

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

11354 SENATE STATE AFFAIRS

11. The NLRB is not applicable to political entities, and for good reason.

The exclusion for confidential employees is based upon case law from the National Labor Relations Board (Board) and existing state regulation. B. F. Goodrich Co., 115 N.L.R.B. 722, 37 L.R.R.M. (BNA) 1383 (1956); 8 AAC 97.990(a)(1). The Board has consistently recognized an exclusion from bargaining for "persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." The Alaska Labor Relations Agency adopted this definition as regulation in 8 AAC 97.990(a)(1); although, rather than exclude these employees from bargaining entirely, the agency requires them to bargain in a separate unit when they are employed by the state. 8 AAC 97.090. Bargaining in a separate unit, however, does not remove the conflict of interest created when a public employer is forced to bargain the wages and working conditions of employees responsible for actually developing and implementing the employer's labor policy. Recognizing this problem, the agency excluded the confidential positions of labor analyst and human resource manager from bargaining completely in State of Alaska v. Confidential Employees Ass'n, Decision & Order No. 157 (04/07/1993). The agency's decision, however, was reversed on appeal, State of Alaska v. Confidential Employees Ass'n, case no. 1JU-93-0656 CI (9/1/1994, as clarified on 10/12/1994), necessitating a legislative solution to the problem.

10. This bill looks to the NLRB for a reason to strip 1500 employees of their collective bargaining rights not because the NLRB has any bearing on this matter, but because there is no Alaska law, regulation or labor relations decisions that support or even suggest that stripping 1500 folks of their collective bargaining rights is right or legal.

The exclusion for managers is based on National Labor Relations Board v. Bell Aerospace Co., 416 U.S. 267, 287-88 (1974). In that case the United States Supreme Court affirmed the Board's longstanding exclusion from bargaining of employees "who formulate and effectuate management policies by expressing and making operative the decisions of the employer." The exclusion was based on the Board's interpretation of Congressional intent.

11. I, and the rest of the supervisors and confidential bargaining unit members urge you to kill this bill with the utmost speed and authority, so it will never see the light of day again.

I urge your prompt and favorable action on this measure.  
Sincerely yours,  
/s/  
Frank H. Murkowski  
Governor

Thank you for his opportunity to testify before your committee.

Bill Quinn  
DOT&PF Supervisor and thankful collective bargaining member  
907-341-3210

**Subject:** HB518 and SB 352

**Date:** Tue, 24 Feb 2004 08:09:19 -0900

**From:** "Tom Reimer" <ttmr2@hotmail.com>

**To:** Kenai\_LIO@legis.state.ak.us, Anchorage\_LIO@legis.state.ak.us,  
Seward\_LIO@legis.state.ak.us

**Please forward this message to any and all legislators or representatives that have any effect on these bills**

*I am an employee of the State of Alaska. I am a mid level manager responsible for the supervision of 500 hundred prisoners and 150 Correctional Officers. I am scheduled to work 37.5 hours a week and I often put in more hours at my desk than scheduled. Additionally I am "on call" for the rest of the day. I am not compensated for any of this "on call" time and am not eligible for overtime. Many of the staff I supervise have a higher annual income than I do.*

*<?xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />*

*I accomplish a public safety job that is governed by the Alaska Statutes, Alaska Administrative Code as well as Departmental Policies & Procedures and facility Standard Operating Procedures. I am familiar with and work within decisions made as a result of court decrees, the National Labor Relations Board as well as any applicable Arbitration decisions as they are published.*

*The tone & text of this bill suggests that as a public employee I should have "undivided loyal" to the politician(s) running the state rather than the laws and statutes that govern them. I have been employed by the State of Alaska for 18 years. My loyalty to my employer, the State of Alaska, has never been in question before now. I have faithfully served under numerous administrations over the past 18 years. As the politicians come and go it is employees and managers such as myself that offer the people of the state and their fellow employees the stability necessary to deliver the public services that they deserve. The public safety sector is often unpopular. Difficult decisions must be made and difficult stands must be taken. These decisions cannot be swayed by a perceived or politically forced loyalty to any political group. These actions must be loyal to the laws and statutes that guarantee every individual the rights and privileges guaranteed under law.*

*At the present time collective bargaining is even more important than ever. The political moves happening within the state make no recognition of the needs of the citizens. The rewarding of jobs to unqualified people as political paybacks is degrading the effectiveness work force. This type of political rewarding by the use of jobs and privileges is dangerous and places employees and citizens at risk. Collective bargaining gives employees a favorable wage & benefit package. With my wage I pay a mortgage and buy food for my family. All the money I take in I spend for needed services. This expenditure of my wage guarantees employment for other Alaskans and their dependents. To be completely honest if I do not work or have less disposable wage I will spend less and that is less money that circulates in the state economy.*

*I urge you to vote against this bill. It sets a dangerous precedent. This will lessen the quality of public services and in some situations lessen the quantity & quality of public safety.*

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# Alaska State Legislature

Please enter into the record my testimony to the Senate State Affairs  
 committee name  
 committee on SB 352, dated 2/24/04  
 bill/subject

I hope you will closely scrutinize the language of this bill & not approve it. Depriving employees of their right to bargain is not right and fair. Additionally, the idea of loyalty being questioned is offensive & supervisors work long & hard hours, not eligible for overtime. Supervisors deserve the same consideration as other classified employees.

Signed: J Pennington Cofer  
 Testifier  
Self  
 Representing (Optional)  
POB 240165  
 Address  
 Phone No.



# Alaska State Legislature

Please enter into the record my testimony to the Senate State Affairs  
committee name

Committee on SB 352, dated 2-24-04  
bill # / subject public hearing date

Passage of this bill will politicize local supervisory positions. Decisions made by professionals in those capacities would be overwhelmed by political gains and bureaucratic pressure, rather than being based upon decisions most professionally appropriate and most responsive to local community needs.

The bargaining unit allows local supervisors to voice concerns without fear of administrative retribution. If a supervisor is non-compliant with administrative directives, the current union contract recognizes insubordination and the vehicle for that supervisor's dismissal (or other discipline) is already in place.

Passage of this bill will be a detriment to the local community, while becoming a boon to high-level bureaucrats.

Signed: William Galic  
 Testifier (William Galic)

Representing (optional)  
PO Box 2232 Kenai 99611  
 Address  
907-262-1866  
 Phone number

**Subject:** SB352-State Affairs today

**Date:** Tue, 24 Feb 2004 10:02:38 -0900

**From:** Cliff Stone <Cliff\_Stone@legis.state.ak.us>

**Organization:** Alaska State Legislature

**To:** Katrina Matheny <Katrina\_Matheny@legis.state.ak.us>

**CC:** Senator Gary Stevens <Senator\_Gary\_Stevens@legis.state.ak.us>

Hi Katrina....

In reviewing bills to be heard today, I noticed one that the administration appears to be fast tracking... SB352 was barely noticed on time and only has one committee of referral on the Senate side. It's companion in the House is HB 518 - with referrals to House

State Affairs and House L&C. ...no hearings scheduled, so SB352 is probably the vehicle they will use.

It seems innocuous at first glance, but when you study it.... it really undermines the collective bargaining process. These changes will remove at least 500 supervisory personnel from the collective bargaining process. Why should you or your boss be concerned..?

Through any administration change... these managers and confidential employees are the bulwark ..if you will against action by an appointed individual. Whether that action is good or bad... the managers have the institutional knowledge and the credentials quite frankly to make a call... independent of politics. That's what makes them unpopular sometimes to the employer... they make calls everyday that are based on years of experience, but sometimes not the one the employer (state) wants to hear. More times than not they probably keep their employer (the commissioners, deputy's, spec. asst's, etc....all appointees) out of hot water with state and federal regulations.

These managers also provide the continuity between one administration to the next. Can you imagine 500 more employees that are exempt from the Public Employment Relations Act... they in essence will be political appointees (my perception). Who then are going to watch the fox in the

chicken coop?? What level of expertise will these new guys and gals have?? I imagine it would be hard to get qualified individuals to apply for some of these positions... knowing that they have little or no job security. I suspect that the pay will go thru an adjustment down the road as well.... and we all know that will be less!

As you can see... I believe whole heartedly in the collective bargaining process. Even though you and I are exempt... we wouldn't enjoy the pay or the benefits if it wasn't for the ability of folks to organize. I think this is only a first step to try and dismantle organized labor in this state! That may sound harsh... but I bet they will use the threat of this at the bargaining table with other state unions.

Take my thoughts for what they're worth... I felt they were warranted since I don't want to see Gary get wrapped around the axel on this labor issue.... especially with his constituency while running a campaign.

**Subject: FW: Senate State Affairs Committee - RE Supervisor Collective Bargaining Proposal**

**Date: Mon, 23 Feb 2004 19:00:48 -0900**

**From: "Sen. Gretchen Guess" <Senator\_Gretchen\_Guess@legis.state.ak.us>**

**To: wayne\_leighty <wayne\_leighty@legis.state.ak.us>**

Please print and give a copy to Katrina for the record.

- SB 352

----- Forwarded Message

> From: g.gaguzis@att.net

> Date: Mon, 23 Feb 2004 22:59:20 +0000

> To: Senator\_Gretchen\_Guess@legis.state.ak.us

> Subject: Senate State Affairs Committee - RE Supervisor Collective Bargaining Proposal

>

> Dear Senator Guess,

>

> I am writing to you with regard to a proposal by the Administration to rewrite Alaska Labor Law by eliminating bargaining unit status from State supervisors. The attached word document is intended to provide an opinion in opposition to this proposal. It does not address all of the issues concerning the proposal, but reflects on a very important possible outcome of this legislation. I would appreciate your accepting this as a part of any public testimony concerning the proposal.

>

> Thank You,

>

> george gaguzis

> 7100 Old Harbor Ave.

> Anchorage, Alaska 99504


>

> g.gaguzis@att.net

> 907-338-1960

>

----- End of Forwarded Message

 Supervisor Collective Bargaining.doc	Name: Supervisor Collective Bargaining.doc Type: WINWORD File (application/msword) Encoding: base64 Download Status: Not downloaded with message
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Supervisors and their collective bargaining is more than just a discussion concerning work hours, wages and benefits. The supervisor/manager has to make decisions based on laws and regulations, and not on an administrator's whim or their politics.

As administrations change so does the leadership of each of the agencies involved with providing the necessary services to the residents of the state. Over the years the supervisor / manager has provided the continuity between these changes that permits the state to continue to operate without interruption of critical services.

A part of this continuity is the knowledge of the application of statutes and regulations governing their areas of responsibility, and the ability, without fear of reprisal, to ensure these laws are enforced even when facing extreme pressure from politically appointed administrators to do otherwise. Currently, could a supervisor be coerced into changing documents of record or ignore certain aspects of the law for someone's advantage? Yes, of course they could, but it would be less likely due to the protections afforded to them under the contractual framework that exists today between the state and its classified workers.

Insubordination cannot be tolerated in any workplace. But without contractual agreements, refusing an unlawful order by an unscrupulous administrator could result in an unjust claim of insubordination or other unfounded grounds for immediate removal from state service. Under this threat of reprisal, the administration of agency law could not be guaranteed to be impartial or applied without prejudice when the determination of the outcome is made without regard to the application of the law and through the insistence of a corrupt administrator.

I don't see much good coming as a result of the elimination of collective bargaining for the supervisors except for those that are requesting the changes. My concern involves the public trust in our system of laws that ensures that government provides assistance and services without regard to one's position or personal preferences. My fear is the possible evolution of a process reminiscent of morally bankrupt regimes of certain third world countries that impose rules at will and would usually involve kick - backs and pay - offs under the table in order to accomplish things legally or illegally. Perhaps this position is a bit extreme, but so is the need to protect the public trust.



# Alaska State Legislature

Please enter into the record my testimony to the Senate State Affairs  
committee name

Committee on SB 352, dated 2-24-04  
bill # / subject public hearing date

I am writing to ask that this bill not be allowed to pass and that this legislation be stopped. Supervisors need the protection of a collective bargaining unit in the event of disciplinary actions or unfair termination.

Signed: Marty Ellis  
Testifier  
Self  
Representing (optional)  
PO Box 2665 Kenai, AK 99611  
Address  
283-5755  
Phone number

SB 352 SENATE STATE AFFAIRS

Please read this testimony to the committee at the Legislative Hearing scheduled for Tuesday, February 24 on HB 518 / SB 352

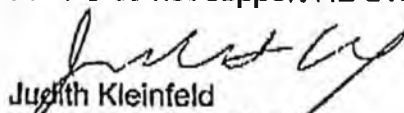
I am a department head at the University of Alaska and the reason that I am not here testifying in person is that I am teaching a class called "Individual, Society, and Culture" to approximately 55 students at the University of Alaska. This semester I teach 4 courses.

HB 518 removes department chairs, such as myself, from collective bargaining agreements on the false grounds that they are not "faculty." As you can see from my own teaching schedule as a department head, the idea that department heads are administrators and not teaching faculty is absurd. In many departments, faculty are elected to serve a term as a department head. Department heads are not administrators.

If HB 518 passes, faculty like me will have to think seriously about refusing to serve as department heads because this would mean that we would lose all our protections for wages, health insurance, job security and the ability to protest unfair discipline. This means the university would have to hire actual "administrators" to do the work of department heads. This will increase administrative positions and university costs.

The university is already spending far too much money on redundant administrators. Many of these functions could be consolidated.

Please do not support HB 518.

  
Judith Kleinfeld  
Professor of Psychology  
Director, Northern Studies Program (A director is a department head)  
February 24, 2004

Senate State Affairs Committee

Please take this letter and read it at the appropriate time during the meeting on SB 352 in the Belts Room at 3:30 today 2/24/04 as I am not able to attend this meeting today.

Thank you.

J. Kevin Burchfield

Senate State Affairs Committee  
State Capitol, Belts Room  
Juneau, AK 99801

2/24/04

To Whom It May Concern:

This afternoon you are hearing about SB352. This bill calls for changes in the State labor laws that would allow the State to reclassify any supervisor currently working for the State to a class that is exempt from collective bargaining and the protections that are afforded by collective bargaining.

What does this mean to the State of Alaska? Well, currently supervisors, managers, and confidential employees are protected, via collective bargaining, and are able to make decisions in all state manners on the basis of what is right according to Alaska state statutes and regulation without the fear of political reprisal.

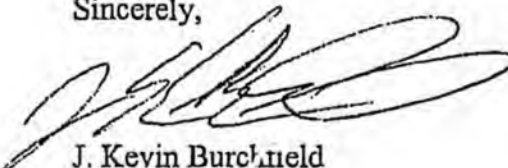
I have a great concern that if this bill were to pass this would no longer be the case. Supervisors, managers, and confidential employees would be required to make decisions on the added basis of what is politically correct at the time. This is not the way for decisions to be made for the people of Alaska. The people of Alaska deserve more out of government.

Basically this bill would place ones political beliefs right in the middle of the State of Alaska's day to day business. There is no way this could possibly be good for the State of Alaska.

This bill also removes any incentive for talented employees to move into these supervisory, managerial, and confidential positions, therefore creating even more of a void where the talent is really needed.

It is my opinion that SB352 brings absolutely nothing to the table and only politicizes the process more adding yet more consternation to the people of Alaska.

Sincerely,



J. Kevin Burchfield



# Alaska State Legislature

Please enter into the record my testimony to the Senate State Affairs  
committee name  
 Committee on HB 518 / Supervisors  
SB 352 / Union, dated 2/24/04  
bill # / subject public hearing date

Please do not support this legislation that will weaken or even dismantle the Supervisors Union. I believe in organized labor and the worker protections that they ensure.

Signed: Nancy Sahrag  
Testifier

Representing (optional)

312 Princess, Kenai, AK 99611  
Address

283-9382  
Phone number

SB 352

FRANK H. MURKOWSKI  
GOVERNOR  
GOVERNOR@GOV.STATE.AK.US



P.O. Box 110001  
JUNEAU, ALASKA 99811-0001  
(907) 465-3500  
FAX (907) 465-3532  
WWW.GOV.STATE.AK.US

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

February 20, 2004

The Honorable Gene Therriault  
President of the Senate  
Alaska State Legislature  
State Capitol, Room 111  
Juneau, AK 99801-1182

Dear President Therriault:

Under the authority of article III, section 18, of the Alaska Constitution, I am transmitting this bill to amend the Public Employment Relations Act (PERA). Specifically, the bill would exclude public employees in upper-level ("managerial") or sensitive ("confidential") positions from collective bargaining. Allowing employees in these positions to participate in bargaining creates a conflict of interest and could allow employees in managerial or confidential positions to benefit from the inherent advantage they have over other employees. When managerial and confidential employees bargain they have access to information and key officials that is unavailable to other employees.

Amending PERA resolves the conflict of interest and reduces the opportunity for unfair gain by those employees. Bargaining laws for public employees would be aligned with the labor laws that apply to private industry, federal law, and the majority of state's that have chosen to exclude confidential and managerial employees from bargaining.

The bill provides legislative findings setting out the concerns the bill is intended to address. These findings were drawn mainly from the work of the Blue Ribbon Commission (Commission) on the State Personnel Act.

The Commission reviewed state employment laws from 1977 through 1980. The Commission recognized that allowing managers to participate in bargaining could hamper labor negotiations and that the state's managers needed to be politically responsive to the chief executive. The Commission recommended that assistant and deputy directors and certain chiefs be excluded from bargaining. *Report of the Blue Ribbon Commission on the State Personnel Act to the Eleventh Alaska State Legislature 14 (1/9/1980).*

SB352

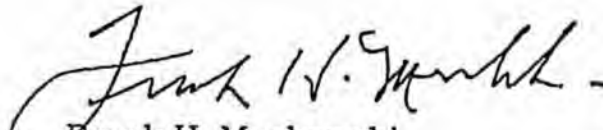
The Honorable Gene Therriault  
February 20, 2004  
Page 2

The exclusion for confidential employees is based upon case law from the National Labor Relations Board (Board) and existing state regulation. B. F. Goodrich Co., 115 N.L.R.B. 722, 37 L.R.R.M.(BNA) 1383 (1956); 8 AAC 97.990(a)(1). The Board has consistently recognized an exclusion from bargaining for "persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." The Alaska Labor Relations Agency adopted this definition as regulation in 8 AAC 97.990(a)(1); although, rather than exclude these employees from bargaining entirely, the agency requires them to bargain in a separate unit when they are employed by the state. 8 AAC 97.090. Bargaining in a separate unit, however, does not remove the conflict of interest created when a public employer is forced to bargain the wages and working conditions of employees responsible for actually developing and implementing the employer's labor policy. Recognizing this problem, the agency excluded the confidential positions of labor analyst and human resource manager from bargaining completely in State of Alaska v. Confidential Employees Ass'n, Decision & Order No. 157 (04/07/1993). The agency's decision, however, was reversed on appeal, State of Alaska v. Confidential Employees Ass'n, case no. 1JU-93-0656 CI (9/1/1994, as clarified on 10/12/1994), necessitating a legislative solution to the problem.

The exclusion for managers is based on National Labor Relations Board v. Bell Aerospace Co., 416 U.S. 267, 287-88 (1974). In that case the United States Supreme Court affirmed the Board's longstanding exclusion from bargaining of employees "who formulate and effectuate management policies by expressing and making operative the decisions of the employer." The exclusion was based on the Board's interpretation of Congressional intent.

I urge your prompt and favorable action on this measure.

Sincerely yours,



Frank H. Murkowski  
Governor

Enclosure

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB 352  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: All  
 Title An Act amending the Public Employment RDU \_\_\_\_\_  
Relations Act Component \_\_\_\_\_  
 Sponsor Governor  
 Requester Senate State Affairs Committee Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill will not have a significant fiscal impact on any state agency.

Prepared by: Jack Kreinheder, Senior Analyst Phone 465-4676  
 Division Office of Management and Budget Date/Time 2/23/04 1:19 PM  
 Approved by: Cheryl Frasca, Director Date 2/23/2004  
 Agency Office of Management and Budget

Katrina  
Here is some information -  
please do not distribute.  
Thanks  
Kevin

## PUBLIC EMPLOYMENT RELATIONS ACT BILL

### What does it do?

- Amend the Public Employment Relations Act ("PERA") to exclude government employees in upper-level or sensitive positions from collective bargaining.
- The bill removes employees who perform confidential and managerial duties for a public employer from the PERA's definition of "public employee." The language used to create the exclusions was taken largely from federal labor law.

### How are the exclusions defined?

- "Confidential employee" means an individual who assists and acts in a confidential capacity to a person who formulates, determines, and effectuates management policies in labor relations matters.
- "Manager" means an individual who formulates and effectuates management policy by expressing and making operative the decisions of the employer and who has discretion in the performance of the job independent of the employer's established policy.

### Why establish these exclusions?

- By allowing managers and confidential employees in these positions to participate in bargaining, PERA creates a conflict of interest that can benefit the employees personally at the public's expense. Amending the Act to exclude these positions resolves the conflict.

- Excluding positions that make policy or represent a public employer's interests in collective bargaining will avoid a conflict in loyalty. The employees in these positions enjoy an advantage when they bargain because they have access to information and key officials that is unavailable to other employees.
- The special contractual advantages these employees can obtain are not only unfair to other employees, but can result in increased labor costs for public employers. Good government requires that employees serving in key positions represent public employers' interests first.
- The bill simply brings the bargaining laws for public employees in Alaska into line with the laws applying to public employees in other states and private industry nationwide.

**What is the legal foundation for these exclusions?**

- **Confidential Employees:** The exclusion for confidential employees is based upon case law from the National Labor Relations Board and an existing state regulation. *B. F. Goodrich Co.*, 115 N.L.R.B. 722, 37 L.R.R.M.(BNA) 1383 (1956); 8 AAC 97.990(a)(1). The board has consistently recognized an exclusion from bargaining for "persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." The Alaska Labor Relations Agency adopted this definition as regulation in 8 AAC 97.990(a)(1); although rather than exclude these employees from bargaining entirely, the agency requires them to bargain in a separate unit when they are employed by the state. 8 AAC 97.090. Bargaining in a separate unit, however, does

not remove the conflict of interest created when a public employer is forced to bargain the wages and working conditions of employees responsible for actually developing and implementing the employer's labor policy. Recognizing this problem, the agency excluded the confidential positions of labor analyst and human resource manager from bargaining completely in *State of Alaska v. Confidential Employees Ass'n*, Decision & Order No. 157 (04/07/1993). The agency's decision, however, was reversed on appeal, *State of Alaska v. Confidential Employees Ass'n*, Case o. 1JU-93-0656 CI (9/1/1994, as clarified on 10/12/1994), necessitating a legislative solution to the problem.

- **Managers:** The exclusion for managers is based on *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 287-88 (1974). In that case the United States Supreme Court affirmed the National Labor Relations Board's longstanding exclusion from bargaining of employees "who formulate and effectuate management policies by expressing and making operative the decisions of the employer." The exclusion was based on the board's interpretation of Congressional intent.

**SUMMARY OF STATE LABOR RELATIONS ACT PROVISIONS**

<b>State</b>	<b>Can Confidential employees bargain?</b>	<b>Can Management employees bargain?</b>	<b>Can supervisors bargain?</b>
Alaska	Yes	Yes	Yes
California	No	No	No
Connecticut	No	No	Yes (in separate units)
Delaware	No	Yes	Not in units certified after 1994
Florida	No	No	Yes (in separate units)
Hawaii	No	No	Yes (in separate units)
Illinois	No	No	No
Indiana	No	No	No
Iowa	No	No	No
Kansas	No	No	No
Maine	No	No	Yes (if the supervisor does not participate in formulation or effectuation of policy or have a role in administration of contract)
Maryland	No	No	No
Massachusetts	No	No	Yes
Michigan	No (excluded by agency decision)	Yes (in a separate unit)	Yes (in a separate unit)
Minnesota	No	No	Yes (in a separate unit)
Missouri (Meet and confer law for public employees – no right to strike or to enforce agreement)	No (excluded by agency decision)	No (excluded by agency decision)	No (excluded by agency decision)

State	Can Confidential employees bargain?	Can Management employees bargain?	Can supervisors bargain?
Montana	No	No	No
Nebraska	Statute defines units and the units do not include confidential employees, but statute allows additional units and does not expressly prohibit confidential employee participation	Statute does not set out a management unit; case law under prior law allowed managers to bargain in a separate unit with a different representative than the rank and file employees' representative	Statute allows supervisors to bargain in a separate unit but limits bargaining to meet and confer
Nevada (local government only)	No	Yes (in a separate unit)	Yes (in a separate unit)
New Hampshire	No	No	Yes (in a separate unit)
New Jersey	No	No	Yes
New Mexico	No	No	No
New York	No	No	Yes
Ohio	No	No	No
Oklahoma (police/fire only)	Yes	Yes	Yes
Oregon	No	No	No
Pennsylvania	No	No	First level supervisors may bargain in a separate unit; second level supervisors and above are excluded from bargaining as managers
Rhode Island	No (by decision)	No (by decision)	No (by decision)
South Dakota	Unclear	No	No
North Dakota (teachers only)	-	-	-
Vermont	No	No	Yes (in separate units)
Washington	No	No (excludes the entire management service)	Yes (in separate units) (unless a member of the management service)
Wisconsin	No	No	No

-----Original Message-----

From: Bruce Ludwig [mailto:bludwig@apea-aft.org]  
Sent: Friday, February 20, 2004 3:42 PM  
To: all\_su@state.ak.us  
Subject: ?Black Friday?

"Black Friday"

"These are the times that try men's souls" was the opening line of a series of pamphlets written by Thomas Paine in December 1776, advocating independence from England. What those words contemplate for us today, while significantly different in circumstance, express a significant development on the negotiations and union front. These are the times that will try a man and woman's soul.

Assistant Commissioner of Administration Kevin Jardell followed through with his threat of submitting a Bill(which we call the "Crony Bill") that will dismantle the Supervisory Bargaining Unit as we know it. This "Crony Bill" will rewrite part of the Alaska labor law and will remove at least 500 positions, and likely more, from the protection of bargaining status and move them to non-covered status. Since there is no federal law guaranteeing our bargaining rights, there is the real possibility that all supervisory employees could be removed from bargaining status, depending upon interpretation and administrative action. What we are sure of is that at least five hundred supervisors (again, likely more) will be severely impacted.

How severe? We will lose all rights to bargain for our wages, health insurance, vacation time, hours of work, etc. Also, this will kill all union protection for us if we are unfairly disciplined. This is a huge concern since supervisors make unpopular, but right/correct decisions everyday. We will now lose significant protection in that regard and bring politics squarely into our day to day working decisions.

Why is this being done? The answer we have been given is that some people in the Department of Administration don't like the organizational structure. In reality, there is no problem that can't be fixed under current law. What is afoot is an attack on organized labor and we are the first potential victims. This attempt to rewrite law that attacks organized labor will not stop with us, but will affect all employees who find freedom in being able to organize. Not only will other State Unions be next on the chopping block, but attempts to weaken the law could have far reaching impact on all organized labor within the State.

Not so coincidentally, we have suffered a huge setback at the negotiating table. Despite what has been steady progress over the last few months, proposals were made by the State this week that would move us to 40 hour work weeks without additional compensation, the complete elimination of standby pay, and the possible erosion of health benefits.

What to do? First and foremost, this legislation must be killed. This is now job one and all else rides on our ability to kill this "Crony Bill". We will need to call in all relationships we have with our legislators to kill this Bill. Although it hasn't yet been submitted(so we can't yet give you a Bill number), it is already scheduled for a hearing before the Senate State Affairs Committee on next Tuesday at 3:30. It will be teleconferenced. We need to contact our Legislators to let them know that we think this is a bad idea. A bad idea for us, a bad idea for the state, and a bad idea for the people of Alaska who rely on us to make impartial, nonpartisan decisions.

We will be sending additional information about the legislation in the next few days and making specific requests as we track this legislation. Please follow through with our requests and have your relatives, friends, etc. do the same. Another e-mail will be sent in the few days.

Your Supervisory Unit Board and Negotiators'

President: John White jwhite@ptialaska.net  
Secretary-Treasurer: Doris Tanner doris\_tanner@correct.state.ak.us  
Northern Vice President: Cris Tigner cris\_tigner@correct.state.ak.us

Southcentral Vice President: Gerry Guay gerry\_guay@dec.state.ak.us

Southeast Negotiator: John White jpwhite@ptialaska.net

Alternate: John Kuterbach jfklives@ak.net

Southcentral Negotiator: Dean Williams deanwilliams@gci.net

Alternate: Leslie Simmons LeslieFSimmons@hotmail.com

Northern Negotiator: Bruce Senkow bsenkow@apea-aft.org

Alternate: Tim Viavant viavant@gci.net

Staff: Bruce Ludwig bludwig@apea-aft.org

Valerie -  
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# STATE OF ALASKA

**DEPARTMENT OF ADMINISTRATION**

*OFFICE OF THE COMMISSIONER*

**FRANK H. MURKOWSKI, GOVERNOR**

P.O. BOX 110200  
JUNEAU, ALASKA 99811-0200  
PHONE: (907) 465-2200  
FAX: (907) 465-2135

February 23, 2004

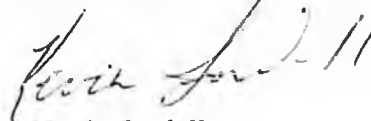
The Honorable Gary Stevens  
Chair, Senate State Affairs Committee  
Alaska State Senate  
State Capitol  
Juneau, AK 99801-1182

Dear Senator Stevens,

The attached table was researched and created by the Department of Law and represents all States know to have statutes relating to labor relations. The table illustrates how other States treat public sector confidential, managerial, and supervisory employees for purposes of collective bargaining.

If you have any questions, please call me at 465-5671. Thank you.

Sincerely,



Kevin Jardell  
Assistant Commissioner



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## U.S. Supreme Court

**NLRB v. BELL AEROSPACE CO., 416 U.S. 267 (1974)**

416 U.S. 267

**NATIONAL LABOR RELATIONS BOARD v.  
BELL AEROSPACE COMPANY, DIVISION OF TEXTRON, INC.  
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND  
CIRCUIT.  
No. 72-1598.**

Argued January 14, 1974.

Decided April 23, 1974.

On a petition by a labor union for a representation election, the National Labor Relations Board (NLRB) held that the buyers employed by respondent company constituted an appropriate collective-bargaining unit and directed an election. The NLRB stated that even though the buyers might be "managerial employees" they were nevertheless covered by the National Labor Relations Act (NLRA) in the absence of any showing that union organization of the buyers would create a conflict of interest in labor relations. Subsequently the buyers voted for the union, and the NLRB certified it as their exclusive bargaining representative. The company refused to bargain, however, and was found guilty of an unfair labor practice and ordered to bargain. The Court of Appeals denied enforcement on the grounds that (1) it was not certain that the NLRB's decision rested on a factual determination that the buyers were not true "managerial employees" rather than on a new, and in the court's view, erroneous holding that the NLRB was free to regard all managerial employees as covered by the Act unless their duties met the conflict-of-interest touchstone, and (2) in view of its previous contrary decisions, the NLRB was required to proceed by rulemaking rather than by adjudication in determining whether buyers are "managerial employees." Held:

1. Congress intended to exclude from the protections of the NLRA all employees properly

classified as "managerial," not just those in positions susceptible to conflicts of interest in labor relations. This is unmistakably indicated by the NLRB's early decisions, the purpose and legislative history of the Taft-Hartley amendments to the NLRA in 1947, the NLRB's subsequent construction of the Act for more than two decades, and the decisions of the courts of appeals. Pp. 274-290.

2. The NLRB is not required to proceed by rulemaking, rather [416 U.S. 267, 268] than by adjudication, in determining whether buyers or some types of buyers are "managerial employees." Pp. 290-295.

(a) The NLRB is not precluded from announcing new principles in an adjudicative proceeding, and the choice between rulemaking and adjudication initially lies within the NLRB's discretion. *SEC v. Chenery Corp.*, 332 U.S. 194 ; *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 . P. 294.

(b) In view of the large number of buyers employed in manufacturing, wholesale, and retail units, and the wide variety of buyers' duties, depending on the company or industry, any generalized standard would have no more than marginal utility, and the NLRB thus has reason to proceed with caution and develop its standards in a case-by-case manner with attention to the specific character of the buyers' authority and duties in each company. P. 294.

475 F.2d 485, affirmed in part, reversed in part, and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BLACKMUN, and REHNQUIST, JJ., joined. WHITE, J., filed an opinion dissenting in part, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, post, p. 295.

Norton J. Come argued the cause for petitioner. With him on the brief were Solicitor General Bork, Peter G. Nash, John S. Irving, Patrick Hardin, and Linda Sher.

Richard E. Moot argued the cause and filed a brief for respondent. \*

[ Footnote \* ] Jolin Fillion, Stephen Schlossberg, Abe F. Levy, Victor Van Bourg, Charles K. Hackler, and Jack Levine filed a brief for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America as amicus curiae urging reversal. Milton Smith, Gerard C. Smetana, and Jerry Kronenberg filed a brief for the Chamber of Commerce of the United States as amicus curiae.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents two questions: first, whether the National Labor Relations Board properly determined [416 U.S. 267, 269] that all "managerial employees," except those whose participation in a labor organization would create a conflict of interest with their job responsibilities, are covered by the National Labor Relations Act; 1 and second, whether the Board must proceed by rulemaking rather than by adjudication in determining whether certain buyers are "managerial employees." We answer both questions in the negative.

## I

Respondent Bell Aerospace Co., Division of Textron, Inc. (company), operates a plant in Wheatfield, New York, where it is engaged in research and development in the design and fabrication of aerospace

products. On July 30, 1970, Amalgamated Local No. 1286 of the United Automobile, Aerospace and Agricultural Implement Workers of America (union) petitioned the National Labor Relations Board (Board) for a representation election to determine whether the union would be certified as the bargaining representative of the 25 buyers in the purchasing and procurement department at the company's plant. The company opposed the petition on the ground that the buyers were "managerial employees" and thus were not covered by the Act.

The relevant facts adduced at the representation hearing are as follows. The purchasing and procurement department receives requisition orders from other departments at the plant and is responsible for purchasing all of the company's needs from outside suppliers. Some items are standardized and may be purchased "off the shelf" from various distributors and suppliers. Other items must be made to the company's specifications, and the requisition orders may be accompanied by detailed blueprints and other technical plans. Requisitions often designate a particular vendor, and in some instances the [416 U.S. 267, 270] buyer must obtain approval before selecting a different one. Where no vendor is specified, the buyer is free to choose one.

Absent specific instructions to the contrary, buyers have full discretion, without any dollar limit, to select prospective vendors, draft invitations to bid, evaluate submitted bids, negotiate price and terms, and prepare purchase orders. Buyers execute all purchase orders up to \$50,000. They may place or cancel orders of less than \$5,000 on their own signature. On commitments in excess of \$5,000, buyers must obtain the approval of a superior, with higher levels of approval required as the purchase cost increases. For the Minute Man missile project, which represents 70% of the company's sales, purchase decisions are made by a team of personnel from the engineering, quality assurance, finance, and manufacturing departments. The buyer serves as team chairman and signs the purchase order, but a representative from the pricing and negotiation department participates in working out the terms.

After the representation hearing, the Regional Director transferred the case to the Board. On May 20, 1971, the Board issued its decision holding that the company's buyers constituted an appropriate unit for purposes of collective bargaining and directing an election. 190 N. L. R. B. 431. Relying on its recent decision in *North Arkansas Electric Cooperative, Inc.*, 185 N. L. R. B. 550 (1970), the Board first stated that even though the company's buyers might be "managerial employees,"<sup>2</sup> they [416 U.S. 267, 271] were nevertheless covered by the Act and entitled to its protections. The Board then rejected the company's alternative contention that representation should be denied because the buyers' authority to commit the company's credit, select vendors, and negotiate purchase prices would create a potential conflict of interest between the buyers as union members and the company. In essence, the company argued that buyers would be more receptive to bids from union contractors and would also influence "make or buy" decisions in favor of "make," thus creating additional work for sister unions in the plant. The Board thought, however, that any possible conflict was "unsupported conjecture" since the buyers' "discretion and latitude for independent action must take place within the confines of the general directions which the Employer has established" and that "any possible temptation to allow sympathy for sister unions to influence such decisions could effectively be controlled by the Employer." 190 N. L. R. B., at 431.

On June 16, 1971, a representation election was conducted in which 15 of the buyers voted for the union and nine against. On August 12, the Board certified the union as the exclusive bargaining representative for the company's buyers. That same day, however, the Court of Appeals for the Eighth Circuit denied enforcement of another Board order in *NLRB v. North Arkansas Electric Cooperative, Inc.*, 446 F.2d 602, and held that "managerial employees" were not covered by the Act and were therefore not entitled to its protections. 3 *Id.*, at 610.

Encouraged by the Eighth Circuit's decision, the company moved the Board for reconsideration of its earlier [416 U.S. 267, 272] order. The Board denied the motion, 196 N. L. R. B. 827 (1972), stating that it disagreed with the Eighth Circuit and would adhere to its own decision in North Arkansas. In the Board's view, Congress intended to exclude from the Act only those "managerial employees" associated with the "formulation and implementation of labor relations policies." *Id.*, at 828. In each case, the "fundamental touchstone" was "whether the duties and responsibilities of any managerial employee or group of managerial employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization." *Ibid.* Turning to the present case, the Board reiterated its prior finding that the company had not shown that union organization of its buyers would create a conflict of interest in labor relations.

The company stood by its contention that the buyers, as "managerial employees," were not covered by the Act and refused to bargain with the union. An unfair labor practice complaint resulted in a Board finding that the company had violated 8 (a) (5) and (1) of the Act, 29 U.S.C. 158 (a) (5) and (1), and an order compelling the company to bargain with the union. 197 N. L. R. B. 209 (1972). Subsequently, the company petitioned the United States Court of Appeals for the Second Circuit for review of the order and the Board cross-petitioned for enforcement.

The Court of Appeals denied enforcement. 475 F.2d 485 (1973). After reviewing the legislative history of the Taft-Hartley Act of 1947, 61 Stat. 136, and the Board's decisions in this area, the court concluded that Congress had intended to exclude all true "managerial employees" from the protection of the Act. It explained [416 U.S. 267, 273] that this "exclusion embraced not only an employee `so closely related to or aligned with management as to place the employee in a position of conflict of interest between his employer on the one hand and his fellow workers on the other' but also one who is `formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties,' *Illinois State Journal-Register, Inc. v. NLRB*, 412 F.2d 37, 41 (7 Cir. 1969)." 475 F.2d, at 494. The court added, however, that "the Board would [not] be precluded, on proper proceedings, from determining that buyers, or some types of buyers, are not true `managerial employees' and consequently come within the protection of 8 (a) (5) and (1)." *Ibid.*

Turning to the merits of the present case, the court acknowledged that there was substantial evidence that the company's buyers were not sufficiently high in the managerial hierarchy to constitute true "managerial employees." Nevertheless, the court denied enforcement for two reasons. First, it was not certain that the Board's decision rested on a factual determination that these buyers were not true "managerial employees" rather than on "its new, and in our view, erroneous holding that it was free to regard all managerial employees as covered by the Act unless their duties met" the conflict-of-interest touchstone. *Id.*, at 494-495. Second, although the Board was not precluded from holding that buyers, or some types of buyers, were not "managerial employees," the court thought that, in view of the Board's long line of cases holding the contrary, it could not accomplish this change of position by adjudication. Rather, the Board should conduct a rulemaking proceeding in conformity with 6 of the Act, 29 U.S.C. 156. The court therefore remanded the case to the Board for such a proceeding. [416 U.S. 267, 274]

We granted the Board's petition for certiorari. 414 U.S. 816 .

## II

We begin with the question whether all "managerial employees," rather than just those in positions susceptible to conflicts of interest in labor relations, are excluded from the protections of the Act. 4 The Board's early decisions, the legislative history of the Taft-Hartley Act of 1947, 61 Stat. 136, and subsequent Board and court decisions provide the necessary guidance for our inquiry. In examining

these authorities, we draw on several established principles of statutory construction. In addition to the importance of legislative history, a court may [416 U.S. 267, 275] accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. 5 This is especially so where Congress has re-enacted the statute without pertinent change. 6 In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress. 7 We have also recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight. 8 Application of these principles leads us to conclude, as did the Court of Appeals, that Congress intended to exclude from the protections of the Act all employees properly classified as "managerial."

## A

The Wagner Act, 49 Stat. 449, did not expressly mention the term "managerial employee." After the Act's passage, however, 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. In [416 U.S. 267, 276] *Freiz & Sons*, 47 N. L. R. B. 43, 47 (1943), for example, the Board excluded expeditors from a proposed unit of production and maintenance workers because they were "closely related to the management." Similarly, in *Spicer Mfg. Corp.*, 55 N. L. R. B. 1491, 1498 (1944), expeditors were again excluded from a unit containing office, technical, clerical, and professional employees because "the authority possessed by [the expeditors] to exercise their discretion in making commitments on behalf of the Company stamps them as managerial." This rationale was soon applied to buyers. See, e. g., *Hudson Motor Car Co.*, 55 N. L. R. B. 509, 512 (1944); *Vulcan Corp.*, 58 N. L. R. B. 733, 736 (1944); *Barrett Division, Allied Chem. & Dye Corp.*, 65 N. L. R. B. 903, 905 (1946); *Electric Controller & Mfg. Co.*, 69 N. L. R. B. 1242, 1245-1246 (1946). The Board summarized its policy on "managerial employees" in *Ford Motor Co.*, 66 N. L. R. B. 1317, 1322 (1946):

"We have customarily excluded from bargaining units of rank and file workers executive employees who are in a position to formulate, determine and effectuate management policies. These employees we have considered and still deem to be 'managerial,' in that they express and make operative the decisions of management."

Whether the Board regarded all "managerial employees" as entirely outside the protection 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. The Board was cautious, however, in determining which employees were "managerial." For example, in *Dravo Corp.*, 54 N. L. R. B. 1174, 1177 (1944), the Board excluded buyers and expeditors from a unit of office and clerical employees, [416 U.S. 267, 277] but reserved the question whether all such employees were to be considered "managerial":

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

During this period the Board's policy with respect to the related but narrower category of "supervisory employees" manifested a progressive uncertainty. The Board first excluded supervisors from units of rank-and-file employees, e. g., *Mueller Brass Co.*, 39 N. L. R. B. 167, 171 (1942), but in *Union Collieries Coal Co.*, 41 N. L. R. B. 961, supplemental decision, 44 N. L. R. B. 165 (1942), it certified a separate unit composed of supervisors who were to be represented by an independent union. Shortly thereafter, in *Godchaux Sugars, Inc.*, 44 N. L. R. B. 874 (1942), the Board approved a unit of

supervisors whose union was affiliated with a union of rank-and-file employees. This trend was soon halted, however, by Maryland Drydock Co., 49 N. L. R. B. 733 (1943), where the Board held that supervisors, although literally "employees" under the Act, could not be organized in any unit. And in Yale & Towne Mfg. Co., 60 N. L. R. B. 626, 628-629 (1945), the Board further held that timestudy men, whose "interests and functions" were "sufficiently akin to those of management," should neither be included in a unit with other employees, nor be established as a separate unit."

Maryland Drydock, supra, was subsequently overruled in Packard Motor Car Co., 61 N. L. R. B. 4, 64 N. L. R. B. 1212 (1945), where the Board held that foremen could constitute an appropriate unit for collective bargaining. The Board's position was upheld 5-4 by this Court in [416 U.S. 267, 278] Packard Co. v. NLRB, 330 U.S. 485 (1947). In view of the subsequent legislative reversal of the Packard decision, the dissenting opinion of MR. JUSTICE DOUGLAS is especially pertinent. Id., at 493. He stated:

"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.

"I do not believe this is an exaggerated statement of the basic policy questions which underlie the present decision. For if foremen are 'employees' within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents - indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management, with the exception of the directors. If a union of vice-presidents applied for recognition as a collective bargaining agency, I do not see how we could deny it and yet allow the present application. But once vice-presidents, managers, superintendents, foremen all are unionized, management and labor will become more of a solid phalanx than separate factions in warring camps.

.....

"[I]f Congress, when it enacted the National Labor [416 U.S. 267, 279] Relations Act, had in mind such a basic change in industrial philosophy, it would have left some clear and unmistakable trace of that purpose. But I find none." Id., at 494-495.

MR. JUSTICE DOUGLAS also noted that the Wagner Act was intended to protect "laborers" and "workers" whose right to organize and bargain collectively had not been recognized by industry, resulting in strikes, strife, and unrest. By contrast, there was no similar history with respect to foremen, managers, superintendents, or vice presidents. Id., at 496-497. Furthermore, other legislation indicated that where Congress desired to include managerial or supervisory personnel in the category of employees, it did so expressly. See, e. g., Railway Labor Act of 1926, 44 Stat. 577, 45 U.S.C. 151; Merchant Marine Act, 1936, as amended, 52 Stat. 953, 46 U.S.C. 1101 et seq.; Social Security Act, 1101, 49 Stat. 647.

## B

The Packard decision was a major factor in bringing about the Taft-Hartley Act of 1947, 61 Stat. 136.

The House bill, H. R. 3020, 80th Cong., 1st Sess. (1947), 9 provided for the exclusion of [416 U.S. 267, 280] "supervisors," a category broadly defined to include any individual who had authority to hire, transfer, promote, discharge, reward, or discipline other employees or effectively to recommend such action. It also excluded (i) those who had authority to determine or effectively recommend the amount of wages earned by other employees; (ii) those employed in labor relations, personnel, and employment departments, as well as police and timestudy personnel; and (iii) confidential employees. The Senate version of the bill, S. 1126, 80th Cong., 1st Sess. (1947), 10 also excluded supervisors, but defined that category more narrowly than the House version, distinguishing between "straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management [416 U.S. 267, 281] prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947). It was the Senate's view that employees such as "straw bosses," who had only minor supervisory duties, should be included within the Act's protections.

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. Focusing on MR. JUSTICE DOUGLAS' dissent in *Packard*, the Senate Report specifically mentioned that even vice presidents might be unionized under the Board's decision. *Ibid.* It also noted that unionization of supervisors had hurt productivity, increased the accident rate, upset the balance of power in collective bargaining, and tended to blur the line between management and labor. *Id.*, at 4-5. The House Report echoed the concern for reduction of industrial output and noted that unionization of supervisors had deprived employers of the loyal representations to which they were entitled. 11 And in criticizing the [416 U.S. 267, 282] 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).

The Conference Committee adopted the Senate version of the bill. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947). The House Managers' statement in explanation of the Conference Committee Report stated:

"The conference agreement, in the definition of `supervisor,' limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. The conference agreement does not treat time-study personnel or guards as supervisors, as did the House bill. Since, however, time-study employees may qualify as professional personnel, the special provisions of the Senate amendment . . . applicable with respect to professional employees will cover many of this category. In the case of guards, the conference agreement does not permit the [416 U.S. 267, 283] certification of a labor organization as the bargaining representative of guards if it admits to membership, or is affiliated with any organization that admits to membership, employees other than guards." *Id.*, at 35-36.

The legislative history of the Taft-Hartley Act of 1947 may be summarized as follows. The House wanted to include certain persons within the definition of "supervisors," such as straw bosses, whom the Senate believed should be protected by the Act. As to these persons, the Senate's view prevailed. There were other persons, however, who both the House and the Senate believed were plainly outside the Act.

The House wanted to make the exclusion of certain of these persons explicit. In the conference agreement, representatives from both the House and the Senate agreed that a specific provision was unnecessary since the Board had long regarded such persons as outside the Act. Among those mentioned as impliedly excluded were persons working in "labor relations, personnel and employment departments," and "confidential employees." But assuredly this did not exhaust the universe of such 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).<sup>12</sup> We think [416 U.S. 267, 284] 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. JUSTICE DOUGLAS' Packard dissent relating to the organization of executives, not because it disagreed but because it deemed this unnecessary." 475 F.2d, at 491-492. <sup>13</sup> (Footnote omitted.) [416 U.S. 267, 285]

### C

Following the passage of the Taft-Hartley Act, the Board itself adhered to the view that "managerial employees" were outside the Act. In *Denver Dry Goods*, 74 N. L. R. B. 1167, 1175 (1947), assistant buyers, who [416 U.S. 267, 286] were required to set good sales records as examples to sales employees, to assist buyers in the selection of merchandise, and to assume the buyer's duties when the latter was not present, were excluded by the Board on the ground that "the interests of these employees are more closely identified with those of management." The Board reiterated this reading of the Act in *Palace Laundry Dry Cleaning*, 75 N. L. R. B. 320, 323 n. 4 (1947):

"The determination of 'managerial,' like the determination of 'supervisory,' is to some extent necessarily a matter of the degree of authority exercised. We have in the past, and before the passage of the recent amendments to the Act, recognized and defined as 'managerial' employees, executives who formulate and effectuate management policies by expressing and making operative decisions of their employer, and have excluded such managerial employees from bargaining units. We believe that the Act, as amended, contemplates the continuance of this practice." (Citations omitted.)

Buyers and assistant buyers were again excluded in *Denton's, Inc.*, 83 N. L. R. B. 35, 37 (1949), because their "interests . . . are more closely identified with management . . ." And in *American Locomotive Co.*, 92 N. L. R. B. 115, 116-117 (1950), the Board held that buyers could neither be included in a unit of office and clerical employees nor placed in a separate unit, stating:

"The Employer maintains that the buyers are representatives of management. As it appears that the buyers are authorized to make substantial purchases for the Employer, we find that they are representatives of management, and as such may not be accorded bargaining rights under the Act."

Buyers, who were authorized to bind the employer without prior approval, were also excluded from a

unit in [416 U.S. 267, 287] *Curtiss-Wright Corp.*, 103 N. L. R. B. 458, 464 (1953), because "they are representatives of management and as such may not be accorded bargaining rights under the Act."

Finally, in *Swift & Co.*, 115 N. L. R. B. 752, 753-754 (1956), the Board reaffirmed its long-held understanding of the scope of the Act. In refusing to approve a unit of procurement drivers who were found to be representative of management, the Board declared:

"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. Accordingly, we reaffirm the Board's position that representatives of management may not be accorded bargaining rights under the Act . . . ." (Footnotes omitted.)

Until its decision in North Arkansas in 1970, the Board consistently followed this reading of the Act. <sup>14</sup> It never [416 U.S. 267, 288] certified any unit of "managerial employees," separate or otherwise, and repeatedly stated that it was Congress' intent that such employees not be accorded bargaining rights under the Act. And it was this reading which was permitted to stand when Congress again amended the Act in 1959. 73 Stat. 519.

The Board's exclusion of "managerial employees" defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer," <sup>15</sup> has also been approved by courts without exception. See, e. g., *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (CA7), cert. denied, 400 U.S. 831 (1970); *Illinois State Journal-Register, Inc. v. NLRB*, 412 F.2d 37, 41 (CA7 1969); *Continental Insurance Co. v. NLRB*, 409 F.2d 727, 730 (CA2), cert. denied, 396 U.S. 902 (1969); *Retail Clerks International Assn. v. NLRB*, 125 U.S. App. D.C. 63, 65-66, 366 F.2d 642, 644-645 (1966) (Burger, J.), cert. denied, 386 U.S. 1017 (1967); <sup>16</sup> *International Ladies' [416 U.S. 267, 289] Garment Workers' Union v. NLRB*, 339 F.2d 116, 123 (CA2 1964) (Marshall, J.). <sup>17</sup> And in *NLRB v. North Arkansas Electric Cooperative, Inc.*, 446 F.2d 602 (1971), the Eighth Circuit reviewed the history of the Act and specifically disapproved the Board's departure from its earlier position.

## D

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. <sup>18</sup> 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.

In view of our conclusion, the case must be remanded to permit the Board to apply the proper legal standard [416 U.S. 267, 290] in determining the status of these buyers. <sup>19</sup> *SEC v. Chenery Corp.*, 318 U.S. 80, 85 (1943); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972). We express no opinion as to whether these buyers fall within the category of "managerial employees." <sup>20</sup>

## III

The Court of Appeals also held that, although the Board was not precluded from determining that buyers or some types of buyers were not "managerial employees," it could do so only by invoking its rulemaking procedures under 6 of the Act, 29 U.S.C. 156. <sup>21</sup> We disagree. [416 U.S. 267, 291]

At the outset, the precise nature of the present issue must be noted. The question is not whether the

Board should have resorted to rulemaking, or in fact improperly promulgated a "rule," when in the context of the prior representation proceeding it held that the Act covers all "managerial employees" except those meeting the new "conflict of interest in labor relations" touchstone. Our conclusion that the Board applied the wrong legal standard makes consideration of that issue unnecessary. Rather, the present question is whether on remand the Board must invoke its rulemaking procedures if it determines, [416 U.S. 267, 292] in light of our opinion, that these buyers are not "managerial employees" under the Act. The Court of Appeals thought that rulemaking was required because any Board finding that the company's buyers are not "managerial" would be contrary to its prior decisions 22 and would presumably be in the nature of a general rule designed "to fit all cases at all times."

A similar issue was presented to this Court in its second decision in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (Chenery II). 23 There, the respondent corporation argued that in an adjudicative proceeding the Commission could not apply a general standard that it had formulated for the first time in that proceeding. Rather, the Commission was required to resort instead to its rulemaking procedures if it desired to promulgate a new standard that would govern future conduct. In rejecting this contention, the Court first noted that the Commission had a statutory duty to decide the issue at hand in light of the proper standards and that this duty remained "regardless of whether those standards previously had been spelled out in a general rule or regulation." *Id.*, at 201. The Court continued:

"The function of filling in the interstices of the [Securities] Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which [416 U.S. 267, 293] arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

"In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards." *Id.*, at 202-203. (Emphasis added.)

The Court concluded that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.*, at 203.

And in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), the Court upheld a Board order enforcing an election list requirement first promulgated in an earlier adjudicative proceeding in *Excelsior Underwear Inc.*, 156 N. L. R. B. 1236 (1966). The plurality opinion of Mr. [416 U.S. 267, 294] Justice Fortas, joined by The Chief Justice, MR. JUSTICE STEWART, and MR. JUSTICE WHITE, recognized that "[a]djudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein," and that such cases "generally provide a guide to action that the agency may be expected to take in future cases." *NLRB v. Wyman-Gordon Co.*, *supra*, at 765-766. The concurring opinion of Mr. Justice Black, joined by MR. JUSTICE BRENNAN and MR.

JUSTICE MARSHALL, also noted that the Board had both adjudicative and rulemaking powers and that the choice between the two was "within its informed discretion." *Id.*, at 772.

The views expressed in *Chenery II* and *Wyman-Gordon* make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. Although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the present case would justify such a conclusion. Indeed, there is ample indication that adjudication is especially appropriate in the instant context. As the Court of Appeals noted, "[t]here must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds of thousands of the latter." 475 F.2d, at 496. Moreover, duties of buyers vary widely depending on the company or industry. It is doubtful whether any generalized standard could be framed which would have more than marginal utility. The Board thus has reason to proceed with caution, developing its standards in a case-by-case manner with attention to the specific character of the buyers' authority and duties in each company. The Board's judgment that adjudication best serves this purpose is entitled to great weight. [416 U.S. 267, 295]

The possible reliance of industry on the Board's past decisions with respect to buyers does not require a different result. It has not been shown that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding. Furthermore, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements. Nor are fines or damages involved here. In any event, concern about such consequences is largely speculative, for the Board has not yet finally determined whether these buyers are "managerial."

It is true, of course, that rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course. But surely the Board has discretion to decide that the adjudicative procedures in this case may also produce the relevant information necessary to mature and fair consideration of the issues. Those most immediately affected, the buyers and the company in the particular case, are accorded a full opportunity to be heard before the Board makes its determination.

The judgment of the Court of Appeals is therefore affirmed in part and reversed in part, and the cause remanded to that court with directions to remand to the Board for further proceedings in conformity with this opinion.

It is so ordered.

## Footnotes

[ Footnote 1 ] As amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.

[ Footnote 2 ] The opinion revealed that Board Member Jenkins did not view the company's buyers as exercising managerial functions and therefore considered them "employees" under the Act to the same extent as production and maintenance employees. 190 N. L. R. B., at 431 n. 2. A majority of the Board, however, apparently accepted the company's contention that the buyers were managerial employees. *Id.*, at 432 n. 3.

[ Footnote 3 ] As mentioned, the Board had relied on its North Arkansas decision in the present case. The Eighth Circuit's earlier opinion concerning a related issue in the same case is reported at 412 F.2d

324 (1969).

[ Footnote 4 ] Section 2 (3) of the Act defines the term "employee" as follows: "The term `employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined." 29 U.S.C. 152 (3). Supervisory employees are expressly excluded from the protections of the Act. That term is defined in 2 (11): "The term `supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment." 29 U.S.C. 152 (11).

[ Footnote 5 ] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Zemel v. Rusk, 381 U.S. 1, 11 -12 (1965); Udall v. Tallman, 380 U.S. 1, 16 -18 (1965); Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933).

[ Footnote 6 ] Zemel v. Rusk, supra, at 11-12; Commissioner v. Noel Estate, 380 U.S. 678, 682 (1965); NLRB v. Gullett Gin Co., 340 U.S. 361, 365 -366 (1951); Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 114 -115 (1939); Norwegian Nitrogen Co. v. United States, supra, at 313.

[ Footnote 7 ] Zemel v. Rusk, supra, at 11-12; Costanzo v. Tillinghast, 287 U.S. 341, 345 (1932); United States v. Midwest Oil Co., 236 U.S. 459, 472 -473 (1915).

[ Footnote 8 ] Red Lion Broadcasting Co. v. FCC, supra, at 380-381; FHA v. Darlington, Inc., 358 U.S. 84, 90 (1958).

[ Footnote 9 ] Section 2 (12) of the House bill defined the term "supervisor" as follows: "The term `supervisor' means any individual - "(A) who has authority, in the interest of the employer - "(i) to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any individuals employed by the employer, or to adjust their grievances, or to effectively recommend any such action; or "(ii) to determine, or make effective recommendations with respect to, the amount of wages earned by any individuals employed by the employer, or to apply, or to make effective recommendations with respect to the application of, the factors upon the basis of which the wages of any individuals employed by the employer are determined, [416 U.S. 267, 280] if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment; "(B) who is employed in labor relations, personnel, employment, police, or time-study matters or in connection with claims matters of employees against employers, or who is employed to act in other respects for the employer in dealing with other individuals employed by the employer, or who is employed to secure and furnish to the employer information to be used by the employer in connection with any of the foregoing; or "(C) who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer."

[ Footnote 10 ] Section 2 (11) of the Senate bill contained the following definition of the term "supervisor": "The term `supervisor' means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[ Footnote 11 ] The Report also makes evident that Congress was concerned with more than just the possibility of a conflict of interest in labor relations if supervisors were unionized: "Supervisors are management people. They have distinguished themselves in their work. They have demonstrated their ability to take care of themselves without depending upon the pressure of collective action. No one forced them to become supervisors. They abandoned the `collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such `security.' It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the 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 [416 U.S. 267, 282] 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).

[ Footnote 12 ] The Report stated in reference to "confidential employees": "These are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. Most of the [416 U.S. 267, 284] people who would qualify as `confidential' employees are executives and are excluded from the act in any event. "The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these." Ibid. (Emphasis added.) In 1946 in Ford Motor Co., 66 N. L. R. B. 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those who exercised "`managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

[ Footnote 13 ] The dissenting opinion first asserts that the Act is "very plain on its face" and covers all employees except those expressly excluded post,[i] at 297, but later concedes that the "Conference Committee implied that certain groups of employees were to be excluded." Post, at 305. The dissent then argues that "managerial employees" were not among those impliedly excluded because "no such explicit direction was set forth." Ibid. This overlooks the fact that, as in the case of "confidential employees" and those working in "labor relations, personnel and employment departments," no explicit exclusionary [416 U.S. 267, 285] provision was necessary in 1947 because the Board had never approved the organization of "managerial employees" in either a separate unit or as part of a rank-and-file unit. Indeed, every prior Board decision had resulted in the exclusion of such employees as "managerial." Moreover, it cannot be denied that Congress thought that "executives" were excluded from the Act, for the House Report so stated in express terms. See n. 12, supra. And the congressional debates, along with the Senate Report, evinced a concern over the possible extension of the Act to cover corporate vice presidents and other executives who were part of management. See, e. g., 93 Cong. Rec. 3443, 4136, 5014. In addition, the dissent completely ignores the fundamental change in industrial philosophy which would be accomplished through unionization of "managerial employees." As MR. JUSTICE DOUGLAS explained in his Packard dissent, the Wagner Act was designed to protect "laborers" and

"workers," not vice presidents and others clearly within the managerial hierarchy. 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. The dissent also relies upon the specific inclusion of "professional employees" within the Act to support its assertion that "managerial employees" were to be similarly treated. Post, at 297-298. See 29 U.S.C. 152 (12). "Professional employees," however, are plainly not the same as "managerial employees." As the Conference Committee Report explained, the term "professional employees" refers to "such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 36. In contrast to "managerial employees," they are not defined in terms of their authority "to formulate, determine and effectuate management policies." Ford Motor Co., 66 N. L. R. B., at 1322. [i] ERRATA: a comma should be inserted before "post".

[ Footnote 14 ] See, e. g., Eastern Camera & Photo Corp., 140 N. L. R. B. 569, 571 (1963); AFL-CIO, 120 N. L. R. B. 969, 973 (1958); General Tel. Co. of Ohio, 112 N. L. R. B. 1225, 1229 (1955). The cases excluding buyers or those exercising buyers' functions from other units are legion. See, e. g., Ed's Foodland of Springfield, Inc., 159 N. L. R. B. 1256, 1260 (1966); Albuquerque Div., ACF Ind., Inc., 145 N. L. R. B. 403, 414-415 (1963); Weaver Motors, 123 N. L. R. B. 209, 215-216 (1959); Kearney & Trecker Corp., 121 N. L. R. B. 817, 822 (1958); Temco Aircraft Corp., 121 N. L. R. B. 1085, 1089 (1958); Federal Tel. & Radio Co., 120 N. L. R. B. 1652, 1653-1654 (1958). Surprisingly, the dissent maintains that the Board "actually held only twice" that "managerial employees" were not covered by the Act. Post, at 309. This is difficult to reconcile with the undisputed fact that until its decision in North Arkansas the Board had never even certified a separate unit of "managerial employees" and had stated in case after case that managerial employees were not to be accorded bargaining rights under the Act. E. g., Palace Laundry |416 U.S. 267, 288| Dry Cleaning, 75 N. L. R. B. 320 (1947); American Locomotive Co., 92 N. L. R. B. 15 (1950); Curtiss-Wright Corp., 103 N. L. R. B. 458 (1953); Swift & Co., 115 N. L. R. B. 752 (1956), and cases cited above.

[ Footnote 15 ] Palace Laundry Dry Cleaning, supra, at 323 n. 4. See Ford Motor Co., 66 N. L. R. B., at 1322.

[ Footnote 16 ] In Retail Clerks International Assn. v. NLRB, supra, MR. CHIEF JUSTICE (then Circuit Judge) BURGER explained the Board's policy on "managerial employees": "The Board also excludes from the protections of the Act, as managerial employees, `those who formulate, determine, and effectuate an employer's policies,' AFL-CIO, [120 N. L. R. B. 969, 973 (1958)], and those who have discretion in the performance of their jobs, but not if the discretion must conform to an employer's established policy, Eastern Camera and Photo Corp., 140 N. L. R. B. 569, 571 (1963) (store managers who could set prices are not managerial). The rationale for this Board policy, though unarticulated, seems to be the reasonable belief that Congress intended to exclude |416 U.S. 267, 289| from the protection of the Act those who comprised a part of `management' or were allied with it on the theory that they were the one[s] from whom the workers needed protection." 366 F.2d, at 645. (Emphasis added.)

[ Footnote 17 ] In International Ladies' Garment Workers' Union v. NLRB, supra, MR. JUSTICE (then Circuit Judge) MARSHALL explained that "[a]lthough the Act makes no special provision for `managerial employees,' under a Board policy of long duration, this category of personnel has been excluded from the protection of the Act." 339 F.2d, at 123.

[ Footnote 18 ] The contrary interpretation of the Act urged by the dissent would have far-reaching results. Although a shop foreman would be excluded from the Act, a wide range of executives would be

included. A major company, for example, may have scores of executive officers who formulate and effectuate management policies, yet have no supervisory responsibility or identifiable conflict of interest in labor relations. If Congress intended the unionization of such executives, it most certainly would have made its design plain. See n. 13, *supra*.

[ Footnote 19 ] The Board has had ample experience in defining the term "managerial" in the manner which we think the Act contemplates. See, e. g., *Eastern Camera & Photo Corp.*, *supra*, at 571. Of course, the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are "managerial" must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management.

[ Footnote 20 ] To be sure, it would also be appropriate for the Board to exclude employees from a unit on the ground that their participation in a labor organization would create a conflict of interest with their job responsibilities. *New England Telephone*, 90 N. L. R. B. 639 (1950). See also *Retail Clerks International Assn. v. NLRB*, 125 U.S. App. D.C., at 65-66, 366 F.2d, at 644-645. In this respect, respondent has suggested that it was never afforded fair notice and an opportunity to introduce evidence relating specifically to the possibility of a conflict of interest in labor relations. Tr. of Oral Arg. 33-35, 43, 47. At the representation hearing, the hearing officer did not indicate that the conflict-of-interest standard was relevant, and respondent proceeded on the assumption that the only question was whether the buyers were "managerial employees." App. 8, 83. The present record may well be adequate for purposes of this determination. However, if new and relevant information on this point is tendered on remand, the Board should consider reopening the record for purposes of its admission.

[ Footnote 21 ] Section 6 provides: "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure [416 U.S. 267, 291] Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter." 29 U.S.C. 156. The Administrative Procedure Act (APA) defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. 551 (4). The rulemaking requirements include publication in the Federal Register of notice of the proposed rulemaking and hearing; an opportunity for interested persons to participate; a statement of the basis and purpose of the proposed rule; and publication in the Federal Register of the rule as adopted. The APA defines "adjudication" as "agency process for the formulation of an order," and "order" is defined as "the whole or a part of a final disposition whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. 551 (7), (6). Proceedings for "the certification of worker representatives" are exempted from the Act's procedural requirements for an "adjudication." 5 U.S.C. 554 (a) (6), 556 (a), 557 (a). Sections 9 (c) (1) and (2) of the National Labor Relations Act (NLRA) empower the Board to investigate petitions involving questions of unit representation, to conduct hearings on such petitions, to direct representation elections, and to certify the results thereof. 29 U.S.C. 159 (c) (1) and (2). Board determinations on such representation questions would appear to constitute "orders" within the meaning of the APA. See 5 U.S.C. 551 (6), (7). The NLRA does not specify in what instances the Board must resort to rulemaking.

[ Footnote 22 ] A number of Board decisions have excluded buyers from units of rank-and-file employees. See n. 14, *supra*. But *American Locomotive Co. and Swift & Co.* appear to be the only cases in which the Board has held that buyers are not entitled to organize in a separate unit.

[ Footnote 23 ] *Chenery II* did not involve 4 of the APA, 5 U.S.C. 553, but is nevertheless analogous.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR.

JUSTICE MARSHALL join, dissenting in part.

I concur in Part III of the Court's opinion insofar as it holds that the Board was not required to resort to rulemaking in deciding this case, but I dissent from its holding [416 U.S. 267, 296] in Part II that managerial employees as a class are not "employees" within the meaning of the National Labor Relations Act.

Section 7 of the Act, 29 U.S.C. 157, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . ." Section 8 (a) (1), 29 U.S.C. 158 (a) (1), makes it an unfair labor practice to interfere with the rights guaranteed in 7, and under 8 (a) (5), 29 U.S.C. 158 (a) (5), it is an unfair practice for the employer to refuse to bargain collectively with representatives of his "employees." For the purposes of the foregoing sections, the term "employee" as defined in 2 (3) of the Act, means "any employee" of the employer,

"but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . ." 29 U.S.C. 152 (3).

The issue in this case is whether the term "employee" excludes not only those specifically excluded by 2 but also the broad category of "managerial" employees who, although literally "employees" of the employer and not expressly excluded by 2, are nevertheless not to be considered employees for the purposes of the Act because they make and implement managerial policies. The Court holds that no managerial employee is an employee for the purposes of the Act. I cannot agree with this conclusion. [416 U.S. 267, 297]

The Act is very plain on its face - "any employee," with specified exclusions, is entitled to the benefits of the Act. Each of the exclusions is a narrow and precisely defined class, and none of them mentions managerial employees. "Supervisors" are excluded, but a precise definition of that class, much narrower than the class of managerial employees, is provided in 2 (11):

"any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. 152 (11).

Without more, it could not be concluded that Congress meant to exclude a whole category of employees in addition to those expressly excepted in 2 (3). To infer that all managerial employees are not employees for purposes of the Act because a specified managerial subgroup, supervisors, was expressly excluded, is unwarranted, at least where Congress was careful to define precisely what employees were within the scope of the supervisory exclusion.

What is more, Congress in 2 (12), 29 U.S.C. 152 (12), has defined a special subclass of professional employees having special skills and duties "involving the consistent exercise of discretion and judgment in" the performance of their work. These employees are obviously "employees" for the purposes of the Act; and in 9, 29 U.S.C. 159, after investing the Board with the powers necessary to decide the units appropriate for collective bargaining, it is provided [416 U.S. 267, 298] that the Board shall not hold any

bargaining unit to be appropriate "if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." It is apparent, it seems to me, that there are many professional employees who would qualify as managerial employees; yet the Act clearly treats them as employees for purposes of the Act and Congress assumed they would have full organizational and bargaining rights unless it was provided otherwise in accordance with congressional desires. Hence 9 (b).

Insofar as the face of the Act is concerned, and as compared with an across-the-board exclusion of "managerial" employees, the present ruling of the Board, which excludes only those managerial employees whose work may involve them in a conflict of interest if they are permitted to bargain collectively, is a far narrower exclusion adhering much more closely to the rationale of the supervisory exclusion and to the apparent intent of Congress. The Court nevertheless not only holds that the term employee may be construed to exclude managerial employees but also that it must be so construed. No narrower exclusion, it is said, in addition to those expressly provided for, will satisfy the Act.

Although it would appear to be a difficult and questionable feat to rewrite the statute so substantially, the Court purports to find license for its result in the legislative history of the 1947 amendments to the Act, read in the light of previous and subsequent Board and court decisions. It is true that the exclusion of supervisors from the definition of employees first occurred in 1947, but, with all respect, I find no basis in the history of these amendments, read in the light of prior Board cases, for concluding that Congress intended to exclude all [416 U.S. 267, 299] managerial employees, in addition to supervisors, from the benefits of the Act.

As I understand its decisions, the Board at no time prior to 1947 completely excluded the broad category of managerial employees from the class of employees protected by the Act. The Court concedes that the Board's cases during this period involved only the exclusion of managerial employees from bargaining units of rank-and-file workers. Some of the Board's statements may have been ambiguous, but no Board case held or had occasion to hold that managerial employees as a group would not be protected by the Act. As the Court acknowledges, the Board, in one decision excluding buyers and expeditors from a unit of office and clerical employees, pointedly expressed the caveat that "[t]his is not to say, however, that buyers and expeditors are to be denied the right to self-organization and to collective bargaining under the Act." *Dravo Corp.*, 54 N. L. R. B. 1174, 1177 (1944). In *Hudson Motor Car Co.*, 55 N. L. R. B. 509, 512 (1944), where the Board excluded buyers from a bargaining unit of office and clerical employees, the reason given for the exclusion was "that their duties are closely allied to management, differing materially from those of the other clerical employees." And in *Vulcan Corp.*, 58 N. L. R. B. 733, 736 (1944), the Board excluded a buyer from a production and maintenance employees' unit, not because a managerial employee could not be accorded bargaining rights, but "[b]ecause of the responsibility of his position and his peculiar relationship to management, and in view of the fact that his interests are apparently different from those of the production and maintenance employees." This line of Board decisions addressed the question whether certain managerial employees had sufficient community of interest with rank-and-file employees to be included in the same bargaining unit with them, and the Board was exercising its power to designate [416 U.S. 267, 300] appropriate bargaining units under 9. It is clear that the Board at no time held managerial employees to be outside the scope of the Act during the period prior to the Taft-Hartley amendments.

The Board's position with respect to supervisors, as a class, vacillated during this time, the Board first excluding supervisors from rank-and-file units but recognizing units confined to supervisory employees, then refusing to recognize any bargaining units of supervisors and finally returning to its earlier rule. But even when the Board determined for a short period that supervisors should not be permitted to organize either with other employees or in separate units, it never went as far as to hold

supervisors not to be "employees" under the Act. This was the Court's understanding of the Board's position in *Packard Co. v. NLRB*, 330 U.S. 485, 492 n. 3 (1947), the very case which prompted the 80th Congress to go further than the Board had ever gone and exclude supervisors entirely from the category of employees accorded bargaining rights under the Act. <sup>1</sup> In *Maryland Drydock Co.*, 49 N. L. R. B. 733, 738, 740 (1943), the Board was "no longer convinced that from the mere determination [416 U.S. 267, 301] that a supervisor is an employee it follows that supervisors may constitute appropriate bargaining units" because "the benefits which supervisory employees might achieve through being certified as collective-bargaining units would be outweighed not only by the dangers inherent in the commingling of management and employee functions, but also in its possible restrictive effect upon the organizational freedom of rank and file employees." Shortly thereafter, the Board, faced with a claim by the employer that foremen are not employees within the meaning of the Act, did not address this possible ground of decision but held instead that it was "not persuaded that the factors militating against the establishment of units of supervisory employees, set forth in . . . the *Maryland Drydock* case, are obviated by the circumstance that the union seeking to represent such employees is an independent, unaffiliated union." *General Motors Corp.*, 51 N. L. R. B. 457, 460 (1943). Moreover, the Board held in *Soss Mfg. Co.*, 56 N. L. R. B. 348 (1944), that while a bargaining unit of supervisory employees might not be appropriate, a supervisor, like other employees, was nonetheless protected against an unfair labor practice: "We conclude that supervisors are 'employees' and that supervisory status does not by its own force remove an employee from the protection of Section 8 (1) and (3)" of the Act. *Id.*, at 353. Ultimately, in the *Packard* cases, 61 N. L. R. B. 4, 64 N. L. R. B. 1212 (1945), the Board reverted to its earlier rule that bargaining units of supervisors were entitled to recognition under the Act as long as they included no rank-and-file members.

When Congress undertook to amend the Act following this Court's decision in *Packard* upholding the Board's inclusion of supervisors as employees under the Act, it was acting in light of a renewed Board policy to [416 U.S. 267, 302] permit supervisory employees to organize in separate units under the mantle of the Act's protection, an enduring Board policy not to exclude supervisors from the statutory definition of employees, and a further policy which excluded managerial employees from rank-and-file units but had never denied them the right to establish separate bargaining units or placed them outside the Act's definition of "employee." The amendments adopted by Congress in 1947 in light of this pattern of Board practice clearly intended to do away with the *Packard* decision approving the Board's authority to grant recognition to unions of supervisors. The House and the Senate both proposed to exclude supervisors from the individuals defined as employees for purposes of the Act. The Senate definition of "supervisor" was limited to individuals with authority, in the employer's interest, to take or recommend action involving the employment of other employees, if the exercise of such authority required the use of independent judgment, S. 1126 2 (11). But the proposed House definition would also have identified as excluded "supervisors" (a) those who could determine or effectively recommend the wages to be paid other employees, (b) employees with responsibility in the area of labor relations, personnel, employment, police, or time-study matters, and (c) confidential employees, H. R. 3020 2 (12). Neither of these proposals sought to exclude in express terms the entire category of "managerial employees," i. e., those who are in a position to formulate, determine, and effectuate management policies beyond the area of labor relations, whether by defining such persons as "supervisors" or by proposing a separate exclusion for "managerial employees." Such a step could easily have been taken had Congress intended to exclude these individuals from the protection of the Act. But it was not, despite the fact that the Board had recently considered whether [416 U.S. 267, 303] certain employees should be denied organizational rights, either because they were supervisory or, separately, because their job responsibilities involved the exercise of managerial discretion. See, e. g., *Ford Motor Co.*, 66 N. L. R. B. 1317, 1322 (1946); *Electric Controller & Mfg. Co.*, 69 N. L. R. B. 1242 (1946). One would expect that if Congress had intended to eliminate the Board's authority to accord bargaining rights to managerial employees, as well as supervisors, it would have said so, particularly as Board practice had treated these two categories separately and differently.

The Court would fill this gap by referring to the House Managers' statement accompanying the Conference Committee Report and explaining the adoption of the narrower Senate definition of excluded "supervisors." This report is indeed instructive, but it indicates even more clearly, in my opinion, that Congress did not contemplate the exclusion of managerial employees from the coverage of the Act:

"The conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential employees as well, and it was not the intention of the conferees to alter this practice in any respect. The conference agreement does not treat time-study personnel or guards as supervisors, as did the House bill. Since, however, time-study employees may qualify as professional personnel, [416 U.S. 267, 304] the special provisions of the Senate amendment . . . applicable with respect to professional employees will cover many in this category. In the case of guards, the conference agreement does not permit the certification of a labor organization as the bargaining representative of guards if it admits to membership, or is affiliated with any organization that admits to membership, employees other than guards. The provision dealing with the certification of bargaining units for guards is dealt with in section 9 (b) of the conference agreement . . ." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35-36 (1947).

The Court emphasizes that the statutory language adopted in the 1947 amendments did not expressly exclude persons working in labor relations, personnel, or employment departments, or confidential employees, but that these were "impliedly excluded" from the Act's coverage by dint of the House Managers' statements just quoted. From this premise, the Court proceeds to assume that other categories of employees, similarly not excluded under the express terms of the amended definition of "employee," were also impliedly excluded from the Act. In my view, there is no warrant for the assumption that groups of employees, which the statute, or express legislative statements, do not address, are to be excluded from the Act; nor is there any legislative debate whatsoever which can reasonably be construed as expressing an authoritative intent to exclude managerial employees as a class.

The House Managers' statement accompanying the Conference Committee Report explains that the Act was not amended expressly to exclude labor relations and confidential employees from coverage under the Act, because it was already prevailing Board practice to exclude these employees. This was not an entirely accurate [416 U.S. 267, 305] representation of Board practice, which seemed to hold only that such employees should not be included in rank-and-file bargaining units, and not necessarily that they would have no protections under the Act, see, e. g., *Murray Ohio Mfg. Co.*, 61 N. L. R. B. 47 (1945); *Ford Motor Co.*, 66 N. L. R. B. 1317 (1946), but even accepting the House Managers' statement as an authoritative direction that these workers were not to be considered employees within the meaning of 2, it does not follow that other groups of employees, regarding whom no such explicit direction was set forth and whom the Board had not treated in such a manner, were also intended to be excluded. Such statement implied that certain groups of employees were to be excluded, but it also noted that some timestudy personnel could qualify as professional employees and could therefore organize in units which a majority of them approved, and that guards were not wholly excluded from the Act, but were restricted to units composed solely of other guards. 9 (b), 29 U.S.C. 159 (b). Given that Congress made specific provision for timestudy and plant protection employees, who were to be entitled to bargaining rights, and that it expressed a desire to exclude only labor relations and confidential employees whom it thought the Board had previously held outside the Act, there is no reason to suppose from the further congressional silence that special provisions, whether of inclusion or exclusion, were intended with respect to other categories of employees. If it be argued that the absence of any express treatment of

managerial employees by Congress was somehow intended to codify prior Board practice, then the unavoidable fact is that Board decisions had not held that managerial employees were unprotected by the Act. They had only been excluded from rank-and-file bargaining units. Moreover, there is no indication in the legislative history as to what [416 U.S. 267, 306] Congress might have perceived the Board's rule to be with respect to managerial employees as a class. 2

Nor is the Court's position much advanced by the few passing references in the House Report and in the floor debates, which the Court cites, ante, at 283, and nn. 12 and 13, for the assumption that "executives" would be excluded from the Act apart from whether they were confidential employees or not, and for the discussion of supervisors as representatives of management whom the amendments sought to exclude. In none of the cited passages was the category of "managerial employees," as the Board had defined it, ever addressed, and the focus of these remarks is clearly directed at the exclusion of supervisors as defined in the proposed amendments. 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 [416 U.S. 267, 307] 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. 3

Finally, if we are to consider the 1947 amendments as intending to enact the views of the dissenting Justices in *Packard*, it should be noted that the dissent interpreted the National Labor Relations Act to "put in the employer category all those who acted for management not only in formulating but also in executing its labor policies." 330 U.S., at 496. (Emphasis supplied.) See also *id.*, at 500. Limiting the exclusion of managerial employees to those who are charged with the formulation or implementation of labor relations policies, as the Board has now done in the case before us, is [416 U.S. 267, 308] entirely consistent with this view and with the purposes of the Act. As the Senate Report noted, its concern in changing the law with respect to supervisory employees, as constructed by *Packard*, was that the balance of power in the collective-bargaining process had been upset by "the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise." S. Rep. No. 105, 80th Cong., 1st Sess., 3 (1947). See also H. R. Rep. No. 245, 80th Cong., 1st Sess., 13 (1947); 93 Cong. Rec. 3553. Where an employee may be deemed managerial because of the nature of his duties apart from supervision of other employees, however, there is no reason to suppose that union affiliation, at least in separate units, would raise the same labor relations concern.

Following the Taft-Hartley amendments in 1947, the Board continued to hold, as it had frequently held before, that buyers, and others with managerial interests, were to be excluded from bargaining units of other employees. *Denver Dry Goods*, 74 N. L. R. B. 1167 (1947); *Palace Laundry Dry Cleaning*, 75 N. L. R. B. 320 (1947); *Denton's, Inc.*, 83 N. L. R. B. 35, 37 (1949); *Wise, Smith & Co.*, 83 N. L. R. B. 1019, 1021 n. 6 (1949); *Westinghouse Electric Corp.*, 89 N. L. R. B. 8, 14 (1950). But in 1950, in *American Locomotive Co.*, 92 N. L. R. B. 115, 117, the Board, in rejecting the inclusion of buyers in an office and clerical employees unit or their placement in a separate bargaining unit, said that "[a]s it appears that the buyers are authorized to make substantial purchases for the Employer, we find that they are representatives of management, and as such may not be accorded bargaining rights under the Act." Reliance for this [416 U.S. 267, 309] statement was placed on the *Wise, Smith & Co.* case and *Westinghouse Electric* case which involved the appropriateness of placing the managerial employees in a particular bargaining unit. In *Swift & Co.*, 115 N. L. R. B. 752 (1956), the Board held that a proposed unit of procurement drivers could not be accorded bargaining rights, even in a separate unit. There, the Board flatly asserted that it was "the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management." *Id.*, at 753-754. The sole support for this statement, which the

Board has now repudiated, was a reference to the statutory definitions of "employee" and "employer" and to the Conference Committee Report's explanation of the term "supervisors," as quoted above and reprinted in the Congressional Record.

The Board thereafter continued to exclude managerial employees from bargaining units of other employees, occasionally citing *Swift*, e. g., *Copeland Refrigeration Corp.*, 118 N. L. R. B. 1364, 1365 n. 2 (1957); *AFL-CIO*, 120 N. L. R. B. 969 (1958), but more frequently excluding managerial employees from particular units without citing that case or suggesting that the excluded workers were not protected employees. E. g., *Mack Trucks, Inc.*, 116 N. L. R. B. 1576, 1577-1578 (1956); *Diana Shop*, 118 N. L. R. B. 743, 745 (1957); *Federal Tel. & Radio Co.*, 120 N. L. R. B. 1652, 1654 (1958); *Kearney & Trecker Corp.*, 121 N. L. R. B. 817, 822 (1958); *Weaver Motors*, 123 N. L. R. B. 209, 216 (1959); *Eastern Camera & Photo Corp.*, 140 N. L. R. B. 569, 572 (1963).

Until the Board overruled *Swift* in *North Arkansas Electric Cooperative, Inc.*, 185 N. L. R. B. 550 (1970), it had thus actually held only twice that managerial employees could not be afforded protection under the Act, and its support for that conclusion was without any persuasive appeal. It is true, of course, that the Board had not held to the contrary either, and that [416 U.S. 267, 310] various courts of appeals interpreted and deferred to the Board's position as one of total exclusion of managerial employees from the scope of the Act, although in none of these cases was that conclusion necessary to the result reached. But the Board has now rejected this broad exclusion, and the question is whether the current view should be sustained. That the Board now refuses to follow its prior precedents is no reason to overturn it, for we have frequently sustained Board decisions overruling its prior interpretations of the Act. E. g., *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *Packard Co. v. NLRB*, 330 U.S. 485 (1947). And the face of the Act and the events of 1947 demonstrate that the Board's present decision is a permissible construction of the statute.

Nor did Congress in 1959, when it again amended the statute, expressly or impliedly enact or approve the statutory interpretation announced in *Swift & Co.* 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. Congressional silence does not imply legislative approval of all Board rulings theretofore made. As the Court noted in *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 241-242 (1970), which overruled *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962):

"Nor can we agree that the conclusive weight should be accorded to the failure of Congress to respond to *Sinclair* on the theory that congressional silence should be interpreted as acceptance of the decision. The Court has cautioned that '[i]t 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). Therefore, in the absence of any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance of *Sinclair*, the mere silence of Congress is not a sufficient reason for refusing to consider the decision."

See also *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). Similarly, from the congressional silence in 1959 concerning *Swift's* exclusion of managerial employees from the protection of the Act, it should not be assumed that Congress intended to approve of *Swift* and foreclose the possibility of the Board's reconsidering *Swift* and overruling it on further and more examining reflection. *NLRB v. Seven-Up Co.*, 344 U.S. 344, 350-352 (1953).

The Board's decisions in this area have not established a cohesive and precise pattern of rulings. It is often difficult to tell whether an individual decision is based on the propriety of excluding certain

employees from a particular bargaining unit or whether the worker under consideration is thought to be outside the scope of the Act. But this Court has consistently said that it will accept the Board's determination of whether a particular individual is an "employee" under the Act if that determination "has `warrant in the record' and a reasonable basis in law," *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944); *NLRB v. United Insurance Co.*, 390 U.S. 254, 260 (1968). 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.

I respectfully dissent.

[ Footnote 1 ] "The Board had held that supervisory employees may organize in an independent union, *Union Collieries Coal Co.*, 41 N. L. R. B. 961, 44 N. L. R. B. 165; and in an affiliated union, *Godchaux Sugars, Inc.*, 44 N. L. R. B. 874. Then it held that there was no unit appropriate to the organization of supervisory employees. *Maryland Drydock Co.*, 49 N. L. R. B. 733; *Boeing Aircraft Co.*, 51 N. L. R. B. 67; *Murray Corp. of America*, 51 N. L. R. B. 94; *General Motors Corp.*, 51 N. L. R. B. 457. In this case, 61 N. L. R. B. 4, 64 N. L. R. B. 1212; in *L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298; *Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 386, 71 N. L. R. B. 1261; and in *California Packing Corp.*, 66 N. L. R. B. 1461, the Board re-embraced its earlier conclusions with the same progressive boldness it had shown in the *Union Collieries* and *Godchaux Sugars* cases. In none of this series of cases did the Board hold that supervisors were not employees. See *Soss Manufacturing Co.*, 56 N. L. R. B. 348."

[ Footnote 2 ] The majority argues that "no explicit exclusionary provision was necessary in 1947 because the Board had never approved the organization of `managerial employees' in either a separate unit or as part of a rank-and-file unit." Ante, at 284-285, n. 13. It does not dispute, however, that the Board had never disapproved their organization either, and admits that the Board had stated in *Dravo Corp.*, 54 N. L. R. B. 1174 (1944), that by excluding buyers from a clerical employees unit it did not mean to say they would be denied bargaining rights under the Act. The Board had not held managerial employees excluded prior to 1947, and Congress did not address itself to the class of "managerial employees" by that term or by reference to the Board's definition. There is, therefore, no justification for excluding from the statutory designation of "any employee" an entire class that the Board had not previously excluded and that Congress did not expressly deal with in its amendments to the Act or in the legislative materials surrounding their adoption. If Congress had intended to exclude managerial employees, it would have said something about them, since it took such great pains to discuss supervisors and labor relations, confidential, time-study, and plant protection employees.

[ Footnote 3 ] The majority expresses concern that extending organizational and bargaining rights to managerial employees would permit the extension of the Act to vice presidents and other high level executives, thereby blurring the distinction between management and labor. The concern is overblown; for most, if not all, executives will obviously be "super" supervisors, confidential employees, professionals or within the Board's definition of those employees whose organization would result in a conflict of interest with respect to the company's labor policies. If there are remaining executives outside these categories who should also be excluded, the Board should be told to exclude that particular group, rather than to exclude the managerial class that would reach not only vertically, but laterally, to deny "hundreds of thousands," 475 F.2d 485, 496, of buyers and other relatively low-level management employees the organizational benefits and other protections of the Act otherwise available to "any employee." To argue, as the majority does, that had Congress intended to include managerial employees, it would have said so expressly, ignores the fact that the Act covers "any employee" and that the burden properly falls on those who would exclude managerial employees to demonstrate that it

was the intent of Congress to exclude this category when it legislated directly to exclude supervisory employees. [416 U.S. 267, 312]



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454 U.S. 170

**NATIONAL LABOR RELATIONS BOARD v. HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORP.****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

No. 80-885.

Argued October 5, 1981

Decided December 2, 1981 \*

*Held:*

There is reasonable basis in law for the practice of the National Labor Relations Board (NLRB) of excluding from collective-bargaining units only those confidential employees with a "labor nexus," while rejecting any claim that all employees with access to confidential information are beyond the reach of the definition of "employee" in 2(3) of the National Labor Relations Act (NLRA). Pp. 177-192.

(a) There is nothing in the Taft-Hartley Act's legislative history to support any inference, let alone conclusion, that Congress intended to alter, or disapproved, the NLRB's determination prior to the 1947 passage of the Act that only confidential employees with a "labor nexus" should be excluded from bargaining units. Rather, the contrary appears. Indeed, the Taft-Hartley Act's express inclusion of "professional employees" under the Act's coverage negates any reading of the legislative history as excluding confidential employees generally from 2(3)'s definition of "employee." Pp. 177-185.

(b) The dictum in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 284, n. 12, that Congress "clearly

thought that the [NLRA] did not cover 'confidential employees,' even under a broad definition of that term," cannot be squared with congressional intent. Nor is there any merit to the argument that the NLRB has applied the labor-nexus test inconsistently. A review of the NLRB'S decisions indicates that it has never followed a practice of depriving all employees who have access to confidential business information from the full panoply of rights afforded by the NLRA. Rather, for over 40 years, the NLRB, while declining to create any implied exclusion from the definition of "employee" for confidential employees, [454 U.S. 170, 171] has applied a labor-nexus test in identifying those employees who should be excluded from bargaining units because of access to confidential business information. This consistent, longstanding interpretation of the NLRA by the NLRB cannot be ignored. Pp. 186-190.

627 F.2d 766 and 631 F.2d 734, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J. filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, post, p. 192.

Deputy Solicitor General Wallace argued the cause for petitioner in No. 80-885 and respondent in No. 80-1103. With him on the briefs were Solicitor General Lee, former Solicitor General McCree, Barry Sullivan, Norton J. Come, and Linda Sher.

Warren D. Krebs argued the cause and filed a brief for Hendricks Rural Electric Membership Corp., respondent in No. 80-885 and petitioner in No. 80-1103. Russ R. Mueller argued the cause and filed a brief for Malleable Iron Range Co., respondent in No. 80-885.Fn

[ Footnote \* ] Together with National Labor Relations Board v. Malleable Iron Range Co. (see this Court's Rule 19.4), and No. 80-1103, Hendricks county Rural Electric Membership Corp. v. National Labor Relations Board, also on certiorari to the same court.

Fn [454 U.S. 170, 171] Briefs of amici curiae urging reversal in both no. 80-885 and No. 80-1103 were filed by J. Albert Woll, Laurence Gold, and George Kaufmann for the American Federation of Labor and Congress of Industrial Organizations; and by John A. Fillion for United Auto Workers. Joseph E. Finley filed a brief for the Office and Professional Employees International Union, AFL-CIO, CLC, urging reversal in No. 80-885.

David Crump filed a brief for the Legal Foundation of American as amicus curiae urging affirmance in both No. 80-885 and No. 80-1103.

Stephen A. Bokat filed a brief for the Chamber of Commerce of the United States as amicus curiae in both No. 80-885 and No. 80-1103.

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether an employee who, in the course of his employment, may have access to information considered confidential by his employer is impliedly excluded [454 U.S. 170, 172] from the definition of "employee" in 2(3) of the National Labor Relations Act and denied all protections under the Act. I

We have before us two cases under the same docket number. We shall first state separately the factual and procedural background of each.

#### The Hendriks case

Mary Weatherman was the personal secretary to the general manager and chief executive officer of respondent Hendricks County Rural Electric Membership Corp. (Hendricks), a rural electric membership cooperative. She had been employed by the cooperative for nine years. In May 1977 she signed a petition seeking reinstatement of a close friend and fellow employee, who had lost his arm in the course of employment with Hendricks, and had been dismissed. Several days later she was discharged.

Weatherman filed an unfair labor practice charge with the National Labor Relations Board (NLRB or Board), alleging that the discharge violated 8(a)(1) of the National Labor Relations Act, (NLRA or Act), 29 U.S.C. 158(a)(1). Hendricks' defense, inter alia, was that Weatherman was denied [454 U.S. 170, 173] the Act's protection because as a "confidential" secretary she was impliedly excluded from the Act's definition of "employee" in 2(3). The Administrative Law Judge (ALJ) rejected this argument. He noted that the Board's decisions had excluded from bargaining units only those "confidential employees . . . [ ]who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." 236 N. L. R. B. 1616, 1619 (1978), quoting *B. F. Goodrick Co.*, 115 N. L. R. B. 722, 724 (1956). Applying this "labor nexus" test, the ALJ found that Weatherman was not in any event such a "confidential employee." 2 He also determined that Hendricks has discharged Weatherman for activity - signing the petition - protected by 7 of the Act, 29 U.S.C. 157. 3 The ALJ thus sustained Weatherman's unfair labor practice charge. The Board affirmed "the rulings, findings, and conclusions of the Administrative Law Judge," and ordered that Weatherman be reinstated with backpay. 236 N. L. R. B., at 1616.

Hendricks sought review in the United States Court of Appeals for the Seventh Circuit and the Board cross-petitioned for enforcement. A divided panel of the court reversed and remanded for further proceedings. 603 F.2d 25 (1979). Although the majority agreed with the Board's factual finding that Weatherman did not "assist in a confidential capacity with respect to labor relations policies," *id.*, at 28, the majority, relying on language in a footnote to *NLRB v. Bell Aerospace [454 U.S. 170, 174] Co.*, 416 U.S. 267, 284, n. 12 (1974), held that "all secretaries working in a confidential capacity, without regard to labor relations, [must] be excluded from the Act." 603 F.2d, at 30. 4 The Court of Appeals therefore remanded for a determination whether Weatherman came within this substantially broader definition of confidential secretary.

On remand, the Board found that Weatherman was not privy to the confidences of her employer and thus concluded that she did not fall within the broader definition of confidential secretary that the Court of Appeals had directed the Board to apply. 247 N. L. R. B. 498 (1980). 5 Hendricks again petitioned for review and the Board cross-petitioned for enforcement. The Court of Appeals, by a divided panel, denied enforcement. 627 F.2d 766 (1980). The majority held that the Board had "actually reapplied[d] the old standard incorporating the labor nexus," and that the evidence in the [454 U.S. 170, 175] record failed to support a finding that Weatherman did not come within the court's broader definition of confidential secretary. *Id.*, at 770. 6

#### The Malleable case

This case grew out of efforts of the Office and Professional Employees International Union (Union) to represent, as collective-bargaining agent, various employees of respondent Malleable Iron Range Co.

(Malleable). In December 1978 the Union sought certification as the collective-bargaining representative for a unit of office clerical, technical, and professional personnel employed at the respondent's facility in Beaver Dam, Wis. At the subsequent representation hearing, Malleable challenged the inclusion of 18 employees in the unit on the ground that they had access to confidential business information. The Regional Director of the NLRB rejected Malleable's objection, concluding that none of the challenged 18 employees was a confidential employee under the Board's "labor nexus" test. App. to Pet. for the Cert. 76a-94a. The Union prevailed in a later representation election, and was accordingly certified as the bargaining agent for the unit. Malleable nevertheless refused to bargain with the Union. Seeking relief, the Union filed unfair labor practice charges with the NLRB. The Board found that Malleable's refusal to bargain violated 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and issued a bargaining order. 244 N. L. R. B. 485 (1979).

Malleable petitioned the Court of Appeals for the Seventh Circuit for review of the order and the Board cross-petitioned for enforcement. In an unreported opinion, a divided panel of the court denied enforcement. App. to Pet. for Cert. [454 U.S. 170, 176] 56a-60a. Order denying enforcement, 631 F.2d 734 (1980). The majority noted that the Regional Director, in determining that none of the 18 individuals was a confidential employee, had applied the Board's labor-nexus test which the Seventh Circuit had rejected in the earlier decisions involving Hendricks. The court remanded the case to the Board for reconsideration consistent "with the Hendricks case." App. to Pet. for Cert. 56a, 59a.

We granted the Board's petition for certiorari in both cases to resolve the conflict among the Courts of Appeals respecting the propriety of the Board's practice of excluding from collective-bargaining units only those confidential employees with a "labor nexus," while rejecting any claim that all employees with access to confidential information are beyond the reach of 2(3)'s definition of "employee." 7 450 U.S. 964 (1981). We hold that there is a reasonable basis in law for the Board's use of the "labor nexus" test. We therefore reverse the judgments of the Court of Appeals, with directions in the Hendricks case to enforce the Board's order, 8 and with [454 U.S. 170, 177] directions in the Malleable case for further proceedings consistent with this opinion.

## II

Section 2(3) of the NLRA provides that the "term 'employee' shall include any employee . . ." (emphasis added), with certain stated exceptions such as "agricultural laborers," "supervisors" as defined in 2(11), and "independent contractors." 9 Under a literal reading of the phrase "any employee," then, the workers in question are "employees." But for over 40 years, the NLRB, while rejecting any claim that the definition of "employee" in 2(3) excluded confidential employees, had excluded from the collective-bargaining units determined under the Act those confidential employees satisfying the Board's labor-nexus test. Respondents Hendricks and Malleable (hereafter respondents) argue that contrary to the Board's practice, all employees who may have access to confidential business information are impliedly excluded from the definition of employee in 2(3).

In assessing the respondents' argument, we must be mindful of the canon that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially where Congress has refused to alter the administrative construction." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (footnote omitted); see NLRB v. Bell Aerospace Co., 416 U.S., at 274 -275; Zemel v. Rusk, 381 U.S. 1, 11 -12 (1965). We therefore proceed to review the Board's determinations from 1940 to 1946 whether confidential employees were "employees" within 2(3) of the NLRA (Wagner Act), and then determine whether Congress, when it considered those determinations in enacting the Labor Management Relations Act of 1947 (Taft-Hartley Act), intended to alter the Board's practice. [454 U.S. 170, 178]

## A

In 1935 the Wagner Act became law. 49 Stat. 449. The Act's road objective were to "encourage[e] the practice and procedure of collective bargaining and . . . protec[t] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Id.*, at 449-450. The employees covered by the Act were defined in 2(3): "the term 'employee' shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse." Although the Act's express exclusions did not embrace confidential employees, the Board was soon faced with the argument that all individuals who had access to confidential information of their employers should be excluded, as a policy matter, for the definition of "employee." The Board rejected such an implied exclusion finding it to have "no warrant under the Act." *Bull Dog Electric Products Co.*, 22 N. L. R. B. 1043, 1046 (1940). See also *Creamery Package Manufacturing Co.*, 34 N. L. R. B. 108, 111 (1941). But in fulfilling its statutory obligation to determine appropriate bargaining units under 9 of the Act, 29 U.S.C. 159, for which broad discretion has been vested in the Board, see *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491-492 (1947); *Pittsburgh Place Glass Co. v. NLRB*, 313 U.S. 146 (1941), the Board adopted special treatment for the narrow group of employees with access to confidential, labor-relations information of the employer. The Board excluded these individuals from bargaining units composed of rank-and-file workers. <sup>10</sup> See, e. g., *Brooklyn Daily Eagle*, 13 [454 U.S. 170, 179] N. L. R. B. 974, 986 (1939); *Creamery Package Manufacturing Co.*, *supra*, at 110. The Board's rationale was that "management should not be required to handle labor relations matters through employee who are represented by the union with which the [c]ompany is required to deal and who in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, and other labor relations matter." *Hoover Co.*, 55 N. L. R. B. 1321, 1323 (1944).

Following its formulation, through 1946, the Board routinely applied the labor-nexus test in numerous decisions to identify those individuals who ere to be excluded from bargaining units because of their access to confidential information. <sup>11</sup> And in at least one instance in which a Court of Appeals [454 U.S. 170, 180] had occasion to review the Board's application of a labor-nexus test under the Wagner Act, the test was upheld. *NLRB v. Poultrymen's Service Corp.*, 138 F.2d 204, 210-211 (CA3 1943). See also *NLRB v. Armour & Co.*, 154 F.2d 570, 573-574 (CA10 1945); *Polish National Alliance v. NLRB*, 136 F.2d 175, 180 (CA7 1943), *aff'd*, 322 U.S. 643 (1944).

In 1946, in *Ford Motor Co.*, 66 N. L. R. B. 1317, 1322, the Board refined slightly the labor-nexus test because in its view the "definition [was] too inclusive and needlessly preclude[d] many employees from bargaining collective together with other workers having common interests." Henceforth, the Board announced, it intended "to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who [454 U.S. 170, 181] exercise 'managerial' functions in the field of labor relations. <sup>12</sup> This was the state of the law in 1947 when Congress amended the NLRA through the enactment of the Taft-Hartley Act. 61 Stat. 136.

## B

Although the text of the Taft-Hartley Act also makes no explicit reference to confidential employees, when Congress addressed the scope of the NLRA's coverage, the status of confidential employee was discussed. But nothing in that legislative discussion supports any inference, let alone conclusion, that Congress intended to alter the Board's pre-1947 determinations that only confidential employees with a "labor nexus" should be excluded from bargaining units. Indeed, the contrary appears.

The Taft-Hartley Act was in part a response to the Court's decision in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), which upheld the Board's certification of a bargaining unit composed of plant foremen. See *NLRB v. Bell Aerospace Co.*, 416 U.S., at 279. Although the House and Senate initially passed differing bills, both Houses explicitly excluded "supervisors" from the definition of "employee" in the NLRA. H. R. 3020, 80th Cong., 1st Sess., 2(3) (1947); S. 1126, 80th Cong., 1st Sess., 2(3) (1947). In defining the term "supervisor," however, the bills differed substantially. The House bill defined "supervisor" to include within its scope the confidential employee, broadly defined as one "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 [454 U.S. 170, 182] use in the interest of the employer." 13 The Senate, on the other hand, did not include the confidential employee within its definition of "supervisor." 14

The differing House and Senate bills were submitted to a Conference Committee. In Committee, the Senate definition of "supervisor," with no reference to confidential employees, [454 U.S. 170, 183] prevailed. As described in the statement of the House Managers, appended to the Conference Report:

"The conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947). 15

With this understanding, both Houses adopted the conference Report, 93 Cong. Rec. 6393 (1947) (House); id., at 6536 [454 U.S. 170, 184] (Senate). although President Truman vetoed the Taft-Hartley bill, see id., at 7485-7488 (veto message), the bill nevertheless became law when Congress successfully overrode the veto, id., at 7489 (House); id., at 7538 (Senate).

The Court of Appeals interpreted the legislative history of Congress' exclusion of "supervisors" from the definition of "employees" as warranting an implied exclusion for all workers who may have access to confidential business information of their employer. That interpretation must be rejected. It is flatly belied by the Conference Committee's rejection of the House proposal of an exclusion of all confidential employees - for obviously the House conceded on this issue to the Senate. 16

Indeed, the Taft-Hartley Act's express inclusion of "professional employees" under the Act's coverage 17 negates any reading of the legislative history as excluding confidential employees generally from the definition of employee in 2(3). The definition of professional employees was intended to cover "such persons as legal, engineering, scientific and medical [454 U.S. 170, 185] personnel together with their junior professional assistants." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 36 (1947). 18 But surely almost all such persons would likely be privy to confidential business information and thus would fall within the broad definition of confidential employee excluded under the House bill. It would therefore be extraordinary to read an implied exclusion for confidential employees into the statute that would swallow up and displace almost the entirety of the professional-employee inclusion.

Plainly, too, nothing in the legislative history of the Taft-Hartley Act provides any support for the argument that Congress disapproved the Board's prior practice of applying a labor-nexus test to identify confidential employees whom the Board excluded from bargaining units. To the contrary, the House Managers' statement accompanying the Conference Committee Report indicates that Congress intended

to leave the Board's historic practice undisturbed. 19 [454 U.S. 170, 186]

### III

The Court of Appeals, and the respondents here, rely on dictum in a footnote to *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), to suggest that the 80th Congress believed that all employees with access to confidential business information of their employers had been excluded from the Wagner Act by prior NLRB decision and that Congress intended to freeze that interpretation of the Wagner Act into law. The Bell Aerospace dictum is:

"In 1946 in *Ford Motor Co.*, 66 N. L. R. B. 1317, 1322, the Board had narrowed its definition of 'confidential employees' to embrace only those who exercised "managerial" functions in the field of labor relations.' The discussion [454 U.S. 170, 187] of 'confidential employees' in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in 'labor relations.' Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover 'confidential employees' even under a broad definition of that term." *Id.*, at 284, n. 12.

Obviously this statement was unnecessary to the determination whether managerial employees are excluded from the Act, which was the question decided in *Bell Aerospace*. In any event, the statement that Congress "clearly thought that the Act did not cover 'confidential employees,' even under a broad definition of that term," is error. The error is clear in light of our analysis above of the legislative history of the Taft-Hartley Act pertinent to the question. Moreover, the footnote erroneously implies that *Ford Motor Co.*, 66 N. L. R. B. 137 (1946), marked a major departure from the Board's prior practice. To the contrary, that Board decision introduced only a slight refinement of the labor-nexus test which the Board has applied in numerous decisions from 1941 to 1946. See n. 11, *supra*. Certainly the Conference Committee, in approving the Board's "prevailing practice," was aware of the Board's line of decisions. 20 Cf. *Cannon v. University of Chicago*, 441 U.S. 677, 696-699 (1979). Thus the only plausible interpretation of the Report is that, in describing the Board's prevailing practice of denying certain employees the full benefits of the Wagner Act, the Report referred only to employees involved in labor relations, personnel and employment functions, and confidential secretaries to such persons. For that, in essence, is where the Board law as of 1947 stood. It follows that the dictum in *Bell Aerospace*, and the Court of Appeals' reliance upon it, cannot be squared with congressional intent, and should be "recede[d] from" now that the issue of the status of confidential employees is "squarely presented." *NLRB v. Boeing Co.*, 412 U.S. 67, 72 (1973).

We also find no merit in the respondents' argument that the Board has applied the labor-nexus test inconsistently. As noted earlier, *supra*, at 178-181, the Board, in excluding "confidential employees" from bargaining units, routinely applied such a test in the six years proceeding the enactment of Taft-Hartley. In the years following the passage of the Taft-Hartley Act, the Board continued to apply the labor-nexus criterion in determining whether individuals were to be excluded from bargaining units as confidential employees. In *B. F. Goodrich Co.*, 115 N. L. R. B. 722 (1956), the Board [454 U.S. 170, 189] reaffirmed its previous ruling in *Ford Motor* and underscored its intention "in future cases . . . to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." 115 N. L. R. B., at 724 (footnote omitted) (emphasis deleted). 21 In succeeding years, while continuing to apply the labor-nexus test, the Board has deviated from that stated intention in only one major respect: it has also, on occasion, consistent with the underlying purpose of the labor-nexus test, see *supra*, at 179, designated as confidential employees persons who, although not assisting persons exercising managerial functions in the labor-relations area, "regularly have access to confidential

information concerning anticipated changes which may result from collective-bargaining negotiations." Pullman Standard Division of Pullman, Inc., 214 N. L. R. B. 726, 762-763 (1974); see Triangle Publications, Inc., 118 N. L. R. B. 595, 596, and nn. 3-4 (1957).

In sum, our review of the Board's decisions indicates that the Board has never followed a practice of depriving all employees who have access to confidential business information from the full panoply of rights afforded by the Act. Rather, for over 40 years, the Board, while declining to create any implied exclusion from the definition of "employee" for confidential employees, has applied a labor-nexus test in identifying those employees who should be excluded from bargaining units because of access to confidential business information. <sup>22</sup> We cannot ignore this consistent, longstanding [454 U.S. 170, 190] interpretation of the NLRA by the Board. See *Bell Aerospace*, 416 U.S., at 275; *Red Lion Broadcasting Co. v. FCC*, 395 U.S., at 381.

#### IV

The Court's ultimate task here is, of course, to determine whether the Board's "labor nexus" limitation of the class of confidential employees who, although within the definition of "employee" under 2(3), may be denied inclusion in bargaining units has "a reasonable basis in law." See *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *Chemical Workers v. Pittsburgh Plate Publications, Inc.*, 322 U.S. 111, 131 (1944). Clearly the NLRB's longstanding practice of excluding from bargaining units only those confidential employees satisfying the Board's labor-nexus test, rooted firmly in the Board's understanding of the nature of the collective-bargaining process, and Congress' acceptance of that practice, fairly demonstrates that the Board's treatment of confidential employees does indeed have "a reasonable basis in law." We therefore return finally to the disposition of the cases before us.

#### Hendricks

In *Hendricks*, the Board determined that the personal secretary, Mary, Weatherman, was not confidential secretary because she "did not act in a confidential capacity" with respect to labor-relations matters. 236 N. L. R. B., at 1619. While the Court of Appeals affirmed this finding, it denied enforcement of the Board's order on the basis that the evidence failed to support the Board's additional finding, required by the Court of Appeals, that Weatherman had no access to confidential non-labor-related information. In [454 U.S. 170, 191] approving the Board's limited labor-nexus exclusion, we have held that a finding is irrelevant to the determination of whether the secretary was a confidential employee. In this Court respondent *Hendricks* does not argue that Weatherman came within the labor-nexus test as formulated by the Board, but rather concedes that Weatherman did not have "confidential duties with respect to labor policies." Brief for Respondent *Hendricks* 43. Because there is thus no dispute in this respect, and in any event no suggestion that the Board's finding regarding labor nexus was not supported by substantial evidence, we conclude that the Court of appeals erred in holding that the record did not support the Board's determination that Weatherman was not confidential employee with a labor nexus. <sup>23</sup> We therefore reverse the judgment of the Court of Appeals in *Hendricks* insofar as enforcement of the Board's order was denied, and remand with directions to enter an order enforcing the Board's order.

#### Malleable

In *Malleable*, as well, the respondent makes no argument that the 18 employees in question satisfying the labor-nexus test of the Board. Rather, *Malleable* argues, and the Court of Appeals held, that the Board should have applied a broader definition of confidential employee to include all employees in possession of confidential business information. Having rejected the broad exclusion on which the

Court of Appeals' judgment relies, we reverse that judgment. But because the Court of Appeals has not yet addressed Malleable's contentions [454 U.S. 170, 192] that some of the 18 employees should have been excluded from the bargaining unit for reason entirely unrelated to whether they are confidential employees, 24 we remand Malleable for further proceedings consistent with this opinion.

It is so ordered.

## Footnotes

[ Footnote 1 ] Section 2(3), 61 Stat. 137, as set forth in 29 U.S.C. 152(3), provides:

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

[ Footnote 2 ] The ALJ held that although the Board excluded confidential employees with a labor nexus from bargaining units, it afforded them the other protections of the NLRA. Therefore, the ALJ held, even if Weatherman were a confidential employee excludable from a bargaining unit, 8(a)(1) barred Hendricks from discharging Weatherman for engaging in protected concerted activity.

[ Footnote 3 ] The Board has held that circulation of a petition on behalf of a discharged employee is protected activity under 7. *Youngstown Osteopathic Hospital Assn.*, 24 N. L. R. B. 574 (1976).

[ Footnote 4 ] Judge Bensa, sitting by designation, dissented, being of the view that the record established that Weatherman was not a confidential employee.

[ Footnote 5 ] The Board stated in part:

"Although Weatherman typed all a [general manager] Dillon's letters, this correspondence apparently did not relate to labor relations or personnel matter other than occasional letters referring to the dates of negotiating meeting with a union. Nor is there any evidence that it concerned confidential matter of any description. Weatherman generally did not place Dillon's telephone calls, nor did she keep a record of his appointments. Weatherman did share a partitioned office with Dillon, but no personnel records or confidential records of any type were kept there, excluding Dillon's testimony that he kept some papers concerning labor negotiations in a file behind his desk. Weatherman did not attend meeting of Respondent's board of directors or other management meetings. However, she did type minutes of meetings of the board of directors and the agenda for such meetings. While these meetings apparently occasionally involved personnel matters, there is no indication that such matters, or any other issues discussed during them, were confidential. Weatherman did not type internal memoranda regarding labor relations or personnel or employment matters. Finally, and most significantly, Dillon conceded at the hearing that the Respondent did not maintain secret or classified papers or documents." 247 N. L. R. B. at 498-499 (footnote omitted).

[ Footnote 6 ] Judge Cudahy dissented. He suggested, inter alia, that there "is abundant evidence in the record to support the Board's conclusion that Weatherman is not property classified as a confidential secretary." 627 F.2d, at 771.

[ Footnote 7 ] Cf. *Union Oil of California, Inc. v. NLRB*, 607 F.2d 852, 853-854 (CA9 1979); *NLRB v. Allied Products Corp.*, 548 F.2d 644, 648 (CA6 1977); *Westinghouse Electric Corp. v. NLRB*, F.2d 669, 670 (CA6 1968); *NLRB v. Quaker City Life Ins. Co.*, 319 F.2d 690, 694 (CA4 1963); *NLRB v. Armour & Co.*, 154 F.2d 570, 573-574 (CA10 1945); *NLRB v. Poultrymen's Service Corp.*, 138 F.2d 204, 210-211 (CA3 1943).

[ Footnote 8 ] We also granted Hendricks' cross-petition in No. 80-1103, which presented the question whether the Court of Appeals properly rejected Hendricks' claim that Weatherman was the functional equivalent of a personnel department employee and therefore excluded from coverage of the Act on that basis as well. After briefing and argument, however, we are persuaded that our grant of certiorari on the cross-petition was improvident. The Court of Appeals held that the evidence in the record supported the Board's finding that Weatherman was not the functional equivalent of a personnel department employee. As such, we are presented primarily with a question of fact, which does not merit Court review. The writ of certiorari in No. 80-1103 is therefore dismissed as improvidently granted. See *Rudolph v. United States*, 370 U.S. 269 (1962) (per curiam); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

[ Footnote 9 ] For all the full text of the current definition, see n. 1, supra.

[ Footnote 10 ] Although the early decisions did not explicitly preclude the Board from certifying a bargaining unit composed solely of confidential employees, that possibility was apparently foreclosed in *Hoover Co.*, 55 N. L. R. B. 1321, [454 U.S. 170, 179] 1322-1323 (1944), and *Electric Boat Co.*, 57 N. L. R. B. 1348, 1349 (1944), thereby excluding confidential employees, as defined by the Board, from collective-bargaining units.

[ Footnote 11 ] See *Warner Brothers Pictures, Inc.*, 35 N. L. R. B. 739, 744 (1941); *Chrysler Corp.*, 36 N. L. R. B. 157, 161-162 (1941); *Western Union Telegraph Co.*, 36 N. L. R. B. 1066, 1069 (1941); *General Motors Corp.*, 37 N. L. R. B. 441, 446-447 (1941); *Montgomery Ward & Co.*, 38 N. L. R. B. 297, 300 (1942); *Chrysler Detroit Co.*, 38 N. L. R. B. 313, 321 (1942); *Cincinnati Times-Star Co.*, 39 N. L. R. B. 39, 42 (1942); *Poultrymen's Service Corp.*, 41 N. L. R. B. 444, 448 (1942), enf'd, 138 F.2d 204 (CA3 1943); *Polish National Alliance*, 42 N. L. R. B. 1375, 1381-1382 (1942), enf'd as modified, 136 F.2d 175 (CA7 1943), aff'd, 322 U.S. 643 (1944); *Bendix Products Division*, 43 N. L. R. B. 912, 915-916 (1942); *Paramount Pictures, Inc.*, 45 N. L. R. B. 116, 122-123 (1942); *Murray Corp.*, 45 N. L. R. B. 854, 856-857 (1942); *Puget Sound Bridge & Dredging Co.*, 46 N. L. R. B. 1071, 1074 (1943); *Bohn Aluminum & Brass Corp.*, 47 N. L. R. B. 1229, 1229, 1231 (1943); *Armour & Co.*, 49 N. L. R. B. 688, 690 (1943); *Firestone Tire & Rubber Co.*, 50 N. L. R. B. 679, 682 (1943); *Boston Edison Co.*, 51 N. L. R. B. 188, 123 (1943); *Republic Steel Corp.*, 51 N. L. R. B. 1228, 1230 (1943); *St. Johns River Shipbuilding Co.*, 52 N. L. R. B. 12, 17 (1943); *General Motors Corp.*, 52 N. L. R. B. 649, 653-655 (1943); *Babcock & Wilcox Co.*, 52 N. L. R. B. 900, 903 (1943); *U.S. Smelting, Refining & Mining Co.*, 53 N. L. R. B. 84, 86 (1943); *New York Telephone Co.*, 53 N. L. R. B. 307, 310 (1943); *Potash Co.*, 53 N. L. R. B. 441, 444 (1943); *Coolerator Co.*, 53 N. L. R. B. 461, 462-464 (1943); *Colonial Broach Co.*, 53 N. L. R. B. 846, 848 (1943); *General Motors Corp.*, 53 N. L. R. B. 1096, 1100 (1943); *Consolidated Vultee Aircraft Corp.*, 54 N. L. R. B. 103, 112-114 (1943); *Armour & Co.*, 54 N. L. R. B. 1005, 1013 (1944); enf'd as modified, 154 F.2d 570 (CA10 1945); *Armour & Co.*, 54 N. L. R. B. 1462, 1465 (1944); *General Cable Corp.*, 55 N. L. R. B. 1143, 1145-1146 (1944); *Hoover Co.*, 55 N. L. R. B. 1321, 1322-1323 (1944); *West Penn Power Co.*, 55 N. L. R. B. 1356, 1358



The Senate Committee that reported the bill out apparently considered [454 U.S. 170, 183] but rejected a more expansive definition. See S. \_\_\_\_, 80th Cong., 1st Sess., 2(12) (1947) (Act amending NLRA; Comm. Print, Mar. 19, 1947); S. \_\_\_\_, 80th Cong., 1st Sess., 2(12) (1947) (Act amending NLRA; Comm. Print, Mar. 21, 1947).

[ Footnote 15 ] Senator Taft similarly described the conference Committee's action in a written summary inserted in the Congressional Record:

"Supervisors: Both the House bill and the Senate amendment excluded supervisors from the individuals deemed to be employees for the purposes of the act. There was a share divergence between the House and Senate, however, with respect to the occupational groups which fell within this definition. The Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors. The House had included numerous other classes. There were generally (A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, checkers, weighmasters, and time-study personnel, (B) labor relations personnel, police, and claims personnel, and (C) confidential employees. The Senate amendment confined the definition of supervisor to individuals generally regarded as foreman and employees of like or higher rank." 93 Cong. Rec. 6442 (1947) (emphasis added).

[ Footnote 16 ] This concession is clear in the comments made by Representative Hartley, sponsor of the House bill, in explaining to the full House the results of the House-Senate conference:

"Entirely too much emphasis has been placed on the so-called concessions that the House conferees made during the conference. I will be very frank and say that I agreed to some of these concessions very reluctantly. I would much rather have seen the House bill as it originally passed enacted into law, but I want to see a bill that can be enacted into law passed by this Congress. . . .

"I also want to make it perfectly clear that there was no concession made except upon the assurance that it would provide us votes in another body to be certain that the legislation would be enacted into law." *Id.*, at 6383-6384.

[ Footnote 17 ] See 9(b) of the NLRA, 29 U.S.C. 159(b) (providing that the Board may not approve a bargaining unit "if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit"); 2(12), 29 U.S.C. 152(12) (defining "professional employee").

[ Footnote 18 ] The House bill did not define "professional employees," but did explicitly give "any craft, department, plant, trade, calling, profession or other distinguishable group within a proposed bargaining unit" the opportunity to exclude itself from the bargaining unit. H. R. 3020, 80th Cong., 1st Sess., 9(f)(2) (1947) (emphasis added). The Senate bill similarly allowed groups of professional employees to exclude themselves from bargaining units, 9(b)(1), but in addition defined the term "professional employee." The version that ultimately was adopted by both Houses incorporated the Senate's definition of professional employees and permitted groups of professional employees to exclude themselves from proposed bargaining units in which nonprofessional employees were to be included. See n. 17, *supra*.

[ Footnote 19 ] It is true that the Conference Committee Report, in stating that the Board has treated confidential employees as "outside the scope of" the Wagner Act, could suggest that Congress failed to discern by the labor-nexus test, from bargaining units, but still affording them the other protections of the Act. See, e. g., *Bethlehem Steel Co.*, 63 N. L. R. B. 1230, 1232, and n. 2 (1945); *Southern Colorado*

Power Co., 13 N. L. R. B. 699, 710 (1939), *enfd*, 111 F.2d 539 (CA10 1940). Whether Congress' use of that phrase indicates that it misperceived the state of the law in this [454 U.S. 170, 186] respect is not clear since the Board itself, in several instances, had used a similarly imprecise shorthand description of its pragmatic with respect to confidential employees. See *General Motors Corp.*, 53 N. L. R. B., at 1098; *Armour & Co.*, 49 N. L. R. B. at 690; *Armour & Co.*, 54 N. L. R. B., at 1465. JUSTICE POWELL, in dissent, relying in part on the conferees' use of the phrase "outside the scope of," criticized the Board's practice of allowing "labor nexus" employees some protections under the Act. Because we hold that the Board properly determined that neither the secretary in *Hendricks* nor the 18 workers in *Malleable* were "labor nexus" employees, we have no occasion in this case to decide the propriety of this aspect of the Board's practice. The question will be more properly addressed in a case that presents it.

Whether Congress intended to leave the Board free to depart from a labor-nexus test is not entirely clear from the House Managers' statement. The statement may be read as indicating that congress embraced the "prevailing Board practice with respect to" confidential employees. And as previously discussed, *supra*, at 178-181, the Board had consistently applied a labor-nexus test in defining confidential employees under the Wagner Act. But the declaration by the House Managers that the conferees did not intend "to alter" the Board's practice "in any respect" may alternatively be read as suggesting that Congress recognized this area as one for the exercise of Board expertise and judgment. The House Managers' suggestion that "presumably" the Board would continue its prevailing practice with respect to certain classes of employees is consistent with such a deferential reading. Because neither reading of the legislative history affords any comfort to respondents, we need not decide which is proper.

[ Footnote 20 ] Indeed, the Board's labor-nexus test had been brought to the attention of the Congress through the NLRB's annual reports. see, e. g., 10 NLRB Ann. Rep. 34, and n. 92 (1946). Significantly, the NLRB's report submitted to Congress on January 3, 1947, five months before the conference Committee Report was issued, described the Board's refinement of the labor-nexus test in *Ford Motor*. See 11 NLRB Ann. Rep. 32, and nn. 18-21 (1947).

Citing two 1941 NLRB decision, *E. P. Dutton & Co.*, 33 N. L. R. B. 761; *Montgomery Ward & Co.*, 36 N. L. R. B. 69, JUSTICE POWELL finds "supports in the case law" for his assertion that it was Congress' understanding that the Board had previously excluded from the Act all secretaries with access to confidential information, without regard to [454 U.S. 170, 188] labor nexus. *Post*, at 196, n. 7. The significance he would give these two cases is clearly unwarranted. *E. P. Dutton* rested explicitly in the seminal labor-nexus decision in *Brooklyn Daily Eagle*, 13 N. L. R. B. 974 (1939), to exclude three secretaries from a bargaining unit. 33 N. L. R. B., at 767-768, n. 8. And in *Montgomery Ward Co.*, *supra*, the Board relied in turn on *E. P. Dutton*. See *Montgomery Ward & Co.*, *supra*, at 73, n. 6, citing *E. P. Dutton*. But whatever support JUSTICE POWELL may find in these two decisions for his understanding of Board law in 1941, his reading of congressional awareness is plainly erroneous; it entirely ignores congressional acceptance of the countless Board decisions between 1941 and 1947 in which the NLRB, in determining whether individuals were confidential employees excludable from bargaining units, consistently and explicitly required a labor nexus. See n. 11, *supra*.

[ Footnote 21 ] The *B. F. Goodrich* decision was apparently prompted by the fact that the Board, on several occasions following the *Ford Motor* decision, had returned to its prior practice of designating as "confidential employees" those with mere access to confidential, labor-relations information. See *Bond Stores, Inc.*, 99 N. L. R. B. 1029, 1031, n. 4 (1952); *Minneapolis-Honeywell Regulator Co.*, 107 N. L. R. B. 1191, 1192 (1954).

[ Footnote 22 ] Indeed, while it may be true that the Board's formulation of the [454 U.S. 170, 190] labor-

nexus test has deviated in minor respects over the years, the refinements are of the sort that are to be expected - if not required - in the process of case-by-case adjudication by an administrative agency.

[ Footnote 23 ] We do not suggest that personal secretaries to the chief executive officers of corporations will ordinarily not constitute confidential employees. Hendricks is an unusual case, inasmuch as Weatherman's tasks were "deliberately restricted so as to preclude her from" gaining access to confidential information concerning labor relations. 236 N. L. R. B. 1616, 1619 (1978). Whether Hendricks imposed such constraints on Weatherman out of specific distrust or merely a sense of caution, it is unlikely that Weatherman's position mirrored that of executive secretaries in general.

[ Footnote 24 ] Malleable apparently seeks to argue that 13 of the challenged persons should be excluded as "managerial" employees, and that another 4 should be excluded as "supervisors." Brief for Malleable in Opposition 2, n. 1.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, concurring in part and dissenting in part.

I concur in the court's holding that employee in the possession of proprietary or nonpublic business information are not for that reason excluded from the NLRA as "confidential" employees. By explicitly providing for the inclusion of professional employees, the Act itself indicates that Congress did not intend such a sweeping definition of the confidential employee exclusion. But because the majority's decision "tends to obliterate the line between management and labor," 1 a line which Congress insisted be observed by enacting the Taft-Hartley Act, I dissent from the conclusion that the confidential secretary in this litigation 2 is not a confidential employee excluded from the Act.

## I

In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), we [454 U.S. 170, 193] held that all managerial employees were excluded from the Act regardless of whether they had a "labor nexus." In reversing the Board, the Court found that a basic purpose of the Taft-Hartley Act was to establish a sharp line between management and labor. When the Board breached this line by deeming supervisors to be "employees" within the Act, Congress responded by passing the Taft-Hartley Act with its explicit exclusion of supervisory employees. And when the Board in *Bell Aerospace* departed from its own recognition that "[i]t was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management," 3 this Court responded by again requiring the Board to adhere to the dividing line between management and labor - a line fundamental to the industrial philosophy of the labor laws in this country. 4

Indeed, it was to assure that those employees allied with management were not included in the ranks of labor that the Board Originally developed the "supervisory," "managerial," and "confidential" employees exclusions from the Wagner Act. The Board recognized that employees who by their duties, knowledge, or sympathy were aligned with management should not be treated as members of labor. In the adversary system which our labor laws envision, neither management nor labor should be forced to accept a potential fifth column into its ranks. Thus, both before and after the Taft-Hartley Act, the Board excluded from bargaining units of the [454 U.S. 170, 194] rank and file, employees who like "expeditors" are "closely related to management," *Friez & Sons*, 47 N. L. R. B. 43, 47 (1943), or who like assistant buyers have "interests . . . more closely identified with those management." *Denver Dry Goods Co.*, 74 N. L. R. B. 1167, 1175 (1947). The Board has excluded employees "who formulate, determine, and effectuate an employer's policies," *AFL-CIO*, 120 N. L. R. B. 969, 973 (1958), and employees who because of their familial relation to management "are on an intimate relationship with

officers of the company." *Burke Brewery, Inc.*, 54 N. L. R. B. 1061, 1062, n. 2 (1944).

The "confidential employee" exclusion and the labor nexus which the Board insists upon must be viewed as part of this larger effort to keep the line between management and labor distinct. Certainly employees with knowledge of sensitive labor relations information or "who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations," 5 fall on the management side of the line and should be excluded from the Act. But useful as it may be in identifying employees who are allied to management, the "labor nexus" test is but a means to this end. By its rigid insistence on the labor nexus in the case of confidential secretaries, the Board, and now this Court, have lost sight of the basic purpose of the labor-nexus test itself and of the fundamental theory of our labor laws. Thus, it makes little sense to exclude "expeditors," "assistant buyers," and "employment interviewers" as managerial but include within the rank and file confidential secretaries who are privy to the most sensitive details of management decisionmaking, who work closely with managers on a personal and daily basis, and who occupy a position of trust incompatible with labor-management strife. To include employees so clearly allied to management [454 U.S. 170, 195] within the ranks of labor does a disservice to management and labor alike. 6

## II

The Court's decision not only is in conflict with the basic framework of the labor laws, it also conflicts with explicit expressions of congressional intent on this subject. Congress only forbore from including an explicit provision in the Taft-Hartely Act excluding confidential secretaries because of its belief that the Board had been treating, and would continue to treat, such employees as allied to management. In discussing a proposed exclusion for confidential employees, the House Report stated:

"Most of the people who would qualify as 'confidential' employees are executives and are excluded from the act in any event.

"The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these." H. R. Rep. No. 245, 80th Cong., 1st Sess., 23 (1947) (emphasis added).

The Conference Report indicated a similar belief:

"In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the [454 U.S. 170, 196] House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board Practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947) (emphasis added).

It was in light of these statements in the legislative history that we felt confident in *Bell Aerospace* that "Congress could not have supposed that, while "confidential secretaries" could not be organized, their bosses could be" 416 U.S. at 284, quoting *Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 491-492 (CA2 1973).

The Court's opinion argues that the foregoing explicit legislative history is to be ignored because the express exclusion in the House bill of confidential secretaries was omitted in Conference. But it is clear from the language in the Reports italicized above that the omission was prompted by an understanding that the Board itself consistently had excluded "such people as confidential secretaries." 7 Indeed, [454 U.S. 170, 197] the Members of Congress had no reason to believe that it could be argued seriously that

confidential secretaries to management officials were not among the "individuals allied with management." *Swift & Co.*, 115 N. L. R. B. 752, 754 (1956). The "labor nexus," as increasingly narrowed by the Board and now accepted by this Court, is antithetical to any common-sense view or understanding of the role of confidential secretaries.

### III

Just as I would reject the Board's adherence to the labor-nexus test in the case of confidential secretaries, so too, I would reject the Board's position that confidential employees are not excluded from the Act as a whole but only from collective bargaining. The Board urges the Court to hold that even if the secretary in this litigation was conceded to be a confidential employee, indeed, even if she has a labor nexus, the company still could not have dismissed her without incurring liability under the Act.

The Court wisely declines the Board's invitation. See, ante, at 186, n. 19. Such a holding would be a major departure from the basic philosophy of the Act. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947). Under such an interpretation confidential employees with a labor nexus might do anything in furtherance of their allegiance to labor except join the union, and the company would be powerless to protect itself. Confidential employees might join picket lines, sign petitions advocating the cause of labor, speak out against management at employee meetings, and engage in all manner of concerted activity. Even in the midst of labor-management strife, the confidential secretaries to the top managers of the company, with daily access to the company's bargaining positions, might convey confidential information as to these positions to the union, as well as take their place on the picket lines. The company would be unable to dismiss them or demote them, at least without the risk of an unfair [454 U.S. 170, 198] labor practice charge being filed. The Board developed the labor-nexus test because it recognized that "management should not be required to handle labor relations matters thorough employees who are represented by the union." *Hoover Co.*, 55 N. L. R. B. 1321, 1323 (1944). Neither should management be required to expose its flank to confidential employees who are overtly committed to the union or the cause of labor in all but actual membership.

The legislative history of the Act contains no support whatever for the Board's position. To the contrary, the Congress repeatedly stated its belief that in addition to supervisors certain other employees would be excluded from the Act. Thus, the Conference Report stated that "[i]n the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision . . . since the Board has treated, and presumably will continue to treat, such persons as outside of the scope of the act." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947) (emphasis added). In a generally similar context in *NLRB v. Bell Aerospace Co.*, 416 U.S., at 283, we said: "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" (emphasis added). As the majority's discussion of the legislative history indicates, the Congress viewed the confidential and managerial exemptions as akin to the supervisory exclusion. Congress considered that confidential and managerial employees, like supervisors, would be entirely excluded from the Act.

In *Bell Aerospace*, supra, at 289, we held that "'managerial employees' are not covered by the Act." The majority accepts this holding. See ante, at 187. Yet if managerial employees are excluded from the Act in its entirety I see no principled reason why confidential employees with a labor nexus should be treated differently. [454 U.S. 170, 199]

I would reject the Board's seeming "half-a-loaf" approach to the confidential employees exclusion. 8 As

Judge Craven explained for the Fourth Circuit:

"It strikes us as nonsense for the Board to exclude [a confidential secretary] from membership in the bargaining unit and then extend to her the same protection for the same concerted activity that she would have enjoyed if a union member. If [a confidential secretary] is committed to the union cause to the extent she joins the strike by refusing to cross the picket line, it would seem to matter little to the company that she is not technically a union member. A confidential secretary who pledges her troth with the union differs in form, but not in substance, from one who holds a union card. Since she cannot formally join the unit, there is nothing incongruous in holding that she cannot 'pledge her troth' with the unit. Indeed, it seems more consistent to say that if she cannot act in concert by participating in the unit, then she cannot act in concert on an informal basis, or more accurately, that if she does so, it will be without the protection of the Act." *NLRB v. Wheeling Electric Co.*, 444 F.2d 783, 788 (1971).

Accord, *Peerless of America, Inc. v. NLRB*, F.2d 1108, 1112 (CA7 1973). But see *NLRB v. Southern Greyhound Lines*, 426 F.2d (CA5 1970) (assuming without discussion that confidential employees are not excluded from the Act in its entirety).

#### IV

After today's decision, labor must accept into its ranks confidential secretaries who are properly allied to management. [454 U.S. 170, 200] And these confidential employees, who are privy to the daily affairs of management, who have access to confidential information, and who are essential to management's operation may be subjected to conflicts of loyalty when the essence of their working relationship requires undivided loyalty. The basic philosophy of the labor relations laws, the expressed intent of Congress, and the joint desire of labor and management for undivided loyalty all counsel against such a result.

[ Footnote 1 ] *Packard Motor Car Co. v. NLRB*, 330 U.S. 494 (1947) (Douglas, J., dissenting).

[ Footnote 2 ] The secretary here has worked for four years as the personal secretary to the general manager, the chief executive officer of the company. She opened his mail, typed his letters, answered the phone, and typed the minutes of meetings of the board of directors. She and the general manager shared a single office with a 6-foot partition in between their desks. She could overhear his telephone conversation when he raised his voice. She handled no labor relations materials.

[ Footnote 3 ] *Swift & Co.*, 115 N. L. R. B. 752, 753-754 (1956) (emphasis added).

[ Footnote 4 ] As Justice Douglas explained in his dissent in *Packard*, supra:

"The present decision [by the Court] . . . 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. . . . [I]f congress, when it enacted the National Labor Relations Act, had in mind such a basic change in industrial philosophy, it would have left some clear and unmistakable trace of that purpose. But I find none." 330 U.S., at 494-495.

[ Footnote 5 ] *B. F. Goodrich Co.*, 115 N. L. R. B. 722, 724 (1956).

[ [Footnote 6](#) ] Just as management opposes the creation of conflicts of loyalty within its midst, neither does labor wish to represent employees who are allied to management. Thus, in *Montgomery Ward & Co.*, 36 N. L. R. B. 69, 73 (1941), for example, it was the union that sought to exclude confidential secretaries to store managers from the bargaining unit. See, e. g., *Stroock & Stroock & Lavan*, 253 N. L. R. B. 447-448 (1980) ("the Employer argues the secretaries to the firm's executive committee are not confidential employees and should be included in the unit. The [union] counters that the Employers must have some confidential employees . . ."); *E. P. Dutton & Co.*, 33 N. L. R. B. 761, 766 (1941) ("Among the employees whom the Guild would exclude as confidential are three secretaries to officers of the Company").

[ [Footnote 7](#) ] This understanding was not without support in the case law. In *E. P. Dutton & Co.*, *supra*, the Board excluded secretaries to officers of the company from the bargaining unit of clerical employees without any mention of a labor nexus. The Board took notice of the fact that "[t]he nature of a personal secretary's work is such that much of the confidential material pertaining to the management passes through his or her hands. . . . [M]anagement should not be required to handle such material through employees in the unit represented by the union with which it is delaying." *Id.*, at 766-767, n. 8, quoting *Brooklyn Daily Eagle*, 13 N.L.R.B. 974, 986 (1939) (emphasis added). The Board expressed its belief that "private secretaries should be excluded where . . . [the union] . . . is of the opinion that the personal and confidential relationship existing between the private secretaries . . . and the Company's officers is such as to create a possible division of their localities between the management and the potential bargaining agent." 33 N. L. R. B., at 766-767, n. 8 (emphasis added). See also *Montgomery Ward & Co.*, *supra* (secretaries of store managers excluded without reference to labor nexus).

[ [Footnote 8](#) ] Of course there are limits to the power of management over its confidential employees just as there are limits to its power over its supervisory employees. See, e. g., *NLRB v. Taladega Cotton Factory, Inc.*, 213 F.2d 209 (CA5 1954). [454 U.S. 170, 201]

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State	Can Confidential employees bargain?	Can Management employees bargain?	Can supervisors bargain?
Alaska	Yes	Yes	Yes
California	No	No	No
Connecticut	No	No	Yes (in separate units)
Delaware	No	Yes	Not in units certified after 1994
Florida	No	No	Yes (in separate units)
Hawaii	No	No	Yes (in separate units)
Illinois	No	No	No
Indiana	No	No	No
Iowa	No	No	No
Kansas	No	No	No
Maine	No	No	Yes (if the supervisor does not participate in formulation or effectuation of policy or have a role in administration of contract)
Maryland	No	No	No
Massachusetts	No	No	Yes
Michigan	No (excluded by agency decision)	Yes (in a separate unit)	Yes (in a separate unit)
Minnesota	No	No	Yes (in a separate unit)
Missouri (Meet and confer law for public employees – no right to strike or to enforce agreement)	No (excluded by agency decision)	No (excluded by agency decision)	No (excluded by agency decision)

State	Can Confidential employees bargain?	Can Management employees bargain?	Can supervisors bargain?
Montana	No	No	No
Nebraska	Statute defines units and the units do not include confidential employees, but statute allows additional units and does not expressly prohibit confidential employee participation	Statute does not set out a management unit; case law under prior law allowed managers to bargain in a separate unit with a different representative than the rank and file employees' representative	Statute allows supervisors to bargain in a separate unit but limits bargaining to meet and confer
Nevada (local government only)	No	Yes (in a separate unit)	Yes (in a separate unit)
New Hampshire	No	No	Yes (in a separate unit)
New Jersey	No	No	Yes
New Mexico	No	No	No
New York	No	No	Yes
Ohio	No	No	No
Oklahoma (police/fire only)	Yes	Yes	Yes
Oregon	No	No	No
Pennsylvania	No	No	First level supervisors may bargain in a separate unit; second level supervisors and above are excluded from bargaining as managers
Rhode Island	No (by decision)	No (by decision)	No (by decision)
South Dakota	Unclear	No	No
North Dakota (teachers only)	-	-	-
Vermont	No	No	Yes (in separate units)
Washington	No	No (excludes the entire management service)	Yes (in separate units) (unless a member of the management service)
Wisconsin	No	No	No



# Cronyism at the Capital

## The Murkowski Administration Wants **500** New Political Pawns.

The Murkowski Administration recently introduced bills in both the Alaska State House and the Alaska State Senate that convert 500 existing state employees into political pawns.

The "Crony" bills — HB518 and SB 352 — take as many as 500 jobs that are currently independent of partisan politics, and makes them part of the Governor's political patronage system.

Engineers, public health nurses, pharmacists, architects, foresters, geologists, fisheries scientists, social service program administrators, fire marshals, village safe water engineers, and even state troopers will become politicized.

### Contact your legislator.

To send a Public Opinion Message, go to  
<http://www.legis.state.ak.us/poms/>

Tell the Murkowski administration to keep partisan politics away from state services.

*Kodiak Daily Mirror*  
*3/1/04*

SB

354

.....

# facsimile transmittal

To: Leg. Legal Fax: 2029

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From: Katrina Matheny, Sen. Gary Stevens Date: 4/2/2004  
Office

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Re: State Affairs CS for SB 354 Pages: 1

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CC:

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Urgent     For Review     Please Comment     Please Reply     Please Recycle

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Can I please get a Senate State Affairs CS for SB 354. The committee passed version A with the following three amendments. 1) On Page 4, line 31 and Page 5, line 1, they changed reasonable and diligent to **reasonably diligent**. 2) On Page 3, lines 27 & 28, the committee changed the sentence to read: **An accusation may be reasonably and fairly amended by the commission.** 3) On Page 4, line 23, the committee deleted "two" years and inserted "one" year.

Thanks.

.....

# SENATE COMMITTEE REPORT

## First Committee of Referral

DATE: 2/27/04

FURTHER: Judiciary

Date of 5-Day Notice: 3/25/04  
(in accordance with Uniform Rule 23)

DATE TURNED  
IN TO OFFICE: 4/2/04

State Affairs Committee considered SENATE BILL NO. 354

### SB 354 HUMAN RIGHTS COMMISSION PROCEDURES

"An Act relating to complaints filed with, and investigations, hearings, and orders of, the State Commission for Human Rights; making conforming amendments; and providing for an effective date."

and recommends:

- be replaced with \_\_\_\_\_ CS SB 354 (STA)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

<b>Senate Bill:</b>	
<input checked="" type="checkbox"/>	Same Title
<input type="checkbox"/>	New Title
<b>House Bill:</b>	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	Technical Title Change
<input type="checkbox"/>	New Title w/ SCR # _____

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#
<u>DOG</u>	<u>2/24/04</u>			<input checked="" type="checkbox"/>	<u>1</u>

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<u>John A. Caudrey</u>	<input checked="" type="checkbox"/>			
<u>Robert K. Thurman</u>			<input checked="" type="checkbox"/>	
CHAIR: <u>[Signature]</u>			<input checked="" type="checkbox"/>	

## ANALYSIS OF PROPOSED ASCHR BILL

- Would allow complainant to withdraw complaint before accusation is served, but preserve commission's right to file complaint on its own; bill avoids conflicts between (1) staff's exercise of expanded discretion to compromise, dismiss, or pursue complaint and (2) victims' interests, by allowing complainant to opt out of commission procedures; complainant may, after withdrawal, pursue claim independently of commission in another forum
- Would incorporate current regulation's (6 AAC 30.230) 180-day limitation period for filing complaint
- Would permit conciliation agreements compromising damage claims, require that agreements be reduced to writing, and provide that agreements would be enforceable as commission orders
- Would give commission staff greater authority to evaluate complaints and choose those that go to hearing, reversing decision in *Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995); prosecutorial discretion would allow commission to commit its resources to complaints it determines merit pursuit, based on factors such as strength of evidence, severity of alleged violation, employer's history before the commission, or complaint's value in establishing precedent
- Would require commission to follow procedures in Administrative Procedure Act, unless AS 18.80 provides different procedure; would eliminate some

procedural requirements that Administrative Procedure Act addresses, such as admissibility of evidence and requirement that testimony be under oath

- Would limit amendments to complaint after case is referred for hearing to insure that all changes are supported by substantial evidence and that respondent has opportunity to address all charges informally before being required to defend them in formal hearing
- Would allow something similar to a motion for summary judgment if facts are not disputed
- Would clarify remedies available through commission to remedy unlawful discrimination; no noneconomic or punitive damages; remedies would normally be limited to restoration of actual benefits lost – i.e., hiring, promoting, or reinstating to position – except if working environment had deteriorated intolerably, when commission could award up to two years' compensation, less wages employee should be able to earn
- Would tie rate of interest awarded by commission to legal rate in AS 09.30.070; would bring commission into conformity with other administrative agencies and the courts

SENATE BILL NO. 354

IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 2/27/04  
Referred: State Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to complaints filed with, and investigations, hearings, and orders of,  
2 the State Commission for Human Rights; making conforming amendments; and  
3 providing for an effective date."

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 \* Section 1. AS 18.80.100 is amended to read:

6           Sec. 18.80.100. Complaint; time limitations. A person who is aggrieved by  
7           a [ANY] discriminatory practice [CONDUCT] prohibited by this chapter may sign  
8           and file with the commission a written, verified complaint stating the name and  
9           address of the person alleged to have engaged in the discriminatory practice  
10           [CONDUCT], and the particulars of the discrimination. A complainant may  
11           withdraw the complaint at any time before the service of an accusation under  
12           AS 18.80.120. A withdrawal must be signed by the complainant and be in  
13           writing. A withdrawal does not limit the discretion of the executive director  
14           provided in (b) of this section. [THE EXECUTIVE DIRECTOR MAY FILE A

1 COMPLAINT IN LIKE MANNER WHEN AN ALLEGED DISCRIMINATION  
2 COMES TO THE ATTENTION OF THE DIRECTOR.]

3 \* Sec. 2. AS 18.80.100 is amended by adding new subsections to read:

4 (b) The executive director may file a complaint in the manner provided in (a)  
5 of this section when a discriminatory practice comes to the attention of the executive  
6 director.

7 (c) A complaint may be filed no later than 180 days after the alleged  
8 discriminatory practice or, for a continuing discriminatory practice, no later than 180  
9 days after the alleged discriminatory practice stopped.

10 \* Sec. 3. AS 18.80.110 is amended to read:

11 **Sec. 18.80.110. Investigation and conciliation.** The executive director or a  
12 member of the commission's staff designated by the executive director shall  
13 informally investigate the matters set out in a filed complaint, promptly and  
14 impartially. If the investigator determines that there is [THE ALLEGATIONS ARE  
15 SUPPORTED BY] substantial evidence of a discriminatory practice under this  
16 chapter, the investigator shall immediately try to eliminate or remedy the  
17 discriminatory practice through an agreement reached [DISCRIMINATION  
18 COMPLAINED OF,] by conference, conciliation, and persuasion. If an agreement is  
19 reached, it must be reduced to writing and signed by the complainant, executive  
20 director, and respondent. The agreement is binding and enforceable under this  
21 chapter as an order of the commission. Any agreement reached under this  
22 section may include the compromise of damages authorized under this chapter.

23 \* Sec. 4. AS 18.80 is amended by adding a new section to read:

24 **Sec. 18.80.112. Dismissal for administrative convenience.** (a) At any time  
25 before the issuance of an accusation under AS 18.80.120, the executive director may  
26 dismiss without prejudice a complaint for administrative convenience if the executive  
27 director determines, in the executive director's discretion, that the complainant's  
28 objection to a proposed conciliation agreement is unreasonable; the complainant is  
29 unavailable or unwilling to participate in a hearing; relief is precluded by the absence  
30 of the person alleged to have engaged in the discriminatory practice; a hearing will not  
31 benefit the complainant; the person aggrieved by the discriminatory practice has

1 initiated or wants to initiate an action or proceeding in another forum based on the  
 2 same facts; a hearing will not represent the best use of commission resources; a  
 3 hearing will not advance the purposes stated in AS 18.80.200; the probability of  
 4 success of the complaint on the merits is low; or proceeding to a hearing will not serve  
 5 the public interest.

6 (b) Dismissal under this section does not prevent a complainant from

7 (1) initiating an action or proceeding in another forum; or

8 (2) filing a new complaint under AS 18.80.100 that resolves the  
 9 grounds for the dismissal under (a) of this section.

10 \* Sec. 5. AS 18.80.120 is repealed and reenacted to read:

11 **Sec. 18.80.120. Hearing.** (a) If informal efforts under AS 18.80.110 to  
 12 eliminate or remedy the alleged discriminatory practice are unsuccessful and the  
 13 executive director determines, in the executive director's discretion, to refer the  
 14 complaint for hearing, the executive director shall issue an accusation based on the  
 15 investigator's determination of substantial evidence and serve the person charged in  
 16 the accusation and the complainant with notice of the referral and a copy of the  
 17 accusation. The executive director's decision to refer the complaint to hearing is not  
 18 reviewable by the commission under this chapter. The location of the hearing is the  
 19 commission office unless the commission designates another location. The executive  
 20 director, or the executive director's designee, presents the case in support of the  
 21 accusation before the commission. The person charged in the accusation may file a  
 22 written answer and may appear at the hearing, with or without counsel, and submit  
 23 evidence.

24 (b) The commission shall follow the procedures in the Administrative  
 25 Procedure Act, AS 44.62.330 - 44.62.630, except as otherwise provided in this  
 26 chapter.

27 (c) An accusation may be amended by the commission, ~~only upon a showing~~  
 28 ~~of good cause.~~ An amendment to name a different discriminatory practice must be  
 29 supported by substantial evidence, and the discriminatory practice must be referred for  
 30 conciliation as provided in AS 18.80.110, before a hearing may proceed.

31 (d) In a hearing on an accusation, each element of an accusation or defense

1 must be proven by a preponderance of the evidence.

2 (e) At any time after the issuance of an accusation, the executive director or  
3 the person charged in the accusation may petition for a summary decision on the  
4 accusation. The commission shall grant a petition if the record shows that there is no  
5 genuine issue of material fact and the petitioner is entitled to an order under  
6 AS 18.80.130 as a matter of law.

7 \* Sec. 6. AS 18.80.130(a) is amended to read:

8 (a) At the completion of the hearing or after consideration of a petition for  
9 summary decision under AS 18.80.120(e), if the commission finds that a person  
10 charged in an accusation [AGAINST WHOM A COMPLAINT WAS FILED] has  
11 engaged in the discriminatory practice [CONDUCT] alleged in the accusation  
12 [COMPLAINT], it shall order the person to refrain from engaging in the  
13 discriminatory practice [CONDUCT]. The order must include findings of fact, and  
14 may prescribe conditions on [THE ACCUSED'S] future conduct relevant to the type  
15 of discriminatory practice [DISCRIMINATION]. The commission may not order  
16 an award of noneconomic or punitive damages in any case. In a case involving a  
17 discriminatory practice [DISCRIMINATION] in

18 (1) employment, the commission may order one or more of the  
19 following: the training of an employer, labor organization, or employment  
20 agency, and its employees, concerning discriminatory practices; [ANY  
21 APPROPRIATE RELIEF, INCLUDING BUT NOT LIMITED TO,] the hiring,  
22 reinstatement or upgrading of an employee with or without back pay; the payment of  
23 front pay for a period of not more than two years if hiring, reinstatement, or  
24 upgrading of an employee is inappropriate because no vacancy exists, the  
25 employer's discriminatory practice rendered the employee incapable of returning  
26 to work, or the relationship between the employer and employee has so  
27 deteriorated as to make working conditions intolerable; [,] restoration to  
28 membership in a labor organization; [,] or admission to or participation in an  
29 apprenticeship training program, on-the-job training program, or other retraining  
30 program; however, an order for back pay or front pay must be reduced by the  
31 amount the employee could have earned or could earn by making reasonable and

1           diligent efforts to obtain similar employment;

2                           (2) housing, the commission may order the sale, lease, or rental of the  
3 housing accommodation to the aggrieved person if it is still available, or the sale,  
4 lease, or rental of a like accommodation owned by the person charged in the  
5 accusation [AGAINST WHOM THE COMPLAINT WAS FILED] if one is still  
6 available, or the sale, lease, or rental of the next vacancy in a like accommodation,  
7 owned by the person charged in the accusation [AGAINST WHOM THE  
8 COMPLAINT WAS FILED]; the commission may award actual damages which shall  
9 include[, BUT NOT BE LIMITED TO,] the expenses incurred by the complainant for  
10 obtaining alternative housing or space; for storage of goods and effects; for moving  
11 and for other costs actually incurred as a result of the unlawful practice or violation.

12 \* Sec. 7. AS 18.80.130(c) is amended to read:

13                           (c) If the commission finds that a person charged in an accusation  
14 [AGAINST WHOM A COMPLAINT WAS FILED] has not engaged in the  
15 discriminatory practice [CONDUCT] alleged in the accusation [COMPLAINT], it  
16 shall issue and cause to be served on the complainant an order dismissing the  
17 complaint.

18 \* Sec. 8. AS 18.80.130 is amended by adding a new subsection to read:

19                           (f) The interest rate for an award under this section is determined in the  
20 manner provided in AS 09.30.070.

21 \* Sec. 9. AS 18.80.140 is amended to read:

22                           **Sec. 18.80.140. Effect of compliance with order.** Immediate and continuing  
23 compliance with all the terms of a commission order is a bar to criminal prosecution  
24 for the particular instances of discriminatory practice [CONDUCT] described in the  
25 accusation issued under AS 18.80.120 [FILED BEFORE THE COMMISSION].

26 \* Sec. 10. AS 18.80.270 is amended to read:

27                           **Sec. 18.80.270. Penalty.** A person, employer, labor organization, or  
28 employment agency, who or that wilfully engages in an unlawful discriminatory  
29 practice [CONDUCT] prohibited by this chapter, or wilfully resists, prevents,  
30 impedes, or interferes with the commission or any of its authorized representatives in  
31 the performance of duty under this chapter, or who or that wilfully violates an order of

1 the commission, is guilty of a misdemeanor and upon conviction by a court of  
2 competent jurisdiction is punishable by a fine of not more than \$500, or by  
3 imprisonment in a jail for not more than 30 days, or by both.

4 \* Sec. 11. AS 18.80.300 is amended by adding a new paragraph to read:

5 (17) "complainant" means a person who is aggrieved by a  
6 discriminatory practice prohibited by this chapter and who has filed a complaint as  
7 provided in AS 18.80.100.

8 \* Sec. 12. AS 44.62.330(a) is amended by adding a new paragraph to read:

9 (61) State Commission for Human Rights, where procedures are not  
10 otherwise expressly provided in AS 18.80.

11 \* Sec. 13. The uncodified law of the State of Alaska is amended by adding a new section to  
12 read:

13 APPLICABILITY. This Act applies to all complaints filed on or after the effective  
14 date of secs. 1 - 12 of this Act.

15 \* Sec. 14. The uncodified law of the State of Alaska is amended by adding a new section to  
16 read:

17 TRANSITION: REGULATIONS. The State Commission for Human Rights may  
18 proceed to adopt regulations necessary to implement the changes made by this Act. The  
19 regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the  
20 effective date of the statutory change.

21 \* Sec. 15. Section 14 of this Act takes effect immediately under AS 01.10.070(c).

22 \* Sec. 16. Except as provided in sec. 15 of this Act, this Act takes effect July 1, 2004.

SENATE BILL NO. 354  
"AN ACT RELATING TO COMPLAINTS FILED WITH,  
AND INVESTIGATIONS, HEARINGS, AND ORDERS OF,  
THE STATE COMMISSION FOR HUMAN RIGHTS"

SECTIONAL ANALYSIS  
OFFICE OF THE ATTORNEY GENERAL

Section 1: Amends AS 18.80.100 to ensure that a complainant may withdraw a complaint of unlawful discrimination during the investigative and conciliation phases of the procedures and before the executive director issues an accusation, which begins formal procedures.

Section 2: Adds new subsections to 18.80.100. The power of the executive director to file a complaint is moved to proposed subsection (b).

Proposed subsection (c) adds to 18.80.100 the limitation period for filing a complaint set out in 6 AAC 30.230. The limitation period established allows the filing of a complaint for 180 days after the discriminatory act or practice ends.

Section 3: Amends 18.80.110 to require a written and signed agreement if a complaint is resolved in the conciliation phase, to make that agreement the equivalent of a commission order for purposes of enforcement, and to authorize the compromise of a damages claim in the agreement.

Section 4: Adds a new section expanding the discretion of the executive director to dismiss complaints in appropriate circumstances. The purpose of the section is to reverse the Alaska Supreme Court's decision in *Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995), that a hearing is mandatory if a complaint is supported by substantial evidence. The Court concluded that the law did not give the commission

staff discretion to discontinue action on a complaint after an investigator found substantial evidence of unlawful discrimination. *Id.*, at 1373. The effect of this decision was to require the commission to commit its resources to any complaint supported by substantial evidence without regard to such factors as the weakness of the evidence, the strength of an employer's affirmative defenses, or the significance of the alleged violation.

Subsection (a) expands the discretion of the executive director to pursue complaints based on such factors as, for example, the strength of the evidence, the severity of the alleged violation, an employer's history before the commission, the complainant's cooperation, or the complaint's value in establishing precedent guiding future conduct.

Subsection (b) ensures that the executive director's administrative dismissal is not a dismissal on the merits and that a complainant may file an action with a court or another agency or even file a new complaint with the commission if the reason for the administrative dismissal can be resolved.

**Section 5:** Repeals and reenacts 18.80.120, which sets out the requirements for a hearing on a complaint of discrimination.

Subsection (a) implements the expanded discretion of the executive director to choose the complaints that commission staff pursue to hearing and provides that the commission may not review the executive director's exercise of that discretion. It also provides that, if the executive director refers a complaint for hearing, the executive director must issue an accusation based on the investigator's determination of substantial evidence.