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THE STATUS OF FOREMEN AS "EMPLOYEES" UNDER THE NATIONAL LABOR RELATIONS ACT

*HERMAN E. COOPER**

WHETHER foremen are "employees" under the National Labor Relations Act[1] awaits final determination by the Supreme Court.[2] Wider interest probably has been stirred by this controversy than by any similar labor relations question currently subject to judicial review.[3] It affects the only broadly significant section of the Act which remains thus unsettled.[4]

Nature of the Problem

The Court in 1937 upheld the power of Congress to legislate the right of "employees" to organize and engage in concerted action.[5] Since then a line of decisions has illuminated the meaning and application of many of the principal provisions of the Act as administered by the National Labor Relations Board.[6] However, the highest judicial tribunal

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1. 49 STAT. 449 (1935), 29 U. S. C. § 151, *et seq* (1940).

2. Matter of NLRB v. Packard Motor Car Co., 157 F. (2d) 80, 18 LAB. REL. REP. Man. 2268 (C. C. A. 6th, 1946). Petition for rehearing was denied by the Circuit Court on September 30, 1946, 18 LAB. REL. REP. Man. 2432. Following original decision on Aug. 12, 1946, the Packard Motor Car Company announced that if such rehearing was denied, the case would be taken to the Supreme Court. 18 LAB. REL. REP. 295 (1946). Such an appeal was filed with the Supreme Court on Oct. 30, 1946. *See* GREGORY, LABOR AND THE LAW (1946) 324.

3. LEVENSTEIN, LABOR TODAY AND TOMORROW (1945) 119-120; the author estimates five million foremen would be affected by a Supreme Court decision in the Packard case *supra*; PETERSON, AMERICAN LABOR UNIONS (1945) 90-97. TENTH ANNUAL REPORT OF THE NLRB (1945) 30-35. Former NLRB member Gerald D. Reilly has stated that it is a problem which transcends all others in labor relations, N. Y. TIMES, Nov. 8, 1946, p. 35, col. 3.

4. GREGORY, LABOR AND THE LAW (1946) 289-333. The cases arising under the National Labor Relations Act comprise more than half of the labor cases which have been decided by the Supreme Court in the period since June, 1940. These concerned cases involving interference, restraint and coercion, domination and interference with the formation and administration of labor organizations, discrimination, and collective bargaining. WALLACE LABOR LAW (1946) 21 IND. L. J. 235.

5. Matter of NLRB v. Jones & Laughlin Steel Co., 301 U. S. 1, (1937).

6. For some of the leading cases, see: The Associated Press v. NLRB, 301 U. S. 103 (1937); Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938); Consolidated Edison Co. of N. Y., Inc. v. NLRB, 305 U. S. 197 (1938); NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U. S. 241 (1939); Amalgamated Utility Workers v. Consolidated Edison Co. of N. Y., Inc., 309 U. S. 261 (1940); National Licorice Co. v. NLRB, 309 U. S. 350 (1940); H. J. Heinz Co. v. NLRB, 311 U. S. 514 (1941);

has yet to review the decision of the Board in the *Packard* case[7] which expresses a fundamental departure from previously prevailing policy in that groups of supervisors are by that decision presently included within the orbit of the statute.

Aside from the immediate legal implications, the policy under review strikes a challenging note in the field of labor-management relations. Its effect is firmly but differently regarded as (1) a disturbing and unwarranted intrusion into the core of managerial control of enterprise,[8] (2) a realistic adaptation of process by administrative legislation to a new economic realignment,[9] or (3) an inescapable consequence of clear Congressional purpose without regard to its general impact on the industrial scene except possibly as a quieting influence on an otherwise potential source of labor unrest.[10]

From the vigor and scope of the contending positions, it is transparently clear that a more fundamental difference divides the conflicting views than an abstract juridical question. Actually, the basic dispute involves the extent to which the National Labor Relations Board may narrow the margin between top managerial hierarchy and the lower echelons of employees. The ultimate effect of the Board's decision in the *Packard* case, which thus narrows the margin, must be considered in terms of a consequent change in the character of management as no longer embracing all groups of supervisors. The resultant stratifi-

Pittsburgh Plate Glass Co. v. NLRB, 313 U. S. 146 (1941); Phelps Dodge Corp. v. NLRB, 313 U. S. 177 (1941); NLRB v. Electric Vacuum Cleaner Co., 315 U. S. 685 (1942); Virginia Electric & P. Co. v. NLRB, 319 U. S. 533 (1943); J. I. Case Company v. NLRB, 321 U. S. 332 (1944); Medo Photo Supply Corp. v. NLRB, 321 U. S. 678 (1944); NLRB v. Hearst Publications, 322 U. S. 111 (1944); Wallace Corp. v. NLRB, 323 U. S. 248 (1944); Republic Aviation Corp. v. NLRB, 324 U. S. 793 (1945); *See also* discussions in: 2 LAB. REL. REP. Man. 1043 (1938); 4 LAB. REL. REP. Man. 1073 (1939); 5 LAB. REL. REP. Man. 1130 (1940); 10 LAB. REL. REP. Man. 1285 (1942); 12 LAB. REL. REP. Man. 2546 (1943); 14 LAB. REL. REP. Man. 2556 (1944).

7. Matter of Packard Motor Car Co. and Foreman's Association of America, 64 N.L.R.B. 1212; 17 LAB. REL. REP. 506, 17 LAB. REL. REP. Man. 163 (1945); Employer found to have violated NLRA by refusal to meet with certified union representative of foremen employees after determination by NLRB upholding as appropriate a unit of foremen in representation proceeding. 61 N.L.R.B. 4, 16 LAB. REL. REP. 168, 16 LAB. REL. REP. Man. 43 (1945).

8. Following initial Board decision in the Packard case, 61 N.L.R.B. 4 (1945) directing election, spokesman for Automotive Council for War Production indignantly framed the issue: "Who is going to run the plants?" 16 LAB. REL. REP. 209 (1945).

9. GREGORY, LABOR AND THE LAW, (1946) 321; *see* dissenting opinion of Chairman Millis *in re* Maryland Drydock Company, 49 N.L.R.B. 733 (1943) in which he referred to the Board's refusal to include foremen under the Act as an appropriate unit, as "administrative legislation."

10. Majority opinion *in re* Packard case, 61 N.L.R.B. 4 (1945).

cation of management into "policy-makers" only,[11] necessarily conveys more importance than a mere grant to foremen of collective bargaining rights under government protection, and certain obvious developments, far beyond the precise and circumscribed matter at issue, can be expected to flow from a Supreme Court affirmance of the Circuit Court in the *Packard* case. The stern resistance of Industry to coalescing individual supervisors into collective units, with joint bargaining and concerted means of channelling grievances, is likely to continue unabated.[12] In part such an attitude appears to spring from a fond attachment to a lingering tradition that "management" is an all-embracing relationship with the company president at one terminal point and the lowliest foreman at the other. Within that broad range the effort has been to develop an *esprit-de-corps* which not only serves to plan and direct the activities of the enterprise but also to provide a bulwark against what is regarded as the growing encroachment of unions upon the "prerogatives" of management.[13]

To find a rank of supervisors, then, not only eager for unionization of their own, but willing to strike for this recognition,[14] has compelled a re-evaluation of the entire relationship. The occurrence is most frequent in large scale industry. This is wholly understandable since there the unquiet of the supervisors is bred of the impersonality which is largely unavoidable in mass production.[15] Whether it is that develop-

11. President C. E. Wilson of General Motors stated that if foremen elected to join unions, the Company would be forced to re-define their duties, train new management personnel, reduce the status of foremen and turn their managerial functions to others. The Packard Motor Car Company advised its foremen if they voted for a union in the approaching NLRB election they might well become the "traffic cops," the characterization of them used by the NLRB in its decision. 16 LAB. REL. REP. 209 (1945).

12. Following the Board decision in the Packard case, 61 N.L.R.B. 4 (1945), the Company issued a letter to its foremen in which it stated in part: "It is our intention to continue to oppose by all proper and legal means the union representation of foremen." 16 LAB. REL. REP. 209, 210 (1945).

13. *Employer Opposition to Foremen's Bargaining*, 16 LAB. REL. REP. 209 (1945).

14. For a discussion of foremen's efforts to achieve recognition through strikes, see Huddle, *Unionization of Foremen*, (1944), EDITORIAL RESEARCH REPORTS, Vol. I, No. 21, pp. 379-380; *The Unionization of Foremen*, (1945) AMERICAN MANAGEMENT ASS'N, RESEARCH REPORTS No. 6, p. 13; PETERSON, *op. cit. supra*, note 3, at 96.

15. The enormous expansion of large scale industry, especially during the recent war, produced a substantial increase in the number of supervisory employees and foremen. Many rank and file workers were elevated to supervisory positions which they feared to lose by being laid off or demoted when contract cancellations and consequent cutbacks might occur. The National War Labor Board Special Panel found that the interest of these employees in collective bargaining was inspired by two principal causes:

"(1) The desire of foremen to retain their jobs, which they know to be un-

ment or the incitement of the Wagner Act itself, which has inspired foremen's union organization, is an interesting but perhaps fruitless speculation as to cause and effect which may be indulged in equally in respect to much current legislation.[16] Sufficient for the purposes of this discussion that a situation exists to which a legislative device has been applied and as to which the appropriate administrative agency and the courts have spoken.

Scope of the National Labor Relations Act

The design of the statute is to minimize interruptions of commerce induced by the refusal of employers to recognize and bargain collectively with representatives lawfully chosen by their employees.[17] Functionally, the Board has the responsibility of applying administrative and judicial procedures involving the prohibition and correction of unfair labor practices, the holding of elections for the selection of representatives and the determination of appropriate units for collective bargaining.[18]

The specific statutory provisions from which the controversy generated as to foremen's rights under the National Labor Relations Act are Section 2, subsections (2)[19] and (3)[20] and Section 7.[21] Under Section 2 (2), "The term 'employer' includes any person acting in the interests of an employer, directly or indirectly. . . ." Section 2 (3) states that "The term 'employee' shall include any employee. . . ."[22] Section 7 declares the legislative objective to be as follows:

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usually good ones, and to escape demotions when cutbacks come; and (2) the desire of the foremen for freer interchange of viewpoints with higher management particularly better opportunities to present such grievances as may arise."

Matter of NLRB v. Packard Motor Car Co. 157 F. (2d) 80, 18 LAB. REL. REP. Man. 2268, 2270, (C. C. A. 6th, August 12, 1946).

16. "It is doubtful," wrote Professor Gray as to "whether at all stages of legal history, rules laid down by judges have not generated custom, rather than custom generated the rules." NATURE AND SOURCES OF THE LAW (1909), Sec. 634. The same observation has validity when applied to the growing influence of legislation as changing rather than reflecting the *mores* of the community.

17. 49 STAT. 449 (1935), 29 U. S. C. § 151 (1940); GREGORY, *op. cit. supra*, note 2, pp. 229-235; NLRB v. Fansteel Metallurgical Corp., 306 U. S. 240 (1944).

18. 49 STAT. 453 (1935), 29 U. S. C. § 159 (1940); 49 STAT. 1921 (1936), 29 U. S. C. § 160 (1940), GREGORY, *op. cit. supra*, note 2, pp. 235-252.

19. 49 STAT. 450 (1935), 29 U. S. C. § 152 (2) (1940); NLRB v. Lund, 103 F. (2d) 815 (C. C. A. 8th, 1939).

20. 49 STAT. 450 (1935), 29 U. S. C. § 152 (3) (1940); NLRB v. Fansteel Metallurgical Corp., 306 U. S. 240 (1944).

21. 49 STAT. 452 (1935), 29 U. S. C. § 157 (1940); Fansteel Metallurgical Corp. v. Lodge 66, 295 Ill. App. 323, 14 N. E. (2d) 991 (1938).

22. The only categories excluded were agricultural employees, domestics and children,

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

The Board's jurisdiction requires a finding initially that a question exists between an employer and "employees" entitled to the protection of the legislative pattern evolved for their benefit.[23] The limited proposition here considered relates to the scope of the statutory term "employee"; does it encompass foremen so as to entitle them to collective bargaining rights under the Act?

The Board in Quest of a Policy

Although this question is novel as presented for judicial review, it was not so in the history of the Board's consideration of the general problem. The *Packard* case, however, represented a departure from the previously prevailing doctrine in accordance with which foremen were excluded from bargaining rights in separate units under the Act. On this issue the Board had most recently adhered to the "principles" reflected by the *Maryland Drydock* case.[24] Prior thereto, the policy had fluctuated between granting and disallowing recognition of such units of foremen. Significantly enough it was not until seven years after the enactment of the National Labor Relations Act that the Board was first confronted with the issue of a separate unit for supervisory employees.[25] Until that occasion, the Board's concern with foremen was solely as to whether as a "fringe" group they should be included or excluded from units of rank and file workers. On this subject the Act itself provided two broad standards: To determine the desire of the employees and to increase the bargaining power of workers.[26] No other guides are contained in the Act for the exercise of the Board's discretion. Only its decisions disclose the principles on which its determinations are made.

husbands or wives of employers. It would appear that the exceptions were made solely "for administrative reasons." SEN. REP. No. 595, 74th Cong. 1st Sess. (1935) p. 7.

23. 49 STAT. 453 (1935), 29 U. S. C. Sec. § 159 (c) (1940); Montgomery Ward Employees Assn. v. Retail Clerks International Protective Assn., Local No. 47, 38 F. Supp. 321 (N. D. Cal. 1941); this includes "wrongfully discharged employees;" NLRB v. Carlisle Lbr. Co., 94 F. (2d) 138 (C. C. A. 9th, 1937); and striking employees, NLRB v. Mackay R. & Tel. Co., 304 U. S. 333 (1938).

24. 49 N.L.R.B. 733 (1943). See Note (1945) 5 NAT. LAWYERS GUILD REV. 44 for an analysis of the *Maryland Drydock* decision.

25. Matter of Union Collieries Coal Company, 41 N.L.R.B. 961 (1942); Matter of Godchaux Sugars, Inc., 44 N.L.R.B. 874 (1942).

26. See note 17 *supra*; 29 U. S. C. § 159; METZ, LABOR POLICY OF THE FEDERAL GOVERNMENT (1945) 91.

Nor does the Board state with any precision what standards it will apply in any particular case. As a consequence it is not always clear in advance which principle announced by the Board will apply.[27]

In the light of the current decisions of the Board, particularly the fundamental criterions announced in the *Packard* case, the earlier views and treatment of the problem require underscoring. The Board was constantly in search of a formula which would reconcile the conflicts inherent in the marginal status of foremen. Whether to include foremen in the same appropriate bargaining unit with the rank and file employees at all times posed a delicate dilemma. So, in the *Consumers' Power Company* case,[28] for instance, crew foremen were at first included in the same bargaining unit with production employees. Shortly thereafter the Board, by a supplementary ruling, excluded crew foremen when one of that group involved management in an unfair labor practice situation.[29] In other early cases, when Board policy was particularly fluid, in practice although not so in expression, supervisory employees would be automatically excluded from the same unit of their subordinates unless their inclusion was affirmatively justified.[30] Such tests as were applied touched upon the nature and extent of the supervisory authority possessed by the foremen involved. No serious controversy as to their exclusion arose in cases in which it was demonstrated that the foreman enjoyed the power to hire and fire or could exercise controlling influence in that regard as well in the recommendation of wage increases, transfers or promotions for those employees in whose unit it was sought to have the foremen included.[31]

A further standard which was utilized to determine whether supervisory employees could be embraced by the same unit as their subordinates rested upon the degree of proximity of this supervision group to management as distinguished from their being part of the working forces.[32] The Board contended in such matters that supervisors should be excluded where in the bargaining process their interests were more

27. *Ibid.*

28. 9 N.L.R.B. 701 (1938).

29. 9 N.L.R.B. 742 (1938).

30. Matter of Pacific Manifold Book Co. Inc., 3 N.L.R.B. 551 (1937); Matter of Keystone Mfg. Co., 7 N.L.R.B. 172 (1938); Matter of Union Envelope Co., 10 N.L.R.B. 1147 (1939).

31. Matter of Kingsley Lumber Co., 13 N.L.R.B. 174 (1939); Matter of Nekoosa-Edwards Paper Co., 11 N.L.R.B. 446 (1939); Matter of Zellerbach Paper Co., 4 N.L.R.B. 348 (1937).

32. Matter of Rockwood Alabama Stone Co., 40 N.L.R.B. 790 (1942); Matter of Ford Motor Co., 23 N.L.R.B. 342 (1940).

akin to those of management.[33] This was demonstrable where it was shown that such employees directed the work of others by giving orders, apportioning work, enforcing discipline and being responsible for maintaining productivity levels as to quantity and quality.[34]

Another factor which resolved the Board's decisions in many cases depended upon the attitude of the unions involved. So, if the union desired to exclude supervisory employees, the Board was disposed to accept that position as controlling.[35] By the same token, the request of the unions to include foremen has generally been adopted by the Board, especially where all the unions involved in the controversy expressed the same wish.[36] Foremen have even been included where one of the unions urged their inclusion and another contending union made no contest.[37] Frequently, however, it has been sufficient merely for one of the unions involved to object for such supervisory employees to be excluded.[38] In case of any conflict as to inclusion or exclusion, the Board has in most instances ruled against having foremen in the same unit as rank and file workers.[39] Management exercised little influence on this issue with the Board.[40] The general principle appeared to be that the desire of the employees should be controlling if other factors were relatively balanced. As a general rule, it might be stated that the Board was likely to include foremen if they were eligible for union membership or if their inclusion was in accord with the prevailing practice in the industry.[41]

The other facet of the problem of immediate concern related to the grouping only of supervisory employees in particular units appropriate for collective bargaining. In *Matter of Union Collieries Coal Company*,[42] the Board in apparently decisive fashion found appropriate a unit of assistant foremen, fire bosses, weight bosses and coal inspectors. A

33. Matter of Goodyear Tire & Rubber Co., 3 N.L.R.B. 431 (1937).

34. Matter of Charles McCormick Lumber Co., 7 N.L.R.B. 38 (1938). Matter of J. Tartel & Son, 45 N.L.R.B. 551 (1942).

35. Pittsburgh Plate Glass Co. v. NLRB, 313 U. S. 146 ((1941); Matter of Medo Photo Supply Corp., 43 N.L.R.B. 989 (1942); Matter of Inland Steel Co., 9 N.L.R.B. 783 (1938).

36. Matter of Willys Overland Motors, Inc., 9 N.L.R.B. 924 (1938); Matter of Richmond Hosiery Mills, 8 N.L.R.B. 1073 (1938).

37. Matter of the Harris-Hub Bed & Spring Co., 13 N.L.R.B. 1236 (1939).

38. Matter of Jones Lumber Co., 12 N.L.R.B. 209 (1939).

39. Matter of Western Pipe & Steel Co. of Calif., 17 N.L.R.B. 942 (1939).

40. Matter of A. Fink & Sons, Inc., 9 N.L.R.B. 441 (1938).

41. Matter of J. C. Sanders Cotton Mills Co., 31 N.L.R.B. 298 (1941); Matter of Lidz Bros., Inc., 5 N.L.R.B. 757 (1938).

42. 41 N.L.R.B. 961 (1942).

local CIO union was thereafter certified in *Matter of Godchaux Sugars*[43] for working and non-working foremen but excluding general foremen. In the succeeding two cases on the same question, however, the Board rejected as not appropriate a unit consisting of managers, assistant managers, utilitarians and treasurers in a theater chain[44] as well as a unit of general foremen and assistant foremen of an aircraft company.[45]

The conflict among the members of the Board was revealed in full measure by the differences expressed in the decision in the *Union Collieries Coal* case where the issue was first squarely presented. Here the Board had ruled that supervisory employees enjoyed the rights of the Act for collective bargaining purposes. Chairman Harry A. Millis and William M. Leiserson supported the unit while Gerald Reilly dissented and made a *reductio ad absurdum* argument to the effect that: "A literal interpretation of the statute would mean that even the president, vice-president and treasurer of a corporation have a right to collective bargaining since they are also employees; . . .", that the status of supervisors would be so compromised "as to result in disruption of the practice of collective bargaining rather than industrial peace;" that management's informed representatives would be sitting with the union during the bargaining process; and finally that management would be improperly involved by the *respondeat superior* doctrine which would make it responsible for the acts of supervisors.[46] The first real indication that the Board was attempting to reconcile its conflicts by refining the issue was revealed by the decision in the *Studebaker Corporation* case.[47] Here the Board was confronted with the issue of whether to sanction two units in one department, each of which would include various categories of supervision. In dismissing the union's petition for certification the Board drew its authority from the *Boeing Aircraft*[48] and *Godchaux Sugars*[49] cases. These cases respectively held that a single bargaining unit could not be composed of various levels of supervisory and non-supervisory employees. However, these same cases were also authority for the broad principle that units of supervisory employees were appropriate. In substance then the Board was already

43. 44 N.L.R.B. 874 (1942).

44. Matter of Stanley Co. of America, 45 N.L.R.B. 625 (1942).

45. Matter of Boeing Aircraft Co., 51 N.L.R.B. 67 (1943); *see also* Matter of Murray Corp. of America, 51 N.L.R.B. 94 (1943); Matter of General Motors Corp., 51 N.L.R.B. 457 (1943).

46. Mr. Reilly's dissent later became the majority view in the *Maryland Drydock* case.

47. 46 N.L.R.B. 1315 (1943).

48. 51 N.L.R.B. 67 (1943).

49. 44 N.L.R.B. 874 (1942).

veering away from the initial position that foremen could properly form their own unit under the Wagner Act. The decision in the *Studebaker* case discloses the whittling away of that policy by a forced refinement of the facts to arrive at a narrow distinction.

The *Maryland Drydock* case[50] reflected a complete rejection of the intial policy of the Board on the foremen issue by specifically overruling the decisions in the *Union Collieries* and *Godchaux Sugars* cases. The Board now declared its "firm" policy to be that, with the exception of the printing and maritime trades where foremen traditionally were organized, units of foremen would not be accepted as appropriate for collective bargaining purposes. This policy was articulated on the premise that such units would "impede the processes of collective bargaining, disrupt established managerial and production techniques and militate against effectuation of the policies of the Act."[51] The decision was by a divided Board with both views forcefully set forth in the opinions. It was apparent that feeling on the issue was neither detached nor affable.[52]

The completely divergent views, both as to the meaning of the Act and the effect of its application, which separated the members of the Board on this issue, also revealed their conflicting philosophies. So, when the *Maryland Drydock* case was decided, it was not unexpected that it would be by a divided Board. A majority, in this instance composed of Gerald Reilly and John M. Houston, took the position that the Act's purposes would not be accomplished by establishing bargaining units of supervisory employees except where of long and customary standing, such as in the maritime and printing trades. Chairman Millis, who had voted with the majority in the *Union Collieries* case, maintained the same position as there assumed although now in a dissenter's role. The holding in the *Maryland Drydock* case was broadly justified upon a consideration of "the dangers inherent in the co-mingling of management and employee functions" and "the possible restrictive effect upon the organizational freedom of rank and file employees."[53] In

50. 49 N.L.R.B. 733 (1943).

51. The crux of the conflict appeared centered in the ultimate effect on the Industrial scene of the Board's policy, as the controlling determinant. A writer then considered that the majority "made their decision on the basis of prophecy and theory rather than on the history and experience of the problem and of the organizations involved." Note (1943) 3 LAWYERS GUILD REV. 53.

52. For an early discussion of the effect of the Board's changing personnel see, Note (1942) 55 HARV. L. REV. 269.

53. The converse conclusion was drawn by the majority in the *Packard* case to arrive at a diametrically opposite result.

applying the Act, the Board as then constituted, was persuaded by what it anticipated would be the practical consequences of its rule and adopted the views of Member Reilly.

The *Maryland Drydock* doctrine was later somewhat delimited by the *Soss Manufacturing* case.[54] Here was evidenced the natural outgrowth of the basic conflict resulting from the effort of the Board to predicate a rule of convenience in terms of concrete principles. For the decision in the *Soss Manufacturing* case held to be improper the refusal to issue a complaint against an employer which had discharged foremen for union activity. This placed foremen in the peculiar position of being granted protection under Sections 8 (1)[55] and 8 (3)[56] but being at the same time denied the protection of Section 8 (5)[57] and Section 9[58] of the National Labor Relations Act. The effect therefore, was that such supervisory employees were afforded redress from unfair labor practices under the Act but denied access to representation proceedings. The *Soss Manufacturing* case in some measure foreshadowed the development of Board attitude on the question of foremen, as reflected by the subsequent *Packard* case[59] decision. However, in the process

54. 56 N.L.R.B. 348 (1944); Note (1946) 59 HARV. L. REV. 606.

55. Unfair labor practice for an employer: "To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 49 STAT. 452 (1935), 29 U. S. C. § 158 (1) (1940).

56. Unfair labor practice for an employer: "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude any employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made." 49 STAT. 452 (1935), 29 U. S. C. § 158 (3) (1940).

57. Unfair labor practice for an employer: "To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)." 49 STAT. 452 (1935) 29 U. S. C. § 158 (5) (1940.

58. "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer." 49 STAT. 453 (1935), 29 U. S. C. § 159 (a) (1940).

59. 47 N.L.R.B. 932 (1943).

of formulating what it hoped would be a durable policy, the Board in a relatively consistent fashion followed the *Maryland Drydock* decision[60] until it reversed this position in the *Packard* case.

The *Packard* case afforded the Board a new opportunity to reconsider the problem. Again, a divided opinion issued, the majority now being former Chairman Millis and Member Houston, who had reversed his position, and the dissenter now being Gerald Reilly.[61] It is evident that both Millis and Reilly clung tenaciously to their disparate convictions and represented the polar extremities on this question.

The Rule of the Packard Case

Directly at variance with its previous policy, a recent series of Board decisions,[62] led by the decision in the *Packard* case, concluded that foremen were "employees" within the meaning of Section 2 (3) of the Act. By qualitative analysis the terms "employees" and "employers" as stated in the Act were found not to be mutually exclusive. Rather the *pro tanto* difference was considered to depend for applied meaning upon particular behaviour or relationship incidents than upon mere nomenclature in any absolute sense.[63] While recognizing that foremen, as marginal employees, have a dual capacity, being deemed part of management in dealing with the rank and file, it was determined that their relation to the company which they served was that of employees. This crucial distinction was predicated upon the evident fact that foremen are hired, discharged, paid and directed in their work and their employment conditions determined, by their employer, and that they are without real participation in formulating management policy. They

60. See note 50 *supra.*

61. Comment, *Rights of Supervisory Employees to Collective Bargaining Under the National Labor Relations Act* (1946) 55 YALE L. J. 754.

62. Matter of B. F. Goodrich Co., 65 N.L.R.B. No. 58, 17 LAB. REL. REP. 692 (1946); Matter of L. A. Young Spring & Wire Corp., 65 N.L.R.B. 59, 17 LAB. REL. REP. 687 (1946); Matter of Midland Steel Products Co., 65 N.L.R.B. No. 177, 17 LAB. REL. REP. 858 (1946); Matter of Jones & Laughlin Steel Corp., 66 N.L.R.B. No. 51, 17 LAB. REL. REP. 971 (1946); Matter of American Brake Shoe Co., 67 N.L.R.B. 25, 17 LAB. REL. REP. 1264 (1946); Matter of Hudson Motor Car Co., 67 N.L.R.B. No. 52, 17 LAB. REL. REP. 1259 (1946); Matter of U. S. Rubber Co., 67 N.L.R.B. No. 104, 18 LAB. REL. REP. Man. 1025 (1946); Matter of Ethyl Corp., 67 N.L.R.B. No. 176, 18 LAB. REL. REP. Man. 1068 (1946); Matter of First National Stores, Inc., 68 N.L.R.B. No. 77, 18 LAB. REL. REP. Man. 1137 (1946); Matter of Simmons Company, Case No. 2-C-6244, 70 N.R.L.B. —, 18 LAB. REL. REP. Man. 1356 (1946).

63. The job title does not control on whether an employee is supervisory; *see* Matter of Richards Chemical Works, Inc., 65 N.L.R.B. No. 3, 17 LAB. REL. REP. 617 (1945), where "foremen" were not held to be supervisory employees.

function "in a sort of unenviable limbo between real management and the workers".[64] The decision fundamentally modified the earlier stand of the Board and frankly subordinated a theoretical hypothesis to the Board's current concept of economic realities.

The single bargaining unit found as appropriate in the *Packard* case included the four levels of supervisory employees—general foremen, foremen, assistant foremen and special assignment men.[65] The responsibility and authority of these foremen were co-extensive.[66] For a long time, however, the nature of the foreman's position in management had been undergoing a gradual change. The foreman was progressively exercising less authority coupled with reduced responsibility for influencing policy with a concomitant increase in responsibility for carrying out policies.[67] In essence, the impact of technological advances in mass production has changed the functional relationship of foremen so that much of the plenary authority and discretion formerly enjoyed had diminished.[68] Accordingly the importance and consequent sense of security of supervisory employees decreased proportionately. It was a short step for this group actively to seek the protection of the Wagner Act which would afford governmental support and sanction to their bargaining aims.[69]

The *Packard* case, as the landmark of the prevailing doctrine resolving the marginal status of foremen under the Act, provides a convenient arena in which to survey the contending positions. All phases of the question were carefully weighed and considered and a comprehensive, although somewhat contradictory opinion issued.

64. GREGORY, *op. cit. supra*, note 2, at 322.

65. More than 1,100 supervisory employees were involved: 125 general foremen, 643 foremen, 273 assistant foremen and 65 special assignment men. They constituted the ranks of supervision below some 77 members of the Employer's managerial hierarchy from President to Division Superintendents. Volume III of the Record, p. 1814-1815.

66. The employer urged that since some grades of foremen exercised supervisory powers over foremen in other grades, each grade of foreman should be segregated into a separate unit. The Board has frequently found that a unit otherwise appropriate was not rendered inappropriate by the circumstances here involved. Matter of Celotex Corp., 66 N.L.R.B. No. 97, 17 LAB. REL. REP. 984 (1946). In the only such case contested, the Board's order was sustained by the Circuit Court of Appeals. Jones & Laughlin Steel Corp. v. NLRB, 146 F. (2d) 833 (C. C. A. 5th, 1945) *cert. denied*, 325 U. S. 886 (1945).

67. Majority opinion by Circuit Judge Allen in NLRB v. Packard Motor Car Co., 157 F. (2d) 80, 18 LAB. REL. REP. Man. 2268, 2270 (C. C. A. 6th, (1946).

68. *Ibid.*

69. Foremen, themselves, vigorously denied that they were functionally a part of management and did not require the aid of the Wagner Act. *Hearings Before the Committee on Military Affairs on H. R. 2239, H. R. 1742, H. R. 1728 and H. R. 992*, 78th Cong., 1st Sess. (1943) 299-318, 489-516, 614-695, 706-759.

In the *Packard* case[70] the Board petitioned the Circuit Court of Appeals for the Sixth Circuit for enforcement of an order charging the company with unfair labor practices. This was based upon the refusal of the company to bargain with the Foremen's Association of America which had been selected by a majority of the foremen in a Board election.[71] The company resisted the Board's order by contending that foremen were not "employees" under the Act and therefore not entitled to its privileges. As defined by the Circuit Court, the controlling questions in the Packard case were "(1) whether the supervisory employees involved herein are entitled to or excluded from the privileges accorded by the National Labor Relations Act and (2) if they are entitled to the privileges of the Act whether the unit established by the Board is appropriate to effectuate the purposes of the Act."[72] A resolution of the basic question rested upon a construction of the legislative intent and purpose with respect to coverage under the Act. In upholding the Board a divided Court ruled that "the foreman, although he is part of the front line of management in his obligation to get out the work, to negotiate grievances and to perform the manifold responsibilities . . . in his relationship to his employer with reference to his own wages and conditions of labor [he] is an employee entitled to the benefits of Section 157" of the Act. The Court also sustained the Board's determination grouping general foremen, foremen, assistant foremen and special assignment men ("trouble shooters") in one unit.[73]

A significant variation, however, appears in the judicial view respecting the type of union organization sanctioned for supervisory employees under the Act. Here the Court differed with the Board's policy by conditioning certification of a union to act for supervisors under the Act upon the basis of it being "independent and neither a part of nor controlled by the union representing the production workers."[74] This

70. 64 N.L.R.B. 1212 (1945).

71. 61 N.L.R.B. 4 (1945).

72. 157 F. (2d) 80, 18 LAB. REL. REP. Man. 2268, 2271 (C. C. A. 6th, 1946).

73. *Id.* at 2273. "The authority to determine the appropriate unit is primarily vested in the Board. Section 159 (b). If reasonably exercised, its decision cannot be set aside. Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U. S. 146. Hearst Publications, Inc., *supra*, 133."

74, Id. at 2274. "As found by the Panel of the War Labor Board, it is not appropriate for supervisors 'who are responsible for discipline, assignment of work, rate adjustments and promotions, who represent the employers in handling grievances of rank and file workers, and who generally represent higher management in dealing with the rank and file workers, to be subject to discipline by a union which is controlled directly or indirectly by the men whom they supervise. The effectiveness of management requires that it have its own uncontrolled agents to represent it in dealing with the rank and

particular question was not specifically at issue in the *Packard* case. The judicial restriction therefore should properly be regarded as *dictum* rather than controlling. When the Board's later decisions in the *L. A. Young*[75] and *Jones and Laughlin*[76] cases, holding the contrary, are tested before the Courts, a definitive ruling should result.

Before considering the conflicting positions confronting the Court on the basic issue, it is well to narrow the area of dispute and accordingly confine the argument. That foremen had the right to form and join unions was accepted without question.[77] Nor were the parties divided by any differences on the proposition that, independent of the Act, foremen are employees as the term is commonly understood as well as in legal effect.[78] The crux of the issue was whether the Board had exceeded its authority by so applying the Wagner Act as to grant to foremen the same rights thereunder as enjoyed by rank and file employees.

The Employer's Challenge to the Change in Board Policy

Close reasoning grounded on valid appraisals of experience and measured against established principles did not uniformly characterize the position of either disputant. Rather both were marked by frequent resort to "loose inference and dogmatic assertion."[79] But the intangibles of labor relations invite conjecture from the very absence of sufficiently stable rules of the game. In consequence, greater reliance falls upon the capacity of "experts"[80] to distinguish subjectively the most effective

file, just as the rank and file are entitled to have their own uncontrolled representatives for dealing with higher management.'"

75. 65 N.L.R.B. No. 59, 17 LAB. REL. REP. 687 (1946).

76. 66 N.L.R.B. No. 51, 17 LAB. REL. REP. 971 (1946).

77. In the oral argument before the Board, the Employer's counsel in reply to a question by Board Member Houston, stated: "The foremen have a right to organize. We do not deny that." Volume II of the Record, p. 1194. This precise point had previously been raised in NLRB v. Skinner & Kennedy Stationery Co., 113 F. (2d) 667, 6 LAB. REL. REP. Man. 967 (C. C. A. 8th, 1940). The court there held that the foreman is an employee for the purpose of pressing his personal needs and demands upon his employer.

78. The Federal Employers' Liability Act defines employees entitled to its benefits as "any employee of a carrier." This definition, identical in terms with the definition contained in Section 2 (3) of the National Labor Relations Act, has been applied without challenge to foremen. Owens v. Union Pacific R. Co., 319 U. S. 715 (1943). *See also* Alaska Mining Co. v. Whelan, 168 U. S. 86, 89 (1897). Also so conceded by Circuit Judge Simons in his dissent from the majority in the *Packard* case.

79. Mr Justice Frankfurter dissenting in Hill v. Florida, 325 U. S. 538, 554 (1945).

80. For an excellent comprehensive study of the role of the "expert," see Butler, *The Rising Tide of Expertise* (1946) 15 FORDHAM L. REV. 19, 48-50.

way to achieve the broad objectives of the Act, as dictated by practical considerations. Principles, then, do not evolve in response to a rule of reason and law but are superimposed to fit a rule of immediate convenience.[81] This approach was apparent in that neither the employer nor the Board gave heed to the warning of the Supreme Court that ". . . the old admonition never becomes stale that this Court is concerned with the bounds of legal power and not with the bounds of wisdom in its exercise by Congress."[82] So it was not a strange phenomenon to find the employer's position which challenged the Board's ruling before the Circuit Court to be, like the ruling itself, a curious admixture of legal and practical arguments less concerned with the state of the law than with what it should be.[83] It was apparent that less weight attached to strictly legal arguments than to a forecast of the catastrophic dangers implicit in granting foremen bargaining rights under the Wagner Act.

In an effort at divining the Congressional intent in legalistic terms the employer placed great reliance upon the unclear references in the legislative history of the Act[84] to "workers" and "labor" as disclosing an intended limitation upon the term "employees" to the rank and file rather than their supervisors.[85] The failure of Congress expressly to include "subordinate officials" within the definition of employees, as Congress had in Section 1, of the Railway Labor Act of 1934,[86] was similarly urged as revealing a Congressional purpose to preclude those performing supervisory functions.[87] The Packard Company also argued

81. *See* Note (1944) 19 ST. JOHN'S L. REV. 47.

82. Polish National Alliance v. NLRB, 322 U. S. 643, 650 (1944).

83. As in most similar controversies involving construction of the Wagner Act, undue comfort was derived from the classic expression of Holmes that "the life of the law has not been logic; it has been experience." HOLMES, THE COMMON LAW (1881) 1.

84. 49 STAT. 449 (1935), 29 U. S. C. § 151 *et seq.* (1940).

85. For a summary of the Employer's position on this point, see the vigorous dissenting opinions of Circuit Judge Simons both in the original decision on the Packard case 157 F. (2d) 80, 18 LAB. REL. REP. Man. 2268 (C. C. A. 6th, 1946), and in the order denying rehearing —F. (2d)—, 18 LAB. REL. REP. Man. 2432 (C. C. A. 6th, 1946). The same argument was urged against recognition of clerical and other non-manual workers as employees and was rejected as lacking in merit. NLRB v. Armour & Co., 154 F. (2d) 570 (C. C. A. 10th, 1945); Associated Press v. NLRB, 301 U. S. 103, 129 (1937); *See* McIver, Wagner and McGerr, *Technologists' Stake in the Wagner Act* (1944) AMERICAN ASS'N OF ENGINEERS.

86. 48 STAT. 1185 (1934), 45 U. S. C. § 151 (1940), Section 1 (5) of that Act provides "The term 'employee' as used herein includes every person in the service of a carrier . . . who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission. . . ."

87. The National Labor Relations Act was "an amplification and further clarification

that supervisory employees allegedly had not participated in strikes for collective bargaining rights prior to the enactment of the statute.[88] The rationale was that since the Act ostensibly relates only to such categories of employees as had created labor disturbances for collective bargaining rights and who were therefore, exclusively in the contemplation of Congressional concern, no others were entitled to the derivative benefits.[89] In a further effort to relate the objects of the Act to its position, the company emphasized the Report and Findings of a Special Panel appointed by the National War Labor Board to investigate disputes involving foremen.[90] Upon the findings therein contained a showing was attempted of the lack of substantial grievances or just causes for complaint of foremen regarding their wages, hours and working conditions.[91] From this was deduced the conclusion that the Act could not apply since foremen had no need for collective bargaining. No evil was therefore claimed to exist which invited statutory remedy.[92]

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of the principles" of the Railway Labor Act. H. R. REP. 1147, 74th Cong., 1st Sess. (1935) 3; *See* Matter of Soss Manufacturing Company, 56 N.L.R.B. 348, 350 (1944). Also *see* Section 2 of the Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U. S. A. § 101 *et seq.* (1940), in which employees are contrasted with "owners of property." In Section I of the National Labor Relations Act, the term "employers" was substituted for "owners of property" and the balance of the clause was repeated verbatim.

88. A sharp issue of fact divided the parties on this point. The Board attempted to establish a long previous history of union organization and activity by foremen antedating the Act. (Record Vol. III, p. 1794); 1763, 1916-1924). Particular reference was made to such collective bargaining in the printing, building, and metal trades, and in the maritime and railroad industries. (U. S. Dept. of Labor, Bull. No. 745, *Union Membership and Collective Bargaining by Foremen*, pp. 1-5, 6-7). Since the Act, from July 1, 1943 through November, 1944, particularly, there were 20 strikes of supervisory employees involving 131,000 employees and causing the loss of 669,159 man-days of work, of which 96 per cent was lost in strikes for recognition. TENTH ANNUAL REPORT OF THE N.L.R.B. (1945) 31. *See* also, PETERSON, *op. cit. supra*, note 3, at 221.

89. An interesting observation to consider on this argument was made by Professor Gray when in his lectures on the "Nature and Sources of the Law" he stated, "The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present." GRAY, NATURE AND SOURCES OF THE LAW (1909) 165.

90. REPORT AND FINDINGS OF A PANEL OF THE NATIONAL WAR LABOR BOARD IN CERTAIN DISPUTES INVOLVING SUPERVISORS, Jan. 19, 1945, WLBA-3397.

91. Member Reilly in dissenting from the majority view in the *Packard* case, 61 N.L.R.B. 4 (1945), interpreted the War Labor Board findings to indicate "that the standard foreman grievances, so repeatedly cited in argument before this Board . . . turned out to be largely fanciful." *But see* note 15 *supra*.

92. Resolving the controversy as to the Congressional purpose, requires it be tested

Dealing with the consequences of the inclusion of foremen, the employer urged that, if it were required to bargain collectively with a foremen's union, the allegiance of its supervisors would be divided between management and the union. Management would thus be precluded from accepting the judgment and discretion of foremen. This was contended on the anticipated likelihood that the foremen would be influenced less by their duty to the company than by their responsibility to their union. By like reasoning an *in terrorem* argument was offered that the foremen would become so subject to the pressures of rank and file unions, as well as their own, as to destroy the basic relationship between management and foremen upon which the employer relies for efficiency in conducting its business.[93] Portraying the special function of foremen the employer also emphasized the position of the Board and the Courts that supervisory employees are frequently deemed to speak for management even though unauthorized or directly forbidden to do so.[94]

The Policy Crystalized

After the Board's initial determination in the *Packard* case that supervisors could form an appropriate unit,[95] the question again came before the Board upon the refusal of the employer to bargain with the union involved.[96] The same issues now confronted the Board anew. In the interim Chairman Herzog had ascended to his position in place of Millis.[97] His judgment was called upon to settle the continuing contro-

"in the light of the mischief to be corrected and the end to be attained." NLRB v. Armour & Co., 154 F. (2d) 570, 17 LAB. REL. REP. 372, 373 (C. C. A. 10th, 1945).

As noted by Pound, "The emphasis has changed from the content of the precept and the existence of the remedy to the effect of the precept in action and the availability and efficiency of the remedy to attain the ends for which the precept was devised." Pound, *Administrative Application of Legal Standards*, (1919), A. B. A. REP., 415; *Cf.* Pound, *Mechanical Jurisprudence*, 8 COL. L. REV. 603 (1908).

93. This position was consistently argued from the initial presentation of the issue to the Board in Matter of Union Collieries Coal Co., 41 N.L.R.B. 961 (1942). It reflects the core of the employer's resistance to foremen unionization as creating a "divided loyalty" role for supervisors which the Board and now the Courts are requested to avoid. Chairman Herzog, in his concurring opinion in the Packard case noted that whenever foremen and their employers "sit on the opposite sides of the bargaining table their interests are momentarily adverse. This is true whether they bargain individually or collectively."

94. International Association of Machinists v. NLRB, 311 U. S. 72 (1940); NLRB v. Link-Belt Co., 311 U. S. 584, 598 (1941); Matter of Tenn. Copper Co., 9 N.L.R.B. 117, 118 (1938); Matter of Inland Steel, 9 N.L.R.B. 783, 808 (1938); H. J. Heintz Co. v. NLRB, 311 U. S. 514 (1941).

95. 61 N.L.R.B. 4 (1945).

96. 64 N.L.R.B. 1212 (1945).

97. Succeeded H. A. Millis, who resigned as of July 4, 1945.

versy between Houston and Reilly. The determination of the issue, so far as the Board was concerned, therefore, rested with the basic philosophic concepts which the chairman brought to the Board. It must be parenthetically noted that Chairman Herzog occupied the position previously, and prior to his entry into the Armed Forces, as Chairman of the New York State Labor Relations Board. That Board had earlier ruled as appropriate a unit of supervisors in a decision in which Mr. Herzog joined.[98] It could therefore have been reasonably anticipated that upon his elevation into the national scene the arguments which were persuasive in the case before the New York State Labor Relations Board would be equally effective when before him as the one holding the decisive vote on the National Labor Relations Board. But mere consistency did not operate as the controlling factor in the chairman's decision. For he displayed in his opinion a rare feeling and regard for the essence of employer-employee relationships in terms not of title or designation, but rather of economic realities. Abandoning precise and archaic judicial phrasing, Chairman Herzog, in an almost buoyant mood, unabashedly reflected his deep and sweeping convictions on the right of foremen to the full protection of the Act.[99]

The expressed warrant for the alteration of policy and abandonment of precedent was the Board's developing awareness that the dangers which had been envisioned as resulting from foremen inclusion under the Act had not materialized. Affirmatively the Board now stated its recognition of the "clear economic facts" and need to "protect the na-

98. Matter of Bee Line, Inc., 6 N.Y.R.B. 686 (1943). The New York Labor Relations Board there noted the *Maryland Drydock* decision by the NLRB and flatly rejected that doctrine in an opinion which parallelled the later prevailing opinion, also by Mr. Herzog, in the *Packard* case. *See* to the same effect: Matter of Delparke Realty Corp., 6 N.Y.S.L.R.B. 905 (1943); 8 N.Y.S.L.R.B. Ann. Rep. 14-15, 28-30 (1944). These rulings were affirmed by the highest court of New York in: In Matter of N.Y.S.L.R.B. v. Metropolitan Life Insurance Co., 183 Misc. 1064, 52 N. Y. S. (2d) 590 (Sup. Ct. 1944) *aff'd memo*, 269 App. Div. 934, 58 N. Y. S. (2d) 343 (1st Dep't 1945), *aff'd*, 295 N. Y. 836, 66 N. E. (2d) 853 (1946). *See also* Alleghany Ludlum Steel Corp. v. Kelley, 295 N. Y. 607, 64 N. E. (2d) 352 (1945). Pennsylvania has consistently followed the *Maryland Drydock* decision. Division 1327 of the Amalgamated Ass'n of Street Electric and Motor Coach Employees v. Pennsylvania LRB, Pa. Ct. of Comm. Pls., 13 LAB. REL. REP. Man. 910 (1944). Massachusetts was earlier in accord with the New York view. *See* Matter of Sears, Roebuck & Co., Case No. CR 517, 8 LAB. REL. REP. Man. 393 (1941); The Massachusetts Board later adopted the doctrine of the *Maryland Drydock* case. Hathaway Bakeries, Inc. v. Labor Relations Commission, —Mass.—, 55 N. E. (2d) 254, 14 LAB. REL. REP. Man. 647 (1944).

99. Some significance must necessarily attach to the circumstance that Chairman Herzog here expressed one of his relatively infrequent differences with Member Reilly.

tional interest" by giving foremen the benefits of the Act.[100] It was, therefore, concluded that the continued denial of the Act to foremen would deprive them of a substantial right, the granting of which would not disadvantage Industry proportionately. In further rationalizing the change and somewhat to relieve the discomfort entailed in again shifting its position, the Board now argued that its *Maryland Drydock* decision[101] was not based on any consideration of lack of statutory authority, but rather upon one of considered expediency derived from the balancing of dangers and advantages. The Board therefore felt free, in reconsidering the facts upon which its prior policy was predicated, to change that policy in accordance with what it regarded as a more realistic appraisal of the need of foremen for the protection of the Act and the favorable consequences of granting such relief. Rejecting the argument for unit segregation of each level of foremen, formerly so persuasive in the *Studebaker* case,[102] the Board also bluntly grounded its decision for a single unit upon "compelling practical reasons". In the Board's view, the collective bargaining process itself was sufficiently flexible to allow satisfactory adjustments by the parties of such problems as might develop from the combination of various levels of supervision in a single

100. The majority displayed an acute awareness of what they regarded as the "realities" of the situation. Yet the transition from the doctrine of *Union Collieries Coal Company* to *Maryland Drydock* to *Packard* completed a cycle that brought the Board back to its initial policy. The indecisiveness of the judgments could perhaps best be explained in terms of a search for the kind of "economic realities" on which a majority might agree. A less cynical view might rest upon the observation of Cardozo to the effect that "Courts know today that statutes are to be viewed, not in isolation or in *vacuo*, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions as revealed by the labors of economists and students of the social sciences in our own country and abroad." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1925) 81.

101. 49 N.L.R.B. 733 (1943).

102. 46 N.L.R.B. 1315: In connection with the composition of the bargaining unit of supervisory employees, the Board is likely to exclude all supervisors in the higher levels of management if their interests are shown to be inimical to those of the groups being organized. Matter of Simmons Co., 65 N.L.R.B. No. 174, 17 LAB. REL. REP. 820 (1946) and Matter of Fibreboard Products Inc., 66 N.L.R.B. No. 87, 17 LAB. REL. REP. 1066 (1946).

The unit test also appears to be that, like the rank and file units, all members must have a community of interest and not too great a disparity in rank. L. A. Young Spring & Wire Corp., 65 N.L.R.B. No. 59, 17 LAB. REL. REP. 687 (1946). Where common background and interests are close but a marked divergence exists in rank and authority between levels, supervisory employees in the highest levels may elect whether or not to be in the same unit as their subordinates. Hudson Motor Car Co., 67 N.L.R.B. No. 52, 17 LAB. REL. REP. 1259 (1946).

unit.[103] This holding specifically reversed the Board's prior holdings in the *Murray Corporation* case[104] and the *Boeing Aircraft Company* case[105] on the distinction that the same strong community of interest between classes of supervisors was not established there as sufficiently as in the *Packard* case.

Aside from the convenient resort to legalisms to justify a position formerly abandoned as untenable, the motivating influence for the new policy appeared to be a conviction by the majority of the Board that the practical effect of the denial to foremen of access to the Board's process would be to compel a trial by combat through use of economic strength in order to force unwilling employers to grant recognition to the foremen for purposes of collective bargaining. Such a trial, it was considered, would be in derogation of the principal object of the Act which was designed to avoid industrial strife or unrest as a means of achieving collective bargaining rights and to substitute therefor the orderly processes available through the National Labor Relations Board.[106]

A grappling with the fundamental problem, rather than preoccupation with its periphery, was evidenced by the general reply to the contentions made by the employer. This reply rested upon the concept of the majority of the Board that the over-all grievance of foremen, as of all employees, was "the denial by their employer of their right to participate in the decisions which affect their welfare as employees." Chairman Herzog writing the prevailing opinion of the Board in the *Packard* case emphasized these considerations by stating:

"Just as rank and file employees before the passage of the Act were forced to resort to tests of economic strength in order to gain recognition, so it is today with supervisory employees. These are the plain and inescapable eco-

103. Chairman Herzog regarded the solution of the problems which might develop from the Board's decision as a product of time and experience. He stated: "American management has shown such resilient genius that, once foremen's representatives lose their sense of insecurity and can adopt a policy of self-restraint, the parties will find a way to resolve their occasional conflict of interest. Government cannot resolve that conflict for them. But it can intercede to lay the groundwork for reasoned negotiation, so that what seems anathema today may become habitual tomorrow."

104. 51 N.L.R.B. 94 (1943).

105. 51 N.L.R.B. 67 (1943).

106. In concluding his opinion, Mr. Herzog observed on this point, ". . . it is better that a Board dedicated to encouraging the bargaining process move forward, not backward . . . and continue to put a premium on the conference table rather than on the harsh arbitrament of industrial war. The more difficult the problem, the more important it is that the stage be set for men to sit down and reason together." 64 N.L.R.B. 1212, 1216 (1945).

nomic facts, and we think it therefore manifest that the time has come when, in the interest of effectuating the policies of the Act, we must accord greater recognition to the militantly expressed need of supervisory employees for collective bargaining through their own organizations. . . . it must be remembered that foremen have the right to form and join labor organizations apart from and outside the Act. This is a fundamental right, the right of free association, which was not created, but implemented, by the Act. The statute we administer was enacted to insure that this already existing right could be exercised in a peaceful and orderly manner so that the flow of goods and services in interstate commerce would not be interrupted. Thus, to deny the foremen in this case the protection of the Act is not to deny them the right to form and join their union or to demand collective bargaining rights from their employer. It would only be a denial of access to peaceful procedures to exercise that right."[107]

This position was fully adopted by the majority of the Circuit Court in the *Packard* case.[108] Brushing aside considerations urged by the employer as to the extent to which foremen required the benefits of the Act, the Court stated:

"If these foremen fall within the coverage of the statute it is immaterial whether their grievances are or, are not great, for they have a right, just as employees of the rank and file, to organize and bargain collectively. This is the principal issue in the case."[109]

"Employees" under the Wagner Act as Broadly Construed in the Hearst Case

Necessarily any approach to a construction of the Act compels the consideration of the objects sought to be attained and the evil to be remedied. From the language employed by Congress, particularly in its statement of "Findings and Policy",[110] explicit and unambiguous purposes are described. Congress found that because employers had denied employees organizational rights and refused readily to accede to collective bargaining procedures strikes and other industrial unrest resulted which burdened or obstructed commerce. Unless employees were aided in overcoming their inequality in bargaining with employers by being protected in their right to organize and bargain collectively, the public welfare was adversely affected. This inequality and its con-

107. 61 N.L.R.B. 4, 14, 18 (1945).

108. 157 F. (2d) 80, 18 LAB. REL. REP. Man. 2268, (C. C. A. 6th, 1946).

109. *Id.* at 2271.

110. 49 STAT. 449 (1935), 29 U. S. C. § 151 (1940). NLRB v. Jones & Laughlin Steel Corp., 146 F. (2d) 718 (C. C. A. 6th, 1944); NLRB v. Century Oxford Mfg. Corp., 140 F. (2d) 541 (C. C. A. 2nd, 1944).

sequences could be overcome, Congress decided, by providing a free and unhampered means for the selection of bargaining representatives by employees while imposing on employers the duty to bargain collectively with such representatives. Within this framework of Congressional intention must be tested any controversy as to the meaning of an applicable statutory provision or term. The Supreme Court construed this Congressional action as expansive in nature to a limit "so far as its power can reach."[111] The statute is unique in its freedom from technical legal distinctions and complexities.[112] Emphasis is placed upon the comprehensiveness of the language as revealing the broad objectives. In the *Hearst Publications* case the Supreme Court stated its view that the term "employee" used in Section 2 (3) of the Act, "like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. 'Where all the conditions of the relation require protection,' protection ought 'to be given.' "[113] The Court further noted that the task of defining the term "employee" in cases as they arise "has been assigned primarily to the agency created by Congress to administer the Act. Determination of 'where all the conditions of the relation require protection' involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board."[114]

Since the *Hearst* case is likely to serve as the expression of applicable doctrine by which the Supreme Court is to measure the *Packard* case, a more than passing consideration of the *Hearst* case is merited. The case developed because four Los Angeles newspapers refused to bargain collectively with a union of newsboys selling their papers on the streets.

111. NLRB v. Hearst Publications, 322 U. S. 111, 125 (1944).

112. *Id.* at 120, 126-130.

The Court stated that Congress had no intention to constrict this remedial legislation by a "mass of technicality" so that the "employee" concept at common law would so prevail as to bar the benefits of the Act to persons who, not being independent entrepreneurs, were entitled to its benefits.

113. *Id.* at 129.

114. *Id.* at 130.

The technical basis for the refusal was, as with foreman in the *Packard* case, on the ground that the newsboys were not "employees" under the Act. The Board upheld the union in all respects.[115] However the Circuit Court rejected the Board's findings and held that by common law standards the newsboys were not employees and were not therefore included within the protection of the Act.[116] The Supreme Court reversed the Circuit Court and held the newsboys to be employees under what has been dubbed the "mischief-remedy test."[117] This test might be reduced to its simplest terms: If the worker is a victim of the evils which the Act was designed to correct, it must follow that the worker is the kind of an "employee" intended by the Act. "The test of who is an employee is social, rather than individual in its approach. It looks beyond narrow and technical contractual rights to economic forces and their consequences for its meaning and authority. In this sense it is a realistic and practical attempt to formulate a flexible, workable concept of the term 'employee.' "[118] The majority in the *Hearst* case, while finding newsboys to be employees under the Act, practically conceded them not to be employees according to the common law meaning of the word. And so the majority of the Court held, in the opinion of Mr. Justice Rutledge, that common law tests derived from the law of master and servant were not controlling. If they are not, the court said, "it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in this special situation."[119]

The majority of the Circuit Court in the *Packard* case leaned heavily upon the concept of the term "employee" as stated by the Supreme Court in the *Hearst* case. However, Circuit Judge Simons in his dissent similarly relied upon the decision in the *Hearst* case to support his view. In essence, the jurist declared that unless *some* limitation was placed upon the term "employees", as intimated by the Supreme Court, the strict application of the test suggested by the majority of the Circuit Court would compel the inclusion not only of foremen but also of superintendents, department heads and executive officers.[120] He then pro-

115. 39 N.L.R.B. 1256 (1942).

116. 136 F. (2d) 608 (C. C. A. 9th, 1943).

117. NLRB v. Armour & Co., 17 LAB. REL. REP. 372 (C. C. A. 10th, 1945).

118. 32 CALIF. L. REV. 289, 296 (1944).

119. 322 U. S. 111, 127 (1944).

120. "Undoubtedly in ordinary parlance and by common law tests foremen are employers. So also are superintendents, department heads, managers and executive officers. It has been made plain, however, by the Supreme Court that in interpreting the National

ceeded to the nub of his contention that the Court had no concern with making policy but only with the interpretation of the statute. "Since controlling authority interprets the Labor Act as clothing supervisory employees with the authority and responsibility of the employer, collective bargaining provisions are not available to them. I am in accord with the earlier view of the Labor Board and the Panel of the War Labor Board and would deny enforcement to the present petition."[121]

The Board's Power to Deny an Appropriate Unit to Foremen as "Employees"

Neither the majority nor the dissenting Judge in the Circuit Court, however, touched specifically upon whether the Board had *power* to exclude foremen from the statutory protection of the right to bargain collectively, through the method of holding a unit inappropriate so as to accomplish such a result. In no particular instance did either opinion affirmatively suggest the area of discretion available to the Board in granting or withholding access to its processes after a preliminary finding that supervisors were "employees" within the meaning of the Act.

The employer contended that even if the foremen were found to be "employees" the Board could, in its judgment, exclude them from bargaining rights in accordance with the obligation so to proceed as to "effectuate" the purposes of the Act.[122] Since, it was argued, the fixing of a separate unit from such supervisors would be undesirable, the Board could, upon so concluding, exclude them. In response, the Board, in the *Packard* decision evaded the precise question, and took the equivocal position that, in the exercise of its discretion it would grant supervisors the unit requested once it found them to be "employees".[123] Not until

Labor Relations Act common law tests are not controlling. So those who in other aspects may be independent contractors are brought within the sweep of the term 'employees' by underlying economic facts rather than technically and exclusively by previously established legal classifications." 18 LAB. REL. REP. Man. 2274 (1946).

121. *Ibid.*

122. This argument was based upon the provision in Section 159 (b) which requires the Board to decide whether a particular unit in each case will "insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act." The Board had first held in the *Maryland Drydock* case that it enjoyed such power to deny certification by disapproving every possible type of unit for supervisory employees. 49 N.L.R.B. 733 (1943). That "power" was also exercised in Matter of Boeing Aircraft Co., 51 N.L.R.B. 67 (1943); Matter of Murray Corp. of America, 51 N.L.R.B. 94 (1943); and Matter of General Motors Corp., 51 N.L.R.B. 457 (1943).

123. However, the Board did argue before the Circuit Court that it had no power

the *L. A. Young Spring and Wire Corp.* case[124] did the Board squarely acknowledge its mandate for Congress as compelling the certification of an appropriate unit for supervisory employees. This was based in part upon the Report of the Congressional Committees on the Bill that became the Act.[125] The Committees indicated specifically that Section 8 (5)[126] was not a detachable part of the Act to be granted or denied as a matter of choice to employees who had been granted the right to self-organization and collective bargaining relieved of employer interference through the means enumerated in the four preceding subsections of Section 8.[127] The inclusion of Section 8 (5) in the Bill was explained by the Senate Committee:

"It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated (whether as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. . . . Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace."[128]

The House Committee also noted that "The fifth unfair labor practice, regarding the refusal to bargain collectively, rounds out the essential purpose of the bill to encourage collective bargaining and the making of agreements."[129]

The Board therefore concluded that it could not ignore Section 8 (5) for a particular class of employees. By reference also, the language of Section 9 (b), read in connection with the other provision of the Act, indicates the obligatory nature of the blanket provision. Section 9 (b) provides:

"The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective

to deny to foremen who were "employees" under the Act, the statutory protection of the right to bargain collectively by holding that they could not constitute an appropriate unit.

124. 65 N.L.R.B. No. 59, 17 LAB. REL. REP. 687 (1946).

125. The Senate Report stated that the guarantee of the right to organize and bargain collectively was intended for the purpose of "encouraging the practice of collective bargaining and protecting the rights upon which it is based." SEN. REP. No. 573, 74th Cong., 1st Sess. (1935) 6. *See also* H. R. REP. No. 1147, 74th Cong., 1st Sess. (1935) 8.

126. 49 STAT. 452 (1935), 29 U. S. C. § 158 (5) (1940).

127. 49 STAT. 452 (1935), 29 U. S. C. § 158 (1940).

128. SEN. REP. No. 573, 74th Cong., 1st Sess. (1935) p. 12.

129. H. R. REP. No. 1147, 74th Cong., 1st Sess. (1935) p. 20.

bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."[130]

The Board pointed out in the *L. A. Young* case[131] that this language "is language not of exclusion but of classification. We are to choose between alternatives: Whether the appropriate unit for collective bargaining purposes shall be the 'employer unit, craft unit, plant unit, or subdivision thereof.' The function of deciding the appropriate unit is a positive one. 'It is not a negative concept to be used as a means of denying all bargaining rights under the Act to a given group of employees in all circumstances.' Once the Board determines that certain individuals are 'employees' within the meaning of the Act, its sole remaining duty under Section 9 (b) is to group these 'employees' in that unit which will insure to them the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.' Under the power to define the unit, the Board may properly insist that foremen be organized in bargaining units apart from their subordinates, but it cannot ostracize them."[132]

Further support for the Board's more recent construction of the requirements of Section 9 (b) is disclosed by examining the standards delineated by Congress for the Board in making unit determinations. The indications are that the Board's power is limited to determining the composition of voting groups of employees and not to decide whether such employees should ever exercise the franchise, since Section 9 (b) directs the Board to fix appropriate units in such a way as "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act."[133] Although not so stated in the *Packard* case, the Board con-

130. 49 STAT. 453 (1935), 29 U. S. C. § 159 (b) (1940).

131. 65 N.L.R.B. No. 59, 117 LAB. REL. REP. 687 (1946).

132. Of particular significance was the quotation by the Board from the decision of the New York State Labor Relations Board, Matter of Bee Line, Inc., 6 N.Y.S.L.R.B. 686, 695 (1943) previously joined in by Chairman Herzog.

133. The Circuit Court upheld the Board's exercise of discretion in grouping the supervisory employees involved in one unit. After referring to the duties vested in the general foremen, foremen, assistant foremen and special assignment men, the Court stated: "The similarity of their obligations which compels them at times to act interchangeably, and of the privileges which set them all off from the workers of the rank and file, make them a group by themselves, necessarily experiencing the same needs, having in general the same conception of the relationship between them and their employer." 18 LAB. REL. REP. Man. 2268, 2273 (1946). *See also* THIRD ANNUAL REPORT OF THE NLRB (1938) 180-183; Daykin, *The Status of Supervisory Employees under the National Labor Relations Act* (1944) 29 IOWA L. REV. 297, 317-322.

cluded before the Circuit Court, contrary to its previous view, that such standards would not be respected by a unit determination which had the effect of denying the full benefit of collective bargaining and which prevented, rather than encouraged, the practice and procedure of collective bargaining in acordance with the policy declared by Section 1 of the Act.

The Board's Control Over the Type of Labor Organization Designated by Foremen in an Appropriate Unit

As previously noted, the Circuit Court upheld the Board in the *Packard* case but deviated in one respect.[134] Although not required to do so by the matter at issue, the Court declared that its approval of the Board ruling respecting foremen units was conditioned upon the labor organization involved being unaffiliated and in no case a part of the same union as represented the rank and file workers. Even though without controlling effect, this judicial pronouncement compels consideration as touching upon a vital phase of the administration of the Act far transcending the instant issue. It relates to a fundamental element in the broad controversy and suggests an accord in spirit if not by edict with the forecast of the disastrous effect of foremen being granted the protective aegis of the Act in their own units. Similarly, the extension of Board authority in this sphere entails a direct and telling influence upon the structure and affairs of labor unions which might be difficult to delimit once established as a doctrine. The Court was apparently persuaded to embark upon this controversial matter, which was not at issue, by the potential dangers and the perilous effect upon Industry which the members of the Court foresaw might result from having both supervisory and other employees in the same labor organization.[135] Yet no statutory authority could be invoked to give effect to the Court's view of the inadvisability of both groups through separate local unions being affiliated to the same national union.[136]

134. See note 74 *supra.*

135. The majority of the Circuit Court quoted with favor from the conclusions of the War Labor Board panel which investigated the status of supervisory employees in major automobile and shipping industries, including Packard, as follows: "The effectiveness of management requires that it have its own uncontrolled agents to represent it in dealing with the rank and file, just as the rank and file are entitled to have their own uncontrolled representatives for dealing with higher management," 18 LAB. REL. REP. Man. 2268, 2274.

136. As one writer recently noted on this point: "In fact, such a rationale runs counter to the specific provisions, as well as the spirit of the Act." Comment (1946), 55 YALE L. J. 754, 765.

Necessarily, by the terms of the Act, this question came within the administrative discretion, deducible, by implication at least, from Section 9 (c) of the Act, which provides that: "Whenever a question affecting commerce arises concerning the representation of employees, the Board may [not must] investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected."[137]

In the *Packard* case the Board specifically withheld any decision or exercise of discretion on this score since it found that the Foremen's Association was in fact independent of rank and file employees, and the issue was therefore not before it. More recently, however, in *Matter of Jones and Laughlin*[138] the Board met the specific question reserved in the *Packard* case, the issue being whether the Board had discretion to refuse to certify units of supervisory employees represented by labor organizations affiliated with or admitting to membership rank and file employees. The Board concluded in that case that it had not been vested by Congress with the power to control the freedom of choice of any unit of employees. It regarded as an abuse of its discretion the withholding of certification from any representative so chosen by supervisory employees in an appropriate bargaining unit. This was a return in general view to that stated in the *Godchaux Sugars* case.[139] There it was also indicated that Section 1 of the Act required the same result when it stated the Congressional policy to be the encouragement of "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."[140]

In further support of the position that it lacked authority to limit the choice of representatives, reliance was placed by the Board upon the Supreme Court decision in *Hill* v. *Florida*.[141] The Court in that case held to be invalid a statute of the State of Florida which attempted to limit those who could act as employee collective bargaining representatives. The Court explicitly stated that: "Congress attached no con-

137. In the absence of an order by the Board under this section, the Courts are without jurisdiction to review. It would appear to follow that the failure of the Board, in its discretion, to apply the section, cannot be judicially mandated. *See* NLRB v. Standard Oil Co., 124 F. (2d) 895 (C. C. A. 10th, 1941); NLRB v. National Mineral Co., 134 F. (2d) 424, 426, 427 (C. C. A. 7th, 1943), *cert. denied*, 320 U. S. 753 (1943). Such review of representation cases has also been specifically excepted by the recently enacted Administrative Procedure Act, Pub. L. No. 404, 79th Cong., 2d. Sess. (June 11, 1946) § 5; 18 LAB. REL. REP. 76 (1946).

138. 66 N.L.R.B. No. 51, 17 LAB. REL. REP. 971 (1946).

139. 44 N.L.R.B. 874, 877 (1942)

140. *Cf.* 79 CONG. REC. 2336 (1945).

141. 325 U. S. 538 (1945).

ditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon the agent's qualifications."[142] The Board concluded that it had no greater power than the State of Florida, in view of the Court's holding, to attempt to superimpose its judgment upon that of the employees as to who should represent them.[143]

Another consideration in this connection is likely to foreclose a determination by the Supreme Court adverse to the Board's ruling on this issue. Since it would appear that the matter is either beyond the discretion of the Board or within its discretion, the practical result in this instance will be the same. The Board, having decided that it would not restrict the collective bargaining representative selected by supervisors by such conditions as the Circuit Court found advisable in the *Packard* case, exercised discretion, which if so regarded, is not reviewable. It does not appear to constitute that kind of quasi-judicial discretion which the courts may review as distinguished from administrative discretion which is not reviewable;[144] rather it falls within the same category as the Board's action in issuing or refusing to issue a complaint or in directing or refusing to direct an election.[145] So, had the Board refused to conduct elections in foremen's units where affiliated labor organizations were petitioners, it would seem that such action could no more have been judicially reviewed than similar refusals to direct elections on other grounds.[146]

142. *Id.* at 541.

143. *See* Chief Justice Stone, dissenting on other grounds in Pittsburgh Plate Glass Co. v. NLRB, 313 U. S. 146, 171-172 (1941), where he stated that:

". . . the function assigned to the Board is not the choice of the labor organization to represent a bargaining unit, for that is to be the free choice of the majority of the employees in some defined group of employees which the Board finds to constitute the appropriate unit."

144. Federal Trade Commission v. Klesner, 280 U. S. 19, 25-26 (1929); Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 141, 146 (1940); American Tel. & Tel. Co. v. United States, 299 U. S. 232, 236 (1936); New England and Divisions Case, 261 U. S. 184, 196-199 (1923); Perkins v. Lukens Steel Co., 310 U. S. 113, 127-128 (1940); Confiscation Cases, 74 U. S. 454, 458-459, 463 (1868).

145. Anthony v. NLRB, 132 F. (2d) 620 (C. C. A. 9th, 1942); NLRB v. Waterman S.S. Corp., 309 U. S. 206, 226 (1940).

146. See, *e.g.*, May Department Stores v. NLRB, —U. S.—, 66 Sup. Ct. 203, 206 (1945) in which Mr. Justice Reed stated: "Under Section 9 (b) the Board is delegated the authority to determine the unit. The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion, but to 'guaranty against arbitrary action by the Board.'"

The quoted section in the opinion is from SEN. REP. No. 573, 74th Cong., 1st Sess (1935) p. 14.

Whether the attitude of the Circuit Court will be projected into the reasoning and conclusions of the Supreme Court is uncertain. However, it will provide an interesting demonstration of judicial ratiocination if that Court would concurrently seek to sustain the administrative discretion of the Board while imposing a limitation upon its exercise in a particular matter in which the Court may be in disagreement with the Board's conclusions.

Conclusion

Of all administrative agencies to which Congress has delegated governmental functions, the National Labor Relations Board appears least inhibited by statutory strictures. In consequence of the spare legislative yardsticks provided to measure their application of the Act, the Board members have often indulged in well-meaning but inconstant expressions of current policy. Suspended judgments have passed currency as doctrine. Confusion has marred the uniformly scrupulous, if occasionally misdirected, performance of its personnel. That confusion has been twice confounded in that parties frequently could neither anticipate nor avoid the often unforeseeable consequences of any pattern of behaviour by management or employee representatives however innocent or calculated. It was not merely a straining after a neatly turned phrase that inspired the characterization of the Board's rulings as "the wilderness of single cases."

Much of the difficulty was unavoidable. A relatively uncharted field of governmental action was the base on which pragmatic tests could vie with flexible concepts for supremacy. Necessarily, policies, apparently firmly entrenched by sound reasoning processes, were later abandoned as unstable miscalculations. The absence of more rigid limitations imposed by the statute was both a blessing and a misfortune. It invited experimentation, but held the Board members to sharp account for the consequences. Out of the welter of confusion there is still seeking for emergence what might be termed a governmental labor policy.[147] Such a policy, if it is possible to evolve, will provide not only orderly processes for settling differences, but fixed rules and perceptible standards instead of an inconstant schematic system. *Stare decisis* and respect for precedent are likely then to be more familiar characteristics of Board policy than the shifts in "principle" which fluctuate with the realignments of the Board members. Against this background it is not altogether strange that the foreman question should have been so often solved in so many different ways. The issue directly

147. Rothenberg, *Economics and Labor Law* (1946), 50 DICK. L. REV. 153.

involves the traditional equilibrium between management and labor, a relationship which sharply invites stabilizing as a means of achieving more than ephemeral industrial peace.

A decision by the Supreme Court in the *Packard* case would be most welcome as settling the broad phase of the question of foremen status under the Wagner Act and removing it beyond further alteration of policy particularly "when Board consistency depends primarily upon unchanging Board personnel."[148] It may reasonably be expected that the Supreme Court will not only uphold the decision in the *Packard* case, but is likely to sustain the Board in the *Jones and Laughlin* case as well. It requires no clairvoyant sense to envision that the pace of industrialization will increase in tempo and that centralization, standardization and technological advances will continue to subordinate the foreman's role so that by economic pressures his orientation would be increasingly that of an employee and less that of part of management. The Court, faced by this reality and buttressed by what is likely to be deemed the Congressional purpose in its broader aspects, may be expected to resolve the issue ultimately in the light of the aim of supervisory employees to implement their presently enjoyed right to unionization by the concomitant advantage of access to the benefits and protections of the National Labor Relations Act.

148. Comment (1946) 55 YALE L. J. 754, 774. See also note 52 *supra*.