UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POINT PARK UNIVERSITY
Employer

and 6-RC-12276

NEWSPAPER GUILD OF PITTSBURGH/
COMMUNICATIONS WORKERS OF AMERICA
LOCAL 38061, AFL-CIO, CLC
Petitioner

On Remand from the United States Court of
Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF EMPLOYMENT AND LABOR RELATIONS SCHOLARS IN RESPONSE TO INVITATION TO FILE BRIEFS

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Interest of *Amici*

Amici are academics long engaged in the study and analyses of systems of work organization and employee representation. (A list is appended at the close.) They will address the issues put by the Board, particularly in questions (5) and (6), from the perspective of neither "labor" nor "management" as organized interests but as impartial scholars of industrial relations. They are uniquely qualified to bring their decades of experience and thought to bear, to assist the Board in accommodating the Labor Act to the emerging needs of the modern workplace.

Summary of Argument

The Board's invitation for the submission of *Amicus* briefs anticipates its engagement with systems of worker involvement in the formulation and effectuation of employer policies: of whether those so engaged are exempted from the coverage of the National Labor Relation Act because they are managers, or possibly, statutory supervisors. In a post-industrial society where increasing managerial responsibilities are delegated to front-line workers and where work itself is more knowledge-driven, the roles of managers and supervisors under the law merit close consideration.

The law on the supervisory exemption is crisp: Anyone who possesses the necessary modicum of effective authority over a list of enumerated subjects is a statutory supervisor where that authority is possessed "in the interest of the employer," whether or not any palpable conflict with the duty of loyalty that person owes to the employer would be divided as a result of unionization. Congress has made that determination categorically. But the principle is subject to two corollaries. First, to act "in the interest" of the employer means that the employer has the power to hold the person accountable for the exercise of those responsibilities. If the person is not accountable — as neither a shop steward under a collective bargaining agreement nor a

member of a safety committee would be — she or he cannot be a supervisor. Second, an employee whose performance of admittedly supervisory functions is segregable from her ordinary duties and comprises only an insubstantial amount of her time is not a supervisor: she can bargain collectively with regard to her terms and conditions of employment for the non-supervisory portion of her job. Even if supervisory roles are shifting from a command-and-control model to a coaching-and-mentoring model in some workplaces and even if unilateral management actions increase the coincidence of interest between front-line workers and supervisors, the plain language of the Act requires continued exclusions of supervisors from collective bargaining coverage.

In sharp contrast, the law on managerial status is amorphous. A manger must be "aligned" with management, must "formulate" or "effectuate" managerial policy, and at a high level. To decide whether that is so, the Board must consider the employee's actual job responsibilities, authority, and "relationship to management." This test is fashioned, akin to the statutory supervisory exemption, to ensure against a division of loyalty. But, in contrast to the supervisory exemption, where the statute sets out precisely what is to be considered, the direction to examine the "relationship to management" necessarily implicates a more far ranging examination. Nor does the *Yeshiva* Court's treatment of the participation of faculty in policy formulation relieve the Board of that engagement. On the contrary, the Court's statement that "some" lessened degree of accountability will not result in non-managerial status necessarily requires the Board to weigh the entire scope of accountability as well other aspects of the employee's relationship to management.

In one instance, however, the law of supervisory and managerial exemption should coincide. And that is where the employee performs a managerial function that is segregable

from her normal responsibilities and consumes an insubstantial amount of her work time. Thus, the classifications of a group of employees as "managers" is highly consequential and a determination that must be made in context.

In fact, the context for industrial relations is changing. The pyramidal structure of command and control prevalent in 1935, and 1947, is flattening. Employers have come to see the need to secure employee participation and involvement, their knowledge and insight, on a range of issues "outside the box" of wages, hours, and working conditions. As front-line employees assume expanded managerial functions in a growing number of leading-edge workplaces, it is only individuals whose work is entirely managerial who are clearly to be excluded from coverage under the Act. For many other types of employees, including faculty in higher education, *Amici* submit that there is ample play in the statutory joints to accommodate the Act to this manifest need.

Argument

I. High Performance or Knowledge-Driven Systems that Involve Employees and Their Representatives in the Management of the Company are an Important Advance in Industrial Relations

As the NLRB considers the specifics of the Point Park case and the broader standards concerning managerial and professional work, it is important to consider the degree to which managerial responsibilities are routinely placed on the shoulders of front-line workers and their union representatives in settings that are unambiguously covered under the NLRA. These instances suggest that the standard for coverage under the NLRA should be very broad with respect to professional work and that many managerial functions are now routinely handled by front-line workers in a wide range of industries. Moreover, the NLRB, like any other regulatory body, has a responsibility to adapt to changes in workplace practices as they evolve, consistent with the full range of principles and purposes of the law it enforces. There is clear and

unambiguous evidence that the distinction between "managers" and "employees" as originally envisioned at the time of the passage of the NLRB has changed in response to the changing organization of work, especially in knowledge based organizations. The line between these two categories of workers is now blurred to the point it no longer serves the law's original purpose.

While there is continued debate among scholars on the specific way to characterize the present post-industrial era, it was over a quarter century ago that compelling evidence was presented on our entering a "second industrial divide"[1] that posed transformational challenges for the American systems of industrial relations.[2] Observers initially focused on the new ways that information technologies were "informating" work in ways that led employers to rely more heavily on employees to change their work processes and to use the data and information produced by new technologies to participate in the control (e.g., reduce variances and error rates) of operations and to track and improve organization performance.[3] A wave of scholarship documented how clusters of work practices, including employee involvement in business decisions (particularly front-line decision making concerning product and service quality), accounted for high performance work systems.[4] The distributed knowledge of the front-line workforce has come to be seen as central to the capacity of organizations to "learn" from

[1] Michael Piore & Charles Sabel, The Second Industrial Divide: Possibilities for Prosperity (New York: Basic Books 1984).
[2] Thomas A. Kochan, Harry C. Katz & Robert B. McKersie, The Transformation of American Industrial Relations (New York: Basic Books 1986).
[3] Shoshana Zuboff, In the Age of the Smart Machine (New York: Basic Books 1984).
[4] Joel Cutcher-Gershenfeld, *The Impact on Economic Performance of a Transformation in Workplace Relations*, 44 Indus. & Lab. Rel. Rev. 241–60 (1991); Mark A. Huselid, *The impact of human resource management practices on turnover, productivity, and corporate financial performance*, 38 Acad. of Mgmt. J. 635–72 (1995); C. Inchiowski & K. Shaw, *The Effects of Human Resource Management Systems on Economic Performance: An International Comparison of U.S. and Japanese Plants*, 45 Mgmt. Sci. 704 –21 (1999); John Paul Macduffie, *Human Resource Bundles and Manufacturing Performance: Organizational Logic and Flexible Production Systems in the World Auto Industry*, 48 Indus. & Lab. Rel. Rev. (1995).

experience[5] and this "knowledge-driven" nature of work has been documented as diffusing across national boundaries.[6]

The legal implications of these changes in the nature of work itself were highlighted in 1994 by what was termed the "Dunlop Commission" on labor law reform,[7] which concluded that the doctrines used to distinguish between supervisors/managers and employees needed to be updated to "define employees and employers in ways consistent with economic reality." Specifically, the Commission concluded that public policy needed to update:

> . . . the definitions of supervisor and manager to insure that only those with full supervisory or managerial authority and responsibility are excluded from coverage of the law. We further recommend that no individual or group of individuals should be excluded from coverage under the statute because of participation in joint problem-solving teams, self-managing work groups, or internal self-governance or dispute resolution processes.[8]

To understand the shift around increased managerial content in front-line work, consider the origins of what is presently the nation's largest labor-management partnership, which involves over 90,000 health care professionals belonging to a coalition of unions at Kaiser Permanente. As Kochan and co-authors[9] document, over a decade ago, former union leader Peter diCicco recalled a meeting with top management leaders in the context of escalating adversarial conflict: "We went to that meeting ready to blast Kaiser Permanente for its behavior." diCicco added, "At the top of our list was patient care. That's where the frustration was greatest among our members." Thus, the core concern was not wages, hours or working conditions, but the very business itself, "patient care." As the authors note, "the labor leaders

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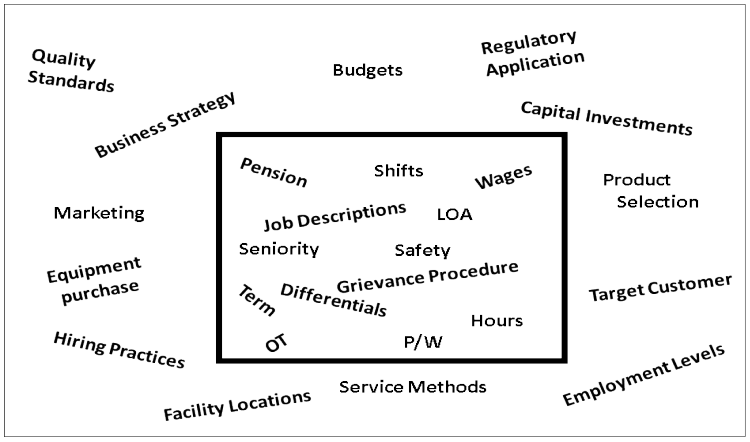
[5] Ikujiro Nonaka, *The knowledge-creating company*, 69 Harv. Bus. Rev. 96–104(1991).
[6] Joel Cutcher-Gershenfeld et al., Knowledge-Driven Work: Unexpected Lessons from Japanese and United States Work Practices (Oxford University Press 1998).
[7] U.S. Dep't of Labor, U.S. Comm'n on the Future of Worker-Management Relations—Final Report (Dec. 1, 1994).
[8] *Id.* at 9.
[9] Thomas A. Kochan et al., Healing Together: The Labor-Management Partnership at Kaiser Permanente (Cornell University Press 2009).

were in for a surprise." CEO Lawrence opened the meeting with a statement that diCicco recalls disarmed them. "He said all the things we were prepared to say . . . It was clear that there was almost total alignment of objectives."[10] That interchange gave birth to a labor management partnership at Kaiser that has now lasted fourteen years. Over 3,000 unit based teams composed of service workers, technicians, nurses, administrators, and physicians work together to improve health care quality, cost control, use of electronic records technologies for preventive care, etc. Moreover, specialized joint labor management committees provide advice on marketing, new hospital design, planning, and organization, and other strategic concerns of shared interest to managers, physicians, and employees. Thus, the changing nature of work begins with alignment of labor and management around working together to advance strategic organizational objectives. Note that there are enduring areas of conflicting interests on aspects of wages, hours, and working conditions, but even these are addressed using a more problem-solving oriented approach to collective bargaining.[11] It is instructive that the parties at Kaiser Permanente have even developed a visual image to reflect the efforts that do and do not fit into what they term the "NLRA box," which is as follows:

Inside and Outside the NLRA Box



Source: Kaiser Permanente and the Coalition of Unions

[10] *Id.* at 2.
[11] *Id.*

Kaiser Permanente is not the only health care setting where unionized professional workers have responsibility for strategic managerial decisions. At the University of Massachusetts Memorial health care complex the union representing the front-line service workers (food service, etc.), SHARE, is widely regarded for its success in improving patient satisfaction in parts of the hospital where managers, doctors and nurses all had previously had little success. The negotiated contract language supporting what is termed "Joint work on Patient Satisfaction and Process Improvement," reads as follows:

> UMass Memorial and SHARE recognize our joint interest in improving patient satisfaction, employee satisfaction, and doing other joint process improvement projects. We agree to continue and expand our joint work in these areas. UMass Memorial leadership and SHARE leadership will work together to enable this to happen – working with the employees and their managers to overcome obstacles to releasing SHARE Reps, and being flexible in balancing the needs of these projects with the other needs of the departments. A joint union-management oversight committee will meet regularly to assess progress and to remove barriers.[12]

This reflects a fundamental feature of new work systems, which is the degree to which knowledge, information, skills, and processes integral to continuous improvement in business operations are distributed widely and deeply within organizations in ways that cut across traditional "employee-supervisor-manager" job titles. This contrasts with the model forged in the industrial revolution where supervisors were the experts and employees were to follow direction.

In the auto industry, the concept of "kaizen" (roughly translated as "continuous improvement based on knowledge") was first pioneered, as documented in *The Machine that*

[12] Agreement between UMass Memorial & SHARE, Oct. 1, 2007–Sept. 30, 2011, *available at* http://theshare union.org/SHARECONTRACT2007-2011.pdf

Changed the World, based on the Toyota production system.[13] This model placed substantial managerial responsibility for continuous improvement on front-line workers, but only on a very narrow range of issues associated with the work in their defined work area. The Saturn Corporation was founded in the mid-1980s with a central role for a broader form of front-line employee engagement with the business operations and union-management partnership in running the business.[14] This includes a "self-directed" team-based work system, consensus decision making, groups of one hundred workers led by a union-management pair of "advisors." At the highest levels, union leaders shared responsibility with management for new product development, selection of suppliers, marketing, and work force selection, training and development.[15] Thus, it is important to recognize independent (if, at times, fragile) emergence of such models in the U.S. context. The case of Saturn and others like it make clear that distinctions between production and managerial work can't be make without appreciating the larger institutional context in which labor-management have structured their relations. If they have adopted a full partnership model, that will shape all the roles within it.

Even without an overarching co-determination model akin to Saturn, the work itself of union members in the auto industry has expanded to include managerial functions. The UAW and Ford are widely regarded for having jointly implemented a Quality Operating System that helped the auto maker jump from near the bottom in product quality to world-leading quality.[16] This has included "charters" at multiple levels with precisely defined roles and responsibilities

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[13] J. Womack & D. Roos, The machine the changed the world (MacMillan 1990).

[14] Saul A. Rubinstein & Thomas A. Kochan, Learning from Saturn: Possibilities for Corporate Governance and Employee Relations (Cornell University Press 2001).

[15] Despite the advantages of the Saturn model (and a similar partnership at the New United Motors Manufacturing, Inc. [NUMMI] joint venture between GM and Toyota) in terms of product quality and employee engagement, the full partnership model was threatening in important ways to the both the UAW and General Motors leadership. *Id.* As a result, individual work practices diffused across the larger organization, but the full model was not embraced.

[16] Joel Cutcher-Gershenfeld, *Bargaining When the Future of an Industry is at Stake: Lessons from UAW-Ford Collective Bargaining Negotiations*, 27 Negotiation J. 115–45 (2011).

on quality, including work teams with responsibility for providing input on what is termed "design for manufacture" in engineering decision making. For example, the charter for the UAW-Ford National Quality Committee[17] includes the following mission statement:

> The UAW-Ford National Quality Committee is committed to driving "Best-In-Class" quality through the joint efforts of the UAW and Ford. We will partner with and support front-line operations in their quest to deliver World Class quality to our customers by:
>
> - Supporting Divisional and Local joint quality efforts
> - Helping to standardize quality principles and practices across the business
> - Ensuring a climate of fairness and respect
>
> These elements will help to sustain and grow the business, while enabling the personal growth, development and adaptability of the workforce.

Underlying the UAW-Ford National Quality Committee charter is a strategic decision by the parties, made in the 2003 national negotiations, to have all quality activities at all levels of the corporation under one set of governing committees (at corporate, divisional and plant levels). Thus, there are no separate managerial forums for quality. Labor and management individuals serving on the national committee have detailed roles and responsibilities, including the following with respect to plant-level committees (with are also joint committees with union and management members):

> **Roles and Responsibilities with Respect to the Facility Quality Committees:**
>
> - Overall responsibility to implement and support the "Best-In-Class" Quality Program as listed in Appendix Q, through the Divisional and Facility Committees
> - Communicate quality objectives and strategies under the "Best-In-Class" Quality Program through the Divisional Committees to Facility levels
> - Provide tools, coaching and other support, as appropriate, to enable the implementation of quality objectives and strategies through Divisional Committees to Facility levels to include, but not limited to, Joint Alignment and Implementation
> - Coach Local/Facility compliance to the Local Quality Committee (LQC) Effectiveness Assessment

[17] Correspondence with Dan Brooks, former UAW Co-Chair of the UAW-Ford National Program Center & Marty Mulloy, Vice President, Global Labor Affairs, Ford Motor Company, UAW-Ford National Quality Committee Charter.

- Serve as a resource to Facilities, through Divisions in meeting Quality goals and objectives
- Certify local UAW Quality Representatives
- Provide support and training for the Quality Operating System Coordinators (QOSC)
- Identify leading Quality best practices – internally and externally
- Provide NQC training as requested
- Provide reward and recognition as appropriate

Notice that these roles and responsibilities include overall responsibility for the corporation's "best in class" quality program, enabling quality goal accomplishment, certification of local UAW quality representatives, training and development, and rewards and recognition. These are all managerial functions that are now shared equally between labor and management.

In the airline industry, the most heavily unionized airline, Southwest Airlines, is also the most profitable (with a valuation that exceeds that of nearly all other airlines combined). At the heart of this success story, is a model of workforce engagement in the business operation that involves new forms of "relational coordination."[18] The many professional roles, including pilots, flight attendants, customer service agents, ramp agents, and mechanics work collectively and seamlessly with supervisors and managers on mission critical tasks, such as the rapid "turning" of a plane coming and going at the gate. The key to this success is that no one function or level acts in territorial ways about "its work" and instead all roles share all responsibility for the business operation of turning around planes safely, efficiently, and in ways that preserve/support high levels of customer satisfaction. An attempt to segment work by profession or to draw a line around what is or isn't managerial would undercut the very essence of what has been termed "the Southwest Way."[19]

[18] Jody Hoffer Gittell, The Southwest Airlines Way: The Power of Relationships for Superior Performance (McGraw Hill 2003).
[19] *Id.*

The same trend in blurring lines between supervisors and employees is not only occurring in the public sector, it is being actively encouraged in education via federal government "Race to the Top" incentives and federal mediation/facilitation efforts. At the heart of the reform efforts are improved teacher evaluation, professional development, curriculum innovations, and reassignments, transfers, and discipline/discharge decisions and processes. Increasingly "peer review" models are being used to carry out these interrelated processes in which senior teachers evaluate, coach, and mentor teachers along with assistant principals, principals, and other administrative personnel. Consider the following language from the collective bargaining agreement between the San Juan teachers and the school administration:

> The District and the Association agree to take responsibility and be held accountable for the improvement of the quality of teaching and learning which represents an expanded role in public education. It is in the best interest of the San Juan Schools that the District and the Association cooperatively engage in activities and communication which demonstrate mutual respect for all stakeholders and results in the improvement of student achievement through development of common goals, a cooperative, trusting environment and teamwork. It is the [parties'] belief that actively and constructively involving all relevant stakeholders contributes significantly toward achieving these goals.
>
> Shared responsibility and accountability for results are at the core of a continuous improvement model. Joint responsibility for student success means that educators share in celebrating what works and share in identifying together areas that are not working and are in need of improvement.[20]

Here the teachers are joining with management to take shared responsibility for the central public goods at stake in the operation – the educational mission. Note the emphasis on "shared responsibility and accountability," which are the essence of the managerial function and which are central to the teacher's professional identities. Language similar to the above can be found in a growing number of schools[21] and form the basis for much of what is being advocated and

[20]Joel Cutcher-Gershenfeld and Saul A. Rubinstein, *Innovation and Transformation in Public Sector Employment Relations: Future Prospects on a Contested Terrain*, Ohio St. J. on Disp. Resol. (Symposium Issue, forthcoming).
[21] Saul A. Rubinstein & John E. McCarthy. Collaborative School Reform: Creating Union-Management Partnerships to Improve Public School Systems, Rutgers University School of Management and labor Relations

put in place in charter schools, some of which are unionized and some of which are not. Thus, if a non-union charter school faculty sought union representation, the traditional supervisor-employee distinction would be of no value in assuring that teachers as professional employees were afforded the right to representation.[22] It is clearly in the national interest to continue to work collaboratively across the traditional "supervisor-manager-employee" boundaries in education.

The expansion of front-line worker responsibility has long been documented in nonunion work settings.[23] Indeed, key elements of high performance work systems have been examined across both unionized and non-union settings,[24] confirming that the increased responsibility for managerial functions can be found in both contexts. Consider professional work at the MIT-Broad Institute, which won the race to sequence the human genome. Tasks had been organized in a linear assembly line fashion for the first five years of operations. An exponential reduction in the cost per sequence pair of DNA happened, however, after the work was restructured into a team-based work system with weekly "kaizen" meetings that also included test equipment manufacturers.[25]

While there are many documented examples of workplaces where front-line workers have responsibility for managerial decisions, the full high performance model still represents a

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(Oct. 2010). *See also* Barry Bluestone & Thomas Kochan, Toward a Grand Bargain: Collaborative Approaches to Labor-Management Reform in Massachusetts (The Boston Foundation Oct. 2011).

[22] Indeed, the federal government, through the U.S. Department of Education and the Federal Mediation and Conciliation Service are actively promoting and facilitating diffusion of this new model of collaboration and joint decision making. A joint statement of these agencies with the two national teachers' organizations, and national organizations of school superintendents and board members was signed at a May 23–24, 2012 conference. The statement can be found at www2ed.gov/documents/labor-management-collaboration/vision-statement-sigs.pdf.

[23] Richard E. Walton, *From control to commitment in the workplace*, 63 Harv. Bus. Rev. 77–84 (1985).

[24] S.E. Black & L.M. Lynch, *How to Compete: The Impact of Workplace Practices and Information Technology on Productivity*, (National Bureau of Economic Research, Inc., NBER Working Papers 6120, 1997).

[25] R. Nichol, A multi-domain process design and improvement framework (2010) (ESD Doctoral Dissertation) (MIT).

minority of U.S. workplaces.[26] One estimate suggests that there are approximately 7.7 million U.S. workers in unionized and nonunion high performance work systems[27] based on adding ten percent of the unionized workforce and ten percent of the nonunion workforce.[28] Black and Lynch set traditional nonunion work practices as zero and documented the following performance levels for traditional unionized facilities and what they termed "transformed" or high performance facilities:[29]

Relative Performance of Union and Nonunion Facilities with Traditional and Transformed Work Practices

	Traditional	**Transformed**
Nonunion	0%	15%
Union	-15%	20%

Source: Black and Lynch, 1997

The diffusion to approximately ten percent of the workforce is what has happened without supporting policy initiatives. By contrast, other nations see these new work systems as instrumental for competitive advantage in a global economy. This is the logic that underlies, for example, the recently passed "Fair Work Australia" legislation, which seeks to "provide a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians."[30] Importantly, these high performance work practices have been found to be more effective than regulatory oversight in

[26] S.E. Black & L.M. Lynch, *supra* note 24.
[27] Joel Cutcher-Gershenfeld & Saengdow Prasittisuk, Beyond Gridlock: Advancing the American Dream in a Global Knowledge Economy Via Distinct Models for Labor and Employment Relations Policy, LERA Annual Meeting, panel on Creating a New Balance in the Corporate World: Promoting Stable Employment and Long-Term Growth (2011).
[28] Ten percent of workplaces ended up in the high performance category in the studies by Black and Lynch, op. cit. (union and nonunion workplaces); C. Inchiowski & K. Shaw, *supra* note 4 (steel mill finishing lines in the U.S. and Japan), and in a study by Cutcher-Gershenfeld, J. and T. A. Kochan, *Taking Stock: Collective Bargaining at the Turn of the Century*, 58 Indus. & Lab. Rel. Rev. 3–26 (Oct. 2004).
[29] S.E. Black & L.M. Lynch, *supra* note 24.
[30] Fair Work Act (2009) Australia, http://www.fwa.gov.au/index.cfm?pagename=legislationfwact.

fostering compliance with basic labor standards in global supply chains.[31] While there is not a global convergence in public policy in this domain,[32] there is sufficient movement in this direction that it should also be taken into account as part of the NLRB's deliberations.

At stake in the NLRB's consideration of professional and managerial work is both the changing nature of work and the connection of new forms of work to the continued realization of key objectives of the NLRA, namely to increase employee purchasing power, to promote orderly and efficient interstate commerce (i.e., adapt to the changing organization of business in ways that promoted efficiency and economic growth), and to provide employees a voice on the terms and conditions of employment. When front-line workers and professional employees have increased managerial responsibility it has the potential to increase their purchasing power and to further balance the power of labor and management. When a sharp distinction for coverage under the NLRA is drawn based on having even substantial degrees of managerial responsibility, vast segments of the U.S. workforce that unambiguously should be covered under the act (such as auto workers, nurses, teachers, professors, and airline crews) would be in tension as their responsibilities have expanded. These are not isolated exceptions, but emblematic of larger shifts in the nature of work itself. There are clearly supervisory and managerial jobs in which the work in its entirety is supervisory and managerial. Drawing distinction short of this standard will encounter difficulty given that increasingly knowledge-driven nature of work in leading organizations across a wide array of industries and sectors.

[31] Richard M. Locke et al., *Does monitoring improve labor standards? Lessons from Nike*, 61Indus. & Lab. Rel. (2008).
[32] H.C Katz & O.R. Darbishire, Converging Divergences: Worldwide Change in Employment Relations (ILR Press 2000).

II. Employee Participation in Policy Formulation and Effectuation Alone Does Not Result in Managerial Status: the Touchstone is of an Impermissible Division of Loyalty

A. The Analytical Framework

In *NLRB* v *Bell Aerospace Co*, 410 U.S. 267 (1974), the Court looked to the policy undergirding the statutory exclusion of supervisors to drive inexorably to the exclusion of managers: Neither should be made subject to any division in the duty of loyalty they singularly owe to their employers. The extension of a statutory right to engage in concerted activity for protection *from* management, or to bargain collectively *with*, it by the firm's executives, responsible for the exercise of managerial power *for* the hierarchy, would blur—the term the Court used was "eviscerate"—the very distinction between management and labor that the statute allowed companies to create and rely upon.[33] Thus a line has to be drawn to distinguish an "executive officer" (416 U.S. at 289), "executives who formulate and effectuate management policies" (416 U.S. at 286), from employees. In the line-drawing process the Court commanded close attention to the employee's "actual job responsibilities, authority, and *relationship to management*." 416 U.S. n. 19 at 290 (emphasis added). The scope of the former two are clear. The third draws attention specifically to the nature of the individual's precise relationship to higher authority that would be threatened by engagement in collective bargaining. More on that needs be and will be said below.

But first it should be stressed that the *Bell Aerospace* Court was concerned that the Board's approach would blur the distinction between labor and management that companies relied upon in structuring their employment relations and which the Labor Act sanctioned; that

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[33] *NLRB* v *Bell Aerospace Co*., *supra* n.13 at 284:

> The Wagner Act was designed to protect 'laborers' and others clearly within the managerial hierarchy. Extension of the Act to cover true 'managerial employees' would indeed be revolutionary, for it would eviscerate the raditional distinction between labor and management. If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly.

is, a system of managerial command and control. But much has changed in the nearly 40 years since *Bell Aerospace* was decided. Companies have come to adopt "high performance" systems in the unionized setting, with union participation and support, that flatten the hierarchy and devolve decision-making to employees, their work groups and representatives. *See* Section I, *supra*. This sea-change in industrial relations poses the obverse of the issue addressed in *Bell Aerospace*: not whether the Board's construction of the Act will blur a managerial distinction that employers maintain and claim in order to retain hierarchical control; but, whether the Board can adapt the Act to those situations where it is management that has blurred the distinction, where it is willing to concede to employees *as employees* a capacity to influence key company policies because doing so yields benefits in efficiency, job satisfaction, productivity, and profits.

That issue is beclouded as a result of *NLRB* v. *Yeshiva University*, 444 U.S 672 (1980). As Paul Weiler so aptly put it, the premise upon which the Court proceeded was

> the importance of ensuring that the allegiance of every manager adheres to the enterprise he serves, rather than to a union which might be serving him. This sentiment is most plausible in the case of the traditional hierarchical firm, in which there is assumedly a major conflict of interest between labor on one side and capital on the other. This premise is much less plausible, though, in situations in which contemporary collegial approaches to production have been adopted, and in which the firm seeks in effect to involve all employees in at least some aspect of management of the enterprise.

Paul Weiler, Governing the Workplace 216–17 (1990).

"Beclouded" because even as the *Yeshiva* Court struggled with a "collegial approach to production," albeit in higher education, not manufacturing, and sought to place it within the *Bell Aerospace* framework, the Court's actual treatment was a tissue of ambiguity, of begged questions. What is one to make of a college or university faculty that customarily participates, and significantly so, in the formulation and execution of basic day-to-day educational policies: admission standards, curriculum, degree requirements, and the like. The faculty's role in these

matters has long been understood in the academic world — in public and private institutions alike—as reflecting widely shared principles of good governance. And so did this Board, which held the bringing to bear of professional judgment in matters of educational policy was not managerial in the industrial sense used by the *Bell Aerospace* Court. As the Board well knows, however, the *Yeshiva* Court disagreed.

Instead, the *Yeshiva* Court drew an industrial analogy: those who satisfied the institution's degree requirement were its product; completion of the curriculum was the process by which the product was produced; admissions standards governed the selection of the institution's raw materials, and so forth. And so the Court opined that, "To the extent to which the industrial analogy applies, the faculty determine…the product to be produced, the terms on which it will be offered, and the customers who will be served." 444 U.S. at 686. But, when confronted with the argument that in making those determinations the faculty is not acting for the managerial hierarchy in the industrial sense but rather is exercising an independent professional judgment the Court responded in a critical passage that needs to set out at length:

> It may appear, as the Board contends, that the professor performing the governance functions is less "accountable" for departures from institutional policy than a middle-level industrial manager whose discretion is more confined. Moreover, traditional systems of collegiality and tenure insulate the professor from *some* of the sanctions applied to an industrial manager who fails to adhere to company policy. *But the analogy of the university to industry need not, and indeed cannot, be complete*. It is clear that Yeshiva and like universities must rely on their faculties to participate in the making and implementation of their policies. The large measure of independence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the board traditionally has sought to prevent.

Yeshiva, 444 U.S. at 689–90 (footnotes omitted) (emphases added)

Note that the pivotal issue was posed but not confronted, and so no dispositive guidance was given. It was ducked, left for another day, which is now. If a "large measure of

independence" is accorded, in the sense that the employee is "less" accountable to the corporate hierarchy in the industrial sense, how *can* loyalty to the employer—which *Bell Aerospace* and *Yeshiva* teach is the critical question—possibly be divided?[34]

Importantly, the Court does not say that the industrial analogy has *no* application, nor that it would be irrelevant if *no* sanctions were available to control managerial discretion. It says that the analogy merely need not be "*complete*" and that the unavailability of "s*ome* of the sanctions" applicable to an industrial manager is irrelevant. In effect, the Court has returned the resolution of these questions to the Board, with virtually no indication of where or how the lines are to be drawn.

B. The Board Has Failed to Pursue the Question—and so the Meaning—of the Putative Manager's "Relationship to Management"

Thus far, the Board has read *Bell Aerospace* and *Yeshiva* to render the issue of the putative manager's relationship to management to be irrelevant *sub silentio*. The question has never been mentioned, let alone analyzed. The entirety of the Board's treatment has been devoted exclusively the first two prongs of *Bell Aerospace's* three pronged test: to just how much recommendatory authority the faculty member has, over what issues, and to what effect, to place her in one box to the other. It is instructive that the Regional Director's decision in this case devotes over eighty pages of exacting exposition to these questions without even once mentioning whether the president or a dean can sanction a faculty member due to displeasure

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[34] Robert A. Gorman & Matthew W. Finkin, Basic Text on Labor Law: Unionization and Collective Bargaining 51 (2d ed. 2004) (footnotes omitted):

> If college professors (or other professional employees) who effectively recommend a variety of ostensibly "managerial" policies are not answerable to higher management for the recommendations they make, one would ordinarily be hard pressed to see how they could be considered "managerial." Nor would the extension of the Act to them seem to pose the kind of a threat of divided loyalty that both the statutory exemption of supervisors and the judge-made exemption of managers was intended to forestall. In consequence, the reach of the managerial exemption not only with respect to faculty in private universities but with respect to professional employees generally remains clouded.

with her recommendation let alone examine the consequences of any want of accountability to the question of the duty of loyalty. Nor is this singularity of the Board's focus under *Yeshiva* unique to the faculty setting. *FHP, Inc*., 274 NLRB 1141 (1985).

A decision that is at once the prime example of this singularity of focus and a *reductio ad absurdum* of it is the Board's decision in *College of Osteopathic Medicine and Surgery*, 265 NLRB 295 (1982) [COMS], a "telling example of the 'Catch-22' situation that professional [or other] employees since *Yeshiva* may face if they attempt to gain more input into work place decision making." U.S. Dept. of Labor, U.S. Labor Law and the Future of Labor-Management Relations, Bureau of Labor-Management Relations and Cooperative Programs Report No. 113 (Feb. 1987) at p. 67.

In the *COMS* case, a faculty secured collective representation; the administration did not assert managerial status, nor, apparently, could it due to the want of any participative governance. The faculty then bargained for a committee structure to give it a role in educational policy formulation and execution that it had not had theretofore. The Board then held the faculty to be managerial as a result of the bargain made with the faculty union:

> The *Yeshiva* decision does not expressly or impliedly distinguish situations in which managerial authority was gained through collective bargaining from situations in which such authority was more freely granted, and we do not believe that such a distinction is required by the Act. Accordingly, we must look to the extent of managerial authority held by college faculties rather than the manner in which such authority was obtained.

COMS, *supra*, at 298. The Board did not think it relevant to inquire any further into whether and how the faculty's "relationship to management" was such as to have possibly compromised its duty of loyalty by serving on committees their union created by collective agreement with the administration.

It is obvious to *Amici* that employee participation in key areas of managerial decision making "outside the box"—business strategy, marketing, product selection, quality standards, and the like occurring today in high performance workplaces (Section I, *supra*)—which is the product of collective bargaining does not convert the employee participants in those co-operative engagements into non-employee managers. Such a result would be antithetical to the very purpose such systems are bargained for. Nor should the result differ if the participatory system were to be the product of company policy rather than the product of an arms-length bargain. The reason why that should be so turns upon the concept that the Court held to undergird the managerial exemption: the need for undivided hierarchal loyalty. That, *Bell Aerospace* tells us, requires an assessment not only of the employee's "job responsibilities and authority"—which the Board has taken to be the *only* issues to be addressed—but also of the employee's "relationship to management," which the Board has thus far ignored.

The Board's neglect of the critical element is in sharp contrast to the Board's close attention to it in deciding the issue of supervisory status on which the *Bell Aerospace* Court drew so heavily by analogy to exempt managers. To obviate the evil of divided loyalty Congress excluded not just those who have power, or effective recommendatory power, to make a variety of decisions affecting employee status—to hire, fire, assign, or responsibly direct the work of others. It limited the exemption only to those who possessed that authority in "the interest of" the employer. 29 U.S.C. § 152 (11). Accordingly, the supervisory exemption requires an assessment of the employee's "relationship to management," just as the *Bell Aerospace* Court required in making the judgment of managerial status. But here, as *Oakwood Healthcare, Inc.*, 348 NLRB 688 (2006), evidences, the Board has paid close attention to that relationship, in particular in the matter of accountability. Citing well establish authority, the Board in that case emphasized that

to be responsible for the performance of a duty is to be answerable, to be accountable, to the managerial hierarchy for it. *Id*. at 691–92. And to be "accountable" means "that there is a prospect of adverse consequences for the putative supervisor if he/she does not" act as the hierarchy would wish. *Id*. at 692. Whence the conflict that would follow should the supervisor become unionized. To be sure, *Oakwood Healthcare* discusses this issue only with respect to the element of "responsible direction" under § 2(11). But such is an inextricable component of the requirement that all the putative supervisor's actions be "in the interest of the employer." To act in that interest, in the statutory sense, is to be accountable for its exercise.

Let us take the example of union stewards. Collective agreements commonly provide that union stewards will be on company-paid time when performing those duties—*i.e.*, winnowing out frivolous or unjustified claims of breach of contract or company rules, bringing unforeseen or novel problems to managerial attention, and securing adherence to company policies by both employees and management, all in aid of managerial objectives set out in the collective agreement and collateral company policies. But because of their "relationship to management" in the performance of these functions, absent engagement in such misconduct as would be cause to dismiss any employee, e.g. bribery or the falsification of company records, they cannot be dismissed for excessive zeal or an overabundance of militance. As such is not their relationship to management they cannot be supervisors—or managers. As the Court put it:

> The interpretation of the "in the interest of the employer" language mandated by our precedents and by the ordinary meaning of the phrase does not render the phrase meaningless in the statutory definition. The language ensures, for example, that union stewards who adjust grievances are not considered supervisory employees and deprived of the Act's protections.

NLRB v *Health Care & Retirement Corp*., 511 U.S. 571, 579 (1994).

To take another example, collective agreements commonly provide for employee safety committees and often clothe them with considerable authority. Employees who serve on these bodies are not rendered members of management thereby: even as their decisions are obviously for the benefit of, "in the interest of," the company in that sense, they do not function in the shadow of "adverse consequences" should management be displeased with actions they take in that capacity. Sanction for managerial displeasure with what to management might be a too aggressive an approach to safety and health would be a violation of the collective agreement, not the exercise of managerial accountability.

Nor, again, is it necessary that that authority be conferred by collective agreement in order for the employee exercising it to be non-managerial for the Board's error has lain in collapsing the possession of influential authority into a conclusive if tacit presumption of a relationship of accountability and control. To stay with job safety and health for a moment, over a dozen states have mandated employee-management safety committees. *See* Cynthia Estlund, Regoverning the Workplace 172–80 (2010). These commonly require an equal number of managerial and *non-management* employee representatives. E.g., N.C. Gen. Stat. § 95-252 (d) (2) (2011) (italics added) ("*Employee* safety and health representation shall be selected by and from among the employer's *non-managerial* employees…."); OR. Rev. Stat §654.182 (1) (a) (2011) ("to ensure equal members of *employees*… and *employer representation*"). These laws authorize these bodies to take specific and sometimes far-reaching action: to conduct inspections, review incidents, and recommend safety improvements. N.C. Gen. Stat. § 595-252 (c) (4); OR. Rev Stat. § 654.182 (d). The exercise of discretion effectively to recommend the content of company safety and health policies and effectively to oversee its execution would surely seem to come within *Yeshiva's* definition of management. But these non-managerial representatives are

not converted into members of management merely by performing these functions alone. These employee-participative systems require independence from management, not accountability to it. Today, even in the absence of an express statutory anti-retaliation clause, the discharge or discipline of an employee for doing what the statute authorizes her to do, for performing these duties, would be in violation of public policy and actionable in tort on that ground. Such, indeed, would seem to be the general state of the common law. *See* Restatement (Third) Employment Law §402 (b) (2011) *commented* on at 13 Emp. Rts. & Emp. Poly. J. 183–203 (2009).

Suppose, then, that in a jurisdiction lacking such a statute a company were to see it to its interest to establish such a committee. In fact, "thousands of non-union health and safety committees are currently operation within firms' internal compliance programs." Regoverning the Workplace, *supra*, at 177. And assume further that as a matter of company policy such bodies were clothed with independence equal to that statutorily commanded elsewhere or ensured by collective agreement, for the effectiveness of the safety program and its credibility turn upon both the reality and perception of the employee participants' independence from management.[35] It should follow that employees serving on such bodies as part of their duties, working, as union stewards are, on Company-paid time, could not suffer "adverse consequences" for their efforts. And absent that accountability, *as Health Care & Retirement Corp.* teaches, they cannot be made members of management by virtue performing those functions alone.

[35] David Weil, *Are Mandated Health and Safety Committees Substitutes for or Supplements to Labor Unions?* 52 Indus. & Lab. Rel. Rev. 339 (1999).

C. The Party Proposing that an Employee is a Manager Should be Obligated to Prove How Statutory Coverage Would Create a Demonstrable Conflict in the Duty of Loyalty: Absent that Conflict the Employee Cannot *Be* a Manager

The current state of the law is a muddle. On the one hand, *Bell Aerospace* teaches that the determination of managerial status, resting on the need for undivided loyalty, turns on a three-pronged analysis: of how much power an employee has, over what issues, and, in exercising that power, of the employee's relationship to the hierarchy, which ordinarily would include the employee's accountability to the hierarchy. The Court echoed the latter is when it later expressly distinguished union stewards as non-managerial despite the rather effective influence they have. But on the other hand, *Yeshiva* says that, for faculty—and, potentially, others engaged in participative forms of institutional or corporate governance—the analogy to industry need not be "complete," that the lack of "some" degree of accountability is not dispositive. Maddeningly, however, the Court declined to breathe any hint of what the degree of incompleteness was, what the degree of unaccountability would be that would nevertheless not disprove a determination of managerial status.

What is the Board to make of this? The short, if obvious answer is that one cannot fathom *what* the Court had in mind by these Delphic dicta.

The total absence of guidance counsels the Board to adhere closely not only to the three-pronged test the Court set out in *Bell Aerospace*, but to the ground these tests are devised to address and which that Court in both *Bell Aerospace* and *Yeshiva* held to be determinative: whether coverage under the Act would deprive the employer of the duty of loyalty the employee singularly owes to it when he or she participates in the formulation or effectuation of managerial policies. In the case of high executives—whom *Bell Aerospace* addressed as the paradigmatic example of statutory exclusion—the answer would be obvious. In contested cases, however,

where the answer is far from clear—as it is when the exemption confronts faculty participation in institutional governance or employee participation in high performance systems—the party asserting managerial status should be required to prove that statutory coverage would so demonstrably engender the conflict the exemption contemplates as to warrant the employee to be held to be a manager — such being his or her "relationship to management."

This line of analysis is consistent with the Court to treatment of supervisors in *NLRB* v. *Health Care & Retirement Corp*, *supra*. There, the Board argued that persons who met the statutory definition of a supervisor were nevertheless covered by the Act because the professional judgment required for their supervisory work posed no threat of divided loyalty. The Court denied the Board the power to take that approach as it would create an entirely new category not contemplated by the Act. "The Act is to be enforced according to its own terms, not by creating legal categories inconsistent with its meaning as the Board has done in nurse cases." 511 U.S. at 580. In other words, insofar as division of loyalty is the problem § 2(11) was divised to solve, anyone who meets the tests set out in § 2(11) is irrebuttably presumed to be in such a position. The statute forecloses any examination of that issue.

Here, the question is not whether a manager should have the right to engage in collective bargaining because doing so would pose no conflict in loyalty: if there would be no conflict of loyalty the employee isn't a manager at all. Unlike the statutory supervisory exemption, the managerial exemption is judge-made; its categories are loosely defined, to say the least. One element of the analysis commands an examination of the putative manager's relationship to the hierarchy which necessarily includes the extent to which the duty of loyalty is implicated. As noted above, the *Yeshiva* Court adverted to that question but, by saying that the loss of *some* degree of accountability did not work against a finding of managerial status, the Court essentially

and necessarily required the extent and depth of accountability to be examined. In sum, that which the Act conclusively presumes for those who are supervisors is what is required to be decided for those who are managers.

As the Board and the judiciary have acknowledged, the question is not whether the employee is aligned with management or effectuates employer policy *simpliciter*. All employees can be said to advance the company's mission and policies. The question is whether they are *so* aligned or *so* specially situated vis-à-vis the hierarchy that they should not be covered by the Act. Accordingly the Board is called upon to address and explain how the employee's relationship to management drives toward the extension or denial of managerial status, not to create some new category.

Because the loss of statutory protection is at stake, the conflict in loyalty should be demonstrable. The evidence should be more than speculative; more than a generalized suspicion. In the case of physicians at an HMO who serve on committees reviewing patient care, therapies, patient services, and work environment—in *FHP, Inc.*, for example—the employer should be required to show how unionization would compromise the physicians' loyalty to the hierarchy in the matter of patient care. If it would not, they would not be managers as defined by their relationship to it. Thus, evidence from analogous employments in the public sector could readily be looked to: in the case of professors, whether collective bargaining by faculties in public universities, whose exercise of the same degree of influence or authority over basic educational policies is indistinguishable from their private sector counterparts has compromised their duty of loyalty in any way; in the case of teachers in private or charter schools, whether teachers in public schools who have collectively bargained for robust participative governance

systems have compromised their duty of loyalty or management's ability to manage;[36] in the case of employees in company-sponsored participative bodies, whether their unionized counterparts — at Kaiser Permanente or Ford—have caused those managements a demonstrable loss of loyalty; and in the case of employed physicians, whether management of their unionized counterparts in public health services have experienced an unacceptable division of loyalty as a result of collective bargaining.

As that is a question the claim of managerial status necessarily presents, there is every good reason for the Board to require that it be addressed directly: by the party asserting that fact to be so and best positioned to prove it. *NLRB v. Kentucky River Community Care, 532 U.S. 706(2001)*. In this way, the Board will be able to distinguish the true manager while dispelling the pall of legal uncertainty that hangs over high performance systems under current Board doctrine. Section III, *infra*.

III. An Employee Whose Time Spent in Participative Governance is Insubstantial in Terms of His or Her Primary Responsibilities is Not a Manager

Section I, *supra*, pointed out that there has been a significant movement in the years subsequent to *Bell Aerospace* and *Yeshiva* to involve employees and their representatives—*as* employees—in formulating and effectuating their employers' policies. To consider these employees to be members of management in consequence of that participation would deprive them of the protection of the Labor Act and the benefits of collective bargaining. Consequently, to extend managerial status on that basis would blunt the desire by unions and employees to participate in such systems, much to the Nation's disadvantage. This concern was expressed clearly in the Dunlop Report, Section I, *supra*. As that Section noted, despite the benefits of high performance systems, adoption, though significant, has not been exponential; but the pace of

[36] *See supra* text accompany notes 21 –22.

union-management cooperation can be explained in part by the pall of uncertainty cast by the current state of Board doctrine. A student comment captured the situation rather well:

> Unions would have to balance the desire of enabling their members to gain sufficient power to influence the policies of the employer against the concern that units of workers who gain sufficient discretion at the bargaining table might eventually be decertified. A union would be most reticent when it perceives that the employer is most likely to seek decertification; these probably are situations in which labor relations have been problematic in the past—*precisely the situations in which such participative management agreements would have the most potential for benefit.*

Comment, *Protecting Managerial Employees Under the National Labor Relations Act*, 91 Colum. L. Rev. 405, 428 (1991) (footnote omitted) (emphasis added). *See also* Comment, *The Managerial Exclusion Under the National Labor Relations Act: Are Worker Participation Programs Next?*, 48 Cath. U. L. Rev. 557 (1998/99).

One factor that distinguishes the employee-participant from the true manager—the "executive" that the *Bell Aerospace* Court said was at the center of the exemption's concern—is that an executive is an executive all the time. A vice president for marketing, a director of product design is always a vice president for marketing or a director of product design. The job he or she holds is managerial. An employee who serves on a union-management committee on marketing or product design does so in addition to his or her normal job duties which do not involve engagement with policy issues. But the Board's treatment of the managerial status of those who participate in shared governance has ignored the difference: the fact that a majority of physicians have served from time to time on a variety of committees concerned with the quality of patient care in addition to their normal care-giving functions was held, without more, sufficient to render the entire complement of physicians to be managerial. *FHP, Inc., supra*. Not only did the Board omit any discussion of accountability, Section II, *supra*, it devoted no

consideration to how substantial a part of the physicians' time was consumed in that participation.

Quite the contrary is so of the supervisory exemption, where a supervisor's supervisory duties can also be segregable from and in addition to non-supervisory job responsibilities. The Board has long acknowledged that the possession of segregable supervisory power which is exercised only a small amount of time does not render the employee a supervisor. The amount of time devoted to separate supervisory functions that, in the Board's view, will result in supervisory status has fluctuated over the years. *See e.g.*, *Detroit College of Business*, 296 NLRB 318 (1989). But the basic principle has been consistently acknowledged.

> Where an individual is engaged a part of the time as a supervisor and the rest of the time as a unit employee, the legal standard for a supervisory determination is whether the individual spends a regular *and substantial* portion of his/her work time performing supervisory functions.

Oakwood Healthcare, Inc., 348 NLRB 686, 694 (2006) (footnote omitted) (emphasis added).

In other words, those who spend an insubstantial portion of their time doing supervisory work pose no threat of divided loyalty, even though they are doing *some* genuine supervisory work, at least not so serious a threat as to deprive them of statutory protection in their role as rank-and-file employees. Consequently, *Amici* are hard-pressed to see why an employee who does not spend a substantial portion of her time participating in collaborative bodies that formulate or effectuate company or institutional policies should not be treated similarly. Yet the Board has paid no attention to this issue, perhaps due to the obvious fact that authentic managers are rarely, if ever, part-time in that capacity.

Amici submit that not only professional employees but non-professionals as well who are alleged to be managers on the basis of participation in systems of shared corporate or institutional governance but which participation does not consume a substantial portion of their

time should not be denied the protections of the Act as employees. We believe that it would strain credulity to conceive that a worker who spends a few hours a week or less to participate on a committee on product design, marketing, safety or environmental policy, would engender an intolerable conflict of loyalty with the company by virtue of union representation. Nor would a faculty member who, in addition to keeping up in her discipline, preparing for classes—current and under development—researching and publishing, counseling students, engaging in outreach and public service, and who serves on institutional committees, few of which deal with basic policy issues and which meet for only relatively brief periods of time. Even a worker who is on assignment to product design operations for a defined period of time — say a period of months – – but will spend the preponderance of their career doing production work would not be considered to have changed jobs and left the bargaining unit. *Westinghouse Elec. Corp.*, 163 NLRB 723 (1967) *aff'd* 171 NLRB 1239 (1968) *aff'd* 424 F.2d 1151 (7th Cir. 1970) *explained* in *Canonie Transp. Co.*, 289 NLRB 299 (1988). This approach would merely extend well established doctrine regarding supervisors with dual responsibilities to the parallel situation of employees who participate in cooperative governance systems in addition to their normal duties. More important, it would effect a much-needed accommodation of the Act, consistent with extant doctrine, to facilitate the adoption of high performance or value-added workplace participation systems. Section, I, *supra*.

Conclusion

The course of action outlined in the foregoing is consistent with the Act, is well within the Board's authority to pursue, and will benefit the Nation by fostering a legal atmosphere conducive to the adoption of high performance workplace systems. *Amici* believe that the health

of the nation's economy and the well-being of its working force will be significantly advanced as a result.

Respectfully submitted,

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