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The Unionization of Law Firms

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NOTE

THE UNIONIZATION OF LAW FIRMS

I. INTRODUCTION

Although traditionally among the most difficult to organize, increasing numbers of "white-collar" employees are beginning to believe that unionization is a means of achieving better terms and conditions of employment.1 Advances in technology, particularly the increased use of the computer, and the growth in size of corporations and law firms have contributed to the routinization and bureaucratization of many white-collar jobs. Changes resulting from such advances and growth, along with the attendant depersonalization and lack of communication between employer and employee, are serving to blur the perceived distinctions between white-collar workers and blue-collar workers.2 Law firm employees, in line with this trend, have exhibited an increased interest in unionization.3 On the other hand, the legal profession has traditionally considered itself to be a learned profession,4 as opposed to a trade or commercial enterprise, and thus exempt from the provisions of the National Labor Relations Act (NLRA)5 and other statutes that derive their constitutional authority from the commerce clause.6 Nevertheless, various federal regulatory provisions have been held applicable to law firms.7 Moreover, on May 4, 1977, the National Labor Relations Board

1. While the numbers are increasing, from 2.42 million in 1956 to 3.6 million in 1976, the proportion remains small compared to the large increase in the numbers of white-collar workers. A. Sloane & F. Witney, Labor Relations 9 (3d ed. 1977) [hereinafter cited as Labor Relations].
4. See notes 40-42 infra and accompanying text.
6. U.S. Const. art. I, § 8, cl. 3. For example, the learned profession exemption has been relied upon in the context of the Sherman Act. See notes 40-42 infra and accompanying text.
UNIONIZING LAW FIRMS

(Board) in a unanimous opinion decided to assert jurisdiction over law firms as a class. Relying on a Supreme Court finding that the practice of law is "trade or commerce" within the meaning of the Sherman Act and "that the activities of lawyers play an important part in commercial intercourse," the Board found that "it is clear that law firms, as a class, do have a substantial impact on interstate commerce" within the meaning of the National Labor Relations Act.

At the time of the ruling, one commentator stated that the Board's decision was likely to result in better treatment, improved working conditions, and higher pay scales for employees of major law firms. Six months later, another commentator noted that the reaction of some members of the Bar to the possibility of unions in law firms was one of "serious concern" and recommended that firms respond with a "calm approach but not necessarily a passive one." Despite this concern on the part of law firms, the decision and the possibility of better treatment and working conditions prompted an increase in union organizational efforts within the legal profession. An organizational campaign in major New York City law firms was undertaken by Local 6 of the International Federation of Health Professionals, an affiliate of the International Longshoremen's Association, and by District 65 of the Distributive Workers of America. In addition, law office workers, in New


14. Levin, supra note 3, at 1, col. 2.

15. See Hochberger, supra note 3, at 1, col. 2. The firms targeted for union drives were among New York's oldest and largest. Local 6's petition for a representation election of 26 clerical employees of Hughes Hubbard & Reed was dismissed by the Regional Director of Region 2 on the ground that the bargaining unit was inappropriate. Hughes Hubbard & Reed, No. 2-RC-17725 (Region 2 Sept. 30, 1977), review denied, 251 Daily Lab. Rep. (BNA) A-1 (Dec. 29, 1977). See notes 151-60 infra and accompanying text for a discussion of this decision. Local 6 was also seeking to organize the 375 nonlegal employees of Cravath, Swaine & Moore, 178 N.Y.L.J., Nov. 10, 1977, at 1, col. 4, and the 84 clerical and paralegal employees of Davis, Polk & Wardwell, 178 N.Y.L.J., Nov. 14, 1977, at 1, col. 5. The president of Local 6 claimed that more than 85% of the eligible employees at Davis, Polk had signed cards showing an interest in union representation. Id. See also Levin, supra note 3, at 4, col. 2.

16. Hochberger, supra note 3, at 2, cols. 3-4. District 65 already represents law office workers at the New York Civil Liberties Union, the American Civil Liberties Union, and Rabinowitz, Boudin & Standard, a private law firm. The Distributive Workers Union is known as the office workers' union. An organizer from District 65 expected the bargaining units to contain secretaries, bookkeepers, file clerks, and telephone operators. Id.
York City and elsewhere, began to consider the option of union representation.  

This Note will first consider the constitutional question of whether the Board has the power to assert jurisdiction over private law firms as a class. In order to do so, the Board must find that law firms, as a class, affect commerce within the meaning of the commerce clause. Then, an analysis of whether the Board should assert such jurisdiction will be presented. The analysis will focus on two problems: (1) whether law firms have a substantial impact on commerce within the meaning of section 14(c)(1) of the NLRA, and (2) whether there are insurmountable problems connected with conflict of interest and the attorney-client relationship which should prevent unionization of law firm employees. Finally, this Note will deal with questions concerning the determination of an appropriate bargaining unit. Three types of employees of a law firm will be discussed: associate attorneys, paralegals, and administrative and support employees.

II. CAN THE BOARD ASSERT JURISDICTION OVER LAW FIRMS AS A CLASS?

The National Labor Relations Act empowers the Board to regulate various aspects of labor relations. "It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce . . . ." The Supreme Court "has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." The Court has also held that the Board has the power to determine whether certain practices affect commerce.


19. See pt. III(A) infra. The Board has decided not to assert its jurisdiction to the fullest possible statutory extent. See note 53 infra and accompanying text.

20. See pt. III(B) infra.


22. See pt. IV(A) infra.

23. See pt. IV(B) infra.

24. See pt. IV(C) infra.

25. 29 U.S.C. § 141(b) (1970). The NLRA definition of commerce is "trade, traffic, commerce, transportation, or communication among the several States." NLRA § 2(6), 29 U.S.C. § 152(6) (1970). The Act defines "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." NLRA § 2(7), 29 U.S.C. § 152(7) (1970).

26. NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963); see Guss v. Utah Labor Relations Bd., 353 U.S. 1, 3 (1957); Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 647-48 (1944);
The Board, moreover, need not find a direct nexus between the business of
the employer and interstate commerce because the statutory language "affect-
ing commerce" can extend to some activities that are wholly intrastate. That
is, the activity need not actually be interstate commerce, but must somehow
affect interstate commerce. Thus, an employer may "affect commerce" and
therefore be subject to the Board's jurisdiction although it is not engaged in
interstate commerce. In one extreme example of the kind of intrastate
activities that have been held to affect commerce, the Supreme Court held
that Congress could regulate the production of wheat consumed entirely at
the farm on which it was grown, on the theory that changes in the volume
of such wheat could affect the supply and demand for grain sold across
state boundaries. Hence, it would seem that very few activities do not
affect interstate commerce. Even in Bodle, Fogel, Julber, Reinhardt &
Rothschild, in which the Board declined to assert jurisdiction over law

NLRB v. Fainblatt, 306 U.S. 601, 607 (1939); NLRB v. Jones & Laughlin Steel Corp., 301 U.S.
1, 30-31 (1937). Thus, the NLRA derives its authority from the commerce clause, which provides
that Congress shall have the power "To regulate Commerce with foreign Nations, and among the
several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The NLRA, however,
does provide for some specific exclusions. Certain types of employers are not defined as employers
for the purpose of the NLRA: the United States, any wholly owned government corporation, the
Federal Reserve Bank, states and political subdivisions thereof, persons subject to the Railway
Labor Act, 45 U.S.C. §§ 151-188 (1970), and any labor organization (other than when acting as
also specifically excluded from the NLRA's coverage: agricultural laborers, those in domestic
service to a person or family at his home, individuals employed by a parent or spouse,
independent contractors, supervisors (as defined in NLRA § 2(11), 29 U.S.C. § 152(11) (1970)),
and employees employed by an employer subject to the Railway Labor Act. NLRB § 2(3), 29
U.S.C. § 152(3) (1970). In addition, the Board has created two other exclusions, for "managerial
employees" and "confidential employees." Managerial employees are those "who are in a position
to formulate, determine, and effectuate management policies." Ford Motor Co., 66 N.L.R.B.
1317, 1322 (1974). "[M]anagerial status is not conferred upon rank-and-file workers, or upon
those who perform routinely, but rather it is reserved for those in executive-type positions, those
who are closely aligned with management as true representatives of management." General
discussion of confidential employees.

538, 539 (6th Cir.), cert. denied, 347 U.S. 1015 (1954); NLRB v. J. L. Hudson Co., 135 F.2d
29. Wickard v. Filburn, 317 U.S. 111 (1942). Since that decision, the commerce power has
been the basis for asserting federal jurisdiction over numerous activities that have little to do with
interstate commerce, including truck dealers, Liddon White Truck Co., 76 N.L.R.B. 1181 (1948);
grocery stores, Providence Pub. Mkt. Co., 79 N.L.R.B. 1482 (1948); newspapers selling only
0.5% of their copies out of state, Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946); and
30. 206 N.L.R.B. 512 (1973). This firm was relatively small, consisting of five attorney
partners and seven attorney associates. The other firm over which the Board declined to assert
jurisdiction was also a small firm consisting of four lawyers. See Evans & Kunz, Ltd., 194
N.L.R.B. 1216 (1972).
firms, on discretionary grounds, the Board stated that it had the legal authority to exercise jurisdiction over law firms that supplied commerce data that satisfied the liberally construed “affecting commerce” test. The Board pointed out that modern-day law firms assisted large corporations, labor unions, and other institutional entities in their interstate activity, including, for example, the negotiation and formulation of complex interstate agreements relating to trade and business. Such assistance was found to “affect commerce.”

In Goldfarb v. Virginia State Bar, an antitrust case, the Supreme Court examined the nature of legal practice and the relationship between lawyers and interstate commerce. The Court held that the Sherman Act applied to attorneys in that case because searches of local land titles for clients affected interstate commerce. The Court analyzed local lawyers’ activities in relation to other “transactions which create the need for the particular legal services in question,” and it found the necessary nexus with interstate commerce on the grounds that local real estate markets often rely on out-of-state financing and that many home loans are guaranteed by the federal government. There-

31. Employers are expected to file a commerce data questionnaire with the Board so that it can determine whether that employer is within the monetary standards which the Board has established. On the basis of this data, the Board may decide not to exercise jurisdiction over an employer whose impact on commerce is determined by the Board not to be significant. For example, the Board will decline to exercise jurisdiction over retail concerns with less than $500,000 of yearly gross sales. A. Cox, D. Bok & R. Gorman, Cases and Materials on Labor Law 97-98 (8th ed. 1977); R. Gorman, Basic Text on Labor Law § 2 (1976). The jurisdictional standards which, for the most part, are still in effect were promulgated in Siemons Mailing Serv., 122 N.L.R.B. 81 (1958). Congressional enactment of NLRA § 14(c)(1) in the Landrum-Griffin Act, Pub. L. No. 86-257, § 701, 73 Stat. 519, 541 (1959), gave explicit approval to the Board’s discretionary declination of jurisdiction, but prohibited the Board from making its jurisdictional standards any more restrictive: “[T]he Board shall not declare to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.” 29 U.S.C. § 164(c)(1) (1970). In 1947, Congress authorized the Board, as a means of relieving some of its caseload, to agree to cede jurisdiction of Board cases to a state or territorial agency having regulations consistent with the NLRA. NLRA § 10(a), 29 U.S.C. § 160(a) (1970). However, the Board has not yet exercised this option.


33. 206 N.L.R.B. at 513.

34. 421 U.S. 773 (1975).

35. Id. at 783-85. In Goldfarb, the plaintiffs had sued the Fairfax County Bar Association alleging that the minimum fee schedule of the county bar and its enforcement by the state bar, as applied to fees for real estate transactions, constituted price fixing in violation of § 1 of the Sherman Act. The Court held that minimum fee schedules did restrain competition among attorneys and were therefore a violation of the Act. Id. at 781-83. See notes 72-74 infra and accompanying text for discussion of the applicability of the Sherman Act in determining the jurisdictional limit of the NLRA.

36. Id. at 783-84.

37. Id.
fore, since firms representing only local clients were found to affect commerce, it would follow logically that firms representing large national companies would affect commerce. As the Goldfarb Court noted, "in the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse . . . ."38

Despite this broad interpretation of the commerce clause as it applies to the practice of law, two arguments can be raised against the validity of the Board's jurisdiction: the learned profession exemption and the doctrine of state immunity. Although, as will be discussed below, both arguments arose in the context of the Sherman Act, courts have traditionally treated jurisdictional issues arising under both the Sherman Act and the NLRA in a similar manner.39 The notion of a learned profession exemption derives from dictum in a case which exempted major league baseball from the proscriptions of the Sherman Act.40 The Supreme Court declared that "a firm of lawyers sending out a member to argue a case . . . does not engage in [interstate] commerce because the lawyer . . . goes to another State."41 Whatever authority may have existed for a learned profession exemption, however, seems to have been overturned by the Goldfarb decision, which rejected the argument that the learned professions are not trade or commerce and found that the nature of an occupation would not provide automatic "sanctuary" from the Sherman Act.42 In addition, even if lawyers were exempt as members of a learned profession, the exemption would still not extend to paralegals and administrative and support personnel.

The state action immunity doctrine derives from Parker v. Brown.43 There,
the Supreme Court refused to enjoin, as violative of the Sherman Act, the enforcement of a state marketing program which established standard grades of raisins and fixed prices of those grades for all raisins grown in California. The Court found that the program did not "operate by force of individual agreement or combination ... [and] derived its authority and its efficacy from the legislative command of the state ..." Since the purpose of the Sherman Act was to prevent only private business combinations, and not to restrain state action, the state program was found not violative of the Sherman Act. If, then, the Sherman Act prohibits private activities in restraint of trade and does not reach state activities, employers can argue that because the legal profession is regulated by the courts of each state, the state action doctrine precludes NLRB jurisdiction over law firms.


44. 317 U.S. at 351-52. The Court reached this conclusion in spite of the fact that one-half of the world crop of raisins was produced in California and the fact that between 90 and 95% of the raisins grown there were shipped out of state. Id. at 345. It must be noted, however, that the state law in question was not inconsistent with federal law. Id. at 352-59. The Court stated that Congress could have prohibited a state from maintaining such a program because of its effect on interstate commerce. Id. at 350.

45. Id. at 350.


47. 317 U.S. at 352. "The state in adopting and enforcing the [standard grading and price-fixing] program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." Id.

48. Id. One authority has noted the impropriety of referring to the decision in Parker v. Brown as an immunity or exemption doctrine since the Court specifically found no congressional intent to extend the scope of the Sherman Act beyond private actions to "restrain a state or its officers or agents from activities directed by its legislature." Id. at 350-51. Thus, by statutory construction, the Court avoided confronting the constitutional question of state immunity or exemption. See Handler, The Current Attack on the Parker v. Brown State Action Doctrine, 76 Colum. L. Rev. 1, 9 (1976). See also E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52, 56 (1st Cir.), cert. denied, 385 U.S. 947 (1966) ("[W]e do not reach the question of immunity, since there was no attempt on the part of Congress to impose liability in the first place.").

49. In Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977), the Supreme Court held that a violation of the state bar disciplinary rule against lawyer advertising was not subject to attack under the Sherman Act since such disciplinary action was "compelled by the state acting as a sovereign." Id. at 2697-98 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975)). State action was present since the Court found that the "real party in interest" was the Arizona Supreme Court and not the state bar which acted "as the agent of the Court under its continuous supervision." Id. at 2697. (Despite its finding of immunity from the Sherman Act, the Court struck down the disciplinary rule on the ground that the advertisement in question fell within the protection of the first amendment. Id. at 2708-09.) Bates can be distinguished on the ground that no element of state compulsion is present in private law firm labor practices. See text accompanying notes 50-52 infra. See also National League of Cities v. Usery, 426 U.S. 833 (1976), in which the Court noted "that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress . . . ." Id. at 845.
The Goldfarb Court, however, rejected this argument with respect to the anticompetitive effects of the minimum fee schedules of the state bar association.\textsuperscript{50} The state bar might be a state agency for some limited purposes, and therefore anticompetitive conduct might be "prompted" by state action; but for the state action exemption to apply, "activities must be compelled by direction of the State acting as a sovereign."\textsuperscript{51} A state cannot immunize private anticompetitive activity merely by authorizing or approving such conduct.\textsuperscript{52} Just as the anticompetitive activities of the lawyers in the Goldfarb case were not compelled by direction of the state acting as a sovereign, neither are labor practices of law firms compelled by the state. Aside from the state's having set minimum licensing requirements for those persons who can be employed as attorneys, there is no element of state compulsion as to the hiring and firing of law firm employees, or to the terms and conditions of their employment.

III. SHOULD THE BOARD ASSERT JURISDICTION OVER LAW FIRMS AS A CLASS?

Even when the activities of a class of employers are found to affect commerce, the Board has the discretion to decline jurisdiction where the purposes of the NLRA would not be advanced substantially by an assertion of jurisdiction over those employers.\textsuperscript{53} The primary factor in such a discretionary decision by the Board usually is whether a labor dispute in the trade or industry in question would have a "sufficiently substantial" effect on commerce.\textsuperscript{54} A secondary factor, which has been raised in the particular context of law firm employees, is the issue of confidentiality.\textsuperscript{55}

A. Substantial Effect on Commerce

In two early decisions, the Board declined to assert jurisdiction over private law firms on the ground that there was a "minimal . . . degree of impact on interstate commerce of potential labor disputes between law firms and their employees . . .."\textsuperscript{56} In Bodle, Fogel, Julber, Reinhardt & Rothschild v. National Labor Relations Board, 206 N.L.R.B. 512, 514 (1973). See also Evans & Kunz, Ltd., 194 N.L.R.B. 1216, 1216 (1972).
schild, a Teamsters Union local sought to organize a labor law firm's clerical staff and petitioned the Board for a representation election. The employer firm earned annual gross revenues in excess of $50,000 for legal services performed for clients who met the Board's jurisdictional standards, and the total income of the firm was in excess of $500,000. The Board noted that it had discretion to decline jurisdiction under section 14(c)(1) and denied the union's request for an election, the major consideration being "whether the stoppage of business by reason of labor strife would tend substantially to affect commerce." Although it conceded that law firms do affect commerce, the Board concluded that the firm's connection with commerce was indirect and incidental, and that the attorney was merely a "helper" to his client, "who is the moving force in commerce." The Board also concluded that the advice and services rendered by lawyers were related to law rather than the facts of the case. The law firm involved consisted of four to six attorneys who practiced almost entirely within the state. Although the Board declined to assert jurisdiction on grounds of insubstantial impact on commerce, it did note that the firm furnished legal services valued in excess of $50,000 to clients who themselves met the jurisdictional standards of the Board and that therefore the Board could have asserted jurisdiction.

Only in the case of two classes of businesses, real estate brokers and racetracks, does the Board still decline jurisdiction. In Seattle Real Estate Bd., 130 N.L.R.B. 608 (1961), the Board found that the services performed by a real estate broker have only a remote relationship to interstate commerce, since a broker merely functions as one bringing together the buyer and seller of real property, an "essentially local" function. Id. at 610. The Board stated that the broker does not handle financing of the sale, which might involve out-of-state transactions and creates a more direct impact on interstate commerce. Id. On these grounds, the holding can be distinguished from Goldfarb and may survive that decision.

In Hialeah Race Course, Inc., 125 N.L.R.B. 388 (1959), the Board found an insubstantial effect on commerce by reason of the local nature of racetrack operations and the high degree of state control over such operations. Id. at 391. See also Centennial Turf Club, Inc., 192 N.L.R.B. 698 (1971); Walter A. Kelley, 139 N.L.R.B. 744, 747 (1962). Nevertheless, the Board recently asserted jurisdiction over another form of gambling operation in Volusia Jai Alai, Inc., 221 N.L.R.B. 1280 (1975). The Board distinguished the jai alai industry from the horseracing industry because of the differing nature of employment in the two industries. In the case of horseracing "the sporadic nature of the employment . . . minimizes the impact on commerce," whereas the jai alai industry was found to have a stable work force with stable hours and tenure. Id. at 1281-82. In another case, the Board asserted jurisdiction over gambling casinos. See El Dorado, Inc., 151 N.L.R.B. 579 (1965).

58. Id. at 512.
59. Id. at 513 (quoting Service Stores Corp., 62 N.L.R.B. 1161, 1162-63 (1945)).
60. See notes 30-33 supra and accompanying text.
61. 206 N.L.R.B. at 513. The Board reached this conclusion in spite of its recognition that law firms today "frequently assist large corporate entities . . . in their interstate commerce activity. Thus the guiding hand of the lawyer can, and in many instances does, assist in the negotiation and ultimate formulation of complex interstate agreements relating to trade and business." Id. The Board apparently did not consider the fact that, if a law firm were crippled by its own labor problems, an attorney would be unable to assist his client and would thereby prevent the client from conducting some of its interstate activities. See notes 34-38 supra and accompanying text.
than to commerce. Law firms were distinguished "from entities such as engineering firms, architectural firms, or advertising firms, whose services relate directly to commerce." The Board failed to explain the reasoning behind this distinction among professions, however. The distinction that the Bodle majority attempted to make between law firms, on the one hand, and engineering, architectural, and advertising firms on the other, apparently results from the Board's erroneous definition of commerce as manufacturing, construction, or sales activity. The dissent, however, pointed out that the Board has always taken jurisdiction over employers who furnish services to other enterprises engaged in interstate commerce even when the employer is furnishing intangible services to the interstate enterprises.

The Bodle decision divided the Board by a 3-2 vote, and the two dissenters vigorously criticized the majority ruling. Arguing that clients would not be able to engage in interstate commerce without the services of lawyers, the dissent stated:

Without the services of the legal profession, American business as we know it today could not function. The legal profession plays a vital role at all stages from the act of incorporation through the obtaining of licenses or certificates which might be needed, governmental approval of rates and/or routes, the issuance and sale of stocks and bonds, the negotiations and preparation of legal contracts necessary for the holding of property, and the purchase and sale of materials and products, to name but a few aspects . . . .

In addition, the recent increase in the quantity of corporate litigation and class action suits also points to the greater potential of lawyers to affect commerce.

The dissent's argument prevailed four years later in Foley, Hoag & Eliot, where the Board overruled Bodle and unanimously decided to assert jurisdiction over law firms as a class, subject to their meeting an appropriate jurisdictional standard.

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62. 206 N.L.R.B. at 513; see note 71 infra and accompanying text.
63. See Recent Decision, 7 Loy. U.L.A.L. Rev. 385, 389 n.32 (1974); note 71 infra and accompanying text.
64. 206 N.L.R.B. at 515 (Members Fanning and Penello dissenting).
65. See id. at 514 (Members Fanning and Penello dissenting).
66. Id. at 515 (Members Fanning and Penello dissenting).
The Board adopted the Bodle dissent's reasoning that law firms very directly and immediately affect commerce and noted that it had previously asserted jurisdiction over employers engaged in furnishing intangible services to enterprises engaged in interstate commerce. In reversing its opinion on the question of substantiality, the Board analyzed the applicability of Goldfarb, and found that the word "commerce" as used by the Supreme Court has held that the sale of personal services, as well as commodities, is trade. See, e.g., Radovich v. National Football League, 352 U.S. 445, 451-52 (1957) (football player); American Medical Ass'n v. United States, 317 U.S. 519, 528-29 (1943) (group health plan). In addition, the Board has asserted its jurisdiction over numerous employers furnishing intangible services to other employers engaged in interstate commerce. See Truman Schulp, 145 N.L.R.B. 768 (1963) (engineering and surveying services); Browne & Buford, 145 N.L.R.B. 191 (1947) (appraisal, investigation, and surveys of property services); Hazelton Laboratories, Inc., 136 N.L.R.B. 1609 (1962) (research and development services); DeLeuw, Cather & Co., 72 N.L.R.B. 765 (1963) (surveying, design, and inspection services); Electrical Testing Laboratories, Inc., 65 N.L.R.B. 1239 (1946) (testing of electrical products); Salmon & Cowin, Inc., 57 N.L.R.B. 845 (1944), aff'd, 148 F.2d 941 (5th Cir.), cert. denied, 326 U.S. 758 (1945) (appraising of mining property); W. J. Cochrane, 44 N.L.R.B. 617 (1942) (analyzing metal ores); U.S. Testing Co., 5 N.L.R.B. 696 (1938) (chemical and physical analysis of commodities). In addition, jurisdiction also has very recently been asserted over a nonprofit corporation engaged in the operation of a rehabilitation and training center for the mentally retarded, see Kent County Ass'n, 227 N.L.R.B. No. 222 (1977), and over a charitable corporation that provided health and welfare services, see Mon Valley United Health Servs., 227 N.L.R.B. No. 114 (1977).


71. Id. The Supreme Court has held that the sale of personal services, as well as commodities, is trade. See, e.g., Radovich v. National Football League, 352 U.S. 445, 451-52 (1957) (football player); American Medical Ass'n v. United States, 317 U.S. 519, 528-29 (1943) (group health plan). In addition, the Board has asserted its jurisdiction over numerous employers furnishing intangible services to other employers engaged in interstate commerce. See Truman Schulp, 145 N.L.R.B. 768 (1963) (engineering and surveying services); Browne & Buford, 145 N.L.R.B. 191 (1947) (appraisal, investigation, and surveys of property services); Hazelton Laboratories, Inc., 136 N.L.R.B. 1609 (1962) (research and development services); DeLeuw, Cather & Co., 72 N.L.R.B. 765 (1963) (surveying, design, and inspection services); Electrical Testing Laboratories, Inc., 65 N.L.R.B. 1239 (1946) (testing of electrical products); Salmon & Cowin, Inc., 57 N.L.R.B. 845 (1944), aff'd, 148 F.2d 941 (5th Cir.), cert. denied, 326 U.S. 758 (1945) (appraising of mining property); W. J. Cochrane, 44 N.L.R.B. 617 (1942) (analyzing metal ores); U.S. Testing Co., 5 N.L.R.B. 696 (1938) (chemical and physical analysis of commodities). In addition, jurisdiction also has very recently been asserted over a nonprofit corporation engaged in the operation of a rehabilitation and training center for the mentally retarded, see Kent County Ass'n, 227 N.L.R.B. No. 222 (1977), and over a charitable corporation that provided health and welfare services, see Mon Valley United Health Servs., 227 N.L.R.B. No. 114 (1977).

Court in determining jurisdiction in that case was "equally applicable" to determining jurisdiction under the NLRA. Since both Acts apply only to those activities that result in more than an incidental or indirect effect on interstate commerce, and the purpose of both Acts is to prevent obstructions of commerce, the Supreme Court's conclusion in *Goldfarb* that lawyers and law firms do exert a substantial impact on commerce was persuasive authority for the Board's change of position in *Foley*.

In effect, the Board in *Foley* did not reject the strict test for the Board's jurisdiction promulgated in *Bodle*. The *Bodle* Board was concerned with whether labor strife in a law firm would tend to substantially affect commerce. The *Foley* Board found such a "substantial" effect on interstate commerce on the basis of the Supreme Court's holding in *Goldfarb*. Since the Supreme Court had found that the activities of lawyers substantially affect interstate commerce, the Board concluded that the disruption of legal services caused by a labor dispute would also substantially affect interstate commerce.

In sum, the Board had ample grounds for its discretionary decision to assert jurisdiction over law firms as a class, because of their substantial impact on commerce. However, substantiality of effect on commerce is not the only discretionary factor the Board may consider in determining whether to exercise jurisdiction over a particular class. In cases involving law firms, issues of confidentiality and attorney-client privilege have been asserted as additional discretionary factors to be weighed.

### B. Confidentiality

The Board has frequently mentioned the problem of confidentiality in connection with unionization in law firms but has not adequately analyzed or resolved the issues involved. Much of the confusion surrounding this issue

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73. 229 N.L.R.B. No. 80, [1977-78] 5 Lab. L. Rep. (CCH) at 30,069. "In regulating labor relations under the Act, the Congress intended to exercise fully the same plenary and comprehensive commerce power which it had exercised in regulating commerce under the Sherman Act." *Id.* (quoting Van Camp Sea Food Co., 212 N.L.R.B. 537 (1974)).


75. 206 N.L.R.B. at 513.


77. *Id.; see* notes 30-33 *supra* and accompanying text. The *Foley* decision was bolstered by the Board's assertion of jurisdiction over proprietary hospitals in *Butte Medical Properties*, 168 N.L.R.B. 266 (1967). The Board's previous policy of declining jurisdiction was based on its finding of an insubstantial impact on commerce because of the local character of such hospitals. In rejecting this argument, the Board found that "operationally, [hospitals] are a multibillion dollar complex and, as such, compromise [sic] one of the largest industries in the United States. . . . [They] influence and affect commerce beyond their immediate individual confines." *Id.* at 267.

lies in the failure to distinguish between the broad issue of confidentiality arising from conflicts of interest and breach of the attorney-client confidential relationship, and the Board's more narrow concept of "confidential employee." The mere fact that an employee has access to confidential information does not render him a confidential employee within the meaning of Board precedent. Nevertheless, the law firms argue that unionization will create such conflicts of interest for the employees that serious breaches both of the evidentiary attorney-client privilege and of the broader ethical duty of the attorney to protect the confidences and secrets of his client are likely to result, and therefore, that all law firm employees should be deemed confidential employees.

1. The Law Firms' Argument of Confidentiality

The confidentiality problems envisioned by the employer law firms were carefully delineated in the briefs filed by two law firms involved in labor


80. See notes 86-92 infra and accompanying text.


In order to promote the administration of justice, it has long been recognized that it is necessary to provide clients with the opportunity to disclose information and problems confidentially to their attorneys. See Schwimmer v. United States, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956); 8 J. Wigmore, Evidence §§ 2294, 2306, 2310, 2317 (McNaughton rev. ed. 1961). This confidential relationship between attorney and client is protected by the attorney-client evidentiary privilege. Id. § 2292, at 554. Observance of this privilege is required by the ABA Code of Professional Responsibility EC 4-1, EC 4-2. The privilege also applies to the employees of the attorney. The courts have recognized that the complexities of modern practice create a situation in which few lawyers can function without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and various other aides. See United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961). See also 8 J. Wigmore, supra § 2301, at 583. In addition, the Code of Professional Responsibility imposes an even wider obligation to maintain confidentiality by providing for an affirmative duty on the part of the lawyer to exercise reasonable diligence to prevent disclosure by his employees. ABA Code of Professional Responsibility DR 4-101(D). Note that paralegal associations are also proposing codes of ethics for their profession. See American Paralegal Association National Steering Committee, Code of Ethics for Legal Assistants; National Association of Legal Assistants, Inc., Code of Ethics and Professional Responsibility, reprinted in N. Shayne, The Paralegal Profession apps. II & III (1977).

82. ABA Code of Professional Responsibility DR 4-101(B).
organizational activity. Examples of possible breaches of attorney-client relationship arising from the division of employee loyalty between the union and the law firm included the following situations: (1) An employee covered by a collective bargaining agreement containing a "just cause" and grievance arbitration provision is discharged for disclosing a client's confidential or secret information. If the employee challenged his discharge, the employer would have to disclose the confidential or secret information to defend his claim of "just cause" for discharging the employee. Doing so would be a breach of his duty to his client. (2) An employee handles certain documents relating to tender offers or corporate acquisitions. He then divulges the information to his labor organization, which uses the information with regard to investments for its pension plan.

The above examples assume that a real conflict of interest would be caused by the division of employee loyalties between his labor representative and his employer. Many different types of employees, however, in a wide variety of occupations, have already been organized under the NLRA, despite the fact that they have access to confidential information concerning clients and other third parties. Employees with confidential information about their employer's production, sales, or trade secrets have been held to be within the Board's jurisdiction.


84. Foley Employer's Brief, supra note 79, at 18; see Sinclair Refining Co. v. NLRB, 306 F.2d 569, 571 (5th Cir. 1962) (the employer is under a duty to furnish the union with requested information which is "necessary to enable the parties to administer the contact and resolve grievances or disputes"). A related problem is the situation in which an employer claims financial inability to meet a wage demand during the negotiation of a collective bargaining agreement. He must substantiate that claim upon the request of a bargaining representative. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956). Such substantiation might involve disclosure of a firm's income and costs, including specific information about the fees a client pays the firm, information the client might deem confidential. Foley Employer's Brief, supra note 79, at 19. Note, however, that the Truitt decision does not dictate that employees are always entitled to having evidence substantiated. The facts of each case will determine whether, and to what extent, the employer must divulge proof of inability to meet union demands. 351 U.S. at 153-54.

85. Foley Employer's Brief, supra note 79, at 18. The Securities and Exchange Commission recently noted: "It has come to the attention of the Commission that in certain instances law firm personnel may have abused their position of trust and confidence . . . by revealing such information to others who have engaged in securities transactions on the basis of such information. . . . Law firms . . . have an affirmative obligation to safeguard such information." SEC Exchange Act Release No. 13437, [1977-78 Transfer Binder] Fed. Sec. L. Rep. (CCH) 581,116 (Apr. 8, 1977). See also Bernstein, supra note 67, at 112.

been included, as have employees of a credit bureau who had access to confidential data concerning the Bureau’s customers. In another case, analogous to the law firm situation, the Board approved a bargaining unit even though the employer association’s business included developing and implementing labor relations policies for its member employers. In that case, the Board specifically rejected the employer’s argument that its workers were confidential employees. Most importantly, the Board has previously directed elections for units composed of lawyers. Moreover, the Board has continually affirmed the principle that union membership may not be viewed as a threat to the loyalty of an employee to his employer:

The law has clearly rejected the notion that membership in a labor organization is in itself incompatible with the obligations of fidelity owed to an employer by its employees. To the contrary, employees placed in positions of trust by employers engaged in a wide variety of financial activities have exercised their fundamental rights guaranteed by the Act without raising the spectre of divided loyalty or compromised trust.

87. Northwestern Bell Tel. Co., 79 N.L.R.B. 549, 554 (1948). The employees in this case often received confidential information concerning both the customer’s business and labor relations. See also Remington Rand Inc., 71 N.L.R.B. 626, 627-28 (1946) (employees who have access to confidential information from the employer’s customers are neither confidential nor managerial employees).

88. Credit Bureau, Inc., 73 N.L.R.B. 410, 412-13 (1947). The employees assisted in the preparation of credit, personnel, and other reports for the clients of the employer. The Board rejected the employer’s claim of confidentiality, noting that the employees were all warned against divulging information on penalty of discharge, and also rejected the employer’s argument that the sources of the information required to prepare the reports would be reluctant to disclose necessary facts to a member of a labor organization. Employees of Dun & Bradstreet have twice been held entitled to the protections of the NLRA despite the fact that they have access to extremely sensitive and privileged information about most of the nation’s financial and corporate institutions. See Dun & Bradstreet, Inc., 194 N.L.R.B. 9 (1971); Dun & Bradstreet, Inc., 80 N.L.R.B. 56, 58-59 (1948). In the 1971 case, the employer contended that “the unauthorized acquisition of confidential credit reports by unions and others has in the past caused some sources to withhold information previously furnished.” 194 N.L.R.B. at 10. But the Board found that the employer had failed to cite a case in which one employee had compromised a report. Id. Other employees covered by the NLRA include: accountants and auditors, Armstrong Rubber Co., 144 N.L.R.B. 1115 (1965); brokerage house employees, Goodbody & Co., 182 N.L.R.B. 81 (1970); insurance agents and adjusters, Fireman’s Fund Ins. Co., 173 N.L.R.B. 982 (1968); messengers who carry confidential documents, Mississippi Prods., Inc., 78 N.L.R.B. 873 (1948); and health care employees subject to the doctor-patient privilege, Eljer Co., 108 N.L.R.B. 1417 (1954), even though all have access to confidential information relating to their employer’s clients or customers.


90. Id. at 780-81.

91. Air Line Pilots Ass’n, Int’l, 97 N.L.R.B. 929, 930-31 (1951) (attorneys employed by a labor organization); Lumbermen’s Mutual Cas. Co., 75 N.L.R.B. 1132 (1948) (attorneys employed by an insurance company). In Lumbermen’s the Board rejected the employer’s argument that an attorney-client relationship existed between it and its employees that would preclude the existence of an employer-employee relationship. 75 N.L.R.B. at 1137.

Consequently, it seems that the Board will reject the law firms' broad argument that the inherent nature of the attorney-client relationship gives rise to serious conflict of interest problems which justify a general exclusion of law firm employees on confidentiality grounds.

2. The Board's Definition of "Confidential Employee"

The concept of confidential employee raises a more substantial ground upon which the Board might decline jurisdiction over some law firms. Although there is no statutory exclusion of "confidential employees" from the coverage of the NLRA, the Board has held, nevertheless, that employees who in the regular course of their duties have access to confidential data bearing directly upon the employer's labor relations policies should be excluded. The classic example of a confidential employee is the secretary to the company's vice president in charge of labor relations. The rationale for this exclusion is that access to a company's confidential labor relations information would place such an employee in a potential conflict of interest situation. In order to prevent the definition of confidential employee from being too inclusive, the Board decided to "limit the term 'confidential' so as 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." The purpose of this limitation was to prevent many employees from needlessly being deprived of their rights under the NLRA. As the Board stated in Pacific Maritime Association: "we find that only employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management labor relations policies affecting directly the Employer's own employees are confidential employees . . ." According to this definition, law firm employees could not be held to be confidential employees unless they assisted in the determination of their employer law firm's policies.

3. The Board's Analysis in Private Law Firm Cases

In none of the three private law firm cases decided thus far has the Board adequately distinguished the two separate aspects of the confidentiality prob-

93. NLRB v. Quaker City Life Ins. Co., 319 F.2d 690, 694 (4th Cir. 1963). The Supreme Court, in NLRB v. Bell Aerospace Co., 416 U.S. 267, 283-84 n.12 (1974), noted that Congress intended to exclude confidential employees from the coverage of the NLRA although that intention was not reflected in the express statutory language.
95. Westinghouse Elec. Corp. v. NLRB, 398 F.2d 669, 670 (6th Cir. 1969) (citing Retail Clerks Int'l Ass'n v. NLRB, 366 F.2d 642, 645 n.7 (D.C. Cir. 1966), cert. denied, 386 U.S. 1017 (1967)).
97. Thus, the Board has ruled, for example, that an employee may not be excluded because he has access to confidential information concerning the employer's internal business operations. Swift & Co., 129 N.L.R.B. 1391, modified on other grounds, 131 N.L.R.B. 1143 (1961); Dohrmann Commercial Co., 127 N.L.R.B. 205 (1960).
99. Id. at 780-81.
lem: the Board's narrow definition of a "confidential employee," and the broader issues raised by the law firms. It is clear that the Board will exclude only "confidential employees," but it appears possible that future decisions of the Board may broaden that category somewhat to include certain law firm employees.

Dictum in Bodle provides a good example of the Board members' confusion on the confidentiality issue. The majority seemed to fear that conflicts of interest which could lead to a disruption of the "peculiarly delicate and confidential" attorney-client relationship were likely to arise if the law firm's employees were represented by organizations which might have interests contrary to the interests of the law firm's clients. The Board, therefore, stated:

For reasons paralleling those which have led us to exclude confidential employees from bargaining units generally, we would hesitate to certify that a unit of law firm employees is appropriate for collective bargaining when such a unit must of necessity include employees with access to information coming within the peculiarly confidential relationship between lawyer and client.

The majority in Bodle, therefore, seemed to be accepting the broader confidentiality argument of the law firms. They would not exclude specific employees under the Board's confidential employee test but rather would expand the exclusionary category to embrace all law firm employees because of their "access to information coming within the peculiarly confidential relationship between lawyer and client." The dissent, however, specifically rejected the contention that employees in a law firm are in any way analogous to confidential employees, noting that the Board had already rejected in another case the argument that the confidential relationship between the attorney and client dictates precluding attorneys from the protection of the NLRA. Three members of the Board, then, would have excluded law firm employees as some sort of confidential employee, while two members would not.

100. 206 N.L.R.B. 512. In Evans & Kunz, Ltd., 194 N.L.R.B. 1216 (1972), the first case in which the Board considered the question of jurisdiction over law firms, the Trial Examiner noted that one reason for declining jurisdiction over law firms was that the exercise of jurisdiction could lead to problems with the "well-established absolute privilege covering attorney-client communications." Id. at 1218. He conceded, nevertheless, that legal secretaries are not "confidential employees" as defined by the Board. Id. The Board, however, did not mention the confidentiality issue in its decision. Note, however, that the discussions of confidentiality in both cases were dicta since the Board declined jurisdiction in both Evans and Bodle on other grounds. See notes 56-61 supra and accompanying text.


102. Id. at 514. The law firm involved in Bodle, for example, represented one union that competed with the labor organization that was seeking to represent the law firm's employees.

103. Id. (emphasis supplied).

104. Id.

105. Id. at 516 (Members Fanning and Penello dissenting). The case referred to was Lumbermen's Mut. Cas. Co., 75 N.L.R.B. 1132 (1948), in which the Board had found that attorneys working for an insurance company were not confidential employees because they were not directly or indirectly concerned with the employer's labor relations policies. See note 91 supra and accompanying text.
In Foley the Board made a partially successful attempt to resolve the issue.\textsuperscript{106} The Board still did not clearly distinguish between the two aspects of the confidentiality problem, but did suggest a case-by-case approach for dealing with the issue.\textsuperscript{107} Although a unanimous opinion, the members of the Board remained divided in their concern about the confidentiality problem. Three members clearly stated that they would not treat law firm employees differently from any other group of employees.\textsuperscript{108} A majority of the Board, therefore, would continue to exclude only confidential employees as defined by the Board. The remaining two members, however, regarded the position of employees in labor law firms to be analogous to confidential employees. They reasoned that law firm attorneys who participate in the client's labor relations policies perform the function of labor relations officials and can therefore be considered confidential employees.\textsuperscript{109}

Because the Board stated that it would deal with the problem of confidentiality on a case-by-case basis in the context of determining an appropriate bargaining unit, Members Murphy and Walther concurred in the decision to assert jurisdiction over the employees of law firms.\textsuperscript{110} It seems, then, that the Board has rejected the broader concept of confidentiality which was suggested by dictum in Bodle, and has reverted to a more traditional meaning of confidential employee as one who has access to labor relations information. In addition, however, the Board has indicated that the concept may be broadened to include not only employees assisting in the formulation of the direct employer's labor relations policies but also those assisting in the formulation of the client's labor relations policies.\textsuperscript{111} The Board's continued reference to the broader problem of confidentiality indicates that there is still sufficient concern with this problem, in the context of private law firms, to lead the Board to justify some special consideration for law firm employees.\textsuperscript{112}

Since the Board has discretion to "place appropriate limitations on the choice of bargaining representatives should it find that public or statutory policy so dictate,"\textsuperscript{113} the Board can determine on a case-by-case basis whether or not the choice of a particular union will create potentially serious conflict of interest problems. That approach led to the rejection of the confidentiality argument in the Hughes Hubbard & Reed opinion by a Regional Director.\textsuperscript{114} She found no proof that "any of the Employer's attorneys participate in the formulation and effectuation of their clients' labor relations policies so as

\begin{itemize}
  \item \textsuperscript{106} See 229 N.L.R.B. No. 80, [1977-78] 5 Lab. L. Rep. (CCH) at 30,069-70 n.12.
  \item \textsuperscript{107} See id.
  \item \textsuperscript{108} Id. at 30,069 n.12 (Chairman Fanning and Members Jenkins and Penello).
  \item \textsuperscript{109} Id. at 30,069-70 n.12.
  \item \textsuperscript{110} Id.
  \item \textsuperscript{111} Id.
  \item \textsuperscript{112} Although the three members stated that they would not treat law firm employees differently, they seemed to concur in the case-by-case approach. Id.
  \item \textsuperscript{113} NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416, 422 (1947).
\end{itemize}
to make them 'confidential employees' within the meaning of Board precedent." This conclusion was reached despite the fact that the union seeking to organize Hughes Hubbard & Reed's employees was an affiliate of the International Longshoreman's Association and that one of the employer's clients had a bargaining relationship with the Longshoreman's Association. The Regional Director noted that the firm's only labor relations work consisted of advising clients with respect to employee benefit programs. Thus, the Board in Foley and the Regional Director in Hughes Hubbard & Reed have clearly rejected the argument that possible breaches of attorney-client privilege or conflict of interest should lead to a general exclusion of all law firm employees. It seems possible, however, that a future decision might exclude all attorneys, or even all employees, of a law firm with a substantial labor practice. Members Murphy and Walther have accepted the fiction that an attorney is actually employed by the client and therefore becomes a "confidential employee" of the client when he engages in labor relations work for the client. Members Murphy and Walther have further argued that when administrative and paralegal assistants to the attorneys assist them in labor relations matters, "they—no less than aides of labor relations officials—are arguably 'confidential employees.'" This analysis

115. Id., slip op. at 2 (footnote omitted).
116. Id., slip op. at 1 n.2.
117. Id., slip op. at 1-2. In a footnote, however, the Regional Director stated that because she had already dismissed the petition, it was unnecessary to consider whether any of the employer's legal staff did participate in client labor relations policies, and whether their secretaries assisted them so as to be confidential employees within the meaning of Board precedent. Id., slip op. at 6 n.10. It is unclear why she stated this, in light of her statement in the text of her opinion that she failed to find any proof that the firm's employees participated in the formulation of client's labor relations policies. See id., slip op. at 1-2. Perhaps she was merely attempting to avoid providing any definitive answers to the confidentiality problem.


119. In Hughes Hubbard & Reed, the Regional Director mentioned the concern over the confidential relationship between attorney and client, but directed her attention solely to the practice of labor law, citing the note in Wayne County Neighborhood Legal Servs., Inc., 229 N.L.R.B. No. 171, [1977-78] 5 Lab. L. Rep. ¶ 18,229, at 30,264 n.7 (May 27, 1977), to the effect that the attorneys in that case did not formulate or effectuate the labor relations policies of their clients. Id., slip op. at 2 & n.4.

Since 10 to 15% of Foley, Hoag & Eliot's practice consisted of labor relations, it appears that the Board will be concerned only if more than that percentage of the practice is labor relations. See Request for Review of the Decision of the Acting Regional Director, Exhibit A, at 2, Foley, Hoag & Eliot, 229 N.L.R.B. No. 80, [1977-78] 5 Lab. L. Rep. (CCH) ¶ 18,116 (May 4, 1977).

120. Note, however, that Members Murphy and Walther are most concerned with this problem. Chairman Fanning and Members Jenkins and Penello seem to regard the problem as too speculative and would not treat law firm employees differently from any other group of employees. Although the private law firm decisions so far have not involved attorneys, perhaps some of the broader notions of breach of attorney-client privilege will influence them at least to place attorneys in labor law firms in the confidential employee category.

121. 229 N.L.R.B. No. 80, [1977-78] 5 Lab. L. Rep. (CCH) ¶ 18,116, at 30,069 n.12. It is
would result in an expansion of the Board's definition of confidential employees: the determinative facts would not be simply the direct employer's labor relations practices, but would include those of the clients. Nevertheless, it is apparent that the Board will not issue a general exclusion of law firm employees based upon the "peculiarly confidential nature" of the attorney-client relationship. Instead, the Board will exclude only those employees who can arguably be classified as confidential employees within the established Board meaning of that term.

IV. THE DETERMINATION OF AN APPROPRIATE BARGAINING UNIT

As an incident to conducting a representation election, the Board must decide which group of jobs or job classifications will comprise an appropriate collective bargaining unit. Typically, the employer will favor large units because the union will find organizing a greater number of employees in a greater number of job classifications more difficult, thus decreasing the labor organization's chances of demonstrating a sufficient showing of interest to the Board. The Board has the option of selecting any one of several bargaining units that might be appropriate because the statute requires only that the representative selected be chosen "by the majority of the employees in a unit appropriate for [collective bargaining] purposes." In making its determina-
tion the Board seeks to group employees united by a "community of interest." 125

Within a law firm there are three different types of employees that the Board must consider in determining an appropriate bargaining unit: associate attorneys, paralegals, and administrative and support employees. Associate attorneys, as professional employees, may not be included in the unit by the Board without the consent of a majority of attorneys. 126 It is not clear whether paralegals are professional or nonprofessional employees, 127 and no Board or court decisions have yet determined their status. Hence, paralegals may or may not be included in a bargaining unit with the remaining administrative and support employees of a firm.

The Regional Director of Region 2 has held that the administrative and support personnel constitute a typical office clerical group for the purpose of determination of an appropriate bargaining unit. 128 Applying the concept of a

required to choose the most appropriate unit, but may choose a unit within range of several appropriate bargaining units in a particular situation. Wil-Kil Pest Control Co. v. NLRB, 440 F.2d 371, 375 (7th Cir. 1971). See also Wheeler-Van Label Co. v. NLRB, 408 F.2d 613 (2d Cir.), cert. denied, 396 U.S. 834 (1969); NLRB v. Davis Cafeteria, Inc., 396 F.2d 18 (5th Cir. 1968); Overnite Transp. Co. v. NLRB, 327 F.2d 36 (4th Cir. 1963). The NLRA, however, does not provide the Board with explicit guidelines to make a determination. Section 9(b) merely states that the determination assure the "employees the fullest freedom in exercising the rights guaranteed by this subchapter." 29 U.S.C. § 159(b) (1970). Beyond that general mandate, three statutory limitations are provided. Section 9(b)(1) prohibits the inclusion of professional employees in a unit with nonprofessional employees unless a majority of the professionals vote for inclusion. 29 U.S.C. § 159(b)(1). Section 9(b)(2) limits Board discretion with respect to craft units. 29 U.S.C. § 159(b)(2). Section 9(b)(3) prohibits the inclusion of guards in a unit with other employees of that employer. 29 U.S.C. § 159(b)(3).

125. See NLRB v. Detective Intelligence Serv., Inc., 448 F.2d 1022, 1025 (9th Cir. 1971) ("community of interest of employees is a significant doctrine when the Board is drawing an appropriate unit"); Smith Steel Workers v. A.O. Smith Corp., 420 F.2d 1, 11 (7th Cir. 1969) ("general community of interest of the employees carries substantial weight in defining the appropriate unit"); Uyeda v. Brooks, 365 F.2d 326, 329 (6th Cir. 1966) ("touchstone of an appropriate bargaining unit is the finding that all of its members have a common interest in the terms and conditions of employment").

One commentator has noted that the board considers several factors in determining which of the employees are united by a "community of interest," including: (1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization." R. Gorman, supra note 31, at 69; see Collins Radio Co., 210 N.L.R.B. 3 (1974); Colorado Nat'l Bank, 204 N.L.R.B. 243 (1973); United States Steel Corp., 192 N.L.R.B. 58 (1971); Mallinckrodt Chem. Works, 162 N.L.R.B. 387 (1966); Potter Aeronautical Corp., 155 N.L.R.B. 1077 (1965); Continental Baking Co., 99 N.L.R.B. 777 (1952).

126. See notes 135-37 infra and accompanying text.

127. See notes 143-48 infra and accompanying text.

128. Hughes Hubbard & Reed, No. 2-RC-17725 (Region 2 Sept. 30, 1977), review denied,
"community of interest," the Board has consistently held that fragmenting office clerical groups results in inappropriate bargaining units.\textsuperscript{129} For example, in \textit{National Broadcasting Company},\textsuperscript{130} the Board found that a bargaining unit of messengers separate from other clerical employees was inappropriate because of the high degree of job integration and the similarity of working hours, conditions, and fringe benefits shared by messengers and all other clerical employees.\textsuperscript{131} The messengers, the Board reasoned, did not perform unique functions with characteristics "sufficient to set them apart in the face of evidence as to the community of interest they share with other unrepre-
sented employees."\textsuperscript{132} In an earlier case, in which the petitioning union sought to represent a unit comprised solely of the employees of the accounting department, the Board stated that "this department constitutes only a seg-
ment of the office force and may not therefore constitute a separate unit."\textsuperscript{133} Apparently, the Board will find that all administrative and support personnel have a community of interest.

A. Associate Attorneys

Although the NLRA is now considered to be applicable to lawyers as employees,\textsuperscript{134} lawyers must be treated according to a separate set of rules established for professional employees.\textsuperscript{135} Because professional employees...
specialized intellectual instruction and study . . . and (ii) is performing related work under the supervision of a professional person . . . .” Id. In the House Conference Report, the Committee on Labor and Public Welfare referred to the definition of professional employees and noted that “(t)his definition in general covers such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants.” H.R. Cong. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947).


137. Labor Management Relations Act, ch. 20, § 101, 61 Stat. 136, 143 (1947) (codified at 29 U.S.C. § 159(b)(1) (1970)). The inclusion of the two sections dealing with professionals was in response to the finding by Congress that the Board was lumping professionals (including lawyers) working for corporations into general units of production and maintenance or office and clerical employees. See S. Rep. No. 105, 80th Cong., 1st Sess. 11 (1947).

138. Spokespersons for the two unions most active in organizing law firm employees stated that they had not been approached by any associates about organizing at their firms. Hochberger, supra note 3, at 2, col. 4. See also Levin, supra note 3, at 4, col. 2. Associates may conclude that the benefits of unionization might be outweighed by a dampening of their long-term pursuit of a partnership in the firm. They may continue to believe that they have more to gain from individual bargaining than from collective bargaining.

The prevalent antilabor view that unionism results in the elimination of individual merit awards is indicated by the perception of professionals that the few who may desire unions are “either mediocrities in need of such group support, or masochists.” Labor Relations, supra note 1, at 14. Nevertheless, increasing numbers of professional employees, including professional athletes, nurses, and doctors, are finding the option of organization more attractive. Golodner, Professionals Go Union, AFL-CIO American Federationist, Oct. 1973, at 8. Lawyers and accountants in corporations are also opting for union representation as a means of improving salaries, fringe benefits, and working conditions. Doctors, Nurses, Teachers—Why More Are Joining Unions, U.S. News & World Rep., Nov. 10, 1975, at 61. See also Kassalow, supra note 2, at 51.

139. The Board’s first case concerning unionization of attorneys was Lumbermen’s Mut. Cas. Co., 75 N.L.R.B. 1132 (1948). An unaffiliated labor organization sought to represent all the investigators, adjusters, and attorneys employed in a branch office of the employer. Arguing that attorneys are not employees within the meaning of the NLRA, the employer contended that attorneys could not appropriately be included in any bargaining unit. The Board found that the professional status of attorneys was not sufficient to deprive them of the benefits of the NLRA. Citing the Senate and House Conference Reports, supra notes 135-36, the Board reasoned that the addition of the definition of the term "professional employee" in § 2(2) of the NLRA and the provision for a separate vote by such professional employees on the question of whether they desire to be included in a unit containing nonprofessional employees manifested the intention of Congress that attorneys be included in the definition of professional employees, and that professional employees, as a class, should not be deprived of their right to be represented by a
Briot, the Board deemed appropriate a legal services bargaining unit that included staff attorneys (excluding supervising attorneys), law school graduates who had not yet passed the bar, paralegals, secretaries, law students, and investigators. Thus, the Board appears to have clearly rejected any general policy of excluding private law firm staff attorneys from bargaining units.

B. Paralegals

It is more likely that organizational efforts will be directed at paralegals. Whether or not paralegals employed by law firms will desire to unionize and,

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140. Wayne County Neighborhood Legal Servs., Inc., 229 N.L.R.B. No. 171, [1977-78] 5 Lab. L. Rep. (CCH) ¶ 18,229 at 30,262 (May 27, 1977) (The question of a separate unit for the attorneys did not arise. Apparently, the labor organization involved was an in-house group consisting of all of the employees.). The Board asserted that the position of the legal services organization involved in this case was analogous to that of a private law firm. Id. The Association of Legal Aid Attorneys is the recognized bargaining representative for the Legal Aid Society and the Legal Services Staff Association represents attorneys and other employees of the Community Action for Legal Services.

141. See notes 118-21 supra and accompanying text for types of confidentiality situations that may dictate a broad decision to exclude certain attorneys from a bargaining unit.

142. The "increasingly prevailing term" "paralegal" will be employed throughout rather than "legal assistant" or "legal paraprofessional." N. Shayne, The Paralegal Profession 2 (1977). Although laymen have long been employed by lawyers for certain legal tasks, the emergence of paralegals as a distinct type of employee is relatively new. The distinction between a legal secretary and a paralegal is based on the expertise in legal concepts, procedures, and research that a paralegal acquires as a result of a paralegal training program. Id. at 86, 157. Several commentators have suggested that one way to improve the delivery of legal services is to expand the use of paralegals within the legal profession. See generally Brickman, Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Para-
if so, whether or not the Board will treat them as professionals are both open questions. Because the concept of paralegal employees is relatively new, it is difficult to generalize about the paralegals' position within the legal structure, and specifically within a law firm. There is little doubt that paralegals desire to be treated as professionals, and at least one authority regards paralegals as professionals. However, the NLRB definition of the term professional employee would seem to exclude these employees. Paralegals are employed to free the attorney from "tedious and routine" work that is probably not of the "intellectual and varied character" contemplated by the NLRA. In addition, the feasibility of using paralegals at the present time is based on the premise that legal problems can be broken down into small tasks that can be handled without "the consistent exercise of discretion and judgment." profession, 71 Colum. L. Rev. 1153 (1971); see also ABA, Report to the House of Delegates of the Special Committee on Legal Assistants (Feb. 1972); Hughes, Employment of Paralegals in Trial Preparation, 11 Forum 1142, 1143 (1976).

In 1968, the ABA's House of Delegates adopted the Special Committee on the Availability of Legal Services' Report, which recommended that many tasks now performed by lawyers could be performed by trained paralegals and that the legal profession should encourage the training and employment of such paralegals. Proceedings of the 1968 Annual Meeting of the House of Delegates, 93 Ann. Rep. of the A.B.A. 344, 353 (1968). Their use would help insure that legal services would be more available to the public since "freeing a lawyer from tedious and routine detail" would conserve the lawyer's time and energy for "truly legal problems." Report of the Special Committee on Availability of Legal Services, No. 3, 93 Ann. Rep. of the ABA 529 (1968).

143. In a recent survey conducted for the New York Law Journal, the authors reported that 52% of the respondents felt that they were treated as professionals all the time, 24% part of the time, and 23% never. In spite of this, 87% stated that their work product was expected to be on a professional level all of the time. Guinan & Ferguson, Paralegals Define Their Work, Skills, Status in Profession, 177 N.Y.L.J., May 10, 1977, at 4, col. 1.

144. N. Shayne, The Paralegal Profession (1977). At the present time, there are several approaches to training paralegals. See generally id. at 85. Certification of paralegals, establishing high standards of proficiency and competence, could contribute to the professional status of paralegals. In 1975 the Oregon State Bar Association first administered a certification examination for paralegals. To become certified, a paralegal must have completed 90 hours of credit including 15 hours in 5 basic general areas relating to legal research and 45 in general college courses. In addition, two years experience in a law office is required. Id. at 86-87.

145. See note 135 supra and accompanying text.

146. Id.

147. NLRA § 2(12), 29 U.S.C. § 152(12) (1970); see Hughes, Employment of Paralegals in Trial Preparation, 11 Forum 1142, 1142-43 (1976) (quoting ABA, Report to the House of Delegates of the Special Committee on Legal Assistants (Feb. 1977)). Language used in a somewhat analogous case is perhaps revealing on this question. In Westinghouse Elec. Corp. v. NLRB, 440 F.2d 7 (2d Cir.), cert. denied, 404 U.S. 853 (1971), the petitioning union sought to include "Systems Analysts," a newly created job classification, in an existing bargaining unit consisting of all office, clerical, and technical employees. The company maintained that the analysts were professional employees who could not be placed in the unit without a special election provided for by NLRA § 9(b)(1), 29 U.S.C. § 159(b)(1) (1970). In finding that these employees were not professional employees within the meaning of the NLRA, the court stated: "[A]lthough [they] do exercise some independence of judgment, their function is much narrower than that of professional employees . . . and their range of discretion is not so broad . . . . The
While paralegals may not meet NLRA standards for treatment as professionals, their desire to be treated as professionals is reflected in their desire to be assigned more challenging and less routine work. The dissatisfaction of paralegals with work assignments, coupled with the lack of adequate feedback within the law firm could serve as an impetus to organization. On the other hand, the president of the New York City Paralegal Association has stated that the effect of unionizing "would be to bring down in some way the stature we would like to have. As professionals, unionizing would not be appropriate. There's no point in antagonizing those we must work hand in glove with."\textsuperscript{149}

If paralegals do desire to organize and are not considered to be professionals, for the purpose of allowing them to exercise the professional employees' right to a separate vote, the Board may still find that paralegals do not have a "community of interest" with the clerical workers and accord paralegals a separate bargaining unit.\textsuperscript{150}

C. Administrative and Support Employees

The group of employees most susceptible to organization will be the administrative and support personnel of medium and large firms with fifty or more employees.\textsuperscript{151} In \textit{Hughes Hubbard & Reed}, the Regional Director for

\textsuperscript{148}A large number of the paralegals surveyed felt that they received boring, repetitive, and unchallenging assignments. See Guinan, supra note 143 at 4, col. 4.

\textsuperscript{149}Fitzhugh, supra note 13, at 3, col. 1. The organizer for District 65 also expressed uncertainty as to whether paralegals would want to be included in a bargaining unit. Hochberger, supra note 3 at 2, col. 4. It should be noted, however, that Local 6 of the International Federation of Health Professionals is including paralegals in its petition. See 178 N.Y.L.J., Nov. 14, 1977, at 1, col. 5; 178 N.Y.L.J., Nov. 10, 1977, at 1, col. 4.

\textsuperscript{150}Such a finding could be predicated on the usually greater educational levels of paralegals. See N. Shayne, The Paralegal Profession 85-86 (1977); Guinan & Ferguson, supra note 143, at 4, col. 1.

\textsuperscript{151}See Levin, supra note 3, at 4, col. 3. Although office workers have been relatively unreceptive to unionization, compared to blue-collar workers, several factors point to the probability of increasing organization. Traditional barriers to unionization of office workers include the fact that they have historically viewed themselves as superior to blue-collar workers and thus considered that unionization would decrease their occupational status. See generally Labor Relations, supra note 1, at 13; Kassalow, supra note 2, at 46. In addition, some white-collar workers have readily identified with management because they perceive some opportunity to advance into managerial ranks and are therefore more reluctant to support unionization, which they perceive as a significant constraint on employer freedom of action. Labor Relations, supra note 1, at 13-14; Kassalow, supra note 2, at 46. The above factors would apply more to paralegals, see notes 142-48 supra and accompanying text, and to personal secretaries employed by partners than to other clerical employees, who perform more standard-
Region 2 has already ruled on the appropriateness of one clerical bargaining unit.\textsuperscript{152} Hughes Hubbard & Reed was composed of about eighty attorneys (thirty-one partners), fifteen paralegals, three accountants, and 150 administrative and support employees.\textsuperscript{153} The union\textsuperscript{154} sought to represent the firm’s two xerographic copying machine operators, six pages, and nineteen messengers supervised directly by the office services manager.\textsuperscript{155} The Regional Director’s review of the record revealed that the employees the union sought to represent worked at a variety of tasks, performing duties in cooperation with the other nonlegal employees.\textsuperscript{156} Although the firm’s employees were assigned to distinct job classifications for administrative purposes, the operation of the firm entailed a “continuous flow of work with substantial interdependency of functions” and similarity in duties.\textsuperscript{157} In addition, the adminis-

ized and menial functions. As the gap between the income of blue-collar and white-collar workers continues to widen, “appreciation of the fact that snobbishness neither purchases groceries nor pays the rent” seems to account for the willingness of some white-collar employees, including teachers, to consider organizing. Labor Relations, supra note 1, at 16. Perhaps more important, the working conditions of these employees are changing in a direction that creates dissatisfaction. “More and more white-collar workers are being routinized and bureaucratized. Office jobs in instance after instance become less interesting in the wake of modernization. The white-collar worker’s relationship with his supervisor also becomes more remote; and, in most instances, he has no individual contact with the public. Further, since such large numbers are employed, there is a considerable blockage of upward mobility.” Kassalow, supra note 2, at 47 (footnote omitted).

It is significant to note that since most office employees are women, women stand to gain the most from the Foley decision. Traditionally, the large number of women in white-collar jobs has proved to be an obstacle to unionism in offices. Kassalow, supra note 2, at 46. Previously, most women considered their employment to be short term and were therefore less likely to be interested in unionizing as a long-term job safeguard. Id. However, female office workers have begun to form groups to combat sex bias and petty chores. Lublin, supra note 3, at 1, col. 1. A confederation of the various office worker groups representing women in banks, insurance companies, law firms, publishing companies, brokerage houses, and universities may be the “opening wedge in a drive to unionize secretaries and other clerical employees.” Id. Women have been increasingly aware of the need for collective bargaining to guarantee improved working terms and conditions. Id. at 24, col. 4.


153. Id. at 3. Both parties agreed to the exclusion of the attorneys, paralegals, and accountants. The remaining nonlegal employees were under the overall supervision of a director of administration.

154. The union involved was Local 6, International Federation of Health Professionals.

155. Hughes Hubbard & Reed, No. 2-RC-17725, slip op. at 3 (Region 2 Sept. 30, 1977), review denied, 251 Daily Lab. Rep. (BNA) A-1 (Dec. 29, 1977). The office services manager is responsible for other nonlegal employees. This is significant since common supervision is one criterion the Board uses in determining appropriate bargaining units. See note 125 supra and accompanying text.

156. Hughes Hubbard & Reed, No. 2-RC-17725, slip op. at 5.

157. Id. See also Brief for the Employer, at 16, Hughes Hubbard & Reed, No. 2-RC-17725. A finding of substantial similarity and interchange in the job functions of the administrative and support employees would be sufficient for the Board to find a unit which included only some of the administrative and support employees to be inappropriate. See Potter Aeronautical Corp., 155 N.L.R.B. 1077 (1965).
trative and support personnel shared the same working hours, privileges, conditions, and severance benefits. On the basis of these findings, the Regional Director concluded that all the firm's nonlegal employees constituted a "typical office clerical unit which the Board constantly finds appropriate," and that the petitioner had attempted to carve out a bargaining unit that was neither all clerical workers nor even a separate departmental group. Thus, the Regional Director followed Board precedent against fragmenting an office clerical group and found petitioner's unit inappropriate.

The Regional Director's ruling has been upheld by the Board, the obvious implication being that a larger unit, containing all the law firm's clerical employees, would be deemed appropriate.

V. CONCLUSION

In Foley, the Board found that "law firms, as a class, do have a substantial impact on interstate commerce" and asserted jurisdiction over them. This decision means that employees of law firms are now entitled to organize, bargain collectively, and strike under the protection of the NLRA and are thus in a better position to gain greater concessions from the management of law firms. To what extent employees will take advantage of this decision and which employees will be most likely to do so have not yet been determined. It can be expected, however, that more employees will begin to organize and that the greatest activity will be among the administrative and support personnel, at least for the present time.

Another unclarified problem is the manner in which the Board will employ the confidential employee category to exclude either certain law firms as a whole, or particular law firm employees from the bargaining unit. It does appear, however, that firms engaged in little or no labor relations work will not be treated differently from any other employer in this respect. In addition, although the Board has upheld the Hughes Hubbard & Reed decision, it is unclear whether the Board will continue to lump all administrative and support employees into one unit or will allow separate units for

159. No. 2-RC-17725, slip op. at 5.
160. Id. at 6; see National Broadcasting Co., 231 N.L.R.B. No. 155, [1977-78] 5 Lab. L. Rep. (CCH) ¶ 18,553 (Aug. 31, 1977); Bank of America, 174 N.L.R.B. 101 (1969); Royal Blue Print Co., 166 N.L.R.B. 205 (1967); Carling Brewing Co., 126 N.L.R.B. 347 (1960). See also General Electric Co., 148 N.L.R.B. 811 (1964); Swift & Co., 119 N.L.R.B. 1556 (1958). Local 6 appealed the decision. 178 N.Y.L.J., Nov. 10, 1977, at 1, col. 4. The Board dismissed the appeal, however, stating that it raised no substantial issues. As suggested earlier, one factor that might lead clerical employees to such union representation is the absence of personal contact between white-collar clericals and management. In some law firms, however, legal secretaries work in much closer contact with attorneys, and may have a consequently weaker desire to unionize.
162. See Fitzhugh, supra note 13, at 3, col. 1; Hochberger, supra note 3, at 1, col. 2 and at 2, col. 3-4; Levin, supra note 3, at 4, cols. 2-4.
163. See note 119 supra and accompanying text.
employees such as legal secretaries upon a showing of a lack of community of interest. Another unclear point is the appropriate monetary standard the Board will employ in deciding the law firms over which it will assert jurisdiction. In *Camden* the Board set out a standard of $250,000 in gross annual revenues.\(^{164}\) However, the fact that the employer stipulated to a much higher sum in *Hughes Hubbard & Reed* may be an indication that the Board intends to increase the *Camden* figure.\(^{165}\) One thing that is clear is that the *Foley* ruling has created a new opportunity for those law firm employees who wish to organize into unions.\(^{166}\)

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165. See note 69 *supra*.
166. The success of the organizers will obviously depend on the actual conditions within any given law firm. See Fitzhugh, *supra* note 13, at 1, col. 2-3.

*Georgene M. Vairo*