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NOTE

THE ANAMAG DECISION: AN ILLUSTRATION OF LEGISLATIVE INADEQUACY

The National Labor Relations Board's ("NLRB") recent decision in the petition of Anamag and International Union of Electrical, Technical, Salaried & Machine Workers" held that 'team leaders' are not supervisors under section 2(11) of the National Labor Relations Act ("NLRA"). The Anamag facility utilizes a Japanese managerial philosophy commonly referred to as the "team concept." This managerial system is becoming quite popular in the United States and has had tremendous success in a number of industries.

2. A supervisor is any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment. 29 U.S.C. § 152(11) (1982).
4. 284 N.L.R.B. No. 72 at 2.
5. Holstein & Engardio, The Difference Japanese Management Makes, Bus. Wk., July 14, 1986 at 47. The invasion of the Japanese capitol and managerial techniques promises to be one of the most important economic forces reshaping America as the century concludes. Japanese companies are establishing themselves in the steel, electronics, telecommunications and most heavily, in the automobile industry in the United States.

The Japanese managerial philosophy is that of a "hands-on" approach as opposed to the passive approach of most United States companies. The Japanese use a "flexible assembly line" operated by teams of workers who supervise themselves. This flexible assembly line system gives the workers, or "team members" as they are called, tremendous input into produc-
It is the intent of this Note to illustrate the inconsistency between the NLRA, primarily the Taft-Hartley amendments and the supervisory exclusion, and the case law, which is designed to effectuate the Act's policies. The Anamag decision serves to illustrate this inconsistency which creates a complex dilemma to an already problematic area of labor law.6

THE HISTORY AND CONGRESSIONAL INTENT OF THE NLRA AND THE TAFT-HARTLEY AMENDMENTS

In the early portion of the twentieth century, conditions existed which adversely affected the free flow of commerce in the United States.7 The common worker was helpless against the employer due to a lack of bargaining power.8 As a result, employers treated their workers unfairly, most notably, depressing the worker's wage.9 These conditions existed due to a lack of government intervention in the labor-management relationship.10

10. Congress did pass the Clayton Act in 1914 to protect labor unions from the scope of the Sherman Anti-Trust Act of 1890. Although this was the intent of the Clayton Act, the...
Congress enacted the National Labor Relations Act of 1935 to combat the pressing problem of labor-management relations. The NLRA's basic policies were the encouragement of unionization and collective bargaining. The encouragement of unionization was the government's solution to the depression of wages. The use of collective bargaining was the government's solution to the tense relationship between labor and management. Congress believed that unionization and collective bargaining would lead to the free flow of commerce.

The NLRA was a major victory for the union movement and was bitterly opposed by labor management. The NLRA paved the way for strong unionization of employees, not only in the face of management, but at management's expense. The employers were blamed by the government for inducing the workers to strike and were condemned for the overall condition of unrest between labor and management. "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . . ." The NLRA gave the employees the express right to organize and to form labor organizations which would act as their collective bargaining agent against the employer. The NLRA set out several proscribed acts, known as
unfair labor practices, from which the employer must refrain or be held liable.\textsuperscript{20} The policy of the NLRA's unfair labor practices was to preserve the right of the workers to organize and be free of employer interference and coercion which had impeded labor organizations in the past.\textsuperscript{21} In no section of the NLRA of 1935 will one find any unfair labor practices on part of labor organizations. There was no proscribed conduct on the part of labor organizations.

THE TAFT-HARTLEY AMENDMENTS OF 1947

The NLRA was a major turning point in the progression of the labor movement nationwide. The impending war in Europe and the actual outbreak of World War II also added tremendous power to the union movement.\textsuperscript{22} The critical need for labor caused unions to solidify and strengthen.\textsuperscript{23} By the mid 1940's, however, labor unions had become too powerful\textsuperscript{24} and were greatly feared by many people in government.\textsuperscript{25} The labor unions had abused their power in a number of ways which were very detrimental to the nation's economy. The most notable abuses of the labor unions were constant strikes,\textsuperscript{26} racketeering and organized crime in labor organizations, violence at strikes, discriminatory nature of unions and their membership, constant union craft conflicts, overuse of the secondary boycott and the abuse of the closed shop principle.\textsuperscript{27}

Congress came to the inevitable conclusion that something had to be done to curb the strength of the labor unions.\textsuperscript{28} Consequently, Congress passed the National Labor Relations Act of 1947,\textsuperscript{29} commonly known as the Taft-Hartley amendments. The Taft-Hartley

\textsuperscript{20} The unfair labor practices of the employers are enumerated in 29 U.S.C. § 158(a).
\textsuperscript{21} Id.
\textsuperscript{22} See, A. Cox, D. Bok, & R. Gorman, supra note 8, at 10.
\textsuperscript{23} Seitz, Legal, Legislative, and Managerial Responses to the Organization of Supervisory Employees in the 1940's, 28 Am. J. Legis. Hist. 201 (1984).
\textsuperscript{24} See, A. Cox, D. Bok, & R. Gorman, supra note 8, at 91.
\textsuperscript{25} Id.
\textsuperscript{26} During the six years preceding the enactment of the National Industrial Recovery Act of 1933, the United States had an average of 753 strikes per year, involving an average of 297,000 workers; during the next six years 2,541 strikes per year involving an average of 1,181,000 workers; and during the next five years through 1944—3,514 strikes per year involving an average of 1,508,000 workers. In 1945, approximately 38,000,000 days of labor were lost as a result of strikes. H.R. Rep. No. 245, 80th Cong., 1st Sess. 3-4 (1947).
\textsuperscript{27} The most notable of the strikes were two long stoppages by the United Mine Workers, led by John L. Lewis, which occurred during the Second World War, in direct defiance to the government. A. Cox, D. Bok, & R. Gorman, supra note 8, at 91.
\textsuperscript{28} See, A. Cox, D. Bok, & R. Gorman, supra note 8, at 91.
\textsuperscript{29} 61 Stat. 136 (1947).
amendments were a reversal of the government's attitude toward labor unions. 30 The Taft-Hartley amendments still promulgated the original policies of the NLRA, that is, the encouragement of collective bargaining and the betterment of labor-management relations. In this respect, the Taft-Hartley amendments were consistent with the NLRA. The marked difference in the government's attitude was the realization that it could attain these policies without overly powerful labor unions. 31 The Taft-Hartley amendments did not seek to destroy the labor unions, but they did intend to curtail their immense power and to stop their abuses which had an adverse effect on the economy. 32 The Taft-Hartley amendments were the result of a strong lobbying effort by management and the government's desire to halt the labor union's power. 33 The Taft-Hartley amendments did have its opposition. The amendments were bitterly opposed by labor organizations who foresaw their power being stripped. Equally opposed were the congressional liberals who were dependent on the political support of the labor union membership. 34 Even President Truman was opposed to the new amendments and vetoed them. However, his veto was overridden by a determined Congress. 35

The policy statement of the Taft-Hartley Amendments found fault with the labor unions. 36 "Experience has . . . demonstrated that . . . practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods . . . . The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." 37 The "elimination of such

31. Id. at 209.
32. Id. at 232.
34. A. Cox, D. Bok, & R. Gorman, supra note 8, at 89.
35. President Truman, in his state of the Union address on January 6, 1947, warned that, "We must not, under the stress of emotion, endanger our American freedoms by taking ill-considered action which will lead to results not anticipated or desired." H.R. No. 245 80th Cong., 1st Sess. 65 (1947). President Truman offered several alternatives to the sweeping legislation of the Taft-Hartley Act. These alternatives were supported by the Senate Minority. Id. at 66. Truman proposed legislation against specific ills of the labor unions, such as jurisdictional strikes and secondary boycotts. Id. The Department of Labor would have been given more strength to assist freer collective bargaining. Id. Federal programs would have been established to assist workers and to alleviate their fear of management. Id. Finally, the President would have urged the creation of a temporary joint commission to inquire into the field of labor-management relations. Id. at 67. These alternatives were rejected by Congress. H.R. Rep. No. 245, 80th Cong., 1st Sess. 67 (1947).
practices" was done, in part, by listing unfair labor practices on the part of labor unions. The right of the employees to organize and form labor unions was now equal to the right of employees to refrain from such activities. Labor unions, along with management, were obligated to bargain collectively. More importantly, for our purposes, the amendments set forth the expressed exclusion of supervisors from the definition of employee and defined supervisory status.

**SUPERVISORY PERSONNEL UNDER THE NLRA AND THE TAFT-HARTLEY AMENDMENTS**

It was held in *In Re Collieries* that the NLRA included supervisors as employees and were entitled to the Act’s protections and rights. The *Collieries* decision was overruled one year later by *In Re Maryland Drydock and Local 31 of the Industrial Union of Marine and Shipbuilding Workers of America*, which excluded supervisors from the scope of the NLRA. The *Maryland Drydock* decision was a product of lobbying pressures by labor management after *Collieries*. The matter was finally laid to rest in *In Re Packard*

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For the past fourteen years, as a result of labor laws being ill-conceived and disastrously executed, the American working man has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions, beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act. His whole economic life has been subject to the complete domination and control of unregulated monopolists. He has on many occasions had to pay them tribute to get a job. He has been forced into labor organizations against his will. At other times when he has desired to join a particular labor organization he has been prevented from doing so and forced to join another one. He has been compelled to contribute to causes and candidates for public offices to which he was opposed. *Id.*

38. The unfair labor practices on part of the labor unions are enumerated in 29 U.S.C. § 158(b).
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in § 8(a)(3). *Id.*
41. 29 U.S.C. § 152(3).
42. See supra note 2 (setting forth the definition of supervisor under the NLRA).
43. 41 N.L.R.B. 961 (1942).
44. *Id.*
45. 49 N.L.R.B. 733 (1943).
46. Seitz, supra note 23, at 219-220.
Motor Car Company and the FAA\textsuperscript{47} which reversed Maryland Dry-dock. The Packard decision was a response to an industrial strike created by supervisors at their exclusion of employee rights.\textsuperscript{48} The Packard Board decided it was in the best interest of the country to include the supervisory personnel within the scope of the NLRA.\textsuperscript{49}

After the Collier\textit{ies} decision, supervisory labor unions began to form.\textsuperscript{50} Although supervisory labor unions already existed in some industries,\textsuperscript{51} they were unions consisting primarily of basic floor supervisors.\textsuperscript{52} The supervisors unionized because they perceived themselves as the forgotten man,\textsuperscript{53} the odd man out between the power of the employer and the powerful employee unions.\textsuperscript{54} The supervisory unions soon realized, however, that they needed the backing of the powerful rank and file unions in order to effectively bargain with the employer.\textsuperscript{55} This combination would give the supervisors the leverage they needed in negotiations with management.\textsuperscript{56} As a result, the su-

\begin{footnotes}
47. 61 N.L.R.B. 3 (1943).
48. The majority expressed in their opinion,
\begin{quote}
We would be remiss in our duty as public officials if we permitted our reluctance to alter the existing rule to blind us to the effects of the powerful economic forces which have manifested themselves since that rule was laid down . . . . The Nation has not experienced the drastic consequences of extra-statutory organization by supervisory employees, and the duty of this Board has become plain. To continue to deny such employees as a class the bargain right guaranteed by the Act would be to ignore the clear economic facts and invite further industrial strife—a state of affairs which the Nation can ill afford at this time and which the Act was designed to mitigate. We are now convinced that the national interests will be better protected if the organizational activities of foremen are conducted within, rather than without, the framework of the collective bargaining statute.  \textit{Id.} at 20-21.
\end{quote}
49. \textit{Id.} It must be pointed out that the timing of the Packard decision was crucial. The NLRB was well aware that World War II was being waged and the full force of the country's labor was needed without major strikes.
50. Seitz, supra note 23, at 200. The two major supervisory unions which formed were in the mass production industries. They were the Foremen's Association of America ("FAA") and the Mine Officials Union ("MOU"). These unions contrasted in operational philosophy. The FAA attempted to form and be maintained independent of the rank and file unions. They attempted to be a distinct and unique grouping of employees. The MOU, in contrast, wanted to affiliate with the rank and file unions. It successfully did so in 1943 when it was received by the United Mine Workers Union ("UMW"). \textit{Id.}
51. Seitz, supra note 23, at 211. Many AFL unions and some CIO unions either permitted or required foremen and supervisors as members. Aside from these, there were about twelve unions whose constituents were exclusively supervisors. For example, the printing, construction, and maritime industries traditionally unionized supervisors. The Railway Supervisors Union was institutionalized by the Railway Labor Act of 1927. \textit{Id.}
52. Seitz, supra note 23, at 200
53. \textit{Id.} at 209.
54. \textit{Id.}
55. \textit{Id.} at 200.
56. \textit{Id.}
\end{footnotes}
supervisory unions began to associate themselves more and more with the rank and file.

The life of supervisory unions was short due to the passage of the Taft-Hartley amendments and through the modernization of the plant floor.57 As the plant floor became increasingly advanced through technical innovation, the authority of the supervisors and the need for their individual, unique methods decreased dramatically.58 The exclusion of the supervisors from NLRA protections was the result of a major lobbying effort from labor management.60 Labor management feared that the supervisors, backed by the powerful rank and file unions, could take over the plant floor.60 Simply, the more supervisors aligned themselves and identified themselves with the rank and file, the less control the employer had over the production and management of his plant. Congress quickly recognized, with the assistance of the lobby group, that the employer needed complete loyalty from his supervisors in order to effectively control his plant.61 The organization of supervisors and the combined power of the rank and file workers with supervisors contravened Congress' intention of supervisory loyalty. Thus, supervisors were excluded from the scope of the NLRA.62

Since the Taft-Hartley amendment had opposition,63 Congress stressed additional reasons for excluding supervisors. Congress contended that union standardization would be unfair to supervisory personnel due to their superior skill.64 Moreover, unionization would inhibit the advancement of supervisors to higher management levels.65 Congress, in an effort to cool the opposition, did not preclude the supervisors from unionizing.66 Supervisory personnel still had the right to unionize but were not protected by the NLRA.67

57. Id. at 209.
58. Id.
59. Id. at 202.
60. Id.
62. Id. at 14.
63. See supra notes 34-35 and accompanying text.
67. Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining. Id.
The Senate minority was quick to state that the right to organize under the NLRA was useless without the Act’s protections.

In summary, the overall policy of the Taft-Hartley amendments was to decrease the immense power of the labor unions. The supervisory exclusion policy of mandating loyalty to management was consistent with this overall policy because it decreased the power of the labor unions on the plant floor.

THE ANAMAG TEAM LEADER

The Anamag plant utilizes the Japanese managerial system called the “team concept”. The Anamag plant organizes its production employees into six teams. The team members elect a “team leader” for an indefinite period of time. There are no management restrictions as to who may be a team leader or how many times one may be elected. Team members are permitted to replace their team leader at any time, for any reason, by a majority vote of the team. Team leaders serve solely at the discretion of the team members. Team leaders, as a whole, participate in managerial decisions such as disciplinary actions against employees, job and overtime assignments, hiring and recalling of employees, and performance efficiency appraisals. Although the team leader in the Japanese team concept system seems to possess supervisory authority and characteristics, the NLRB has excluded them from the rank of supervisor.

THE SUPERVISOR: DEFINITION AND CLARIFICATION

The status of the supervisor is essentially one of fact and the courts have given the NLRB discretion in determining supervisory
The courts have recognized the NLRB's expertise in this area and will not reverse their decisions as long as there is substantial evidence to support the Board's findings, taking the record as a whole. The question of supervisory status reaches the NLRB in two classic settings. First, the supervisory status question is raised when the employer refuses to collectively bargain with the union because a "supervisor" is being included within the bargaining unit. The second setting is one in which the union seeks to hold the employer liable for an unfair labor practice allegedly committed by a "supervisor." 

**GENERAL SUPERVISORY POWERS**

Although there are as many as thirteen powers listed in the NLRA, it has been generally held that the statute is to be read in the disjunctive, and that only one power will satisfy the authority criteria of supervisory status. Supervisory status is only achieved if one possesses actual authority to do any of the enumerated powers listed. Thus, it was held in *NLRB v. Southern Bleachery & Print Works* that an employer could not make a supervisor out of a rank and file worker simply by giving the worker an official title. Although actual authority is required for supervisory status, this power need not be direct. It may be actual authority directly or by some chain of command. Applying these principles, the *Anamag* Board concluded that the "team leader" did not possess supervisory status. The Board stressed that supervisory authority was lacking.

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82. *E.g.*, *NLRB v. Parma Water Lifter Co.*, 211 F.2d 258, 260-261 (9th Cir. 1954).

Although the employer has total loyalty on the part of his supervisors, there is a price to pay. As a result of this loyalty between the supervisor and his employer, the employer is responsible for the actions of his supervisors. *NLRB v. Kaiser Agricultural Chemicals*, 473 F.2d 374, 381 (5th Cir. 1973). Any act on the part of any supervisor which adversely affects the collective bargaining right of the employees, directly or indirectly, or gives management an advantage is considered an unfair labor practice on the part of the employer. *Daykin*, supra note 65, at 304. The employer is responsible for all supervisors, regardless of rank. Kaiser, 473 F.2d at 384. As can be seen, the effect of supervisory status can be just as substantial upon the employer as it can be to the individual himself. The supervisor and the employer may be personally affected due to the acts of the other, all directly traceable to the determination of the worker as a supervisor.

84. *NLRB v. Quincy Steel Casting Co.*, 200 F.2d 293, 295 (1st Cir. 1952).
85. *Id.* at 296.
86. 257 F.2d 235 (4th Cir. 1958).
87. *Id.* at 239.
89. 284 N.L.R.B. No. 72 at 4.
since the “team leader” is largely preempted by the decision making power of the team members who can remove the team leader at their will. In this respect, the Anamag decision was consistent with the case law defining the “supervisor.” However, this reasoning is inconsistent with the policies of the supervisory exclusion and the Taft-Hartley amendments.

The decision making power of the team members should have been examined more extensively. If the team members have actual authority, the supervisory exclusion policy, as well as the overall Taft-Hartley policies, are defeated. When labor personnel has actual authority over the plant floor, management’s control dramatically decreases. Team members’ loyalty will still reside with their union while being fully protected by NLRA due their “employee” status. Strong control by labor, coupled with loyalty to unions and protection under the NLRA, could revive the labor union abuses discussed earlier.

As stated above, a supervisor is one who has actual authority to perform any one of the listed powers, but, who must receive such authoritative mandates? Illinois State Journal Register v. NLRB held that a person must have actual authority over people who are within the definition “employee” as expressed in the NLRA. This strict interpretation of the supervisory definition was made even narrower by Westinghouse Electric Corp. v. NLRB.

In Westinghouse Electric Corp., Westinghouse manufactured and serviced turbine generators and related equipment. They had two basic installation and servicing contracts, one of which was

90. Id.
91. 412 F.2d 37 (7th Cir. 1969).
92. Id. at 44. Compare a vigorous dissenting opinion set forth in Mourning v. NLRB, 559 F.2d 768 (D.C. Cir. 1977). The dissent argued that the term “supervisor” should not be read in conjunction with the “employee” definition of the Act.

Primarily, since a “supervisor” is one having authority to direct “other employees”, Congress intended a broad, everyday meaning to the term “employee” and did not intend to limit the term to its definition under the Act. If it were otherwise, Congress would not have used the word “other”. The Illinois State Journal Register court answered this argument that “other employees” refers to other workers of the same employer of the supervisor. It doesn’t mean other workers aside from the supervisor himself, therefore, the word “other” does not harm the majority’s position.

Secondly, the dissent posed a hypothetical company, which is layered, where a person may be a supervisor without a definitional “employee” under him. This argument fails since supervisory authority need not be direct and may be in a chain of command. 559 F.2d at 770.

94. Id. at 1153.
95. Id. at 1153-54.
called the "technical supervision" contract.96 Under this contract, Westinghouse supplied material and equipment at specified prices and the services of one or more Westinghouse engineers at an hourly rate.97 The customer supplied all the "casual labor" at the installation site.98 On larger projects, the customer also supplied foremen.99 Westinghouse contended that their engineers assigned to the installation sites "supervised" the casual workers.100 The Board and the Court rejected this argument and decided, "[t]he fact that the people allegedly supervised are not Westinghouse employees prevents the field engineers from being their supervisors within the meaning of section 2(11) of the act. . . ."101 The Courts' interpretation of the supervisor definition is consistent with the policy of excluding supervisors from the NLRA. The disjunctive reading of the enumerated powers is broad enough to cover all those with specific authority. Limiting the definition to authority over "employees" of the supervisor's employer illustrates that loyalty was only intended for those who are closely aligned with the employer himself. Therefore, a somewhat broad and narrow reading of different sections of the supervisory definition is perfectly consistent.

The supervisor definition ends stating that one must use "independent judgment."102 Therefore, one must possess at least one listed power utilized with independent judgment to be classified as a supervisor under the NLRA. In NLRB v. Island Film Processing Co.,103 the Court stressed the statutory language of "if in the connection with the foregoing," to determine that supervisory status is attained only by the authority of any one power listed used in conjunction with independent judgment.104 However, the use of independent judgment should not be confused with acts that are merely clerical or routine.105 The use of independent judgment is not found because a person has greater skill than those around him,106 or that they may command other's respect,107 or that they may have greater responsi-

96. Id.
97. Id. at 1154.
98. Id.
99. Id.
100. Id.
101. Id. at 1155.
102. See supra note 2.
103. 784 F.2d 1446 (9th Cir. 1986).
104. Id. at 1451.
105. Quincy, 200 F.2d at 296.
107. Id.
Applying these principles, the Anamag Board concluded that the team leaders did not use independent judgment in their functions. The team vote or instructions from management precluded the team leader from utilizing independent judgment in his duties. The Board concluded that the team leader’s direction of workers was merely routine because it directly corresponded to production requirements set by management. The record showed that although a team leader could request a team member to work on another machine, he did not have the authority to mandate such action. In this respect, the Anamag decision was consistent with the case law defining the supervisor. However, the Board failed to address and recognize the repercussions of their decision. It is the team leader and his team members who control actual production on the plant floor, even though production quotas are mandated by management. This results in a plant floor controlled solely by the labor force, with no person having mandated loyalty to management. Yet, these same team members enjoy the protections of the NLRA since none are classified as supervisors. It is this important aspect which is contrary to the supervisory exclusion and the Taft-Hartley policies.

As stated earlier, one must possess actual authority, coupled with the use of independent judgment to be classified as a supervisor. The existence of supervisory authority must not be confused with the exercise of supervisory authority. It is well established that the test of supervisory power is the existence of authority and not the exercise of such authority. Infrequent use of actual authority is considered irrelevant in determining the status of supervisor. The only relevance that the infrequent exercise of “authority” may have is to refute the contention that the “authority” exists at all. However, it is agreed that once actual authority is proven, the frequency of its use is irrelevant.

The above stated maxim has often been confused. In Goldies,
Inc. v. NLRB, the First Circuit Court held that several Goldies' counterpersons were not supervisors and thus entitled to NLRA protections. Goldies employed six countermen at the store in question. In general, they were responsible for selling automobile and truck parts to customers. The countermen also took orders by telephone, showed merchandise, quoted prices, and answered questions of customers. Two countermen had the authority to hire and fire and were given supervisory status. The record showed that all six countermen had the actual authority to issue oral and written reprimands, although only the two supervisors had actually issued any. The Court held that the remaining four supervisors were not supervisors under the NLRA. The Court affirmed the NLRB's finding on the basis that the supervisory function of issuing reprimands was no more than "spasmodic and infrequent." The Court stated that spasmodic and infrequent use of supervisory authority was insufficient to establish supervisory status under the NLRA.

Goldies cited NLRB v. Quincy Steel Casting Co., NLRB v. Leland-Gifford Co., and Oil, Chemical & Atomic Workers Int'l Unions v. NLRB as controlling. It is quite correct that Quincy, Leland-Gifford, and Oil Workers stand for the proposition that spasmodic and infrequent use of supervisory power does not establish supervisory power, but these cases are factually distinct. These three cases all dealt with rank and file employees replacing or "filling-in" for supervisors for short periods. The Goldies case dealt with per-
manent countermen who were not filling-in for a supervisor who had actual authority. Quincy, Leland-Gifford and Oil Workers each enunciate the rule that the mere existence of supervisory power is sufficient to establish supervisory status. The only time spasmodic or infrequent use of supervisory authority does not establish supervisory status is in the temporary or “fill-in” supervisor situation.

Using this principle, the Anamag Board concluded that supervisory status should not be bestowed on the team leader because he infrequently “filled-in” for “team advisors” who do have supervisory status. The Board did not cite the Goldies interpretation of current case law. However, a more complex problem presents itself. The overall power of the team leader and his team cannot be overlooked. As noted earlier, the team leader, along with his team, could effectively rule the plant floor while being protected by the NLRA. The fact that “team advisors” are supervisors should not color the determination of the team leader. Given the team leaders’ power, temporary assignments as “team advisor” could yield even more control. This adds up to less control over the plant floor by management, a direct contradiction of the Taft-Hartley policies.

**Specific Supervisory Powers**

Any of the powers listed in the statute which one has actual authority to use with independent judgment is sufficient to establish supervisory authority. Thus, the following powers are indicative of supervisory status: authority to lay-off and recall, direct employees, transfer employees, make pay raises and promotions, and

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the Act. This is perfectly consistent with the Congressional intent of promoting loyalty to management. If there is no serious threat to management by the temporary supervisor being included in the bargaining unit, then they would keep their employee status. The Board has always approved the rank and file worker using “infrequent” or “spasmodic” supervisory authority for short periods. In seasonal industries, rank and file workers who assume supervisory status in peak seasons are not excluded from the Act’s protections. Basically, a temporary supervisor does not fall under the Act’s “supervisor” definition as long as his temporary authority is not a regular and substantial part of his job. Moreover, his rank and file duties can be sharply demarcated. GAF Corp. v. NLRB, 524 F.2d 492, 495-496 (5th Cir. 1975).

134. 628 F.2d at 708.
135. Quincy, 200 F.2d at 296; Leland-Gifford, 200 F.2d at 625; Oil, Chemical & Atomic Workers, 445 F.2d at 244.
136. GAF Corp. v. NLRB, 524 F.2d 492, 495-496 (5th Cir. 1975).
137. 284 N.L.R.B. No. 72 at 10.
139. NLRB v. Charley Toppino & Sons, 332 F.2d 85, 86 (5th Cir. 1964).
140. NLRB v. Big Ben Dep’t Stores, 396 F.2d 78, 82 (2d Cir. 1968).
141. Charley Toppino & Sons, 332 F.2d at 86.
to discipline employees.\textsuperscript{142} The authority to hire and discharge employees also establishes supervisory status,\textsuperscript{143} but does not include all situations. In \textit{International Union Brewery Workers v. NLRB},\textsuperscript{144} it was held that employees who hire and fire personal helpers, whom the employees themselves pay, are not considered supervisors under the Act.\textsuperscript{146} The authority to assign work is also sufficient to establish supervisory status,\textsuperscript{148} but these assignments cannot be routine. In \textit{NLRB v. City Yellow Cab Co.},\textsuperscript{147} the court ruled that the switchboard operators at a cab company who radioed driver pickup sites were not supervisors since they merely routinely assigned work.\textsuperscript{148} The authority to suspend an employee is evidence of supervisory status, even if it exists only for one shift of work.\textsuperscript{149} The power to suspend has been held to exist even when higher authoritative personnel made the final determination of suspension status.\textsuperscript{150}

Utilizing the above principles, the \textit{Anamag} Board concluded that the team leaders were not supervisors.\textsuperscript{151} The Board stressed that the team leaders are only involved in the hiring and recall procedure after a candidate has been approved by management.\textsuperscript{152} Team leaders are only used in the procedure to determine if the candidate would be compatible to the leader’s particular team.\textsuperscript{153} This does not bring supervisory status.\textsuperscript{154} The Board also concluded that the team leaders do not “assign” overtime.\textsuperscript{155} Team leaders needed the vote of the team members to “assign” the overtime, therefore, the leader was bound to his team’s decision.\textsuperscript{156} The Board also concluded that the team leaders did not discipline employees\textsuperscript{157} or promote them.\textsuperscript{158} The team leader was limited to counseling employees as to attendance related infractions and merely kept account of the

\begin{footnotesize}
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\item[142.] NLRB \textit{v. Ajax Tool Works}, 713 F.2d 1307, 1312 (7th Cir. 1983).
\item[143.] NLRB \textit{v. Big Three Indus.}, 602 F.2d 898, 902 (9th Cir. 1979).
\item[144.] 296 F.2d 297 (D.C. Cir. 1961).
\item[145.] \textit{Id.} at 303-304.
\item[146.] NLRB \textit{v. Dadco Fashions, Inc.}, 632 F.2d 493, 496 (5th Cir. 1980).
\item[147.] 344 F.2d 575 (6th Cir. 1965).
\item[148.] \textit{Id.} at 581.
\item[149.] NLRB \textit{v. Gray Line Tours}, 461 F.2d 763, 764 (9th Cir. 1972).
\item[150.] Eastern Greyhound Lines \textit{v. NLRB}, 337 F.2d 84, 88 (6th Cir. 1964).
\item[151.] 284 N.L.R.B. No. 72 at 8.
\item[152.] \textit{Id.}
\item[153.] \textit{Id.} at 9.
\item[154.] Kenosha News Publishing Corp., 264 N.L.R.B. No. 50 (Sept. 29, 1982).
\item[155.] 284 N.L.R.B. No. 72 at 7.
\item[156.] \textit{Id.}
\item[157.] \textit{Id.} at 5.
\item[158.] \textit{Id.} at 7.
\end{enumerate}
\end{footnotesize}
number of infractions in a clerical setting.\textsuperscript{159} As to promotions, the team members collaborated as to employee performance appraisals which would bring an advance in pay.\textsuperscript{160} Thus, the team leader did not have an authoritative hand in the promotion process.\textsuperscript{161} Therefore, the Board held that none of the above duties of the team leader established supervisory status.

In this respect, the \textit{Anamag} decision was consistent with the case law defining the supervisor. However, the team leaders' function cannot be minimized. The team leaders could effectively restrict the use of management approved candidates by claiming that the candidate is not “compatible” with their team. Should each team member concur, management is placed in the difficult situation of either discharging a candidate or creating a hostile environment on the plant floor. Management is not likely to disturb plant harmony, and with this knowledge, team leaders could effectively choose new candidates. Team members also vote on the assignment of overtime and collaborate on employee appraisals. Collectively, these powers equate to more control by the team leader and his team on the plant floor, yet, management cannot mandate loyalty from any of them due to the NLRA protections. Again, the policies of the supervisory exclusion and Taft-Hartley are defeated.

Although a person may not have actual, direct power to do any of the above actions he may still be a supervisor. If a person has actual authority to “effectively recommend” any of the above powers, they are considered supervisors under the act.\textsuperscript{162} The term “effectively recommend” is considered a question of fact which is determined by the NLRB.\textsuperscript{163} There has been some conflict as to the meaning of “effectively recommend” among the Circuits. In \textit{Stop & Shop Co. v. NLRB},\textsuperscript{164} the plaintiff operated a chain of drug stores.\textsuperscript{165} One pharmacist was designated the “pharmacy manager” in each store.\textsuperscript{166} The pharmacy managers did not have direct authority to hire and discharge employees but they did play a significant role in the process.\textsuperscript{167} The pharmacy managers completed perform-

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\item \textsuperscript{159} \textit{Id.} at 5.
\item \textsuperscript{160} \textit{Id.} at 7.
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Berry Schools v. NLRB}, 627 F.2d 692, 697 (5th Cir. 1980).
\item \textsuperscript{163} \textit{Stop & Shop Co. v. NLRB}, 548 F.2d 17, 18 (1st Cir. 1977).
\item \textsuperscript{164} 548 F.2d 17 (1st Cir. 1977).
\item \textsuperscript{165} \textit{Id.} at 17.
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{Id.} at 19.
\end{itemize}
ance review forms concerning each clerk.\textsuperscript{168} These reviews played a part in granting raises although there was evidence that raises were given even without the pharmacy manager's knowledge.\textsuperscript{168} The Board ruled that the pharmacy managers were not supervisors.

The First Circuit reasoned that the pharmacy manager did not "effectively" recommend any enumerated powers.\textsuperscript{170} "There was evidence that... the pharmacy manager's recommendations as to discharge were sometimes ignored. By the principle of ejusdem generis, in the phrase 'effectively to recommend', the emphasis is on the initial word."\textsuperscript{171} The court's analysis is weak. The phrase "sometimes ignored" implies that the pharmacy manager's recommendations were sometimes used.

A better analysis is contained in Metropolitan Life Insurance.\textsuperscript{172} The Court in Metropolitan Life concluded that the fact that higher authorities review recommendations does not indicate that the issuer of such recommendation is not a supervisor.\textsuperscript{172} The power to recommend implies review by higher authority.\textsuperscript{174} If one, using independent judgment, has the authority to evaluate workers, which is relative to promotions and pay raises, and they are used by higher authority, they should be classified as supervisors.\textsuperscript{176} Two years after Stop & Shop, the same court decided NLRB v. JK Electronics\textsuperscript{176} which stated that "substantial" input satisfied the wording of "effectively to recommend" for supervisory status.\textsuperscript{177}

Using a combination of Stop & Shop, JK Electronics and Metropolitan Life Insurance, the Anamag Board concluded that team leaders do not effectively recommend employee terminations or transfers. The Board stressed that there was nothing in the record to show that management's actions were a direct result of the team leader's recommendations\textsuperscript{178} or that these recommendations were accepted without an independent investigation by management.\textsuperscript{179} In this respect, the Anamag decision was consistent with the case law defining the supervisor. However, the fact that team leaders make

\textsuperscript{168} Id.
\textsuperscript{169} Id. at 19-20.
\textsuperscript{170} Id. at 19.
\textsuperscript{171} Id.
\textsuperscript{172} 405 F.2d 1169 (2d Cir. 1968).
\textsuperscript{173} Id. at 1177.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} 592 F.2d 5 (1st Cir. 1979).
\textsuperscript{177} Id. at 7.
\textsuperscript{178} 284 N.L.R.B. No. 72 at 5.
\textsuperscript{179} Id.
recommendations at all, illustrates control over the plant floor. Although team leader recommendations are not accepted without independent investigation, the team leader can instigate investigations by making such recommendations. This power could elicit the team leader more support from team members who are aware that a team leader’s recommendation could lead to a promotion. This creates more loyalty from team members to team leaders. This can lead to tremendous control of the plant floor by team leaders, who would continue to enjoy the protections of the NLRA. This is yet another example of an instance in which the supervisory exclusion and Taft-Hartley policies are frustrated.

Finally, one may achieve supervisory status if one has authority to adjust grievances.\textsuperscript{180} This is distinguishable from someone who merely presents grievances. It was held in \textit{International Ladies' Garment Workers Union v. NLRB},\textsuperscript{181} that union representatives who merely presented workers’ grievances were not supervisors because they had no authority to “adjust” those grievances.\textsuperscript{182} Using these principles, the Anamag Board concluded that team leaders do not adjust grievances. Although the team leaders could settle employee conflicts,\textsuperscript{183} higher management officials settled all “grievances” which could not be settled among the team or by the team leader.\textsuperscript{184} Therefore, the team leader has no significant impact in the adjustment of grievances.

The Anamag reasoning concerning this aspect of the decision was consistent with the case law defining the supervisor. However, team leaders do have the authority to settle disputes among the workers on the plant floor. This authority again gives the team leaders more power and control over the workers. More importantly, it creates a stronger relationship with the team members. This could allow the team leaders to effectively control the “goings and comings” of the plant floor, while still under the NLRA’s protections. This sharply decreases management’s power over the plant floor and frustrates the policy of having loyal supervisors on the plant floor. Again, the policies of the supervisory exclusion and Taft-Hartley are defeated.

It must be explained that the above study is not an exhaustive one as to the determination of supervisory status. The Board and the

\begin{enumerate}
\item NLRB v. Sheet Metal Workers Int'l, 477 F.2d 675, 676 (5th Cir. 1973).
\item 339 F.2d 116 (2d Cir. 1964).
\item Id. at 121.
\item Id. at 121.
\item 284 N.L.R.B. No. 72 at 8.
\item Id.
\end{enumerate}
courts consider several other factors not expressed above. 185

CONCLUSIONS

The Anamag decision was consistent with the current case law determining supervisory status. However, this case law does not effectuate the policies of the supervisory exclusion or the Taft-Hartley amendments. This contradiction stems from the fact that the Japanese managerial philosophy and techniques are not consistent with the basic premise of the NLRA. The policy excluding supervisors from the scope of the NLRA was designed to regulate an adversarial setting between labor and management. 186 The Japanese managerial philosophy has labor and management working together, each performing functions traditionally performed by the other. Is it possible to use the existing labor laws to regulate a system whose very essence was never imagined? If it is possible, should it be done? 187

185. The following are by no means controlling to establish or refute supervisory status. They are merely guiding points which may sway the Board one way or the other in their factual determination of supervisory status. They are not taken alone on their faces but are considered within the record as a whole. NLRB v. Scott Paper Co., 440 F.2d 625, 628 (1st Cir. 1971). The attendance of managerial conferences is usually indicative of supervisory status. Brewton Fashions, Inc. v. NLRB, 361 F.2d 8, 12-14 (5th Cir. 1966). The approval of time cards without any other authority supports the position that supervisory status is lacking. Oil, Chemical & Atomic Workers, 445 F.2d at 243. An employee does not become a supervisor merely because other workers regard him as such. Keener Rubber, Inc. v. NLRB, 326 F.2d 968, 970 (6th Cir. 1964). An employee is not a supervisor because he is paid at a higher rate or by a different method than other employees. Filler Products, Inc. v. NLRB, 376 F.2d 369, 375 (4th Cir. 1967). The size of a given unit is given much consideration in determining supervisory status. If the size of a given unit is relatively small, it lends support to the proposition that the worker in question is probably not a supervisor. NLRB v. Imperial Bedding Co., 519 F.2d 1073, 1075 (5th Cir. 1975). The converse is also true. The larger the given unit, the more likely the worker in question is a supervisor. Silvercup Bakers, 222 N.L.R.B. No. 828 (1976). The wearing of distinctive clothing or uniforms indicates supervisory status. NLRB v. American Casting Services, 365 F.2d 168, 171 (7th Cir. 1966).

There is one final point which must be briefly expressed. There were certain positions in the workforce which Congress meant to include and exclude from the definition of the supervisor although they did not expressly do so. H.R. Rep. No. 510, 80th Cong., 1st Sess. 35-36 (1947). These positions included strawbosses, leadmen, time study men, management officials and confidential employees. In the cases of the leadmen and strawbosses it was believed by Congress that these positions did not possess any real authoritative power. They merely gave routine or clerical instructions for the convenience of efficient plant operation. Congress did not expressly include confidential employees or management officials in the supervisor definition because the Board always excluded these positions from the scope of the Act. Congress felt it was unnecessary to expressly include them. H.R. Rep. No. 510, 80th Cong., 1st Sess. 35-36 (1947).


187. For a complete analysis outside the scope of this note, See Id.; See also Craver, The NLRA at Fifty: From Youthful Exuberance to Middle Aged Complacency, 36 L.L.J. 604 (1985).
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consequences of inconsistent decisions regarding the supervisory status of employees can have irreparable effects.\textsuperscript{188}

There has been a tremendous rise in the use of labor-management cooperative plans in many industries throughout the United States.\textsuperscript{189} This increase in cooperative plans, along with the Japanese managerial system which intertwines labor and management, may bring an end to the NLRA. Some have either called for it or have at least called for modification in current labor law to reflect the change of managerial attitudes and philosophy.\textsuperscript{180} The direction the Courts and Congress may take remains to be seen.

The Anamag board recognized that the NLRA did not contemplate the Japanese managerial system.\textsuperscript{191} The NLRB is not Congress and is bound by the current NLRA and case law. However, it is clear that the case law does not effectuate the basic policies of the supervisory exclusions and the Taft-Hartley amendments. This inconsistency must be corrected. Congress must re-evaluate the current NLRA and amend it accordingly.

\textit{Carmine E. Esposito}

\textsuperscript{188} The determination of the worker as a supervisor denies him or her all rights and privileges of the Act. Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir. 1970). The employer unfair labor practices do not apply to acts against the supervisor and the employer is under no legal duty to collectively bargain with his supervisors. Florida Power & Light Co. v. International Brotherhood of Elec. Workers, 417 U.S. 790, 808 (1974). The employer is given a free hand in the discipline of his supervisors. GAF Corp., 524 F.2d at 495. This principle was taken to the extreme when an employer was given the right to discharge a supervisor, without liability, in the face of state “right to work” statutes. Beasley v. Food Fair, 416 U.S. 653 (1974). An employer may discharge a supervisor specifically for joining or engaging in union activity. Beasley, 416 U.S. at 656. It has been held that there is no such thing as an unfair labor practice against a supervisor, but there are three exceptions which give the supervisor slight protection. An employer’s conduct violates the Act when (1) a supervisor is disciplined for testifying before the Board or during the processing of an employee's grievance (cite omitted); (2) a supervisor is disciplined for refusing to commit an unfair labor practice (cite omitted); (3) where a supervisor who hired his own crew was discharged as a pretext for terminating his pro-union crew (cite omitted). Automobile Salesmen Union v. NLRB, 711 F.2d 383, 386 (D.C. Cir. 1983).

\textsuperscript{189} Schlossberg and Fetter, \textit{supra}, at 595-596.

\textsuperscript{190} \textit{Id.} at 615. \textit{See also} Craver, \textit{supra}, at 615.

\textsuperscript{191} 284 N.L.R.B. No. 72 at 2.