The Burger Court Opinion Writing Database

NLRB v. Hendricks County Rural Electric Membership Corp.

454 U.S. 170 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 8, 1981

RE: 80-885 - NLRB v. Hendricks Company Rural Electric Membership Corporation
80-1103 - Hendricks Company Rural Electric Membership Corporation v. NLRB

MEMORANDUM TO THE CONFERENCE:

At Conference there was a considerable spread on the disposition of the case of the Chief Executive Officer's secretary but a unanimous vote to reverse as to the 18 employees.

My vote was to affirm as to the Secretary. I believe several of those voting to reverse on the Secretary's case seemed to concede that there was no evidence to support the Board's finding that there was no labor nexus as to the Secretary. However, these utterances also seemed to "wobble" a bit.

My further review satisfies me that the Board's finding of no labor nexus as to the Secretary is flatly repudiated by the finding that the "CEO" ran the labor negotiations. For me that called for a rejection by the Court of Appeals of the Board's holding. That the Court of Appeals was "inept" and "inartful" in doing it cannot relieve this Court of the duty to look at the whole record. At least I would remand to make the Board explain the incompatibility of the findings. Alternatively, I would see an adequate basis for the Court of Appeals holding on that single employee.

Even though I agree with 18/19ths of the case I am asking Bill Brennan to assign since both cases can be put in one opinion.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 9, 1981

RE: 80-885 - NLRB v. Hendricks Company Rural Electric Membership Corporation
80-1103 - Hendricks Company Rural Electric Membership Corporation v. NLRB

MEMORANDUM TO THE CONFERENCE:

Byron brought up the possibility of a DIG on 80-1103 and Harry also seemed interested in a DIG.

I am prepared to go that route if four others agree. This is surely a murky record to let stand a Board rule that personal secretaries to "top management" are covered by the Act.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 16, 1981

Re: Nos. 80-885 & 80-1103 - NLRB v. Hendricks County Rural Electric Membership Corp.

Dear Lewis:

I join your opinion concurring in part and dissenting in part.

Regards,

WEB

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 9, 1981

RE: Nos. 80-885 and 1103 N.L.R.B. v. Hendricks Company
Rural Electric Membership Corporation

Dear Chief:

I'll try my hand at opinions for the Court in the above cases.

Sincerely,

Bill

The Chief Justice

cc: The Conference

0$0885B, 11-9-81, drb

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

Justice Brennan

Circulated: NOV 9 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80–885 AND 80–1103

NATIONAL LABOR RELATIONS BOARD, PETITIONER
80–885 *v.*
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER
80–1103 *v.*
NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[November ——, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether an employee who, in the course of his employment, may have access to information considered confidential by his employer is impliedly excluded from the definition of "employee" in § 2(3) of the National Labor Relations Act and denied all protections under the Act.[1]

[1] Section 2(3), 29 U. S. C. § 152(3) provides:

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any in-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 12, 1981

MEMORANDUM TO THE CONFERENCE

RE: Nos. 80-885 and 1103 N.L.R.B. v. Hendricks Co. Rural Electric Membership Corporation

The only change that I plan to make in response to Lewis' concurring and dissenting opinion is the following revision of footnote 19 at page 15:

"It is true that the Conference Committee Report, in stating that the Board had treated confidential employees as "outside the scope of" the Wagner Act, could suggest that Congress failed to discern the Board's actual practice of excluding confidential employees, as defined by the labor-nexus test, from bargaining units, but still affording them the other protections of the Act. See, e.g., Bethlehem Steel Co., 63 N.L.R.B. 1230, 1232 & n. 2 (1945); Colorado Power Co., 13 N.L.R.B. 699, 710 (1939), enforced, 111 F. 2d 539 (CA 10 1940). Whether Congress' use of that phrase indicates that it misperceived the state of the law in this respect is not clear since the Board itself, in several instances, had used a similarly imprecise shorthand description of its practice with respect to confidential employees. See General Motors Corp., 53 N.L.R.B. 1096, 1098 (1943); Armour & Co., 49 N.L.R.B. 688, 690 (1943); Armour & Co., 54 N.L.R.B. 1462, 1465 (1944). Justice Powell, in dissent, relying in part on the conferees' use of the phrase "outside the scope of," criticizes the Board's practice of allowing "labor nexus" employees

some protections under the Act. Because we hold that the Board properly determined that neither the secretary in Hendricks nor the eighteen workers in Malleable were "labor nexus" employees, we have no occasion in this case to decide the propriety of this aspect of the Board's practice. That question will be more properly addressed in a case that presents it.

W.J.B.Jr.

15, 17

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

0$0885B, 13-NOV-81, Drb

Circulated: _____

Recirculated: NOV 14 '81

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80–885 AND 80–1103

NATIONAL LABOR RELATIONS BOARD, PETITIONER

80–885 *v.*

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

80–1103 *v.*

NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[November ——, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether an employee who, in the course of his employment, may have access to information considered confidential by his employer is impliedly excluded from the definition of "employee" in § 2(3) of the National Labor Relations Act and denied all protections under the Act.[1]

[1] Section 2(3), 29 U. S. C. § 152(3) provides:

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any in-

Nonstylistic change: 17

Stylistic changes: 3, 5, 6, 13, 14, 15, 16, 17, 19

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor
Justice Brennan

0$0885B, 17-NOV-81, rev. Drb

Circulated:

Recirculated: NOV 19 1981

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80–885 AND 80–1103

NATIONAL LABOR RELATIONS BOARD, PETITIONER
80–885 *v.*
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER
80–1103 *v.*
NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[November ——, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether an employee who, in the course of his employment, may have access to information considered confidential by his employer is impliedly excluded from the definition of "employee" in § 2(3) of the National Labor Relations Act and denied all protections under the Act.[1]

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[1] Section 2(3), 29 U. S. C. § 152(3) provides:

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 6, 14, 16

0$0885B, rev. 11/23/81 spw

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: NOV 24 '81

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80–885 AND 80–1103

NATIONAL LABOR RELATIONS BOARD, PETITIONER
80–885 *v.*
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER
80–1103 *v.*
NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[November ——, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether an employee who, in the course of his employment, may have access to information considered confidential by his employer is impliedly excluded from the definition of "employee" in § 2(3) of the National Labor Relations Act and denied all protections under the Act.[1]

[1] Section 2(3), 29 U. S. C. § 152(3), provides:
"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any in-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 12, 1981

Re: 80-885 - NLRB v. Hendricks Co. Rural Electric Membership Corp.

80-1103 - Hendricks Co. Rural Electric Corp. v. NLRB

Dear Chief,

No. 80-1103 is the cross-petition by the Hendricks Co-op challenging the Court of Appeals' holding that Mrs. Weatherman, the general manager's secretary, was not the equivalent of a personnel department employee and excludable from the bargaining unit. The cross-petition did not warrant a grant in the first place, and you are right that I could join a dismissal.

But this still leaves No. 885, which is really two cases: one is whether Mrs. Weatherman, the Hendrick's Co-op secretary, is a confidential employee excludable from the unit, and the other involves the eighteen employees of the Malleable Iron Range Company. At this juncture my vote is to reverse the Court of Appeals' holding in this case both with respect to Mrs. Weatherman and the eighteen employees because in my view the exclusion of all employees with access to any kind of confidential information is erroneous. Also, I would not disturb the conclusion of both the Board and the Court of Appeals that Mrs. Weatherman had no access to confidential labor relations information, particularly since that conclusion is not challenged here. For the same reason, this is not a proper case to carve out an exclusion for secretaries to major corporate officers.

Sincerely yours,

Byron

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 10, 1981

Re: 80-885 - NLRB v. Hendricks County Rural Electric Membership Corp.

80-1103 - Hendricks County Rural Electric Membership Corp. v. NLRB

Dear Bill,

Please join me.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 12, 1981

Re: Nos. 80-885 and 80-1103-NLRB v. Hendricks and Hendricks v. NLRB

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 13, 1981

Re: No. 80-885 - NLRB v. Hendricks County Rural Electric Membership Corporation
No. 80-1103 - Hendricks County Rural Electric Corporation v. Hendricks

Dear Chief:

I agree with Byron's comments in his letter of October 12 concerning these cases. I, too, could dismiss the cross-petition, No. 80-1103. This, however, does not dispose of the Weatherman case except as to the "personnel" issue. Weatherman still is involved in No. 80-885. My vote there remains to reverse across the board.

Sincerely,

Harry

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 16, 1981

Re: No. 80-885 - NLRB v. Hendricks County Rural Electric
No. 80-1103 - Hendricks County Rural Electric v. NLRB

Dear Bill:

Please join me.

Sincerely,

Harry

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 14, 1981

80-885 & 80-1103--NLRB v. Hendricks County Rural Electric Membership Corporation

Dear Chief,

I would agree to DIG No. 80-1103, the cross petition in this matter. But I would not DIG in 80-885, rather I would affirm in part and reverse in part.

It seems to me that the CA7 reached the correct result with respect to the confidential secretary. The Taft-Hartley Act, our decision in Bell Aerospace, and the basic framework of the labor laws in this country all suggest that the line between management and labor should be kept distinct. That is the purpose of the "managerial," "supervisorial" and "confidential" employee exclusions from the Act. I have little doubt that confidential secretaries to top management are members of the management team by the nature of their duties, knowledge, and sympathy--whether or not they have a labor nexus.

The labor nexus test may be a useful way to determine who should be treated as a member of management, but it is not the only indication. I think as well that the legislative history of the Taft Hartley Act indicates rather strongly that Congress believed confidential secretaries were excluded from the Act. I would not oppose a remand on the question of whether the particular secretary here was confidential and whether the particular manager was a chief officer. But I do not think that is necessary.

I would reverse the CA7's holding in the Malleable case that all employees privy to nonpublic business information are thereby confidential employees excluded from the Act. The Act's explicit inclusion of professional employees indicates that this is not what Congress intended.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

0$0885G, Wilma 10-24-81

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: NOV 8 1981

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80–885 and 80–1103

NATIONAL LABOR RELATIONS BOARD, PETITIONER
80–885 *v.*
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER
80–1103 *v.*
NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[November ——, 1981]

JUSTICE POWELL, concurring in part and dissenting in part.

I concur in the Court's holding that employees in the possession of proprietary or nonpublic business information are not for that reason excluded from the NLRA as "confidential" employees. By explicitly providing for the inclusion of professional employees, the Act itself indicates that Congress did not intend such a sweeping definition of the confidential employee exclusion. But because the majority's decision "tends to obliterate the line between management and labor,"[1] a line which Congress insisted be observed by enacting the Taft-Hartley Act, I dissent from the conclusion that the confidential secretary in this case[2] is not a confidential employee excluded from the Act.

[1] *Packard Co.* v. *NLRB*, 330 U. S. 485, 494 (1947).

[2] The secretary in this case had worked for four years as the personal secretary to the General Manager, the chief executive officer of the com-

New Part III, pp. 6-8

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Rehnquist

\$0885G, Wilma 10-24-81

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80–885 and 80–1103

NATIONAL LABOR RELATIONS BOARD, PETITIONER
80–885 *v.*
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER
80–1103 *v.*
NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[November ——, 1981]

JUSTICE POWELL, concurring in part and dissenting in part.

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[1] *Packard Co.* v. *NLRB*, 330 U. S. 485, 494 (1947).

[2] The secretary in this case had worked for four years as the personal secretary to the General Manager, the chief executive officer of the com-

stylistic changes
1, 3, 5, 6, 7, 8, 9

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

0$0885G, rev. 11/16/81 spw

From: Justice Powell

Circulated: NOV 16 1981

Recirculated:

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80–885 AND 80–1103

NATIONAL LABOR RELATIONS BOARD, PETITIONER
80–885 *v.*
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER
80–1103 *v.*
NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[November ——, 1981]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, concurring in part and dissenting in part.

I concur in the Court's holding that employees in the possession of proprietary or nonpublic business information are not for that reason excluded from the NLRA as "confidential" employees. By explicitly providing for the inclusion of professional employees, the Act itself indicates that Congress did not intend such a sweeping definition of the confidential employee exclusion. But because the majority's decision "tends to obliterate the line between management and labor,"[1] a line which Congress insisted be observed by enact-

[1] *Packard Co.* v. *NLRB*, 330 U. S. 485, 494 (1947) (Douglas, J., dissenting).

Pg 1, 7, 8

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: NOV 17 1981

0$0885G, rev. 11/17/81 Drb

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80–885 AND 80–1103

NATIONAL LABOR RELATIONS BOARD, PETITIONER
80–885 *v.*
HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER
80–1103 *v.*
NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[November ——, 1981]

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, concurring in part and dissenting in part.

I concur in the Court's holding that employees in the possession of proprietary or nonpublic business information are not for that reason excluded from the NLRA as "confidential" employees. By explicitly providing for the inclusion of professional employees, the Act itself indicates that Congress did not intend such a sweeping definition of the confidential employee exclusion. But because the majority's decision "tends to obliterate the line between management and labor,"[1] a line which Congress insisted be observed by enact-

[1] *Packard Co.* v. *NLRB*, 330 U. S. 485, 494 (1947) (Douglas, J., dissenting).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 14, 1981

MEMORANDUM TO THE CONFERENCE

Re: No. 80-885 NLRB v. Hendricks Co. Rural Electric Membership Corp.
No. 80-1103 Hendricks Co. Rural Electric Membership Corp. v. NLRB

I agree with Sandra's position in this case.

Sincerely,

WHR

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 11, 1981

Re: Nos. 80-885 & 80-1103 NLRB v. Hendricks County Rural Electric Membership Corp.

Dear Lewis:

Please join me in your opinion in this case, concurring in part and dissenting in part.

Sincerely,

wm

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 12, 1981

Re: 80-885 and 80-1103 - NLRB v. Hendricks

Dear Bill:

Please join me.

Respectfully,

JPS

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

October 13, 1981

Re: 80-885 -- NLRB v. Hendricks Co. Rural Electric Membership Corp.
80-1103 - Hendricks Co. Rural Electric Membership Corp. v. NLRB

Dear Chief,

I agree to DIG No. 80-1103, the cross petition claiming Mrs. Weatherman was a personnel department employee. In No. 80-883, I would reverse with respect to both Weatherman and the eighteen Malleable employees. I agree with Byron that we should not disturb the Court of Appeals' finding, unchallenged by Hendricks, that Weatherman had no confidential duties with respect to labor policies. See petn for certiorari at 27a (Court of Appeals opinion) ("We do not believe that the judge erred factually by finding that Weatherman did not assist in a confidential capacity with respect to labor relations policies."); Brief for Hendricks at 43 (Weatherman did not have "confidential duties 'with respect to labor policies'").

I believe our opinion can make clear that most secretaries to chief executive officers will satisfy the labor nexus test. The peculiar facts of this case, however, show that Weatherman's boss did not use her in a confidential capacity on labor relations matters. At most, Weatherman could have gained unauthorized access to labor files kept in her boss's office. Any employee, however, can read confidential documents on the sly. On the facts of this case, as found by the ALJ and consistently upheld below, Weatherman had no greater link to confidential labor policies.

I add one further note on the labor nexus standard. The Board has applied an extremely rigorous standard, excluding employees only if they act in a confidential capacity to persons who "formulate, determine, and effectuate management policies in the field of labor relations." Petn for certiorari at 44a (emphasis added). The ALJ in Hendricks questioned whether these functions should be stated conjunctively. Id. at 45a n.8. I agree with him that an employee with a confidential relationship to a person who merely formulates labor policy satisfies the labor nexus test. I, therefore, would modify the Board's traditional labor nexus test to state the functions disjunctively.

Sincerely,

Sandra

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 9, 1981

No. 80-885 NLRB v. Hendricks Co. Rural Electric Membership Corporation
No. 80-1103 Hendricks County Rural Electric Membership Corporation v. NLRB

Dear Bill,

I will be circulating a separate draft concurring in part and dissenting in part.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 12, 1981

No. 80-885 NLRB v. Hendricks Co. Rural Electric Membership Corporation
No. 80-1103 Hendricks County Rural Electric Membership Corporation v. NLRB

Dear Lewis,

I previously indicated I would write separately in these cases concerning my belief that the labor-nexus test employed by the NLRB is too narrow. After studying your dissent and Bill Brennan's opinion, I have decided to join your dissent and to forego writing separately. I now believe your approach is essentially correct, both because of the Board's pre-1947 cases and the legislative history and because of this Court's opinion in Bell Aerospace.

My joinder may have the effect of turning your dissent into a majority. As a result, I am including a few thoughts which you may wish to consider.

Since the opinion rests in part on Congress' belief that the Board had treated confidential secretaries as allied with management, it might be helpful to cite some pre-1947 cases adopting that course. In E.P. Dutton & Co., 33 N.L.R.B. 761 (1941), cited in your footnote 6, the Board excluded secretaries to officers from a bargaining unit without explicitly invoking a labor-nexus test. Instead, the Board simply explained that union and management are ordinarily adverse and that, since personal secretaries see much "of the confidential material pertaining to the management," those employees should not be included in bargaining units. The Board also referred to the "personal and confidential relationship" between secretaries and officers and noted the undesirabililty of dividing the secretaries' loyalties. 33 N.L.R.B. at 766 & n.8. In Montgomery Ward & Co., 36 N.L.R.B. 69 (1941), also cited in

your footnote 6, the Board also excluded private secretaries of store managers from a bargaining unit without mentioning any labor-nexus. Instead, the Board simply cited E.P. Dutton. While the language in these cases is not overwhelming, perhaps they could be used to suggest that the Board originally excluded confidential secretaries without searching for a labor-nexus. This, in turn, would suggest that Congress correctly perceived Board practice prior to 1947.

At the bottom of page 5, the dissenting opinion refers to secretaries "serving high level members of management." This blurs the line drawn by the opinion, since it suggests that confidential secretaries to lower level managers may enjoy the Act's protection. You may have intentionally left this line vague, but it might be desirable to draw a more definite line -- either by explicitly limiting the rule to high levels of management or by explicitly extending it to all managers' secretaries. I tend to prefer the latter, but I am flexible on this issue.

I am also wondering how your dissenting opinion applies to confidential employees who are not secretaries. At the start, the language parallels the legislative history and carefully refers only to secretaries. The conclusion, however, more broadly refers to "employees." Since the Conference Report refers expressly to secretaries (although the House Report also refers to clerks) and Weatherman was a secretary, the opinion might restrict its language to secretaries. Certainly the Board will have to consider other categories of employees who work for managers, but the Court might avoid prejudging those cases.

Finally, I mention one very minor matter. The language from Goodrich quoted on page 3 appears twice in the Goodrich opinion, once with "and" emphasized and once without the word emphasized. I continue to have doubts about the wisdom of the Board's conjunctive statement, and would prefer to see quoted the unemphasized version. That version appears on page 724 of Goodrich.

Sincerely,

Sandra

Justice Powell

Copies to the Conference