

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 94-102

November 30, 1994

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: William G. Stack, Associate General Counsel

SUBJECT: Investigation of Supervisory Status of Nurses

As you know, pursuant to Memorandum GC 94-7, the Regions are required to submit to Advice all unfair labor practice cases where the question as to whether a nurse is a Section 2(11) supervisor turns on an analysis of the nurse's authority to assign or responsibly direct less skilled employees or on whether the nurse's exercise of authority requires the use of independent judgment.

As these cases can present complex and close issues, it is very important in investigating these cases to obtain and submit to Advice a full description of all relevant evidence pertaining to the supervisory question. For example, affidavits relating to a nurse's authority to assign and/or responsibly direct or exercise independent judgment, should include specific instances of the use of such authority rather than only broad conclusions that the nurse possesses this type of authority.

In addition, where there is a substantial conflict between the testimony of the nurse in question and other nurses and/or managers, it is critical that the Region make all reasonable efforts to obtain affidavits from the managers and other nurses and from some of the employees that the nurse allegedly supervised.

Supervisory status of nurses can be found based on the preparation of evaluations only if the evaluations lead directly, by automatic wage linkage or by recommendations that are not changed by reviewing managers, to personnel actions affecting the evaluated employees. Thus, in order to determine whether the employer routinely relied on the nurse's

evaluations of others, it is important to attempt to obtain affidavits from the reviewing managers as well as documentary evidence related to the positions of the parties. In this regard, the evidence sought could include payroll and personnel records, and copies of the evaluations and job descriptions of both the nurse in question as well as the evaluated employees.

In addition to the foregoing, please see the attached Brief of the General Counsel which was submitted to the Board as part of the recent oral argument in Providence Hospital, Case 19-RC-12866 and Ten Broeck Commons Nursing Home, Case 3-RC-10166, which will provide you with further guidance in this area:

If you have any questions concerning this memorandum, please contact Advice or Operations, as appropriate.


W.G.S.

Attachment

MEMORANDUM OM 94- 102

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROVIDENCE HOSPITAL
Employer

and

Case 19-RC-12866

ALASKA NURSES' ASSOCIATION
Petitioner

TEN BROECK COMMONS NURSING HOME
Employer

and

Case 3-RC-10166

UNITED INDUSTRY WORKERS LOCAL 424,
A DIVISION OF UNITED INDUSTRY
WORKERS, DISTRICT COUNCIL 424

Petitioner

BRIEF OF THE GENERAL COUNSEL

On September 20, 1994, the National Labor Relations Board issued a notice of oral argument in the two above-captioned cases, directing that certain issues regarding the supervisory status of charge nurses be addressed in light of the Supreme Court's decision in NLRB v. Health Care & Retirement Corp., ___ U.S. ___, 114 S.Ct. 1778 (1994). On October 18, the Board granted the General Counsel's motion to file a brief as amicus curiae.

Interest of the General Counsel

The General Counsel, while not formally a party to representation proceedings, shares with the Board the concern that "questions preliminary to the establishment of

Directors and their staffs. See also Board's Rules and Regulations, Secs. 102.60-102.72; Statements of Procedure, Secs. 101.17-101.21.

The General Counsel also maintains a substantial interest in representation proceedings because of his authority, pursuant to Section 102.72 of the Board's Rules and Regulations, to permit a representation petition to be filed directly with the General Counsel and then to continue such petition before him for purposes of investigation or transfer and consolidation with other cases.

Finally, the General Counsel maintains an interest in these proceedings because he is responsible for prosecuting unfair labor practice charges which allege interference with, or restraint or coercion of, the exercise of Section 7 rights of non-supervisory employees, as well as those which allege a so-called "technical" refusal to bargain as a collateral attack on the actions of the Board in underlying representation case proceedings. Since the allegations in such cases potentially implicate the issues to be addressed in oral argument, the General Counsel is vitally concerned that his views upon such issues be considered.

Representation proceedings are non-adversarial in nature, and the General Counsel does not take a position on the merits in representation cases. Therefore, he expresses

no view on what decision should be reached in these cases. The General Counsel believes, however, that his recommendation, as set forth below, of the appropriate test to be used in determining whether individuals are statutory employees under Section 2(3) or supervisors under Section 2(11) of the Act can be of assistance to the Board in resolving the issues raised by these cases.

I. SUMMARY OF ARGUMENT

Prior to Health Care, the Board viewed professionals who "assigned" or "responsibly directed" employees in furtherance of their professional duties as not acting "in the interest of employer" as that phrase is used in Section 2(11). The Supreme Court in Health Care, however, held that Section 2(11) requires the Board to address three questions in determining supervisory status. "First, does the employee have authority to engage in one of the 12 listed activities? Second, does the exercise of that authority require 'the use of independent judgment'? Third, does the employee hold the authority 'in the interest of the employer'?" Health Care, supra, 114 S.Ct. at 1780. In Health Care, the Court rejected the Board's test for determining when health care workers were exercising authority "in the interest of the employer." However, the Court did not rule on the Board's determination of the first two questions. Indeed, the Court acknowledged that the

Board is owed deference in defining such phrases as "assign", "responsibly to direct", and "independent judgment."

The General Counsel submits that the authority of skilled health care workers to direct other less-skilled employees how to perform specific tasks, or to assign them to those tasks, is not responsible direction or assignment as contemplated by the statute even if "independent judgment" is used. Something more managerial in nature is needed. Further, even if health care workers assign or responsibly direct others within the meaning of Section 2(11), they are not statutory supervisors where the exercise of that authority is "routine," i.e. does not require the use of "independent judgment." These views are based on the language of Section 2(11), the legislative history underlying the Congressional enactment of Section 2(11) and the Board cases outside the health care industry which have construed the terms "assign," "responsibly to direct," and "independent judgment."

II. PRE-HEALTH CARE APPLICATION OF SECTION 2(11)

Section 2(11), included by Congress as part of the 1947 Labor Management Relations Act, defines a statutory supervisor as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In the same bill, Congress provided that the protection of the Act would extend to "professional" employees, whom it defined in Section 2(12)(a) as those

engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes. . . .

Moreover, Congress provided in Section 9(b)(1) that professional employees would only be represented in the same bargaining unit as non-professional employees if the professionals "vote to be included in such unit;" the Senate report accompanying this amendment stressed that "the committee was careful in framing a definition to cover only strictly professional groups such as engineers, chemists, scientists, architects, and nurses." S.Rep. No. 105, 80th

Cong., 1st Sess. 19 (1947), reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947 ("Leg. Hist."), at 425 (1985).

The Board has often stated that although it should refrain from construing supervisory status too broadly because such a construction would necessarily remove affected individuals, including such professionals and technical employees as registered nurses (RNs) and licensed practical nurses (LPNs), respectively, from the protections of the Act, the supervisory definition is nonetheless phrased in the disjunctive; thus, using independent judgment in exercising any one of the indicia listed in Section 2(11) may warrant a finding of supervisory status. See Northcrest Nursing Home, 313 NLRB 491 (1993) (citations omitted).¹ Between 1967 and 1974, the Board began its determination of health care professional supervisory issues from the premise that health care professionals, such as RNs, are "a highly trained group of professionals who normally inform other, lesser skilled, employees as to the work to be performed for patients and insure that such work is done." See Doctors' Hospital of Modesto, 183 NLRB 950, 951 (1970), enfd. 489 F.2d 772 (9th Cir. 1973). The Board then consistently found

¹ In Northcrest, 313 NLRB at 491-97, the Board summarized the history of its application of Section 2(11) to charge nurses since 1967, when jurisdiction was extended to proprietary hospitals and nursing homes. The discussion of that history herein paraphrases and supplements the Northcrest summary.

that nurses who performed such professional duties, without more, did not exercise supervisory authority in the interest of their employer, but that nurses were supervisors if they "also possessed the authority to make effective recommendations which affected the job status and pay of the employees working on their wings." Id. at 951-52. See Northcrest, supra, at 492, n.7, citing cases.

When the 1974 Health Care Amendments² were submitted to Congress, the accompanying Committee Reports contained the conclusion that no amendment to Section 2(11) excluding health care professionals from the supervisory definition was necessary based on existing Board decisions:

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

The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations.³

² National Labor Relations Act Amendments of 1974, Pub. L. 93-360, 88 Stat. 395.

³ S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974), reprinted in NLRB, Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974, at 8, 13, and 269, 275 (1974), respectively.

For the next 20 years, the Board, with the approval of most courts of appeals,⁴ explicitly used a "patient care" analysis in determining supervisory status in the health care field, i.e., "in terms of a dichotomy between the interest of the employer and the interest of the patient." Northcrest, supra, at 493. See, e.g., Wing Memorial Hospital Association, 217 NLRB 1015, 1016 (1975), where the Board held that although head nurses assigned employees to particular patients and directed their work, this was principally the product of highly professional skills and did not, without more, constitute the exercise of supervisory authority in the interest of their employers. On the other hand, "shift supervisors," who also responsibly directed RNs and other nursing personnel, were found to be supervisors because they had the authority to effectively recommend hiring, responsibly directed and/or authorized overtime, called in off-duty employees, revised schedules, made assignments, and transferred and evaluated employees.⁵

⁴ See Northcrest, supra, at 495, citing cases. However, the Sixth Circuit has consistently disagreed with the Board's application of its patient care analysis. See NLRB v. Beacon Light Christian Nursing Home, 825 F.2d 1076 (6th Circuit 1987); Beverly California Corp. v. NLRB, 970 F.2d 1548 (1992); Health Care & Retirement Corp. v. NLRB, 987 F.2d 1256 (1993).

⁵ Similarly, an "operating room supervisor" was a statutory supervisor where she provided personnel to help in other areas of the hospital, could reprimand employees and excuse their tardiness, and "most significantly, because she interviews applicants for employment as to whom she makes effective recommendations." 217 NLRB at 1017.

In Sutter Community Hospitals of Sacramento, 227 NLRB 181, 192 (1976), the Board stated that in determining whether "health care professionals, including registered nurses, are supervisors within the meaning of the Act, we are bound to adhere to the traditional standards for determining supervisory status... [and] we are not unmindful of the [Senate] report" regarding the 1974 Health Care amendments. Based on the standards set forth in that report, the Board found that head nurses, assistant head nurses and charge nurses performed duties predominantly in "the exercise of professional judgment" incidental to patient treatment, and that their "24-hours-a-day responsibility" was "addressed to the delivery of continuous nursing care of high quality and not the general supervision of other employees in subordinate positions who share in [that] responsibility, as they possess none of the traditional indicia of supervisory authority...." In Northcrest Nursing Home, 313 NLRB at 502, 504-505, the Board found that while calling in aides as replacement employees pursuant to an established procedure was only a routine task to keep the facility fully staffed, charge nurses used independent judgment when they assigned aides to specific tasks or temporarily reassigned aides, including changing wing assignments, to meet staff shortages or emergency situations. However, the Board immediately moved "to the next part of the analysis: is the independent judgment exercised incidental to professional or technical judgment

or is [it] exercised . . ." in addition to patient care; the Board found that the charge nurses were not supervisors. Id. at 505.

Thus, although charge nurses use independent judgment to assign work and direct employees in order to provide sound patient care, the Board has determined that such responsibilities flow from their professional or technical status and "there will seldom exist the risk of a conflict of interest between the employer and employees such that the employer must be able to demand the nurses' loyalty in exercising those responsibilities." Ibid. See also NLRB v. Res-Care, 705 F.2d 1461, 1466 (7th Cir. 1983) (citing Packard Motor Car Co. v. NLRB, 330 U.S. 485, 494-95 (1947) (dissenting opinion)). The Board has also justified its use of the patient care analysis based on "the necessity of accommodating the legislative intent of allowing professional health care employees to be covered by the Act," much as it reaches the same accommodation in its "leadman" analysis in other industries. Northcrest, supra, at 494 and n.13, citing cases.

As recently as November 1993, the Board reiterated that it did not agree with the Sixth Circuit's conclusion "that simply because health care is the business of the employer all independent professional judgments of nurses in directing and assigning aides to patient care duties is

automatically in the interest of the employer as contemplated by the statute." Northcrest, supra, 313 NLRB at 496. This disagreement was resolved by the Supreme Court in Health Care.

III. THE TEACHING OF THE SUPREME COURT DECISION IN HEALTH CARE

In NLRB v. Health Care & Retirement Corp., 114 S.Ct. at 1780, the Court noted that it was deciding "the narrow question" of whether the Board's test for determining if a nurse is a supervisor is consistent with the definition set forth in Section 2(11), specifically, the phrase "in the interest of the employer." The Court first held that the Board's interpretation that a nurse's supervisory duties are not exercised in the interest of the employer if incidental to the treatment of patients is similar to the approach which the Court had already rejected in NLRB v. Yeshiva University, 444 U.S. 672 (1980). Thus, the Court noted that the Board again created "a false dichotomy - in this case, the dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer." 114 S.Ct. at 1782. The Court found the Board's patient care analysis test inconsistent with Yeshiva, as well as the Court's earlier decision in Packard Motor Car Co., and therefore agreed with the Sixth Circuit that there is no basis for a blanket assertion that "supervisory authority

exercised in connection with patient care is somehow not in the interest of the employer." Id. at 1782.

The Court also rejected the Board's argument that the statutory phrase "in the interest of the employer" cannot be read so broadly as to override the Congressional intent to provide professional employees with the protection of the Act. Thus, the Court stated quite clearly that

the Act does not distinguish professional employees from other employees for purposes of the definition of supervisor in Section 2(11). The supervisor exclusion applies to "any individual" meeting the statutory requirements, not to "any non-professional employee."

Id. at 1784. The Court further rejected the Board's reliance on the Committee Report to the 1974 Health Care Amendments and stated that the report "does not represent an authoritative interpretation of the phrase 'in the interest of the employer,' which was enacted by Congress in 1947." Id. at 1784.

Although the Court's holding was limited to a rejection of the Board's dichotomy between "interest of the employer" and "interest of the patient," the Court's decision also makes three general criticisms of the Board's approach to supervisory determinations in the health care field that should inform the Board's reconsideration of this issue. First, the Court admonished that "the statute must control

the Board's decision, not the other way around." Id. at 1784. That is, the Board must focus on the language of Section 2(11), not just on policy considerations. Second, the Court rejected an interpretation of statutory language that was industry-specific. Thus, it was impermissible to define the phrase "in the interest of the employer" differently in the health care industry than in other industries. Id. at 1784-85. Accordingly, the Board should not give such statutory terms as "assign," "responsibly to direct" and "independent judgment" a different meaning in the health care industry than it does in other industries. Finally, the Court criticized the Board for "distorting" the terms of Section 2(11) in order to accommodate the tension between the Act's exclusion of supervisors and inclusion of professionals. Id. at 1784. Accordingly, the Board, in its effort to cover professional employees (such as nurses), should not in effect read such terms as "responsibly to direct" and "assign" out of the statute in determining the supervisory status of a professional employee.

However, the Court also made clear that an examination of the duties of professionals to determine whether one or more of the Section 2(11) supervisory indicia is performed in such a way that the employees become statutory supervisors "is, of course, part of the Board's routine and proper adjudicative function. In cases involving nurses, that inquiry no doubt could lead the Board in some cases to

conclude that supervisory status has not been demonstrated." Id. at 1785. In response to the argument that such phrases in Section 2(11) as "independent judgment" and "responsibly to direct" are ambiguous, and that the Board needs ample room to apply them to different categories of employees, the Court stated: "[t]hat is no doubt true, but it is irrelevant in this particular case, because the interpretation of those phrases is not the underpinning of the Board's test. The Board instead has placed exclusive reliance on the 'in the interest of the employer' language in Section 2(11)." Id. at 1782. The Court specifically noted that in applying Section 2(11) in other industries, without implicating the statutory phrase "in the interest of the employer," the Board occasionally has reached results "reflecting a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives." Id. at 1785.

As set forth below, the General Counsel submits that the legislative history underlying the Congressional enactment of Section 2(11), and how the Board has previously applied the terms "assign" and "responsibly direct" outside the health care industry, permit the Board to find that the mere giving and direction of patient care tasks using independent judgment does not make a nurse a 2(11) supervisor; rather something more managerial in nature is needed.

IV. SUPERVISORY DETERMINATIONS OUTSIDE THE HEALTH CARE INDUSTRY

A. Findings of Supervisory Status prior to 1947

To understand what Congress intended when it enacted the "supervisor" definition in Section 2(11), we begin with the legal background against which Congress legislated. After passage of the Wagner Act, the Board was confronted with questions as to the applicability of the Act to supervisory employees. In Maryland Drydock Co., 49 NLRB 733 (1943), the Board held that it would refuse to certify bargaining units composed of supervisors. Shortly thereafter, the Board set out its general test for determining supervisory status:

As a general rule, it is our policy to exclude from the appropriate unit employees who supervise or direct the employees therein, and who have authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees, or whose official recommendations concerning such action are accorded effective weight.

Douglas Aircraft Co., 50 NLRB 784, 787 (1943). See Eighth Annual Report of the National Labor Relations Board ("Eighth Annual Report") 57 (1943). The "Douglas Aircraft" test was followed in numerous cases.⁶ In applying this test, the

⁶ See, e.g., Electric Auto-Lite Co., 50 NLRB 1006, 1008 (1943); Heckman Furniture Co., 50 NLRB 834, 837-38 (1943); E.I. du Pont de Nemours & Co., 53 NLRB 473, 476 (1943).

Board consistently distinguished between employees who were "true" supervisors⁷ and those who merely performed minor supervisory duties.⁸

⁷ See, e.g., Murray Corp. of America, 47 NLRB 1003, 1006 (1943) (various classifications of "supervisors" who do no production work and engage in supervisory duties exclusively, including authority to recommend transfer, dismissal, or promotion of other supervisors and employees); Chesapeake Corp. of Virginia, 51 NLRB 32, 33 (1943) ("boss machine tenders," who can lay off employees and recommend new hires and who are, in the absence of the plant superintendent, the highest supervisory officials in the plant, found to be supervisors); General Motors Corp., 51 NLRB 457, 458 (1943) (foremen were supervisors where they were "responsible in the first instance for production and maintenance of production schedules," "correlate the work of the employees under their supervision," take steps necessary to remedy break-downs and similar difficulties, and represent employer in grievance processing); Lincoln Casting Co., 65 NLRB 182, 185 (1945) (foremen who performed greater amounts of production work than normally due to manpower shortage were supervisors where they reprimanded careless work, settled grievances, and effectively recommended the hire, discharge, promotion, and lay-off of employees in their departments); Underwood Corp., 67 NLRB 1017, 1019 (1946) (set-up men responsible for keeping informed as to what jobs are to be set up, getting proper tools, setting up machines, and instructing machine operators, were supervisors since they also assigned operators, substituted for foremen and effectively recommended pay rates or discipline).

⁸ See, e.g., Lockheed Aircraft Corp., 50 NLRB 958, 960-61 (1943) (although firemen organized, trained, directed and "supervised auxiliary firemen," and could exercise disciplinary power to remove them only from the volunteer fire brigade, the firemen had no power to "affect the employee status of the auxiliary firemen," and were therefore not true supervisors); Colonial Press, Inc., 50 NLRB 823, 826 (1943) ("working foreman" in charge of employer's paper room did not possess "sufficient supervisory authority" to warrant excluding him from bargaining unit where, unlike the foreman, he had no authority to hire, discharge, or effectively recommend such action); The Arundel Corp., 53 NLRB 466, 470-71 (1943) (a "journeyman machinist, who at times directs and is assisted by [5 to 6] helpers" on repair jobs "according to a custom long prevailing in the machinists' craft," was not a true supervisor where he had no authority to recommend or make

In Packard Motor Car Co., 61 NLRB 4 (1945), affirmed 330 U.S. 485 (1947), the Board, reversing its position in Maryland Drydock, again held that supervisors had organizational rights under the Act. Nevertheless, "[t]he Packard decision did not affect the Board's long-established rule that supervisory employees who are vested with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, are not properly included in bargaining units comprising their subordinates." Tenth Annual Report 34 (1945). Thus, the Board still had the same need to distinguish supervisors from other employees, and adhered to its established test for determining supervisory status. See Eleventh Annual Report 31 (1946); Twelfth Annual Report 21-22 (1947).

During this period, the Board continued to distinguish employees who possessed true supervisory authority from leadmen, "straw bosses," craftpersons with assistants, and others whose work only involved minor supervisory functions, changes in employee status); Douglas Aircraft Co., 53 NLRB 486, 491-492 (1943) (certain "leadmen" described as "working employees who are in charge of from 4 to 12 men" were not supervisory employees); Byron Jackson Co., 53 NLRB 528, 532 (1943) ("leadmen" in production and maintenance unit, each of whom had "from 3 to 25 employees under him" and received an additional 5 to 10 cents an hour, were not supervisory employees since, unlike the blacksmith and heat treaters foremen, they did not possess authority to hire, fire, discipline, or transfer employees or recommend such action).

and continued to rule that the latter were not supervisors for NLRA purposes. For example, in cases that would subsequently be cited with approval in the legislative history of the LMRA, the Board held that the following employees were not supervisors: "Timekeeper Leaders A" who each "direct[ed] the work of from 6 to 20 timekeepers and timekeeper leaders B," Bethlehem-Sparrows Point Shipyard, Inc., 65 NLRB 284, 286-7 (1946); "group leaders" who "instruct and assign material to men who work under them in groups from 1 to 40," Pittsburgh Equitable Meter Co., 61 NLRB 880-882 (1945); "so-called foremen and assistant foremen" who "spend part of their time supervising and the balance in assisting in getting out the work," The Richards Chemical Works, 65 NLRB 14, 16 (1945); and "[s]o-called 'supervisory employees'" who "direct from one to six employees" and whose "duties are to keep production moving on schedule and to inspect and control the quality of work," Endicott Johnson Corp., 67 NLRB 1342, 1347 (1946).

B. Legislative History of Section 2(11)

The legislative history of the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley Act") with regard to the exclusion of "supervisors" is of substantial aid in clearing up the apparent ambiguities in the Act with regard to the reach of the "supervisor" definition. That history confirms that Congress did not intend to exclude as

"supervisors" employees who have some role in giving direction to other employees but are not "aligned with management" (Yeshiva, supra, 444 U.S. at 690) to the same degree as traditional industrial foremen.

Section 2(11) of the Act is essentially the bill drafted in 1947 by the Senate Committee on Labor and Public Welfare, which sought to overturn Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), by treating supervisors as "management" and thus removing them from the protection of the NLRA.⁹ The Senate Committee Report accompanying the bill explained that:

In framing this definition, the committee exercised great care, desiring that the employees herein excluded from coverage of the act be truly supervisory.

* * * *

In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. *It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. In other words the committee adopted the test which the Board itself has made in numerous cases when it has permitted certain categories of supervisory*

⁹ The Senate bill contained all of the supervisory functions contained in the provision as enacted except the function "responsibly to direct." S. 1126, 80th Cong., 1st Sess. §2(11) (1947), quoted in NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170, 182 n.14 (1981).

employees to be included in the same bargaining unit with the rank and file. (Bethlehem Steel Company, Sparrows Point Division, '65 N.L.R.B. 284 ... Pittsburgh Equitable Meter Company, 61 N.L.R.B. 880... Richards Chemical Works, 65 N.L.R.B. 14... Endicott Johnson, 67 N.L.R.B. 1342, 1347...) 1 Leg. Hist. at 410, 425 [emphasis supplied].¹⁰

In introducing the Committee bill, Senator Taft emphasized that the purpose of the provision regarding supervisors was to reverse the Board's decisions regarding foremen, and that the Committee's "definition of foremen is applied to persons who are strictly foremen.... [not] any of the others about whom controversy has arisen." 2 Leg. Hist. at 1009.

The Committee's version of §2(11) was altered prior to passage by an amendment offered by Senator Flanders to add the words "or responsibly to direct them" after the phrase "discipline other employees." 2 Leg. Hist. at 1303. Senator Flanders explained the purpose of the added language:

As an employer for many years past, and until I resigned to enter this body, I can say that the definition of "supervisor" in this act seems to me to cover adequately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer a worker to another department on other work instead of discharging,

¹⁰ The cases cited in the Senate Report are discussed, supra, at p. 19.

disciplining or otherwise following the recommended action.

In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.

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

The proposed amendment was immediately accepted by Senator Taft, who stated that it "merely adds to the definition of the word 'supervisor.' The definition in the bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years; but I have no objection certainly to including the words 'or responsibility [sic] to direct them.'" 2 Leg. Hist. at 1304. The amendment passed by voice vote without further debate.¹¹

¹¹ The Conference Committee accepted the Senate version of the supervisor exception. NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. at 182-183. Senator Taft, in reporting that action to the Senate, stated that the "Senate Amendment, which the conference ultimately adopted, is limited to bona fide supervisors * * * to individuals generally regarded as foremen and employees of like or higher rank." 2 Leg. Hist. at 1537.

Thus, the phrase "responsibly to direct" was added to the statute to indicate that a supervisor need not have hiring, firing, or disciplinary authority. Congress, however, did not intend that phrase to encompass all acts of direction, but distinguished between minor supervisory direction, such as that exercised by skilled craftsmen, and direction that entails more significant managerial responsibility. The supervisor exception covers responsible direction that reflects managerial authority, not minor supervision that flows, for example, from an employee's greater skill or experience than that of other employees.

C. Findings of Supervisory Status after 1947

Since 1947, the Board's application of Section 2(11) outside the health care industry did not reflect any change in approach from its previous determinations of supervisory status. In a variety of industrial settings, the Board and the courts have construed the phrase "responsibly to direct" to reflect the distinction between true foremen and straw bosses or leadmen. See Southern Bleachery & Print Works, Inc., 115 NLRB 787, 791 (1956) (machine printers "exercised an authority which the average rank-and-file employee does not possess," but were not supervisors, because it "is not the authority responsibly to direct other employees which flows from management and tends to identify or associate a

worker with management" but rather "derives from their working skill and from their responsibility for the operation of a complex machine which requires a 7-year apprenticeship to achieve") (emphasis added), enforced, 257 F.2d 235, 239 (4th Cir. 1958) (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"), cert. denied, 359 U.S. 911 (1959); Ross Porta-Plant, Inc. v. NLRB, 404 F.2d 1180, 1182 (5th Cir. 1968) (requiring "the type of authority which flows from management and tends to associate an individual with management"); NLRB v. Security Guard Service, 384 F.2d 143, 149 (5th Cir. 1967) (requiring "[s]ome kinship to management, some empathic relationship between employer and employee * * * before the latter becomes a supervisor for the former").¹²

¹² Moreover, sporadic exercise of Section 2(11) authority, including responsible direction, or assignment of work made in conjunction with unit employees, is insufficient to make these straw bosses or leadmen 2(11) supervisors. See U.S. Gypsum Co., 79 NLRB 48, 49 (1948) (working foreman who has authority to discharge, hire, or promote only when the shift foreman is on vacation or ill, is not a supervisor since "the occasional and sporadic exercise of supervisory powers is not sufficient basis on which to exclude an employee from a unit"); The Austin Co., 77 NLRB 938, 942-43 (1948) (Mechanical Assistant, Electrical Assistant, and two Assistant District Estimators who directed approximately 3 to 4 employees each, found to be "no more than group leaders," not supervisors, although they had authority to "assign and guide work of their professional colleagues" and "make recommendations concerning [subordinates'] employment status," where recommendations as to dismissal and discipline "may come from anyone familiar with the facts

The Board has also applied the foregoing principles to professional employees. Thus, in Golden West Broadcasters-KTLA, 215 NLRB 760, 761-62 (1974), television directors who gave instructions that were artistic in nature, or were necessary for the proper performance of work for which they were professionally responsible, did not responsibly direct other crew members, and were not supervisors where they could only hire in emergency situations. In Marymount College, 280 NLRB 486, 489 (1986), librarians who were generally responsible for the flow of work were not supervisors of technicians, who generally worked independently, although librarians exercised such arguably supervisory duties as assigning non-routine tasks. Additionally, in Neighborhood Legal Services, 236 NLRB 1269, 1271 (1978), the employer established units which handled cases in specific legal specialties, and the "unit head" concept evolved from weekly unit meetings "at which problems encountered by individuals within a unit in handling particular cases were discussed, feedback or support from other unit members was obtained, and a consensus on how to best handle problems was arrived at." Attorney "unit heads" were not supervisors because training, assignment and direction of legal assistants and paralegals were merely incidental to their responsibilities as attorneys, unit

. . . whether or not [they] happened to be the head of a department").

heads were just conduits of information, and were responsible for the paralegals and legal assistants' work since these employees were non-attorneys. Id. at 1272-73. In National Broadcasting Co., 160 NLRB 1440, 1441-2 (1966), deskmen were not supervisors even though they had final responsibility for programming and could reassign and call-in off-duty newsmen, since those tasks "fall within the scope of the newswriting craft or profession," and reassigning employees to other stories is "part of the group or team effort" required for professionally prepared news program under employer standards.¹³

V. THE SUPERVISORY STATUS OF HEALTH CARE WORKERS WHO ASSIGN AND DIRECT PATIENT CARE TASKS IS ONLY ESTABLISHED WHEN SOME "MANAGERIAL" FUNCTION IS INVOLVED

As the principles established in the foregoing cases indicate, health care workers should only be considered supervisors to the extent that they perform assignment or direction functions in excess of those performed by leadmen; straw bosses, and other minor supervisory officials. This interpretation of "responsibly direct" and "assign" is supported by the wording of the statute and by the legislative history of the 1947 amendments. Thus, the

¹³ See also Wurster, Bernardi & Emmons, 192 NLRB 1049, 1051 (1971) (where work on projects is organized on a team basis, several employees may work under direction of "project architect," and 75 percent of the architects have performed these duties on different projects, architects not supervisors even though they directed others because roles are not constant, changed depending on project, and architects direct "in a professional sense and related only to a particular project").

phrase "responsibly to direct" must mean something more than simply "direct" the work of others, even where that direction entails the exercise of independent judgment; otherwise, the word "responsibly" would have no meaning, and the phrase "independent judgment" in Section 2(11) would be redundant. Indeed, the legislative history buttresses this proposition. Thus, the legislative history makes clear that in using the phrase "responsibly to direct," Congress in 1947 intended to maintain the distinction previously drawn by the Board between such "minor supervisors" as "leadmen" and such supervisors vested with real managerial authority as foremen.

Accordingly, given its acknowledged ambiguity, the Board's interpretation of the phrase "responsibly to direct" properly may distinguish between the authority to direct another to perform specific tasks - such as that possessed by an employee with specialized expertise to direct other employees on discrete tasks related to that expertise - and the authority to define the overall job of another. Thus, in the health care context, while the LPN or RN may tell the aide when or how to perform specific tasks such as changing beds, turning patients and tending to the needs of particular patients, such authority is not "responsible direction" without the additional managerial authority, for example, to require the aide to work overtime or to report

to work in the event of staff shortages.¹⁴ This interpretation of "responsibly direct" enables it to serve the purpose which its proponent, Senator Flanders, envisioned - that is, of treating as supervisors individuals who, although they lacked the power to hire, fire, or discipline, nonetheless possessed significant managerial authority.

As with the definition of "responsibly to direct," the term "assign" must be defined in a manner that gives it independent meaning. Thus, "assign" must mean something more than directing others to do specific tasks; otherwise it would have been unnecessary for Congress to add the term "direct" to Section 2(11). Rather, the term "assign" should encompass more significant matters, like the initial determination as to where, and on what shift, an employee is to work, or subsequent changes in the employee's shift or work station.

Finally, only if it is found that an individual exercises one or more of the twelve indicia of supervisory status is it necessary to determine whether the exercise was accompanied by independent judgment. In this regard, it is important to distinguish the use of the term "judgment" in

¹⁴ Though the exercise of such additional authority may amount to "responsible direction," it may or may not involve "independent judgment," depending on how much discretion is left to the LPN or RN.

the definition of a professional in Section 2(12)(a) from the use of the term "independent judgment" in Section 2(11). That is, the fact that a professional employee, by definition, exercises "discretion and judgment" does not mean that he or she necessarily exercises independent judgment in the 2(11) sense. A professional may be capable of exercising judgment, but nevertheless, by virtue of operating under instructions or routines, may not, in fact, exercise independent judgment in assigning or directing work.¹⁵

Thus, in Sav-On Drugs, 243 NLRB 859, 861-62 (1979), enfd. 709 F.2d 536 (9th Cir. 1983), pharmacy managers who had responsibility for inventory control functions, including ordering drugs and merchandise to maintain inventory levels established pursuant to detailed guidelines, making out pharmacist schedules pursuant to the employer's "narrowly drawn guidelines requiring equal rotation of hours and days off," and authorizing overtime without prior managerial consent in extraordinary circumstances without also being able to order individuals to work, were found not to be supervisors. The Board also noted that these managers were the most experienced pharmacists in the stores, only directed non-unit clerks to a limited extent, and another pharmacist "in charge" had to

¹⁵ To the extent that the Board suggested the contrary in Northcrest Nursing Home, supra, 313 NLRB at 492, that suggestion should be disavowed.

be on duty in their absence. However, head pharmacists are supervisors where they are also in charge of a whole store over 30 hours per week. Id. at 862 n.14, citing cases.

CONCLUSION

For the foregoing reasons, the General Counsel urges that the Board focus on giving content to the relevant terms of Section 2(11), and to apply those terms in the health care industry consistent with the way they are applied in other industries. In this regard, the mere fact that health care workers assign tasks to other employees using independent judgment does not put them within the statutory definition. Something more managerial in nature is needed.

Respectfully Submitted,



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