

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

OAKWOOD HEALTHCARE, INC.,
Employer

and

Case 7-RC-22141

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

BEVERLY ENTERPRISES-MINNESOTA, INC.,
d/b/a GOLDEN CREST HEALTHCARE CENTER,
Employer

and

Cases 18-RC-16415
18-RC-16416

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC,
Petitioner

CROFT METALS, INC.,
Employer

and

Case 15-RC-8393

INTERNATIONAL BROTHERHOOD
OF BOILERMAKERS, IRON SHIP
BUILERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO,
Petitioner

**GOLDEN CREST'S BRIEF IN RESPONSE TO THE BOARD'S
NOTICE AND INVITATION TO FILE BRIEFS**

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I. BACKGROUND

On January 27, 1999, the United Steelworkers of America ("the Union") filed two representation petitions with the Eighteenth Region, seeking to represent two bargaining units of employees represented by Beverly Enterprises – Minnesota, Inc. d/b/a Golden Crest Healthcare Center ("Golden Crest" or "the Employer") – one bargaining unit consisting of RNs (18-RC-16415) and one consisting of LPNs (18-RC-16416).

After the investigating NLRB Agent conducted a pre-election hearing, the Regional Director rejected the Employer's contention that the RNs and LPNs are statutory supervisors. It was the Regional Director's conclusion in this regard (and the outcome of the resulting Sonotone election) that spawned the 4½ years of legal proceedings leading up to the filing of the instant brief. (For a complete description of the procedural history, *see* the Employer's Second Request for Review.) After bouncing back and forth between the Eight Circuit Court of Appeals, the Board, and the Regional Director, the matter involving Golden Crest has landed before the Board once more, this time on the Employer's Second Request for Review.¹

II. FACTS

The evidence contained in the record relating to the nurses' authority to responsibly direct employees can be neatly summarized. The record demonstrates that the RN charge nurses possess and exercise the authority to:

¹ It is important to note that the Employer's Second Request for Review only addresses whether the RNs and LPNs are statutory supervisors by virtue of their authority to "assign" and "responsibly direct" other employees, since these are the only issues that were encompassed by the Board's April 24, 2002 remand to the Regional Director, and his resulting August 20, 2002 Supplemental Decision. In the event that this case winds its way back up to the Eighth Circuit Court of Appeals, the Employer will continue to argue that the RNs and LPNs are statutory supervisors on the basis of other factors in addition to their authority to assign and responsibly direct employees.

- Redistribute work on the second floor, including making patient assignments or changes to the assignments. (Tr. 67).²
- Reassign an employee from the first floor to the second floor. (Tr. 67-68).
- Assign a CNA to perform a particular task based on the CNA's skill level. (Tr. 67-68).
- Independently instruct staff to leave early or stay late, depending on the workload. (Tr. 69).
- Mandate overtime or shortened shifts. (Tr. 69-70, 73).
- Approve a slip requesting an edit or revision of a CNA's computerized time clock entry. (Tr. 76-77).
- Act as the top authority in the facility on evenings and weekends. (Tr. 51-52, 181-182).

The LPNs-at-issue possess and exercise the authority to:

- Direct the work of CNAs on the first floor, which includes their work related to patient care and personal conduct. (Tr. 409-410).
- Reassign or move CNAs from section to section, as deemed necessary, which includes assigning patient cares to a CNA or redistributing work. (Tr. 410-411).
- Lengthen or shorten the shifts of CNAs. (Tr. 411).
- Mandate that employees come to work, using the call-in list by seniority. (Er. Ex. 61; Tr. 413-414).

III. ANALYSIS

A. Introduction

Section 2(11) of the Act defines the term "supervisor" to mean:

[A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, **assign**, reward, or discipline other employees, or **responsibly to direct them**, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority **is not of a merely routine or clerical nature, but requires the use of independent judgment.** [emphasis added]

There is a three part test for determining supervisory status. Employees are supervisors if: (1) they hold the authority to engage in any one of the twelve listed supervisory functions, (2)

² Citations to Tr. followed by a page number are to the transcript from the pre-election hearing.

their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.” NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 712-713, 121 S.Ct. 1861, 1867 (2001) (*citing* NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574, 114 S.Ct. 1778, 1780 (1994)).

Section 2(11) was added to the Act in 1947 as part of the Taft-Hartley Amendments. Kentucky River, 121 S.Ct. at 1870-1871. The term “assign” apparently appeared in the initial drafts of the definition of “supervisor.” The term “responsibly to direct,” however, was added at the 11th hour as the result of a proposed amendment made by Senator Flanders. Providence Hospital, 320 NLRB 717, 727 (1996).

Notwithstanding the obvious fact that Congress intended for the term “responsibly to direct” to have a different meaning from “assign,” it appears that many Board and court decisions have simply conflated the two terms. This confusion was most likely engendered by the Board’s own reluctance to analyze and define the scope of the term “responsibly to direct.” In Providence Hospital, the Board announced that “it [wa]s preferable not to develop a full analysis of the term ‘responsibly to direct’ in the abstract.” 320 NLRB at 729. Instead, the Board would follow its “traditional method of analysis:”

Historically, however, the Board has not continued in subsequent cases [after 1948] to define the meaning of this statutory indicium. Instead, the Board generally has treated “responsibly to direct” in conjunction with Section 2(11)’s qualifying language that the exercise of any statutory indicia “is not of a merely routine or clerical nature, but requires the use of independent judgment.”

Id. at 728. Thus, rather than define what it means for a nurse to exercise authority to “responsibly direct” other employees, the Board embarked upon the path that led to Kentucky River. In that case, the Supreme Court rejected the Board’s methodology of concluding that

nurses are not supervisors on the basis that they do not use “independent judgment” when exercising “ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.” 121 S.Ct. at 1867.

As the result of Kentucky River, the Board can no longer skip over the meaning of “responsibly to direct” and carve-out nurses from supervisory status on the basis that they do not exercise the *right kind* of independent judgment. The Board must now adequately define “assign” and “responsibly to direct,” and proceed to analyze the degree of independent judgment exercised by nurses when acting within those definitions.

B. The supposed “tension” between “supervisor” and “professional employee”

Before describing what the term “assign” means, and comparing that with the term “responsibly to direct,” the oft cited “tension” between the §2(11) exclusion of “supervisor” and the §2(12) inclusion of “professional employee” warrants discussion. In Kentucky River, the Board noted that “professional employees,” by definition, engage in work “involving the consistent exercise of discretion and judgment,” and argued that, if this sort of judgment makes someone a supervisor, “then Congress’s intent to include professionals in the Act will be frustrated, because ‘many professional employees (such as lawyers, doctors, and nurses) customarily give judgment-based direction to the less-skilled employees with whom they work.’” 121 S.Ct. at 1871 (quoting from the Board’s brief)). Granted, not every “professional employee” who gives any type of assignment or direction to an employee is a “supervisor.” At the same time, there is no justification for the Board to set the standard for supervisory status so high that it results in a categorical exclusion of a certain category of professionals (*e.g.*, nurses). In order to avoid either extreme, the Board must recognize that there is a difference between §2(11) “independent judgment” and §2(13) “discretion and judgment.”

Former Board Member Cohen, in his dissent in Providence Hospital, cogently explained the distinction:

My colleagues also suggest that there is some tension between the Section 2(11) exclusion of "supervisors" from the protection of the Act, and the Section 2(12) inclusion of "professionals" as protected by the Act. They recognize, of course, the familiar rule that each and every section of the Act is to be given effect, and the corollary rule that the Act is to be construed so as to avoid conflicts between sections thereof. Applying these principles, this alleged tension between Section 2(11) and (12) is easily avoided. Concededly, the phrase "independent judgment" in Section 2(11) of the Act is roughly mirrored by the phrase "discretion and judgment" in Section 2(12) of the Act. But, the difference between the two is substantial and real. The supervisor exercises independent judgment with respect to the function listed in Section 2(11), and he or she does so vis-a-vis employees. By contrast, the professional exercises discretion and judgment with respect to the task that he or she performs.

Thus, for example, the task of devising a patient treatment plan involves the use of professional judgment. The nurse who devises that plan is a professional employee. But, the nurse who then administers that plan may have to exercise supervisory responsibilities vis-a-vis employees. For example, the nurse must decide which of the various tasks (outlined in the plan) must be done first, and the nurse must then select someone to perform that task. In the words of Senator Flanders, the nurse must decide "what job will be undertaken next and who shall do it." In addition, the nurse must take steps to assure that the task is performed correctly. In the words of Senator Flanders, the nurse gives "instructions of its proper performance, and training in the performance of unfamiliar tasks."

320 NLRB at 736-737 (footnotes omitted). Thus, for Member Cohen, *professional judgment* entails the employee's use of his/her professional knowledge, skill, and experience (*i.e.*, "discretion and judgment") with respect to the *task* that s/he is charged to perform. *Independent judgment*, on the other hand, entails the individual's *assignment and direction of employees* in order to accomplish that task. Member Cohen's analysis is sound; the supposed "tension" between §2(11) and §2(12) is illusory. Applied properly, Member Cohen's distinction can guide the Board's attempt to strike the appropriate balance between excluding too few and too many professional employees as supervisors.

C. The meaning of "assign" and "responsibly to direct"

Accepting that supervisory independent judgment is distinguishable from professional discretion and judgment, the next step is to define and compare "responsibly to direct" and

“assign.” The analysis must start with a statement made by Senator Flanders shortly before the Senate bill was passed, as it sheds a great deal of light on the difference between the two terms:

[T]he definition of “supervisor” in this act seems to me to cover adequately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department.

NLRB, Legislative History of the Labor Management Relations Act of 1947, at 1303. Thus, at the outset, the legislative history suggests that the term “responsibly to direct” refers to the day-to-day supervision of employees, whereas the term “assign” refers to broader activities performed by human resources departments.

Under Senator Flanders’ interpretation, an employer “assigns” an employee by placing him/her into a specific job classification, by establishing the employee’s job duties in that job classification (*i.e.*, creating the job description), by assigning the employee to a particular department or location, and by setting the employee’s general hours of employment (*e.g.*, first versus second shift).

These “assignment” activities must be, according to Senator Flanders, distinguished from “the basic act of supervising” that constitutes “responsibly to direct.” Legislative History at 1303. Before the bill was passed, Senator Flanders described “responsibly to direct” as follows:

[U]nder some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned. [¶] Such men are above the grade of “straw bosses, lead men, set-up men, and other minor supervisory employees” as enumerated in the [Senate] report. The essential managerial duties are best defined by the words “direct responsibly,” which I am suggesting. [Id.]

This description further confirms that the term “responsibly to direct” is meant to encompass day-to-day supervisory activities.

In Golden Crest’s view, a nurse “directs” another employee (the “responsibly” portion is discussed below) any time that s/he instructs the employee or has control over (1) *what* tasks the employee is to perform, (2) *when* the employee is to work, or (3) *where* the employee is to work. The following table lists several examples of a nurse’s instruction or control that amounts to “directing” another employee:

<i>What</i>	Assigning an employee to care for a particular patient. Assigning an employee to perform a particular task.
<i>When</i>	Instructing an employee to leave early or stay late. Adjusting an employee’s break schedule. Independently requesting that an employee come into work on his/her day off. Allowing an employee to take off on a day when the employee is scheduled to work.
<i>Where</i>	Assigning an employee to work on a specific unit or floor. Moving an employee from one unit to another on an as-needed basis.

In addition, a nurse is certainly engaged in “direction” when s/he is acting as the highest ranking authority in the building.

All of these examples of “direction” reflect activities that involve the “basic act of supervising,” rather than activities performed by a “personnel manager or department.” Legislative History at 1303. All of these examples also reflect the idea that an individual performs direction by “determin[ing] under general orders what job shall be undertaken next and who shall do it.” Id.

The individual’s authority to direct employees to *perform particular tasks* (the *what*) warrants additional discussion, in light of the following statement made by the Supreme Court in Kentucky River:

Perhaps the Board could 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 [§2(11)] requires.

121 S.Ct. at 1871 (*italics in original*). The key word in the Court's dicta, notwithstanding its lack of emphasis, is "manner." The Court opines that the Board could distinguish between the act of directing the "manner" of others' performance of discrete tasks versus the act of directing other employees. The "manner" of performing a discrete task is a reference to *how* that task should be completed. Thus, the Court suggests that the Board could find that it does not constitute supervisory "direction" for a more-skilled employee to show a less-skilled employee *how* a particular task should be performed.

Surely the Board can, as the Court suggests, determine, on a case-by-case basis, that an employee is not a supervisor merely because s/he shows less-skilled employees how to perform a particular task. Nevertheless, it would be improper for the Board to *categorically* determine that showing employees how to perform their work *never* evinces authority to direct. Accepting the notion that "responsibly to direct" refers to day-to-day supervision, it would seem that an individual who *formally trains* an employee is engaged in "direction." This interpretation is supported by the remarks of Senator Flanders, who stated that "responsibly to direct" includes "giv[ing] training in the performance of unfamiliar tasks to the worker to whom they are assigned." Legislative History at 1303. This is not to suggest that an individual's responsibility for providing formal training will, all by itself, suffice to make him/her a supervisor. However, providing formal training is another factor that should be considered as part of "direction," along with the individual's authority to direct *what* tasks the employee is to perform, *when* the employee is to work, and *where* the employee is to work. (The need to consider all of these factors *together* is discussed in more detail below.)

In any event, the Supreme Court stated that the Board could distinguish between directing the *manner* of performing a task and directing other employees. The Court did *not* state that the Board could distinguish between *directing an employee to perform a particular task* and directing other employees. Nor could it have made such a statement, since instructing an employee to perform a particular task clearly constitutes one element of “direction.” True, an individual is not necessarily a “supervisor” just because s/he assigns specific tasks to other employees. But certainly the fact that an individual instructs other employees to perform specific tasks is *relevant* to the issue of whether or not s/he is a supervisor. Ultimately, whether an individual possesses *supervisory* authority to direct depends upon all of the circumstances, including the type and frequency of task direction. For example, if an individual directs all or nearly all of the particular tasks performed by a given employee, this factor would strongly support a conclusion that the individual exercises sufficient authority to direct to qualify as a supervisor. On the other hand, if an individual assigns employees to perform particular tasks only rarely and sporadically, this factor would probably do little, if anything, to support a conclusion that s/he meets the statutory threshold for exercising authority to direct employees. In other words, whether an individual possesses *supervisory* authority to direct employees depends on the circumstances surrounding the assignment of other employees to perform particular tasks (including the frequency and nature of such task assignments), along with the other activities of direction.

D. What it means to “*responsibly* direct” other employees

The statutory indicium “direct” is the only criterion preceded by the word “responsibly.” Presumably, the inclusion of this prefix is meant to add something to the term “direct” that is not part of the analysis for the other indicia of supervisory status. Unfortunately, the Board has, for

the most part, declined to examine the scope of “*responsibly to direct*,” and it appears to have never examined this uniqueness. The courts of appeals, however, have taken this initiative on several occasions. In Ohio Power Co. v. NLRB, 176 F.2d 385, 387, 24 LRRM 2350, 2352 (6th Cir. 1949), the court stated that “[t]o be responsible is to be answerable for the discharge of a duty or obligation.” In NLRB v. Fullerton Publishing Co., 283 F.2d 545, 550, 47 LRRM 2061, 2063 (9th Cir. 1960), the court added to this definition by stating that the analysis should look at whether the individual is “held answerable for the performance of” the employees. *See also*, Northeast Utilities Service Corp., 35 F.3d 621, 147 LRRM 1361 (1st Cir. 1994), *and cases cited in Providence Hospital*, 320 NLRB at 728 fn.27.

The theme running through all of these cases is that the individual must be “answerable” or “accountable” in order to conclude that s/he has the authority to “responsibly direct.” *If the individual has responsibility or accountability for matters relating to or affecting the day-to-day working conditions of other employees, then it should be concluded that s/he exercises the authority to responsibly direct other employees.*³

The best way to measure an individual’s responsibility or accountability is to take all of the ways in which s/he engages in “direction” and consider them together. It stands to reason that, the more factors of responsibility an individual has for “directing” other employees, the more s/he affects their day-to-day working conditions, and the more accountability she has with the employer. Thus, on case-by-case basis, the Board should take a look at the quantity and quality of an individual’s responsibility for “directing” other employees. If the individual’s

³ It would seemingly be rare for an employer to directly reward or punish a supervisor on the basis of the performance of his/her subordinates. Thus, it would be improper for the Board to hold that an individual does not “responsibly direct” other employees unless s/he is individually punished when they perform their jobs inadequately, or individually rewarded when they perform better than expected.

combined activities of “directing” other employees meets the threshold established by the Board, then s/he possesses the authority to “*responsibly* direct” the employees.

It is not necessary for Golden Crest to articulate the precise benchmark that the Board should use for determining whether an individual’s combined activities of “directing” would suffice to make him/her a “responsible” supervisor. It is enough to point out that, whatever *reasonable* threshold the Board establishes, it must be concluded that Golden Crest’s nurses exercise the authority to “responsibly direct” other employees. With respect to this point, it bears repeating that the Golden Crest nurses are responsible for (1) assigning nursing assistants to perform particular tasks and care for specific patients (*what*), (2) determining whether patient care needs dictate that certain employees are required to stay late or permitted to leave early, or that one or more additional employees are needed and should report for work (*when*), and (3) reassigning employees from one floor/section to another (*where*). In addition, the RN charge nurses act as the top authority in the facility on the evenings and weekends. In the instant case, the Golden Crest nurses have been given a great deal of responsibility over other employees. It would be inconceivable to conclude that the nurses exercise all of these responsibilities impacting the day-to-day working conditions of other employees, but yet do not “*responsibly* direct” them.

E. Independent judgment

Of course, under the three-prong test for supervisory status, nurses are supervisors only if their “exercise of [] authority [to assign or responsibly direct] is not of a merely routine or clerical nature, but requires the use of independent judgment.” In connection with this criterion, the Court in Kentucky River wrote:

It falls clearly within the Board’s discretion to determine, within reason, what scope of discretion applies. . . . [I]t is also undoubtedly true that the degree of

judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.

121 S.Ct. at 1867.

Of course, the Board does not have the unfettered discretion to set the “*degree of discretion required for supervisory status*” or the “*scope of discretion [that] qualifies.*” Id. As the Supreme Court specifically pointed out, the Board has this discretion only “*within reason.*” Id.

The Board’s history with respect to determining supervisory status for nurses demonstrates that the Board must be very cautious when establishing the degree or scope of discretion that is required to meet the threshold, and when applying that standard. In NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 114 S.Ct. 1778 (1994), the Board argued that nurses do not qualify for supervisory status on the theory that, when directing other employees, they act in the interest of their patients, and not “in the interest of the employer” (as required by the third prong of the supervisory analysis). 114 S.Ct. at 1780-1781. The Court rejected the Board’s interpretation, stating that it created a “false dichotomy” which “makes no sense,” finding that it “read[] the responsible direction portion of § 2(11) out of the statute in nurse cases,” and concluding that there was “no basis for the Board’s blanket assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer.” Id. at 1782-1783.

The Board responded to Health Care by issuing its decision in Providence Hospital. In that case, the Board adopted the view that nurses did not use “independent judgment” (as required by the second prong) when exercising ordinary professional or technical judgment in directing less-skilled employees. 320 NLRB at 729, 733. In other words, nurses were

categorically excluded from supervisory status because they did not exercise the right *kind* of judgment when directing other employees. Of course, this is the standard that was rejected in Kentucky River.

In Kentucky River, the Supreme Court recognized that the Board's interpretation of "independent judgment" was an attempt to get around the result of Health Care:

It is impossible to avoid the conclusion that the Board's interpretation of "independent judgment," applied to nurses for the first time after our decision in Health Care, has precisely the same object. This interpretation of "independent judgment" is no less strained than the interpretation of "in the interest of the employer" that it has succeeded.

121 S.Ct. at 1869. Other courts were even more to the point, openly criticizing the Board for this attempt. *See, e.g.,* Glenmark Associates, Inc. v. NLRB, 147 F.3d 333, 339 fn.8 (4th Cir. 1998).

In fact, "[m]any courts have expressed an unwillingness to defer to the Board's interpretation of Sec. 2(11), finding that the Agency's 'manipulation of the definition of supervisor has reduced the deference that otherwise would be accorded its holdings.'" Mississippi Power & Light Co., 328 NLRB 965, 981 fn.28 (1999) (Hurtgen and Brame, dissenting) (*citing* NLRB v. Attleboro Associates, Ltd., 176 F.3d 154, 160-161 (3rd Cir. 1999), *and other cases*). The point of this is simply that the courts of appeals and the Supreme Court will no doubt be keeping their eyes on how the Board interprets and applies "independent judgment" going forward. Thus, while the Board may have the discretion to determine the degree or scope of independent judgment required for supervisory status, the courts will not hesitate to invalidate any attempt to set the bar too high.

As explained in the Employer's Second Request for Review, *prior to* the Court's decision in Kentucky River, several courts of appeals reached the same conclusion that was ultimately adopted by the Court – *i.e.*, that the Board had been improperly interpreting "independent

judgment” to categorically exclude nurses from supervisory status. Golden Crest will not repeat the lengthy discussion of those cases here. Suffice it to say that, in those cases where courts had applied a standard of “independent judgment” consistent with Kentucky River, they concluded, under facts very similar to the instant matter, that the nurses exercised independent judgment and were statutory supervisors. *See, e.g., Kentucky River Community Care, Inc. v. NLRB*, 193 F.3d 444, 162 LRRM 2449 (6th Cir. 1999); NLRB v. Attleboro Associates, Ltd., 176 F.3d 154, 161 LRRM 2139 (3rd Cir. 1999); Glenmark Assoc. Inc. v. NLRB, 147 F.3d 333, 158 LRRM 2582 (4th Cir. 1998); Grancare Inc. v. NLRB, 137 F.3d 372, 157 LRRM 2513 (6th Cir. 1998); Beverly Enterprises, Virginia, Inc. [Carter Hall Nursing Home] v. NLRB, 165 F.3d 290, 160 LRRM 2217 (4th Cir. 1999). More specifically, these cases establish that nurses exercise independent judgment when they serve as the highest ranking person in the facility, when they decide whether or not to seek additional employees in the event of a staffing shortage, when they make schedule changes such as shifting employees’ break times or allowing employees to go home early; when they move employees from one floor/unit to another on an as-needed basis; and when they take into account the skill and experience level of employees and assign employees to particular tasks or certain patients on that basis. These are they very activities performed by the nurses in this case, mandating a conclusion that the Employer’s nurses are statutory supervisors.

In his Supplemental Decision, the Regional Director, relying upon Kentucky River, held that “the judgments of the charge nurses are so circumscribed by existing policies, orders and regulations of the Employer that they do not exercise independent judgment within the meaning of Section 2(11).” (*See* August 20, 2002 Supplemental Decision at p. 4). There are several problems with the Regional Director’s broad proclamation. First, although Kentucky River does state that “the degree of judgment that might ordinarily be required to conduct a particular task

may be reduced below the statutory threshold by detailed orders and regulations issued by the employer,” 121 S.Ct. 1861, this statement does not give the Regional Director (or the Board) carte blanche to simply declare (without analysis or factual support) that the individuals do not exercise independent judgment on the basis that certain employer rules guide how they should go about directing employees. The Board only has discretion “within reason” to find an insufficient level of independent judgment when analyzing the effect of such rules, so it cannot simply latch onto the Court’s statement and escape scrutiny. *See Allentown Mack Sales and Service v. NLRB*, 522 U.S. 359, 376, 188 S.Ct. 818, 827-828 (1998) (“An agency should not be able impede judicial review, and indeed even political oversight, by disguising its policymaking as factfinding.”). Second, the presence of some rules relating to an activity of direction does not automatically lead to the conclusion that the individual lacks independent judgment when performing that activity. “[T]he existence of governing policies and procedures and the exercise of independent judgment are not mutually exclusive.” *NLRB v. Quinnipiac College*, 256 F.3d 68, 74, 167 LRRM 2487, 2492 (2d Cir. 2001). This is particularly true as to scheduling – the only factor for which the Regional Director actually discussed the existence of employer rules. In *Glenmark*, the court considered (and rejected) the precise line of reasoning apparently adopted by the Regional Director:

The Board mistakenly assumes that because there is an established procedure for handling a particular scheduling situation, nobody is required to think. In the Board’s view, LPNs just mechanically follow established procedure. The record before us reveals the fallacy of the Board’s logic. Although there is a general procedure in place regarding whom to call to work should an absence occur, on some occasions the LPNs, either the charge nurse or any floor nurse, exercise their independent judgment and decide to operate the nursing home or their floor shorthanded. Record testimony demonstrates that LPNs on the floor have the authority to allow CNAs to leave [the nursing home] early, and when that occurs, they generally reassign the remaining CNAs to ensure adequate patient coverage. In other situations, where the charge nurse is confronted with a floor in which

patients are sicker than usual, the charge nurse may make a decision to assign an additional CNA to that area.

147 F.3d at 341-342, 158 LRRM at 2589-2590. Third, *even if* one activity of direction is constrained by employer rules, that does not mean that the individual lacks independent judgment when exercising other activities that evince “responsibly to direct.” This is true for “responsibly to direct” more than any other indicium of supervisory status. As pointed out above, the activities that make up an individual’s responsible direction of other employees cannot be considered in isolation. Rather, the Board needs to look at the totality of the various activities when determining whether an individual is a supervisor by virtue of exercising authority to “responsibly direct” other employees. The Regional Director’s analysis does not follow this approach at all.

IV. CONCLUSION

For the reasons set forth above, the Board must conclude that that Employer’s RNs and LPNs are supervisors. Accordingly, the Board should revoke the Certification of Representative and dismiss the two representation petitions.

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