In the

# Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs

BELL AEROSPACE COMPANY, DIVISION OF TEXTRON, INC.,

Respondent.



No. 72-1598



Washington, D. C.
January 14, 1974

Pages 1 thru 52



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| NATIONAL LABOR RELATIONS BOARD, Petitioner, | : | |
| v. | : | No. 72-1598 |
| BELL AEROSPACE COMPANY, DIVISION OF TEXTRON, INC., Respondent. | : | |

Washington, D. C.,

Monday, January 14, 1974.

The above-entitled matter came on for argument at 1:11 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C. 20570; for the Petitioner.

RICHARD E. MOOT, ESQ., Ohlin, Damon, Morey, Sawyer & Moot, 1800 Liberty Bank Building, Buffalo, New York 14202; for the Respondent.

# C O N T E N T S

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Norton J. Come, Esq.,
for the Petitioner 3

Richard E. Moot, Esq.,
for the Respondent 23

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-1598, National Labor Relations Board against Bell Aerospace.

Mr. Come, you may proceed whenever you're ready.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE PETITIONER

MR. COME: Mr. Chief Justice, and may it please the Court:

This case is here on certiorari to the Second Circuit, and the principal question involves the extent to which certain kinds of employees whom the Board calls managerial employees are covered by the National Labor Relations Act.

Now, managerial employees is a Board concept, it's not a statutory definition, and the Board has defined these as "employees who are in a position to formulate, determine, and effectuate management policies."

The category, as I will show, is not limited to top management, nor is it limited to persons who carry out labor relations policies, but it includes a wide range of minor, administrative or executive, personnel, such as buyers, expediters, claims adjusters, and so forth.

The present case involves buyers employed by a company which manufactures and sells rocket engines and

electronic equipment.

Now, it is the Board's position that managerial employees, assuming that they're not otherwise exempt as supervisors, are covered by the National Labor Relations Act, and thus entitled to organizational and bargaining rights under the Act, unless their duties are concerned with labor relations or other matters which are likely to cause a conflict between their job responsibilities and their responsibilities to a labor organization.

The court below, on the other hand, held that all managerial employees are exempt from the Act.

QUESTION: What's the Board's theory on -- you say this is not a statutory concept, it's a pure Board case-by-case definition?

MR. COME: Yes, sir.

QUESTION: And pursuant to what authority did it purport to, say, exclude from coverage managerial employees of any kind, other than supervisors?

MR. COME: I will show that that is based upon some indication in the legislative history, which I'll get to in a moment.

QUESTION: Okay.

MR. COME: The case arises in this factual setting: Local 1286 of the Auto Workers filed a petition with the Board seeking certification as the bargaining representative

of 25 buyers employed in the purchasing and procurement department of the company's Wheatfield, New York, plant. The company opposed the petition on the ground that the buyers were managerial employees and thus excluded from the Act's coverage.

At a hearing before the Board, the following facts were established:

The Purchasing and Procurement Department fills orders from thirty other departments. This involves purchasing, maintenance and repair items such as fuel oil and light bulbs, support items such as packaging and paper, and production items ranging from simple nuts and bolts to sophisticated components for the equipment that the company manufactures. And about seventy percent of the company's business consists of parts for the Minute Man Missile Project.

QUESTION: The nuts and bolts don't loom very large in that total spectrum, do they?

MR. COME: I said that seventy percent of the company's business are materials for the Minute Man Missile Project, some of which has nuts and bolts.

Many of the purchases are off-the-shelf items which can be obtained from a number of sources. Other items must be made up according to the company's specific needs. The buyers in this proceeding work under a

Procurement Director, an Assistant Procurement Director, two purchasing agents, and four supervisors. There are seven or eight supervisory personnel over the buyers.

The buyers need not have a college education, nor does the company have any formal training program for them. They are guided in their work by a procurement manual, and other written instructions. Their salaries range from $195 to $275 a week. They are not paid for casual overtime, but they are compensated for scheduled overtime that had been authorized by a supervisor.

Purchase orders are initiated by requisition from the various departments. These go to the Procurement Department, where they are assigned to a supervisor who in turn assigns them to a particular buyer.

Requisitions for items which have been ordered previously generally specify a particular vendor. Where no vendor has been designated on the requisition, the buyer is free to select one.

When obtaining sophisticated production items, purchasing decisions are made by a team of supervisory personnel from the engineering, quality assurance, finance, and manufacturing departments; and the buyer acts as the team chairman.

The buyers may place or cancel orders of less than $5,000 on their own signature. Larger orders, however, require

supervisory approval, with higher levels of supervision required as the cost rises.

Indeed, on orders over $5,000, the buyer is required to conduct prenegotiations with supervisory personnel in the Procurement Department before he can even contact a potential vendor.

On the basis of these facts and others in the record, the Board assumed that the buyers were managerial employees as the company contended. However, following its decision in North Arkansas Electric, where it had held that managerial employees were covered by the Act and entitled to representation rights thereunder, unless they were concerned with labor relations or other matters that would present the conflict of interest that I alluded to earlier, the Board concluded that the company's buyers were not in this category and therefore covered by the Act.

The Board rejected the company's claim that the buyers' authority to commit the company's credit and to select suppliers, created a potential conflict of interest in that the buyer would be more receptive to higher bids from unionized contractors.

The Board found that the purchasing discretion of the buyerswas neither, quoting from the Board, presently so unbridled or potentially so uncontrollable as to create the possible problems of which the employer complains.

The Board then found that a unit of buyers alone would constitute an appropriate unit for collective bargaining, directed an election in the unit, which the union won, certified the union, the company refused to bargain in order to test the certification, and the Board issued a bargaining order.

The Court of Appeals, as I indicated, rejected the Board's view that managerial employees are covered by the Act except where a conflict of interest is presented, and held that a managerial employee is not only an employee that would present a conflict-of-interest problem, but any one who was formulating, determining or effectuating his employer's policies, or has discretion independent of an employer's established policy in the performance of his duties.

If you fell into that category you were a managerial employee and not covered by the Act.

However, the court added that the Board would not be precluded from determining that the buyers here, or some types of them, might not be managerial employees, as it defined the term, and it remanded the case to the Board for such a determination, but directed the Board to do so via a rule-making proceeding under Section 4 of the Administrative Procedure Act.

Now, we do not think that we reach that issue, although we are prepared to, if the Board's definition of

managerial employee is upheld.

QUESTION: I note your brief says a 1947 amendment, what is this, a second, a revised definition?

MR. COME: I think that it is, Your Honor, as I will now get to.

QUESTION: Excuse me. I'm sorry.

QUESTION: Oh, Mr. Come, but the Second Circuit said that you had already defined, or held that buyers were managerial and not covered, and that you couldn't change your mind now without a rule.

MR. COME: That is -- that is correct. There is a case, the Swift case, which --

QUESTION: So we're going to have to -- even if you had been correct in the first instance, in defining buyers as covered by the Act, the Second Circuit says you didn't, and that even though you could, with the right procedures, change your mind now, you have to follow different procedures?

MR. COME: We may have to reach that if you are persuaded that the Swift case is not an aberration but a true change.

QUESTION: Well, but we would have to also disagree with the Second Circuit as to their reading, as to what you had done?

MR. COME: Yes, Your Honor.

QUESTION: Yes, okay.

MR. COME: Now, I'd like to get to what we have been doing.

Section 2(3) of the Wagner Act provided that the term "employee" shall include any employee, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

Now, the Board early ruled that since the statutory devision was of wide comprehension and only had these three exclusions in it, it covered all other employees, including managerial employees and supervisory employees.

Thus, the discharge of managerial or supervisory employees for engaging in union activity would violate Section 8(1) and (3) of the Wagner Act.

The Board, however, excluded managerial and supervisory employees from bargaining units of rank-and-file employees on the ground that their duties were closely related to management.

With respect to supervisors, because that's where most of the action occurred under the Wagner Act, the Board vacillated between holding that not only were supervisors not included within rank-and-file units, but for a time it held that it wasn't even appropriate to put them in a unit confined to supervisors.

But the Board changed that policy in the Packard case and found that a unit of supervisors was appropriate for bargaining.

The Packard case came to this Court in 1947, and this Court, by a five-to-four vote, sustained the Board's position that foremen were protected by the Act and that a unit limited to foremen or supervisors was appropriate for collective bargaining.

Now, in 1947, Congress turned around and overturned the Packard decision by specifically excluding any individual employed as a supervisor under Section 2(3) definition of employee. And thus from the coverage of the Act.

The legislative evolution of this exclusion, however, is very significant. The House bill defined a supervisor as including not only those individuals with power to hire, transfer, promote and discharge, discipline, other employees; but also personnel who fix or make effective recommendations with respect to wages earned by other employees; labor relations, time-study, police and guard personnel; and confidential employees.

This would have excluded from coverage not only traditional supervisors but many of the individuals whom the Board had treated as managerial employees.

QUESTION: It wouldn't, by its terms, have

excluded the president of the company, though, would it?

MR. COME: What's that, Your Honor?

QUESTION: Just taking that exclusion as you've discussed it, it wouldn't, by its terms, exclude either the president or the vice president of the company, as I understand it.

MR. COME: Except in so far as they would have been excludable as supervisors. It's difficult to conceive of one in that position that would not have met the supervisory definition.

Now, the Senate Bill defined the term "supervisor" more narrowly, limiting it to individuals having authority to hire, transfer, suspend, lay off, and so on, the traditional indicia of a supervisor.

The Senate Report and the Senate debate showed that the narrower Senate definition represented a rejection of the views of those who instead of merely wanting to overturn Packard, and exclude supervisors with genuine management prerogatives from the Act, wanted to exclude wider categories of employees.

Now, the Conference Committee accepted the Senate's definition of supervisor, but with regard to those additional employees who had been included within the House but not the Senate definition, the Conference Report stated:

"In the case of persons working in the labor

relations, personnel and employment departments, it was not, though, necessary to make specific provision, as was done in the House bill, since the Board has treated, and will continue to treat, such persons as outside the scope of the Act. This is the prevailing Board practice with respect to such people as confidential secretaries as well," and it went on to say that they were not excluding time-study people or guards, nor did they exclude professional employees.

Now, the House Conference Report, in so far as it stated that the Board was excluding persons working in the labor relations, personnel and employment departments from the coverage of the Act, it was mistaken, in that the only thing that the Board had done with respect to those people, as it had done with respect to supervisors, was to hold that they were not appropriately included in units of rank-and-file, office and clerical employees.

But, giving that Conference Report the benefit of what, of the misapprehension that the conferees were under, the most that it shows was an intent to exclude from the coverage of the Act labor relations personnel and employees in the employment departments, and confidential employees.

The buyers here, and most other of the managerial employees not concerned with labor relations policy, certainly do not fit within that category.

Now, the reason for excluding persons in the labor

relations and employment departments from coverage is that people with those duties are in a position where their duties could bring them into a conflict-of-interest situation, if you were to accord them unionization rights.

The Board's test of what managerial employees are and are not covered by the Act, we submit, gives effect to this congressional intention that those types of employees should be excluded from coverage; whereas, on the other hand, the broader definition of the Court of Appeals that would exclude from coverage not only managerial employees who are concerned with labor relations policies, but any other employee who is concerned with effectuating the employer's policies, would exclude from coverage thousands of employees who, there is no reason to believe, that Congress would have wanted to exclude.

It would exclude many employees that certainly do not rise to the level of the front line of management, which was what Congress was careful to confine itself to in restricting the definition of supervisor, and would exclude many who certainly are not as well-trained as professional employees, whom Congress did not exclude from the coverage of the Act.

The only provision that was made with respect to professional employees was to say that before you can group them in a unit with nonprofessionals, you have to give them a

self-determination election.

Now, what are the reasons which led the Court of Appeals to what we regard as a misreading of the congressional intention?

The Court of Appeals thought that unless they adopted the expansive interpretation of managerial employees that I have just alluded to, you would not be giving full effect to this Court's decision in the -- that is, the dissent in the Packard case, which, to be sure, was very, very responsible for the exclusion of supervisors from the coverage of the Act.

Now, in Packard, however, the dissent, as we read it, was concerned with putting in the employer category all those who acted for management, not only in formulating but in also executing its labor policies.

The Board's conflict of interest test excludes from the coverage of the Act managerial employees who are so involved with labor policies.

Now, the court below also said, and this gets back, I believe, to the question that you asked, Mr. Justice Rehnquist, that if you interpret -- unless you interpret managerial employees as broadly as the court below did, you could lead to the organization of vice presidents and other top executives, which was prophesied in the dissenting opinion in Packard.

We submit that the Board's test does not do that, for two reasons.

In the first place, as I mentioned before, most such executives are likely to be excluded from the Act as supervisors, and those who do not meet the supervisory definition would probably present a conflict-of-interest situation, and thus would be the type of managerial employee which the Board's test would exclude from the Act, because --

QUESTION: May I interrupt for a moment?

MR. COME: Yes.

QUESTION: What is the authority for going beyond the definition of "supervisor" that Congress has set down in the '47 amendments?

MR. COME: I think the authority would be the sentiment of Congress as expressed in that House Conference Report.

QUESTION: Does -- because the term "employee" that came out, the definition of "employee" was also amended by that, --

MR. COME: That is correct, and what --

QUESTION: -- and all it did is exclude supervisors as defined by the Act.

MR. COME: That is correct. I think that the -- that if the Board had --

QUESTION: It seems to me, arguably, anyway, you can only exclude --

MR. COME: Supervisors.

QUESTION: -- supervisors. Maybe some of them you might put a label on, like managerial, but they still have to be supervisors as defined by the Act.

MR. COME: I think -- I think that that would have been a terrible interpretation of the statute.

However, that would not, I submit, give effect to the sentiment as expressed in the House Conference Report, that certain other employees, namely, those concerned or working in the labor relations, employment departments, and confidential employees would not be covered by the Act.

Now, as I explained, Congress was mistaken in that the Board was not excluding them from the Act. It was merely excluding them from bargaining units.

QUESTION: Well, maybe those two categories, but that's a long way from buyers.

MR. COME: That is correct, and that is why we submit --

QUESTION: Well, I know, but it's also a long way from any other group that you might say is so wound up in employer policy that there might be a conflict. That's the Board's view, isn't it?

MR.COME: That is correct, Your Honor.

QUESTION: But that's a lot broader than the definition of supervisors.

QUESTION: Right.

MR. COME: That is correct.

QUESTION: Is there -- is it conceivable that a buyer who is a member of the union would make decisions on purchases, those within his jurisdiction and those recommendations that he could make up to fifty thousand, favorable or weighing unduly the companies that had contracts with his own union, as distinguished from neutral factors that a buyer should take into account?

Is that a rational factor for an employer to take into account in this equation?

MR. COME: Well, the employer can take it into account in so far as in the procurement policy manual or instructions that he controls the discretion of the buyer, to point out that that should not be a factor. And if it proves to be a factor, I suppose it would be grounds for discharge; but it's a long way for --

QUESTION: But it's a pretty difficult thing to try to enforce, is it not? As is so often the case with conflicts of interest.

MR. COME: What the -- but, on the other hand, the chances of enforcing it are not that remote that you go to the other extreme of saying that a whole group of people, and

the Court of Appeals pointed out that there must be hundreds of thousands of buyers, should be denied the protection of the Act if they wished to organize and bargain collectively.

Now, the Court of Appeals felt that the Board had, in the Swift case, led Congress, when it amended the Act in 1959, to believe that buyers were not covered by the Act, and therefore the fact that Congress, in 1959, didn't change the Act should be deemed to fortify the view that buyers were not covered by the Act.

Now, in the Swift case, in 1954, to be sure, the Board held that a separate unit of poultry procurement drivers could not constitute an appropriate unit for collective bargaining, because it was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management.

We submit that this was an inaccurate statement, that went beyond Congress's intent in 1947, it was contrary to numerous Board decisions immediately after the enactment of the 1947 amendments, which merely held that managerial employees could not be included in the same bargaining unit with rank-and-file employees.

The fact that Congress in 1959 did nothing, we further submit, is of no relevance because when it amended the Act in 1959 there was nothing in those amendments which dealt, in so far as the basic 1959 changes, dealt with

the rights of labor unions under Landrum-Griffin, --

QUESTION: Right.

MR. COME: -- reporting and so on. And the only amendments to the National Labor Relations Act were to strengthen the union unfair labor practices against secondary boycotts and picketing. There is absolutely no indication that anyone brought up the question of the coverage of managerial employees or that Congress focused on them.

We submit that the fact that the '59 amendments were enacted without any change in the managerial definition does not advance our analysis one whit.

I see that my time is up. I'll have to refer the Court to our brief on the rule-making problem in the case.

Thank you.

QUESTION: Has the Labor Board ever made any rules of a substantive nature?

MR. COME: Not of a substantive nature. Since Wyman-Gordon, which was the last time that we were before this Court on that question, the Board has enacted two rules with respect to the assertion of jurisdiction. One over colleges and universities, and the other over symphony orchestras.

After a rule-making proceeding, the Board set dollar amounts which would govern the exercise of its discretionary jurisdiction over these industries.

QUESTION: Horse racing and dog racing, too, didn't

it?

MR. COME: They held a rule-making proceeding with respect to horse racing and dog racing, but after getting in the views of the various interested parties they decided not to assert jurisdiction.

QUESTION: This didn't apply to the horses and the dogs, I suppose, but to the people.

MR. COME: No, this would be to the trainers and the personnel there.

[Laughter.]

QUESTION: The Board, in fact, has been rather -- well, I was going to say allergic; but, in any event, just simply hasn't deemed it appropriate or wise to rule-making authority that other agencies used. That's a fair statement of the historic fact, isn't it?

MR. COME: I think that that is a fair statement.

However, I should like to -- if I might take a few more minutes -- point out that although the academicians and the legal scholars find that the Board should use it more, the surprising thing has been that the practitioners before the Board, both on the labor and the management side, and this has been the subject of numerous discussions on the various American Bar Association committees, are perfectly satisfied with the Board's continuing to treat these problems via the adjudicative route. And have been uniformly

in agreement that there should be no departure from past practice.

Of course that is not the be-all and the end-all, but it indicates that the Board's customary procedure has been found satisfactory.

Now, the other part of the problem is that the Board, unlike many other administrative agencies, does not have any roving commission to go out and investigate a problem and then promulgate a rule. We can only get into the act if somebody files a charge with us, or somebody files a petition for a representation election.

So, there you are, in the middle of an adjudicatory proceeding, where the facts are very important; and if you were to go to a rule-making proceeding at that point, you're going to have to have that proceeding mark time, conduct your rule-making proceeding and, with respect to many of the provisions that we administer which are in general terms and where facts make a difference, it's been the Board's judgment, and I might say that this has been the view -- this is something that the Board has been consistent on, irrespective of the composition of the Board; that when you got through with all of that, you would end up with something of such a general nature that it wouldn't be of much value.

You'd have to pick up your adjudicatory or representation proceeding and go on from there.

QUESTION: Which is the point you make in the brief in this case, isn't it?

MR. COME: Yes. I think that, although I know that Judge Friendly has been very vigorous in this area, that this is, I believe, the worst possible case for making the case for rule-making. I think that we were much more vulnerable in Wyman-Gordon.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Moot.

ORAL ARGUMENT OF RICHARD E. MOOT, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MOOT: If it please the Court. Mr. Chief Justice:

I am Richard Moot from Buffalo. We represent the Bell Aerospace Company, a Division of Textron.

Our firm has represented this company and its predecessor, the old Bell Aircraft Company, for a great many years. My partner, now deceased, Mr. Winch, handled the original proceeding before the -- at the time of the hearing.

I would like, at the beginning, just to mention the facts briefly where we believe the statement of facts is somewhat lacking, and then to give you the points which I will make here this afternoon, which are very brief.

The buyers in this case, who petitioned to be represented under the Labor Management Relations Act, were

25 in number. The job description called for a preferred for a senior buyer, and that was the largest number of them, of a college education with a business administration specialty.

Now, it's true that many of them did not have them, and that was not covered at the hearing.

But six years' practical experience was considered a substitute for it.

In this case the buyers -- and may I just say that our business was not either burning fuel oil or burning out electric light bulbs, as the brief might suggest; we're a contractor very heavily in research and development and seventy percent of our business is the guidance package, propulsion package for the Minute Man missile, a large part of which is tailormade to the most exact specifications.

The buyers in this case had the prime responsibility, two-fold, of seeing a steady flow of the necessary material, special tools and components came to the plant at Bell, so that the production schedule for Minute Man would stay on line.

Secondly, they had the responsibility to see that this was done with the maximum economy of the company, their employer's money.

One buyer, senior buyer in this case, in the 19-month period, which we're talking about, spent $1,300,000 on

his own initiative, taking collectively the amount that he purchased on his own say-so alone.

The group in total --

QUESTION: Over how long a period was this?

MR. MOOT: Nineteen months.

QUESTION: Nineteen months. Unh-hunh.

MR. MOOT: In the 19-month period the group of 25, together, spent $7,600,000 on their own initiative. Collectively they participated --

QUESTION: Well, it was the company that spent it; right?

MR. MOOT: Yes. But on their signature.

QUESTION: Right.

MR. MOOT: Collectively, in the same period, the group of 25 supervised or participated in the procurement of material in the amount of $41,300,000.

Now, I say those facts, so that we'll not be misled in talking about buyers, to think we're opening up a catalog from Sears, Roebuck and saying where are they going to get this or that piece of pottery to stack the shelf.

We're not talking about light bulbs, fuel oil, packing paper, or shelf items, which are constantly being mentioned in the opposing brief. At best, that is, and I'll be quite frank, an attempt to mislead the Court as to the nature of the duties here.

QUESTION: But to the contrary, you say you're not talking about light bulbs, you're not talking about this, you're not -- what are you talking about?

MR. MOOT: We're talking, Mr. Justice Marshall, we're talking about special components for a Minute Man missle, highly complex electronic devices. In many cases it's cheaper for our client, Bell, to buy, say, a black box from Minneapolis-Honeywell than it would be to ask the people in the plant to make it.

Wherever they're asking for a guidance system, or any part of a guidance system, or an intricate valve on one of the control valves for Minute Man, if that can be made more cheaply and better outside the plant, then that's the buyer's job to find somebody who can do it and have it built outside the plant and brought in.

And in the Appendix to the record here --

QUESTION: How many people do they supervise?

MR. MOOT: They act on their own initiative.

QUESTION: So they don't supervise anybody.

MR. MOOT: They're not being exempt as supervisors.

QUESTION: That's why they're not supervisors.

MR. MOOT: That's right. They're acting as a part of management.

And in this, buyers act as a team; they include engineering, quality control, financial, and the buyer himself

acts as captain of that team.

He does not perform his job at a desk at the Bell plant. It's necessary for him to visit the various sub-contractors or parties where the material, special tool or special component is either being designed or being built. He has the responsibility to see that the production date and schedules are maintained.

If a strike occurs at this supplier's plant, and the dollar amount is under $5,000, he can cancel it at the strike-ridden plant and put it in a non-union plant, in order to insure the orderly flow of necessary components to the assembly of the Minute Man missile.

QUESTION: Are these people --

QUESTION: Mr. Moot -- excuse me. Go ahead.

QUESTION: Are these people, as a group, charged with the responsibility of making so-called make-or-buy decisions, or do they only operate after the decision has been made to buy?

MR. MOOT: They have, as the proof shows here, the authority to decide make-or-buy; they also have the authority, under 5,000, to change from the recommended source; if some department at Bell recommends a given source they can change that source if it's under 5,000. If it's over 5,000, they make an investigation and a report and it goes up the ladder.

QUESTION: On a, let's say, big item, a hundred thousand dollar item, --

MR. MOOT: But again --

QUESTION: -- do they have a make-or-buy decision? I know they can't do the buying, if it's on their own, if it's over 5,000; but how about the management decision to make-or-buy?

MR. MOOT: They make the recommendation, and that recommendation is reviewed. But I'm sure Your Honor well knows that where the work has been carefully done at that level, the question on review is: is it documented? is it a satisfactory piece of work?

But the knowledge and the specialty and to know how to make an intelligent recommendation there rests with the buyer. And in the overwhelming cases, as the proof in this record shows, he is sustained on review.

QUESTION: Are there any limitations on the buyer's authority to select the seller?

MR. MOOT: He is -- yes, there is, and this is why he's part of management. His limitation is he must select the supplier which is going to do it most economically for the company. And in the record here, there are about fifteen pages of cost reductions achieved by selecting a buyer [sic] sometimes other than the one designated, because he could get a better price. He has the characteristic function of

management, to try and conduct the business of the company in a more economical manner. But he has no restrictions on whether he should buy union or non-union. And if he thinks he can get a better price non-union, he buys it non-union.

QUESTION: Does top management provide the buyer with a list of manufacturers who are deemed technically competent to produce this sophisticated equipment you are talking about?

MR. MOOT: There are regulations with respect to -- or guides that people have used before, and people who have been approved by the Department of Defense and other guidelines; yes, there are.

QUESTION: But if the prospective supplier is on the list, then the buyer has the authority to make the decision?

MR. MOOT: Well, I think he has the right to go off the list, too, in certain cases.

Now, if I can just --

QUESTION: You believe the buyers here, the twenty-odd buyers here, Mr. Moot, have professional engineering training?

MR. MOOT: I think -- and again this is not detailed name-by-name in the proof, as I read the record -- the experience in this case was predominantly learned on the job.

Now, if -- excuse me.

QUESTION: It strikes me that, interesting as this has all been, probably it's not very material to the case, because doesn't the government concede that these, at least for the purposes of this case and this argument, doesn't the government concede that these are managerial employees?

ic/ MR. MOOT: Thank you, Mr. Justice Byron, that's what -- I was hopeful I could get to that before more of my time was gone.

QUESTION: Yes.

MR. MOOT: That certainly is true.

And the point I want to make, and if I only make this one point this afternoon, I believe I'll serve my client well.

The rule that's being espoused in this case is new. Make no mistake about it. The position of Judge Friendly below is very simple.

He said: Where there's a well-established rule as to what is management and what is not management, you stick by the rule, unless -- if you're going either rule-making or back to the Congress.

Now, let's just make this point --

QUESTION: But the Board's first decision on that was in the North Arkansas case.

MR. MOOT: They did, and let me just --

QUESTION: This isn't really any different from

what they did there, is it?

MR. MOOT: The point exactly I'm making is that North Arkansas is a new rule, and North Arkansas, of course, --

QUESTION: And North Arkansas overruled Swift, three years ago.

MR. MOOT: Exactly. And the claim made in brief here, Justice --

QUESTION: That's three years ago.

MR. MOOT: Yes, but this proceeding began in 1970. At the time this hearing was conducted, North Arkansas had not been decided.

As a matter of fact, by a strange coincidence, the decision was dated, on North Arkansas, August 27th, 1970. And the hearing officer began proof in this case August 28th, 1970.

And if I could just read a short part from the record, to make how clear it is that this conflict-of-interest rule, which they're now saying they had all along.

The claim in brief here is that Swift is an aberration, and that from the time of 1947, the Taft-Hartley amendment and the overturning of Packard, that all along they have excluded, or -- excuse me -- they have said managerial employees are only excluded if they're in labor relations or if they present a potential conflict-of-interest or a

statutory -- I think as Mr. Justice White points out -- exclusion, like supervisors.

And we say that just simply is not so. The conflict-of-interest rule is just as new as North Arkansas.

QUESTION: Well, they felt -- I gather the Board felt it essential to decide North Arkansas the way it did, to overrule Swift.

MR. MOOT: Yes, and what --

QUESTION: And it also said not only Swift but other decisions to the same effect.

MR. MOOT: That is correct, Mr. Justice White, and that's where Judge Friendly below and general counsel for the Board have parted company.

The position of Judge Friendly below that where a long line of cases, from 1947 up to 1970, have said that buyers who spent significant amounts of the company's money, with significant independent discretion, have been considered a part of management and not covered by the Act.

And where a long line of cases, such as that, is well established, and you wish to change it, you should adopt rule-making, otherwise it leaves the practitioner, and we certainly don't adopt the view of the American Bar Association or anyone else, that we want to have a new rule as to what is management and what is labor, produced by this case or any other case.

If they're going to make a change in how they've decided these cases from 1947 up to 1970, which is the date of our case --

QUESTION: But your case was tried under the new rule, was it?

MR. MOOT: No. Let me just point that out.

QUESTION: Yes.

Even though your hearing began the day after North Arkansas came down?

MR. MOOT: Well, quite understandably, Mr. Justice Brennan, we don't read the slip opinion from the National Labor Relations Board on a 24-hour basis.

QUESTION: No, but what could the hearing examiner do? Did he --

MR. MOOT: Yes, I'm going to read that right from the record. I'm pleased to have your question.

The hearing officer said --

QUESTION: Where are you reading from now?

MR. MOOT: Page 8.

QUESTION: Of the Appendix?

MR. MOOT: Yes, Your Honor.

The hearing officer asks my associate, or my partner, Mr. Winch: "Briefly what is the position of the company?"

And Mr. Winch replies: --

QUESTION: I'm sorry, I can't find that. Did you say page 8?

MR. MOOT: Page 8.

QUESTION: Oh, yes. Thank you.

MR. MOOT: And the hearing officer says: "Mr. Winch, briefly what is the position of the company as to the appropriateness of this unit?"

And Mr. Winch replies: "The employees within the named unit are managerial employees and, secondarily, that they have no community of interest."

The community-of-interest matter did not survive in the hearing, and the question then resolved as to whether they were or were not managerial employees.

The representative for the UAW, at the conclusion of the proof -- I'm now turning to page 83 of the record -- in which he was stating what he wanted to prove. This is the UAW representative himself.

"I would like to have the record show that this adjournment was granted solely for the purpose of giving the union an opportunity to produce evidence that the buyers are not managerial employees and for no other purpose."

QUESTION: Did anybody even mention North Arkansas in the course of this proceeding?

MR. MOOT: No. Nor, Mr. Justice Brennan, was the matter of conflict of interest, the very thing which in brief

now they say must be determined, factual question to be determined, was not even mentioned. There was no argument with respect to conflict of interest at the time of the proof.

The first time conflict of interest entered this case --

QUESTION: What happened when you got to the Board?

MR. MOOT: When it got to the Board, the Board conceded that these were managerial employees and a part of management, but they said, we have the right -- and you've led me to my next question.

QUESTION: Well, they must have followed their own North American precedent.

MR. MOOT: North Arkansas.

QUESTION: North Arkansas; sorry.

MR. MOOT: Yes, they did.

And they said by brief, if I can read again -- now, this is the position directly contrary to the position taken by brief in this Court, which we find somewhat embarrassing.

They said: While the Board's decision in North --

QUESTION: What page are you on?

MR. MOOT: What's that?

QUESTION: What page?

MR. MOOT: I'm on the brief for the Board in the Second Circuit.

QUESTION: Oh. We don't have that.

MR. MOOT: Well, I believe it's filed with the Court, Your Honor, but I'm not sure it's in front of you.

QUESTION: Yes.

MR. MOOT: But we also quoted it in our brief.

And they say: While the Board's decision in North Arkansas and the instant case mark a change in Board policy, it is well settled that the Board may change its policy if in doing so it does not act arbitrarily.

Now, this is where Judge Friendly said: If you're going to change and say what has always been a part of management and say that's not management, or to say, if you will, that management has the right to organize and bargain under the Act with management, if you can't show that it's labor sensitive or in a conflict of interest.

Judge Friendly and the Eighth Circuit both read the legislative history to say that that's absolutely out, that when Congress originally passed the Act it was designed -- in answer to your earlier question, Mr. Justice White -- to provide a set of ground rules for management to bargain with labor. It was never intended that management would bargain with non-labor sensitive management.

And that was the position that Judge Friendly took.

And he said: If you want to establish a rule now that managerial employees, part of management, have the right to organize and bargain with other management, if they're outside of the labor relations department, or if they're not in a conflict-of-interest situation, you go back to Congress with that argument.

But, he said, if what you're trying to say is that buyers who, for this whole period, from 1947 to 1970, on similar-fact situations, without exception during that period, the Board had treated as they did in Swift and American Locomotive, had treated those type of employees as a part of management, and said that they were outside the Act.

He said, now, if you want to say buyers are not really part of management, you want to change your mind, that you should go through rule-making to do that.

And we think that that rule is an eminently sensible one. That if they want to establish two categories of management and have management bargain with management, that's for Congress.

If you want to change a well-established definition as to what is part of management, buyers under factual situations similar to what we have here, you should do that with rule-making.

I think the --

QUESTION: The first part of that proposition

announced by Judge Friendly was based on his theory that Congress had reenacted what had been a Board view.

MR. MOOT: In part.

QUESTION: Well, what else was it based on?

MR. MOOT: I think it was based upon the original approach and handling of the National Labor Relations Act when it was first passed; that the National Labor Relations Act, when first passed,--

QUESTION: But these --

MR. MOOT: -- had not attempted to find what was management in all-inclusive terms. It was assumed that if it was management, it was on one side, and labor was on the other side.

And the first major dispute over that arose in Packard. Where, in Packard, they said that foremen are not a part of management and they're covered. And Congress quickly corrected that, and said they should not be, they should be excluded from the Act; and that was done.

But from the very beginning of the National Labor Relations Act, and certainly throughout its whole history, the whole purpose is to provide a system or ground rules between management on one side and labor on the other, and no attempt, I don't believe, Mr. Justice White, was ever made to say the following shall constitute management and the following shall constitute labor.

QUESTION: Well, I still wonder, what's the basis for saying that even by a rule the Board couldn't give a construction to some statutory words that might be different from what -- from the way it had construed them before. Unless you're going to say that Congress itself has adopted the one construction.

MR. MOOT: Well, certainly that's what the Eighth Circuit and the Second Circuit did in --

QUESTION: Well, that's in effect saying that Congress froze the Board's original definition, isn't it?

MR. MOOT: After a long period of time, and it's not surprising that they did, considering the number of years.

QUESTION: That's the question, I suppose.

MR. MOOT: Yes. Yes, it is. And all I can say, in answer to your question, Mr. Justice White, is that we agree with the legislative history arguments in both the Eighth Circuit and the Second Circuit.

But the point which I'm trying to make, and I want to make absolutely clear here, is that when they came to North Arkansas they changed the rules, and that Swift is not, as they now claim, an aberration; that the rule was well established, from 1947, the time of the Taft-Hartley Act, to 1950 [sic].

Let me just read from general counsel's brief in

in the North Arkansas case. Now, this is general counsel from the National Labor Relations Board --

QUESTION: But you give the problem of not only saying what Board practice was but that Congress froze it, if you're going to say that --

MR. MOOT: Yes, I understand that. And all I can say in the time allotted here, Mr. Justice White, --

QUESTION: -- is that you just rely on the legislative history.

MR. MOOT: Of the two -- I think that both the Eighth Circuit and the Second Circuit --

QUESTION: Read it correctly.

MR. MOOT: -- were correct.

QUESTION: Yes.

MR. MOOT: And I think that they've given full weight to --

QUESTION: And I suppose we've got to re-read it ourselves, don't we?

MR. MOOT: I expect that is true.

QUESTION: Yes.

MR. MOOT: But I think that where, in attempting to get around that --

QUESTION: Well, let's assume for the moment, though, that you -- that we disagreed with you on whether Congress froze that approach, and the question is: May the

Board change its mind?

Accepting your view of Swift and of North Arkansas as a change in the rule, was it permissible for the Board to change its mind in an adjudicatory proceeding?

MR. MOOT: I don't think so.

QUESTION: Now, there is no authority for that, is there? Other than what -- other than the judgment we're reviewing.

MR. MOOT: Well, that's -- and I think that the provisions of the Administrative Procedure Act, I certainly am in Judge Friendly's corner on that.

Let's put this, if we will, in the pragmatic posture it was when it came to us, as counsel for an employer. And here we had an unbroken line of cases from the Taft-Hartley Act forward, which said: managerial employees of this type were outside the protection of the Act. They were spending a significant amount of money of the company; they were primarily charged with economy and management of the company and its funds, and they're exempt.

QUESTION: We've certainly approved a lot of mind changes without a rule, up to now, I would suppose.

MR. MOOT: What we're saying is that where such a major departure is going to be made from a well-established line of cases, that it's either for Congress, which has amended it, as they did in the case of overturning Packard,

or it's for rule-making. That's our position.

I think the reason why, in this Court, --

QUESTION: I suppose that, earlier in this term -- I'm sorry I don't know the name of it, since I wrote it, but I don't -- we dealt with this problem of the Board's changing its mind. I think it was the definition of successor corporation, for purposes of liability under an order issued against a predecessor.

And it never occurred to us to suggest rule-making in that case.

MR. MOOT: Well, I think, quite honestly, if you're going to -- to me, the argument that's appealing to me as a lawyer is that if you're going to change what you've always considered to be management; in other words, if you're going to change the jurisdictional grounds of this statute, that that's something Congress ought to be doing and we ought not to be doing it on a single case.

That's more appealing to me, that this is for the legislature not the courts.

QUESTION: Yes.

QUESTION: But I think an examination of the Board's activity in the successor corporation area would disclose that this was done in a series of cases, a series of short steps rather than one large leap.

MR. MOOT: Well, that's the very advice here, and

the leap happens to come after we've had the hearing. After the very factual issue which is supposed to be determined in each case is over. We never got to conflict of interest because it wasn't the law.

Mr. Winch had practiced in this field for forty years. He never heard of it. The hearing officer hadn't heard of it. And the UAW representative hadn't heard of this rule.

QUESTION: Do I understand there was no evidence in this record at all on the conflict-of-interest issue?

MR. MOOT: None whatsoever, Mr. Justice Powell. It's that new.

And the idea that Swift is an aberration which is being urged upon Your Honors by the brief here is absolutely false.

QUESTION: And it came up for the first time in the opinion of the Board --

MR. MOOT: In North Arkansas.

QUESTION: -- and it was not argued before the Board.

MR. MOOT: In -- well, North Arkansas went up --

QUESTION: In this case.

MR. MOOT: -- and then back and then up again. And finally the Eighth Circuit rejected that conflict-of-interest test the second time it went to the Eighth Circuit.

And this led to another embarrassing thing in our case, because the very day of the decision, second decision in North Arkansas was the day of the decision of the Board in our case. And we asked: Reconsider it. The Eighth Circuit doesn't agree with you.

And they said: We don't have to reconsider it, we were right in the first place.

Now, we've got two Circuit Courts which say this is management and it's not covered; and they said, We don't care, we'll still persist with this rule.

And the pragmatics of applying conflict of interest just open a whole host of problems.

I'll leave it there, because I see I only have a few minutes.

I don't think, and I agree with Mr. Chief Justice the test of conflict of interest must be one of the most difficult of all to apply, because, as the facts and circumstances change, whether a particular part of management is in a conflict of interest will change. And people may be in one time and out another. An example from our very own company:

The decision was made from a corporate point of view to take the principal production from Wheatfield and move it to Texas, and labor costs were a significant part of it, they had a very stormy production, labor negotiation

history in the Niagara Peninsula.

Many people would have to participate on that move from Wheatfield to Texas. Once made, the same people might have no labor-sensitive input whatsoever to management, but they might be highly labor-sensitive, or in a position to conflict-of-interest while that decision of opening a separate plant in the south was before the table.

Afterwards, they wouldn't be.

QUESTION: Now, could I ask you: As I understood your recitation of what happened in this case, when the Board got around to deciding the case and issuing its own order, it did take cognizance of North Arkansas.

MR. MOOT: That's correct.

QUESTION: And it did pitch its decision on North Arkansas?

MR. MOOT: Yes.

QUESTION: And on conflict.

MR. MOOT: That's right.

QUESTION: Now, on that record, on the record that it had before it, whether you tried it on that theory or not, the Board apparently thought the record adequate and that you weren't denied due process or anything by their deciding the case on the North Arkansas basis.

MR. MOOT: Well, that's what they thought.

QUESTION: Now,Judge Friendly seemed to think that

it was -- that you could not affirm -- that you could not decide this case on the North Arkansas basis.

MR. MOOT: Well, he thought North Arkansas was wrong, and secondly, he said you couldn't change it, --

QUESTION: Well, he went --

MR. MOOT: -- which way they decided it.

QUESTION: Well, what he actually said was: We cannot be sure --

MR. MOOT: That's right.

QUESTION: -- that the Board's decision rested on such a factual determination, --

MR. MOOT: That's right.

QUESTION: -- rather than on its new and highly erroneous holding.

MR. MOOT: You couldn't tell.

QUESTION: And he said there's a Chenery problem involved.

MR. MOOT: That's right.

And you can't tell to this day, reading this record, which way they decided it.

QUESTION: I know, but you've just said that the Board did pitch its decision on North Arkansas.

MR. MOOT: Well, I said that --

QUESTION: And on conflict.

MR. MOOT: -- to this extent, that they conceded

that the buyers were managerial, both in brief and by argument. That's the only way you can tell, that they apparently made that concession.

But as Judge Friendly said, when I argued the case in front of him, the fact the Board conceded it doesn't mean that it's so.

QUESTION: Now, do I understand your position is that you put no evidence in on this issue of conflict because,at the time you were putting your evidence in, that wasn't relevant evidence.

MR. MOOT: True.

And it's a very difficult thing to make evidence on potential conflict of interest, because the real conflict of interest often doesn't develop until you organize the part of management.

QUESTION: How long did it take you to try the case before the examiner?

MR. MOOT: Two days or -- I think it began the 28th, it went to September 3rd. So maybe a week's time altogether.

QUESTION: And no one -- still nobody had heard of North Arkansas?

MR. MOOT: No, they didn't. But we did get it and put it in the addendum of our brief, Mr. Justice --

QUESTION: But, you know, North Arkansas, by the

time they got around to overruling Swift and Company, that was on remand from the Eighth Circuit.

MR. MOOT: True.

QUESTION: And that had been in 1967, that the Eighth Circuit remanded to find out if that particular managerial employee there should not only be excluded from the unit but to see whether he had protections against unfair labor practices.

MR. MOOT: That's correct.

QUESTION: Now, that was an outstanding issue in --

MR. MOOT: Yes, but the decision was on our side at that time.

QUESTION: I understand, but it was --

MR. MOOT: Yes, we were in a representation case, and the Eighth Circuit had made it clear that a managerial employee of the type in North Arkansas did not qualify for representation. That was one of their first decisions, and so we're quite correct in saying conflict of interest is not a provable matter in this hearing, because it never had been before; and the Eighth Circuit said it shouldn't be.

So neither the hearing officer nor the UAW representative or Mr. Winch, who had spent forty years in this field, attempted proof on it, because it wasn't proper.

MR. CHIEF JUSTICE BURGER: That's only your white light; you have five minutes left.

MR. MOOT: All right. I'm happy to answer any more questions, but I believe if I've made my one point and made it to the best of my ability: that they're espousing a new rule, and perhaps it's an overstatement, but certainly I don't believe so.

That what they're trying to do in this case, the Board is trying to do, is to say that the protection of the Labor Management Act extends not just to labor, but that management, unless it's in a labor-sensitive position, in labor relations, or excluded by a particular portion of the code -- like supervisors, that's one; agricultural workers are another -- that management is free to organize and bargain with management, subject to those exclusions.

And we say that's brand new. And we say that if that's what they want, they better go to Congress to get it.

QUESTION: You were starting to read something from the brief of the general counsel --

MR. MOOT: Yes. Just because --

QUESTION: -- some time ago when we interrupted you. I'd be interested in what that was.

MR. MOOT: It's thoughtful of you to remind me, because certainly in the brief here there's no question that they have taken the position that -- they've taken the position in their brief here that Swift is an aberration.

I see that that position has not been adopted by

several members of this Court right now, but general counsel, in his brief in the Eighth Circuit, took no such position.

QUESTION: Now, this is in what case, and when?

MR. MOOT: In North Arkansas. In -- I can't tell you right now, because I've got the citation but it doesn't say first or second appeal. This is what --

QUESTION: But sometime in 1970-71?

MR. MOOT: That's right. Well, it would be between '67 and '70.

QUESTION: Unh-hunh.

MR. MOOT: And this is general counsel, writing for the Board:

While the Act makes no specific provision for managerial employees, the Board has long held that this category of personnel to be excluded from the Act.

Now, that's general counsel from the Board itself saying this category of employees in a long line of cases was held to be excluded.

QUESTION: Now, I take it that one of the approaches of the Board has been not to define these managerial employees as excluded employees, but as -- that they are employers. You define the term "employer" to include these managerial employees. That's what this --

MR. MOOT: Yes. I suppose they're equating "managerial" with "management" and "employer".

QUESTION: Well, that's what they've said.

MR. MOOT: That's right.

QUESTION: That's what they said in North Arkansas. That they will construe -- that the question about managerial employees is whether they're to be thought of as employers or as employees.

MR. MOOT: Yes. And prior to North Arkansas, for that long line, as general counsel said, they were considered employers. Now they want to change it all.

We say that we want to change the basic coverage of the Act in this fundamental way: introduce a new concept of labor negotiations, management bargaining with non-labor-sensitive management; that perhaps Congress ought to do that and not the Board, by a decision which two Circuit Courts have considered and disagreed with.

QUESTION: Well, I take it what you're saying is that large-scale buying, acquisition, is inherently a managerial function.

MR. MOOT: Exactly. Particularly where cost cutting is a major part of it.

I should mention that we have copies of the amicus brief. We have not filed replies to those briefs, but the UAW brief, in the last part I think, is wrong when it attempts to say that this will affect or exclude people now already covered as technical or professional people. Nothing in

this case bears on that.

Whatever coverage is afforded professional and technical people, it's not touched by this appeal.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:21 o'clock, p.m., the case in the above-entitled matter was submitted.]