Articles

OAKWOOD HEALTHCARE, INC., 348 N.L.R.B. NO. 37 (2006): HOW TEXTUALISM SAVED THE SUPERVISORY EXEMPTION

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For the past twenty years, union membership has been steadily declining.[1] For instance, the International Association of Machinists, or IAM, has reported a decline of over 100,000 members from 2000 through 2003.[2] Overall, less than 8% of private sector employees choose to be represented by unions.[3] This dramatic decline in union membership over the past 20 years is uniformly recognized. The AFL-CIO, in fact, recently recognized that "union membership has declined from a high of 33% of the

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1. *See* The Labor Research Association Online, *Job Losses Erode Union Membership* (February 23, 2004), http://www.laborresearch.org/print.php?id=347 (noting that "[t]he unionization rate for the private sector has fallen by about half over the past twenty years").

2. *See* IAM's LM-2 Report from 2004, http://erds.dol-esa.gov/query/getOrgQry.do (indicating a recent sharp decline in membership) (last visited Oct. 11, 2006).

3. Press Release, U.S. Department of Labor, *Union Members in 2005* (January 20, 2006) *available at* http://www.bls.gov/news.release/union2.nr0.htm (last visited Oct. 11, 2006).

workforce . . . to less than 15 percent."[4] This decrease in union membership has been accompanied by (or been the product of) a decrease in the number of union elections, or as they are commonly known, representation elections.[5] The number of union representation elections held in 2005 decreased to 2,117 from 2,361 in 2004, continuing an annual decline in National Labor Relations Board (NLRB or Board) elections since 1996 when about 3,300 elections were conducted.[6] Recent changes in the union movement will likely curb this decline, increase organizational activity around the country, and inevitably lead to a significant increase in the number of representation elections.

On April 28, 2005, the President of the AFL-CIO, John J. Sweeney, released a twenty-six page manifesto of sorts entitled "Winning for Working Families."[7] The document's design was to address the recent failures of the labor movement as well as the membership declines spawned by these failures. It specifically states that "[o]ur goal is clear: We must rebuild our movement to create a stronger voice and a better future for working people."[8] To meet this objective, the document broadly outlines a strategy that will more than likely have a major impact on many of America's employers. The strategy is to give local unions in all industries monetary incentives to ramp-up organizing efforts. The AFL-CIO alone has set aside roughly $500 million per year to "deepen and increase the activism . . . build lasting mobilization structures . . . [and] stay organized not just for elections but *between* elections . . . ."[9]

Several influential members of the AFL-CIO, led by the Teamsters and the Service Employees International Union, are unhappy with these changes, and have therefore disaffiliated very recently from the coalition.[10] According to most sources, the split was the byproduct of a fundamental disagreement between AFL-CIO leaders and others over the best strategy for reinvigorating the movement, i.e., stopping the decline in union

4. John J. Sweeney, *Winning for Working Families: Recommendations from the Officers of the AFL-CIO for Uniting and Strengthening the Union Movement* at 3 (April 2005), *available at* http://www.aflcio.org/aboutus/thisistheaflcio/outfront/upload/executive_officers.pdf.

5. *See* Michael H. Cimini, *U.S. Department of Labor, National Labor Relations Board (NLRB) Union Representation Elections, 1998-2002* (April 28, 2003), http://www.bls.gov/opub/cwc/content/cb20030425tb01.stm (last visited Oct. 11, 2006) (indicating a decrease in the number of union representation elections).

6. Bureau of National Affairs (BNA), *Number of NLRB Elections, Win Rate By Labor Unions Both Decreased in 2005*, DAILY LABOR REP., No. 80, C-1 (April 26, 2006).

7. Sweeney, *supra* note 4.

8. *Id.* at 5.

9. *Id.* at 11.

10. *See generally* BNA, *UNITE HERE Disaffiliates from AFL_CIO, Citing Differences Over Organizig, Politics*, DAILY LABOR REP., No. 178, at AA-1 (September 15, 2005).

membership.[11] The AFL-CIO leaders believed that resources should be allocated equally to lobbying for favorable legislative change and to organizational activities. The disaffiliated unions disagreed with this strategy, believing that resources should be allocated primarily, if not exclusively, to union organizing efforts.[12] The disagreement prompted the historic split, with the disaffiliated union taking a "pot full of money" that was once allocated to paying coalition dues that can now theoretically be used for organizing.[13] The AFL-CIO reforms, coupled with the disaffiliated union's strategy to pour significant resources into organizing efforts, will invariably result in more union elections.[14] The number of elections could, in fact, increase dramatically.[15]

This article explores how these changes, and in particular the increase in union elections, place renewed importance on section 2(11) (also referred to throughout as the "supervisory exemption") of the National Labor Relations Act (NLRA or Act),[16] as well as the NLRB's institutional obligation to set out a statutorily sound interpretation of section 2(11). The article then explores and provides an answer to the much more important and related question: Did the NLRB finally satisfy this institutional obligation in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), the Board's most recent and arguably most comprehensive refinement of the supervisory exemption?[17] Or will *Oakwood* meet with the same interpretative misfortunes of the Board's past constructions of section 2(11)?

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11. *Id.*

12. For instance, on February 22, 2006, the American Federation of State, County and Municipal Employees (AFSCME) announced a new program entitled Union Spring Break 2006. The program is designed to recruit and train future union organizers. John Melegrito, *A Great Spring Break*, http://www.afscme.org/publications/3573.cfm (last visited Nov. 24, 2006).

13. *See generally* BNA, *AFL-CIO Council to Hold Special Meeting to Respond to Defections by SEIU, Teamsters*,, DAILY LABOR REP., No. 143, at AA-1 (July 27, 2005).

14. *See generally* BNA, *Split in AFL-CIO Said Likely to Generate Additional Organizing Drives, Union Activism*, DAILY LABOR REP., No. 144, at AA-2 (July 28, 2005) ("Observers from both labor and management circles agree the split will likely generate at least a short-term bump in union organizing drives and union activism").

15. *Id.*

16. National Labor Relations Act, 29 U.S.C. § 159(b) (2006).

17. The Board announced two other related decisions on the same day as *Oakwood*: *Beverly Enterprises-Minnesota, Inc.*, 348 NLRB No. 39 (2006) and *Croft Metals, Inc.*, 348 NLRB No. 38 (2006). In both, the Board applied for first time the standards articulated in *Oakwood*. The three cases, before the Board actually decided them, were collectively called the *Kentucky River* cases, for reasons that will become obvious below.

I. THE SUPERVISORY EXEMPTION AND THE IMPORTANCE OF PROVIDING IMMEDIATE INTERPRETIVE GUIDANCE

Representation proceedings often precede a union election.[18] A representation proceeding is nothing more than a hearing at which an NLRB Hearing Officer (or sometimes an Administrative Law Judge) decides who will and who will not vote in the election.[19] More specifically, when the respondent, most often an employer, in a representation election (and sometimes in an unfair labor practice hearing) disagrees with the composition of the voting unit designated by the petitioner, most often a union, one of the Board's Hearing Officers will determine whether the designated voting unit is an "appropriate" unit.[20] This determination is made prior to the election at what is called a Unit Clarification ("UC") hearing.[21] The Hearing Officer's determination centers on whether the proposed voting unit contains employees who have a mutual interest in wages, hours, and conditions of work, otherwise known as a "community of interests."[22] In conducting the community of interests analysis, the Hearing Officer is not searching for the single best unit.[23] Their job is only to examine whether the proposed unit is an appropriate one.[24] If the Hearing Officer determines that the proposed unit is appropriate, the

18. This is not always true, however. Sometimes there are no disputes over who will participate in the election. *See infra* note 19 and accompanying text.

19. Other election matters can be addressed at this hearing, such as the date and time of the election. *See generally* NATIONAL LABOR RELATIONS BOARD, NLRB CASEHANDLING MANUAL PART TWO, *available at* http://www.nlrb.gov/publications/manuals/r_-casehandling_manual_(II).aspx (detailing the procedure used in representation proceedings).

20. 29 U.S.C. § 159(b) (2006) ("The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .").

21. *See generally* NATIONAL LABOR RELATIONS BOARD, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 40, *available at* http://www.nlrb.gov/nlrb/legal/manuals/outline_chap4.pdf (describing the peition for Unit Clarification).

22. Continental Baking Co., 99 NLRB 777, 782 (1952); *see also* NATIONAL LABOR RELATIONS BOARD, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 125, *available at* http://www.nlrb.gov/nlrb/legal/manuals/outline_chap4.pdf (detailing how and why a community of interest is found).

23. Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 610 ("[E]mployees may seek to organize 'a unit' that is 'appropriate' -- not necessarily *the* single most appropriate unit."); *see also* Cal. Pac. Med. Ctr. v. NLRB, 87 F.3d 302, 308 (9th Cir. 1996) ("The Board need only select an appropriate unit, not the most appropriate unit."); NATIONAL LABOR RELATIONS BOARD, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 123, *available at* http://www.nlrb.gov/nlrb/legal/manuals/outline_chap12.pdf ("there is nothing in the statute which requires that the unit for bargaining be . . . the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'").

24. *Cal. Pac. Med. Ctr*, 87 F.3d at 308.

employees identified by the petitioner will constitute the voters in the representation election. If the Hearing Officer determines that the proposed unit is inappropriate, the Board will include or exclude the employees necessary to make the unit appropriate.[25]

The UC hearing is the first, and likely the most important procedural event in the election campaign for both parties involved. The election could be affected by the composition of the unit, as well as "the future course of . . . labor relations."[26] Employers and unions alike will, therefore, vociferously battle to obtain a voting unit (and later a bargaining unit) that will most likely yield a favorable electoral outcome. Central to these battles will be (and has always been) the statutory supervisory exemption, contained within Section 2(11) of the National Labor Relations Act.[27]

The supervisory exemption was created in 1947 in an attempt to maintain a balance between unions and employers, and to avoid situations where members of a bargaining unit might experience a conflict of interest between representing management as a supervisor and collective action on behalf of employees.[28] According to Section 2(11) of the Act, a supervisor is:

> [A]ny individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to responsibly 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.[29]

As has been made clear on multiple occasions, "[t]he text of [section] 2(11) of the Act . . . sets forth a three-part test for determining supervisory

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25. Over the years, the Board has used a number of factors related to the community of interests analysis to determine whether a unit is appropriate, including: evaluation of the employees' desires, duties and skills of the designated employees, the extent of union organization, bargaining history, whether there is common supervision amongst the designated employees, and the employers' organizational structure. These factors are heavily relied upon. This is true largely because the National Labor Relations Act itself provides the Board little statutory guidance for determining an appropriate unit. *See generally* NATIONAL LABOR RELATIONS BOARD, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 123-39, *available at* http://www.nlrb.gov/nlrb/legal/manuals/outline_chap12.pdf (describing the procedure by which the appropriate unit is determined).

26. Louis Jackson and Robert Lewis, WINNING NLRB ELECTIONS: MANAGEMENT'S STRATEGY AND PREVENTIVE PROGRAMS 107 (1972).

27. 29 U.S.C. § 152(11) (2006).

28. NLRB v. Yeshiva University, 444 U.S. 672, 682 (1980); Florida Power & Light Co. v. IBEW Local 641, 417 U.S. 790, 808-10 (1974); N.L.R.B. O.M. Mem. 04-09 (Oct. 31, 2003).

29. 29 U.S.C. § 152(11) (2006).

status."[30] Employees fall within this statutory exemption if (1) they hold the authority to engage in any of the twelve listed supervisory functions, (2) their "exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment,"[31] and (3) their authority is held "in the interest of the employer."[32] All three questions must be answered affirmatively; otherwise the employee will not be deemed a supervisor under the Act.[33]

The NLRA thus does not cover and, by logical extension, does not protect supervisors.[34] This means that supervisors may not be included in the voting (and later the bargaining) unit.[35] The inclusion of a supervisor in the proposed voting unit would make the voting unit inappropriate. This has obvious consequences for the UC hearing described above. The Hearing Officer must often times determine an employee's proper job classification (i.e., supervisor or non-supervisor) in assessing the appropriateness of the proposed voting unit.

And, as has been recognized for some time, "[t]he most frequently litigated job classification issue is whether a particular employee is a supervisor as defined by the Act."[36] The supervisory exemption has indeed provided fertile ground for controversy because many employers in any number of different fields have employees whose duties straddle the lines of professional, supervisory, and managerial functions. The supervisory exemption has, in fact, been a point of contention over the years in just about all sectors of our economy, including communications and publishing,[37] construction and mining,[38] transportation,[39] public utilities,[40]

30. NLRB v. Kentucky River, 532 U.S. 706 (2001).

31. 29 U.S.C. § 152(11) (2006).

32. *Id.*

33. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 574 (1994).

34. *See generally* NATIONAL LABOR RELATIONS BOARD, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 204-15, *available at* http://www.nlrb.gov/nlrb/legal/manuals/outline_chap17.pdf (discussing the supervisory exception in the Act).

35. *Id.*

36. Jackson & Lewis, *supra* note 26, at 109.

37. *See, e.g.*, Russell J. Davis, *Who Are Supervisors Within The Meaning of The National Labor Relations Act In Communication and Publishing*, 48 ALR Fed. 45 (2006) (identifying who qualifies as a supervisor in the context of communications and publishing).

38. *See e.g.*, Russell J. Davis, *Who Are Supervisors Within the Meaning of the National Labor Relations Act In Construction and Mining Operations*, 54 ALR Fed. 74 (2006) (identifying who qualifies as a supervisor in the context of construction and mining).

39. *See e.g.*, Russell J. Davis, *Who Are Supervisors Within the Meaning of the National Labor Relations Act In Transportation Operations*, 50 ALR Fed. 126 (2006) (identifying who qualifies as a supervisor in the context of transportation).

40. *See e.g.*, Russell J. Davis, *Who Are Supervisors Within the Meaning of the National Labor Relations Act in Public Utilities Operations*, 51 ALR Fed. 14 (2006) (identifying who qualifies as a supervisor in the context of public utilities).

health services, and education,[41] just to name a few.

The problem that has historically faced unions and employers alike is that the Board has failed to fully articulate the parameters of the supervisory exemption (or at least one that could withstand Supreme Court scrutiny). Indeed, much jurisprudential uncertainty has existed. For countless years, employers and unions have been left to guess who is and who is not a supervisor. Worse yet, they have had to satisfy themselves with the inherent uncertainty produced by the application of section 2(11) without a definitive standard. This historic jurisprudential uncertainty is the product of the Board's consistent misinterpretation and recent inattention to the supervisory exemption, both of which border on institutional malpractice. Indeed, ever since 2001, the year the U.S. Supreme Court overturned the Board's second attempt to articulate guidance on the supervisory exemption, the law in this area has been marred with uncertainty. Employers, Unions, and the Hearing Officers who are on the front lines applying section 2(11) on a daily basis, have had little guidance. In an environment that is ripe for an explosion in the number of representation elections, legal uncertainty about one of the most hotly contested election issues was simply unacceptable. There was an urgent need to clarify the uncertainty that surrounded the supervisory exemption. The Board needed to act. The *Kentucky River* cases, as they have been so pejoratively named, gave the Board the opportunity to do just that. These cases gave the Board the chance to provide employers, unions, and its own agents with much-awaited and much-needed guidance. The Board had the opportunity to finally eliminate the uncertainty.

The question on everyone's mind in 2003 when the Board decided for the first time that it would tackle the supervisory exemption: will the Board finally get it right, or will it prolong the uncertainty by promulgating yet another interpretation of the supervisory exemption that the Supreme Court would find unacceptable. The remainder of this article explains why the Board got it right, averting historic déjà vu, and finally eliminating the jurisprudential uncertainty once and for all.

II. THE BOARD'S HISTORICAL MISINTERPRETATION AND RECENT INTERPRETIVE INACTIVITY OF THE SUPERVISORY EXEMPTION

The Board has always struggled to adopt an interpretation of the supervisory exemption that is statutorily sound enough to withstand Supreme Court scrutiny. In recent years, the health care industry has been the primary (or at least the most recognized) battle ground for supervisory

41. *See e.g.*, Russell J. Davis, *Who Are Supervisors Within the Meaning of the National Labor Relations Act in Education and Health Services*, 52 ALR Fed. 28 (2006) (identifying who qualifies as a supervisor in the context of education and health services).

issues and the Board's efforts to promulgate an interpretation that will not be struck down by the high court.[42] Charge nurses and their proper statutory categorization (i.e., supervisor or not) were thrust to the forefront in the late 1980s and early 1990s.[43] For many years, the Board and courts disagreed on whether and under what circumstances a charge nurse was a supervisor within the meaning of 2(11). The Board used, what it termed, the "patient care" analysis to resolve this question. Pursuant to the patient care analysis, the Board examined whether "the alleged supervisory conduct of the charge nurses is the exercise of professional judgment incidental to patient care or the exercise of supervisory authority in the interest of the employer."[44] If the judgment was incidental to patient care (i.e., in the interest of the patient), the charge nurse would fall outside the definition of supervisor. On the other hand, if the charge nurse exercised judgment in the interest of the employer, he or she would fall within the definition of supervisor.[45] In other words, if the alleged supervisor is directing another employee to do that which she was technically trained to do, the alleged supervisor would not constitute a statutory supervisor, regardless the type of direction.

Not surprisingly, the Board's "patient care" analysis was not widely accepted by the circuit courts because of the apparent disconnect with its ostensible statutory source, section 2(11). Several courts specifically reasoned that the Board's patient care analysis carved out an exception for charge nurses that ran contrary to the plain language of the statute.[46] The Sixth Circuit, for instance, held that "it is up to Congress to carve out an exception for the health care field, including nurses, should Congress not wish for such nurses to be considered supervisors,"[47] reminding the Board

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42. *See* Jonathan E. Motley, *Grandmothers And Teamsters: How The NLRB's New Approach To The Supervisory Status Of Charge Nurses Ignores The Reality Of The Nursing Home*, 73 IND L.J. 711, 711-44 (1998) (stating that NLRB's decision that charge nurses are supervisors misunderstands the difference between acute-care hospitals and nursing homes).

43. Charge nurses are responsible for the daily functioning of their ward, or unit; they will determine unit needs, direct nursing staff, and assess nursing care given by the staff. *See* EM Nurses Home Page, *The Charge Nurse Role/Description*, http://depts.washington.edu/emsuw/nurses/charge.htm (last visited Oct. 11, 2006) (describing duties and requirements of charge nurse). The charge nurse must be a certified RN in emergency medical service with six months experience as an RN. *Id.*

44. Northcrest Nursing Home, 313 NLRB 491, 493 (1993) (citing Newton-Wellesley Hospital, 219 N.L.R.B. 699, 699-700 (1975)).

45. *Id.*

46. *See* Beverly California Corp. v. NLRB, 970 F.2d 1548 (6th Cir. 1992) (holding that registered nurses came within supervisory definition); NLRB v. Beacon Light Christian Nursing Home, 825 F.2d 1076 (6th Cir. 1987) (holding that licensed practitioner nurses were supervisors).

47. Northcrest Nursing Home v. NLRB, 987 F.2d 1256, 1261 (6th Cir. 1993)

"that it is the courts, and not the Board, who bear the final responsibility for interpreting the law."[48]

The Supreme Court agreed with the Sixth Circuit and several other circuit courts. It found that the Board's interpretation "created a false dichotomy" and thus "makes no sense."[49] Specifically, the Court found that the "patient care" analysis departed unacceptably from the plain meaning of section 2(11) and rendered "portions of the statutory definition in § 2(11) meaningless."[50] The Court then spoke to the Board's indifference to the text of section 2(11), admonishing that "the statute must control the Board's decisions, not the other way around."[51] This decision, by no means, resolved the controversy over the proper interpretation of "supervisor." And, of course, the Board continued to misinterpret it.

After the *Northcrest* decision, the Board focused on another part of the statutory definition of supervisor: independent judgment.[52] The Board settled on an interpretation that would, once again, prove controversial. The Board interpreted "independent judgment" such that the definition excluded those who exercised ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.[53] According to this interpretation, an employee does not exercise "independent judgment," as enumerated in section 2(11), when they are merely exercising "ordinary professional or technical judgment in directing less skilled employees to deliver services."[54] In other words, independent judgment is not independent if it arises from technical knowledge or experience. Staunch criticism immediately followed. Employers argued that this interpretation impermissibly narrowed the definition of a supervisor, pulling into the NLRA's coverage many employees with true supervisory responsibilities albeit under some direction from higher management.[55]

The Board's interpretation came before the Supreme Court in *NLRB v. Kentucky River Community Care*.[56] Like in *Northcrest*, the Supreme Court

48. *Id.* at 1160. Note that LPN stands for Licensed Practical Nurse.
49. NLRB v. Northcrest Nursing Home, 511 U.S. 571, 577 (1994).
50. *Id.* at 578.
51. *Id.* at 580.
52. *E.g.*, N.L.R.B. O.M. Mem. 04-09 (Oct. 31, 2003).
53. NLRB v. Kentucky River Cmty. Care, 532 U.S. 706, 713 (2001).
54. *Id.*
55. *Kentucky River*, 532 U.S. 706.
56. *Id.* In *Kentucky River*, the employer operated a home for the mentally disabled. Kentucky River Cmty. Care, Inc. v. NLRB, 193 F.3d 444, 447 (6th Cir. 1999). The facility employed approximately 110 professional and non-professional employees in addition to about twelve clearly managerial or supervisory employees. *Id.* at 449. The Kentucky State District Council of Carpenters ("Carpenters") petitioned the Board, requesting to represent all 110 of Kentucky River's professional and non professional employees. *Id.* At the UC hearing, the employer objected to the inclusion of six registered nurses who had the job title

disapproved of the Board's interpretation. Also like in *Northcrest*, the Court did so because the interpretation was not sufficiently wed to its statutory roots in section 2(11). The Court specifically found that "[t]he first five words of . . . [the Board's] interpretation insert a startling categorical exclusion into the statutory test that does not suggest its existence."[57] Such a categorical exclusion, the Court further reasoned, would virtually eliminate supervisors from the Act.[58] The Court found the remaining words of the Board's interpretation ("in directing less-skilled employees to deliver services") were also unsupported by the text of section 2(11): "[t]his second rule is no less striking than the first, and is directly contrary to the text of the statute."[59]

Even a cursory reading of *Kentucky River* demonstrates that it far from resolved the controversy surrounding section 2(11). The Court not only left many questions unanswered, it apparently generated a few new questions.[60] An article published right after the decision commented about the practical impact of *Kentucky River*:

> Far from settling the matter, the *Kentucky River* decision has placed back before the Board the question of whether nurses or any professional, technical or skilled employees who rely on less highly trained or experienced personnel to help them accomplish their work now fall outside the protection of the Act. Does *Kentucky River* mean that any guidance or direction given by a professional to another employee constitutes supervisory conduct? Will working as part of a team with other employees who do not share the same professional expertise cost the professional his or her section 7 rights? Is a skilled electrician who works with an apprentice or other assistant an exempt supervisor based on directions he or she gives the assistant? And, even more to the point, does the NLRB retain discretion to

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of Building Supervisors. *Id.* It claimed that they were supervisors and, therefore, excluded from the Act's coverage and from the voting unit. *Id.* The Board's Regional Director (who conducted the hearing) disagreed and included the six disputed employees in the bargaining unit. *Id.* After the Carpenters won the election, the employer subsequently refused to bargain on the ground that six charge nurses were improperly included in the voting unit. *Id.* The NLRB then found that the employer's refusal to bargain constituted an unfair labor practice. *Id.* The employer petitioned the Sixth Circuit Court of Appeals for review and the Board cross-petitioned for enforcement of its order. *Id.* The Sixth Circuit, holding that the Board's interpretation of the "independent judgment" language of Section 2(11) was in error, refused to enforce the Board's order. *Id.*at 454. The Supreme Court granted certiorari in an effort to determine the proper interpretation of the "independent judgment" language in Section 2(11). NLRB v. Kentucky River Cmty. Care, 532 U.S. 706, 708 (2001).

57. *Kentucky River Cmty. Care*, 532 U.S. at 714.

58. *Id.* at 714-15.

59. *Id.*

60. *See* N.L.R.B. O.M. Mem. 04-09 (Oct. 31, 2003) (discussing the Board's invitation for briefs on a series of supervisory issues following the decision in *Kentucky River*).

> construe the Act in a manner that will prevent a significant portion of the professional workforce as well as large numbers of nonprofessionals, but skilled and experience workers thought to be at the very core of the category of employees protected by the Act, from being swept outside the Act's protection as supervisors?[61]

Obviously, this left practitioners, employers, and unions alike searching for guidance in this turbulent area of labor law. The Supreme Court, like it did after *Northcrest*, placed the onus on the Board to properly interpret the supervisory exemption. The Board shied from the challenge for nearly two years, however, choosing to address the supervisor issue with already-established and accepted principles of law (discussed below), rather than try to fill the statutory void created by *Northcrest* and *Kentucky River*. Due mostly to the Board's interpretive inactivity, the circuit courts likewise provided no guidance after *Northcrest* and *Kentucky River*. The circuit courts, while occasionally referencing *Kentucky River* and at times purporting to apply its principles, simply addressed the supervisor issue using well-established legal principles.[62]

In an attempt to provide some much needed guidance, in July 2003, the Board invited interested parties to file briefs addressing supervisor issues left unresolved by *Northcrest* and *Kentucky River*, a rather unique move.[63] The specific issues that the Board requested input on included:

> 1.The difference between assigning and directing.
> 2.The meaning of the word "responsibly" in the statutory phrase "responsibly to direct."

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61. Craig Becker & Diana O. Ceresi, *Toward A Rational Interpretation Of The Term "Supervisor" After* Kentucky River, 18 LAB. LAW. 385, 386 (2003).

62. *See* Public Service Co. of Colorado v. NLRB, 405 F.3d 1071, 1079 (10th Cir. 2005) (holding that workers were not supervisors just because they made decisions affecting bonuses); Hosp. Gen. Menonita v. NLRB, 393 F.3d 263, 267-68 (1st Cir. 2004) (upholding determination that registered nurses, who direct the patient care tasks of LPNs and technicians, were not supervisors); NLRB v. Dole Fresh Vegetables, Inc., 334 F.3d 478, 485-86 (6th Cir. 2003) (stating that "lead" employees who distribute tasks assigned by shift supervisors to technicians were not supervisors under section 2(11)); Entergy Gulf States, Inc. v. NLRB, 253 F.3d 203, 211 (5th Cir. 2001) (holding operations coordinators who direct field workers are supervisors); Coastal Lumber Co. v. NLRB, 24 Fed. Appx. 120, 121 (4th Cir. 2001) (unpublished disposition) (refusing to enforce NLRB order because of Court's holding in *Kentucky River*); NLRB v. Quinnipiac Coll., 256 F.3d 68 (2d Cir. 2001) (stating that security officers were supervisors because they directed others, assigned tasks, and recommended discipline). *But see* Multimedia KSDK, Inc. v. NLRB, 303 F.3d 896, 900 (8th Cir. 2002) (rejecting the Board's order because it contradicted with the Court's holding in *Kentucky River*); Coastal Lumber Co. v. NLRB, 24 Fed. Appx. 120, 121 (4th Cir. 2001) (unpublished disposition) (refusing to enforce NLRB order because it applied the standard that existed before the Court's holding in *Kentucky River*).

63. Lester A. Heltzer, *Notice and Invitation to File Briefs* (July 25, 2003), *available at* http://www.nlrb.gov/nlrb/press/releases/kyriver.pdf.

> 3.The distinction between directing 'the manner of others' performance of discrete tasks' and 'directing other employees,' guidance offered by the Court in *Kentucky River*.
> 4.The significance of schedules that rotate employees in and out of supervisory positions.
> 5.What is the meaning of the term 'independent judgment' as used in Section 2(11) of the Act? In particular, what is the 'the *degree* of discretion required for supervisory status,' i.e. 'what scope of discretion qualifies.'
> 6.What are the appropriate guidelines for determining the status of a person who supervises on some days and works as a non-supervisory employee on other days?
> 7.To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as giving rank-and-file employees greater autonomy and using self-regulating work teams?[64]

In response to this request, the Board received briefs from twenty-two interested parties.[65] Armed with these submissions, the Board appeared primed and ready to provide the long awaited *interpretative* guidance that would affect an estimated 8 million workers.[66] This guidance could not come soon enough, as there were countless cases pending before the Board raising these very issues.[67]

The remainder of this article provides the authors' thoughts on three issues addressed by the Board in *Oakwood*, and specifically how the Board articulated an interpretation of the supervisory exemption that will finally withstand Supreme Court scrutiny. The authors' thoughts are preceded by a brief summation of supervisory issues that have already been settled, an

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64. *Id.*

65. Press Release, NLRB, Statement of National Labor Relations Board Regarding "Kentucky River" Cases, (July 13, 2006) *available at* http://www.nlrb.gov/nlrb/press/releases/r2596.pdf (last visited Oct. 11, 2006).

66. *See* Ross Eisenbrey & Lawrence Mishel, *Supervisor in Name Only: Union Rights of Eight Million Workers at Stake in Labor Board Ruling*, ECON. POL'Y INST., Issue Brief #225 (July 12, 2006) ("The very broad definition of 'supervisor' employers are seeking could take away the right to join a union and bargain collectively from 8 million Americans throughout the labor market.").

67. The NLRB consolidated three cases to specifically address these issues: Oakwood Healthcare, Inc., Case 7-RC-22141; Golden Crest Healthcare Ctr., Case 18-RC-16415; and Craft Metals, Inc., Case 15-RC=8393. However, there "are an additional 65 cases awaiting decisions in these three cases." Michelle Ambler, *Labor Movement Rallies Around Pending NLRB Rulings Defining Supervisors*, DAILY LABOR REP. (BNA), No. 1522-5968, at 14-11 (July 14, 2006). *See also* Joyce E. Cutler, *NLRB: Multiple Cases on Supervisor Definition*, DAILY LABOR REP. (BNA), No. 171, at C-1 (September 6, 2005) (speaking about the issues left unresolved by *Kentucky River*, Chairman Battista stated, "I'm hopeful we can get this [decision] out when we return to five-member status. It's a priority. It's an important issue. It has a substantial backlog of cases behind it. The issue is likely to go to the Supreme Court for the third time. It's important we get it right.").

overview of the scholarly work addressing the three, until recently, unsettled issues, along with an explanation of how these works have missed the mark.

III. THE SUPERVISORY EXEMPTION: ESTABLISHED PRINCIPLES

There are a host of legal principles relating to the definition of supervisor that are uncontroversial and well-settled. Although not exhaustive, below is a list of some of the important principles.

A."Supervisory issues are, of course, highly fact bound. Deciding whether an individual possesses any 2(11) indicia of supervisory authority often calls for making delicate, difficult, and even fine distinctions, and there are frequently gray areas."[68]

B.Congress sought to distinguish between truly supervisory personnel, who are "vested with genuine management prerogatives," and employees, such as "straw bosses, lead men, and set-up men, and other minor supervisory employees."[69] Consequently, the Board and courts will generally look beyond titles and specified hierarchical stations to an employee's actual authority.[70]

C.Congress' intent was to create a definition that would fairly reconcile two competing interests: (1) providing protection to an expansive number of employees; and (2) ensuring that employees with genuine management authority were denied organizational rights because, in Congress' judgment, they should have an undivided loyalty to management interests when they exercise independent judgment with respect to personnel matters or the responsible direction of work.[71]

D."[I]n the interest of the employer," from section 2(11) covers most employment conduct. As the Supreme Court held in *Northcrest*: "[a]n employee who *in the course of employment* uses independent judgment to engage in 1 of the 12 listed activities, including responsible direction of

68. Northcrest Nursing Home, 313 NLRB 491, 493 (1993).

69. NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-81 (1974) (quoting S. REP. No. 80-105, at 4 (1947)).

70. *See e.g.*, Entergy Gulf States, Inc. v. NLRB, 253 F.3d 203, 208 (5th Cir. 2001) (looking to activities such as monitoring of power lines to determine whether workers are supervisors).

71. *See Bell Aerospace*, 416 U.S. at 279-283 (holding Congress intended to exclude from NLRA protection all employees classified as managerial); Florida Power & Light Co. v. Elec. Workers, Local 641, 417 U.S. 790, 807-813 (1974) (stating Congress amended definition of employee to exclude supervisory positions); NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169, 1178 (2d Cir. 1968) (holding that engineers are not supervisors as defined by Congress); Douglas Aircraft Co., 238 N.L.R.B. 668, 671 (1978), *enforced*, McDonnell Douglas Corp. v. NLRB, 655 F.2d 932 (9th Cir. 1981) (asserting that Congress could not have meant to include supervisors in the definition of employee).

other employees, is a supervisor."[72]

E.Although never determinative, the Board and most courts use "secondary indicia" as a means of determining supervisor status. Secondary indicia include: perception of other workers, attendance at management meetings, time spent ordering others around rather than engaging in production work, salary, distinctive clothing, and the ratio of employees to supervisors.[73]

F."The burden of proving the applicability of the supervisory exception . . . fall[s] on the party asserting it," i.e., the employer.[74]

G.The *Kentucky River* decision does *not* undermine prior Board decisions based on other indicia of supervisory status, i.e., authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline or adjust grievances.[75]

H.The three-part supervisor test remains in tact. In other words, to fall within the category of supervisor and be denied protection under the Act, three conditions must be met: (a) employee holds the authority to engage in or effectively to recommend any 1 of the 12 listed supervisory functions (i.e. hire, transfer, suspend, lay off, recall promote, discharge, assign, reward, discipline other employees, responsibly to direct them, or to adjust their grievances); (b) the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment; and (c) the authority is held in the interest of the employer.[76]

This is what we do know. But as touched on above, this left much unresolved either because of historic misinterpretation or recent interpretative inaction by the Board. Of the unresolved issues, three took center-stage in the recently decided *Oakwood* case: (1) What does it mean to "assign;" (2) What does it mean to "responsibly direct;" and (3) What degree of independence constitutes "independent judgment."[77] The remainder of this article will explain how the Board's interpretation of these three formerly unresolved issues were right on the mark.

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72. NLRB v. Northcrest Nursing Home, 511 U.S. 571, 579 (1994).

73. *See* NLRB v. Dole Fresh Vegetables, Inc., 334 F.3d 478, 487-88 (6th Cir. 2003) (looking to indicia such as time spent ordering others to state that employees were not supervisors under section 2(11)); *Entergy Gulf States*, 253 F.3d at 209 (looking to time spent managing others to say they are supervisors); N. Mont. Health Care Ctr. v. NLRB, 178 F.3d 1089, 1096 n.6 (9th Cir. 1999) (using indicia such as perception and not relying on "paper authority"); NLRB v. Attleboro Assocs. Ltd., 176 F.3d 154, 163 n.5 (3d Cir. 1999) (using indicia such as directing others).

74. NLRB v. Kentucky River Cmty. Care, 532 U.S. 706, 711 (2001).

75. Becker & Ceresi, *supra* note 61, at 386 (2003).

76. Public Service Company of Colorado v. NLRB, 405 F.3d 1071, 1076 (10th Cir. 2005) (citing Kentucky River, 532 U.S. at 711-12).

77. 348 N.L.R.B. No. 37, at *4-11 (2006).

IV. INTERPRETING THE SUPERVISORY EXEMPTION: TEXTUALISM

Scholars and practitioners can argue about how the remaining unresolved issues *should have been* resolved by appealing to normative, value-laden concepts like the friendly resolution of industrial disputes or "conflicting policy goals that Congress sought to reconcile."[78] However, this would be an exercise in futility. A more useful exercise would be to argue about how the remaining issues will *likely be* resolved. Why? In the final analysis, the Supreme Court will have the last word on the Board's interpretations. This consideration should guide and, perhaps more importantly, should limit any discussion about the parameters of the supervisory exclusion. Scholars should take stock of the Court's prevailing methodology used for purposes of statutory interpretation. This is, no doubt, what the Board did, and actually had to do in articulating the new standards in *Oakwood*. This alone ensured that the decision would not suffer the fate of the standards examined in *Northcrest* and *Kentucky River*.

Considering the make-up of the Court, the Board needed to (and, as will be explained below, did) employ textualism in resolving the issues referenced above and discussed below. Textualism holds that the text of a given piece of legislation should retain primacy. As a result, there is no need to delve into the vagaries of congressional intent or legislative history, both of which are elusive concepts leading to incongruent results based on speculation and surmise.[79] Interpreting a statute under a textualist methodology merely requires giving "nontechnical words and phrases their ordinary meaning."[80] The ordinary or "plain meaning of a text is the meaning that it would have for a "normal speaker of English" under the circumstances in which it is used."[81] To ascertain this ordinary or plain meaning, "[t]extualists rely primarily on dictionary definitions, rules of grammar, punctuation, and canons of construction."[82]

It is irrelevant whether one agrees with this methodological approach to statutory interpretation because the U.S. Supreme Court will most likely use textualism to scrutinize any of the Board's interpretive moves. Indeed, Justice Scalia and Justice Thomas are self-proclaimed textualists.[83]

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78. N.L.R.B. O.M. Mem. 04-09, *supra* note 58.

79. Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 396-98 (1996).

80. Smith v. United States, 508 U.S. 223, 242 (1993).

81. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 206 (1980).

82. Richard J. Pierce, Jr., *Justice Breyer: Intentionalist, Pragmatist, and Empiricist*, 8 ADMIN. L.J. AM. U. 747, 747 (1995).

83. *See* Shawn Burton, *Justice Scalia's Methodological Approach to Judicial Decision-Making: Political Actor or Strategic Institutionalist?* 34 U. TOL. L. REV. 575 (2003)

Constitutional scholar William N. Eskridge, Jr. remarked on Scalia and Thomas' approach to constitutional statutory interpretation:

> Justices Scalia and Thomas operate under an approach to public law that is philosophically positivist and doctrinally textualist. They claim that courts are duty-bound to apply the plain meaning of statutory and constitutional texts, and not to depart one iota from their commands, even when to do so would appear fair and just.[84]

Some have even claimed that Justice Kennedy is a textualist.[85] This may also be true for new appointees to the Court. John Roberts, the new Chief Justice of the U.S. Supreme Court is, according to many accounts, a textualist.[86] Additionally, Samuel Alito, the Court's most recent appointee, nicknamed "Scalito" by the mainstream media, is also rumored to be a textualist.[87]

More importantly, textualism has guided the Court in the seminal supervisory cases. In *Northcrest* and *Kentucky River*, the Court rejected the Board's interpretations primarily because they were not sufficiently wed to the text of the statutory exclusion. In *Kentucky River*, for example, the Court stated that "[t]he first five words of this interpretation insert a startling categorical exclusion into the statutory text that does not suggest its existence."[88] The Court continued with its textual admonishment, noting that "[t]he text, by focusing on the 'clerical' or 'routine' (as opposed to

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(identifying Justice Scalia as a textualist); William N. Eskridge, Jr., *Textualism and Original Understanding: Should The Supreme Court Read* The Federalist *but Not Statutory Legislative History?* 66 GEO. WASH. L. REV. 1301, 1301 (1998) (identifying Justices Scalia and Thomas as textualists)..

84. William N. Eskridge, Jr., *Textualism and Original Understanding: Should The Supreme Court Read* The Federalist *but Not Statutory Legislative History?* 66 GEO. WASH. L. REV. 1301, 1301 (1998).

85. *See, e.g.*, Ernest Gellhorn, *Justice Breyer on Statutory Review and Interpretation,* 8 ADMIN. L.J. AM. U. 755, 758 (1995) ("Justices Kennedy and Scalia have led a textualist movement claiming that the plain meaning of the statute should be given effect.") (internal quotations removed); *see also* Pierce, *supra* note 82, at 748 (identifying Justice Kennedy as a textualist).

86. *See, e.g.*, Jay Alan Sekulow & Erik Michael Zimmerman, *Posting the Ten Commandments is a 'Law Respecting an Establishmen of Religion'?: How McCreary County v. ACLU Illustrates the Need to Reexamine the Lemon Test and its Purpose Prong,* 23 T.M. COOLEY L. REV. 25, 58 (2006) ("Chief Justice Roberts [has] a commitment to a text-based, rule-of-law approach to the Constitution."); Categorically Imperative, *John Roberts: A Bork in Sheep's Clothing*, Aug. 22, 2005, http://dailykos.com/story/2005/8/22/18180/3617 (last visited Oct. 11, 2006) ("John Roberts is purportedly an originalist and a textualist.").

87. *See, e.g.*, Emily Umbright, *U.S. Supreme Court Watchers Weigh in on Alito, Miers,* ST. LOUIS DAILY RECORD/ST. LOUIS COUNTIAN, Nov. 2, 2005 ("Alito is going to be closer to the Thomas purist type, where you start with text and you make precedent fit with text.").

88. *Kentucky River Cmty. Care*, 532 U.S. at 714.

'independent') nature of the judgment, introduces the question of degree of judgment that we have agreed falls within the reasonable discretion of the Board to resolve."[89]

Thus, appeals to normative values, efforts to discern congressional intent, or attempts to scour over the legislative history to resolve the issues addressed below would be unproductive, resulting in a higher likelihood of reversal by the high Court. Using a non-textual methodology would have been the Achilles heel for the Board, as it had been in the past. Focus needed to be concentrated on the plain meaning of the terms being interpreted. Textualism was the key to getting it right this time around.[90]

Obviously (even though there is no candid admission) the three-member Board majority in *Oakwood* recognized this methodological reality, making clear at the outset of the decision that they would not employ "a results-driven approach" or rely "primarily on selective excerpts from legislative history."[91] Instead, they wisely chose a textualist approach, explaining that "we start, *as we must*, with the words of the statute."[92] A review of the decision demonstrates that the three-member majority faithfully applied this approach to construing "responsibly to direct," the difference between "assigning" and "directing," and "independent judgment," enabling them to produce sound statutory interpretations that will not suffer the fate of those examined in *Northcrest* and *Kentucky River*.

A. Responsibly To Direct

"Responsibly to direct" is arguably the least ambiguous of the phrases addressed in *Oakwood*, particularly when viewed from a textualist perspective. Direct is commonly defined as "to point, extend, or project in a specified line or course."[93] Responsibly is commonly defined as "subject to being held to account."[94] From a textualist perspective then, any individual who instructs or guides any part of the workforce (i.e., employees at any level) in the operation of the business and is held accountable for such instruction or guidance, no matter how significant the guidance or instruction, responsibly directs.

This text-driven interpretation was adopted in *Oakwood*. With respect to "direct," the three-member majority explained that "the authority to

89. *Id.*

90. Not only will a textualist approach help ensure that future Board interpretations do not suffer the fate of *Northcrest* and *Kentucky River*, it will also produce an interpretation that accommodates workplace realities in the 21st Century.

91. Oakwood Healthcare, Inc., 348 N.L.R.B. No. 37, at *15 (2006).

92. *Id.* (emphasis added).

93. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988).

94. *Id.*

'responsibly to direct' is not limited to department heads."[95] Instead, as long as the putative supervisor "has 'men under him, and . . . that person decides what job shall be undertaken next or who shall do it,' that person" directs.[96] With respect to "responsibly," the Board turned again to the "ordinary meaning of the word."[97] As explained by the Board, "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly."[98]

Many will, of course, disagree with this interpretation because it admittedly sweeps many individuals from the Act's coverage, something that would not necessarily result with a narrower and less text-sensitive interpretation. Prior to the decision, in fact, the General Counsel, argued for an interpretation that would require the "direction" to be much more significant. The General Counsel proposed an evidentiary standard that states "[a]n individual who responsibly directs with independent judgment within the meaning of Section 2(11): has been delegated substantial authority to ensure that a work unit achieves management's objectives and is thus 'in charge.'"[99] In a similar vein, Craig Becker and Diana Ceresi, two union attorneys, contend that:

> [T]he entire legislative history of § 2(11) suggests that § 2(11) authority to "responsibly to direct" is an "essential[ly] managerial" authority to direct the overall work of all employees in a department subject to "only general orders," such as that traditionally exercised by a foreman or department head (like the Director of Nursing in a nursing home) over all underlings in a department.[100]

Even the dissent in the *Oakwood* decision raised concerns about such an interpretation, claiming that a text-driven interpretation of "responsibly to Direct" would result in supervisory status being extended to "every person on the shop floor."[101]

The General Counsel's interpretation, as well as Becker and Ceresi's, are certainly not inconsistent with the Court in *Kentucky River*. As Justice Scalia said, "[p]erhaps the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees

95. Oakwood Healthcare, Inc., 348 N.LR.B. at *27.
96. *Id.* at *28.
97. *Id.* at *32-33.
98. *Id.* at *32-33.
99. N.L.R.B. O.M. Mem. 04-09 (Oct. 31, 2003)
100. Becker & Ceresi, *supra* note 61, at 403.
101. Oakwood Healthcare, Inc., 348 N.LR.B. at *8.

who direct the manner of others' performance of discrete tasks from employees who direct other employees . . . ."[102] This does not, however, mean that the individual needs to be 'in charge' or be a department head to be responsibly directing. The Board majority wisely refused to read too much into Scalia's statement, because doing so would ignore the plain text of Section 2(11). "Direct" is modified by "responsibly." It is not modified by significant or substantial (or any term synonymous with significant or substantial). Instead, the plain text reads such that *any* direction, as long as there is accountability, constitutes "responsible direction." Interpreting "responsibly to direct" in the manner suggested by the General Counsel would add a modifier that is simply not in the statutory text. If Congress intended the definition suggested by the General Counsel and Becker and Ceresi, it could have added another modifier after "responsibly." Congress, for whatever reason, chose not to. As the Court said in *NLRB v. Health Care*, "it is for Congress not us, to create exceptions or qualifications at odds with [the Act's] plain terms."[103] The dissent's concerns, valid or not, ignores one critical consideration: result-driven interpretations that focus on potential "real world" consequences have not and will not survive Supreme Court scrutiny.

B. The Difference Between Assigning and Directing

"Assigning" and "directing" presented a tougher interpretive task for the Board, mainly because they are linguistically similar enough that one could mistakenly take the position that there is no discernable difference in meaning between the two. Again, since the text retains primacy, there must be a distinction. Congress certainly did not intentionally include an active verb, and at the same time intend it to be superfluous. Such an interpretation defies logic, especially from a textualist point of view. Therefore, any attempt to identify a distinction must start with the plain meaning of the two words.

Assign is commonly defined as "to appoint to a post or duty."[104] Juxtaposing this definition with the definition of direct, the distinction becomes clear. As noted above, direct is commonly defined as "to point, extend, or project in a specified line or course."[105] Operations are directed, whereas employees are assigned. That is, an individual conducts, manages, runs, steers, and controls (all synonyms for direct) a business or a discrete portion of a business. On the other hand, an individual appoints or

102. *Kentucky River Cmty. Care*, 532 U.S. at 720.
103. NLRB v. Health Care & Retirement Corp. of Am, 511 U.S. 571, 573 (1994).
104. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988).
105. *Id.*

designates employees to a particular task within the confines of the prearranged operations.

Obviously there will be overlap. For instance, when an individual controls the operations, he or she may also be given the responsibility to determine exactly how the employees will fit into the operations. Overlap is not inevitable, however. Consider an individual (A) who designs or engineers a manufacturing process to make product (X) and also sees to it that the daily operations conform to that design. However, (A) is not involved in determining which employees are stationed at which machine or which employees perform which tasks in the process. This latter task is left up to another individual (B), who may or may not be held accountable to (A). Under this scenario, (A) is directing, but not assigning, and (B) is assigning, but not necessarily directing. The distinction lies, therefore, in the subject upon which the action is taken.

Despite the distinction, "assign" and "direct" do have something in common. Like directing, the plain language of Section 2(11) must be read to include *any* assignment. Otherwise, another modifier would be read into the statutory text, something that is clearly at odds with the plain language. The inclusion of other modifiers (i.e., "responsibly" and "independent judgment"), makes the conclusion, countenanced by others, that another non-explicit modifier be placed in front of "assign" illogical. Becker and Ceresi, nevertheless, advocate an interpretation of "assign" that would do just that. They specifically argue that:

> [R]eading "assign" to refer to non-transitory work status changes is consistent with the rule of statutory interpretation that words in a list should be given similar meanings. The authorities listed in the definition of supervisor--to "hire, transfer, suspend, lay off," etc.—generally encompass matters pertaining to employment status rather than matters pertaining to performing day-to-day operations.[106]

The dissenters in *Oakwood* similarly argued that "an assignment is an act that must affect 'basic' terms and conditions of employment or an employee's 'overall status or situation.'"[107] Like Becker and Ceresi, the dissent would impose "a unique and heightened standard on the supervisory function of assigning."[108]

106. Becker & Ceresi, *supra* note 61, at 399.
107. Oakwood Healthcare, Inc., 348 N.L.R.B. No. 37, at *5.
108. *Id.*

This narrow interpretation would require that the assignment be significant, such that "merely assigning tasks to employees does not make an employee a supervisor."[109] A narrow interpretation would obviously provide protection to many more individuals than the relatively broad interpretation advanced above. While this may be advantageous to union adherents, such an interpretation, as explained by the Board majority in *Oakwood*, ignores the plain text of Section 2(11). And as we have seen before, the Court will not accept an interpretation that ignores the plain text, regardless of whether it is arguably faithful to the "structure, and history of the statute."[110]

Recognizing this, the Board majority in *Oakwood* turned to the "ordinary meaning of the term 'assign,'" refusing to adopt an non-textual interpretation merely based on "predictions of the results it will entail."[111] In doing so, the Board recognized that, in order for its interpretation to be textually meaningful, there had to be a discernable difference between assign and direct.[112] Thus, as explained by the Board majority, "direction may encompass ad hoc instructions to perform discrete tasks; assignment does not."[113] For the Board majority, and to the obvious dismay of the dissent and others, the statute plainly does not contain a modifier before "assign," and, thus, any interpretation that would require the assignment to be one that changes the basic terms and conditions of the assigned employee's working conditions is textually and statutorily illogical. Consistent with the plain meaning of the term, and as explicitly recognized by the Board, "assign" must be construed as involving any instance where an employee is assigned to a task. This would necessarily include more than just the act of "giving significant overall duties."[114] It would also include, something the Board keenly pointed out, "the act of designating an employee to a place (such as a location, department, or wing)" and the act of "appointing an employee to a time (such as a shift or overtime period)."[115]

C. Independent Judgment

As the Supreme Court made clear in *Kentucky River*, "independent judgment" in section 2(11) deals with the degree of independence exercised, rather than the kind of independence exercised. That much is

109. Becker & Ceresi, *supra* note 61, at 399
110. *Id.* at 398.
111. Oakwood Healthcare, Inc., 348 N.L.R.B. No. 37, at *25 (2006).
112. *Id.* at *17.
113. *Id.* at *21-22.
114. *Id.* at *18-19.
115. *Id.*

apparent. The Supreme Court failed, however, to draw a line between supervisory independence and non-supervisory independence, except to state that "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer," and that "[i]t falls clearly within the Board's discretion to determine, *within reason*, what scope of discretion qualifies."[116] Independent judgment is arguably the most ambiguous of the terms discussed so far. As a result, it presumably presented the most difficult interpretative task for the Board. However, the plain meaning of the term resulted in a sound interpretation, or at least an interpretation that will survive future Supreme Court scrutiny.

Independent is commonly defined as "not subject to control by others."[117] From this definition, the Board could draw a relatively bright line between supervisory independence and non-supervisory independence. As long as an individual can make a decision without obtaining approval from another—-whether from a single individual, a committee, or some other type of collegial body—the judgment is sufficiently independent to be supervisory. If on the other hand, an individual must obtain prior approval before making any decisions, the judgment is not sufficiently independent to be supervisory. This interpretation would not only comport with the text or plain meaning of the term, but would also be consistent with the Court's dicta referenced above. Decisions dependent on, rather than merely *guided* by, detailed orders and regulation issued by the employer would constitute non-supervisory judgment. But where the orders or regulations—whether they come from a Company manual or another supervisory employee—merely provide guidance for making a decision, and the purported decision-maker retains the ultimate discretion to authorize the decision, the judgment would be supervisory.

Like with the two other terms in question, the Board majority, in interpreting "independent judgment," remained faithful in *Oakwood* to the text. They stated, in no uncertain terms, that "[t]o ascertain the contours of 'independent judgment,' we turn first to the ordinary meaning of the term."[118] In doing so, the Board majority did, as analysis above would suggest, define independent judgment to mean "not subject to control by others."[119] They also made clear that independent judgment is no less independent simply because the putative supervisor is guided by some manual, proclaiming that "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow

116. *Kentucky River Cmty. Care*, 532 U.S. at 713 (emphasis added).
117. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988).
118. Oakwood Healthcare, Inc., 348 NLRB No. 37, at *36 (2006).
119. *Id.* at *9

for discretionary choices."[120] Clearly then, the Board's interpretation is consistent with a textualist methodology.

V. CONCLUSION

The number of representation elections will invariably increase as unions begin to implement their new strategy for halting the decline in union membership. The supervisory exemption in section 2(11) will, as it has historically, be one of the most hotly contested issues in these elections. The Board thus had an institutional obligation to not only provide unions and employers with statutory guidance, but also to provide statutory guidance that would withstand Supreme Court scrutiny and not suffer the fate of its two most recent attempts to interpret the supervisory exemption. This article has suggested the methodological tool for meeting its institutional obligation: textualism. Textualism will ensure that the Board's interpretations are consistent with the plain meaning of the statutory terms at issue. The Supreme Court has historically demanded and will continue to demand statutorily sensitive interpretations of the supervisory exemption. Interpretations that are sufficiently wed to statutory text of section 2(11), like the three articulated in this article, are a must. Normative values and attempts to discern congressional intent are not the ingredients of sound statutory interpretations of section 2(11), and will do nothing but engender more uncertainty.

This article has also suggested that the Board, in *Oakwood*, met its institutional obligation by applying a textualist methodology. The Board successfully resisted (unlike the dissent and others) the temptation to employ a non-textual methodology, which looks to things like "the context and purpose of the National Labor Relations Act and . . . authoritative legislative history."[121] It recognized what it should have recognized many years ago: "in all cases involving statutory construction, our starting point must be the language employed in Congress, . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used."[122] This faithful application of the statute ensures that the Supreme Court, overwhelming comprised of textualists, will sustain the interpretations set out in *Oakwood*. Now, not only do unions, employers, practitioners, and the Board's agents, have "meaningful and predictable standards for the adjudication of future cases . . . the Board's constituents" have the certainty that has been sorely missing since the supervisory

120. *Id.* at *38.

121. *Id.* at *21

122. Oakwood Healthcare, Inc., 348 NLRB No. 37, at *15 (2006) (quoting Immigration and Nationalization Serv. v. Phinpathya, 464 U.S. 183, 189 (1984)).

exemption was added to the NLRA over fifty years ago.[123] This certainty is of vital importance in the current union organizing climate which will invariably make the supervisory exemption the most hotly contested issue in all of labor law.

123. *Id.*