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Kentucky River at the Intersection of Professional and Supervisory Status: Fertile Delta or Bermuda Triangle?

Introduction

On January 27, 1997, the Kentucky State District Council of Carpenters, AFL-CIO, petitioned Region Nine of the National Labor Relations Board (NLRB) for a representation election at the Caney Creek Rehabilitation Complex. Caney Creek was a psychiatric rehabilitation facility, owned and operated by Kentucky River Community Care, Inc. (KRCC), a non-profit organization. The union sought to represent all employees except guards, clerical and administrative employees, and supervisors, who are excluded by § 2(11) of the National Labor Relations Act (NLRA) from its protections.¹ The union's most important strategic consideration was to ensure that the rehabilitation counselors, borderline professional employees, were included in the bargaining unit. These workers strongly supported the unionization effort. Rehabilitation counselor Glenn Moore was doing the lion's share of organizing the workplace from within.² In the union's view, the rehabilitation counselors and

¹ Petition, Ky. River Cmty. Care, Inc., NLRB Case No. 9-RC-16837.

² The description in this chapter of the union's perspective is based on a telephone interview with Carpenters Union counsel Thomas J. Schulz, October 1, 2004 and a telephone interview with Carpenters Union Supreme Court counsel, AFL-CIO Associate General Counsel Craig Becker, December 17, 2004. The description of AFL-CIO advocacy from the mid-1990's onwards is based on the telephone interview with Becker, as well as a telephone interview with AFL-CIO Associate General Counsel Jim Coppess, December 17,

nurses working at Caney Creek were non-supervisory professional employees whose right to join unions is explicitly protected by § 2(12) of the NLRA.

There were three strategic prongs to the employer's response, two legal and one practical: (1) try to avoid having any election at all by claiming to be exempt from the National Labor Relations Act (NLRA); (2) try to exclude as many workers as possible from the bargaining unit, particularly pro-union voters such as Glenn Moore and his rehabilitation counselor coworkers, by claiming that they were supervisors; (3) try to defeat the union in the election. Initially, KRCC failed on all three fronts. Following established NLRB case law, the Regional Director ruled against all of KRCC's arguments. The union won an overwhelming victory at the polls, even though the employer fired Moore and other union activists during the campaign.

The Sixth Circuit, however, in which KRCC was located, had harshly criticized NLRB formulations of the fundamental distinction between non-supervisory health care professionals and supervisors holding professional credentials who exercise significant discretion and authority over subordinates in personnel matters. Nevertheless, in the appellate court, the employer only prevailed to the extent of excluding the six registered nurses (RNs) from the overall bargaining unit. KRCC was unable to overturn the certification as to the other ninety-five percent of the workforce. The union would have happily declared victory, and begun bargaining. The employer would have accepted its modest partial victory, and pursued passive resistance at the bargaining table. Exclusion of six RNs from a 100 employee unit was not critical to either side. The NLRB petitioned for certiorari, despite the risk of an adverse outcome. However, the NLRB lost the case and did not get the legal clarity it sought. Rather, in *NLRB v. Kentucky River Community Care*, the Supreme Court rejected the Board's rule that professionals are not supervisors if the only form of authority they exercise is to use judgment based on their professional training in directing less skilled coworkers in the delivery of services, pursuant to standards set by the employer. Although the Court rejected the NLRB's rule, it did not articulate one of its own and did little to clarify the very uncertain line between professional

2004. The description of the employer's perspective is based upon telephone interviews with Kentucky River's lawyers, George J. Miller on December 17, 2004, and Michael W. Hawkins on January 13, 2005. The description of the NLRB's perspective is based on a telephone interview with former General Counsel Fred Feinstein, December 16, 2004; a telephone interview with former General Counsel Leonard R. Page, February 16, 2004; an interview with former Member Sarah M. Fox in Silver Spring, Maryland, August 28, 2004; a telephone interview with former Member Fox, December 17, 2004; an interview with former Member John E. Higgins, Jr. in Silver Spring, Maryland, August 28, 2004; and a telephone interview with Associate General Counsel John H. Ferguson, December 17, 2004.

employees who provide some direction to non-professional subordinates, and supervisors who are also professionals.³

This chapter will tell the story of how the Supreme Court arrived at its construction of § 2(11) in a ruling which opened up as many questions as it resolved, on the basis of facts barely related to the adjudicated legal issues. It will consider future interpretation of § 2(11) and the *Kentucky River* decision's impact upon the broad structure of organizing and bargaining under the NLRA. It also will describe the NLRB's clear victory on the question of the burden of proof. This sleeper issue, to which other litigants paid little attention, may have significant consequences for all of the exclusions from NLRA coverage.

Social and Legal Background

Kentucky River merged two streams of social and legal history: the branch differentiating between rank and file and supervisory workers, and the tributary on NLRA applicability to the health care industry. This chapter next will review the antecedents of today's issues, first, in the Wagner Act treatment of craft and industrial supervisors, next, in the adoption of the Taft–Hartley amendments, and then, in the checkered sequence of NLRA coverage and exclusion of health care employers. The two streams combined in a 1994 case about the supervisory status of nursing home charge nurses, *NLRB v. Health Care & Retirement Corp. of America (HCR)*, discussion of which will follow. *HCR* sets the stage for *Kentucky River*, which will be considered thereafter.

THE BATTLE OVER UNIONIZATION OF SUPERVISORS

How § 2(11) Came To Be: (1) Wagner Act Treatment of Foremen's Unionization

Initially, the Wagner Act did not explicitly exempt supervisors from the statutory definition of employees protected by the Act. The rise and fall of unions of foremen is a fascinating story, which led directly to enactment of the Taft–Hartley amendments that deprived supervisors of the right to unionize while protecting the right of professionals to do so.⁴ The maritime, metal, building and printing trades of the American

³ *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001).

⁴ This history of the treatment of supervisors prior to adoption of the Taft–Hartley Act draws upon the following contemporary sources: Ernest Dale, *The American Foreman Unionizes*, 19 J. Bus. U. Chi. 25 (Jan. 1946); Walter L. Daykin, *The Status of Supervisory Employees under the National Labor Relations Act*, 29 Iowa L. Rev. 297 (1944); David Levinson, *Foremen's Unions and the Law*, 1950 Wis. L. Rev. 79; Herbert R. Northrup, *Unionization of Foremen*, 21 Harv. Bus. Rev. 496 (1943); Russell A. Smith, *Labor Law—Some Developments During the Past Five Years (A Service for Returning Veterans)*, 44 Mich. L. Rev. 1089, 1109–12 (1946); Comment, *Rights of Supervisory Employees to Collective Bargaining under the National Labor Relations Act*, 55 Yale L.J. 754 (1946);

Federation of Labor (AFL) had long included all members of the occupation, regardless of managerial level. This tradition continued after enactment of the 1935 Wagner Act. In the 1930's and early 1940's, the recently-founded Congress of Industrial Organizations (CIO) organized factory-wide "production and maintenance" units in mass production, the growth sector of industry. Union membership quintupled from three million to fifteen million between 1935 and 1947.⁵ As unions won collective bargaining agreements improving wages and working conditions of factory workers, however, front-line supervisors found that their own position had deteriorated compared to their subordinates. This led in the early 1940's to large-scale unionization by manufacturing foremen. Unionization threatened to shift the allegiance of foremen to the working class, depriving employers of loyal front-line agents and potentially impairing operational efficiency. Manufacturing firms depended on their foremen to enforce discipline and productivity in harsh, unsafe, repetitive assembly line jobs. Union-based loyalty to the interests of the workers could subvert the supervisor's enforcement of policies aimed at extracting increased productivity and discipline. Unionized foremen also might strike with the rank and file, or honor their picket lines.

Under the Wagner Act, placement of supervisors in the NLRA scheme arose in three different contexts: (1) whether a foreman's anti-union conduct could be imputed to the employer for purposes of establishing employer liability for unfair labor practices (ULPs); (2) protection of foremen as employees against employer anti-union discrimination; and (3) foremen's organizing and bargaining rights. Although the statutory text has been amended, the problem of the treatment of supervisors continues to arise today in each of these distinct settings. As a matter of statutory construction, the Board had to decide whether the foremen fell under the § 2(2) definition of "employer," the § 2(3) definition of "employee," or both at once, in each of the three contexts. The Wagner Act definition of "employer" in § 2(2) expansively provided: "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly." The § 2(3) definition of "employee" in the Wagner Act was either extremely broad or else vague and was, in any event, circular; it simply stated that: "The term 'employee' shall include any employee."

Note, *The Status of Supervisory Personnel under the NLRA*, 59 Harv. L. Rev. 606 (1946); Martin Bordon, Note, *Labor Law: Right of Supervisory Employees to Bargain Collectively Under Provisions of the National Labor Relations Act*, 34 Cal. L. Rev. 245 (1946); Edwin R. Fischer, Note, *Problem of the Propriety of a Foreman's Union*, 34 Geo. L.J. 89 (1946); Note, *Collective Bargaining By Supervisory Employees Under the Wagner Act*, 13 U. Chi. L. Rev. 332 (1946). See also Joseph E. Moore, *The National Labor Relations Board and Supervisors*, 21 Lab. L.J. 195 (1970).

⁵ See, e.g., David Brody, *Workers in Industrial America: Essays on the Twentieth Century Struggle* 157 (2d ed. 1993).

Acts of first-level supervisors were consistently treated as binding the employer for ULP purposes, so long as no issue of foremen's unionization was on the horizon.⁶ Thus, if a foreman made an anti-union statement, the law would impute the statement to the employer, and the employer might be liable for a ULP. When the foremen acted in their own collective interests, however, or contrary to instructions from higher management, and in the interests of rank and file workers, their actions were not attributed to management under § 2(2). On the contrary, when foremen claimed to be victims of employer discrimination based on their own union activities, they were held to be protected as § 2(3) "employees." The dual role theory prevailed:

There is no inconsistency [between Sections 2(2) and 2(3)]. . . . A foreman, in his relation to his employer, is an employee, while in his relation to the laborers under him he is the representative of the employer and within the definition of Section 2(2) of the Act. Nothing in the Act excepts foremen from its benefits nor from protection against discrimination nor unfair labor practices of the master.⁷

The clarity of the dual role approach, however, evaporated when it came to determining collective bargaining units under § 9. In early cases involving craft unions which had traditionally included supervisors, they were deemed statutory "employees" entitled to organize. Absent such a history, however, the Board excluded supervisors from bargaining units of ordinary workers.⁸ The Board vacillated over certification of separate units of foremen in manufacturing. In 1942, in *Union Collieries Coal Co.*,⁹ the NLRB held that foremen were § 2(3) employees, with the right to organize and bargain. Member Reilly dissented, stressing that unionized foremen could both deprive employees of the free choice of union representative, either in the interest of the foremen themselves or in their employer's interest, and also deprive the company of the foremen's full loyalty in disciplining and supervising subordinates. Six months later, in *Maryland Drydock Co.*,¹⁰ Member Reilly wrote for a new NLRB majority, and held against further certification of foremen's bargaining units. Without resolving the question whether foremen were entirely excluded from the definition of employee in § 2(3), the Board asserted

⁶ See, e.g., *Int'l Ass'n of Machinists v. NLRB*, 311 U.S. 72, 79–80 (1940); *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 518–21 (1941); *NLRB v. Link-Belt Co.*, 311 U.S. 584, 598–99 (1941).

⁷ *NLRB v. Skinner & Kennedy Stationery Co.*, 113 F.2d 667, 671 (8th Cir. 1940).

⁸ See Walter L. Daykin, *The Status of Supervisory Employees Under the National Labor Relations Act*, 29 Iowa L. Rev. 297, 301, 311–13, 317–19 (1944) (collecting cases).

⁹ 41 NLRB 961 (1942); 44 NLRB 165 (1942) (supp. op.).

¹⁰ 49 NLRB 733 (1943).

that it had wide discretion under § 9 to determine that an appropriate bargaining unit could not include supervisors, except in industries where pre-Wagner Act traditions supported unionization. For a brief period, the Board attempted to hold that supervisors were “employees” protected against anti-union reprisals by their employer but that they could not unionize under § 9.¹¹ However, it proved difficult to sustain the position that foremen were full-fledged “employees” against whom ULP violations of §§ 8(1), 8(3), and 8(4) could be committed, yet they had no § 7 rights to organize under NLRB § 9 auspices, and employers could not violate § 8(5) by refusing to bargain with foremen’s unions. Shortly thereafter, in *Packard Motor Car Co.*,¹² one Board member reversed his position, and the Board restored the right of low-level supervisors to organize in a separate unit.

Mass production employers did not acquiesce in the new approach. Packard itself refused to comply, and the Board successfully petitioned for enforcement in the Court of Appeals. The Supreme Court affirmed, accepting the dual status theory, reasoning that the Board had correctly held that the plain language of § 2(3) dictated treating foremen as “employees” with respect to their own terms and conditions of employment, with full rights, including organizing and bargaining. In dissent, Justice Douglas rejected the dual status concept, noting the employer’s dilemma when “[a]n act of a foreman, if attributed to the management, constitutes an unfair labor practice; the same act may be part of the foreman’s activity as an employee. In that event the employer can only interfere at his peril.” The Wagner Act was intended, he reasoned, to protect “the right of free association—the right to bargain collectively—by the great mass of workers, not by those who were in authority over them and enforcing oppressive industrial policies.”¹³ Contemporaneously with *Packard*, the Board and the Court had broadly defined “employee” in two other, related contexts: plant guards and independent contractors.¹⁴ All three issues—treatment of foremen, contractors, and plant security staff—were regarded by corporations as unduly expanding their

¹¹ *Soss Mfg. Co.*, 56 NLRB 348 (1944).

¹² *Packard Motor Car Co.*, 61 NLRB 4 (1945) (separate unit represented by independent union). See also *Packard Motor Car Co.*, 64 NLRB 1212 (1945) (rejecting employer’s challenge to certification on ground of union affiliation with rank and file union); *L.A. Young Spring & Wire Corp.*, 65 NLRB 298 (1946) (unit of higher levels of supervisors); *Jones & Laughlin Steel Corp.*, 66 NLRB 386 (1946) (one union representing two separate units).

¹³ *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 489–92 (1947); *id.* at 497, 499 (Douglas, J., dissenting).

¹⁴ *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947) (plant guards); *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398 (1947) (plant guards); *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944) (independent contractors).

duty to bargain collectively and disrupting their ability to operate efficiently.

How § 2(11) Came To Be: (2) Congress Reacts by Enacting the Taft-Hartley Amendments

By the end of World War II, the labor relations tide had turned.¹⁵ Although wartime efforts to prevent unionization of foremen, including the Smith bills of 1943, had failed for lack of support, in 1946 the Republicans took control of Congress and adopted an omnibus overhaul of the NLRA (known as the Case bill) that excluded most foremen from organizing rights. The bill passed Congress, but was vetoed by President Truman; Congress lacked the votes to override.¹⁶ The next year, Congress adopted the Taft-Hartley Act. President Truman vetoed this bill as well, but this time, Congress overrode the veto. The foremen's union drives, especially a strike of the Foremen's Association of America while congressional debate was in progress, provided pivotal impetus for Congress' adoption of the overlapping set of provisions on employee and supervisory status.

The Taft-Hartley Act neither adopted the Smith bill approach of outright prohibition against foremen organizing, nor the two-tier approach of the Case bill, which would have preserved bargaining rights only for foremen in industries with a pre-NLRA history of unionized foremen. Instead, the law eliminated supervisors from *all* NLRA rights, by excluding them from the § 2(3) definition of covered "employee." Employers were free to "prohibit supervisors from [union] membership because Congress believed that granting supervisors a protected right to join a union [would] be 'inconsistent with the policy of Congress to assure workers freedom from domination or control by their supervisors' and 'inconsistent with our policy to protect the rights of employers.'"¹⁷

¹⁵ On Taft-Hartley Act history, in addition to historical sources already cited, this chapter draws upon David Brody, *Workers in Industrial America: Essays on the Twentieth Century Struggle* (2d ed. 1993); James A. Gross, *The Reshaping of the National Labor Relations Board: National Labor Policy in Transition, 1937-1947* (1981); R. Alton Lee, *Truman and Taft-Hartley: A Question of Mandate* (1966); Harry A. Millis & Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (1950); and Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960* (1985), as well as NLRB, *Legislative History of the Labor Management Relations Act, 1947* (Reprint ed. 1985) [hereinafter *Legis. Hist.*].

¹⁶ The Smith bills were H.R. 2239, 78th Cong. (1943) and H.R. 1996, 78th Cong. (1943). The Case bill was H.R. 4908, 79th Cong. (1946). See H.R. Rep. No. 80-245, at 8, 17 (1947), reprinted in 1 *Legis. Hist.* at 299, 308. President Truman's veto message is reprinted at 1946 U.S.Code Cong. Serv. 1686.

¹⁷ NLRB v. Int'l Bhd. of Elec. Workers, Local 340, 481 U.S. 573, 593 n.17 (1987) (quoting H.R. Rep. No. 80-245, at 14 (1947), reprinted in 1 *Legis. Hist.* at 305).

At the same time, a new § 14(a) disclaimed any prohibition against “voluntary” collective bargaining for supervisors. Where employers and unions with supervisor members found it in their mutual interest, they could bargain collectively, albeit outside NLRB auspices. This avoided any contention that the law violated the asserted constitutional rights of supervisors to organize.¹⁸

The Taft–Hartley framers were eager to address the conflicting obligations Wagner Act dual role case law had imposed upon employers. In fact, Taft–Hartley solved some of these problems twice over. Besides excluding supervisors in § 2(3), Congress insulated from union pressure the employer’s control over those of its supervisors permitted by the employer pursuant to § 14(a) to have union representation. In § 8(b)(1)(B), Congress limited union disciplinary pressures upon unionized supervisors aimed at influencing the supervisors’ representation of management’s position in responding to employee grievances, and restricted union pressures aimed at management’s selection of supervisors to handle grievances or perform collective bargaining-related functions. Congress narrowed § 2(2) to cut back the range of workers whose acts could be imputed to the employer as to alleged ULPs. The definition of employer was changed from “any person acting in the interest of an employer” to “any person acting as an agent of an employer.”

At the heart of Taft–Hartley was its response to business outrage at the expansive construction of the term “employee.” Congress amended the § 2(3) definition to exclude both “supervisors” and “independent contractors.” New, cross-referenced definitions were inserted in § 2, legislatively overruling the Supreme Court. At the same time, Congress rejected employer efforts to exclude professional employees and plant security staff, two groups employers had analogized to supervisors, based on management’s need for their undivided loyalty as well as their different class allegiance and higher status compared to laborers. Congress did not adopt the Smith bill formulation for supervisory exclusion, which would have barred from unionizing “any individual employed in a bona fide executive, administrative, professional, or supervisory capacity.”¹⁹ Instead, Congress inserted a definition of “professional” in § 2(12) and amended the representation provisions of § 9 to provide that professional and non-professional employees could not be combined in a single bargaining unit unless a majority of the professionals voted in favor of inclusion. After Taft–Hartley, outside of fields with a pre-NLRA tradi-

¹⁸ Comment, *Rights of Supervisory Employees to Collective Bargaining under the National Labor Relations Act*, 55 Yale L.J. 754, 766 (1946) (relying upon *Tex. & New Orleans R.R. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548 (1930) and *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911)).

¹⁹ H.R. 1996, 78th Cong. (1943). See also H.R. 2239, 78th Cong., § 4 (1943).

tion of union representation of foremen, few businesses “voluntarily” allowed their foremen to join rank and file bargaining units or to organize separately. Rather, they addressed the sources of foremen’s discontent by upgrading front-line supervisors and making them feel more a part of management. The Foremen’s Association of America rapidly withered away.

The statutory exclusion of supervisors has provided a whole new arena for litigation-related delays. The amendment presumed that a bright line could be drawn between supervisory and non-supervisory staff. It also presupposed that the organization of jobs and allocation of supervisory functions would not be altered by management with an eye to labor law consequences. These assumptions, however, had been debunked by commentators well before enactment of Taft–Hartley.²⁰ The 1947 redefinition of “employee” encouraged employers to label even low-level workers as supervisors and to reorganize job responsibilities for reasons unrelated to economic performance simply to maximize statutory exclusions. More recently, that definition has rewarded litigation seeking to broaden the definition of supervisor within newer forms of work organization, excluding expanding categories of workers. These developments have been especially evident among professionals in the health care industry. Before considering precisely who is a “supervisor” in light of Taft–Hartley, however, we first review NLRA coverage and exclusion of health care, which has strongly influenced interpretation of § 2(11).

BELATED NLRA COVERAGE OF HEALTH CARE AND
ITS CONSEQUENCES FOR ORGANIZING

*Exclusion, and Re-Inclusion of Health Care Institutions Under the
NLRA*

Eliminating supervisors and independent contractors was not the only way Congress changed NLRA coverage in Taft–Hartley. The original Wagner Act covered health care employers, but the 1947 legislation excluded most of the industry. It amended the § 2(2) definition of “employer” to exempt non-profit hospitals.²¹ It was not until the Health Care Amendments Act of 1974²² that coverage was restored for all private sector health care employers. Section 2(14) was added, defining “health care institution.” Special restrictions on strikes against health

²⁰ For example, Comment, *Rights of Supervisory Employees to Collective Bargaining Under the National Labor Relations Act*, 55 Yale L.J. 754, 770–71 (1946).

²¹ Section 2(2) excluded “any corporation or association operating a hospital if no part of the net earnings inures to the benefit of any private shareholder or individual.” Pub. L. No. 80–101, § 101, 61 Stat. 136 (1947).

²² Pub. L. No. 93–360, 88 Stat. 395 (1974).

care employers were imposed. Congress recognized that “the needs of patients in health care institutions required special consideration”—essentially, greater protection against disruption of patient care in the course of labor disputes.²³ Subsequent cases regarding solicitation and distribution of union literature likewise have recognized this priority.²⁴ Strikes interrupting the delivery of health care were a major impetus behind restoration of NLRA coverage. Congressional testimony indicated that ninety-five percent of strikes in non-profit hospitals had been recognitional. Resuming NLRA coverage was expected to reduce recognitional strikes by providing NLRB machinery for establishing enforceable union representation rights. The special rules regulating health care industry work stoppages were intended to encourage peaceful resolution of disputes over new agreements. Congress also hoped that collective bargaining would improve wages and benefits in the industry, and lead to better-qualified workers and higher standards of patient care.²⁵

By the time the health care amendments had been adopted, however, the labor relations climate among employers, legislatures, courts, and the NLRB was less favorable to collective bargaining, compared to earlier decades, and more delay was to ensue. Seventeen years of litigation over appropriate units in health care institutions followed adoption of the 1974 amendments, dampening union organizing, especially among RNs and other professionals.²⁶ Health care is unusual in having a heavy composition of diverse state-licensed professionals, each with a scope of practice and professional responsibility governed by state law, and with highly distinct professional identities. Many technical occupations are likewise state-regulated. The patient-care occupations are arranged in a strict education-based status hierarchy, with doctors on top, registered nurses, technologists, and other professionals below them, LPNs, technicians, and other technical employees underneath them, and nurses aides and other service employees at the bottom.²⁷ Eventually, the NLRB held

²³ S. Rep. No. 93-766, at 3 (1974). The provisions are NLRA §§ 2(14), 8(d), 8(g); LMRA § 213.

²⁴ See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773 (1979); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978).

²⁵ See H.R. Rep. No. 93-1051, at 4 (1974); S. Rep. No. 93-766, at 3 (1974). See also *Beth Israel Hosp.*, 437 U.S. at 497-98 & nn. 14-15 and legislative sources cited therein.

²⁶ The discussion regarding appropriate bargaining units in health care facilities is based on the the Supreme Court opinion in the rulemaking case, *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991), the underlying rulemaking proceedings, 52 Fed. Reg. 25,142 (July 2, 1987) (Notice of Proposed Rulemaking) (hereinafter NPR I); 53 Fed. Reg. 33,900 (Sept. 1, 1988) (Second Notice of Proposed Rulemaking) (hereinafter NPR II); 54 Fed. Reg. 16,336 (Apr. 21, 1989) (Final Rule), *codified at* 29 CFR § 103.30 (2004).

²⁷ See, e.g., David R. Kochery & George Strauss, *The Nonprofit Hospital and the Union*, 9 *Buff. L. Rev.* 255, 265 (1960).

its first-ever formal rulemaking proceeding to regularize appropriate health care bargaining units. The Board found that “organizing and initial bargaining among health care workers has historically been by occupationally homogeneous units,” and adopted a rule for acute care hospitals that put registered nurses, physicians, technical employees, skilled maintenance employees, business office clerical employees, guards, and all other nonprofessional employees each in separate units. Nursing homes, rehabilitative hospitals, and psychiatric hospitals, however, were excluded from the rule; bargaining units in these types of facilities remain subject to determination through adjudication.²⁸ Only after the 1991 Supreme Court decision upheld the rule did organizing in the industry, especially among RNs and other professionals, begin to pick up speed.²⁹ It was thus not until the 1990’s that a large volume of cases arose regarding the supervisory status of health care professionals.

Who is a Supervisor: The Law Before Health Care & Retirement Corp.

In the interim, some aspects of the interpretation of § 2(11) became settled. Disputes over supervisory status arise in dozens of cases annually.³⁰ The 1947 amendments altered § 2(3), defining “employee” as excluding “any individual employed as a supervisor,” and inserted a new § 2(11), defining a “supervisor” as:

[A]ny 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.

Section 2(11) has been parsed into a three-part test. To be a supervisor: (1) a worker must possess one or more of the twelve types of personnel authority listed in § 2(11); (2) the worker must exercise that authority “in the interest of the employer,” rather than anyone else; and (3) the worker’s exercise of that authority must “require the use of independent judgment” rather than be of “a merely routine or clerical nature.” Because the § 2(11) list is written in the disjunctive, possession of even one type of authority will render the worker a statutory supervisor. The legislative history indicates that Congress was aiming squarely

²⁸ 29 C.F.R. § 103.30(a),(f),(2),(g); NPR II, 53 Fed. Reg. at 33,910; Final Rule, 54 Fed. Reg. at 16,346, 16,347–48.

²⁹ *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606 (1991).

³⁰ For numbers in the 1970’s, see Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1713 (1981). The numbers today are, if anything, greater.

at excluding foremen in drawing the § 2(11) line between employees and supervisors. Congress sought to differentiate 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.”³¹ Drawing this line has proven easier said than done, even in the industrial workplace with its conventional, hierarchical chain of command. In settings deviating from that model, the task has been vexing indeed.

Forms of authority to make tangible personnel changes are most readily adjudicable. If the putative supervisor has a record of hiring, suspending, laying off, recalling, promoting, discharging, conferring pay increases or other rewards, or disciplining employees, the individual will be held to be a supervisor. However, neither a job title, such as “foreman” or “supervisor,” nor a paper job description establishes supervisory status. Some evidence that the individual actually possesses the authority is necessary. If a worker has held a position for several years without exercising supervisory authority, the credibility of a job description purporting to confer it is undermined. If the worker attempts to exercise the authority but is rebuffed by higher management, the claim of supervisory status is negated. “Effectively recommend” is interpreted to mean the marginal supervisor’s recommendations are usually followed without independent investigation. The Board rejects as lacking probative value conclusory testimony about authority nominally conferred upon workers holding a particular job title without specifics establishing its actuality. Some courts of appeals, however, more readily accept such general statements as probative.

The Board does not deem supervisory authority to include intermediate personnel functions such as investigation and reporting of incidents, or evaluation of coworkers’ job performance without recommendations regarding discipline, promotion, or pay increase, and without reward or punishment as a direct consequence. Even oral disciplinary warnings are held by the Board to be too weak to constitute § 2(11) disciplinary authority, unless they may lead to tangible personnel consequences. Neither “evaluate,” “investigate,” nor “report” appears on the § 2(11) list. On the contrary, the Taft–Hartley conference committee compromise embraced the Senate language for supervisory status and rejected the House version, which would have deemed supervisory those job classifications involving investigative or evaluative functions such as claims investigators.³² Although some circuits have deferred to the Board’s interpretation, others have rejected it, holding marginal or

³¹ S. Rep. No. 80–105, 4, (1947) *reprinted in 1 Legis. Hist.* at 167–68.

³² H.R. 3020, 80th Cong., § 2(12), (1947), *reprinted in 1 Legis. Hist.* at 167–68.

intermediate forms of personnel authority sufficient to render a worker a statutory supervisor. The courts often disagree with the Board's crediting of facts or drawing of inferences in this area, sometimes making it difficult to discern whether the circuit court has applied a different standard for § 2(11) status, or merely decided that the Board's factfinding was unsupported by substantial evidence, the standard for appellate review.

Directing work and assigning tasks, divorced from other forms of § 2(11) authority, have posed the greatest problem. The Board has never fully resolved whether "assignment" is limited to assigning individual workers to shifts, departments, and job classifications, or whether it also reaches assigning individual tasks to a worker. The syntax and context of § 2(11) suggests the former, leaving task assignment to be addressed under the "responsibly direct" rubric. Board treatment of responsible direction is even murkier. Many years ago, the Board adopted a narrow construction of "responsibly to direct" based on its understanding of general legislative intent in 1947. This analysis was promptly rejected by the Sixth Circuit in favor of a broad, dictionary definition, later accepted in several other circuits: "To be responsible is to be answerable for the discharge of a duty or obligation."³³ The NLRB has avoided rather than resolved the issue, determining supervisory status, insofar as possible, without relying on "responsible direction." Failing that, it has interpreted "responsible direction" only as modified by "independent judgment," in a single package, leaning heavily on the "independent judgment" element to avoid interpreting "responsible." "Responsible direction" has been problematic in industrial cases, and even more so in professional employment.

Rather than excluding professionals, the Taft-Hartley Act in § 9(b)(1) treated them specially as to bargaining unit placement. It also added § 2(12), defining "professional employee" as an employee engaged in "predominantly intellectual and varied" work "involving the consistent exercise of discretion and judgment" and "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." The task in cases alleging a professional to be a statutory supervisor is thus to differentiate between the exercise of "independent judgment" in the performance of personnel functions listed in § 2(11) as supervisory attributes, on the one hand, and the exercise of professional "discretion and judgment" in the performance of professional work described in § 2(12)(a)(ii), on the other. In addition, that § 2(12) also defines a professional to include new profes-

³³ *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387, (1949) *denying enforcement of* 80 NLRB 1334 (1948).

sional school graduates who are completing their qualification for professional credentials by “working under the supervision of a professional person,” seems to contemplate professional employees overseeing the work performance of trainees. This is in tension with the inclusion of “responsibly to direct” in the list of § 2(11) forms of authority which render a worker a supervisor. Placing emphasis on “responsibly,” and requiring that the supervisor be above the supposed subordinate in a reporting hierarchy could reconcile the two provisions, and would fit well with the 1947 Congress’ central focus on foremen and those above them in the hierarchy when it enacted § 2(11). It would be at odds, however, with the Sixth Circuit’s interpretation of “responsibly direct,” at least outside the professional employee context.

The great majority of disputed supervisory status cases before the 1980’s involved employees in occupations such as shop foreman, plant superintendent, and store manager, which are subject to unregulated employer discretion as to job title and content. The factual inquiry as to whether at a particular facility, a person holding the title “foreman” actually possesses the requisite authority under § 2(11) has always had to be conducted separately in every case. As a general rule, the NLRB leaned in favor of a narrow construction of each aspect of supervisory authority. A broad interpretation of § 2(11) might advantage an employer seeking to exclude a borderline supervisor from collective bargaining, or to avoid a ULP charge for discriminating because of the putative supervisor’s union sympathies. However, it might advantage a union seeking to exclude the anti-union, borderline supervisor’s vote in a representation election, or in imputing the marginal supervisor’s anti-union interference to the employer in a different ULP case.

It was not until professionals began organizing on a larger scale that construction of § 2(11) became tied consistently to NLRA treatment of particular categories of workers. Educational, licensure, and regulatory requirements, especially in the health care industry, have standardized elements of many professional and technical job descriptions. In these occupations, although union and employer interests remain subject to *ad hoc* considerations favoring labeling a particular worker an “employee” or a “supervisor,” the two sides also take into account systemic considerations, with unions favoring the employee label, and employers favoring the supervisor label for many professionals. It is no coincidence that the two Supreme Court cases construing the elements of § 2(11) arise in the context of professional health care employees.

HEALTH CARE & RETIREMENT CORPORATION: DRY RUN FOR KENTUCKY RIVER

Starting in the mid-1970’s, the Supreme Court decided three cases, each by a 5–4 vote, involving NLRB categorical exclusions from the definition of employee in which the Court emphasized that the “employ-

er is entitled to the undivided loyalty of its representatives.”³⁴ In each, the Court construed aspects of § 2(11) or § 2(12), or both, in order to decide these other issues. First, in 1974, in *NLRB v. Bell Aerospace Company*,³⁵ the Court created an implied exclusion from § 2(3) employee status for all managerial employees, rejecting the NLRB’s narrower exclusion of only those managers involved in labor relations decision-making. The Court concluded that despite its silence in Taft–Hartley, and its narrow, express exclusion of supervisors in § 2(11), “Congress intended to exclude from the protections of the Act all employees properly classified as ‘managerial.’” The Court endorsed older NLRB case law excluding on that basis “‘executives who formulate and effectuate management policies by expressing and making operative decisions of their employer.’”³⁶ Second, the Court in 1980 in *NLRB v. Yeshiva University* applied the managerial exclusion to the collegial, collective decisionmaking powers of a university faculty over curriculum, grading policies, teaching methods, and matriculation standards. The Court reasoned, “the faculty determines . . . the product to be produced, the terms upon which it will be offered, and the customers who will be served,” concluding that “it is difficult to imagine decisions more managerial than these.”³⁷ However, the next year, the Court backed away from its trend toward broad, implied exclusions from coverage. In *NLRB v. Hendricks County Rural Electric Membership Corp.*,³⁸ the Court upheld the NLRB’s longstanding exclusion from bargaining units of those employees with access to confidential labor relations information, while not excluding workers whose jobs made them privy to non-labor-relations confidential business information.

All three cases relied on legislative history; the plain language of § 2(3) entitles any employee not specifically excluded to the protections of the statute. In each of the three, the § 2(12) treatment of professionals played a role in the analysis. In both *Bell Aerospace* and *Yeshiva*, the Court went to great pains to make clear that it did not intend the judicially-implied managerial exclusion to eviscerate Congress’ express inclusion of professionals. The *Yeshiva* Court cited approvingly NLRB decisions in which professionals working as project captains of teams of professionals were “deemed employees despite substantial planning responsibility and authority to direct and evaluate team members,” including one case involving nurses. *Yeshiva* also pointed for support to the

³⁴ *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682 (1980).

³⁵ 416 U.S. 267 (1974).

³⁶ *Id.* at 275, 286 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323 n.4 (1947)).

³⁷ 444 U.S. at 686.

³⁸ 454 U.S. 170 (1981).

fact that “[i]n the health care context, the Board asks in each case whether the decisions alleged to be managerial or supervisory are ‘incidental to’ or ‘in addition to’ the treatment of patients, a test Congress expressly approved in 1974” in adopting the health care amendments to the NLRA.³⁹

In *Hendricks County*, to support limitation of the implied confidential employee exclusion to workers with direct access to secret labor-relations related materials, the Court relied on the Taft–Hartley conference committee’s rejection of the House bill’s broad definition of “supervisor,” which would have encompassed a wide range of confidential employees as well as professionals. The conference committee adopted instead the Senate version, which “confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank.” The Court also pointed to § 2(12), covering such professionals as “‘legal, engineering, scientific and medical personnel together with their junior professional assistants,’ . . . almost all [of whom] would likely be privy to confidential business information. . . . It would . . . be extraordinary to read an implied exclusion for confidential employees into the statute that would swallow up . . . the professional-employee inclusion.”⁴⁰

Commentators after *Bell Aerospace* and *Yeshiva* were apprehensive that doctrinal developments were creating a slippery slope which might eviscerate statutory coverage of professionals.⁴¹ The Board, however, perhaps lulled into complacency by the Court’s reasoning supporting preservation of professional employee coverage, continued to follow its line of health care cases, finding supervisory status when the health care professional’s exercise of authority over a less highly educated coworker was “in addition to” as opposed to “incidental to” patient care. The Sixth Circuit was particularly vehement in rejecting the Board’s interpretation in nursing cases. The NLRB successfully petitioned for certiorari in one, *NLRB v. Health Care & Retirement Corp. of America (HCR)*.⁴²

³⁹ 444 U.S. at 690 & n.30.

⁴⁰ *Hendricks County*, 454 U.S. at 184 n.15, 184–85 (quoting 93 Cong. Rec. 6442 (1947) (remarks of Senator Taft) and quoting H.R. Conf. Rep. No. 80–510, at 36 (1947)).

⁴¹ See, e.g., Matthew W. Finkin, *The Supervisory Status of Professional Employees*, 45 *Fordham L. Rev.* 805 (1977); Marina Angel, *Professionals and Unionization*, 66 *Minn. L. Rev.* 383 (1982); David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 *Colum. L. Rev.* 1775 (1989); Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 *Minn. L. Rev.* 953, 972–73 (1990).

⁴² 511 U.S. 571 (1994). Facts of the case which go beyond those reported in the Supreme Court opinion are taken from the decision of the NLRB Administrative Law Judge, 306 NLRB 63, 68 (1992).

Health Care & Retirement Corporation had been charged with disciplining four LPNs in retaliation for their concerted activities. If they were supervisors, the discipline could not have violated the Act. The nursing home's nursing department was headed by a director and assistant director, two § 2(11) supervisors. Reporting to them were about ten nurses, some of whom were RNs and others LPNs, plus about fifty nurses aides. Both types of nurses were assigned the same duties, an approach common in nursing homes. The Court therefore examined the case as though the LPNs were professional rather than technical employees.

The Board had defended the case before the Supreme Court on the basis of the agency's rule that when "the nurses' direction of other employees is carried out in the exercise of professional judgment and is incidental to the treatment of patients," it is not "in the interest of the employer," and hence does not constitute § 2(11) authority. Justice Kennedy's opinion for the 5-4 majority of the Court rejected the NLRB's use of the third § 2(11) prong, "in the interest of the employer," to differentiate between professional task delegation to and oversight of less skilled workers, on the one hand, and general responsible direction of subordinates by a superior, on the other. The *HCR* Court rejected the Board's "incidental to patient care" gloss on "in the interest of the employer" not only as being contrary to the plain meaning of the phrase, which the Court emphatically claimed was unambiguous, but also as contravening the broad interpretation the 1947 *Packard* Court placed on the phrase as it appeared in the Wagner Act § 2(2) definition of employer. The Court also criticized the Board's interpretation of "in the interest of the employer" as, in effect, reading "responsibly to direct" out of the Act as to nurses, and castigated the Board for creating an interpretation of "in the interest of the employer" unique for a profession or industry.

Whatever the weaknesses of the Court's analysis in terms of syntax and history, the Board's distinction between discretionary actions based on professional norms and those based on personnel authority delegated by the employer was too heavy a load to place on the phrase "in the interest of the employer" standing alone. The NLRB's point would have been stronger had it been based on the legislative policies and compromises embodied in the Taft-Hartley Act as a whole, and the entirety of § 2(11) in particular. Before the Supreme Court, however, the Board had boxed itself in, formally limiting itself to interpretation of "in the interest of the employer," rather than arguing on all three bases—in the interest, independent judgment, and responsible direction—alternatively, or construed together.

For the NLRB, the *HCR* opinion provided contradictory messages. The Court emphasized that its opinion addressed only the "in the

interest of the employer” phrase, and no other portion of § 2(11). Because the Court distinguished similar reasoning in other professional employee cases as relying on the “independent judgment” phrase rather than the “in the interest” phrase of § 2(11), it was easy for the Board to read *HCR* as leaving open the interpretation of “independent judgment” and of each of the twelve listed forms of supervisory authority, including “responsibly to direct.” Moreover, although the Court claimed that “in the interest of the employer” is clear and unambiguous, it conceded that “independent judgment” and “responsibly to direct” are ambiguous, entailing judicial deference to the NLRB’s reasonable construction of these terms.

Despite these assurances, however, *HCR* also contained many warning flags for the Board. Portions of the opinion assume an expansive meaning for “independent judgment,” “assign,” and “responsibly to direct.” In characterizing the facts regarding the nurses’ job, the Court’s conclusory description more closely resembles the employer’s and the Sixth Circuit’s version than it does the NLRB’s carefully detailed rendition, despite the statutory requirement that the Board’s findings of fact be conclusive on the courts so long as they are supported by substantial evidence.

Soon after *HCR* was decided, the NLRB General Counsel advocated taking the Court at its word on limiting the holding to interpretation of “in the interest of the employer.” His approach was a two-legged one, depending simultaneously on construction of “independent judgment,” the other phrase of limitation in § 2(11), and on construction, rather than fact-specific application, of the ambiguous terms among the list of twelve forms of supervisory authority, particularly “assign,” and “responsibly to direct.”⁴³ The NLRB then decided a hospital case, *Providence Hospital* and a nursing home case, *Ten Broeck Commons*,⁴⁴ which only partially followed the course urged by the General Counsel. The Board took at face value the Court’s pronouncements limiting the *HCR* holding to “in the interest of the employer.” However, the Board rejected the General Counsel’s two-legged approach, also strenuously urged upon it by the AFL–CIO, and chose instead to stand only on one leg, construction of “independent judgment.” The Board held that nurses’ direction and assignment of tasks to less-educated and less-trained nurses, nursing assistants and aides is “merely routine,” and does not reflect § 2(11) “independent judgment,” so long as the decisionmaking is sufficiently

⁴³ See, e.g., *Cascade Care Ctr.*, 1995 NLRB GCM LEXIS 90 (Nov. 7, 1995); *Wesley Willows*, 1994 NLRB GCM LEXIS 83 (Nov. 17, 1994); *Villa Elizabeth, Inc.*, 1995 NLRB GCM LEXIS 95 (Mar. 10, 1995); *North Oakland Med. Ctrs.*, 1995 NLRB GCM LEXIS 96 (Mar. 8, 1995).

⁴⁴ *Providence Hosp.*, 320 NLRB 717 (1996); *Nymed, Inc., d/b/a/ Ten Broeck Commons*, 320 NLRB 806 (1996).

cabined by directives from the employer or by professional norms. The Board said it was applying its “traditional analysis for determining the supervisory status of employees in other occupations,” in an effort to comply with the *HCR* Court’s holding that the Act does not distinguish professional employees from others in the § 2(11) definition of supervisor.

The Board Members, General Counsel and staff were keenly aware that § 2(11) was headed back to the Supreme Court. Guidelines were issued instructing the regions to follow the *Providence Hospital and Ten Broeck Commons* “independent judgment” rubric in all cases.⁴⁵ The circuits fragmented, some deferring to the NLRB’s statutory interpretation and factfinding, others skeptical but moderate in tone, and the Fourth and Sixth extremely hostile.⁴⁶ The Sixth Circuit declared the Board’s new analysis “disingenuous,” a manipulative shell game to support the Board’s continuing to treat cases exactly as it had previously. What the Board regarded as an invitation from the Supreme Court to devise a new rubric to support similar results, some of the circuit courts, especially the Sixth, saw as the Court’s warning shot across the agency’s bow. The NLRB staff did not want legal developments to turn on the chance decision of an employer to seek certiorari, or on the calculated decision of an employer group to target a case for Supreme Court review. They scrutinized circuit court rulings, looking for a clean case with an adverse appellate decision based on minimal indicia of supervisory status. Such a case would afford an appealing vehicle for the agency to return to the Court with the Board’s new § 2(11) analysis. In *Kentucky River*, the NLRB believed that it had found one.⁴⁷

Factual Background

The organizing drive in *Kentucky River* had some distinctive aspects, but none which would have led the participants to anticipate their case going to the Supreme Court.⁴⁸ In the fall of 1996, Glenn Moore ap-

⁴⁵ Telephone Interview with NLRB Associate General Counsel John H. Ferguson, December 17, 2004.

⁴⁶ See, e.g., *NLRB v. GranCare, Inc.*, 170 F.3d 662 (7th Cir. 1999) (*en banc*) (deferential); *Passavant Ret. & Health Ctr. v. NLRB*, 149 F.3d 243 (3d Cir. 1998) (intermediate); *Beverly Enters., Va., Inc. v. NLRB*, 165 F.3d 290 (4th Cir. 1999) (*en banc*) (hostile); *Caremore, Inc. v. NLRB*, 129 F.3d 365 (6th Cir. 1997) (same).

⁴⁷ Telephone Interview with former Member Fox, December 17, 2004; Telephone Interview with NLRB Associate General Counsel Ferguson, December 17, 2004; Telephone Interview with former NLRB General Counsel Feinstein, December 16, 2004.

⁴⁸ The factual background is derived from telephone interviews with Schulz and Miller, October 1, 2004 and December 17, 2004, and from the NLRB Region Nine file in *Kentucky River Community Care, Inc.*, NLRB Case No. 9-RC-16837, and the Region Nine file in *Kentucky River Community Care, Inc.*, NLRB Case No. 9-CA-34926. Excluding portions as

proached the Kentucky State District Council of Carpenters about organizing the employees at KRCC's Caney Creek psychiatric rehabilitation and long-term care facility. The union's director of organizing, Lawrence Hujo, tried to talk Moore into approaching some other union. The Carpenters Union primarily represents skilled trades workers at construction sites, not professional and technical employees at health care facilities. Moore, however, had decided that he and his fellow employees really needed a union. He had asked around among his political and union contacts, seeking the best union in the area, and was repeatedly told that the Carpenters Union "would treat you right." Moore continued to press the Carpenters to organize at Caney Creek.

Because of Moore's persistence and enthusiasm, the Carpenters Union reconsidered. His web of connections and support at Caney Creek had already halfway organized the workforce. Once the Carpenters Union undertook the campaign, it put its full effort into it. The campaign rapidly moved from initial organizing to amassing enough support to demand employer recognition and file the election petition with the NLRB. Major issues in the campaign included the difficult job conditions, low pay, and control over scheduling and staffing. Arbitrary exercise of management discretion over pay increases was a particularly festering irritation for those workers who were not in their supervisors' social clique since the unit coordinators and nursing coordinator had almost unfettered discretion in performance evaluations that determined pay increases. After organizing for a little over a month, on January 22, 1997, union organizer Hujo wrote to KRCC demanding recognition. When the employer refused, on January 27, Hujo filed the union's petition with the NLRB Region Nine office in Cincinnati, Ohio. The estimated eighty-six employee unit included the six RNs, the twenty rehabilitation counselors, as well as the single licensed practical nurse then on the payroll, the forty rehabilitation assistants, a few recreation assistants, and some kitchen, service and maintenance workers. The union submitted as its showing of interest union authorization cards signed by about eighty percent of the proposed bargaining unit.

Because Moore was the key in-facility organizer, the rehabilitation counselors were the heart of the union's support and the crucial strategic factor shaping the bargaining unit requested in the petition. There was no question of the union seeking to represent the rehabilitation

to which privilege was asserted, the files were provided to the author by the NLRB pursuant to a series of requests submitted under the Freedom of Information Act. Some documents are reprinted in the appendix section of the Petition for a Writ of Certiorari, Kentucky River Community Care, Inc., available at <http://supreme.lp.findlaw.com/supreme_court/docket/2000/febdoCKET.html> [hereinafter Petition for a Writ of Certiorari] and excerpts from the transcript and exhibits in the representation proceeding are reprinted in the Joint Appendix (J.A.), available on microfiche.

assistants, recreation assistants, and LPNs alone, in a technical employee unit. The union was unsure whether the rehabilitation counselors would properly be characterized as professionals in any event. As union in-house counsel Tom Schulz put it, the union “bluffed” the issue, simply asking for a single, all non-supervisory, non-guard bargaining unit. KRCC counsel did not focus on it. The RNs, unlike the rehabilitation counselors, were not essential to the union, even though some were among the union’s strongest supporters. Being in the Sixth Circuit, where *HCR* had been decided before it went to the Supreme Court, union counsel was aware that the RNs were likely to be challenged as supervisory. They were included in the unit, not only because they were union supporters, but also as a “diversionary tactic, if need be, to trade-off and get the rest” of the workers, said Schulz.

The union’s petition blindsided management, which had had little awareness of the organizing campaign until it received Hujo’s formal demand for recognition. Management retained counsel George J. Miller only at that point. Miller, an experienced labor lawyer, was a partner in the Lexington, Kentucky office of the 200-attorney, Louisville-based law firm of Wyatt, Tarrant & Combs. KRCC responded to the petition first, by claiming to be exempt from the Act; and second, by trying to exclude as supervisors both the RNs and the rehabilitation counselors, in effect arguing that its entire professional employee complement fell outside the protections of the NLRA. The first argument contended that KRCC, a non-profit corporation, was operating in lieu of a state government-created body, with authority contractually delegated to it by the state and with its discretion in personnel matters so heavily constrained by its contract with the state that it should be deemed a governmental unit. Miller later explained, “If we won on the first issue, the case was over. If we won on the second issue, we would have carved those people out of the unit and made them available to use in campaigning against the union.” Employers commonly resort to a third, fallback strategy if pre-election legal strategies fail: trying to defeat the union in the election, through legal means such as captive audience speeches and campaign literature, or through tactics of dubious legality, such as promises of benefits if employees vote against the union, “predictions” that job loss will ensue if the union wins, or firing of leading union supporters ostensibly for disciplinary reasons. KRCC’s election campaign efforts fit this pattern, but they were insufficient to derail the pro-union majority.

Prior Proceedings

PROCEEDINGS BEFORE THE NLRB: THE REPRESENTATION PROCEEDING

The representation case was assigned to Natalie Morton of the NLRB Region Nine office. She verified the union’s “showing of interest,” and in a pre-hearing conference call, unsuccessfully tried to persuade the

parties to consent to an election in an agreed-upon bargaining unit. In February 1997, Morton presided over a pre-election hearing in the Perry County Courthouse in Hazard, Kentucky, which lasted a total of about nine hours. Although regional staff members preside over representation case hearings, the regional directors issue quasi-adjudicatory decisions resolving disputed matters on the basis of the record created in the hearing. On February 21, 1997, Region Nine Regional Director Richard L. Ahearn issued his Decision and Direction of Election, finding KRCC to be covered by the Act, and finding both the registered nurses and the rehabilitation counselors to be “professional employees” and not “supervisors” under the Act.

The Caney Creek complex was headed by administrator Leonard Echols, who reported directly to KRCC CEO Louise Howell. Reporting to Echols were the assistant administrator, the nursing coordinator, and unit coordinator Mark Stone, as well as a second unit coordinator whose position was then vacant, with Echols himself filling in in the interim. These positions were stipulated to be § 2(11) supervisors. The facility is divided into four identical twenty-bed units, each staffed by five rehabilitation coordinators and ten rehabilitation assistants. Each of the two unit coordinators was in charge of two of the four units. Each unit coordinator thus had thirty subordinates: ten rehabilitation coordinators and twenty rehabilitation assistants. In each unit, four of the five rehabilitation coordinators worked the day shift, while one worked a swing shift, covering the afternoon half of the day shift, and early evening portion of the evening shift. The ten rehabilitation assistants per unit were divided up among all three shifts, although more assistants worked the day shift to handle many of the activities and training programs for residents.

The employer contended that the rehabilitation counselors directed the work of the rehabilitation assistants with sufficient independent judgment and discretion to be § 2(11) supervisors. The Regional Director found, however, that the rehabilitation counselors “do not have the authority to hire, fire, discipline, promote, or evaluate employees and any assignment or direction which they may give other employees is routine.”⁴⁹ The Regional Director followed *Providence Hospital* and *Ten Broeck Commons* in determining that mere authority to coordinate the work of others is not sufficient independent judgment to satisfy § 2(11), and that mere formulation of treatment plans fulfilled by other employees is not a form of § 2(11) authority at all. He distinguished *HCR* as limited to the “in the interest of the employer” analysis. He bolstered his conclusion by noting that under KRCC’s analysis, there would be an

⁴⁹ Decision and Direction of Election at 7, *reprinted in* Petition for a Writ of Certiorari, 35a, 49a.

unrealistic 1:2 ratio of supervisor rehabilitation counselors to subordinate rehabilitation assistants.

The employer's claim of supervisory status for RNs was artfully bolstered by conflation of two separate bases for arguing about their supervisory status: their regular role as nurses and their role as building supervisors when management was away from the premises. Nursing coordinator Alicia Cook had authority over all nurses. Fully staffed, the facility employed six RNs and three LPNs, but as of the hearing only one LPN was on the payroll. The nurses were the only trained medical personnel in the facility at most times; the doctor and psychiatrist were independent contractors on the premises a few hours per week. The six RNs were assigned two to a shift, rotating across all seven days per week, to ensure 24/7 coverage. Each RN worked about four weekend shifts per month. The primary role of the RN was to provide direct medical services to the residents, and to document medical treatment and changes in medical condition of residents, acting under the instructions of the resident's physician or psychiatrist. She either herself administered all doctor-ordered medication or was responsible for documenting its administration by an LPN. She also cooperated with the rehabilitation counselor in development and revision of individual resident treatment plans, with regard to the medical aspects of those plans. She was not in the line of supervision or regular direction of either rehabilitation counselors or rehabilitation assistants. The employer's own treatment in its formal job descriptions of supervisor-subordinate reporting relationships, its employment handbook references to supervisors' role in performance evaluation, pay increases, and grievance procedures, as well as the verbal usage throughout the testimony of KRCC's management witnesses, consistently labeled only the unit coordinators and nursing coordinator as supervisors. Both the rehabilitation assistant job description and the rehabilitation counselor job description showed these workers as reporting to the unit coordinator as their supervisor, not to the RN, or for that matter, the rehabilitation counselor. The employer did not offer into evidence the job description of either the RN or the LPN position.

The employer's argument rested on two very thin bases to claim the RNs responsibly directed other workers, exercising independent judgment, in their regular job duties: they had to ensure proper LPN administration of medication when an LPN was on duty simultaneously with the RN, and they occasionally requested help from a rehabilitation assistant in dealing with an unruly resident. If the RNs were all supervisors over the single LPN, the supervisor-to-subordinate ratio would have been a ridiculous 6:1; even with a full three LPN complement, it would still have been 2:1. Moreover, Registered Nurse Alice

Anderson testified that the RNs and LPNs had a relationship of equality at the facility.

The stronger aspect of KRCC's contention that the RNs were supervisors rested on their role as "building supervisor" when none of the stipulated § 2(11) supervisors were on the premises at night and on weekends. The details of this role, however, were hotly contested. The union offered what it contended was the only officially disseminated description of the special duties added to the RN position when the RN served as building supervisor. The memorandum indicated that the main role of the building supervisor was to buffer the off-duty, on-call manager from unnecessary telephone calls, and also to make sure minimum staffing requirements were met on each unit. If unexpected absences or weather emergencies reduced the ratio of staff to residents below unit minimums pre-set by management, the building supervisor was to obtain additional staff to restore the minimum ratio. Solving the staff ratio problem could be done by moving a rehabilitation assistant from a unit with excess staff to the short-staffed unit for the duration of the shift; or, absent extra staff, the building supervisor could ask someone to stay over from the departing shift; failing that, she could call someone in to work who would otherwise be off duty.

The employer offered two additional memos documenting beefed-up authority for the building supervisor, but testimony failed clearly to establish whether the memos were ever distributed to employees. These memos increased the authority and responsibility of the building supervisor by placing her in charge of the entire facility and giving her the duty to check staffing levels every day when she came on duty, authorizing her to require, rather than merely request, the affected staff member to switch units, work overtime, or report to work, and instructing her to "write up" anyone who refused her instruction. One manager testified that the building supervisor not only could require staff to work longer or come in from home to meet minimum ratio requirements, but that she also had the discretion to increase the staffing level above the pre-set minimum if problems arose with residents on a unit during a particular shift. This witness also testified that the building supervisor had authority to send home from work a worker who was intoxicated or otherwise misbehaving, and only thereafter contact the employee's regular supervisor, although she conceded that this had never occurred. This evidence conflicted with Nurse Anderson's testimony that such actions would have exceeded the scope of her authority, and that she would first have contacted the on-call administrator for instructions prior to taking any action. The only time Anderson had failed to get advance approval from the on-call supervisor before asking an employee to stay over to meet pre-set ratios, she had been reprimanded by unit coordinator Mark Stone, the on-call manager, and the other employee was sent home early

so that KRCC would not have to pay overtime. The employer's own witness, Caney Creek's top manager, Echols, corroborated Anderson's testimony that as building supervisor, the RN could only request, and not require other workers to stay over or come in to work on a day off, and that in calling in employees during inclement weather, they simply resorted to the list of local employees provided by management. Testimony that there was no formal handover of authority when the last administrator left the building for the day, and that when two RNs were on duty at once, they decided among themselves which one should fill the role, further bolstered the union's depiction of the modest, informal nature of the building supervisor role.

The Regional Director, after noting that the employer had the burden of proof on § 2(11) status, concluded that even when serving as building supervisors the RNs were not statutory supervisors. At most, he found, they could request coworkers, such as LPNs and rehabilitation assistants, to perform tasks routinely part of the coworkers' job description, and, as building supervisors, in accordance with pre-set policies about staffing ratios, could ask workers to remain on the job after the end of their shift or could call in volunteers. He specifically found the building supervisor RNs "do not have any authority . . . to compel an employee to stay over or come in to fill a vacancy under threat of discipline."⁵⁰ The functions, he held, are too routine to qualify as independent judgment for purposes of § 2(11). The Regional Director ordered that the election be held in two separate voting groups, one composed of the non-professionals, and the other composed of the professional employees, *i.e.*, the RNs and the rehabilitation counselors. He further held each of these two separate bargaining units, as well as the combined unit, appropriate. The votes of the professional group were to be counted at the outset. If a majority voted for inclusion in the overall unit, then its votes on whether to have the Carpenters as bargaining representative would be counted together with the votes of the non-professional employees, and a majority of the total votes cast by the workforce would be required for the union to prevail; otherwise each group's votes for or against unionization would be counted separately.

On March 6, 1997, the employer filed a request for review of the Regional Director's decision with the NLRB in Washington. To obtain this discretionary review, the requester must show "compelling reasons." On March 21, 1997, a panel composed of NLRB Chairman William B. Gould, IV, plus Members Sarah M. Fox and John E. Higgins, Jr. issued a one-sentence order, denying the request "as it raised no substantial issues warranting review." The panel viewed both the RN

⁵⁰ Decision and Direction of Election at 8, *reprinted in* Petition for a Writ of Certiorari, at 35a, 51a.

and rehabilitation counselor issues as routine applications of the NLRB's recent decisions in *Providence Hospital* and *Ten Broeck Commons*.⁵¹

The election campaign took place while the request for review was pending in March 1997. The union's campaign at the outset highlighted the same festering issues that originally had led Glenn Moore to approach the Carpenters Union. On February 26, 1997, however, management suspended Moore, and on March 13, fired him. Several other union activists also were discharged in the course of the campaign. The union filed a series of ULP charges, challenging not only the allegedly discriminatory discipline and discharge practices, but also claiming that the employer had offered a new discounted vacation package to employees, had discriminated in permitting employee posting of anti- as opposed to pro-union literature, had threatened the loss of business and jobs if employees voted for the union, and had threatened that it would refuse to negotiate anyway if employees voted in the union. The union also included a request to proceed, so that the charges would not block the election timetable.⁵² The discharged workers also filed for unemployment compensation. When the employer contested their claims, Tom Schulz represented them for free, and the employees all won their benefits by establishing that KRCC's anti-union animus rather than employee misconduct was the reason for their discharge. Anti-union firings sometimes deflate support for a union seeking to organize a workforce. At Caney Creek, however, Moore and some of the others became martyrs to the union cause, solidifying employee support for union representation.

The election was conducted and the ballots were counted. A 15-4 majority of the professional group was tallied as having voted for inclusion in the combined bargaining unit. The ballots of all employees were then counted together. Of approximately ninety-six eligible voters, ninety-one actually had attempted to vote. Fifty-six employees voted for the union, twenty-nine voted against, with six casting challenged ballots. Because the number of challenged votes was too small to affect the outcome of the election, the results were certified without those ballots being opened.

PROCEEDINGS BEFORE THE NLRB: THE TECHNICAL REFUSAL TO BARGAIN

Armed with the certification, on April 24, 1997, the Carpenters Union wrote to KRCC, requesting that it commence collective bargaining. KRCC counsel Miller replied that the employer "declines to recognize or bargain with the union, for the purpose of testing the Regional Director's certification of the union." On May 20, the union filed an

⁵¹ Interview with former Member Sarah M. Fox, Silver Spring, Maryland, August 28, 2004.

⁵² Kentucky River Community Care, Inc., NLRB Charge No. 9-CA-34653-3.

unfair labor practice charge, initiating a “technical refusal to bargain case,” in which the employer’s refusal to bargain with the union provides the procedural vehicle for the employer to obtain federal appellate court review of the underlying representation proceeding, which is not otherwise reviewable. The NLRB issued a formal complaint, KRCC filed an answer, and in rapid order, the General Counsel moved for summary judgment, the case was transferred to the Board in Washington, and an opportunity was provided for KRCC to file a response. On July 10, 1997, the same three-member panel that had previously rejected the employer’s request for review in the representation proceeding issued the NLRB Decision and Order in the ULP case.⁵³ It granted summary judgment, holding that the employer’s admitted refusal to recognize and bargain with the union violated § 8(a)(5) and § 8(a)(1).

PROCEEDINGS IN THE COURT OF APPEALS

On July 15, 1997 Region Nine Director Ahearn wrote to Miller to advise that he was recommending commencement of proceedings to enforce the NLRB’s order. Two days later, Miller filed a petition for review of the order with the Sixth Circuit.⁵⁴ A week after that, however, KRCC changed counsel. Michael W. Hawkins and Cheryl E. Bruner, of the Cincinnati law firm of Dinsmore & Shohl, took over as counsel for KRCC. Hawkins, with decades of experience handling NLRA matters, would represent the employer in both the Sixth Circuit and in the Supreme Court. The NLRB, in the meantime, had cross-applied for enforcement and the union had moved to intervene, which the charging party in a ULP proceeding may do as a matter of right.

Despite the change in counsel, the employer made similar arguments before the circuit court that it had made during the representation proceeding. The lion’s share of KRCC’s briefs was devoted to the political subdivision argument, with only short sections contending, alternatively, that RNs and rehabilitation counselors were statutory supervisors. They relied heavily on the authority conferred in the two contested building supervisor memos, treating them as undisputed fact even though the Regional Director had failed to credit them as having been implemented. Hawkins artfully utilized prior cases in which the

⁵³ 323 NLRB No. 209 (1997), *reprinted in* Petition for a Writ of Certiorari at 26a.

⁵⁴ The description of proceedings in the Sixth Circuit Court of Appeals in Case No. 97-5885/97-5983 is taken from telephone interviews with Thomas Schulz, October 1, 2004, George Miller, December 17, 2004, and Michael Hawkins, January 13, 2005, the court’s docket sheet in the case, *reprinted at* J.A. 3-4, as well as the briefs and papers submitted by the parties, and the judgment of the court. These portions of the appellate court file were provided by the NLRB pursuant to a Freedom of Information Act request. The judgment of the Sixth Circuit and the order denying the employer’s suggestion for rehearing en banc are reprinted in Petition for a Writ of Certiorari at 61a and 64a.

Sixth Circuit had found nursing home charge nurses to be supervisors and reversed NLRB decisions. His brief reiterated the Sixth Circuit's own protestation that the Board "has steadfastly failed to apply" Sixth Circuit precedent in nurse supervisor cases, and characterized the KRCC case as yet "another situation where the NLRB has ignored the Sixth Circuit."⁵⁵ KRCC also briefly discussed another Sixth Circuit precedent, *NLRB v. Beacon Light Christian Nursing Home*, noting parenthetically that that case states that the NLRB "always has the burden of coming forward with evidence showing that the employees are not supervisors in bargaining unit determinations."⁵⁶ The thrust of the KRCC briefs was to induce the circuit court to analogize the building supervisor RNs, as well as the rehabilitation counselors, to charge nurses, whom a series of Sixth Circuit cases had found to be supervisors because they regularly delegate patient care tasks to nurses aides.

The NLRB brief framed the issue quite differently—whether substantial evidence supported the Board's finding that the rehabilitation counselors and the registered nurses were not supervisors.⁵⁷ The brief documented evidence substantiating the Regional Director's factfinding about the RNs' authority and noted the conflicting evidence about dissemination of the pivotal building supervisor memoranda. The brief succumbed to the temptation to rely on NLRB case law holding that RNs delegating patient care tasks to LPNs and aides constitutes "routine" performance of the RNs' professional duties, not "responsible direction" of less skilled employees "in the exercise of independent judgment." Although the brief distinguished adverse Sixth Circuit authority on nurse supervisors on the grounds that the nurses in those cases had disciplinary, overtime assignment, and pay-related evaluation responsibilities, the brief also suggested that those cases were inconsistent with the NLRB's new approach because they relied on a different phrase in § 2(11). This strategy might have prompted the circuit court to bridle at the agency's resistance to following circuit court case law. The brief also implicitly seemed to accept the employer's overstatement of the degree to which RNs supervised other employees in administering medication and delivering care; the Board's brief merely asserted that that responsibility was "simply an aspect of their performance of their professional

⁵⁵ Brief of Petitioner/Cross-Respondent Kentucky River Community Care, Inc. at 46 [hereinafter KRCC Brief] (quoting *Health Care & Ret. Corp. v. NLRB*, 987 F.2d 1256, 1260 (6th Cir. 1993), *aff'd*, 511 U.S. 571 (1994)). See also Reply Brief of Petitioner/Cross-Respondent Kentucky River Community Care, Inc., at 19 [hereinafter KRCC Reply Brief] (citing *Caremore, Inc. v. NLRB*, 129 F.3d 365 (6th Cir. 1997)).

⁵⁶ 825 F.2d 1076, 1080 (6th Cir. 1987), cited in KRCC Brief at 39 and in KRCC Reply Brief at 12.

⁵⁷ Brief for the NLRB, at 3–4.

duties.” The agency’s brief made no mention of the burden of proof issue.

The Sixth Circuit heard oral argument on November 5, 1998. Michael Hawkins argued for KRCC, Daniel J. Michalski argued on behalf of the NLRB, and Tom Schulz argued for the union. Almost a year later, the court issued a split decision.⁵⁸ The majority overturned the holding that the RNs were covered employees, while enforcing the remainder of the NLRB order directing the employer to recognize and bargain with the union on behalf of the non-professional employees and the rehabilitation counselors. KRCC succeeded in its strategy of mobilizing the court’s festering irritation with the Board for exercising its right to adhere to the agency’s own interpretation of the Act, contrary to that adopted by the circuit. After castigating the Board for placing the burden of proof of supervisory status on the employer, the court found that the RNs had, as to administration of medication, authority to responsibly direct in the exercise of independent judgment the LPNs, who had become three in number based on a non-factual assertion in the KRCC brief. As building supervisor, the court found, the RNs were the highest ranking staff member on the premises, with authority to “seek additional employees in the event of a staffing shortage, move employees between units as needed, and . . . write up employees who do not cooperate with staffing assignments.” The latter finding, without evidentiary explanation, ignored the contrary evidence credited by the Regional Director. The majority had rejected the Board’s construction of “independent judgment” as contrary to circuit precedent and as unworthy of judicial deference because the agency, according to the court, applied it manipulatively. Applying Sixth Circuit case law, the court held that these forms of authority were sufficient to render the RNs § 2(11) supervisors. Dissenting as to the nurses, Judge Nathaniel R. Jones would have deferred to the Board’s factfinding, which he found had substantial support on the record as a whole.

The Supreme Court Decision

On May 12, 2000, the government petitioned the Supreme Court for certiorari.⁵⁹ The decision to seek certiorari was hotly debated within the

⁵⁸ 193 F.3d 444, 454 (6th Cir. 1999).

⁵⁹ The description of proceedings in the Supreme Court is based upon telephone interviews with Hawkins, Schulz, Carpenters Union Supreme Court counsel and AFL-CIO Associate General Counsel Becker, AFL-CIO Associate General Counsel Coppess, former Member Fox, former NLRB General Counsel Feinstein, former NLRB General Counsel Page, and NLRB Associate General Counsel Ferguson, as well as the Supreme Court docket sheet, and the briefs and other filings in *NLRB v. Kentucky River Community Care, Inc.*, Supreme Court Case No. 98-1815. The docket sheet and joint appendix are available on microfilm. The transcript of the oral argument and the NLRB’s briefs are available at

NLRB. The agency has sought certiorari in very few cases over the past twenty years. At almost the same time as it decided *Kentucky River*, the same Sixth Circuit panel decided another nurse supervisor case, *Integrated Health Services of Michigan, at Riverbend, Inc. v. NLRB*,⁶⁰ a nursing home case in which Judge Jones had filed a concurrence. The government could have sought certiorari in either of these cases, or in one from another circuit, or awaited a better case from the Sixth.

Kentucky River was in several respects an atypical nurse supervisory status case, making the choice of it for Supreme Court review an odd one. The case is set in a psychiatric facility rather than the more typical hospital or nursing home. As the employer had unsuccessfully argued before the Sixth Circuit, the relationship of the rehabilitation counselors to the rehabilitation assistants somewhat paralleled that of the RN or LPN to nurses aides or certified nursing assistants in the hospital or nursing home. The RNs at Caney Creek, by contrast, exercised little authority to responsibly direct others in the performance of patient care tasks, and there were no nurses aides. Despite a modicum of evidence about the RNs directing an LPN in the administration of medications, the weight of the circuit court's conclusion that the *Kentucky River* RNs were supervisors was based on their building supervisor role, a role almost wholly independent of their professional skills and judgment. If the employer had not been required to have an RN on duty at all times, it might well have designated one of the rehabilitation assistants on each shift to the role, which would have altered the complexion of the supervisory status argument. The building supervisor role, moreover, gave the employer the strong practical argument in favor of supervisory status that when serving as building supervisor, the RNs were the highest ranking staff member in the facility, and they filled this role for long periods of time each week.

The General Counsel and the Board nevertheless concluded that *Kentucky River* was the best case available. They wanted a case from the Sixth Circuit because of its explicit attitude of non-deference to the factfinding and statutory interpretation of the Board and because it was the only circuit rejecting the NLRB's allocation of the burden of proof. As between the two Sixth Circuit decisions, *Kentucky River* presented the better case for review. *Integrated Health Services* did not present cleanly the "independent judgment" issue in the context of responsible direction; there was too much evidence of disciplinary authority. A Supreme Court decision upholding the Board's position would not have changed the result in *Integrated Health Services*, precluding satisfaction

<http://supreme.lp.findlaw.com/supreme_court/docket/2000/febdoCKET.html>. The remaining briefs of the parties and of *amicus curiae* are available on Lexis and Westlaw.

⁶⁰ 191 F.3d 703 (6th Cir. 1999).

of Supreme Court certiorari criteria. In *Kentucky River*, had the Court accepted the Board's § 2(11) independent judgment analysis along with its allocation of the burden of proof, the RNs would not have been deemed supervisors. The Jones dissent in *Kentucky River* was another plus since it enhanced the credibility of the Board's case before the Supreme Court.

The tenor of Sixth Circuit case law also militated against waiting in hopes of a more perfect certiorari vehicle. As NLRB General Counsel Feinstein put it, the Sixth Circuit had invited employers to forum shop. Major nursing home chains always have a location in the Sixth Circuit, and therefore have the right to file their petitions for review of adverse NLRB ULP decisions in that circuit, no matter the location of the nursing home where the case arose. The effect was to give nearly nationwide effect to the case law of that one circuit, contrary to that of the Board. As Judge Jones had opined in his concurring opinion in *Integrated Health Services*, the circuit had "become so entrenched in our disagreements with the Board regarding the construction of § 2(11) that, as a practical matter, we have made it impossible for nurses to form bargaining units at nursing homes."⁶¹ The General Counsel and the Board Members felt it imperative to obtain a Supreme Court ruling on the construction of "independent judgment" in the health care industry as well as on the allocation of the burden of proof of supervisory status.

Those most actively involved in the decision thought the Board would win in the Supreme Court. Others in the agency, however, were more pessimistic, as were AFL-CIO lawyers who had been working with union counsel on many nurse supervisor cases at the circuit court level. Nevertheless, the General Counsel and the Board urged the Solicitor General, who had the final decision, to seek certiorari in *Kentucky River*, and the Solicitor General did so.

The Board sought Supreme Court review on three questions: (1) the Board's construction of "independent judgment" in § 2(11) as not encompassing "an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards"; (2) the propriety of the NLRB's allocation of the burden of proof to the party alleging an individual to be a supervisor, whether in a representation proceeding or a ULP case; and (3) whether in applying its interpretation of § 2(11) "independent judgment" and its allocation of the burden of proof, the NLRB reasonably found the RNs to be employees rather than supervisors. The Carpenters Union had not joined in the petition, or responded to it, because it could not afford to take the case to the Supreme Court. However, once the Board had petitioned, to the delight of the Carpen-

⁶¹ *Id.* at 713 (Jones, J. concurring).

ters, the AFL–CIO stepped in. Its lawyers wrote the Carpenters Union’s response in support of granting certiorari and later, wrote the brief on the merits. The AFL–CIO had a much broader interest in the case than the Carpenters Union, because of the impact of the nurses issue on many AFL–CIO affiliate unions. KRCC counsel Hawkins also opposed certiorari. He accused the NLRB of picking on a small, poor employer as a weak opposing litigant in choosing the case for certiorari. Hawkins later explained that his client had not wished to expend its meager resources on Supreme Court litigation. On September 26, 2000, the Court granted the writ.

The NLRB’s main brief was largely divorced from the evidence. Most of the brief was devoted to arguing that in light of *HCR*, “independent judgment” was ambiguous, hence the Board’s interpretation was entitled to deference because it was rational and consistent with the Act. The Board presented the *Providence Hospital* analysis as its controlling interpretation of “independent judgment”: “an employee does not exercise the ‘independent judgment’ that triggers supervisory status . . . when the employee exercises ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.” The Regional Director’s decision on the Kentucky River RNs was erroneously characterized as flowing straightforwardly from application of that test, and many of the facts were rearranged to fit more appropriately within the schema of professional direction of less skilled employees. The RNs were said to “work with and occasionally direct less-skilled employees to deliver services in accordance with the employer-specified standards expressed in the treatment plans,” a neat application of the *Providence Hospital* rule to a hypothetical Caney Creek which differed significantly from the one portrayed in the representation proceeding. The treatment plans at Caney Creek were overwhelmingly aimed at mental and social rehabilitation programs designed by the rehabilitation counselors, and performed by them and by the rehabilitation assistants; the nurses’ role in connection with the treatment plans was almost entirely limited to medication monitoring and administration, under physician guidance. Any direction regarding performance of the treatment plans was done by the rehabilitation counselors, whose employee status was no longer at issue. The NLRB briefs also overstated the nurses’ working relationship with the rehabilitation assistants: “the RNs perform hands-on medical treatment and give limited direction to other members of their teams, based on their experience and special competence, pursuant to the requirements of the residents’ treatment plans.”⁶² The Caney Creek RNs had no teams.

⁶² Reply Brief for the NLRB, at 9–10. See also Brief for the NLRB at 5.

The NLRB's briefs handled the facts very poorly, at several key points accepting the employer's or the Sixth Circuit's version rather than the conflicting evidence upon which the Regional Director had relied. For example, in the NLRB's brief, there were three LPNs working at Caney Creek, "the RNs and LPNs provide medical services to residents throughout the [residential] units," and "two RNs and one LPN generally work on each of the three shifts, . . . although occasionally only one RN works on the third shift." Aside from the fact that, as of the hearing, only one LPN position was filled, this text made it sound as though at all times, two RNs and one LPN were on duty together. Instead, they were spread across seven days a week of the particular shift, so that usually only two out of the three nurses would be on the job at the same time; with only one LPN on the payroll as of the hearing, most of the time, the RNs each worked alone. When part of the supervisory status claim is that the RNs supervised the LPNs in administering medications, it is important that most of the time each RN worked there was no LPN on duty to "responsibly direct." The NLRB briefs confused the several building supervisor memos, citing as authoritative one that the Regional Director did not find to have been disseminated. This was compounded by the brief then weakly stating that there was no evidence that any building supervisor had actually exercised the authority conferred by that memo to "write up" a worker refusing to work overtime in the event of staff shortage. In fact, as noted above, Nurse Anderson had been reprimanded the only time she ever kept a worker over without prior management authorization.

The employer's brief treated the facts conclusorily "found" by the Sixth Circuit, as well as those repeated from its Sixth Circuit brief, as though they were uncontradicted in the record, and again leaned heavily on the lack of any other supervisor on the premises during building supervisor hours. It persuasively picked up on a view the *HCR* majority had expressed in connection with "in the interest of the employer": KRCC argued that the Board's effort to separate out professional judgment from independent judgment would have the effect of precluding a finding of supervisory status whenever the supervisory authority was exercised on the basis of the individual's professional training and expertise, unless it involved a change in the employee's status such as promotion, discipline or discharge. KRCC argued that under the Board's construction of "independent judgment," all professionals would be employees, and none would be supervisors, no matter how much managerial and personnel authority they exercised over other workers. In its reply brief, the Board reversed the argument, contending that on KRCC's construction, all professionals would be supervisors, and none would be covered employees.

KRCC made a fall-back argument which the NLRB did not parallel. KRCC argued that even under the NLRB's construction of "independent judgment," the RNs were supervisors, but it relied for this point on evidence that had been contested and not credited by the Regional Director, particularly the building supervisor memoranda. The NLRB, on the other hand, did not bother to argue that, if the agency's analysis of "independent judgment" were rejected by the Court, the record was nevertheless sufficient to support the Regional Director's conclusion that they lacked supervisory status. With better marshalling of the record, the Board could have argued that the RNs' direction of LPNs and rehabilitation assistants was *de minimis*, as was their discretion when operating within the building supervisor role, falling far below any threshold for "responsible direction," as well as "independent judgment."

The union briefs partially compensated for the deficiencies of the NLRB briefs by meticulously detailing the evidence, linking the facts in the record with the Board's entitlement to deferential review on its factfinding, and point by point, highlighting the many liberties the KRCC brief took in its characterization of the evidence. The union briefs also provided greater clarity than the Board's about the distinction the NLRB drew between occupational discretion and judgment, on the one hand, and supervisory independent judgment, on the other. The former, the union explained, is the judgment a professional, technical or skilled employee must exercise in carrying out her own work responsibilities. If one imagines a highly skilled worker performing an assignment without any assistance from another worker, judgment the highly skilled worker exercises is of necessity professional or occupational rather than supervisory, since there are no personnel functions involved. The latter is discretion in the decision about delegating particular tasks to less skilled workers, or about the selection of one particular worker rather than another to perform a given task.

At the oral argument on February 21, 2001, Deputy Solicitor General Lawrence G. Wallace argued first, on behalf of the NLRB, and Michael W. Hawkins argued on behalf of the employer. The NLRB did not split time with the union intervenor. Early in the argument, one of the justices successfully pressed Wallace to concede that the case was limited to construction of "independent judgment," and did not include interpretation of "responsibly to direct." Wallace focused his presentation almost entirely on the Board's "independent judgment" test distinguishing "professional judgment," a distinction several justices found confusing if not incoherent. When asked questions about key facts, he became confused, and vacillated. Several times in the argument Wallace failed to make clear to the justices the strongest facts in the record that supported the Board's conclusions and the places in which the Sixth Circuit

had misstated the record or rejected the Board's factual findings even though supported by substantial evidence. KRCC counsel Hawkins pressed hard on the danger to institutionalized patients if the highest level employee on duty for ten hours at night was not a supervisor with undivided loyalty to the employer. There was no discussion at all during the argument about the burden of proof issue. The NLRB and union attorneys at the argument left discouraged about the chances of a favorable opinion; Hawkins and employer attorneys left elated.

Hawkins later remarked on how abstract and policy-oriented the Court's focus was during oral argument. The Carpenters Union counsel Schulz expressed a similar view, and also was trenchantly critical of Wallace's performance. In Schulz's recollection, Wallace had been

so totally focused on whether the Board had the right "independent judgment" standard, he never clearly argued that assuming the Board was right, the employer had the burden of proof, and the employer never proved supervisory status. Also, he failed to hone in on the three key documents, [the three RN building supervisor exhibits,] and that the Sixth Circuit in effect had overturned a reasonable Board ruling on credibility as to whether the later ones were real and actually in effect despite conflicting testimony. The test of substantial evidence on the record as a whole should have forced reversal of the Sixth Circuit on the RNs even if the Court had remanded the case under a new standard. In addition, Wallace should have argued the fallback position that the employer never proved the supervisory status of the RNs under any standard. After all, they were really arguing about ordinary supervisory authority with respect to the building supervisor role, not anything unique to professionals.

On May 29, 2001, the Supreme Court rendered a 5–4 decision in *Kentucky River*.⁶³ The majority, in an opinion by Justice Scalia, rejected the NLRB's new formulation for § 2(11) status, although it unanimously affirmed the Board's allocation of the burden of proof to the party claiming that the worker is a supervisor. The Court conceded, on the basis of its reasoning in *HCR*, that the term "independent judgment" was indeed ambiguous, hence the NLRB was entitled to judicial deference in its construction, so long as it was rational and consistent with the statute. However, according to the Court, the Board's interpretation was neither, hence it was "unlawful."

The predicate for the Court's analysis was its reasoning about the nature of the ambiguity in the term "independent judgment." The Board's formula for independent judgment, and its brief outlining its

⁶³ 532 U.S. 706 (2001). All quotes in this and following paragraphs are from the opinion.

interpretation, had straddled the question of whether the agency was arguing about a distinction based on quality or quantity; in effect, it was arguing for both. The NLRB used “independent judgment” to differentiate between direction of coworkers based on professional or technical judgment, as opposed to judgment based on personnel factors, while also including a quantitative aspect, based on how broad a range of discretion was conferred upon the putative supervisor. The Supreme Court, however, held that “independent judgment,” particularly as distinguished in § 2(11) from “activity routine or clerical in nature” was ambiguous as to the minimum degree or scope of discretion required to render the judgment “independent” rather than “routine,” but that the phrase left no room for differentiation based on the nature, quality, or source of the judgment. Introduction of differentiation based on the nature of the judgment as professional or technical inserted a “categorical exclusion” into statutory text whose plain meaning suggests only one of degree rather than kind. Moreover, much as it had in *HCR*, the *Kentucky River* Court feared this distinction would permit the Board to deem to be covered employees many workers exercising broad human resources discretion over coworkers, asking “[w]hat supervisory judgment worth exercising . . . does not rest on ‘professional or technical skill or experience?’”

In addition, as the Court understood it, the Board’s “independent judgment” analysis was effectively limited to “responsibly to direct.” The Court was particularly impatient with this error in statutory construction. It regarded the Board, in developing its formulation, as having ignored the Court’s teaching in *HCR*, that “in the interest” required a construction applicable to all twelve § 2(11) supervisory functions, a syntax-based analysis just as relevant to “independent judgment.” The Court accused the Board once again, as in *HCR*, of having in effect “read the responsible direction portion of § 2(11) out of the statute in nurse cases.” The Court characterized the Board’s interpretation of the interrelation of § 2(11) and § 2(12) as an argument that the § 2(12) policy of coverage of professionals supports the “categorical exclusion of professional judgments” from “independent judgment.” Such an interpretation of “independent judgment” restricted to its use to limit “responsible direction,” the majority concluded, “contradict[s] both the text and structure of the statute, . . . as well [as] the rule of [*HCR*] that the test for supervisory status applies no differently to professionals than to other employees.”⁶⁴

The majority rejected the Board’s construction of “independent judgment” but not its underlying policy-based reasoning that the express

⁶⁴ *Id.* at 715, 717, 720–21 (quoting *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 579–80 (1994)).

inclusion of professionals in § 2(12) supported interpretation of § 2(11) so as to avoid their wholesale elimination as supervisors. Similarly, the Court did not dispute the propriety of the Board's reliance on Taft-Hartley Act legislative history emphasizing Congress' intent only to exclude "true supervisors" with "genuine management authority" but not "minor supervisors." Conceding that "the Board is entitled to judge [the soundness of its labor policy] without our constant second-guessing," the Court reasoned that "[t]he problem with the argument is not with the soundness of its labor policy . . . [but] that the policy cannot be given effect through this statutory text." The majority suggested that the Board instead might be able to limit the scope of the supervisory exclusion in responsible direction cases by "distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees, as § [2(11)] requires," noting that some NLRB case law had already drawn that distinction. Because the Board had "carefully insisted that the proper interpretation of 'responsibly to direct' [was] not at issue," however, the Court declined to consider this alternative.

The NLRB did win a victory on its other major issue. The Court unanimously held that the Sixth Circuit erred in not deferring to the Board's allocation of the burden of proof. Allocating the burden, both in representation cases and in ULPs, to the party advocating a special exclusion from a statutory prohibition, the Court reasoned, follows the general rule of statutory construction. In addition, it is easier to demonstrate that an employee has one of the twelve § 2(11) supervisory functions than to disprove that the employee has any of the twelve. The Court also rejected the employer's and the Sixth Circuit's position that in technical § 8(a)(5) cases the NLRB General Counsel nevertheless should bear the burden of proof because the validity of the bargaining unit is an element of the case. Disproving supervisory status, the Court held, is not an element of the ULP. Rather, the General Counsel must only prove that the unit was properly certified, which it was unless the *employer* successfully bore its original burden of proof, in the earlier representation proceeding, of the supervisory status of the RNs.

One might have expected the Court to remand the case to the Sixth Circuit for reconsideration under the correct burden of proof, but it did not. The Board's error in construing "independent judgment" prevented the Court from enforcing the NLRB order as to the RNs, and the Court held that it could not enforce the agency's order by substituting a legal standard of its own devising, which the Board had in any event not asked the Court to do. Thus far, the reasoning is uncontroversial. The decision goes on, however, to point out that under similar conditions in *HCR*, the Court simply affirmed the judgment of the circuit court, and "since neither party has suggested that [*HCR*'s] method for determining

the propriety of a remand should not apply here, we take the same course.” The affirmance of the circuit court left its judgment standing, meaning the employer was ordered to bargain as to the wall-to-wall bargaining unit, excluding the RNs. Both KRCC counsel Hawkins and Union counsel Schulz found this portion of the Court’s reasoning mystifying.

The *Kentucky River* majority opinion was almost entirely divorced from the facts of the case. The Supreme Court quotes the lower court’s opinion as though it accurately described the facts in stating “that the Board had erred by classifying ‘the practice of a nurse supervising a nurse’s aide in administering patient care’ as ‘routine [simply] because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with management.’”⁶⁵ Of course, there were no nurses aides at Caney Creek, so the nurses could not have been supervisors in directing employees who did not exist. Elsewhere, the Court characterized the Board’s interpretation of “independent judgment” as “[t]he only basis asserted by the Board, before the Court of Appeals and here, for rejecting respondent’s proof of supervisory status with respect to directing patient care.” Yet the reasoning below turned very little on RN direction of patient care, as opposed to their building supervisor role, a role nearly totally divorced from the professional judgment aspect of the NLRB’s “independent judgment” analysis. This error, as well as the Court’s failure to remand the case, shows that it handled the case as though it were simply reviewing an NLRB rule adopted through a rulemaking process. The Court ignored the fact that this was a case in which the effect of its holding was to deprive six registered nurses of rights as employees under the NLRA, when what it should have done was to remand the case to have their employee status litigated under a properly allocated burden of proof. All nine justices found that the court of appeals misallocated the burden of proof. Had the case been remanded to fix that error, the results for the RNs might have been different.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented on the holding regarding RN status. The dissenters insisted that the § 2(11) terms “independent judgment” and “responsibly to direct” are “quintessential examples of terms that the expert agency should be allowed to interpret in light of the policies animating the statute.” The NLRB’s reading, asserted Justice Stevens, provided a definition of supervisor that, unlike the majority’s, would not completely eliminate the coverage of professionals. The dissent defended the Board’s distinction between the judgment that nurses exercise when asking others to take a patient’s temperature and the judgment that nurses

⁶⁵ *Id.* at 710 (quoting 193 F.3d 444, 453 (6th Cir. 1999)).

exercise when they discipline others. In the dissent's view, the Board was correct in concluding that the exercise of independent judgment should mean one thing when it modified the ambiguous term "responsibly to direct" and something else when it modified the unambiguous terms in the other § 2(11) supervisory functions, such as "promote" or "discharge." The Board's reading was correct because only the term "responsibly to direct" was ambiguous and only it was "capable of swallowing" the statutory inclusion of professionals "if not narrowly construed." The dissent also pointed out the irony of the majority's conclusion that the RNs, who had no subordinates, were supervisors while leaving untouched the Board's conclusion that the rehabilitation counselors, who did routinely direct activities of the rehabilitation assistants, were not supervisors. Finally, the dissent maintained that since the Court had unanimously concluded that the Sixth Circuit had applied the wrong burden of proof, it should not have affirmed the lower court's judgment, but instead remanded for the lower court to apply the correct standard.

The majority's main holding effectively sends the NLRB back to the drawing board to interpret § 2(11). The decision leaves the Board with only four clear guidelines for its future construction of § 2(11) "independent judgment." First, it cannot use that phrase to differentiate based on the nature or quality of the judgment. Second, it can set a reasonable threshold or minimum quantity, degree or scope of discretion as requisite for the judgment to be "independent." Third, the Court accepted the tail end of the NLRB's *Providence Hospital* formulation; "the degree of judgment . . . may be reduced below the statutory threshold by detailed orders and regulations issued by the employer."⁶⁶ Fourth, the Board should carefully ensure that the interpretation it places on "independent judgment" applies identically, across-the-board, to all twelve forms of § 2(11) supervisory authority. Apart from these points, however, the decision shines a hazy light on a possible interpretation of "responsibly to direct" as requiring more than assignment of discrete tasks.

HCR has ruled out "in the interest of the employer" as a means to resolve the tension between professional and supervisory status. *Kentucky River* has ruled out the use of "independent judgment" in terms of the qualitative nature of the judgment, or its source in professional, technical or skilled craft knowledge rather than personnel management. The Court has, however, left open the prospect of a minimum threshold of discretion in managing other workers being required, as well as the possibility of interpretation of "responsibly to direct" and "assign" which might accomplish much the same accommodation of coverage of professional employees as the Board's earlier formula for "in the interest of the employer" and "independent judgment." On the other hand,

⁶⁶ *Id.* at 713-14.

similar dicta in *Yeshiva* lured the Board onto the rocks in *HCR* and similar dicta in *HCR* led the Board to run aground in *Kentucky River*. This new invitation holds great promise of sending the NLRB over Niagara Falls in a barrel, taking with it the NLRA rights of professionals and perhaps also many technical and skilled trades employees.

The Immediate Impact of NLRB v. Kentucky River

The decision in *Kentucky River* had important consequences—for the Caney Creek employees, for nurses around the country seeking to organize, and for those with union representation attempting to continue collective bargaining. The ripples have rapidly spread to other professions, as well as to borderline supervisors in manufacturing and service industries. Most directly, the end of the story for the parties in *Kentucky River* is that, except for the RNs, the employees finally won their bargaining rights.⁶⁷ Although the Supreme Court litigation delayed the commencement of bargaining for about two years, it is unclear to what extent this additional delay altered the course of contract negotiations. It is doubtful whether the decision to exclude the RNs from the unit has made much difference, since their inclusion would have only very modestly increased the union's bargaining leverage with the employer. Ironically, the failure to remand, although depriving the union of the chance to argue that the employer failed to carry its burden of proving the RNs to be supervisors under a revamped NLRB standard for "independent judgment," benefitted the rest of the unit. It moved the case to closure, with an order to bargain covering ninety-five percent of the requested positions for the bargaining unit. The employer then abandoned its open resistance to union representation. The war for entrenchment of the union as bargaining agent, and negotiation and implementation of a collective bargaining agreement, on the other hand, continues. As of early 2005, no labor contract had been reached, and the prospects for one have become increasingly remote.

The § 8(a)(3) charges regarding the discharge of Glenn Moore and a few other workers during the election campaign dragged on throughout the litigation up to the Supreme Court and thereafter. The cases were all settled in the end. Moore won a substantial settlement, but had to agree to waive reinstatement. For a while Moore went to work for his father, then he drifted around for a period and moved on. Moore's departure, as well as a large layoff and turnover among the workforce, has contributed to the erosion of the union's support at Caney Creek. Some of the rehabilitation counselors spearheaded a failed effort at decertification a year or two after the employer commenced bargaining with the Carpenters. The union has found itself trapped in a no man's land, in which the

⁶⁷ Telephone Interview with union counsel Thomas Schulz, October 1, 2004; Telephone Interview with KRCC counsel Michael Hawkins, January 13, 2005.

opponents of union representation lack sufficient support to decertify, but the union lacks enough hard core support to exert serious economic pressure on KRCC through a strike, picket line, or other job action that might bring labor contract talks to a conclusion. Exacerbating the union's weakness is the reluctance of the rehabilitation assistants and counselors to take any job action that might jeopardize patient care and progress. Dinsmore & Shohl continued to handle the contract negotiations for the employer for about a year after the Supreme Court decision. Since then, KRCC CEO Dr. Louise Howell and other in-house staff have handled the employer's negotiations, although from time to time, they continue to consult Hawkins. Schulz regards Dr. Howell as a "tough negotiator."

The Continuing Importance of Kentucky River Today

The broader story of NLRB construction of § 2(11) likewise has not reached closure. The aftermath at the NLRB might best be described as "deja vu all over again." On July 23, 2003, a Board now composed predominantly of Bush administration appointees issued a notice inviting the filing of briefs by parties and interested amici in three representation cases, *Oakwood Healthcare, Inc.*, *Beverly Enterprises—Minnesota, Inc. (Golden Crest Healthcare Center)*, and *Croft Metals, Inc.*⁶⁸ These cases, one involving a hospital, one a nursing home, and one a manufacturing plant, are to be the vehicle through which the Board will attempt, yet again, to resolve how to interpret § 2(11), this time within the constraints of *Kentucky River*. Major employer organizations, the AFL-CIO and many major unions filed briefs, as did the NLRB General Counsel.⁶⁹ A General Counsel Memorandum instructs regional staff, both in handling ULP cases and when presiding in representation cases, to ensure a full factual record on these issues.⁷⁰

The Board's notice invites suggestions about the gamut of post-*Kentucky River* issues. Following directly from the Supreme Court's reasoning, it asks where to set the minimum "degree" or "scope of

⁶⁸ Notice and Invitation to File Briefs, *Oakwood Healthcare, Inc.*, NLRB Case No. 7-RC-22141; *Beverly Enterprises—Minnesota, Inc.*, d/b/a *Golden Crest Healthcare Ctr.*, Cases 18-RC-16415, 18-RC-16416; *Croft Metals, Inc.*, Case 15-RC-8393, July 25, 2003, <www.nlr.gov/nlr/press/releases/kyriver.pdf>.

⁶⁹ Brief of the General Counsel, *Oakwood Healthcare, Inc.*, NLRB Case No. 7-RC-22141; *Beverly Enterprises—Minnesota, Inc.*, d/b/a *Golden Crest Healthcare Ctr.*, Cases 18-RC-16415, 18-RC-16416; *Croft Metals, Inc.*, Case 15-RC-8393, *reprinted as attachment to Evidentiary Guidelines for Determining Supervisory Status*, GC Memorandum OM 04-09, Oct. 31, 2003, *available at* <http://www.nlr.gov/nlr/shared_files/ommemo/ommemo>.

⁷⁰ *Evidentiary Guidelines for Determining Supervisory Status*, GC Memorandum OM 04-09, Oct. 31, 2003, *available at* <http://www.nlr.gov/nlr/shared_files/ommemo/ommemo>.

discretion” for § 2(11) “independent judgment”; how to define “responsibly,” in “responsibly to direct”; how to differentiate or address the overlap between “assign” and “direct,” and how one can intelligibly distinguish between directing other employees and directing the manner in which others perform discrete tasks. The notice also requests views on additional fundamental issues of statutory construction, including how to resolve the tension between § 2(11)’s exclusion of supervisors and § 2(12)’s inclusion of professionals, whether a viable distinction can be drawn between § 2(11) “independent judgment” and § 2(12) “discretion and judgment,” and whether there are identifiable functions which can serve as points of demarcation to differentiate, in Congress’ words, between true supervisors possessing “genuine management prerogatives,” and “minor supervisory employees.” In reconciling the supervisory exclusion with the professional inclusion, the notice specifically asks, “[d]oes the Act contemplate a situation in which an entire group of professional workers may be deemed supervisors, based on their role with respect to less-skilled workers?” In addition, responders are asked to address an employer’s ability to rotate, alternate, or divide up supervisory functions among its workforce, so as to exclude the great majority of workers as statutory supervisors, or to devolve those functions to collective decisionmaking by self-regulating work teams. The final question seeks advice on the extent to which the Board should continue to take into account in supervisory status determinations the so-called “secondary indicia” such as ratio of supervisors to subordinates and proportion of time spent performing rank and file work by putative supervisors. These indicators are labeled “secondary” because they do not appear in the text of § 2(11), yet they have functioned as powerful markers, or as the General Counsel’s brief suggested, “circumstantial evidence” regarding the actual allocation of authority within a workplace, an important brake on manipulation of job content by employers to exclude many ordinary workers as supervisors.

In the meantime, *Kentucky River* has sharply affected union organizing and collective bargaining, especially among nurses and other health care workers. Employers have been emboldened to seek to exclude from NLRB rights entire existing as well as proposed bargaining units of staff nurses, sometimes on grounds of their professional task delegation to nursing aides or technicians and sometimes on the basis that the nurses rotate through or occasionally serve as substitutes in the position of charge nurse. One health care employer has deemed guard leaders working with two or three other guards to be supervisors and an automotive parts manufacturer has challenged as supervisory the team leaders of its self-directed production teams.⁷¹ Aided by the *Kentucky*

⁷¹ Decision and Direction of Election, Providence Everett Med. Ctr., Case 19-RC-14157 (Nov. 29, 2001) (leader security guards); Decision and Direction of Election, Borg Warner

River holding that the proponent of supervisory status bears the burden of proving it, unions continue to win favorable regional director decisions in about nine out of ten representation cases in which the employer seeks to exclude hospital or nursing home nurses as § 2(11) supervisors. However, since *Kentucky River*, employers have been filing requests for review in many of these cases. As of December 2004, one AFL-CIO lawyer estimated that there were over thirty pending before the NLRB, awaiting disposition of *Oakwood* and *Golden Crest*, in addition to those before the courts of appeals.

Kentucky River precludes the Board from interpreting “independent judgment” to differentiate based on the quality or nature of the judgment, but invites the Board to define the term by setting a minimum threshold of discretion which it would require the putative supervisor to have in the performance of at least one § 2(11) function before it would attach the “independent judgment” label. It also suggests that one permissible construction that might reconcile § 2(11) with the coverage of professionals in § 2(12) would be to treat direction of discrete tasks as insufficient to qualify as “responsible direction,” requiring instead that the worker “responsibly direct” other employees in their overall work. This has reopened, rather than settled, the issue of where and how to draw the line between “employees” and “supervisors,” putting into question nearly all established Board case law on all but the most clear-cut bosses, on the one hand, and laborers, on the other. At the least, it will entail a change in the Board’s analytical methodology, if not a change in outcomes. Moreover, because the Court has insisted that the Board may not devise a construction of § 2(11) that explicitly treats professionals differently from other employees, future cases construing § 2(11) will affect not only professionals and technicals, but also skilled trades workers directing apprentices and helpers, and leaders and machine set-up employees directing production employees.

When Taft-Hartley was enacted, it is highly improbable that Congress had any idea that its last-minute addition of “responsibly to

(Morse Tec, Inc.), (Case 17-RC-12183) (May 21, 2003) (team leaders of self-directed work teams); Decision and Direction of Election, HMR of Maryland, LLC, Case 5-RC-15444 (Sept. 13, 2002) (entire proposed RN and LPN bargaining unit, where nurses rotated through charge nurse positions); Decision and Direction of Election, Gordon Health Ventures, 6-RC-12195 (Mar. 25, 2003) (entire six RN and LPN bargaining unit on grounds that they served as shift supervisor/charge nurses with authority over the nursing assistants); Decision and Direction of Election, Hosp. Gen. Menonita, Inc., Case 9-RC-17602 (Feb. 21, 2002) (all eighty members of proposed RN staff nurse bargaining unit because of role utilizing technicians, LPNs and service personnel in patient care); Decision and Order, Integrated Health Servs., Inc., Case 6-UC-445 (Dec. 19, 2002) (petition for clarification of ten-year-old all-LPN bargaining unit effectively to eliminate entire unit based on LPNs’ role directing CNAs). All these decisions are available at <<http://www.nlr.gov/nlr/legal/decisions>>.

direct” to the list of twelve § 2(11) functions might lead to interpretation of the supervisory exclusion as encompassing most professionals, expressly covered in § 2(12) and § 9(b)(1), or the many skilled trades workers who delegate and oversee work of trainees, given special bargaining unit rights in § 9(b)(2). When the statute is read as a whole, such an interpretation would undermine effectuation of several provisions. It is clear from the legislative history that Congress had in mind foremen charged with running entire departments or production lines. The reports, statements, and speeches rarely refer to “supervisors,” but rather, most of the time, to “foremen.” This is consistent with the statement of Senator Flanders, who in proposing the insertion of “responsibly to direct” on the Senate floor said he merely wanted to ensure that even where a personnel department ignored the foremen’s recommendations on discipline or pay increases too often for them to satisfy the § 2(11) requirement that they be “effective recommendations,” a foreman with authority and control to run an operation would still be a statutory supervisor. Had Congress thought that provisions of the bill effectively would repeal NLRA coverage for ordinary skilled trades workers, because they delegate tasks to helpers and apprentices, the political forces of the day, particularly the AFL craft union affiliates, probably would have marshaled enough votes in Congress to block Taft-Hartley, or at least they would have prevented the override of President Truman’s veto. It is only when the pieces of § 2(11)—“responsibly to direct” and the other listed forms of authority, “in the interest of the employer,” and “independent judgment”—are dissected separately, extracted from their statutory and historical context, that one can conclude the contrary.

AFL-CIO Associate General Counsel Craig Becker, now filing briefs in the post-*Kentucky River* NLRB and court of appeals cases, summarized the situation: “As a legal matter it has been an interesting exercise. There is a strong argument based on the legislative history that Congress did not intend this group of workers to be excluded. However, the statutory language does not lend itself to an easy effectuation of this intent and the Board’s choice of means to effectuate that intent, moving first from ‘in the interest of the employer,’ shifting then to ‘independent judgment,’ was not necessarily the best possible.”⁷²

It remains to be seen whether yet another interpretative move under § 2(11) will suffice to reconcile the statutory command favoring inclusion of professionals with the command to exclude “true supervisors” to ensure employers the undivided loyalty of their representatives. There is a substantial risk of yet another replay of *HCR* and *Kentucky River*, whether the Board interprets “responsible direction” so as to

⁷² Telephone Interview with Craig Becker, December 17, 2004.

exclude direction of *ad hoc* tasks, or shifts to an interpretation of “independent judgment” setting a fairly high quantum of discretion as a threshold, or both. Moreover, whatever formula is adopted by the Board, it is likely to influence personnel practices in areas starting with the health care industry, but spreading far afield. Labor lawyers, industrial relations practitioners, and personnel specialists will no doubt rethink how they organize work and allocate functions, with an eye toward influencing legal consequences.

In the center of this picture of broader labor relations consequences is the plight of nurses, doctors, and other health care workers, and the undoing of the congressional intent behind the 1974 health care amendments that brought the industry under NLRA jurisdiction. The Supreme Court in *HCR* found the legislative history of these amendments to have no value in interpreting § 2(11) because that provision had been enacted by Congress twenty-seven years earlier. Nevertheless, the 1974 Congress clearly thought it was covering employee RNs, LPNs, MDs, and other health care professional and technical employees who, because of their specialized jobs, routinely delegate tasks to less-skilled workers. Had it believed otherwise, Congress might well have amended the definition of employee in the statute to cover them specifically, as the American Nurses Association had in fact requested. In 1974, the NLRA was amended because recognition strikes were disrupting health care and because low pay and poor working conditions for unorganized workers were driving the brightest and most talented out of the field. As it becomes progressively harder for nurses to organize, their pay and conditions worsen and the nursing shortage continues to grow—exactly the problems for the industry and for patients that Congress sought to avoid. In its reasoning in both *HCR* and *Kentucky River*, the Supreme Court tacitly assumes that by excluding such professional and technical workers from the protections of the Act, the employer will have their “undivided loyalty” because they will lose the statutory right to organize and bargain collectively. Depriving them of the right to organize does not guarantee their loyalty, and it does not prevent them from taking collective action—it merely moves the activity outside the regulation of the NLRA, restoring the status quo ante 1974. A new wave of recognition strikes for excluded “supervisor” nurses in hospitals and nursing homes could be the ultimate undoing of the goals of the 1974 legislation.

Conclusion

Unlike the typical NLRA organizing campaign story, in which the employer’s allegedly unfair labor practices or objectionable campaign activities take center stage, the *Kentucky River* story has focused on structural issues of bargaining unit composition. The bargaining unit is both an election district and a grouping for economic pressure tactics in

the heat of collective bargaining. The inclusion or exclusion from the protections of the Act of professional workers at the boundary line of supervisory authority affects both elections and the union's collective bargaining power. For the workers involved in *Kentucky River*, the union, the employer, and their trial counsel, the case was one focused on factual issues determining who would be included in the bargaining unit, hence whether the union would win the election and, ultimately, whether it could pressure the employer into a collective bargaining agreement. For the agency's lawyers, however, particularly at the appellate and Supreme Court level, as well as for the AFL-CIO, the *Kentucky River* story was mainly about technical legal issues and NLRB agency policy: the correct formula for interpreting the supervisor definition while preserving the right to organize and bargain for ordinary professional employees. For employers such as KRCC, the issue was how to ensure that the employer retains control over those workers representing it in directing subordinates.

For scholars of labor law and industrial relations, the focus is different still. *Kentucky River* flows through core structural questions about the Act. It compels reexamination of questions regarding which types of workers have rights of freedom of association and collective bargaining and how large a percentage of the workforce can be excluded from statutory coverage without rendering § 7 a hollow promise. In the early days of the Wagner Act, the foremen's unionization drives triggered a battle between those on the bottom and those on the top over the loyalties of those in the middle. In transmuted form, the battle continues today for the hearts and minds—and NLRA status—of workers who use skill and education to exercise judgment but who have little control over coworkers. In the modern workplace, with flattened managerial hierarchies, and with managerial authority pushed downward to the lowest possible level and distributed as widely as possible, a broad construction of the § 2(11) factors could render nearly everyone a supervisor excluded from employee status under the Act. Congress, the Board, and the courts have struggled with where to draw the line since the earliest days of the NLRA. They no doubt will continue to do so in an ever-growing volume of cases triggered by new forms of work organization in the Bermuda Triangle established at the intersection of *HCR* and *Kentucky River*.