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The Court’s provisions for notice of the charges, opportunity to call witnesses and to present real evidence, and a written record of the evidence relied on and reasons for the action taken are crucial to a fair hearing and their importance must not be ignored. The effectiveness of these procedures for insuring fairness, however, is diminished by the denial of confrontation and cross-examination.

First, although notice is required in part to “enable [the inmate] to marshal the facts and prepare a defense,” “[a]bsent confrontation and cross-examination, . . . the party proceeded against is without knowledge of the adverse evidence and cannot, therefore . . . make his defense.” Furthermore, without the chance to “challenge the word of his accusers” given by the rights of confrontation and cross-examination, it will be considerably more difficult for the prisoner to “explain away the accusation” since he cannot show mistake by the other party. Finally, even the most impartial hearing board cannot fairly judge credibility, nor accurately determine which version of the disputed facts is true if one side in the contest is not even questioned.

THOMAS WARREN ROSS

Labor Law—Organizational Rights of Managerial Employees

In 1970 the National Labor Relations Board (NLRB) abruptly departed from the position it had maintained throughout its history on the status of managerial employees under the National Labor Relations Act (NLRA). Traditionally, the Board had excluded from bargaining units and from coverage by the Act, all employees whom it identified as managerial, even though these employees were never statutorily ex-

103. 418 U.S. at 581 (Marshall, J., dissenting).
104. Id. at 564.
106. 418 U.S. at 582 (Marshall, J., dissenting).
108. 418 U.S. at 582.

eluded by the NLRA. For purposes of this exclusion, the Board labelled as "managerial" any employee who participated in the formulation, determination or effectuation of management policies. In 1970, however, the Board repudiated its former position and in effect established a presumption that managerial employees were entitled to bargaining rights under the NLRA unless it could be shown that they were involved in shaping or implementing labor relations policies for their employers. This new position was shortlived. In NLRB v. Bell Aerospace Co. Division of Textron, Inc. the United States Supreme Court reinstated the Board's former rule, holding that all employees properly classified as managerial are excluded from the protections of the NLRA—not just those in positions susceptible to conflicts of interest in labor relations.

On June 16, 1971, the buyers in the purchasing and procurement department of a plant operated by Bell Aerospace Company voted in favor of union representation. Prior to the election the company had objected to the designation of the buyers as an appropriate bargaining unit on the grounds that they were managerial employees and thus excluded from the collective bargaining provisions of the Act. The

3. 29 U.S.C. § 152(3) (1970). The Board accomplished this statutory modification through the exercise of the discretionary power to determine appropriate bargaining units which was vested in it by section 9(b) of the Act. Section 9(b) reads in part as follows: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." 29 U.S.C. § 159(b) (1970).

Managerial employees were not the only class of employees to be denied collective bargaining rights under this section. Confidential employees, defined in Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946) as "those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations," have also been refused the protection and privileges granted to other workers by the NLRA. Both classes of employees were excluded from the Act to the same extent as were the statutorily excluded employees—all are outside the Act for purposes of the employee rights accorded by section 7 (including bargaining unit representation) and denied protection from what otherwise would be unfair labor practices under section 8, despite the lack of reference to either classification in the language of the NLRA." 26 Vand. L. Rev. 850, 853-54 (1973).

7. A second issue resolved in Bell Aerospace, which will not be discussed in this note, was whether, in order to decide if a certain class of employees, in this case buyers, were properly classified as managerial, the Board was obligated to employ its section 6 rulemaking powers or whether it could make this determination in an adjudicatory proceeding. The Court held that not only is resolution of this type of problem in an adjudicatory proceeding permitted, but that adjudication is a particularly appropriate method of making that determination. Id. at 294.
8. Id. at 269. The company argued alternatively that, since the buyers could ne-
Board, however, held that only those managerial employees who are involved in formulating and effectuating their employer's labor policies are excluded from the Act and certified the union as the exclusive bargaining representative of the buyers. The company refused to bargain after the election and the Board, upon finding that the company had violated sections 8(a)(5) and 8(a)(1) of the Act, issued an order requiring the company to bargain. The Second Circuit denied enforcement of the order and the case was brought to the Supreme Court on appeal by the Board. A sharply divided Supreme Court held that all managerial employees must be excluded from the coverage of the Act and that the Board was not free to restrict that traditional exclusion to only those employees whose union activity might present a conflict of interest in labor relations.

To reach this decision without any explicit statutory basis, the majority relied first upon the legislative history of the Taft-Hartley Act. To the Court, this history indicated that Congress had intended to exclude managerial employees from the NLRA even though no express provision to that effect was included in the Taft-Hartley Act. Congress apparently believed that explicit exclusion was unnecessary since the Board's policy at that time was to exclude such employees and there was no reason to expect this policy to change in the future. The

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Court also noted that, in passing the Taft-Hartley Act, Congress was concerned with the welfare of the common worker and not with those representing the employer's interests. Accordingly, Congress sought to maintain a distinct division between management and labor to assure that employers would have loyal representatives within the company and that "bosses" would not be allowed in positions that would enable them to dominate or cause them to be dominated by the rank-and-file workers.\footnote{15} From rather sketchy passages in the legislative history of the Taft-Hartley Act the majority reasoned that, since Congress may have intended to exclude certain managerial employees, all other employees traditionally classified as managerial should likewise be considered as outside of the Act even though they were never mentioned in the congressional debates or reports. The majority also relied heavily upon congressional failure to enact legislation either in 1947\footnote{16} or 1959\footnote{17} explicitly including managerial employees within the scope of the Act in light of the Board's prior holdings that they were excluded.\footnote{18}

The dissent, on the other hand, agreed with the Board's new position that only those managerial employees who shape and implement the employer's labor policies should be denied the right to organize under the NLRA. They argued that only the organization of this narrower group of workers would upset the delicate balance of power in the collective bargaining process that Congress had intended to maintain.\footnote{19}

Although the Supreme Court majority in \textit{Bell Aerospace} presented a feasible argument that Congress in 1947 contemplated the ex-
clusion of managerial employees as well as supervisory employees from the Act, the dissent presented an equally persuasive argument that Congress did not intend such a broad exclusion. Confronted with such ambiguity, perhaps a better approach to the issue would have been to examine it in light of the policies that underlie the NLRA and the economic realities of current industrial organization.

The congressional concerns outlined in the majority's decision were based on industrial organization as it existed in 1947. Employment patterns, however, have changed drastically since that time with a larger percentage of workers now entering the lower levels of management. As the number of these managerial employees has increased, so may have the bureaucratization and concomitant disaffection with higher management that usually accompanies such an increase. As a result, the traditional alignment with the employer that the Board had in the past attributed to managerial employees may have been severed. If these employees have lost or subsequently lose their attachments to their employers and find that their demands are not being satisfied, they may, despite the Supreme Court's ruling in *Bell Aerospace*, organize and bargain outside of the Act. Their constitutional right to do so has been established. The result might be the type of economic warfare that the Act was designed to avoid.

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20. Statistics presented in the United States Bureau of the Census Reports show for example that, while only 0.09% of the labor force were classified as personnel and labor relations workers in 1950, 0.15% were so classified in 1960 and 0.38% in 1970. Likewise, in 1950 only 0.059% of the labor force were classified as credit personnel whereas the 1960 figure was 0.070% and the 1970 figure was 0.080%. This trend is also reflected in the percentages of workers employed as purchasing agents and buyers (other than retail buyers): 0.11% in 1950; 0.15% in 1960; and 0.21% in 1970. See *U.S. Bureau of the Census, U.S. Census of Population: 1970, Subject Reports, Occupational Characteristics* (Final Rep. 1973); *U.S. Bureau of the Census, U.S. Census of Population: 1960, Subject Reports, Occupational Characteristics*, table 1, at 2-3 (Final Rep. 1963); *U.S. Bureau of the Census, U.S. Census of Population: 1950, Employment and Personal Characteristics*, table 1, at 1B 15-16, (Spec. Reports, pt. 1, ch. A, 1953).


23. Section 1 of the Act expresses its policy: The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce.

Experience has proved that protection by law of the right of employees
Neither the Board nor the Court could then regulate this activity since the regulatory mechanisms of the Act are not applicable to employees not covered by it. The result could be detrimental to the interests of both employers and employees.

The Supreme Court's decision to exclude all managerial employees from the collective bargaining process provided by the Act also ignores the fact that, although these employees may be more closely aligned to management than to rank-and-file workers with respect to their job responsibilities, they share with all other employees the desire for job security, periodic wage increases, and other economic benefits that the employer might not provide absent organized economic pressure. Although in the past managerial employees could probably expect to achieve such benefits by performing their jobs well, a substantial increase in the number of managerial employees might have reduced the possibility that outstanding work will be noticed and rewarded.

While there are legitimate policies favoring unions of managerial employees, there are also legitimate objections. The Board has long recognized that the most serious of these objections is the potential conflict of interest\(^{24}\) that might destroy the delicate balance of power between labor and management that the Act seeks to assure. Examples of the potential dangers to employers claimed to be inherent in such a split of allegiance include the possibilities: (1) that managerial employees who are unionized might show favoritism to union-organized companies when accepting bids or making purchases; (2) that the employees will guard the interests of their sister unions in the company when making recommendations of management policies or when executing these policies; and (3) that managerial employees may further disrupt the conduct of their employer's business by engaging in sympathy strikes or other economic measures to assist sister unions in their bargaining struggle with the employer in exchange for similar as-

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24. The conflict is between the employee as a union member and the employee as a representative of management.
sistance when the managerial employees bargain.

Such concerns, however, are perhaps unfounded since the employer has the capacity to control possible inclinations toward favoritism by discharging employees if their unprotected activities cause injury to the business and by establishing strict guidelines to which these employees must conform when making managerial decisions. However, the employer may argue in response that after-the-fact discharge does not remedy a *fait accompli* breach of trust and that in certain instances, broad discretion is precisely what is required of an employee's position. Thus forcing the employee to adhere to strict guidelines would partially destroy his usefulness to the employer.

As a result of *Bell Aerospace* the types of employees to whom the Act's protections will not be available will be determined by the criteria established by the Board for defining managerial employees prior to 1970. Corporate officers and employees who work in labor relations have always been held to be managerial as have employees who have actual responsibility for hiring or firing or who may effectively recommend such action. Other employees have been found to be managerial if the evidence showed that they participated in making or implementing the employer's management policies or had "discretion, independent of the employer's established policy, in the performance of [their] duties." Using this formula, the Board has fairly consistently labelled the following positions managerial: buyers, credit de-

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28. Illinois State Journal-Register, Inc. v. NLRB, 412 F.2d 37, 41 (7th Cir. 1969); Eastern Camera & Photo Corp., 140 N.L.R.B. 569 (1963). "[T]he Board does not consider the performance of duties requiring the exercise of judgment to be an indication of managerial status per se, nor do the lack of close supervision and freedom to exercise considerable discretion render an employee managerial where his decisions must conform to the employer's established policy." Albert Lea Cooperative Creamery Ass'n, 119 N.L.R.B. 817, 822-23 (1957); see American Broadcasting Co., 107 N.L.R.B. 74, 79 (1953); Northwestern Bell Tel. Co., 79 N.L.R.B. 549, 554-55 (1948).

29. Swift & Co., 115 N.L.R.B. 752, 753 (1956); see Curtiss-Wright Corp., 103
partment personnel,\textsuperscript{30} expediters,\textsuperscript{31} and employees who establish the company's price lists.\textsuperscript{32}

Had the Board's new test been affirmed by the court, labor relations personnel would of course have been excluded. The dissent also suggested that, if corporate officers were not reached because of their responsibilities for labor relations, they could probably be excluded as supervisory.\textsuperscript{33} In addition, although neither the Board nor the dissent in \textit{Bell Aerospace} defined the scope of the category "employees who shape or implement the employer's labor relations policies," it is likely that such a category would include upper-level employees in the employment and personnel departments. Thus the principal categories of employees who would be excluded from the Act under the majority's test but included under the Board's test are buyers, some credit department personnel, expediters, and employees who set prices for goods manufactured by the company.

Having established whose right to organize under the Act is actually at issue, one may then determine whether the Supreme Court or the Labor Board adopted the better position. To make this determination it is necessary to balance the employer's right to have loyal employees to assist him in making and executing his management policies against the strong public policy of promoting peaceful settlements of labor disputes and the employees' interest in achieving a bargaining position sufficient to insure their effective participation in their economic future. Would permitting these employees to organize in

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\item N.L.R.B. 458, 464 (1953); Electric Controller & Mfg. Co., 69 N.L.R.B. 1242, 1246 (1946); Barrett Div., Allied Chem. & Dye Corp., 65 N.L.R.B. 903, 905 (1946); Hudson Motor Car Co., 55 N.L.R.B. 509, 512 (1944). The Board has also excluded as managerial a buyer who, though limited to placing orders with an approved list of vendors, could use his discretion as to which vendor would receive the order. Titeflex, Inc., 103 N.L.R.B. 223, 225-26 (1953).
\item 30. Charles Livingston & Sons, Inc., 86 N.L.R.B. 30, 33-34 (1949). \textit{Contra}, Franklin's Stores Corp., 117 N.L.R.B. 793, 794-95 (1957). If the amount of credit and the standards for extending credit are so limited as to make the determinations routine, the employee will not be held to be managerial. Socony-Vacuum Oil Co., 100 N.L.R.B. 90, 91 (1952).
\item 33. 416 U.S. at 307 n.3.
\end{itemize}
bargaining units separate from those of the rank-and-file workers\textsuperscript{34} so hinder the employer in operating his business and place him at such disadvantage at the bargaining table that the employees should be denied the right to organize by judicial decree even though the NLRA has never explicitly denied them that right? The answer to this question is at best a matter of opinion. However, it was precisely for deciding this type of question that Congress established a special agency that, through its constant contact with industry and the problems of interpreting the labor statutes, could develop the expertise needed to resolve these issues.\textsuperscript{35} Nevertheless, the Board's response has been rejected and the responsibility for providing these employees the protection of the NLRA lies now with Congress.

Shirley J. Wells

Public Utilities—State Action and Informal Due Process After Jackson

For nearly a century those who would impose constitutional limitations on ostensibly private conduct have been grappling with the elusive concept of "state action."\textsuperscript{1} Indeed, the problem of defining state action in the troublesome no man's land between purely private and purely governmental conduct has been called the most important problem in American law.\textsuperscript{2} In \textit{Jackson v. Metropolitan Edison Co.}\textsuperscript{3} the United States Supreme Court found the essential state action requirement lacking in a customer's attempt to impose due process limitations on the termination procedure of a privately owned utility company.\textsuperscript{4}

\textsuperscript{34} Separate units for guards and professional employees have been authorized since 1947. 29 U.S.C. § 159(b) (1970).


\begin{enumerate}
\item In the Civil Rights Cases, 109 U.S. 3, 11 (1883) the United States Supreme Court first propounded the essential dichotomy between state action, which is subject to constitutional restraints, and "individual invasion of individual rights," which is not. The distinction for fourteenth amendment purposes is based on the proscription that "[n]o State shall make or enforce any law . . . ." U.S. Const. amend. XIV, § 1.
\item 95 S. Ct. 449 (1974).
\item Lower courts had been sharply divided in applying the state action doctrine to utilities which were privately owned, but subject to extensive and detailed regulation by the state. \textit{Compare} Palmer v. Columbia Gas, Inc., 479 F.2d 153 (6th Cir. 1973); Ihrke