
Volume 51
Issue 4 *Dickinson Law Review - Volume 51,*
1946-1947

6-1-1947

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Recommended Citation

I. H. Rothenberg, *Foremen-The Industrial Question Mark*, 51 DICK. L. REV. 211 (1947).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol51/iss4/2>

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FOREMEN — THE INDUSTRIAL QUESTION MARK

By

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One of the most difficult problems that has arisen under the National Labor Relations Act appertains to the status and rights of supervisory employees. The recent litigation in the so-called "Packard Foremen's Case"¹ has pointed up rather than resolved the complexity of the problem.

The Packard Foremen's Case was by no means the first instance in which the right of supervisory employees . . . viz: foreman . . . to collective bargaining under the National Labor Relations Act was raised. On the contrary the issue has a substantial and interesting history, to which we shall directly advert.

In considering the question of the status and rights of supervisory employees, it must first be remembered that the issue has three distinct facets: the first is the question of whether supervisory employees have the basic right of organization and collective bargaining; secondly, whether such employees constitute an appropriate bargaining unit; and, finally, whether there exists in the employer the duty to recognize and bargain collectively with a bargaining unit of that character.

Before exploring any of the foregoing aspects of the question, it might be well to first enquire into what constitutes one as a supervisory employee, as contrasted to other categories of employee. Generally speaking, employees may be classed in three groups: production, supervisory and executive. Treating these groups in inverse order of their presentation, it may broadly be said that executive employees are those who participate in the formulation or variation of "policy."² The supervisory employee may be characterized as a functionary to whom has been delegated the *execution* of "policy," but who has no substantial discretion therein. The production employee, of course, is the physical worker who is completely removed from "policy."

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¹N.L.R.B. vs. Packard Motor Car Co., 64 N.L.R.B. 1212 (204), enforced in 157 F. (2nd) 80, affirmed in 67 S. Ct. 789.

²Eagle-Picher Mining & Smelting Co. vs. N.L.R.B., 119 F. (2nd) 903.

The National Labor Relations Act³ defines an "Employee" as follows:⁴

"The term 'employee' shall include any *employee*⁵, and

shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with, any current labor dispute or because of any unfair labor practise, 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 family or spouse."

It will be observed that the foregoing definition of "*employee*" includes *any* employee. The only ones excluded from the definition are those expressly eliminated by the Act's own terms. The Act instead of actually defining what an employee is merely says in effect: "An employee is an employee." The interpolation of the word "any" to expand the word "employee" does not supply the deficiency. The term "employee" still remains undefined.

Since the Act itself did not present a clear statement of the meaning of "employee," it devolved upon the courts and the National Labor Relations Board to furnish a meaning by judicial interpretation. Unfortunately, this vacuum led more to *judicial* and administrative *legislation* rather than *interpretation*.

The current controversy concerning the status of supervisory employees under the National Labor Relations Act stems primarily from the contention that such employees are so identified with employer-interest that they are, per se, disqualified as "employees" within the meaning of the Act.

The first discoverable litigation under the Act which concerned the status of supervisory employees and their rights thereunder was the case of *Atlantic Greyhound Corp.*⁶ In that case, without pursuing to any great length the question of whether the identity of interest between an employer and his supervisory personnel disqualified the latter under the Act, the Board categorically held that one whose supervisory or managerial functions were of a minor nature was an "employee" within the meaning of the Act. This case, however, involved *individual* rather than *group* rights. The essence of this case was that, as individuals, *lesser* supervisory employees were "employees" under the Act and, as such entitled to all of the rights and protection afforded by the Act.⁷ The case neither involved nor decided the broader issue of whether supervisory employees *gen-*

³Act of July 5th, 1935, c. 372, 49 Stat. 449-457, 29 U. S. Code, Secs. 151-166.

⁴Section 2 (3).

⁵Italics supplied.

⁶7 N.L.R.B. 1189 (1938).

⁷See: N.L.R.B. vs. Hearst Publications, Inc., 322 U. S. 111; Eagle-Picher Mining Co. vs. N.L.R.B., 119 F. (2nd) 903; N.L.R.B. vs. Skinner & Kennedy Co., 113 F. (2nd) 667; N.L.R.B. vs. Star Pub. Co. 97 F. (2nd) 465; N.L.R.B. vs. American Potash & Chemical Corp., 98 F. (2nd) 488; Hazel-Atlas Glass Co. vs. N.L.R.B., 127 F. (2nd) 109.

erally and as a class came within the category of "employees" under the Act. Thus this question, together with the resultant issue of whether such a class was entitled to *collective* (as contrasted to individual) *bargaining* rights under the Act remained unanswered.

Following the *Atlantic Greyhound Corp.* case there ensued a period in which the Board vacillated indecisively on the question of basic right, never explicitly ruling on the question but vicariously concerned itself with the secondary aspects of the issue. During this period the Board, by indirection, first *suggested*⁸ that supervisory employees were entitled to the right of collective bargaining under the Act by holding that a unit consisting of assistant foremen, weighmasters and other kindred managerial functionaries of a colliery constituted an appropriate bargaining unit for collective bargaining purposes under the Act. Although the fundamental question of supervisory personnel as "employees" and their *right* to collective bargaining were not directly determined, these elements were circuitously affirmed by the Board's decision that such employees formed an appropriate bargaining unit for the purpose of collective bargaining.

In the same year, 1942, the question of propriety of bargaining unit was again before the Board. This time, however, the proposed bargaining unit consisted not only of all non-working foremen (exclusive, however, of general foremen), but of production workers as well. Notwithstanding the joinder of supervisory and production workers in the proposed bargaining unit, the majority of the Board held⁹ that the unit was a proper one for collective bargaining purposes. Board member Gerard D. Reilly, however, dissented from the majority view, urging that formation of the bargaining unit was improper in that supervisory and production employees were joined in a single bargaining unit. The dissenting member of the Board protested that such an indiscriminate co-mixture of personnel in a single bargaining unit would place the supervisory employees in an extraordinary position to interfere with the rights guaranteed by the Act to the other employees.

It will be noted that in the *Godchaux* case, as in the preceding *Union Collieries Coal Co.* case, the emphasis was on the propriety of the composition of the proposed bargaining unit, rather than upon the cardinal and underlying question of the *status* of supervisory employees and their basic rights as such. Whatever treatment these considerations received was indirect and casual.

Strangely enough, in a case¹⁰ that was decided after the *Godchaux* case, but within the same month, the Board, upon substantially comparable facts, rendered a decision which was founded upon the minority dissent rather than the majority opinion in the *Godchaux* case. Almost immediately following, the

⁸Matter of Union Collieries Coal Co., 41 N.L.R.B. 874.

⁹Matter of Godchaux Sugars, Inc., 44 N.L.R.B. 874 (No. 172).

¹⁰Matter of the Stanley Co., etc., 45 N.L.R.B. 625 (No. 94).

Board, in a decision¹¹ that completely confused the issue, held that a bargaining unit which was comprised exclusively of general foremen, foremen and assistant foremen and contained no non-supervisory employees, was an inappropriate bargaining unit. This decision was reached on the grounds that since the general foremen had supervisory authority over the foremen and the latter exercised similar authority over assistant foremen, the consolidation of these classes of employees in a single bargaining unit placed each group, in turn, in a position to stultify the lesser group's rights under the Act. Despite the incongruity of this decision, it did, however, reaffirm the implication in previous cases that supervisory employees were "employees" under the provisions of the Act and consequently were entitled to the right of collective bargaining conferred by the Act upon "employees."

On May 11th, 1943, the Board, in exercise of its juridical prerogatives, underwent a complete and thorough change of heart. It peremptorily decided¹² that although supervisory personnel were "employees" within the meaning of the Act, they were not entitled to the right of collective bargaining secured by the Act. In this case, for the first time, the Board dealt directly and squarely with the issued concealed under the cloaking question of propriety of bargaining units. The reasons with which the Board fortified its startling decision was one which had by that time become trite: i. e., the inclusion of supervisory and production employees in a single bargaining unit endangered the rights of the production employees. The second reason was more original. It was elicited by the proposal in the Petition for Investigation that *alternative* and separate bargaining units be composed exclusively of supervisors of the grade of "temporary supervisors" and "working leaders." This proposal produced the unexpected decision that "We are of the opinion that in the present state of industrial administration and employee self-organization, the establishment of bargaining units composed of supervisors exercising substantial managerial authority will impede the processes of collective bargaining, disrupt established managerial and production techniques and militate against effectuation of the policies of the Act." The Board thereupon unembarrassedly stated that it was reversing its prior decisions in the *Union Collieries Coal Co.* and *Godchaux Sugar* cases.

While the Board's courage and candor merit recognition and commendation, the validity of its obverse conclusions is a matter of serious debate. Since the Act itself expressly secures the right of collective bargaining to "employees," an immediate need for explanation was created by the Board's anomalous decision that even though supervisory personnel were "employees" within the provisions of the Act, they were nevertheless disentitled to the privileges guaranteed to "employees" by the Act because of the exigencies of modern industrial methods. Board Member, Chairman Harry A. Millis, furnished the explanation

¹¹Matter of Boeing Aircraft Company, 45 N.L.R.B. 630 (No. 95).

¹²Matter of Maryland Drydock Co., 49 N.L.R.B. 733 (No. 105).

in his dissenting opinion in which he concluded that the majority Board, in rendering its decision, had cast itself in the role of administrative legislators. "Manifestly," Chairman Millis asserted, "to engraft upon the Act an *amendment*¹³ which denies to a substantial segment of employees, as a class, the protection vouchsafed therein to all 'employees'¹⁴ is not within the permissible bounds of administrative discretion, but is *administrative legislation*."

In searching for a further explanation for this surprising reversal of policy by the Board, it is interesting to note, as Allen, C. J., of the U. S. Circuit Court of Appeals, Sixth Circuit,¹⁵ observed, that this decision coincided with the pendency in Congress of a bill which proposed to make the Act inapplicable to foremen. Whether because of the Board's decision or in spite of it, the Act did not succeed in passing.

Whatever the merit or legal validity of the Board's position in the *Maryland Drydock* case, it must be conceded that the decision at least clarified the issue. Although continued for several succeeding cases¹⁶ this condition of clarity, however, did not long survive, for on May 8th, 1944, in the case of *Soss Manufacturing Co.*¹⁷ the process of obfuscation was again resumed. In the latter case, one in which a foreman was alleged to have been discriminatorily discharged because of his admitted activities in the Foremen's Association of America,¹⁸ the respondent-employer was ordered to reinstate the foreman in accordance with the terms of the Act. The Board, on the basis of its position that supervisory personnel were "employees" held that such "employees" were entitled to the Act's guarantee against discriminatory discharge for union activity, even though, under the *Maryland Drydock* case, neither the supervisory employees (nor the very labor organizations in which, the Board acknowledged, their activities were protected by the Act) were entitled to engage in *collective bargaining*. In ordering the reinstatement of the particular foreman, the Board, in effect, held that supervisory personnel were "employees" for one purpose of the Act (security against discriminatory discharge), but not for another purpose (collective bargaining). Nor did the Board do much to disperse the recurrent fog by noting in its opinion that, "In reaching this conclusion we do not mean to suggest, of course, that every discharge of a supervisory employee for union activity is a violation of the Act."

On March 26th, 1945 the Board, in the case of the Packard Motor Car Co.,¹⁹ achieved a monumental masterpiece of administrative acrobatics. It executed

¹³Italics Supplied.

¹⁴This remark was made by Chairman Millis after he noted that the majority Board members had acknowledged that supervisory personnel were "employees."

¹⁵In the case of N.L.R.B. vs. Packard Motor Car Co., 157 F. (2nd) 80.

¹⁶Matter of Boeing Aircraft Co., 51 N.L.R.B. 66; Matter of Murray Corp., 51 N.L.R.B. 94; Matter of General Motors Corp., 51 N.L.R.B. 457.

¹⁷56 N.L.R.B. 348 (No. 70).

¹⁸A national labor union comprised entirely of supervisory employees.

¹⁹61 N.L.R.B. 4 (No. 3).

an aerial reversal without leaving the ground. Or at least it protested that it had its feet on the ground. In an amazing decision, it concluded that the same modern industrial conditions which, in the *Maryland Drydock* case, it held to preclude organization and collective bargaining by supervisory personnel as a group it now (approximately 22 months later) declared it imperative that such personnel be permitted to organize their own groups and engage in collective bargaining. Moreover, with supreme decision, it decreed that not only were supervisory employees entitled to organize and bargain collectively but that they formed an appropriate bargaining unit, notwithstanding that the supervisory employees forming the particular bargaining unit may hold supervisory authority over other members of the unit. This was a complete reversal of all that it had previously held on the subject. Having established that it had the fortitude to interpret the law as it *finally* saw it, even at the expense of denunciation for inconsistency, the Board, in the very same opinion, suffered a weakening of its resolution by declaring that its act in declaring a bargaining unit consisting of all levels of foremen to constitute a proper bargaining unit was merely an experimental ruling; that it reserved the right to reconsider its ruling in event that it should not prove feasible in practise. The Board thereupon ordered an election which eventuated in the election of the Foremen's Association as the unit's bargaining representative, following which it was certified as such by the Board. This development, unfortunately, did not end the matter for the employer-corporation refused, despite the election, to recognize the union or to bargain collectively with it. The union countered by filing with the Board a charge of unfair labor practise because of the Packard Motor Car Company's defiant refusal to comply with the Act. A complaint was issued by the Board. The case²⁰ culminated in a Cease and Desist Order directing the Company to bargain collectively with the union. When the Company persisted in its refusal to comply with the order, the Board filed with the U. S. Circuit Court of Appeals (Sixth Circuit) a petition for enforcement. That Court, in a decision handed down by Allen, C. J.,²¹ sustained the Board on all counts. The Court, taking cognizance that the acts of supervisory employees, as against other workers, operated to bind the employer, nevertheless held that despite this and other industrial indicia of identity of interest between supervisory personnel and employer, the former, insofar as their *own interests* were concerned were, vis-a-vis the employer, "employees" under the term of the Act and, notwithstanding the duality of their role, were entitled to all the rights and protections which the Act afforded to other employees. The Court, in rendering its opinion, however, made a point of noting that this decision was predicated, in a great measure, on the fact that the claimant foremen's Association was an independent labor union which excluded so-called "rank and file workers" and was comprised entirely of supervisory workers.

²⁰Matter of Packard Motor Car Co., 64 N.L.R.B. 1214 (No. 204).

²¹N.L.R.B. vs. Packard Motor Car Co., 157 F. (2nd) 80.

In the interim and prior to the Circuit Court's confirmation of its opinion in the *Packard Motor Car Company* case the Board undertook to enlarge the policy which it enunciated in that case. In succession it held that neither the nature of the industry in which they are employed nor the degree of supervisory discretion which they enjoy are determinants of the rights of supervisory employees, that their rights under the Act obtain notwithstanding such considerations²²; and, more important, that supervisory bargaining units and "rank and file" bargaining units may be affiliated with a single *parent* labor union.²³

These latter decisions seemed to indicate that the Board had finally decided to remove all qualifications from its determination that supervisory employees were entitled to the full privileges and protections of the Act. But, not unexpectedly, once again the Board interjected an old distinction into what was apparently a completely decided issue of law. On February 12th, 1946, in the case of *Midland Steel Products Co.*²⁴ it displayed a revitalized interest in the contention that a hierarchal difference existed between different levels of supervisory employees according to the degree of their respective supervisory discretion and authority. Accordingly, in that case, the Board decided to order separate elections between the several grades of supervisors. In its accustomed unorthodox fashion (despite the fact that, even conceding that only an issue of propriety of the composition of bargaining units was involved, and it was *its undelegable* duty to determine the proper unit²⁵) it held that it would be *bound* by the decision of the employees as evidenced by the result of the election. In other words, it delegated the decision of this important question to the voting employees.

Of course it would be mere conjecture to venture an opinion as to the course which the Board would have pursued had not the Supreme Court recently intervened to sustain the Board's decision in the *Packard Motor Car* case. Whether or not such a development would have occurred without the crystallization of the law by the Supreme Court is anyone's guess, but, on the basis of the history of the Board's treatment of the issue it is certainly not beyond the realm of possibility that the Board, in another attack of unpredictability, might have subverted the entire state of the law by again reversing itself. However, such a disconcerting contingency has been precluded by the Supreme Court which, in a five to four decision written by Mr. Justice Jackson²⁶ (and dissented from by Mr. Justice Douglas, Chief Justice Vinson and Mr. Justice Burton concurring in the dissent in full, Mr. Justice Frankfurter concurring in the dissent in part) held that not only are supervisory personnel "employees" within the meaning of the

²²Matter of Young Spring & Wire Corp., 65 N.L.R.B. - (No. 59).

²³Matter of Jones & Laughlin Steel Corp., 66 N.L.R.B. - (No. 51) This rule has not yet received final judicial approval.

²⁴65 N.L.R.B. - (No. 177).

²⁵N.L.R.B. vs. Marshall Field & Co., 135 F. (2nd) 391.

²⁶67 S. Ct. 789 (March 10th, 1947).

Act and as such entitled to all the benefits of the Act, but that employers are bound by the Act to bargain collectively with the bargaining agents of such employees.

While this decision of the Supreme Court undoubtedly removed all the cobwebs and barnacles from the basic issue and to that degree foreclosed any further vacillation or torturing of the point, it did, in passing, take notice of the contention that the permissive unionization of supervisory personnel might result in a division of loyalties of supervisors and constitute a disruptive force in the industrial machinery. However, the Court stated that this was a matter for legislative rather than judicial decision; that if the policy of the law, as it was interpreted, was asocial then it devolved upon Congress and not the Courts (and, presumably, nor the Board) to change the law.

Whether for better or worse, it appears that Congress has at the time of this writing accepted the challenge. In the House of Representatives a bill which, inter alia, bears directly on the point, has been passed and sent to Senate. The so-called "Hartley Bill"²⁷, in amending and amplifying the Act as it now exists, expressly provides in Section 2 (3): "The term 'employee' . . . shall not include any individual employed as a supervisor . . ." If this section of the Hartley Act or kindred provisions in the other bills now pending in Senate should be enacted into law, the effect of such legislation would be questionable. Assuming the constitutionality of such a statutory provision, there can be little doubt that supervisory employees would be disqualified from *relief under the Act* and its amendments. This disqualification, however, may not prove to be as effective a nostrum as hoped. The first difficulty will arise in determining who is a "supervisor" and who is a "worker." In the higher managerial and lower production sections of personnel there will be no difficulty of identification. However, in the complex organization of modern mass production systems many "twilight areas" of classification exist. Nomenclature alone will not supply an answer, for, as stated by Mr. Justice Douglass in his dissenting opinion in the *Packard Motor Car* case, the "label" is unimportant . . . for "those who are so-called foremen may perform duties not substantially different from those of skilled workers." Obviously neither the Courts nor Congress can undertake to define what constitutes a "supervisor" for no matter how painstaking or circumspect the definition, it cannot escape stultification by the diversities and complexities of modern industrial organization. Neither the presence nor absence of the duty of manual work, considerations of rate of pay, title, right of discipline or kindred elements will be decisive in every case. What may in a large plant constitute one a "supervisor," may, in a smaller establishment, be the ordinary characteristics of a "worker," or vice versa. It is conceivable that the expedient of barring from relief all whom the unreliable term "supervisor" fits may be more productive of industrial

²⁷H.R. 3020, 80th Congress, 1st Session (Report No. 245), introduced by Congressman Fred Hartley of New Jersey.

confusion and litigation than now exists by admitting all to relief. Like Cinderella's slipper many feet must first be tried before it will be discovered who the term fits. It is equally conceivable that every attempted application of the term will entail protracted litigation. If such a condition ensues, it is not probable that Congressman Hartley's proposal will produce the desired solution to the "foreman's" problem.

Another foreseeable difficulty with the proposed congressional treatment of this problem is that whether or not "supervisors" are disqualified from *relief* under the Act and its anticipated amendments, the fact will remain that they are "employees" by common law and common sense, a fact affirmed by Mr. Justice Jackson in the majority opinion in the *Packard Motor Car* case. Moreover, as Mr. Justice Jackson stated in that opinion, as employees and entirely apart from the provisions of the Act, they are entitled to organize into groups for mutual self-help and for collective bargaining purposes. The only assistance which the Act affords them is achieved by the imposition upon the employer of the duty of recognition and collective bargaining, supplemented by a prohibition against employer-interference or discrimination. While it is true that by removing "supervisors" from the operation of the Act there is denied to them *administrative* and *judicial enforcement* of their basic rights of organization and collective bargaining, this statutory deprivation of governmental enforcement will not operate to impair the fundamental rights themselves. Having these rights by law but being denied governmental aid in their enforcement, it is very likely that in the future, even as Mr. Justice Jackson has observed was done in the past before the promulgation of the Act, such employees will resort to their own devices to achieve the fulfillment of their legal rights. If such an eventuality should materialize, it is hardly to be expected that less damage to industrial organization or production will result from enforced substitution of industrial strife for the orderly processes of law. This very prospect should suffice to indicate that whatever may be the solution it would seem that it does not lie in the direction proposed by Congressman Hartley. If, indeed, the situation does require some solution and if neither the enjoyment²⁸ nor the denial²⁹ of full employees' rights will furnish the answer, then, in truth, foremen are the industrial question mark.

May 5, 1947.

²⁸As prescribed by the Supreme Court.

²⁹As indicated by the "Hartley" Bill.