

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 BUILDING AND CONSTRUCTION TRADES  
DEPARTMENT, AFL-CIO TO FILE A BRIEF *AMICUS CURIAE*  
IN SUPPORT OF THE PETITIONERS**

The Building and Construction Trades Department, AFL-CIO requests leave to file a brief, *amicus curiae*, in support of the Petitioners in these cases.

The Building and Construction Trades Department of the AFL-CIO (“BCTD”) is a federation of labor unions representing more than 1,000,000 journeymen, apprentices and helpers employed in the construction industry throughout the United States.

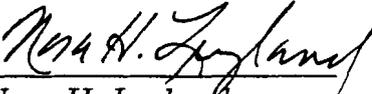
Congress, the National Labor Relations Board (“NLRB” or “Board”), and the courts have long recognized that journeymen, who basically oversee and direct less-skilled employees, have authority over those less-skilled employees that stems from the journeymen’s experience, training and skills. These entities have similarly recognized that journeymen also may act as “leads,” who direct, on the basis of experience, training and skill, other workers on a crew -- some of whom may have skills, training and experience equal to the journeyman taking the “lead” position, and who, in turn, may occupy the lead position themselves. And Congress, the Board and the courts have long acknowledged that the relationship that exists in the construction industry between journeymen and less-skilled, less-experienced workers, and between journeymen who act as leads and the members of the crew they lead, does not transform journeymen into supervisors who are excluded from coverage under the National Labor Relations Act.

The Supreme Court’s ruling, in *National Labor Relations Board v. Kentucky River*, 532 U.S. 706, 720 (2001), that the Board may not exclude nurses from the definition of supervisor on the theory that nurses do not use “independent

judgment” when they direct others on the basis of their professional experience, training and skills, thus implicates the status of construction industry journeymen, whose authority to direct stems from *their* experience, training and skills. In response to the Supreme Court’s decision in *Kentucky River*, the Board has issued a notice inviting the parties in these cases and interested *amici* to file briefs addressing several questions concerning the definition of “supervisor” under Section 2(11) of the Act.

Accordingly, the BCTD requests leave to file the attached brief to present the Board with its views on these important issues. Pursuant to the Board’s notice, briefs were due in this case on Friday, September 19, 2003. Because both the Board’s Washington, D.C. office and our office were closed on Thursday, September 18, and Friday, September 19, 2003, due to Hurricane Isabel, we request leave to file the BCTD *amicus* brief on the next business day, Monday, September 22, 2003.

Respectfully submitted,



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Dated: September 22, 2003

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I hereby certify that copies of the Motion of the Building and Construction Trades Department, AFL-CIO, to File a Brief *Amicus Curiae* on Behalf of the Petitioners, were sent, by overnight delivery service, on September 22, 2003, to the following individuals:

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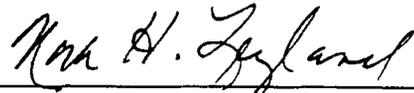
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AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO,  
IN SUPPORT OF THE PETITIONERS**

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## INTRODUCTION

The Building and Construction Trades Department of the AFL-CIO ("BCTD") is a federation of labor unions representing more than 1,000,000 journeymen, apprentices and helpers employed in the construction industry throughout the United States.

Congress, the National Labor Relations Board ("NLRB" or "Board"), and the courts have long recognized that journeymen, who basically oversee and direct less-skilled employees, have authority over those less-skilled employees that stems from the journeymen's experience, training and skills. These entities have similarly recognized that journeymen also may act as "leads," who direct, on the basis of experience, training and skill, other workers on a crew -- some of whom may have skills, training and experience equal to the journeyman taking the "lead" position, and who, in turn, may occupy the lead position themselves. And Congress, the Board and the courts have long acknowledged that the relationship that exists in the construction industry between journeymen and less-skilled, less-experienced workers, and between journeymen who act as leads and the members of the crew they lead, does not transform journeymen into supervisors who are excluded from coverage under the National Labor Relations Act.<sup>1</sup>

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<sup>1</sup> Indeed, in other industries in which "craft" workers are employed, such as the manufacturing, utility and telecommunications industries, there is a similar relationship between skilled workers, and less-skilled employees who become proficient in their craft in part from on-the-job direction given by more senior, skilled employees. The Board similarly does not find these relationships to involve supervisory direction.

The Supreme Court's ruling, in *National Labor Relations Board v. Kentucky River*, 532 U.S. 706, 720 (2001), that the Board may not exclude nurses from the definition of supervisor on the theory that nurses do not use "independent judgment" when they direct others on the basis of their professional experience, training and skills, thus implicates the status of construction industry journeymen, whose authority to direct stems from *their* experience, training and skills.

It is the BCTD's view that the Board must establish a standard for supervisors that does not include those, such as journeymen and leadmen, whose authority to direct arises from their experience, training and skills but is limited to the direction of the performance of discrete *tasks*. Such a resolution was in fact suggested by Justice Scalia in *Kentucky River*, 532 U.S. at 720, when he invited the Board to limit the scope of the supervisory function of "responsible direction" by distinguishing those who "direct the manner of other's performance of discrete *tasks* from employees who direct other *employees*" (emphasis added). As the legislative history of the Act, as well as numerous Board and court decisions relying on that history, reveals, the authority of *both* groups (those who direct *tasks* and those who direct *employees*) may arise from their experience, training and skills. Adoption of the distinction suggested by Justice Scalia would, therefore, limit the definition of responsible direction to those who, on the basis of such experience, etc., exercise the true management prerogative of directing *employees*. And such a resolution would, furthermore, fully comport with the legislative intent Congress manifested, when it defined the term supervisor, to preserve coverage under the Act for "straw bosses,

leadmen, set-up men, and other minor supervisory employees” (NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 409 (1985) (“hereafter NLRB, LEGISLATIVE HISTORY at \_\_\_”), *i.e.*, those whose authority to direct others in the performance of discrete *tasks* stems from their experience, training and skills.

If the Board fails to establish such a limitation, it risks depriving countless employees of the Act’s coverage who have enjoyed that coverage from the Act’s inception, and for whom Congress fully intended to preserve such protections when it excluded supervisors from the Act. Indeed, if the Board does not do so, there may not be any journeymen left in the construction industry, or experienced employees in other industries, that will *not* be classified as supervisors.<sup>2</sup>

The BCTD joins in the arguments set forth by the AFL-CIO in its Brief as *Amicus Curiae*. The BCTD will not repeat those arguments here, but will instead address only the question of the definition of “responsibly to direct,” and will urge the Board to incorporate into its standard for determining when such direction is engaged in, the distinction between those who direct *tasks*, such as journeymen and leadmen, and those who, because they direct *employees*, are supervisors under the Act.

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<sup>2</sup> According to the most recent information available from the Bureau of Labor Statistics (“BLS”), in 2001 there were approximately 4,880,450 employees below the level of supervisor in categories of employees that fall under the jurisdiction of building trades unions. BLS does not separately report the number that have attained journeyman status, but, under the apprentice system in effect in the construction industry, most employees are expected eventually to attain journeyman, or comparable, status. These figures, moreover, do not include leadmen, etc., in industries other than construction that also employ craft people, such as manufacturing, utility and telecommunications.

## ARGUMENT

### I. THE BOARD SHOULD LIMIT THE DEFINITION OF “RESPONSIBLY TO DIRECT” BY DISTINGUISHING THOSE WHO DIRECT OTHERS IN THE PERFORMANCE OF DISCRETE TASKS, FROM THOSE WHO DIRECT *EMPLOYEES*.

The Board has asked the parties to respond to the Supreme Court’s invitation to the Board, in *National Labor Relations Board v. Kentucky River*, 532 U.S. 706, 720 (2001), to offer a limiting interpretation of the supervisory function of responsible direction by “distinguishing employees who direct the manner of other’s performance of discrete *tasks* from employees who direct other *employees*.” (Notice at 2, Issue 4).

The legislative history of the Act and numerous Board and court decisions demonstrate that the answer to this question is inexorably intertwined with the answer to the Board’s additional question regarding what functions or authority would distinguish between “straw bosses, leadmen, set-up men, and other minor supervisory employees,” whom Congress intended to include within the Act’s protections, and those employees vested with “genuine management prerogatives,” that Congress intended to exclude as supervisors. (Notice at 3, Issue 9)

When the Court invited the Board to limit the definition of “responsibly to direct” by distinguishing the direction of *tasks* from the direction of *employees*, it explained that “certain of the Board’s decisions appear to have drawn that distinction in the past,” and cited to a specific passage in the Board’s decision in *Providence Hospital*, 320 NLRB 717 (1996). *Kentucky River*, 532 U.S. at 720 (citing to *Providence Hospital*, 320 NLRB at 729).

In the portion of *Providence Hospital* to which the Court referred, the Board had explained that the common theme of Board cases that had drawn this distinction had been to exclude from the definition of supervisor those employees with the authority to direct other employees in the performance of discrete *tasks* based on the directing employee's experience, skills or training.

Thus, in the relevant passage in *Providence Hospital*, the Board first stated "the Board has, with court approval, distinguished supervisors who share management's power or have some relationship or identification with management, from skilled non-supervisory employees whose direction of other employees reflects their superior training, experience or skills." 320 NLRB at 729. The Board then discussed several cases, and concluded that their common theme was that "Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform *discrete tasks* stemming from the directing employee's experience, skills, training or position...." *Id.* (emphasis added).

The Board went on to give three examples of what it meant by such direction of discrete *tasks*:

- (1) the direction which is given by a lead or journey level employee to another or apprentice employee,
- (2) the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training, and
- (3) the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training.

*Id.*

As discussed below, the Supreme Court's suggestion in *Kentucky River*, that this limitation is properly a limitation on the supervisory function of responsible direction, grows directly out of Congress' statements about its intention to preserve coverage under the Act for "leadmen...and other minor supervisory employees," and the numerous Board and court decisions finding such employees not to be supervisors. The BCTD urges the Board to clarify that those who direct others in the manner of performance of discrete tasks are not engaged in responsible direction; and that direction that fits within one or more of the three examples the Board provided in *Providence Hospital* is direction of discrete *tasks*, and thus not responsible direction. The BCTD asks the Board to further clarify that the direction of *employees* is the exercise of true management prerogatives in directing, under only general orders, an entire department or comparable unit of employees.<sup>3</sup>

As explained below, such a limitation on the definition of responsible direction, and the recommended clarifications, are necessary to fulfill Congress' intent to exclude what it termed "minor supervisory employees" from the definition of what constitutes a supervisor and thus preserve their protection under the Act.

#### **A. *The Legislative History of the Amended Act***

The Senate Committee that crafted the definition of the term "supervisor," explained that it was distinguishing between certain employees with "minor"

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<sup>3</sup> The BCTD agrees that the Board should adopt the standard proposed by the AFL-CIO in its Brief for limiting the definition of "responsibly to direct." See AFL-CIO Brief at Section IV.A.2. The BCTD's Brief is intended to provide a detailed explanation of the second element of the standard proposed by the AFL-CIO, which is: "whether he or she 'directs other employees' or merely 'directs the manner of others' performance of discrete tasks'."

supervisory duties, such as “straw bosses, leadmen, set-up men, and other minor supervisory employees,” whom it intended to include under the Act’s coverage, and supervisors invested with “genuine management prerogatives,” which it intended to exclude. NLRB, LEGISLATIVE HISTORY at 409. Indeed, an earlier House Report had cautioned that the definition of supervisor should not be so broad as to include a “carpenter with a helper,” or to include (and thus penalize) “those employees who have shown the most skill and conscientiousness in the performance of their duties.” *Id.* at 362.

In preserving the status of such “minor supervisory employees” as employees covered under the Act, the Senate Committee observed that it was adopting the test that the Board itself had made in numerous cases when it included such employees in the same bargaining unit with other rank and file employees. NLRB, LEGISLATIVE HISTORY at 409. The Committee then cited four cases as examples of the type of “minor” supervisory duties it was preserving as those typifying employees included under the Act: *Bethlehem Steel Co.*, 65 NLRB 284 (expeditors);<sup>4</sup> *Pittsburgh Equitable Meter Co.*, 61 NLRB 880 (group leaders with authority to give instructions and to lay out the work); *Richards Chemical Works*, 65 NLRB 14 (supervisors who are mere conduits for transmitting orders); *Endicott Johnson*, 67 NLRB 1342, 1347 (persons having the title of foreman and assistant foreman but with no authority other than to keep production moving). *Id.*

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<sup>4</sup> The Board reports this decision under a slightly different case name: *Bethlehem-Sparrows Point Shipyard, Inc.*, 65 NLRB 284 (1946).

The supervisory function of “responsibly to direct” was added to the definition by Senator Flanders, who noted that he wanted to clarify that the term “supervisor” was intended to include persons who have “large responsibility for the exercise of personal judgment based on personal experience, training and ability.” NLRB, LEGISLATIVE HISTORY at 1303. As Senator Flanders explained, such persons are “charged with the responsible direction of [their] department[s];” and “determine[ ], under general orders, what job shall be undertaken next and who shall do it.” *Id.*

The Senator was careful to note that the addition of the supervisory function of “responsibly to direct” would not alter the status of “minor” supervisory employees whom the Committee had stated it intended to exclude from the definition of supervisor. As Flanders stated, the persons his amendment would include as supervisors (and thus exclude from the Act’s coverage) were “*above the grade of ‘straw bosses, lead men, set-up men, and other minor supervisory employees,’ as enumerated in the report,*” and engaged in direction that was “essential[ly] *managerial.*” *Id.* (emphasis added). The final Conference Committee Report, which post-dates Flanders’ amendment, noted that the Senate’s definition, which excluded persons below the level of “foremen and persons of like and higher rank” was the definition agreed upon when the House and senate Bills were reconciled in conference. NLRB, LEGISLATIVE HISTORY at 539.

Thus, the universe of employees who exercise responsible direction does not include “lead men...and other minor supervisory employees.” And the cases to which Congress pointed in excluding these minor supervisory employees show that

Congress intended “responsibly to direct” to encompass only those who had management authority over *employees*, and *not* those who had authority only over aspects of the *work* performed by other employees. In all four cases cited by Congress as examples of those who would *not* come under the definition of a statutory supervisor, the authority of the “minor supervisory employee,” was the authority to expedite the *work*, usually stemming from the employee’s skills, training, or experience.

For example, in *Bethlehem-Sparrows Point Shipyard, Inc.*, 65 NLRB 284 (1946),<sup>5</sup> the employer contended that its “outfitters” (who planned the work of various ship building and repair crafts to prevent production lags) were excluded from the Act’s coverage as managerial employees, and that its “outfitter supervisors” (who, at a level above the outfitters, acted as “expeditors” of the work in progress) should be excluded from the production and maintenance unit as supervisors. The Board disagreed with the employer on both counts, expressly noting that the functions the employees at issue exercised were not of such a nature as to identify them with *management*.

In *Pittsburgh Equitable Meter Co.*, 61 NLRB 880 (1945), the Board found that “group leaders” who assigned material to and instructed personnel who worked under them in groups of one to forty, were not supervisors. Although the factors on which the Board relied are not set forth in the decision, they can be divined from the two cases to which the Board cited in stating its conclusion. In the first of these,

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<sup>5</sup> The Committee Report refers to this case as *Bethlehem Steel Co.*, 65 NLRB 284. NLRB, LEGISLATIVE HISTORY at 409.

*Edgewater Steel Co.*, 56 NLRB 1778 (1944), the Board found that the unit should include trainers (experienced employees who taught new employees to operate machinery and to perform other work functions), servicemen (similar to expeditors); and gang leaders (more experienced employees who conveyed orders from foremen to rank and file employees). In the second case, *Charlottesville Woolen Mills*, 59 NLRB 1160 (1944), the Board included assistant foremen, who performed regular production work, but who also assisted the foremen in expediting the work.

In *Richards Chemical Works*, 65 NLRB 14 (1945), the Board included foremen and assistant foremen in the unit. The Board concluded that the foremen, some of whom performed manual labor, merely served as conduits for the transmittal of orders to their men, and, beyond that, their sole responsibility was to see that "the work got out." Finally, in *Endicott Johnson*, 67 NLRB 1342, 1347 (1946), the Board included foremen and assistant foremen with the responsibility to keep production moving on schedule and to inspect and control the quality of the work.

It is clear, therefore, that Congress intended to preserve the Act's protection for employees who direct others in some aspect of their *work* on the basis of training, skills and/or experience. It is equally clear that Congress intended to deprive of the Act's protection those persons who are vested with genuine *management* prerogatives: those who, as explained by Senator Flanders, exercise the type of personal judgment based on experience, training and skill in performing *managerial* duties, that is best defined as responsible direction.

The resolution of the question that has plagued the Board in recent years, in attempting to distinguish among those who “direct” on the basis of skill, training and experience, thus turns on understanding what Congress meant when it simultaneously included “minor supervisory employees” under the Act, and excluded, as supervisors, persons who perform managerial duties based on experience, training and skill, and are thus vested with the genuine management prerogative of responsible direction.

As the Supreme Court suggested in *Kentucky River*, when it cited to *Providence Hospital* and invited the Board to offer a limiting definition of “responsibly direct,” the answer lies in the distinction the Board draws between those who direct others in the performance of *tasks* (i.e., specific work), and those who direct *employees*.<sup>6</sup> When dividing those employees who engage in responsible direction from those who do not, it is clear that personnel who exercise some

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<sup>6</sup> The Court referred twice in *Kentucky River* to the Board’s statement in *Providence Hospital* that “supervisory authority does not include the authority to direct others to perform discrete tasks stemming from the directing employee’s experience, skills, training or position.” The Court first rejected the statement as support for the Board’s ruling that judgment exercised in connection with responsible direction is not “independent judgment,” to the extent that the judgment is informed by professional or technical training or experience. *Kentucky River*, 532 U.S. at 715, n.1. The Court noted that, if applied to every supervisory function, exclusion of technical, professional or experienced judgment from the definition of independent judgment would virtually eliminate the definition of supervisor from the Act. *Id.* at 715. Later in the decision, however, the Court suggested that the limitation regarding “discrete tasks” could be appropriately employed in narrowing the definition of the supervisory function of “responsibly to direct” itself. *Id.* at 720. Under such a limitation, moreover, the question whether an experienced, skilled employee who directs others in performing *tasks* uses “independent judgment” when so “directing” would not even be reached, because that employee would not be engaged in *responsible* direction.

authority stemming from experience, training and ability fall on both sides of the equation. But as the legislative history of the Act, as well as numerous Board and court cases demonstrate, the dividing line is clear: employees do not engage in “responsible” direction when the direction is limited to directing others in the manner of their performance of discrete tasks. These employees are the same, or comparable to the “lead men...and other minor supervisory employees” for whom Congress intended to maintain protection under the Act, and often fall into one or more of the three examples of those who direct discrete *tasks*, as set forth in *Providence Hospital*.<sup>7</sup> In contrast, personnel who engage in responsible direction, that is, those who direct *employees*, are personnel Senator Flanders defined as those who direct the work of an entire “department,” or similar unit, under “only general orders.”

***B. Directing the Manner of Other’s Performance of Discrete Tasks***

Both of the principal cases on which the Board relied in the critical passage in *Providence Hospital*, dealt with skilled, experienced employees who directed some aspect of the *work* of others. And the Board’s decisions that the employees at issue in both cases were not supervisors were grounded in Congress’ statement that it

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<sup>7</sup> As stated, the Board in *Providence Hospital* explained that Section 2(11) supervisory authority does *not* include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee’s experience, skills, training or position,” and illustrated this limitation with three examples: (1) the direction which is given by a lead or journey level employee to another or apprentice employee; (2) the direction which is given by an employee with specialized skills and training which is incidental to the directing employee’s ability to carry out that skill and training, and (3) the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training. 320 NLRB at 729.

intended to include “lead men ...and other minor supervisory employees,” under the Act. In the first of these two cases, *Southern Bleachery and Print Works*, 115 NLRB 787 (1956), *enforced*, 257 F. 2d 235 (4<sup>th</sup> Cir. 1958), *cert. denied*, 359 U.S. 911 (1959), the Board specifically commented on the meaning of “responsibly to direct.”

The Board’s decision in *Southern Bleachery* illustrates the type of employee who would come within either of the first two of the Board’s examples of employees who direct others in the performance of discrete *tasks* – *i.e.*, either a journeyman directing an apprentice, or an employee with specialized skills giving direction incidental to his or her ability to utilize his or her own skills. The Board explained in *Southern Bleachery* that machine printers, who underwent a seven year apprenticeship, and who had authority over less skilled and less experienced workers who assisted them in the operation of the printing machines, did not exercise the type of authority over those workers that Congress intended to include under the statutory definition of “supervisor.” To the contrary, the Board explained that the authority exercised by the machine printers was “*not* the authority to *responsibly direct* other employees which flows from management and tends to identify or associate a worker with management.” 115 NLRB at 791 (emphasis added). As the Board went on to explain:

Throughout the industry of this Nation, there are highly-skilled employees whose primary function is physical participation in the production or operating processes of their employer’s plants and who incidentally direct the movements and operations of less skilled subordinate employees. These artisans have a close community of interest with their less experienced co-workers and the amended Act has preserved for them the right to be represented by a collective-bargaining agent in dealings with their employers. [footnote omitted]

The Board has, therefore, consistently included in bargaining units such employees, often craftsmen or persons in comparable positions, whose authority is based upon their working skill and experience.

*Id.* In reaching its conclusion in *Southern Bleachery*, the Board cited directly to the Senate Committee's statement (written only nine years earlier) that Congress intended to preserve the distinction between "straw bosses, lead men...and other minor supervisory employees" and "the supervisor vested with genuine management prerogatives." *Id.*, n. 8. When the Court of Appeals for the Fourth Circuit enforced the Board's order in *Southern Bleachery*, it agreed that the relevant inquiry is "whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management." 257 F.2d at 239.<sup>8</sup>

The third example of direction of discrete tasks provided by the Board in *Providence Hospital* -- the coordination of others with similar skills -- is illustrated in the Board's decision in *General Dynamics Corp.*, 213 NLRB 851, 858-59 (1974), to which the Board also cited in the critical passage in *Providence Hospital*. In that case, the Board found that certain competent professional and administrative employees (senior engineers and "scientific employees") were not excluded from the

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<sup>8</sup> Member Cohen's objection to the Board's reliance on *Southern Bleachery* in *Providence Hospital* in attempting to distinguish direction from "responsible direction" was, therefore, misplaced. Member Cohen objected because, in his view, *Southern Bleachery* did not focus on the concept of responsible direction, but merely held that the attempt to elevate employees to supervisory status was not effective. 320 NLRB at 736 and n.2. As demonstrated above, however, the Board went on in *Southern Bleachery* to explain that the machine printers had never, even before the employer changed their duties on paper, engaged in "responsible direction" as Senator Flanders defined that term.

Act as either managerial or supervisory employees, when they functioned as “proposal managers,” or “project leaders.”

The employees at issue designed, and then oversaw and monitored (or “processed”), given projects to completion. 213 NLRB at 857. In so doing, they assigned “tasks” to employees (some of whom the project leaders might specifically request be assigned to the project at hand), and gave “work direction,” as well as “technical aid and direction” to those employees, while sometimes working along with them. *Id.* at 856-57. The employees the project leader “directed” might also be assigned to other projects and be “directed” simultaneously by other project leaders as well. *Id.* The project leader could also be a “directed” employee on another project, at another time, or even at the same time he or she “directed” others. *Id.* All of the employees, both the leaders and the employees they “directed,” also reported to what the Board described as a “functional” supervisor, regardless of which (or how many) projects they were working on. *Id.*<sup>9</sup>

The Board found that, rather than being supervisors, these project leaders were senior employees who provided “professional direction and coordination” for other senior and non-senior employees with similar skills. 213 NLRB at 858-59. As project leaders, the Board noted, the direction they gave was directly related to their responsibility for the work performed. *Id.* at 858. The Board’s distinction thus rested on responsibility for the *work*, rather than for the *employees* themselves,

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<sup>9</sup> The Board described the engineers as reporting “technically” to the project leaders and “functionally” to their institutional supervisors. 213 NLRB at 857. The Board also described this distinction as one between “technical” control and “administrative” control. *Id.* at 859.

who, as noted, reported to other “functional” supervisors. The Board also found it significant that the project leaders could be “directed” by other senior engineers or scientific employees when those persons were taking their turn as project leader. *Id.* at 859. Here too, the Board grounded its decision in the Conference Committee Report in which, as the Board observed, Congress distinguished between “leadmen, setup men and other minor supervisory employees...and the supervisor vested with genuine management prerogatives.” *Id.* at 858. In contrast, the Board in *General Dynamics* excluded certain employees as supervisors and/or managerial employees because their job responsibilities exceeded those of the project leaders discussed above, and included “functional supervisory authorities.” *Id.* at 859. For example, the Board excluded tool and manufacturing engineers and senior engineers as “managerial and/or supervisory” personnel, in part, because they could “establish priorities and shift personnel to various tasks.” *Id.* at 863. The Board also found that one engineer (Kolbricht) was a “supervisory and/or managerial employee” because he substituted regularly as the department supervisor. *Id.* at 862.<sup>10</sup>

As in the principal cases relied on by the Board in *Providence Hospital*, the employees at issue in decisions in which the Board and courts have found that lead men and similar employees whose authority stems from their training, experience

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<sup>10</sup> The employees at issue in *General Dynamics* actually worked at the job they were found not to be “supervising” (albeit at a somewhat higher level). While actively working at the trade is, therefore, indicative of non-supervisory status, the converse is not necessarily true. It is evident from the Board’s decisions in the pre-Taft-Hartley cases involving expeditors and planners discussed above at Section I.A., that an employee who coordinates the work of other employees may still retain non-supervisory status even if he or she does not also perform the work he or she is coordinating.

or skills, but who direct employees only in the manner of their performance of discrete tasks, generally fall under one or more of the three examples set forth by the Board in *Providence Hospital*, as shown below.

1. *Direction given by a lead or journey level employee to another or apprentice employee*

Subsequent to the Taft-Harley amendments, the Board has, with court approval, found in countless cases that more experienced employees, such as journeymen or other craft leadmen, who provided some direction to other, less experienced workers, were not supervisors under the Act. See, e.g., *NLRB v. North Carolina Granite Corp.*, 201 F.2d 469, 469-70 (4<sup>th</sup> Cir. 1953) (carpenter who worked with two other carpenters on a repair squad that repaired company buildings and housing was no more than the lead hand of the squad and therefore was not a supervisor – his position was not that of a representative of management with power to responsibly direct laborers working under him, but that of a laborer occupying the position of lead hand or straw boss); *NLRB v. Beaver Meadow Creamery*, 215 F.2d 247, 251 (3d Cir. 1954) (dairy employee at issue was at most a leadman; he checked out eggs to driver-salesmen and instructed new employees in how to “candle” and grade eggs, but he did not possess any supervisory authority; *United States Gypsum Co.*, 118 NLRB 20, 29-30 (1957) (“maintenance leaders,” who, after consulting a master schedule, determined the maintenance jobs to be done each day, and then assigned the work to themselves and other mechanics, and oversaw the other mechanics’ work, were not supervisors: “the directions the maintenance leaders give to the mechanics derive from their greater skill and [they]

only ‘incidentally direct the movements of less skilled’ mechanics.”); *Northern Chemical Industries*, 123 NLRB 77, 79 (1959) (electrical leadman, who was the only first class electrician in his department of five, and directed the work of the other three employees who acted as his helpers in executing work orders received from the admitted supervisor, was not a statutory supervisor: “such direction or judgment as the leadman exercises is that usually exercised by an experienced mechanic with respect to less skilled workers”); *Thompson, Weinman & Co.*, 125 NLRB 301, 303 (1959) (electrical department foreman was not a supervisor – the direction he exercised over a helper was that of a more experienced worker over a less experienced one; machine shop foreman is not a supervisor – he was assisted by a machinist and a welder, but the direction he exercised was technical and of the sort exercised by the more experienced over the less experienced employees); *General Dynamics*, 144 NLRB 908, 911 (1963) (engineer who directed oilers on tugboats was akin to a skilled mechanic-helper relationship and not supervisor-employee); *Brown & Root, Inc.*, 314 NLRB 19, 22 (1994) (two employees who headed up construction “survey” crews were not supervisors, notwithstanding their “direction” of the crews: “It is well-established that the exercise of authority on the part of more skilled and experienced employees (such as typical leadmen in crafts) to assign and direct other employees in order to assure the technical quality of the job does not in itself confer supervisory status. [footnote omitted]”); and *Electrical Specialties, Inc.*, 323 NLRB 705, 707 (1997) (job leaders or leadmen for electrical contractor, who laid out the work pursuant to the general contractor’s specification,

ordered materials, signed purchase orders, and directed the other electricians to do the work in accordance with the specifications, did not engage in responsible direction).

2. *Direction given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training*

In addition to the machine printers in *Southern Bleachery* (discussed above at Section I.B.) the Board has often found that employees, whose "direction" of other employees was merely incidental to the directing employee's ability to carry out his or her own functions, were not supervisors. See, e.g., *Cities Service Oil Co.*, 75 NLRB 468 (1947) (two chemists who work with four junior chemists and sometimes require the assistance of the junior chemists in making certain tests are not supervisors; they cannot effect changes in the status of employees); *American Finishing Co.*, 86 NLRB 412, 414, 417-18 (1949) (assistant foremen in textile printing plant not supervisors – the supervision exercised by the assistant foreman over other employees in order to operate the textile printing machines is that normally exercised by a skilled craftsman over his helper and not that of a supervisor over an employee; the assistant foreman remains in front of the machine to observe the run of the cloth while the back tender, gray tender, and swingman perform their duties in the back of the machine); *NLRB v. Esquire, Inc.*, 36 LRRM (BNA) 2053, 2056 (7<sup>th</sup> Cir. 1955) ("sound mixer's" direction to boom man when the boom man's microphone was not picking up was not assigning and directing an employee within the meaning of § 2(11), and he is not a supervisor); *Southern*

*Illinois Sand Co.*, 137 NLRB 1490, 1492 n.2 (1962) (pilot who usually was assisted by a deckhand and at times had effectively recommended against assignment of a particular deckhand to his boat was not a supervisor – his direction of the deckhand was not that of a supervisor but that of a more experienced employee over one who is less skilled); *General Dynamics*, 144 NLRB 908, 911-12 (1963) (engineers who work in conjunction with repairmen and direct them in repair of machinery not supervisors – direction is like that of an experienced mechanic who directs the work of helpers in the performance of their joint task; and *Canada Dry Corp.*, 154 NLRB 1763, 1766-67 (1965) (head mechanic who worked with and directed the work of a helper and a gasser-washer was not a supervisor – his recommendations and directions involved those exercised by the more experienced employee with respect to several who are less skilled).

**3. *Direction given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training***

Although the concept of a skilled employee who coordinates work of others with similar specialized skills and training certainly extends beyond professional or technical employees,<sup>11</sup> the employees that the Board has found are not supervisors under this rationale have generally tended to be professional or technical employees. See, e.g., *Skidmore, Owings & Merrill*, 192 NLRB 920, 921 (1971) (architects who serve as “project managers,” and who are professionally responsible

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<sup>11</sup> For example, this concept would clearly apply to an experienced journeyman who simply lays out the work for other experienced journeymen and then monitors their progress while working alongside of them.

for the quality of the *work* performed on the project, are not supervisors, but merely provide “professional direction and coordination for other professional employees”); *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB 1049, 1051 (1971) (“project architects,” who have the overall administrative responsibility for given projects, are not supervisors, “[a]lthough they responsibly direct other employees, it is in professional sense only and related only to a particular project.”) *See also Ethyl Corp.*, 118 NLRB 1369, 1372 (1957) (although intermediate auditors assign work to two junior auditors, there is not sufficient evidence that they responsibly direct or effectively recommend changes in the status of these employees); *National Broadcasting Co.*, 160 NLRB 1440, 1441-42 (1966) (newsmen who alternate working as deskmen, when they edit material submitted by other newsmen and can reassign newsmen to late-breaking stories and in emergencies call in off duty newsmen are not supervisors -- are but part of a team effort to produce professionally prepared news, so their work is essentially production rather than supervision; and *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1155 (7<sup>th</sup> Cir. 1970) (lead engineers who had overall responsibility for planning, scheduling, and successful completion of installation and service of turbine generators and related equipment and guide and direct the other engineers on the project do not exercise supervisory authority over other field engineers).

In sum, the three examples, set forth in *Providence Hospital*, of employees who direct discrete tasks and thus do not engage in responsible direction, are well

grounded in the Act's legislative history as well as numerous Board and Court cases interpreting the Board's definition of "supervisor."

In addition to illustrating what does *not* constitute responsible direction, several of the cases cited above also provide examples of what *does* constitute supervisory "direction." For example, while the Board found in *Northern Chemical Industries*, 123 NLRB 77 (1959) that three types of leadmen were not supervisors, it also found that two types of leadmen were in fact supervisors. Thus, the Board found supervisory status for one group of leadmen because they spent three quarters of each year "in charge of a shift and "responsibly direct[ing]" from 15 to 20 employees." While acting in this capacity, the leadmen apparently did not do actual production work, which they did perform in the other part of the year. *Id.* at 78. The Board also found that the "pipefitter leadman," who "responsibly direct[ed] the work of the 10 to 15 pipefitters in the pipefitting department" and was "responsible for all pipefitting at the plant," was a supervisor.

As discussed in more detail in the next section, the BCTD agrees that such employees do engage in responsible direction, within the meaning intended by Congress, because they exercise genuine management prerogatives, by directing, under only general orders, a department or comparable unit of employees.

### *C. Directing Employees*

As shown above, an examination of the legislative history and the early Board cases on which Congress relied in distinguishing "leadmen . . . and other minor supervisory employees," from supervisors vested with "genuine management

prerogatives” shows that Congress intended to limit “responsibly to direct” to employees who exercise *managerial* authority over a department or comparable unit of *employees*. Congress expressly excluded supervisors from the protection of the Act in 1947 in reaction to the Board’s decision in *Packard Motor Car Co.*, 61 NLRB 4 (1945), in which the Board had directed an election in a unit of supervisory employees. NLRB, LEGISLATIVE HISTORY at 304-05 (1985). The employees at issue in the *Packard* case were foremen, who did not merely direct the work of other employees, but also exercised managerial authority over the employees under their direction. The foremen were in charge either of a department or a segment of the work of an entire department. They handled employee grievances, disciplined employees, and made recommendations regarding their discharge, transfer, layoff, and reclassification. They also signed various types of “employee passes.”<sup>12</sup> *Packard*, 61 NLRB at 10, 11, 22, 23. This is the class of supervisor Congress intended to exclude from the Act’s protection when it passed the Taft-Hartley amendments.

Also, as noted above, Senator Flanders offered an amendment to add “responsibly to direct” to § 2(11)’s list of supervisory indicia, which Congress limited to those who exercise “genuine management prerogatives.” In offering the amendment, Flanders stated: “the definition of ‘supervisor’ in this act seems to me to cover adequately everything except the basic act of supervising.” NLRB,

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<sup>12</sup> The Board does not explain what function “employee passes” served, but it may be assumed that they granted employees some right of action.

LEGISLATIVE HISTORY at 1303. Senator Flanders explained that “responsibly to direct” includes the supervisor,

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.

*Id.* (emphasis added). Thus, Flanders intended to exclude from the Act only those who, under general orders, exercise managerial authority over a department or comparable unit of workers.

In the years before the Board began struggling over the definition of “responsibly to direct” as it applies to nurses and other professionals, the Board often used the term in the same sense as Senator Flanders defined it. That is, the Board interpreted responsible direction as turning on whether the directing employees exercised managerial authority – which the Board also described as directing employees while acting in the capacity of an employer (*i.e.*, “*qua*” employer)<sup>13</sup> – over a department or comparable unit of employees. Thus, in *Ross Porta-Plant, Inc.*, 166 NLRB 494, 495-97 (1967), in considering whether department heads at a cement equipment manufacturing plant were supervisors, the Board described the standard as “whether the individual is merely a superior workman or

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<sup>13</sup> The meaning of “*qua*” is “in the capacity or character of.” BLACK’S LAW DICTIONARY 1114 (5<sup>th</sup> ed. 1979).

lead man who exercises the control of a skilled worker over less capable employees, or is a supervisor who *shares the power of management*" (emphasis added). In enforcing the Board's decision that the department heads were not supervisors, the Fifth Circuit explained that the authority to "effectively direct" is "the type of authority which flows from management and tends to associate an individual with management." *Ross Porta-Plant, Inc. v. NLRB*, 404 F.2d 1180, 1182 (5<sup>th</sup> Cir. 1968). In *Southern Bleachery*, the Board described "responsible direction" as the exercise of authority that "flows from management and tends to identify or associate a worker with management." 115 NLRB at 791.

This also is the distinction the Board drew in *General Dynamics*, discussed above, between *technical* oversight by project leaders who provided team members with "technical aid and direction," and *functional* supervision of employees regarding *personnel matters* such as hiring, disciplining, discharging, promoting, rewarding, or granting leave. 213 NLRB at 856-57.<sup>14</sup> See also, e.g., *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1156 (7<sup>th</sup> Cir. 1970), quoting *ILGWU v. NLRB*, 339 F.2d 116, 121 (2d Cir. 1964) ("Although there are many ways in which one person can 'direct' and 'assign' another, only if the individual 'directs' or 'assigns' *qua* employer, or *qua* representative of the employer, such as a foreman might do, does the individual 'supervise' within the meaning of Section 2(11)").

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<sup>14</sup> As noted above, at Section I.A., the Board in *General Dynamics* excluded as supervisors those engineers who acted as project leaders and could, in addition, "establish priorities and shift personnel to various tasks." 213 NLRB at 863.

These cases represent the correct interpretation of “responsibly to direct,” and should be followed in setting forth a clear definition of the phrase.

As the Fifth Circuit has recognized, “the statutory words ‘responsibility to direct’ are not weak or jejune but import active vigor and potential vitality.” *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143, 147 (5<sup>th</sup> Cir. 1967). Accordingly, following the cases cited above and those cited below, the Board should now clearly define “responsibly to direct” to mean the exercise of “genuine management prerogatives” exercised by an individual, under general orders, over the employees of a department or comparable unit – that is, exercising authority over them that flows from management.

Numerous Board decisions exemplify the exercise of “genuine management prerogatives” that constitutes responsible direction, making the directing employee a supervisor. See, e.g., *Alabama Marble Co.*, 83 NLRB 1047, 1072-74 (1949) (a master mechanic in sole charge of directing the work of the mechanics in a shop who has discretion to assign them overtime responsibly directs and is a supervisor); *L & H Shirt Co.*, 84 NLRB 248, 258 n.4 (1949) (two “floor ladies” in sole charge of directing the work of 75-100 employees in the department of a shirt manufacturing plant responsibly direct and are supervisors); *Research Craft Mfg. Corp.*, 129 NLRB 723, 725-26 (1960) (leadmen or foremen in charge of a shift of 18 to 20 press operators in a manufacturing operation who have discretion to assign them to various jobs responsibly direct employees and are supervisors); *Victory Grocery Co.*, 129 NLRB 1415, 1416-17 (1961) (two employees responsible for directing the

operation of a grocery warehouse who have discretion to determine the manner in which the work is performed, assign employees to different jobs, grant overtime, and grant time off for a reason they deemed valid responsibly direct the employees and are supervisors); *Block-Southland Sportswear, Inc.*, 170 NLRB 936, 941-42 (1968) (foreman in charge of the night shift of cutting department employees in a shirt manufacturing plant who has discretion to move employees to different jobs, give them permission to leave early when sick, and send them home early when they did not perform properly, responsibly directs the employees and is a supervisor); *Groendyke Transport, Inc.*, 171 NLRB 997, 998 (1968) (dispatchers who have discretion to “order the drivers when to leave on a particular schedule and to wait for a particular time,” select drivers to take particular loads, and reprimand drivers for tardiness, responsibly direct the drivers and are supervisors); *McClatchy Newspapers*, 307 NLRB 773, 773, 777-79 (1992) (newspaper press operators who had discretion to direct crews who operate the presses, including deciding whether to stop or slow the presses, which could result in overtime work, responsibly direct the employees and are supervisors); *NLRB v. Baby Watson Cheesecake, Inc.*, 148 LRRM (BNA) 2897 (2d Cir. 1994) (employee responsible for managing the “ovens area” of a cheese cake company who has discretion to shift employees from task to task, decide when they can take breaks, and sometimes decide when employees can leave work and when they needed to work overtime responsibly directs the employees and is a supervisor); *American Commercial Barge Line*, 337 NLRB No. 168 (Aug. 1, 2002) slip op. at 1-2 (tugboat pilots who, for substantial periods, are the

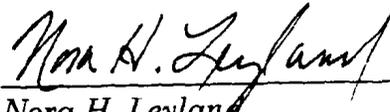
highest ranking official on duty and have discretion to direct the deckhands, change the priority of the crew's work, and wake the call watch man when deemed necessary, even if it results in overtime, responsibly direct the crew members and are supervisors).

The personnel at issue in all of these cases clearly exercised "authority that flows from management and tends to associate an individual with management." As demonstrated, this is what Congress intended by the phrase "genuine management prerogatives," which applies to § 2(11)'s list of supervisory indicia, including "responsibly to direct." *Ross Porta-Plant, Inc. v. NLRB*, 404 F.2d 1180 (5<sup>th</sup> Cir. 1968). See also *Southern Bleachery*, 115 NLRB at 791.

### CONCLUSION

For all of the foregoing reasons, the BCTD urges the Board to adopt the standard for assessing the supervisory function of "responsibly to direct" proposed by the AFL-CIO, and to clarify that the second factor in that standard, *i.e.*, "whether he or she 'directs other employees' or merely 'directs the manner of other's performance of discrete tasks'" has the meaning suggested by the BCTD in this Brief. That is, the Board should clarify that employees do not engage in responsible direction when they exercise the authority to direct the manner of others' performance of discrete tasks stemming from the directing employee's experience, training or skills, as illustrated by the three examples set forth by the Board in *Providence Hospital*.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Nora H. Leyland". The signature is written in dark ink and is positioned above a horizontal line.

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