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Comment

Bell Aerospace and the Status of Managerial Employees Under The NLRA

Daniel Rhodes Barney†

In Bell Aerospace the United States Supreme Court held that managerial employees are excluded from the protections of the National Labor Relations Act. The Court rejected the Board's determination that only those managerial employees whose participation in a labor organization would create a conflict of interest were to be denied bargaining rights under the Act. This Note analyzes the Court's decision and argues that it is based on a strained construction of the Act and a misconception of the consequences that would attend unionization of managerial employees. It also discusses the potential impact of the decision and proposes amendments to the Act which would codify the Board's conflict-of-interest standard for managerial employees.

I

INTRODUCTION

The National Labor Relations Board [hereinafter also referred to as the Board] has long classified certain types of workers as “managerial employees” and excluded them from bargaining units of other employ-

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1. Managerial employees are usually defined as “employees who are in a position to formulate, determine and effectuate management policies. These employees express and make operative the decisions of management.” Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946). They are not necessarily concerned with labor relations, as illustrated by the types of workers often found to be managerial employees. See, e.g., Astronautics Corp., 210 N.L.R.B. 652 (1974), Hudson Motor Car Co., 55 N.L.R.B. 509, 512 (1944) (buyers and others with authority to make financial commitments on behalf of their employers); ACF Indus., Inc., 145 N.L.R.B. 403, 404-05 (1963), Spicer Mfg. Corp., 55 N.L.R.B. 1491, 1498 (1944) (work expediters); General Tel. Co., 112 N.L.R.B. 1225, 1229 (1955) (local commercial representatives); General Dynamics Corp., 213 N.L.R.B. No. 124, 87 L.R.R.M. 1705 (Oct. 4, 1974) (administrative accountants and price estimators); General Dynamics Corp., id., Yale & Towne Mfg. Co., 135 N.L.R.B. 926, 927-28 (1962) (senior engineers); Wichita Eagle & Beacon Publishing Co. v. NLRB, 480 F.2d 52 (10th Cir. 1973), cert. denied, 416 U.S. 982
Nonetheless, for many years, the Board considered such workers "employees" within the meaning of section 2(3) of the National Labor Relations Act [hereinafter also referred to as the Act or NLRA], who were thus entitled to the Act’s protections in their collective bargaining activities. In 1956, however, the Board refused to recognize as an appropriate bargaining unit a group of managerial employees seeking to organize separately from other employees. Fifteen years later, in Bell Aerospace Co., Division of Textron, Inc., the Board reversed its position. Holding that a group of buyers for an aircraft manufacturer constituted an appropriate bargaining unit, the Board declared that all managerial employees, except those whose participation in a labor organization would create a conflict of interest with their job responsibilities, were fully covered by the Act.

The Second Circuit, however, denied enforcement of the Board’s order, and the Supreme Court affirmed by a vote of 5 to 4, holding that managerial employees are excluded from the protection of the Act. The


Employees who have access to confidential information concerning, or who act for management in, labor relations matters were once classified as managerial employees. See, e.g., Murray Ohio Mfg. Co., 61 N.L.R.B. 47, 57 (1945). Today they are generally classified as "confidential employees." See, e.g., Litton Financial Printing, 216 N.L.R.B. No. 66, 88 L.R.R.M. 1233 (Jan. 30, 1975); Ford Motor Co., supra.

Managerial employees are to be distinguished from supervisors, whom the National Labor Relations Act defines as individuals with authority to "hire, transfer, discharge, ... or discipline other employees ...." NLRA § 2(11), 29 U.S.C. § 152(11) (1970).

5. 196 N.L.R.B. 827, 828 (1972). The Board earlier had overruled that portion of Swift which had held that managerial employees could not be deemed "employees" within the meaning of Section 2(3) of the Act even to the extent of protecting them from discharge for activities in support of other employees' efforts to unionize. North Ark. Elec. Coop., Inc., 185 N.L.R.B. 550, 551 (1970), enforcement denied, 446 F.2d 602 (8th Cir. 1971). In North Arkansas, the question of whether managerial employees were entitled to form separate bargaining units under the Act was not before the Board.

The Court was unanimous, however, in reversing the Second Circuit's additional holding that on remand the Board would have to proceed by rulemaking, rather than adjudication, in determining whether all buyers, or at least the buyers in the instant case, were managerial employees. Id. at 290-95. The Court aptly noted the subjective nature of the employee status in issue and expressed doubt as to "whether any generalized standard could be framed which would have more than marginal utility." Id. at 294.
Court based its decision on Board and court decisions ranging over three decades, the legislative history of the 1947 amendments to the Act, and the silence of Congress when, in 1959, it again amended the Act. Unfortunately, the decision leaves much room for criticism. First, the Court's statutory construction of the Act provides weak support for the holding. Second, and more importantly, the Court failed to adequately relate the issue in the case to the basic purposes of the Act and gave insufficient weight to the Board's unique competence to perform this task. Third, though the extent of the decision's impact will depend largely on what test the Board adopts for determining managerial status and how it applies that test, at a minimum the decision will result in the denial of bargaining rights under the Act to thousands of white collar workers. It is probable that experience under the Court's approach will necessitate a legislative re-examination of the issue—one more deferential to the fundamental policies of the Act and more sensitive to the needs of a burgeoning class of middle-level managers in the American economy.

II

THE COURT MISCONSTRUED THE ACT

The Supreme Court drew heavily on several familiar rules of statutory construction in deciding *Bell Aerospace*. At the start of its opinion, the Court noted the "importance of legislative history" and the "great weight" which a court may accord "to the longstanding interpretation placed on a statute by an agency charged with its administration." Applying these rules to the relevant case law and congressional pronouncements, the Court stated:

In sum, the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals, all point unmistakably to the conclusion that "managerial employees" are not covered by the Act. We agree with the Court of Appeals below that the Board "is not now free" to read a new and more restrictive meaning into the Act. 475 F.2d at 494.

Though the Court's reliance on settled principles of statutory construction is well placed, its application of those principles to the scant

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Although the Board, by making only token use of its rulemaking authority, NLRA § 6, 29 U.S.C. § 156 (1970), has missed valuable opportunities to inform itself fully before deciding controversial issues, see generally Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970), the Court was correct in deciding that the instant case provided no such opportunity.

8. 416 U.S. at 274-75.
9. *Id.* at 289 (footnote omitted).
indicia of legislative intent available in the instant case appears to have been less than circumspect. The Court's interpretations of several Board and court decisions on managerial employees, both before and after the 1947 amendments to the National Labor Relations Act, are subject to serious doubt. In addition, the Court adopted a far more expansive view of the legislative history of the 1947 amendments than seems warranted by the evidence. Finally, the Court misapplied a principle of statutory construction to which it attached great importance: the Court concluded that Congress' failure, in re-enacting a statute, to revise or repeal the "longstanding interpretation" placed on it by the agency charged with its administration is "persuasive evidence that the interpretation is the one intended by Congress."\(^\text{10}\)

\(\text{A. The Court's View of the Board's Pre-1947 Policy Toward Managerial Employees}\)

At the outset of its opinion, the Supreme Court traced the development of Board policy toward managerial employees prior to the passage of the 1947 amendments to the National Labor Relations Act. The Court's objective was to reconstruct a conception of prevailing Board practice with respect to managerial employees which the Court could then impute to a 1947 Congress silent on the subject.

The Court began by observing that the Wagner Act\(^\text{11}\) did not mention the term "managerial employee."\(^\text{12}\) Soon after the Act's passage, the Court stated, "the Board developed the concept of 'managerial employee' in a series of cases involving the appropriateness of bargaining units. The first cases established that 'managerial employees' were not to be included in a unit with rank-and-file employees."\(^\text{13}\) Though it is true that the Board frequently excluded from rank-and-file units those employees whose interests and duties tied them closely to management, these exclusions were merely in conformity with its policy of designing units to comprise employees with common interests. They were not based upon a belief that Congress had intended to deny bargaining rights under the Act to managerial employees.\(^\text{14}\) Furthermore, it is not

\(\text{10. Id. at 275.}\)
\(\text{12. The fact that it did not, coupled with its expansive definition of the term "employee," NLRA § 2(3), 29 U.S.C. § 152(3) (1970) (originally enacted in ch. 372, § 2(3), 49 Stat. 449) (see NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944)), suggests that the Supreme Court in Bell Aerospace should have accepted at face value the pre-1947 Board decisions, declaring that managerial employees were indeed "employees" within the meaning of Section 2(3) of the Act. See note 15, infra, and text accompanying.}\)
\(\text{13. 416 U.S. at 275.}\)
\(\text{14. A buyer of timber for a sawmill who spent 75 percent of his time away from the mill, for instance, was excluded from a bargaining unit of the mill's production and}\)
true that the term "managerial employee" first appeared in appropriate bargaining unit cases. Rather, the term was first seen in cases involving employers disciplining employees in positions of authority for having engaged in union activities, and in these early cases, the Board consistently held that the disciplined employees were "employees" within the meaning of section 2(3) of the Act despite their managerial status, and thus protected in their union activities.\(^{15}\)

Without reference to these decisions, the Court continued:

Whether the Board regarded all "managerial employees" as entirely outside the protections of the Act, as well as inappropriate for inclusion in a rank-and-file bargaining unit, is less certain. To be sure, at no time did the Board certify even a separate unit of "managerial employees" or state that such was possible.\(^{16}\)

While it is true that the Board did not certify a separate unit of managerial employees during this period, to infer from that fact that the Board had viewed managerial employees as "entirely outside the protections of the Act"—or, more importantly, that such a Board view must have been apparent to Congress when it was amending the Act in 1947—is to engage in risky speculation. Not only did the Board's early decisions evidence its recognition of managerial employees as "employees" under Section 2(3) of the Act as noted above, but, further, the Board never definitively denied bargaining rights to all managerial employees.

In *Yale & Towne Manufacturing Co.*,\(^{17}\) the Board held that time-


16. 416 U.S. at 276.

17. 60 N.L.R.B. 626 (1945).
study employees, being "agents of management" and exercising a "function of management," "should neither be included in a unit with other employees, nor be established as a separate unit." But a few months later, before Congress could have considered the Board's policy towards managerial employees while debating the Taft-Hartley Act, the Board expressly overruled Yale & Towne and certified a separate unit of time-study employees. Finding such employees neither "managerial" nor "confidential," the Board again declined to specifically address the question of the bargaining rights of managerial employees under the Act.

Earlier, the Board had intentionally left open the possibility that it would eventually certify a separate unit of managerial employees. In a decision excluding buyers and expediters from a unit of office and clerical workers, it had declared:

This is not to say, however, that buyers and expediters are to be denied the right to self-organization and to collective bargaining under the Act. The precise relationship of the buyers and expediters to management here is not now being determined by us.

Though the Court noted this hesitancy on the part of the Board to explicitly exclude managerial employees from coverage under the Act, the Court chose to assume that Congress, looking back in 1947, inferred from the Board's failure to certify any separate units of managerial employees that the Board had followed a policy of completely denying the protections of the Act to such employees.

An alternative inference would have been that no groups of managerial employees had applied to the Board for certification as separate bargaining units. During this period, industry's modest population of managerial employees chiefly occupied positions in the executive level of their employers' organizational structures. It can be assumed that most of these upper-level managerial employees either did not want or did not need the protection of the Act. The rest were conceivably too few and too scattered to be able to organize into separate certifiable groups. The existence of large groups of white collar workers who are almost as remote from their employers' executive structures, and as vulnerable to their coercion, as unorganized blue collar workers is a relatively recent phenomenon, stemming from the growth of huge, bureaucratized employers over the last 25 years—that is, after the 1935-47 period at issue.

18. Id. at 628-29.
21. 416 U.S. at 277.
22. In 1940, white-collar workers constituted only 32.5 percent of the country's
The Court next stated that the Board’s treatment of the “related but narrower category” of supervisory employees during this period reflected a “progressive uncertainty.” Whatever uncertainty existed was resolved by Packard Motor Car Co. v. NLRB, in which the Supreme Court enforced a Board order certifying a separate unit of supervisory employees. The Court in Bell Aerospace emphasized the Packard dissenting opinion, calling it “especially pertinent” in view of the “subsequent legislative reversal of the Packard decision.” Justice Douglas, writing for the three disenters in Packard, had argued that the recognition of supervisors as “employees” under the Act would tend to “obliterate the line between management and labor” and lead to the unionization of presidents, vice-presidents, and other company executives. In citing the dissent as support for the broad proposition that the 1947 amendments were intended to forestall this result, the present Court failed to mention Justice Douglas' significantly limiting conclusion that the Act should have been construed as putting “in the employer category all those who acted for management not only in formulating but also in executing its labor policies.” In essence, the test for

experienced civilian labor force. In 1950, they made up 37.5 percent and, in 1960, 43.1 percent of the labor force. By 1970, almost half (48.3 percent) of the nation's workers were white-collar. During this 30-year period, the total number of employees in all occupations increased by 70.0 percent. The number of managers and administrators, however, jumped by 122.7 percent. U.S. Bureau of the Census, Dept of Commerce, Statistical Abstract of the United States 186 (73d ed. 1952); id. at 230 (93d ed. 1972).


23. 416 U.S. at 277.

24. In fact, the Board’s policy towards supervisory employees was as consistent as its policy towards managerial employees in that at no time prior to 1947 did it exclude all such employees from coverage under the Act. The Board initially recognized supervisors as “employees” within the meaning of Section 2(3) of the Act, Atlantic Greyhound Corp., 7 N.L.R.B. 1189, 1196 (1938), but generally excluded them from rank-and-file bargaining units. See, e.g., Mueller Brass Co., 39 N.L.R.B. 167, 171 (1942). In Union Collieries Coal Co., 41 N.L.R.B. 961 (1942), the Board held that supervisors could form their own bargaining units under the Act. A year later, the Board reversed itself and held that supervisors could not be organized in any unit. Maryland Drydock Co., 49 N.L.R.B. 733 (1943). Nonetheless, the Board continued to recognize supervisory employees as “employees” under the Act and to protect them from discharge for pro-union activity. See, e.g., Soss Mfg. Co., 56 N.L.R.B. 348, 353 (1944). Within two years, the Board returned to its policy of certifying separate units of supervisory employees. Packard Motor Car Co., 61 N.L.R.B. 4 (1945).

26. 416 U.S. at 278.
27. 330 U.S. at 494.
28. Id. at 496 (emphasis added); further discussion, Id. at 500.
employee status propounded by Justice Douglas in Packard was the same as the conflict-of-interest test adopted by the Board in the instant case.29

B. The Court's Expansive Construction of The 1947 Amendments

As the Court noted in opening its discussion of the legislative history of the 1947 amendments, "[t]he Packard decision was a major factor in bringing about the Taft-Hartley Act of 1947, 61 Stat. 136."30 Activated by what they considered to be the possible ill effects of the decision, the House and the Senate passed bills in 1947 excluding "supervisors" from the protections of the Act. The two bills, however, defined the term "supervisors" differently.

The Senate bill limited the term to those individuals with the authority to hire, transfer, discipline, or fire other employees or to recommend that such action be taken.31 The House bill, on the other hand, defined "supervisor" to include, in addition to the individuals specified in the Senate bill: (1) personnel who fixed or made effective recommendations with respect to the wages earned by other employees; (2) labor relations, time-study, police and guard personnel; and (3) confidential employees. The bill defined "confidential employee" as any individual "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."32 As the Court noted, the House bill's definition embraced far more employees than simply the foremen accorded bargaining rights in Packard.33 Moreover, its definition of "confidential employee" would have excluded from the protective scope of the Act many more employees than the Board's definition had excluded up to that point.34

Turning to the committee reports on the respective bills, the Court commented: "Significantly, both the House Report and the Senate Report voiced concern over the Board's broad reading of the term 'employee' to include those clearly within the managerial hierarchy."35 The Court observed that the Senate Report, drawing on the Packard dissenting opinion, had addressed the possibility that Packard would lead to the unionization of vice-presidents. The House Report, the Court said, had declared that:

29. See 196 N.L.R.B. at 828.
30. 416 U.S. at 279.
33. 416 U.S. at 279-80.
34. See note 1 supra.
35. 416 U.S. at 281.
The unionization of supervisors had deprived employers of the loyal representations to which they were entitled. And in criticizing the Board's expansive reading of the Act's definition of the term "employees," the House Report noted that "[w]hen Congress passed the Labor Act, we were concerned, as we said in its preamble, with the welfare of 'workers' and 'wage earners,' not of the boss." H.R. Rep. No. 245, 80th Cong., 1st Sess., 13 (1947).36

From statements in the House Report, the Court inferred that Congress had intended, through its express exclusion of "supervisors" from the Act's protections, to exclude all managerial employees—not merely those employees with the authority to hire, transfer, discipline, or fire other employees.37

Such an expansive construction of the 1947 amendments is questionable. Though the House evidenced, through its broad definition of the term "supervisor," a desire to exclude from the Act's protections wage-setting, labor relations, and confidential employees as well as ordinary foremen, neither the House bill nor the House Report mentioned the term "managerial employees." In addition, the House Report did not refer to Packard nor to Justice Douglas' dissenting views in explaining the need for the amendments.

The Senate Report, on the other hand, referred to the Douglas dissent in Packard and to an apprehension that Packard might lead to the unionization of vice-presidents. But, again, neither the Senate Report nor the Senate bill contained any reference to "managerial employees." Moreover, the Senate bill, unlike the House bill, defined "supervisor" to include only traditional foremen—not managerial employees nor even the wage-setting, labor relations, and confidential employees included in the House bill's definition. Given this narrow definition, it is arguable that the Senate's concern with Packard was restricted to a desire to codify Justice Douglas' conclusion in dissent and exclude from the Act's coverage only those employees who "act for management on labor policy matters."38 The Senate bill's definition appeared to embrace all such employees and was hence a suitable response to the holding in Packard.

In any event the subsequent legislative history of the Taft-Hartley Act suggested that, while Congress may have intended to exclude from the National Labor Relations Act's protection those employees listed in the House bill, it did not intend to exclude all managerial employees. The Conference Committee adopted, and Congress enacted, the Senate's narrow definition of "supervisor," stating that it was unnecessary to

36. Id. at 281-82 (footnote omitted).
37. Id. at 283.
38. 330 U.S. at 500 (emphasis added).
include "persons working in labor relations, personnel and employment departments" and "confidential secretaries" in the definition of "supervisor" because "the Board has treated, and presumably will continue to treat, such persons as outside the scope of the Act. Nowhere in any of the Congressional reports or debates, however, was there any suggestion that all employees traditionally classified as managerial should be excluded from the Act's coverage or that such was the current Board policy. To the contrary, discussion focused primarily on whether three limited classes of "managerial" employees, because of their unique and close relationship to management, should be included within the term "supervisor." The Conference Committee realized that the Senate's narrow definition did not include managerial employees in general and sanctioned this result, believing that the subclasses with which the House bill was concerned were already excluded by Board practice. In sum, the Committee selected the narrower definition, consciously rejecting one that would have excluded from federal labor law protection all employees who might be classified as managerial.

The Court's defense of its conclusion that Congress intended to exclude all managerial employees from the Act's protections is concentrated in one key passage:

But assuredly [labor relations personnel and confidential employees] did not exhaust the universe of [impliedly] excluded persons. The legislative history strongly suggests that there also were other employees, much higher in the managerial structure, who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary. For example, in its discussion of confidential employees, the House Report noted that "[m]ost of the people who would qualify as 'confidential' employees are executives and are excluded from the act in any event." H.R. Rep. No. 245, p. 23 (emphasis added). We think the inference is plain that "managerial employees" were paramount among this impliedly excluded group. The Court of Appeals in the instant case put the issue well: "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. In other words, Congress failed to enact the portion of Mr.

39. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 35 (1947). The accuracy of the latter statement is questionable. The Board had generally held only that such employees could not be included in bargaining units with other employees. See, e.g., Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946); Murray Ohio Mfg. Co., 61 N.L.R.B. 47, 57 (1945) (time-study men who set wage rates); The Babcock & Wilcox Co., 52 N.L.R.B. 900, 903 (1943) (employees of the personnel department and secretaries to executives).
Justice Douglas' Packard dissent relating to the organization of executives, not because it disagreed but because it deemed this unnecessary." 475 F.2d at 491-92. (Footnote omitted.)

The Court's interpretation of the legislative history is subject to criticism for several reasons. The Court's quotation from the House Report regarding the House bill's exclusion of "confidential employees" does not appear to have raised a "plain" inference that the entire Congress had intended to "impliedly exclude" managerial employees. As noted above, the adoption by Congress of the Senate bill's narrow definition of the term "supervisor" implies a rejection of the House bill's broad definition of that term, including its reference to "confidential employees." It is more reasonable to suppose that Congress thereby intended also to reject the House bill's broad sub-definition, and exclusion from the Act's coverage, of "confidential employees."

This supposition is not refuted by the Conference Report's exclusion of "confidential secretaries" from the Act's coverage. Common usage suggests that Congress intended the scope of the Conference Report's exclusion to differ markedly from the scope of the House bill's exclusion of "confidential employees." "Confidential secretaries," the term used in the Conference Report, ordinarily denoted in 1947, as it does now, clerical assistants to executives, not executives themselves.

Moreover, since the Conference Report expressly based its exclusion of "confidential secretaries" on "prevailing Board practice," the conferees must have intended the term "confidential secretaries" to bear the same meaning as the Board's term "confidential employees." The Board had clarified its definition of the latter term only the year before. In Ford Motor Co., the Board had stated: "[I]t is our intention to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations." Since the conferees had impliedly excluded those persons "who exercise 'managerial' functions in the field of labor relations" through the earlier reference in the Conference Report to "persons working in the labor relations, personnel and employment departments," it is probable that the conferees intended their term "confidential secretaries," like the Board's

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40. 416 U.S. at 283-84 (footnotes omitted).
41. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1910 (1928); WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 2262 (1950).
43. 66 N.L.R.B. 1317 (1946).
44. Id. at 1322.
45. Id.
term "confidential employees," to signify clerical assistants to labor relations executives.\textsuperscript{47}

Finally, the Court quoted with approval the lower court's conclusion that "Congress could not have supposed that, while 'confidential secretaries' could not be organized, their bosses could be."\textsuperscript{48} The confusion engendered by this statement is due to the implicit equation of such "bosses" with the general class of managerial employees. Though such "bosses" should be excluded from the Act's coverage, it is not necessary to classify them as managerial to accomplish this purpose. As Justice White wrote in dissent:

Perhaps it was clear to Congress that a confidential secretary's superior would be excluded by the Act, but such an individual would either be a confidential employee himself, or a supervisor, or both. We are referred to nothing in the debates or other congressional materials where the category of managerial employees, as distinguished from the class of supervisory employees, a distinction the Board had previously drawn, is discussed.\textsuperscript{49}

C. The Court's Interpretation of Later Board and Court Decisions

Continuing to trace the chronological development of the issue, the Supreme Court stated that "[f]ollowing the passage of the Taft-Hartley Act, the Board itself adhered to the view that 'managerial employees' were outside the Act."\textsuperscript{50} In support of this assessment, the Court cited five Board cases. A close reading of these cases, however, reveals that none was squarely on point. Denver Dry Goods,\textsuperscript{51} Palace Laundry Dry Cleaning Corp.,\textsuperscript{52} and Denton's, Inc.\textsuperscript{53} were simply reaffirmations of the Board's pre-1947 policy of excluding managerial employees from units of other employees. Although the Board stated in dictum in American Locomotive Co.\textsuperscript{54} and Curtiss-Wright Corp.,\textsuperscript{55} that managerial employees "may not be accorded bargaining rights under the Act," its holdings


\textsuperscript{48} See note 40, supra, and text accompanying.

\textsuperscript{49} 416 U.S. at 306-07 (footnote omitted).

\textsuperscript{50} Id. at 285.

\textsuperscript{51} 74 N.L.R.B. 1167 (1947).

\textsuperscript{52} 75 N.L.R.B. 320 (1947).

\textsuperscript{53} 83 N.L.R.B. 35 (1949).

\textsuperscript{54} 92 N.L.R.B. 115, 117 (1950) (dictum).

\textsuperscript{55} 103 N.L.R.B. 458, 464 (1953) (dictum).
there were no broader than in the first three cases. In both of the latter cases, the Board excluded buyers, because of their managerial status, from a unit of office and clerical employees.\textsuperscript{56} None of the five cases authoritatively addressed the question whether managerial employees could form separate bargaining units under the Act.

The Court then discussed \textit{Swift & Co.},\textsuperscript{57} where the Board had considered, for the first time, a petition for a separate unit of managerial employees. In refusing to approve a separate unit of buyers, the Board concluded:

\begin{quote}
It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act.\textsuperscript{58}
\end{quote}

But to view this case as the affirmation of a "long-held" Board policy, as the Court described it,\textsuperscript{59} is to overlook the significant precedent setting nature of this decision. Prior to \textit{Swift}, the Board had held several times that managerial employees were "employees" within the meaning of section 2(3) of the Act.\textsuperscript{60} But on the question of the independent bargaining rights of managerial employees, the Board had had occasion to speak only in dictum. Thus, \textit{Swift} was not the routine affirmation of a well-settled policy; rather, it was the institution of a new policy.

Continuing its analysis of \textit{Swift}, the Court left the impression that the Board had frequently applied this policy over the succeeding 15 years. After quoting the \textit{Swift} holding, the Court stated that "[u]ntil its decision in \textit{North Arkansas} in 1970, the Board consistently followed this reading of the Act," and added that the \textit{Swift} reading of the 1947 amendments "has also been approved by courts without exception."\textsuperscript{61} Indeed, in many of the cases cited by the Court,\textsuperscript{62} the Board or appellate court had cited \textit{Swift} in support of its holding.\textsuperscript{63} However, all of these

\textsuperscript{56} The dissent in the instant case, as well as the majority, erroneously interpreted the Board's holding in \textit{American Locomotive} as "rejecting the inclusion of buyers in an office and clerical employees unit or their placement in a separate bargaining unit . . . ." 416 U.S. at 308 (dissenting opinion) (emphasis added). In fact, the Board there did not, and, because the question was not presented, was in no position to, reach the latter conclusion. Moreover, in support of its dictum that managerial employees were not covered by the Act, the Board cited Wise, Smith & Co., 83 N.L.R.B. 1019, 1021 n.6 (1949), and Westinghouse Electric Corp., 89 N.L.R.B. 8, 14 (1950), cases which involved only the appropriateness of including managerial employees in rank-and-file units. 92 N.L.R.B. at 117 n.7.

\textsuperscript{57} 115 N.L.R.B. 752 (1956).

\textsuperscript{58} \textit{Id.} at 753-54 (footnote omitted).

\textsuperscript{59} 416 U.S. at 287.

\textsuperscript{60} See note 15, \textit{supra}, and text accompanying.

\textsuperscript{61} 416 U.S. at 287-88.

\textsuperscript{62} \textit{Id.} at 287-88 n.14, 288-89.

\textsuperscript{63} In many other cases, the dissent pointed out, the Board had excluded manage-
cases had involved merely the exclusion of managerial employees from units of other employees, and hence the citations to Swift were inapt. Until the instant case in 1971, the Board was not confronted with another application for a separate unit of managerial employees and thereby put in a position directly on point with Swift. Faced squarely with the issue, the Board chose to reject Swift's holding. Thus, the policy instituted in Swift was never expanded beyond its limited application to Swift's buyers.64

D. The Court's Reliance on the 1959 Congress' Purported Silent Approval of Swift

Finally, the Court stated that "it was this [Swift] reading which was permitted to stand when Congress again amended the Act in 1959. 73 Stat. 519."65 The Court was applying the rule of statutory construction enunciated at the start of its opinion: that Congress' failure, in reenacting a statute, to "revise or repeal" the "longstanding interpretation" placed on it by the agency charged with its administration is "persuasive evidence that the interpretation is the one intended by Congress."66 The Court was interpreting Congress' failure to revise or repeal Swift in the Labor-Management Reporting and Disclosure Act of 195967 as an endorsement of the Board's reading of the 1947 Congress' intent reflected in Swift.68

The Court's reliance on this rule of legislative action by inaction appears to be misplaced. Previously, the Court had seldom resorted to the rule, applying it when necessary with great caution.69 "[T]he

64. Indeed, the same year it was decided, Swift was interpreted by the D.C. Circuit on petition for rehearing to be applicable only to buyers who were acting as agents of their employer. The court found that buyers for meat markets were "so identified with employee and Union activity as to be within the statutory meaning of 'employees' for purposes of section 8(b)(4)(A)." Amalgamated Meat Cutters v. NLRB, 237 F.2d 20, 27 (D.C. Cir. 1956), cert. denied, 352 U.S. 1015 (1957).
65. 416 U.S. at 288.
66. Id. at 275.
68. Here, as elsewhere in its opinion, the Court adopted the reasoning of Chief Judge Friendly in the Court of Appeals below, 475 F.2d at 493-94.
69. Professors Hart and Sacks, in a comprehensive and insightful study, questioned the constitutionality and wisdom of this rule. Observing that proponents of the rule viewed Congressional inaction in the face of an agency or court interpretation of a statute as amounting to enactment of the interpretation into law, they asked: "But how could Congress do this without complying with the Constitutional prerequisites for the enactment of bills? . . . Can Congress circumvent the President's veto power?" 2 H. HART & A. SACKS, THE LEGAL PROCESS 1395 (tent. ed. 1958).
doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions," the Court had said in *Jones v. Liberty Glass Co.* The Court's misgivings about the rule generally stemmed from the difficulty of ascertaining whether approval of the prior judicial or administrative interpretation had in fact been Congress' reason for remaining silent. In the words of Justice Frankfurter, "To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. Congress may not have had its attention directed to an undesirable decision . . . ." The Court expressed a similar concern in the more recent case of *Zuber v. Allen*:

The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. "It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946). Its significance is greatest when the area is one of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme. . . . Where, as in the case before us, there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence, let alone the approval discerned by the dissent.72

The professors also noted that application of the rule of legislative acquiescence presumed, on Congress' part, a knowledge of the prior agency or court interpretation and a duty to consider every question of public policy decided by the agency or court in question. Such knowledge, they said, was often highly speculative and the duty, impossible to discharge, probably non-existent as to any agency or court. *Id.* As the Supreme Court had declared in *Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1948):

> We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation. In short, the original legislative language speaks louder than such judicial action.

Finally, the two scholars ruminated about the implications of widespread application of the rule:

> Think about the potential sweep of a doctrine of legislative action by not acting. It can be extended, can it not, beyond the mere prohibition of overruling of an outstanding decision or line of decisions to an inhibition against any kind of creative development of the law by the courts at all?

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Nothing cited in *Bell Aerospace* indicates that the 1959 Congress' silence as to *Swift* was based on an awareness of the *Swift* decision, let alone an approval of it. As the dissent observed, "The 1959 amendments dealt with secondary boycotts and picketing, and we are cited to nothing suggesting that the attention of Congress at that time was directed to or focused on the question whether managerial employees were covered or excluded in the statute." Nor is the administration of the National Labor Relations Act an "area . . . of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme." Congress has amended the Act only five times in the 40 years since its enactment; during the same period, Congress enacted numerous modifications annually in the tax laws.

Examination of the Statute suggests that, contrary to the Court's presumption, Congress "re-enacted . . . without pertinent change" neither the entire Act nor those of its provisions defining the scope of its protections when Congress passed the Labor-Management Reporting and Disclosure Act of 1959. Rather, this legislation amended provisions of the Act relating to secondary boycotts and picketing. The legislative materials do not indicate that Congress, prior to passing the 1959 amendments, undertook a study of the administration of the Act so broad as to raise an inference that it had considered and acquiesced in the *Swift* decision's exclusion of managerial employees from the Act's coverage.

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74. 416 U.S. at 310.
78. 416 U.S. at 275, 288.
The Court's use of this rule of statutory construction was premised on the notion that the Board's interpretation in *Swift* of the 1947 Act's definition of "supervisor" was a "longstanding" one. In fact, only three years elapsed between the announcement of the Board's interpretation in 1956 and the passage of the legislation which the Court believed silently endorsed that interpretation. In addition, not once during that brief period (or since) did the Board announce a decision involving the same interpretation. The cases cited by the Court as authority for the proposition that "a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration," employed the term "longstanding" to denote a period far longer than three years, and one punctuated with frequent agency references to the interpretation.

In applying the controversial rule of legislative silence, the Court appears to have overlooked an important countervailing rule. The Board, like the Court, may overrule its own prior interpretation of the Act, provided that the new interpretation accords with the broad purposes of the Act and provided also that Congress has not expressly adopted the prior interpretation in the meantime. Here Congress had not expressly enacted the holding of *Swift*, and the Board's rejection of that holding in the present case at least arguably conformed to the fundamental purposes of the Act. Thus, as the dissent observed, "That the Board now refuses to follow its prior precedents is no reason to overturn it . . . ." If weight is to be given to the interpretation placed on the Act by the agency charged with administering it, it should not be given wholly to the earlier, less carefully considered, of two opposing interpretations.

By emphasizing the *Swift* interpretation of the 1947 amendments and the 1959 Congress' possible acquiescence in it, the Court tended to draw attention away from a more reliable indicium of legislative intent: the face of the Act, which, in itself, was persuasive evidence that the

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Acquiescence in the exclusionary decision of *Swift* is even harder to argue given the Senate's eagerness to *expand* the coverage of the Act by approving a provision exempting "service assistants" in the communications industry from the definition of supervisor. § 704, S. 1555, 86th Cong., 1st Sess. (1959) (as passed by Senate).

82. 416 U.S. at 275.
83. *Id.* at 275 n.5.
87. *See* text accompanying notes 131-35 *infra*.
88. 416 U.S. at 310.
Board's decision in *Bell Aerospace* was "a permissible construction of the statute." Placed in context, the evidence becomes compelling. The coverage of the 1935 Act was expansive; its protections were expressly extended to "any employee . . . ." Early Board decisions recognized that managerial employees, a category distinct from supervisors, were "employees" within the meaning of section 2(3). In 1947, Congress amended and re-enacted this section, adding "supervisors" to the clearly denominated classes of employees expressly exempted from the coverage of the Act. None of the amendments nor their legislative history mentioned managerial employees. That Congress, in excluding supervisors, took great care to define the term to encompass only certain types of workers in positions of authority, strongly suggests that it would have excluded managerial employees with equal specificity had it intended to do so.

III

THE COURT MISCONCEIVED THE CONSEQUENCES OF UNIONIZATION

Perhaps the greatest flaw in the Court's opinion, however, was not its construction of a particular provision of the National Labor Relations Act, but rather the failure to relate the issue involved to the policies that underlie the Act. Only by footnote, in an attempt to derive the legislative intent of the 1947 Congress, did the Court make several assumptions concerning the consequences of permitting managerial employees to organize under the Act. The Court stated that unionization would divide the loyalties of managerial employees, thereby undermining the adversary relationship between management and labor. It suggested that unionization of managerial employees would facilitate employer interference with the union activities of rank-and-file employees. Finally, the Court evinced a concern that unionization would dull the initiative and ability which had propelled managerial employees into their positions of responsibility.

A. Dividing the Loyalties of Managerial Employees

The National Labor Relations Board warned in 1943, for the first and perhaps only time, that to permit certain employees to unionize would blur the distinction between management and labor, which exists at the heart of the federal regulatory scheme. In *Maryland Drydock*

89. *Id.*
91. 416 U.S. at 281-82 n.11, 284-85 n.13 & 288-89 n.16.
Co. the Board expressed the fear that, once organized, even in a separate unit, the foremen would ally themselves with the rank and file, thus depriving the employer of completely loyal and trustworthy representatives. Chairman Millis, in dissent, pointed out that the same predictions, made some years earlier by opponents of unionization in connection with the organizing of rank-and-file employees, had not come to pass.

Two years later, the Board reversed its position and, in approving a separate bargaining unit of foremen, adopted Chairman Millis' reasoning. The Supreme Court upheld the Board in Packard Motor Car Co. v. NLRB, but three dissenting justices, in an opinion by Justice Douglas, breathed new life into the opposing Maryland Drydock rationale:

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

In Bell Aerospace, a majority of the Supreme Court for the first time adopted this view. In a footnote, the Court stated:

Extension of the Act to cover true "managerial employees" would indeed be revolutionary, for it would eviscerate the traditional distinction between labor and management. If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly.

One can appreciate the Court's concern for preserving the adversary system of labor relations embodied in the Act and can agree that "[O]nce vice-presidents, managers, superintendents, foremen all are unionized, management and labor will become more of a solid phalanx than separate factions in warring camps." But in assessing the likelihood that such a development would follow the unionization of

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92. 49 N.L.R.B. 733 (1943).
93. Id. at 746. See Comment, 55 Yale L.J. 754, 769 (1946).
96. Id. at 494.
98. Id. at 278, quoting Packard Motor Car Co. v. NLRB, 330 U.S. 485, 494 (dissenting opinion).
managerial employees, it is important to recognize that the range of employees benefitted by the Board's decision in Bell Aerospace would have been far narrower.

Superintendents and foremen would have been excluded from the Act's coverage as supervisors under the 1947 amendments. Most vice-presidents and managers would have been excluded as super-supervisors or labor relations personnel. Other executives whose duties included even indirect, marginal involvement in the formulation or execution of the employer's labor relations policies would have been excluded from the Act's protections under the conflict-of-interest test formulated by the Board in Bell Aerospace. The exclusionary sweep of that test was potentially great:

For instance, a corporate representative, charged with the duty of determining where an employer's plants should be located or what capitol expenditures a corporation ought to make, may well have such broad managerial discretion as to necessarily involve the determinations of matters affecting employment and employment policies that he should be excluded from coverage . . . .

A like analysis might also dictate the exclusion of those bearing primary responsibility for determination of financial policies, or even those charged with the direction of basic policies in the field of research and development . . . .

Left protected by the Act and subject to the Court's prediction would have been the sharply defined but nonetheless populous group of employees who exercised discretion in formulating, as well as in executing, their employer's policies and performed duties which could not conflict with their participation in union activities.

100. Id.
101. The number of managerial employees can only be roughly estimated as neither the Board nor any other agency keeps a running total of workers so denominated. In addition, since the Board's application of the term cuts across occupational lines, adding up the national census totals for every occupation, some of whose members were found in a particular case to be managerial employees, would not render an accurate account. See note 1 supra. Quotation of some of these totals, however, will indicate the upper limits on the population of managerial employees.

In 1970, the nation's labor force included 6,463,000 "managers and administrators," not including "foremen" or any administrative personnel who might fit the census-takers' definitions of "clerical workers" and "professional, technical and kindred workers." "Buyers, purchasing agents, and sales managers," a subgroup of "managers and administrators," numbered 820,000. There were 990,000 "sales representatives" for manufacturing industries and wholesale trade, and 1,302,000 engineers. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 352-56 (95th ed. 1974). The 1970 labor force also included 491,000 "accountants and auditors" and 112,000 "editors and reporters." 4 U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1737, TOMORROW'S MANPOWER NEEDS 17-20 (rev. ed. 1971).

By way of comparison, it might be noted that one category of employees to which
With respect to managerial employees, the Court's forecast is premised largely on the notion that unionization would lead such employees to become disloyal to their employer. The concern is that, if permitted to organize, managerial employees might disserve their employer in their relations with his other employees. They might also, in service to the bargaining strategy of their union, cease performing faithfully their employment duties.

Given the limited class of managerial employees that would be permitted to organize, the likelihood is small that the first of these suppositions would prove correct. Managerial employees passing the Bell Aerospace conflict-of-interest test lack, by definition, the capacity to represent their employer disloyally in dealings with other employees. These managerial employees, unlike supervisors, labor relations personnel, confidential employees, and those managerial employees failing the conflict-of-interest test, do not act, even indirectly, on behalf of their employer in labor relations matters. Thus, they are never in a position to subordinate their employer's interests to those of their fellow employees.

A union representing managerial employees might, of course, actively support the concerted activities of a rank-and-file union at the same company—by refusing to cross its picket lines, for example—in the hope that the latter would reciprocate in the event of a labor dispute between the employer and the managerial employees. But the very dearth of common interests which causes the Board to exclude managerial employees from units of rank-and-file employees would most likely inhibit the two classes from making frequent or lasting alliances. Indeed, particularly in the case of a small employer operating on a tight budget, the managerial employees might find themselves competing, rather than collaborating, with the rank-and-file employees for concessions from the employer. Even if inter-union cooperation were the norm, it is difficult to understand why the prospect of managerial employees exchanging support for bargaining activities with rank-and-file employees should seem any more threatening to the "traditional" distinction between labor and management than the present day reality of frequent tactical alliances between, for instance, professional employees and rank-and-file employees of the same company.

Congress has accorded special protective treatment under the Act, "guards and watchmen," numbered in 1970 only 312,000. U.S. Bureau of the Census, supra.

102. Underlying the discussion which follows is the assumption that, absent the Supreme Court's reversal of the Board in Bell Aerospace, conflict-of-interest considerations would have impelled the Board to confine the bargaining rights even of those managerial employees passing its Bell Aerospace test to the right to form bargaining units separate from those of other employees and represented by unions not affiliated with those representing other employees of the same employer.
The Court's prediction that the unionization of managerial employees would erode the adversary relationship between management and labor also hinges implicitly on the supposition that managerial employees, once unionized, would divide their on-the-job allegiance between employer and union. But, as Justice Jackson wrote for the Court in Packard:

There is nothing new in this argument. It is rooted in the misconception that because the employer has a right to wholehearted loyalty in the performance of the contract of employment, the employee does not have the right to protect his independent and adverse interest in the terms of the contract itself and the condition of work. But the effect of the National Labor Relations Act is otherwise . . . .

The National Labor Relations Act, coupled with the Norris-LaGuardia Act, deprived employers of their ability to exact from their employees a loyalty so absolute as to preclude them from participating in union activities. These statutes did not diminish the employer's power to discipline employees who failed to perform their duties fully and faithfully. They did, however, protect from employer reprisals any employee participating in concerted activities in support of collective bargaining demands. Had the Court affirmed the Board's decision in Bell Aerospace, certain managerial employees would have been entitled to this protection of their economic interests, but within the same bounds that constrain other employees in their concerted activities.

Much energy has been expended establishing the limits on the protection section 7 affords concerted activities. The Board and the courts have refused to order reinstatement of employees discharged for unlawful activities, violent activities, and activities in breach of contract, even though related to a labor dispute.

More recently, in NLRB v. Int'l Bhd. of Elec. Workers Local 1229 (Jefferson Standard), the Supreme Court held unprotected, as "disloyal" behavior, the public distribution by picketing employees of leafletting.
lets disparaging the quality of their employer's product. The Court also agreed, arguendo, with the Board that the concerted temporary refusal of district insurance agents to solicit new business, comply with the employer's reporting procedures, attend employer-arranged business conferences, and perform customary duties constituted unprotected activities punishable by discharge.

To reduce further the opportunities for certain employees to take advantage of their positions to pressure the employer improperly, the Board regularly excluded from units of other employees all employees who acted for management in labor relations matters. Toward the same end, Congress in 1947 amended the Act to withhold its protections from supervisors.

In theory, the system of federal regulation protects the employee's right to bargain collectively for favorable conditions of employment and the employer's right to demand that his employees discharge their job responsibilities faithfully. Experience under the system has vindicated the theory. Employers have stated that they were wrong in their earlier predictions that unionization would diminish the fidelity and productivity of rank-and-file employees. And a mid-1950's survey by researchers at the New York State School of Industrial and Labor Relations indicated that employees also viewed their loyalty to union and management as dual, not divided.

Are managerial employees who pass the Bell Aerospace conflict-of-interest test any more prone to disloyalty than rank-and-file employees? Though the Court did not address this question one can speculate as to its answer. Because their duties involve formulating as well as effectuating the employer's policies, managerial employees may feel that they have a greater stake than other employees in the success of the employer's enterprise. As a result, they may be less inclined to jeopardize the enterprise through concerted on-the-job disruptions. Like managerial

employees, they exercise judgment and discretion, albeit only in executing policies established by others. Nonetheless, employers have not agitated for exclusion of professional employees from the Act on the ground that their discretionary duties make them especially prone to disloyalty.116

While it may be theorized that by virtue of their policy making responsibilities, managerial employees are capable of inflicting on their employer far greater damage, surreptitiously, than either rank-and-file or professional employees, several factors undermine this proposition. For one thing, managerial employees are no more likely than other organized employees to keep their concerted activities secret. To be effective as a weapon for pressuring the employer, a concerted activity by any group must be revealed, if not publicly, at least to the employer. In addition, managerial employees, as employees, are not exempt from the constant scrutiny of supervisors.

Upon learning of a seriously disruptive or damaging on-the-job activity by his managerial employees, an employer would most probably discharge them. It is equally certain that the Board would hold any such activity to be unprotected by Section 7 and would refuse to order the employees reinstated. The Board's record of declaring unprotected any concerted activity involving even a hint of sabotage117 suggests that it would not hesitate to deal harshly with the wasting of corporate assets, the defrauding of the employer in his relations with third parties, the divulging of the employer's trade secrets or confidential plans, or any other improper activity peculiarly within the capacity of managerial employees. The likelihood of discovery by the employer and disapproval by the Board would undoubtedly deter managerial employees, as they presently deter other organized employees, from engaging in disobedient or disruptive activities.

It is also questionable whether many managerial employees passing the Board's conflict-of-interest test would be in a position to participate in disruptive concerted activities any more damaging to their employer than the protected activities in which all employees may participate. In light of the pitfalls of attempted executive-level sabotage, one would

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116. Absent from the legislative history of either the Labor-Management Relations Act, ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 144-87 (1970)), in which Congress first provided specifically for protection of professional employees, see National Labor Relations Board, Legislative History of the Labor Management Relations Act, 1947 (1948), or any of the enactments amending the National Labor Relations Act since 1947, see note 76 supra; see also Hearings on the Administration of the Labor Management Relations Act by the National Labor Relations Board Before the Subcomm. on the National Labor Relations Board of the House Comm. on Education and Labor, 87th Cong., 1st Sess. at 641-74 (1961); is any expression or implication of employers' or others' dissatisfaction with the union activities of professional employees under the National Labor Relations Act.

117. See notes 107-12, supra, and text accompanying.
expect managerial employees to view strikes and boycotts as their most effective means of pressuring the employer in collective bargaining. There is no reason to assume that such well-established, protected activities would prove any more damaging to the employer when executed by managerial employees than when executed by rank-and-file employees.

Finally, the largely unblemished record of organized plant guards supports the conclusion that unionization would not divert managerial employees from the faithful performance of their duties. In the early years after passage of the Act, many employers expressed the fear that the organization of plant guards, who, like managerial employees, control the employer's most valuable assets, "would divide the allegiance of these employees and undermine plant discipline and security."

Later these employers admitted that their plant guards had "not performed their tasks any less faithfully or efficiently because of their organization in a collective bargaining unit."

B. Threatening Rank-and-File Union Activities

In another footnote, the Court stated that the Board had followed a policy of excluding managerial employees "from the protections of the Act . . . on the theory that they were the one[s] from whom the workers needed protection." Implicit in this statement was the belief that managerial employees, if permitted to unionize, would interfere on behalf of their employer with the bargaining activities of the rank and file.

The Board had long excluded managerial employees from rank-and-file units to ensure that such units comprised employees with common employment interests and to protect the rank and file from employer interference in their union activities. But, as argued in Part I of this Note, the Board had not developed the broader policy, attributed to it by the Court, of excluding managerial employees "from the protections of the Act." Had it developed such a policy, it is not likely the Board would have based it "on the theory that [managerial employees] were the one[s] from whom the workers needed protection." Supervisors and labor relations personnel, possessing the power to coerce the rank and file, were the employees from whom the rank and file needed their greatest protection, and they had been excluded from the Act's coverage by statute and Board practice. Also, in the brief period since the Board's decision in North Arkansas, managerial employees whose duties

119. Id.
might have conflicted with their participation in a labor organization, were likewise excluded from the Act's coverage.

Those managerial employees who survived this winnowing process posed little threat to the rank and file for they lacked any opportunity or authority to interfere with the latter's bargaining activities. Indeed, such managerial employees were probably as estranged from executive decision making and as vulnerable to coercion by the employer as were rank and file employees.

C. Stifling Ambition and Productivity

Finally, the Court footnoted a paragraph in the House Report on the 1947 amendments to the Act stating that the unionization of supervisors, and, by the Court's implication, managerial employees as well, would dampen their initiative and ambition and thus hinder the country's productivity:

"It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the leveling processes of seniority, uniformity and standardization that the Supreme Court recognizes as being fundamental principles of unionism. (J.I. Case Co. v. National Labor Relations Board, 321 U.S. 332 (1944).) It is wrong for the foremen, for it discourages the things in them that made them foremen in the first place. For the same reason, that it discourages those best qualified to get ahead, it is wrong for industry, and particularly for the future strength and productivity of our country." H.R. Rep. No. 245, 80th Cong., 1st Sess. 16-17 (1947).121

The House Report did not reveal any factual basis for the House Committee's contention that unionization stifled ambition and ability in employees and productivity in industry. More importantly, the Committee did not reconcile its conclusions with the fact that supervisors were, and are, frequently selected, on the basis of initiative and ability, from the ranks of unionized employees. If the supervisors thus demonstrated, while they were members of a union, "the things in them that made them foremen in the first place," it is difficult to reach the conclusion advanced by the Committee and endorsed by the Court as to the adverse effect of unionization.

It should also be recognized that to the same extent that an employer may count on his employee's complete fidelity in the fulfillment of his job responsibilities, the employee may count on freedom from union control. The employee's allegiance to the union, as against the employer, is limited to certain matters relating to the terms and

121. 416 U.S. at 281-82 n.11.
conditions of employment and does not extend to the performance of job duties. Thus, if the "leveling processes" which the House Committee and the Court attributed to unionization cannot operate on the employee during the performance of his duties—the time when he will nurture and exercise whatever initiative and ability he possesses—they are not likely to stifle his development of such traits.

Finally, if unionization checks ambition and "discourages those best qualified to get ahead," one would expect to find Congress, or at least the House Committee, excluding professional employees from bargaining rights under the Act. Indeed, the main function of most professional employees is to take initiative and exercise discretion. Yet, in the same enactment in which it excluded supervisors from the Act's coverage, Congress, partially in reliance on the recommendation of the House Committee, expressly provided for the protection of professional employees by the Act. Based upon the experience of these employees, there is little evidence to suggest that the Court's concern with the "leveling processes" of unionization would prove any more valid with respect to managerial employees.

D. Creating a Hybrid Class of Employees

One commentator recently suggested a fourth undesirable consequence of the unionization of managerial employees: the creation of a "hybrid class of workers which might cause conceptual problems in the application of the Act." He elaborated:

For example, a managerial employee who supports the union in a representation election might be exercising protected rights as an employee, while at the same time committing an unfair labor practice as a representative of the employer for improperly influencing the election's outcome. The Act itself provides no method for dealing with this type of conflict.

Justice Douglas had voiced a similar concern regarding supervisors in his Packard dissenting opinion.

Prior to the exclusion of supervisors from the Act's coverage in 1947, such a concern was justified in the case of a supervisor participating in or attempting to influence the union activities of rank-and-file employees. Though the Board had earlier observed, as the commen-

125. Id. (footnote omitted).
127. The case which the commentator cited as authority for his contention involved such a situation. See Wells, Inc., 68 N.L.R.B. 545 (1946).
tator acknowledged, that the hybrid problem could be avoided if the employer ordered his supervisors to refrain from engaging in non-neutral activities during rank-and-file organizing campaigns, this solution would have been ineffective where supervisors sought to organize themselves.\textsuperscript{128}

Alternative solutions to this problem, however, were not impossible to formulate. The Board had found little difficulty in protecting both the supervisors' right to unionize and the employer's right to preserve his neutrality "when facts [of the case were] taken into consideration."\textsuperscript{129} If careful fact finding could not have cured the hybrid problem, the Board could have ruled that employers were liable for the acts of supervisors, when organizing themselves, only if they had authorized or ratified the acts.\textsuperscript{130}

As applied to managerial employees, however, the hybrid problem seems of far less concern. If managerial employees could act on behalf of their employer in labor relations matters, the Board actions described above would probably resolve whatever hybrid difficulties might arise. But, in fact, those managerial employees who are not excluded from the Act's coverage as supervisors or labor relations personnel and who would not have been excluded under the \textit{Bell Aerospace} conflict-of-interest test lack, by definition, the capacity to represent the employer in labor relations matters. Without such capacity, their participation in union activities, whether their own or those of the rank-and-file, could not constitute an unfair labor practice.

\textbf{E. Effectuating the Basic Purposes of the Act}

The Court failed even by footnote to explain how its holding would give effect to the fundamental purposes of the National Labor Relations Act. Principal among those purposes is to "[encourage] the practice and procedure of collective bargaining and . . . [protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ."\textsuperscript{131}

Significantly, this declaration of policy is not limited to "rank-and-file workers" or to "such workers as are expressly provided for in this Act." It is applicable to all persons who can be characterized by the unmodified term "workers." A similarly expansive meaning is given to the term "employee." Section 2(3) of the Act defines that term as "any

\textsuperscript{129} Union Collieries Coal Co., 41 N.L.R.B. 961, 965 (1942), quoting NLRB v. Skinner & Kennedy Stationery Co., 113 F.2d 667, 671 (8th Cir. 1940).
\textsuperscript{130} See R.R. Donnelly & Sons Co., 60 N.L.R.B. 635 (1945), enforced, 156 F.2d 416 (7th Cir. 1946); B.F. Goodrich Co., 64 N.L.R.B. 1303, 1308 (1945).
\textsuperscript{131} NLRA § 1, 29 U.S.C. § 151 (1970).
employee . . . ,” not including several carefully delineated categories of employees.132 Both the policy declaration and the definition of “employee” leave the clear impression that Congress intended the Act to protect the collective bargaining rights of all employees, regardless of description, except those in certain expressly exempted categories. Yet, the Court in Bell Aerospace held that managerial employees, not an expressly exempted group, were not covered by the Act.

The Court here also departed from its longstanding policy, established in deference to the Board’s unique competence in this area, of granting the Board broad discretion in determining the scope of the term “employee.” Ever since its decision in NLRB v. Hearst Publications, Inc.,133 the Court has consistently stated that it would accept any such determination by the Board which had “‘warrant in the record’ and a reasonable basis in law.”134 In Bell Aerospace, however, the Court refused to apply this standard to the Board’s determination that managerial employees passing its conflict-of-interest test were “employees” within the meaning of section 2(3) of the Act. As Justice White commented in dissent:

There is no reason here to hamstring the Board and deny a broad category of employees those protections of the Act which neither the statutory language nor its legislative history requires simply because the Board at one time interpreted the Act—erroneously it seems to me—to exclude all managerial as well as supervisory employees.135

IV

THE COURT DISENFRANCHISED A MULTITUDE

The Court’s strained construction of relevant portions of the Act and its misconception of the consequences that would attend unionization of managerial employees establish grounds for a Congressional reversal of Bell Aerospace. But whether corrective action is actually needed to carry out the purposes of the Act depends, first, on the scope of the decision’s exclusionary effects and, second, on the probability that the excluded employees would exercise their bargaining rights if the decision were overturned.

A. The Decision’s Exclusionary Impact

The Supreme Court held in Bell Aerospace that Congress had intended to deny the Act’s protections to all managerial employees, not

133. 322 U.S. 111, 131 (1944).
135. 416 U.S. at 311.
just to those whose participation in a labor organization would give rise to conflicts of interest with their job responsibilities. The Court declined, however, to determine whether the Bell buyers were managerial employees. Instead, it remanded the case to the Board "to apply the proper legal standard" in determining their status.\textsuperscript{136} Although the Court left to the Board the framing of the standard as well, it footnoted\textsuperscript{137} its approval of the Board's definition of "managerial employees" in \textit{Eastern Camera & Photo Corp.}\textsuperscript{138} 140 N.L.R.B. 569 (1963). In that case, the Board had stated:

The Board has defined managerial employees as those who formulate, determine, and effectuate an Employer's policies. . . . [T]he determination of an employee's "managerial" status depends upon the extent of his discretion, although even the authority to exercise considerable discretion does not render an employee managerial where his discretion must conform to the employer's established policy.\textsuperscript{139}

Prior to its own decision in \textit{Bell Aerospace}, the Board occasionally had applied the \textit{Eastern Camera} standard in deciding whether to exclude certain employees, alleged to be managerial, from rank-and-file units.\textsuperscript{140} Almost simultaneously with the issuance of the Supreme Court's decision in \textit{Bell Aerospace}, however, the Board announced a significant narrowing of the \textit{Eastern Camera} standard. In \textit{Boston After Dark, Inc.},\textsuperscript{141} the Board indicated that it would thereafter exclude from rank-and-file units, as managerial, only those employees who formulated, determined, and effectuated their employer's \textit{labor relations} policies or whose exercise of discretion could create conflicts of interest with their participation in a labor organization.

After the Supreme Court's decision in \textit{Bell Aerospace}, the Board reverted to the unmodified \textit{Eastern Camera} standard.\textsuperscript{142} Thus, whatever impact the Supreme Court's decision may have on the rights of

\begin{footnotes}
\item[136] 416 U.S. at 289-90. On remand, the Board held that the buyers were not "managerial employees" under the \textit{Eastern Camera} standard. Bell Aerospace Co., Div. of Textron, Inc., 219 N.L.R.B. No. 42, 89 L.R.R.M. 1664 (July 23, 1975).
\item[137] Id. at 290 n.19.
\item[138] 140 N.L.R.B. 569 (1963).
\item[139] Id. at 571 (footnotes omitted).
\item[141] 210 N.L.R.B. 38, 41-42 (1974).
\end{footnotes}
allegedly managerial employees to form separate bargaining units under the Act, it has already caused the Board to resume excluding from rank-and-file and professional units employees to whom, it had indicated only recently, it would accord protection.

Nevertheless, the Board has demonstrated a welcome inclination to continue extending the protections of the Act to as many workers as possible. In several recent cases, including Bell Aerospace on remand,\textsuperscript{143} it carefully examined the job responsibilities of each challenged class of employees and frequently included in the bargaining units those classes exercising arguably managerial duties. The Board by implication limited the Eastern Camera standard in Westinghouse Broadcasting Co. (WBZ-TV)\textsuperscript{144} so that even employees who exercised discretion independent of their employer's established policies would not be deemed managerial if their discretionary actions were subject to a superior's approval. The Board also established that it would not label as managerial those professional employees who exercised discretion in making professional judgments, as long as their actions affected the company's direction only occasionally or indirectly.\textsuperscript{145}

In other cases, the Board indicated that it would not only include arguably managerial employees in units with other rank-and-file employees, but that it would also allow such employees to form separate units.\textsuperscript{146}

Notwithstanding these attempts to narrow the definition of "managerial," it is apparent that the application of the Eastern Camera standard will exclude from the Act's protections numerous employees for whose exclusion no independent policy justification can easily be found. Buyers excluded from a rank-and-file unit as managerial employees will now be denied all bargaining rights under the Act, despite a Board finding that they would have been "entitled to the protections of the Act" if they had chosen to organize separately from the other employ-

\textsuperscript{144} 215 N.L.R.B. No. 26, 11-12, 88 L.R.R.M. 1012, 1015 (Nov. 26, 1974).

The Board's extension of the Act's protection through the strict construction of the term "managerial employee" has not been limited to representation cases. It has adopted the same approach to unfair labor practice cases involving the discharge of employees alleged to be managerial. See Retail Store Employees Local 876, 219 N.L.R.B. No. 187, 90 L.R.R.M. 1113 (Aug. 15, 1975); Lebanon Homes, Inc., 216 N.L.R.B. No. 111, 88 L.R.R.M. 1522 (Feb. 26, 1975). But see Curtis Indus., Div. of Curtis Noll Corp., 218 N.L.R.B. No. 222, 89 L.R.R.M. 1417 (June 30, 1975).
Administrative accountants and price estimators, excluded from both rank-and-file and professional units because of their managerial status, will now be excluded completely from the Act's coverage, even though they perform no duties which could conflict with their participation in union activities.

Many of the pre-Bell Aerospace Board cases excluding certain employees, as managerial, from units of other employees illustrate the difficult choice imposed on the Board by the Supreme Court's decision. In these cases the Board applied a community-of-interest standard, not Eastern Camera's exercise-of-discretion standard, in determining managerial status. Since the duties and employment conditions of the challenged employees clearly distinguished them from the rank and file, their exclusion served the valid purpose of promoting effective bargaining by the rank and file. Grocery store co-managers, for instance, were excluded from a rank-and-file unit, not because they formulated policy and exercised discretion, but because they at times exercised general, non-supervisory authority over the stores, collected salaries rather than wages, did not punch a time clock, and were covered by a different insurance plan from the other store employees.

The Supreme Court's decision in Bell Aerospace means that such differences in employment interests now must deprive the co-managers of the right even to form a separate bargaining unit despite the irrelevance of community-of-interest considerations to the question of protection under the Act. It will be futile for the co-managers to point out that their duties do not place them in a position to disserve either their employer or their fellow employees. Other recent Board cases suggest the same problem.

To be sure, some employees excluded from rank-and-file units as managerial on community-of-interest grounds are in positions to damage the collective bargaining interests of both the employer and the rank and file. A managerial employee possessing many of the same duties and reporting to the same supervisor as a supervisory employee of the same company would fall within this category. Such employees should not be permitted to organize in any way under the Act.

But why should the exclusion of employees with readily identifiable conflicts of interest, in as much as they shape and implement an employer's labor policies, require the exclusion of the many managerial employees who lack the potential to face such conflicts? It was to remedy this injustice that the Board adopted the conflict-of-interest test in *Bell Aerospace*. By reversing the Board, the Supreme Court has presented the Board with a disagreeable choice: either to disregard community-of-interest considerations and exclude fewer employees, as managerial, from rank-and-file units, thereby jeopardizing the bargaining interests of the rank and file; or to continue excluding employees, as managerial, from rank-and-file units on community-of-interest grounds, thereby preventing such employees from organizing in separate units as well.

Given such a choice, the Board will understandably favor the rank and file, for in most cases examining the appropriateness of the bargaining unit they are the most numerous category of employees and the category most in need of the Act's protections. The number of managerial employees thus excluded from the Act's coverage will not be slight. As noted earlier,152 the nation's labor force includes millions of managerial personnel. Buyers, frequently labeled "managerial" by the Board, number in the hundreds of thousands. When even a fraction of the millions of technical engineers, commercial representatives, salesmen, accountants, price estimators, work expediters, assistant managers, public relations workers, and editors are counted, the number of managerial employees who would have passed the Board's conflict-of-interest test but who now will be denied all bargaining rights under the Act becomes so large as to demand legislative action. It certainly exceeds the number of plant guards, a category which Congress thought large enough to provide special protection for in the Act.153

The success of the Board's efforts to keep managerial-employee exclusions to a minimum will depend upon the responses of the Courts of Appeals. The record of judicial review in this area provides some cause for optimism. Although reviewing courts have rarely reversed Board holdings that particular employees were managerial,154 they have also rarely overturned Board determinations that challenged employees were not managerial, particularly during the past 15 years.155 But

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152. See note 101 supra.
because several circuits have yet to be heard from and because the appellate decisions hinge largely on the peculiar facts of each case, this record is no guarantee that the reviewing courts will refrain from expanding the managerial-employee category beyond the limits set by the Board.

B. Managerial Employees' Desire to Organize

One commentator has suggested that managerial employees would not attempt to unionize even if protected by the Act: "[U]nless management were uniformly unionized, managerial employees would probably be deterred from organizing by the detrimental effect that unionization might have on their upward mobility."\textsuperscript{156} If the commentator's concern is with the allegedly "leveling" effects of union membership, it is difficult to share this concern without some evidence offered for its validity.\textsuperscript{157}

If, on the other hand, the commentator's concern is with the "detrimental effect" of participation in initial organizing efforts, it manifests a lack of confidence in the Board's ability to effectuate the basic purposes of the Act. If managerial employees were protected by the Act and sought to unionize, any employer reprisals in the form of limitations on the managerial employees' upward mobility would constitute unfair labor practices. Despite the difficulty of proving such violations, diligent enforcement by the Board would discourage the widespread use of such tactics. While some managerial employees would doubtless be deterred from organizing by the mere possibility of such reprisals, there is no reason to think that their reaction would be uniformly shared throughout industry, particularly by the many managerial employees not concerned with labor relations, such as sales representatives and accountants, who have relatively little upward mobility to lose.

The commentator's argument also fails to appreciate the strength, both economic and psychological, which labor unions can muster amongst any employees seeking to unionize. The earliest rank-and-file workers to organize suffered impediments to their upward mobility far more threatening than the pressure produced by peer-group competition. Yet, with the help of established unions and eventually the protections of federal law, they generated sufficient solidarity and strength to force their employers to recognize their right to bargain collectively. It should not be assumed that most managerial employees,

\textsuperscript{156} The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 264 n.39 (1974).
\textsuperscript{157} See text accompanying notes 121-23 supra.
who would face lesser deterrents and who today could count on the support of a more powerful labor movement and the friendly surveillance of a more vigilant federal regulatory body, would be any less eager to unionize than the rank and file were in the early years of unionization under the Act. Professional employees, who share many duties and employment interests with managerial employees, have exhibited no widespread reluctance to organize under the Act. Moreover, at least one major union which has provided much of the impetus to the organization of professional employees has indicated an interest in organizing managerial employees as well.

C. A Proposal to Blunt the Decision's Impact

It seems clear not only that the Supreme Court's decision in Bell Aerospace will deny the Act's protections to hundreds of thousands of deserving employees, but also that many of these employees eventually would exercise their bargaining rights if enabled to do so. Congress should declare and safeguard these employees' bargaining rights. It should amend the Act in such a way, however, as not to jeopardize the legitimate collective bargaining interests of either employers or rank-and-file employees. Congress could accomplish the task by:

1. Modifying the definition of the term "employee" to include all managerial employees whose duties would not conflict with their participation in union activities. The new definition might read, in relevant part (proposed language underlined):

   "(3) The term 'employee' shall include any employee . . . 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, and any individual employed as a managerial employee whose duties and responsibilities do not include determinations which should be made free of any conflict of interest which could arise if the individual were a participating member of a labor organization, but shall not include any individual employed as an agricultural laborer . . . ."

2. Adding to section 2 a subsection defining the term "managerial employee" much as Eastern Camera did:

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158. See generally Illinois State Journal-Register, Inc. v. NLRB, 412 F.2d 37 (7th Cir. 1969) (certain quasi-managerial employees—"district circulation managers"—recognized as constituting by themselves an appropriate bargaining unit).


(15) The term 'managerial employee' means any individual having the authority to exercise considerable discretion, independent of both a superior's approval and the employer's established policies and regulations, in formulating, determining, or effectuating the employer's policies."

3. Amending section 9(b)\(^{162}\) to instruct the Board not to include managerial employees in units of other employees and to authorize the Board to continue excluding from such units any non-managerial employees whose discretion and divergent employment condition clearly distinguish their bargaining interests from those of the other employees (proposed language underlined):

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not \ldots (4) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a managerial employee; but no labor organization shall be certified as the representative of employees in a bargaining unit of managerial employees if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than managerial employees; Provided further, That the Board may decide that a unit is not appropriate for such purposes if it includes, together with other employees, any individual, not a managerial employee, whose inclusion, because of the individual's discretion and distinct conditions of employment, would prove detrimental to the bargaining interests of the other employees."

Before Congress acts, and in the event that Congress does not act, the Board should take steps to minimize the impact of the Supreme Court's decision in Bell Aerospace. To avoid precluding particular employees from some day organizing in a separate unit merely because their divergent employment interests require their exclusion from a rank-and-file unit, the Board should rely solely on a community-of-interest rationale in ordering such exclusions. It should state in such cases that it is withholding judgment as to whether such excluded employees are "managerial" and thus denied the right to organize even in separate units under the Act. Whatever standard for managerial status the Board applies, it should exclude employees from rank-and-file

units only when absolutely necessary to secure the rights of the rank and file. In particular, the Board should take care not to exclude from either rank-and-file or professional units, as managerial employees, any professional employees whose exercise of professional judgment affects the employer's policies only occasionally or indirectly.

The Board should reserve the Eastern Camera exercise-of-discretion standard for cases involving the right of employees, alleged to be managerial, to organize separately from other employees. Unmodified by the addition of the Bell Aerospace conflict-of-interest test, the Eastern Camera standard does not serve the Act's purposes when applied in such a context, but it is probably the least exclusionary standard applicable under the Supreme Court's decision in Bell Aerospace. The Board should continue to apply the Eastern Camera standard with the utmost caution and solicitude for the bargaining rights of challenged employees.

V

CONCLUSION

The emergence of the large corporation as a dominant force in the American economy is a relatively recent phenomenon. The sheer size of American industry has necessitated the specialization of function and the delegation of duty down an elaborate hierarchy of responsibility. The result has been the rise of a new class of middle-level managers, who share little community of interest with either management or the rank-and-file.

The Board, manifesting its unique competence in the area of labor relations, detected this transformation in organizational structure and attempted to align the fundamental policies of the Act with this new economic reality by interpreting the Act to protect these middle-level managers. Unfortunately, the Court exhibited less perspicacity and reversed the Board, basing its decision on a strained construction of the Act and a misconception of the consequences that would attend unionization of managerial employees.

It would be a serious injustice to dismiss this decision as insignificant because of a presumed apathy on the part of managerial employees toward organization. Available evidence suggests that managerial employees, if permitted, would be as eager to unionize as were the rank-and-file in the early years of unionization under the Act. This decision threatens serious harm to managerial employees and calls for immediate legislative redress if the Act is to continue to serve as a regulatory scheme attuned to the modern realities of labor relations.