TESTIMONY OF
U.S. CHAMBER OF COMMERCE

THE HR POLICY ASSOCIATION

THE SOCIETY FOR
HUMAN RESOURCE MANAGEMENT (SHRM)

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Jones Day

H.R. 1644-The Re-Empowerment of Skilled and Professional Employees in Construction Tradeworkers Act

The United States House of Representatives

Committee on Education and Labor – Subcommittee on Health, Employment, Labor and Pensions

"Are NLRB and Court Rulings Misclassifying Skilled and Professional Employees as Supervisors?"

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I. OVERVIEW

Good afternoon Chairman Andrews, and Members of the House Health, Employment, Labor and Pensions Subcommittee. My name is G. Roger King, and I am a partner in the Jones Day law firm. Jones Day is an international law firm with 2,200 lawyers practicing in 30 offices located both in the United States and throughout the world. We are fortunate to count more than 250 of the Fortune 500 employers among our clients. I have been practicing labor and employment law for over 30 years and I work with employer clients located in various parts of the country with varying workforce numbers. I am testifying today on behalf of the U.S. Chamber of Commerce, the HR Policy Association, and The Society for Human Resource Management ("SHRM") (collectively, the "Associations"), whose members collectively represent a substantial portion of this country's employers, and employ millions of American workers.

- The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

  More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

  Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states.

  Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

- HR Policy Association consists of chief human resource officers representing more than 250 of the largest corporations in the United States, collectively employing nearly 18 million employees worldwide. One of HR Policy's principal missions is to ensure that laws and policies affecting employment relations are sound, practical, and responsive to the realities of the workplace.

- The Society for Human Resource Management ("SHRM" or "Society") is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission

is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

The title of today's hearing is, *"Are NLRB and Court Rulings Misclassifying Skilled and Professional Employees as Supervisors?"* and, in addition to the subjects noted in such title, also includes a review of H.R. 1644, introduced by Chairman Andrews and other members of this Body.[2] This legislation, which is titled the "Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers Act" or the "RESPECT Act", would amend Section 2(11) of the National Labor Relations Act ("NLRA" or the "Act") (29 U.S.C. 152(11)) by:

- inserting the phrase "and for a majority of the individuals worktime" after the phrase "interest of the employer";
- striking the word "assign"; and
- by striking the phrase "or responsibility to direct them" [Section 2(11) of the NLRA states, "or responsibly to direct them" and apparently, H.R. 1644 contains a drafting error on this point].

Further, it is my understanding that H.R. 1644 is being proposed as a response to certain National Labor Relations Board ("NLRB" or "Board") decisions in the following cases: *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006); and *Croft Metals, Inc.*, 348 NLRB No. 38 (2006); commonly known as the *Kentucky River* Trilogy of cases. These cases, as the Subcommittee is well aware, concern the application of Section 2(11) of the NLRA to certain individuals in the workplace including, most particularly, nurses and leadpersons in a manufacturing facility.

At first glance, the NLRA amendments proposed in H.R. 1644 would appear to be of slight importance to our Nation's labor laws given their brevity and simplistic wording. Such a conclusion, however, would be erroneous. First, the suggested amendments to Section 2(11) are not, as some have suggested, simply a "correction" of the Board's *Kentucky River* Trilogy of cases. Second, H.R. 1644, if enacted, would negatively impact a wide variety of employers, not just the healthcare industry. Third, based upon an extensive review of federal court of appeals and NLRB decisions from 1995 to present, a case cannot be made to support the H.R. 1644 amendments – indeed, in a majority of the decisions of the courts and the Board since 1995 construing Section 2(11), the employees at issue were not found to be statutory supervisors. Fourth, the proposed amendments to the NLRA, if enacted, would seriously disturb the necessary but delicate equilibrium between management and labor in determining the scope and authority of employers' supervisory workforce. Indeed, H.R. 1644 would especially hurt small and medium businesses, and other employers, who utilize their supervisory workforce to concurrently perform Section 2(11) duties and also non-management functions. In a unionized setting, absent agreement from the union in question, such individuals would be precluded from

[2] A similar bill has been introduced by Senator Dodd in the other Body, Senate 969.

performing non-supervisory or bargaining unit work and employers would have to hire additional employees given such conflict or forego a portion of their business operation all together.

Establishing the appropriate "demarcation" labor law lines between management and non-management employees is extremely important from both a public policy and statutory perspective. The Congress in 1947, in enacting the Taft-Hartley amendments, clearly understood this important balancing and, indeed, spent considerable time and great care in drafting and enacting Section 2(11). Indeed, it is particularly helpful to review the historical context in which Section 2(11) came into being. The Congress, in reacting to labor strife and an imbalance of power in the workplace under the Wagner Act, spent considerable time in formulating a statutory framework to place employees either in a management category or in a non-management category. This Subcommittee should carefully study the history behind the enactment in 1947 of the Taft-Hartley amendments before proceeding with changes with respect to the NLRA generally, and specifically with respect to Section 2(11) of the Act.

If the delicate and appropriate balance of power is not maintained in deciding which employees belong in the management ranks and which employees should be excluded, employers of all types will have considerable difficulty in effectively and efficiently running their businesses and achieving appropriate objectives. Stated alternatively, if such balance of power tilts too far in one direction or the other, the Nation's economy can be severely and adversely impacted resulting not only in increased labor strife, but also in serious economic losses occurring. Employers ultimately must have the complete loyalty of a sufficient number of "supervisors" in their respective workforces if they are to deliver products, goods and services in an effective, productive and safe manner. Given the increasing global competition that this Country faces, this delicate balance of power in the workplace is even more critical to preserve today than perhaps it was in 1947.

Establishing the appropriate line between management and non-management employees is also exceptionally important for statutory compliance reasons. Indeed, under the NLRA alone, determination of who is and who is not a supervisor is at the very core of the Act and has many significant implications. For example "supervisory" status findings determine who:

- can form, join, or assist labor organizations;
- is eligible to vote in Board-conducted representation elections;
- can circulate decertification petitions and who is permitted to vote in a decertification election to remove a union; and
- has the right to boycott their employers, or engage in work stoppages.

Further, individuals who are determined to be supervisors are generally considered to be legal agents of their employers and, as such, an employer is bound by their acts including the potential of an adverse finding for such acts under the NLRA.

A determination of supervisory status also has important ramifications under other statutes. For example, an employer's supervisors, who, as noted above, are its legal agents, are often in large part responsible for an employer's compliance in such areas as:

- Occupation Safety and Health Act rules and regulations;
- Federal and state requirements to provide a workplace free of sexual and other harassment;
- Federal and State leave statutes, including the Family Medical Leave Act;
- Anti-discrimination statutes;
- Minimum wage and overtime requirements under the Fair Labor Standards Act; and
- A whole host of other federal and state labor and employment statutes, rules and regulations.

If an employer does not have the ability to select, control and demand the loyalty of such individuals, it will have considerable difficulty in complying with our Nation's labor and employment laws.

The legislation before the Subcommittee today has been interpreted by certain individuals, as noted above, as an effort to simply address perceived "overreaching" and incorrect analysis by the NLRB in the *Kentucky River* Trilogy of cases. Such a conclusion, however, it is submitted, is incorrect. The bill before the Subcommittee today goes considerably further than reacting to three recently decided NLRB cases, and would seriously damage the important equilibrium established in Section 2(11) of the Act in determining who is and who is not a part of management. Indeed, the Board has been unjustly criticized from certain quarters regarding these decisions. For example, only 12 out of between 168 and 178 employees being reviewed in these cases were found to be statutory supervisors; that is to say, less than 7% of the employees at issue in the *Kentucky River* Trilogy of cases were found to be Section 2(11) supervisors.[3] The prediction by the Economic Policy Institute ("EPI") and other organizations that millions of employees would suddenly be reclassified from non-supervisory status to Section 2(11) supervisory status is simply not only factually inaccurate, but also without any legitimate theoretical predicate.[4] Based on discussions with various types of employers throughout the

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[3] The total number of employees at issue in *Oakwood*, 348 NLRB No. 37, was 124. The total number of employees at issue in *Golden Crest*, 348 NLRB No. 39, was 19, and in *Croft Metals*, 348 NLRB No. 38, the number of employees at issue was between 25 and 35. Ultimately, only 12 permanent charge nurses in *Oakwood* were held to be statutory supervisors.

[4] *See* Economic Policy Institute Issue Brief #225, July 12, 2006 (http://www.epi.org/content .cfm/ ib225); *see also* Ross Eisenbrey, *Millions to Lose Overtime Pay*, The Montan Standard, August 17, 2004 (http://www.epi.org/content.cfm/webfeatures_viewpoints_OT_pay_loss); Ross Eisenbrey, *Longer Hours, Less Pay, Labor Department's new rules could strip overtime protection from millions of workers*, Briefing Paper #152, July 2004 (http://www.epi.org/content.cfm/briefingpapers_bp152); Ross Eisenbrey and Jared Bernstein, *Eliminating the Right to Overtime Pay, Department of Labor proposal means lower pay, longer hours for millions of workers*,

Country, including those of the Associations, and a review of NLRB case filings after the issuance of the *Kentucky River* Trilogy of cases, there have been virtually no employer initiated actions to reclassify employees from non-supervisory to Section 2(11) supervisory status under the Act.[5] In fact, a number of employers and unions have stipulated in their collective bargaining agreements not to challenge current bargaining units under the precedent set forth in the *Kentucky River* Trilogy of cases.[6] Moreover, the NLRB itself has recognized the limited impact the *Kentucky River* Trilogy of cases has had – despite any predictions to the contrary.[7]

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Briefing Paper #139, June 26, 2003 (http://www.epi.org/content.cfm/briefingpapers_flsa_jun03); and other articles published by EPI (http://www.epi.org), predicting that hundreds of thousands of workers would be reclassified from non-exempt to exempt status as a result of proposed regulations to the Fair Labor Standards Act by the United States Department of Labor. There have been no studies or data to support such sensationalistic and inaccurate prediction.

[5] Indeed, there has been arguably only one significant NLRB Regional Director decision on remand from the Board in light of the *Kentucky River* Trilogy of cases that has resulted in the reclassification of previously classified non-supervisory employees to Section 2(11) status. *See Salt Lake Regional Medical Ctr., Inc*, Case No. 27-RC-8157 (Region 27, Feb. 20, 2007). On remand, the Regional Director for NLRB Region 27 found that, of a total of eighty-eight nurses, sixty-four (or 73%) qualified as supervisors under Section 2(11) in light of the Board's recent rulings. The Regional Director came to such conclusion by way of the test for analyzing supervisory status under Section 2(11) – namely whether (i) the employee at issue has authority to engage in one of the twelve statutory criterion; (ii) the employee's performance of such activity is not routine or clerical, but exercised with independent judgment; and (iii) the employee spends a regular and substantial portion of his or her time engaging in such supervisory activity. (The issue of whether such activity was performed in the interest of the employer was apparently not at issue in the case.)

On remand, the employer only advanced evidence that the charge nurses had authority to assign duties to other nurses, and did so through the exercise of their independent judgment. The Regional Director found that the charge nurses had "full authority" to assign nurses and aids to particular patients, that such assignments which were rarely questioned by the staff, and that the record indicated that the employer took action against at least one employee who did not want to accept an assignment from a charge nurse. The Regional Director further found that the charge nurses *exercised independent judgment* in making such assignments because they considered a variety of factors, including the skill set of available staff members, the conditions and medical needs of the patients, the patients' personal preferences, and the personalities of the staff – all without any control by or detailed policy or instruction from the employer. Finally, the Regional Director held that, of the eighty-eight nurses at issue, sixty-four worked *regularly and substantially* in the charge nurse position because they worked at least ten percent of their time in the charge nurse positions, but "*the great majority of them worked considerably more than 10% of their time in the charge nurse position, and … they worked as charge nurse on a regular and recurring basis over numerous pay periods* …." (emphasis added) Accordingly, the ultimate issue in this case was the question of whether the nurses at issue met the independent judgment test, a part of Section 2(11) that is not touched by H.R. 1644.

[6] *See, e.g.*, *RNs at Two California Hospitals Gain Pay Increases and Job Security Provisions*, Collective Bargaining Newsletter, 12 COBB 43, April 12, 2007 (noting that the collective bargaining agreements for registered nurses at Stanford Hospitals & Clinics and Lucile Packard Children's Hospital in Palo Alto, California include language prohibiting the hospital from relying upon the *Kentucky River* Trilogy of cases to challenge the status of anyone currently in the bargaining unit); *NLRB Members Discuss Effects of Oakwood, Pending Cases*, Collective Bargaining Newsletter, 12 COBB 23, February 15, 2007 (noting a similar agreement between Kaiser Permanente and the unions representing its employees); *Las Vegas Hospital Accords Expand Staffing Protections*, Collective Bargaining Newsletter, 12 COBB 20, February 15, 2007 (noting similar language in the new contracts between the Service Employees International Union and Valley Hospital Medical Center and Desert Springs Medical Center in Las Vegas, Nevada); *Massachusetts Nurses at Two Hospitals Gain Wage Increases, Protected Job Status*, Collective Bargaining Newsletter, 11 COBB 145, December 7, 2006 (noting that Brigham and Women's Hospital and the Massachusetts Nurses Association included a provision in their contract that the hospital would not

A further fallacy with respect to certain initial analysis of H.R. 1644 is that it primarily would only have an impact on the healthcare industry. To be sure, the proposed amendments to the Act would seriously harm the definition of who is a supervisor in the healthcare workplace.[8] Such amendments, however, as noted in the appendices to this testimony, would potentially impact many different types of employers in the Country and impede their ability to successfully assemble a necessary "supervisory" workforce.[9]

Finally, in the short amount of time available to prepare for this hearing, we have reviewed the significant decisions issued by the United States Courts of Appeal and the NLRB from 1995 – the year after the United States Supreme Court handed down its decision in *NLRB v. Healthcare Retirement Corporation* ("*HCR*"),[10] the first lead Supreme Court case construing Section 2(11) – to the present (there are in excess of 1,500 Board and court cases in this time period that mention Section 2(11)). Based upon our analysis of these cases, the following conclusions can be reached:

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challenge the bargaining unit status of any employee based on the *Kentucky River* Trilogy of cases); *RN Union rights Protected Under Toledo Hospital Accord*, Collective Bargaining Newsletter, 11 COBB 134, November 9, 2006 (noting that the contracts between the United Auto Workers and St. Vincent Mercy Medical Center in Toledo, Ohio contained a similar provision).

[7] NLRB Member Dennis P. Walsh (D) stated that the NLRB has not received many unit clarification petitions after deciding the *Kentucky River* Trilogy of cases, and Member Peter N. Kirsanow (R) stated that the *Kentucky River* Trilogy of cases "is 'not going to have the kind of dramatic impact on supervisory status as some had thought before the decision was issued.' It is 'not an easy proposition' for management to exclude employees from the bargaining unit by making them supervisors …." *NLRB Members Discuss Effects of Oakwood, Pending Cases*, Collective Bargaining Newsletter, 12 COBB 23, February 15, 2007.

[8] *See* May 4, 2007 letter from the American Hospital Association and the American Organization of Nurse Executives to the Honorable Howard P. McKeon and the Honorable George Miller opposing H.R. 1644.

[9] *See, e.g.*, *Arlington Masonry Supply, Inc.*, 339 NLRB No. 99 (2003) (maintenance supervisor was found to be a 2(11) statutory supervisor. "[T]he employee is [not] required to regularly and routinely exercise the powers set forth in the statute. It is the existence of the power which determines whether or not an employee is a supervisor.") (citing *NLRB v. Roselon Southern, Inc.*, 382 F.2d 245, 247 (6th Cir. 1967)); *Progressive Transp. Servs., Inc.*, 340 NLRB No. 126 (2003) (deck lead supervisor who had the authority to recommend discipline was 2(11) statutory supervisor even though she performed all of the duties performed by the non-supervisor dispatchers); *Heartland of Beckley*, 328 NLRB No. 156 (1999) (licensed practical nurses ("LPN's") were 2(11) statutory supervisors because they had authority to discipline); *Pepsi-Cola Co.*, 327 NLRB No. 183 (1999) (account representatives who had authority to discharge were 2(11) statutory supervisors even though they may spend about 60 to 90% of their time performing to same tasks as non-supervisor merchandisers); *Beverly Enters. v. NLRB*, 166 F.3d 307 (4th Cir. 1999) (LPN's were 2(11) supervisors under the act because they exercised at least some independent judgment in assigning and disciplining for "almost one-half of their working hours"); *Beverly Enters. v. NLRB*, 165 F.3d 290 (4th Cir. 1999), (LPN's who were found to be were supervisors were the most senior staff working almost two-thirds of the time they worked); *Glenmark Assocs., Inc. v. NLRB*, 147 F.3d 333 (4th Cir. 1998) (LPN's who spent over two-thirds of their working time as the highest ranking employee and exercised independent judgment in assigning and disciplining were 2(11) supervisors); *see also*, *NLRB v. Attleboro Assoc. Ltd.*, 176 F.3d 154 (3rd Cir. 1999); *Integrated Health Servs. of Mich., at Riverbend, Inc. v. NLRB*, 191 F.3d 703 (6th Cir. 1999).

[10] 511 U.S. 571, 114 S.Ct. 1778 (1994).

- Many types of industries and businesses, not just healthcare, have been involved in litigation construing the application of Section 2(11) of the NLRA;

- The majority of United States Court of Appeals and Board decisions that have applied Section 2(11) have found that the employees in question are not statutory supervisors;

- The NLRB prior to its decision in the *Kentucky River* Trilogy of cases, was criticized twice by the United States Supreme Court, and also by a number of the United States Courts of Appeals, for its inconsistent and often result oriented approaches in applying Section 2(11) of the NLRA.

II. HISTORY OF SECTION 2(11) OF THE NLRA AND THE TAFT-HARTLEY AMENDMENTS

The conclusion of World War II was not only the beginning of a period of great prosperity for this Country, but also brought about considerable labor unrest. Many industries and their workers had been under the strict control of the War Labor Board and correspondingly had been constrained with respect to wage and benefit adjustments. When such controls were lifted after the War, a considerable number of work stoppages occurred. One of the problems identified in such settings was that a substantial portion of the workforce that many considered to be management employees became embroiled in strikes and other confrontations with their respective employers. Indeed, the Wagner Act provided virtually no guidance on who was a supervisor or part of management. This statutory void in part lead to the enactment of the Taft-Hartley Amendments to the NLRA in 1947. In discussing the supervisory issue, which became an important part of the Taft-Hartley Amendments, Senator Robert Taft, for instance, stated that "it is impossible to manage a plant unless the foremen are wholly loyal to the management."[11] The Senate Committee on Labor and Public Welfare noted that "[a] recent development which probably more than any other single factor has upset any real balance of power in the collective bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise."[12]

Although it was the Senate's definition of the term "supervisor" that was ultimately included in the Act, it is important to note that similar statements regarding the importance of supervisor loyalty were made in the House of Representatives. For instance, the House Committee on Education and Labor noted that employers, "as well as workers, are entitled to loyal representatives in the plants, but when the foreman unionize . . . they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them."[13] The House Committee concluded that "no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or

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11 93 Cong. Rec. 3952 (daily ed. April 23, 1947).

12 S. Rep. No. 80-105, at 3 (1947).

13 H.R. Rep. No. 80-245, at 14 (1947).

one whom, for any reason, he does not trust."[14] Importantly, the House Committee specifically listed "[d]octors, nurses, [and] safety engineers" as examples of the types of positions that must remain fully faithful to the interests of the employer, and not the unions.[15]

As Congress envisioned, supervisors with divided loyalties will be less effective to perform proper management functions and to carry out the business purposes of their employers. Section 2(11) thus seeks to ensure that employers have in place a reliable supervisory team to maintain efficient operations in their facilities. This is the policy that drives Section 2(11), and it is the policy that is espoused in the text of the Act.[16] In short, this is the policy to which the Board and the courts must adhere to in all events.[17]

Prior to passing the Taft-Hartley Act, Congress considered – and rejected – arguments that the language chosen for Section 2(11) was too broad and excluded too many persons from the Act's protections. The Minority Report from the House Committee on Labor and Education complained that although Congress had purported:

> to define the meaning of "supervisor," actually, supervisors play only a minor role in this definition, which includes all persons having only slight authority such as pushers, gang bosses, leaders, second hands, and a host of similarly placed persons with no actual supervisory status. It is sufficiently broad to cover a carpenter with a helper.[18]

Indeed, prior to the passage of the Taft-Hartley Act, the Board defined supervisors as those who "supervise or direct the work of other employees …, *and* who have authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees."[19] As the Supreme Court pointed out, "[t]he 'and' bears emphasis because it was a true conjunctive: The Board consistently held that employees whose only supervisory function was directing the work of other employees were not 'supervisors' within its test."[20] The Board's pre-Taft-Hartley Act definition of supervisor thus bears one striking difference with the one found in Section 2(11): "Whereas the Board [previously] required a supervisor to direct the work of other employees *and* perform another listed function, the [Taft-Hartley] [A]ct permit[s] direction alone to suffice."[21] As the Board pointed out in the *Oakwood* decision, "Senator Flanders, who offered the amendment adding the phrase 'responsibly to direct' to Section 2(11), believed that the

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14 *Id.* at 17.

15 *Id.* at 16.

16 *See NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1213, 1217 (7th Cir. 1996).

17 *See, e.g., Providence Hospital*, 320 NLRB 717, 726 (1996) (acknowledging the Supreme Court's mandate that the text of Section 2(11) must drive Board policy, "not the other way around").

18 H.R. Rep. No. 80-245, at 71 (1947).

19 *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 718, 121 S.Ct. 1861 (2001) (citing *Douglas Aircraft Co*., 50 NLRB 784, 787 (1943)).

20 *Id.* (citing as examples *Bunting Brass & Bronze Co.*, 58 NLRB 618, 620 (1944) and *Duval Texas Sulphur Co.*, 53 NLRB 1387, 1390-91 (1943)).

21 *Id.* at 719.

amendment addressed an element of supervisory status missing from an earlier amendment, which included 'assign' as 1 of 11 supervisory functions."[22] Thus, there can be no dispute that, even in 1947, Congress was aware of concerns as to the breadth of Section 2(11).[23] Nevertheless, Congress chose to adopt the provision – including the terms "assign" and "responsibly to direct" – plainly believing that its language was appropriate and needed to establish the proper balance between management and labor in the workplace. Correspondingly, however, the Congress, in 1947, excluded from supervisory status "straw bosses," "leadmen," and similar persons.

III. RECENT LITIGATION INVOLVING SECTION 2(11) OF THE NLRA

The Board, over the years, has often been accused of inappropriately taking a results-oriented approach to interpreting who is, or is not, a supervisor under Section 2(11). Commentators have noted that this inconsistent application of the definition of a supervisor has been quite favorable to organized labor: Often, in Board cases, "borderline individuals were found to be supervisors when that determination had the effect of attributing liability to an employer for an individual's actions . . . . In contrast, borderline individuals were found to be employees when that determination protects them from an employer's sanction."[24] Likewise, a number of courts of appeals have been critical of the Board's approach to interpreting Section 2(11).[25] For example, the United States Court of Appeals for the Fourth Circuit stated: "We are not the first court to wonder whether [the Board's] new interpretation [of independent judgment] is an end run around an unfavorable Supreme Court decision in order to promote policies of

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[22] 348 NLRB No. 37 (citing NLRB, Legislative History of the Labor Management Relations Act of 1947, 103-104).

[23] As previously noted, Congress ultimately adopted the Senate's version of Section 2(11). Nevertheless, while the House's version included as supervisors persons such as labor relations personnel and confidential employees, it was similar to the Senate's in that it defined a supervisor to include those with the authority to "hire transfer, suspend, lay off, recall, promote, discharge, *assign*, reward, or discipline." H.R. 3020, as reported, at Sec. 2(12)(A) (1947) (emphasis added). As such, the House Minority Report's critique may fairly be said to have encompassed the Senate's version as well.

[24] Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1713-27 (1981). *Politics Not As Usual: Inherently Destructive Conduct, Institutional, Collegiality and The National Labor Relations Board,* 32 Fla.St. U.L.Rev. 51 (2004), and *The Supreme Court's Rejection of Excluding "Ordinary Professional or Technical Judgment" As Independent Judgment When Directing Employees: Does Kentucky River Mean Lights Out for Mississippi Power?,* Kenneth R. Dolin, 18 Lab. Law 365 (2003).

[25] *See, e.g., Integrated Health Servs. of Mich.*, 191 F.3d at 707 (noting the Board's "'unique' misapprehension of the manner in which § 2(11) applies to nurses"); *Attleboro Assocs.*, 176 F.3d at 160 (noting the Board's "biased mishandling of cases involving supervisors") (internal quotations and citations omitted); *Spontenbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2nd. Cir. 1997) (noting "the Board's manipulation of the definition of supervisor"); *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1214 (7th Cir. 1996) (same); *Schnuck Mkts., Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992) (same); *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1067 (4th Cir. 1982) (same); *see also* Todd Nierman, *The RESPECT Act: A Bad Law With A Snappy Acronym Is Still A Bad Law*, Mondaq Bus. Briefing, April 24, 2007 ("Prior to 2006, the [NLRB] had a long history of inconsistently applying th[e] definition [of supervisor]. That inconsistency led several courts of appeals to question the deference to which the NLRB's decisions on this issue were entitled….").

broadening the coverage of the Act, maximizing the number of unions certified, and increasing the number of unfair labor practice findings it makes."[26]

Of most significance, though, are the two opinions from the United States Supreme Court – *NLRB v. HCR*[27] and *NLRB v. Kentucky River Comty. Care, Inc.*, ("*Kentucky River*")[28] – which plainly rejected the Board's interpretation of Section 2(11), and implored the NLRB to offer a clear working definition of "supervisor" that was faithful to the text of Section 2(11). In 1994, the Supreme Court issued its opinion in *HCR*, which concerned "the proper interpretation of the statutory phrase 'in the interest of the employer,'" specifically in the context of nursing.[29] The Board had held that a nurse's supervisory activity is not in the interest of the employer if such activity is incidental to the treatment of patients.[30] The Supreme Court summarily rejected the Board's interpretation, stating that it "makes no sense."[31] The Court found that the Board's interpretation of "in the interest of the employer" "created a false dichotomy … between acts taken in connection with patient care and acts taken in the interest of the employer."[32] The Court explained that "[p]atient care is the business of a nursing home, and it follows that attending the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer."[33] The Court saw "no basis for the Board's blanket assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer."[34] That is to say, while many acts performed by supervisors in a health-care setting are for clinical, patient-care reasons, such acts also further the employer's business objective – to provide health-care services. The *HCR* court was clear that "the statutory dichotomy the Board ha[d] created [was] no more justified in the health care field than it would be in any other business where supervisory duties are a necessary incident to the production of goods or the provision of services."[35]

The Court also criticized the Board for effectively – but implausibly – reading out of the Act the portion of Section 2(11) that provides that an individual who uses independent judgment to engage in responsible direction of other employees is a supervisor. In addition, the *HCR* court "did not share the Board's confidence that there is no danger of divided loyalty"[36] when nurses are summarily determined not to be supervisors under the Act. The Court noted:

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26 *Glenmark Assocs.,* 147 F.3d at 340 n.8.

27 511 U.S. 571.

28 532 U.S. 706.

29 511 U.S. at 574.

30 *Id.* at 576.

31 *Id*. at 577.

32 *Id*.

33 *Id*.

34 *Id.* at 577-78.

35 *Id*. at 580.

36 *Id*. at 580-81.

> Nursing home owners may want to implement policies to ensure that patients receive the best possible care despite potential adverse reaction from employees working under the nurses' direction. If so, the statute gives the nursing home owners the ability to insist on the undivided loyalty of its nurses. . . .[37]

In 2001, the Supreme Court issued its opinion in *Kentucky River*, affirming a decision of the United States Court of Appeals for the Sixth Circuit which held that six registered nurses who assigned and directed other employees were supervisors. The NLRB had held that these nurses' assignments and directions were merely the product of their superior skill and training – not the use of their "independent judgment." In response to the Board's holding, the Supreme Court asked rhetorically, but pointedly, "What supervisory judgment worth exercising, one must wonder, does not rest on 'professional or technical skill or experience?'"[38] The Court stated that the Board's interpretation of "independent judgment" had "insert[ed] a startling categorical exclusion into statutory text that does not suggest its existence[,]" and that "[t]he breadth of this exclusion is made all the more startling by virtue of the Board's extension of it to judgment based on greater 'experience' as well as formal training."[39] Ultimately the Court held that it could not enforce the Board's order based upon its interpretation of independent judgment.[40] In addition, the Court invited the Board to "offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*, as Section 2(11) requires."[41]

IV. THE *KENTUCKY RIVER* TRILOGY OF CASES

Given the sharp criticism the pre-Bush NLRB received from courts and commentators regarding its interpretation of Section 2(11), it was not surprising that the *Kentucky River* Trilogy of cases was a highly anticipated clarification of the Board's jurisprudence. In fact, the NLRB acknowledged the Supreme Court's disagreement with Board precedent on supervisory status and admitted that it "occasionally reached too far" in its attempts to not "construe supervisory status too broadly."[42] Given the importance of the decision, the NLRB "considered the record and briefs of the parties and *amici*, and the Supreme Court's decision in *Kentucky River*," and used the decisions as an opportunity to "refine the analysis to be applied in assessing supervisory status."[43] The Board explained that the "refined analysis honors [the NLRB's] responsibility to protect the rights of those covered by the Act; hews to the language of Section 2(11) and judicial interpretation thereof, most particularly the guidance provided by the Supreme Court in *Kentucky River* and other decisions; and endeavors to provide clear and broadly applicable guidance for

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37 *Id*. at 581.

38 532 U.S. at 715.

39 *Id*. at 714-15.

40 *Id*. at 721.

41 *Id*. at 720 (emphasis in original).

42 *Oakwood*, 348 NLRB No. 37.

43 348 NLRB No. 37.

the Board's regulated community."[44] Specifically, the Board in the *Kentucky River* Trilogy of cases "adopt[ed] definitions for the terms 'assign,' 'responsibly direct,' and 'independent judgment' …."[45]

In *Oakwood Healthcare, Inc.*, the Board, in a 3-2 decision, reversed the decision of the Regional Director and held that certain charge nurses in an acute-care hospital were supervisors where they were responsible for "overseeing the patient care units" and assigning other employees "to participate on their shifts."[46] NLRB Chairman, Robert Battista, and Members Peter Schaumber and Peter Kirsanow voted in the majority; Members Dennis Walsh and Wilma Liebman dissented. The *Oakwood* case arose in the context of an attempt by the United Auto Workers ("UAW") to organize registered nurses ("RNs") at Oakwood Heritage Hospital, in Taylor, Michigan, which employed approximately 180 staff registered nurses. These nurses served as "charge nurses" and were responsible "for overseeing the patient care units," assigning other employees "to patients on their shifts," and various other duties. Twelve RNs served as permanent charge nurses, while 112 RNs rotated at various times into the charge nurse position. The UAW filed a petition seeking a representation election of all RNs working at Oakwood. The Acting Regional Director for NLRB Region 7 issued a Decision and Direction of Election finding that none of Oakwood's charge nurses were supervisors and that all should be included in the voting unit. The employer filed a request for review, which the Board granted in light of *Kentucky River*.

In the *Oakwood* decision, the Board "construe[d] the term 'assign' to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.*, tasks, to an employee," because "the place, time, and work of an employee are part of his/her terms and conditions of employment." The Board further explained that "assign" refers to an individual's designation of "significant overall tasks [to an employee] … not to the [individual's] ad hoc instructions to perform discrete tasks." A significant overall duty, according to the NLRB, is less than a full "shift assignment" but more than one duty.

The NLRB next addressed the term "responsibly to direct." Agreeing with prior circuit court decisions, the Board held that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." As such, for an employer to meet the "responsibly to direct" test, it must show (1) "that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary," and (2) "that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps."

The NLRB also adopted a definition of independent judgment "[c]onsistent with the Court's *Kentucky River* decision …." Under the refined definition, "independent judgment"

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44 *Id.*

45 *Id.*

46 *Id.*

requires an employee to "act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." That is, where "detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement" dictate the outcome of the "judgment," it is not independent under the Act. Thus, the Board left open the door for narrowing the Section 2(11) definition by application of employer policy and procedure, legislation, or collective bargaining negotiations. Finally, the NLRB stressed that an individual must spend "a regular and substantial portion of his/her time performing supervisory functions" in order to be considered a supervisor under the Act. Although the Board has not adopted a strict numerical definition of "substantial," supervisory status has been found "where the individuals have served in a supervisory role for at least 10-15 percent of their total work time."

Applying these definitions to the facts at hand, the NLRB found that only the twelve permanent charge nurses qualified as supervisors under the Board's newly refined analysis. The NLRB noted that the employer offered no evidence that the charge nurses are required to take corrective action if other employees failed to follow their instructions, nor any evidence that the charge nurses were subject to lower evaluations or discipline as a result of their direction.

The Board did find, however, that the "charge nurses' assignments determine what will be the required work for an employee during the shift, thereby having a material impact on the employee's terms and conditions of employment." "Having found that the charge nurses hold the authority to [assign tasks, the] next step [was] to determine whether the charge nurses exercise[d] independent judgment in making the[] assignments." The Board found that only some of the charge nurses exercised independent judgment. Charge nurses on patient-care units "exercised the requisite discretion to make [an] assignment a supervisory function 'requiring the use of independent judgment'" because they made "assignment[s] based upon the skill experience, and temperament of other nursing personnel and on the acuity of the patients …." By contrast, charge nurses in the emergency department did not exercise independent judgment because they simply announced a rotating schedule when making assignments. **In its final analysis, the Board found that only the twelve permanent charge nurses were supervisors under the Act; the 112 nonpermanent or 'rotating' charge nurses did not act in supervisory roles with the requisite regularity to satisfy the Act.**

In *Golden Crest Healthcare Ctr.*,[47] the Board held, in a 3-0 decision, that charge nurses at a nursing home were not supervisors. The dispute arose out of an effort by the United Steelworkers to organize RNs and licensed practical nurses ("LPNs") employed by Golden Crest at an eighty-bed nursing home in Hibbing, Minnesota. Golden Crest employed eight RNs who worked as charge nurses, twelve LPNs, eleven of whom occasionally worked as charge nurses, thirty-six certified nursing assistants ("CNAs"), and five stipulated supervisors. Golden Crest contested the petitioned-for bargaining units, arguing that its RNs and LPNs acting as charge nurses were supervisors under the Act. The Regional Director in NLRB Region 18 issued a Decision and Direction of Election in March 1999, finding that charge nurses at Golden Crest were not supervisors under the NLRA. After much litigation on the issue, the NLRB granted the employer's request for review.

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[47] 348 NLRB No. 39.

In *Golden Crest*, the employer argued that its charge nurses "assigned" employees by ordering them to go home early, assigning them to different locations based on staffing needs, and mandating that employees come in to work from home or leave work early. According to the NLRB, however, these nurses did not have the authority to "require" that any action be taken; they merely made requests, failing to satisfy the definition of "assigning" announced in *Oakwood*. In addition, the NLRB held that the nurses did not "responsibly direct" because they would not experience any "material consequences" from the performance of their directing duties. Although the employer presented evidence that nurses were rated differently on their ability to direct, the Board held that the employer did not meet its burden: "[T]he mere fact that charge nurses were rated on this factor does not establish that any adverse consequences could or would befall the charge nurses as a result of the rating." The Board was looking for evidence that actual "action, either positive or negative, has been or might be taken as a result of the charge nurses' evaluation on this factor." Indeed, the burden of proof alone required under *Golden Crest* could limit the number of individuals who could otherwise be considered supervisors under Section 2(11) in future cases.

In the third opinion in the *Kentucky River* Trilogy, *Croft Metals, Inc.*,[48] the NLRB held that lead persons in an aluminum and vinyl window and door manufacturing facility were not supervisors under the Act. The dispute in *Croft Metals* arose in the context of a representation petition filed by the International Brotherhood of Boilermakers seeking to represent production and maintenance employees at Croft Metal's manufacturing facility in McComb, Mississippi. Croft Metals employed approximately 350 production and maintenance employees, about 15 statutory supervisors, and between 25 and 35 lead persons. These lead persons spent a "great deal" of their time engaging in the type of hands-on work performed by the undisputed unit employees. Lead persons were paid by the hour, while supervisors received a salary. Lead persons generally enjoyed benefits comparable to those of hourly potential bargaining-unit employees, as opposed to supervisors. Croft Metals argued that the lead persons were supervisors and should be excluded from the bargaining unit. The Acting Regional Director in NLRB Region 15 issued an opinion finding that the lead persons were not supervisors under the NLRA, and the Board granted review of the finding.

The NLRB first found that the "[l]ead persons do not assign employees to production lines or departments or to shifts or overtime periods … [or] to their job classifications … The employees allocated to the lead persons generally perform, consistent with their classification, the same tasks or job on the line or in their department every day … Occasionally, a lead person may switch tasks among employees on his line or in his crew during the shift … the lead persons may direct the employees as necessary to ensure that the projects are completed on a timely basis." According to the NLRB, this "sporadic rotation of different tasks by the lead persons more closely resembled an 'ad hoc instruction that an employee perform a discrete task' during the shift" rather than an assignment.

The Board did hold, however, that the lead persons did "responsibly direct" because "the lead persons direct individuals when they decide 'what job shall be undertaken next and who shall do it.'" In addition, there was a "specific showing of 'some adverse consequence befalling

[48] 348 NLRB No. 38.

the lead persons providing the oversight if the tasks performed [were] not performed properly….'" In the final analysis, the Board concluded that the lead persons were not supervisors because they did not exercise "independent judgment." The NLRB found that any discretion exercised was "routine or clerical," and most decisions were dictated by pre-established work rules. The holding in *Croft Metals* is consistent with prior Board precedent, which has generally held that "lead persons" do not qualify as "supervisors" under the Act.

V. THE "SO CALLED TENSION" BETWEEN SECTIONS 2(11) AND 2(12) OF THE NLRA

In the past, the Board has attempted to defend non-textually based limitations to Section 2(11) as a means to relieve the purported tension between Section 2(11)'s exclusion of "supervisors" from the Act's coverage and Section 2(12)'s inclusion of "professional" employees. *See, e.g.*, *Id*. at 719-20. In reality, however, the alleged conflict between the two sections has been greatly overstated. Furthermore, (1) to the extent that any such conflict exists, it does not and cannot justify interpretations of Section 2(11) that distort the plain and ordinary language of that Section; and (2) such "distinctions" do not support a case for enactment of H.R. 1644.

As former NLRB Member Charles Cohen pointed out in his dissent in *Providence Hosp*., 320 NLRB 717 (1996), the application of basic principles of statutory construction—such as the maxim that "each . . . section of the Act is to be given effect" and that "the Act is to be construed so as to avoid conflicts between the sections thereof"—reveals that there is no true conflict between Section 2(11) and Section 2(12). 320 N.L.R.B. at 736 (Cohen dissenting). As Member Cohen noted, it is, of course, true that professional employees are covered by the Act and supervisors are not. It is also true that some of the language in Section 2(11) is roughly paralleled in Section 2(12). Section 2(11) defines a supervisor, in part, as one who uses "independent judgment" in the execution of one or more enumerated activities. Section 2(12) defines a professional employee, in part, as one who uses "discretion and judgment" in the exercise of his or her duties. Nevertheless, the distinction between Section 2(11) and Section 2(12) is "substantial and real." *Id.* at 737.

> The supervisor exercises independent judgment with respect to the functions listed in Section 2(11), and he or she does so vis-a-vis employees. By contrast, the professional exercises discretion and judgment with respect to the task that he or she performs. A professional exercises discretion and judgment with respect to tasks that he or she performs.

Id. (emphasis added); *see also Attleboro Assocs*., 176 F.3d at 168 ("There is an obvious distinction between exercising independent judgment or acquired skill in completing a task, on the one hand, and using independent judgment in performing one of the 12 section 2(11) tasks, on the other hand.").

Member Cohen then went on to illustrate the distinction between an employee's use of judgment in the execution of a professional task assigned to the employee, and the use of judgment in supervision of other employees. He did so in the context of the nursing and in the context of directions given to other employees.

> Thus, for example, the task of devising a patient treatment plan involves the use of professional judgment. The nurse who devises that plan is a professional employee. But, the nurse who then administers the plan may have to exercise supervisory responsibilities vis-à-vis employees. For example, the nurse must decide which of the various tasks (outlined in the plan) must be done first, and the nurse must select someone to perform that task. In the words of Senator Flanders [the author of the Act's "responsibly to direct" language] the nurse must decide "what job will be undertaken next and who shall do it." In addition, the nurse must take steps to assure that the task is performed correctly. In the words of Senator Flanders, the nurse gives "instructions for its proper performance, and training in the performance of unfamiliar tasks."

Id. The Second Circuit has illustrated the distinction similarly:

> It may be the case that one who makes a judgment about the need for certain actions based on specialized knowledge and experience and exercises no further authority is not a statutory supervisor. But where the responsibility to make such a judgment and to see that others do what is required by that judgment are lodged in one person, that person is a quintessential statutory supervisor. For example, if one's responsibility for a particular patient is exhausted by indicating on a form a treatment program, the actual treatment being the entire responsibility of others, it may be that one is not a supervisor. However, where one must both determine a treatment and ensure that others administer the treatment, it can hardly be said that supervisory authority is not being exercised.

Schnurmacher, 214 F.3d at 268 (emphasis added). In short, then, when a professional employee exercises judgment in the execution of one of Section 2(11)'s listed functions—including the giving of directions to others—that employee is properly classified as a supervisor.

Such analysis[49] does not create "tension" between Section 2(11) and 2(12), but rather gives effect to the plain meaning of both provisions. In all events, even assuming *arguendo* that some tension did exist, the Supreme Court has repeatedly made clear that the Board may not "distort[] the statutory language" of Section 2(11) to resolve it. *Kentucky River*, 532 U.S. at 720 (quoting *HCR*, 511 U.S. at 581 (quoting *NLRB v. Yashiva Univ*., 444 U.S. 672, 686 (1980))). Plainly, "[t]he Act does not distinguish professional employees from other employees for the purposes of the definition of supervisor in Section 2(11)." *HCR*, 511 U.S. at 581; *see also Attelboro Assocs*., 176 F.3d at 168 ("Consequently, it is impossible to comprehend how a nurse's status as a professional employee negates her status as a supervisor."). As such, the Board and the courts may not avoid a straightforward and textually honest application of Section 2(11) in nurse-supervisor cases, or other cases involving professional employees, simply because it

[49] To be clear, in acknowledging the textually driven distinction between the exercise of judgment for the purposes of Section 2(11) and for the purpose of Section 2(12), we do not endorse the idea that there is a distinction between "directing the manner of others' performance of discrete tasks" and the direction of "other employees." Such a distinction is not supported by the text of Section 2(11). To the contrary, it would gut the very purpose for which the term "responsibly to direct" was added to the Act. *See, e.g*., 93 Cong. Rec. 4804 (daily ed. May 7, 1947) (statement of Sen. Flanders) (describing a supervisor who gives responsible direction as one who "gives instruction for proper performance" and "training in the performance of unfamiliar tasks to the worker to whom they are assigned") (emphasis added).

dislikes the results. *See Providence Hosp.*, 320 NLRB at 726 (acknowledging this Court's command that "Section 2(11) must drive Board policy, not the other way around").

VI. ORGANIZED LABOR'S REACTION TO THE *KENTUCKY RIVER* TRILOGY OF CASES

Organized labor has been highly critical of these opinions,[50] claiming that the *Kentucky River* Trilogy "welcomes employers to strip millions of workers of their right to have a union by reclassifying them as 'supervisors' – in name only."[51] Certain union-oriented publications rely upon the sensationalist article, *Supervisor in Name Only; Union Rights of eight million workers at stake in Labor Board ruling,* published by EPI more than two months *before* the Board issued the opinions. Despite the fact that the Board had yet to rule, and EPI did not know how the NLRB would ultimately refine the definition of supervisor, it none-the-less alleged that the *Kentucky River* Trilogy of cases would take away the right to unionize from 8 million Americans.[52] EPI also published a "State-by-State Analysis" of the *potential* impact of the Board's then-upcoming decision.[53] Upon a careful review of these critiques, however, it becomes apparent that EPI's analysis is without any factual basis and without any scholarly or academic value.

As an initial matter, in the very cases that EPI predicted would strip away the rights of millions to unionize, less than 7% of the employees at issue were found to be supervisors.[54] In fact, *Oakwood* was the only one of the three decisions to find that any of the disputed employees were supervisors, and in that instance, only twelve out of 124 nurses were held to be supervisors.[55] The NLRB held that none of the nineteen nurses in *Golden Crest* were supervisors under the Act,[56] and neither were the lead persons in *Croft Metals*.[57] Moreover, the unions ultimately won the certification elections at the facilities at issue in both *Golden Crest* and *Croft*

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[50] *See, e.g.,* James Parks, *Working Families Take Action on Anti-Worker Labor Board Ruling*, Oct. 4, 2006 (http://blog.aflcio.org/2006/10/04/working-families-take-action-on-anti-worker-labor-board-ruling); Nathan Newman, *Major Destruction of Workers Rights at NLRB Today*, Oct. 3, 2006 (http://www.tpmcafe.com/blog/coffeehouse/2006/oct/03/major_destruction_of_workers_rights_at_nlrb_today).

[51] *AFL-CIO President Sweeney On Today's Bush Labor Board Decision That Will Strip Workers of Union Rights*, Oct. 3, 2006 (http://www.aflcio.org/mediacenter/prsptm/pr10032006.cfm?RenderForPrint=1).

[52] Economic Policy Institute Issue Brief #225.

[53] Economic Policy Institute Policy Memorandum #115, *The Potential Impact of NLRB's Supervisor Cases, A State-by-State Analysis*, September 5, 2006 (http://www.epi.org/printer.cfm?id=2477&content_type=1&nice_name=pm115).

[54] The total number of employees involved in the *Kentucky River* Trilogy was somewhere between 168 and 178 (124 in *Oakwood*; 19 in *Golden Crest*; 25-35 in *Croft Metals*), and only 12 were found to be supervisors.

[55] 348 NLRB No. 37.

[56] The employer in *Golden Crest* employed 8 RNs who work as charge nurses and 12 LPNs, 11 of whom work at least occasionally as charge nurses, for a total of 19 charge nurses who could have potentially been supervisors. 348 NLRB No. 39.

[57] The employer had "roughly 25-35 lead persons …." 348 NLRB No. 38.

Metals. Since, the NLRB issued the *Kentucky River* Trilogy of cases, there do not appear to have been any published opinions regarding bargaining unit clarification issued by the Board that rely upon the *Kentucky River* Trilogy of cases. EPI's claim that 8 million workers would be reclassified as supervisors a result of the *Kentucky River* Trilogy of cases simply does not comport with the reality of the results and is yet another example of extreme sensationalism and highly inaccurate "findings" by this organization.[58]

Moreover, the majority in *Oakwood* specifically addressed the dissent's similar concern that the decision "threaten[ed] to sweep almost all staff nurses outside of the Act's protection."[59] Rejecting the argument that there would be a "sea change in the law," the majority was clear that it would not "start with an objective – for example, keep all staff nurses within the Act's protection – and fashion[] definitions from there to meet that targeted objective …." The majority, apparently skeptical of the doomsday predictions, explained that the Board does "not prejudge what the result in any given case will be. [It] shall continue to analyze each case on its individual facts, applying the standards set forth herein in a manner consistent with the Congressional mandate set forth in Section 2(11)." Moreover, the majority's approach was in line with prior judicial criticism on the Board's tendency to interpret Section 2(11) "in a unique manner" in the nursing context.[60]

Further, EPI's methodology was patently flawed. EPI's analysis relies on a definition of "supervisor" that is not based upon the definition of supervisor found in the NLRA. Instead, EPI used the Bureau of Labor Statistics' estimates of the share of supervisory duties possessed by the occupations assessed in the Bureau of Labor Statistics' National Compensation Survey ("NCS").[61] This "share" of supervisory duties is one of ten factors (*e.g.*, knowledge, complexity, personal contacts, etc.) used in the NCS, each of which is categorized at various levels. EPI identified those occupations at NCS' level 2 of supervisory duties as those that would be stripped of their right to unionize. Specifically, for purposes of its statistics, EPI considered employees supervisors where the "[i]ncumbent sets the pace of work for the group and shows other workers in the group how to perform assigned tasks. Commonly performs the same work as the group, in addition to lead duties. Can also be called group leader, team leader, or lead worker."[62] It is readily apparent that none of the twelve statutory indicia of a supervisor under Section 2(11) – authority to (1) hire; (2) transfer; (3) suspend; (4) lay off; (5) recall; (6) promote; (7) discharge; (8) assign; (9) reward; (10) discipline; (11) responsibly direct; or (12) adjust grievances – are

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58 *See, e.g.*, Ross Eisenbrey, *Millions to Lose Overtime Pay*, The Montana Standard, August 17, 2004 (http://www.epi.org/content.cfm/webfeatures_viewpoints_OT_pay_loss), Ross Eisenbrey, *Longer Hours, Less Pay, Labor Department's new rules could strip overtime protection from millions of workers*, Briefing Paper #152, July 2004 (http://www.epi.org/content.cfm/briefingpapers_bp152); Ross Eisenbrey and Jared Bernstein, *Eliminating the Right to Overtime Pay, Department of Labor proposal means lower pay, longer hours for millions of workers*, Briefing Paper #139, June 26, 2003 (http://www.epi.org/content.cfm/briefingpapers_flsa_jun03); and other articles published by EPI regarding the Department of Labor's proposed changes to the Fair Labor Standards Act regarding overtime pay available at http://www.epi.org.

59 348 NLRB No. 37.

60 *HCR*, 511 U.S. at 574; *see also Kentucky River,* 532 U.S. 706.

61 Economic Policy Institute Issue Brief #225.

62 Economic Policy Institute Issue Brief #225.

present in this definition. EPI's statistics, therefore, hold little, if any weight, given that they rely upon a definition of supervisor wholly unrelated to Section 2(11). Further, if EPI's description of a "supervisor" is any way related to the decisions found in the *Kentucky River* Trilogy of cases, it could only be with the definition of a "lead person." For example, in *Croft Metals*, the lead persons spent a large amount of their time performing the same work as the putative bargaining-unit employees, although they occasionally performed lead duties, such as switching tasks among employees and sometimes directing employees as necessary to complete a project. Under prior NLRB precedent, such "lead person" was generally not considered to be a "supervisor," and the *Kentucky River* Trilogy of cases did not stray from this precedent. Indeed, the lead persons in *Croft Metals* were held not to be supervisors because their purported authority to assign more closely resembled an "ad hoc instruction that an employee perform a discrete task." Clearly, the definition of supervisor relied upon by EPI in its statistics would not be considered a supervisor under the *Kentucky River* Trilogy of cases or prior Board precedent. By using a definition of what constitutes a supervisor that is wholly unrelated to Section 2(11) and related jurisprudence, EPI has inflated the number of affected employees and distorted the overall impact of the Board's decisions. Again, one only need look to the actual results of the *Kentucky River* Trilogy of cases to realize the extent of EPI's exaggeration.

VII. THE H.R. 1644 AMENDMENTS

To properly analyze the proposed amendments contained in H.R. 1644, one first needs to review Section 2(11) in its entirety. Section 2(11) states:

> The term "supervisor'" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[63]

There is unanimity that only one of the twelve statutory indicia of supervisory status needs to be present in order for an employee to be a supervisor under Section 2(11).[64] The inquiry, however, does not end there. The very text of Section 2(11) sets forth a three-part test for determining supervisory status: "Employees are statutory supervisors if[:]

(1) they hold the authority to engage in any 1 of the 12 listed supervisory functions[;]

(2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment[;]' and

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63 29 U.S.C. 152(11).

64 *See Kentucky River*, 532 U.S. at 713; *Oakwood*, 348 NLRB No. 37.

(3) their authority is held 'in the interest of the employer.'"[65]

In addition, the individual must "spend[] a regular and substantial portion of his/her work time performing supervisory functions."[66] Under this test, "'regular' means according to a pattern or schedule as opposed to sporadic substitution."[67] The NLRB has not adopted a strict, numerical, definition of "substantial," but has found that at least 10-15% of the individual's work time will suffice.[68] Finally, although the NLRA "does not … expressly allocate the burden of proving or disproving a challenged employee's supervisory status … [t]he Board … has filled the statutory gap with the consistent rule that the burden is borne by the party claiming that the employee is a supervisor[,]" a rule that has been accepted by the Supreme Court.[69] Thus, it is clear that there are safeguards within the statute to exclude from the definition of supervisor those who only engage in one of the twelve criterion without any of the other trappings of a statutory supervisor. The Board's decision in *Croft Metals* is a good example of these safeguards in action, where the lead persons had authority to and did responsibly direct other employees to perform certain tasks, but did so in a routine or clerical nature because their decisions were dictated by the employer's pre-established work rules. What is clear from the existing analysis of supervisory status is that the process is reasoned and informed, and, as discussed more fully below, does not easily lead to a finding of supervisory status. This thorough analysis helps to maintain the proper balance between management and labor.

The proposed amendments included in the RESPECT Act – striking "assign" and "responsibility to direct" [Section 2(11) contains the phrase "responsibly to direct" and apparently, H.R. 1644 contains a drafting error on this point] – are clearly targeted at the Board's recent clarification of Section 2(11) found in the *Kentucky River* Trilogy of cases and are without doubt founded in part upon EPI's incorrect doomsday predictions that millions of employees would be stripped of their right to unionize. Interestingly, it should be noted that the H.R. 1644 amendments would have had little impact on the decisions in the *Kentucky River* Trilogy of cases – if at all. Such amendments arguably would only have changed the status of the 12 employees who were actually found to be supervisors out of somewhere between 168 and 178 total employees in all three cases. Indeed, the twelve nurses in *Oakwood* who were found to be supervisors because they spent a *regular and substantial* amount of their time exercising their authority to "assign" through the use of their *independent judgment*. Additionally, the majority's interpretation of "assign" is not as all-encompassing as some would claim, and in fact conforms to the guidance provided by the Supreme Court as well as the text and legislative history of the statute. The NLRB was clear that it did not interpret assign to encompass an "ad hoc instruction that the employee perform a discrete task," but rather the "designation of significant overall duties." Additionally, as discussed above, Congress intentionally included the criterion "responsibly to direct" after consideration of the Board's prior definition of supervisor under

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65 *Kentucky River,* 532 U.S. at 713 (citing *HCR*, 511 U.S. at 573-74).

66 *Oakwood*, 348 NLRB No. 37 (citing *Brown & Root, Inc.*, 314 NLRB No. 19, 21 (1994); *Gaines Electric Co.*, 309 NLRB 1077, 1078 (1992); and *Alladin Hotel*, 270 NLRB 838 (1984)).

67 *Id.*

68 *Id.*

69 *Kentucky River*, 532 U.S. at 710-11.

which such activity alone would not qualify an employee as a supervisor. Furthermore, the *Kentucky River* Trilogy of cases did not create any categorical exclusions, or inclusions, to the definition of a supervisor under Section 2(11). Rather, as the majority in *Oakwood* explained, the NLRB "shall continue to analyze each case on its individual facts, applying the standards set forth herein in a manner consistent with the Congressional mandate set forth in Section 2(11)."

With respect to the addition of "and for a majority of the individual's worktime" after "interest of the employer," this amendment is an unnecessary addition to the statute. First, as the NLRB pointed out in the *Oakwood* decision, when an employee engages in a supervisory role only part of the time, such time must be both a "regular and substantial portion of his/her work time" for the employee to be considered a statutory supervisor. Notably, the 112 rotating charge nurses in *Oakwood* were not found to be supervisors because there was no "showing of regularity for assigning the 'rotating' charge nurses," thus the Board did "not decide whether these RNs possess the 'rotating' charge nurse duties for a 'substantial' part of their work time."[70] To be sure, an employee can be a statutory supervisor if he or she engages in supervisory activities less than fifty percent of the time, but occasional or isolated instances of supervisory functions surely do not qualify. As one commentator has pointed out, the NLRB takes a qualitative and not quantitative approach.[71] The addition of "for a majority of the individual's worktime" would only add an arbitrary temporal criterion to the statute.

Furthermore, our survey of NLRB and federal court litigation involving Section 2(11) from 1995 to present, indicates that in many instances the Board and the courts have not found individuals to be supervisors under Section 2(11) of the Act. (*See* Appendix 1, Appendix 2) In half of the federal court cases, the employees at issue were not found to be supervisors, and in the instances in which the court did find them to be supervisors, the finding was generally based on grounds other than, or in addition to, their authority to "assign" or "responsibly to direct." (*See* Appendix 1) The decisions by the NLRB since 1995 are quite similar. (*See* Appendix 2) The majority of the NLRB decisions found that the employees at issue were not supervisors, and in the majority of those cases where the employees were held to be statutory supervisors, such determination was based on criteria other than, or in addition to, authority to "assign" or "responsibly to direct."

Additionally, one can reach the conclusion that decisions of the NLRB prior to the present Bush Board inconsistently interpreted Section 2(11), by failing to properly apply the requirements of Section 2(11). The decisions of the United States Supreme Court in *Kentucky River* and *HCR*, discussed above, would appear to clearly validate such conclusion. Further, analyses of Board decisions prior to 1995 also reached the conclusion that the Board was not only incorrect in their analysis and application of Section 2(11), but did so in a result oriented fashion. For example, in the article "The NLRB and Supervisory Status: An Explanation of Consistent Results" the author concluded that in many Board cases "borderline individuals were found to be supervisors when that determination had the effect of attributing liability to an

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[70] The Board had noted that a substantial portion must be at least 10-15 percent of the employee's total work time. *Oakwood*, 348 NLRB No. 37.

[71] *See*, Todd Nierman, *The RESPECT Act: A Bad Law With A Snappy Acronym Is Still A Bad Law*, Mondaq Bus. Briefing, April 24, 2007.

employer for an individual's actions. . . . In contrast, borderline individuals were found to be employees when that determination protects them from an employer's sanction.[72]"

Mr. Chairman and Members of the Subcommittee, one thing I believe that all interested stakeholders to this discussion can agree, whether they be members of the Board, the federal judiciary, employer or union representatives, that it is important for there to be clarity and predictability in the application of Section 2(11) of the NLRA. Such clarity and predictability is indeed important for stability in labor relations in this country. All stakeholders should think carefully, however, before pursuing any changes, not only to the NLRA generally, but particularly, to Section 2(11) of the Act. As noted above there are many important public policy and statutory considerations that went into the drafting of this Section of the NLRA. While it is not perfect in its statutory construction – like many of our statutes – it does represent a carefully crafted equilibrium between the interest of management and labor. If this Subcommittee intends to pursue a dialogue in this area, much greater consideration should be given to this topic.

Mr. Chairman, and Members of the Subcommittee, thank you for permitting me to share my views with you this afternoon. I would be happy to answer any questions that you may have.

[72] Note, the NLRB and supervisory status: "an explanation of inconsistent results", 94 Hrv.L.Rev. 1713, 1713-27 (1981).

APPENDIX 1

Survey of U.S. District Court of Appeals Decisions Since 1995
In Which the Definition of Supervisor Under Section 2(11)
Was a Component of the Court's Holding

Case	2(11) Aspect of Case
Jochims v. NLRB, No 05-1455, 2007 U.S. App. LEXIS 6756 (D.C. Cir. March 23, 2007)	Charge nurse did not possess the ability to "discipline" under Section 2(11) where she merely had the ability to issue written reprimands. Also, charge nurse did not exercise "independent judgment" in (i) sending two employees home after gross misconduct, and (ii) completing another employees evaluation because management instructed her to undertake both tasks.
NLRB v. St. Clair Die Casting, L.L.C., 423 F.3d 843 (8th Cir. 2005)	Set-up specialists were not supervisors under the Act where set-up specialists did not exercise independent judgment in disciplining other employees or in assigning tasks and did not recommend personnel action in their evaluations.
NLRB v. Dole Fresh Vegetables, Inc., 334 F.3d 478 (2003) (6th Cir. 2003)	Leads were not supervisors where the leads did not possess any of the supervisory indicia under Section 2(11). Court specifically found that the leads did not assign or responsibly direct.
Public Serv. Co. of Col. v. NLRB, 271 F.3d 1213 (10th Cir. 2001)	Overturned Board's ruling based on Board's misinterpretation of the term "independent judgment."
Integrated Health Servs. of Mich., at Riverbend, Inc. v. NLRB, 191 F.3d 703 (6th Cir. 1999)	The Court, in a blistering opinion, overturned the Board's ruling and held that staff nurses were supervisors because the nurses scheduled, assigned, disciplined and directed.
NLRB v. Hilliard Dev. Corp., 187 F.3d 133 (1st Cir. 1999)	Charge nurses were not supervisors where they didn't act with independent judgment.
Cooper/ T. Smith, Inc. v. NLRB, 177 F.3d 1259 (11th Cir. 1999)	Docking pilots were not supervisors under the Act because they did not exercise independent judgment in assigning and responsibly directing other employees.
NLRB v. Attleboro Assoc. Ltd., 176 F.3d 154 (3rd Cir. 1999)	Court found that charge nurses were supervisors under the Act because they exercised independent judgment in administering discipline, adjusting grievances, and assigning.

Case	**2(11) Aspect of Case**
NLRB v. Grancare, Inc., 170 F.3d 662 (7th Cir. 1999)	Licensed practical nurses ("LPN's") were not supervisors because they did not exercise independent judgment in their assignment, scheduling, and disciplining functions.
Beverly Enters. v. NLRB, 166 F.3d 307 (4th Cir. 1999)	LPN's were supervisors under the act because they exercised at least some independent judgment in assigning and disciplining for "almost one-half of their working hours."
Beverly Enters. v. NLRB, 165 F.3d 290 (4th Cir. 1999)	LPN's were supervisors because they acted on behalf of the employer, and exercised independent judgment in assigning, directing, and disciplining. LPN's were the most senior staff working almost two-thirds of the time they worked.
Beverly Enters. v. NLRB, 148 F.3d 1042 (4th Cir. 1998)	The LPNs were not supervisors because they did not exercise any of the supervisory indicia with independent judgment.
Glenmark Assocs., Inc. v. NLRB, 147 F.3d 333 (4th Cir. 1998)	The LPN's who spent over two-thirds of their working time as the highest ranking employee and exercised independent judgment in assigning and disciplining.
Edgewood Nursing Ctr., Inc. v. NLRB, No.'s 96-6236, 96-6322, 1998 U.S. App. LEXIS 3151 (Feb. 24, 1998)	Court held that charge nurses were supervisors under the Act because they exercised independent judgment in responsibly directing other employees.
Grancare, Inc. v. NLRB, 137 F.3d 372 (1998)	Court held that charge nurses exercised independent judgment in assigning, responsibly directing, and disciplining.
Providence Alaska Med.l Ctr. v. NLRB, 121 F.3d 548 (9th Cir. 1997)	Court found that charge nurses did not exercise independent judgment in carrying out any supervisory function.

APPENDIX 2

Survey of NLRB Decisions Since 1995
In Which the Definition of Supervisor Under Section 2(11)
Was a Component of the Board's Holding

Case	**Section 2(11) Aspect of Case**
Croft Metals, Inc., 348 NLRB No. 38 (2006)	The Board held that lead persons in a manufacturing facility were not statutory supervisors. The lead persons did not "assign" because they did not have "authority to require" other employees to undertake the actions in question. The lead persons did, however, manage their assigned team, correct inadequate performance, and move employees to different tasks. Still, the lead persons were not supervisors under the Act.
Golden Crest Healthcare Ctr., 348 NLRB No. 39 (2006)	The Board held that the charge nurses lacked the supervisory authority to assign and responsibly direct other employees. The charge nurses lacked the authority to send certified nursing assistants ("CNAs") home early, to reassign CNAs to other tasks, or to require CNAs to stay late. The Board determined that the employees at issue did not meet the supervisory requirements of Section 2(11).
Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006)	Charge nurses were responsible for "overseeing the patient care units" and assigning other employees to patients during the shift. The Board held that twelve charge nurses met the definition of a supervisor under the Act. However, the Board also held that 112 other charge nurses, including rotating charge nurses, did not have sufficient authority, duties, discretion, and accountability to meet the definition of a supervisor. The Board concluded that the employer failed to demonstrate that the charge nurses "were accountable for the performance of the task" and, thus, did not responsibly direct under the Act. However, the duties of the charge nurses did meet the statutory definition of "assign" because they regularly assigned nursing personnel to specific patients during the shift.
J.C. Penney Corp., Inc., 347 NLRB No. 11 (2006)	The Board held that a training supervisor did not meet the supervisory status requirements of Section 2(11). The training supervisor lacked hiring decision authority and simply steered applicants through the system.

Case	**Section 2(11) Aspect of Case**
Dynasteel Corp., 346 NLRB No. 12 (2005)	A maintenance department fitter and welder was not a supervisor under the Act because none of the primary supervisory indicia under Section 2 (11) were established. Board held that the signing of disciplinary warnings against other employees did not show supervisory status. Further, the Board held that the fitter and welder did not have authority to hire, fire, transfer, or discipline employees.
Mountaineer Park, Inc., 343 NLRB No. 135 (2004)	The Board held that "assistant supervisors" in the housekeeping department were supervisors within the meaning of Section 2 (11). The Board held that the assistant supervisors had authority to "effectively recommend" discipline and also possessed secondary indicia of supervisory authority (they earned a higher wage and wore the same uniforms as stipulated statutory supervisors.)
Volair Contractors, Inc., 341 NLRB No. 98 (2004)	The Board held that the employer failed to show that a pipe fitter/welder was a supervisor by virtue of either his assignment of work to and direction of his crewmembers, or alleged disciplinary authority, because the employer failed to show that the pipe fitter/welder exercised authority using independent judgment, as required by Section 2 (11).
Arlington Masonry Supply, Inc., 339 NLRB No. 99 (2003)	The Board held that a "maintenance supervisor" was statutory supervisor under Section 2 (11). The "maintenance supervisor" prioritized work needs, made assignments, exercised discretion, created schedules, and granted time off.
Dean & DeLuca New York, Inc., 338 NLRB No. 159 (2003)	The Board held that a buyer was not a statutory supervisor, even though the individual periodically held management meetings, was in charge of the store on Saturdays and may have filled out personnel reviews. The Board also held that the manager of a maintenance department was not a statutory supervisor, even though he made schedules, closed the store at nights, and allegedly had firing authority. The activities of the employees did not establish supervisory status under Section 2 (11).

Case	Section 2(11) Aspect of Case
Los Angeles Water and Power Employees' Assoc., 340 NLRB No. 146 (2003)	The Board held that an employer failed to establish that an "accountant" was a supervisor under Section 2 (11). The Board found no merit in the employer's contention that the accountant acted for the office manager when he was out, and had the authority to assign employees and recommend the hiring and disciplining of employees.
Progressive Transp. Servs., Inc., 340 NLRB No. 126 (2003)	The Board held that a "deck lead supervisor" was a supervisor within the meaning of Section 2 (11) of the Act. The Board held that the "deck lead supervisor" had authority to effectively recommend discipline and possessed several secondary indicia of supervisory authority.
Visiting Nurses of Health Midwest, 338 NLRB No. 113 (2003)	The Board held that the employer failed to establish that a clinical coordinator was a supervisor under the Act. The employer contended that the clinical coordinator was a supervisor because she assigned patients needing IV therapy to line employees.
American Commercial Barge Line Co., 337 NLRB No. 168 (2002)	The Board held that pilots were supervisors under the Act because they had authority to direct the towboat crew in their work and to assign work.
Heritage Hall, E.P.I. Corp., 333 NLRB No. 63 (2001)	The Board held that LPNs were not statutory supervisors. The employer's contention that the LPN job description which included language about supervising nursing assistants was not dispositive of their status. Further, the record did not establish that the LPNs' assignment authority over the nursing assistants was anything more than routine in nature.
Ken-Crest Servs., 335 NLRB No. 63 (2001)	The Board held that the program managers were not supervisors within the meaning of Section 2 (11) of the Act. The Board found that the program managers did not actually resolve minor grievances. Further, the Board found that their limited authority to resolve minor disputes is insufficient to establish supervisory authority.

Case	Section 2(11) Aspect of Case
Michigan Masonic Home, 332 NLRB No. 150 (2000)	The Board held that the LPNs were not supervisors within the meaning of Section 2 (11) of the Act. The Board found that the employer had not met its burden of establishing that the LPNs performed a supervisory function in disciplining employees.
Training School at Vineland, 332 NLRB No. 152 (2000)	The Board held that group home managers were not supervisors within the meaning of Section 2 (11) of the Act. The employer contended that the group home managers assigned, directed, effectively recommended hiring, effectively recommended discipline, and evaluated direct care workers. The Board found that the employer did not establish that the group home managers possessed any of the claimed statutory supervisory authority as their responsibilities did not evidence the requisite independent judgment.
Acme Markets, Inc., 328 NLRB No. 173 (1999)	The Board affirmed the Regional Director's decision that pharmacy managers are not statutory supervisors as defined in Section 2 (11) of the Act. There was no record evidence that the pharmacy managers possessed supervisory authority and in the limited instances where pharmacy managers were involved in employee discipline, their involvement was insufficient to demonstrate effective recommendation of discipline.
Crittenton Hospital, 328 NLRB No. 120 (1999)	The Board held that the nurses did not possess any of the indicia of supervisory status under Section 2 (11). The nurses' participation in the evaluations process did not demonstrate a link between the evaluation and an effect on employee job status.
Elmhurst Extended Care Facilities, Inc., 329 NLRB No. 55 (1999)	The Board held that the charge nurses were not Section 2 (11) supervisors. The employer did not show that the nurses' completion of annual evaluations lead directly to personnel actions that affected the wage or job status of nursing assistants.

Case	Section 2(11) Aspect of Case
Heartland of Beckley, 328 NLRB No. 156 (1999)	The Board found that the licensed nurse practitioners possessed Section 2 (11) supervisory authority. The Board found that the nurses had the authority to discipline within the employer's progressive disciplinary system.
Macy's West, Inc., 327 NLRB No. 201 (1999)	The Board found that a chief engineer was not a statutory supervisor within the meaning of Section 2 (11). The record failed to establish that the chief engineer's role, based on his technical expertise, in assigning and directing maintenance engineers, involved the use of independent judgment required under Section 2 (11).
Masterform Tool Co., 327 NLRB No. 185 (1999)	The Board found that leadmen were not supervisors under Section 2 (11). The Board found that the leadmen's assignment and direction of employees involved typical routine decisions without any exercise of independent judgment.
McGraw-Hill Broad. Co., 329 NLRB No. 48 (1999)	The Board found that producer/directors were not statutory supervisors under the Act. The Board found that where individuals are a part of an integrated team in which their skills and responsibilities are collaborative to develop a single product, there is not a showing of Section 2 (11) supervisory status. Further, the Board found that the producer/directors did not exercise independent judgment in assigning employees; also, their authority to give directions to the employees working with them was not supervisory authority.
Pepsi-Cola Co., 327 NLRB No. 183 (1999)	The Board found that all account representatives who have merchandisers assigned to them are supervisors as defined by Section 2 (11). The Board found that the account representatives were statutory supervisors based on their authority to discharge the merchandisers assigned to them.

Case	Section 2(11) Aspect of Case
Vencor Hospital – Los Angeles, 328 NLRB No. 167 (1999)	The Board held that the RN team leaders did not possess any supervisory indicia within the meaning of Section 2 (11) of the Act. The Board held the RN team leaders did not assign or independently direct employees, did not discipline or effectively recommend disciplinary action, and did not use independent judgment in completing employee evaluations.
Custom Mattress Mfg., Inc., 327 NLRB No. 30 (1998)	The Board found that an employee in the sewing department was not a Section 2 (11) supervisor. The employee did not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, discipline, direct, or adjust grievances or recommend such action. The employee's higher wage and ability to make recommendations concerning wage increases did not amount to Section 2 (11) supervisory status.
Ryder Truck Rental, Inc., 326 NLRB No. 149 (1998)	The Board found that a technician in charge was not a Section 2 (11) supervisor. The Board held the technician did not independently discipline others, did not independently assign work to others, and did not independently assign overtime.
Youville Health Care Ctr., Inc., 326 NLRB No. 52 (1998)	The Board held that charge nurses were not supervisors under Section 2 (11). The Board held that the record demonstrated that the nurses' authority was routine and did not require the use of independent judgment.
Byers Engineering Corp., 324 NLRB No. 125 (1997)	The Board found that a leadman was not a supervisor under Section 2 (11). The Board held that while the leadman did have some authority to make and adjust assignments and direct the work of others, the record did not establish that he used independent judgment.

Case	Section 2(11) Aspect of Case
St. Francis Medical Ctr. – West, 323 NLRB No. 185 (1997)	The Board found that a production leader was not a Section 2 (11) supervisor. The Board held that while the production leader substituted for a manager about 5 of the 10 months proceeding the election, the substitution was not regular, was only temporary and was not likely to recur. Further, even after returning to his regular duties, the production leader's direction of employees was simply routine and did not require use of independent judgment.
Azusa Ranch Market, 321 NLRB No. 112 (1996)	The Board held that a "liquor manager" and "key carriers" were not Section 2 (11) supervisors. The Board held that the limited authority of the employees to assign routine duties to other employees was insufficient to warrant a finding of supervisory status
Rest Haven Living Ctr., Inc., 322 NLRB No. 33 (1996)	The Board held that LPNs were not Section 2 (11) supervisors. The Board held that the nurses did not exercise supervisory authority with respect to directing the work of CNAs, assigning, transferring or disciplining CNAs.
Ten Broeck Commons, 320 NLRB No. 65 (1996)	The Board found that the employers licensed nurse practitioners were not Section 2 (11) supervisors. The Board found that the nurses did not exercise independent judgment in making assignments or directing work, did not effectively render discipline, and they did not sufficiently participate in the evaluation process to render them Section 2 (11) supervisors.
Chevron Shipping Co., 317 NLRB No. 53 (1995)	The Board held that second and third mates and the assistant engineers on steam tankers were not 2 (11) supervisors. The Board found that they did not exercise statutory supervisory authority with respect to discipline, or assignment of overtime.

Case	**Section 2(11) Aspect of Case**
Harbor City Volunteer Ambulance Squad, 318 NLRB No. 93 (1995)	The Board found that assistant shift supervisors and assistant NEMT supervisors were statutory supervisors under Section 2 (11) because of their role in evaluating other employees. The NLRB found the evaluations to be effective and that they were never changed by upper management.