CURRENT agitation over the organization of foremen has raised important problems which deserve careful attention from employers, unions, and the public. How important is the union movement among supervisory personnel? Are foremen “employees” within the meaning of the Railway Labor and National Labor Relations Acts? If so, what will be the effects of the unionization of foremen on the freedom of production and maintenance employees to choose their collective bargaining representatives? What will be the effect on the ability of the employer to command the allegiance of his subordinate officials? These and related questions are discussed in this article.

Earlier Foreman Organization

First of all, it seems necessary to dispel the idea that the organization of subordinate supervisory officials is something new. For many years workers having the prerogatives of foremen, that is, supervision of work and the power to hire and/or discharge,1 have been members either of unions of their class or of the same unions as the regular employees, in the railway, maritime, printing, and building construction industries, among others. An examination of industries in which collective bargaining has a long history indicates that the organization of foremen has not been an uncommon practice once unionism has become an accepted fact.

On the other hand, it should not be forgotten that most American unions exclude supervisory personnel from membership either by constitutional provision or by tacit consent. They take the attitude that the foreman is a representative of management whose loyalty is with management and whose presence within their ranks will, therefore, have a disturbing and probably weakening effect. But the policies of such unions are likely to undergo a change if a national union of foremen threatens to invade the industries in which they have jurisdiction. The developments in the automobile, the aircraft, and the bituminous coal industries are illustrative of the possibilities.

The United Automobile Workers admitted some foremen in small-parts plants in the Detroit area as early as 1937, despite a constitutional prohibition to their membership, but the opposition of management and the coolness of top UAW leaders to their membership induced these foremen to withdraw and form a separate union. After first refusing, the CIO granted them a local union charter. The request of the CIO foremen for recognition during a 1939 Chrysler strike proved their undoing. Not only was recognition refused, but the CIO foremen were forced to agree to cease organizational activities in order to secure reinstatement for some discharged members. Apparently, the UAW did not deem it worth while to assist the foremen to win recognition and might even have sacrificed their demands in exchange for concessions to hire and discharge. It should be noted, however, that the distinction between a production and a supervisory employee is not always clear.
its own members. At any rate, nothing has been heard from the CIO foremen’s union since then, and the UAW has made no further attempt to organize supervisory personnel. UAW leaders, however, have indicated that their policies may change if foremen are declared “employees” under the National Labor Relations Act.  

More recently, an independent union, the Foremen’s Association of America, has made rapid progress in the Detroit area. Founded in August, 1941, it now has contracts with the Ford Motor Company and the Packard Motor Car Company, a large following in several other plants, and a claimed membership of 14,000. Meantime, other independent foremen’s unions have sprung up in aircraft factories in other parts of the country.  

The United Mine Workers have never accepted foremen as members. But after the Union Collieries Coal Company case, which is discussed in the third section of this article, John L. Lewis demanded that foremen be included within the scope of the UMW union-shop contract.

**Foremen as Employees**

Are foremen “employees” within the meaning of the Railway Labor and the National Labor Relations Acts? The fact that minor supervisory employees on the railroads have engaged in collective bargaining with top management since the turn of the century induced Congress to define “employee” in the former law as any railway worker “who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission . . . ” The question, therefore, was not left to the discretion of the National Mediation Board.

The National Labor Relations Act, however, is not clear on the subject. The “employer” is defined in Section 2(2) as “any person acting in the interest of an employer, directly or indirectly . . . ” But the very next paragraph defines “employee” to include “any employee” with certain specific exceptions, notably agricultural and domestic service labor. Obviously, minor supervisory officials can be included within these definitions of both employer and employee. Apparently Congress envisaged a clear line of demarcation between the functions of employer and employee when considering the National Labor Relations Act despite its experience with the Railway Act. Its failure either expressly to include or to exclude foremen from the definition of employee has left the matter to the discretion of the National Labor Relations Board. The board has uniformly decided that supervisory personnel are employees within the meaning of the act for collective bargaining purposes.

As early as March 21, 1936, for instance, it acknowledged the right of licensed masters, mates, and engineers, who have supervisory authority over seamen, to be represented by unions for the purpose of collective bargaining with an employer. On October 13, 1941, it

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3 In the Boeing plant in Seattle, for instance, two independent unions are contesting for the right to represent foremen, a third seeks to represent assistant foremen, and the Machinists’ Union, which represents the production employees, is now seeking to include foremen and assistant foremen within its contract.

4 48 U. S. Stat. 926 (1934), Title I, Sec. 1(5). Italics supplied.


6 *Matter of International Mercantile Marine*, 1 NLRB 384.
decided "the plant protection force, engaged in guarding company property against sabotage, theft, trespass, fire and accident hazards, and enforcing safety and disciplinary regulations, to be an appropriate bargaining unit despite the [Chrysler] Company's contention that the men involved performed confidential and disciplinary duties and were therefore instruments of management." That same month, the NLRB held that "shift operating engineers with supervisory authority and responsibility for safe operation of the powerhouse equipment, constituted an appropriate bargaining unit, although opposed by the employer on the ground that they were supervisory employees performing duties closely allied with management."

The courts have uniformly supported the board's contention that supervisory officials are employees within the meaning of the act and that top management cannot discriminate against them for union activities. Said the circuit Court of Appeals, for the Eighth circuit:

It is first argued that Eckert is not an employee within the meaning of the Act. The contention is that being a foreman he is an employer and not an employee. Section 2(2) of the Act is relied upon wherever an "employer" is defined to include "any person acting in the interest of an employer." Section 2(3) of the Act is ignored. It provides that the term employee shall include any employee. There is no inconsistency in these provisions when facts are taken into consideration. A foreman, in his relation to his employer, is an employee, while in his relation to the laborers under him he is the representative of the employer and within the definition of Section 2(2) of the Act. Nothing in the Act

excepts foremen from its benefits nor from protection against discrimination nor unfair labor practices of the master.8

The foreman is thus pictured as a two-sided personality who is capable of serving opposing interests with equal diligence. As an employee, he has the right to join a union free from his employer's influence. But as an employer's representative, he has no right to encourage the employees under his direction to join this same organization lest his employer be guilty of an unfair labor practice!

The Union Collieries Decision

The policy of the NLRB toward foremen reached its climax in the Union Collieries Coal Company case, in which a majority of the board, composed of Chairman Millis and Member Leiserson, certified the independent Mine Officials' Union of America as the sole bargaining agent for the assistant mine foremen, fire and weigh bosses, and coal inspectors employed by the company. Member Reilly vigorously dissented. The decision apparently opened the way for all supervisory officials to unionize. An analysis of the majority and minority opinions is, therefore, well worth while.10

Two questions were at stake in the Union Collieries case. First, were the above-listed subordinate officials "employees" within the meaning of the National Labor Relations Act? And second, if so, were they an appropriate bargaining unit? The majority of the board answered both questions in the affirmative. Relying upon the NLRB and Court decisions already quoted, the majority contended that all of the board's position.

8 Matter of Chrysler Corporation, 36 NLRB 593; Matter of General Motors Corporation, 36 NLRB 439; quoted with other pertinent cases in Matter of Union Collieries Coal Company, 41 NLRB 961.


10 41 NLRB 961 and 44 NLRB 165. The opinions in the original and supplemental decisions are combined in the summary of them which follows. The original decision was reached on June 15, 1942, and the supplemental decision on September 18, 1942.
tended that the first question was "now well settled." Had Congress wished that foremen and supervisors be excluded from the meaning of the term "employee," it would have so stated, as it did in the case of agricultural and domestic service labor. Hence the board had no power to withhold the protection of the act from these employees even if it so wished.

The majority took cognizance of the fact that employers may be bound by the unfair labor practices of their subordinates. But it declared that "even if the protection afforded by the Act could be withheld . . . it would be arbitrary to do so merely because in certain aspects of their employment relationship, supervisors are in a position to bind their employer. On the contrary, were an employer free to set up a company-dominated union among his supervisory personnel or discriminate against them with impunity, the coercive effect upon the subordinate staff would be direct and powerful."

Turning to the second question, the majority declared that the subordinate mine officials "have that community of interest which is prerequisite to inclusion within a single unit." The majority refused the contention of the company that the appropriate unit should be, if anything, all similar supervisory employees employed by members of the Western Pennsylvania Coal Operators Association, which handled the company's labor relations. It found that no record of collective bargaining on a multiple employer basis existed for supervisory employees and that the fact that multiple employer bargaining has a long history among production employees was not pertinent.

The majority also denied the plea of the company that supervisory employees should be represented by the United Mine Workers, if by anybody, because such employees were then specifically excluded from the national Appalachian Agreement and its supplements.11

Mr. Reilly's minority dissenting opinion acknowledged the validity of the NLRB and Court cases cited by the majority as precedents but denied that they were controlling. Despite the broad definition of the term "employee" in the act, there must be an implied limitation. "A literal interpretation of the statute would mean that even the president, vice-president, and treasurer of a corporation have a right to bargain collectively, since they are also employees. Yet very few persons would contend for such an absurd construction and it is unlikely that the courts would be hospitable to such an argument." While the courts have held that a foreman may be an employee under the act, no court has held that all supervisors are necessarily employees, and none of the cases referred to by the majority opinion "grew out of circumstances even remotely resembling those here. . . ."

Mr. Reilly found to be without merit the contention of the majority that Congress, by its failure specifically to exclude supervisory employees from the definition of employee, as it so excluded agricultural labor, left the board without power to deny supervisory employees the protection of the act. Rather, this omission left the board discretion to treat each case upon its merits. And in determining each case, the board must take into consideration "the status in the managerial hierarchy of the personnel claiming to be an appropriate unit, . . . the effect that this inclusion will have upon the rights of self-organization demand that foremen be included within the scope of the Appalachian Agreement."

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11 An interesting contention in view of the operators' refusal to agree to the United Mine Workers' later
and collective action of the production employees, and . . . whether [the] determination in any particular case that supervisory employees constitute a unit appropriate for collective bargaining will so compromise the status of such employees as to result in disruption of the practice of collective bargaining rather than industrial peace.” Mr. Reilly then proceeded to examine the question of employee status in conjunction with that of the appropriate unit rather than by itself. His analysis focused attention on the serious implications of the majority opinion.

The NLRB has recognized the desirability of a clear demarcation between employer and employee at the conference table. Consequently, in ordinary representation cases supervisory employees have been excluded from the unit of production and maintenance employees. While this method has maintained the distinction between employer and employee in the maritime industry, “where unionization of the licensed deck personnel has developed quite apart from the development of collective bargaining in the forecastle or the engine room,” it is not likely to do so in industry generally because foremen would have the opportunity to join the union of the production workers.

In the coal mines, for instance, supervisory employees have been excluded from the Appalachian Agreement because of a general understanding that they were management’s representatives. But should the board declare them to be employees, the United Mine Workers would seek to represent them. The board would then “be faced with a situation in some mines in which the union which already represents the production and maintenance employees would also be representing supervisory officials. While it may be argued that any conflict of interest can be met by establishing separate bargaining units, such a separation is more theoretical than real where both units have the same representative.”

Much more serious, however, is the threat of unions’ competing for the allegiance of both production and supervisory employees.

If supervisory personnel are deemed employees within the meaning of the Act, there would seem to be no tenable basis upon which to deny them the full privileges of union activity which . . . [the Act] guarantees to all employees. Supervisory personnel may then proselytize among production workers on behalf of their collective bargaining representative. The Board’s frequent recognition of the influence and power of minor supervisory employees over production workers is ample evidence of the degree to which the freedom of choice of the production workers would thereby be destroyed. Furthermore, although the employer maintains punctilious neutrality, . . . [the Board] would impute to him all such activities of his supervisory personnel and would find him guilty of violation . . . of the Act, but if the employer attempts to avoid this result by demoting the supervisors, . . . [the Board] would find his conduct innocent. . . . [It] would then have assumed the anomalous position of finding these persons entitled to the privileges afforded by the Act, but at the same time not entitled to a full measure of protection against discrimination upon exercise of these privileges.

Not only may supervisory employees, even though nominally in a separate unit, dominate and interfere with the rights of self-organization of production employees, but by unionizing they may cease to become effective agents of management. If allied in the same union as production employees, they could not speak for management at the conference table. But if they were excluded from union-management discussions, employ-
ers would be deprived of the assistance of subordinates who alone are completely familiar with grievances that constantly arise. "Officials in higher positions do not and cannot be expected to possess the same knowledge. It is therefore reasonable to assume that under these circumstances collective bargaining negotiations will be impeded and will tend to be disrupted by frequent misunderstandings."

Production employees have refused to cross the picket lines of striking mine foremen. But when the company involved has sought to fire the miners for illegal stoppage in breach of the Appalachian Agreement, the United Mine Workers have resisted on the grounds that the strike was really a lockout by management! One can easily visualize the complete breakdown of plant discipline from such occurrences.

Mr. Reilly did not deny that supervisory employees would be benefited by being designated as employees under the act, but he felt that this was outweighed by the disadvantages, particularly the threat such organization has for the free choice of representatives by the majority. Hence he urged that the petition be dismissed.

The Dissenting Opinion

This writer contends that the dissenting opinion in the Union Collieries case rested on firmer ground than did that of the majority. Mr. Reilly's belief that the unionized foremen would be in a position to impinge upon the free choice of bargaining representatives by the production employees and that their organization would deprive management of the allegiance of its foremen were not idle fears. Examples may be drawn from industries in which the union-foremen controversy is an old subject.

The Brotherhood of Maintenance of Way Employees was founded by railway track foremen in 1886 and did not admit other trackmen till a decade later. Foremen, however, have remained the key men in the organization, and most union officials are drawn from this group. This situation is to be expected because gang foremen are frequently the only permanent employees in the maintenance of way department, all the others being casual workers hired for a particular job. The foremen are also the most difficult to replace in case of a strike; hence the success of the brotherhood depends to a much larger extent upon its ability to control laborers than upon its success in enrolling the more numerous laborers.

Besides being essential to the union, however, track foremen remain representatives of management with power to hire and discharge. The brotherhood has long recognized that such authority places foremen in a strategic position to "encourage" organization. Wrote a correspondent of the union journal recently: "The best organizer we have is the foreman of any crew regardless of classification. If the foreman asks a man to join the Brotherhood, you can be sure that in most every case this man will join. . . ."12 The implication is, of course, clear and freedom of choice a mockery under such conditions.13

12 Maintenance of Way Employees Journal, August, 1940, p. 38.
13 Of interest is the situation which exists in respect to Negro track laborers. Despite the fact that approximately 20% of the trackmen in the country and 75% of those in the South are colored, the constitution of the Maintenance of Way Employees restricts the participation of Negroes to "allied lodges," the members of which have no other right to participate in union affairs. In the South, track foremen are often the only white men employed over large areas. By virtue of their power to discharge, they can induce the Negroes to join the brotherhood and then exert control over them as representatives of both management and the union.
The Typographical Union requires that foremen on closed-shop jobs be union members. The result is that the foreman is paid by the employer but is really responsible to the union. If he permits any infraction of union rules, he may be fined or even expelled, and expulsion, of course, means discharge. Should the union foreman discharge a union typographer, the question may be referred to the local union with appeal to the Executive Council of the International Union. The employer is not even considered a party to the controversy despite his obvious interest.  

Foremen on closed-shop building jobs are often required to be union members. In such instances, the contracts state that the foremen "shall be the agents of the employer." This does not, however, prevent a union from fining, or even expelling, a foreman for "rushing" or for other reasons. Thus union membership restricts the foreman's supervisory initiative and deprives the employer of much of the value of the foreman's services.  

To the examples must be added the increase in jurisdictional strife which the NLRB decision in the Union Collieries case threatened to foster. For, under such a ruling, not only would unions be likely to extend their jurisdictions to include supervisory personnel, but AFL, CIO, and independent foremen's unions might arise to compete with the union of production workers for the right to represent a plant's supervisory employees. The employer would then have to deal either with a union which included his supervisory personnel or with several organizations at one time. In the former instance, he would no longer control his subordinates; in the latter, his control over his subordinates would be limited, and he would be faced with the problems incident to multi-union negotiations, such as interunion rivalry and wage differentials. In either case, the future of industrial relations would not be a happy one.

Union Collieries Decision Reversed  

In February, 1943, Dr. Leiserson was transferred back to the National Mediation Board and was replaced by former Congressman John M. Houston. Several cases involving foremen were on the board's docket at the time. Most of these had arisen because of the attempts of unions of production employees to extend their jurisdiction to foremen in the light of the Union Collieries decisions. With Dr. Millis and Mr. Reilly holding opposing views, it became apparent that the opinion of Mr. Houston would be decisive. He sided with Mr. Reilly. By a two to one vote, the board reversed itself in the Maryland Drydock case. The majority declared that it was "now persuaded that the benefits which supervisory employees might achieve through being certified as collective bargaining units would be outweighed not only by the dangers inherent in the commingling of management and employees' functions, but also in its possible restrictive effect upon organization freedom of rank-and-file employees." Accordingly, the petition of the Marine and Shipbuilding Workers, CIO, to be allowed either to merge the supervisory employees in the same bargaining unit as the production employees, or to establish a separate unit for supervisory employees, was dismissed. Chairman Millis dissented, stat-

Unionization of Foremen

ing that he did "emphatically reject . . . the general position that . . . petitions for 'foremen's units' will not be entertained and acted upon by this Board."

Although the NLRB has now refused to designate foremen as "employees," it does not prevent them from joining or forming unions. But if such unions are formed, they have no government protection and are in exactly the same position as were all unions prior to the passage of the Wagner Act. The NLRB will not force an employer to deal with the union. Nor will it certify a union of foremen as an appropriate collective bargaining unit. If Mr. Reilly's opinion had prevailed from the first, however, organizations such as the United Mine Workers or the Marine and Shipbuilding Workers would not have been encouraged to open their doors to supervisory officials and thus to widen the area of interunion strife.

The fact that foremen have shown a desire to unionize is a strong presumption that they have real grievances, and undoubtedly they have. Foremen today are frequently working longer hours than the men under them. Despite the fact that their job, being somewhat administrative in character, is usually more difficult than that of the production employees, foremen often receive no penalty overtime pay, and thus their weekly earnings are frequently below those of the production employees. Moreover, foremen have been stripped of much of their authority by collective agreements and ambitious union shop stewards. Especially aggravating to foremen has been the failure of top management to give them its unqualified support in their dealing with labor in times when such support has been particularly essential to their authority. The

result has been that, as unions have grown strong, they have tended to ignore subordinate officials and have endeavored to deal directly with top management.

The foremen's position has been made still more difficult by the fact that they are between management and labor but, in a very real sense, a part of neither. Management has too often looked upon its foremen as being outside its group, although those who have opposed the unionization of foremen have frequently, as an argument at least, claimed them as one of their own. Labor, on the other hand, generally has regarded foremen as outside its fold, as is shown by provisions in many union constitutions excluding subordinate officials from membership.

It is not, therefore, surprising that, as a consequence of their grievances and their peculiar position, foremen have sought to organize. In most instances top management has only itself to blame for its failure to remove the causes of discontent among its subordinates. A contented supervisory force is, after all, a prerequisite for efficient production. But it is fortunate that the National Labor Relations Board withdrew its encouragement to unions to "take over" foremen. Such action would not be likely to spread contentment among either top management, subordinate officials, or the rank and file of unions.

Conclusion

As a result of the protest of the president of the General Motors Corporation against the designation of foremen as employees, Representative Howard Smith has introduced a bill in Congress which would make the unionization of supervisory personnel illegal. The

tools or machinery used by members, or anything which "in any other manner interferes with the full utilization of the Nation's manpower in the present
This does not appear to be a sound approach to the problem. In the first place, Mr. Smith's bill, like so many others which he has introduced, is not designed primarily as a constructive remedy. Rather, it is, pure and simple, a union-busting device and thus forbids a multitude of perfectly legitimate union activities in addition to its ban on the unionization of foremen. It would seem far preferable to leave discretion in the matter to the NLRB so that each case can be decided upon its merits. Mr. Reilly believes (as does this writer) that the National Labor Relations Act does just that. The administrative process was created precisely because even legislators with constructive intentions could not possibly foresee the many complicated situations which might arise. The argument of Drs. Millis and Leiserzon, however, that the NLRB has no power to exclude supervisory employees from the definition of employee in the act not only is unconvincing, but it robs the administrative agency of its primary raison d'être, flexibility. Besides, as Professor Christensen has said, "Any war..." It also requires employers to report violations and provides penalties of $1,000 fine and one year imprisonment for violations.


19 Discussing the board's position editorially on May 13, 1943, The New York Times declared that the National Labor Relations Act ought "to be rational recommendation concerning a public program for regulation of collective bargaining... ought to begin with an appreciation of trade union action as a product of the market and industry in which it is found."

What is needed, therefore, is not sweeping legislation but the proper appreciation on the part of administrators of the implications of their decisions. Had Drs. Millis and Leiserzon seen, as Mr. Reilly clearly did, that the Union Collieris case rose out of circumstances entirely different from those upon which they relied for precedent, the board would have escaped the criticism which was heaped upon it for reversing itself. As the matter now stands, foremen are free to organize and will probably do so in those instances in which top management fails to correct their grievances, or where special market or industrial conditions favor such organization. But the special invitation which was extended to foremen to unionize has been recalled, as has the encouragement to unions to extend their influence over management's subordinates.

revised to make more explicit the respective rights of labor and management." Here again, however, the difficulty of legislating for widely different situations in the economy is ignored. No matter how much the act was amended, it would still have to be interpreted, and no legislation is preferable to bad legislation. Besides, the NLRB is not singular in that it has reversed itself. Witness the Supreme Court!
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