

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
BUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO

Petitioner

BRIEF OF AMICUS CURIAE AMERICAN FEDERATION
OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS

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This brief is submitted on behalf of the American Federation of Labor & Congress of Industrial Organizations (AFL-CIO) as Amicus Curiae in support of the petitioners.

INTEREST OF THE AMICUS CURIAE

The AFL-CIO is the largest organization of working men and women in the United States. Its 66 national and international affiliates represent approximately 16 million working people. Many of the workers represented by AFL-CIO unions and many workers who wish to be represented by AFL-CIO unions are nurses, other professionals, skilled craft employees, and other educated, skilled and experienced workers with duties parallel to those of the employees at issue in these three cases. The long-recognized right of these employees to join unions and engage in collective bargaining should be reaffirmed in these cases.

INTRODUCTION

The Board has requested supplemental briefing in these three cases in order to address the issues raised by the Supreme Court decision in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). In *Kentucky River*, the Court rejected the Board's construction of the term "independent judgment" in section 2(11) of the Act, based on which the Board had held the nurses at issue in that case to be protected employees rather than supervisors.

Three points must be clearly understood from the outset. First, the Supreme Court's decision did not hold that *all* nurses much less that all similar professional, skilled and experienced workers are supervisors exempt from the Act's protections. In fact, the Court did not hold that the Board's ultimate conclusion in *Kentucky River* and prior nurse cases that the nurses at issue were not supervisors was wrong. The Court merely held that the Board had rested its conclusion on an infirm statutory foundation.

Second, the Supreme Court did not hold that the meaning of any of the key terms in the

definition of supervisor – assign, responsibly to direct, or independent judgment – was unambiguous under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), so as to deprive the Board of discretion to determine their meaning consistent with the statutory language and the policies underlying the Act. To the contrary, the Court reaffirmed its conclusion in *NLRB v. Health Care & Retirement Corp. (HCR)*, 511 U.S. 571, 579 (1994), that “phrases in § 2(11) such as ‘independent judgment’ and ‘responsibly to direct’ are ambiguous, so the Board needs to be given ample room to apply them to different categories of employees.” See 532 U.S. at 717 n. 2 (citing this portion of *HCR*). In fact, the Court specifically suggested that “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.” 532 U.S. at 720. In addition, the Court specifically held that “the statutory term ‘independent judgment’ is ambiguous with respect to the degree of discretion required for supervisory status” and that “[i]t falls clearly within the Board discretion to determine, within reason, what scope of discretion qualifies.” *Id.* at 713. Thus, the Board retains discretion to construe the Act’s definition of supervisor in a manner consistent with both congressional intent and its prior holdings in the health care field and a wide variety of other industries.

Third, if the Board does not both remain true to its consistent conclusion that nurses performing duties typical in their profession are not supervisors and rest that conclusion on an appropriate statutory foundation, the Board’s two wrong turns in the nurse cases could lead to sweeping an enormous swath of workers long understood to be protected by the Act outside its protections despite Congress’ clear intent not to exclude nurses and other professional, skilled

and experienced workers with “minor supervisory duties”¹ from the protections of the Act and despite the absence of any direction from the Supreme Court to do so.

Kentucky River should not be read to deprive large numbers of nurses, professionals, craft workers, leadmen, and other similar employees of statutory protection. Such a result is neither suggested by the Supreme Court’s decision nor permissible given the congressional intent manifest in the legislative history. Instead, what the Board must do in interpreting what all agree to be ambiguous language in the Act’s definition of supervisor, is place its jurisprudence in this area on a new foundation, one that is rational, consistent with congressional intent, and respectful of the Supreme Court’s instruction to “take care to assure that exemptions from [the Labor Act’s] coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

I. The Statutory Terms, the Nurse Cases, and
the Limits of the Supreme Court’s Decision in *Kentucky River*

Under the Act, the definition of a "supervisor" has three elements: a supervisor must have the authority, (1) "in the interest of the employer," (2) to "hire, transfer, suspend, layoff, 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," and (3) the exercise of such authority must not be "of a merely routine or clerical nature, but [must] require[] the use of independent judgment." 29 U.S.C. § 152(11). In addition, employees are not excluded from the protections of the Act unless they are “employed as a supervisor.” 29 U.S.C. § 152(3).

¹The apparent contradiction in this language reflects Congress’ express intent not to include all those who might be commonly thought of or colloquially referred to as supervisors within the Act’s definition of supervisor. See *infra* § II, B.

The instant cases arise out of the difficulty the Board has had applying these statutory terms to nurses. This difficulty resulted not from the Board's entirely appropriate attempt to honor Congress' intent not to exclude most nurses and similar professional, skilled, and experienced workers from the protections of the Act, but rather from the Board's attempt to construe the definition of supervisor in a unique manner in health care cases and its two erroneous choices of how to construe the statutory terms in order to honor Congress' intent.

Initially, the Board approached this issue by asking whether nurses were acting "in the interest of the employer" in assigning or directing work. The Board held that, when the assignment or direction was in the interest of patient care, and thus within the scope of a nurses' professional responsibilities, it was not "in the interest of the employer" and did not render the nurse a supervisor. *See, e.g., Northcrest Nursing Home*, 313 NLRB 491, 493-94 (1993). In considering the 1974 amendments to the Act that brought the employees of proprietary hospitals within its scope, the relevant Senate and House committees indicated that Congress accepted this approach. S.Rep. No. 93-766, 93rd Cong., 2d Sess. 6 (1974); H.R.Rep. No. 93-1051, 93rd Cong., 2d Sess. 7 (1974).² Nevertheless, in 1994 the Supreme Court rejected the Board's construction of the phrase "in the interest of the employer" in *HCR*, 511 U.S. at 584.

Following the *HCR* decision, the Board again addressed the status of nurses, this time through a construction of the third element of the "supervisor" definition, requiring that the exercise of authority to assign or responsibly to direct involve "independent judgment." In its first post-*HCR* decision addressing the supervisory status of nurses, the Board held that nurses do

²In fact, the Supreme Court commented in dicta in *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690 n. 30 (1980), that "Congress expressly approved this approach in 1974."

not exercise independent judgment within the meaning of the Act when they exercise ordinary professional judgment. *Providence Hosp.*, 320 NLRB 717, 729-30 (1996), *enfd.*, 121 F.3d 548 (9th Cir. 1997).

This is the construction addressed in *Kentucky River*. The holding of that case, therefore, is necessarily narrow: the Court only rejected the Board's effort to create a categorical exclusion from the scope of what constitutes independent judgment. The Supreme Court addressed only the question of "whether judgment is not 'independent judgment' to the extent that it is informed by professional or technical training or experience." 532 U.S. at 708. And, the Court held only that the Board may not employ a "categorical exclusion of professional judgments from a term, 'independent judgment,' that naturally includes them." *Id.* at 721.

Thus, several important aspects of the existing jurisprudence on "supervisory status" remain unaffected by the *Kentucky River* decision.

First, the decision does not undermine prior Board decisions based on the other indicia of supervisory status, i.e., authority to hire, transfer, suspend, layoff, recall, promote, discharge, reward, discipline or adjust grievances.

Second, the decision does not alter the requirement that the requisite independent judgment be used *in the exercise of the supervisory authority*. Thus, the fact that a nurse uses independent judgment in developing a patient care plan does not establish that the nurse is a supervisor since that task is not among the listed Section 2(11) supervisory duties even if the nurse also assigns or directs other employees, so long as the assignment or direction is merely routine or clerical. Similarly, it may take a great deal of independent judgment for a doctor or nurse to decide that a patient needs an x-ray. But, once that judgment has been exercised,

directing an orderly to take the patient to the x-ray department is likely a purely routine act.

Taking patients to x-ray is a normal and regular job duty for an orderly and the doctor or nurse does not exercise independent judgment in selecting an assigned orderly to perform this task.

Third, the decision did not deprive the Board of discretion to determine how much independent judgment is enough to render an employee a supervisor. In fact, the Court made clear that exactly where the threshold is between independent judgment and judgment that is so limited or constrained as to be merely routine or clerical is a question committed to the discretion of the Board. The Court held that the term “independent judgment” was ambiguous “with respect to the degree of discretion required for supervisory status” and, thus, “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies.” *Id.* at 713. This echoed the Court’s earlier statement in *HCR* that it is “no doubt true” that “the phrases in [section] 2(11) such as ‘independent judgment’ . . . are ambiguous, so the Board needs to be given ample room to apply them to different categories of employees.” 511 U.S. at 579. Thus, the *Kentucky River* Court agreed that “[m]any nominally supervisory functions may be performed without the ‘exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding’ of supervisory status.” 532 U.S. at 713. In other words, even if an employee exercises some discretion, the Court held, the Board may conclude the discretion is not sufficient to constitute independent judgment.

Fourth, the decision does not change the law with respect to assignment or direction that is sufficiently constrained by employer policies, directions or practices that it does not require the requisite “independent judgment.” For example, a nurse on the night shift who has authority to “assign” off-duty employees to a shift and post when scheduled employees do not show up for

work, does not exercise independent judgment if the employer's policies *require* that the nurse call in off-duty employees whenever the staff-patient ratio falls below a set level and, as is often the case, *require* that off-duty employees be called in a prescribed order (such as seniority). Indeed, the Supreme Court endorsed this line of Board doctrine in *Kentucky River*. The Court expressly embraced the Board's understanding 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." *Id.* at 713-14. The Court cited as an example of the Board's proper exercise of its discretion, the Board's conclusion in *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995), that "although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations, which require the watch officer to contact a superior officer when anything unusual occurs or when problems occur." 532 U.S. at 714.

Accordingly, putting points three and four together, after *Kentucky River* it remains within the Board's discretion to determine whether employees' discretion to assign or direct is circumscribed in such a manner -- by employer policies, instructions from higher management, standardized procedures, etc. -- as to fall below the threshold of "independent judgment" set by § 2(11).

Finally, the burden of proving supervisory status continues to rest with the party asserting that an employee is a supervisor. The Supreme Court resolved the conflict in the circuits on this issue in a manner favorable to the Board in *Kentucky River*. The Court sustained the Board's conclusion that the burden of proving every element of supervisory status rests on the party

urging exclusion. 532 U.S. at 711-12.

II. Congress Intended Broad Coverage and Narrow Exclusions Not Including “Minor Supervisory Employees, Most Professionals and Craft Workers, or Most Nurses”

A. Broad Coverage

The Board must begin its analysis of the questions it has posed with the clear understanding that Congress intended the Act to have broad coverage and, thus, narrow exclusions. The Supreme Court has often noted that “the ‘breadth of §2(3)’s definition [of covered employees] is striking.” *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 91 (1995) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984)). Therefore, “[t]he Board has a duty not to construe the statutory language [defining supervisors] too broadly because the individual found to be a supervisor is denied employee rights protected under the Act.” *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997).

B. Including “Minor Supervisory Employees”

In adopting the Taft-Hartley amendments to the National Labor Relations Act in 1947, Congress made it clear that it did not intend the new exclusion of supervisors to reach employees who stand in closer proximity to the rank-and-file than to management even if they are referred to as supervisors and have some authority to assign and direct other employees. The Senate Committee Report on the amendments states:

the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with . . . genuine management prerogatives [*Legislative History of the Labor-Management Relations*

Act, 1947 at 410 (GPO 1974) (hereinafter *Leg.Hist.*)³

Thus, Congress did not intend to include “minor supervisory employees,” those with “minor supervisory duties,” among the “supervisors” defined in § 2(11) and excluded from protection by the Taft-Hartley amendments

Within months after the Taft-Hartley Act was enacted, the Board was called upon to interpret and apply the supervisory exclusion. The Board's initial decisions shed considerable light on the contemporaneous understanding of §2(11)'s import. In these decisions, arising out of a wide variety of industries, the Board classified professionals, journeymen, and other skilled and experienced workers who assigned tasks to or directed a small number of other employees to perform discrete tasks as employees, rather than supervisors. For example, in *Cities Service Oil Co.*, 75 NLRB 468 (1947), the Board considered chemists employed by a petroleum company who “require the assistance of other laboratory workers in making certain tests.” *Id.* at 469. “If the results of a test appear inaccurate to [the chemist], he may request that it be repeated.” *Id.* at 470. The Board held that this form of direction did not render the chemists supervisors. In *George Ehlenberger and Co., Inc.*, 77 NLRB 701 (1948), the Board did not exclude workers in a dairy who “work side by side with the other production employees,” but “who by virtue of their seniority and experience act as leadmen” and whose “duties involve the direction or guidance of other employees in the course of production operations.” *Id.* at 703. In *H.J. Heinz Co.*, 77 NLRB 1103 (1948), the Board included an engineer in a boiler room who spent 75% of his time “perform[ing] the usual duties incidental to this job classification,” but also gave “instructions to

³This legislative history is discussed at greater length in relation to the construction of the term responsibly to direct *infra* § IV(A)(2)..

other employees in the boiler room.” *Id.* at 1104-05. In *The Austin Co.*, 77 NLRB 938 (1948), the Board considered employees of a design and construction company who “perform substantially the same work as the employees under their direction [2-4 of them], as well as assign and review the work of the latter.” *Id.* at 941-42. The Board found that these employees “assign and guide the work of certain of their professional colleagues” and “direct with some degree of responsibility the employees in their respective sections,” but nevertheless held that they were “no more than group leaders” and were protected by the Act. *Id.* at 943. *See also The S-P Mfg. Co.*, 75 NLRB 701, 704 (1947) (group leaders in manufacturing plant who “give out work [to approximately seven employees] under the supervision of the general foreman” not supervisors).

As we show below, the Board has continued to respect Congress’ intent not to exclude “minor supervisory employees” from the effective date of the amendments until now.

C. Including Most Professionals and Craftsmen

It is also clear that Congress did not intend the exclusion of supervisors to substantially swallow the explicit inclusion of both professional and craft employees adopted by the same Congress. *See* 29 U.S.C. §§ 152(12), 159(b)(1). The Supreme Court has explained that “in expounding a statute” decisionmakers are “not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law.” *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989). In particular, courts and agencies must “fit, if possible, all parts into an harmonious whole.” *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959). Here, this principle requires that the Board seek a construction of the term supervisor that does not encompass a substantial number of professional and craft employees engaged in the ordinary duties of such employees.

Congress defined professionals in the Taft-Hartley amendments in order to enhance their protection as employees by granting them unique powers of self-determination. *See* 29 U.S.C. §§152(12), 159(b)(1). And, Congress clearly intended nurses to be classified as professionals. The Senate Committee Report explains that the Committee was “careful in framing a definition to cover only strictly professional groups such as . . . nurses.” *Leg.Hist.* 425. *See also id.* at 11. In the same amendments, Congress also recognized the unique and protected interests of craft employees. *See* 29 U.S.C. § 159(b)(2).

Indeed, the definitions of professional and supervisory employees are adjacent section of the Act, both inserted by the same 1947 amendments. Section 2(12) defines a subset of included §2(3) employees. Section 2(11) operates as a proviso to §2(3) that excludes a group of individuals from §2(3). That much alone leads to the conclusion that Congress could not have intended for the §2(11) exclusion from the category of employee to empty the §2(12) subset of the category of employee of all or nearly all its contents.

The statutory definition of included professionals requires that a professional be engaged in work “involving the consistent exercise of discretion and judgment in its performance,” 29 U.S.C. § 152(12). Similarly, the definition of excluded supervisors requires the exercise of “independent judgment” in the performance of a supervisory function. 29 U.S.C. § 152(11). In addition, most professionals (and many craft and other skilled employees who also exercise independent judgment in their jobs) make use of lesser trained employees to accomplish their own duties.⁴ For example, a doctor asks a nurse for a scalpel and a lawyer asks a clerk to file a

⁴The briefs of Amici American Nurses Association and United American Nurses as well as of Petitioners Auto Workers and Steelworkers and Amici unions representing nurses both clearly
(continued...)

document. As Judge Posner observed in endorsing a “distinction between supervision in the statutory sense and work direction by a professional,” “most professionals have some supervisory responsibilities in the sense of directing another’s work – the lawyer his secretary, the teacher his teacher’s aide, the doctor his nurses, the registered nurse her nurse’s aid, and so on.” *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983).

At the very moment when it excluded supervisors and granted new right to professionals, Congress also clearly understood this practical reality – that professional employees almost universally direct the work of less skilled colleagues and assistants. Section 2(12) of the Act defines professionals to include both those who are independently performing professional work and those who have completed their instruction and are “performing related work under the supervision of a professional person.” Specifically referring to medical professionals, the Conference Report on the 1947 amendments makes clear, “This definition in general covers such persons as . . . medical personnel together with their junior professional assistants.” *Leg.Hist.* 540. Congress could not have intended this form of direction, expressly recognized in the definition of included professionals and in its legislative history, to be sufficient to classify professionals as excluded supervisors.

The combination of the statutory requirement that professionals exercise discretion and judgment and the congressionally recognized reality that most professionals direct less highly trained employees cannot be sufficient to place most professionals into the category of supervisors. Such a result would be inconsistent with Congress’ intent because, as the Supreme

⁴(...continued)

demonstrate that *all* nurses, in the performance of their ordinary duties, delegate discrete tasks to both other nurses and less skilled personnel.

Court observed in considering the exclusion of managers, to create an “exclusion that would sweep all professionals outside the Act [would be] in derogation of Congress’ expressed intent to protect them.” *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690 (1980). In fact, the Supreme Court in *Yeshiva* cited with approval Board holdings in which “architects and engineers functioning as project captains for work performed by teams of professionals are deemed employees despite substantial planning responsibility and authority to direct and evaluate team members.” *Id.* at 690 n. 30.⁵ The Court described their holdings as follows: “Only if an employee’s activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.” *Id.* at 690. This logic applies equally to the supervisory status of such professionals.⁶ The Court stated, “We think these decisions accurately capture the intent of Congress.” *Id.*

Similarly, Congress was surely aware that many craft employees work with helpers and apprentices and give them directions based on the greater skill and experience of the journeyman level craftsman. “Throughout the industry of this Nation,” the Board has recognized, “there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employers’ plants and who incidentally direct the movements and operations of less skilled subordinate employees.” *Southern Bleachery and Print Works, Inc.*, 115 NLRB 787, 791 (1956). Yet Congress expressly provided that craft employees were protected by the Act, again in the same Taft-Hartley amendments that introduced the supervisory

⁵The cited cases are *General Dynamics Corp.*, 213 NLRB 851, 857-58 (1974); *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB 1049, 1051 (1971); *Skidmore, Owings & Merrill*, 192 NLRB 920, 921 (1971).

⁶Indeed, in the three cases, the Board found the professionals were not managers or supervisors.

exclusion. 29 U.S.C. § 159(b)(2).

The Board has long recognized that to hold that such craftpersons are supervisors “would be to eliminate a substantial part of the craftsmen in the Nation from the coverage of the Act and fly in the face of the demonstrated concern of Congress for craft units.” *Southern Bleachery*, 115 NLRB at 792. “The Board has, therefore, consistently included in bargaining units such employees, often craftsmen or persons in comparable positions.” *Id.* at 791. Indeed, the Board has categorically concluded that a relationship which is nothing “other than that between master craftsman and apprentice” is not supervisory. *Rub-R Engraving Co.*, 89 NLRB 475, 476 (1950). The Board has expressly held that “the authority . . . that any skilled workers ha[ve] over helpers and apprentices” is not sufficient to exclude them from the Act’s protections. *Soil Engineering Co.*, 269 NLRB 55, 56 (1984).

In *Kentucky River*, the Court did not question “the soundness of [this] labor policy” – “to preserve the inclusion of ‘professional employees’ within the coverage of the Act” – which it held “the Board is entitled to judge,” but merely held “that the policy cannot be given effect through *this* statutory text.” 532 U.S. at 720 (emphasis added). In other words, the Court merely rejected the specific construction of the term “independent judgment” which the Board had used to effectuate the statutory policy. The Board can and must continue to construe the definition of supervisor in a manner that respects Congress’ clear intent to protect ordinary professionals and craft employees, but it must find a new and appropriate statutory foundation on which to rest the harmonization of the Act’s provisions.

All of this, of course, does not suggest that a professional or craft employee cannot be a

supervisor.⁷ But it does suggest that the Board must construe the ambiguous terms in the definition of supervisor so as not to exclude large numbers of professionals and craft employees performing the “duties *routinely* performed by similarly situated professionals” and craft employees. *Yeshiva*, 444 U.S. at 690 (emphasis added).

D. Including Most Nurses

Congress was even more specific in expressing its intent to protect nurses when it extended the coverage of the Act to proprietary hospitals in 1974. In discussing the notice provisions of the amendments, both the Senate and House reports on the amendments expressly distinguish between “supervisory help” and “nurses.” See Sen. Rep. No. 93-766, 93d Cong., 2d Sess. 4 (1974); H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 6 (1974). Even more directly on point, both reports state that the committees did not include an amendment excluding health care professionals, including “registered nurses,” from the definition of supervisors, despite the “direction” they routinely give other employees, because it was “unnecessary because of existing Board decisions.” Sen. Rep. No. 93-766, 93d Cong., 2d Sess. 6 (1974); H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 7 (1974). The committees both explained:

The Committee notes that the Board has carefully avoided applying the definition of ‘supervisor’ to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] the professionals’ treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.

The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations. [*Id.*]

While the Supreme Court in *HCR* held that the Board could not rely on these committee

⁷For example, in the two nurses cases at issue, the petitioners conceded that several nurses were supervisors. In *Oakwood*, for example, they are the Nursing Site Leader, Clinical Managers, Assistant Clinical Managers, and Clinical Nurse Supervisors. *Oakwood*, tr. at 17.

reports in order to give the term “in the interest of the employer” a meaning it could not bear, 511 U.S. at 581-82, the Court did *not* hold that the Board could disregard this clear expression of Congress’ intent in construing the other, *ambiguous* terms in the definition of supervisor. Indeed, to ignore the express congressional intent to protect nurses “who give direction to other employees in the exercise of their professional judgment, which direction is incidental to the professional’s treatment of patients” would fly in the face of Supreme Court precedent holding that committee reports are the most reliable source of legislative intent outside the statutory text. In *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986), the Supreme Court rejected the suggestions that committee reports deserved “little weight,” stating, “We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.” Likewise, in *Zuber v. Allen*, 396 U.S. 168, 186 (1969), the Court explained, “A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.”

The Board must continue to honor this clear and explicit legislative intent to protect nurses when it construes the ambiguous terms in the definition of supervisor consistent with *Kentucky River*.⁸

⁸A construction of the Act that would classify most nurses as supervisors would also be inconsistent with the Board’s considered judgment, reflected in the acute care hospital bargaining unit rules, that, absent extraordinary circumstances, a unit of all registered nurses is an appropriate unit, 29 C.F.R. § 103.30(a)(1). Such a construction would empty this presumptively appropriate unit of all or substantially all its occupants. Following *Kentucky River*, at least one regional director has erroneously done exactly that. See *Pavia Hospital*, No. 26-RC-8289 (Oct. 6, 2000) (excluding all 140 registered nurses in an acute care hospital).

III. Failure to Honor Congress' Intent Will Lead to a Radical Reversal of Board Precedent and Will Sweep Large Numbers of Employees Outside the Protection of the Act

In innumerable cases since 1947, the Board has held that professionals, craft employees, skilled workers and leads who primarily work at their trade, but who also have limited authority to assign work and direct other employees in the performance of discrete tasks, are not supervisors. These cases are literally too numerous to cite here but a small sample from different industries is illustrative. See, e.g., *The Door*, 297 NLRB 601, 602 n.7 (1990) (doctor) (“routine direction of employees based on a higher level of skill or experience is not evidence of supervisory status”); *Aquatech, Inc.*, 297 NLRB 711, 716-17 (1990), *enfd*, 926 F.2d 538 (6th Cir. 1991) (leadman who “delegated the various tasks to workers depending on their particular skills . . . and generally gave guidance to employees who might need assistance”); *Koons Ford of Annapolis, Inc.*, 282 NLRB 506, 513 (1986), *enfd*, 833 F.2d 310 (4th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988) (mechanics with helpers) (“limited authority given to the mechanics with helpers was intended to facilitate the work of the mechanics and more importantly, as part of the process of training employees who themselves were potential mechanics”); *Marymount College of Virginia*, 280 NLRB 486, 489 (1986)(librarians) (“the working relationships between the professional librarians and the library technicians are typical of the relationship between a professional and a technician”); *Golden-West Broadcasters-KTLA*, 215 NLRB 760, 762 n. 4 (1974) (directors) (“an employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor”); *General Dynamics Corp.*, 213 NLRB at 858-59 (engineers acting a project leaders) (“Supervisors are management people. Their job functions are aligned

with managerial authority rather than with work performance of a routine, technical, or consultative nature.”); *Frederick Confer & Assocs.*, 193 NLRB 910, 910 (1971)(architect “project captains” and “specification writers”); *Fordham University*, 193 NLRB 134, 138 (1971)(professor) (“The mere fact that professional employees may have secretaries does not necessarily constitute them supervisors.”); *Nat’l Broadcasting Co.*, 160 NLRB 1440 (1966) (“deskman” in newsroom) (“functions of the deskman . . . in keeping newsmen assigned to the most newsworthy stories, are but a part of a group or team effort required for the production of up-to-the-minute, professional prepared news programs”); *Pennsylvania Power & Light Co.*, 122 NLRB 293, 295-96 (1958)(senior project engineer); *Worden-Allen Co.*, 99 NLRB 410, 412, 414, 414 n. 16 (1952)(draftsmen “squad leaders” who spend approximately 20% of their time “assigning work” to other approximately 6 draftsmen on squad and “are responsible for seeing that the detailed drawings are properly prepared within the time allotted” are not supervisors); *Sonotone Corp.*, 90 NLRB 1236, 1239 (1950)(engineers “direct the work of the associate and assistant engineers” but “the relationship . . . is primarily that of the more skilled to the lesser skilled employee and not that of supervisor to subordinate”); *Rub-R*, 89 NLRB at 476 (“Journeyman” who “[w]orked at his trade in the typesetting department” and spent “some proportion of [his] time . . . directing and instructing the apprentices” not supervisor); *American Finishing Co.*, 86 NLRB 412 (1949) (assistant foremen who operate printing machines but direct “backhelp”); *Dixie Spindle and Flyer Co.*, 84 NLRB 109, 110-11 (1949) (“machinist of considerable experience” who “[because of his experience . . . instructs and assists other employees in the toolroom” not supervisor); *Union Elec. Power Co.*, 83 NLRB 872, 879 n. 14 (1949) (accountants who “coordinate and direct the work of the other accountants working with

them” are “group leaders and are not supervisors”); *General Steel Tank Co.*, 81 NLRB 1345, 1347 (1949) (authority exercised by leadman who “operates a number of machines” and “has from one to three helpers assisting him” “is merely of they type normally exercised by a skilled workman over helpers”). *See also* cases cited *supra* § II, B and n. 4.

The employees whose statutory protection has been preserved in these decisions represent a huge segment of the workforce. In 2000, there were approximately twenty-seven million people employed as professionals or in related occupations in the United States and by 2010 it is estimated that there will be almost thirty-four million, accounting for 20% of the workforce. Hecker, *Occupational Employment Projections to 2010*, 124 MONTHLY LAB. REV. ONLINE 57, 65 tbl. 2 (2001), at <http://www.bls.gov/opub/mlr/2001/1/contents/htm>. People employed as registered nurses (“RNs”) currently hold 2.1 million jobs and comprise the second largest professional classification after teachers (who hold 3.8 million jobs). U.S. Bureau of Labor Statistics, U.S. Department of Labor, OCCUPATIONAL OUTLOOK HANDBOOK 269 (2002-03), at <http://www.bls.gov/oco/pdf/ocos027.pdf>. Additionally, there are approximately 420,000 licensed practical nurses (“LPNs”) employed in hospitals and nursing homes. *Id.*, [ocos083.pdf](http://www.bls.gov/oco/pdf/ocos083.pdf). Among various other professional classifications, the current job breakdown is as follows:

Engineers	1.5 million
Accountants & Auditors	976,000
Computer Systems	887,000
Lawyers	681,000
Physicians	598,000
Designers	492,000
Social Workers	468,000
Writers & Editors	305,000
Financial analysts	239,000
Economists	134,000
Architects	102,000

See id. at 103, 22, 172, 211, 263, 122, 161, 147, 51, 240, 91. In addition, there are millions of craft employees working in construction and many other industries.

A construction of the supervisory exclusion that would place in question the status of a substantial percentage of these vast segments of the workforce is clearly inconsistent with Congress' intent and would represent a radical departure from over half a century of Board jurisprudence.

IV. Construction of the Statutory Definition of Supervisor

A. Assign and Responsibly to Direct

We begin our analysis of the questions posed by the Board with the meaning of the terms assign and responsibly to direct because the Board should logically determine whether an employee has authority to perform one of the listed supervisory functions before the Board determines whether performance of the supervisory function requires the use of independent judgment.

As explained above, the outcome of most of the Board's nurse supervisor cases is actually consistent with congressional intent as well as with the broader supervisor case law concerning other professional, technical, and skilled workers. However, the Board's nurse jurisprudence has rested on an infirm statutory foundation. In order to continue to be faithful to Congress' clear intentions and to prevent the decision in *Kentucky River* from being mistakenly understood to sweep not only most nurses, but large numbers of other professional and skilled employees outside the Act's protections, the Board should impose a limiting construction on the terms "assign" and "responsibly to direct.

Kentucky River left the Board with broad authority to construe these two terms. The

Court made clear that “the proper interpretation of ‘responsibly to direct’ is not at issue in this case.” 532 U.S. at 721. In *HCR*, the Court agreed with the Board’s assertion that “phrases in § 2(11) such as . . . ‘responsibly to direct’ are ambiguous, so the Board needs to be given ample room to apply them to different categories of employees.” 511 U.S. at 579.

1. Authority to Assign Other Employees

In interpreting the statutory definition of supervisors, the Board has found that “[t]he term ‘assignment’ has not presented as much difficulty as the phrase ‘responsibly to direct.’” *Providence*, 320 NLRB at 727. The term “assign,” the Board suggested in its comprehensive summary of the law in *Providence*, “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.” *Id.* It is the “prepar[ation of] monthly schedules [that is] the type of assignment most closely identified with essential managerial functions requiring the use of independent judgment,” the Board observed. *Id.* at 731. “Whether assignment also includes ordering an employee to perform a specific task is, however, less clear.” *Id.* at 727. In *Providence*, the Board found it “unnecessary to reach the issue of the exact parameters of the term ‘assignment’ under Section 2(11).” *Id.* Such a construction is now necessary.

The words, structure, and history of the statute all support a reading of the term “assign” as not encompassing the simple, day-to-day assignment of discrete tasks typically done by nurses, professional, and other skilled workers. Thus, for example, assigning specific residents of a nursing home to a Certified Nursing Assistant for a single shift is the assignment of discrete tasks – those needed to care for the residents. Similarly, changing an employees’ work location or work assignment for a part of a shift or for a single shift is not “to . . . assign . . . employees.”

Rather, the statutory phrase encompasses instead more on-going changes in the employee's work assignment, changes of more significance in the employee's work life (such as long-term shift change, or a long-term work location change). This is true for three reasons.

First, the syntax of the statutory language -- "authority . . . to . . . assign . . . other employees" -- strongly suggests that what is at issue is assignments *of* employees rather than assignments *to* employees. There is a palpable difference of grammatical usage between the two syntaxes, such that tasks or duties are usually assigned *to* a person, rather than the person to a task. Thus, for example, one would speak of assigning an electrician to the night shift rather than the day shift, but would speak of assigning the task of fixing a cable to electrician X. In the latter locution, it is not the electrician who is being assigned but the task.

Second, reading "assign" to refer to more permanent or on-going work status changes is consistent with the rule of statutory interpretation that words in a list should be given similar meanings. The authorities listed in the definition of a supervisor -- to "hire, transfer, suspend, lay off," etc. -- generally encompass matters pertaining to employment *status* rather than matters pertaining to performing day-to-day operations.

Finally, if interpreted more broadly, so as to include day-to-day assignment of discrete tasks, the term "assign" would be synonymous with the term "direct." Such an interpretation would not only render the term "direct" superfluous, but would subvert Congress' clear intent (discussed below) to limit the type of direction that makes an employee a supervisor by attaching the limiting word "responsibly" to the term "direct."

Consistent with this construction, the Board and Courts have held in numerous contexts that merely assigning tasks to employees for one shift or during a shift does not make an

employee a supervisor. *See, e.g., Clark Mach. Corp.*, 308 NLRB 555, 555-56 (1992) (assistant foremen in machine shop's assignment of jobs that "could usually be completed in a day" "is a function of routine work judgment and not a function of authority to use the type of independent judgment required of a supervisor."); *Kent Prods.*, 289 NLRB 824, 824 (1988) (welding department leadperson not supervisor when assessed jobs and available personnel and then assigned personnel to machines needed to perform jobs); *Plastic Indus. Prods.*, 139 NLRB 1066, 1068 (1962) (leadmen not supervisors when "they . . . assign operators to particular machines"); *Martin Aircraft Tool Co.*, 115 NLRB 324, 326 (1956) (leadman who "changes employees from one lathe to another" when "it is necessary that a job on a particular lathe be performed by an employee more skillful than the one assigned") (1956). *See also Providence*, 121 F.3d 548, 552 (9th Cir. 1997) ("The charge nurses do not create the work schedule for other RNs. Rather, they make assignments of nurses to patients within the parameters of the supervisory nurse's monthly assignment schedule.") (citation omitted); *J.L.M., Inc.*, 31 F.3d 79, 82 (2d Cir. 1994) (laundry "supervisor" who assigned duties to other employees in department not statutory supervisor); *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 921 (6th Cir. 1991) (warehouse leadman who told employees which trucks to unload and allocated time to perform tasks not supervisor); *NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634, 643 (5th Cir. 1986) (leadman on construction crew not supervisor).

While some of these decisions appear to rest on a conclusionary finding that the assignment of tasks did not require independent judgment, the firmer foundation for the holdings is that the assignment of discrete tasks is not the assignment of employees as the term is used in §2(11).

2. Authority Responsibly to Direct Other Employees

In *Providence*, the Board found it unnecessary to “develop a full analysis of the term ‘responsibly to direct.’” 320 NLRB at 729. An express limiting construction of the phrase is now necessary because, as the Board has “long recognized,” ““there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employer’s plants and who incidentally direct the movements and operations of less skilled subordinate employees,’ who nevertheless are not supervisors within the meaning of the Act because their authority is based on their working skills and experience.” *Ten Broeck Commons*, 320 NLRB 806, 809-810 (1996) (quoting *Southern Bleachery*, 115 NLRB at 791). As the quoted language suggests, in *Providence* and *Ten Broeck*, the Board placed these employees outside the ambit of the Act’s definition of supervisor by holding that the judgment they exercise in directing other employees was not independent judgment because it was based on their professional training or other skill or experience. The Supreme Court rejected this categorical limitation of the term “independent judgment” in *Kentucky River*. 532 U.S. at 721. Therefore, without a limiting construction of the term “responsibly to direct,” which has up to now been unnecessary, professionals, journeymen level craft workers, leads, and other skilled employees in diverse occupations across the economy – employees who Congress clearly intended to protect – may be erroneously swept outside the Act’s scope.

In fact, the Supreme Court suggested just such a limiting construction in *Kentucky River* itself when the Supreme Court observed that “the Board could offer a limiting interpretation of the supervisory function of responsible direction” along the lines suggested in *Providence*. *Id.* at 720. The Court cited to a portion of the Board’s decision suggesting that “supervisory authority

does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position." *Providence*, 320 NLRB at 729 (cited in *Kentucky River*, 532 U.S. at 720). The Supreme Court stated, "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 § 152(11) requires." 532 U.S. at 720. It is this suggested construction, paralleling that of the term "assign" described above, that the Board should develop to carry out Congress' intent in this area.

Of the eleven types of supervisory authority listed in NLRA § 2(11), only the authority to direct other employees is qualified by the adverb "responsibly." For this reason, the word responsibly must mean something other than that the employee is held responsible or is answerable for the directions he gives, for surely the same is true for assignments within the meaning of §2(11) and other supervisory actions such as hiring and firing.⁹ Rather, this unique qualification in the statutory language indicates that the kind of direction Congress had in mind as an identifying characteristic of a supervisor was *not* the kind of direction to perform discrete tasks that a more experienced or more highly trained employee would give to a co-worker as a normal incident of the performance of the directing employee's own job, but rather a higher, more "responsible" form of direction.

This was made clear by Congress itself in adopting the supervisory exclusion in 1947.

⁹In *Providence*, the Board noted that some courts of appeals had given the word "responsibly" this meaning, but held that the word has no single "plain meaning" and thus could not be understood without reference to its context, the legislative history, and the policies underlying the Act. 320 NLRB at 728-29.

The Senate Committee Report on the 1947 Taft-Hartley amendments discussed above states that the Committee “has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act.” *Leg.Hist.* at 410. The Committee reported that it “distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor.” *Id.* The Committee indicated that it took “great care” that employees excluded from the coverage of the Act “be truly supervisory.” *Id.* at 425.

Congress’ intent to draw the line between supervisors and employees above the level of nurses and other professional and skilled employees who incidentally direct less skilled workers during the course of their own work is also clear from the central objective of the Taft-Hartley Congress. The unionization of foremen was the immediate problem Congress intended to address through the exclusion of supervisors and Congress understood the term supervisor to mean only foremen and those of like or higher rank. This is important because Congress understood the term foremen to encompass employees who performed no manual work but rather supervised a department or like unit.

Throughout the legislative history are statements that make it clear that it was “unions of foremen” that Congress intended to put outside the Act’s protection. *Leg.Hist.* at 299. *See also id.* at 306-07, 410-11, 603, 1480, 1496, 1576. Senator Taft himself explained to the Senate that his “bill provides that foremen shall not be considered employees.” *Id.* at 1008. *See also id.* at 1519. Congressman Pepper stated the general understanding explicitly, “what [the bill] does, in substance, is to deny to supervisory personnel, whom we usually think of as foremen, the right of collective bargaining.” *Id.* at 1167. In fact, members of Congress often used the terms

supervisors and foremen interchangeably. *See id.* at 869, 993, 1606.

The House Conference Report explained that the adopted conference language “confined the definition of ‘supervisor’ to individuals generally regarded as foremen and persons of like or higher rank.” *Id.* at 539. In fact, the broader House bill had been attacked on the floor on the grounds that it “not only excludes foremen and higher supervisory employees [but others as well].” *Id.* at 652. In a similar statement to the Senate after the conference, Senator Taft explained, “The Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors. . . . The Senate Amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank.” *Id.* at 1537.

These clear statements that the exclusion of supervisors was intended to encompass only “foremen” and “persons of like or higher rank” are significant because the term “foremen” had a well-understood meaning in 1947. In fact, in the very case that Congress sought to overturn through adoption of § 2(11), *Packard Motor Car Co.*, 61 NLRB 4 (1945), the Board first observed that “the status and duties of all classes of foremen at Packard is the same as that of foremen in other mass production industry,” *id.* at 23, and then found: (1) The foremen “are in charge of one or more departments,” *id.* at 21, and (2) “None of the . . . foremen perform[] any manual work,” *id.* at 23. Thus, members of Congress understood the exclusion of supervisors to apply to foremen or department heads who did not themselves work at the trade¹⁰ but rather supervised all employees in a department and to persons of “like or higher rank.”

¹⁰In fact, the main “contrast” between foremen and the “straw bosses, leadmen, [and] set-up men” who Congress did not intend to define as supervisors was that the latter “spent most of their time in actual production.” Lichtenstein, “*The Man in the Middle: A Social History of Automobile Industry Foremen*,” in Lichtenstein & Meyer, *ON THE LINE: ESSAYS IN THE HISTORY OF AUTO WORK* 153, 157 (1989).

That the phrase “responsibly to direct” refers to a broad, managerial type of direction is also strongly supported by the specific legislative history of the phrase. The “responsibly to direct” language was adopted as an amendment to the Taft-Hartley bill offered from the floor by Senator Flanders. Shortly before the Senate bill was passed, the Senator explained his amendment’s purpose as follows:

the 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.

[A supervisor may be] charged with the 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. . . .

Such men are above the grade of ‘straw bosses, lead men, set-up men, and other minor supervisory employees,’ as enumerated in the [Senate Committee] report. Their essential managerial duties are best defined by the words ‘direct responsibly,’ which I am suggesting. [*Leg.Hist.* at 1303.]

In other words, Senator Flanders was concerned that the definition, prior to his amendment, actually might not include foremen if all personnel functions other than the full-time direction of a group of employees in a department were centralized in a personnel department. His proposal was immediately accepted by Senator Taft, who stated, “I have no objections certainly to including the words ‘or responsibility [sic] to direct them.’” *Id.* at 1304. The amendment passed by voice vote without further debate. *Id.* at 1304. The amendment was thus intended to make clear that, consistent with the clear historical purpose of the supervisory exclusion, employees like foremen and department heads, who do not work at their trade but rather direct the work of an entire “department” under only “general orders,” but have none of the other duties enumerated in the original Senate language, are supervisors.

The statements of Senator Flanders as well as the entire legislative history of § 2(11)

suggest that the § 2(11) authority “responsibly to direct” is an “essential[ly] managerial” authority to direct the overall work of all employees in a department subject to “only general orders,” such as that traditionally exercised by a foreman or department head (like the Director of Nursing in a nursing home) over all underlings in a department. By the same token, the type of sporadic task-direction typically performed by “leadmen” or “group leaders” is *not* the exercise of the authority “responsibly to direct.” *Neither* is the authority typically held by higher-skilled employees, such as nurses, to direct their aides, helpers, support staff or apprentices to perform discrete tasks.

Such a construction was, in fact, strongly suggested by the Board just months after the adoption of the Taft-Hartley Amendments. In *The Austin Co.*, 77 NLRB 938 (1948), the Board considered employees “who head their respective subdepartments,” consisting of between two and four other employees, “perform substantially the same work as the employees under their direction,” but also “assign and review the work of the latter,” and “direct [them] with some degree of responsibility.” *Id.* at 941-43. While recognizing that “these disputed individuals may assign and guide the work of certain of their professional colleagues,” the Board found, “under the circumstances of this case, the alleged supervisors are no more than group leaders.” *Id.* at 943. The Board held “we are not convinced . . . that they have the required authority ‘responsibly to direct.’” *Id.*

Again in 1948, the Board, in one of its only extended discussions of the term “responsibly to direct,” reached the same conclusion. In *The Ohio Power Co.*, 80 NLRB 1334 (1948), *enf.*

denied, 176 F.2d 385 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949),¹¹ the Board concluded that the “[l]egislative history indicates . . . that the broad scope implied in a literal construction of the authority ‘responsibly to direct’ was not intended by Congress, but rather that a specific qualified meaning was attached to this phrase.” *Id.* at 1338. “Senator Flanders,” the Board continued, “desired specifically to encompass those individuals who engage *regularly* in the basic acts of supervision but who do not exercise the other specific powers of supervision set forth in the definition.” *Id.* at 1338-39 (emphasis added). Senator Flanders did not intend to exclude a broad swath of employees with his essentially clarifying amendment but rather “individuals . . . [who] fall within *a narrow area* lying between those ‘above the grade of straw bosses, lead men, set-up men and other minor supervisory employees,’ and those who . . . [12]possess any of the other specific authorities enumerated in the Act’s definition.” *Id.* at 1339 (emphasis added).

The Board should place its jurisprudence in this area on a more secure statutory foundation by considering the following four factors in determining whether an employee responsibly directs others: (1) the scope of the alleged supervisor’s authority to direct, i.e. whether he or she directs an entire department or just particular employees,¹³ (2) whether he or

¹¹While the Sixth Circuit denied enforcement of *Ohio Power*, its rationale, that the term “responsibly to direct” is “plain and unambiguous,” thus precluding the Board’s analysis of the legislative history, 176 F.2d at 387-8, has since been rejected in both *HCR* and *Kentucky River* as explained above.

¹²The language left out of the quote – “do not” – is obviously the result of a grammatical error since employee who “do not” possess the other indicia of supervisory status are in the “narrow area” the Board is describing not outside it

¹³The Board has cited this factor in its analysis of whether individuals have authority responsibly to direct employees. *See, e.g., Legion Utensils Co.*, 109 NLRB 1327, 1338 (1954) (“Panelli unquestionably is in general charge of the polishing department with its 32 employees.”)

she “directs others employees” or merely “directs the manner of others’ performance of discrete tasks;”¹⁴ (3) the extent to which he or she works at a profession or trade and gives directions incidental to his or her performance of his or her own non-supervisory functions;¹⁵ and, (4) whether there is an identifiable supervisor (other than the alleged supervisor), who exercises § 2(11) supervisory authority over the employees the alleged supervisor purportedly directs.¹⁶

B. Independent Judgment

1. Exercise of Independent Judgment in Performing Supervisory Function

In applying the statutory definition of “supervisor,” it is important for the Board to continue to recognize that some employees -- particularly professionals and other highly trained and experienced employees -- who have authority to direct other employees may exercise

¹⁴This is the distinction suggested in *Kentucky River*. 532 U.S. at 720.

¹⁵In prior decisions, the Board has repeatedly cited this factor. See, e.g., *Legion Utensils*, 109 NLRB at 1339 (“In view of the fact that Bilotti spends some two-thirds of his time polishing, the foregoing duties hardly constitute responsible direction of the work of employees.”); *KGW-TV*, 329 NLRB 378, 383 (1999) (“such directions simply are incidental to the employees’ ability to perform their own work”). In *New York Univ.*, 221 NLRB 1148, 1156 (1975), the Board explained that it was attempting to distinguish between “professional employees who . . . are essentially supervisory” and “professionals with incidental . . . supervisory authority.” 221 NLRB at 1156. Finally, the Board has repeatedly held that the directions issued by “skilled workers” to “helpers and apprentices” are not supervisory. See, e.g., *Koons Ford*, 282 NLRB at 513. In *Koons Ford*, the ALJ, in a decision affirmed by the Board, stated that “the limited authority given to the mechanics with helpers was intended to facilitate the work of the mechanics.” *Id.*

¹⁶ “[T]he immediate and substantially constant supervision exercised by each shift operating engineer, who, in turn, is supervised by the operations supervisor and the plant superintendent, convinces us that the control operators herein do not have such power ‘responsibly to direct’ their assistants.” *Ohio Power*, 80 NLRB at 1340-41. The Board and Courts have held that the continuous availability of an admitted supervisor militates against finding that lower-level employees are supervisors. See, e.g., *Northcrest Nursing Home*, 313 NLRB at 500; *Children’s Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 133 (7th Cir. 1989).

independent judgment in the performance of their own job *without* exercising independent judgment in “the exercise of [section 2(11)] authority.”

A professional or other skilled employee does not become a supervisor merely because his or her job involves both the exercise of discretion and the direction of other employees. In *Providence*, the Board explained:

[W]hen a professional gives directions to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give. For example, designing a patient treatment plan may involve substantial professional judgment, but may result in wholly routine direction to the staff that implements that plan. Independent judgment must be exercised in connection with the §2(11) function if the actor is to be deemed a statutory supervisor; use of judgment in related areas of a professional or technical employee’s own work does not meet the statute’s language. . . . [*Id.* at 728-29.]¹⁷

The point in this regard is that before even considering the degree of discretion an employee has in making decisions, the Board must determine whether that discretion is exercised in assigning or directing other employees. Only independent judgment that is exercised in carrying out one of the supervisory functions is sufficient to place an employee into the category of supervisor. Thus, the party urging exclusion bears the burden of proving that the alleged supervisors “have authority to exercise at least one of the powers enumerated in Section 2(11) . . . and that the use of that authority involved a degree of discretion that rises to the level of [independent judgment].” *Dean & Deluca New York, Inc.*, 338 NLRB No. 159 at 2 (2003). The Board has designated the requisite independent judgment ““supervisory independent judgment.””

¹⁷The Board has long been attentive to whether the independent judgment is exercised in relation to the §2(11) functions in non-nurse cases as well. *See, e.g., Central Cartage, Inc.*, 236 NLRB 1232, 1247 (1978) (dispatcher uses “skill, specialized knowledge, and seasoned judgment . . . concern[ing] equipment availability” but does not act with “discretion in directing employees”); *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331, 334 (1st Cir. 1948).

Id.

2. Degree of Discretion Needed to Exercise Independent Judgment

In *Kentucky River*, the Court expressly held that the term “independent judgment” was ambiguous “with respect to the *degree* of discretion required for supervisory status” and, thus, “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies.” *Id.* at 713.

In this short sentence, the Supreme Court makes two crucial points. First, Congress did not provide that *any* exercise of discretion in the performance of supervisory functions was sufficient under § 2(11). In other words, it is not only in cases in which decisions are *wholly* dictated by employer policies and instructions that the Board can hold there is insufficient independent judgment.

Second, the Board has discretion to draw the line between the degree of discretion that is insufficient to constitute independent judgment and the degree that is sufficient. In doing so, the Board must obviously be guided by the express congressional intent described above. In other words, the Board must draw the line not only above the level of the oft-cited parking lot attendant who directs the president of the company where to park his car, *see, e.g. Providence*, 320 NLRB at 726, but also above the level of the “minor supervisory employees” Congress did not intend to exclude. *Leg.Hist.* at 410. As the Seventh Circuit recognized, “The concept of ‘independent judgment’ under §2(11) is, at its core, concerned with those who work at the margins of supervisory authority.” *NLRB v. Grancare, Inc.*, 170 F.3d 662, 667 (7th Cir. 1999). Congress intended the application of the independent judgment criteria to separate supervisors from “employees who exercise some authority but not enough to be considered more than part of

the regular work force." *Id.* at 667-68.

Specifically, the Board should consider a number of factors in deciding whether an employee exercises sufficient discretion in the performance of supervisory functions to constitute independent judgment within the meaning of §2(11). First, the Board should consider the percentage of time the employee spends performing supervisory functions. Obviously, the more time employees spends performing supervisory functions, the more difficult it is and thus the less likely it is that the employees' performance of those functions is dictated by employer directions or policies sufficient to reduce the employees' discretion below the level of independent judgment.

Second, the Board should consider the scope of the employees' supervisory authority for similar reasons. An employee who directs two or three employees in the loading of a single truck is less likely to exercise independent judgment than an employee who directs all employees in the shipping department.

Third, the Board should continue to consider the nature of the tasks performed by the allegedly supervised employees. If they are largely repetitive, it is less likely that they alleged supervisor exercises independent judgment in directing the performance of the tasks. *See, e.g., Chicago Metallic Corp.*, 273 NLRB 1677, 1692 (1985) ("the products to be produced are generally standardized").

Fourth, the Board should continue to consider whether assignments are made simply to equalize the work load.

Fifth, the Board should continue to consider whether assignments are based on employees' known skills or capacities.

Finally, the Board should consider employer policies, instructions, plans, and standard operating procedures that constrain the alleged supervisor's discretion. Both before and after *Kentucky River*, the Board has held that when directions are given within a framework of policies, plans or standard-operating-procedures, the giving of the directions does not require the exercise of independent judgment. In *Ferguson Electric Co.*, 335 NLRB No. 15 (2001), for example, the Board considered the status of project foremen who had the authority "to lay out the work, tell the electricians where they are to work on any given day and how the work should be done, and to oversee the performance of this work by the employees on their crew." *Id.* at 5. The Board held that the project foremen were not supervisors because "this authority is circumscribed by the blueprints and specifications and the dictates of the general contractor or owner as communicated to the foreman by the project manager and/or general foreman." *Id.* at 7. See also *Dynamic Science*, 334 NLRB No. 57 at 2 (2001).

Again, the important point made in *Kentucky River* is that these employer policies need not wholly eliminate the alleged supervisors' discretion. Rather, if they reduce the employees' discretion below the level of "independent judgment" established by the Board, the employees are not supervisors. No written or oral directions can anticipate every situation and cover every detail, thus eliminating all discretion. But when, for example, the doctors' orders, care plans, or other directions make clear that "the judgment of others figure much more prominently" than that of the alleged supervisor, the latter role is "primarily a routine one." *VIP Health Servs, Inc. v. NLRB*, 164 F.3d 644, 649 (D.C. Cir. 1999).

E. Occasional Performance of Supervisory Functions

Many employees covered by the Act occasionally assume supervisory duties. This may occur when a supervisor is absent or when employees rotate into a supervisory role. The Board must take care not to allow this sharing of supervisory duties to strip large numbers of employees who are primarily just that of the Act's protections.

1. Substitution for Supervisor

When employees occasionally assume supervisory duties, the Board has held that they are not excluded from the protections of the Act unless they assume the duties on a "regular and substantial" basis. *Aladdin Hotel*, 270 NLRB 838, 839 (1984). This standard has two distinct prongs. First, the employee must assume the supervisory duties on a "regular" basis. Regular means according to an established pattern. An employee who substitutes for a supervisor when the supervisor is out, but such absences are not "regular" is not a supervisor. "Such sporadic assumption of supervisory duties does not establish supervisor status." *Webco Industries*, 334 NLRB No. 77 at 3 (2001). When "substitutions occurred irregularly rather than on any scheduled basis," the substituting employee is not a supervisor. *Blue Island Newspaper Printing*, 273 NLRB 1709, 1710 (1985). Only when the substitution is not "limited to . . . sporadic and irregular absences" can it turn an employee into a supervisor. *Honda of San Diego*, 254 NLRB 1248, 1249 (1981). See also *Hexacomb Corp.*, 313 NLRB 983, 984 (1994); *Rhode Island Hospital*, 313 NLRB 343, 348 (1993).

Second, even if the employee assumes the supervisory duties on a "regular" basis, the employees must also possess the duties for a "substantial" part of their work time. The Board's precedent on what is "substantial" is both inconsistent and lacking a guiding rationale. The

controlling question should be is the worker primarily a supervisor or primarily an employee. Once this question is asked, it is clear that the test should be whether the employee possesses at least one of the indicia of supervisory status more often than not.

In *Westinghouse Electric Corp.*, 163 NLRB 723 (1967), the Board correctly reasoned:

Nor . . . do we believe we should wholly deny the benefits of employee status to any engineer who acquires the major part of his work experience during a work year in nonsupervisory work . . . simply because he has spent some of his time during such year in supervisory . . . work. For it is clear that such engineers are primarily attached to the nonsupervisory work force and that they share a substantial community of interest with their fellow nonsupervisory engineers. [*Id.* at 727.]

Based on this logic, the Board correctly adopted a clear and simple rule, protecting any employee who during the preceding 12 months “spent 50 percent or more of his working time . . . performing nonsupervisory duties.” *Id.*

The Board subsequently, erroneously distinguished *Westinghouse* in *Doctors’ Hospital of Modesto, Inc.*, 183 NLRB 950 (1970), on the grounds that the rule enunciated in that case does “not apply to circumstances like the instant case, wherein the disputed individuals are performing both the allegedly supervisory and nonsupervisory jobs during the same workweek, in the same department with essentially the same complement of employees.” *Id.* at 951. In a footnote, the Board mistakenly stated that the “basis” of the earlier decision was the fact that when the employees assumed supervisory duties, they did not supervise employees who they also worked side-by-side with when they did not possess supervisory duties. *Id.* n. 11. But while the Board noted this fact in *Westinghouse*, 163 NLRB at 727, it did not base its holding on the fact or limit its holding to such cases.

Nor was there any sound policy reason to depart from the *Westinghouse* rule. Any

problem of “divided loyalty,” discussed by the Board in *Westinghouse, id.* at n. 26, can be eliminated by the employer simply consolidating the supervisory duties in one or more full-time supervisors. Rather than protecting employers’ legitimate interests, the rejection of the *Westinghouse* rule allows employers to strip large numbers of employees of their rights by giving each of them supervisory authority for a small percentage of time. The unfairness of such an application of the post-*Westinghouse* jurisprudence is embodied in the rotating charge nurse, as in *Oakwood*, who not only rotate into the charge nurse position for only one of two shifts during a two-week period, but, even when they are in the position, largely perform nonsupervisory functions, including carrying a patient load, and spend only a very small percentage of their time on allegedly supervisory functions. Thus, the continued, mistaken failure to follow *Westinghouse* could lead to such nurses being stripped of their statutory rights based on spending a tiny minority of their work time in possession of allegedly supervisory authority that they very rarely exercise even during that time.

The Board should return to the *Westinghouse* rule.

2. Rotation of Supervisory Functions

Even if employees satisfy the regular and substantial test, the Board has not excluded them from the protections of the Act as supervisors if they simply assume a leadership or coordinating role among equals on a rotating basis such that they “supervise” employees who may “supervise” them the next day. Again a good example of this is the distribution of the charge nurse function on the wards of many hospitals. The Board has held, “Statutory supervisory authority is not shown by the limited authority of a charge nurse team leader on one day to ‘supervise’ coequal RNs, some of whom may on another day ‘supervise’ their equals

including the charge nurse.” *Providence*, 320 NLRB at 733.

The Board has reached the same conclusion in other industries, often among other professionals. Considering engineers, for example, the Board held, “true supervisory authority is not vested in the senior engineering and administrative employees . . . as equals, who, for indeterminate amounts of time, ‘supervise’ coequals who, in turn, later ‘supervise’ their equals while simultaneously being ‘supervised’ by their coequals.” *General Dynamics Corp.*, 213 NLRB 851, 859 (1974). Holding that architects assuming the role of “project architects” are not supervisors, the Board explained that they perform alleged supervisory and other functions, “including routine drafting, either serially or simultaneously on different projects” such that “less than a quarter of the Employer’s architectural graduates have not performed duties as project architect.” *Wurster, Bernardi*, 192 NLRB at 1051. Among reporters, the Board held, “That such work is essentially production rather than supervisory work seems all the clearer to us when we consider that five of the six newsmen regularly perform work both as deskmen and as newsmen under deskmen, and thus at different times come under the direction of each other.” *Nat’l Broadcasting Co.*, 160 NLRB at 1442. *See also Electrical Specialities, Inc.*, 323 NLRB 705, 707 (1997) (in holding leadmen not supervisors, noted that 10 or 12 had functioned as leadmen on different projects).

In many of these rotation cases, the employees themselves choose who will serve in the “supervisory” role on any given shift. This is true, for example, in many of the departments in the *Oakwood* case, where the admitted supervisors testified that they actually did not know how the nurses decided among themselves who would serve as the charge nurse during any given shift. *See Oakwood*, tr. at 345, 372, 412, 463, 476, 473. Surely this is not the “genuine

management prerogatives” intended by Congress when it is rotated among peers and often distributed by ones peers rather than by management.

F. The Role of the Secondary Indicia

The Board has correctly held that nonstatutory factors cannot render an employee a supervisor when he or she does not satisfy the standards set forth in § 2(11). We believe three such factors merit further discussion.

1. Ratio

A large ratio of supervisors to supervised employees should cause the Board to further scrutinize the facts in order to fulfill its duty to “take care to assure that exemptions from [the Act’s] coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.” *Holly Farms*, 517 U.S. at 399. Moreover, while it is theoretically possible to divide supervisory authority into any number of pieces, practical experience teaches that employers do not have more supervisors than rank-and-file employees and the Board is justifiable suspicious of efforts to exclude a substantial portion of the workforce as supervisors. *See, e.g. Airkaman, Inc.*, 230 NLRB 924, 926 (1977).

2. Importance of Job Not Relevant

In considering health care professionals, other professionals, and similar skilled and experienced workers, it is also important for the Board to continue to make clear that the “mere importance does not make the judgments rendered by such individuals supervisory in nature.” *King Broadcasting Co.*, 329 NLRB 378, 382 (1999). “[T]he Board has held that neither . . . responsib[ility] for the safety of others, or responsibility for physical property alone, confers supervisory status.” *Pantex Towing Corp.*, 258 NLRB 837, 842 (1981). Congress did not

exempt skilled, key, or life-sustaining employees -- but only supervisors.

3. Highest Ranking Employee on Site Not Relevant

Several times since *Kentucky River*, the Board has repeated its long-standing holding that “nothing in the statutory definition of ‘supervisor’ implies that service as the highest ranking employee on site requires finding that such an employee must be a statutory supervisor.” *Ken-Crest Services*, 335 NLRB No. 63 at 3 n. 16 (2001). The fact that an employee was “in charge” of a store on Saturdays “does not establish that he exercised supervisory authority.” *Dean & Deluca*, 338 NLRB No. 159 at 2.

Congress did not require that at least one on-site employee be classified as a supervisor during each shift. To simply assume that one on-site employee must be a supervisor is to indulge in a degrading assumption about U.S. workers which the Board has never adopted. For example, in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001), the Board adopted the ALJ’s conclusion that project foremen were not supervisors despite the fact that on some projects they were the highest ranking employees “on site every day.” *Id.* at 6. The ALJ properly recognized that the employees on the site were “experienced journeymen electricians, they did not need constant supervision and knew what had to be done.” *Id.*

Moreover, supervisory authority can be exercised without physical presence. “In today’s modern world of beepers, cordless phones, and fax machines, a supervisor need not be physically present to exercise supervision over the workplace.” *Grancare, Inc. v. NLRB*, 137 F.3d 372, 383 (6th Cir. 1998) (Moore, J., dissenting).

Thus, the Board should continue to make clear that the Act does not require the continued physical presence of a supervisor at the work site.

G. The Burden of Proof

In *Kentucky River*, the Supreme Court affirmed the Board's placement of the burden of proof on the party seeking to exclude an employee from the Act's protection. The Board has properly held parties seeking an exclusion strictly to their burden, making clear that "whenever the evidence is . . . inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia."

Phelps Community Medical Center, 295 NLRB 486, 490 (1989). "[A]ny lack of evidence in the record is construed against the party asserting supervisory status." *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n. 8 (1999).

The Board's burden of proof jurisprudence provides clear guidance on what is necessary to carry the burden of proving supervisory status. First, the proponent of exclusion must carry the burden of proving each element of the definition of supervisor. For example, proof of direction is insufficient without proof of the exercise of independent judgment in such direction. "A mere inference of independent judgment without specific support in the record cannot be sustained." *Quadrex Environmental Co.*, 308 NLRB 101, 101 (1992).

Second, general, nonspecific testimony about a classification or category of employees is insufficient to carry the burden of proof because the question of whether an employee is a supervisor requires a particularized inquiry. Only individual employees can be excluded from the protections of the Act and only if it is proven that the individual employee fits into the Act's definition of supervisor. Thus, in *The Bakersfield Californian*, 316 NLRB 1211 (1995), the Board found, "Nor does the Employer give any examples with respect to recommendations made by these individuals Accordingly, these assertions do not establish that *these individuals*

possess any Sec. 2(11) authority.” *Id.* at 1218 n. 17 (emphasis added). The Supreme Court has observed that “the gradations of authority . . . from that of general manager or other top executive to ‘straw boss’ are . . . infinite and subtle.” *Marine Engineers Beneficial Ass’n v. Interlake S.S. Co.*, 370 U.S. 173, 179 n. 6 (1962). Courts of Appeal have agreed. For example, the First Circuit concluded that there are “myriad iterations of authority that are possible and . . . subtle distinctions . . . easily can be drawn.” *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 274 (1st Cir. 1997). Given the great variation in the distribution of authority that is possible, general statements about all nurses in a hospital or all employees in a classification in a plant is not sufficient to carry the burden of proof.

The Board has expressly declined to exclude alleged supervisors in one department based on evidence concerning alleged supervisors in another departments. In *Staco, Inc.*, 244 NLRB 461 (1979), the Board rejected the logic of the Administrative Law Judge which it described as follows: “Jones is a leadman, and since leadmen are in charge of departments, and since there is no evidence of any other first-line supervision in Jones’ department, then Jones must have been performing, in her department, the same type of supervisory duties shown to have been exercised by those other challenged leadmen.” *Id.* at 461-62. The Board held, “While the Administrative Law Judge’s logic has some surface appeal, we believe that it has a fatal flaw – there is a total lack of evidence in the record before us to show that Jones herself exercised or possessed any of the indicia of supervisory authority set out in Section 2(11) of the Act.” *Id.* at 462.

Third, the burden of proof cannot be carried with “conclusionary statements” about an individual’s authority. *Sears, Roebuck & Co.*, 304 NLRB 193, 193 (1991). Indeed, such testimony is not factual evidence, it is merely the assertion of a legal conclusion. “Such

expressions are words of art reflecting legal conclusions, but they are not evidence which assists in the resolution of disputed supervisory status.” *United States Gypsum Co.*, 118 NLRB 20, 25 (1957). The Board has held that evidence that an alleged supervisor makes a decision does not establish the exercise of independent judgment absent evidence of *how* the decision is made, i.e. the criteria used in rendering the judgment. *See, e.g., Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 (2000); *Crittenton Hosp.*, 328 NLRB 879, 879 (1999) (“no evidence showing how mandatory overtime or additional staffing needs are determined, or the process by which employees are selected for overtime or call-in. Thus, the Employer has failed to demonstrate that RNs utilized independent judgment.”)

Such conclusionary testimony is insufficient to carry the burden of proof. The Board held in *Sears, Roebuck*, “that conclusionary statements made by witnesses in their testimony, without supporting evidence, does not established supervisory authority.” 304 NLRB at 193. In *American Radiator Corp.*, 119 NLRB 1715 (1958), the Board held, “Conclusionary statements such as the assertion that these five individuals tell employees in their field of activity ‘what to do, and when and how to do it’ do not, without supporting evidence, establish supervisory authority.” *Id.* at 1718.

CONCLUSION

The Board retains discretion to construe the ambiguous terms of the Act in a manner that will prevent a significant portion of the professional and craft workforces as well as large numbers of nonprofessional, but skilled and experienced workers at the very core of the category of employee protected by the Act, from being swept outside the Act’s protection as supervisors. Congress clearly expressed its intention to protect such employees. The Board must, therefore,

use these three cases to place the long-standing and proper protection of these employees on a firm statutory foundation.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of the AFL-CIO as Amicus in Support of the Petitioners was served by overnight express on the following this 22nd day of September 2003.

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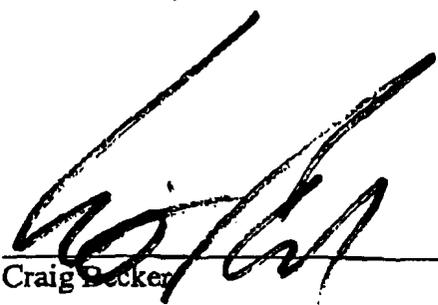
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