



# JONES DAY COMMENTARY

## ***KENTUCKY RIVER* TRILOGY: RECENT NLRB DECISIONS CLARIFY THE DEFINITION OF THE TERM “SUPERVISOR” UNDER THE NLRA**

Recently, the National Labor Relations Board (the “NLRB” or “Board”) issued three highly anticipated opinions following the Supreme Court’s decision in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), involving the definition of the term “supervisor” under the National Labor Relations Act (the “NLRA” or “Act”). The Board’s decisions, which have been referred to as “the *Kentucky River* decisions,” were issued in three companion cases involving representation or election petitions filed by various labor unions: *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (Sept. 29, 2006); and *Croft Metals, Inc.*, 348 NLRB No. 38 (Sept. 29, 2006). These decisions provide certain guidance in interpreting the term “supervisor” as defined in Section 2(11) of the Act, particularly in the context of two United States Supreme Court cases that have criticized the Board’s previous positions in this area.

These three cases are important for all private-sector employers because the distinction between “supervisors” and “employees” is pivotal in determining which employees are eligible to vote in Board-conducted representation elections, which employees are protected from the anti-discrimination provisions of the Act, which employees are eligible to petition for an NLRB election to remove a union and to vote in such an election if it is held, and whether an employee is a legal agent of his or her employer with respect to actions that may be in violation of the NLRA. Given its importance, the issue of supervisory status has been frequently litigated by employers and unions before the NLRB and in the courts, especially in matters involving registered nurses and licensed practical nurses in various health-care settings. The outcome in these cases is of significance to employers, given the structure of the NLRA, which permits employers to require the loyalty of those in supervisory positions and concurrently permits individuals in such positions



to exercise their independent judgment without the threat of accountability to employees under their command (or to a union representing those employees). To achieve this fundamental objective, the Act extends its protections against disciplinary acts only to those workers defined as “employees.” To emphasize this point, Section 2(3) of the Act specifically excludes “supervisors” from the definition of “employees.” As a result, supervisors generally do not have the right to form, join, or assist labor organizations; cannot vote in NLRB elections or circulate representation or decertification petitions; and are denied the right to boycott their employers or engage in work stoppages. Moreover, the distinction between an “employee” and a “supervisor” is important when determining an employer’s potential liability for unfair labor practices based on an agency theory. Generally speaking, an employer’s potential liability under the NLRA will be greater with respect to activities undertaken by its “supervisors” than by its “employees.” For these reasons, identifying those employees who qualify as supervisors under the Act is of paramount importance in complying with the Act.

These decisions touch on certain aspects of the definition of “supervisor” under the Act but do not include an analysis of all 12 distinct bases of authority under which an individual can qualify as a supervisor under Section 2(11). These 12 indicia permit an employee to be classified as a supervisor if such individual, in the interest of his or her employer, has the authority to either (1) hire, (2) transfer, (3) suspend, (4) lay off, (5) recall, (6) promote, (7) discharge, (8) assign, (9) reward, (10) discipline, (11) adjust the grievances of, or (12) responsibly direct other employees. The Act also provides that a supervisor’s exercise of such authority must not be of a “merely routine or clerical nature, but requires the use of independent judgment.” It is important to remember that pursuant to well-established Board case law, Section 2(11) of the NLRA is to be read in the disjunctive, and therefore, in order to be considered a supervisor, an individual needs only to perform one of the above indicia, so long as such authority is exercised in the interest of the employer and exercised with the use of “independent judgment.” Finally, the legal burden of establishing supervisory status is the obligation of the party asserting such status.

The *Kentucky River* decisions focus primarily on two of the above statutory criteria: the ability to “assign” and the ability to “responsibly direct.” Two of the decisions also focus on

the additional supervisory prerequisite of “independent judgment.” Moreover, even though the Board does provide new, more detailed legal standards with respect to the supervisory indicia, the Board’s application of these new definitions in these three cases suggests that, at least for the time being, the definition of the term “supervisor” will continue to be a frequently and contentiously litigated aspect of labor law.

## THE SUPREME COURT REJECTS THE BOARD’S INTERPRETATION OF THE TERM “SUPERVISOR”

Prior to the Board’s most recent pronouncements on this issue, the United States Supreme Court twice issued opinions criticizing the Board’s narrow interpretation of and inconsistent approach to defining the term “supervisor.” In addition, numerous courts of appeal have likewise denied enforcement of NLRB orders based upon prior erroneous Board decisions in this area. These criticisms were largely well-founded, given the Board’s historically erratic, contradictory, and often results-oriented decision making.

For example, in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 584 (1994) (“*HCR*”), the Supreme Court rejected the Board’s efforts to narrowly construe the term “supervisor.” The Court found that supervisory tasks taken for clinical reasons based upon training and education were, in fact, “cutting out” the employer’s business objectives and were “in the interest of the employer” for purposes of Section 2(11) of the Act. In so holding, the Court criticized the Board for creating a false dichotomy between clinical acts taken for the purpose of patient care and acts taken in the interest of the employer. Stated alternatively, while many actions taken by supervisors in a health-care setting are for clinical, patient-care reasons, such actions also further the employer’s business objective of providing health-care services. 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 2001, the Supreme Court issued another important decision in this area. This case, the *Kentucky River* decision, again rejected the Board’s jurisprudence pertaining to supervisory status and affirmed a decision of the United States Court of Appeals for the Sixth Judicial Circuit that held that



six registered nurses who assigned and directed other employees were supervisors. The Board 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." The Court, in refusing to enforce the Board's order, held that judgment is "independent" if it is free of significant employer constraints. The Court explained that the fact that the judgment may be based on superior skill or professional training is irrelevant to the Section 2(11) inquiry. The Court further held that under Section 2(11), an employee is a supervisor if (1) he or she has the authority to engage in one of the 12 statutorily stated supervisory activities discussed above; (2) the employee exercises such authority in the interests of the employer; and (3) the exercise of the employee's authority is not routine or clerical but involves the use of independent judgment. The Court noted that the Board's interpretation of Section 2(11) through the years has been controversial at best, often resulting in sharp disagreements between the Board and various federal courts.

## **KENTUCKY RIVER TRILOGY: THE BOARD ADDRESSES THE SUPREME COURT'S CRITICISM**

On September 29, 2006, the Board issued three decisions analyzing whether certain employees are employees or supervisors under the Act. As noted above, in *Kentucky River*, the Supreme Court criticized the Board's interpretation of the term "independent judgment" and established general guidelines for future interpretation of the term. Therefore, before ruling on *Oakwood Healthcare*, the Board sought comments not only from the litigants, but also from interested third parties relating to "the meaning of 'assign,' 'responsibility to direct,' and 'independent judgment,' as those terms are used in Section 2(11) of the Act." Many organizations, including the United States Chamber of Commerce, the Society for Human Resource Management, and the AFL-CIO, filed *amicus* briefs in these cases. In these decisions, the Board, in following the directives of the Supreme Court in *HCR* and *Kentucky River*, sought to establish a workable test for determining whether employees meet the requirements of Section 2(11) of the Act to be classified as "supervisors." The Board also addressed the status of employees under the NLRA who periodically "rotate" as supervisors.

**Oakwood Healthcare, Inc.: The NLRB Concludes That Certain Charge Nurses in an Acute-Care Hospital Are Supervisors Under the NLRA.** In the lead case, *Oakwood Healthcare, Inc.*, the Board held, in a 3-2 decision, that certain charge nurses in an acute-care hospital fell within the definition of "supervisor" set forth in Section 2(11) of the Act. NLRB chairman Robert Battista and members Peter Schaumber and Peter Kirsanow voted in the majority, and members Dennis Walsh and Wilma Liebman dissented in this important decision.

The *Oakwood Healthcare* case arose in connection with the attempt of the United Auto Workers (UAW) to organize registered nurses ("RNs") at Oakwood Heritage Hospital in Taylor, Michigan. Oakwood employed approximately 180 staff registered nurses, many of whom served as "charge nurses." The charge nurses were responsible "for overseeing the patient care units" and assigning other employees "to patients on their shifts." Charge nurses also monitored patients, met with doctors and patients' family members, followed up on unusual incidents, and sometimes took on their own patient load. When serving as charge nurses, RNs received an additional \$1.50 per hour. At Oakwood, 12 RNs served permanently as charge nurses on every shift that they worked, while 112 other RNs rotated at various times into the charge-nurse position.

The UAW filed a petition seeking a representation election in a unit of all RNs working at Oakwood. On February 4, 2002, the Acting Regional Director for NLRB Region 7 issued a Decision and Direction of Election finding that all of Oakwood's charge nurses were not supervisors and, accordingly, that these nurses should be included in the voting unit. The employer filed a request for review. The Board granted review to consider whether the charge nurses were supervisors under the Act in light of the Supreme Court's decision in *Kentucky River*.

In reaching its decision in *Oakwood Healthcare, Inc.*, the Board first evaluated the term "assign" found in Section 2(11) of the Act. The Board construed such term to "refer to the act of a putative supervisor 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." The Board summed up its definition of "assign" by explaining that



the term refers to an individual's "designation of significant overall duties to an employee, not to the [individual's] ad hoc instruction that the employee perform discrete work." The Board did not announce any definition of "significant overall duties" but held that this standard meant more than one duty, but less than a full "shift assignment." Finally, the Board majority, in an important clarification, concluded that the term "assign" included assignment of significant tasks and duties and criticized the minority's position that the term applied only to assignment of employees to shifts, positions, designated work sites, or work hours.

Next, the Board found that "for direction to be 'responsible,' the person directing and performing the oversight of others must be accountable for the performance of the task by such employees such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." Thus, the Board held that in order to establish responsible direction, it must be shown: (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 Board explained that this concept of accountability as a mandatory element of responsible direction is consistent with post-*Kentucky River* Board decisions that consider an accountability element for "responsibility to direct."

After defining the term "assign" and the phrase "responsible direction," the Board as required by Section 2(11) analyzed the "independent judgment" requirement of the statute. The Board started with the proposition that independent judgment requires an individual to "act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." With respect to freedom of control, judgment will not be "independent" under the Act 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. 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. However, the Board pointed out that the existence of company policies on a particular subject will not preclude a finding of "independent

judgment" if the policies allow for discretionary choices. Finally, the Board found that for the purposes of "independent judgment," the degree of discretion exercised must be more than "routine and clerical."

The Board then reaffirmed established precedent with respect to the supervisory status of individuals who serve in supervisory-titled positions on a rotating or part-time basis. The Board stressed that in order to be a supervisor under the Act, an individual must spend "a regular and substantial portion of his/her time performing supervisory functions." Furthermore, the word "regular" has been defined as "according to a pattern or schedule, as opposed to sporadic substitution." To date, the Board has not adopted a strict numerical definition of "substantial"; however, 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."

The Board thereafter examined the responsibilities of the regularly assigned Oakwood charge nurses in light of the newly articulated standards in order to determine whether such nurses were, in fact, supervisors under the Act. In analyzing whether the charge nurses "responsibly directed" other individuals, the Board held that the charge nurses did not responsibly direct under the Act because "the employer failed to demonstrate that the individuals were accountable for the performance of the task." Specifically, the Board observed that Oakwood offered no evidence that the charge nurses must take corrective action if other staff members failed to comply with their instructions. The Board also held that because the individuals were not subject to lower evaluations or discipline as a result of their direction, the individuals were not accountable for purposes of the Act.

The Board then found that the charge nurses' authority to assign staff to certain patients as well as the assignment of staff to a geographic location within a nursing unit fell within the definition of "assign." The Board focused on the fact that the "charge nurses' assignments determine what will be the required work for an employee during the shift," thereby materially impacting the employee's "terms and condition of employment."

Next, the Board held that to the extent the charge nurses exercised independent judgment in making such assignments, such employees were supervisors for purposes of



the Act. The Board held that some of the charge nurses on patient-care units at the hospital exercised “independent judgment” by taking into account such factors as the medical condition and needs of a patient compared to the training, education, and aptitude of the staff available on the shift in question before making assignments. In contrast, the hospital’s charge nurses who worked in the emergency department merely announced a rotating schedule in making assignments and therefore were found not to exercise “independent judgment.” The Board’s analysis indicates that these types of decisions are quite fact-intensive and require the analysis of the specific duties of all employees, even if the employees are similarly titled and appear in the first instance to have similar management authority.

Finally, pursuant to its well-established standards in analyzing temporary or rotating supervisory status, the Board found that the hospital’s RNs who only periodically performed charge-nurse duties did not meet the requirements of Section 2(11) of the Act. Specifically, the Board found that in none of the units where such nurses worked was there an established pattern or “predictable schedule for when and how often RNs take turns in working as charge nurses.”

**Golden Crest Healthcare Center: The NLRB Finds That Charge Nurses at a Nursing Home Are Not Supervisors.** In contrast to its conclusions with respect to the charge nurses in Oakwood, in the companion case *Golden Crest*, the Board in a 3-0 decision concluded that charge nurses at a nursing home were not supervisors for purposes of the Act. The *Golden Crest* case arose out of an effort by the United Steelworkers to organize RNs and licensed practical nurses (“LPNs”) employed by an 80-bed nursing home in Hibbing, Minnesota. The employer, Golden Crest, employed eight RNs who worked as charge nurses; 12 LPNs, 11 of whom worked at least occasionally as charge nurses; and 36 certified nursing assistants (“CNAs”). The nursing home also employed five stipulated supervisors.

Golden Crest contested the petitioned-for bargaining units, arguing that its RNs and LPNs acting as charge nurses were supervisors under Section 2(11) of the Act. In March 1999, the Regional Director in NLRB Region 18 issued a Decision and Direction of Election finding that charge nurses at Golden Crest were not supervisors under the Act. On September 18,

2002, after much litigation on the issue, the Board granted the employer’s request for review.

In this case, Golden Crest 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. In evaluating whether the charge nurses “assigned” under Section 2(11), the Board held that the individuals in question did not “assign” for purposes of the Act because they did not have “authority to require” other employees to undertake the actions in question. Specifically, the Board found that the charge nurses merely had the authority to “request that a certain action be taken,” such as requesting that a nurse stay past the end of her shift. As noted above, the Board held in *Oakwood Healthcare* that in order to be a supervisor, a charge nurse must have authority to “require” that an action be taken.

A potentially troubling aspect of the *Golden Crest* decision concerns the “responsible direction” analysis of this case. In examining whether the charge nurses had authority to “responsibly direct,” the Board found that because the individuals did not experience any “material consequences,” either “positive or negative,” as a result of their performance in directing, the employer failed to meet the “responsible direction” standard. The Board came to this conclusion despite Golden Crest’s evidence that its charge nurses were evaluated on their ability to direct. In fact, Golden Crest presented evidence establishing that charge nurses often received different ratings, based on their ability to direct. Nevertheless, the Board held that the employer had not met its burden of establishing that the charge nurses were accountable for their actions in directing other nurses, reasoning that:

Here, the Employer asks us to find that the charge nurses are held accountable for their performance in directing CNAs simply because the job evaluation forms suggest that such accountability exists. In the absence, however, of any evidence of actual or prospective consequences to charge nurses’ terms and conditions of employment resulting from a rating on the “Directs CNAs” performance factor, the Employer has shown only “paper accountability.” . . . Put another way, the 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. Thus, we find that the “prospect of adverse consequences” for the charge nurses here is merely speculative and insufficient to establish accountability.

As the foregoing quote shows, the Board has placed considerable emphasis on the concept of “accountability.” The Board will now apparently require that in order for an individual to be a supervisor, the employer must prove not only that the individual is evaluated on his or her ability to direct, but also that the employer has rewarded or disciplined the individual in the asserted supervisory position for his or her performance in directing others. This is a significant new burden imposed on parties in cases involving supervisory status, especially where there are only a few persons in the supervisory position in question. This burden may reduce the number of individuals who otherwise could be considered supervisors under the Act in the future.

***Croft Metals: The NLRB Reaffirms That Lead Persons Are Not Considered Supervisors.*** In *Croft Metals*, the third in the Board’s trilogy of supervisor cases, the Board in another 3-0 decision held that lead persons working in a manufacturing facility were not supervisors under the Act. The employer in that case, Croft Metals, manufactured aluminum and vinyl doors and windows at its facility in McComb, Mississippi. Croft Metals employed approximately 350 production and maintenance employees and approximately 15 admitted statutory supervisors. Croft Metals also employed between 25 and 35 lead persons. Lead persons spent a “great deal” of their working time performing hands-on work of the type performed by “undisputed unit employees.” The lead persons were paid by the hour, while the employer paid its supervisors a salary. Lead persons also generally enjoyed benefits comparable to those of hourly bargaining-unit employees rather than supervisors.

The *Croft Metals* case arose in the context of a representation petition filed by the International Brotherhood of Boilermakers seeking to represent production and maintenance employees at the employer’s factory. Croft Metals argued that lead persons should be excluded from the unit because they were supervisors. After a hearing, the Acting Regional Director in NLRB Region 15 issued an opinion finding that the lead persons were not supervisors under the

Act. The Board granted review to determine whether the lead persons were supervisors.

In a fairly straightforward opinion, the Board held that the lead persons at Croft Metals were not supervisors under the Act. Croft Metals argued that its lead persons possessed supervisory authority in that they assigned, directed, and effectively recommended whether bargaining-unit employees should be hired, discharged, or disciplined. In evaluating whether the lead persons “assigned” under Section 2(11), the Board held that the individuals in question did not “assign” for purposes of the Act because they did not have “authority to require” other employees to undertake the actions in question. The Board made this finding despite testimony that a lead person occasionally switched tasks among employees and sometimes directed employees as necessary in order to ensure that projects were completed on time. Specifically, the Board found that the “sporadic rotation of different tasks by the lead person” more closely resembled an “ad hoc instruction that an employee perform a discrete task” rather than an assignment.

In examining whether the lead persons “responsibly directed,” the Board held that because the lead persons had been disciplined as a result of their direction, the individuals did in fact “responsibly direct” other employees. Nonetheless, the Board found that the individuals in question were not supervisors because the employer failed to meet the Section 2(11) “independent judgment” test. Specifically, the Board held that the employer failed to establish that such direction “involves a degree of discretion that rises above the ‘merely routine or clerical.’ ” The Board’s opinion is not surprising here, as it is consistent with previous Board decisions that frequently held that lead persons do not meet the definition of “supervisor” under the Act.

## CONCLUSIONS AND SUGGESTIONS

All interested parties to NLRB proceedings – employers, unions, and representatives of these entities – certainly embrace greater guidance in resolving supervisory issues under the NLRA. The Board’s *Kentucky River* decisions are an attempt to achieve this objective while following the directives of recent decisions of the United States Supreme Court that, as noted above, have been highly critical of previous



Board decisions in this area. While greater clarity perhaps could have been provided by the Board in this area in its *Kentucky River* decisions, the following guidance clearly emerges from these decisions:

1. The phrase “responsibly direct” contained in Section 2(11) of the Act will in the future be interpreted to mean that for an employee to be designated as a supervisor, such individual must be “*accountable*” for the performance of others reporting to him or her and actual documented adverse consequences will occur to such employee if the business objectives and tasks assigned to be accomplished are not successfully and timely completed.
2. The term “assign” in Section 2(11) of the Act according to these decisions means that a putative supervisor must have the actual authority to designate an employee to work in a specific geographic location (e.g., department, wing, or unit) or position (e.g., shift, new job) and to perform significant overall duties. This term, however, does not mean that the individual in question only has the authority to require the performance of periodic or minor tasks. (The phrase “significant overall duties” was not defined and undoubtedly will be addressed on a case-by-case basis.)
3. The Board’s *Kentucky River* decisions clearly state that the phrase “independent judgment” in Section 2(11) of the Act requires an employee to “act, or effectively recommend action, free from the control of others” and that “detailed instructions, whether set forth in company policies or rules, the verbal instructions of higher authority, or in the provisions of a collective bargaining agreement” will no doubt disqualify an individual from such status. Finally, however, the Board stressed that even if the types of controls and constraints described above are in place, they will not automatically preclude a finding of supervisory status if such policies or constraints also allow for discretionary choices of the individual in question.
4. The Board will continue to follow its historic approach in generally rejecting arguments that rotating or temporary supervisors can meet the requirements of Section 2(11) of the Act. Regularity of supervisory assignment at a minimum will be a requirement for a finding of supervisory status, with a further minimum threshold of at least 15 or 20 percent of such individual’s time being devoted to performing one or more of the criteria required in Section 2(11) of the Act.
5. Individuals functioning as “lead persons,” or in like positions, as a general rule, will not qualify as supervisors.
6. Given the level of detail required by the Board in its *Kentucky River* decisions, employers should be mindful of the need not only to document the job duties of putative supervisors, but also to evaluate and actually reward or discipline these employees with respect to the performance of supervisory functions. Indeed, the Board has clearly signaled that it will not be satisfied by “mere paper trails” in these cases.
7. Specific actions that an employer may wish to consider pursuing or implementing in light of the *Kentucky River* decisions include the following:
  - Review organizational design of its management structure to identify all individuals in the organization whom the employer desires to be supervisors in order to permit the employer to accomplish its business objectives.
  - Revise the job descriptions (and actual job duties) of putative supervisors to reflect supervisory functions recognized by the Act other than assigning work or directing others, such as hiring, disciplining, transferring, laying off/recalling, promoting, rewarding, and adjusting grievances.
  - Where uncertainty exists as to whether certain members of an employer’s management structure are “supervisors” under Section 2(11), consider granting such individuals additional responsibilities and reward them or discipline them if they fail to meet the objectives and responsibilities they are assigned.
  - Modify merit pay and/or variable compensations programs to reward employees for exceptional performance in supervisory matters.



- Document any disciplinary action with respect to unsatisfactory performance in supervisory functions.
- Review collective bargaining agreements and proposals at the bargaining table to ensure that the work duty restrictions contained within such agreements and proposals do not erode independent judgment.
- Review whether certain employees should now be included or excluded, due to supervisory status, from existing bargaining units.
- Review NLRA training programs to be certain that nonsupervisory employees are not being asked to participate in training designed to respond to union organizing campaigns.
- Schedule training sessions for individuals who are clearly supervisors under the Act to educate them on the importance of not committing unfair labor practices that are the ultimate responsibility of the employer.
- Develop a bargaining strategy for employers that have union contracts to respond to union proposals that an employer not implement the directives of the *Kentucky River* decisions.

If you are uncertain whether an individual is a supervisor or employee under the established rules, consult with legal counsel.

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If you desire further information on this topic, please contact one of the following Jones Day lawyers who regularly practice in this area of the law, or your regular Jones Day lawyer contact. General e-mail messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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