NLRB v. Health Care & Retirement Corporation of America: A "Narrow" Decision?

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I. FACTS

The National Labor Relations Board (the Board) alleged the owner of the Heartland Nursing Home violated the National Labor Relations Act (the Act) by disciplining and terminating licensed practical nurses (LPN). The General Counsel of the Board alleged that Heartland disciplined several nurses, and eventually terminated three, because the nurses engaged in protected activities. The nurses in question initiated a meeting with officials at the headquarters of the nursing home to discuss perceived problems at the facility. As a result of the meeting, an investigation was launched by the director of human resources.

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2. In Louisiana, the "practice of practical nursing" is defined as:
   [T]he performance for compensation of any acts, not requiring the education, training and preparation required in professional nursing, in the care, treatment or observation of the ill, injured or infirm and for the maintenance of the health of others and the promotion of health care, including the administration of medications and treatments or in on job training or supervising licensed practical nurses, subordinate personnel or instructing patients consistent with the licensed practical nurse's education and preparation, under the direction of a licensed physician or dentist acting individually or in his capacity as a member of the medical staff, or registered nurse. The licensed practical nurse may perform any of the foregoing duties, and with appropriate training may perform additional specified acts which are authorized by the Board of Practical Nurse Examiners when directed to do so by the licensed physician or dentist acting individually or in his capacity as a member of the medical staff, or registered nurse.

La. R.S. 37:961 (1988). Although the nurses at issue here were employed in Ohio, the Louisiana definition of practical nursing is illustrative of the requirements and duties of LPNs.

3. The General Counsel of the Board exercises general supervision over the attorneys employed by the Board. The General Counsel has final authority, on behalf of the Board, in respect of the investigation of charges, the issuance of complaints, and the prosecution of such complaints before the Board. 29 U.S.C. § 153(d) (1988).

4. The Act provides:
   Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.


5. The problems included what some employees thought were the employer's disparate enforcement of its absentee policy, short staffing, low wages for nurses' aides, increasing the nurses' paperwork, and management's failure to communicate with employees. Health Care & Retirement Corp. of Am., 306 N.L.R.B. 63 (1992).
The investigation culminated in the termination of the nurses who initiated the investigation. The discharged nurses filed a complaint with the Board alleging unfair labor practices. The General Counsel issued a complaint. The nursing home owner answered by denying he had violated the Act and by alleging the nurses were "supervisors," not afforded the protection of the Act. The nurses were usually the senior ranking employees on duty at the nursing home. Their duties included ensuring adequate staffing, making daily work assignments, monitoring and evaluating the work of nurses' aides, and reporting to management. In the hearing on the unfair labor practice, the administrative law judge (ALJ) held the nurses were not supervisors because the nurses' direction of other employees focused on the health care of the patients and not on the business of the employer. The National Labor Relations Board affirmed the finding of the ALJ. The Sixth Circuit, however, reversed and held that the Board's test for determining the supervisory status of nurses was inconsistent with the Act. The Supreme Court granted writs and affirmed the Sixth Circuit. \textit{HELD:} The National Labor Relations Board's test for determining the supervisory status of nurses in the health care profession is inconsistent with the wording and the legislative intent of the National Labor Relations Act. The Board created a "false dichotomy" that distinguished between acts taken "in connection with patient care" and acts taken "in the interest of the employer." The "patient care analysis" used by the Board was inconsistent with the statutory definition of supervisor and may no longer be utilized to classify nurses as supervisors or employees.

The impact of this decision will be felt immediately in the health care profession. Employers may withdraw recognition from unions representing licensed practical nurses, and new units including licensed practical nurses will not be recognized as appropriate bargaining units. Nurses who have operated under the assumption that their activities are protected by the Act may now find themselves left without recourse to the Board if they are terminated or

6. \textit{Id.}
7. \textit{Id.} at 69.
8. Whenever it is charged that any person has engaged in an unfair labor practice, the charge is investigated by an agent of the Board from the regional office. If the regional investigation indicates the charge is meritorious, the Board issues a formal complaint and orders the individual to appear for a hearing. If the charges are established at the hearing before an administrative law judge, the Board will issue an order requiring such person to cease and desist from any unfair labor practice. The Board may also order other types of relief, such as reinstatement and backpay. The Board or any person affected by an order of the Board may obtain review of such order in the appropriate United States Court of Appeals. 29 U.S.C. § 160 (1988).
9. 306 N.L.R.B. at 63.
10. \textit{Id.}
11. Health Care & Retirement Corp. of Am. v. NLRB, 987 F.2d 1256 (6th Cir. 1993).
14. \textit{Health Care & Retirement Corp. of Am.}, 114 S. Ct. at 1785.
disciplined because of their protected activities. Additionally, this decision may have an even greater impact outside of the health care profession. This decision could easily be expanded and applied to any hierarchically organized workplace to exclude from coverage employees who direct the work of other employees. The ultimate result of this decision may be the exclusion of thousands of employees, previously thought to be protected, from the coverage of the Act.

II. PRIOR LAW

The National Labor Relations Act (Wagner Act)\(^1\) was enacted by Congress to ensure that employees were guaranteed the right to organize, to bargain collectively, and to engage in strikes, picketing, and other concerted activities.\(^2\) Congress simultaneously created the National Labor Relations Board to interpret and administer the provisions of the Act. The Act established the Board's jurisdiction over all labor disputes affecting commerce.\(^3\) In resolving these disputes, the Board may either act by adjudicatory proceedings or by promulgating rules.\(^4\) The rights guaranteed by the Act were established to create a balance in bargaining power between an employer and the collective strength of employees. These rights are not, however, guaranteed to everyone. The Act only applies to individuals who are included in the definition of "employee" under the Act.\(^5\) In general, any person who works for an employer is an "employee," unless specifically exempted by the Act or by a decision of the Board. The Act expressly excludes supervisors from the definition of employee.\(^6\)

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19. An "employee" includes:
any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by this patient or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act as amended from time to time, or by any other person who is not an employer as herein defined.
20. The statutory exclusion of supervisors does not prohibit supervisors from organizing. The exclusion does mean, however, that an employer is not required either to recognize supervisors' collective bargaining representative or to bargain with the supervisors. Moreover, supervisors are not protected against any unfair labor practices of the employer.
"Supervisor" is defined broadly in the Act as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 2

For an employee to be considered a supervisor under the Act, the individual in question must exercise independent judgment with respect to the enumerated factors. 22 The statutory factors must be read in the disjunctive; therefore, possession of any one of the statutory factors is sufficient to confer supervisory status. 23 This authority must, however, be exercised in the interest of the employer. 24

The actual duties of the employee, and not job title, or job classification, determine supervisory status. 25 An employee may supervise other employees without becoming a supervisor for purposes of the Act, if the employee is a professional acting in accordance with professional norms. 26 An employee who issues routine or minor orders or instructions will not be considered a supervisor under the Act. 27 In borderline cases, the courts and the Board may consider other factors to determine supervisory status. 28 Courts have used these principles to determine the supervisory status of employees. 29

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22. NLRB v. Hale Container Line, Inc., 943 F.2d 394, 396-97 (4th Cir. 1991) ("An individual qualifies as a supervisor if he maintains any of the preceding responsibilities and exercises his authority with 'independent judgment' and not merely in a 'routine manner.'").
23. NLRB v. KDFW-TV, Inc., 790 F.2d 1273, 1277 (5th Cir. 1986) ("Section 2(11) is to be read in the disjunctive, with the existence of any one of the statutory powers sufficient to confer supervisory status.").
24. Northcrest Nursing Home, 313 N.L.R.B. 491, 493 (1993) ("If an individual independently exercises supervisory authority, the Board must then determine if that authority is exercised 'in the interest of the employer.'").
25. International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 396 n.13, 106 S. Ct. 1906, 1915 n.13 (1986) ("Whether a particular employee is a supervisor under the Act depends on his or her actual duties, not on his or her title or job classification.").
26. Children's Habilitation Center, Inc. v. NLRB, 887 F.2d 130, 131 (7th Cir. 1989) ("The word ' supervisor' in the Act is a term of art, since the statutory definition ... allows an employee to do some supervision without thereby becoming a supervisor under the Act. This frequently happens when the employee is a professional acting in accordance with professional norms.").
27. NLRB v. Yuba Natural Resources, Inc., 824 F.2d 706, 709 (9th Cir. 1987) ("An employee who only gives minor or routine orders will not be considered a supervisor.").
28. These factors include whether the employee: (1) is considered by other employees and by himself to be a supervisor; (2) attends management meetings; (3) receives a higher wage than his fellow employees; and (4) has substantially different benefits from his fellow employees. Hardin, supra note 16, at 1611-12.
validity of these principles has, however, been called into question by the Supreme Court’s decision in *Health Care & Retirement Corp. of America*.

While the Act expressly excludes supervisors from its coverage, the Act expressly includes professional employees within its coverage.\(^{29}\) The term professional employee was intended to refer to "such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants."\(^{30}\) Some tension has arisen from the inclusion of professionals and the exclusion of supervisors. This tension has arisen primarily because much professional work includes and mandates functions which would otherwise be viewed as supervisory under the Act.\(^ {31}\) The Board has repeatedly held that a professional employee may be excluded from the Act if he fits the definition of supervisor.\(^ {32}\) Both the courts and the Board have struggled to resolve the tension created by the "two overlapping directives."\(^ {33}\)

In implementing the statutory definition of supervisor, the Board and the courts created secondary tests (beyond the statutory indicia) to determine supervisory status.\(^ {34}\) One of these tests was the "patient care analysis." This test was used in cases involving members of the health care profession.\(^ {35}\) In implementing this test, the courts and the Board drew a distinction between acts taken in the interest of the employer and acts taken in the interest of patient care. According to this test, if an employee exercised supervisory authority to facilitate care for a patient, the employee was not a supervisor.\(^ {36}\) This test was used to

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29. The term "professional employee" means:
(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).


35. See *Centralia Convalescent Ctr.*, 295 N.L.R.B. 42 (1989); Waverly-Cedar Falls Health Care, 297 N.L.R.B. 390 (1989); NLRB v. Res-Care, Inc., 705 F.2d 1461 (7th Cir. 1983).

ensure that only employees with real authority would be excluded from coverage under the Act.

A. Legislative History

The National Labor Relations Act (Wagner Act)\textsuperscript{37} was passed by Congress in 1935. From 1935 until 1947, labor unions flourished with the aid and encouragement of the federal government.\textsuperscript{38} In 1935, less than three million employees belonged to unions; in 1947, almost fifteen million employees were members.\textsuperscript{39} By 1947, labor unions had achieved great power in the industrialized sector. Both Congress and the general public were concerned about this increasing power. The Labor Management Relations Act of 1947 (the Taft-Hartley Act) was brought about primarily as a response to the important position unions had assumed in the workplace.\textsuperscript{40} The Taft-Hartley Act was also a response to public fear that unions were growing too powerful. Many believed Congress needed to halt abuses of power by organized labor.\textsuperscript{41}

The 1947 amendments to the Act were an attempt, by Congress, to equalize power in the workplace. The goal was to create a balance of power between management and labor unions. One component of this goal was to exclude supervisors from the Act's definition of employee. The Act of 1935 did not exclude supervisors from its coverage. Prior to 1947, the Board recognized bargaining units composed entirely of supervisors, and employers were required to bargain with them.\textsuperscript{42} Additionally, if an employer took action against a supervisor for engaging in these activities, the supervisor could file charges of an unfair labor practice against the employer and would be afforded the full protection of the Act. Prior to 1947, the Board did exclude, although not required to do so by the Act, personnel with supervisory duties from bargaining units that included their subordinates.\textsuperscript{43}

The Supreme Court, in \textit{Packard Motor Car Co. v. NLRB},\textsuperscript{44} upheld the Board's decision to allow supervisory personnel to organize. The Court refused to establish an exception that would deny the coverage of the Act to supervisors,

\begin{itemize}
\item \textsuperscript{38} Archibald Cox et al., Cases and Materials on Labor Law 92-97 (1991).
\item \textsuperscript{39} \textit{id.} at 92.
\item \textsuperscript{40} \textit{id.} at 94.
\item \textsuperscript{41} \textit{id.} at 94.
\item \textsuperscript{42} Hardin, \textit{supra} note 16, at 1609.
\item \textsuperscript{43} \textit{id.} at 1608-09.
\item \textsuperscript{44} \textit{Packard Motor Car Co. v. NLRB}, 330 U.S. 485, 67 S. Ct. 789 (1947), involved a bargaining unit comprised of foremen. The foremen were responsible for maintaining the quality of production and initiating recommendations for promotion, demotion, and discipline of employees under their purview. The Court held that the Act "leaves no room for a construction of this section to deny the organizational privilege to employees because they act in the interest of an employer. Every employee . . . is required to act in [the employer's] interest." \textit{id.} at 488, 67 S. Ct. at 791-92.
\end{itemize}
stating "it is for Congress, not for us, to create exceptions or qualifications at odds with [the Act's] plain terms." Congress did create such an exception with the Taft-Hartley amendments by excluding supervisors from the definition of "employee." The Board was stripped of the authority to include supervisors in bargaining units or to establish units composed entirely of supervisory personnel. In addition to defining and excluding supervisors from the Act's coverage, the Taft-Hartley Act expressly excluded non-profit hospitals from the coverage of the Act.

The exclusion of supervisors was controversial and one of the most important changes made by the 1947 amendments. Congress, in amending the Act, attempted to guarantee the loyalty of supervisors to employers. Congress also wanted to minimize any potential conflict of economic interests. The members of the House and Senate Committees who approved the amendments wanted to ensure that only employees with real authority were excluded from the coverage of the Act. The Senate Committee Report stated that the definition of "supervisor" had been framed with a view to assuring that "certain employees with minor supervisory duties" be included in the Act. Specifically, the committee members wanted to distinguish between "straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendation with respect to such action." Congress clearly envisioned a distinction between supervisory employees that were essential to the management and control of the workplace and those vested with minor supervisory authority. However, by amending the Act and excluding supervisors, Congress did accede to the interests of management. Congress chose to exclude supervisors from the Act and thus left them vulnerable to employers' actions.

The Taft-Hartley amendments shielded non-profit hospitals from the requirements of the Act until 1974. The Act was further amended by the National Labor Relations Act Amendments of 1974 when Congress added private, non-profit hospitals to the list of employers regulated by the Act. These amendments, known as the Health Care Act Amendments, extended the

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45. Id. at 490, 67 S. Ct. at 792.
49. Cox, supra note 38, at 104. See supra p. 992.
protections of the Act to approximately 1.5 million individuals employed by private, non-profit hospitals.\^53

Between the years of 1947 and 1974, state law had governed the labor rights of non-profit hospital employees.\^54 Congress enacted the Health Care Act Amendments to create a uniform standard in the health care industry and to remedy perceived problems. Congress believed that the lack of unionization at these facilities caused low wages, poor working conditions, and a lower standard of patient care.\^55 There were two main goals of the amendments. First, Congress wanted to grant non-profit hospital employees the benefit of collective organization. Second, Congress wanted to assure a constant supply of quality health care.\^56 The 1974 amendments set the stage for a Congressional debate on the supervisory status of all employees in the health care profession.

In 1974, when Congress amended the Act, there was much debate over the status of many classes of employees. Both the Senate and House Committees rejected a proposed amendment that would have explicitly excluded health care professionals from the definition of supervisor. Congress, in rejecting the amendment, stated, "with particular reference to health care professionals, such as registered nurses, intern resident, fellows, and salaried physicians," the proposed amendments were deemed not necessary in light "of existing Board decisions."\^57 Congress approved of the fact that "the Board [had] carefully avoided applying the definition of 'supervisor' to a health care professional whose direction of other employees [was] merely 'incidental to' the treatment of patients."\^58 Also Congress expressly approved the Board's test to determine supervisory status in the health care profession.\^59 Thus, by rejecting a specific amendment to the Act, Congress acknowledged and approved the Board's "patient care analysis."

B. Jurisprudential Developments

Although Congress stated approval of the Board's test for classification of nurses and other health care professionals, a split developed in the Circuit courts concerning the proper test to determine the supervisory status of nurses. This split eventually led to the Supreme Court's resolution of the issue in Health Care & Retirement Corp. of America.\^60

\^53. Twomey, supra note 47, at 133.
\^55. Twomey, supra note 47, at 133.
\^56. Stapp, supra note 54, at 63-64.
\^58. Id.
\^59. Id.
\^60. 114 S. Ct. 1778 (1994).
The Board's test was adopted by the Second Circuit in *Misericordia Hospital Medical Center v. NLRB.* The court held the appropriate test to determine the supervisory status of a health care professional was whether "that individual, who may give direction to other employees in the exercise of professional judgment which is incidental to the professional's treatment of patients, also exercises supervisory authority in the interest of the employer." The test used by the Board was described as "an elusive one," but the court stressed that Congress had sanctioned this test in the Health Care Act Amendments of 1974. The court relied on this legislative approval when citing and applying the test. The court added that the determinations of the Board are entitled to "special weight" and should be accepted so long as there exists "a reasonable basis in law" for the decision.

The Seventh Circuit, when faced with the same issue, emphasized not only Congress' intent, but also the policy behind the exclusion of supervisors from coverage under the Act. In *NLRB v. Res-Care, Inc.*, the court held seven licensed practical nurses were employees rather than supervisors. The court emphasized that the exclusion of supervisors from the Act was one method used to ensure that the balance of power in the workplace did not shift entirely to the union side. This "brake" would, for example, allow employers to use supervisory personnel to replace striking workers. Employers may also use supervisors to disseminate information in attempts to defeat unions during union organizing campaigns. Furthermore, the exclusion of supervisors ensured the employer would retain control of its workforce. The supervisors, who were in charge of hiring, disciplining, and assigning other employees, would not be subject to the control of the same union that represented their subordinates.

61. 623 F.2d 808 (2d Cir. 1980). In *Misericordia*, a head nurse who prepared a report which criticized the hospital's operations was discharged by the director of the hospital. The hospital was charged with committing an unfair labor practice because preparation of the report allegedly constituted protected activity under the Act. The Hospital defended its actions by alleging that, first, the activity (preparation of the report) was not one protected by the Act, and second, that the discharged nurse was a supervisor rather than an employee, and thus was not protected by the Act. *Id.*

62. *Id.* at 816

63. *Id.*

64. *See supra* text accompanying notes 52-59.

65. *Misericordia*, 623 F.2d at 816 (citing Amalgamated Local 355 v. NLRB, 481 F.2d 996, 1000 (2d Cir. 1973)).


67. 705 F.2d 1461 (7th Cir. 1983) A union won a representation election held at the nursing home; however, management at the facility refused to bargain with the union. The Board brought unfair labor practice proceedings against the nursing home based on the refusal to bargain and, after a hearing, issued an order to bargain. In its defense, the nursing home alleged that the LPNs were supervisors and therefore, could not be included in the bargaining unit, nor vote for union representation. *Id.*

68. *Id.* at 1465.
If supervisors were allowed to organize, the court noted, there could be "serious conflicts of interest."69 This created a potential for divided loyalties should the supervisor engage in concerted activity with the same employees he was supposed to hire, fire, or lay-off. The court stated, however, that the potential for conflict was "attenuated" if the supervisor was only responsible for supervising or directing the employees' work.70

Supervision, the court noted, should not be defined broadly. The simple direction of another's work is not enough to trigger the supervisory exclusion. A supervisor must have "authority over another's job tenure and other conditions of employment."71 The court adopted the Board's "patient care analysis" and stated any discretion the nurses had was "exercised in accordance with a professional judgment as to the best interest of the patient rather than a managerial judgment as to the employer's best interests."72

The policy behind the Act was also the focus of the Eighth Circuit's decision in Waverly-Cedar Falls Health Care Center, Inc. v. NLRB.73 In Waverly, the Board held nurses were not supervisors, and the Eighth Circuit affirmed. The nurses at Waverly directed and assigned the nurses' aides, but the court emphasized that this authority was routine. Any supervisory authority the nurses exercised was related primarily to the care of patients and not to the business of the employer. The court emphasized:

The determination of who is a supervisor is a fact question which calls upon the Board's special function of applying the general provisions of the Act to the infinite gradations of the authority within a particular industry. Therefore the Board may exercise a large measure of informed discretion and a court must accept its determinations so long as they have "warrant in the record" and a reasonable basis in law.74

The Second, Seventh, and Eighth Circuit Courts of Appeals all adopted the Board's bifurcated test. When faced with deciding the supervisory status of nurses, each court examined whether the duties of the nurses furthered the purpose of patient care or the employer's business. If the facts indicated that nurses exercised authority in the interest of the employer, the court held the nurses to be supervisors. However, if the facts indicated that nurses exercised authority only in the interest of patient care, the courts held the nurses were

69. Id. at 1466.
70. Id.
71. Id. at 1465.
72. Id. at 1468.
73. 933 F.2d 626 (8th Cir. 1991)
74. Id. at 629.
employees. The Sixth Circuit, when faced with the same decision, rejected the Board's analysis and held that licensed practical nurses were supervisors. *NLRB v. Beacon Light Christian Nursing Home*\(^7\) was one of two decisions in which the Sixth Circuit firmly rejected the Board's test.

In *Beacon Light*, the court evaluated the responsibility and duties of licensed practical nurses and determined they were supervisors under the Act.\(^6\) The court dismissed the reasoning of the Board and stated "nurses with this kind of responsibility are not disqualified from being supervisors simply because their duties largely involve 'mere patient care.'"\(^7\) Patient care, the court emphasized, was the business of a nursing home. If a nurse meets the statutory definition of supervisor, she is not exempt simply because the activity being supervised is the care of patients. The court found the legislative history of the supervisory exception did not support the Board's reading of the statute. If Congress had intended to provide a special exception for health care employees, it would have amended the statute. Instead, Congress rejected such an exception.\(^8\)

The Sixth Circuit held that the "law means exactly what it says"\(^9\) and that the Board's test did not comport with a literal reading of the statute. The *Beacon Light* court refused to allow the Board to create an exception, by means of its test, to the statutory definition of supervisor. This refusal was a deviation from the other Circuits and sparked a controversy that was not resolved until the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp. of America*.\(^8\)

III. *N.L.R.B. v. Health Care & Retirement Corp. of America*

A. Board Decision

The Board issued a complaint on May 25, 1989, alleging Health Care and Retirement Corporation of America (HRC) had committed an unfair labor practice. The complaint alleged HRC had violated the Act by improperly

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75. 825 F.2d 1076 (6th Cir. 1987).
76. In *Beacon Light*, an employer refused to bargain with a union. The employer alleged that the bargaining unit was wrongly determined because twenty LPNs were included in the unit. The employer contended the nurses were supervisors and thus excluded from the unit. The LPNs were responsible for directing patient care and supervising and instructing nurses' aides. The LPNs evaluated the nurses' aides and reported any infractions by the aides to management. The LPNs also assigned patients to nurses' aides, covered unexplained absences, and suspended aides for improper conduct. *Id.*
77. *Beacon Light*, 825 F.2d at 1079.
79. *Beacon Light*, 825 F.2d at 1079.
disciplining four licensed practical nurses employed at the Heartland Nursing Home for engaging in alleged concerted activity.81

Heartland is a long-term care nursing facility. The Director of Nursing is responsible for the nursing department. The nursing department consists of an Assistant Director of Nursing, nine to eleven staff nurses, and fifty to fifty-five nurses' aides.82 The staff nurses include both registered nurses and the LPNs at issue in the case.83

The staff nurses were the highest ranking employees at the facility after 5:00 p.m.84 They were responsible for the overall management and supervision of nurse stations. The nurses were responsible for assigning work to the aides,85 ensuring adequate staffing,86 evaluating aides' performances,87 reporting to management, and resolving any disputes that arose concerning an aide. The nurses also actively participated in the care of patients. They were responsible for checking for any changes in a patient's health, administering medication to patients when needed, preparing records on patient treatment, giving reports to

81. See supra pp. 987-89.
82. The nurses' aides employed at the facility were non-licensed personnel and were responsible for providing basic care to the patients. Brief for Respondent at 8, NLRB v. Health Care & Retirement Corp. of Am., 114 S. Ct. 1778 (1994) (No. 92-1964). The nurses' aides had the most frequent contact with the residents, but this work was not technical. They assisted the residents when bathing, dressing, or grooming themselves. When on duty, the nurses' aides reported directly to the staff nurses. Health Care & Retirement Corp. of Am., 306 N.L.R.B. 63, 69 (1992).
83. In order to operate 24 hours a day, the facility staffed three shifts of employees. On the day shift, one staff nurse and six aides worked each wing. On both the evening shift and the night shift, one staff nurse was on duty in each wing, with four aides on the evening shift and five aides on the night shift. Brief for Respondent, supra note 82, at 8.
84. Heartland's organizational structure was hierarchical. The nursing home was headed by an administrator. Under the administrator were several department heads who were required to report directly to her. One of these was the Director of Nursing (DON). The DON had total responsibility for the nursing department. Directly under the DON was the Assistant Director of Nursing (ADON), a treatment nurse and a patient assessment nurse. Brief for Respondent, supra note 82, at 8.
85. The staff nurses assigned the nurses' aides to care for specific residents. After making the assignments, the staff nurses had little authority in directing the performance of the nurses' aides' work. Brief for Petitioner at 7, NLRB v. Health Care & Retirement Corp. of Am., 114 S. Ct. 1778 (1994) (No. 92-1964).
86. The staff nurses and the nurses' aides interacted frequently. A nurse in charge of a wing could transfer an aide from one wing to another. The aides usually decided who would switch. A nurse could also call an aide at home to see if she was available to replace an absent aide. A nurse could not order an aide to report to work nor require an aide to work overtime, but the nurse did initial time cards for aides who had worked overtime or arrived late. They also routinely reported problems, like excessive absenteeism, to the DON or ADON. 306 N.L.R.B. at 69-70.
87. The staff nurses filled out "employee counseling forms," which were used to report misconduct or poor job performance by an aide. These reports were sent to the administrator or the DON and were placed in the aides' personnel files. The nurses also filled out evaluation forms. The nurses rated the aides in several categories, but did not assign an overall rating nor did they make any recommendations with respect to an aide's continued employment. Evaluations were conducted after completion of an aide's probationary period and annually thereafter. Brief for Petitioner, supra note 85, at 7.
replacement staff on a patient's condition, and providing information about
patients to physicians and families.

The owner of the nursing home contended that the duties and responsibilities
of the licensed practical nurses made them supervisors under the Act. This
supervisory status would prevent the nurses from being afforded the protection
of the Act. The case was first heard by an administrative law judge (ALJ) who
resolved the issue in favor of the nurses and held that they were not supervisors
under the Act.88

According to the ALJ, the primary responsibility of the nurses was to
"ensure that the needs of the residents [were] met."89 Due to this responsibility,
the ALJ noted that very little of the nurses' time was spent on any activity that
could be construed as supervisory. The nature of the nurses' work suggested
employee status, but the nurses did have some authority over and responsibility
for the nurses' aides.90

The ALJ reviewed the responsibility of the nurses to direct the work of the
aides. He noted once a task was assigned, the nurses retained little, if any,
control over the method of completion. The nurses did have the authority to
criticize an aide for improper performance or to order an aide to repeat a task.
The nurses also issued orders to aides concerning any change in a resident's
condition. The ALJ found, however, that the focus of this direction was on the
"well being of the residents rather than of the employer."91 The ALJ adopted
the patient care analysis and distinguished between direction given other
employees to further the interests of the employer and direction given to facilitate
the care of patients. Because this work focused on patient care, the nurses did
not meet the statutory definition of supervisor.92 The Board then reviewed the
case and adopted the opinion of the ALJ insofar as the supervisory status of the
nurses was concerned.93

88. 306 N.L.R.B. at 63.
89. Id. at 69.
90. The ALJ examined the duty of the nurses to assign work to the aides and to shift aides
from wings. The nurses followed "old patterns" when assigning work and would routinely allow the
aides to decide among themselves which tasks to complete. The ALJ then concluded that the
assignment of tasks did not make the nurses supervisors because this duty did not require the use of
independent judgment. Id. at 69-70.
91. Id. at 70.
92. The ALJ additionally determined that the direction the nurses gave to the aides was similar
to the direction of employees by "leadmen" or "straw bosses." These individuals, according to the
ALJ, were persons Congress considered "employees." After evaluating the nurses' duties and the
statutory definition of supervisor, the ALJ held that Heartland's nurses were not supervisors. Id. at
70.
93. 306 N.L.R.B. at 63. The Board stated: "The judge found, and we agree, that the
Respondent's staff nurses are employees within the meaning of the Act." Id. at 63 n.1.
B. Sixth Circuit Decision

The United States Court of Appeals for the Sixth Circuit,94 the one Circuit that had consistently rejected the Board's analysis of the status of nurses, heard the case and reversed. The court explained that its analysis was directed by the need to draw a real distinction between a supervisor and an employee. Congress, the court explained, realized the necessity that employers have the undivided loyalty of employees in certain positions.95 Congress enabled employers to maintain control by providing coverage to employees, while denying coverage to supervisors. The statutory definition, emphasized the court, provides explicitly that if an individual has any authority in any one of the listed categories, the individual is a supervisor if the authority is exercised in the interest of the employer.96

After announcing its test, the court acknowledged that there was a "history of conflict"97 between the courts and the Board over the supervisory status of nurses. The conflict existed because the Board maintained nurses were not supervisors if their actions were taken in the patients' interest.98 The court expressly rejected a distinction based on whether the action taken was in the interest of the employer or in the interest of a patient. After reviewing the duties of Heartland's nurses, the court concluded those duties required the use of independent judgment and were performed in the interest of the employer.99 The court held the nurses were supervisors and were exempted from the coverage of the Act. To reach a different result, the court stated, Congress must "carve out an exception for the health care field."99 The Board petitioned for certiorari to the Supreme Court, and the Court granted it. In a 5-4 decision, the Court affirmed the Sixth Circuit and thus struck down the Board's test by holding it was inconsistent with the Act.100

C. Supreme Court's Decision

1. Majority Opinion

The Supreme Court, in rejecting the Board's analysis, disagreed with both the statutory and the policy arguments offered by the Board. The opinion emphasized that the issue presented was a "narrow question" of whether the Board's test was rational and consistent with the Act's definition of supervi-

94. Health Care & Retirement Corp. of Am. v. NLRB, 987 F.2d 1256 (6th Cir. 1993).
95. Id. at 1259.
96. Id. at 1260.
97. Id. at 1260.
98. Nurses, the Board argued, work for the patient rather than the employer. Id. at 1260.
99. Id. at 1261.
100. NLRB v. Health Care & Retirement Corp. of Am., 114 S. Ct. 1778 (1994).
The Court noted resolution of the issue depended upon the proper interpretation of the statutory phrase "in the interest of the employer." The Board's interpretation of the phrase was similar to an earlier approach taken by the Board, which the Court had rejected, in _NLRB v. Yeshiva University_. In _Yeshiva_, the Board developed a similar bifurcated analysis to determine whether university faculty members were managerial employees exempted from coverage under the Act. The Board distinguished between authority exercised in the faculty's own interest and authority exercised in the interest of the university. The Court, upon hearing the case, determined the faculty's own professional interests could not be separated from those of the university. These were not separate, distinct interests because the business of a university is the education of its students.

The Board had consistently held that a nurse's direction of less-skilled employees, in the exercise of judgment incidental to the treatment of patients, is not authority exercised in the interest of the employer. The Board separated patient care from acts taken in an employer's interest. The Court found this was a "false dichotomy" that made "no sense." The Court reasoned that the residents of a nursing home were the employer's customers, and therefore, patient care was in the interest of the employer. The Court saw no "basis for the Board's blanket assertion that supervisory authority exercised in connection with patient care [was] somehow not in the interest of the employer." The Court also reiterated language from _Packard Motor_, stating "[e]very employee . . . is required to act in [the employer's] interest." The Board's test was inconsistent with prior case law and would effectively render portions of the statutory definition meaningless. The Act mandates that an employee who uses independent judgment to engage in any one of the twelve enumerated activities is a supervisor. One of those enumerated activities is "responsible direction of other employees." However, under the Board's test, a nurse who used independent judgment to responsibly direct another employee would be a supervisor only if this direction was not connected with patient care. Simple direction of an employee would not be sufficient to render a nurse-employee a supervisor under the Act. The Court refused to sanction a test that

101. 114 S. Ct. at 1780.
103. 114 S. Ct. at 1782 (citing NLRB v. Yeshiva University, 444 U.S. 672, 100 S. Ct. 856 (1980)).
104. 114 S. Ct. at 1782.
105. See supra pp. 991-92.
106. 114 S. Ct. at 1782.
107. Id.
108. Id. at 1782 (quoting Packard Motor Car Co. v. NLRB, 330 U.S. 485, 488, 67 S. Ct. 789, 792 (1947)).
110. Id.
111. 114 S. Ct. at 1783.
eliminated parts of the statutory definition. The Court also dismissed the Board's argument that since ambiguity existed in the statute, the Board should be given broad authority to interpret the definition. The Court found that the statutory phrase "in the interest of the employer" was not ambiguous. The language, for example, ensured that union stewards, who adjust grievances, are not supervisors. Furthermore, the Board's dichotomy was not acceptable in the health care profession or in any other profession that supplied goods or services.

Equally unpersuasive were the Board's nonstatutory arguments. The Court explained that, contrary to the Board's assertions, there did exist a danger for divided loyalties in the health care profession. Nursing home owners implement policies to ensure adequate patient care, and should be able to do so with the undivided loyalty of their nursing staff. The argument that a broad reading of the definition of supervisor would effectively nullify the inclusion of professionals within the definition of "employee" in the Act was rejected. Although the exclusion of supervisors and the inclusion of professionals does create some tension, the tension could not be alleviated by distorting statutory language.

The Board also argued that the 1974 amendments to the Act clearly authorized the Board's interpretation of the statute. This assertion was rejected by the Court, stating, "if Congress wishes to enact the policies of the Board, it can do so without indirection." The Court held that the patient care analysis could no longer be utilized by the Board. The Court did, however, emphasize that the decision would have little impact outside of the health care profession because the Board's patient care analysis test was confined to nursing cases.

2. The Dissent

The dissent concluded that the Board's approach was rational and consistent with the Act and thus should not be disturbed by the Court. The dissenting opinion reviewed the legislative history of the exclusion of supervisors, which indicated that only truly supervisory personnel were intended to be excluded from the Act's coverage. Additionally, the simultaneous inclusion of professionals within the definition of "employee" indicated Congress did not intend the exclusion of supervisors to be interpreted so broadly that it would eliminate professionals from the Act. The broad interpretation of "supervisor" would eliminate most professionals from the Act's coverage because of the direction most professionals exercise over other employees. Many professionals have a

112. Id.
113. Id.
114. Id.
115. See supra p. 991.
116. 114 S. Ct. at 1785.
117. 114 S. Ct. at 1778 (Ginsburg, J., dissenting).
duty to direct subordinates, for example, "the lawyer his secretary, the teacher his teacher's aide."  

The dissent noted that in formulating its test, the Board focused on the policy behind the exclusion of supervisors. Congress' intention was to exclude employees with real managerial authority. The Board's test for nurses reflected this intent by distinguishing between "key managerial authority" and direction given in connection with patient care. The Board had also applied, and the courts had accepted, bifurcated analyses such as this in other professions.

The dissent feared a broad interpretation of "supervisor" would exempt a large number of workers from the Act and noted the "opinion [had] implications far beyond the nurses in this case" despite the fact that the majority alleged otherwise. The dissent advocated approval of the Board's test, asserting it was one method the Board had used to ensure professionals are afforded the full protection of the Act, while truly supervisory personnel are excluded.

IV. CONSEQUENCES OF THE DECISION

As the Court stated, its duty in hearing the case was to decide whether the Board's test was "rational and consistent with the Act." The decision rendered by the Court, however, failed to properly apply this standard. The Board's interpretation of "in the interest of the employer" was consistent with the purpose and spirit of the Act and was rational in light of the policies behind the Act.

The Act was passed to afford certain, enumerated protections to employees. Supervisors are excluded from the Act's coverage, while professionals are expressly included within the coverage of the Act. As both the majority and the dissent note, the simultaneous inclusion of professionals and the exclusion of supervisors creates some tension in the Act. In order to resolve this tension, the Act must be considered as a whole. An isolated, narrow reading of the definition of supervisor, like the one advocated by the Court, would effectively exclude most professionals from coverage under the Act. However, the Board's analysis, which does place some limit on the very broad statutory definition of supervisor, carefully excluded those who actually did exercise supervisory authority from the Act, while allowing professionals to be covered.

118. 114 S. Ct. at 1788 (quoting NLRB v. Res-Care, Inc., 705 F.2d 1461, 1465 (7th Cir. 1983)).
119. 114 S. Ct. at 1788.
121. 114 S. Ct. at 1799.
122. 114 S. Ct. at 1781 (quoting Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 107 S. Ct. 2225 (1987)).
123. See supra p. 991.
As some courts have noted, an employee should be permitted to possess some supervisory authority without becoming a supervisor for purposes of the Act.\textsuperscript{124} This is especially true in the cases where an employee is a professional who is acting in accordance with professional norms. A classic example is an attorney directing or issuing orders to a paralegal. In this context, it becomes apparent that the direction, or supervision, by the attorney neither impacts, nor adversely affects, the employer. The "responsible direction" of the attorney could include asking the paralegal to file papers or to research a legal issue. A strict reading of the statute would indicate that the attorney is a supervisor. However, the purposes behind the Act weigh in favor of the attorney retaining his status as an employee. The direction given the paralegal does not implicate the danger of divided loyalties, nor the subversion of the employer's economic goals. The direction given to the paralegal furthers the attorney's work, but does not derogate from the employer's control of the workplace. A reading of the Act as a whole, and a consideration of the spirit of the Act, demonstrates that the Board's test delivers the best result. True supervisors, individuals who are essentially front line management, are excluded from coverage. Professionals, like attorneys and nurses, who incidentally direct less skilled employees would still be covered by the Act.

The Board's test was also rational and consistent with the policies behind the Act. To give a practical, useful meaning to the statutory definition, the policy behind the exclusion of supervisors, and the Act as a whole, should be considered. The majority opinion did not adequately address the policy behind the statutory definition of supervisor, and the policy behind the Act itself. Congress enacted the National Labor Relations Act to allow employees to organize and to bargain collectively for improved terms and conditions of employment. The intent of Congress in passing the Wagner Act was to equalize the balance of power in the workplace.

Congress wanted to guarantee the protections of the Act to as many employees as possible. Congress did, however, when re-balancing power in the Taft-Hartley Act, recognize that certain employees should be denied protection from discrimination by the employer if they organized or engaged in concerted activity. Because employers needed the undivided loyalty of employees with managerial or supervisory authority, Congress exempted supervisors from the definition of employee under the Act.

The Board's "patient care analysis" clearly reflected a balancing of these policies. Not all nurses benefited from the test by being found nonsupervisory. The Board's test did ensure truly supervisory nurses would not be afforded the protections of the Act. The "patient care analysis" was designed to extend coverage to nurses that supervised other employees in patient care. The threat of depriving employers of exempt supervisors was negligible. Any nurse with

\footnotesize{\textsuperscript{124} Children's Habilitation Center, Inc. v. NLRB, 887 F.2d 130 (7th Cir. 1989); NLRB v. Res-Care, Inc., 705 F.2d 1461 (7th Cir. 1983).}
real supervisory authority would not be covered under the Act. The Court, in rejecting the test, failed to acknowledge that it was in line with the policies behind the Act and the statutory exemption.

The Supreme Court emphasized that the issue decided was a narrow one and would not extend beyond the confines of the nursing profession. The decision does, however, create numerous problems. The broad definition of “supervisor” adopted by the Court could easily be expanded beyond the facts of this case and eventually seriously limit the overall effectiveness of the Act by excluding from its coverage a large number of employees.

The Board, after the decision, is left without a workable test to determine the supervisory status of health care employees. The Court refused to allow the Board to continue to utilize the “patient care analysis.” In so doing, the Court circumvented the Board’s attempt to be consistent with past jurisprudence in identifying personnel who truly possess supervisory authority. Although the Court rejected the Board’s test, it did not suggest an alternative one. Unlike the Sixth Circuit, the Court did not go as far as suggesting the only test that may be utilized is the unembellished statutory definition.125 The Sixth Circuit test would classify an employee as a supervisor if the employee possessed any one of the statutory indicia.

The Court did indicate that the Board may reformulate a test that deals specifically with nurses or other members of the health care profession, but offered no guidance on what test would be approved by the Court. But, by not formulating a substitute test, the Court has left the Board, and the health care profession, in a state of flux. The future of already established bargaining units is uncertain, and the possibility of future bargaining units including nurses is not promising. The Board may reformulate a test, but employers and unions may be reluctant to rely upon this test until the Supreme Court again determines its acceptability. Until then, every employer will contend that every nurse is a supervisor, and every union will argue that the Court did not hold that in its decision.

The Court also severely weakened the position of the Board. The Board formulated this test to alleviate a special problem perceived in the health care profession. Applying expertise derived from many years of deciding such cases, the Board resolved the problem by tailoring an exception that balanced the competing interests—allowing nurses to organize, while protecting the economic interests of employers in the health care industry. This decision limits the Board’s authority to formulate and implement specialized tests. Therefore, in the future, the Board will find it difficult to fashion a test (that will pass muster with the Court) that will bring within the coverage of the Act employees who exercise any direction over other employees.

The Supreme Court misjudged the generic aspects of this case and the ease with which its reasoning can be stretched to other types of employees who direct

125. Health Care & Retirement Corp. of Am. v. NLRB, 987 F.2d 1256 (6th Cir. 1993).
co-employees.\textsuperscript{126} As noted, the organization at Heartland is hierarchical. As in most workplaces, there is an administrator, a number of middle managers, and the rank-and-file employees. At Heartland, the person with the greatest authority was the administrator, while the employees with the least authority were the nurses' aides. Work orders were issued from the administrator, implemented by the middle managers, and eventually trickled down to be performed by the nurses' aides. Each level of employees was controlled by the next higher level. The DON supervised the ADON, the ADON supervised the nurses, and the nurses supervised the aides.

By eliminating the "patient care analysis," the Court has established a system in which everyone but the lowest level of employee in a health care setting is a supervisor. In any hierarchically structured workplace, it is conceivable every level of employee will have some control and direction over the next level of employees. The Court's refusal to defer to the Board's specialized test results in a strict, generic application of the definition of supervisor.

Because the structure of a nursing home is an organization form that is repeated throughout the health care profession, and in many other businesses, the language the Court used in rejecting the test could easily translate to other professions. For example, in a typical law firm, there is a hierarchical structure much like the structure in a nursing home or in a hospital. As discussed earlier, an attorney in the firm, although a professional employee, could be a supervisor because of the direction given to paralegals. But, when the example is taken one step further, the impact of the Court's decision becomes evident. Under the Court's broad conception of supervisor, even the paralegal achieves supervisory status. A paralegal, who gives direction to any office staff, secretaries, runners, or even mail room clerks, would qualify as a supervisor and would lose the protections of the Act. This clearly does not comport with Congress' intention of excluding only those employees with real managerial authority. The typical paralegal has a say in neither formulating, nor implementing, the policies of the employer. Classifying a paralegal, or any other similarly situated employee, as a supervisor works against the purpose of the Act and severely limits the ability of workers to organize.

V. Solutions

There are several possible solutions to the problems created by Health Care & Retirement Corp. of America. One such solution is for the Board to exercise its rulemaking authority. The Act gives the Board the authority "to make, amend, and rescind . . . such rules and regulations as may be necessary."\textsuperscript{127} The Board first exercised its rulemaking authority in the health care context.\textsuperscript{128}

\textsuperscript{126} Daily Labor Report, 1994 DLR 165 (August 29, 1994).
\textsuperscript{128} 29 C.F.R. § 103 (1988). The Board established collective bargaining units for acute care.
This authority could be utilized to create a comprehensive rule regarding LPNs or nurses as a profession. The Board promulgates rules with the input of both representatives of management and of labor. A rule that ensures coverage of nurses without genuine supervisory authority should satisfy both employers and nurses. Such a rule would also fulfill the mandates of the Act.

Although debate has raged about the propriety of the Board's rule making authority, a rule in this case would stabilize and clarify an otherwise murky situation. Millions of people are employed in the health care profession. A solid, well-defined rule would ensure that neither employers nor employees would be forced to play a guessing game concerning the supervisory status of nurses. There are advantages to the Board's rulemaking authority. Rules and regulations promote stability by providing clear, unchanging guidelines. Rulemaking is also advantageous because of the prospective application of the regulations. Both employers and employees would know well in advance their status and their obligations under the Act. However, one of the disadvantages of rulemaking is the difficulty of formulating a workable test. The Court has the authority to review any rules promulgated by the Board. The Court has amply demonstrated its disfavor for any jurisprudential test that modifies the statutory framework. A regulation issued by the Board is likely to be met with equal disfavor.

The Board could also ensure the protection of the nurses by adjudication and determining the status of nurses on a case-by-case basis. This would allow the Board to carefully review the unique facts and nuances of each case and apply the statutory indicia to each particular scenario. This type of case-by-case analysis would allow the Board to achieve a common sense, realistic application of the Act to the problems of the health care profession. As several courts have noted, a reviewing court should uphold the Board's legal conclusions if it applied the substantive law correctly. A reviewing court should also pay substantial deference to the Board's function of applying general provisions of the Act to the complexities of industrial life. If the courts follow this policy of deference, the Board could conceivably remedy the problem and determine supervisory status without formulating another test. However, this solution would lead to increased litigation. Each case would have to be considered and evaluated based on its unique factual circumstances. This process could be a long and arduous one, before any predictability was achieved, and could create even more instability in the workplace.

hospitals. In American Hosp. Ass'n v. NLRB, 111 S. Ct. 1539 (1991), the Supreme Court affirmed the rule promulgated by the Board.


130. See, e.g., NLRB v. Yuba Natural Resources, Inc., 824 F.2d 706 (9th Cir. 1987).

131. NLRB v. KDFW-TV, 790 F.2d 1273 (5th Cir. 1986).
Alternatively, Congress could amend the statute to provide a legislative exception to the general definition of supervisor. Congress could legislatively overturn \textit{NLRB v. Health Care & Retirement Corp. of America} by codifying the "patient care analysis," and nurses, as a result, would be protected from arbitrary classifications. The disadvantage to this solution is that the Act is generalized to apply to a variety of employees. It has survived the dramatic changes in the workplace because of the simplicity and generality of definitions of such terms as "employee" and "supervisor." The advantage of a congressional amendment is that it presents the only solution that would establish a reasonable test, adequately accommodating competing groups, which would not be stricken down by the Court. Congress may also use an amendment to resolve the tension created by the exclusion of supervisors and the inclusion of professionals. If the statute is amended for one special group, however, Congress will be flooded by requests from other employee groups to amend the statute to protect their own specific interests. A statutory amendment may be the only effective way, however, to protect nurses and other similarly situated employees. As discussed above, it will be difficult for the Board to formulate a test to distinguish between supervisory and nonsupervisory nurses that will be upheld by the Court.

VI. CONCLUSION

The Supreme Court, in rejecting the "patient care analysis," has created numerous problems in the health care profession and potentially, even greater problems in other professions. The Court has increased the tension that already existed between supervisors and professionals. The Court also failed to acknowledge and enforce the policies that underlie the Act. Congress' desire to extend coverage to employees, while ensuring the loyalty of true supervisors to management, has been thwarted. Additionally, the Court has broadened the definition of "supervisor." As a result, many employees never before considered to be supervisors may now be denied coverage.

There are three possible solutions to these problems created by the Court. The Board could resolve the conflict by rulemaking or could adjudicate any inequities on a case-by-case basis. Congress could also remedy the problem by amending the Act to codify the Board's patient care analysis and thus provide coverage to nurses and other similarly situated employees. The problems created by the decision are obvious; the best solution is much less clear.

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