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Jack McNally
Business Manager
International Brotherhood of
Electrical Workers, Local 1245
P.O. Box 4790
Walnut Creek, CA 94596

Re: Status of Managerial Employees

Dear Jack:

As you requested, this letter is to clarify the **status of managerial employees** under the National Labor Relations Act. Although there is no specific exclusion for managerial employees in Section 2(3) of the Act (the definition of "employee"), the Board as a matter of policy has held that managerial employees are outside the scope of the statute and may not invoke its protections.

In N.L.R.B. v. Bell Aerospace Company, Division of Textron, Inc., 416 U.S. 267 (1974), the Supreme Court approved of the Board's policy of excluding managerial employees, noting that the NLRA implies this exclusion.[1] The Court recognized that managerial employees are higher in the corporate structure than "those explicitly mentioned by Congress . . . [supervisors] which regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." 416 U.S. at 286-88. The rationale for this exclusion, like the exclusion of supervisors, is to assure employers of the undivided loyalty of its representatives. N.L.R.B. v. Yeshiva University, 444 U.S. 672 (1980).

The result of this exemption, of course, is that managerial employees who engage in union and/or concerted activities are not

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[1] There is no firm criteria for who is a managerial employee. Generally, managerial employees are defined as those who formulate and effectuate management policies.

protected by the Act. They have no federally protected bargaining rights, no strike protection and may be discharged or disciplined for engaging in union and/or concerted activity.

Although managerial employees are not covered by the NLRA, their labor activities are governed by California law. Section 923 of the Labor Code declares as a matter of public policy that individual employees are guaranteed full freedom of self-organization and of association with others "for the purpose of collective bargaining or other mutual aid or protection . . . ."

At least one California court has held that Section 923 of the Labor Code extends collective bargaining rights to a union of supervisory employees. In Knopf v. Producers Guild of America, Inc. (1974) 40 Cal.App.3d 233, Executive and Associate Producers of movie picture and television productions formed a union. As producers they were supervisors and exempted from coverage under the National Labor Relations Act.[2/]

In extending the protections of the California Labor Code to the supervisors, the court held that the NLRA neither enlarges nor limits the existing fundamental rights of supervisors and that the right of self-organization and of selection of a bargaining representative are rights which exist independently of labor relations acts.

The Knopf court noted that in an earlier decision, the California Supreme Court recognized that supervisory employees have fundamental labor rights. In Safeway Stores v. Retail Clerks Etc. Assn. (1953) 412 Cal.2d 567, 572-573, the court said "By the exclusion of supervisory employees and the regulations of their collective bargaining rights from the federal act, the field as to them was left open to state control."

One issue which must be anticipated in any state court action for violation of collective bargaining rights and/or protected concerted activities is that of preemption.

In Knopf, the court explored the issue of preemption, that is, whether it was permissible to extend collective bargaining rights to supervisors in view of the doctrine of preemption under Section 14(a) of the NLRA.

[2/]The union was sued in state court by six producers who sought to have the court declare that the union lacked status as a labor organization. One of the arguments raised by the plaintiffs was that the union was a union of supervisors and that Section 923 of the Labor Code did not apply to supervisors.

Section 14(a) of the NLRA provides that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, national or local, related to collective bargaining."

Relying on two United States Supreme Court cases which dealt with the issue of preemption,[3/] the Knopf court distinguished the situation before it and ruled that the doctrine of preemption was inapplicable.

The issue of preemption has been successfully raised in state court actions which allege discharge for union and/or protected concerted activities. In Henry v. Intercontinental Radio, Inc. (1984) 155 Cal.App.3d 707, a complaint was dismissed when the plaintiff failed to allege that the NLRB had declined to exercise jurisdiction over his case. Although the plaintiff was a discharged supervisor, the discharge of a supervisor may, arguably, fall within the NLRB's jurisdiction if the discharge has the effect of interfering with the rights of non-supervisory employees in the exercise of their own rights. Iron Workers v. Perko (1963) 373 U.S. 701. The preemption doctrine has not been applied where the activity was "peripherally the concern of [the NLRA] or touched interests so deeply rooted in local feelings and responsibility that, in the absence of compelling congressional direction, [the United States Supreme Court] could not infer that Congress had deprived States of the power to Act." San Diego Building Trades Council et al. v. Garmon (1959) 359 U.S. 236, 243-244.

In summary, although managerial employees cannot become members of IBEW or request certification of their own union from the NLRB, any labor activity in which they engage will be governed by the California Labor Code. However, any discrimination against them for engaging in these activities may give rise to a preemption issue, should the discrimination become the subject of a state court action.

If you have any further questions on this, give me a call.

Very truly yours,

John L. Anderson

JLA:mja

[3/] Hanna Mining Co. v. Marine Engineers (1965) 382 U.S. 181 and Beasley v. Food Fair of North Carolina, Inc. (1974) 416 U.S. 653.

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