

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

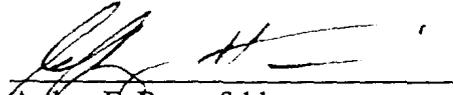
Petitioner.

**MOTION OF THE GENERAL COUNSEL TO FILE
SUBJECT INDEX TO BRIEF**

On September 18, 2003, the General Counsel filed an amicus brief in the above-referenced matter. Pursuant to Rule 102.46(j), the General Counsel moves to file a

subject index to the above-referenced brief, with page references and an alphabetical table of cases and authorities.

Dated this 25th day of September, 2003.



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National Labor Relations Board

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BRIEF OF THE GENERAL COUNSEL

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BRIEF OF THE GENERAL COUNSEL

On July 24, 2003, the Board advised the parties and interested amici to file briefs with the Board on or before September 19, 2003, addressing several questions regarding the supervisory status of the individuals in dispute in the three above-captioned cases in light of NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001) (Kentucky River).

Interest of the General Counsel

Although not formally a party, the General Counsel has a substantial interest in these proceedings in view of his role in administering the National Labor Relations Act (Act). Since the Board has posed questions aimed at determining the scope of supervisory status in light of the Supreme Court's decision in Kentucky River, the General Counsel is vitally concerned that his views be considered.

Although the General Counsel does not take a position on the merits in representation cases, the General Counsel believes that his recommendation, as set forth below, of the appropriate test to be used in determining whether individuals are statutory employees under Section 2(3) or supervisors under Section 2(11) of the Act can be of assistance to the Board in resolving the issues raised by these cases.

Introduction and Overview

The recurring and important question of who is a supervisor within the meaning of Section 2(11) of the Act¹ has long been a source of disagreement among Board members and between the Board and the reviewing courts. The disagreement has largely centered on the relationship of the terms "responsibly to direct" and "assign" with the term "independent judgment."

The conflict with the courts has always been pronounced in the power industry, where the Board has resisted finding dispatchers and similar controllers to be supervisors.

¹ Section 2(11) states, "[t]he term 'supervisor' means any individual having 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."

See, e.g., Ohio Power, 80 NLRB 1334 (1948), enf. denied, 176 F.2d 385, 387 (6th Cir.) (rejecting Board finding that control operators were not 2(11) supervisors where they were responsible in emergencies), cert. denied, 338 U.S. 899 (1949); Maine Yankee Atomic Power Co., 239 NLRB 1216 (1979), enf. denied, 624 F.2d 347, 366 (1st Cir. 1980) (same).

Since the enactment of the Health Care Amendments in 1974, the disagreement between the Board and the courts has become particularly important in the health care industry. In the 1970s, the Board adopted the “patient care analysis,” which examined “whether the alleged supervisory conduct of the charge nurses is the exercise of professional judgment incidental to patient care or the exercise of supervisory authority in the interest of the employer.” Eventide S., a Div. of Geriatrics, Inc., 239 NLRB 287, 289 (1978); see also French Hosp. Med. Ctr., 254 NLRB 711, 713 (1981); Northcrest Nursing Home, 313 NLRB 491, 493 (1993). After many years of conflict within the Board and circuit courts, the Supreme Court rejected the “patient care analysis” in NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 579 (1994) (HCR).

After HCR, the Board focused on refining its definition of “independent judgment” in nursing and other contexts, reasoning that the exercise of professional or technical judgment or expertise by professional and technical workers was routine and not the exercise of “independent judgment.” See, e.g., Providence Hosp., 320 NLRB 717, 729 (1996), enfd. 121 F.3d 548 (9th Cir. 1997) (Providence). After another lengthy conflict in the circuit courts, the Supreme Court in Kentucky River rejected the Board’s position that independent judgment does not include the exercise of professional or technical judgment in directing less skilled employees. See 532 U.S. at 714. Although

the Court agreed with the Board's allocation of the burden of proof in supervisory cases and held that the Board had authority to decide whether the degree of delegated discretion sufficed to constitute "independent judgment," the Court found that the Board's "categorical exclusion" of a particular kind of judgment, namely, professional or technical judgment, inserted a "startling categorical exclusion into statutory text that does not suggest its existence." Id. at 713-714. While recognizing the Board's asserted tension between Section 2(12)'s definition of professional employees as those who use discretion and judgment and Section 2(11)'s definition of supervisors, the Court found the Board's solution could not "be given effect through [the] statutory text." Id. at 720. The Court did, however, suggest 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," citing Providence. Ibid. (emphasis in original). The Court, however, declined to consider the distinction because interpretation of "responsibly to direct" was not at issue. Id. at 720-721.

It is in light of the Supreme Court's Kentucky River decision that the Board now revisits the problem of devising a construction of "assign," "responsibly to direct," and "independent judgment." To assist the Board in evaluating the issues in the cases presented, the General Counsel submits as follows: In Section A, the General Counsel proposes two general principles that should be applied in all supervisory cases. In Section B, the General Counsel proposes evidentiary standards for giving effect to the terms "responsibly to direct" and "assign" with "independent judgment" in a manner that accounts for the statute's plain language and its legislative history, the Supreme Court's

decisions, and the realities of modern workplaces. In Section C, the General Counsel proposes a framework for evaluating a particularly difficult factual scenario — part-time and rotating supervisors.

In summary, the General Counsel’s position is as follows:

A. General Principles For Evaluating All Section 2(11) Cases:

- 1. The Board Should Evaluate the Facts of Each Section 2(11) Case in Light of the Conflicting Interests that Congress Sought To Reconcile in Enacting Section 2(11).**
- 2. The Board Should Evaluate the Evidence in Each Section 2(11) Case To Determine How Supervisory Authority is Actually Delegated in a Particular Workplace.**

B. Whether Individuals Possess The Authority Responsibly To Direct Or To Assign With Independent Judgment Should Be Evaluated With The Aid Of The Proposed Evidentiary Tests:

1. Meaning of “Responsibly Direct” with “Independent Judgment.”

An individual who responsibly directs with independent judgment within the meaning of Section 2(11):

- a. has been delegated substantial authority to ensure that a work unit achieves management’s objectives and is thus “in charge.”**

The following factors seek to answer the question of whether the individual is “in charge:”

- i. The individual in question has sole or significant authority over the work unit and is not closely overseen by superior(s).**
 - ii. The employer relies on the individual to ensure that management policies and rules are implemented in the work unit.**
 - iii. Circumstantial evidence (i.e., so-called “secondary indicia”) support a finding that the individual is in charge.**
- b. is held accountable for the work of others; and**

- c. **exercises significant discretion and judgment in directing his or her work unit.**

Four principles should be considered in making this assessment:

- i. **Established procedures and rules may reduce the level of discretion required to make decisions below the threshold for independent judgment.**
- ii. **Discretion may more likely be required, or even inherent, in directing others in critical situations and emergencies.**
- iii. **The direction of routine and repetitive tasks, by its nature, often does not require discretion.**
- iv. **Merely conveying superiors' directions does not require discretion.**

2. Meaning of "Assign" with "Independent Judgment."

- a. **The Section 2(11) power to assign with independent judgment is demonstrated by evidence that the alleged supervisor has discretion to assign work of differing degrees of difficulty or desirability on the basis of his or her own assessment of an employee's ability or attitude.**
- b. **The Section 2(11) power to assign with independent judgment is lacking where evidence shows that the work to be performed does not differ significantly in difficulty or desirability or where the choice of whom to assign is largely dictated by nondiscretionary factors.**

C. Application of Analysis To Difficult Fact Pattern: Part-Time Or Rotating "Supervisors."

- 1. **The Board should determine whether the purported "supervisor" is actually vested with Section 2(11) authority on the days in which the individual acts as a "supervisor" by applying the statutory criteria, including the reformulated evidentiary tests for "responsible direction" and "assignment" proposed here.**
- 2. **If the application of 2(11) reveals that the individual does possess supervisory authority on the days in which he or she serves as a supervisor, the Board should determine whether the individual is vested with that authority on a "regular and substantial" basis.**

Analysis

A. General Principles for Evaluating All Section 2(11) Cases.

Because the case law concerning supervisory status is often difficult to reconcile and has at times been outcome driven, the General Counsel submits that two overriding propositions should guide the Board's analysis. First, all supervisor cases should be evaluated in light of the conflicting policy goals that Congress sought to reconcile in enacting Section 2(11). Second, all 2(11) analyses should center on the fundamental question: Has managerial authority been delegated to the individual or individuals in question?

1. The Board Should Evaluate the Facts of Each Section 2(11) Case in Light of the Conflicting Interests that Congress Sought To Reconcile in Enacting Section 2(11).

In enacting Section 2(11) of the Act, Congress sought to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives,” and employees, such as “straw bosses, leadmen, and set-up men, and other minor supervisory employees.” NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974) (Bell Aerospace) (quoting S. Rep. No. 105, 80th Cong., 1st Sess., at 4 (1947)). Persons vested with genuine management authority were denied organizational rights because, in Congress' judgment, they should have an undivided loyalty to management interests when they exercise independent judgment with respect to personnel matters or the responsible direction of work. See Bell Aerospace, 416 U.S. at 279-283; Florida Power & Light Co. v. Elec. Workers, Local 641, 417 U.S. 790, 807-813 (1974). Similarly, employees are entitled to protection from supervisory influence within the union's organization. See NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169, 1178 (2d Cir.

1968); Douglas Aircraft Co., 238 NLRB 668, 671 (1978), *enfd. sub nom. McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932 (9th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982). At the same time, “straw bosses, leadmen, and set-up men, and other minor supervisory employees” were to enjoy the Act’s protections even though they perform “minor supervisory duties.” Bell Aerospace Co., 416 U.S. at 280-281 (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess., at 4 (1947)). Thus, Congress sought to create a supervisory test that was inclusive enough to prevent the conflict of interest problems outlined above, while narrow enough so as to grant the Act’s protections to employees with “minor supervisory duties.” Ibid.

Numerous Board decisions reflect a concern not to construe Section 2(11) “too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect.” Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985), *affd. in relevant part*, 794 F.2d 527 (9th Cir. 1986); Chevron Shipping Co., 317 NLRB 379, 381 (1995). One of the lessons of Kentucky River — particularly in light of earlier related decisions in NLRB v. Yeshiva University, 444 U.S. 672, 690 (1980), and HCR — is that the Board must also take care not to construe Section 2(11) too narrowly lest it fail to give effect to the language and policy of the Act designed to ensure that persons vested with supervisory authority over others do not participate in union activities. Individuals who in fact are vested with supervisory authority owe a duty of undivided loyalty to their employer that Congress thought was inconsistent with their possession of Section 7 rights. See HCR, 511 U.S. at 581. And employees with Section 7 rights are entitled to protection against supervisors interfering with or dominating their organizational and bargaining activities. See Metropolitan Life, 405 F.2d at 1178. In

short, all Section 2(11) cases must be evaluated in light of the statute's conflicting policy goals: Congress' policy to give Section 7 rights to minor supervisors is no more important than its policy to deny Section 7 rights to true supervisors. By formulating a concept of "responsible direction" and "assignment" that is consistent with the language and history of 2(11), the Board will better harmonize other areas of Board law that are affected by 2(11) issues. Among the areas affected by the Board's 2(11) jurisprudence, for example, are unfair labor practice cases in which employers are alleged to discriminate against union adherents, interfere with employees' Section 7 rights, control a union's choice of labor representative, or dominate a labor organization. Thus, the Board's correct determination of supervisory status is important not only to representation cases but to all aspects of Board law and must be analyzed accordingly.

2. The Board Should Evaluate the Evidence in Each Section 2(11) Case To Determine How Supervisory Authority is Actually Delegated in a Particular Workplace.

It is the employer's delegation of managerial authority in any particular workplace that determines whether an individual is a statutory supervisor. Thus, it is a question of fact in every case whether the individual is merely a superior worker or lead, "or is a supervisor who shares the power of management." See NLRB v. Southern Bleachery & Print Works, Inc., 257 F.2d 235, 239 (4th Cir. 1958), cert. denied, 359 U.S. 911 (1959). The Board's task in each case is to determine what authority has in fact been delegated and what retained.

As detailed in Section B.1 and 2, *infra*, the Board must evaluate responsible direction and assignment in light of this principle. Thus, in determining whether an individual is a supervisor, the Board should look to the individual's level of responsibility

and discretion, who else within the organization has such authority, and how that other authority limits or accentuates the authority of the individual in question. The Board should also view so-called “secondary indicia,” including ratios of supervisors to employees, as circumstantial evidence of whether managerial authority actually has been delegated. Thus, as discussed further in Section B.1.a.iii, *infra*, circumstantial evidence or secondary indicia are not independent factors but are indicators of whether power was actually delegated to a particular individual.

Because workplaces are structured in a myriad of ways that are constantly changing, the General Counsel submits that the critical inquiry in all 2(11) cases is what authority has been delegated to the purported supervisor and what has been retained. Thus, the Board cannot not substitute its judgment for that of the employer’s in determining management structure.

B. Whether Individuals Possess The Authority Responsibly To Direct Or To Assign With Independent Judgment Should Be Evaluated With The Aid Of The Proposed Evidentiary Tests.

The difficulty in this area of the law is not with legal principles themselves, but in their consistent application to the myriad fact situations in which Section 2(11) issues may arise. For that reason, the objective of this brief is to provide evidentiary guidelines that will aid the Board in deciding whether alleged supervisors have been delegated meaningful responsibility to “responsibly direct” and to “assign” employees with “independent judgment.” The General Counsel submits that the proposed evidentiary standards will enable the Board to honor the statutory language and the legislative purposes.

1. Meaning of “Responsibly Direct” with “Independent Judgment.”

The term “responsibly to direct” was added to encompass those individuals who do not exercise any of the other supervisory indicia, but who still manage a group of employees. See 93 Cong. Rec. 4677-4678 (1947), 2 Leg. Hist. of the Labor Management Relations Act 1303-1304 (1947) (Sen. Flanders) (Leg. Hist.). In proposing the amendment, Senator Flanders described individuals who “direct responsibly” as those who are essentially responsible for their work unit:

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 [Section 2(11)] are transferred in modern practice to a personnel manager or department. . . .

In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a personal judgment based on personal experience, training, and ability. He is 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. 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 report. Their essential managerial duties are best defined by the words “direct responsibly,” which I am suggesting.

In a large measure, the success or failure of a manufacturing business depends on the judgment and initiative of these men. The top management may properly be judged by its success or failure in picking them out and in backing them up when they have been properly selected.

Id. at 1303.

The legislative history thus indicates that Congress added the phrase “responsibly direct” to cover an individual who did not have traditional supervisory indicia — such as

hiring, firing, or disciplinary authority. Ibid. Congress, however, did not intend the phrase “responsibly to direct” to encompass all acts of direction. Rather, it was intended to encompass individuals performing a function so “essential that the employer would “los[e] the control” necessary to run its business effectively and efficiently unless it could demand undivided loyalty from them. 2 Leg. Hist. 1303-1304. Thus, the definition of a “supervisor, taken from the Senate bill, was intended to exclude only “individuals generally regarded as foremen and persons of like or higher rank.” H.R. Conf. Rep. No. 510 on H.R. 3020, 80th Cong. 1st Sess., at 35, 93 Cong. Rec. 6442 (1947), 1 Leg. Hist. 539 (Sen. Taft).

With the legislative history in mind, the General Counsel submits that the Board needs to formulate a standard for responsible direction and independent judgment that applies across all industries and will withstand judicial scrutiny. See Public Serv. Co. of Colo. v. NLRB, 271 F.3d 1213, 1221 (10th Cir. 2001) (“[I]f the Board wishes to introduce a new standard for interpreting when a person responsibly directs employees, it should do so forthrightly and explicitly so that it may be required to apply in fact the clearly understood legal standard that it enunciates in principle.”) (internal quotation marks omitted). To that end, the General Counsel proposes the following evidentiary standard:

An individual who responsibly directs with independent judgment within the meaning of Section 2(11):

- a. has been delegated substantial authority to ensure that a work unit achieves management’s objectives and is thus “in charge;”**
- b. is held accountable for the work of others; and**
- c. exercises significant discretion and judgment in directing his or her work unit.**

The first two elements explore the extent of the authority to responsibly direct others that management has delegated to the individual in question. The first element focuses on Senator Flander’s explanation that an individual “directs responsibly” when the individual is in charge of the work unit, while the second element accounts for the development of case law, which has increasingly relied upon accountability as an indicator that an individual is responsible. The third element explores whether independent judgment is used in wielding that authority by analyzing the degree of authority delegated rather than the type of authority (e.g., whether that authority is professional or technical in nature). See Kentucky River, 532 U.S. at 713-714 (rejecting Board’s categorical exclusion of types of judgment).

While the proposed evidentiary standard is different from the one mentioned by the Supreme Court in Kentucky River, where the Court suggested that the Board could distinguish between directing “tasks” versus directing “employees,” id. at 720, the General Counsel submits that the proposed standard provides a clearer and more specific framework for distinguishing between nonsupervisory direction and 2(11) responsible direction. Thus, while the Board has made a distinction between task direction and employee direction, see, e.g., Providence, 320 NLRB at 729, the purported distinction is confusing because all direction involves the direction of employees to perform discrete tasks. The alleged dichotomy between “task direction” and “employee direction” thus begs the question — what distinguishes task direction (i.e., nonsupervisory direction) from employee direction (i.e., supervisory direction). The General Counsel’s proposed evidentiary standard provides a clearer framework for the distinction.

The suggested principles are not new, but rather are a synthesis of Board and court law which have, in a circumscribed manner, analyzed the term “responsible direction.” A non-exhaustive list of issues and evidence relevant to these elements follows with illustrative cases.

a. The individual has been delegated substantial authority to ensure that a work unit achieves management’s objectives and is thus “in charge.”

The legislative history and case law suggest that only individuals who are “in charge” of their work units for some period of time are encompassed within the term “responsible direction.” See, e.g., 2 Leg. Hist. 1303; B & B Insulation, Inc., 272 NLRB 1215, 1219 (1984) (where individual placed “in charge” of exceedingly important quality control functions, and was responsible for training, assignment, and direction of other employees, she responsibly directed them); Chem Fab Corp., 257 NLRB 996, 998 (1981) (individual who was “in charge” during second shift and exercised independent judgment was supervisor), *enfd.* 691 F.2d 1292 (8th Cir. 1982). In addition to harmonizing the legislative history and case law, this interpretation accords with the statute’s plain language by providing meaning to the term “responsible.” Thus, the term “responsible,” by definition and by the legislative history, suggests that the individual is granted a significant amount of authority to run a work unit. This element is intended to explore the extent to which the person has been delegated authority to direct a unit or group of employees.

The following evidentiary factors explore whether the individual is “in charge:”

i. The individual in question has sole or significant authority over the work unit and is not closely overseen by superior(s).

A critical inquiry in determining whether the disputed person responsibly directs a unit or group of employees is whether the individual in question is the sole or most significant authority for the work unit for a period of time. While an individual with sole or significant authority is still required to exercise independent judgment in directing employees,² the Board and courts have long emphasized this factor in determining whether an individual “responsibly directs” the work unit. Cases relying on the sole authority factor in finding individuals to be supervisors include:

- Evergreen New Hope Health & Rehab. Ctr. v. NLRB, 65 Fed. Appx. 624, 625 (9th Cir. 2003) (charge nurses at nursing home were highest authority during 2 of 3 shifts and were supervisors);
- Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484, 491 (2d Cir. 1997) (tug masters were supervisors as they had absolute command of vessel under maritime law);
- Dale Serv. Corp., 269 NLRB 924, 925 (1984) (senior operators at sewage treatment plant who were responsible for operation of plant in absence of managers were supervisors).

Individuals with “significant authority” for workers in a facility can also be “in charge,” even though there are other supervisors and managers in the facility at the time. See Maine Yankee Atomic Power Co. v. NLRB, 624 F.2d 347, 351-352, 353-354 (1st Cir. 1980) (highest authority on each shift was plant shift superintendent; shift operating supervisors who reported directly to that superintendent were also supervisors because they had the authority to “run the shift”).

² See, e.g., NLRB v. Res-Care, Inc., 705 F.2d 1461, 1467 (7th Cir. 1983) (although evening and night shift “licensed practical nurses are the highest-ranking employees on the premises, this does not ipso facto make them supervisors. A night watchman is not a supervisor just because he is the only person on the premises at night, and if there were several watchmen it would not follow that at least one was a supervisor.”).

On the other hand, the presence or availability of superiors may indicate that the individual in question is not “in charge.” This may be because the individuals do not have significant authority over the work unit or because they do not exercise “independent judgment” (see Section B.1.c., *infra*):

- *Oil, Chemical & Atomic Workers v. NLRB*, 445 F.2d 237, 241-242 (D.C. Cir. 1971) (absence of on-site supervision during many hours of day did not mean senior operator “responsibly directed” junior operators where they were instructed to consult plant manager in emergencies or unusual circumstances), cert. denied sub nom. *Angle v. NLRB*, 404 U.S. 1039 (1972);
- *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 581-582 (6th Cir. 1965) (absence of on-site supervision at night and other times did not confer supervisory status on switchboard operators in charge where superiors could be reached by telephone);
- *Beverly Health & Rehab. Servs., Inc.*, 335 NLRB 635, 669-670 (2001), *enfd.* in relevant part, 317 F.3d 316, 323-324 (D.C. Cir. 2003) (LPNs at nursing home did not responsibly direct aides where the LPNs and aides worked under the direction of RNs who were present on every shift).

The significance of the availability of superiors by telephone or other means is tempered by the individual in question’s discretion to contact the supervisor. Where the individual has discretion over whether to call a superior (as opposed to being required to call in particular circumstances), he or she is more likely to be in charge and, therefore, a supervisor:

- *NLRB v. Detroit Edison Co.*, 537 F.2d 239, 244 (6th Cir. 1976) (notification of supervisors did not remove system supervisors’ discretion in emergencies);
- *Vanguard Tours, Inc.*, 300 NLRB 250, 260-261 (1990) (bus dispatcher in sole charge of operation for at least two hours at a time; manager’s availability by phone did not limit dispatcher’s discretion), *enf. denied* on other grounds, 981 F.2d 62 (2d Cir. 1992);
- *West Virginia Pulp & Paper Co.*, 122 NLRB 738, 742 (1958) (“higher supervision is on call only by telephone in those emergencies which the tour foremen feel they cannot, or should not, handle alone” and “the decision to call higher supervision at night lies wholly within the discretion of the tour foremen”).

The exclusion of individuals from the bargaining unit who are in charge of their work unit for a period of time comports with the statute's legislative history and purpose — to avoid the problem of conflicted loyalties. Thus, management has a right to demand the loyalty of individuals in charge of a work unit, and employees have a right to be free from such individual's influence in the union.

ii. The employer relies on the individual to ensure that management policies and rules are implemented in the work unit.

Where the disputed person is relied upon to ensure that the employer's management policies and rules are implemented in the work unit, the individual is more likely to possess the authority "responsibly to direct." The employer is entitled to expect loyalty from an individual who is thus "in charge" of the work unit. See HCR, 511 U.S. at 581 (discussing danger of divided loyalty should nursing home owners "want to implement policies to ensure patients receive the best possible care despite potential adverse reaction from employees working under the nurses' direction");³ see also Bell Aerospace, 416 U.S. at 281 (noting that in enacting Section 2(11) to limit organizational rights, Congress was concerned in part "that unionization of supervisors had hurt productivity [and] increased the accident rate").

³ Numerous studies have found that policies, rules, and standards for producing quality health care for patients are not self-enforcing, but require active managerial and supervisory monitoring and follow-up to ensure employee compliance. See E. Bardach & R.A. Kagan, Going By the Book: The Problem of Regulatory Unreasonableness 99-101 (Temple University Press 1982); N. Foner, The Caregiving Dilemma: Work in an American Nursing Home 76-90 (University of California Press 1994); M. Maas, K. Buckwalter, & J. Specht, "Nursing Staff and Quality of Care in Nursing Homes," in Nursing Staff in Hospitals and Nursing Homes: Is it Adequate? 403-404 (G.S. Wunderlich, F.A. Sloan, & C.K. Davis, eds., National Academy Press 1996).

Moreover, the employees likely view that individual as the “boss,” given that the individual has the power and responsibility to enforce the employer’s policies, performance standards, and work rules. Cases relying on this enforcement of rules factor in finding supervisory status include:

- American Diversified Foods, Inc. v. NLRB, 640 F.2d 893, 895 (7th Cir. 1981) (among other responsibilities, duty managers were “responsible for enforcing the company’s dress and behavior rules”);
- Darbar Indian Rest., 288 NLRB 545, 551 (1988) (chief chef held to responsibly direct the work of kitchen employees where it was his responsibility to “make sure that anything that goes out of the kitchen goes according to his recipes and according to his tastes.”);
- Wedgewood Health Care, 267 NLRB 525, 525 (1983) (LPNs at nursing home had authority to enforce major personnel policies);
- Piccadilly Cafeterias, Inc., 231 NLRB 1302, 1311 (1977) (assistant chefs have an immediate responsibility “for the preparation, timing, and presentation of a variety of foods in an effective manner” that constitutes responsible direction requiring independent judgment), enfd. 584 F.2d 388 (5th Cir. 1978) (Table);
- Avon Convalescent Ctr., Inc., 200 NLRB 702, 706 (1972) (LPNs at nursing home enforced “major personnel policies and rules,” which was “certain to require the exercise of independent judgment”), enfd. 490 F.2d 1384 (6th Cir. 1974).

This evidentiary guideline comports with unfair labor practice law. Thus, where an individual has the ability to retaliate against Section 7 activity by enforcing the employer’s rules in a discriminatory manner, that factor supports a finding that the individual is a supervisor. See, e.g., Mid-Mountain Foods, Inc. v. NLRB, 269 F.3d 1075, 1076 (D.C. Cir. 2001) (supervisors threatened harsher enforcement of company work rules if the union won the election).

On the other hand, where the individual in question has the ability to enforce work rules, but there is no other evidence that the individual is “in charge” of a work unit, the individual may not be found to “responsibly direct” the work unit. See Endicott

Johnson Corp., 67 NLRB 1342, 1347 (1946) (persons who directed 1 to 6 employees and whose “duties are to keep production moving on schedule and to inspect and control the quality of work” are not supervisors), cited with approval in S. Rep. No. 105 (1947), 1 Leg. Hist. 410; Precision Fabricators, Inc. v. NLRB, 204 F.2d 567, 568-569 (2d Cir. 1953) (lead who keeps employees busy on assignments given him by others is not a supervisor). Thus, the ability to enforce work rules is an important consideration in determining whether an individual is “in charge,” but must be looked at in conjunction with other evidence indicating that the employer is actually relying on the putative supervisor to ensure that employees follow the employer’s management policies. That is the import of the statute’s requirement that a supervisor must have not simply the power to direct, but the power “responsibly to direct.”⁴

iii. Circumstantial evidence (i.e., so-called “secondary indicia”) support a finding that the individual is in charge.

Circuit courts have come to varied conclusions on the weight to be accorded to “secondary indicia.” See NLRB v. Dole Fresh Vegetables, Inc., 334 F.3d 478, 487 (6th Cir. 2003).⁵ Because of the mixed significance placed on secondary indicia, it is

⁴ Moreover, even if the person possesses some authority to implement policies and rules in the work unit, the delegated authority still “requires the use of independent judgment” to be supervisory. See, e.g., Holiday Inn of Dunkirk-Fredonia, 211 NLRB 461, 461-462 (1974) (assistant housekeeper who oversees work by maids assigned to one of two floors of a motel, inspects the rooms which they clean, and exercises independent judgment in ordering the maids to correct deficiencies in their work is a supervisor); Jas. H. Matthews & Co., 149 NLRB 161, 168-171 (1964) (departmental leadmen use independent judgment in directing, monitoring, criticizing, and inspecting the work of employees), *enfd.* 354 F.2d 432, 435 (8th Cir. 1965), *cert. denied*, 384 U.S. 1002 (1966). See discussion on independent judgment, Section B.1.c, *supra*.

⁵ For instance, the Third Circuit has declined to consider secondary indicia at all because they are not encompassed in the statutory language, see, e.g., NLRB v. Attleboro Assocs. Ltd., 176 F.3d 154, 163 n.5 (3rd Cir. 1999); the Seventh Circuit considers secondary

particularly important that the Board define where these factors fit into a supervisory analysis. Factors such as perceptions by employees, pay differentials, and ratios, promote the application of a consistent evidentiary standard in supervisory cases that should lead to more consistent results.

The General Counsel believes that while “secondary indicia” are not set forth in the statute’s text, they can provide insight into the existence of supervisory status. Those indicia may provide circumstantial evidence of whether an individual is “in charge.” These “circumstantial evidence” or “secondary indicia” include: whether the individual is perceived by co-workers as a supervisor; whether the individual attends management meetings; whether the individual spends more time ordering others around than on production work; whether the individual wears a different uniform from non-supervisors; and whether there appears to be an unreasonable ratio of employees to supervisors. See Poly-Am., Inc. v. NLRB, 260 F.3d 465, 479 (5th Cir. 2001). All of these factors inform the determination of whether managerial authority has actually been delegated to the individual in question, normally as it relates to responsible direction. For instance, individuals are more likely to be “in charge” of their work unit if they are perceived as supervisors, if they attend management meetings, and if they spend more time engaging in ordering employees around than working in production. Thus, these “secondary indicia” are not set forth in the statutory text, but rather provide

indicia as relevant only if another statutory criteria is present, see, e.g., E & L Transp. Co. v. NLRB, 85 F.3d 1258, 1270 (7th Cir. 1996); and the Ninth Circuit considers them relevant only in borderline cases, see, e.g., Northern Mont. Health Care Ctr. v. NLRB, 178 F.3d 1089, 1096 n.6 (9th Cir. 1999).

circumstantial evidence useful in assessing the contention that an individual is “in charge” of a work unit.⁶

This interpretation accords with the meaning that early Board cases gave to secondary indicia. That is, early Board decisions looked at secondary indicia not as separate quasi-factors of supervisory status, but as evidence of whether an individual actually responsibly directed a work unit:

- Baltimore Gas & Elec. Co., 138 NLRB 270, 277 (1962) (fact that night foreman earned 10 to 15 percent more than employees and high ratio of employees to only one night foreman supported finding of responsible direction);
- Liberty Coach Co., 128 NLRB 160, 163-164 (1960) (individuals’ attendance at management meetings supported finding of responsible direction);
- Potomac Elec. Power Co., 111 NLRB 553, 557-559 (1955) (relying in part on “high ratio of employees to acknowledged supervisors in the division” in finding that lead charwomen “responsibly directed” the work of their crews);
- Austin Co., 77 NLRB 938, 943 n.12 (1948) (relying on ratios, in part, in finding that individuals did not “responsibly direct” their work units; if the employer’s supervisory claim were upheld, the result would be that groups of 3 or 4 employees are directly supervised by 5 persons).

Thus, circumstantial evidence indicates whether an individual is “in charge” of a work unit. While the functions, duties, and authority of an individual remain critical in determining whether an individual “responsibly directs” a work group, the “secondary indicia” provide circumstantial evidence that an individual is truly in charge.

⁶ A hearing officer is not permitted to make credibility resolutions in representation cases. See Section 9(c)(1) of the Act. See Utica Mut. Life Ins. v. Vincent, 375 F.2d 129, 130 (2d Cir.), cert. denied, 389 U.S. 839 (1967). Thus, the Regional Director’s ability to evaluate circumstantial evidence in determining supervisory status is particularly helpful because it is information that is easily obtained from testimony.

Caution must be exercised in considering ratios in order to avoid prejudging the facts based on abstract ideas about “proper” ratios.⁷ Analysis of ratios must therefore go beyond sheer numbers and must include the context. For instance, a seemingly disproportionate ratio may be reasonably explained in a high-risk industry, where employers may conclude that closer supervision is necessary, but considerably less plausible in cases in which the work is highly routine. Compare Maine Yankee Atomic Power Co. v. NLRB, 624 F.2d 347, 365 (1st Cir. 1980) (shift operating supervisors at atomic power company; court noted that there was no duplication of responsibilities and downplayed ratio of 1:3 because it was for the employer, not the Board, to decide the appropriate ratio), with Highland Superstores, Inc. v. NLRB, 927 F.2d 918, 923 (6th Cir. 1991) (ratio of one supervisor for every two and a half employees was suspect “given the routine nature of the warehouse work”). Thus, ratios may be a helpful aid in analyzing an employer’s hierarchy and may elucidate whether management has truly delegated to a particular individual the authority to be “in charge.”⁸

b. The individual is held accountable for the work of others.

After analyzing whether an individual is “in charge” of a work unit, the Board should look at whether they are held accountable for the work of others. Courts and, increasingly, the Board have recognized that accountability or responsibility for the work

⁷ See NLRB v. GranCare, Inc., 170 F.3d 662, 667 (7th Cir. 1999) (en banc) (ratios are “central to the balance of power concern;” if LPNs were supervisors, 40 percent of nursing staff would be supervisors, which would be “a top-heavy setup that we think would be bizarre to say the least”).

⁸ See, e.g., Beverly Enters. v. NLRB, 148 F.3d 1042, 1047 (8th Cir. 1998) (“the ratio of supervisors to non-supervisory employees is often significant”); Dixon Indus., 247 NLRB 1446, 1446 n.3, 1449-1451 (1980), *enfd.* 700 F.2d 595, 598-599 (10th Cir. 1983) (supervisory ratio of 1½ supervisors to 40 employees would be unrealistic).

of others is a strong indication that an individual is responsible for the work unit, and thus, that he or she “directs responsibly” that group. The addition of this factor to the responsible direction test comports with the statutory intent. That is, where a purported supervisor is susceptible to discipline for the actions of the employees, the interests of the two diverge.

Where the individuals in question are accountable for the work of others, they are more likely to be supervisors:

- Maine Yankee Atomic Power Co. v. NLRB, 624 F.2d 347, 360 (1st Cir. 1980) (finding supervisory status where individual was “held fully accountable and responsible for the performance and work product” of his employees);
- NLRB v. Adam & Eve Cosmetics, Inc., 567 F.2d 723, 728 (7th Cir. 1977) (individual was held to be supervisor in part because he could be dismissed for deficient performance of others);
- NLRB v. Fullerton Publ’g Co., 283 F.2d 545, 547, 549-550 (9th Cir. 1960) (editor who was fully accountable and responsible for the performance and work product of the reporters in his department was supervisor);
- Ohio Power Co. v. NLRB, 176 F.2d 385, 387-388 (6th Cir. 1949) (control operators responsibly directed where they were “answerable for the discharge of a duty or obligation”), cert. denied sub nom. Angle v. NLRB, 404 U.S. 1039 (1972).

Where individuals are not held responsible for others’ conduct, they are generally not supervisors:

- Northeast Utils. Serv. Corp. v. NLRB, 35 F.3d 621, 625 (1st Cir. 1994) (“Finally, and most importantly, [purported supervisors] are simply not held accountable if a [subordinate] disobeys a direct order, misquotes a price or causes a blackout.”);
- NLRB v. KDFW-TV, Inc., 790 F.2d 1273, 1278 (5th Cir. 1986) (directors were not supervisors where record suggested they were responsible “only for their own performance in orchestrating a particular broadcast”).

A leader of an integrated work team — a team of employees working collaboratively on a project — is not a supervisor where the team members are

responsible for independently executing their assignments and the leader is not responsible for the work product of the other team members. See McGraw-Hill Broad. Co., 329 NLRB 454, 457 (1999) (television producers were not supervisors in part because relationship was one of co-equals involved in sequential functions in development of single product); see also Multimedia KSDK, Inc. v. NLRB, 303 F.3d 896, 902 (8th Cir. 2002) (Bye, J., dissenting) (suggesting that Board could apply “collaborative theory” to limit parameters of responsibly direct indicia — majority did not disagree with this theory but declined to consider it because court would not enforce Board order on alternative grounds). Thus, an individual is not a supervisor if he or she is not accountable for the work unit’s overall product or service:

- NLRB v. KDFW-TV, Inc., 790 F.2d 1273, 1278 (5th Cir. 1986) (producers, directors, and assignment editors were not 2(11) supervisors where they were not responsible for the performance of the skilled technicians with whom they worked but only for their own performance and for coordination);
- Post-Newsweek Stations, 203 NLRB 522, 523 (1973) (equals involved in separate but sequential functions of development of single product were not supervisors where they were not responsible for the direction or control of the employees’ activities).

Although the Board declined to adopt an accountability test in Providence, 320

NLRB at 729, the Board has considered accountability in recent decisions:

- American Commercial Barge Line Co., 337 NLRB No. 168, slip. op. at 2 (2002) (if a crew member on the towboat did something wrong during the pilot’s watch, the pilot was held responsible);
- Franklin Home Health Agency, 337 NLRB No. 132, slip op. at 6 (2002) (finding that RNs working for a home health agency were not supervisors in part because they were not accountable);
- Ingram Barge Co., 336 NLRB No. 131, slip. op. at 5 (2001) (towboat pilot responsibly directed deck employees where, during his watch period, the pilot was fully responsible for the operation of the boat).

While some courts appear to view accountability alone as dispositive of supervisory status,⁹ the General Counsel does not advocate this approach because accountability alone does not determine whether the individuals exercise independent judgment or whether they are “in charge” of a work unit, a factor that the Board has consistently relied upon and which comports with the statute’s legislative history. See Third Coast Emergency Physicians, P.A., 330 NLRB 756, 759 (2000) (while emergency physicians were responsible by law for making sure midlevel providers follow hospital protocols and standing orders, such mandated accountability did not establish supervisor status where physicians did not otherwise responsibility direct midlevel providers, nor did they exercise independent judgment regarding any employment issues).

c. The individual exercises significant discretion and judgment in directing his or her work unit.

While an individual may “responsibly direct” his or her work unit, the Board should separately analyze whether the direction is exercised with “independent judgment.” Thus far, this Brief has discussed guidelines for responsibly to direct — that is, factors to determine whether sufficient authority has been delegated to the alleged supervisor. This section sets forth factors that explore whether independent judgment is used or required to exercise that authority. After Kentucky River, the distinction between

⁹ See, e.g., NLRB v. Quinnipiac College, 256 F.3d 68, 77 (2d Cir. 2001) (security shift supervisors were reprimanded for others’ actions; “accountability for another’s failure to perform a duty establishes as a matter of law an employee’s supervisory power responsibly to direct”) (quoting Schnurmacher Nursing Home v. NLRB, 214 F.3d 260, 267 (2d Cir. 2000)); NLRB v. Adam & Eve Cosmetics, Inc., 567 F.2d 723, 728 (7th Cir. 1977) (production line supervisor was reprimanded for not keeping warehousemen busy; court stated “this alone would seem to settle the question of whether Schwartz had the authority, in the interest of the employer, to responsibly direct his fellow employees in the course of their duties”).

professional or technical judgment and independent judgment is invalid. Thus, the proposed factors avoid relying on the type of judgment (e.g., professional or technical) that is used and instead focus on the degree to which the alleged supervisor must use discretion in exercising the delegated authority. The following factors examine some constraints that can eliminate or effectively reduce the individual's discretion to "routine" or "clerical" rather than "independent" judgment.

i. Established procedures and rules may reduce the level of discretion required to make decisions below the threshold for independent judgment.

Employers often have established (written or unwritten) procedures or rules for their operations. As stated by the Supreme Court in Kentucky River, 532 U.S. at 713-714, 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." Thus, individuals who merely follow detailed protocols rather than use their own thought or discretion in making decisions do not exercise independent judgment:

- Beverly Enters. v. NLRB, 148 F.3d 1042, 1047 (8th Cir. 1998) (nurses' authority to adjust aides' duties and priorities in response to changes in patient condition and in staff availability "does not require the use of independent judgment but is instead narrowly circumscribed by an elaborate system of procedures, policies, and protocol regarding patient care");
- NLRB v. Meenan Oil Co., 139 F.3d 311, 321 (2d Cir. 1998) (truck dispatchers' assignment and direction of work were routine and clerical because decisions were circumscribed by detailed procedures and a computer program generated and grouped delivery tickets);
- Dynamic Sci., Inc., 334 NLRB 391, 391 (2001) (post-Kentucky River Board determined that test leaders did not responsibly direct other employees where their role was limited by detailed orders and regulations).

The mere existence of rules and procedures, however, does not necessarily eliminate independent judgment if application of the procedures still requires the individual to exercise significant discretionary decision-making. Even the most detailed manuals may require individualized action and thus require the exercise of independent judgment:

- NLRB v. Quinnipiac College, 256 F.3d 68, 78 (2d Cir. 2001) (shift supervisors exercised independent judgment when they dealt with situations not covered by policies and procedures by assessing situation, deploying personnel, and notifying superiors at the end of the incident);
- Glenmark Assocs., Inc. v. NLRB, 147 F.3d 333, 341 (4th Cir. 1998) (“[T]he Board mistakenly assumes that because there is an established procedure for handling a particular scheduling situation, nobody is required to think.”);
- B&B Insulation, Inc., 272 NLRB 1215, 1215 n.1 (1984) (quality control supervisor exercised independent judgment in directing employees where she could not rely solely on established guidelines).

Similarly, the extent to which the alleged supervisor may deviate from protocol also demonstrates discretion and independent judgment. The more deviation from protocol permitted, the more likely an individual is to have authority to exercise independent judgment. See Clear Lam Packaging, Inc., 265 NLRB 701, 701 n.3 (1982) (leadpersons were supervisors where frequent rush jobs or machine or material dysfunction necessitated their exercise of discretion in reordering job assignments by deviating from oral and written instructions).

ii. Discretion may more likely be required, or even inherent, in directing others in critical situations and emergencies.

While these guidelines are intended for general application in all industries and to all positions, courts have considered the significant impact that some jobs have, such as in the health care and public utility industries. Accordingly, where the purported supervisor plays a key role in directing others in critical situations that are unlikely to be covered by established procedures, the Board and courts have taken the view that independent judgment is exercised in responding to and resolving such incidents:

- Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484, 491 (2d Cir. 1997) (tug masters were responsible for preventing maritime catastrophes that could result in discharge of fuel into waterway);
- American Commercial Barge Line Co., 337 NLRB No. 168, slip op. at 2 (2002) (pilot used judgment to direct employees in critical situations; errors in tug boat pilots' judgment "can be catastrophic, including a collision causing loss of life or a chemical spill");
- Avon Convalescent Ctr., Inc., 200 NLRB 702, 706 (1972) (LPN in charge of shift at nursing home was "prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically and routinely" where patients' "critical needs may momentarily require variations in standard procedures"), enfd. 490 F.2d 1384 (6th Cir. 1974).¹⁰

In cases where individuals rarely exercise authority but the consequences of mishandling situations are severe, courts are more likely to conclude that they are supervisors. While the Board has previously rejected the severe consequences

¹⁰ While Avon Convalescent was overruled in Northcrest Nursing Home, 313 NLRB 491, 494 n.12 (1993) and Providence, 320 NLRB at 725-726 n.17, the General Counsel submits that Avon represents the sounder view under many factual scenarios. Avon is more consistent with Kentucky River, as both Northcrest and Providence relied in part on the "professional" or "technical" judgment distinction. Avon also accords with studies noting the high demands increasingly placed on licensed nurses in nursing homes. See, e.g., Jean Johnson et al., "Quality of Care and Nursing Staff in Nursing Homes," in Nursing Staff in Hospitals and Nursing Homes: Is it Adequate? 430-432 (G.S. Wunderlich, F.A. Sloan, & C.K. Davis, eds., National Academy Press 1996).

rationale,¹¹ the General Counsel submits that consideration of this factor is required given the courts' views:¹²

- NLRB v. McCullough Env'tl. Servs., Inc., 5 F.3d 923, 942 (5th Cir. 1993) (lead operators who handled emergencies at sewage treatment plant were supervisors);
- Maine Yankee Atomic Power Co. v. NLRB, 624 F.2d 347, 356 (1st Cir. 1980) (faulting the Board for making "no reference to the serious consequences that can flow from even simple errors made in connection with the operation of a nuclear electrical generating plant");
- Ohio Power Co. v. NLRB, 176 F.2d 385, 388 (6th Cir.) (rejecting Board's view that sporadic exercise of authority was insufficient, court found control operators at electric generating station directed plant in emergencies), cert. denied, 338 U.S. 899 (1949).

Responsibilities in isolated instances that are unlikely to recur and are not a part of an individual's normal job duties have, however, been found insufficient to confer supervisory status. See Springfield Jewish Nursing Home for the Aged, Inc., 292 NLRB 1266, 1267 (1989) (nurse did not become a supervisor because of responsibilities during a fire).

¹¹ See Providence, 320 NLRB at 725-726 n.17 ("[T]he possibility that severe consequences might flow from a professional's misjudgment does not necessarily make that judgment supervisory; critical judgment is the quintessence of professionalism.") (disapproving of Maine Yankee Atomic Power Co. v. NLRB, 624 F.2d 347 (1st Cir. 1980)), enf'd. 121 F.3d 548 (9th Cir. 1997)).

¹² Thus, the power to exercise authority may be sufficient to confer supervisor status even if the authority is not exercised often. See Cherokee Heating & Air Conditioning Co., 280 NLRB 399, 404 (1986) (existence of authority, not how often it is used, determines supervisory status). On the other hand, the lack of exercise of authority, in emergencies or otherwise, can support a theory that the authority does not, in reality, exist. See Beverly Enters.-Mass., Inc. v. NLRB, 165 F.3d 960, 964 (D.C. Cir. 1999) (Board justified in concluding that nurses' authority was not "an actuality, albeit undemonstrated, but [] instead a speculative possibility, which absent demonstration, is simply 'paper power'"); Oil, Chemical & Atomic Workers v. NLRB, 445 F.2d 237, 244 (D.C. Cir. 1971) ("[T]he nearly total lack of existence of authority actually exercised negates its existence."), cert. denied sub nom. Angle v. NLRB, 404 U.S. 1039 (1972).

Similarly, merely notifying a superior of an emergency situation without assuming any other role in deciding how to resolve the situation is insufficient to confer supervisory status. See Exxon Pipeline Co. v. NLRB, 596 F.2d 704, 706 (5th Cir. 1979) (oil management supervisor in pipeline operation was “little more than a night watchman, who can hardly be said to supervise the police when he calls to report and request investigation of the burglary he has just discovered”).

Where the person in question is required to call a superior to handle a critical situation — instead of having the discretion to call — the individual may not exercise the requisite independent judgment to be a supervisor:

- Oil, Chemical & Atomic Workers v. NLRB, 445 F.2d 237, 241-242 (D.C. Cir. 1971) (plant extracted helium from natural gas; operators were instructed to consult plant manager in emergencies or unusual circumstances), cert. denied sub nom. Angle v. NLRB, 404 U.S. 1039 (1972);
- Chevron Shipping Co., 317 NLRB 379, 381 (1995) (watch officer was required to contact a superior for any problems or unusual situations).

iii. The direction of routine and repetitive tasks, by its nature, often does not require discretion.

The flip side of emergencies and unusual circumstances is the daily or repetitive task. Section 2(11) explicitly states that “merely routine or clerical” exercise of authority does not constitute the exercise of independent judgment. Where the alleged supervisor’s exercise of authority involves routine or repetitive tasks, there is little room for discretion. As indicated by recent Board decisions, routine or repetitive tasks require the purported supervisor to exercise less discretion than unprecedented or unusual tasks and, thus, may not require independent judgment:

- Beverly Health & Rehab. Servs., Inc., 335 NLRB 635, 669 (2001) (LPNs at nursing home whose duties were performed in the same manner for the same

people day in and day out do not require independent judgment), enfd. in relevant part, 317 F.3d 316, 323-324 (D.C. Cir. 2003);

- Evangeline of Natchitoches, Inc., 323 NLRB 223, 223-224 (1997) (LPNs in nursing home did not responsibly direct aides with independent judgment where tasks were routine and familiar).

iv. Merely conveying superiors' directions does not require discretion.

If the individual in question merely conveys instructions or direction from a superior, his or her role as a conduit between superiors and other employees is insufficient to confer supervisory status because the individual is not exercising independent judgment.¹³ Such a supervisory structure indicates that the true supervisor is the superior who determines the direction rather than the individual who simply conveys that direction:

- NLRB v. Dole Fresh Vegetables, 334 F.3d 478, 486 (6th Cir. 2003) (work orders in vegetable processing plant were prepared by shift supervisors, and leads simply gave those orders to technicians, recorded work that was done, and had no authority to prioritize work);
- Beverly Health & Rehab. Servs., Inc., 335 NLRB 635, 669 (2001) (LPNs at nursing home were conduits where RNs set forth care requirements on written sheet and LPNs merely reviewed sheet with aides), enfd. in relevant part, 317 F.3d 316, 323-324 (D.C. Cir. 2003);
- Fleming Cos., 330 NLRB 277, 277 n.1 (1999) (individual's "role as a mere conduit for management's directive is insufficient evidence of independent judgment").

¹³ While such authority may be insufficient to confer supervisory status, it may be sufficient to confer agency status, particularly where the employees are unaware that the individual is merely a conduit for higher management. See Service Employees Local 87 (West Bay Maint.), 291 NLRB 82, 83 (1988) (citing Restatement (Second) of Agency § 27 cmt. a (1958) (where principal creates a reasonable basis for third party to believe principal has authorized alleged agent to perform acts in question, apparent authority and thus agency is established)).

2. Meaning of “Assign” with “Independent Judgment.”

The power to assign is a separate and distinct statutory indication of supervisory status under Section 2(11). Concededly, individuals who possess the power to “responsibly direct” are often the same individuals with the power to “assign” because both indicia are usually applicable to front-line supervisors. In addition, “assignment” power in many instances appears to be part and parcel of “responsible direction.” While recognizing the close relationship between the two indicia, given the court decisions and legislative history, the General Counsel urges the Board to apply two analytically distinct tests — the responsible direction test outlined above and the assignment test outlined below. The proposed analysis comports both with the plain language of 2(11), which lists “assign” and “responsibly to direct” separately and distinctively, and with the statute’s legislative history, which indicates that Congress intended “responsibly to direct” to encompass something other than “assignment” power.¹⁴

The term “assign” indisputably includes actions that affect the status of employees (such as assigning employees to shifts or departments).¹⁵ In Providence, 320

¹⁴ See 93 Cong. Rec. 4677-4678 (1947), 2 Leg. Hist. 1303-1304 (in proposing to add the term “responsibly to direct” to a definition that already included the word “assign,” Senator Flanders stated: “the definition of ‘supervisor’ in this act seems to me to cover adequately everything except the basic act of supervising”). While in many instances, supervisors will have both the power to responsibly direct and assign employees, there are cases in which a supervisor will possess only one of the powers. See, e.g., Entergy Gulf States, Inc. v. NLRB, 253 F.3d 203, 209 (5th Cir. 2001) (dispatchers have the power to responsibly direct employees but not to assign tasks to employees); Arlington Masonry Supply, Inc., 339 NLRB No. 99, slip op. at 2 (2003) (supervisor has power to assign tasks using independent judgment but not to responsibly direct employees).

¹⁵ See, e.g., Superior Bakery, Inc. v. NLRB, 893 F.2d 493, 496 (2d Cir. 1990) (authority to set workers’ schedules); Providence, 320 NLRB at 727 (noting that, at a minimum, assignment refers to assigning employees’ hours or shifts, or assigning employees to a different department or division).

NLRB at 726-27, the Board refrained from deciding whether the term also includes the authority to assign tasks to employees on a given workshift.

The General Counsel submits that the power to assign includes the power to assign tasks. Assignment power is supervisory, however, only if the purported supervisor exercises independent judgment or discretion in making the assignment based on his or her own assessment of an employee.

The proposed test comports with the legislative history of the term “assign.” According to the legislative history, the term “assign” was included, along with other enumerated supervisory powers, as part of the definition of “supervisor” that the Board itself had used for several years. See 93 Cong. Rec. 4678 (1947), 2 Leg. Hist. 1304 (Sen. Taft); 2 Leg. Hist at 1065, 1068 (Sen. Ellender). The word “assign,” however, was not included in many of the working definitions of the term “supervisor” that the Board had reported to Congress prior to the amendments.¹⁶ The necessary inference is that by choosing to follow other definitions that did include the term “assign,” Congress was expressing its approval of a distinct line of pre-amendment Board decisions finding that the power to assign tasks was supervisory. Thus, while a number of the Board’s pre-

¹⁶ See, e.g., NLRB Tenth Annual Report for FY 1945, at 34 (GPO 1946) (referring to “the Board’s long-established rule that supervisory employees who are vested with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, are not properly included in bargaining units comprising their subordinates”); NLRB Eighth Annual Report for FY 1943, at 57 (GPO 1944) (“[T]he Board during the past fiscal year adopted a general standard definition of supervisory employees which is applied in each case unless particular circumstances warrant other treatment.”) (citing Douglas Aircraft Co., 50 NLRB 784, 787 (1943) (“As a general rule, it is our policy to exclude from the appropriate unit employees who supervise or direct the work of employees therein, and who have authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees, or whose official recommendations concerning such action are accorded effective weight.”))).

amendment decisions regarded as supervisory only those powers that changed the status of employees,¹⁷ other cases did include the power to assign within a list of supervisory powers based on the authority to assign tasks.¹⁸ That line of Board decisions appears to be the one that Congress, after studying the matter, incorporated into the statute.

Consistent with that view, the Board issued decisions in a number of cases decided shortly after Section 2(11)'s enactment finding task assignment to be a supervisory power.¹⁹ The Board was thus acting in accordance with well-reasoned,

¹⁷ See, e.g., Glidden Co., 61 NLRB 297, 300 (1945) (working foremen with no authority to “effect changes in the status of employees, or effectively recommend such action” are not supervisors); Rockford Screw Prods. Co., 62 NLRB 1430, 1432 (1945) (working foremen who instruct new employees and assign work to and set up machines for employees, but have “no authority to hire, discharge, or discipline, or effectively recommend such action,” are not supervisors); Charles Eneu Johnson & Co., 67 NLRB 1234, 1236 (1946) (group leads, who “make work assignments to employees within their respective groups, and are generally responsible for the completion of jobs assigned to such groups,” are not supervisors because “they have no authority to hire, discharge, discipline or otherwise effect the employment status of the employees they direct”).

¹⁸ See, e.g., Johnson Bronze Co., 59 NLRB 957, 960 (1944) (machine setters are supervisors because they “adjust and set up machines, instruct new operators, assign work, keep the production of their respective groups flowing, and maintain discipline,” although they have no power to hire or fire); Plankington Packing Co., 59 NLRB 35, 37 (1944) (shift supervisors excluded from unit because they have the supervisory and managerial authority to “assign stations and other work to the policemen and box pullers, and have the power and duty to make recommendations concerning the hiring, firing, promotion, discipline, or other changes affecting the status of employees”); Horton's Laundry, Inc., 72 NLRB 1129, 1134-1135 (1947) (finding of “substantial supervisory duties” because supervisor “assigns work to other employees,” advises them when to leave, reports bad work to the employer, reprimands employees, and was occasionally in charge of giving overtime).

¹⁹ See Killefer Mfg. Corp., 74 NLRB 1344, 1346-1349 (1947) (sustaining challenges to the ballots of certain leadmen because of their work assignment powers), *affd. sub nom. John Deere Killefer Co.*, 86 NLRB 1073, 1074 n.3 (1949) (where, in the related unfair labor practice case, the Board noted that Congress' addition of “responsibly to direct” to the criteria previously applied by the Board only served to strengthen the Board's earlier finding of supervisory status); Steelweld Equip. Co., 76 NLRB 831, 832-833 (1948) (four working foremen are supervisors where they “assign work to, and are responsible for the output of, groups of approximately 8 to 30 employees”).

congressionally approved Board precedent when it recently held that the power to assign work to employees with independent judgment is, by itself, “a primary indicia of supervisory authority.” See Arlington Masonry Supply, Inc., 339 NLRB No. 99, slip op. at 2 (2003).

- a. **The Section 2(11) power to assign with independent judgment is demonstrated by evidence that the alleged supervisor has discretion to assign work of differing degrees of difficulty or desirability on the basis of his or her own assessment of an employee’s ability or attitude.**

This proposed evidentiary standard is consistent with Board 2(11) decisions that have recognized that assignments based on an assessment of a particular employee’s skills and ability are the essence of supervisory judgment. Thus, a supervisor’s ability to assess an individual is critical to finding that the individual assigns with independent judgment:

- Juniper Indus., 311 NLRB 109, 110-111 (1993) (independent judgment with respect to assignment of work established by evidence that foreman moved employees between jobs, established priorities in work assignments, determined the technical means by which jobs were to be accomplished, and made assignments on the basis of the employees’ experience and skills);
- Polynesian Hospitality Tours, 297 NLRB 228, 228 n.3, 239 (1989) (finding dispatcher to be supervisor in part because, in making assignment, he considered the driver’s “experience with different sorts of equipment, the driver’s ability to perform certain specialized functions,” and endeavored “to avoid seeming to ‘play favorites’” in making assignments), enfd. on other grounds, 920 F.2d 71 (D.C. Cir. 1990), cert. denied, 502 U.S. 810 (1991);
- Lexington Metal Prods. Co., 166 NLRB 878, 881 (1967) (concluding that supervisor, who was accused of violating 8(a)(1), assigned tasks to employees with independent judgment because “he kn[ew] the abilities of his men and assign[ed] them to tasks which fit their skills”).

This standard is also in harmony with recent court decisions, which have analyzed the alleged supervisors' authority to consider employees' skills and employers' needs in making work assignments:

- NLRB v. Quinnipiac College, 256 F.3d 68, 75 (2d Cir. 2001) (shift supervisors used independent judgment to assign employees because, in part, they may “reassign or redeploy other security department employees, taking into consideration the employees’ experience and capability to respond to a particular incident, as well as other campus security needs and requirements”) (quoting underlying Board decision);
- Alois Box Co. v. NLRB, 216 F.3d 69, 75 (D.C. Cir. 2000) (although “evidence to show that [individual in question was] aligned with management, and thus outside of the bargaining unit, is thin,” individual was supervisor because he “assigned work based on his own evaluations of the employees’ skills and not simply in accordance with management’s evaluations”).

Where supervisors have the power to assign based on their assessments of employees, they also have the power to favor or disfavor employees. See NLRB v. American Med. Servs., Inc., 705 F.2d 1472, 1474 (7th Cir. 1983) (finding nurses to be supervisors where they had discretion to decide who to call for overtime and that discretion enabled the nurses to “wield the carrot (overtime for favored employees)”). To include individuals with such powers in the bargaining unit or to allow them to participate in union organizing campaigns (or even to occupy sensitive positions within the union itself) poses unacceptable risks to the freedom of rank and file employees to exercise their Section 7 rights. See ITT Lighting Fixtures v. NLRB, 712 F.2d 40, 44 (2d Cir. 1983) (“The authority to grant rewards in the form of transfer, or favorable work assignments, or selection to work overtime to make more money, or excuse from overtime, can be just as coercive in the election process as the authority to issue warnings.”), cert. denied, 466 U.S. 978 (1984).

The proposed evidentiary standard is also consistent with the Board's Section 8(a)(1) and (3) decisions where task assignment power was significant enough to restrain or coerce employees' exercise of their Section 7 rights. See Wilkie Co., 333 NLRB 603, 608-609 (2001), enfd. 55 Fed. Appx. 324 (6th Cir. 2003) (high-level supervisor uses punitive work assignments to retaliate against an employee on the union bargaining committee); see also NLRB v. Regional Home Care Servs., Inc., 237 F.3d 62, 69 (1st Cir. 2001) (low-level supervisor "may have much more actual power to coerce or to reward than someone with a higher title in the corporate totem pole").

Finally, the proposed evidentiary standard is consistent with the teachings of the Board's Section 8(b)(1)(B) decisions, which explain that the power to resolve informal grievances about work assignments implicates an employer's interest in having loyal representatives deal with the union. As a practical matter, the discretionary power to resolve grievances about work assignments is an aspect of the discretionary power to make initial work assignments. See, e.g., Adelphi Univ., 195 NLRB 639, 643 & n.16 (1972) (authority to resolve faculty complaints about "excessive workloads, assignments to teach undesirable or new courses, and early morning classes" was an indicia of 2(11) supervisory status). As the Board explained in Sheet Metal Workers Local 68 (DeMoss Co.), 298 NLRB 1000, 1003-1004 (1990), employee objections to particular work assignments are in reality incipient grievances that, if granted on the spot, mean that formal grievances are never filed; if the employer's right to manage is not to be thwarted at the threshold, the person exercising independent judgment in resolving such issues must be free to do so with undivided loyalty. Accord Maritime Overseas Corp. v. NLRB, 955 F.2d 212, 220-221 (4th Cir. 1992).

These practical considerations explain why courts that have found fault with the Board's pre-Kentucky River standard for resolving "assign" and "responsibly direct" issues have also found fault with Board decisions finding an absence of 2(11) grievance-adjustment authority. See, e.g., NLRB v. Attleboro Assocs., Ltd., 176 F.3d 154, 166 (3d Cir. 1999) (power to resolve minor gripes concerning work assignments and break times involves independent judgment and is supervisory); Passavant Ret. & Health Ctr. v. NLRB, 149 F.3d 243, 248 (3d Cir. 1998) (same). The evidentiary standard that the General Counsel proposes here harmonizes the conflicting strands of Board case law in a manner that, if adopted by the Board, would bring a greater consistency to its treatment of interrelated statutory issues and increase the likelihood that its decisions will be upheld by reviewing courts.

- b. The Section 2(11) power to assign with independent judgment is lacking where evidence shows that the work to be performed does not differ significantly in difficulty or desirability or where the choice of whom to assign is largely dictated by nondiscretionary factors.**

This proposed evidentiary standard — the corollary to the standard for finding that the power to assign with independent judgment exists — is consistent with Board 2(11) decisions that have recognized that the power to assign is not supervisory if the putative supervisors lack any significant discretion either because of the routine nature of the work, the restrictions placed on them by company policy or officials, or other objective factors. Those decisions emphasize the need to protect leads, who lack authority to use their own judgment about employees' skills when assigning tasks, from being deprived of employee status. Thus, where the purported supervisor assigns work

based on what needs to be done first or other nondiscretionary criteria, the individual is held to be nonsupervisory:

- Esco Corp., 298 NLRB 837, 839 (1990) (assignment of work was not indicia of supervisory status because assignments were “not based on the level of employee skill but on the need to get work done or to vary an employee’s routine”);
- Delta Mills, Inc., 287 NLRB 367, 371 (1987) (section leaders’ assignment of repair work to only employee capable of work not exercise of independent judgment).

Where the work has been deemed so routine such that the purported supervisor does not differentiate between employee skill levels, the individual has been found to be nonsupervisory:

- Patagonia Bakery Co., 339 NLRB No. 74, slip op. at 1 n.1, 20-21 (2003) (Telling employees “clean this, clean that,” clean first this area, have it done soon, or “do that, do here, do there,” is routine assignment and direction where there is “no evidence that any of the jobs assigned . . . requires any particular skills, nor that the abilities of any of the employees who perform the jobs differed substantially, such that selecting a particular employee for a task would require independent judgment”);
- Injected Rubber Prods. Corp., 258 NLRB 687, 689 (1981) (leadmen did not exercise independent judgment when assigning employees to particular machines because those selections, to which the employer was indifferent, “require[] no knowledge, judgment, or skills not possessed by each of the press operators,” are often random and, even when purposeful, “[e]veryone on each shift knows which operators perform best on which press”);
- Arkay Packaging Corp., 221 NLRB 99, 102 (1975) (authority of line manager, who was accused of 8(a)(1) violation, to assign jobs to employees was not exercised with independent judgment because it was “of a routine nature, as the [assigned job] was so simple that inexperienced employees could operate the . . . machines without any formal training”).

Similarly, where an individual’s assignment power is circumscribed by established company policy or higher authority orders, the individual has been held to be nonsupervisory:

- NLRB v. Dole Fresh Vegetables, Inc., 334 F.3d 478, 486 (6th Cir. 2003) (leads were not supervisors where they merely gave orders that had been prepared by the shift supervisors to the technicians);
- NLRB v. Meenan Oil Co., 139 F.3d 311, 320-322 (2d Cir. 1998) (truck dispatchers' assignment and direction of work was routine and clerical in nature because decision-making was directed and circumscribed by clearly established company policy; not only did a computer program generate delivery tickets grouped geographically, but also any individualized response to particular customer requests was governed by detailed company procedures that determined the priorities to be given to filling orders and by commonsense considerations concerning efficient routing);
- Halpak Plastics, Inc., 287 NLRB 700, 706 (1987) (lead's power to assign work and overtime on the basis of employees' skills not exercise of independent judgment when employees had established job classifications and the assignments were essentially transmissions of the plant manager's orders), enfd. 854 F.2d 1314 (2d Cir. 1988) (Table);
- Tucson Gas & Elec. Co., 241 NLRB 181, 182 (1979) (construction coordinator was essentially a nonsupervisory leadman because his assignment of work to employees "comport[ed] with the general time frames mandated by the employer's established category and priority system");
- Ellenville Handle Works, Inc., 142 NLRB 787, 792-793 (1963) (foreman did not assign work to employees with independent judgment because such assignments were based on superintendent's instructions), enfd. 331 F.2d 564 (2d Cir. 1964).

C. Application of Analysis To Difficult Fact Pattern: Part-Time Or Rotating "Supervisors."

Cases involving part-time supervisors — that is, individuals who exercise some supervisory authority on certain days or shifts or on a rotating basis — present particular challenges that can be resolved by applying the principles and evidentiary guidelines advocated with respect to responsible direction and assignment. The Board has long held that part-time supervisors are Section 2(11) supervisors as long as the individual possesses true 2(11) authority on a "regular and substantial" basis. Thus, the mere fact of part-time exercise of authority does not necessarily negate the individual's supervisory

status. See Rhode Island Hosp., 313 NLRB 343, 348 (1993); Doctors' Hosp. of Modesto, Inc., 183 NLRB 950, 951 (1970), *enfd.* 489 F.2d 772 (9th Cir. 1973); Archer Mills, Inc., 115 NLRB 674, 676 (1956). The difficulty is in determining whether an individual is actually exercising 2(11) authority on the days in which he or she serves as the purported supervisor.

The General Counsel proposes that the Board should focus its analysis in part-time supervisor cases on the following test:

To determine whether a part-time supervisor is excluded from the Act's coverage:

- 1. The Board should determine whether the purported "supervisor" is actually vested with Section 2(11) authority on the days in which the individual acts as a "supervisor" by applying the statutory criteria, including the reformulated evidentiary tests for "responsible direction" and "assignment" proposed here; and**
- 2. If the application of 2(11) reveals that the individual does possess supervisory authority on the days in which he or she serves as a supervisor, the Board should determine whether the individual is vested with that authority on a "regular and substantial" basis.**

The proposed test comports with the statute's legislative history. Underlying the 1947 exclusion of supervisors was "the fact that Congress was gravely concerned lest rank-and-file employees be interfered with or dominated by their supervisors, and lest employers lose the loyalty of, and control over, their supervisors." Great W. Sugar Co., 137 NLRB 551, 555-556 (1962) (M. Rodgers and Leedom, dissenting) (citing H.R. Rep. No. 245 on H.R. 3020, 409-411, 1 Leg. Hist. 304-308; S. Rep. No. 105 on S. 1126, 1 Leg. Hist. 409-411; 2 Leg. Hist. 1008-1009 (Sen. Taft)). Where an individual serves as both employee and supervisor within a given work period, the employer and the union are both faced with a "supervisor-employee" with conflicting loyalties. *Id.* at 556-557.

Both management and unions must have agents and representatives whom they can trust, and no one “can serve two masters at the same time.” *Id.* at 556.

Finding part-time supervisors who serve in that capacity on a “regular and substantial basis” to be 2(11) supervisors solves the conflict of interest problem: management can demand their loyalty, and employees and labor unions do not have to fear supervisory involvement in their organizations. But that result is legally justifiable only where the record evidence establishes that that the part-time employee at issue is vested with sufficient Section 2(11) authority. “To put the issue in homely terms, do the other employees feel, assuming the alleged supervisor is one who reasonably respects his duties, ‘Here comes that so-and-so, get to work,’ or is he, basically, but one of the gang who merely gives routine instructions?” *Stop & Shop Cos. v. NLRB*, 548 F.2d 17, 19 (1st Cir. 1977). The first part of the proposed test seeks to answer this question. The second part of the test sets forth the definition of “regular and substantial.”

1. The Board Should First Evaluate Whether the Individual Possesses Supervisory Authority on the Days in Which the Individual Serves as a Purported “Supervisor.”

The first inquiry is whether the individual possesses supervisory authority when he or she is the purported “supervisor.” As in all 2(11) cases, the Board should look at whether the individual possesses any of the 12 enumerated statutory indicia and whether the individual exercises these indicia with independent judgment in the interest of the employer. If the individual possesses such authority during the time in which he or she serves as a “supervisor,” the individual should generally be found to be a statutory supervisor as long as he or she serves in that capacity for a “regular and substantial” period. See, e.g., *Rhode Island Hosp.*, 313 NLRB 343, 348 (1993) (lead offset printer

who frequently substituted for manager was supervisor where he made effective recommendations regarding hiring and raises); Honda of San Diego, 254 NLRB 1248, 1249-1250 (1981) (individual who regularly spent 10 of 40 hours substituting for supervisor where he had authorization to discharge employees was statutory supervisor).

a. “Responsible Direction” and part-time supervisors.

The classification of part-time supervisors, like all supervisors, turns on the actual delegation of authority by management. Thus, if management has conferred supervisory authority upon a part-time employee and the individual serves as a supervisor on a regular and substantial basis, the Board should find that the individual is a supervisor:

- NLRB v. St. Mary’s Home, Inc., 690 F.2d 1062, 1067-1068 (4th Cir. 1982) (nurse was held to be a supervisor where, 40 percent of her time, she was the highest ranking employee on her shift, the only person directing day to day activities of individuals on the shift, and was considered to be “the boss;” if anything went wrong on her shift, she “got the heat” and she was thus “fully responsible” for nursing home operations);
- Glenmark Assocs., Inc. v. NLRB, 147 F.3d 333, 341-342 (4th Cir. 1998) (LPNs, who all could potentially serve as charge nurses, were held to be supervisors where, on two of three shifts, charge nurses had the “total run of the building,” with the authority to operate the home shorthanded, allow CNAs to leave early, reassign CNAs, and call in CNAs).

The fact, however, that an individual is only in charge on a limited number of days may indicate that the individual is neither “responsibly directing” employees nor exercising “independent judgment,” as the terms are defined above. Inherent in the part-time supervisory situation is the likelihood that the employer has given supervisory authority to individuals other than the part-time supervisor, whether it is superiors or peers who assume the part-time supervisor’s responsibilities when the person in question is doing unit work. Accordingly, the employer likely does not rely upon the disputed person or position to be “in charge” under the definition outlined above. Similarly, a

part-time supervisor may be likely to be held accountable for the work of others. Even if a part-time supervisor does “responsibly direct” employees, the part-time supervisor is more likely to have his judgment constrained by established rules and procedures, or be required to call upon higher authority before exercising any independent judgment. Thus, in part-time “supervisor” cases in which nonsupervisory status was found, the individual in question had both limited responsibility over the unit (and thus, did not appear to “responsibly direct” the unit), and circumscribed, if any, discretionary judgment:

- NLRB v. St. Francis Hosp. of Lynwood, 601 F.2d 404, 421 (9th Cir. 1979) (assistant head nurses were not supervisors where they filled in for head nurses when they were absent from shifts; insufficient evidence that the hospital had a “consistent and established” policy empowering the individuals to act as supervisors and had not provided any instruction or guidance making the assistant head nurses aware of their purported supervisory authority or how to exercise it in the interest of management);
- Meharry Med. College, 219 NLRB 488, 490 (1975) (RNs who all rotated on a daily or weekly basis into a charge nurse position were held not be statutory supervisors in part because clinical supervisors continued to have 24-hour responsibility for the nursing service divisions; charge nurse could not grant time off or excuse employees for reasons other than immediate illness without checking with the clinical supervisor and only reported disciplinary problems).

Even where part time supervisors have been vested with the authority to “responsibly direct” their work groups, that authority may be insufficient to confer supervisory status because the direction is constrained by higher management. See NLRB v. Dole Fresh Vegetables, 334 F.3d 478, 488-489 (6th Cir. 2003) (leads on third shift were not supervisors even though they were highest ranking employees at plant for most of shift, where work orders were left by the second shift supervisors, and where there was no evidence that the leads exercised any supervisory duties during third shift rotation).

Where all employees in a classification rotate into a position in which they purportedly supervise each other, the Board should be particularly probing as to whether these individuals possess true supervisory authority. These individuals' jobs usually do not implicate the policy rationale of excluding supervisors from the Act's protections — to prevent a conflict of interest. Further, such individuals normally do not exercise the authority to direct in a genuine managerial sense:

- General Dynamics Corp., 213 NLRB 851, 859 (1974) (supervisory authority was not vested in individuals “vis-à-vis the nonsenior employees in their work group, nor is it vested in themselves as equals, who, for indeterminate periods of time, ‘supervise’ coequals who, in turn, later ‘supervise’ their equals while simultaneously being ‘supervised’ by their coequals”);
- Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151, 1155-1156 (7th Cir.) (lead engineer was not supervisor where any engineer could be selected as lead on any given project, and “[e]xcept for the fact that the lead engineer is given wider authority and greater responsibility as to the particular project, there is no evidence that he exercises or has the type or degree of authority over the other engineers that would make him their supervisor in the statutory sense”), cert. denied, 400 U.S. 831 (1970).

This is particularly true where individuals within the same job classification are purportedly supervising each other. See, e.g., General Dynamics, 213 NLRB at 859.

b. Assignments and part-time supervisors.

Where an individual serves in a “supervisory” capacity on a part-time basis, the individual is less likely than a full-time supervisor to have the power to “assign” employees within the meaning of Section 2(11). This is because a full-time supervisor is normally responsible for such assignment tasks, and the part-time individual either carries out the full-time supervisor’s orders or makes adjustments in assignments that do not pertain to an employee’s skills or other discretionary factors. Thus, the Board should examine part-time supervisor cases to determine whether an individual is actually

assigning work based on his or her assessment of employee skills or other discretionary factors.

In the nursing context, the fact that a part-time charge nurse who rotates into the charge position on a regular and substantial basis assigns and reassigns employees to patients based on his or her assessment of the particular skills of the employees and the acuity of the patients is sufficient after Kentucky River to establish supervisory status. The evidentiary problem in these cases will be determining whether the charge nurse actually assigns employees based on their individual skill, such that the charge nurse is exercising independent judgment, or whether the assignments are based on predetermined schedules or other objective criteria. See Youville Health Care Ctr., Inc., 326 NLRB 495, 496, 503 (1998) (both ALJ and Board decision are ambiguous as to whether rotating charge nurses made assignments to staff based on staff skills).

If, however, the charge nurse, during her “supervisory shift,” makes staff assignments based on staff skills or her personal opinions of staff members, the charge nurse should be classified as a supervisor. See Glenmark Assocs., Inc. v. NLRB, 147 F.3d 333, 342 (4th Cir. 1998) (LPN rotating charge nurses were supervisors where matched acuity of patient to the special skills of particular staff members).

If, on the other hand, the party asserting supervisory status fails to prove that staffing assignments are based on the charge nurses’ perceptions of employees skills or other discretionary factors, assignment should be found to be routine. See Bozeman Deaconess Hosp., 322 NLRB 1107, 1107 (1997) (RNs who all rotated into position of charge nurse were not supervisors where hospital “has not established that the abilities of

employees in the same classification vary significantly, such that selecting a particular staff member for a task would require independent judgment”).

2. If an Individual Possesses 2(11) Authority on Some Days and Not Others, the Board Should Determine Whether the Individual Serves in the Supervisory Capacity on a “Regular and Substantial” Basis.

If an individual exercises 2(11) authority on some days within a given workweek but not others, the individual should be classified as a Section 2(11) supervisor only if he or she exercises that authority on a “regular and substantial” basis, and not a “sporadic and infrequent” basis. Rhode Island Hosp., 313 NLRB 343, 348 (1993); Aladdin Hotel, 270 NLRB 838, 840 (1984). The Board has reasoned that for purposes of collective bargaining, this sporadic supervision does not ally an individual with management so as to create a more generalized conflict of interest and the risk of divided loyalties that Congress sought to avoid when it amended the NLRA to exclude supervisors. See Adelphi Univ., 195 NLRB 639, 644 (1972).

To be “regular and substantial,” a part-time supervisor only needs to serve in the supervisory capacity a very limited amount of his work time — certainly not 50 percent.²⁰ The Board has defined “substantial” broadly; thus, an employee who is regularly scheduled to exercise supervisory authority as little as one or two times per month is a statutory supervisor:

- Rhode Island Hosp., 313 NLRB 343, 349 (1993) (laundry group leaders who worked as weekend supervisor every four weeks was supervisor);

²⁰ See Aladdin Hotel, 270 NLRB 838, 839-840 (1984) (rejecting the application of a 50 percent rule, which the Board applies in “seasonal supervisor” situations, see Westinghouse Elec. Corp., 163 NLRB 723 (1967), enfd. 424 F.2d 1151 (7th Cir. 1970), where supervisory duties are clearly demarcated in time and duties).

- Aladdin Hotel, 270 NLRB 838, 840 (1984) (boxmen and foremen who substituted for supervisors at least two times per month during the last three months were supervisors);
- Honda of San Diego, 254 NLRB 1248, 1249-1250 (1981) (individual who substituted for supervisor one or two times during workweek was held to be statutory supervisor);
- Doctors' Hosp. of Modesto, Inc., 183 NLRB 950, 951 (1970) (if relief head nurses possessed supervisor authority 2 days per week, they would be statutory supervisors, "regardless of the fact that they spent a major portion of their time working at nonsupervisory jobs"), enfd. 489 F.2d 772 (9th Cir. 1973).

On the other hand, the Board has held that an individual exercises supervisory authority on a "sporadic and infrequent" basis where the individual acts in the supervisory capacity only during the regular supervisor's vacation periods or on other unscheduled occasions.

Since a "substantial" period of time can be as little as one weekend per month, see Rhode Island Hosp., 313 NLRB at 349, the key is whether the individual is regularly scheduled to serve as the part-time supervisor:

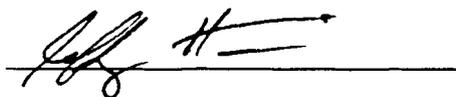
- Webco Indus., 334 NLRB 608, 610 (2001) (employee who substituted for supervisors on four occasions for indefinite durations was not statutory supervisor);
- St. Francis Med. Ctr.-W., 323 NLRB 1046, 1046 (1997) (while individual substituted into supervisory role for 5 to 10 months preceding election, substitution was not regular because it was temporary and caused by "extraordinary circumstances," e.g., illness, that were not likely to recur);
- Hexacomb Corp., 313 NLRB 983, 984 (1994) (foreman who substituted for supervisor when supervisor was sick or on leave was not statutory supervisor);
- Gaines Elec. Co., 309 NLRB 1077, 1078 (1992) (foreman whose supervision was "intermittent," "sporadic," and without a pattern, was included in unit).

Because the tests for part-time supervisory status are consistent with the objectives of the Act and heed Congress' conflict of interest concerns, the General Counsel recommends adhering to the "regular and substantial" test.

Conclusion

For the reasons stated above, the General Counsel respectfully submits that the Board adopt the evidentiary standards for analyzing supervisory cases outlined above.

Dated this 18th day of September, 2003.

A handwritten signature in black ink, appearing to read 'A. Rosenfeld', is written over a horizontal line.

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