

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

**OAKWOOD HERITAGE HOSPITAL, )  
Employer, )  
)  
VS. )  
)  
INTERNATIONAL UNION, UNITED )  
AUTOMOBILE, AEROSPACE & )  
AGRICULTURAL IMPLEMENT )  
WORKERS OF AMERICA (UAW), )  
Petitioner. )**

**CASE NO. 7-RC-22141**

**BRIEF OF AMICUS CURIAE  
AMERICAN COMMERCIAL BARGE LINE LLC**

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**STATEMENT OF INTEREST**

American Commercial Barge Line LLC ("ACBL") operates a fleet of over 100 tow boats that move thousands of barges transporting commodities along the nation's waterways. The supervisory status of ACBL's pilots has historically been the subject of litigation before the National Labor Relations Board. Since Kentucky River, the Board has correctly found pilots are supervisors. ACBL has a strong and unique interest in the Board's continued treatment of pilots under Section 2(11) of the Act.

It is ACBL's position that its pilots exercise independent judgment in assigning and responsibly directing the work of the crews on its vessels. They are supervisors within the meaning of the Act.

## QUESTIONS PRESENTED BY THE BOARD

1. What is the meaning of the term "independent judgment" as used in Section 2(11) of the Act?
2. What is the difference, if any, between the terms "assign" and "direct" as used in Section 2(11) of the Act?
3. What is the meaning of the word "responsibly" in the statutory phrase "responsibly to direct"?
4. What is the distinction between directing "the manner of others performance of discrete tasks" and directing "other employees"?
5. Is there tension between the Act's coverage of professional employees and its exclusion of supervisors, and, if so, how should that tension be resolved?
6. What are the appropriate guidelines for determining the status of a person who supervises on some days, and works as a non-supervisory employee on other days?
7. What, if any, difference does it make that persons in a classification rotate into and out of supervisory positions, such that some or all persons in the classification will spend some time supervising?
8. To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as giving rank and file employees greater autonomy and using self-regulating work teams?
9. What functions or authority could distinguish between "straw bosses, lead men, set-up men, and other minor supervisory employees," Congress intended to include within the Act's protections, and "the supervisor vested with genuine management prerogatives"?
10. To what extent, if at all, should the Board consider secondary indicia – for example, the ratio of alleged supervisors to unit employees or the amount of time spent by the alleged supervisors performing unit work – in determining supervisory status?

## I. SUMMARY OF ARGUMENT

A pilot on a riverboat assigns and responsibly directs the work of the crewmen assigned to that boat. He is responsible for the safety of the vessel and crew and directs the deck crew based on his assessment of the dynamic activity surrounding him, including weather, river traffic, changing currents, floating debris, and whether the boat, itself, is operating properly. While on watch, the pilot must make decisions regarding numerous operational changes. His decisions necessitate the direction of work to the deck crew regarding matters such as maintaining or tightening the lines, securing barges, navigation lights, maintenance and repair, docking and locking the vessel, and, on occasion, the direction of work to deck employees must be made in preparation for inclement weather. He changes the priority of crewmen's work and instructs crew members to stop work on one assignment in order to perform a navigation assignment. Pilots constantly exercise independent judgment when assigning and responsibly directing work.

The Board has a long history of inconsistently applying the statutory definition of a "supervisor" found in Section 2(11) of the Act. See, e.g., NLRB v. North Ark. Elec. Co-op., 412 F.2d 324, 328 (8<sup>th</sup> Cir. 1969) (court accuses Board of using different analysis in unfair labor practice cases than in bargaining unit cases); NLRB v. Porta Sys., 625 F.2d 394, 405-07 (2<sup>nd</sup> Cir. 1980). That inconsistency has led several Courts of Appeal to question the deference to which the Board continues to be entitled. See, e.g., Beverly Enters., Va., Inc. v. NLRB, 165 F.3d 290, 295 (4<sup>th</sup> Cir. 1999) ("The Board has, we believe, manifested an irrational inconsistency"); Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484 (2<sup>nd</sup> Cir. 1997) ("The Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions."); Glenmark Assocs., Inc. v. NLRB, 147 F.3d 333 (4<sup>th</sup> Cir. 1997) ("The

Board should reconsider its single-minded pursuit of its policy goals without regard for the supervisory role of the [courts]."); NLRB v. Winnebago Television Corp., 75 F.3d 1208, 1214 (7<sup>th</sup> Cir., 1996) ("The NLRB's manipulation of the definition provided in [Section 2(11)] has earned it little deference"); Caremore, Inc. v. NLRB, 129 F.3d 365 (6<sup>th</sup> Cir. 1997) ("The NLRB continues to misapprehend both the law and its own place in the legal system.").

The two resounding messages of these many court decisions are that the Board should: (1) respect, and refrain from attempts to modify, the plain language of the statute; and (2) yield to the decisions of the reviewing courts. See Mississippi Power & Light Co., 328 NLRB 965, 981, n.25 (1999) (Brame dissenting). These are the fundamental answers to each of the questions the Board poses.

Consistency and predictability, based on sound statutory analysis and established court precedent, are worthy goals. The fact the Board has asked for amicus briefs on its questions sends a positive signal to employers that the Board intends to strive for these goals. But, employers have been down this road before, and have found no relief in the Board's decisions.

In 1994, in the wake of NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994), the Board heard oral argument in Providence Hosp., 320 NLRB 717 (1996); and Ten Broeck Commons, 320 NLRB 806 (1996), and asked for amicus briefs addressing "how the Board should interpret 'assign,' 'responsibly to direct,' 'routine,' and 'independent judgment,' and how it should harmonize the provisions of Sections 2(11) and (12)." A number of amici filed briefs. See Providence Hosp., supra, at n.1. The Board pretended to listen.

In Providence Hosp. and Ten Broeck Commons, the Board announced it was going to apply its "traditional analysis" for determining the supervisory status of nurses in long

term care facilities. It did not. In its cases leading up to the Supreme Court's decision in Kentucky River, the Board continued to manipulate the statutory language to enable it to categorize nurses as employees, not supervisors. Sherwood Corp., 320 NLRB 68 (1996); Caremore, Inc., 321 NLRB 120 (1996); Bozeman Deaconess Found., 322 NLRB 196 (1997); Pine Brook Care Ctr., Inc., 322 NLRB 130 (1996); Washington Nursing Home, Inc., 321 NLRB 48 (1996).

In the wake of Kentucky River, the Board has correctly applied a traditional analysis for determining the supervisory status of pilots on riverboats. Alter Barge Lines, 336 NLRB 1266 (2001); Ingram Barge Co., 336 NLRB 1259 (2001); American Commercial Barge Line Co., 337 NLRB 168 (2002). ACBL believes the Board should continue this process.

The Board has asked amici for advice on the same issues it presented in Providence Hosp., and Ten Broeck Commons. This time, the Board must act within the bounds of the law. The Board should continue to use a traditional analysis of the plain statutory language, regardless of industry, and follow the case law of the Courts of Appeal, for "it is the courts, and not the Board, who bear the final responsibility for interpreting the law." Health Care & Retirement Corp. v. NLRB, 987 F.2d 1256, 1260 (6<sup>th</sup> Cir. 1993). If it does so, the answers to the Board's questions are not hard to find. These issues have already been decided as a matter of law. Alter Barge Lines, 336 NLRB 1266 (2001); Ingram Barge Co., 336 NLRB 1259 (2001); American Commercial Barge Line Co., 337 NLRB 168 (2002); Beverly Enters., Va., Inc., *supra*; Integrated Health Servs. of Mich. v. NLRB, 191 F.3d 703 (6<sup>th</sup> Cir. 1999); GranCare, Inc. v. NLRB, 137 F.3d 372 (6<sup>th</sup> Cir. 1998); Glenmark Assocs., Inc., *supra*; Mid-America Care Found. d/b/a Fair Oaks Healthcare Ctr v. NLRB, 148 F.3d 638 (6<sup>th</sup> Cir. 1998); Spentonbush/Red Star Cos. v. NLRB, *supra*; Caremore, Inc. v. NLRB, *supra*; Beverly Calif. Corp. v. NLRB, 970 F.2d

1548 (6<sup>th</sup> Cir. 1992); NLRB v. Beacon Light Christian Nursing Home, 825 F.2d 1076 (6<sup>th</sup> Cir. 1987). The Board should yield to these consistent, well-reasoned, decisions.

## II. ARGUMENT

### 1. What is the meaning of the term "independent judgment" as used in Section 2(11) of the Act?

In NLRB v. Kentucky River Cmty. Care, 532 U.S. 706 (2001), the Court allowed that "the statutory term 'independent judgment' is ambiguous with respect to the degree (not what kind) of discretion required for supervisory status." The Court stated that the Board may determine, within reason, what degree of discretion is required; and that detailed employer-promulgated orders and regulations are relevant to determining the degree of discretion actually exercised in a particular case.

As the Supreme Court notes, there are degrees of judgment contemplated by the Act. The Act distinguishes between judgment which is "routine" and judgment which is "independent". Routine judgment is formulaic; there is little, if any, room for discretion. If a decision is based on reference to detailed employer promulgated guidelines (written or otherwise), it is likely that only routine judgment is being exercised. In such a case, the course of action is prescribed by the employer, and the individual reacts reflexively. There simply is no subjective decision making. If *all* of an individual's decisions are so controlled, the individual is not a supervisor.

In contrast, where the individual depends on his or her own authorities and thought processes to weigh, analyze, and choose among alternative courses of action, the individual is exercising independent judgment. The fact that the thought process is based on the individual's skill, training, and experience, does not negate the individual's supervisory status. In such a case, employer guidelines may inform the individual's decision-making, but all decisions

are not controlled by the guidelines. Importantly, only *some portion* of an individual's decisions must fall in the independent judgment category for the individual to be a supervisor. Mid-America Care, 148 F.3d at 643 (an employer must only demonstrate that some portion of the individual's authority is free from strict regulation).

Thus, even where an employer maintains detailed guidelines, independent judgments can still be exercised. "The existence of governing policies and procedures and the exercise of independent judgment are not mutually exclusive." NLRB v. Quinnipiac College, 256 F.3d 68, 74 (2<sup>nd</sup> Cir. 2001); NLRB v. Detroit Edison Co., 537 F.2d 239 (6<sup>th</sup> Cir. 1976). In many industries, like riverboat transportation, detailed guidelines cannot cover every possible situation. Likewise, an individual is a supervisor where he or she is not prevented from departing from written instructions if another course of action is more advantageous. See Mississippi Power & Light Co., 328 NLRB 965, 977 (1999) (Hurtgen and Brame dissenting).

Once it is determined that an individual exercises independent, as opposed to routine, judgment, analysis of the degree of discretion ends. The Act does not create degrees of independent judgment, nor does it require that independent judgment be exercised all the time or impact matters of substantial importance or significance. This is not to say that the frequency of exercise, or the severity of the impact of faulty decision-making, may not be relevant to determining whether independent judgment is exercised in the first place. But the issue before the Board is not the consequence of the judgment, it is whether there is independent judgment for the individual to exercise. As Members Hurtgen and Brame note in their dissent in Mississippi Power:

Concededly, there may be cases where an individual must take a rigidly prescribed course of action (e.g., throw a lever) and, if he/she fails to do that, a terrible consequence will occur. We

would agree that such an individual, acting without discretion, is not a supervisor.

328 NLRB at 980

In the riverboat transportation context, it is well-established that pilots exercise independent, not routine, judgment when they assign and direct work. The Board has historically found pilots to be supervisors. Bernhardt Bros. Tugboat Serv., Inc., 142 NLRB 851, 853-54 (1963), enforced 328 F.2d 757, 758 (7<sup>th</sup> Cir. 1964); Universal Towing Co., 198 NLRB 1124, 1127 (1972); A.L. Barge Lines, Inc., 197 NLRB 592, 595 (1972); Local 28, Int'l Org. of Masters, Mates & Pilots v. NLRB (Ingram Barge), 321 F.2d 376 (D.C. Cir. 1963). Since Kentucky River, the Board has continued to find pilots to be supervisors. Alter Barge Lines, 336 NLRB 1266 (2001); Ingram Barge Co., 336 NLRB 1259 (2001); American Commercial Barge Line Co., 337 NLRB 168 (2002).

The Second Circuit Court of Appeals decision in Spentonbush/Red Star Cos. v. NLRB, 106 F.3d 484 (2<sup>nd</sup> Cir. 1997), sets the standard for considering whether the assigning and directing authority of pilots is routine or requires independent judgment. The court squarely rejected the argument that assigning and directing the towboat crews' work was "routine," and, quoting an earlier Board decision, stated:

Furthermore, even if a particular operation is performed again and again, it does not necessarily follow that it is routine. In recent months, the world has been painfully reminded in a series of highly publicized incidents of the fact that because of the size, complexity, and cargo which it carries, a supertanker is an extremely dangerous place to work. Constant monitoring and accountability is essential. Otherwise repetitive operations must be performed under constantly changing conditions which significantly vary the individual components of the operation and the order and the manner in which they are performed. Mistakes can and do result in disastrous consequences.

Id. at 491 (quoting Sun Refining, 301 NLRB 642, 649 (1991)).

The post-Kentucky River decisions of the Board are illustrative of how the Board should approach the independent judgment question in all industries. Alter Barge Lines, 336 NLRB 1266 (2001); American Commercial Barge Line Co., 337 NLRB 168 (2002). In American Commercial, deckhands maintained barges that were tied together, cleaned, chipped paint, and acted as lookouts. As a general matter, one could characterize those duties as "routine." But, the Board recognized that the pilots needed to make navigation decisions based on their evaluation of non-routine factors, including the river condition, problems with the boat, inexperienced crewmen, the type of cargo, weather, and traffic conditions. The Board found that not all locks (through which a pilot needs to navigate) were the same, and that although the pilot goes through the same locks on various trips, going through those locks can vary based on current, tow configuration, wind, and time of day. The Board concluded that when a Pilot changes the priority of the deckhands' work and instructs a deckhand to stop work on one assignment in order to perform a navigation assignment, he is directing work using independent judgment. Thus, the question whether pilots exercise independent judgment when assigning and directing work has been decided by the Board and the courts. There simply is no issue. The Board should extend its analysis in American Commercial to all industries.

2. **What is the difference, if any, between the terms "assign" and "direct" as used in Section 2(11) of the Act?**

In many respects, the distinction between "assigning" work and "directing" work is temporal. An individual "assigns" an employee to a particular area or group of residents at the beginning of the day or week. An individual also "assigns" the specific activities the individuals are to perform in that area.

The same individual, or someone else, "directs" the ongoing activities previously assigned. In other words, he oversees the performance of the work. "Direct" was added to the

Act later in the legislative process because of a concern that a front line supervisor may not assign the work to be done, but yet he is charged with seeing that a particular function is accomplished.

3. **What is the meaning of the word "responsibly" in the statutory phrase "responsibly to direct"?**

The meaning of "responsibly" in the statutory phrase "responsibly to direct" means that the individual is charged with getting the particular function done. He is responsible for using his judgment, based on experience, training, and ability, to make sure that the duties someone else assigned to other employees get done by those employees. Mississippi Power, 328 NLRB at 979-80, n.23 (Hurtgen dissenting). He is held responsible and is accountable for the end product. The individual directing the work is deciding what tasks shall be done next, by whom, and how to do them properly. Cong. Rec., S., May 7, 1947.

Relevant, although not dispositive, to the issue of "responsible" direction are the consequences to the individual for failing to exercise or mistakenly exercising judgment. Where an employer holds an individual accountable for such consequences, clearly the individual is responsibly directing the work of others. See Atlanta Newspaper, 306 NLRB 751, 755 (1992); Children's Farm Home, 324 NLRB 61, 64 (1997); Millard Refrigerated Servs., 326 NLRB 1437 (1998).

In the riverboat transportation context, pilots responsibly direct the work of the deck crew. See American Commercial Barge Line Co., *supra*; Alter Barge Lines, Inc., 336 NLRB 1266, 1270 (2001); Ingram Barge Co., 336 NLRB 1259 (2001) (for 12 hours each day, the pilot is responsible for the efficient and safe operation of the vessel and directs the deck crew in the operation of the tow boat).

4. What is the distinction between directing "the manner of others performance of discrete tasks" and directing "other employees"?

There is a distinction between directing "the manner of others performance of discrete tasks" and directing "other employees". A journeyman, lead man or straw boss may, as an incident to his primary function of doing manual tasks, direct specific tasks performed by less-skilled employees. He directs only the manner of others' performance of discrete tasks. There is no "responsible" direction. He is charged with doing the manual task itself. As an incident to that charge, he gives directives to a helper or other less skilled employees, relating to the performance of the charged task.

In contrast, when someone is "directing other employees" he is charged with seeing that subordinate personnel do their tasks; the individual also having his own tasks to perform. The direction is an important, if not primary function, of the employee's job. It is not incidental to the job.

A pilot does more than direct tasks. He directs employees. He is responsible for the safety of the vessel and crew and directs the deck crew based on his assessment of the dynamic activity surrounding him, including weather, river traffic, changing currents, floating debris, and whether the boat, itself, is operating properly. While on watch, the pilot must make decisions regarding numerous operational changes. His decisions necessitate the directing of work by the deck crew regarding matters such as maintaining or tightening lines, securing barges, navigation lights, maintenance and repair, docking and locking the vessel and, on occasion, the direction of work to deck employees must be made in preparation for inclement weather. Ingram Barge Co., 336 NLRB at 1263. He oversees how the crewmen perform their entire jobs, not only specific tasks. This is responsible direction of other employees.

5. **Is there tension between the Act's coverage of professional employees and its exclusion of supervisors, and, if so, how should that tension be resolved?**

The short answer to Board's question is, no. As Member Cohen stated in Providence Hospital, 320 NLRB 717 (1996), the difference between the Section 2(11) exclusion and the Section 2(12) inclusion is "substantial and real". A supervisor exercises independent judgment with regard to the functions set forth in Section 2(11). He does so vis-à-vis other employees. Section 2(12) speaks to exercising judgment only with respect to the task.

Of course, a professional can exercise independent judgment with respect to one of the functions set forth in Section 2(11) while, at the same time, exercising professional judgment. In that case, the professional is a supervisor. If a professional does not exercise independent judgment with respect to one of the functions in Section 2(11), he is not a supervisor. There is no "tension."

Thus, if a professional is charged only with doing a task, as opposed to being responsible for seeing that others perform their tasks, then the professional is not responsibly directing work within the meaning of Section 2(11), even if when doing his tasks, he incidentally gives a directive to another worker in a helper role. See Arizona Public Serv. Co. V. NLRB, 453 F.2d 228 (9<sup>th</sup> Cir. 1971); Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151 (7<sup>th</sup> Cir. 1970).

The Board also asks in Question 5 whether the Act contemplates a situation in which an entire group of professional workers may be deemed supervisors, based on their role with respect to less skilled workers? Supervisory status is determined based on an analysis of an individual's duties and responsibilities with respect to the criteria set forth in Section 2(11). If any individual satisfies one or more of those criteria, he or she is a supervisor. The fact that each member of a classification of professional workers may individually satisfy the statutory definition does not negate the fact that they satisfied the definition.

6. What are the appropriate guidelines for determining the status of a person who supervises on some days, and works as a non-supervisory employee on other days?
7. What, if any, difference does it make that persons in a classification rotate into and out of supervisory positions, such that some or all persons in the classification will spend some time supervising?

The answers to Questions 6 and 7 are combined. Supervisory status turns on the existence of any power in Section 2(11), not the frequency of its exercise. See E&L Transp. Co. v. NLRB, 85 F.3d 1258 (7<sup>th</sup> Cir. 1996) (it is well-settled that if an individual is shown to exercise supervisory authority, the frequency with which the individual exercises that authority does not impact the necessary conclusion that the individual is a statutory supervisor) If an employee regularly works in a supervisory capacity, then Section 2(11) is satisfied. U.S. Radium Corp., 122 NLRB 468 (1958). On the other hand, an individual who exercises only sporadic or irregular supervisory functions may not meet the statutory definition. Occasional, isolated instances of actions which might otherwise be indicative of supervisory authority are generally insufficient to confer supervisory status. See, e.g., Billows Elec. Supply, 311 NLRB 878 (1993); Commercial Fleet Wash, 190 NLRB 326 (1971).

The Board has stated that the proper test is whether a part-time supervisor spends a "regular and substantial" portion of his time performing supervisory duties. Aladdin Hotel, 270 NLRB 838 (1984). This test is workable.

In the context of riverboat transportation, a boat operates 24 hours a day. Pilots are charged with operation of the boats and barges for 12 hours each day, while the captain is off watch. During those 12 hours, the pilot is responsible for the efficient and safe operation of the vessel. He is in charge. Thus, a regular and substantial portion of the pilot's time is spent performing supervisory duties.

8. **To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as giving rank and file employees greater autonomy and using self-regulating work teams?**

If an employer is using a self-regulated work force where no one is exercising supervisory authorities within the meaning of Section 2(11) of the Act, then it is possible that there are no supervisors. The Board does not need to make any wholesale changes to its traditional analysis to account for recent developments in management techniques. The Board should apply the statute to the facts of each case regardless of management techniques.

9. **What functions or authority could distinguish between "straw bosses, lead men, set-up men, and other minor supervisory employees," Congress intended to include within the Act's protections, and "the supervisor vested with genuine management prerogatives"?**

Question 9 relates directly to Questions 2, 3, and 4; in particular to Question 4, where the distinction between directing discrete tasks and directing other employees is discussed. A "straw boss", "lead man", or "set-up man" generally does not responsibly direct the work of other employees. He is responsible for performing a task. Incidental to performing his task, he may give some direction to other less skilled or experienced workers. However, he is not responsible for those workers' performance of their work. Furthermore, a straw boss generally does not use independent judgment. He simply passes along information about work assignments given to him by others. This is simply an application of the statutory definition to the facts before the Board. There is no separate category of "minor supervisors" or "major supervisors". Either an individual is a supervisor within the meaning of the Act or he is not.

10. **To what extent, if at all, should the Board consider secondary indicia – for example, the ratio of alleged supervisors to unit employees or the amount of time spent by the alleged supervisors performing unit work – in determining supervisory status?**

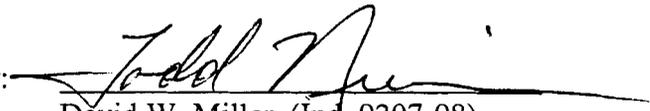
Secondary indicia, such as job descriptions; how subordinate employees view the relationship between themselves and the supervisors; attendance in management meetings; salary levels; and ratios are background factors that should be considered to help analyze evidence relating to Section 2(11) factors. They are particularly useful with apparent authority questions under Section 8 (a)(1) and 8 (a)(3). However, they cannot override the existence of Section 2(11) authority. For example, ratios may be helpful to analyze the actual authority a supervisor has to issue discipline or direct work. If there are five supervisors in a department for five employees, one might question whether all of the supervisors possess Section 2(11) authority. The analysis of Section 2(11) authorities in such a case may be more practical than it otherwise would have been. However, if the record supports a finding that each individual possesses supervisory authority, the ratio is not relevant. Thus, secondary indicia are helpful tools to evaluate evidence, but they are not statutory indicia. The Board should continue to consider secondary indicia as part of its analysis of the overall situation.

### III. CONCLUSION

The Board should take this opportunity to end its long and inconsistent history of manipulating the definition of a supervisor in Section 2(11) of the Act. The Board should respect the plain language of the statute and the decisions of the reviewing courts. The courts have answered the questions posed by the Board. And, as those terms apply to the riverboat transportation industry, the Board and the courts have held as a matter of law that pilots assign and responsibly direct the work of the deck crew, using independent judgment, in the interest of their employers. They are supervisors within the meaning of the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the below counsel of record by and/or party by first class, United States Mail, postage prepaid, this 18<sup>th</sup> day of September 2003.

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