendricks.[50] Hendricks had denied the injured employee reemployment and continued to do so after the petition.[51]

Weatherman filed an unfair labor practice charge with the NLRB alleging that her discharge violated section 8(a)(1) of the Act.[52]

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[46] Hendricks County Rural Elec. Membership Corp. v. NLRB, 627 F.2d 766 (7th Cir. 1980), *rev'd and remanded*, 454 U.S. 170 (1981).

[47] Malleable Iron Range Co. v. NLRB, 631 F.2d 734 (7th Cir. 1980), *rev'd and remanded sub nom.* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981).

[48] 627 F.2d 766 (7th Cir. 1980), *rev'd and remanded*, 454 U.S. 170 (1981).

[49] *Id.* at 767. Mary Weatherman had been employed by the company for a total of nine years, and she had been the secretary to the general manager for the last four years. 454 U.S. at 172. In her job capacity, Weatherman's responsibilities included the processing of insurance and accident claims. 627 F.2d at 771 (Cudahy, J., dissenting). She was also responsible for performing general clerical duties and answering the phone. 454 U.S. at 174 n.5 (citing Hendricks County Rural Elec. Membership Corp. 247 N.L.R.B. 498, 498-99, *enforcement denied*, 627 F.2d 766 (7th Cir. 1980), *rev'd and remanded*, 454 U.S. 170 (1981)).

[50] Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1617-18 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979). The petition had been circulated among the employees, and was ultimately sent to the Board of Directors at Hendricks. *Id.* at 1617. In essence, the people whose signatures appeared on the petition were requesting the directors to allow the injured party to return to work because of the latter's desire to do so, and because the employee had been a "model" employee when he did work for the company. *Id.*

[51] *Id.* The company's reasons for refusing to rehire the injured employee were not made part of the record.

[52] *Id.; see* 29 U.S.C. § 158(a)(1). Section 8 of the Act refers to employer and union unfair labor practices. *Id.* § 158. Section 8(a) specifically refers to those situations in which an action taken by an employer would constitute an unfair labor practice. It protects employees' rights by making it an unfair labor practice for the employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." *Id.* § 158(a)(1). An employee's exercise of § 7 rights—the right to join and participate in labor unions—is generally referred to as protected concerted activity. *See* Johnson, *Protected Concerted Activity In The Non-Union Context: Limitations On The Employer's Rights To Discipline Or Discharge Employees*, 49 Miss. L.J. 839 (1978).

Indeed when Weatherman filed a charge with the Board, she was alleging that she was fired in retaliation for signing the petition, *see* Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1616 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979), which signing has been recognized as protected concerted activity. *See, e.g.*, NLRB v. Pepsi-Cola Bottling Co., 449 F.2d 824, 830 n.5 (5th Cir. 1971); Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574 (1976). Such employee allegations of retaliatory discharge are not at all uncommon. *See, e.g.*, NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971); NLRB v. Interboro Contractors, Inc., 338 F.2d 495 (2d Cir. 1967). If the Board determines that a discharge did constitute an unfair labor practice within the meaning of § 8(a)(1), it may order

Hendricks' defense was that Weatherman was a confidential secretary and therefore, impliedly excluded from the NLRA's definition of employee contained in section 2(3).[53]

This contention was rejected by the Administrative Law Judge (ALJ).[54] The ALJ determined that Weatherman was not a confidential secretary under the test used by the Board in *B.F. Goodrich Co.*[55] The *B.F. Goodrich* test excludes "from bargaining units as confidential employees persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations."[56]

Although the individual for whom Weatherman worked, the general manager, attended the management-union contract negotiation meetings, he disclaimed responsibility for formulating or determining management policy.[57] The ALJ felt that his "passive role in labor and employee relations matters. . .obviously reflect[ed] on the assertedly 'confidential' character of Weatherman's employment."[58] The ALJ also felt that it was significant, in determining Weatherman's status as a confidential employee, that she did not deal with any materials concerning labor relations.[59] Weatherman neither opened

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the employee made whole by reinstatement with back pay. 29 U.S.C. § 160(c); *see infra* note 66 and accompanying text. For an overview of unfair labor practice charges and their effect, see Luxemberg & Roberts, *supra* note 10; Comment, *Collective Bargaining and the Taft-Hartley Labor Act*, 33 VA. L. REV. 549 (1947).

[53] Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1618-19 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979). For the text of § 2(3), see *supra* note 39.

[54] Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1620 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979).

[55] 115 N.L.R.B. 722 (1956). *B.F. Goodrich* involved whether certain employees, accountants, buyer-expediters, and secretaries, could properly be included in a bargaining unit. *Id.* at 723. The company argued that those employees were confidential employees and should be excluded from the unit. *Id.* at 724. The Board refused to broaden the Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946), definition of confidential employees. 115 N.L.R.B. at 724; *see infra* text accompanying note 56.

[56] 115 N.L.R.B. at 724.

[57] Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1619 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979). Had the company been able to prove that Weatherman's boss was involved with labor negotiations, it would have been easier for them to then show that Weatherman was privy to such information, thus arguably bringing her within the Board's labor-nexus test. See *supra* note 42 and accompanying text.

There had been testimony that the general manager " 'formulat[ed] management policies with regard to labor relations,' " 236 N.L.R.B. at 1619, but he was not actively involved in these pursuits. *Id.* Further, the labor information that he did have was placed in a personal file behind his desk. *Id.* at 1619-20. There was no evidence that Weatherman ever knew such a file existed. *Id.*

[58] Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1619 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979).

[59] *Id.* at 1620.

nor even saw letters to or from union representatives.[60] She did not place phone calls, attend board or internal management meetings, or act with respect to labor, personnel, or payroll matters.[61] For these reasons, the ALJ found that Weatherman did not fall into the exception drawn by the Board for confidential employees and was, therefore, an employee protected under the Act.[62]

The ALJ further found that Weatherman's termination was due to her concerted activity for the purpose of mutual aid or protection.[63] Weatherman and her conferees, in urging Hendricks to reinstate the injured employee, "might have paved the way for their own return to work in similar circumstances."[64] Thus, by terminating Weatherman, Hendricks had interfered with her right to engage in protected activity, in violation of section 8(a)(1) of the Act.[65] The ALJ, therefore, ordered that Weatherman be reinstated with back pay.[66]

On appeal, the Board affirmed the decision by the ALJ.[67] Hendricks then appealed to the Court of Appeals for the Seventh Circuit.[68]

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[60] *Id.* at 1619.

[61] *Id.* The only labor-related letters that Weatherman typed were notices to Hendricks' attorneys of the dates of negotiation meetings. *Id.* Further, there was testimony that any mail addressed to the general manager that did contain labor information was delivered directly to him. *Id.*

[62] *Id.* at 1619-21. The ALJ discussed two circuit court opinions that had held that confidential employees were not protected by the Act. *Id.* at 1619. In NLRB v. Wheeling Elec. Co., 444 F.2d 783 (4th Cir. 1971), and Peerless of Am., Inc., v. NLRB, 484 F.2d 1108, 1112 (7th Cir. 1973), the Fourth and Seventh Circuit courts held that such employees were not entitled to § 8(a)(1) safeguards, and denied enforcement of the Board's orders. Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1619 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979).

[63] Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1618 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979). The company alleged that Weatherman's employment had been terminated because she had lied to her boss regarding the injured employee's doctor's form. *Id.* at 1617-18. Apparently he had requested the original of the form, and Weatherman told him that she had already mailed it to the insurance company. *Id.* In fact, however, the form had not been sent, and Weatherman thereafter discovered the missing document in the file. *Id.* She was fired four days later. *Id.* When Weatherman was told about her job termination, he told her that she was fired for "fibbing." *Id.* The ALJ, however, did not believe that the company had fired her because of that incident, but rather for having signed the petition which the general manager found out about two days later. *Id.*

[64] *Id.* at 1620.

[65] *Id.* at 1621; *see supra* note 53 and accompanying text.

[66] Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1619 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979); *see* 29 U.S.C. § 160(c); *supra* note 52.

[67] Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1616 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979). Procedurally, the typical labor case commences when a complaint is filed by either management or labor. *See* 29 U.S.C. § 160(b). A hearing is then held before an ALJ. *Id.* The hearing is an adversarial one, and the ALJ ultimately rules on the complaint. *Id.* There is an absolute right of appeal to the National Labor Relations Board. *Id.* § 160(c). Following the Board's decision, an absolute right to appeal to any circuit court of

The court agreed that the signing of a petition of this sort by an employee constituted protected concerted activity,[69] but it did not agree that Weatherman was an "employee."[70] Although the ALJ had correctly applied the *B.F. Goodrich* standard,[71] the court found the use of that standard to be an error of law.[72] It therefore remanded the case to the Board for a determination of whether Weatherman handled confidential information for Hendricks.[73]

The Board accepted remand of the case in spite of the fact that it did not agree with the Seventh Circuit court's analysis of the law.[74] Applying the standard suggested by the Seventh Circuit,[75] the Board found, based on the prior record, that Weatherman did not deal with any type of confidential information.[76] Even the minutes of the meetings of Hendricks' Board of Directors which she transcribed were not considered confidential by the Board.[77] In support of this position, the Board noted that Hendricks' status as a cooperative required that "all members presumably have access to documents such as the minutes of board meetings."[78]

Hendricks appealed and the Board cross-petitioned for enforcement.[79] In denying enforcement because the Board had not reopened

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appeals exists. *Id.* § 160(e), (f). After a decision at the appellate level, a party may then petition the United State Supreme Court for certiorari. 28 U.S.C. § 1257(1) (1976). The above is, of course, a simplified account of the procedure followed. Section 10 of the Act details alternate methods. *See* 29 U.S.C. § 160.

[68] 603 F.2d 25 (7th Cir. 1979).

[69] *Id.* at 28.

[70] *Id.* The inquiry was whether Weatherman fit the § 2(3) definition of employee. *Id.* See *supra* note 39 and accompanying text.

[71] *See supra* note 40.

[72] 603 F.2d at 28. Instead, the Seventh Circuit court mandated that the Board use the *Bell Aerospace* analysis. *Id.* See *infra* note 131 and accompanying text. The court concluded that the Supreme Court's interpretation of the legislative history of the Taft-Hartley Act required the conclusion that all confidential secretaries were excluded by the Act irrespective of their labor nexus. 603 F.2d at 29; *see infra* notes 81, 82 & 99 and accompanying text.

[73] 603 F.2d at 30.

[74] Hendricks County Rural Elec. Membership Corp., 247 N.L.R.B. 498, *enforcement denied*, 627 F.2d 766 (7th Cir. 1980), *rev'd and remanded*, 454 U.S. 170 (1981). The Board did not take further testimony or evidence; it reviewed the decision with the facts already on record. *Id.* at 499.

[75] *See supra* note 72 and accompanying text.

[76] Hendricks County Rural Elec. Membership Corp., 247 N.L.R.B. 498, 499, *enforcement denied*, 627 F.2d 766 (7th Cir. 1980), *rev'd and remanded*, 454 U.S. 170 (1981).

[77] *Id.* See *infra* text accompanying note 78.

[78] Hendricks County Rural Elec. Membership Corp., 247 N.L.R.B. 498, 499 n.8, *enforcement denied*, 627 F.2d 766 (7th Cir. 1980), *rev'd and remanded*, 454 U.S. 170 (1981). The Board adopted the position of the ALJ. Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1619 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979).

[79] 627 F.2d at 768.

the record in order to obtain further evidence, the Seventh Circuit court held:

> If we had believed that the prior record was sufficient to support a finding under the *Bell Aerospace* standard, we would not have remanded the proceeding to the Board. . . . When an erroneous standard for the admission of evidence is used, it follows almost mandatorily that a new record is needed, not only to add evidence in patchwork fashion but also possibly to rehear all the relevant evidence under the different admission standard.[80]

The Seventh Circuit confirmed that it would adhere to its analysis of *Bell Aerospace* which mandated that confidential employees be "excluded from coverage [under the Act] under a 'broad definition' not limited to those having a labor nexus."[81]

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[80] *Id.* at 770. The company apparently felt that based upon the first Seventh Circuit court opinion, there was sufficient evidence based upon the record below to warrant a finding that Weatherman was not an employee within the meaning of the Act. *Id.* at 768. It did, however, state that if the Board did not share this view, the company was entitled to the opportunity to present further evidence on the matter. *Id.*

[81] 627 F.2d at 768 (citing *Bell Aerospace*, 416 U.S. at 284 n.12). The Seventh Circuit discussed at great length its standard of review, noting that it was "not at liberty to go behind an opinion [of the Supreme Court] or its clear implications on the ground that the Supreme Court 'was not fully apprised by counsel in that case as to the legislative history.' " *Id.* at 760 (quoting United States v. Russell, 461 F.2d 605, 608 (10th Cir. 1972)). In this respect, the Seventh Circuit correctly held that it was not free to disregard a Supreme Court decision. *Id.* at 768. The court of appeals did not adhere to the Board's view that *Bell Aerospace's* discussion of confidential employees was dictum, *id.*, nor did it think that NLRB v. Yeshiva Univ., 444 U.S. 672 (1980), was controlling. 627 F.2d at 769.

The *Yeshiva* decision involved faculty members of the university who had filed a representation petition with the Board. 444 U.S. at 674-75. The university opposed the petition, arguing that the faculty personnel were not covered by the Act because they were either supervisors or managers. *Id.* at 675. The Supreme Court held that the faculty members at Yeshiva University were managerial employees and thus were excluded from coverage under the Act. *Id.* at 691.

It seems, therefore, that the Seventh Circuit court was correct in ruling that *Yeshiva* was not controlling on *Hendricks*. 627 F.2d at 769. *Yeshiva* dealt with professionals in an academic environment. 444 U.S. at 679-80. The issue in *Yeshiva* was whether those professionals were managerial employees. *Id.* at 675. *Hendricks*, however, dealt with whether employees were confidential employees. 627 F.2d at 767.

Judge Cudahy dissented from the majority opinion in *Hendricks*. 627 F.2d at 770 (Cudahy, J., dissenting). Although he expressed no opinion as to *Yeshiva's* applicability, he felt that *Bell Aerospace's* discussion regarding confidential employees was, at best, dictum. *Id.* at 771-72 (Cudahy, J., dissenting). It was his belief that the circuit court was creating an entirely new body of law based on this dictum. *Id.* Judge Cudahy also did not feel that the Board's failure to receive additional evidence in the case warranted a denial of enforcement of the Board's order. *Id.* at 770 (Cudahy, J., dissenting). He stated:

> While it might have been more politic for the Board to have reopened the hearing, the Company argues only one specific fact which it would have tried to establish during such a reopening: the Company's "involve[ment]" in "three (3) litigation cases" (presumably with a competitive investor-owned utility). There is

The second Seventh Circuit decision, *Malleable Iron Range Co. v. NLRB*,[82] also arose out of a decision of the Court of Appeals for the Seventh Circuit and dealt with the proper construction of the confidential employee exclusion.[83] In December, 1978, the Office and Professional Employees International Union sought to be certified as the collective bargaining agent of certain clerical, technical, and professional employees employed at a facility of Malleable Iron Range Company.[84] Malleable contended that eighteen of the employees had access to confidential information concerning business matters, not necessarily labor relations material,[85] and on that basis, as well as others,[86] opposed their inclusion in the requested bargaining unit.[87] The Board decided that none of the eighteen employees were confidential employees because they did not pass the "labor-nexus" test.[88]

Malleable did not claim that these employees met that "labor-nexus" test, but rather argued that they had worked with or had access to information which the company did not want released to the public or to its competitors.[89] For example, they pointed out that certain of the employees in question were technical service engineers, who tested company appliances against industry code specification and made changes necessary to ensure compliance.[90] These employees had knowledge of product specifications, manufacturing costs, and test results.[91] Further, other employees had access to price quotations from suppliers or cost and profit margin information.[92]

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slight likelihood that this "new fact" would materially change the basis for evaluating Weatherman's status as a "confidential secretary." The fact is that Weatherman's status was well explored and ventilated at the original hearing, and both we and the Board should be able to reach the requisite conclusions based on that record.

Id.

[82] 631 F.2d 734 (7th Cir. 1980).

[83] 454 U.S. at 175-76.

[84] 244 N.L.R.B. 485, 486 (1979), *enforcement denied*, 631 F.2d 734 (7th Cir. 1980), *rev'd and remanded sub nom.* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981).

[85] *Id.* at 487.

[86] *See* Brief for National Labor Relations Board at 40 n.7, NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981) [hereinafter cited as Brief for NLRB].

[87] 454 U.S. at 175.

[88] *Id.* See *supra* note 42.

[89] 454 U.S. at 175. For other cases in which companies have made a similar argument, see *supra* note 42.

[90] Brief for NLRB, *supra* note 86, at 10.

[91] *Id.*

[92] *Id.* at 12-13.

The union prevailed in the representation election and was certified as the bargaining agent for the unit.[93] In order to test the underlying findings of the Board in the representation matter, Malleable refused to bargain with the union after the election.[94] As a result, the union filed unfair labor practice charges with the Board.[95] The Board found that Malleable's refusal to bargain was a violation of sections 8(a)(1) and (5) of the Act[96] and issued a bargaining order.[97]

Malleable petitioned the Court of Appeals for the Seventh Circuit for review of that order and the Board cross-petitioned for enforcement.[98] The Seventh Circuit, in an unreported decision, denied enforcement, noting that the Board should not have applied the labor-nexus test rejected by the Seventh Circuit in *Hendricks*.[99] It, therefore, remanded the case to the Board for reconsideration consistent with its decision in *Hendricks*.[100]

The Supreme Court granted the Board's petition for certiorari in both *Hendricks* and *Malleable*,[101] to consider whether the Board's labor-nexus test was appropriate, or whether all those employees who have access to confidential information of their employers are excluded from the Act.[102] Justice Brennan, writing for the majority,[103]

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[93] 454 U.S. at 177. The purpose of a representation election is to determine whether an unrecognized union has sufficient report to be certified as the representative of the involved employees. W. OBERER, *supra* note 1, at 238.

[94] 454 U.S. at 175.

[95] *Id.* See *supra* note 52 and accompanying text.

[96] 454 U.S. at 175; *see* 29 U.S.C. § 158(a) (1), (5). Sections 8(a) (1) and (5) provide:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .
>
> (5) to refuse to bargain collectively with the representative of his employees.

Id.

As a general proposition, § 8(a)(1) is an all encompassing section; it can be violated independently or in connection with § 7. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 307-08 (1965). Further, a violation of § 8(a) (2)-(5), will necessarily be a violation of § 8(a)(1). Radio Officers Union v. NLRB, 347 U.S. 17, 42-44 (1954). *But see* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965) (closing of plant constituted § 8(a)(3) violation but did not violate § 8(a)(1)).

[97] 454 U.S. at 175.

[98] *Id.*

[99] *Id.* at 175-76.

[100] *Id.* at 176.

[101] NLRB v. Hendricks County Rural Elec. Membership Corp. 450 U.S. 964 (1981).

[102] 454 U.S. at 176. The Court was attempting to resolve the conflict in the circuit courts of appeals. *See supra* note 62.

The Supreme Court also granted Hendricks' cross-petition for certiorari on the question of whether Weatherman should have been excluded as "the functional equivalent of a personnel department employee," thus not covered by the Act. 454 U.S. at 176 n.8. The Court, however,

began by stating the standard of review followed by the Court when reviewing decisions made by administrative bodies charged with construction of a statute.[104]

The narrow standard of review used by the Court is derived from two lines of authority. One concedes that the Board alone should formulate the meaning of the term "employee." In *NLRB v. Hearst Publications, Inc.*,[105] for example, the Supreme Court held that Congress had delegated to the Board the task of determining whether there was sufficient evidence present to warrant a finding of whether a person was an "employee."[106] In *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*,[107] the Court again upheld the Board's right, subject to judicial review, to determine "the contours of the term 'employee.' "[108]

The second line of cases supporting the Court's narrow standard of review, deals with the deference accorded to the Board's decisions. As an example, the Court, in *Ford Motor Co. v. NLRB*,[109] stated that the Board's judgments should be followed if its construction of a statute is reasonably defensible.[110] It is only reasonably defensible, however, if the correct legal standard is applied.[111]

In applying this limited standard of administrative review, the Supreme Court examined the Board decisions before the 1947 Taft-Hartley Amendments,[112] the legislative history of the Amendments,[113]

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dismissed the writ of certiorari on the latter point as improvidently granted, since it presented primarily an issue of fact. *Id.* The Court noted that the Seventh Circuit had held that the Board's determination that Weatherman was not the "functional equivalent of a personnel department employee" was supported by the evidence in the record. *Id.*

[103] Justice Brennan was joined by Justices White, Marshall, Blackmun, and Stevens. 454 U.S. at 171. Justice Powell, joined by Justices Rehnquist and O'Connor and the Chief Justice, concurred in part and dissented in part. *Id.* at 192 (Powell, J., concurring in part and dissenting in part).

[104] *Id.* at 177. The Board is charged with investigating and deciding labor-related matters. 29 U.S.C. § 160(c). In Universal Camera Corp. v. NLRB, 340 U.S. 454 (1951), the Supreme Court declared that the Board's findings would be upheld if supported by substantial evidence on the record as a whole. *Id.* at 462. If, however, there appears to have been a gross abuse of discretion, then the Board's decision will be reversed. *Id.* at 463.

[105] 322 U.S. 111 (1944).

[106] *Id.* at 130. In *Hearst Publications*, the Court considered whether newsboys who sold papers were employees within the meaning of the Act. *Id.* at 113-14.

[107] 404 U.S. 157 (1971).

[108] *Id.* at 166.

[109] 441 U.S. 488 (1979).

[110] *Id.* at 497.

[111] *Id.* The Court also noted that it would not uphold the Board's decision if the Court found that the decision "was 'fundamentally inconsistent with the structure of the Act' and an attempt to usurp 'major policy decisions properly made by Congress.' " *Id.* (quoting American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965)).

[112] 454 U.S. at 178-81; *see infra* notes 117-25 and accompanying text.

[113] 454 U.S. at 181-85; *see infra* notes 127-32 and accompanying text.

and the subsequent case history.[114] Before beginning with an examination of Board decisional law prior to the Taft-Hartley Amendments, the Court reviewed the objectives of the Wagner Act.[115] After noting that the Wagner Act had broadly defined employees,[116] the Court examined the line of decisions whereby the Board had narrowed the Act's scope by excluding certain workers from bargaining units.[117] Although the Court observed that confidential employees were not specifically mentioned in the Wagner Act,[118] it noted that in accordance with the policy of the Act, the Board had carved out a category of individuals who were to be excluded from collective bargaining units as "confidential" employees.[119] The Court determined that the Board had rejected, as early as 1940, the concept that all employees with access to confidential information of any type should be excluded from the definition of employee.[120] Between 1940 and 1946, the Board decided at least fifty cases dealing with whether certain employees should be excluded from collective bargaining units because of their status as confidential employees.[121] In his evaluation of these cases, Justice Brennan stated that "the Board routinely applied the labor-nexus test in numerous decisions to identify individuals who were to be excluded from bargaining units because of their access to confidential information."[122]

The Court regarded the 1940 to 1946 cases as developing a test, which was consistently applied, although "refined slightly,"[123] in *Ford*

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[114] 454 U.S. at 181-85; *see infra* notes 133-44 and accompanying text.

[115] 454 U.S. at 178; *see supra* notes 2-8 and accompanying text.

[116] *See supra* note 5.

[117] 454 U.S. at 178; *see infra* notes 118-25 and accompanying text.

[118] 454 U.S. at 178.

[119] *Id.* at 178-79. The Board had the ability to do so by using its authority to determine the appropriateness of a bargaining unit. 29 U.S.C. § 159(b); *see* Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491-92 (1947).

[120] 454 U.S. at 178-79. The Court cited Bull Dog Elec. Prods. Co., 22 N.L.R.B. 1043 (1940), for this proposition. 454 U.S. at 178. In *Bull Dog*, the Board considered whether estimates in an engineering department could be included in a bargaining unit. 22 N.L.R.B. at 1045. The Board was unpersuaded by the company's argument that its employees handled sensitive confidential company matters and held that these employees were protected by the Act. *Id.* at 1046. The Court also cited Creamery Package Mfg. Co., 34 N.L.R.B. 108 (1941), for the same idea. 454 U.S. at 178. In *Creamery Package*, the Board held that employees who did not have a direct connection with labor information were not excluded from the Act. 34 N.L.R.B. at 110-11.

[121] *See* 454 U.S. at 179-80 & n.11.

[122] *Id.* at 179. The Court further noted that the Court of Appeals for the Third Circuit, in NLRB v. Poultrymen's Serv. Corp., 138 F.2d 204 (3d Cir. 1943), approved as sound the Board's test which examined the employee's access to "confidential information with respect to labor relations." *Id.* at 210-11.

[123] 454 U.S. at 180.

Motor Co.[124] In that case, said Justice Brennan, the Board narrowed what had been the prevailing view and from that point forward would only include within the definition of confidential employees those who "assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations."[125]

Whether the Board had a consistent practice of applying a labor-nexus test before the Taft-Hartley Amendments is relevant not only to the establishment of a long-term practice, but also is of concern in determining exactly what Congress believed the Board's policy to be at the time of the Amendments. Thus, the Court examined the legislative history of the Taft-Hartley Act.[126]

The legislative history of Taft-Hartley did not discuss confidential employees in any detail, nor did it approve or disapprove the Board's prior practice.[127] The Court noted that the bill passed by the House of Representatives had explicitly included confidential employees in the Act.[128] The Senate bill did not, however, include confiden-

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[124] 66 N.L.R.B. 1317 (1946).

[125] 454 U.S. at 180-81 (quoting *Ford Motor Co.*, 66 N.L.R.B. at 1332).

[126] *Id.* at 181-85.

[127] *Id.*; *see infra* notes 128, 129, 131 & 132.

[128] *Id.*; *see supra* note 25 and accompanying text. The House definition of "supervisor" included any individual who, by the nature of his or her duties had access to information that was of a confidential nature and that was not available to the public, to competitors, or to employees generally, and was to be used only in the interest of the employer. H.R. 3020, 80th Cong., 1st Sess. § 2(12) (1947), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 26, at 40-41. "Supervisor" was defined as:

> (12) The term 'supervisor' means any individual—
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> (A) who has authority, in the interest of the employer—
>
> (i) to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any individuals employed by the employer, or to adjust their grievances, or to effectively recommend any such action; or
>
> (ii) to determine, or make effective recommendations with respect to the application of, the factors upon the basis of which the wages of any individuals employed by the employer are determined, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment;
>
> (B) who is employed in labor relations, personnel, employment, police, or time-study matters, or in connection with claims matters of employees against employers, or who is employed to act in other respects for the employer, in dealing with other individuals employed by the employer, or who is employed to secure and furnish the employer information to be used by the employer in connection with any of the foregoing; or
>
> (C) *who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.*

Id. (emphasis added).

tial employees in its definition of supervisor.[129] In the Conference Committee, which reconciled the two bills, the Senate version of the definition of supervisor prevailed and confidential employees were not mentioned.[130] The House Manager's statement which was attached to the Conference Report provided:

> The conference agreement, in the definition of "supervisor," limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific 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.*[131]

Therefore, Justice Brennan concluded, it was congressional intent not to change Board practice as Congress understood that practice to be.[132]

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[129] S. 1126, 80th Cong., 1st Sess. § 2(11) (1947), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 26, at 104. The Senate bill read:

> The term 'supervisor' means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, 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.

Id.

[130] 29 U.S.C. § 152(11).

[131] HOUSE CONF. REPORT, No. 510, 80th Cong., 1st Sess. 35 (1947), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 25, at 505 (emphasis added). See *infra* note 134.

[132] 454 U.S. at 184-85. The Court rejected the Seventh Circuit's interpretation of the legislative history of § 2(11). *Id.*; *see supra* note 131. It concluded that since professional employees were explicitly included in the Act, and most professional workers would be privy to the confidential information of a business, Congress could not have intended to exclude all confidential employees from the Act's coverage. 454 U.S. at 184-85. In other words, if Congress had intended to exclude confidential employees, regardless of whether those individuals handled labor-related confidential material, then most of the professional employees would thereby be excluded from the Act. That result would clearly not be what Congress had intended since it had specifically provided for the inclusion of professionals. 29 U.S.C. § 162.

[133] 454 U.S. at 186-90. In *Bell Aerospace*, the Supreme Court noted: " 'Congress recognized there were other persons so much more clearly "managerial" that it was inconceivable that the Board would treat them as employees. Surely Congress could not have supposed that while "confidential secretaries" could not be organized, their bosses could be.' " 416 U.S. at 284 (quoting Bell Aerospace Co. v. NLRB, 475 F. 2d 485, 491-92 (2d Cir. 1973), *aff'd in part, rev'd in part, and remanded*, 416 U.S. 267 (1974)).

The Seventh Circuit understood *Bell Aerospace* to imply that Congress had misunderstood the Board's policy in *Ford Motor Co.* 603 F.2d at 29. Thus, when Congress stated that it did not

The Court then examined footnote twelve from *Bell Aerospace*, which the Seventh Circuit in *Hendricks* had felt constrained to follow.[133] That footnote read:

> In 1946 in *Ford Motor Co.*, . . . the Board had narrowed its definition of "confidential employees" to embrace only those who exercised " 'managerial' functions in the field of labor relations." The discussion of "confidential employees in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, *it clearly thought that the Act did not cover "confidential employees"* even under a broad definition of that term.[134]

The *Hendricks* Court overruled this position of *Bell Aerospace*, stating that it was dicta unnecessary to the determination in *Bell Aerospace* of whether managerial employees should be included in the Act, and further that the *Bell Aerospace* Court was in error concerning congressional intent.[135] The argument espoused by both the companies involved in *Hendricks*, was that the Board had not applied a consistent labor-nexus test in determining whether employees should be excluded as "confidential."[136] The *Hendricks* Court, however, was not persuaded by the argument.[137] The Court viewed the restatement of the labor-nexus test in *B.F. Goodrich*[138] as merely a reaffirmation of *Ford Motor Co.*,[139] "to limit the term confidential so as to embrace only those who assist and act in a confidential capacity to persons who

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intend to disturb Board policy, which excluded confidential secretaries, it assumed that the exclusion of all confidential secretaries, not just those secretaries with a labor nexus, was the Board policy. *Id.* Following the congressional intent, therefore, would mean excluding all confidential secretaries. *Id.* at 29-30.

[134] 416 U.S. at 284 n.12 (emphasis added and citation omitted).

[135] 454 U.S. at 187. Justice Brennan observed that the question presented in *Bell Aerospace* dealt with the inclusion within the Act of managerial employees. 454 U.S. at 187. Thus, any discussion of confidential employees was unnecessary. *Id.*

In reexamining the language of the Conference Committee Report, see *supra* text accompanying note 131, Justice Brennan stated:

> [T]he only plausible interpretation of the Report is that, in describing the Board's prevailing practice of denying certain employees the full benefits of the Wagner Act, the Report referred only to employees involved in labor relations, personnel and employment functions, and confidential secretaries *to such persons*. For that, in essence, is where the Board law as of 1947 stood.

454 U.S. at 188 (emphasis in original).

[136] 454 U.S. at 187-90.

[137] *Id.* at 190.

[138] See *supra* notes 55 & 56 and accompanying text.

[139] See *supra* notes 123-25 and accompanying text.

formulate, determine, and effectuate management policies in the field of labor relations."[140] The Court found that the Board had followed a consistent policy for over forty years which had been implicitly approved by Congress.[141] Congressional failure to amend this when it amended the statute in the Landrum-Griffin Act[142] was, noted the Court, entitled to evidentiary weight.[143] Based upon these findings, the Court applied the labor-nexus test in *Hendricks* and *Malleable*.[144]

The minority in *Hendricks* took issue with some of the broad statements of the majority. Justice Powell, writing for the minority,[145] pointed out that the labor-nexus test had not been consistently applied by the Board.[146] He noted that in *E.P. Dutton & Co.*,[147] the Board excluded three secretaries from the collective bargaining unit without mentioning a labor nexus.[148] Justice Powell continued to take issue with the majority by agreeing with the legislative history as interpreted by the Court in *Bell Aerospace*.[149] The minority concluded that

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[140] 454 U.S. at 188-89 (quoting B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956) (footnote omitted and emphasis deleted)).

[141] *Id.* at 189-90.

[142] See *supra* note 11.

[143] This point was well stated in *Bell Aerospace*:

> In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. *In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.*

416 U.S. at 274-75 (emphasis added).

[144] 454 U.S. at 190-92. In *Hendricks*, the Court reversed the Seventh Circuit, and remanded the case to the appellate court to enter an order enforcing the Board's order. *Id.* at 191. In *Malleable*, the Court reversed the Seventh Circuit's holding regarding confidential employees, but remanded the case to determine whether the employees should be excluded for other reasons. *Id.* at 192.

[145] See *supra* note 103.

[146] *See* 454 U.S. at 196 & n.7 (Powell, J., concurring in part and dissenting in part).

[147] 33 N.L.R.B. 761 (1941).

[148] 454 U.S. at 196 n.7 (Powell, J., concurring in part and dissenting in part). In *E. P. Dutton*, the Board stated:

> [W]e believe that private secretaries should be excluded where, as in the instant case, one of the competing unions which may become the exclusive representative of certain of the Company's employees is of the opinion that the personal and confidential relationship existing between the private secretaries, whom the Guild has not attempted to organize, and the Company's officers is such as to create a possible division of their loyalties between the management and the potential bargaining agent.

33 N.L.R.B. at 767 n.8.

[149] 454 U.S. at 198 (Powell, J., concurring in part and dissenting in part). Justice Powell stated that there was "no support whatever for the Board's position." *Id.* at 195-96 (Powell, J., concurring in part and dissenting in part). He maintained that Congress, in interpreting the pre-1947 Board opinions, had thought that confidential employees, like supervisory employees,

"[t]he 'labor nexus,' as increasingly narrowed by the Board and now accepted by this Court, is antithetical to any common-sense view or understanding of the role of confidential secretaries."[150]

There was, however, some agreement between the majority and minority opinions. Justice Powell agreed that the purpose of the Taft-Hartley Amendments was to exclude those individuals who were allied with management.[151] He further agreed that the definition of confidential employee ought not to be "sweeping."[152] Justice Powell, however, was of the opinion that Weatherman should be excluded from the definition of confidential employees, and thus he dissented from the majority opinion.[153]

In view of the fact that the Supreme Court merely reaffirmed prior Board policy of utilizing a labor-nexus test,[154] its decision in *Hendricks* does not appear to have much effect on the practical application of the confidential employee exception.[155] One issue, however, which remains open after *Hendricks* is which labor-nexus test should be used by the Board.[156]

The majority in *Hendricks* discussed in general terms the labor-nexus test that the Board applies.[157] The Court did not, however, shed any light on which test ought to be applied;[158] it did not approve the *B.F. Goodrich* test. It is not clear whether the Board's definition of "confidential" employees[159] which requires the employee to assist one

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would be excluded from the Act. *Id.* at 198 (Powell, J., concurring in part and dissenting in part).

[150] *Id.* at 197 (Powell, J., concurring in part and dissenting in part).

[151] *Id.* at 192 (Powell, J., concurring in part and dissenting in part); *see supra* notes 27 & 28.

[152] 454 U.S. at 192 (Powell, J., concurring in part and dissenting in part).

[153] *Id.* The minority also discussed the Board's request that the Court hold that even if a confidential employee has a labor nexus, that employee cannot be discharged without running afoul of the Act. *Id.* at 197 (Powell, J., concurring in part and dissenting in part). Justice Powell noted that the majority had not chosen to address the issue, and he felt that its refusal was correct. *Id.* In his opinion, if the Court were to accept the Board's theory it would be a "major departure from the basic philosophy of the Act." *Id.*; *see infra* notes 179 & 180.

[154] *See supra* note 42.

[155] The decision did, of course, end the aberrant behavior of the Seventh Circuit. See *supra* note 72.

[156] See *infra* note 159.

[157] 454 U.S. at 178-81, 188-89.

[158] The ALJ in *Hendricks* did discuss the issue. *See infra* note 159.

[159] See *supra* text accompanying note 56 for the Board's definition of a "confidential employee." The ALJ in *Hendricks* noted that the Board has used a two-part analysis in determining if one is a confidential employee. First, it must be determined if the person acts in a "confidential" capacity; and second, it must be demonstrated that the assisted person formulates, determines, *and* effectuates labor policies. Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1619 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979). This interpretation of the test is known as the "conjunctive" test and requires a finding of all of the elements and

who formulated, determined, *and* effectuated labor-relations policy,[160] should be literally interpreted to require the conjunctive. It could be more loosely interpreted, without changing the fundamental policy, as requiring the assisted person to formulate, determine, *or* effectuate labor relations policy.[161] It is submitted that the conjunctive test,[162] requiring that all three elements be met, is in error, and that the better test would be the latter, disjunctive test.[163] The issue should not be whether a rigid conjunctive test has technically been fulfilled, but rather whether the conclusion is consistent with the policy underlying the labor-nexus test.

As was pointed out by the Supreme Court in *Hendricks*,[164] for example, it was the labor-nexus policy rather than a strict application of the *B.F. Goodrich* test that was applied by the Board in *Pullman Standard Division of Pullman, Inc.*[165] In *Pullman Standard*, the employees in question developed financial estimates of construction costs for which they regularly had "access to confidential information concerning labor costs and anticipated changes which were expected to result from collective bargaining negotiations."[166] Obviously, these employees dealt with information that if available to a labor organization would greatly influence collective bargaining.[167] The Board concluded that these individuals were "confidential employees" because of the nature of the information to which they had access.[168] It is clear

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not merely one of them. *See infra* note 160. The ALJ, however, doubted the propriety of such a test. 236 N.L.R.B. at 1619 n.8. In his opinion, it would be difficult to believe that an employee who worked for someone who "formulate[d]" policy, but did not "effectuate" it would not be considered a confidential employee. *Id.*

[160] Shayne Bros., 213 N.L.R.B. 1408 (1974); Weyerhauser Co., 173 N.L.R.B. 1170, 1172 (1968).

[161] That interpretation would be consistent with the disjunctive test that the Board uses when determining whether an employee is a "supervisor." *See* Golden West Broadcasters—KTLA, 215 N.L.R.B. 760, 764 n.11 (1974).

[162] See *supra* note 160 and accompanying text.

[163] See *supra* note 161 and accompanying text.

[164] 454 U.S. at 189.

[165] 214 N.L.R.B. 762 (1974).

[166] *Id.* at 762-63.

[167] *Id.* at 763. The Board stated:

> We regard such employees as specially aligned with the employer's interests in the area of labor relations, even absent the showing of a confidential work relationship with a specifically identifiable managerial employee responsible for labor policy. . . . Premature disclosure of this information obviously would reveal the Employer's anticipated ultimate settlement figures and thus prejudice its bargaining strategy in future negotiations.

Id.

[168] *Id.*

that *Pullman Standard* was a departure from the formula of *B.F. Goodrich*, but it was not in any sense a departure from the labor-nexus policy and has not been broadly interpreted.[169]

Since *Hendricks*, there has as yet been only one reported case raising the issue of confidential employees, *NLRB v. Rish Equipment Co.*,[170] and that case involved the conjunctive test left open by the *Hendricks* Court. In *Rish*, the employee in dispute was the secretary to a manager who effectuated management policies.[171] The manager was involved in labor negotiations, although only to a minor extent did he formulate and determine those policies.[172] The Court of Appeals for the Fourth Circuit determined that the *B.F. Goodrich* labor-nexus test, requiring that the management representative "formulate, determine *and* effectuate"[173] these policies, was satisfied.[174] The court did not, however, discuss whether all three management qualities were required.[175] Thus, the issue of the conjunctive test is still open to question.

Another issue left open by the Supreme Court in *Hendricks* is whether confidential employees who pass the Board's labor-nexus test are nevertheless afforded the protection of the Act.[176] The Court did not answer that question since it determined that Weatherman was not a confidential employee.[177] It is not clear, though, how the Court will address this issue. Confidential employees are not considered "employees" within the meaning of the Act.[178] It does not follow, though, that those employees are not entitled to the protection of the

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[169] *See* Dun & Bradstreet, Inc., 240 N.L.R.B. 162 (1979) (Board refused to find that credit reporters, who have access to confidential information are "confidential" employees); *see also* Dun & Bradstreet, Inc., 194 N.L.R.B. 9 (1971); *cf.* Pullman Standard, 214 N.L.R.B. at 763 (computer operators with access to confidential information are "confidential" employees).

[170] 687 F.2d 36 (4th Cir. 1982).

[171] *Id.* at 37.

[172] *Id.*

[173] *B.F. Goodrich Co.*, 115 N.L.R.B. at 725 (emphasis added).

[174] 687 F.2d at 37. The Fourth Circuit held that *Hendricks* was not controlling. *Id.* The court interpreted *Hendricks* as merely approving the Board's labor-nexus test. *Id.* In *Rish*, unlike *Hendricks*, the secretary was privy to labor-related materials. *Id.*

[175] The dissenting judge in *Rish* argued that the conjunctive test should have been applied. *Id.* at 38 (Hall, J., dissenting). He felt that there was a distinction between those who effectuate labor policy and those who formulate or determine the policy. *Id.* Therefore, the secretary was not a confidential employee, and Judge Hall would have enforced the Board's order. *Id.* at 39 (Hall, J., dissenting).

[176] The Board has denied confidential employees with the requisite labor-nexus the right to join bargaining units. *See, e.g.*, Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946); Hoover Co., 55 N.L.R.B. 1321, 1323 (1944).

[177] 454 U.S. at 191.

[178] *See supra* note 40.

Act.[179] On the other hand, some courts have held that these confidential employees are not protected by the NLRA.[180]

Although some issues remain open,[181] the Supreme Court's decision in *Hendricks* affirms the labor-nexus test long applied by the Board. Whether another court or Congress will eventually recognize that confidential employees, as that term is customarily used in the business community, should be properly aligned with management, only time will tell.

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[179] Indeed, the Board has held that such employees are entitled to the protection of the Act. *See* Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574 (1976); Bethlehem Steel Co., 63 N.L.R.B. 1230 (1945); Poultrymen's Serv. Corp., 41 N.L.R.B. 444 (1942), *enforced*, 138 F.2d 204 (3d Cir. 1943). Additionally, the ALJ in *Hendricks* held that even if Weatherman had been a confidential employee, she could not have been discharged for protected activity. Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616, 1619 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979). Justice Powell, however, disagreed with that determination. *See supra* note 153.

A similar situation exists regarding the status of supervisors. Although supervisors are not employees protected under the Act, they have been afforded some protection by the Board when their discharge was part of a pattern of conduct intended to coerce employees who are exercising their § 7 rights. *See, e.g.*, NLRB v. Downslope Indus., 676 F.2d 1114 (6th Cir. 1982) (reinstatement of supervisor discharged for protesting sexual harassment); Empire Gas Inc. of Denver, 254 N.L.R.B. 626 (1981) (atmosphere of coercion requires return to status quo ante); DRW Corp., 248 N.L.R.B. 828 (1980)(supervisors protected from discharge when engaged in similar activities as unlawfully discharged employees); Better Morkey Grip Co., 115 N.L.R.B. 1170 (1956), *enforced*, 243 F.2d 836 (5th Cir. 1957). *But see* Parker-Robb Chevrolet, Inc., 262 N.L.R.B. No. 58 (June 23, 1982) (overruling "pattern of conduct" line of cases typified by *DRW Corp.*); *cf.* NLRB v. Nevis Indus., 647 F.2d 905 (9th Cir. 1981) (pro-union activities of supervisors not protected by Act); NLRB v. Southern Plasma Corp., 626 F.2d 1287 (5th Cir. 1980) (supervisors not entitled to protection of Act when they attempt to organize).

[180] *See Hendricks*, 603 F.2d at 28; *supra* note 62.

[181] A third issue involves the *Bell Aerospace* decision. Since the Court in *Hendricks* disapproved of the *Bell Aerospace* majority's interpretation of the legislative history of § 2(11), 454 U.S. at 186-90, it may be that very little is left of the *Bell Aerospace* decision, other than to say that managers are indeed a "subcategory to those already excluded as supervisors." Comment, *supra* note 25, at 123. Exactly what effect *Hendricks* has on managerial employees, though, will and should be left for future determination.