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# Comments: Scope of Protection Accorded Confidential Employees under the NLRA

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# COMMENTS

## SCOPE OF PROTECTION ACCORDED CONFIDENTIAL EMPLOYEES UNDER THE NLRA

*Confidential employees are not expressly excluded from the National Labor Relations Act. Recognizing the incongruity of requiring employers to bargain collectively with confidential employees, the National Labor Relations Board has developed a test that prohibits certain employees from becoming members of units comprised of other clerical workers. However, the Board and the courts disagree over whether those confidential employees satisfying the test are excluded only from becoming members of a particular unit or from the Act in toto. This comment examines this clash of views and suggests that confidential employees should be excluded from all provisions of the Act.*

### I. INTRODUCTION

The nation's workplace is in the midst of a transition from one that was traditionally comprised of blue collar workers to one that encompasses a larger number of gray<sup>1</sup> and white collar employees.<sup>2</sup> Acknowledging this recent trend, labor unions have begun to direct their efforts towards the organization of the gray and white collar sector into their rank and file.<sup>3</sup> Although organized labor readily accepts this challenge, the National Labor Relations Act (NLRA)<sup>4</sup> imposes numer-

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1. The term "gray collar" refers to those employed in service industries. *See* AFL-CIO, *A Short History of American Labor*, AM. FEDERATIONIST (Mar. 1981).
  2. The past two decades have illustrated a significant technological employment transfer. As a total percentage of the Nation's workforce, blue collar employment has decreased by 4.9 percent, whereas white collar employment has increased by 8.8 percent over the same period. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1981 401 (102d ed. 1981). Within the white collar sector, The Bureau of Labor Statistics of the United States Department of Labor has projected that clerical workers will "constitute the largest and fastest growing white-collar group" generating an additional 4.8 million jobs. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MORE THAN HALF OF NEW JOBS BY 1990 WILL BE IN WHITE-COLLAR OCCUPATIONS, USDL 79-903 (1979).
  3. *See, e.g.*, CONSTITUTION OF OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, art. II, 1-2 (Purposes and Aims) (1980) (available from Labor-Management Services Admin., U.S. Dep't of Labor, Washington, D.C. 20216); CONSTITUTION OF THE UNITED ASSOCIATION OF OFFICE, SALES AND TECHNICAL EMPLOYEES, art. II (Purposes), art. III (Membership) (1976) (available from Labor-Management Services Admin., U.S. Dep't of Labor, Washington, D.C. 20216); *see also* Vogel, *Your Clerical Workers are Ripe for Unionization*, 49 HARV. BUS. REV., 48-54 (Mar. 1971) (pointing out that sects of office workers as large as those employed on production lines, and whose work is just as routine, have emerged and are as far removed from management as their blue collar counterparts); *Unions Move Into the Office*, BUSINESS WEEK, Jan. 25, 1982 at 90.
  4. 29 U.S.C. §§ 141-187 (1976). The Wagner Act, as amended by the Taft-Hartley Act, constitutes the Labor-Management Relations Act which is commonly referred to as the National Labor Relations Act.

ous obstacles to the unionization of many of these occupations.

A significant amount of controversy has arisen in regard to the amount of protection an employee is furnished under the NLRA. In particular, it is uncertain whether some occupations are implicitly foreclosed from either all or part of the NLRA's guarantees. Since confidential employees, especially those in clerical positions proximate to management, are not expressly excluded from the NLRA's protections, these positions clearly fall within the parameters of this ambiguous classification.

To exacerbate matters, the National Labor Relations Board (NLRB)<sup>5</sup> maintains that while certain confidential employees are excluded from sections of the NLRA that pertain to collective bargaining, they are, nonetheless, accorded basic protections under other significant provisions.<sup>6</sup> However, the NLRB's position on the protections accorded confidential employees under the NLRA is in conflict with the federal courts of appeals that have squarely addressed the issue.<sup>7</sup>

The NLRB has developed a labor-nexus test in an effort to delineate those confidential employees implicitly exempt from inclusion in a bargaining unit. The labor-nexus test, recently approved by the Supreme Court in *NLRB v. Hendricks County Rural Electric Membership Corp.*,<sup>8</sup> excludes from the collective bargaining unit confidential employees "who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations."<sup>9</sup> This comment examines the way in which both the NLRB and the courts apply the labor-nexus test. Also discussed is the conflict between the NLRB and the circuit courts as to whether employees who meet the test are excluded only from the collective bargaining unit or from the NLRA *in toto*.

## II. BACKGROUND

### A. Development of Labor Law

The Norris-LaGuardia Act was the first federal statute to recognize the rights of employees to engage in concerted activities for the purpose of collective bargaining.<sup>10</sup> The statute limits the power of the

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5. The NLRB is the federal agency statutorily charged with administration of the NLRA. 29 U.S.C. § 153 (1976).

6. See, e.g., *Peerless of America, Inc.*, 198 N.L.R.B. 982, 987 (1972); *enforcement denied*, 484 F.2d 1108 (7th Cir. 1973); *Wheeling Electric Co.*, 182 N.L.R.B. 218, 220-21 (1970), *enforcement denied*, 444 F.2d 783 (4th Cir. 1971); *American Book-Stratford Press, Inc.*, 80 N.L.R.B. 914, 919 (1948).

7. See, e.g., *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973); *NLRB v. Wheeling Electric Co.*, 444 F.2d 783 (4th Cir. 1971).

8. 454 U.S. 170 (1981).

9. *Id.* at 188 (quoting *B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956)).

10. 29 U.S.C. §§ 101-115 (1976). Section 102 states that the public policy of the United States in regard to collective bargaining is as follows:

Whereas under prevailing economic conditions, developed with the aid

federal courts to issue injunctions against union activity in disputes that arise in the field of labor relations.<sup>11</sup> Since many state legislatures followed suit and enacted similar statutes,<sup>12</sup> it soon became difficult for employers to obtain injunctive relief — which placed labor unions in a relatively favorable position.<sup>13</sup>

To further promote collective bargaining between labor and management, Congress enacted the Wagner Act based on the finding that industrial strife significantly burdened the free flow of interstate commerce.<sup>14</sup> The Wagner Act provided for the creation of the NLRB and enumerated specific employer practices as unfair.<sup>15</sup> As a result of these protections, union membership rose dramatically in both strength and

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of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 102 (1976).

11. *Id.* § 104.

12. Twenty-eight states currently have either constitutional or statutory provisions limiting a court's jurisdiction to issue injunctions in labor disputes. 1 LAB. L. REP. *State Laws* ¶ 40,356 (1981); *see, e.g.*, MD. ANN. CODE art. 100, §§ 63-75 (1979 & Supp. 1983); OR. REV. STAT. §§ 662.010-.130 (1981); PA. STAT. ANN. tit. 43, § 206 (Purdon 1982).

13. Prior to passage of the Norris-LaGuardia Act, employers often successfully enjoined union activities by alleging that the concerted efforts amounted to a criminal conspiracy. *See, e.g.*, *Vegelahn v. Gunter*, 169 Mass. 92, 44 N.E. 1077 (1896). Alternatively, the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976), which outlawed "[e]very . . . conspiracy, in restraint of trade or commerce among the several states" provided additional relief to employers to combat concerted union activity.

14. *See* Wagner Act, ch. 372, 49 Stat. 449 (1935). The act declared:

The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

*Id.* (codified at 29 U.S.C. § 151 (1976)).

15. *See* 29 U.S.C. § 153 (1976) (creation of NLRB); 29 U.S.C. § 158(a) (1976) (employer unfair labor practices).

number.<sup>16</sup>

Although the Wagner Act proved beneficial to the collective bargaining process, employers and employees were still unprotected against certain union abuses.<sup>17</sup> In addition, the general public was left unprotected against work stoppages caused by labor disputes.<sup>18</sup> The Supreme Court highlighted the need for these protections in *Packard Motor Car Co. v. NLRB*<sup>19</sup> wherein the court recognized the inadequacies of the Act and stressed that it was for Congress, and not the court, to create a more balanced national labor policy.<sup>20</sup> In addition, *Packard* addressed the issue of whether foremen were included within the Wagner Act's definition of "employees" entitled to collective bargaining rights.<sup>21</sup> The Court rejected the company's contention that foremen are so closely aligned to management that they should not be considered "employees" for purposes of the Act.<sup>22</sup> Furthermore, the Court declined to accept the argument that pursuant to the definition of "employers" foremen acted in the employer's interest.<sup>23</sup> Instead, the Supreme Court strictly construed the Wagner Act's provisions defining "employees" and "employers" and concluded that foremen fell within the scope of "employees."<sup>24</sup> As later noted by Congress, the Supreme Court's interpretation of the Wagner Act in *Packard* had the potential to place all upper level management personnel within the scope of "employees" for purposes of collective bargaining.<sup>25</sup>

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16. By 1950 approximately 15 million workers were members of labor organizations as compared to 3 million in 1933. B. TAYLOR & F. WITNEY, *LABOR RELATIONS LAW* 7-8 (2d ed. 1975).

17. The Wagner Act was devoid of outlining any union activity as unfair.

18. In the Wagner Act's subsequent amendment, Congress indicated the inadequacies of the Act when it stated:

Experience has further demonstrated that certain practices by some labor organizations, their officers and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

29 U.S.C. § 151 (1976) (Taft-Hartley Act).

19. 330 U.S. 485 (1947).

20. *Id.* at 489-90.

21. *Id.* at 486.

22. *Id.* at 488-89.

23. *Id.* at 489-90.

24. *Id.* at 490.

25. S. REP. NO. 105, 80th Cong., 1st Sess. 4 (1947). The House Committee on Education and Labor summarized the congressional disfavor of the decision as follows:

The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our

*B. Taft-Hartley Act*

The Taft-Hartley Act<sup>26</sup> was passed by the eightieth Congress in response to the failure of the Wagner Act to prevent industrial strife and to overrule the sweeping definition given the term "employees" by the Supreme Court in *Packard*.<sup>27</sup> The Taft-Hartley Act specifically defines the term "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.<sup>28</sup>

Furthermore, the Taft-Hartley Act excludes supervisors from the definition of "employee."<sup>29</sup> Thus, Congress effectively overruled *Packard* by preventing supervisors and foremen from composing the collective bargaining unit as well as demonstrating its intent to exclude entirely from the NLRA those who fall within the labor-nexus test.

Although the legislation does not expressly refer to the labor-nexus test, the legislative history of the Taft-Hartley Act is significant to determining whether those falling within the test are excluded only from the bargaining unit or from the NLRA *in toto*. The House bill sought a sweeping exclusion of confidential employees from all protections of the NLRA.<sup>30</sup> The bill defined the term "supervisors" to comprise a wide range of divergent managerial jobs not specifically limited to upper management positions.<sup>31</sup> Included within this broad description were employees having the authority to determine or recommend wage rates, those working in labor relations or personnel departments, and

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policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be "independent" of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them. The evidence shows that rank and file unions have done much of the actual organizing of foremen, even when the foremen's union professes to be "independent." Without any question, this is why the unions seek to organize the foremen.

*Id.*

26. 29 U.S.C. §§ 141-187 (1976).

27. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 13, 14, 17 (1947) (states that the unionization of supervisors, *inter alia*, decreases productivity and upsets the balance of power in the collective bargaining process); S. REP. NO. 105, 80th Cong., 1st Sess. 3-5 (1947) (same).

28. 29 U.S.C. § 152(11) (1976).

29. *Id.* § 152(3).

30. H.R. 3020, 80th Cong., 1st Sess. § 2(12) (1947).

31. *Id.*

those given information confidential in nature.<sup>32</sup> Supervisors were explicitly held to be outside the protections of the NLRA.<sup>33</sup> In sum, the House bill sought to exclude from the NLRA employees privy to general financial, operating, and trade secret information, as well as those involved in labor relations.

Similarly, the Senate bill opted to exclude supervisors from the term "employee."<sup>34</sup> However, in contrast to the House version, the Senate bill narrowly defined those considered "supervisors."<sup>35</sup> Furthermore, under the Senate proposal, confidential employees were neither expressly exempted from the definition of "employee" nor included within the definition of "supervisor."<sup>36</sup>

The Senate definition of "supervisor" was adopted by the conference committee.<sup>37</sup> In its report, the committee states:

The Conference agreement, in the definition of "supervisor," limits such term to those individuals treated as supervisors under the Senate amendment. *In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect.*<sup>38</sup>

The conference committee report is significant in three respects. First, it indicates congressional failure to distinguish the NLRB's "prevailing practice" which excluded confidential employees who fell within the labor-nexus test only from the composition of collective bargaining units, in contrast to Congress' belief that the NLRB excluded them from the act *in toto*. Second, the committee contradicts itself when on the one hand, it appears to distinguish "persons working in labor relations" from "confidential secretaries" in general, while on the other hand it states that Congress had no intention to alter prior NLRB practice. Third, the statement provides valuable insight as to whether Congress intended that employees who fall within the labor-nexus be

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32. *Id.*

33. *Id.* § 2(3).

34. See S. 1126, 80th Cong., 1st Sess. § 2(3) (1947).

35. Section 2(11) of the bill read:

The term 'supervisor' means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

*Id.* § 2(11).

36. See *id.* § 2(3), (11).

37. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 35 (1947).

38. *Id.* (emphasis added).

totally or partially excluded from the NLRA. In *NLRB v. Bell Aerospace Co.*,<sup>39</sup> the Supreme Court stated that "although Congress may have misconstrued recent Board [NLRB] practice, it clearly thought that the [NLRA] did not cover 'confidential employees' even under a broad definition of that term."<sup>40</sup> Thus, *Bell Aerospace* gave rise to a strong inference that the Supreme Court interpreted the Conference Committee report to exclude confidential employees from the NLRA entirely.

### III. NLRB INTERPRETATION OF THE LABOR-NEXUS TEST

#### A. *Evolution of the Labor-Nexus Test*

Since the Taft-Hartley Act made no mention of the labor-nexus test, the NLRB, within certain court imposed limitations,<sup>41</sup> generally applies the test as it sees fit. A brief overview of the NLRB's varied interpretation of the test is necessary to a discussion of the confidential employee exclusion.

Shortly after the enactment of the Wagner Act, the NLRB determined that although "confidential employees" are neither expressly excluded from the NLRA definition of "employees," nor mandated to enjoy fewer protections under the Act, they are, nonetheless, implicitly excluded from the composition of collective bargaining units.<sup>42</sup> Section 9(b) of the Wagner Act empowered the NLRB to "decide in each case . . . the unit appropriate for the purposes of collective bargaining . . . ."<sup>43</sup> Through this authority, the NLRB excluded confidential employees from joining a unit comprised of nonconfidential employees.<sup>44</sup> The determination of whether to impose this exclusion originally centered upon the degree of *access* the employee had to labor relations information.<sup>45</sup> Conversely, *access* to nonlabor related business or financial information was held "insufficient to justify exclusion from the right to collective bargaining."<sup>46</sup>

The extent of labor-related information available to employees was termed the labor-nexus test.<sup>47</sup> If an employee was privy to certain confidential labor relations information, the employee was deemed to

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39. 416 U.S. 267 (1974).

40. *Id.* at 284 n.12.

41. See *infra* notes 74-82 and accompanying text.

42. Brooklyn Daily Eagle, 13 N.L.R.B. 974 (1939).

43. See Wagner Act, ch. 372, 49 Stat. 449, 453 (1935).

44. See, e.g., Hoover Co., 55 N.L.R.B. 1321, 1322-23 (1944); General Motors Corp., 53 N.L.R.B. 1096, 1099-1105 (1943); Western Union Telegraph Co., 38 N.L.R.B. 492, 499 (1942).

45. See sources cited *supra* note 44.

46. Creamery Package Mfg. Co., 34 N.L.R.B. 108, 111 (1941); see also *NLRB v. Armour & Co.*, 154 F.2d 570, 574 (10th Cir. 1945) (enforcing 54 N.L.R.B. 1005 (1944)) (*Creamery Package* doctrine), *cert. denied*, 329 U.S. 732 (1946).

47. See *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 179 (1981).



fall within the labor-nexus, and was excluded from the collective bargaining unit.<sup>48</sup> The NLRB explained its rationale thusly:

[I]n negotiating and in the settlement of grievances, the interests of a union and the management are ordinarily adverse. [M]anagement should not be required to handle labor relations matters through employees who are represented by the union with which the Company is required to deal and who in the normal performance of their duties *may obtain* advance information of the Company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters.<sup>49</sup>

In 1946, a year prior to the passage of the Taft-Hartley Act,<sup>50</sup> the NLRB rejected the "access" requirement of the labor-nexus test. In *Ford Motor Co.*,<sup>51</sup> the NLRB reasoned that the mere access definition was too inclusive and precluded many employees from bargaining together with other workers having common interests. Consequently, the NLRB limited the test "to embrace only those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations."<sup>52</sup> The doctrine enunciated in *Ford Motor* remained the prevailing NLRB practice when Congress enacted the Taft-Hartley Act.

From 1946 to 1956, the NLRB applied the labor-nexus test in a seemingly *ad hoc* fashion.<sup>53</sup> For example, shortly after the enactment of the Taft-Hartley Act in 1947, the NLRB narrowed the test and held that to fall within its confines, employees must handle confidential labor relations matters on a plant-wide or company-wide basis, rather than within the scope of a particular division or department.<sup>54</sup> In 1949, the NLRB ruled that employees will not be considered "confidential" unless the labor-nexus is demonstrated to encompass "general labor relations."<sup>55</sup> Subsequently, the NLRB returned to its original practice and excluded from bargaining units those employees who had mere

48. See, e.g., *Consolidated Vultee Aircraft Co.*, 54 N.L.R.B. 103, 113 (1943); *General Motors Corp.*, 53 N.L.R.B. 1096, 1099-1105 (1943); *Western Union Telegraph Co.*, 38 N.L.R.B. 492, 498-500 (1942); *Creamery Package Mfg. Co.*, 34 N.L.R.B. 108, 110 (1941).

49. *Hoover Co.*, 55 N.L.R.B. 1321, 1323 (1944) (emphasis added) (footnote omitted).

50. 29 U.S.C. §§ 141-187 (1976).

51. 66 N.L.R.B. 1317 (1946).

52. *Id.* at 1322.

53. This phenomena may be attributed to the changing composition of the NLRB, for during that ten year period no less than thirteen members occupied the five seats on the Board. See 11 NLRB ANN. REP. iii (1946) through 21 NLRB ANN. REP. iii (1956).

54. *Chrysler Corp.*, 84 N.L.R.B. 516, 517 n.8 (1949); see also *American Broadcasting Co.*, 107 N.L.R.B. 74, 77-78 (1953); *Wilson & Co.*, 97 N.L.R.B. 1388, 1392 (1952); *Phillips Oil Co.*, 91 N.L.R.B. 534, 538-39 (1950); *Ball Bro. Co.*, 87 N.L.R.B. 34, 37 (1949).

55. *Chrysler Corp.*, 84 N.L.R.B. 516, 517-18 n.8 (1949).

access to confidential labor relations information.<sup>56</sup>

In 1956, the NLRB finally expounded a manageable and predictable standard to assess whether employees fall within the scope of the labor-nexus test. In *B.F. Goodrich Co.*<sup>57</sup> the NLRB reaffirmed the *Ford Motor* standard<sup>58</sup> and limited the definition of confidential employees "so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations."<sup>59</sup> This definition of the labor-nexus test was recently upheld by the Supreme Court in *NLRB v. Hendricks County Rural Electric Membership Corp.*<sup>60</sup>

In *Hendricks*, the NLRB initially held that the secretary to the top executive officer and general manager of a corporation fell outside the labor-nexus test, and therefore could be included in a collective bargaining unit.<sup>61</sup> The NLRB maintained that pursuant to the *B.F. Goodrich Co.*<sup>62</sup> standard, the secretary was not a confidential employee because she did not "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations."<sup>63</sup> *Hendricks* was ordered to reinstate the secretary to her former job, or to a substantially equivalent position, with backpay.<sup>64</sup>

*Hendricks* appealed the NLRB's decision to the Court of Appeals for the Seventh Circuit, arguing that the legislative history of the Taft-Hartley Act and the Supreme Court's decision in *Bell Aerospace* precluded enforcement of the order.<sup>65</sup> The court agreed with *Hendricks* and flatly rejected the labor-nexus test as developed by the NLRB.<sup>66</sup>

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56. *Potomac Electric Power Co.*, 111 N.L.R.B. 553, 562 (1955) (clerk-stenographers and clerk-typists found to regularly have access to labor relations information therefore excluded); *Minneapolis-Honeywell Regulator Co.*, 107 N.L.R.B. 1191, 1192 (1954) (secretaries to department heads not confined to labor relations excluded); *Curtis-Wright Corp.*, 103 N.L.R.B. 458, 462-63 (1953) (staff analyst excluded on grounds of access to confidential manpower schedules but clerical assistants included because no access to labor relations in record); *Bond Stores, Inc.*, 99 N.L.R.B. 1029, 1031 n.4 (1952) (head cashiers found to have access to all confidential memoranda, some of which concerned labor relations policies therefore excluded); *Southeastern Telephone Co.*, 70 N.L.R.B. 4, 7 (1946) (personnel records available to department head secretaries therefore excluded).

57. 115 N.L.R.B. 722 (1956).

58. *Ford Motor Co.*, 66 N.L.R.B. 1317 (1946).

59. *B.F. Goodrich Co.*, 115 N.L.R.B. 722 (1956).

60. 454 U.S. 170 (1981).

61. *Hendricks*, 236 N.L.R.B. 1616, 1619 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979), *on remand*, 247 N.L.R.B. 498, *rev'd*, 627 F.2d 766 (7th Cir. 1980), *rev'd*, 454 U.S. 170 (1981).

62. 115 N.L.R.B. 722 (1956). See *supra* notes 57-59 and accompanying text.

63. *Hendricks*, 236 N.L.R.B. at 1620.

64. *Id.*

65. 603 F.2d at 25.

66. *Id.* at 30. The court of appeals remanded the case back to the NLRB to determine whether the secretary worked in a confidential capacity for her employer without regard to labor relations. *Id.* On remand, the NLRB again applied the labor-

Upon review of the court of appeals' second opinion, the Supreme Court rejected the Seventh Circuit's holding that employees who have access to confidential, general business information are implicitly excluded from the NLRA.<sup>67</sup> In addition, the Court rejected the assertion that its statement in *Bell Aerospace*, that Congress "clearly thought that the Act did not cover 'confidential employees' even under a broad definition of that term," was dispositive.<sup>68</sup> Instead, the Supreme Court reasoned that at the time the conference committee approved the NLRB's "prevailing practice,"<sup>69</sup> Congress had adequate notice of the test as enunciated in *Ford Motor Co.*<sup>70</sup> Therefore, the subsequent passage of the Taft-Hartley Act indicated that Congress intended the labor-nexus refinement to continue.<sup>71</sup> In response to the statement proffered in *Bell Aerospace*, the Court simply admitted that it was made "[in] error" and upheld the NLRB's use of the labor-nexus test.<sup>72</sup> The Court stated that the labor-nexus test which excludes from the bargaining unit those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations has a "reasonable basis in law."<sup>73</sup>

### B. Present Application of Labor-Nexus Test

The labor-nexus test is presently employed by the NLRB to exclude from the bargaining unit employees who "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations."<sup>74</sup> Unfortunately, other than caselaw, the NLRB does not provide any guidelines to aid in the application of the labor-nexus test to specific factual situations.<sup>75</sup>

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nexus test and concluded that the secretary did not have sufficient involvement in labor relations to warrant excluding her from protections under the Act. 247 N.L.R.B. at 498. The Board's second opinion was again reversed by the Seventh Circuit. 627 F.2d at 766.

67. 454 U.S. at 184.

68. *Id.* at 187 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 284 n.12 (1974)).

69. *See supra* notes 37-40 and accompanying text.

70. 66 N.L.R.B. 1317 (1946). *See supra* notes 51-52 and accompanying text.

71. *Hendricks*, 454 U.S. at 188.

72. *Id.* at 187, 190.

73. *Id.* at 190. However, in affirming the NLRB's finding that the secretary fell outside the labor-nexus, the Supreme Court made clear the unusual character of her duties as compared to executive secretaries in general by stating:

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

*Id.* at 191 n.23 (citation omitted).

74. *B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956).

75. The Board, in its administrative capacity, favors adjudication rather than rule-

Therefore, NLRB caselaw must be interpreted to ascertain the relevant factors that govern whether an employee falls within the labor-nexus.

An employee's mere access to labor relations,<sup>76</sup> general business, or financial<sup>77</sup> information is insufficient to render him within the labor-nexus. Similarly, the employee's possession of trade, product, technical information,<sup>78</sup> or involvement with matters that pertain to national security<sup>79</sup> are inadequate to place the employee within the exclusion. In sum, a worker's participation in labor relations must be specific,<sup>80</sup> be for his own employer,<sup>81</sup> and be on a plant-wide or company-wide basis<sup>82</sup> in order to satisfy the NLRB's requisites for exclusion from a bar-

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making in effectuating the purposes of the NLRA. *See, e.g.*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *see also* Administrative Procedure Act, 5 U.S.C. §§ 551-554 (1976 & Supp. V 1981).

76. *See, e.g.*, *Brodart Inc.*, 257 N.L.R.B. 380, 384-85 n.10 (1981) (payroll office employee not confidential solely on basis of access); *Dun & Bradstreet, Inc.*, 240 N.L.R.B. 162, 163 (1979) (credit reporters having access to labor relations data insufficient to render them confidential); *Victor Indus. Corp.*, 215 N.L.R.B. 48 (1974) (payroll employee having access to personnel records which might eventually be utilized in labor negotiations not confidential).
77. *See, e.g.*, *Maidsville Coal Co., Inc.*, 257 N.L.R.B. 1106, 1116 (1981), *enforcement denied*, 693 F.2d 1119 (4th Cir. 1982) (work "entailing sensitive data and/or information . . . too broad a base of disenfranchisement of employees from . . . statutory rights"); *Air Express Int'l Corp.*, 245 N.L.R.B. 478, 502 (1979), *enforced*, 670 F.2d 512 (5th Cir. 1982) (employee participating in confidential customer information not involving labor relations held not confidential); *Community Service Planning Council*, 243 N.L.R.B. 798, 800 (1979) (fiscal officer engaged in auditing not confidential); *Ohio State Legal Services Assn.*, 239 N.L.R.B. 594, 599 (1978) (accounting specialist handling financial data not confidential).
78. *See, e.g.*, *Colt Indus. Inc.*, 228 N.L.R.B. 723, 727-28 (1977) (research and manufacture product technicians not confidential); *see also* *Swift & Co.*, 119 N.L.R.B. 1556, 1567 (1958); *Barrett Div. Allied Chemical & Dye Corp.*, 116 N.L.R.B. 1649, 1652 (1956).
79. *E.I. Dupont De Nemours & Co.*, 107 N.L.R.B. 734, 744 (1954) (employees having access to data and other material classified as confidential and restricted for security reasons by the Atomic Energy Commission not confidential); *Consolidated Vultee Aircraft Corp.*, 92 N.L.R.B. 1290 n.1 (1951) (employees who reproduce and have access to designs and information restricted by the Air Force held not confidential employees).
80. *See* *ITT Grinnell Corp.*, 253 N.L.R.B. 584, 586 (1981) (potential participation in labor relations must be absolute, mere speculation as to when an employee might be involved held insufficient to render confidential status); *ITT Grinnell Corp.*, 212 N.L.R.B. 734 (1974) (implying that future involvement in labor relations policies will deem one, for present purposes, confidential).
81. *See, e.g.*, *Stroock & Stroock & Lavan*, 253 N.L.R.B. 447 (1980) (law firm clericals not confidential employees despite satisfying the labor-nexus test in regard to clients); *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 N.L.R.B. 450, 457 (1980) (advice to employer-clients on labor relations matters does not require holding that employees are confidential); *Kaplan, Sicking, Hessen, Sugarman, Rosenthal & Zientz*, 250 N.L.R.B. 483, 485 (1980) (all clericals in labor law firm not confidential on the basis of handling labor relations of third parties).
82. *See, e.g.*, *Carolina Telephone and Telegraph Co.*, 258 N.L.R.B. 1387, 1388-89 (1981) (employee assisting supervisor in compiling information for use in collective bargaining not confidential employee); *Holly Sugar Corp.*, 193 N.L.R.B. 1024, 1026 (1971) (compilation of information for use by others insufficient in and of itself to render an employee confidential); *Standard Brands, Inc.*, 101 N.L.R.B.

gaining unit. Although the aforementioned guidelines provide a general synopsis of factors the employer should consider in a confidential employee situation, the practitioner should not lose sight of the fact that the NLRB, not the employer, will ultimately determine whether the employee falls within the labor-nexus.

An employer may attempt to take a number of active measures to protect the company's confidential information. An employer may alter job descriptions and employee responsibilities in an effort to modify the number of employees who fall within the labor-nexus. For example, employers can expand the group of employees who fall within the labor-nexus by delegating labor relations responsibilities to employees already in positions of trust, but who would not otherwise satisfy the test. Furthermore, employers can alter job descriptions and create fictitious involvements in labor relations for employees who would not normally be exposed to such information to ensure labor-nexus status. Moreover, an employer may increase the span of authority of those already involved in labor relations to include more lower-level employees within the labor-nexus.<sup>83</sup>

A more desirable alternative is to reduce the number of employees who qualify for the exclusion.<sup>84</sup> An employer could reduce the amount of nonlabor related confidential information that reaches employees who otherwise would not fall within the labor-nexus. This would ensure that all types of confidential information are placed only within the exclusive realm of the predetermined labor-nexus employees. This type of employer self-protection does not run the risk of subverting NLRB policy and simultaneously permits an employer to protect confidential information that pertains to labor relations as well as general business information.

In sum, if an employee is considered to fall within the labor-nexus by the NLRB, that worker is excluded from the composition of a collective bargaining unit. The oft-evaded question then arises as to whether exclusion from the bargaining unit precludes the confidential employee from enjoying other protections guaranteed by the NLRA. Section 7 of the NLRA<sup>85</sup> expounds to whom the Act applies:

*Employees shall have the right to self-organization, to form,*

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1349, 1354 (1952) (supplying factual data in connection with contract negotiations insufficient to support allegation of confidential employee).

83. By placing labor relations responsibilities on more supervisory and managerial personnel, the employees would then "assist and act in a confidential capacity to persons who formulate, determine and effectuate management policy in the field of labor relations." B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956). However, other restrictions the Board places on the labor-nexus test may negate the employees' status as confidential. See *supra* notes 76-82.

84. This approach would not, as contrasted to the aforementioned approach, pose the possibility of circumventing employee rights under the NLRA because more employees would enjoy protections under the Act.

85. 29 U.S.C. § 157 (1976).

join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).<sup>86</sup>

Thus, the issue may be phrased in terms of section 7 rights: Are labor-nexus employees denied only that particular section 7 right to "bargain collectively through representatives of their own choosing" or are such employees stripped of all the rights accorded "employees" in section 7?

#### IV. TOTAL OR PARTIAL EXCLUSION OF LABOR-NEXUS EMPLOYEES?

In *NLRB v. Hendricks County Rural Electric Membership Corp.*,<sup>87</sup> the NLRB asserted, in the alternative, that if the secretary did fall within the labor-nexus test, and therefore is excluded from the bargaining unit, she should still be accorded the protection of the NLRA to engage in concerted activity as provided for in section 7.<sup>88</sup> However, since the secretary was considered to be outside the labor-nexus, the Supreme Court refused to address the NLRB's contention.<sup>89</sup> This omission has generated significant controversy and confusion, for the disposition of the issue whether a confidential employee is only partially excluded from the rights in section 7 is of paramount concern to both employers and employees alike.

Inevitably, some confidential or labor-nexus employees will engage in concerted activity that proves detrimental to the employer's interests.<sup>90</sup> When this occurs, the employer must determine whether the

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86. *Id.* (emphasis added).

87. 236 N.L.R.B. 1616 (1978), *rev'd and remanded*, 603 F.2d 25 (7th Cir. 1979), *on remand*, 247 N.L.R.B. 498, *rev'd*, 627 F.2d 766 (7th Cir. 1980), *rev'd*, 454 U.S. 170 (1981).

88. Brief for Petitioner at 18 & n.14, *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981). In its brief, the NLRB argued that "the Board has treated such employees as otherwise fully protected under the Act." For authority, the NLRB cited the following cases: *Peavey Co.*, 249 N.L.R.B. 853 (1980), *enforced in part*, 648 F.2d 460 (7th Cir. 1981); *Service Technology Corp.*, 196 N.L.R.B. 1036 (1972), *enforced mem.*, 480 F.2d 923 (5th Cir. 1973), *cert. denied*, 415 U.S. 948 (1974); *Southern Greyhound Lines, Inc.*, 169 N.L.R.B. 627 (1968), *enforced*, 426 F.2d 1299 (5th Cir. 1970); *Southern Colorado Power Co.*, 13 N.L.R.B. 699 (1939), *enforced*, 111 F.2d 539 (10th Cir. 1940); *American Book-Stratford Press, Inc.*, 80 N.L.R.B. 914 (1948); and *Coopersville Cooperative Elevator Co.*, 77 N.L.R.B. 1083 (1948). Notwithstanding the impressive array of authority cited by the NLRB, an analysis of these cases reveals no direct support for the NLRB's position. See notes 91-123 *infra* and accompanying text.

89. *Hendricks*, 454 U.S. 170, 185-86 n.19 (1981).

90. The majority of employers with any sizeable workforce will have "labor-nexus" employees within their organization.

NLRA precludes the initiation of sanctions against that employee. If the employee is only partially excluded from the NLRA, the employer runs the risk that any sanctions imposed will be considered an unfair labor practice. However, an in-depth analysis of the NLRB's argument in support of partial exclusion disproves the Board's own proposition that employees who fall within the labor-nexus are only excluded from the composition of bargaining units.

#### A. Court Decisions Supporting Partial Exclusion

Although a Supreme Court resolution is necessary, the confusion in the lower courts is not as detrimental as it first appears. After analyzing the decisions in favor of partial exclusion, the flaws in their reasoning become obvious.

The first case that arguably addressed the total/partial exclusion issue is *Southern Colorado Power Co.*<sup>91</sup> Although the NLRB's decision was enforced by the Tenth Circuit, the total/partial exclusion issue was not raised in the ALJ's hearing and therefore the NLRB could not adjudicate the employer's contention without some substantiation in the record below. The NLRB ordered Southern Colorado to reinstate two employees who were found to be unlawfully discharged for engaging in union organizing activities.<sup>92</sup> The NLRB rejected the employer's contention that office accounting employees have a special relationship with management and stated:

The alleged confidential tie rests for its existence, however, upon the bare assertions . . . without an adequate showing of the nature of the information to which the office employees may have had access, or the extent to which such confidential tie would preclude the organization of the office employees for the purposes of collective bargaining. In any event the Act vests in employees the right to determine for themselves the feasibility of joining, forming, or assisting in the establishment of a labor organization. Nor does it withhold the exercise of such right from confidential employees as a class.<sup>93</sup>

Despite the fact that the case was subsequently affirmed by the Tenth Circuit, *Southern Colorado* cannot realistically be relied upon to support the partial exclusion argument. First, aside from the fact that the case was decided prior to both the NLRB's development of the labor-nexus test and the passage of the Taft-Hartley Act, the record did not show that the employees were confidential, due to their lack of "access" to or actual involvement in managerial responsibilities.<sup>94</sup> Hence, such rank and file employees would naturally be accorded all protec-

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91. 13 N.L.R.B. 699 (1939), *enforced*, 111 F.2d 539 (10th Cir. 1940).

92. 13 N.L.R.B. at 710, 719.

93. *Id.* at 710.

94. *Id.*

tions under the NLRA. Second, the NLRB's statement that confidential employees as a class are not precluded from joining their own union is misleading. The NLRA protects "employees" engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection.<sup>95</sup> Conversely, those workers not within the NLRA's definition of "employees" may join labor organizations and engage in other concerted activities; however, the NLRA does not provide for their protection.<sup>96</sup> Furthermore, confidential employees within the labor-nexus are, for the purposes of the NLRA, considered outside the definition of "employees."<sup>97</sup> Thus, in light of the Taft-Hartley Act, any reliance on *Southern Colorado* appears to be erroneous.<sup>98</sup>

The only decision that may be interpreted as supporting partial exclusion, at least on its face, is *Southern Greyhound Lines, Inc.*<sup>99</sup> There, a clerical worker, a confidential employee by stipulation, was excluded from a bargaining unit comprised of other clerical workers pursuant to the terms of the governing collective bargaining agreement.<sup>100</sup> When the confidential employee refused to cross a picket line, she was discharged for disobeying specific instructions to report to work. The NLRB found the discharge unlawful on the grounds that an employee may "assist a labor organization regardless of whether [the employee] is eligible for membership in it . . . ."<sup>101</sup> The Court of Appeals for the Fifth Circuit affirmed the decision and held that the confidential employee was engaged in protected concerted activity and, therefore, was fully protected under the NLRA.<sup>102</sup>

Although *Southern Greyhound* appears to support partial exclusion from the NLRA for employees who fall within the labor-nexus, two fatal flaws are evident. First, the NLRB erroneously relied upon its prior decisions when it held that *any* employee, including those outside the definition of "employee" in the Act and regardless of the employee's eligibility for union membership, is protected when assisting a labor organization. Contrary to the NLRB's reasoning in *Southern Greyhound* all employees are not protected from adverse employer sanctions when they choose to assist labor organizations.<sup>103</sup> For in-

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95. 29 U.S.C. § 157 (1976).

96. Rights under the NLRA are accorded to "employees" only. See 29 U.S.C. §§ 157, 164(a) (1976).

97. It is incongruous to assert that confidential employees are denied some section 7 protections yet accorded others since the section applies to "employees" in general without making any distinctions between the *type* of employees.

98. The issues litigated in the case are mooted by the Taft-Hartley Act. See *supra* notes 26-38.

99. 169 N.L.R.B. 627 (1968), *enforced*, 426 F.2d 1299 (5th Cir. 1970).

100. 169 N.L.R.B. at 627.

101. *Id.* at 628.

102. 426 F.2d at 1302.

103. Section 8(a)(2) of the NLRA provides that it is "an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." 29



stance, the Supreme Court holds that managerial employees,<sup>104</sup> as well as certain faculty employees,<sup>105</sup> fall outside all protections of the NLRA.<sup>106</sup> The reason proffered by the Court for excluding managerial employees from the NLRA is the same as that asserted for excluding confidential employees. Since both positions are closely aligned with management, it is considered fundamentally sound that their interests should not conflict.<sup>107</sup> Moreover, if such employees are permitted to actively participate in union affairs, their activities may be construed as employer interference in violation of sections 8(a)(1)<sup>108</sup> and 8(a)(2)<sup>109</sup> of the NLRA.

Second, the NLRB was ambiguous when it stated that confidential status is only relevant to the composition of the collective bargaining unit, and has no impact on the disposition of unfair labor practice charges.<sup>110</sup> This view is specious since confidential employees who fall within the labor-nexus are precluded from the protections affiliated with joining a union, and therefore have no interest in participating in the collective bargaining process or activities pertaining thereto.<sup>111</sup>

Finally, the employer in *Southern Greyhound* failed to argue that the employee was totally excluded from the NLRA's protections because of her confidential status. This omission led to a seemingly erroneous ruling by the ALJ that:

Although at the hearing, counsel for Respondent appeared to go to great pains to prove that Anderson was a confidential secretary, and counsel for the General Counsel [went] to equally great pains to prove that she was not, *each now concedes, and I agree, that whether Anderson was protected in her right to refuse to cross the picket line to come to work is unaffected by any determination as to whether she is properly classified as a confidential secretary. Southern Colorado Power Co., 13 N.L.R.B. 699.* There is no suggestion in the record that

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U.S.C. § 158(a)(2) (1976) (emphasis added). Section 2(2) of the NLRA provides that the "term 'employer' includes any person acting as an agent of an employer . . . ." *Id.* § 152(2). Thus a supervisor or other non-"employee" not eligible for membership in a particular unit may not interfere or assist *any* labor organization.

104. NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974).

105. NLRB v. Yeshiva University, 444 U.S. 672, 679-80 (1980).

106. The Supreme Court holds that their status is not that of an "employee" as defined in section 2(3) of the NLRA. See cases cited *supra* notes 104-05.

107. See cases cited *supra* notes 104-05.

108. 29 U.S.C. § 158(a)(1) (1976).

109. *Id.* § 158(a)(2).

110. In essence, the NLRB formulated a double standard when it stated that a confidential employee satisfying the labor-nexus test *was not* an "employee" for the purposes of joining a particular bargaining unit but *was* an "employee" for the purposes of assessing whether the employer violated the NLRA.

111. Confidential employees do not have any direct interest in the labor organization although, arguably, the unionization of other employees may lead to improved working conditions and higher wages for confidential employees on the basis of parity.

Anderson ever disclosed to any employee any matters of a confidential nature or that Respondent ever believed she would do so.<sup>112</sup>

The ALJ misapplied NLRB precedent, because *Southern Colorado* was decided by the NLRB in 1939, eight years prior to the enactment of the Taft-Hartley Act which materially changed the definition of "employee." Furthermore, if the ALJ's determination was valid, why did the General Counsel,<sup>113</sup> at least initially, "go to equally great pains to prove that she was not"<sup>114</sup> a confidential employee unless he felt that a finding of confidentiality would result in a dismissal of the unfair labor practice charge?

For the aforementioned reasons, *Southern Greyhound* cannot be relied upon to support the NLRB's contention of partial exclusion. Since the ALJ erroneously misled the employer's counsel, the total/partial exclusion issue was never actually litigated before the court. Instead, *Southern Greyhound* appears to be based on the doctrine that if a class of employees are expressly excluded from comprising a *particular* collective bargaining unit, as opposed to *any* collective bargaining unit, that group is not automatically stripped of other NLRA protections.<sup>115</sup> This doctrine is based on section 9(a)<sup>116</sup> of the NLRA which empowers the NLRB to determine the "unit appropriate" for collective bargaining.<sup>117</sup> Thus, if an *employee* is excluded from a unit comprised of *employees* with a different community of interest, she is still an *employee* within the NLRA and thus may be included in a unit with other employees similarly situated.<sup>118</sup>

The Court of Appeals for the Third Circuit was the first court to specifically address the issue of whether a confidential employee is totally or partially excluded from the NLRA's protections. In *NLRB v. Poultrymen's Service Corp.*,<sup>119</sup> the NLRB upheld the ALJ's finding that the employer violated the Act with respect to confidential secretaries excluded from the bargaining unit.<sup>120</sup> On appeal, the employer argued that confidential employees satisfying the labor-nexus test are excluded from the NLRA *in toto* and thus he could not have violated the Act.<sup>121</sup>

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112. *Southern Greyhound*, 169 N.L.R.B. at 627 n.2 (emphasis added).

113. The General Counsel of the NLRB has "final authority, on behalf of the Board, in respect to the investigation of charges and . . . the prosecution of such complaints before the Board. . . ." 29 U.S.C. § 153(d) (1976).

114. 169 N.L.R.B. at 627 n.2.

115. See, e.g., *Mosler Safe Co.*, 188 N.L.R.B. 650, 651 (1971); *Robbins & Myers, Inc.*, 144 N.L.R.B. 295, 298-99 (1963); *Vulcanized Rubber and Plastics Co.*, 129 N.L.R.B. 1256, 1257 (1961); *Copeland Refrigeration Corp.*, 118 N.L.R.B. 1364, 1365 (1957).

116. 29 U.S.C. § 159(a) (1976).

117. *Id.*

118. See cases cited *supra* note 115.

119. 41 N.L.R.B. 444 (1942), *enforced*, 138 F.2d 204 (3d Cir. 1943).

120. 41 N.L.R.B. at 445-48.

121. 138 F.2d at 210.

The Third Circuit summarily held that the exclusion of confidential employees from bargaining units "does not deprive [them] of the [other] benefits of the Act."<sup>122</sup>

Despite the Third and Fifth Circuits' holdings in favor of partial exclusion, the decisions lose their viability when examined in light of their factual backgrounds. *Poultrymen's Service* was decided in 1943, four years prior to the enactment of the Taft-Hartley Act.<sup>123</sup> Since the case was decided under the Wagner Act and the subsequent Taft-Hartley Act substantially modified the scope of "employees" protected under the NLRA, the decision is not applicable to the present statutory language. In *Southern Greyhound* the employer simply failed to pursue the argument that confidential employees are totally excluded from all provisions of the Act.

### B. Court Decisions Supporting Total Exclusion

The Fourth Circuit was the first court to expressly hold that confidential employees who satisfy the labor-nexus test are excluded from all protections under the NLRA. In *NLRB v. Wheeling Electric Co.*,<sup>124</sup> the Fourth Circuit rejected the NLRB's finding that the employer violated the NLRA when he discharged a confidential employee engaged in otherwise protected, concerted activity.<sup>125</sup> The court relied on the legislative history of the Taft-Hartley Act to disagree with the NLRB's interpretation of the conference agreement.

The Board admits it has always excluded confidential employees from rank-and-file bargaining units. However, it does not point to a single case in which the Board has certified a bargaining unit made up entirely of confidential employees.<sup>126</sup> The treatment of confidential employees by the Board before 1947 could therefore be properly construed by the Congress as it did — that they were not to be afforded the protection of the Act. We think, additionally, that the Board's continued practice after the enactment of the 1947 Amendments can also be properly construed as treating confidential employees in accordance with the intended scope of the Act, *i.e.*, as "supervisors."<sup>127</sup>

Consequently, the court held that since management is entitled "security of its confidential information . . . confidential employees cannot be granted the protections afforded ordinary employees under the

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122. *Id.*

123. The Taft-Hartley Act was enacted into law in 1947. Ch. 120, 61 Stat. 136 (1947).

124. 444 F.2d 783 (4th Cir. 1971).

125. *Id.* at 788.

126. This reasoning is questionable. There is nothing in the NLRA that proscribes such a unit. However, any concerted activity in furtherance of such a unit is not protected by the NLRA.

127. *Wheeling Electric*, 444 F.2d at 786.

Act."<sup>128</sup>

Shortly after *Wheeling Electric*, the Eighth Circuit, in *NLRB v. North Arkansas Electric Coop., Inc.*,<sup>129</sup> adopted the rationale of the Fourth Circuit and denied enforcement of a NLRB order that required reinstatement of a confidential employee who was discharged for refusing to obey instructions.<sup>130</sup> The court's independent reading of the Taft-Hartley's legislative history furnished an additional basis upon which to reject the NLRB's contention of partial exclusion. The court stated:

We find nothing in the Act or its legislative history to indicate Congress intended the word "employee" to have one definition for the purpose of determining a proper bargaining unit and another definition for the purpose of determining which employees are protected from being fired for union activity.<sup>131</sup>

As the Eighth Circuit indicates, once an employee is stripped of "employee" status for the purposes of becoming a member of a bargaining unit, he is removed from all protections accorded "employees" under the NLRA.

The Second Circuit also favors total exclusion from the NLRA for employees who fall within the labor-nexus test. In *Bell Aerospace Co. v. NLRB*,<sup>132</sup> the court noted that while the congressional conference report does contain some ambiguities as to the total/partial exclusion of confidential employees, "neither the Senate, nor the House . . . thought the exclusion would be limited to persons precisely fitting the Act's definition of 'supervisor'."<sup>133</sup> Instead, the court maintains that Congress passed the Taft-Hartley Act with the understanding that employees who are closely aligned with management are to be excluded from the NLRA *in toto*.<sup>134</sup> Moreover, in *Peerless of America, Inc. v. NLRB*,<sup>135</sup> the Seventh Circuit held that the status of confidential employees renders those employees akin to supervisors; thus, they are ex-

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128. *Id.* at 788.

129. 446 F.2d 602 (8th Cir. 1971).

130. *Id.* at 610.

131. *Id.* at 609-10.

132. 475 F.2d 485 (2d Cir. 1973), *enforced in part*, 416 U.S. 267 (1974).

133. 475 F.2d at 491.

134. *Id.* at 494 n.13. The court noted that:

Congress may have misapprehended the Board's pre-1947 practice with regard to confidential employees. [T]he Board had apparently excluded such employees from bargaining units of rank and file personnel but had not ruled that they were unprotected by the Act. Thus, when the Conference Committee stated that the Board had treated these employees "as outside the scope of the act," it may have been in error. *Nevertheless, since Congress' reason for not expanding the definition of supervisor was its belief that existing Board practices made this unnecessary, that intent should be given effect.*

*Id.* (emphasis added).

135. 484 F.2d 1108 (7th Cir. 1973).

cluded from the definition of "employees" entitled section 7 rights under the NLRA.<sup>136</sup> The Seventh Circuit adopted the reasoning employed in *Wheeling Electric* and found it illogical to hold a confidential employee within the meaning of "employee" for some purposes of section 7, yet outside that meaning for the purpose of inclusion in the bargaining unit.<sup>137</sup>

Thus, the circuit courts that favor total exclusion of confidential employees from protections under the NLRA all recognize the inconsistencies inherent in the partial exclusion theory when viewed in light of the statutory policy to promote collective bargaining. The courts uniformly reason that whenever an employee is excluded from the bargaining unit (due to status as a confidential employee, manager, or supervisor) there is no justification to provide additional protections to them since the object of the accompanying protections is absent.<sup>138</sup> As stated by the Fourth Circuit in *Wheeling Electric*:

It strikes us as nonsense for the Board to exclude [a labor-nexus employee] from the bargaining unit *and then* extend to her the same protection for the same concerted activity that she would have enjoyed if a union member . . . . Since [a confidential employee] cannot formally join the unit, there is nothing incongruous in holding that [a confidential employee] cannot "plight her troth" with the unit.<sup>139</sup>

### C. The NLRB Position

Despite the above discussion, the NLRB continues to adhere to its policy of partial exclusion of the NLRA's protections for those employees who fall within the labor-nexus test.<sup>140</sup> Hence, if an unfair labor

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136. *Id.* at 1112.

137. *Id.*

138. The purpose of the NLRA and its accompanying protections is to ensure to employees the right to engage in collective bargaining. See 29 U.S.C. § 151 (1976).

139. *NLRB v. Wheeling Electric Co.*, 444 F.2d 783, 788 (4th Cir. 1971).

140. See, e.g., *Peavey Co.*, 249 N.L.R.B. 853 n.3 (1980), *enforced in part*, 648 F.2d 460 (7th Cir. 1981) (rejecting the Fourth and Seventh Circuit holdings to the contrary in a case arising in the Seventh Circuit); *Los Angeles New Hospital*, 244 N.L.R.B. 960, 962 n.4 (1979), *enforced*, 640 F.2d 1017 (9th Cir. 1981) (the ALJ's "finding that confidential employees do not enjoy protection under the Act, although consistent with the decisions of several courts of appeals, is, with all respect to those courts of appeals, inconsistent with current board law"); *Service Technology Corp.*, 196 N.L.R.B. 1036, 1043 (1972), *enforced mem.*, 480 F.2d 923 (5th Cir. 1973), *cert. denied*, 415 U.S. 948 (1974) (rejecting the Fourth Circuit's holding in *Wheeling* as not binding on the Board in the Fifth Circuit's jurisdiction). In one case, however, the NLRB employed a "breach of trust" theory to uphold the discharge of a corporate president's private secretary. *American Book-Stratford Press Inc.*, 80 N.L.R.B. 914 (1948). There the secretary had previously promised the president that she would not participate in any union activities. Nevertheless, the secretary showed a copy of the president's statement on union attempts to organize the corporation to a co-chairman of the employees' union committee. The NLRB refused to order the corporation to reinstate the secretary after her

practice charge, which pertains to a labor-nexus employee, arises in a circuit that has not expressly ruled in favor of total exclusion,<sup>141</sup> the NLRB will ignore the majority of circuit court decisions and follow its position of partial exclusion.<sup>142</sup> Furthermore, in proceedings held within the jurisdiction of those courts expressly in favor of total exclusion for labor-nexus employees, the NLRB refuses to be bound to those circuit court decisions.<sup>143</sup>

To achieve its preference for partial exclusion, the NLRB invokes the doctrine it enunciated in *Insurance Agent's International Union*,<sup>144</sup> which states that the ALJ has "the duty to apply established *Board precedent* which the Board or the Supreme Court has not reversed."<sup>145</sup> The NLRB has even gone so far as to hold that an ALJ's reliance on decisions of the circuit courts constitutes *fundamental error*.<sup>146</sup> Consequently, until the Supreme Court rules otherwise, any argument before the NLRB that a confidential employee falling within the labor-nexus test is totally excluded from the NLRA would appear to be futile, even when the circuit court holds in favor of total exclusion. As a result, employers who seek a reversal of the NLRB's policy to partially exclude a confidential employee are forced to litigate the issue before the ALJ and the NLRB before the court of appeals has an opportunity to rule in the employer's favor. Hence, administrative mechanisms<sup>147</sup> coupled with the doctrine enunciated in *Insurance Agent's* work against the employer who believes that the court of appeals will ultimately hold in favor of total exclusion.

## V. SIGNIFICANCE OF THE OPEN QUESTION

Presently, employers are uncertain of what actions they may initiate against confidential employees without incurring a risk that they will commit an unfair labor practice. In a circuit where partial exclusion appears to be, or may be, favored the employer must distinguish between employee activities that pertain to the bargaining unit and

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discharge, concluding that employees who exhibit a special relationship of trust to their employer are outside protections of the NLRA. *Id.* at 915, 917.

141. The First, Third, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits have not expressly held that confidential employees are totally excluded from the Act.

142. See, e.g., *Los Angeles New Hospital*, 244 N.L.R.B. 960, 962 n.4 (1979), *enforced*, 640 F.2d 1017 (9th Cir. 1981).

143. See, e.g., *Peavey Co.* 249 N.L.R.B. 853 n.3 (1980), *enforced in part*, 648 F.2d 460 (7th Cir. 1981) (rejecting the Fourth and Seventh Circuit holdings to the contrary in a case arising in the Seventh Circuit).

144. 119 N.L.R.B. 768 (1957), *enforcement denied per curiam*, 260 F.2d 736 (D.C. Cir. 1958), *rev'd*, 361 U.S. 477 (1960).

145. 119 N.L.R.B. at 773 (emphasis added); see also *Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615, 616-17 (1963), *modified*, 331 F.2d 176 (8th Cir. 1964); *North Country Motors, Ltd.*, 133 N.L.R.B. 1479, 1485 (1961); *Novak Logging Co.*, 119 N.L.R.B. 1573, 1575-76 (1958).

146. *Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615, 616-17 (1963), *modified*, 331 F.2d 176 (8th Cir. 1964).

147. See 29 C.F.R. §§ 101.1-16 (1983).

other types of protected, concerted action. In the former situation, it appears that confidential employees are not protected. However, one may argue to the contrary by asserting that confidential employees are merely excluded from the *composition* of the collective bargaining unit, and any activity not directly attributed to that composition is protected activity. Such an argument is premised on the theory that confidential employees may do anything in furtherance of the union except join it.<sup>148</sup> This reasoning is easily repudiated. If confidential employees may participate in any activity in furtherance of union organization except join the union, it seems fair and logical that they may participate in any activity to defeat unionization. The latter proposition would likely be found to be an employer unfair labor practice in violation of section 8(a)(2) of the NLRA.<sup>149</sup> No matter what the resolution of the above matter may be, the employer is still left with the problem of determining at what point he may restrain a confidential employee from participating in union activities. For example, it is clear in jurisdictions that adhere to the partial exclusion rule that a confidential employee may legitimately distribute union buttons, because the activity does not relate to *composition* of the bargaining unit. However, it is questionable whether the same employee may be permitted to transmit confidential labor relations information to union organizers. Yet, in jurisdictions favoring total exclusion, the employer need not make any distinction between activities that do or do not concern the bargaining unit since confidential employees are deprived of all section 7 rights.

Rather than risk the consequences of an unfair labor practice charge, the employer may opt not to institute any adverse action against the confidential employee. In such a circumstance, the employer would then be reluctant to convey any confidential labor relations information to an employee who might manifest an intention to support a union. This, in turn, could render the status of "confidential employee" virtually meaningless.

Employers are not the only parties who may attempt to circumvent the total/partial exclusion issue. The NLRB goes to great lengths to avoid the issue, often reaching to find employees outside the labor-nexus and thus nonconfidential.<sup>150</sup> In *Los Angeles New Hospital*<sup>151</sup> for example, the NLRB reversed the ALJ's finding that an employee was within the labor-nexus, despite the fact that the ALJ strictly applied the NLRB's labor-nexus test.<sup>152</sup> The courts additionally serve to perpetu-

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148. See *supra* note 111 and accompanying text.

149. See 29 U.S.C. § 158(a)(2) (1976).

150. See, e.g., *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 N.L.R.B. 450 (1980); *Union Oil Co. of California, Inc.*, 236 N.L.R.B. 818 (1978), *enforced*, 607 F.2d 852 (9th Cir. 1979); see also *Rish Equipment Co.*, 258 N.L.R.B. 1139 (1980), *enforcement denied*, 687 F.2d 36 (4th Cir. 1982).

151. 244 N.L.R.B. 960 (1979), *enforced*, 640 F.2d 1017 (9th Cir. 1981).

152. 244 N.L.R.B. at 967 (1979). The ALJ's finding and analysis included:

[The employee] served as [employer's negotiations representative's] per-

ate the skirting of this significant, but evasive, problem when they consistently support NLRB rulings that an employee is outside the labor-nexus and, thus not a confidential employee.<sup>153</sup> For example, when the NLRB sought enforcement of its order in *Los Angeles New Hospital*, the Court of Appeals for the Ninth Circuit upheld the ruling and stated:

The Board did note that the ALJ made a finding inconsistent with current *Board law* when he concluded that the concerted activities of confidential employees go completely unprotected under the Act. *Likewise, we need not reach the labor nexus question . . . of the extent of coverage of confidential employees under the Act if we conclude that substantial evidence on the record as a whole supports the Board's finding that [the employee] did not have the requisite confidential relationship with [the employer's labor relations representative].*<sup>154</sup>

Hence, it appears clear that courts will not squarely decide the issue of total or partial exclusion for confidential employees until the NLRB properly presents the question to the court.

Thus, until the Supreme Court decides the issue of total/partial exclusion, an employer is unguided as to what he may do when confidential employees engage in concerted activities that do not directly relate to inclusion in the bargaining unit. Moreover, the openness of the question is also detrimental to the public, for the NLRB utilizes public appropriations every time it litigates this issue.<sup>155</sup>

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sonal and confidential secretary: she typed and filed all of the [representative's] correspondence, including all personnel-related documents and proposed employee relations memoranda or bulletins . . . . Based on the record before me, including the testimony of [the alleged confidential employee], I find that she was at all times material hereto [a] confidential secretary . . . . [T]he Board restricts only those employees whose involvement in their employer's labor relations policies is regular and substantial. In this instance I find [the employee's] duties concerning the hospital's employee relations policies regular and substantial and feel that she should be treated as an excluded confidential employee.

*Id.*

In addition, the ALJ, relying on *Wheeling Electric* and similar cases, rejected the General Counsel's argument that confidential employees are nonetheless accorded protections under the Act. *Id.*

153. See, e.g., *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981); *NLRB v. Los Angeles New Hospital*, 640 F.2d 1017 (9th Cir. 1981). But see *NLRB v. Rish Equipment Co.*, 687 F.2d 36 (4th Cir. 1982).

154. *Los Angeles New Hospital*, 640 F.2d at 1023 (emphasis added).

155. However, a relatively recent statute may possibly deter an administrative agency from pursuing a course of action not "substantially justified" by providing for recovery of attorney's fees and costs to prevailing private parties who qualify. Equal Access to Justice Act of 1980, 5 U.S.C. § 504 (Supp. V 1981); see also *Haynes-Trane Service Agency, Inc.*, 259 N.L.R.B. 83 (1982).



## VI. EMPLOYER APPROACHES TO NLRB DECISIONS

The employer's first obstacle on appeal of an NLRB decision finding a particular employee outside the labor-nexus or holding that a labor-nexus employee is only partially excluded from the NLRA is to overcome the fact that the NLRB's interpretation of the NLRA is entitled great weight.<sup>156</sup> Furthermore, an NLRB determination of the labor-nexus status of an employee is considered to be one of *fact*.<sup>157</sup> Since the NLRA provides that "questions of fact, if supported by substantial evidence on the record considered as a whole shall . . . be conclusive,"<sup>158</sup> a reviewing court may only consider the evidence on the record<sup>159</sup> and is without authority to substitute its own judgment for that of the NLRB's.<sup>160</sup> Consequently, if an employer chooses to appeal a NLRB finding that an employee is not within the labor-nexus when an unfair labor practice is alleged, his only alternative is to seek review on the theory that the NLRB erred in its legal conclusion. The employer should argue that the NLRB's conclusion is inconsistent with the Supreme Court's application of the labor-nexus test as applied in *NLRB v. Hendricks County Rural Electric Membership Corp.*<sup>161</sup> Conversely, employers who attempt to reverse an NLRB decision in favor of partial exclusion for a labor-nexus employee should always raise the issue that a majority of the federal courts of appeals hold otherwise.<sup>162</sup>

In support of the total exclusion of confidential employees who satisfy the labor-nexus test, an employer may proffer that partial exclusion is inconsistent with the purposes of the NLRA because the statute is designed to protect employee interests in collective bargaining.<sup>163</sup> When a particular employee is excluded from the collective bargaining unit, and thus not accorded the right to "bargain collectively,"<sup>164</sup> the NLRA becomes inapplicable. It should be argued that it is in contravention of congressional intent for the NLRB to dissect section 7 rights

156. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951).

157. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 173 (1981).

158. 29 U.S.C. § 160(f) (1976).

159. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

160. *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965).

161. 454 U.S. 170 (1981). Employers should attempt to present a mixed question of fact and law to the reviewing court.

162. See *supra* notes 124-39 and accompanying text.

163. 29 U.S.C. § 151 (1976) states:

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

*Id.*

164. *Id.* § 157.

in such a manner as to accord labor-nexus employees the protection of certain provisions of the NLRA and yet not permit them to be included in the collective bargaining unit. Furthermore, supporters of total exclusion may assert that since Congress has considered,<sup>165</sup> but refused to pass amendments to the NLRA,<sup>166</sup> an inference may be drawn that Congress acquiesced to the recent total exclusion decisions in the aforementioned courts of appeals.

Proponents of partial exclusion argue that inclusion in the bargaining unit does not control whether an employee is accorded section 7 rights.<sup>167</sup> However, the underlying rationale for the NLRB's development of the labor-nexus test is to "weed out" of the classification of "employees"<sup>168</sup> those workers so closely involved in labor relations matters that to accord them rights under the NLRA would result in an infiltration of organized labor into management's corporate structure.<sup>169</sup> Furthermore, the Supreme Court has definitively ruled that this objective has a "reasonable basis in law."<sup>170</sup>

## VII. CONCLUSION

In *NLRB v. Hendricks County Rural Electric Membership Corp.*,<sup>171</sup> the Supreme Court sanctioned the NLRB's use of the "labor-nexus" test to determine which employees are implicitly excluded from the collective bargaining unit. However, the Court did not address the issue of whether a confidential employee within the labor-nexus test is excluded from the NLRA *in toto*.

A majority of the courts of appeals confronted with the total/partial exclusion issue hold that employees falling within the labor-nexus test are totally excluded from the NLRA. Those courts reason that when an employee is denied the basic statutory right to bargain collectively through representatives of his own choosing, the accompanying safeguards in the Act to protect that right are inapplicable. The opinions of the courts of appeals indicate that absent specific statutory language, confidential employees have interests identical to supervisors

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165. See, e.g., H.R. 8410, 95th Cong., 2d Sess. (1977); S. 2467, 95th Cong., 2d Sess. (1978).

166. With the exception of the Health Care Amendments to the NLRA, 88 Stat. 395 (1974), numerous other measures were defeated either in the committees or on the floor.

167. The argument is couched in the NLRB's determination of an appropriate unit rather than the broad underlying rationale for the exclusion. See, e.g., Brief for Petitioner at 17-24, *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981).

168. See 29 U.S.C. § 152(2) (1976).

169. Whether confidential employees bargain with their employer in their own unit or with that of other nonlabor-nexus employees, the fact remains that they are in privity with the other side of the bargaining table.

170. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 190 (1981).

171. 454 U.S. 170 (1981).

and managerial employees, and thus are totally excluded from the NLRA's protections.

Despite the sound reasoning behind the opinions of these courts, the NLRB continues to maintain its position that such confidential employees are only partially excluded from the Act. The NLRB goes as far as to blatantly ignore the decisions of the circuit courts even in jurisdictions that have specifically held in favor of total exclusion.

Thus, until the Supreme Court or Congress finally resolves the issue, the scope of protection accorded confidential employees under the NLRA remains uncertain. This uncertainty is compounded by the NLRB's varied application of the labor-nexus test by tailoring it to the type of NLRA violation alleged rather than the underlying rationale for treating confidential employees differently than other employees. As the NLRB asserts its statutory authority to fulfill the purposes of the Act, it should pay heed to the relative bargaining positions of the parties and the absurdity of requiring an employer to *bargain* in good faith with a unit comprised of confidential employees who in fact are actively involved in the employer's bargaining strategy. Although a "bright-line" rule is not imperative to the disposition of the issue, the NLRB's failure to abide by the decisions of the majority of the courts of appeals and employing its own varied application of the test, such a rule may well be the only means to clarify the status of confidential employees under the NLRA.

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