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COMMENTS

UNIONIZATION OF LAW FIRM ASSOCIATES?

by Mary Emma Ackels

A few years ago it was thought inconceivable that associates in a law firm would desire to unionize and bargain collectively against the partners of the firm. Prior to 1977 the National Labor Relations Board had not even extended coverage of the National Labor Relations Act to law firms. In the last year, however, the law in this area has been revolutionized. The Board has not only extended its jurisdiction to law firms in general, but it has also allowed legal secretaries, clerks, and even lawyers in legal service clinics to unionize. In New York City organizational drives have begun to unionize law office workers. The next issue to be addressed by the Board will undoubtedly be whether associates in a law firm are covered by the Act or instead fall within the categories excluded from the scope of the Act. Congress did not intend to include all employees under the Act, and it is arguable that associates should be excluded as “managerial” or “confidential” employees as defined by Congress. This Comment discusses the recent changes in the Board’s attitude toward law firms and the various considerations the Board will encounter in deciding whether to extend the Act’s coverage to law firm associates.

I. NATIONAL LABOR RELATIONS BOARD: JURISDICTION OVER LAW FIRMS

A. Scope of the National Labor Relations Act

In passing the National Labor Relations Act Congress provided the Board “the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.” Through the Act, Congress sought to regulate

2. In spite of various attempts to unionize associates, little success has been made in actually establishing bargaining units. See Kopel, Unions Knocking at Firms’ Doors, Nat’l L.J., Oct. 2, 1978, at 1, col. 4. Perhaps the reason for such lack of interest is that associates are content with their working conditions and are generally paid well. Id. at 11, col. 1. In Canada, where unionization of law firms has been permitted for a long time, only a few firms are unionized. Id.

The best way to avoid unionization at a law firm is to use fair employment practices. One author has noted that “[t]he likelihood of success of union organizing in law firms will vary in inverse proportion to the excellence of the personnel practices of the employer.” Levin, Foley, Hoag and Beyond: Union Organizing of Law Firms, Nat’l L.J., Oct. 2, 1978, at 28, cols. 3-4.
industrial relations\(^4\) of employers whose activities affected interstate commerce.\(^5\) The Board's threshold jurisdictional test is thus "whether the stoppage of business by reason of labor strife would tend \(\textit{substantially} \) to \(\textit{affect commerce}.")\(^6\) Since the landmark decision in \(\textit{Wickard v. Filburn},\)\(^7\) Congress is no longer limited to regulating those activities which have a direct effect on interstate commerce. The \(\textit{Wickard}\) decision determined that merely showing that the aggregate effect of the activities may produce an impact on interstate commerce is sufficient.\(^8\) The full scope of congressional jurisdiction has been transmitted to the Board through the broad language of sections 2(6)\(^9\) and 2(7)\(^10\) of the Act.

The Board does not confine its judgment to the quantitative effect of the activities before it. Rather, the Board also looks to see if the immediate situation is representative of many others throughout the country, the total incident of which if left unchecked might produce a far-reaching impact on commerce.\(^11\) The Board then views the alleged local activities to determine whether, in the interlacings of business across state lines, such activities affect commerce.\(^12\) A business thus may be essentially local in nature and still subject to the Act,\(^13\) unless the effect on commerce is found to be \(\textit{de minimis}.\)\(^14\) The Board occasionally declines to assert jurisdiction either because the employer is operating in a "local business,"\(^15\) or because "the

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

5. \(\text{Id.}\) § 160(a); \(\text{see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937).}\)


7. 317 U.S. \(\text{Ill}\) (1942).

8. \(\text{Id.}\) at 127-28; \(\text{see Katzenbach v. McClung (Ollie's Barbecue), 379 U.S. 294 (1964).}\) Few businesses could have less impact on interstate commerce than Ollie's Barbecue.


10. "The term 'affecting commerce' means 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." 29 U.S.C. § 152(7) (1976).


13. \(\text{See NLRB v. Fainblatt, 306 U.S. 601, 605 (1938) (while the activity may separately be viewed as local, it can be reached by federal power if it tends to lead to a labor dispute burdening commerce); Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453 (1938) (the Board has power over a situation that may burden commerce without regard to the source of the obstruction); Community Currency Exch., Inc. v. NLRB, 471 F.2d 39 (7th Cir. 1972).}\)

14. NLRB v. Fainblatt, 306 U.S. 601, 607 (1939); Community Currency Exch., Inc. v. NLRB, 471 F.2d 39, 41-42 (7th Cir. 1973) (\(\text{de minimis limitation held to mean trifles—matters of a few dollars or less.}\) \(\text{See also NLRB v. Shawnee Milling Co., 184 F.2d 57, 58-59 (10th Cir. 1950).}\)"

15. "Local business" is a term used by the Board to explain its refusal to act on certain
effect of a labor dispute on commerce is not sufficiently substantial to warrant exercise of jurisdiction. This failure to exercise jurisdiction does not, however, result in loss of jurisdiction, and the Board may later re-evaluate a prior determination that an activity has an insubstantial effect on commerce.

B. Extending Jurisdiction to Law Firms

The Board initially declined to assert its jurisdiction over disputes involving law firms. In Bodle, Fogel, Julber, Reinhardt & Rothschild the Board recognized its legal authority to assert jurisdiction because the law firm satisfied the affecting commerce test, but declined to assert its jurisdiction because it would not effectuate the policies of the Act to do so. In Evans & Kunz, Ltd. the Board, while stating that it had the power to assert jurisdiction, declined to exercise that jurisdiction over a relatively small law firm.

More recently, the Supreme Court, in Goldfarb v. Virginia State Bar, held the practice of law to be “trade or commerce” within the meaning of the Sherman Act. In the landmark case of Foley, Hoag & Eliot, the Board, in the light of Goldfarb, re-evaluated its prior decision to exclude cases in which operations of the employer involved have only remote or insubstantial effect on interstate commerce. Creative Country Day School at Westchester, Inc., 192 N.L.R.B. 586 (1971).

18. The Board has complete discretionary authority to decline jurisdiction over any industry for which no jurisdictional yardsticks existed on Aug. 1, 1959, provided the effect of a labor dispute on commerce is insubstantial. 29 U.S.C. § 164(c)(1) (1976).
20. 206 N.L.R.B. at 512. The Board found that the law firm did not have a sufficient impact on interstate commerce to warrant the Act’s coverage.
21. 194 N.L.R.B 1216 (1972). This case has never been expressly reversed by the Board, although its impact has been negated by later Board decisions. See notes 32-38 infra and accompanying text.
22. 194 N.L.R.B. at 1216. This law firm had gross revenues in excess of $300,000 and furnished over $50,000 in services to clients who met the Board’s jurisdictional standards. Note that under the jurisdictional test of Camden Regional Legal Servs., Inc., 231 N.L.R.B. No. 47 (1977), a firm with $250,000 of gross revenues will be subject to the Board’s jurisdiction. See notes 33-38 infra and accompanying text.
24. 15 U.S.C. § 1 (1976). The Court refused to find that Congress intended any sweeping learned profession exclusion from the Sherman Act; moreover, the Court described a title examination as a service, and the exchange of such a service for money as “commerce” in the common usage of the term. 421 U.S. at 787-88.
law firms from coverage under the Act. The Board reasoned that Congress intended to exercise fully the same plenary and comprehensive commerce power under the National Labor Relations Act that it had exercised in regulating commerce under the Sherman Act\textsuperscript{26} and, thus, the practice of law was "commerce"\textsuperscript{27} within the meaning of sections 2(6) and 2(7) of the Act.\textsuperscript{28} As a result, the Board asserted jurisdiction over law firms as a class,\textsuperscript{29} and held that file clerks and messengers had the right to petition for unionization. In Wayne County Neighborhood Legal Services\textsuperscript{30} the Board continued the trend set in Foley by asserting jurisdiction\textsuperscript{31} over a nonprofit law clinic that provided legal services to indigent persons within the state of Michigan. The Board noted that the clinic's operational capital came, in part, from congressional funds and that the clinic purchased services from enterprises engaged in interstate commerce.\textsuperscript{32} The minimum jurisdictional standard for law firms was established in Camden Regional Legal Services, Inc.\textsuperscript{33} The Board held that it would effectuate the policies of the Act to limit its assertion of jurisdiction to law firms that receive at least $250,000 in gross annual revenues.\textsuperscript{34} The Board also noted that the law firm had a close nexus with interstate commerce because it purchased goods and services in excess of $50,000 from such national concerns as IBM, Xerox, Bell Telephone Company, and West Publishing Company.\textsuperscript{35} While Camden Legal Services implies that only

\textsuperscript{26} Id. at 457 (citing Van Camp Sea Food Co., 212 N.L.R.B. 537 (1974)); see NLRB v. Gonzalez Padin Co., 161 F.2d 353, 355 (1st Cir. 1947).

\textsuperscript{27} While lawyers are engaged in the sale of personal services, the Board has always applied its jurisdictional standards to employers furnishing intangible services to enterprises engaged in interstate commerce. Cf. Truman Schlup, 145 N.L.R.B. 768 (1963) (engineering and surveying services); Browne & Burford, 145 N.L.R.B. 765 (1963) (surveying, design, and inspection services); Hazelton Laboratories, Inc., 136 N.L.R.B. 1609 (1962) (research and development services); Gray, Rogers, Graham & Osborne, 129 N.L.R.B. 450 (1960) (architecture, engineering, and surveying); De Leuw, Cather & Co., 72 N.L.R.B. 191 (1947) (appraisal, investigation, and surveys of property); 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) (appraising of mining property); W.J. Cochrane, 44 N.L.R.B. 617 (1942) (assaying and analyzing lead and zinc ores); United States Testing Co., 5 N.L.R.B. 696 (1938) (chemical and physical analysis of industrial commodities). Further, a labor strife in the law industry would tend to lead to a substantial impact on interstate commerce, thus meeting the Board's threshold jurisdictional test. Law firms are not included in the list of those employers outside the jurisdiction of the Act and the congressional record evidences a legislative intent to include lawyers within the scope of the Act. See 29 U.S.C. \S\S 152(2), (3) (1976). See also S. Rep. No. 105, 80th Cong., 1st Sess. 11 (1947), and H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947), reprinted in NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 417 & 540 (1948).

\textsuperscript{28} 229 N.L.R.B. at 457.

\textsuperscript{29} Id.

\textsuperscript{30} 229 N.L.R.B. 1023 (1977).

\textsuperscript{31} See Legal Servs. for N.W. Pa., 230 N.L.R.B. No. 103 (1977) (Board asserted jurisdiction over a nonprofit corporation that provided legal services of a civil nature to eligible low income persons). See also Legal Servs. for the Elderly Poor, 236 N.L.R.B. No. 44 (1978) (Board refused to allow law students to join a bargaining unit of either attorneys or clerical people; Board did not decide whether law students could form their own unit).

\textsuperscript{32} 229 N.L.R.B. at 1023.

\textsuperscript{33} 231 N.L.R.B. No. 47 (1977).

\textsuperscript{34} Id.

\textsuperscript{35} Id.
the dollar volume standard must be met to warrant coverage under the Act, the Board has in fact examined the nexus of the legal operations with interstate commerce in its recent decisions concerning lawyers.  

II. Unionization of Law Firm Associates

The right to unionize has been held to be a protected right of association under the first and fourteenth amendments. The right to associate as a labor union, however, is of limited value without the ability to invoke the protections of the National Labor Relations Act. Employees who fall outside the scope of the Act are in a position analogous to that of labor union members prior to enactment of the Act in 1935. They are without the most basic features of the Act: the right to bargain collectively and the right to seek remedies from the Board when the employer commits an unfair labor practice. Yet Congress left those who fall outside the Act’s coverage to their own independent strength, influence, and ability to advance. The ultimate question is whether Congress intended the Act to cover law firm associates, or whether associates possess sufficient qualities to enhance their positions independent of collective pressures.

A. History of Professional Unionization

The Act covers all employees except those Congress specifically or implicitly excluded. The Act, moreover, expressly covers "professional em-

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36. The Board looks to the flow of the employer's goods and services into and out of the state. The Board requires as part of its jurisdictional standards that the operations have an annual inflow or outflow across state lines of at least $50,000, whether such inflow or outflow be direct or indirect. The Board has held that the mere showing that the employer's business meets only the dollar volume standard is wholly insufficient to confer jurisdiction. International Longshoremen & Warehousemen's Union, 124 N.L.R.B. 813, 814-15 (1959). See also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); John Hammond, 160 N.L.R.B. 927 (1966), enforced, 387 F.2d 646 (4th Cir. 1967). The Board, for example, has held that an employer that met the dollar volume test was not subject to the Board's jurisdiction because no evidence was introduced as to the extent of the employer's involvement with the inflow and outflow of goods and services between the states. Absent such proof, the Board has "no basis upon which to establish legal or statutory jurisdiction." Swift Cleaners, Inc., 188 N.L.R.B. 752 (1971).

37. Cf. Legal Servs. for N.W. Pa., 230 N.L.R.B. No. 103 (1977) (employer received a budget of $850,000 annually from state and federal governments), Wayne County Legal Servs., 229 N.L.R.B. 1023 (1977) (employer purchased goods and services in excess of $52,000 from national concerns and purchased law books from outside the state); Foley, Hoag & Eliot, 229 N.L.R.B. 456 (1977) (85% of legal services provided were to clients who were subject to the Act).


40. Collective bargaining is an essential adjunct to the underlying right to unionize and rests at the core of the National Labor Relations Act as stated in the Act's Declaration of Policy: "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association . . . ." 29 U.S.C. § 151 (1976).

41. See id. §§ 157, 158.

42. Id. § 152(3).
ployees” as defined in section 2(12). Professional employees include "any employee engaged in work (i) predominantly intellectual . . . (ii) involving constant exercise of discretion and judgment in its performance.” Congress has required that the Board afford professional employees an opportunity to vote in a separate unit to ascertain whether or not they wish to have a bargaining representative of their own. The relevant legislative history demonstrates further that when Congress defined “professional employees,” it contemplated coverage of attorneys.

The Board has in the past granted only certain types of attorneys coverage under the Act. The Board has looked to both the legislative history and the “right of control test” to determine whether the bargaining unit consists of “employees” within the meaning of the Act. An employer-employee relationship exists “where the person for whom the services are performed reserves the right to control not only the end to be achieved but also the means to be used in reaching such end.” In the leading case of Lumbermen’s Mutual Casualty Co. the Board determined that a group of attorneys working in the legal division of an insurance company was covered by the Act and, thus, could unionize and bargain collectively against their employer. Each attorney was subject to the “control” and direction of the employer in the course of his work and could be disciplined for refusal to follow instructions. The case, however, contained several distinguishing factors. The attorneys were hired like all other employees, worked the same hours, and had the same benefits. The employer assigned the cases, prescribed the types of cases for which a jury trial was not to be requested, and even dictated the affirmative defenses to be pleaded. In addition, the attorneys’ discretion was limited, and they were not permitted to settle any case without the express consent of the employer.

43. Id. § 152(12).
44. Id.
48. “The Board, in conformity with congressional intent, has followed the usual tests of the law of agency and has applied the common law ‘right of control’ test,” in order to distinguish between an employee and an independent contractor. Deaton Truck Lines, Inc., 143 N.L.R.B. 1372, 1377 (1963), review dismissed, 337 F.2d 697 (5th Cir. 1964).
49. 143 N.L.R.B. at 1377. See also Albert Lea Coop. Creamery Ass’n, 119 N.L.R.B. 817 (1957).
50. 75 N.L.R.B. 1132 (1948).
51. Id. at 1134.
52. Id. at 1134-35.
53. Id. These attorneys did not even have authority over their own secretary; stenogra-
The Act's coverage was also extended to attorneys in *Air Line Pilots Association, International.* Three attorneys comprised the employer's legal department, handling general legal work and representing the employer in court and administrative proceedings. The attorneys were found to be professional employees because they worked without immediate supervision in nonroutine work and used continuous discretion and judgment. They also possessed the educational background and specialized training that met the statutory test for professional employees under the Act.

In *Syracuse University* the Board found that members of the law faculty were professional employees and could become part of either a separate law school bargaining unit or an overall bargaining unit. The Board reasoned that faculty members were employees and hence had a legitimate interest under the Act in the terms and conditions of their employment.

### B. Associates as Employees Under the Act

Only in certain types of cases has the Board examined the question of whether attorneys are employees within the meaning of the Act. The National Labor Relations Act provides that "[t]he term 'employee' shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor, or any individual employed as a supervisor." This direct mandate to include "any employee" not exempted must guide the Board in determining whether attorney-associates

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54. 97 N.L.R.B. 929 (1951).
55. Id. at 931. The attorneys were assisted only by a secretary.
56. Id.
57. Id.; 29 U.S.C. § 152(12) (1976). The professional employees were given the option to constitute a separate bargaining unit or become part of the over-all unit.
60. 204 N.L.R.B. at 643.
61. In EEOC v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975), associates in a small law firm were found to be employees under a parallel statute, the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976). The court in *Rinella* reasoned that the employer hired and fired the associates, referred a significant number of his cases to associates, and exerted considerable control over compensation of the associates. He further owned all of the fixed assets and provided office space and equipment for which the associates paid no rent. He also hired, assigned, and paid all secretarial and clerical employees, and all outward appearances to the public indicated that the attorneys were employed by the firm. The court noted, however, that defining jurisdiction in the context of a different statute with different policies and purposes should not be controlling.
are entitled to the Act's coverage. When faced with the next question, whether associates in a law firm are professional employees, the Board may distinguish the fact situation on the basis of one or more factors alluded to in Lumbermen's Mutual Casualty Co. To exclude such associates from the Act's protection the Board must characterize them as supervisory, managerial, or confidential employees.

**Supervisors.** The Act defines supervisors as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action . . . ." A supervisor thus may be any employee who exercises authority to make independent decisions in directing the work of subordinates. In response to a Supreme Court decision holding that foremen were entitled to union membership under the Act, Congress expressly excluded supervisors from any bargaining unit in order to avoid conflicts between the loyalties of an employee who is charged with some measure of responsibility for managing the employer's business. Management must have faithful agents not subject to the influence or control

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63. See NLRB v. Monterrey County Bldg. & Constr. Trades, 335 F.2d 927 (9th Cir. 1964), cert. denied, 380 U.S. 913 (1965).
64. For a discussion of what constitutes an appropriate bargaining unit of attorneys, see Note, The Unionization of Law Firms, 46 FORDHAM L. REV. 1008 (1978). For a discussion of how associates form a labor organization and how the firm should react, see Crawford, A Union in Your Law Firm, 41 TEX. B.J. 359 (1978).
65. 75 N.L.R.B. 1132 (1948); see notes 52-53 supra and accompanying text.
67. NLRB v. International Typographical Union, 452 F.2d 976 (10th Cir. 1971); Mon River Towing, Inc. v. NLRB, 421 F.2d 1 (3d Cir. 1969).
70. The legislative history also makes it evident that Congress was concerned with more than just a conflict of interest in the field of labor relations if supervisors were allowed to unionize:

Supervisors are management people. . . . They have demonstrated their ability to take care of themselves without depending upon the pressure of collective action. . . . They abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such 'security.' It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the leveling processes of seniority, uniformity and standardization that the Supreme Court recognizes as being fundamental principles of unionism. [J.I. Case Co. v. NLRB, 321 U.S. 332 (1944)]. It is wrong for the foremen, for it discourages the things in them that made them foremen in the first place. For the same reason, that it discourages those best qualified to get ahead, it is wrong for industry, and particularly for the future strength and productivity of our country.

of unions.\textsuperscript{71}

The courts have adopted a stern test consistent with the position\textsuperscript{72} that management must have faithful agents that makes evasion of the supervisory exclusion difficult: "[T]he possession of any one of the authorities listed in § 2(11) [of the Act] places the employee invested with this authority in the supervisory class."\textsuperscript{73} An employee will therefore be classified as a supervisor if any one of the indicia of supervisory status is present.\textsuperscript{74} The assistance of a personal secretary, however, will not result in the exclusion under current interpretations.\textsuperscript{75} While professional employees are expressly included in the Act, they often exercise supervisory traits over a secretary. The Board, in an effort to harmonize the practical impact of the two statutory sections, requires the supervisory functions to be inherent in the job rather than incidental to the job.\textsuperscript{76} The Board, however, will not exclude nominal supervisory employees, but will require supervisors to assert genuine management prerogatives, such as the right to hire, fire, and discipline. The Board, for instance, refused to extend supervisory status to relief nurses although they jointly exercised supervisory and nonsupervisory functions.\textsuperscript{77}

Generally associates will not meet the required test, and will not be excluded from the coverage of the Act as supervisors. The right to hire, fire, or discipline is rarely inherent in the job of an associate. While an associate may direct the work of his secretary, such incidental supervision is insufficient to warrant exclusion.\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{71} Beasley v. Food Fair of N.C., Inc., 416 U.S. 653 (1974). The Court further noted that "history compels the conclusion that Congress' dominant purpose in amending [the Act in 1947] was to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests." \textit{Id.} at 661-62.
\item \textsuperscript{72} The Senate Committee on Labor and Public Welfare explained that "[t]here is nothing in the record developed before this committee to justify the conclusion that there is such a thing as a really independent foreman's organization." \textit{S. Rep.} No. 105, 80th Cong., 1st Sess. 4 (1947). \textit{See also} H.R. \textit{Rep.} No. 245, 80th Cong., 1st Sess. 8 (1947).
\item \textsuperscript{73} Ohio Power Co. v. NLRB, 176 F.2d 385, 387 (6th Cir.), \textit{cert. denied}, 338 U.S. 899 (1949); \textit{see} 29 U.S.C. § 152(1) (1976). \textit{See also} NLRB v. Elliott-Williams Co., 345 F.2d 460, 463 (7th Cir. 1965); NLRB v. Fullerton Publishing Co., 283 F.2d 545, 548 (9th Cir. 1960).
\item \textsuperscript{74} Amalgamated Clothing Workers of America v. NLRB, 420 F.2d 1296 (D.C. Cir. 1969) (authority to give direction); NLRB v. Union Bros., 403 F.2d 883 (4th Cir. 1968) (assignment of work and higher wages); NLRB v. Howard Johnson Co., 398 F.2d 435 (3d Cir. 1968) (engineering license to perform responsible duties); Filler Prods., Inc. v. NLRB, 376 F.2d 369 (4th Cir. 1967) (much higher salary than other employees' wages); NLRB v. Ertel Mfg. Corp., 352 F.2d 916 (7th Cir. 1965), \textit{cert. denied}, 383 U.S. 945 (1966) (authority to give work assignments); Eastern Greyhound Lines v. NLRB, 337 F.2d 84 (6th Cir. 1964) (power to discharge or effectively make recommendations to discipline).
\item \textsuperscript{75} \textit{See generally} Air Line Pilots Ass'n, Int'l, 97 N.L.R.B. 929 (1951).
\item \textsuperscript{78} In Airline Pilots Ass'n, Int'l, 97 N.L.R.B. 929, 931 (1951), the Board implied that the assistance of a secretary was not sufficient to exclude a corporate attorney as a supervisory employee.
\end{itemize}
Managerial Employees. The National Labor Relations Act states that the status of employees under the Act "shall not include . . . any individual employed as a supervisor," \(^{79}\) and defines an employer as including "any person acting as an agent of an employer, directly or indirectly." \(^{80}\) Reading these two sections together, the Supreme Court noted that Congress recognized there were other persons, although not specifically defined in the Act, who were "so much more clearly 'managerial' that it was inconceivable that the Board would treat them as employees." \(^{81}\) This implied exclusion is based on the principle that when functions and interests of individuals are more closely allied with management than with production workers, they are not truly employees within the meaning of section 2(3) of the Act as read in conjunction with section 2(2). \(^{82}\)

In *NLRB v. Bell Aerospace Co.* \(^{83}\) the Supreme Court analyzed the history of this longstanding exclusion implicit in the Act. While the original Wagner Act \(^{84}\) did not expressly mention the term "managerial employee," the Board developed this concept in a series of cases in the Act's early history. The first cases established that managerial employees were not to be included in a unit with rank-and-file employees because they were "closely related to management." \(^{85}\) Expediter were similarly excluded from a bargaining unit because "the authority possessed by these employees to exercise their discretion in making commitments on behalf of the Company stamps them as managerial." \(^{86}\) In *Ford Motor Co.* \(^{87}\) the Board summarized its policy on "managerial employees," stating that they "have customarily excluded from bargaining units . . . executive employees who are in a position to formulate, determine and effectuate management policies. These employees we have considered and still deem to be 'managerial,' in that they express and make operative the decisions of management." \(^{88}\) At no time had the Board certified even a separate unit solely of managerial employees or stated that such was possible. \(^{89}\)

Following the passage of the Taft-Hartley Act, \(^{90}\) the Board continued to adhere to the exclusion of all managerial employees. \(^{91}\) The Board declared that "[i]t was the clear intent of Congress to exclude from the cover-

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80. *Id.* § 152(2).
85. Freiz & Sons, 47 N.L.R.B. 43, 47 (1943) (Board excluded expediter from proposed unit of production and maintenance workers).
86. *Spicer Mfg. Corp.*, 55 N.L.R.B. 1491, 1498 (1944). An expediter contacts vendors, places orders, keeps records of progress on deliveries, and has the authority to reassign orders. *Id.*
87. 66 N.L.R.B. 1317 (1946).
90. Ch. 120, § 1, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 151-167 (1976)).
age of the Act all individuals allied with management. Buyers were excluded from any bargaining unit because they were authorized to make substantial purchases for the employer and were authorized to bind the employer without prior approval and, therefore, were considered representatives of management.

Until 1970 the Board had never certified a unit of managerial employees and had stated in case after case that managerial employees were not to be accorded bargaining rights under the Act. This exclusion was also approved by the courts without exception. In 1970, however, the Board held in *North Arkansas Electric Coop., Inc.* that buyers were managerial employees but were nevertheless covered by the Act because there was no conflict of interest. The Eighth Circuit reversed the Board’s finding and held that Congress intended to exclude all true “managerial employees.”

The court reasoned that the exclusion embraced not only an employee who may be placed in a conflict of interest, but also one who is “formulating, determining and effectuating his employer’s policies or has discretion, independent of an employer’s established policy, in the performance of his duties.”

In *NLRB v. Bell Aerospace Co.* the Supreme Court, analyzing the legislative history of the Act, determined that Congress intended that management, like labor, have faithful representatives who are not subject to the influence or control of unions. When Congress passed the Act it was concerned “with the welfare of ‘workers’ and ‘wage earners’ not of the management.” Congress determined that management people have the individual ability to distinguish themselves in their work and thus may not be accorded bargaining rights under the Act.

The Supreme Court further determined that “the purpose and legislative history of the Taft-Hartley Act of 1947, the Board’s subsequent and consistent construction of the Act for more than two decades, and the decisions

96. *Id.* at 288 n.14; see, e.g., Swift & Co., 115 N.L.R.B. 752 (1956); Curtiss-Wright Corp., 103 N.L.R.B. 458 (1953); American Locomotive Co., 92 N.L.R.B. 15 (1950); Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320 (1947).
102. *Id.* at 288 n.14.
104. 416 U.S. at 282.
105. *Id.* at 287 (quoting Swift & Co., 115 N.L.R.B. 752, 753-54 (1956)).
of the courts of appeals all point unmistakably to the conclusion that 'managerial employees' are not covered by the Act."\textsuperscript{106} If Congress had intended such management people to unionize, it "most certainly would have made its design plain."\textsuperscript{107} Other legislation indicated that when Congress desired to include managerial personnel in the category of employees, it did so expressly.\textsuperscript{108}

The Court cautioned against the devastating effect of allowing representatives of management to unionize by warning that "management and labor will become more of a solid phalanx than separate factions in warring camps."\textsuperscript{109} This warning would be particularly appropriate in the situation of a law firm. The partners in a law firm must be able to rely confidently on their associates; on their professional representation of the law firm, and their unequivocal dedication to the client. To allow associates to unionize may deprive the partners and clients of the loyal representation to which they are entitled.\textsuperscript{110} Associates are representatives of the law firm in the truest sense and Congress clearly stated that "no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for any reason, he does not trust."\textsuperscript{111}

Associates, like buyers and expediter,\textsuperscript{112} may have the power to make commitments on behalf of the firm and to bind the firm in court and in negotiations without prior approval. The power to settle a case for the employer without consultation with a higher official or to commit the firm to a certain course of action in a case before the court may place the associate within this exclusion.\textsuperscript{113} Moreover, when associates attend and contribute to meetings where the firm's policies or rules are decided, they may be considered to be more akin to management than to the rank-and-file.\textsuperscript{114}

The same qualities that so distinguish management from labor and supervisors from laborers, distinguish the lawyer from the secretaries and clerical aides who need the security of collective bargaining.\textsuperscript{115} While the success of an attorney's practice necessarily turns on individual characteristics and abilities, the practice and philosophy of collective bargaining

\textsuperscript{106} 416 U.S. at 289.
\textsuperscript{107} Id. at 289 n.18.
\textsuperscript{108} Id. at 279.
\textsuperscript{109} 416 U.S. at 278 (quoting Packard Co. v. NLRB, 330 U.S. 485, 493 (1947) (Douglas, J., dissenting)).
\textsuperscript{110} See 416 U.S. at 281.
\textsuperscript{112} See notes 91-92 supra.
\textsuperscript{113} Yet mere discretion to argue a particular motion, or take an initial position in a case, may not be sufficient to justify the exclusion. See generally AFL-CIO, 120 N.L.R.B. 969, 973 (1958) (performance of duties under little supervision, involving exercise of considerable discretion not necessarily indicative of managerial status).
\textsuperscript{115} Paralegal employees, secretaries, and clerical aides were recently allowed to unionize and bargain collectively against their law firm employers. See Camden Legal Servs., 231 N.L.R.B. No. 47 (1977); Foley, Hoag & Eliot, 229 N.L.R.B. 456 (1977).
looks with suspicion on such individual advantage.\footnote{116} Increased compensation that is based on the individual merit of the attorney is awarded at the cost of collective standards and creates the suspicion of being paid at the expense of the group as a whole.\footnote{117} To require the partners in a law firm to deal with its associates as a union may result in the less qualified attorneys progressing and benefiting at the expense of the more qualified. This practice would only encourage mediocrity and would not further the purposes and policies of the Act. The Supreme Court has determined:

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\item As a standard, the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining. Where the policy of an act is so definitely and elaborately stated, this requirement acts as a permitted measure of delegated authority.\footnote{118}
\item To allow associates to unionize and bargain against the partners would be analogous to putting pressure on the employer "to accord the front line of management the anomalous status of employees," and would "therefore flout the national policy."\footnote{119}
\end{itemize}

**Confidential Employees.** The Board has consistently excluded "confidential employees" from coverage under the Act. Although there is no express statutory exclusion,\footnote{120} the Board has recognized that there are certain employees who act in a confidential capacity and that Congress did not intend to include them in a bargaining unit. There has been considerable confusion, however, as to the scope and application of this implicit exclusion. In *Ford Motor Co.*\footnote{121} the Board narrowed its definition of confidential employees to embrace only those who exercised managerial functions in the field of labor relations.\footnote{122} In amending the Act in 1947 however, Congress, in its discussion of confidential employees in both the House and Conference Committee Reports, unmistakably refers to that term as defined in the House Bill, which was not limited to those in "labor relations." The Supreme Court in *NLRB v. Bell Aerospace Co.* thus found that "although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover 'confidential employees' even under a broad definition of that term."\footnote{123} The Court thus concluded that Congress intended to exclude all "who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally."\footnote{124}

The Board, however, has not expanded its definition of confidential em-

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\item 116. See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944).
\item 117. *Id.* at 338-39.
\item 118. *Pittsburg Plate Glass Co. v. NLRB*, 313 U.S. 146, 165 (1941) (emphasis added).
\item 121. 66 N.L.R.B. 1317 (1946).
\item 122. *Id.* at 1322.
\item 123. 416 U.S. 267, 283-84 n.12 (1974).
\item 124. *Id.* at 283 n.12 (emphasis added).
\end{itemize}
ployees to encompass the broad congressional exclusion. Despite the caveat of the Supreme Court in *Bell Aerospace*, the Board still defines this exclusion narrowly. Under this narrow definition, associates who are not involved with their law firm's labor relations policies may not be excluded from bargaining units. But Congress, wary that the Board may try to include some truly confidential employees, cautioned that

providing confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees. The bill therefore excludes from the definition of employees persons holding positions of trust and confidence whose duties give them secret information.

Associates may be excluded from the Act under this broad congressional definition for it is difficult to conceive of a more confidential relationship than that of an attorney to his clients. It is often stated that a lawyer is like a trustee and is held to something stricter than the “morals of the market place,” and only “thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.” Congress clearly recognized the importance of this common law doctrine in expressly providing in section 204 of the National Labor Relations Act that:

Nothing contained in this chapter shall be construed to require an attorney . . . to include in any report required to be filed pursuant to the provisions of this chapter any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

A significant problem arises, however, when the lawyer can defend himself against an unfair labor practice only through the use of such privileged information. The Board was aware of this very problem in *Evans & Kunz*,

125. In *Ernst & Ernst Nat'l Warehouse*, 228 N.L.R.B. 590, 591 (1977), the Board stated: The mere handling of or access to confidential business or labor relations information is insufficient to render an employee ‘confidential’; as the Board has defined this term. Instead, we look not to the confidentiality of information within the employee’s reach, but to the confidentiality of the relationship between the employee and persons who exercise ‘managerial’ functions in the field of labor relations.

126. For a complete discussion of the Board’s narrow exclusion as applied to law firms, see Note, *The Unionization of Law Firms*, 46 Fordham L. Rev. 1008, 1023-27 (1978).


128. ABA Canons of Professional Ethics No. 4 states the following ethical consideration: “Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.” Disciplinary Rule 4-101(A) under Canon 4 defines “confidence” as the information protected by the attorney-client privilege and “secret” as “other information gained in the professional relationship that the client has requested be held inviolative or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”


130. *Id*.

and for that reason declined to assert jurisdiction over law firms. The Board noted that "to establish the requisite commerce data in any given case might involve the disclosure of privileged communications or the alternative of potential liability" for failure to disclose evidence as necessary to defend against the suit.\textsuperscript{133}

For instance, for a law firm to demonstrate that it does not meet the jurisdictional $50,000 inflow-outflow requirement might necessitate disclosure of the nature of the client's activities, the nature of the legal work performed, detailing any contracts made in other states, and all contracts the client has in other states.\textsuperscript{134} In such event the client would surely assert his privilege to block any disclosure of such information to its competitors or the general public. If the clients claimed their rights to nondisclosure of this privileged information, the Board could infer that the evidence that the law firm did not produce would have been unfavorable.\textsuperscript{135} The Board's policy is to assert jurisdiction in any proceeding in which the employer has failed to cooperate in producing commerce data.\textsuperscript{136} Such was the inference of the Board in a case in which the employer failed to produce evidence as to its profit-loss position.\textsuperscript{137} This places the lawyer in an untenable position, bound by his code of ethics to withhold the very information that is necessary and required in order to defend himself. This problem is posed quite clearly in cases like \textit{Evans}, in which the subpoena duces tecum demanded a complete examination of all the law firm's records relating to all clients of the firm.\textsuperscript{138}

Serious problems would also arise if the law firm were required to defend itself in a suit for an unfair labor practice under section 8 of the Act.\textsuperscript{139} The firm could be called upon to demonstrate why it fired an associate or why an associate did not receive a salary increase if such a decision

\textsuperscript{132} 194 N.L.R.B. 1216 (1972).
\textsuperscript{133} \textit{Id.} at 1218; \textit{see} Sinclair Ref. Co. v. NLRB, 306 F.2d 569, 571 (5th Cir. 1962) (employer has a duty to disclose to the Board information necessary to resolve disputes).
\textsuperscript{134} Under certain circumstances even the name of the client may be privileged and not subject to disclosure. \textit{See} NLRB v. Harvey, 262 F. Supp. 639 (W.D. Va. 1966). \textit{See generally} ABA \textit{Canons of Professional Ethics} D.R. 7-106(b)(2).
\textsuperscript{135} \textit{See generally} 2 J. \textit{Wigmore, Wigmore on Evidence} § 285 (3d ed. 1940).
\textsuperscript{136} When the employer fails to cooperate in the production of necessary commerce information the Board will assert jurisdiction if the record shows some legal jurisdiction of the Board, even if the dollar standards have not been met. Tropicana Prods., Inc., 122 N.L.R.B. 121 (1958).
\textsuperscript{137} NLRB v. Wallick, 198 F.2d 477 (3d Cir. 1952).
\textsuperscript{138} The subpoena required the production of the following documents:
1. Your records of all clients of the firm of Evans & Kunz, Ltd. to whom said firm rendered services during the 12-month period preceding [July 22,] 1970.
2. Such records as show the general nature of business of each of the clients of the aforesaid firm of Evans & Kunz, Ltd. to whom the firm rendered services during the 12-month period preceding July 22, 1970.
3. Such records as show the principal place of business of each of the clients of the firm of Evans & Kunz, Ltd. to whom said firm rendered services during the 12-month period preceding July 22, 1970.
\textit{Brief of the American Bar Association as amicus curiae at 6-7, Evans & Kunz, Ltd., 194 N.L.R.B. 1216 (1972).}
were questioned by the associate before a grievance-arbitration proceeding. The partners would have to disclose confidential or secret information relating to the performance of the associate in his dealings with clients in order to establish that there was good cause for the discharge. The Board would have to scrutinize the details of the performance in each case as well as the quality of representation by the associate. This would require a firm to disclose publicly the dealings of each associate in comparison to the one in question in order to demonstrate fair treatment.

Moreover, in a grievance and arbitration procedure, the employee, or his bargaining representative, frequently has broad access to the records of the employer relating to matters such as work assignments. The production of such records would necessarily involve disclosure of confidential, privileged information. In the final analysis, it is the client who would suffer from disclosure of his financial information, contacts, and legal problems.

While the Board has extended the coverage of the Act to attorneys in Lumbermen's Mutual Casualty Co., the entire emphasis of that opinion was on the distinctions between attorneys on the regular payroll of a corporation and attorneys engaged in the private practice of law. The Board did not address the issue of attorney-client privilege. The application of the privilege to corporate in-house counsel is more difficult to delineate and define. More importantly, consideration of the need to protect confidential information in the context of a case such as Lumbermen's Mutual does not involve third parties. The attorney-client privilege in the Lumbermen's Mutual case belonged to the employer because the employer was the sole client of the attorneys involved. In the case of the attorney engaged in private practice, the privilege belongs to his clients. The clients are not involved in labor relations disputes that might exist between the attorney and his employees. The policy considerations that necessitate recognition of the privilege in the first instance obviously have far greater weight when rights of innocent third parties will be prejudiced.

141. 75 N.L.R.B. 1132 (1948).
142. Id. at 1134-35.
146. The ABA has sanctioned unionization of in-house counsel for limited purposes, but has not extended such sanction to attorneys in private practice. It is our opinion, therefore, that lawyers who are paid a salary and who are employed by a single client employer may join an organization limited solely to other lawyer employees of the same employer for the purpose of negotiating
In Foley, Hoag & Eliot the Board took note of the significant confidentiality problems which may arise from the unionization of the secretaries and other staff employees in a law firm. The seriousness of the situation will be magnified if attorneys themselves are allowed to unionize. The Supreme Court has declared that Congress intended to exclude all confidential employees within the broad meaning of the term. "Surely Congress could not have supposed that while 'confidential secretaries' could not be organized, their bosses could be."

III. Conclusion

There are numerous considerations that the Board must encounter in determining whether Congress intended associates to be covered as employees within the meaning of the Act. While associates do resemble professional employees in their constant exercise of discretion, they also bear the qualities of management. More importantly, the Board as well as the courts will have to examine the nature of the attorney's role since associates are arguably confidential employees. Whatever the Board's decision, its effects will be far-reaching and strongly felt in the legal profession.

wages, hours and working conditions with the employer client so long as the lawyer continues to perform for his employer client professional services as directed by his employer and in accordance with the provisions of the Canons of Ethics.


148. Two members of the Board determined:

[A]ttorneys—whether representing management or labor—who participate in the formulation and effectuation of their clients' labor relations policies perform the same function for their client as would labor relations officials employed directly by the client. Therefore, when employees of attorneys assist in such matters, they—no less than aides of labor relations officials—are arguably 'confidential employees' within the meaning of Board precedent.

Id. at 457.