IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION; and

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

No. 80-885

No. 80-1103

Washington, D.C.

Monday, October 5, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:11 a.m.

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner/Respondent.

WARREN D. KREBS, ESQ., Lebanon, Indiana; on behalf of the Respondent/Petitioner.

RUSS R. MUELLER, ESQ., Milwaukee, Wisconsin; on behalf of the Respondent/Petitioner.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in National Labor Relations Board against Hendricks County and the related case.

Mr. Wallace, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF PETITIONER/RESPONDENT

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

This is two consolidated cases from the Court of Appeals for the Seventh Circuit presenting questions concerning the scope of an implied exclusion from collective bargaining rights under the National Labor Relations Act for nonmanagerial employees entrusted by their employers with confidential information.

The cases do not present the question that has been before the Court in the past concerning the drawing of the line between labor and management, which has been the subject of much past controversy; but the cases are instead decided on the premise that these are employees who fall on the labor rather than management side of that dividing line. There is a contention to the contrary in one of the cases that has not yet been reached by the Court of Appeals and would be reached on remand if the court agrees with our

contentions.

One of the cases, the Malleable case, involves an assortment of 18 employees, and it's disputed whether they should be included within the bargaining unit. They're described in some detail on pages 10 and 11 of our brief. I won't recount all of them at this time. You'll notice that included among them are four engineers, three draftsmen, and a number of relatively low level employees. We describe, for example, one who earns $3.50 an hour and is essentially a shipping clerk and performs such tasks as routing shipments, preparing bills of lading, tracing lost deliveries, and handling damage claim reports. Another at an annual salary of $10,500 handles paperwork relating to shipments to and from the employer's warehouses. Another at an annual salary of $6,400 handles correspondence and telephone calls concerning difficulties with the company's products and is responsible for issuing credits on defective merchandise, et cetera.

QUESTION: Mr. Wallace, isn't Malleable an easier case for the Government than Hendricks?

MR. WALLACE: Well, perhaps so. It certainly is true that the Chamber of Commerce, which has filed an amicus brief against us, confined its brief to the Hendricks case and did not take a position with respect to Malleable.

I'm mentioning this array of employees to give

some indication of the scope of the Court of Appeals holdings here, and I'll get to Hendricks in just a moment. But what I want --

QUESTION: Does that suggest that you think there is a substantial difference or a difference between a confidential secretary and a shipping clerk on the other end of the --

MR. WALLACE: Not on the facts that were found by the Board in these cases, Mr. Chief Justice. If I may just say one further word about the employees in Malleable, then I'll talk about the personal secretary who was involved in Hendricks. I don't think the word "confidential" secretary is the right word there.

There is no claim in Malleable that any of the employees involved had access to confidential information relating to labor relations in any sense. The claim is that they were entrusted with confidences that the employer did not want its potential competitors or competitors to know, or in some instances its customers to know; but not information that the employer would be concerned about a union or fellow employees learning.

Now, Hendricks involved only one employee as it reaches this Court, a personal secretary to the general manager. And I should say up front that ordinarily someone in that position would be found by the Board to have the

labor nexus that I'll be describing in a moment; but the Board is a very fact-specific agency. It made findings here. It goes beyond the labels. It found that this particular general manager had relatively little to do with the setting of labor policies in this small rural electric cooperative. By and large those matters were handled by the counsel for the cooperative and by the Board of Directors themselves. And to the extent the general counsel was involved, the secretary simply did not have a confidential relationship with him with respect to those matters. She did not learn of them. She did not have access.

QUESTION: But wasn't the secretary a superior on the management side under Bell?

MR. WALLACE: He's definitely a manager. He's the general manager of the company.

QUESTION: So he's excluded under Bell Aerospace.

MR. WALLACE: Under Bell he is excluded.

QUESTION: Even though the Board wouldn't have excluded him.

MR. WALLACE: The Board -- that is correct, Mr. Justice.

QUESTION: But Bell disagreed with the Board

MR. WALLACE: That is correct. We don't challenge that here.

QUESTION: This secretary was working for a

superior who himself was excluded under Bell.

MR. WALLACE: That is the situation, Mr. Justice. But since virtually all employees work for the general management of the company and people who are managers, that in itself is not dispositive. The question that the Board has always viewed as the key one is whether there is access to confidential information that is labor related, and the Board has never treated all secretaries to any managerial people as necessarily coming within the Board's definition of confidential employees, although many of them do, if the particular manager has any substantial role in labor relations matters.

But let me just say briefly that the Board in both instances found that its labor nexus test was not met, and therefore rejected the claims that these were confidential employees as the Board has developed that doctrine as an implied exception to the bargaining rights under the Act. And the Court of Appeals in both instances by a 2 to 1 vote denied enforcement of the Board's orders and rejected the labor nexus aspect of the Board's standard in reliance upon a footnote discussion in this Court's Bell Aerospace opinion of several years ago.

Now, the Act itself contains no reference of any kind and never has to confidential employees, but almost from the outset the Board has excluded from bargaining units

as a matter of statutory policy employees who have had access to confidential labor relations information. There has been an evolution, a refinement of the Board's views on this, but there is a continuum with a few bumps along the way that stretches over some 40 years. And these cases have usually arisen in just the way the Malleable case has arisen, as a question of defining who is to be included in a bargaining unit, and the contention between the Board and the employer would be about whether the employees with this confidential information should or should not be included. And it has always been developed as a question of excepting them from collective bargaining rights rather than from all possible protection under the Act's broad definition of employee.

And another peculiarity of the Hendricks case is that there are no collective bargaining rights involved, no union membership involved of any kind, but an exercise of another kind of protected activity, the signing of a petition, which in the Board's view is a protection that extends to confidential employees within the labor nexus definition. In other words, in the Board's view it really doesn't matter whether the secretary in the Hendricks case falls within the labor nexus definition or not; but they did find that she would not, that she did not have access to confidential labor relations information.

The basis for the Board's view was early set out, and we have quoted on pages 18 and 19 of our brief in an opinion called Hoover Company a rationale which has really not been deviated from over the years, that even though the Act did not contain any such exclusion, that there is adversity of interest between the union and management in collective bargaining, in the settling of grievances, and consequently in order to implement the statutory policy and make the collective bargaining process work, the Board concluded that management should not be required to handle labor relations matters through employees represented by unions with whom the company has to deal in either their negotiations for collective bargaining or in the disposition of grievances.

But at the same time from the very beginning the Board has in a long series of cases held that access to other kinds of confidential information and the entrusting of other kinds of confidential information to an employee is not a reason for exclusion from the full protections of the Act. We've referred to this on pages 20 and 21 of our brief as the Creamery Package doctrine. That was one of the earliest cases articulating that point of view. It was an even earlier case than the Hoover case. It was a 1941 decision.

And we have collected in Footnote 21 on page 21 of

our brief some of the many pre-Taft-Hartley cases in which the Board applied this principle to a large variety of employees entrusted with confidential information. And we refer on pages 22 and 23 of our brief to two Court of Appeals decisions that upheld this principle, both well before the enactment of Taft-Hartley. The one we quote is a 1945 decision of the Tenth Circuit, and on page 23 we refer to a Third Circuit decision of 1943 likewise upholding this doctrine.

And the rationale of it is that there is no inconsistency between the rights of self-organization or collective bargaining rights that are conferred by the National Labor Relations Act and loyal and faithful service to an employer.

QUESTION: Do you think that applies with the same force to the secretary to the chief executive officer and the other ten employees?

MR. WALLACE: Well, I think it probably does, Mr. Chief Justice, so long as there is no access to labor relations information.

QUESTION: Well, is the conduct of a personal secretary -- let's not worry about the titles -- the number one secretary to the number one executive officer of an enterprise, is it compatible if that secretary is engaging in activity that is totally at odds with the management

decisions and policies?

MR. WALLACE: Well, perhaps not activity that is totally at odds, but --

QUESTION: Well, the manager thought so sufficiently to discharge her.

MR. WALLACE: I really think the answer to the question lies in the fundamental premise of the National Labor Relations Act, Mr. Chief Justice. The Act was adopted on the premise that interstate commerce would be promoted and preserved from disruption by channeling the inevitable disputes that arise between labor and management into the collective bargaining process and into opportunities for self-organization if the employees chose to exercise those opportunities for self-organization. And denying the employees this opportunity for self-organization if they choose to exercise it does not eliminate the possibility of differences of agreement or disputes. It eliminates that channel for expressing those disagreements.

And the premise of the Act was that that channel has to prevent disruptions of interstate commerce and to promote peace.

QUESTION: You're talking now about the mass of employees, aren't you? I'm addressing my question to just the number one secretary to the number one executive officer, which in the aggregate in the whole United States

is a drop in the bucket of the labor force, is it not?

MR. WALLACE: Well, I understand that.

QUESTION: Barely a drop.

MR. WALLACE: And we're especially talking about a drop in the bucket because, as I said earlier, in most instances the Board would find such a secretary to come within the labor nexus. But it feels, and I think quite properly, that when someone makes a claim for the Board, it can't just rely on labels; it has to see what these people actually do. And in her case she simply did not have access to confidential labor-related information.

QUESTION: Contrary to what would be the case with secretaries to most chief executive officers.

MR. WALLACE: Exactly so, Mr. Justice White.

QUESTION: He's not much of a chief executive officer if he doesn't have access to --

MR. WALLACE: It's an atypical case, but the Board's function is to be fact-specific, and there's certainly nothing to be ashamed of in the fact that the Board looked carefully at the facts here and found them to be atypical.

QUESTION: Mr. Wallace, secretaries to top management in companies deal with the problems their bosses have to deal with, and if you're at the top management level in the great companies -- there may be several hundred of

them -- the problems that they deal with vary from day to day, and often when they arrive at their office in the morning they have no idea what sort of problems will be coming across their desk.

What does the Board do when it has a secretary like that where -- do they count up the days of the year and decide which of those days there was some labor nexus, or what does the Board do?

MR. WALLACE: There doesn't have to be any predominance to the labor --

QUESTION: Ten percent or --

MR. WALLACE: I don't think there's any percentage. The question is whether there are confidences of that kind entrusted to the employee. If so --

QUESTION: At all. At all.

MR. WALLACE: At all. Other than just an exceptional circumstance. There has to be some regularity with which they -- but it doesn't have to be any percentage of that employee's duties. But as long as this is a part of that employees' duties, then the labor nexus test applies as it's been refined. And I just think that's the answer to it.

QUESTION: Mr. Wallace, on the facts of this case no labor nexus at all was found. Would this mean that seniority rules would apply in the union, and if the secretary had to be replaced the union would determine the

next secretary?

MR. WALLACE: That depends wholly on the terms of the collective bargaining agreement, Mr. Justice. That's a contractual question. The statute gives labor and management the right to negotiate and enter into agreements that they found mutually satisfactory.

QUESTION: Well, was there a union here, Mr. Wallace?

MR. WALLACE: Not with relation to the secretary, as I --

QUESTION: She was in no --

MR. WALLACE: There is no question of her engaging in bargaining. The case is atypical in that way as well. It really is only the Malleable case that necessarily presents the question whether the Board's exclusion of --

QUESTION: Well, tell me, was there a union at all here?

MR. WALLACE: There was a union for other employees but not for secretaries, and she wasn't involved in any effort to engage in collective activity.

QUESTION: She was not within the bargaining unit defined by that.

MR. WALLACE: Exactly so.

QUESTION: And the Board draws a line, does it not, between some employees who may be confidential

employees so that they're excluded from being members of a bargaining unit, and at the same time they may exercise rights which are not available to the rank and file employees?

MR. WALLACE: Well, those rights are available to the rank and file, I believe, Mr. Justice. They may not be available to managers of the company who have been excluded from the definition of employees under the Bell Aerospace opinion.

QUESTION: Well, there are some employees under the Board's view who may exercise rights other than participating in a rank and file bargaining unit.

MR. WALLACE: Yes, Mr. Justice. But those who can exercise that right can also exercise these other rights. Signing the petition in the Hendricks case is a good example of that; that is protected concerted activity for employees whether they're in a bargaining unit or not in the Board's view.

Now, the labor nexus test, as I say, has been refined, but it reflects a reasonable interpretation of the Act's fundamental premise: that the opportunity to channel disputes into the bargaining process if the employees so desire as a matter of self-organization is beneficial, helps to avoid disruptions of commerce; that it by maximizing the employees who can exercise that right, narrowing the implied

-- and it's wholly implied -- exclusion from rights conferred by the Act to those employees who need to be brought within the exclusion, because otherwise the process itself would be seriously compromised.

QUESTION: Did the Congress at the time of the Taft-Hartley Act, Mr. Wallace, give any consideration to the Board's policy, the Board's definition, whatever you want to call it, focusing on the so-called labor nexus?

MR. WALLACE: Well, I can't say that it reflected a full understanding of the Board's development of the law and the reasons for it, but it did in the hearings here from industry spokesmen who expressed a need for a change from the Board's current policies and from spokesmen for labor organizations and the Board who opposed that.

QUESTION: It's the same policy today as it was then, isn't it?

MR. WALLACE: It's essentially the same policy.

QUESTION: Going back to shortly after the Wagner Act.

MR. WALLACE: That is correct. It's been refined slightly to make its application more coherent.

QUESTION: Now, what hearing consideration was given to this question?

MR. WALLACE: In hearings in both the House and Senate the question came up, and the House, as a matter of

fact, put into its version of the bill in the amendments to the definition of employees covered by the Act, exclusions for confidential employees, broadly defined, and for employees working in labor relations departments; and to that extent reflected the view that had been espoused in the hearings that the premise of the Act that I have been referring to should to that extent be revised or repudiated because of the need to assure the keeping of nonlabor-related confidences.

The opposing argument, and it was made with great strength during the hearings and on the floor in the House -- the matter never reached the floor in the Senate because it was cut off in the committee; the committee never proposed doing anything like this to the floor of the Senate.

But the countervailing argument that was made is that there is nothing about membership in a labor organization or the exercise of bargaining rights that enhances whatever motivation there may be because of disputes with the employer to betray or not honor confidences that aren't related to labor-management relations. If anything, the premise of the Act is that by channeling frustrations into the bargaining process there's going to be more peace between labor and management. And someone denied bargaining rights may be just as bitter or just as frustrated or just as tempted to betray another kind

of confidence and --

QUESTION: Well, what happened to the proposal in the House?

MR. WALLACE: In essence, the House receded to the Senate's version which did not include this.

QUESTION: Was this in conference or was this --

MR. WALLACE: It emanated from the conference. The two houses passed different versions of the bill, and the House receded with considerable explanation.

The principal point that I have been trying to lead up to is that the Board's interpretation and its narrowing of the exclusion to fulfill the purposes of the Act is one that ordinarily would be entitled to deference. It's a consistent, reasonable interpretation of the Act, unless Congress has in some way revised it. The only contention that's made in this case is that Congress revised it in the Taft-Hartley Act, which was really amendments to the National Labor Relations Act passed in 1947.

And the more I have looked at the legislative materials that are pertinent and considered them in preparing this case, the more firmly I am convinced that the simplest and truest answer to that contention and the dispositive answer is that even though there was consideration of this question during Taft-Hartley, ultimately Congress did not enact anything on the subject.

And one simply cannot amend a statute by committee explanations or explanations on the floor about why no amendment was being put before the Senate or the House for a vote. That is not anything that rises to the level of an exercise of the lawmaking power under Article I of the Constitution.

QUESTION: But if you're having a general overhaul of appeal of the law, certainly explanations of a conference committee as to why something was not included are entitled to some deference, are they not?

MR. WALLACE: They're entitled to great deference with respect to anything that the Congress has enacted, Mr. Justice. It seems to me that that is the fundamental difference between this case and Bell Aerospace. Congress ultimately decided to take action with respect to defining the line between labor and management with respect to overruling the Packard Motor Company case. It enacted a provision defining supervisors and excluding them from the Act.

Now, it's true that that provision was not as comprehensive in dealing with management as it might have been, and this is why the Court divided 5 to 4 in the Bell Aerospace case. But that enactment was based on premises that led to an interpretation of something Congress enacted in Bell Aerospace.

QUESTION: It seems to me this argument is somewhat inconsistent with the position the Labor Board takes with regard to the national policy in favor of industrywide bargaining in a case coming down the line shortly here. The failure to prohibit it, in that case the Government argues, evidenced a national policy in favor of it.

MR. WALLACE: Well, it evidences a willingness of Congress not to disturb the way the Board has been administering the Act. It seems to me that that's wholly consistent, and that's precisely what I'm arguing: that whatever explanations were made in committee and on the floor and whatever ambiguities or misconceptions they may have reflected about the state of the law at that time -- and we really quarrel with the contention that they have to be read as a misconception. The usual presumption is that Congress knew what the law was, and I think they can be read consistently with that.

But whatever misconception there may have been, still what ultimately was put to the membership of each body was the proposition that the Board is handling this all right, and therefore we have not included anything on this. And Senator Taft's explanation as he introduced the conference report to the Senate -- and he was the master strategist -- was that this was an area of controversy that

we are avoiding here. The obvious strategem was to keep as much consensus as possible. He had his eye on other reforms that he wanted to have made. He knew that there would be a veto, that he had to have a broad consensus to override a veto; and this is why the Senate never reported this out in the first place, after the hearings which revealed the dissension on this issue, and this is part of the explanation that he made in introducing it. If I had time I would read the language.

So ultimately, while we have some quarrel, and we've detailed that quarrel, with the Court's characterization of what Congress knew or thought of the Board's position on this subject, we really don't think ultimately it matters.

The footnote in Bell Aerospace did not attribute any legal consequence to what it said Congress thought was the state of the law.

CHIEF JUSTICE BURGER: We have your point now on that score, Mr. Wallace, and your time has expired.

Mr. Krebs.

ORAL ARGUMENT OF WARREN D. KREBS, ESQ.,

ON BEHALF OF THE RESPONDENT/PETITIONER

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

First, I would like to comment that I am the

general counsel who is referred to in the presentation for the REMC, and I can assure the Court and it was not found by the Board that I was not, as the out-house counsel with an office 25 miles away from the cooperative, in charge of their labor relations, and neither were the directors of the REMC which are farmers elected by the consumers. In fact, the Court may want to look at a part of the testimony which is included in my brief at page 42 at the top in which the discharged secretary herself testified that the general manager had general responsibility for all the labor relations of all the employees, union employees as well as those in the office.

The basic issue is a very simple one, and that is whether the Board should be compelled to recognize the written intent of Congress as expressed in the House report that there are certain positions in management for employees loyal to management in positions of trust and confidence, and that these employees should not be subject to influence or control by labor unions or by other employees. Or whether is the question shall we recognize the intent of the Board, which is spelled out I think explicitly in its brief in this case in reply brief, that the intent of the Board is to expand its jurisdiction into every area and to include employees under the rights of the Act and the Act's coverage, which was never anticipated by Congress in 1947.

As the Court is aware, the Taft-Hartley Act in 1947 was basically passed because of the problems that Congress was having with the jurisdictional questions of the Board from the Wagner Act, and most of the Act or a great deal of it is for the purpose of curtailing that jurisdiction.

I think the --

QUESTION: Mr. Krebs, can I interrupt with one broad question similar to one Justice Rehnquist asked your adversary.

MR. KREBS: Yes.

QUESTION: Do you think in terms of legal analysis there's any difference between the two cases? Does the confidential rationale, if it's valid, cover that whole group of employees in the other case just as much as the secretary in this case?

MR. KREBS: I don't think by necessity, and I think one would have to look at the specific facts in the Malleable case.

QUESTION: But you don't confine your argument to secretaries.

MR. KREBS: No.

QUESTION: It would include bookkeepers and clerical personnel who had access to --

MR. KREBS: I think it very well could. Or

administrative assistants, which have been excluded in prior cases by the Board itself. They don't now, but they used to. Personal secretaries, individuals that have this close relationship with management.

QUESTION: Well, it isn't the close relationship, at least under the Court of Appeals rationale, that's controlling; it's the access to confidential information.

QUESTION: Of any kind.

MR. KREBS: Of any kind.

QUESTION: That's secret formulas and customer lists and all that.

MR. KREBS: That's true. That's true. I think the only way that the Board can rationalize its conclusion in the Hendricks case can be seen by its response to the issue presented in the cross petition for cert by Hendricks, which issue was that the Seventh Circuit had erroneously concluded that the Board had decided that this secretary was not employed in a labor relations or personnel department capacity.

And the only response of the Government to that cross appeal, they concede that there was no express decision by the Board, but they say that that impliedly was made because the Board had concluded that she was not a confidential employee. And that basically is the crux of how the Board has over the years since 1957 limited the

exclusions; and that is, they have combined two separate and specific exclusions which are contained in both the summary of Senator Taft given on the floor of the Senate when the bill was passed and in the House conference committee report written by Congressman Hartley. And that is that there were two separate exclusions that both felt existed at that time, and that is, the labor relations personnel employment area exclusion, and separate, the confidential exclusion.

And the Board has over the years co-mingled the two and come up with the confidential labor relations exclusion; and that effectively terminates the effectiveness of both exclusions. And that is the only way that one can reach the result in Hendricks especially that this personal secretary to the chief executive officer of the company is included under the Act and has rights as any other employee when he was specifically on the labor negotiating committee, a point that the Board previously in 1957 in the Ethel case found sufficient to exclude a secretary when he was the ultimate resolver of grievances at the company, even though the Court previously in the GM case in 1943 excluded numerous individuals.

QUESTION: But if the Court agreed with your position in the cross petition, you could win and the Malleable case could go the other way.

MR. KREBS: I think that's probably true.

QUESTION: So you have two arrows.

MR. KREBS: Beg your pardon?

QUESTION: Did you file the cross petition?

MR. KREBS: Yes.

QUESTION: And it was granted?

MR. KREBS: Yes. For certain --

QUESTION: And so you have two arrows.

MR. KREBS: There are two areas here, yes. The second area comes in, but they are by necessity interlinked because of the confusion that the Board has made by linking the two since 1957 in its B.F. Goodrich case in which they --

QUESTION: Yes, but the Board would exclude her if they had found that her employer had access to -- was engaged in labor relations matters.

MR. KREBS: I think that's probably true.

QUESTION: Yes.

QUESTION: Well, your position is that it need not be confined to labor relations but overall managerial activities of the chief executive.

MR. KREBS: Yes. And I think that's clear from the Act, and I think it's clear from the decision of this Court in 1974 in the Bell Aerospace case, which five of the present members of the Court concurred in.

QUESTION: But am I correct, Mr. Krebs, if you lost out on the proposition that merely a confidential

secretary, merely being a personal secretary is not enough to exclude her? You'd say on this record, in any event under your cross petition, her situation and the general manager's satisfied the labor nexus test.

MR. KREBS: I think that's my position.

QUESTION: Yes.

MR. KREBS: As to the Court's decision in Bell Aerospace, it's very specific that this Court found that there were two exclusions intended by Congress, and specifically stated that among those impliedly excluded were persons working in labor relations personnel and employment areas, and "confidential employees."

The dissenting opinion written by Justice White in that case did not disagree with that point. And in fact, Justice White said that the House manager's statement accompanying the conference committee report explains that the Act was not amended expressly to exclude labor relations and confidential employees.

The five separate Circuit Courts of Appeals have also concluded that these are separate exclusions, and perhaps beginning with the 1966 decision in the D.C. Circuit in Retail Clerks International written by now Chief Justice Burger that these individuals are more closely aligned with management regardless of any labor relations department type classification.

QUESTION: How many of those five circuits decided their cases after Bell Aerospace?

MR. KREBS: Each one of the cases that I have were decided prior to, and one of them was the Circuit Court's decision in Bell Aerospace which was affirmed by this Court in '74.

I think the main crux of the issue comes also down, as far as recognizing the difference in these exclusions, in Footnote 12 to the Bell Aerospace decision in which this Court specifically stated regarding confidential employees that these are people who receive from their employers information that not only is confidential but also is not available to the public or to competitors or to employees generally.

QUESTION: Do you regard that as dictum in that case?

MR. KREBS: I think that is dictum in the case, but I think it's very important dictum because the issue there was the Board had taken the labor nexus standard and had attempted to limit managerial employees by the same standard that they've attempted to limit confidential employees. And the Court --

QUESTION: Well, if you rely on Bell Aerospace, you must rely on that dictum, must you not?

MR. KREBS: Beg your pardon?

QUESTION: I say if you get any comfort out of Bell Aerospace, you get it only out of that dictum.

MR. KREBS: That's true. Well, the dictum and the language which Footnote 12 supports, which was the decision that Congress had intended to exclude both labor relations personnel and confidential personnel.

QUESTION: But I don't know that the Board disagrees with that. You wouldn't say that just because -- you wouldn't say that every secretary for every person who is engaged in labor relations is excluded.

MR. KREBS: Every secretary for an individual engaged in labor relations? I think that's the --

QUESTION: Well, no, it is not. It's confidential. It has to be a confidential secretary, one that has access to confidential labor relations information.

MR. KREBS: Right. That has access.

QUESTION: Yes, yes. So it just isn't -- you wouldn't say that every secretary who -- you wouldn't exclude the secretary because that person is engaged in labor relations.

MR. KREBS: Depending upon what his role in labor relations is.

QUESTION: Well, then you never get to the confidential part of it.

MR. KREBS: That's right. It is separate.

QUESTION: So it is two separate concepts.

MR. KREBS: That's true. That's true.

QUESTION: So I don't see anything that the Board is -- I don't see that there is any denial in the Board's position that they are two separate concepts.

MR. KREBS: Well, I think there is in limiting the confidential exclusion to the labor relations nexus only and not considering other situations.

QUESTION: Well, that's just an argument that the Board should give a wider scope to the confidential issue.

MR. KREBS: An example is their decision in 1980 in the Missouri Valley Hospital Employees case in which they held that the personal secretary to the president of the company could join a labor union; and they made this decision in 1980. And the rationale was the president had delegated most of the areas of labor relations to other individuals within the corporate structure, and therefore, his secretary could be a member of the union, which is what they found, although perhaps somebody else's could not be.

QUESTION: Perhaps that's wrong, and perhaps you should win on your cross petition. That certainly doesn't reach the notion that every confidential employee in the company should be excluded.

MR. KREBS: I think the intent of the Congress as placed in the House report was that they looked at

individuals who were involved in areas of highly, and they did use that term, highly confidential areas of the company. And the company would not --

QUESTION: Are professionals excluded?

MR. KREBS: Professionals are a different category under the Act, to my understanding.

QUESTION: Well, they are dealt with specifically, aren't they?

MR. KREBS: They are dealt with, as I understand it, under a different provision of the Act, not the confidential provision.

QUESTION: But they certainly have -- some of them have confidential information and some of them don't.

MR. KREBS: That's true. Some of them could have.

QUESTION: Well, but they are not excluded even if they have confidential information, are they?

MR. KREBS: I don't believe they are.

QUESTION: Well, does that do anything to your argument or not?

MR. KREBS: Well, I guess back to the confidential part of it is the very interesting item, and Congress in the Hartley report, which is the House report, in discussing this and why they didn't want to just limit it to labor relations said that it shouldn't be up to the good faith of the Board or the unions to decide what information is going

to get out of the company.

Now, the argument on the other side to that is the company has a right to discipline employees who leak out confidential information. And that is well and good except when one takes into consideration the Board's decision in 1980 in the Texas Instruments case, which luckily was reversed by the First Circuit in 1981, and that decision was employees who are in the process of organizing had the right to distribute on the street corner the confidential information of the company, even though there was a valid plant rule against such disclosure, because we were interfering with their rights, and therefore the company committed an unfair labor practice in dismissing those employees.

And I think that reflects the notion of Congress in 1947 that we cannot depend upon the Board or upon the unions or the employees to insure that certain types of highly confidential information, which the Board said it was confidential, will not be disclosed to the general public or to competitors.

The interesting part, I think, about the position of the Government is that they have also argued in this case in my opinion at least two separate standards for the exclusion. In the reply brief at page 13 they indicate that in their opinion secretaries to all persons with managerial

functions in the field of labor relations are excluded. That is not the position that they presented in the initial brief or the position that they held in the Hendricks case.

In the Hendricks case the Board specifically held that she was not excluded because her duties did not involve her in a confidential capacity with her employer's responsibility with respect to labor relations policies as opposed to labor implementation or the grievance procedure in the company.

There are two separate standards included even in the briefs of the Board in this specific case, and I cannot reconcile the two. But I think it highlights the confusion in this area that has been recognized by the courts in the Retail Clerks case in 1976, again by Chief Justice Burger, where he recognized, and five other Courts of Appeals have made the same decision subsequent to 1966, that prior to 1966 the Board had a separate strand of, for lack of a better term, managerial employees which they had always excluded. These employees did not have confidential information, were not involved in labor relations or the formulation of any other policies. But the reason for the exclusion was that they were so aligned or related to management to place them in a potential conflict of interest between labor on the one hand and management on the other; and therefore, the Board had always excluded these types of

people, although they didn't give them a categorical name.

And I think that is precisely the type of people, and a couple of the Circuit Courts in discussing this have used the term "confidential employee" as synonymous with those employees aligned and related to management to have a potential conflict of interest.

So I think that there are two viable exclusions. Both should be recognized by the Court. Both were recognized in the Bell case. The Court specifically said in the Bell case that the confidential -- in the dictum that the confidential exclusion was not limited to just confidential and labor relations, because if the Court had ruled that way, then the premise of the Board that managerial limitation exclusion should also be limited by labor relations was also correct, which of course in 1974 by a 5 to 4 decision the Court held that that was not true.

CHIEF JUSTICE BURGER: We will resume at 1:00.

(Whereupon, at 12:00 p.m., the case in the above-entitled matter was recessed, to be resumed at 1:00 p.m., the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Mueller.

ORAL ARGUMENT OF RUSS R. MUELLER, ESQ.,

ON BEHALF OF THE RESPONDENT/PETITIONER

MR. MUELLER: Mr. Chief Justice, and may it please the Court, a brief summary of what has been said. The issue is simple. It is determining the legal standard that should be applied to the confidential exclusion of employees from the National Labor Relations Act. The Board's position is that the labor nexus test should apply, namely, whether the employee is in a confidential work relationship with a specifically identifiable managerial employee responsible for labor relations policy.

The lower court in the Hendricks case rejected that labor nexus test and applied their decision in the Hendricks case to the Malleable case. This controversy is going to be resolved by this Court by the interpretation given to the legislative history of the 1947 amendments to the National Labor Relations Act. This Court dealt with that history, legislative history in the Bell Aerospace case. Namely, in Footnote 12, the Court said, in effect, the discussion of confidentil employees in both the House and Conference reports unmistakably refers to that term defined in the House bill, which was not limited just to those in labor relations.

QUESTION: Do you agree that is a dictum?

MR. MUELLER: It is dictum to the Court's decision, but very fundamentally significant to the decision in that it is an underpinning of the conclusion the Court made as to the managerial implied exclusion of employees, and to --

QUESTION: Well, wouldn't the decision have been just as cogent without that footnote?

MR. MUELLER: I would say that one might be able to reach that conclusion; however, after Footnote 12, the Court, the Court emphasized that therefore, since confidential employees are impliedly excluded from the Act, obviously managerial employees are paramount to them and they therefore should also be excluded.

The definition of confidential employees as defined in the House bill was "those employees given information of a confidential nature for use in the interests of the employer, which is not available to the public, not available to competitors, or not available to employees generally." We believe that is the standard that should be applied to this confidential exclusion.

QUESTION: Why? Why is that?

MR. MUELLER: Based on Footnote 12. And the reason for that is, I endorse the decision of the Seventh Circuit in the Hendricks case, namely, that if the substance

of Footnote 12 is going to be changed, this Court is going to have to change it.

QUESTION: Well, just forget Footnote 12 for a moment. Why would you argue that a provision of a House bill that was never passed should control this case?

MR. MUELLER: Because of what this Court stated in Footnote 12. Namely --

QUESTION: I know. It is just that you are relying on Footnote 12. How about just putting Footnote 12 out of your mind for a moment, and tell me what in the Congressional history would lead you to believe that that standard should control this case?

MR. MUELLER: Well, I will --

QUESTION: It wasn't adopted, was it?

MR. MUELLER: Not the House bill. But I will --

QUESTION: Then what happened?

MR. MUELLER: Well, then a Conference report made a compromise. A Conference report made a compromise between the difference between the Senate and the House bill.

QUESTION: And eliminated that provision. Didn't adopt that provision.

MR. MUELLER: No, I cannot agree that it eliminated it. I agree with what is stated in Footnote 12, that they deferred to the definition of "confidential" in the House bill based on what the Court believed the pre-1947

decisions were in this area.

QUESTION: Even though the Conference report may have been erroneous in that respect?

MR. MUELLER: You mean Footnote 12 or the Conference report?

QUESTION: The Conference report may not have accurately reflected the decisions of the NLRB.

MR. MUELLER: I will concede that if the substance of Footnote 12 as it reads on its face is changed by this Court, that at least to the extent that Malleable is concerned, we lose, because the underpinnings of our position is Footnote 12, because in Malleable, the confidential employee claim rests on non-labor relations information, such as prices, profit margins, costs, customer information, the type of information that unions in labor contract negotiations would be very much interested in.

However, just because a union is a collective bargaining agent does not entitle them to that information. The prevailing law is that they only have that information if the employer voluntarily gives it to them in contract negotiations, or if the employer makes a plea of poverty, and then even when the employer makes a plea of poverty in negotiations, then the right to search financial records of the employer need be restricted by the employer to the extent of requiring the search to be done by a CPA

accountant.

QUESTION: Mr. Mueller, may I ask you a general question? What happens in defense industries that have contracts on highly confidential or secret work with the Defense Department? Take the STEALTH aircraft, for example. I don't know the contractor that is working on that, but Number One, is there a union, or when there are unions, are any employees excluded because of confidential information to which they have access?

MR. MUELLER: I would say that, without referring to a particular case but just generalizing, that under the present Board law, no, they would not be.

QUESTION: Are there any cases --

MR. MUELLER: The Board hasn't been entirely consistent in this regard, because even under their presently professed consistent standard, they do make variations in this area when the information gets particularly sensitive.

QUESTION: You are saying in substance that the Board relies on the labor nexus even in the most sensitive defense work?

MR. MUELLER: The Board shows evidence of taking into consideration these areas of sensitivity. They talk then in terms of alignment with management. The Board hasn't been, contrary to their assertion, hasn't been

entirely consistent through the years in the --

QUESTION: Well, do you think the Seventh Circuit, under the Seventh Circuit opinion, every employee in the defense industry who has access to classified information would be excluded from the collective bargaining --

MR. MUELLER: I think we have to go back to the --

QUESTION: Is that your reading of the Seventh Circuit opinion?

MR. MUELLER: We have to look at the type of confidential information they have.

QUESTION: Why? Why? I thought it was any confidential information.

MR. MUELLER: That is not available to the public, to competitors, or to employees generally. And it has to be used in the interests of the employer If it meets that test, yes, but that doesn't exclude, for instance, if we go to the General Dynamics case, where they had some 1,600 engineers, that wouldn't exclude junior engineers, senior engineers --

QUESTION: It doesn't exclude them because they are professionals, I take it.

MR. MUELLER: Well, but you could also have a professional with access to confidential information who would be excluded as confidential, which leads me to point out that the representation of Malleable as including an

array of confidential exclusions isn't quite accurate, because most of those, in fact the vast majority of those claims are also claimed to be managerial exclusions under Bell Aerospace, and the fact that they have confidential information is used, in regard to the managerial contention, is used to show their alignment with management as a managerial exclusion. The same could apply to treatment of a professional employee.

The point is that the prevailing law relative to unions not having access to this type of financial information, profits, costs, capital and expense budgets, unless there is a plea of poverty, the point is that that prevailing law should not be diluted by adopting the narrow standard of the labor nexus, because obviously the effect of that is, if you have an employee represented by the union who has access to this sensitive financial data, the information could very well find its way to the union, contrary to the union's inability to get it unless the employer would voluntarily choose to share it with the union in contract negotiations, or unless they make a plea of bargaining.

Management is entitled to the security of that type of financial information, and also the loyalty of the employees who have access to it, and therefore, as confidential employees, they should be excluded from the

protection of the entire Act, not just the collective bargaining aspects of it.

QUESTION: Your time has expired now, Mr. Mueller. Let me ask you just one question, though. Would the employer have some disciplinary reach over an employee, even a member of the union covered by the Act, who had violated the confidentiality?

MR. MUELLER: Yes, and I believe, if memory serves me correctly, the Board and the amicus briefs of the unions make that point to the Court. However, it is our position that the burden should not be placed upon the employer to police this area, when the law should be the area that takes care of that situation. For instance, the consideration in terms of discharge, particularly when you are dealing with confidential employees, or let's say management employees, you have an investment in those employees. They have something to contribute that is substantially more to the ongoing management function.

QUESTION: No, but even if the employee is excluded from the bargaining unit, the employer has got the same stake in his keeping his mouth shut, and he is going to have to police his own rules.

MR. MUELLER: If indeed this Court should adopt a standard for determining confidential employees which allows employees with access to that type of sensitive financial

information to be part of the bargaining unit, yes, then the employer will have to --

QUESTION: Well, even if he is not part of it, he is going to have to police his own rules.

MR. MUELLER: Except I believe that begs the question.

QUESTION: It does not. Whether he is in the bargaining unit may not determine whether he is going to keep his mouth shut.

MR. MUELLER: Except that we then get back to the factor of loyalty. If he is outside the bargaining unit, the loyalty is more plain and apparent to all concerned, and if he is in the bargaining unit, then you don't even have the psychological alignment. You have alignment. You have the split personality. You have the split loyalty.

CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:16 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:
NATIONAL LABOR RELATIONS BOARD v. HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATIONS v. NATIONAL LABOR RELATIONS BOARD

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BY Sharon Connelly