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RIGHTS OF SUPERVISORY EMPLOYEES TO COLLECTIVE BARGAINING UNDER THE NATIONAL LABOR RELATIONS ACT

The increased disparity in bargaining power, job security and independence between rank and file union laborers and supervisory employees, during recent years has transformed numerous foremen and superintendents from militant anti-union spokesmen for management to active proponents of self-organization and unionization. The concerted drive for unionization of supervisory employees has become a paramount issue in management-labor relations, particularly in mass production industries, only within the past five years. Prior to that time, organization of foremen had caused no grave concern, although in a limited number of industries supervisory employees customarily had been included in the pattern of unionization.

The movement by supervisory employees to reject the traditional concept that foremen and superintendents are representatives of management with no self-interest in the labor movement, and to embrace the labor union movement was an ultimate product of changing industrial conditions. Centralization of management, standardization of production, specialization

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1. The term “supervisory employee” is used generically to include all employees who in the course of their duties are vested with the authority to give orders, and who are cloaked with one, or a combination, of the following powers: to employ, to promote, to demote, to discharge, to transfer, to apportion work, to maintain production, to grant wage increases, to discipline or to effect changes in the status of employees, or effectively to recommend such action. Also, he usually is a salaried rather than hourly worker. The existence of any of these powers is recognized as an indicium, but not a sole criterion, of such status. These standards, originally invoked by the National Labor Relations Board to impute liability to management for discriminatory action by subordinates, have been generally applied to the question of certification of bargaining representatives. 8 N.L.R.B. ANN. REP. (1943) 55-7; Matter of Borden Mills, Inc., 13 N.L.R.B. 459 (1939); Matter of United Press Associations, 3 N.L.R.B. 344 (1937); 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940) § 292.

The term “supervisory employee” has not been definitely circumscribed by the N.L.R.B. to indicate how high in the hierarchy of management it will be applied. *Infra* p. 774-7. For purposes of this discussion, “supervisory employee” will not be applied to those representatives of management who are concerned with the determination of policy.

Although “supervisory employee” is often used interchangeably with terms like “foreman,” “supervisor” and “superintendent,” the fact that an employee is given a job title commonly ascribed to a supervisory employee, does not control. See Matter of Richards Chemical Works, Inc., 65 N.L.R.B. No. 3, 17 LAB. REL. REP. 617 (1945), where “foremen” were held not to be supervisory employees; cf. Matter of Allied Steel Castings Co., 66 N.L.R.B. No. 128, 17 LAB. REL. REP. 1114 (1946).


3. Printing trades, building trades, metal trades, maritime industry and railroad industry. Also postal and railway mail service. *Union Membership and Collective Bargaining by Foremen* (June 1943) 56 MONTHLY LABOR REVIEW 1049.
and integration of departments and rigid managerial controls robbed supervisory employees of many of their former powers and responsibilities; and management failed to offer any compensation for this loss of discretion and independence. The duties of a supervisor in industry today generally are no longer identifiable with the functions of the traditional foreman. The plenary authority to employ, transfer, promote, demote, discipline or discharge subordinates is gone. Particularly in mass production industries, stringent personnel and management policies have relegated supervisory officials to a position of "traffic cop." 

Union recognition and closed shop agreements generally resulted in pay raises, shorter hours and better working conditions for the rank and file workers, with little or no benefits accruing to supervisors. When industry became geared to wartime production, former union members temporarily promoted to jobs of assistant foremen and foremen felt strongly their loss of seniority rights as production workers; these men, indoctrinated in principles of labor organizations, led the movement to secure for foremen union benefits comparable to those which they lost upon promotion. Companies, often compelled to start new foremen on an increased pay scale, failed to raise the compensation of senior foremen to the same or higher level. At the same time, although rank and file laborers were earning overtime pay, sometimes receiving a total remuneration in excess of their supervisors, supervisory employees were called upon to work excessive hours with no additional compensation. Rarely was attention given to adequate pay differentials or base pay proportionate to responsibilities. Foremen were gravely concerned with a lack of security—they were often subject to discriminatory discharges with no recourse to higher corporate officials; they often had no hearings before discharge, no grievance machinery, no accident

4. "Whereas he was formerly an executive with considerable freedom of action, he is now an executor carrying out orders, plans, and policies determined above. . . ." WLB Panel Reports on Foremen (1945) 15 LAB. REL. REP. 724, 725 (summary of a report and findings of a special panel of the War Labor Board headed by Prof. Sumner H. Slichter).


6. In the Ford Motor Co. union-shop agreement with the United Automobile Workers, it was specifically provided that production workers would cease to acquire seniority when promoted to supervisory capacity. History of Foreman’s Association (1946) 17 LAB. REL REP. 886 (summary of study by Bureau of Labor Statistics).

7. Such a salary disparity occurred in the Chrysler Plant where four newly-appointed foremen were paid $220 per month for work in the same division with eight foremen who continued to receive $205 per month for comparable work. Hearings before Committee on Military Affairs on H. R. 2239, H. R. 1742, H. R. 1728 and H. R. 992, 78th Cong., 1st Sess. (1943) 499 et seq.

8. A foreman in the coal industry with compensation of $230 per month was on December 1, 1940 placed on day wages whenever work was available. For the following two weeks he received compensation of $22.05. Upon requesting more work, he was discharged and evicted from a company-owned house with two weeks’ notice. Id. at 641–2.
or sickness protection, no standard seniority provisions. Moreover, they objected to the loss of prestige and authority which they suffered from the failure of management to give them adequate support; dealings by management directly with subordinates or union shop stewards who found it expedient to bypass impotent supervisors undermined their responsibility.9

These conditions, although not universal, were sufficiently catholic to stimulate a comparatively rapid development in the unionization of supervisory employees. The movement was accelerated by the organization of the independent Foreman's Association of America 10 in September, 1941. Subsequently, the Mine Officials' Union of America, an independent organization of foremen in the coal mining industry, became affiliated with the United Mine Workers of America.11 Other independent unions and unions affiliated with international or national organizations developed.12 In view of management's opposition to the organizational attempts of the unions representing supervisory employees,13 it was inevitable that the representatives of supervisory employees would seek the protective aegis of the National Labor Relations Act.14

SHIFTING SANDS OF ADMINISTRATIVE RULINGS

During the four-year period in which the three-man National Labor Relations Board considered the applicability of the NLRA to organizations of supervisory employees, the Board reversed its direction twice.16 The basic issues before the Board were whether or not a supervisory employee was an "employee" within the meaning of Section 2(3) of the NLRA; whether or not a group of supervisory employees represented by an independent union was an appropriate unit to be certified under the provisions of Sec-

9. For evidence of general employment conditions of supervisory employees, see generally id. at 299-378, 489-516, 641-695, 706-775; WLB Panel Reports on Foremen (1945) 15 LAB. REL. REP. 724; History of Foreman's Association (1946) 17 LAB. REL. REP. 886.
10. The Foreman's Association of America in June 1945 had 281 chapters with over 28,000 members. History of Foreman's Association (1946) 17 LAB. REL. REP. 886.
11. The Mine Officials' Union of America was succeeded by the United Clerical, Technical and Supervisory Employees' Union of the Mining District, Division of District 50, United Mine Workers of America (AFL). This union was petitioner in Matter of Jones & Laughlin Steel Corp., 66 N.L.R.B. No. 51, 17 LAB. REL. REP. 971 (1946).
tions 9(b) and 9(c) of the NLRA for collective bargaining purposes; or whether or not a group of supervisory employees represented by a local union accepting rank and file membership, or affiliated with a national or international union accepting rank and file membership, was the appropriate unit to bargain collectively. Only on the ruling that a supervisory employee was an "employee" within the meaning of the Act has the Board been consistent.

Protection of the Act Accorded Supervisory Employees. In the 1942 case of first impression, *Matter of Union Collieries Coal Company*, the Board determined that a unit of supervisory employees to be represented by the independent Mine Officials' Union of America was appropriate for purposes of collective bargaining. In both the original hearing and the rehearing, a strong dissent was written by Board Member Gerald D. Reilly. Questioning that a supervisory employee was an "employee" within the meaning of the act, Mr. Reilly maintained that it was incumbent upon the Board to determine in each case whether inclusion or exclusion of supervisory personnel within a bargaining unit would serve to effectuate the policies of the Act. His conclusion that supervisory personnel in the coal industry should not be represented even by an unaffiliated union, implied a denial of affirmative rights of collective bargaining under the Act to any supervisory employees other than members of unions traditionally encompassing supervisors.

The majority ruling was buttressed by the decision in the *Matter of Godchaux Sugars, Incorporated*, in which the Board refused to deprive supervisory employees of the statutory rights granted in the *Union Collieries* case because the foremen chose as their representative the C.I.O. local representing production and maintenance employees of the company. A dissent again was entered by Mr. Reilly. This short-lived ruling obtained for only seven months.

Minority Ruling Becomes Majority. With a change in Board membership, the entire question was re-examined in 1943 in the *Matter of Maryland Dry-

17. 44 N.L.R.B. 874 (1942). The ruling in this case was employed as a precedent in *Matter of Harmony Short Line Transportation Co.*, 42 N.L.R.B. 757 (1942), wherein ticket agents and dispatchers, supervisory employees, were allowed representation by an AFL affiliate which bargained for the bus drivers of the same employer. Mr. Reilly did not take part in the decision.
19. Mr. John Houston replaced Mr. William Leiserson as member of the three-man board.
dock Company, in which a C.I.O. affiliate union which represented non-supervisory employees petitioned to have units of supervisory employees declared appropriate. Mr. Reilly, writing the majority opinion, disclaimed the basic conclusions of previous cases on the ground that no consideration had been given to the question whether units of foremen effectuated the basic policies of the NLRA. The instant ruling questioned the inclusion of supervisory employees as employees within the meaning of the Act, but by reading Sections 2(3) and 9(b) together, the majority concluded that the NLRB had been reserved the administrative discretion to determine whether under the Act a supervisor was an employee to be included in a collective bargaining unit. Without distinguishing the two considerations, the majority found that no bargaining unit for supervisory employees, unless supported by historical development, would effectuate the purposes of the Act, and be appropriate. Chairman Millis, in dissent, strongly contested the proposition that supervisory employees, regardless of type of representation or classification, could be denied the protection of the Board’s machinery to insure collective bargaining.

The Maryland Drydock decision was rigidly applied for over two years, so that no unit of supervisory employees, whether or not affiliated with organizations representing rank and file laborers, was recognized as appropriate. But in Matter of Soss Manufacturing Company, the Board subsequently established another explanation for its refusal to recognize independent supervisors’ unions. The independent Foreman’s Association of America brought charges against an employer for having discriminatingly discharged a supervisor for union activity. In ruling that supervisory employees must be accorded the protection of the Act against unfair labor practices, the Board implicitly recognized that organization by supervisory employees came within the purview and protection of the NLRA. However, the Board sanctioned the rigid Maryland Drydock rule on the tenuous grounds that its objective was to prevent representation of supervisory employees by an organization also representing, or affiliated with an organization representing, non-supervisory employees; and that in questions pertaining to certification, there was no assurance that an independent organization would not become affiliated with a rank and file union before the lapse of the year in which such certification would be customarily valid. Therefore, the Board would deny such recognition to all units of supervisory employees.

21. Matter of General Motors Corp., 51 N.L.R.B. 457 (1943); Matter of Boeing Aircraft Co., 51 N.L.R.B. 67 (1943); rev’d in effect, 45 N.L.R.B. 630 (1942); cf. Matter of Rochester and Pittsburgh Coal Co., 56 N.L.R.B. 1760 (1944) when the Board refused to recognize U.C.T. as bargaining representatives of non-supervisory clerical and technical employees because of the large membership of supervisory employees in that union.
22. 56 N.L.R.B. 348 (1944).
23. Violation of § 8(3).
The Board Reverses Itself Again. This incongruous position was not maintained for long. When the question squarely came before the Board again in the Matter of Packard Motor Car Company, a shifting of position by the junior and controlling member of the Board, Mr. John Houston, forced another reversal in policy, and supervisory employees in a mass production industry were constituted an appropriate unit to be represented by an independent organization. In a subsequent hearing, the Board held immaterial any evidence that the independent union might, in the future, be linked with a rank and file organization. This ruling, however, was specifically restricted to the "traffic cop" type of supervisor.

After the Packard case, the Board was deluged with petitions for recognition filed by supervisors' unions. In Matter of Young Spring & Wire Corporation, the Board extended the ruling in the Packard case to cover supervisory employees in non-mass production industries, with duties more extensive than those of a "traffic cop" supervisor, when represented by independent unions. As a final step, the Board, in Matter of Jones & Laughlin Steel Corporation, recently held that, if selected by the two units of supervisory employees designated by the Board as appropriate, the United Clerical, Technical and Supervisory Employees Union of the Mining Industry, Division of District 50, United Mine Workers of America, a direct affiliate of the union representing the production and maintenance workers, could be certified as the representative of those supervisory employees for the purposes of collective bargaining. After a tortuous effort, the Board had found its original decision of four years back to be good law.

24. 61 N.L.R.B. 4, 16 LAB. REL. REP. 168 (1945), approved, 64 N.L.R.B. No. 204, 17 LAB. REL. REP. 506 (1945).
25. Mr. Reilly was again the dissenter.

See concurring opinion by Chairman Paul Herzog, who had replaced Chairman Millis in the interim. In the Packard case the Board under Chairman Millis was patently concerned with existing insecurity and economic dependence of foremen, but subsequently the majority, headed by Chairman Herzog, specifically refused to consider the efficacy of foreman's unions. Matter of Jones & Laughlin Steel Corp., 66 N.L.R.B. No. 51, p. 12, 17 LAB. REL. REP. 971, 972 (1946).

29. 66 N.L.R.B. No. 51, 17 LAB. REL. REP. 971 (1946). Dissent by Mr. Reilly.
30. Note that the majority opinion makes no reference to the previously controlling Maryland Drydock case, but does cite the Godchaux case.
Throughout the quest by supervisors' unions for protection under the Wagner-Connery Labor Act, much attention has been directed toward policy considerations at the expense of rigid statutory interpretation—in part a reflection of the deep concern of the Board in the practical administration of the Act, and in part a result of a lack of judicial direction. Until the concurring opinion of Chairman Herzog in the Packard case and the majority opinion in the Young Spring & Wire case, there was no substantial distinction drawn between the application of the statute and the merits of unionization for supervisory employees.

"Employee" under the Act. Section 2(3) of the Act provides that "the term 'employee' shall include any employee. . . ." 31 That supervisory employees come within the terms of this definition was recognized by the Board 32 and had been given judicial sanction 33 before the question of collective bargaining by foremen through unionization had become acute. To the extent that he is an employee under the Act, the courts have accorded to the foreman the guarantees of self-organization and collective bargaining of Section 7 34 and the protection against discrimination and unfair labor practices under the provisions of Section 8.35 The conclusion appears inescapable that a supervisory employee, accepted as an "employee" for the purposes of some sections of the Act, would be entitled to all rights, protection and privileges under that Act not specifically withheld from him.

The courts have found no inconsistency between the interpretation of a foreman as an "employee" and the definition of an employer in Section 2(2) as "any person acting in the interest of the employer, directly or indirectly. . . ." 36 In cases where discriminatory acts of supervisory employees violate the spirit of Section 8, their acts have not been condemned per se as

31. "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the chapter 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."


36. "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any state or political subdivision thereof, or any person subject to sections 151-163 of Title 45, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." § 2(2).
acts by "employers"; they have been held to be violative of the law because they have been imputed from employee to employer under the doctrines of agency, respondeat superior and other concepts of liability. In his relations with subordinate laborers, the foreman is a representative of his employer, and consequently an employer under Section 2(2). In bargaining with his employer to further his own interests or to better the terms and conditions of his employment, the foreman is an employee. The Board is thus precluded from holding these two terms mutually exclusive.

In a comprehensive, definitive examination of the meaning of "employee" under the Act, the Supreme Court recently refused to treat it as a word of art, but rather stated that it derived meaning from the statute when read in the light of the mischief to be corrected. The applicability of the Act was to be determined broadly in accordance with underlying economic facts, rather than technically and exclusively in accordance with previously established legal dogma. Moreover, it was not "irrelevant" that workers who sought protection of the Act were subject, as an economic fact, to evils the statute was designed to eradicate. When applied to the instant problem, this ratio decidendi would strongly support a conclusion that supervisory employees come within the terms of the NLRA!

The determination by the NLRB that supervisory employees come within the meaning of Section 2(3) is not only supported by these collateral court decisions, but is also strengthened by the judicial recognition that the task to erect definitive limitations around the word "employee" is singularly reserved to the Board. And the Board's conclusion that specified persons are "employees" is to be accepted if it has warrant in the record and a reasonable basis in law.

The claim that a supervisory employee does not come within the board terms of this definition has been advanced by a member of the Board only

39. The Supreme Court has gone beyond the narrow limits of the doctrines of agency and respondeat superior. Justice Douglas has stated that the court is not dealing "with private rights . . . nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taints of an employer's compulsion, domination, or influence." International Ass'n of Machinists v. NLRB, 311 U. S. 72, 80 (1940). H. J. Heinz Co. v. NLRB, 311 U. S. 514 (1941); NLRB v. Pacific Gas & Electric Co., 118 F. (2d) 780 (C. C. A. 9th, 1941).
42. See NLRB v. Hearst Publications, 322 U. S. 111 (1944), rehearing denied 322 U. S. 769 (1944), which involved the question of whether or not Los Angeles newsboys were employees within the meaning of the NLRA.
43. Id. at 127.
44. Id. at 131.
in cautious terms,\textsuperscript{45} based principally upon a relationship with management and upon a constructed intent of Congress. The Railway Labor Act, one recognized precedent for the Wagner-Connery Labor Act,\textsuperscript{46} defined an employee as “Every person . . . who performs any work defined as that of an employee or subordinate official . . .” \textsuperscript{47} It has been suggested that, by omission of the positive phrase “subordinate official,” Congress specifically intended to omit supervisory employees from the scope of the Wagner Act.\textsuperscript{48} However, with equally as slim authority,\textsuperscript{49} it has been argued that since the Railway Labor Act specifically encompassed such supervisors within its scope, the NLRA also was applicable to them.\textsuperscript{50} The Board finally discarded reference to the Railway Labor Act, frankly admitting that its application was susceptible to either interpretation.\textsuperscript{51}

Designation of Appropriate Unit. The Board is compelled, either upon a proceeding for certification to an employer as the appropriate bargaining unit under Section 9(c) or upon complaint under Section 10 because of a refusal of an employer to bargain collectively, to “decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof.”\textsuperscript{52} Mr. Reilly has seized upon this power to designate the appropriate unit of employees to sustain a denial to foremen and superintendents of affirmative rights to collective bargaining under the Act.

The original intent of Congress concerning the power of the Board under Section 9(b) is apparent from the wording of the statute. The Board was authorized to determine whether a craft unit, plant unit, employer unit or other unit was best suited for the purposes of collective bargaining and self-

\begin{enumerate}
\item The majority, in Matter of Maryland Drydock Co., 49 N.L.R.B. 733 (1943), read §§ 2(2) and 9(b) together, and without delimiting the scope of the word “employee,” held that the determination of the question whether or not supervisors are employers who can constitute an appropriate bargaining unit is a function reserved to the administrative discretion of the Board. It is noteworthy that in his concurring opinion in Matter of Stanley Co. of America, 45 N.L.R.B. 625, 629 (1942), Mr. Reilly pointed out that he had previously dissented from the view that supervisors were employees within the meaning of the NLRA.
\item There is no specific indication that Congress considered the question of supervisory employees in the enactment of the Wagner-Connery Labor Act.
\item See Matter of Union Collieries Coal Co., 41 N.L.R.B. 961, 966 fn. 4 (1942), approved 44 N.L.R.B. 165 (1942).
\item Section 9(b).
\end{enumerate}
organization, as well as for effectuation of the policies of the Act.\textsuperscript{53} Apparently once an individual is determined to be qualified to receive the protection of the Act, the Board's sole problem is to classify him properly. It seems to be given no authority under this section to hold that this employee is entitled to membership in no unit. However, Mr. Reilly placed paramount emphasis upon the effectuation of policies of the Act and maintained that the Board has complete discretion to exclude an employee from any rights under the section, if inclusion would be considered in derogation of the Act. This theory would give the Board limitless power to deny membership in any unit to any force of labor, the organization of which is deemed to run counter to the policies of the Act.

The duty of the Board to group laborers who are "employees" under the Act in a bargaining unit, the major premise of the 
\textit{Pachard} and \textit{Jones & Laughlin} rulings, receives indirect support from the Supreme Court. The Court has stated that although the precise meaning of § 9(b) have not been defined, it was certain that they both were circumscribed by the words "employer," "plant" and "craft."\textsuperscript{54} And the unit selected must insure efficient collective bargaining. There was, however, no recognition that within the delegated authority of the Board was the right to exclude certain employees from collective bargaining units.

Furthermore, in selecting appropriate units for collective bargaining purposes, the Board has been charged with accepting public interest as a paramount consideration and has been reversed on court review if its decree has been viewed to run counter to public policy.\textsuperscript{55} However the considerations of public policy have been applied to the character of the representation within the limits of § 9(b) and represent no recognition of the power of the

\textsuperscript{53} The Bill, as first proposed, carried as the only qualification to the choice of unit by the Board, the effectuation of the policies of the Act. \textit{Hearings before the Committee on Education and Labor on S. 1958}, 74th Cong., 1st Sess. (1935) 4. The goal of insuring to employees the full benefit of their right to self-organization and to collective bargaining was inserted at the suggestion of the Attorney General to provide a nominal standard within which the Board could designate appropriate units. A similar provision appears in the Railway Labor Act of 1934. 48 Stat. 1186, § 2 (1934), 45 U. S. C. § 152 (1940). \textit{Report of the Committee on Labor on S. 1958}, H. R. REP. No. 1147, 74th Cong., 1st Sess. (1935) 22.

\textsuperscript{54} See Pittsburgh Plate Glass Co. v. NLRB, 313 U. S. 146 (1941), which, involving the selection between a multiple plant or single plant unit as appropriate unit for collective bargaining, held that the determination by the Board of an appropriate unit will not be overthrown by the courts unless it is arbitrary and capricious.

\textsuperscript{55} NLRB v. Jones & Laughlin Steel Corp., 146 F. (2d) 718 (C. C. A. 6th, 1944), \textit{remanded}, 325 U. S. 838 (1945), \textit{approved on other grounds}, F. (2d), 17 LAB. REL. REP. 1270, (C. C. A. 6th, 1946). This decision, which will probably be taken to the Supreme Court, held that guards, who are members of the municipal police force, cannot be represented by the union representing production and maintenance employees, in view of the fact that the obligations of such guards to the municipality and state would be incompatible with union obligations in cases of strikes and industrial unrest. It is submitted that the frequent attempts to analogize the rights of supervisory employees with the rights of plant protection employees fail because of the basic differences in duties, obligations, and status within the managerial hierarchy, as well as differences in policy considerations.
Board and refuse certification to any group of employees included within the Act by Congress.

In interpreting other provisions of the Act, the courts have guaranteed to supervisors the right to self-organization and to collective bargaining through representatives of their own choosing under Section 7, and have declared as an unfair labor practice interference with these rights. Thus, the finding of the Board that a designation of a unit of supervisory employees for the purposes of collective bargaining is contrary to the policies of the Act, seems inconsistent with the practice of preventing interference with collective bargaining activities of these employees.

Nor is the recognition of bargaining units embracing supervisory employees without precedent. In industries which traditionally have included supervisory employees within their schemes of unionization, units have been composed either solely of supervisors or of both supervisors and their subordinates. Although in other industries the Board has normally excluded supervisory employees from bargaining units of ordinary employees, it has usually included supervisory employees in rank and file units at the option of all interested unions, unless the specific supervisory employees bear a very close connection with management. However, the Board's action in excluding supervisory employees from mixed units is directed toward the protection of subordinate employees from employer-domination, which objection is not present in a bona fide, independent bargaining unit composed solely of supervisory employees.

Majority Choice of Representatives. Implicit in the rejection by Mr. Reilly of appropriate units of supervisory employees is a denial of the statutory right of employees to choose collective bargaining representatives by majority vote. Disregarding considerations of unregulated selection, he emphasized the basic evil of affiliation of supervisory and non-supervisory groups. He would not certify independent units of supervisory employees.

56. See case cited supra, note 35.

In Matter of Coos Bay Lumber Co., 62 N.L.R.B. No. 11, 16 LAB. REL. REP. 526 (1945) (logging), the majority justified the exception based on custom on the ground that with such a heritage, supervisory employees would not reflect management policies, would not impair freedom of other employees, and would not undermine existing discipline. In addition, there was a definite community of interest among employees of both classes. Apparently, the crucial point is the protection of other employees.

60. 4 N.L.R.B. ANN. REP. (1939) 94; see Hearings before the Committee on Labor on H. R. 4749, 76th Cong., 1st Sess. (1939) Supp. 26.
because of the fear that there existed no effective prohibition against amalgamation with rank and file unions through common representation.61

Aside from policy considerations, there appears little statutory basis for a refusal to group employees within appropriate bargaining groups because of their choice of representatives. In fact, such a rationale runs counter to the specific provisions, as well as the spirit, of the Act. Section 7 of the Act, which has been extended to supervisory employees, guarantees to workers collective bargaining through representatives of their own choosing. Section 9(a) provides that representatives shall be selected by the majority of the employees in an appropriate unit. Consideration of proper representatives of any unit must await, not precede, selection of an appropriate unit. Thus any refusal to designate an appropriate unit because of a possible choice by its majority appears to be a perversion of the principle of majority rule62 which pervades the statute.

Congressional Intent. The problem of organization of supervisory employees not being in evidence when the National Labor Relations Act was enacted, it is not surprising that specific indicia of legislative intent as to their rights of collective bargaining are lacking. With the problem apparently ignored, any consideration of Congressional intent must be posed in terms of how Congress would have reacted.63 The stated purposes of the Act,64 are the encouragement of the practice and procedure of collective bargaining; and the protection of the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. It attempts to eliminate industrial strife resulting from a refusal to bargain collectively and to remedy the inequality of bargaining power between employee and employer. These policies would seem clearly to endorse recognition of appropriate units of supervisory employees unless such recognition of appropriate units of supervisory employees unless such recognition of appropriate units of supervisory employees would substantially impair the rights to collective bargaining of another class of workers.65


63. For unsuccessful constructions by reference to Railway Labor Act, see supra, p. 762.


65. In the Packard case, the company maintained that there was no intent of Congress to include supervisory employees within the terms of the Act because at the time of the enactment, foremen were not engaged in industrial strife. The Board shrugged the claim aside with the observation that under such construction each representation case would turn on whether or not the employees involved were organized and engaged in strikes when the statute was enacted.

In the dissenting opinion of that case, Mr. Reilly pointed out that the enacting clause specifically applied to employees who were underpaid and neglected. He supported a con-
There is less doubt, however, as to how subsequent Congresses felt toward the problem of according to supervisory employees rights under the N.L.R.A. On several occasions Congress has considered proposals which would deny supervisory employees the status of employees under the Act or which would prohibit membership of supervisory employees in any labor organization engaged in collective bargaining, but to date, none of these proposals have been enacted.

**Considerations of Policy and Practice**

Fear of practical consequences, not legislative interpretation, gives rise to the most serious objections to the recognition of appropriate units of supervisory employees. Traditional concepts which viewed supervisory employees as agents of management in regulating the rank and file worker, were sorely tested by the organization of supervisory employees; adherents of these concepts were disillusioned when those organizations became affiliated with rank and file labor unions. The natural reaction was for management to advocate the prohibition of foremen's unions, or in the alternative, to urge a denial of affirmative benefits of the Wagner Act on the grounds that such unions did not effectuate the policies of the Act. The resolution of policy considerations will doubtless weigh heavily in the ultimate application of the statute to supervisory employees.

Economic warfare may result from a denial to supervisors of the affirmative rights to collective bargaining under the NLRA. The constitutional rights of supervisory employees to self-organization and collective bargaining are inviolate, and can be invoked without the alternative and additional support of the Wagner Act. Unions of supervisory employees can bargain collectively outside the framework of the Wagner Act, and can obtain recognition through contracts with management, regardless of the composition or affiliation of the union. The additional protection ac-

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66. See H. R. 4908, commonly known as the Case Bill, as passed by the House of Representatives, February 7, 1946; the provision of the bill depriving supervisory employees of the status of “employee” under the Wagner Act was removed from the bill in Senate Committee on Education and Labor. Final bill was vetoed, *Newark Evening News*, June 11, 1946, p. 1. See also, H. R. 1996 (1943) (the term “employee” for the purposes of the NLRA shall not include a bona fide executive administrative, professional or supervisory employee).

67. H. R. 2239 (1943); cf. H. R. 4749 (1939) which would allow supervisory employees, defined as those employees with power to hire and fire, and higher ranks, to become members of any labor organization, and opposition of NLRB to that proposal. *Hearings before Committee on Labor on H. R. 4749*, 76th Cong., 1st Sess. (1939) Supp. 26.


70. Subject to the caveat that the NLRB might conceivably exercise indirect control
corded to the supervisor by the NLRB against unfair labor practices and discriminations against union members, necessarily strengthens the bargaining position of supervisory employees. Unless management is willing to accept representatives of supervisors, or unless the peaceful machinery of collective bargaining under the Act is made available to those supervisors, the only alternative may be a resort to strikes and other weapons of economic strife—the obstructions to commerce that the Act was intended to eliminate.

Incidence of organization of supervisory employees upon rank and file employees. Mr. Reilly, in his unwavering opposition to the recognition of units of supervisory employees, has leaned very heavily upon marshalling of potential evils which would result from such recognition. Not the least serious, from the point of view of effectuating the policies of the Act, is the contention that units of supervisory employees would impinge upon the freedom of the rank and file laborers in their selection of bargaining representatives. This fear arises from the accepted belief that foremen, in the position of authority, will influence and coerce subordinates; it is a reflection of previous Board policy to impute to an employer as unfair labor practices, attempts by foremen to influence the choice of laborers.

If units of supervisory employees, affiliated with rank and file unions, are allowed to operate unregulated, these fears may be justified. Unionization of rank and file workers may be attempted by rejected labor unions through organization of supervisory employees in the industry. In an industry with dual unionism, attempts may be made by union organizers to influence the choice of ordinary laborers through foremen who are members of an affiliate union or who constitute an appropriate unit represented by the same union. Even more subversive is the possibility that management, favoring one union against another, will skillfully place its foremen in organizations affiliated with the favored union; then, unless a direct agency

by refusing to certify representatives of a bargaining unit of production and maintenance workers of the same plant, if the representatives are affiliated with the supervisor's organization. See Matter of Rochester & Pittsburgh Coal Co., 56 N.L.R.B. 1760 (1944).


72. As witnessed by the strike of foremen, followed by government seizure, in the coal industry in September, 1944 to force reversal of the Maryland Drydock policy, as well as to gain recognition of foremen's unions, N. Y. Times, Sept. 5, 1944, p. 32, col. 1, and by the strikes of September 1945 which shut down 92 fields and made idle 38,000 workers, N. Y. Times, Sept. 28, 1945, p. 14, col. 6. One of the demands of the United Mine Workers in the general soft coal strike which started on April 1, 1946 was the recognition of the rights of supervisory employees to unionize. N. Y. Times, March 12, 1946, p. 18, col. 3.


74. Compare with Matter of Stanley Co. of America, 45 N.L.R.B. 625 (1942), where a C.I.O. affiliate attempted to organize the supervisory employees in theatres at a time when a bulk of the rank and file employees had not been organized. This situation led to a charge of "organization from above" in a concurring opinion by Mr. Reilly. Id. at 629.
is proved, it is unlikely that any coercive acts of the foremen could be
imputed to the employer. 75

Such considerations, however, ignore the fact that foremen who are
members of independent unions will not generally be concerned with unioni-
zation of the rank and file laborers, except that they might possibly display a
predilection toward labor organization. If foremen are affiliated with rank
and file unions, protection can be given laborers by management against
capricious or discriminating acts of supervisors. Employers can be required
to declare unequivocally that the foremen do not represent the opinions of
management on questions of labor; 76 moreover, supervisory employees may
be prohibited from participating in the union activities of subordinates
through exercise of the employer’s power to discharge or discipline super-
visory employees for interference with the union activities of subordinates. 77

It must be further recognized that these possible abuses are not created
by the NLRB’s action in certifying bargaining representatives of supervi-
sory employees, but are the result of unionization of supervisors. If such
abuses do exist, they are present in unions of supervisory employees not
accepted within the pale of the NLRA. In view of the fact that these pos-
sible threats to the freedom of the average laborer cannot be eliminated,
it would seem desirable to bring them within the control of the Board. Those
conditions will then continue to prevail only if the Board fails to regulate
abuses as they appear.

It is important to note that the national and international labor unions
representing rank and file employees lead the present drive to unionize
foremen and to associate those units with the rank and file Labor movement.

75. Compare possible results, in absence of the doctrine of imputation, in the fact situa-
tions in Eagle-Picher Mining & Smelting Co. v. NLRB, 119 F. (2d) 903 (C. C. A. 8th, 1941)
wherein an independent union, allegedly organized by the employer and its foremen in a
drive to defeat a C.I.O. strike, later became affiliated with the A.F.L.; International Asso-
ciation of Machinists v. NLRB, 311 U. S. 72 (1940), in which case the employer signed an
agreement with an A.F.L. union after a concerted C.I.O. drive; at the time, alleged super-
visory employees openly shifted their support from a company union to the union selected
by their employer; Hazel-Atlas Glass Co. v. NLRB, 127 F. (2d) 109 (C. C. A. 4th, 1942)
wherein although an A.F.L. union had hitherto been unsuccessful, the employer called upon
another A.F.L. affiliate to counter a drive by a C.I.O. affiliate.

76. The influence that workers may wield over other employees is not restricted to the
control of foremen over subordinates. In the Jones & Laughlin case, the company offered
evidence that the supervisors were recruited by direct action of rank and file members of
the U.M.W.A. Brief for the Company in Matter of Jones & Laughlin Steel Corp., pp. 76–85.
In this light, it is pertinent that the NLRA was originally intended to protect employees from
unfair action by employers, not from influences of other employees. § 1.

77. See Matter of Ecusta Paper Corp., 66 N.L.R.B. No. 147, 17 LAB. REL. REP. 1151
(1946). But when employer had no effective policy of neutrality, or was attempting to defeat
union activity, discharge of a supervisory employee is in derogation of his rights. Matter of
American Steel Foundries, 67 N.L.R.B. No. 2, 17 LAB. REL. REP. 1180 (1946); Matter of
may also find it expedient to accept the proposition that no employee may participate in the
activities of other appropriate units represented by the same or affiliated union.
Union leaders welcome foremen into their midst as a means of controlling arbitrary or abusive supervision. Organized labor apparently does not want this type of Board protection.

Incidence upon relationship between supervisory employees and management. The forces of management feel very keenly that unionization of supervisory employees would have a perilous effect upon industry. The opposition of many representatives of management is directed at unionization of supervisors, and not solely at affiliation with national and international rank and file labor organizations. In at least one industry, management feels that if supervisory employees be grouped in a bargaining unit, that unit be represented by the same organization that represents the rank and file worker. In contrast, Mr. Reilly, conceding that units of foremen should be designated appropriate if their independence could be assured, is concerned primarily with the aspect of affiliation.

Collective bargaining between management and an independent union of foremen has little practical effect upon the relationship between management and its supervisors. Very few of the disastrous predictions offered by management could possibly be present where there is no affiliation with a union of ordinary workers. The opposition is based on the conceptual argument that membership by foremen in a labor organization, with a resultant conflict of interest, would destroy the traditional equilibrium between management and labor. These contentions accompanied arguments similar to those advanced in the struggle against unionization of rank and file workers.

When appropriate units of supervisory employees are represented by organizations accepting ordinary employees or affiliated with rank and file unions, the fear of a deleterious effect upon management-supervisory employee relationship is more substantial. Mr. Reilly pointed with great concern, in the Jones & Laughlin case, to the fact that a supervisory employee who is represented by a union also representing the rank and file workers, is faced with a direct conflict in allegiances. In that case, the U.C.T. which


80. See id. at 1-201. For objections advanced by management following the Pachard case, see Employer Opposition to Foremen's Bargaining (1945) 16 LAB. REL. REP. 209.

81. Matter of Union Collieries, 41 N.L.R.B. 961 (1942), approved, 44 N.L.R.B. 165 (1942), one defense of the employer was that if supervisory employees come under the Act, they should be represented by the U.M.W.A., representatives of the miner. Also, Hearings before the Committee on Military Affairs on H. R. 2239, H. R. 1742, H. R. 1728, and H. R. 992, 78th Cong., 1st Sess. (1943) 37.


84. Mr. Reilly also makes a unique argument that to hold the supervisory employees may be represented by the same organization that represents subordinate workers, would be
petitioned the Board was directly controlled by the U.M.W.A. Its members were required to take the Mine Workers' oath of allegiance that they will "defend on all occasions" and "assist . . . to obtain the highest wages possible" for all members of the organization.

Several undesirable results might stem from this duality of allegiance. The supervisory employee, particularly in a closed shop industry, might allow the threat of union reprisal to interfere with the efficient performance of his duties. A breakdown of managerial operations might result from indirect control by the union over management, and fraternization among superiors and their subordinates. The foreman, an arm of management, would be seated on both sides of the bargaining table. As a representative of management in the grievance procedure, he would hear complaints of a fellow union member. These conditions are prophesied to lead to the disruption of management-labor relations and to industrial warfare.

The pattern of the argument is completed by reference to the doctrine of the imputation to management of unfair labor practices of foremen. In any conflict between unions for representation, it is anticipated that a supervisor who owes allegiance to one of the conflicting unions, might attempt to influence his subordinates. The employer would be powerless to discharge or silence the supervisory employee for fear of a charge of interference with labor activities of workers and of violation of Section 8 of the NLRA. At the same time, he might be liable for the interference of his supervisor. Moreover, unless the Board reverses its previous policy of disestablishing independent unions as company-dominated because of the participation of supervisory employees, contrary rules would be applicable to independent and affiliated unions.

These dire predictions, supported by conceptualism rather than factual evidence, are generally premised on the conclusion that there is a definite demarcation between management and labor, and that foremen and superintendents, traditionally identified with management, have none of the attributes to view the NLRA as "repudiating the historic prohibition of the common law against fiduciaries serving conflicting interests." Matter of Maryland Drydock Co., 49 N.L.R.B. 733, 740 (1943). See Chairman Millis's dissent, id. at 745, n. 7.

85. The U. C. T., nominally a division of District 50, resembles a division of U.M.W.A. It has no charter or by-laws but operates directly under the constitution of the U.M.W.A. Its officers were appointed by the national officials of the U.M.W.A. and their salary paid by that organization. Matter of Jones & Laughlin Steel Co., 66 N.L.R.B. No. 51, p. 10, 17 LAB. REL. REP. 971, 973 (1946).

86. Id. at p. 19, n. 3. Mr. Reilly was especially perturbed by the functions of foremen in the pattern of the coal industry. The foremen in the Jones & Laughlin case bargained for the company in contracting for "dead work"—additional duties such as setting pit posts, removing water from working places, etc., compensation for which is determined by individual agreement.


tributes of laborers. This approach does not recognize the accepted fact that an employee can be a representative of management for some purposes and a subordinate of management for others. Nor does it recognize that some functions peculiar to supervisory employees place them in a third class separate from management and labor. Such artificial classification cannot be deemed determinative of the substantive rights of a group of employees. The fact that certain time-worn concepts are violated may indicate that the concepts should be renovated.

The question of divided allegiance has been over-emphasized. A foreman is subject to immediate discharge for disloyalty. The fear of fraternization within the union does not take into consideration the fact that the employees are separated for bargaining purposes into appropriate units; if the Board maintains a physical segregation of units as well, that fear will be baseless. The claim that recognition of affiliated supervisory employees’ unions would place foremen on both sides of the bargaining table is fanciful since the average foreman takes no part in the collective bargaining activities between management and rank and file laborers. It is true that the average foreman does often participate in the grievance procedure, but involved only in the early stages, his authority is restricted to minor decisions. If management feels that he cannot impartially exercise the limited discretion granted to him in this procedure, it can delegate these duties to a higher level of management. Rights under the Act should not be denied to foremen merely because present practices which may be easily revised will be affected.

Judicial decisions and rulings of the NLRB do not substantiate a conclusion that the doctrine of imputation will favor affiliated unions against independent unions. It is true that independent unions have been disestablished by the Board as company-dominated, if supervisory employees take part in their organization, but the Board has also ordered employees to withdraw recognition from affiliated unions following interference by super-

89. See Matter of American Steel Foundries, 67 N.L.R.B. No. 2, 17 LAB. REL. REP. 1180 (1946) in which the Board acknowledged that a foreman’s conduct in presenting grievance of fellow worker, on behalf of foremen’s union, is protected by the NLRA. For purposes of pressing union grievances, the foreman was removed from the class of subordinate to management, and his objection to management’s promotion of a rank and file worker to foreman over a minor supervisory official, was not deemed insubordination.


91. “Whole congeries” of facts, in addition to evidence of participation by supervisory employees, are usually considered. NLRB v. Link-Belt Co., 311 U. S. 584 (1941); H. J. Heinz Co. v. NLRB, 311 U. S. 514 (1941); Matter of Brown Co., 65 N.L.R.B. No. 43, 17 LAB. REL. REP. 650 (1946); Contra, NLRB v. Swank Products, Inc., 103 F. (d) 2d 872 (C. C. A. 3rd, 1939); Cupples Co. Manufacturers v. NLRB, 106 F. (d) 100 (C. C. A. 3th, 1939), 53 HARV. L. REV. 332; Ballston-Stillwater Knitting Co. v. NLRB, 98 F. (d) 758 (C. C. A. 2nd, 1938).
visory employees. Because of their very nature, company unions would be most closely affected by this principle, and affirmative evidence of independent action of employees would often be lacking. The Board's administration is flexible enough to become adapted to the recent growth of supervisors' unions. The doctrine, accommodated to changing conditions, now provides that foremen, if eligible to union membership, have the same right as ordinary employees to express their views; these acts will not be imputed to their employers, and unions, independent or affiliated, will not be disturbed, unless there is an affirmative showing that they were authorized, encouraged or ratified by the employer.

Evidence from Actual Practice. The predictions of inherent dangers and catastrophic results are supported by none of the industries in which supervisory employees traditionally have participated in the union movement. In fact, an examination of these industries indicates that these fears are without substantiation.

In the newspaper field, internationals have required foremen of union departments to be members of the rank and file union since 1889. The foremen, well acquainted with union problems, have usually been able to manage subordinates with the least friction. Publishers, no longer objecting to unionization of foremen, are now primarily concerned with union discipline when foremen differ with the local union in interpreting the terms of the contract. However, a method has been provided for a joint settlement of these disputes, and the problem of union discipline is not so common as to constitute a major issue. In book and job printing work, union membership of foremen apparently is so thoroughly established that it becomes an issue only occasionally in a newly organized plant. Specific advantage is gained from the strategic position of foremen who can interpret union's and management's problems to each other. The fact that foremen are subject to discipline by the union, remains a source of difficulty. "The fear of discipline may interfere with a foreman's efficiency although a strong foreman is little affected."

The railroad industry has been functioning for years with unions which represent separate bargaining groups of supervisors and their subordinates.

94. TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS (ed. by Harry A. Millis, 1942) 67.
95. Id. at 146, n. 63.
Although the National Mediation Board has recognized this practice, there is no evidence of unusual problems. Likewise, there is no indication that serious issues have arisen from the recognition by the NLRB of appropriate units of supervisory employees in maritime unions.\textsuperscript{52}

The National Labor Relations Board has recognized the rights of foremen to collective bargaining under the Wagner Act in certain industries which have traditionally included them within the collective bargaining scheme. There now appears little warrant for freezing the development of unionization for supervisory employees at its 1935 level. If any of the predicted consequences do result, they will probably be soluble by the Board, or by labor and management at the conference table. "Problems which inevitably arise from the recognition of any class of employees, including supervisory employees, will find their best and most prompt solution in a system of collective bargaining where both labor and management display sincerity and cooperation in day-to-day relationships and proceed to analyze and resolve their differences instead of holding fast to and debating unestablished assumptions."\textsuperscript{97}

It is noteworthy that of the eight states that have labor relations legislation, two of the three which have considered the problem have accorded the benefits of the act to supervisory employees. The New York State Labor Board\textsuperscript{55} has established appropriate units of supervisory employees, with representatives affiliated with the union representing rank and file workers, and highest court of the state has affirmed these rulings.\textsuperscript{53} A similar policy has been adopted in Massachusetts.\textsuperscript{100} Under a state labor relations law which now varies considerably from the Wagner Act,\textsuperscript{101} the Pennsylvania court adopted the then existing administrative policy of the NLRB to reach the opposite conclusion.\textsuperscript{102}
EXAMINATION OF THE FUTURE

The present problem has not as yet been squarely before the courts. A judicial mandate would be welcome at this time when Board consistency depends primarily upon unchanging Board personnel. That a test case has not yet reached the courts principally results from the limitation of judicial review to final orders of the Board prohibiting unfair labor practices. Under this provision, an order denying certification cannot be appealed to the judiciary by labor representatives; only after the employer contests orders issued by the Board restraining unfair labor practices, is judicial review possible. Under present Board policy, a judicial test is forthcoming unless contemporary Congressional action renders the issue moot.

It can be anticipated that the Board's present policy in regard to recognition of appropriate units of supervisory employees for collective bargaining purposes will be affirmed. The court, in extending previous rulings, can be expected to hold that a supervisory employee is an "employee" under the Act, and that as an employee he has a right to be grouped in a unit appropriate for purposes of collective bargaining. The determination by the Board of a bargaining unit of supervisory employees may well be concluded not so capricious and arbitrary as to justify reversal and deemed to effectuate the basic principles and objectives of the NLRA. It would be desirable for the court to deny the doctrine that it is within the discretion of the Board to withhold the privileges of Section 9(b) from workers who admittedly come within the scope of the Act.

Other ramifications of the issue deserve speculation. Implicit is the question of how far the policy of including supervisory employees within the scope of the NLRA will be extended in the hierarchy of management. The Board has included within bargaining units foremen who are alleged to carry the duties and responsibilities of the old-time foremen, as well as foremen who are authorized to contract independently for additional work by their subordinates. It is noteworthy, however, that no decision of the


Board has included employees who formulate management policies or who actually participate in collective bargaining conferences with representatives of rank and file workers. Pragmatically, the problem of how high in the hierarchy of management these concepts will be extended is somewhat academic; those representatives of management who fill discretionary positions are not likely to find unionization desirable. Moreover, there is grave question that a representative of management who fits the description of a policy-maker bears the attributes of an "employee" under the Act.

The issue of representation of a supervisor's bargaining unit by the same local union that represents the production and maintenance workers has not been faced squarely by the Board subsequent to the Godchaux decision in 1942. In line with recent policy, the Board in the Jones & Laughlin case, has accepted representation of supervisors by a local which in effect is an integral part of the national union of rank and file workers. Subsequently the Board has allowed foremen to bargain through a supervisor's "auxiliary" of the rank and file local. If the local union claiming representation of both supervisors and their subordinates is properly constituted, there is little question that the Board will extend recognition to it.

With the exception of certain industries in which foremen with supervisory authority have customarily been included in the same bargaining units with rank and file members, there is no reason to doubt that the Board will continue to segregate supervisors and laborers into separate bargaining units. Although the Board has permitted minor supervisory employees to be included in units with rank and file workers when all contesting unions have agreed, the Board in the future may adopt a sterner policy against the commingling of those two classes of employees in the same bargaining unit. In addition, the Board may demand, as a condition precedent to certification, a physical segregation of, and a line of demarcation between,

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Note that the constitution of the Foremen's Association of America excludes from membership supervisory employees who formulate management policy. History of Foreman's Association (1946) 17 LAB. REL. REP. 886, 887.

108. It is doubtful that management will be able to deprive supervisory employees of the coverage of the Act by a colorable extension of their discretionary powers or by new, more dignified job titles. Matter of Allied Steel Castings Co., 66 N.L.R.B. No. 128, 17 LAB. REL. REP. 1114 (1946), the Board was not impressed by the title of "superintendent" given to a former foreman, without an actual increase in authority.


110. See cases cited supra, note 58. This exception may, through broad interpretation, extend the privileges of including both ranks of employees within one unit. See Matter of Coos Bay Lumber Co., 62 N.L.R.B. No. 11, 16 LAB. REL. REP. 526 (1945), involving the logging industry, in which the dissenting member strongly contested that such a custom did not exist.

111. See note 59 supra.
members of the separate bargaining units within the organization itself, as well as assurance that neither unit will be able to dominate or control the other.

In regard to the composition of the bargaining unit of supervisory employees, there is no doubt that the Board will exclude all supervisors in the higher levels of management if their interests are inimical to those of the groups being organized. The Board has grouped several levels of supervision in one unit if all members possess a community of interest and no marked disparity in rank. However, in recent cases involving distinct levels of supervision, the Board has adopted a novel policy. Where there is a marked divergence in rank and authority between different levels of supervisors proposed for a single bargaining unit, and where at the same time common backgrounds and problems establish a community of interest, the Board has found it undesirable upon its own motion to establish separate units.

Supervisors in the highest level were given the opportunity to determine by election whether or not they desired to be included in the unit of the subordinate supervisory employees. The bargaining units of supervisory employees to be designated for a particular employer have been modelled on the bargaining patterns established for the production and

112. See dissenting opinions by Chairman Millis in Matter of Maryland Drydock Co., 49 N.L.R.B. 733 (1943) and in Matter of Rochester and Pittsburgh Coal Co., 56 N.L.R.B. 1760 (1944), in which he specifically noted the desirability of segregation. See, also, Matter of Jones & Laughlin Steel Corp., 66 N.L.R.B. No. 51, p. 10, 17 LAB. REL. REP. 971 (1946), where the majority pointed out that the locals of supervisory employees met apart from the rank and file members of the U.M.W.A.

113. Concurring opinion by Chairman Millis in Matter of Cramp Shipbuilding Co., 52 N.L.R.B. 309, 312 (1943), reversing, 46 N.L.R.B. 115 (1942) (Maryland Drydock doctrine controlling), in which he refused to certify a bargaining unit of supervisory employees to be represented by the rank and file labor union because "organizational autonomy" was not insured; cf. Matter of Columbia Machine Works, Inc., 66 N.L.R.B. No. 127, 17 LAB. REL. REP. 1112 (1946).


117. A policy of allowing various levels of employees to select, by election, an appropriate unit, could result in a revision of the accepted procedure for designating appropriate units. Compare Marshall Field & Co. v. NLRB, 135 F. (2d) 391 (C. C. A. 7th, 1943) in which the board was enjoined from delegating the selection of the bargaining unit to employees.
maintenance workers, and technical and clerical subordinate employees of the same company. 118

The Board can readily adapt its concepts to a labor movement including supervisory employees. It now refuses to impute to the employer actions of supervisory employees who are solicited for membership in an organization. 119 If there is no showing of encouragement, authorization or ratification by management of campaign activities of supervisors who have personal interest in the movement, as contrasted with those who are volunteers, employers will probably be under no liability for such actions. 120 On the other hand, employers can be prevented from using these recently-gained rights of foremen as a means for fostering company-dominated unions; physical segregation of bargaining units and rigid standards of affirmative neutrality of employers, 121 can protect rank and file laborers against employer domination through friendly supervisors. Finally, the Board can encourage resolution of problems resulting from unionization of supervisors at the conference table of labor and management.


119. See note 93 supra.
