Familial Employees: Exclusion from the Bargaining Unit

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NOTE

FAMILIAL EMPLOYEES: EXCLUSION FROM THE BARGAINING UNIT

The United States Supreme Court’s decision in NLRB v. Action Automotive, Inc.\(^1\) signifies that the majority of the Court is not ready to restrict the statutory authority of the National Labor Relations Board (“NLRB” or “the Board”) to define bargaining units.\(^2\)

2. The National Labor Relations Board (“NLRB” or “the Board”) has the duty to determine an appropriate unit for collective bargaining under Section 9(b) of the National Labor Relations Act (“NLRA” or “the Act”), 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 159 (1982)). In deciding what workers to exclude from a unit, the Board will look for substantial differences in working conditions. The following factors will be examined:

[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs . . . ; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.


For example, a company may employ a clerical staff, salespeople, and mechanics. If these groups do not have the same benefits, hours, and pay structure, the Board may find that their different employment interests outweigh the basic overall community of interest of the employees in the employer wide unit. Three units rather than one would then be appropriate for collective bargaining. The employees, in their appropriate unit, are still protected in their NLRA Section 7 rights “to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing . . . .” 29 U.S.C. § 157 (1982).

Some workers, however, can be excluded completely from an appropriate unit. The Board may exclude any individual employed by his or her parent or spouse from an appropriate unit of employees. 29 U.S.C. § 152(3) (1982) (stating in pertinent part: “The term ‘employee’ shall include any employee, . . . but shall not include . . . any individual employed by his parent or spouse. . . .") This familial exclusion stemmed from the Congressional belief that persons employed by parents and spouses “did not need the protection of the Act because of the close relationship between employer and employee. A bargaining unit, or for that matter concerted activity, was apparently thought unnecessary and also unwanted in such homes.” Note, Confidential Employees: A Recommendation for Uniformity, 31 CLEV. ST. L. REV. 339 (1982).

Problems arise when the Board uses section 9(b) of the NLRA to exclude other workers
The Court has held that the Board did not exceed its authority under section 9(b) of the National Labor Relations Act\(^3\) when it excluded some family members from a bargaining unit even though the employees had enjoyed no special job related benefits. The majority of the Court found that “[t]he Board’s policy regarding family members, although not defined by bright-line rules, is a reasonable application of its ‘community of interest’ standard.”\(^4\) The six to three division of the Court\(^6\) and the Board’s shifts in policy over the years\(^6\) on familial exclusions from the bargaining unit suggest the need for clarification and scrutiny into this area of labor law.\(^7\)

A discussion of the issues in the *Action Automotive* decision must begin with a consideration of the development of the “community of interest” standard, the “expanded community of interest” standard, and the “special status” test. The case law from the circuits and the NLRB on familial exclusions from the bargaining unit will be highlighted in this Note. An examination of the standards will reveal that the “expanded community of interest,” proposed by who happen to have familial relationships with management. Both the union and the employer have a stake in these exclusions. In representation elections the workers are asked to decide whether to unionize. Both the union and the employer want to win these NLRB elections but the final decision is made by the “subjective minds of the employees, each with varying backgrounds, moods, desires, and motivations.” Voegler, *Employer Objections to the Conduct of NLRB Elections*, 4 Glendale L. Rev. 1 (1979-80).

How does the employee who happens to have a familial relationship with management vote? The union might want to challenge the vote of a mother, niece, or brother of the employer on the grounds that the unit was inappropriate and that certain persons have improperly been allowed to vote. The employer may want to set aside an election that the union has won by challenging the allegedly improper exclusion of people. “The ultimate inquiry is whether or not the employees grouped together share a ‘community of interests’ or whether some employees who also share this ‘community of interests’ have been kept out of the unit.” Id. at 1.

3. The Act states in pertinent part: “The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” 29 U.S.C. § 159(b) (1982).
5. Chief Justice Burger delivered the opinion of the Court and was joined by Justices Brennan, White, Marshall, Blackmun and Powell. Justice Stevens filed a dissenting opinion in which Justices Rehnquist and O’Connor joined.
6. While only an individual working for his parent or spouse is expressly excluded by § 2(3) of the Act, the Board has relied on a “community of interest” standard, an “expanded community of interest” standard, or a “special status” test to exclude other relatives.
7. Just as the Board has followed a zig-zag course in applying these standards, see NLRB v. Caravelle Wood Products, 504 F.2d 1181, 1184 (7th Cir. 1974), the circuit courts also have been in conflict as to which standard is the most appropriate. Linn Gear Co. v. NLRB, 608 F.2d 791, 795 (9th Cir. 1979). Furthermore, when objections to a NLRB election are filed, the relationship of the union, workers and employer can remain “in limbo” for several years while the Board, circuit courts and even the Supreme Court decide the issue. See Voegler, supra note 2, at 2.
the Seventh and Ninth Circuits, is the one most appropriate "to assure to employees the fullest freedom in exercising their rights."

During the 1984 term, in *NLRB v. Action Automotive,* the Supreme Court considered whether or not the Board may exclude from the bargaining unit employees who are related to the owners of a closely held corporation if the Board has not found that the relatives enjoyed any special job-related benefits. The controversy originated in January 1982 with the contested election of the Retail Store Employees Union, Local 40, United Food and Commercial Workers International Union as the exclusive collective bargaining representative in two employee bargaining units of Action Automotive, Inc., a retail automobile parts and gasoline dealer. Unit A consisted of the store and warehouse employees at the nine stores of the corporation while Unit B consisted of the office clerical employees at one location. The composition of Unit B included Diane Sabo, the wife of one of the owners of the corporation. When the votes in Unit B were counted, four were for the union, three against. However, each side challenged enough ballots to place the outcome in doubt. The union's challenges included Diane Sabo's ballot.

In the Decision and Order dated June 24, 1982, a three member panel of the Board reaffirmed that a majority of the employees in both bargaining units had selected the union. The Board relegated to a footnote the reasons for sustaining the union's challenge to Diane Sabo's ballot. The decision lacked an analysis of the "community of interest" standard which resulted in Sabo's disqualification. Furthermore, there was no discussion of the union's allegations regarding Sabo's special privilege. Sabo's disqualification was justified by the conclusion that her interests were different from those of the other clerical employees. Action Automotive petitioned the court to review the NLRB's order. Action Automotive maintained that the Board had improperly disqualified not only Diane Sabo, but Mildred Sabo. The mother of the three Sabo brothers who owned and man-

8. *Linn Gear Co.*, 608 F.2d at 796.
12. *Id.*
13. *Id.* at 424, n.4, 110 L.R.R.M. (BNA) at 1399. "In addition to the Hearing Officer's finding that Diane Sabo, the wife of the president and an owner of the Employer, did not share a community of interest with employees in Unit B, Members Jenkins and Zimmerman found that the evidence also established that she enjoyed special privileges. Member Hunter would have sustained the challenge to Sabo's ballot solely on the fact that she enjoyed special privileges." *Id.*
aged the company, Mildred Sabo had been prohibited from voting in the bargaining unit.\textsuperscript{14}

In contrast to the Board’s cursory treatment of the challenges, the Sixth Circuit, upon appeal, cited the following facts: the corporation was owned in equal shares by three brothers who made all policy decisions and were actively involved in the company’s daily operation. Diane Sabo was the general ledger clerk who worked with other clericals under the supervision of an office manager. Mildred Sabo lived with one of the owners and spoke to all of her sons daily.\textsuperscript{15} The court used a “special status” test\textsuperscript{16} to determine whether the interests of Diane and Mildred Sabo were so allied with the interests of management that their votes should not have been counted in the union’s election. In the Sixth Circuit, “special status” was established when the court found a familial tie plus special job-related benefits.\textsuperscript{17} After examining the wage and hour schedule and the procedure for supervision of the two women, the court found that management had accorded no special privileges to Mildred Sabo. The court found one instance of special treatment for Diane Sabo: her work schedule was established for her convenience. The Sixth Circuit held, however, that one finding of special treatment was not sufficient evidence of “special status.”\textsuperscript{18} Therefore, the Board would not be allowed to exclude either Diane or Mildred Sabo.

Other circuits have been imprecise when establishing standards for determining whether relatives of corporate stockholders should be excluded from the voting unit. In \textit{NLRB v. Caravelle Wood Products (Caravelle I)},\textsuperscript{19} the Board petitioned the Seventh Circuit to enforce the Board’s bargaining order on Caravelle Wood Products Company. The company challenged the election of the union since wives and sons of corporate stockholders and department heads had been excluded from the voting unit. The court held that the employ-

\textsuperscript{14} Action Automotive, Inc. v. NLRB, 717 F.2d 1033 (6th Cir. 1983).
\textsuperscript{15} Id. at 1034.
\textsuperscript{16} Id. at 1035.
\textsuperscript{17} See generally NLRB v. Hubbard Co., 702 F.2d 634 (6th Cir. 1983) (the “special status” test was applied to the son-in-law of the corporation's president and majority stockholder when his ballot was challenged by the union; the court considered his familial tie and also examined his work schedule); Cherrin Corp. v. NLRB, 349 F.2d 1001 (6th Cir. 1965) (the work schedule and fringe benefits of the daughter of the corporation's secretary were examined); NLRB v. Sexton, 203 F.2d 940 (6th Cir. 1953) (the court refused to find "special status" solely on a familial relationship). See also cases cited infra note 56 (excluding low-level managers on the basis of a "special status" test).
\textsuperscript{18} Action Automotive, Inc., 717 F.2d at 1035.
\textsuperscript{19} 466 F.2d 675 (7th Cir. 1972).
ees whose parents or spouses were “substantial shareholders" in a closed corporation were “employees" under section 2(3) of the NLRA. Thus, the Seventh Circuit would not allow the Board to automatically exclude a relative who was not otherwise expressly excluded by the Act from voting in a representation election.

The Board had relied on *Foam Rubber City #2* to make its attempted familial exclusion. In *Foam Rubber City #2*, the Board compared a corporation comprised solely of two brothers to a partnership. In a partnership, a son of one of the brothers could be excluded under section 2(3) of the Act. Therefore, a son of a twenty percent stockholder should be similarly excluded. The analogy failed, however, in *Caravelle I* because the ten Paradiso family members owned seventy percent of the stock. The Board’s alternative position had been that the Paradiso relatives should have been excluded under section 9(b) of the Act in any event because a familial relationship automatically nullified any “community of interest” with the other employees.

More than ten years earlier, the Board had attempted to apply this per se rule when the vote of an employer’s nephew had been challenged. Nevertheless, the Sixth Circuit had limited the Board’s authority.

The Seventh Circuit demonstrated more flexibility in *NLRB v.

20. *See id.* at 676 (the Paradiso family owned seventy per cent of the stock); *Cerni Motor Sales*, 201 N.L.R.B. 918, 82 L.R.R.M. (BNA) 1404 (1973) (a substantial shareholder must own at least fifty percent of the stock before his or her spouse or child can be excluded under § 2(3) of the NLRA).
22. 167 N.L.R.B. 623, 66 L.R.R.M. (BNA) 1096 (1967) (the son of the corporation’s president who owns half the stock of the company is not an “employee” and thus is not includable in the bargaining unit).
23. 466 F.2d at 676.
25. *Id.* at 623, 66 L.R.R.M. (BNA) at 1097-98.
26. *Id.* at 624, 66 L.R.R.M. (BNA) at 1098. *See supra* note 2 and accompanying text for the factors the Board has used to determine the existence of a “community of interest.”
28. We find no justification for the exercise of discretion on the part of the Board, by virtue of Section 9 of the Act, to exclude from the appropriate bargaining unit and from participation in the election for the selection of a bargaining agent any persons on the basis of family relationship other than those specifically excluded under Section 2(3).
Caravelle Wood Products (Caravelle I). The court remanded the case and suggested a number of factors which might have been considered:

how high a percentage of stock the parent or spouse owns, how many of the shareholders are related to one another, whether the shareholder is actively involved in management or holds a supervisory position, how many relatives are employed as compared with the total number of employees, whether the relative lives in the same household or is partially dependent on the shareholder.

The examination of such factors would not, however, have uncovered privileges or more favorable working conditions under the Sixth Circuit's "special status" test. The Sixth Circuit required a showing of special job related privileges not only when the challenged employee was the son-in-law of the company's president and majority stockholder, but also when the employee was the wife of the company's president, and the challenge was the inclusion of that employee into the bargaining unit. On the other hand, the Seventh Circuit focused on the strength of the familial relationship itself as well as its potential influence on the employer-employee and employee-employee interaction. This is the substance of the "expanded community of interest" standard.

On remand, the Board in Caravelle I applied the court's "expanded community of interest" standard. The Board found that seventy percent of the stock of the Company was owned by the Paradiso family who "serve as directors, occupy most of the key offices of the Company, are active in its operation, and hold most of the supervisory positions." The sons were minors who attended school and worked part-time under their father's supervision. Because both the sons and the wives lived at home, the Board presumed their financial dependence. Thus, despite the application of the Caravelle I guide-

29. 466 F.2d 675 (7th Cir. 1972).
30.  Id. at 679.
31.  See supra note 17 and accompanying text.
32.  NLRB v. Hubbard Co., 702 F.2d 634 (6th Cir. 1983).
34.  See NLRB v. Caravelle Wood Products, 504 F.2d 1181 (7th Cir. 1974) [Caravelle II] "... Caravelle I fashioned an 'expanded community of interest' standard that permits the Board to exclude employees on the basis of family relationship—without regard to job related factors—provided the factual finding implicitly required by the guidelines is made in each case."  Id. at 1187.  See supra text accompanying note 29 for a listing of the relevant factors.
36.  Id. at 856, 80 L.R.R.M. (BNA) at 3412.
lines, the Board was able to exclude the relatives. The Board found the presence of special privilege, but limited discussion of this issue to a footnote to the decision.\textsuperscript{37} The Board emphasized that the “special status” test was not the basis for the familial exclusion.

Caravelle still refused to bargain with the union. The Board’s decision to exclude family members was once again brought before the court (\textit{Caravelle II}).\textsuperscript{38} The company insisted that a “special status” test must be used to exclude familial employees from the representation unit.\textsuperscript{39} The Regional Director had previously not found any relatives who had enjoyed substantial job related benefits.\textsuperscript{40} Thus the use of this test by the court would have allowed the challenged employees to vote in the election and presumably defeat the union.

The \textit{Caravelle II} court traced the Board’s history of handling representation elections which included employees who were related to management. It was noted that early Board decisions had attempted a per se exclusion by finding no “community of interest” where there was a relationship between the employee and employer.\textsuperscript{41} For example, the Board could exclude a nephew or a son of a corporation’s president from the bargaining units.\textsuperscript{42} When challenged by the Sixth Circuit,\textsuperscript{43} the Board retreated from its use of this irrebuttable presumption. It held that “the mere coincidence of a family relationship between an employee and his employer does not negate the mutuality of employment interests which an individual shares with fellow employees, absent evidence that because of such relationship he enjoys a special status which allies his interest with those of management.”\textsuperscript{44} Thus, the impact of the decision was that a brother, brother-in-law, or nephew by marriage who is related

\begin{footnotes}
\item[37.] \textit{Id.} at 856, 80 L.R.R.M. (BNA) at 3411. “While the usual punching-in time for regular employees was 7 a.m., the vice president’s wife was permitted to report for work about 9 a.m.”
\item[38.] 504 F.2d 1181 (7th Cir. 1974).
\item[39.] \textit{Id.} at 1183.
\item[40.] \textit{Id.} at 1183 n.5.
\item[41.] \textit{Id.} at 1184. In some cases it is the employer who seeks or agrees to the exclusion of the employee-relative from a bargaining unit. \textit{See, e.g.,} NLRB v. Warner, 587 F.2d 896 (8th Cir. 1978); McMahon Transportation Co., 124 N.L.R.B. 1092, 44 L.R.R.M. (BNA) 1602 (1959). \textit{But see,} Parisoff Drive-In Market, 201 N.L.R.B. 813, 82 L.R.R.M. 13 (BNA) 1342 (1973) (comparing employee-relatives to confidential employees whom the Board has historically excluded from the bargaining unit generally at the request of employees). \textit{See generally Voegler, supra note 2.}
\item[42.] P.A. Mueller and Sons, Inc., 105 N.L.R.B. 552, 32 L.R.R.M. (BNA) 1229 (1953).
\item[43.] NLRB v. Sexton, 203 F.2d 940 (6th Cir. 1953) (\textit{cited in Caravelle II}, 504 F.2d at 1184).
\end{footnotes}
to two partners of a company would be entitled to vote in a representation election. Such a relative is presumed to have a common interest with the other employees in "rates of pay, wages, hours of employment, or other conditions of employment." Consequently, the Board more closely examined the special job related privileges of any relative whose vote was challenged for evidence of allied management interest.

The Caravelle II court determined however, that it was unnecessary and impractical for the Board to undertake this investigation. In his dissent in International Metal Products, member Murdock stated that family ties could still interfere with the employees' rights "to organize among themselves and to bargain collectively without interference, restraint or coercion." A relative would likely find it easier to approach management during business hours or would have access to management away from work at social or family gatherings. Other employees who must bargain through a statutory representative would not have such informal opportunities to discuss hours and wages with the "boss." Furthermore, a relative could be in a position to directly receive the benefits of a profitable business, and might forego a special employee privilege for a share of the profits. Such a direct interest in the economics of the business could conflict with the collective bargaining efforts of the other employees for higher wages and shorter work hours. Member Jenkins reasoned that the fear that internal union information might be conveyed to the employer could "inhibit adequate and accurate expression of views and freedom of action on the part of the membership." Just as any intrusion of a representative of management in union activities would cause suspicion, so could the presence of a

45. Id.
47. See generally Cherrin Corp. v. NLRB, 349 F.2d 1001 (6th Cir. 1965), cert. denied, 382 U.S. 981 (1966); Uyeda v. Brooks, 365 F.2d 326 (6th Cir. 1966).
48. 504 F.2d at 1187.
49. 107 N.L.R.B. at 68, 33 L.R.R.M. (BNA) at 1056 (Murdock, mem., dissenting).
50. Pargas of Crescent City, 194 N.L.R.B. 616, 617, 78 L.R.R.M. (BNA) 1712, 1713 (1971). Member Jenkins dissented from the majority's opinion which allowed a wife of the employer's manager, who had no stock interest, to vote in the representation election because she had no "special status." Jenkins discussed the practical grounds for excluding close relatives of management especially when the business was small and closely held. Id.
51. Id. at 617-18, 78 L.R.R.M. (BNA) at 1714.
niece, son-in-law or sister in the bargaining unit cause uneasiness. A relative would not be excluded because he or she would likely vote against the union in a representation election, as such exclusion would violate the neutrality rule mandated by the Supreme Court. However, a relative could be excluded based on the possibility that he or she might not share the same interest in employment conditions as the other employees.

The Seventh Circuit, in Caravelle II, affirmed the "expanded community of interest" standard enunciated in Caravelle I. Consequently, the Board must now examine several factors, in addition to special job-related privileges, in order to determine whether the familial relationship is such that would require the exclusion of family members from the bargaining unit.

In 1979, the Ninth Circuit also adopted in Linn Gear Co. v. NLRB the "expanded community of interest" standard established by Caravelle I and Caravelle II. The Board upheld the Regional Director's challenge to a ballot which had been cast by the son of the majority shareholder. The Regional Director found no "community of interest." The father was majority stockholder of the controlling company and active president of Linn Gear. In addition, his son

52. Id.
53. See NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973). The Court held that the union's waiver of initiation fees for all employees who sign union authorization cards before a Board representation election tends to interfere with employee free choice in the election. "Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it." Id. at 278.

Without violating the Savair principle, the Board necessarily precludes individuals from voting in the election for a unit when the Board excludes them from the appropriate bargaining unit. See Caravelle II, 504 F.2d at 1188 (Savair has never been construed to affect the Board's authority to exclude from a unit employees who do not share a community of interest with other employees because of their relationship with the employer). See also Brief for Petitioner at 19 n. 10, Action Automotive v. NLRB, 105 S. Ct. 984 (1985) (employees with no community of interest may well oppose a union but this presumed opposition stems from their divergent interests and thus is not the basis for their exclusion from the unit).

54. Caravelle II, 504 F.2d at 1187.
55. Id.
56. Id. at 1186. The Board can still exclude an employee-relative who is not aligned with management on the basis of the Caravelle criteria if the employee has special benefits. For example, the Board has excluded or included employee-relatives of low-level managers on the basis of a "special status" test. See, e.g., Queens City Paving Co., 243 N.L.R.B. 71, 101 L.R.R.M. (BNA) 1472 (1979) (son of general manager with no ownership interest included absent special job privileges); Novi American, Inc.-Atlanta, 234 N.L.R.B. 421, 97 L.R.R.M. (BNA) 1317 (1978) (son of regional manager excluded only on basis of special privileges); Weyerhauser Co., 211 N.L.R.B. 1012, 86 L.R.R.M. (BNA) 1492 (1974) (daughter of branch manager included in unit absent special privileges).

57. Linn Gear Co. v. NLRB, 608 F.2d 791 (9th Cir. 1979).
lived at home. However, the court concluded that because the son paid room and board, he might be financially independent from his father. This conclusion supported the theory that there was a "community of interest" with the other employees.

On remand, the court requested that there be a discussion of the following facts:

(1) his relationship to the Union; (2) his communication with other Union members; (3) his relationship with his father and other members of his family; (4) special favors, if any, granted to him as an employee; and (5) any other pertinent facts.

The court was unwilling to exclude automatically a son of a substantial shareholder of a corporation under section 2(3) of the Act as the Board had done in Foam Rubber City #2. The court was reluctant to expand the statutory language of section 2(3) of the NLRA. Furthermore, the Board's per se exclusion of the son without a factual inquiry into whether he had shared a community of interest with his fellow employees would "[have given] the Board total discretion under section 9(b) to accomplish what it could not do under section 2(3)." Section 2(3) of the Act specifically excludes a spouse or child of an individual employer from the definition of "employee." Because certain groups are specifically listed, the implication is that all other relatives would qualify as "employees" under the Act.

Therefore, the Ninth Circuit required the Board to use specific guidelines when excluding a relative from the bargaining unit and noted all the factors listed in Caravelle as well as the following additional factors: "(1) the activity, if any, of the employee in the Union; (2) the total number of employees as against the number of blood related employees; and (3) the overall ties and social activities of the family involved." In eliminating the original fourth factor of

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58. Id. at 793.
59. Id. at 794.
60. 167 N.L.R.B. 623, 66 L.R.R.M. (BNA) 1096 (1967); see also supra notes 22-24 and accompanying text.
61. See Linn Gear Co., 608 F.2d at 795; see also Caravelle I, 466 F.2d at 677. The Seventh Circuit was alarmed at the "Board's discretion in interpreting statutory language." Id.
62. 608 F.2d at 793.
63. Id. at 795, (citing Caravelle I, 466 F.2d at 678); see also NLRB v. Sexton, 203 F.2d 940 (6th Cir. 1953); see supra note 28.
65. See supra text accompanying note 30.
66. 608 F.2d at 796.
special favors,\textsuperscript{67} the Ninth Circuit removed the vestiges of a "special status" test.

Although the Seventh,\textsuperscript{68} Eighth\textsuperscript{69} and Ninth Circuits\textsuperscript{70} have adopted the "expanded community of interest" standard, the Board\textsuperscript{71} and the Sixth Circuit\textsuperscript{72} have continued to use the "special status" test. A result of this conflict is an increase in challenges to representation elections. Thus the courts are inundated with needless litigation. Both the Board and incorporated family-run businesses need clear consistent guidelines in this area of labor law.

In \textit{NLRB v. Action Automotive, Inc.},\textsuperscript{73} the Court held by a six to three vote that the Sixth Circuit's "special status" test unduly restricts the Board's authority to define bargaining units under section 9(b) of the Act.\textsuperscript{74} The Court limited its review of the Board's policy on familial exclusions to a "reasonable basis in law"\textsuperscript{75} standard. Nevertheless, the Court seemed to endorse the "expanded community of interest" standard enunciated by the Seventh Circuit.\textsuperscript{76} First, the Court in \textit{Action Automotive} cited the following \textit{Caravelle I} factors as relevant considerations for exclusion of relatives: (1) the financial dependence of the relative on management; (2) the shared residence with the business owner; and (3) the degree of "family involvement in the ownership and management of the company."\textsuperscript{77} The Court then referred to the factors listed in \textit{Caravelle I}\textsuperscript{78} dismissing the Board's per se exclusion under the "community of interest" standard as being a "bright-line" approach disfavored since 1953.\textsuperscript{79} The Court assumed that since 1953 the Board had used either a variety of objective factors or a "special status" test in making familial exclusions.

Since the Court has clearly relied on the Board's discretion in

\begin{itemize}
  \item \textsuperscript{67} See supra text accompanying note 59.
  \item \textsuperscript{68} \textit{Caravelle II}, 504 F.2d 1181 (7th Cir. 1974).
  \item \textsuperscript{69} \textit{NLRB v. Warner}, 587 F.2d 896 (8th Cir. 1978).
  \item \textsuperscript{70} \textit{Linn Gear Co. v. NLRB}, 608 F.2d 791 (9th Cir. 1979).
  \item \textsuperscript{71} \textit{Tops Club, Inc.}, 238 N.L.R.B. 928, 99 L.R.R.M. (BNA) 1292 (1978). For cases approving the Board's exclusion or inclusion based on job privileges but, nevertheless, holding that such a finding is not required, see \textit{NLRB v. Connecticut Foundry Co.}, 688 F.2d 871 (2d Cir. 1982); \textit{NLRB v. Warner}, 587 F.2d 896 (8th Cir. 1978); \textit{NLRB v. Jackson Farmers, Inc.}, 432 F.2d 1042 (10th Cir. 1970), \textit{cert. denied}, 401 U.S. 955 (1971).
  \item \textsuperscript{72} \textit{Action Automotive, Inc. v. NLRB}, 717 F.2d 1033 (6th Cir. 1983).
  \item \textsuperscript{73} \textit{NLRB v. Action Automotive, Inc.}, \textit{U.S.}, 105 S. Ct. 984 (1985).
  \item \textsuperscript{74} \textit{U.S.}, 105 S. Ct. at 987.
  \item \textsuperscript{75} \textit{U.S.}, 105 S. Ct. at 988. (citation omitted).
  \item \textsuperscript{76} See \textit{Id.}
  \item \textsuperscript{77} \textit{Id.} (citing \textit{Caravelle I}, 466 F.2d at 679).
  \item \textsuperscript{78} 466 F.2d at 679.
  \item \textsuperscript{79} \textit{U.S.}, 105 S. Ct. at 987-88.
\end{itemize}
Action Automotive to exclude relatives (in this case the wife and mother) from the bargaining unit, the Board should have been responsible for a thorough discussion of its decision. Unfortunately, the Board’s decision\(^8\) did not illuminate specific factors under the “expanded community of interest” standard\(^8\) which it found relevant for a finding of exclusion. If the board were to articulate more specific standards, the formation of bargaining units might be less disruptive to family-run businesses. Furthermore, the Board could in the future easily revert to a “bright-line” or per se approach when the record is empty or the discussion is abbreviated. Such a reversion would inappropriately deemphasize an employee’s right to join a union and engage in collective bargaining.

The dissent in Action Automotive criticized the pro-union stance of the majority.\(^8\) Justices O’Connor, Rehnquist and Stevens would have the Board examine objective job characteristics when forming bargaining units.\(^8\) In other words, an employee-relative could only be excluded if he or she met the “special status” test. Although the dissent strongly emphasized the employee’s right to refrain from unionizing,\(^8\) the ramifications of the “special status” test does not lead to a neutral situation. Consider the following scenario.

A relative-employee, with no special privileges, votes in a representati-
tion election. The union wins. The relative is subsequently involved in union activity, and is privy to confidential union information. The dissenting Justices should understand the need to exclude such an employee from the bargaining unit, especially in light of the dissent's approval of \textit{NLRB v. Hendricks County Rural Electric Membership Corp.},\footnote{454 U.S. 170 (1981). In contrast to the confused body of law on employee-relatives vis-a-vis inclusion in the bargaining unit, for over forty years the Board has applied a labor-nexus test, to identify those employees who should be excluded from bargaining units because of access to confidential business information. See \textit{id.}; see also \textit{NLRB v. Bell Aerospace Co.}, 416 U.S. 267 (1974) (Board's exclusion of managerial employees from coverage under the Act for over thirty years).} in which employees who had gained access to confidential information on labor relations were excluded from bargaining units.\footnote{\textit{id.}, 105 S. Ct. at 991 (Stevens, J., dissenting).}

Although the Board and the courts need to protect the employee who does not wish to join the union, as the dissent in \textit{Action Automotive} asserts, the "expanded community of interest" standard is the one under which all employees can assert their section 7 rights. The Board, in determining an appropriate bargaining unit, must "assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter."\footnote{29 U.S.C. § 159(b) (1982); see also 1950 \textit{NLRB ANN. REP. 39} (1951) (grouping together employees who have substantial mutual interest in hours, wages and other conditions of employment will resolve the unit issue).} According to the Sixth Circuit, an appropriate unit contains all "employees" who have a "common interest in the terms and conditions of employment."\footnote{Uyeda v. Brooks, 365 F.2d 326, 329 (6th Cir. 1966).} The Fifth Circuit also holds that an "employee" must be "sufficiently concerned with the terms and conditions of employment" before he or she can be included in a unit.\footnote{Shoreline Enter. v. \textit{NLRB}, 262 F.2d 933, 944 (5th Cir. 1959).} Furthermore, the Ninth Circuit has stated in \textit{Adrian Belt Co.}\footnote{578 F.2d 1304 (9th Cir. 1978).} that in order to determine an appropriate unit "a key consideration is whether that employee shares a sufficient 'community of interest' with other members of the unit."\footnote{\textit{id.} at 1312. (citation omitted).} The Ninth Circuit would define this "community of interest" as the "common interest in the terms and conditions of employment."\footnote{Linn Gear Co. v. \textit{NLRB}, 608 F.2d 791, 796 (9th Cir. 1979).}

Although a family relationship between an employee and an employer does not negate the "community of interest," it should necessitate an examination on a case by case basis to determine to what extent the relative is emotionally and financially dependent...
upon the employer. The more dependent relative is more likely to interfere with other employees’ organizing and collective bargaining efforts. Where there exists a close relationship, the danger of leakage of confidential union information to the management is likely. Confidential workers have been excluded from an appropriate unit because they may divulge information of direct interest to the union. Therefore, relatives who meet the “expanded community of interest” standard should likewise be excluded because they too may disclose to management relevant collective bargaining strategies. Even an appearance of familial closeness might arouse suspicion among the other employees that the relative does not share the union’s goals, and could hinder the airing of labor grievances and frank discussions of union strategies.

Section 2(3) of the Act narrowly defines the persons excluded from coverage. While the Taft-Hartley Act amended the section to add independent contractors and supervisors to the excluded categories, the legislative history of the Act demonstrates that confidential or managerial “employees” would not be excluded by specific statutory language. Congress encouraged the Board to develop its own law in this area. Although section 9(b) could be used by the Board to exclude large numbers of workers because they held managerial positions or had confidential or family relationships with management, the Supreme Court has held that the coverage of the Act should be as broad as possible so that the rights of workers to self-organization and collective bargaining will be expanded rather than narrowed.

95. Grenig and Mukamal, supra note 93, at 25.
96. Id. But see Brief for Respondent at 36, Action Automotive, Inc. v. NLRB, ___ U.S. at ___, 105 S. Ct. 984 (1985). (Unions do not need the protection of the Board to exclude employee-relatives. Under Section 8(b)(1)(A) of the Act, the union is free to exclude any employee-relative who may disrupt the unit or convey confidential information to management.)
97. NLRB v. Hearst Publication, 322 U.S. 11 (1944). But see Comparison of the NLRA of 1935 with Title I of the LMRA of 1947, reprinted in 2 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1661 (1948). (The language in Section 9(b) of the Wagner Act, i.e. “to assure to employees the fullest freedom in exercising the rights guaranteed by this Act.” Id. at 1669-1670. Furthermore, the statutory right to refrain from engaging in concerted action was added to Section 7 of the Act. Id. at 1666; see also H.R. REP. NO. 245, 80th Cong., 1st Sess. 7 (1947), reprinted in 1 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELA-
To limit exclusions, the inquiry should focus on "labor relations interests [of an employee which are] potentially at variance with those of his or her employer and the power to resolve those variances on an individual basis." The Board or courts assume such a conflict of interest when they automatically exclude a relative because he or she is presumed to be more closely aligned with management. This does not have the effect of limiting exclusions. On the other hand, a large number of workers will not be removed from the Act's protection by using an "expanded community of interest" standard. The Board and courts will examine the employment situation and the degree of family dependence. Only small, incorporated family-run businesses with a substantial number of workers will be affected. In such situations, the potential for conflict involving labor relations is slight because the relative is more apt to set wages, hours, and conditions of employment through individual rather than collective bargaining dealings. Even though a "special status" test would exclude the least number of employees, it could also thwart the rights of the other workers. "[A]n employee-relative may be 'special' in the sense that he does not share with his co-workers a common interest in the terms and conditions of their employment, and yet not be sufficiently special for the Board to find that he enjoys a 'special status.'"

While the "community of interest" standard is solely based on inferred family loyalty, the "expanded community of interest" standard does not use loyalty or sympathy to determine exclusion. Rather, the factors under that standard explore the actual authority of the corporate management, the employment interests of the related worker, and the strength of the familial relationship with respect to the employer-employee relationship of the non-related work-
ers. Because the Supreme Court chose to look beyond a loyalty or sympathy standard before excluding a confidential employee from coverage of the Act, it seems reasonable to assume that the Court would prefer the "expanded community of interest" standard for familial employees to a per se exclusion based on family loyalty.

The mandate from Congress is to decide in each case the appropriate unit. Therefore, the Board must not automatically sever an individual from a unit. The premise should be that a common interest in employment conditions exists among employees. The Board must then proceed further and examine the actual employment situation. In a non-familial situation, the Board has used the following factors in determining the existence of substantial differences in interests and working conditions:


An application of the first four factors in a familial employer-employee situation would highlight any special privileges or benefits of the "employee." Such a "special status" test does not recognize that a relative who does not receive special treatment may still sub-

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100. See NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) (The Supreme Court endorsed a "labor nexus" standard for excluding "confidential" employees from collective bargaining units. The standard excludes employees "who assist and act in a confidential capacity to persons who [exercise 'managerial' functions] in the field of labor relations." Id. at 189 (citations and footnotes omitted). Not all employees who are confidants of their employer are excluded by this standard.); see also NLRB v. Yeshiva Univ., 444 U.S. 672 (1980). The Board, using an "alignment with management" argument rather than analyzing job conditions, argued that faculty should be covered under the Act because they were not required to be loyal to management. The Court found that the actual duties and responsibilities of the faculty rather than loyalty was determinative. Id. at 686.

The Board has recognized that employees whose decisionmaking (sic) is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.

Id. at 690 (footnote omitted).


vert the organizing and bargaining efforts of the unit. Furthermore, when using a "special status" test, the courts and Board have not clearly defined the amount of special treatment needed to exclude the relative. In *Cherrin Corp. v. NLRB*, the court examined the Board's decision regarding a relative who was not required to punch a time clock, did not participate in the company's sick leave policy, was not held accountable for absences, and was never disciplined for tardiness.

While the Board had viewed the benefits as evidence of "special status," the Sixth Circuit characterized the Board's findings as based on "flimsy evidence" and suggested that the court might have ruled differently had the case been before it de novo. The court deferred to the Board's decision, however, because it could not say that the "Board's findings are arbitrary and capricious, which is the standard to be followed in representation proceedings."

In *NLRB v. Hubbard Co.*, the circuit court disagreed with the Board, and held that working a special shift, less than half of which included supervision of other employees, did not constitute "special status." In *Action Automotive, Inc. v. NLRB*, the Supreme Court held that special privileges were enjoyed by a relative who was paid on a weekly rather than a hourly basis, was not required to punch a time clock, and had a work schedule established for her convenience. The Sixth Circuit had found that her convenient work schedule was the only example of special treatment, and did not meet the requirements for "special status." The problem with the "special status" test is the difficulty quantifying and qualifying the job benefits which meet the test.

It is through an appropriate unit that an employee exercises his or her guaranteed rights under the NLRA. The inclusion of relatives whose interests are aligned with management could hinder the statutory rights of the group. On the other hand, the exclusion of a relative with common interests to the other employees in the bargaining unit would deny the rights of the relative. While the problematic "special status" test leads to inclusion, the "community of interest" standard results in automatic exclusion. The Supreme Court en-

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103. 349 F.2d 1001 (6th Cir. 1965), cert. denied, 382 U.S. 981 (1966).
104. *Id.* at 1003.
105. *Id.* at 1004.
106. *Id.* at 1006-07.
107. *Id.* at 1007.
108. 702 F.2d 634 (6th Cir. 1983).
110. 717 F.2d 1033, 1034 (6th Cir. 1983).
endorsed the "expanded community of interest" standard in the *Action Automotive* decision. This standard is the most appropriate one "to assure to employees the fullest freedom in exercising [their] rights." \[111\]

*This Note is dedicated to the loving memory of my father, Clarence A. Hanson.*

_Judith Brodlieb_
