

United States of America  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, D.C.

CROFT METALS, INC. )

Employer )

and )

INTERNATIONAL BROTHERHOOD OF )  
BOILERMAKERS, IRON SHIP BUILDERS, )  
BLACKSMITHS, FORGERS AND HELPERS, )  
AFL-CIO )

Petitioner )

BEVERLY ENTERPRISES-MINNESOTA, INC., )  
D/B/A/ GOLDEN CREST HEALTHCARE CENTER )

Employer )

and )

UNITED STEELWORKERS OF AMERICA, AFL-CIO )

Petitioner )

OAKWOOD HEALTHCARE, INC )

Employer )

and )

INTERNATIONAL UNION, UNITED AUTOMOBILE )  
AEROSPACE AND AGRICULTURAL IMPLEMENT )  
WORKERS OF AMERICA (UAW), AFL-CIO )

Petitioner )

Case 15-RC-8389

Cases 18-RC-16415  
18-RC-16416

Case 7-RC-22141

CROFT'S BRIEF IN RESPONSE TO THE BOARD'S JULY 24, 2003,  
NOTICE AND INVITATION TO FILE BRIEFS

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TO THE HONORABLE MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF IN RESPONSE TO THE BOARD'S JULY 24, 2003,  
NOTICE AND INVITATION TO FILE BRIEFS

NOW COMES EMPLOYER, Croft Metals, Inc., through undersigned counsel,  
and in response to the Notice and Invitation to File Briefs dated July 24, 2003

respectfully responds to the inquiries:

### Introduction

In *NLRB v. Health Care and Retirement Corp*, 511 U. S. 571, 114 S.Ct. 1778 (1994), the Court holds Taft Hartley Act § 2(11), 29 U.S.C. § 152(11), sets forth a 3 part test for determining supervisory status. Employees are statutory supervisors if they (1) possess the authority to engage in any one of the twelve identified supervisory functions; (2) their exercise of the granted authority is not merely routine or clerical in nature, but requires the exercise of independent judgment;" and, (3) the authority held is "in the interest of the employer." *Id.* at 573-4.

In *Health Care*, the Court also rejected the Board's broad limitation upon the "responsibly to direct" provision of §2(11). In *Health Care* the Court rejected the Board's position that because nurses' judgment was exercised incidental to professional or technical judgment, they did not exercise authority or independent judgement "in the interest of the employer." Justice Kennedy noted that the Board's position was "inconsistent with . . . the statutory language" because it "read the responsible direction portion of § 2(11) out of the statute in nurse cases." 511 U.S. at 579-80.

In *NLRB v. Kentucky River Community Care, Inc.*, 532 U. S. 706, 121 S. Ct. 1861 (2001), the Board had again found nurses to lack supervisory authority, reasoning the bar of "independent judgment" is not achieved if the judgement exercised is "ordinary professional or technical judgment in directing less-skilled employees to deliver services."

Justice Scalia's opinion in *Kentucky River* expressly rejects the Board's restrictive interpretation of the requisite "independent judgment" required to render

one who responsibly directs subordinates a supervisor. **Kentucky River** stands for the broad proposition that the Board may not eviscerate the “responsibly to direct” provision of §2(11) by claiming the “independent judgment” exercised while “responsibly directing” subordinates was merely the result of professional or technical training or experience.

Twice the Supreme Court has rebuked the Board’s attempt to place limitations upon the “responsibly to direct” provision. Moreover, Justice Scalia observes in **Kentucky River**, that the Board’s failure to apply an “independent judgement” limitation to any other component of § 2(11) “is particularly troubling” **532 U. S. 716, 121 S. Ct. at 1869**. Justice Scalia, however, acknowledges the tension between § 2(11)’s exclusion of managers and supervisors and § 2(12)’s inclusion of professionals, and, further, openly invites the Board to consider “distinguishing employees who direct the manner of others’ performance of discreet tasks from employees who direct other employees, as 152(11) requires.” **532 U. S. 720, 121 S. Ct. at 1871**.

Croft contends the Supreme Court has rejected any limitation upon the responsibly to direct portion of § 2(11) which is not based upon the Board directly defining “responsible direction.” A categorical exclusion of judgements derived from professional or technical training *or experience* is an improper limitation. It is within these parameters defined by the Supreme Court that we address the specific questions presented by the Board.<sup>1</sup>

#### **I. “Independent Judgment”**

**Kentucky River** rejects the Board’s restrictive interpretation of the

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<sup>1</sup> The headings below are enumerated Roman numerals one to ten. These numbers correspond directly to the 10 questions presented in the Board’s July 24, 2003, Notice and Invitation to File Briefs.

"independent judgment" requirement with one rhetorical question. "What supervisory judgment worth exercising . . . does not rest on "professional or technical skill or experience." **532 U. S. 715, 121 S. Ct. at 1868** (emphasis added). Decisions based upon a "supervisor's professional or technical training or experience" do not cease to be an exercise of independent judgment when the decision "responsibly directs" a subordinate employee's action. In answer to the specific question posed by the Board, the requisite independence of judgement is exercised when the acting employee makes a decision using professional or technical skill or experience possessed by the actor. In contrast, when the decision is "circumscribed by the master's standing orders," it is not based upon the actor's professional or technical skill or experience and therefore not an independent one. **See, e.g. Chevron Shipping Co., 317 NLRB 379, 381 (1995)**. However, when some portion of an employee's authority is free from the constraints of regulation or policy, the judgement exercised is independent. **Mid-America Care Foundation v. NLRB, 148 F.3d 638, 643 (6th Cir. 1998)**.

The concept of the "degree of discretion required for supervisory status" relates to a qualitative as well as a quantitative amount of direction affecting subordinate employees. Moreover, this analysis is equally applicable to all of the 12 indicia of § 2(11). Justice Scalia's citation to **Weyerhaeuser Timber Co., 85 NLRB 1170, 1173 (1949)**, illustrates a low qualitative degree of possessed authority as well as a low quantitative degree of both the exercise of the authority and the independence of the judgement necessary to determine the performance of subordinate employees. In **Weyerhaeuser**, strawboss Johnson was not responsible for the work of his shift, only occasionally prioritized the work, had little opportunity to exercise discretion, and had no authority to make major decisions. Johnson possessed no authority to discipline, hire or discharge, or effectively to recommend a change in status of any of the employees on his shift. The plant superintendent retained all authority for making

major decisions. The Board concluded Johnson was not a supervisor because his efforts were routine and normally guided by a superior. Neither the importance (quality) of the decisions nor the scope (quantity) was of sufficient degree to conclude he exercised independent judgment in directing the work of other employees.

The Croft leadpersons in issue exhibit a far broader qualitative and quantitative exercise of independent judgment. In the first place, the lead persons are directly responsible for the performance of their lines, and have been disciplined for inadequate production on their lines. (R. 46-7, 49, 187-8, 190-91, 235-6, 280-293, Employer Exhibits 2, 4, 6-16) It is precisely because a leadperson is "answerable for the discharge of a duty or obligation" or is accountable for the work product of the employees he directs, that he is found to responsibly direct others. **NLRB v. KDFW-TV, Inc., 790 F.2d 1273, 1278 (5th Cir. 1986).**

Croft leadpersons are entrusted with the job of keeping the productive flow of the line moving, responding to employee requests for assistance, ensuring that materials are available so that production is maintained, responsibility to clear up problems or impediments to production on the line, to issue verbal warnings (R. 244) to report disciplinary problems to supervision or human resources. (R. 18, 28, 33-4, 72, 94-5, 192-5, 226, 245, 280)

The Croft leadpersons are responsible for calling out maintenance to repair machinery on the line. (R. 34). If a person gets ill on the line, the leadperson has the authority to allow the ill employee off the line to go to first aid, and in a serious circumstance, to assist the employee to first aid, without seeking permission to do so. (R. 37, 330-31) Leadpersons have the authority to permit employees to leave work early. (R. 50) Leadpersons also can request additional personnel for their departments, but they can not select the personnel to be "borrowed." However, the leadperson is the one to assign the specific work duties to the borrowed employee.

(R. 214, 325-6)

Croft Leadpersons are responsible for ensuring employee time records are accurate. (R. 218, 245) They verify the hours worked by reviewing the time records of employees working on their lines. (R.186, 219, 302-6, Employer Exhibits 3, 22) Many leadpersons actually verify time records and sign them themselves. (R. 218-9, Employer Exhibits 3, 22)

Croft Leadpersons are responsible for instructing the employees on the line, correcting job performance and solving problems. (R. 38) Employees bring their problems and complaints to Leadperson "A's." (R. 248-9) ***The Atlanta Newspapers, 306 NLRB 751(1992)*** (authority informally to resolve squabbles among employees establishes supervisory status). Another indicator of supervisory authority is whether other employees routinely seek out the individuals alleged to be supervisors for assistance in performing their duties. ***See e.g., N.L.R.B. v. McCullough Environmental Services, Inc., 5 F.3d 923, 942, n. 30 (5th Cir. 1993).***

Undersigned did not participate in the hearings in 18-RC-16415, 18-RC-16416 or 7-RC-22141, but it is evident that to the extent the nurses in issue make decisions affecting other employees based upon "professional or technical skill or experience," those decisions are the exercise of independent judgment. The same is true of the Croft leadpersons, with the exception that none of them is a "professional."

## II. "Assign" and "Direct"

To "assign" and "responsibly to direct" provide different criteria with which to evaluate supervisory status. To assign an employee to a job, a shift, a department, a machine, or a position on a production line, provided such assignment is both "in the interest of the employer" and the result of the actor's "independent judgment," is by itself a sufficient indicia of supervisory authority. This effort is distinguishable from

the assignment of particular task components of a job. An example of the former is the actor assigning an employee as the operator on the widget machine. If this selection is made by the actor based upon his knowledge, expertise or training, including technical or professional training, the supervisory indicia "assign" is met.

An example of the latter is the actor providing instruction, to one already assigned a particular job, as to the manner, quality or sequencing of performance of a particular discreet task of the job. To the extent the performance instructed by the actor is dictated by a foreordained methodology, whether that is the nature of the process, or whether the employer has circumscribed a particular methodology, this type of direction is routine or clerical. However, if the actor must determine by resort to professional or technical training, *or experience*, the course to be taken by the directed employee in addition to directing the performance of the discreet task, the actor is "responsibly directing" the employee as a supervisor.

This is the distinction Justice Scalia derives from ***Providence Hospital, 320 NLRB 717 (1996)***. The term "to assign"

clearly differs from responsible direction in that it refers to the assignment of an employee's hours or shift, the assignment of an employee to a department or other division, or other overall job responsibilities. It would also include calling in an employee or reassigning the employee to a different unit. Whether assignment also includes ordering an employee to perform a specific task is, however, less clear. Indeed at oral argument it was contended that the assignment of a particular task to an employee is not an assignment as contemplated by Section 2(11); rather Section 2(11) contemplates only the assignment of employees.

Thus, routine or clerical assignments are not supervisory; only those requiring the exercise of independent judgment are. Although the test is easily stated, application often depends on a careful analysis of the facts of each case.

**Id. At p. 727.**

### III. "Responsibly to Direct"

Prior to Taft-Hartley, the Board required the presence of additional supervisory indicia before it concluded an employee who engaged in the responsible direction of others was a supervisor. **532 U. S. 718, 121 S. Ct. 1870**. Justice Scalia characterizes Board, post-Taft-Hartley, as engaged in a "running struggle to limit the impact of "responsibly to direct" on the number of employees qualifying for supervisory status." **532 U. S. 719, 121 S. Ct. 1870**.

*Kentucky River* and *Health Care* establish Board limitations on the "responsibly to direct" component can not be created by applying interpretations of the "independent judgment" or the "in the interest of the employer" provisos in ways not applied to the other 11 statutory indicia. But a direct interpretation of the meaning of "responsibly to direct" is within the Board's broad discretion, and is suggested by Justice Scalia.

Direction of discreet tasks alone, may be materially different from directing employees. *Providence Hospital* reaffirms the Board's long held position that to be responsible, the direction must be more than that which is "merely routine or clerical nature." Employer disagrees that this is the proper interpretation. It is evident from the face of § 2(11) the phrase "merely routine or clerical nature" defines the opposite of independent judgment, not the opposite of responsible direction. The quoted language from *Providence Hospital* affirms this view. Thus, the concept of responsible direction is distinct from independent judgment.

"Responsibly" means two things. First, it means accountable. An employee held accountable for the performance of employees he/she directs is responsibly directing them. Second, "responsible" describes the quality of the direction.

Following Justice Scalia's suggestion, we contend it is more fruitful first to examine the *responsibility* for direction of employees. If an actor is held accountable

for the performance of the employees whom the actor directs, then the actor is a supervisor. In the absence of such accountability, the actor may also be a supervisor, provided the actor directs employees and the employees are subservient to the direction provided.<sup>2</sup> On the other hand, merely asking an employee to perform discreet tasks, the need for the performance of which is self-evident, which are routinely performed by the instructed employee and others in the normal course of daily activities during the daily performance of an employees job, does not evidence responsible direction. Croft's load supervisors and leadpersons provide a useful example.

**A. The load supervisors responsibly direct their crews.**

The Croft employees referred to by bargaining unit employees as the load supervisors or truck supervisors are classified as leadperson "A" (R. 118, 138, 140, 249, 262), and are paid \$9.30 per hour. (R. 256). Load supervisors are responsible for the proper loading of the over-the-road trucks, and direct employees in achieving that end. (R. 120, 256, 38-142, 144). If that process is not completed timely, the load supervisor is disciplined. (R. 258-9). Load supervisors make the independent decision as to how properly to load the trucks to ensure accurate and efficient delivery of the product to Employer's customers. (R. 120-21). They also use their experienced based independent judgment to assign tasks to employees on their crews. (R. 263). In both

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<sup>2</sup> One example of this would be the circumstance where the employees believe the actor possesses authority. **Helena Laboratories Corp.**, 225 NLRB 257, 265, 93 LRRM 1418 (1976) (lead lady accorded supervisor status where company held her out to employees as such), *modified*, 557 F.2d 1183, 96 LRRM 2101 (5th Cir. 1977); **Aurora & East Denver Trash Disposal**, 218 NLRB 1, 10, 89 LRRM 1416 (1975) (foreman who claimed he was mere conduit for employer's orders to employees was supervisor where he led other employees to believe he was one); **Gerbes Super Market, Inc.**, 213 NLRB 803, 806, 87 LRRM 1762 (1974) (department manager was supervisor where he was regarded by fellow employees as their "boss" and was considered person in authority); **Broyhill Co.**, 210 NLRB 288, 294, 86 LRRM 1158 (1974) (foreman a supervisor where company placed him in a position such that employees reasonably believed that he spoke on management's behalf), *enfd*, 514 F.2d 655, 89 LRRM 2203 (8th Cir. 1975).

instances the load supervisors are ultimately responsible for the result of the work effort of their crews. If their truck is not loaded properly, the load supervisor is held accountable for the crew's failure, and is subject to discipline for that failure. (R. 253). He/She is responsible for directing employees to achieve a qualitative result.<sup>3</sup> Employer submits this situation presents two types of *responsible* direction, both of which evidence the "responsibly to direct" criteria has been met. First accountability for the crew's performance *alone* is the essence of possession of the authority 'to responsibly direct. Second, the direction provided is not constrained by policy or management directive, rather it is based upon the load supervisor's greater experience.

Determining how to load the truck is not unlike the nurse who exercises discretion and professional judgment in developing a treatment plan. The task of implementing the treatment plan is not unlike the loading of the truck. Thus, as the Second Circuit stated in ***Schnurmacher Nursing Home*, 214 F.3d 260 (2d Cir. 2000)**:

It may be the case that one who makes a judgment about the need for certain actions based on specialized knowledge and experience and exercises no further authority is not a statutory supervisor. But where the responsibility to make such a judgment and to see that others do what is required by that judgment are lodged in one person, that person is a quintessential statutory supervisor.

***Id.* at 268.**

**B. Croft's "A" and "B" leadpersons responsibly direct line employees.**

Working in the Croft plant are "A" and "B" leadpersons who are physically

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<sup>3</sup>In addition, union witness Leo Holmes testified that he counsels with employees concerning work performance. (R. 151) In the substantial three month absence of Mr. Holmes immediate supervisor, he reported directly to Harvey Driver,(R. 147) who is the Croft plant manager (R. 13). Finally, it is clear that the load supervisors are regarded as a supervisor by the employees on their crews. (R. 145-6). ***See cases cited in note 2.***

present in the work area to which they are assigned. (R. 17-8). The leadpersons are not assigned to perform a specific task on a production line. (R. 18-9). During a normal production day leadpersons would perform some manual labor, but they remain responsible for the direction of the line. (R. 37, 72-3).

Employer's Exhibit 5 is a job bid posting describing the responsibilities for a leadperson "A" position which was bid on December 5, 2001. The successful bidder, and current occupant of the position, Ronald Tate, was one of Petitioner's witnesses at the reopened hearing. The job bid posting establishes the rate of pay for the position is \$9.35 per hour.

Management assigns leadperson "A's" the responsibility to "[I]nsure the safe, efficient and cost effective operation of the area assigned." Additionally, the leadperson is responsible for using his/her independent judgment to insure; (1) that employees are assigned to jobs which best suit their abilities, and productivity requirements; (2) that all employees, especially new employees, are trained in the proper methods to perform the job, (3) that all employees understand the quality and cost implications of using improper methods, (4) that he motivates and encourages employees, (5) that he monitors quality of work and uses his independent judgment to use employees according to their ability to ensure optimum productivity and orderly production, (6) compliance with safety rules, the use of proper safety equipment, (7) employees are at their work stations timely, and remain there until the end of the work shift. Employer Exhibit 5. Mr. Tate, after reviewing the Exhibit, testified that he was performing the duties as described in the Exhibit. (R. 242-3).

These same, or similar supervisory duties are exhibited by the job descriptions posted for bidding on other leadperson "A" jobs. *See, e.g.*, Employer Exhibit 21, (vinyl door), and Leadperson "B" jobs also. *See, e.g.*, Employer Exhibits 19 (prime window) and 20 (general plant). The successful bidders on each job are identified on the

second page of each exhibit. They are Oliver Anderson, Otis Thompson, Georgia Butler and Ronald Tate. These 4 individuals are currently employed as leadpersons and their job duties are consistent with those of the other leadpersons in the plant. (R. 298-302). The Employer expects its leadpersons to perform the tasks described in the job bid posting. (R. 269-70). Because these jobs are posted, management has publicly held these individuals out as wielding supervisory authority to non-supervisory employees.

Employer's Plant Personnel Director, Tim Leonard testified leadpersons had effectively recommended employees for hire, and provided several examples. (R. 272-75). Mr. Leonard also related specific incidents where leadpersons had effectively recommended discipline and discharge. (R. 276-8, 280). Leonard also testified about leadpersons participating in the process of evaluating employees. (R. 279). Employer's Exhibit 17, and Leonard's testimony about the Exhibit, establishes leadpersons are directly involved in filling out and signing performance evaluations. (R. 294-7, 309, 312). Leonard also testified that probationary employees have been terminated before they became permanent based upon the recommendation of a leadperson. (R. 310).

The "A" and "B" leadpersons report directly to acknowledged supervisors. The supervisors train the leadpersons. (R. 28) The supervisors rely upon the lead persons to direct responsibly the work of the other employees on the lines, to advise employees on their line how to solve problems. (R. 28, 280) The leadpersons are viewed by the employees on their line as the boss. (R. 48-9,136, 183). When the supervisor is in another area of the plant, the leadperson is the sole authority on the line. (R. 93-4, 280, 326-7) The leadpersons are held responsible for the line production by the supervisors. (R. 46-7, 49, 187-8, 280-1, Employer's Exhibit 2). Leadpersons are responsible for production paperwork. (R. 200, 232). Leadpersons

have been disciplined for the failure of their line to meet production goals. (R. 46, 190-91, 235-6, 280-293, Employer Exhibits 2, 4, 6-16). It is precisely because a leadperson is "answerable for the discharge of a duty or obligation" or is accountable for the work product of the employees he directs, that he is found to responsibly direct others. ***NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986)**

Leadpersons are entrusted with the job of keeping the productive flow of the line moving, responding to employee requests for assistance, ensuring that materials are available so that production is maintained, to clear up problems or impediments to production on the line, to issue verbal warnings (R. 244) to report disciplinary problems to supervision or human resources. (R. 18, 28, 33-4, 72, 94-5, 192-5, 226, 245, 280, Employer Exhibit 3). In one particular instance Petitioner's witness testified he had independently ascertained an employee could not perform a job function. After so doing he sent the employee to human resources, a decision the leadperson made independently, (R. 213, 278), and the employee was terminated, without further investigation based upon the decision of the leadperson. (R. 192-5).

The leadpersons are responsible for calling out maintenance to repair machinery on the line. (R. 34). If a person gets ill on the line, the leadperson has the authority to allow the ill employee off the line to go to first aid, and in a serious circumstance, to assist the employee to first aid, without seeking permission to do so. (R. 37, 330-31) Leadpersons have the authority to permit employees to leave work early. (R. 50). Leadpersons also can request additional personnel for their departments, but they can not select the personnel to be "borrowed." However, the leadperson is the one to assign the specific work duties to the borrowed employee. (R. 214, 325-6).

Leadpersons are responsible for ensuring employee time records are accurate. (R. 218, 245). They verify the hours worked by reviewing the time records of

employees working on their lines. (R.186, 219, 302-6, Employer Exhibits 3, 22). Many leadpersons actually verify time records and sign them themselves. (R. 218-9, Employer Exhibits 3, 22).

Leadpersons are responsible for instructing the employees on the line, correcting job performance and solving problems. (R. 38). Employees bring their problems and complaints to Leadperson "A's." (R. 248-9). One indicator of supervisory authority is whether other employees routinely seek out the individuals alleged to be supervisors for assistance in performing their duties. *See e. g., N.L.R.B. v. McCullough Environmental Services, Inc., 5 F.3d 923, n. 30.*

Leadpersons report misconduct to supervisors. (R. 47, 245). Lead persons effectively recommend discipline because the information relayed by them to acknowledged supervision is not independently investigated. (R. 47-8, 192-5). Lead persons have effectively recommended discipline because they have written warnings which acknowledged supervision has signed, without independently investigating the factual basis for the warning. (R. 72). In the absence of supervision, a common occurrence on the line, leadpersons are authorized to bring, and have brought employees directly to the personnel office. (R. 42-3, 48). In such circumstances the personnel office accepts the information presented by the leadperson without conducting an independent investigation. (R. 42) All of this is authorized and done without requesting permission from acknowledged supervision. (R. 34).

The "A" and "B" leadpersons are responsible for evaluating the performance of probationary employees, and ultimately effectively recommend whether probationary employees are retained. (R. 30-1). Leadpersons also effectively recommend employees for raise, promotion. (R. 39-40) and transfer. (R. 40-1)

The "A" and "B" leadpersons often fill in for acknowledged supervisors (R. 246), and are authorize to, and have issued written warnings when so doing. (R. 43-4).

Additionally, leadpersons effectively recommend discipline because the supervisors rely upon their factual assertions and recommendations. (R. 77) Production control determines what product the lines will produce on a given day. Acknowledged supervision communicates the production control information to the leadpersons. The leadpersons, using their independent judgment concerning worker's capabilities, determine which employees will be assigned to which tasks on the line (R. 45, 184-5). When employees are "borrowed" from another department, to replace absent employees, the leadperson decides where the "borrowed employee will be assigned. (R. 230). This is done without the need of supervisory approval. (Id.). The borrowed employee looks to the leadperson to determine where he/she will be assigned to work. (R. 230-1).

At the reopened hearing, Petitioner's witness, Nolan Carmel acknowledged that his employees look to him as their "boss." (R. 182-3). Carmel acknowledged the employees are supposed to "follow [his] instructions." (R. 183). Carmel admitted he is responsible for determining which job on the line will be worked by which employee. (R. 184). This decision is based upon Carmel's independent judgment as to which employee is best capable of getting the work out. (R. 185).

The Croft load supervisors and leadpersons meet both parts of the test described herein. They are responsible for the performance of their crews and lines and they also responsibly direct employees.

#### **IV. Directing tasks or directing employees.**

As noted in **Section III, supra**, Employer contends the initial inquiry under the "responsibly to direct" component of **Taft Hartley Act § 2(11), 29 U.S.C. § 152(11)**, is whether the actor whose supervisory status is in issue is responsible to management for the quality or quantity of the work performance of the actor's

subordinates. Once this inquiry is answered in the affirmative, no further inquiry is necessary, the actor is responsible to direct the subordinate employees.

However, when the actor is not responsible to management for the quality or quantity of the subordinates work effort additional inquiry is appropriate. Justice Scalia's opinion in *Kentucky River*, 532 U. S. At 720, 121 S. Ct. 1871, invites the Board to "offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees, as §152(11) requires.". If the actor directs a discreet task, but possesses no responsibility from management to ensure the quality or quantity of the performance of the task, the actor may not within the meaning of the responsibly to direct provision of § 2(11), but is not necessarily excluded, for the reasons set forth in **Section III, supra**.

#### **V. Professional employees**

There is tension between Sections 2(11) and 2(12). However, tension does not entitle the Board to "distort[] the statutory language" of Section 2(11) to resolve this tension. *Health Care*, 511 U.S. at 581. The Supreme Court has made clear that "[t]he Act does not distinguish professional employees from other employees for the purposes of the definition of supervisor in § 2(11)" *Id.*; *see also NLRB v. Attelboro Associates Ltd.*, 176 F.3d 154, 168 (3rd Cir. 1999). ("Consequently, it is impossible to comprehend how a nurse's status as a professional employee negates her status as a supervisor.").

A professional exercises discretion and judgment with respect to tasks that he or she performs. A supervisor, on the other hand, exercises independent judgment, in the interest of the employer, with respect to the tasks listed in Section 2(11) and vis-a-vis employees. *Providence Hospital*, 320 NLRB 717, 737 (1996) (Cohen

dissenting). When the professional does the latter also, the professional is a supervisor. Thus, by way of example, the task of devising a treatment plan involves the use of professional judgment. The task of implementing that plan, however, may involve the exercise of supervisory responsibilities vis-a-vis employees who actually carry out the plan. The Act contemplates the exclusion of entire groups of workers when they possess any one of the § 2(11) indicia, and neither professional workers nor leadpersons are any different in this regard.

**VI. Intermittent Supervisory Status.**

**VII. Rotation of job classification into supervising status.**

We address these two questions together. If there is a degree of regularity in the intermittent or rotating possession of supervisory authority, supervisory status should attach to an employee who possesses any of the authority specified in § 2(11). The existence of any one of the statutorily enumerated supervisory indicia suffices to confer supervisory status. *Entergy Gulf States, Inc. v. N.L.R.B.*, 253 F.3d 203, 209 (5th Cir. 2001) (“Because we focus on whether OCs responsibly direct others with independent judgment, it will be unnecessary to consider the extent to which OCs reward or discipline others”); *NLRB v. Attleboro Associates, Ltd.*, 176 F.3d 154, 163 (3rd Cir. 1999). See, e.g., *NLRB v. Island Film Processing Co.*, 784 F.2d 1446, 1451 (9th Cir. 1986). Without the recurring possession of 2(11) authority, an individual who, in the past exercised such authority, should be deemed divested of supervisory status. The individual in this instance has ceased to be a supervisor, and has no present expectancy of future possession of supervisory authority.

Both posed questions seem directed towards employees who regularly supervise, but not all days or hours of the term of their employment. The basis for

which Congress passed the broad supervisory exclusion [2(11)] is not extinguished because they do not have supervisory authority every work day. Thus, for all purposes under the Act, those who possess supervisory authority, but only on a part time basis, are supervisors as long as they possess a continuing expectancy of possession of that authority. This result is required by the statutory text, as well as Congress' clear intent. "[N]o employer [covered by the Act] shall be compelled to deem individuals defined herein as supervisors as employees for purposes of any law, either national or local, relating to collective bargaining." **Taft-Hartley Act § 14(a) as amended, 29 U.S.C. § 164(a).**

From a policy perspective this approach ensures management can compel loyalty from those it holds accountable for the operation and productivity of their subordinate employees. On the other hand, this approach ensures management will be accountable for the conduct of such individuals if their actions violate § 8(a).

#### **VIII. Ceded autonomy and self-regulating work teams.**

The Board has broad authority to effectuate policy and courts will defer to Board imposed requirements if they are rational and consistent with the Act. **Allentown Mack Sales & Service, Inc. v. NLRB, 522 U. S. 359, 364, 114 S. Ct 818, 822 (1998).** It is within the Board's discretion, within reason, to examine workplace changes, including "recent developments in management" to aid in its interpretation of the Act. However, the clear message of **Health Care** and **Kentucky River** is that the Board may not make determinations "inconsistent with . . . the statutory language."

Greater rank and file autonomy and self regulating work teams may, or may not affect the statutory definition of a supervisor. But if there is effect to be given, it should be in the interpretation of the "responsibly to direct" indicia, and not to the

"independent judgment" or "interest of the employer" parts of the test, particularly in nurse cases. We also adopt the Employer's Argument in Case Number 7-RC-22141, that modern medical practice increasingly uses nurses responsibly to direct employees providing medical care in healthcare facilities.

#### **IX. "Minor Supervisory Employees"**

The legislative history of the Taft-Hartley Act also gives broad meaning to the term "responsibly to direct." When an employer holds a leadperson accountable for the employees he/she leads, the leadperson is not a minor supervisory employee. In the absence of accountability, a leadperson is a supervisor when the direction provided employees is not constrained by policy or management directive, rather it is based upon the lead person's greater experience. This interpretation squares with the intent behind the Flanders amendment.

Following the adoption of Senate Report No. 105, Senator Flanders successfully proposed an amendment which added Section 2(11)'s "responsibly to direct" language. Senator Flanders' comments on the proposed language illustrate the reasons behind the amendment,

Many of the activities described in paragraph (11) are now the province of the personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, make the actual decision to discipline or discharge, or to perform the other delineated acts described in § 2(11), often following the recommended action of the supervisor.

In some companies the supervisor might be deprived of authority for most of the functions enumerated [in Section 2(11)] and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. She/he is charged with the responsible direction of the department and the workers

under him/her. She/he determines under general orders what job shall be undertaken next and who shall do it. She/he gives instructions for proper performance. If needed, she/he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned. And particularly, as at Croft, where they are ultimately held accountable for the performance of their lines, such leadpersons are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees. ..." Their essential managerial duties are best defined by the words "direct responsibly . . . ." In a large measure, the success or failure of a manufacturing business depends on the judgment and initiative of these individuals. The top management may properly be judged by its success or failure in picking them out and in backing them up when they have been properly selected. **93 Cong. Rec. 4804 (daily ed. May 7, 1947) (statement of Sen. Flanders).**

Senator Flanders thus offered his amendment because, without it, Section 2(11)'s definition of supervisor "cover[ed] adequately everything except the basic act of supervising"-- providing responsible direction to other employees, using "personal judgment based on personal experience, training, and ability." Senator Flanders indicated the reasons that those who provide responsible direction based upon "personal experience, training, and ability" are rightly considered supervisors under Section 2(11).

The reasons are simple and direct. Unless the employer can hire and discharge, promote, demote, and transfer these men, he has lost control of his business. He cannot run it effectively. If he cannot run it effectively and efficiently, he cannot continue in business profitably. If he cannot operate profitably, he is a bad manager, not only from the stockholders' standpoint, but also from that of the working force as well. Only a profitable business can furnish sustained employment at good wages. At this point the interests of stockholders and employees are identical.

***Id.***

Croft relies upon the lead persons to direct responsibly the work of the other employees on the lines, to advise employees on their line how to solve problems. (R. 28, 280) The leadpersons are viewed by the employees on their line as the boss. (R. 48-9,136, 183). When the supervisor is in another area of the plant, the leadperson is the sole authority on the line. (R. 93-4, 280, 326-7) The leadpersons are held responsible for the line production by the supervisors. (R. 46-7, 49, 187-8, 280-1, Employer's Exhibit 2). Leadpersons are responsible for production paperwork. (R. 200, 232). Leadpersons have been disciplined for the failure of their line to meet production goals. (R. 46, 190-91, 235-6, 280-293, Employer Exhibits 2, 4, 6-16). It is precisely because a leadperson is "answerable for the discharge of a duty or obligation" or is accountable for the work product of the employees he directs, that he is found to responsibly direct others. **NLRB v. KDFW-TV, Inc., 790 F.2d 1273, 1278 (5th Cir. 1986)**. This function or authority distinguishes the Croft leadpersons from the class of persons Congress intended to include within the Act's protection.

#### **X. Secondary Indicia**

The Fifth Circuit has noted it is appropriate to consider "secondary indicia" in determining whether one is a supervisor. **Monotech of Miss. v. NLRB, 876 F.2d 514, 517 (5th Cir. 1989)** (applying secondary indicia to find that lead hands at a production and maintenance facility were supervisors). **See II C. MORRIS, THE DEVELOPING LABOR LAW at 1454 (2d ed. 1983)**. The Board has held secondary indicia alone will not confer supervisory status under the Act. To do that, there must be evidence of one or more of the primary indicia. **Adco Electric, 307 NLRB 1113 fn. 1, 1120 (1992)**

Secondary indicia should be demonstrably probative of one or more primary indicia. For example, the ratio of alleged supervisors to unit employees is probative of

whether responsible direction is provided by an employee whose supervisory status is in dispute. If there are no acknowledge supervisors present in the work area for substantial periods of time, (R. 32-3). it tends to prove the alleged supervisor present in the area is responsibly directing subordinate employees. This is particularly true at Croft where they are paid significantly more than rank and file employees and are held accountable for the productivity of the line. **Compare** Exhibit 5 (Croft leadperson "A" makes \$9.35 per hour) **with** Exhibit 1, (collective bargaining agreement establishing significantly lower wage rates for rank and file). Thus, the two secondary indicia (more pay /nobody else responsible in area) in reality are factual support for the conclusion the primary indicia "responsibly to direct" exists.

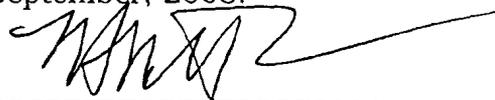
When the additional pay is as much as a 46% differential, and the alleged supervisor admits the pay differential was paid because leadpersons were responsible for "getting the stuff out" [productivity], and for letting his crew "know what to do." (R. 182-3) a compelling case is made the actor is responsibly directing subordinates.

One secondary factor already recognized by the Board is whether the person is perceived as a supervisor. **Helena Laboratories Corp., 225 NLRB 257, 265, 93 LRRM 1418 (1976)** (lead lady accorded supervisor status where company held her out to employees as such), **modified, 557 F.2d 1183, 96 LRRM 2101 (5th Cir. 1977); Aurora & East Denver Trash Disposal, 218 NLRB 1, 10, 89 LRRM 1416 (1975)** (foreman who claimed he was mere conduit for employer's orders to employees was supervisor where he led other employees to believe he was one); **Gerbes Super Market, Inc., 213 NLRB 803, 806, 87 LRRM 1762 (1974)** (department manager was supervisor where he was regarded by fellow employees as their "boss" and was considered person in authority); **Broyhill Co., 210 NLRB 288, 294, 86 LRRM 1158 (1974)** (foreman a supervisor where company placed him in a position such that employees reasonably believed that he spoke on management's behalf), **enfd., 514**

**F.2d 655, 89 LRRM 2203 (8th Cir. 1975).**

The amount of time spent by an alleged supervisor performing unit work may also be helpful, but it cannot trump the existence of a statutory indicia. Moreover, verbal instructions which responsibly direct employees may be given in many work settings, while at the same time the instructing supervisor is performing unit work. Without belaboring the numerous types of secondary indicia the Board properly should consider, Croft suggests secondary indicia are particularly probative of the degree of responsible direction provided by the actors alleged to be supervisors in all three proceedings.

Respectfully submitted this 18th day of September, 2003.



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing Brief has been served upon Petitioner by facsimile transmission 1-615-368-7792, and upon the Acting Regional Director, Region 15 by United States Mail, postage pre-paid, this 18th day of September 2003, as well as the below indicated counsel and parties by fax.



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