

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUB-REGION 33**

INTERNATIONAL UNION OF OPERATING)	
ENGINEERS, LOCAL 159, AFL-CIO)	
)	
Charging Party/Petitioner,)	
)	No. 33 CA 15765, 33 CA 15298,
v.)	33 RC 5002
)	
ROCHELLE WASTE DISPOSAL, LLC,)	
)	
Respondent/Employer.)	

**ROCHELLE’S STATEMENT OF REASONS WHY THE BOARD SHOULD NOT
GRANT THE GENERAL COUNSEL’S MOTION FOR SUMMARY JUDGMENT**

Respondent Rochelle Waste Disposal, LLC (“Rochelle”), by its attorneys, Hinshaw & Culbertson LLP, submits the following as its statement of reasons why the Board should not grant the General Counsel’s motion for summary judgment:

Introduction

The Board’s August 23, 2010, Decision, Certification and Notice to Show Cause (the “Order”) adopted the October 20, 2008, ruling that Rochelle committed an unfair labor practice when it terminated the employment of Landfill Supervisor Jeff Jarvis. The Order also certified the Union as the employees’ exclusive bargaining representative and directed Rochelle to show cause why the General Counsel’s motion for summary judgment, which contends Rochelle has committed a further unfair labor practice by refusing to bargain, should not be granted.

The reason the General Counsel's motion for summary judgment should not be granted is that an intervening decision by the Seventh Circuit requires the Board to examine the Regional Director's decision in the representation proceeding. Because this new decision represents a change in the law and did not exist at the time Rochelle first sought the Board's review of the Regional Director's decision, Rochelle could not raise it any sooner and the Board should consider it now.

Procedural Background

On December 20, 2006, the Regional Director determined that Rochelle's employee Jeff Jarvis was not a statutory supervisor under section 2(11) of the Act. The decision that Jarvis was not a supervisor was based, in part, on a finding that Jarvis did not "responsibly direct" other employees at the landfill. The Regional Director reasoned that "responsible direction" was lacking because Jarvis did not "discipline" the other employees. (*See* Regional Director's Supplemental Decision and Direction of Election, December 20, 2006, p. 15; hereafter "Supp. Dec.")

Rochelle sought Board review of the Regional Director's decision. Although the Board denied review, Member Peter C. Schaumber dissented:

[S]ome of the Regional Director's statements of law regarding the analytical framework applicable in determining supervisory status, as set out in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), [are] incorrect and imprecise. Accordingly, I would grant review and read the record to determine whether the landfill supervisor is a statutory supervisor under the precise analytical framework set out in *Oakwood*.

(G.C. Motion at Ex. 5) The union election followed, and Rochelle refused to bargain on the basis that, *inter alia*, the Union was improperly certified in the representation

proceeding. On April 30, 2009, the Board declined to examine the Regional Director's decision in the representation proceeding and entered summary judgment against Rochelle, finding that it had unlawfully refused to bargain.

Rochelle appealed the Board's decision to the Seventh Circuit where it was fully briefed and argued. The current remand resulted from the U.S. Supreme Court's decision in *New Process Steel, Inc., v. NLRB*, 2010 WL 2400089 (June 17, 2010), not from a decision on the merits. However, while the appeal was pending, the Seventh Circuit decided *Loparex v. NLRB*, 591 F.3d 540 (7th Cir. 2009).

Loparex held that under *Oakwood Healthcare, Inc.*, the Board must "be careful to distinguish between corrective and disciplinary action" when determining the issue of "responsible direction" under section 2(11) of the Act. *Loparex*, 591 F.3d at 550. The *Loparex* decision thus requires examination of the Regional Director's decision in the representation proceeding. This is because *Loparex* did not exist when Rochelle originally sought review and the Regional Director did precisely what *Loparex* said he should not do - he found that "corrective action" and "disciplinary action" were synonymous for purposes of deciding whether Jarvis responsibly directed the other employees at the landfill. (Supp. Dec. at p. 15) The error prejudiced Rochelle because there was evidence in the record that Jarvis had the authority to take corrective action and that he exercised it.

Argument

I. THE BOARD SHOULD RE-EXAMINE THE REGIONAL DIRECTOR'S DECISION IN LIGHT OF *LOPAREX V. NLRB*

The Regional Director's failure to make the critical distinction that *Loparex* now requires makes a difference in this case. The Board should review and reverse the Regional Director's decision because *Loparex* did not exist when the Regional Director ruled on the representation case or when Rochelle sought review of his decision, and *Loparex* represents an intervening change in the law that directly affects the representation analysis.

The *Loparex* court gave the following example of the "separate domains" of corrective and disciplinary actions:

An employee might be said to take corrective action if she requires a coworker to stay late to complete a project that has fallen behind schedule. Placing this small burden on the employee, however, would not amount to a disciplinary action that could affect the employee's job status.

591 F.3d at 550-1. Here, the record shows that Jarvis kept employees late to finish work. (Ex. C TR 62)¹ The record also shows instances of Jarvis performing corrective counseling (Ex. C TR 24, 68, 142-43) and adjusting time cards to correct employee hours (Ex. C TR 42) – all of which can be construed as the type of corrective action that would suffice to show "responsible direction" under the Act.

¹ The transcripts of the evidentiary hearing, conducted in September and November 2006, are attached to Rochelle's original response to the General Counsel's summary judgment motion as Group Exhibit C. Citations to the transcripts are designated by "Exh. C TR.", the same citing convention used in Rochelle's original response brief.

The Board needs to review the Regional Director's decision and the record evidence in light of *Loparex's* clarification of *Oakwood Healthcare*, as Member Schaumber foresaw in his dissent from the denial of Rochelle's previous request for review. Cf. *Beverly Enterprises-Minnesota, Inc. v. NLRB*, 266 F.3d 785, 789 (8th Cir. 2001) (granting a Board-requested remand so that the Board could align its interpretation of "independent judgment" with the supreme court's intervening decision in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). See also *International Ass'n of Machinists and Aerospace Workers v. NLRB*, 595 F.2d 664, 671 n.34 (D.C. Cir. 1978).

II. THE BOARD SHOULD RE-EXAMINE ITS METHODOLOGY UNDER OAKWOOD HEALTHCARE.

Rochelle recognizes that it did not assert any defect in the *Oakwood Healthcare* methodology when it presented its arguments to the Regional Director in the representation proceeding or when it first sought review of the Regional Director's decision in the representation case. Nevertheless, Rochelle requests that the Board re-examine its methodology for determining "responsible direction" under *Oakwood Healthcare* because the question presented is a question of law, there is no prejudice to the General Counsel in doing so and the failure to do so may perpetuate an error in methodology in future cases.

In *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006), the Board concluded that emphasis on accountability as part of the definition of responsible direction will effectively serve to limit the reach of that function. Thus, the Board adopted a standard that "for direction to be 'responsible,' the person directing and performing the oversight

of the employee must be accountable for the performance of the task by the other, such that some adverse consequences may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Id.* at 691-92. The supervisor must not only possess authority to direct the work of others, but must also have authority to take corrective action if necessary and must be subject to adverse consequences should s/he fail to take those steps. *Id.*

A. Authority to Direct

The first part of *Oakwood’s* test for responsible direction – that the putative supervisor must, in fact, have the authority to direct the work of others (*Oakwood Healthcare*, 348 N.L.R.B. at 692) – is unexceptional. And indeed, the Regional Director did not hold that Rochelle failed to meet its burden of proving authority to direct. (Supp. Dec. at p. 12) The Regional Director conceded that Jarvis did, in fact, have authority to provide direction to the equipment operators – making decisions as to when work was performed and who should perform it, directing the operators on the packing, placement, and covering of the garbage, and determining where to move the tipper. (Supp. Dec. at p. 13)

B. “Corrective Action”

Oakwood’s added requirement – that the putative supervisor must also have “authority to take corrective action, if necessary” (*Id.*) – is striking in its disregard for the holding in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). Historically, the Board had required that supervisors have both authority to direct the work of others *and* authority to hire, promote, discharge, discipline, or otherwise effect

changes in the status of such employees. *Kentucky River*, 532 U.S. at 719. Authority to direct was not enough. *Id.* In 1947, however, Congress adopted a definition of “supervisor” which departed from the Board’s standard. *Id.* Under this definition, supervisory status may be based on authority to direct regardless of whether the supervisor has authority to exercise any other supervisory function -- “the Act permit[s] direction alone to suffice.” *Id.* It was this change in definition that “pushed the Board into a running struggle to limit the impact of ‘responsibly to direct’ on the number of employees qualifying for supervisory status.” *Id.* As in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), and *Kentucky River*, the Board’s efforts to accomplish that end with *Oakwood Healthcare* are contrary to the statute.

Notwithstanding the distinction *Loparex* drew between “discipline” and “corrective action,” the Board’s position that authority to direct cannot be “responsible” unless the putative supervisor also enjoys authority to take corrective action is no different than requiring authority to direct the work of others *and* authority to discipline – the Board’s historical test. Indeed, the dictionary defines “discipline” as including the ability to take “corrective” action. WEBSTER’S NEW THIRD INTERNATIONAL DICTIONARY, p. 644.

Congress eliminated the requirement that a supervisor possess authority in addition to the authority to direct and the Supreme Court has firmly held that authority to direct will alone suffice. The Board’s adoption of a standard requiring that authority to direct be supplemented by authority to take corrective action is contrary to the language of the Act and contrary to *Kentucky River*.

C. Adverse Consequences

Oakwood Healthcare sought to further constrain the scope of “responsible direction” by requiring that the putative supervisor face the “prospect of adverse consequences” if s/he fails to exercise the authority to direct and take corrective action. By requiring that a supervisor must be subject to adverse consequences for any failure to take corrective action, the Board simply perpetuates the error of requiring supervisors to possess authority to take corrective action in the first place. As explained above, requiring supervisors to possess such authority is contrary to the statute; requiring that supervisors be subject to adverse consequences related to the failure to adequately exercise such authority is likewise contrary to the statute.

In adopting its standard of accountability, the Board adopted the definition of “responsible” discussed in *Providence Hospital*, 320 N.L.R.B. 717, 728-29 (1996), a definition drawn from the ordinary, dictionary meaning of the word. *Oakwood Healthcare*, 348 N.L.R.B. at 691. “To be responsible is to be answerable for the discharge of a duty or obligation.” *Id.* Such a construction is itself perfectly reasonable, but the Board has unreasonably extended the standard to require that a supervisor must be held accountable – and subject to the prospect of adverse consequences – not merely for his or her own direction of other employees but for how that direction is carried out: the supervisor “must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing oversight if the tasks performed by the employee are not performed properly.” *Id.* at 692.

In other words, the Board's test requires that a supervisor be held responsible for employee performance; the statutory language requires only that the supervisor be responsible for his or her own direction. Logically, to be responsible for the performance of other employees, a supervisor must have some means of controlling employee performance – for example, authority to discipline those employees for failure to follow direction or for following direction poorly. Again, the statute does not require this. *Kentucky River*, 532 U.S. at 719.

Yet this is precisely the standard the Regional Director applied in finding that Rochelle failed to demonstrate that Jarvis was accountable. The Regional Director found “contradictory and inconclusive” evidence that the owner “ever disciplined [Jarvis] for the poor performance of other employees” (Supp. Dec. at p. 16). In finding accountability was not established by the IEPA regulations holding Jarvis ““responsible for directing’ the landfill operations,” the Regional Director found Rochelle “failed to present specific evidence of the circumstances under which the IEPA would hold [Jarvis] accountable for the performance of other employees” (Supp. Dec. at p. 17). But the Act does not require Jarvis to be responsible for the performance of other employees to qualify as a supervisor; he need only be responsible for his own performance in providing direction.

Even if he had properly considered the evidence that Jarvis is accountable for providing direction, the Regional Director erred in adopting a strained interpretation of the Illinois law regulating Jarvis' position. Section 1004(a) of the Solid Waste Site Operator Certification Law provides that Jarvis, as the holder of a Class A operator's

license, is “responsible for directing landfill operations.” 225 ILCS 230/1004(a). Though acknowledging this language, the Regional Director took the surprising position that “there is no evidence” that the term “directing” has the same meaning in this provision as it has under the Act.

Construction of a statute is a question of law, and must begin with the plain language of the statute. *United States v. Rosenbohm*, 564 F.3d 820, 822 (7th Cir. 2009); *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009). The Regional Director offered no explanation for speculating that the Illinois legislature might somehow have intended something different in using this word than the United States Congress intended in using the same word in the Act.

Though the Regional Director did not suggest that the term “responsible” might be construed differently under the Solid Waste Site Operator Certification Law, he concluded that Jarvis’ responsibility under this law is mere “‘paper’ accountability” insufficient to establish responsibility under the Act, citing *Golden Crest Healthcare*, 348 N.L.R.B. 727 (2006). (A50) Under *Golden Crest Healthcare*, as applied here, the Board appears to have adopted a standard in which accountability cannot be proven unless the employer has actually imposed consequences for a supervisor’s direction of other employees. *Golden Crest Healthcare*, 348 N.L.R.B. at 731, (A50).

Certainly, the Regional Director as fact-finder may in an appropriate case find that a supervisor is not truly accountable for the exercise of authority notwithstanding a “paper” delegation of authority. Evidence may be presented demonstrating that a supervisor is not actually held responsible for the exercise of authority despite

contractual, statutory, or other formal terms purportedly creating accountability. But this is not a case in which the Regional Director found sufficient evidence to contradict the “paper” accountability established by the Solid Waste Site Operator Certification Law. Rather, the Regional Director applied a standard in which evidence of written standards will never suffice to establish a supervisor’s accountability unless the supervisor has actually been subjected to adverse consequences.

Such a standard sets an unreasonable bar for establishing responsibility within the meaning of the Act. A supervisor who exercises his authority to responsibly direct others will naturally not be subjected to adverse consequences for his acceptable performance. But, despite superficially recognizing that a “prospect” of adverse consequences will suffice to show accountability, the Board has adopted a standard in which any such prospect will be deemed mere “paper accountability” until the supervisor had in fact been disciplined for poor performance of his authority to direct.

That, in fact, is the case here. Rochelle presented evidence that Jarvis was hired because he was certified under the Solid Waste Site Operator Certification Law (Ex. C TR 22, 68), is identified as the Landfill Supervisor on the site’s IEPA permit (Ex. C TR 122-23), and was reimbursed for the costs of his landfill operator’s tests (Ex. C TR 60, 206). Nevertheless, the Regional Director disregarded as “conclusory” the owner’s testimony that Jarvis would be terminated were he to lose his Class A license for failing to responsibly direct in compliance with the Solid Waste Site Operator Certification Law, because the owner never specifically discussed with Jarvis the consequences of

losing the license and had not – to that point – actually disciplined Jarvis for any poor performance of his responsibilities.

The standard of “accountability” as adopted by the Board in *Oakwood Healthcare* and applied in this case has the same object of the statutory interpretations rejected in *Health Care* and again in *Kentucky River*: to read the responsible direction portion of § 2(11) out of the statute. Because this interpretation of responsible direction is no less strained than the interpretations of “independent judgment” and “in the interest of the employer” that it has succeeded, it, too, is inconsistent with the text and structure of the Act.

Finally, the Regional Director found that Jarvis did not exercise independent judgment in directing the other employees. (Supp. Dec. at p. 20) “Independent judgment” turns on the degree of discretion exercised and the extent to which such discretion is circumscribed by “detailed orders and regulations.” *Kentucky River*, 532 U.S. at 713-14. The Regional Director found no independent judgment because directions as to placement of the wind fences or the direction garbage is pushed are “subject to review and change by the owner.” (Supp. Dec. at p. 20)

The Regional Director’s analysis does not look to constraints limiting Jarvis’ choices at the time he exercised his authority to direct landfill operations but rather to evidence that Jarvis’ exercise of directorial discretion was subject to after-the-fact evaluation by his employer. “Independent judgment,” however, “does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review.” *Haywood v. North American Van*

Lines, Inc., 121 F.3d 1066, 1073 (7th Cir. 1997), quoting 29 C.F.R. 541.207(e)(1); accord *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 375 (7th Cir 2005) (“The fact that a chosen action might be overruled by a supervisor says nothing about the discretion and judgment that went into its selection in the first place.”) Following the Regional Director’s standard would limit supervisory status to only the highest level supervisors who are subject to no oversight by any superior authority.

Alternatively, the Regional Director found that Jarvis did not exercise independent judgment because the equipment operators “are experienced, trained employees who know what tasks need to be performed and require little, if any, direction” and landfill operations are also “highly regulated by the EPA regulations.” (Supp. Dec. at p. 20) While there is no dispute that the landfill employees are good workers and that the landfill must comply with EPA standards, there is also no dispute that Jarvis “does provide direction to the equipment operators” as to “packing, placement, and coverage of the garbage” and other tasks (Supp. Dec. at p. 13).

There is no suggestion that the IEPA regulations for landfill operations specify how such decisions are to be made and no evidence that the operators – however skilled – have either the authority or knowledge to make these decisions. The Certification Law made Jarvis responsible for directing those employees to ensure regulatory compliance. 225 ILCS 230/1004(a). Treating Jarvis’ authority to direct under that statute as “merely routine” renders the Certification Law absurd. Were the tasks necessary to ensuring IEPA compliance “merely routine or clerical,” there would be little sense in requiring a landfill to employ a certified operator. The Regional Director

improperly discounted the Illinois legislature's conclusion that Jarvis' responsibilities were sufficiently non-routine to require certification.

III. CONCLUSION

The Regional Director's decision misinterpreted the Act. Rochelle's refusal to bargain with the Union was justified on the basis that the unit represented by the Union was not properly certified. The General Counsel's motion for summary judgment on the unfair labor practice charge should be denied and judgment should be entered in favor of Rochelle on the basis that the Union was improperly certified in the representation proceeding.

Respectfully submitted,

/s/ Joshua G. Vincent
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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions under the laws of the United States of America, certifies that on October 7, 2010, a copy of the foregoing **Rochelle Waste Disposal's Statement of Reasons Why the Board Should Not Grant the General Counsel's Motion for Summary Judgment** was served upon the following parties as specified below:

VIA ELECTRONIC FILING

I hereby certify that on October 7, 2010, I electronically filed the foregoing document with the National Labor Relations Board.

VIA CERTIFIED MAIL

I also hereby certify that I served a copy of the foregoing document **via U.S. certified mail** and depositing the same in the U.S. Mail at 222 N. LaSalle, by 5:00 p.m. on October 7, 2010 with proper postage prepaid to:

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