

Grandmothers and Teamsters: How the NLRB's New Approach to the Supervisory Status of Charge Nurses Ignores the Reality of the Nursing Home

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"If it looks like a duck and quacks like a duck, it's probably a duck."¹

I. INTRODUCTION

We are a nation growing old.² Few things are more important to a nation growing old than its long-term health-care system. The huge role nursing homes play in the lives of Americans evidences this importance.³ In 1996, there were 17,107 nursing homes in America⁴ with an average occupancy rate of 92%⁵ and a total of 1,532,188 residents nationwide.⁶ In short, the long-term health-care industry is booming and is likely only to grow as the population of the United States continues to get older.⁷ Fundamental to this growth are the workers employed by the health-care industry. And, like most other labor-intensive industries, organized labor plays an important role in the relationship between management and employees in the long-term nursing field. In fact, organized labor has targeted the nursing-home industry for intensive organizational activity in an attempt to gain more strength in America's service economy.⁸ This Note addresses one small but essential issue that accompanies the relationship between

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1. Modified version of the oft-cited "duck test." For a discussion of the long history of this popular American expression in judicial opinions, see Loren Singer, *The Duck Test Is Always in Season in Judicial Opinions*, WEST'S LEGAL NEWS, Aug. 23, 1996, at 1, available in 1996 WL 475556.

2. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 6 (1996) (estimating that U.S. population of elderly will continue to grow into the next century increasing three-fold between 2020 and 2050).

3. Researchers project that of the persons who reached 65 in 1990, 43% are expected to be admitted to a nursing home at least once before they die. See Peter Kemper & Christopher M. Murtaugh, *Lifetime Use of Nursing Home Care*, 324 NEW ENG. J. MED. 595, 597 (1991).

4. AMERICAN HEALTH CARE ASS'N, FACTS AND TRENDS: THE NURSING FACILITY SOURCEBOOK 10 (1996).

5. See *id.* at 33.

6. See *id.* at 10.

7. See BUREAU OF THE CENSUS, *supra* note 2, at 6.

8. See Glenn Burkins, *Small Victories: Nursing Homes Are Labor's New Target in Its Promised Return*, WALL ST. J., July 8, 1997, at A1.

the nursing home and organized labor—the supervisory status of charge nurses within the nursing home.⁹

The question of whether charge nurses should be considered supervisors or employees is extremely important to the relationship between a nursing home's management and its employees. The answer to this question determines whether these charge nurses will be granted organizational rights and protections under the National Labor Relations Act ("NLRA" or "the Act").¹⁰ The NLRA grants employees the right to organize and to engage in collective bargaining free from employer interference.¹¹ However, the Act does not grant such organizational rights and protections to supervisory employees,¹² by excluding any individual employed as a "supervisor" from the statutory definition of "employee."¹³ Section 2(11) defines "supervisor" as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.¹⁴

Therefore, § 2(11) presents a three-level test as to whether a worker meets the statutory supervisory threshold. The first level is whether the worker performs at least one of the twelve listed supervisory duties. If the worker performs at least one of these duties, the next question is whether the worker performs this duty or duties "in the interest of the employer." If the worker meets this level, the final question is whether the worker utilizes "independent judgment" in the performance of this duty or duties. An affirmative answer to these three questions means the contested worker is a supervisor and banned from collective bargaining. However, a negative answer to any one of these questions means the worker is a statutory employee and, therefore, receives statutory protection in his or her choice of whether to organize.

Although § 2(11) presents a seemingly straightforward test for supervisory status, the Act's treatment of "professional" employees causes much confusion over whether charge nurses are supervisors or employees. Because the NLRA

9. It is impossible to address the supervisory status of charge nurses in the nursing home without also addressing the status of charge nurses in the hospital setting because the National Labor Relations Board has treated these classes of workers under the same general framework of analysis.

10. 29 U.S.C. §§ 151-169 (1994).

11. Section 8(a)(1) of the Act makes it an unfair labor practice to interfere with, restrain or coerce employees in the exercise of their right to self-organize, their right to form, join or assist labor organizations, their right to bargain collectively, or their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. See 29 U.S.C. § 158(a)(1). For a more thorough and analytical discussion of the organizational protection afforded to employees, see ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW 113-264 (12th ed. 1996).

12. See 29 U.S.C. § 157.

13. "The term employee . . . shall . . . not include . . . any individual employed as a supervisor . . ." *Id.*

14. *Id.* § 152(11).

includes "professional employees" within the definition of "employee" and because the definitions of "professional employee" and "supervisor" overlap,¹⁵ there is always a difficult issue as to whether nurses are professional employees or supervisors. As stated earlier, the answer to this question determines whether these charge nurses will be granted organizational rights. Therefore, how the National Labor Relations Board ("NLRB" or "the Board") and the courts interpret and apply this definition of supervisor to nurses is essential to determining the extent to which a nursing home will be unionized. Unfortunately, this all-important issue has caused confusion and inconsistent application from the NLRB and the courts.

In response to the confusion caused by the similarity of definition between professional employee and supervisor, the Board formulated the "patient care" analysis to determine whether charge nurses were supervisors or professional employees. Under this analysis, the Board dubbed most charge nurses professional employees and, therefore, granted these nurses organizational rights and protection.¹⁶ The United States Supreme Court struck down this "patient care" test as inconsistent with the NLRA in *NLRB v. Health Care & Retirement Corp. of America*.¹⁷ This Note addresses the Board's response to *Health Care & Retirement Corp.* and how this response neglects many of the differences between the contested nurses in acute-need hospitals as opposed to the contested nurses in long-term health-care facilities. This Note also addresses how the Board's new approach ignores many of the realities of these long-term health-care facilities.

Following *Health Care & Retirement Corp.*, many practitioners, scholars, and students forecasted that the Court's decision would end most nurses' ability to organize and gain protection under the Act.¹⁸ Some doomsayers went as far as forecasting the possible end of all professional unions.¹⁹ The Board, however, was not as pessimistic in its mission to narrowly construe the definition of supervisor under § 2(11) and bestow organizational rights to as many nurses as possible. The Board has taken the next step in accomplishing this mission by

15. Compare *id.* § 152(12) (requiring "consistent exercise of discretion and judgment" to be considered a professional employee), with *id.* § 152(11) (requiring, among other things, the use of independent judgment to be considered a supervisor).

16. See Beverly Enters.—Ohio (Northcrest Nursing Home), 313 N.L.R.B. 491, 494, 509 (1993).

17. 511 U.S. 571, 571-84 (1994).

18. See generally Robin Elizabeth Margolis, *Supreme Court Strikes Blow at Health Care Unions*, HEALTHSPAN, July-Aug. 1994, at 19. (stating that the implications of the Court's decision for health-care unions were quite grave and that employers would rejoice in the decision's effects).

19. Most of these individuals have focused on the dissenting opinion of Justice Ginsburg who stated: "If any person who may use independent judgment to assign tasks to others or direct their work is a supervisor, then few professionals . . . will receive [the Act's] protections." *Health Care & Retirement Corp.*, 511 U.S. at 598 (Ginsburg, J., dissenting); see Fredrick J. Woodson, *NLRB v. Health Care & Retirement Corp. of America: Signaling the Need for Revision of the NLRA*, 14 J.L. & COM. 301 (1995) (discussing how "expanding" supervisory roles would have implications far beyond the nurses involved).

turning its attention away from the "in the interest of the employer" language of § 2(11) in cases decided after *Health Care & Retirement Corp.*²⁰

The purpose of this Note is two-fold: first, to explain the Board's response to *Health Care & Retirement Corp.* and, second, to address how the Board's application of this new standard neglects the major differences between acute-care-hospital settings and nursing-home settings, and the corresponding nurses in each type of facility. Part II of this Note addresses the fundamental differences between the most often contested nurses in the hospital and nursing-home settings. Part III explains the Board's long-standing "patient care" analysis and the Supreme Court's rejection of it in *Health Care & Retirement Corp.* Part IV presents the Board's response to this rejection in two Board cases, *Providence Hospital*²¹ and *Ten Broeck Commons*,²² and how this response alters the approach to the supervisory issue. In Part V, this Note discusses how the Board's application of its new approach neglects the fundamental differences between the hospital and nursing home. Finally, Part VI concludes that while the Board's new approach may have little effect in the hospital setting due to most hospitals' personnel structure, this same approach in the nursing-home setting will create opportunities for division of loyalties that will put the facilities' residents in possible danger.

II. THE CONTESTED NURSES AT EACH TYPE OF FACILITY

At the heart of the dispute over whether certain nurses should be deemed "employees" or "supervisors" are the contested nurses themselves. Just as in many other professions that share common titles, nurses vary from one another with distinctions in education, regulation, and job requirements. These distinctions are critical to this supervisor-versus-employee analysis, and become especially clear when the most frequently contested nurses in the hospital setting are compared with the most frequently contested nurses in the nursing-home setting.

A. The Hospital and the Registered Nurse

Acute-care hospitals provide highly diverse medical services to patients. In order to help provide these services, hospitals employ registered nurses ("RNs"). Under state regulations, these RNs are required to have a degree from a state-accredited nursing program, normally consisting of a four-year program.²³ This specialized training places these RNs, at least initially, under § 2(12)'s definition

20. The Board and the courts have approached § 2(11) as a three-prong test: first, whether the individual is engaged in one of the twelve listed activities, *see supra* note 14 and accompanying text; second, whether the exercise of this responsibility required "independent judgment," and; third, whether the employee exercised this responsibility "in the interest of the employer." *See Health Care & Retirement Corp.*, 511 U.S. at 574.

21. 320 N.L.R.B. 717 (1996).

22. *Nymed, Inc. (Ten Broeck Commons)*, 320 N.L.R.B. 806 (1996).

23. For examples of typical state statutes which regulate nurses, see IND. CODE ANN. §§ 25-23-1-11 to 25-23-1-16.1 (Michie 1995); KY. REV. STAT. ANN. §§ 314.011-.041 (Michie 1995).

of professional employees who are protected under the NLRA.²⁴ The key issue is whether a particular nurse's duty may also be considered supervisory, thereby excluding the nurse from the protection of the Act.

Within hospitals, a hierarchy exists among nursing personnel ranging from nursing administrators to nursing supervisors, charge nurses, and staff nurses. In the hospital setting, unions and employers most often dispute the supervisory status of those nurses who serve at least a portion of their time as a charge nurse.²⁵ The charge nurse's duty consists primarily of "coordinating" patient care within the assigned area of his or her department.

In *Providence*, the case in which the NLRA first announced its new approach towards the supervisory status of charge nurses, the hospital was split into two divisions: care centers and ambulatory-care centers. The care centers were further divided into the medical, surgical, and oncological center, the neuromuscular/skeletal center, and the women and children's service center, while the emergency-services center was included in the ambulatory-care center. The amount of time designated staff RNs spent as charge nurses varied from center to center.²⁶ On the medical oncology and surgical floors, the charge nurses' duties consisted primarily of completing end-of-shift reports used to report deficiencies in performance and other information that the "management need[ed] to know about."²⁷ Their duties also included assessing the patients' needs, monitoring attendance, insuring adequate personnel, and monitoring and evaluating staff nurses' performances.²⁸ In the emergency-services center, the charge nurses ensured adequate staffing from hour to hour depending on the number of incoming patients.²⁹ Charge nurses in the emergency-services center also made patient assignments to staff nurses, monitored the staff nurses' performance, and made end-of-shift reports.³⁰ With respect to all of these departments, the Board found that these duties were not supervisory.³¹

Although the precise duties of the charge nurses in the various departments were different, the boundaries of these duties were the same no matter what department the RNs worked. These limits, whether express or inherent, are essential to understanding the fundamental differences between those charge nurses in the hospital and those in the nursing home. In *Providence*, no RN in any department served as a permanent charge nurse, but instead, there was a group of RNs in each department that rotated from staff nurse to charge nurse.³² The actual amount of time spent as charge nurse varied from 20% to 50% of an

24. See *supra* note 15.

25. See, e.g., BARRY R. FURROW ET AL., *THE LAW OF HEALTH CARE ORGANIZATION AND FINANCE* 176, 179-80 (1991) (discussing nurses' attempt to gain job security through collective bargaining).

26. See *Providence*, 320 N.L.R.B. at 717.

27. *Id.* at 718.

28. See *id.* at 718-19.

29. See *id.* at 720.

30. See *id.*

31. See *infra* Part IV for a discussion of how the Board supported this conclusion. This Part of the Note is concerned solely with presenting the various duties of the contested nurses.

32. See *Providence*, 320 N.L.R.B. at 717.

RN's time on the medical oncology floor, to a range of 60% to 75% on the surgical floor,³³ and from 25% to 90% of the RN's time in the emergency-services center.³⁴ Therefore, in any of these departments, an RN might be "inonitoring" a fellow RN staff nurse on one day and then, on the next day, have that same staff nurse "monitoring" him or her. Furthermore, the charge nurses supervised other RNs who had roughly the same training, education, and pay rate as themselves. The Board used this dichotomy of duties and the fact that all the nurses involved were professionals with similar training to support the finding that charge nurses did not "discipline" other RNs but instead merely acted as one professional expressing concerns to another professional.³⁵ The Board in *Providence* placed much weight on the fact that this "equality" established an inherent check on the charge nurses' use of independent judgment and instead made supervision a "collaborative" effort.³⁶ In support of this inherent check, the Board cited one charge nurse as saying that "she did not tell RNs what to do: '[t]hey are professionals, and they know their jobs.'"³⁷

Another significant limit on the hospital charge nurses' power in *Providence* was that any particular nurse's discretion was usually tempered by the presence of a nursing supervisor, shift coordinator, or administrator that was normally on duty.³⁸ This limit on discretion was most often exhibited in day-to-day personnel decisions. While the charge nurses had the duty to verify attendance and assess whether patients' needs could be met by the current personnel at the beginning, middle, and end of their shift, the Board found that the shift coordinator made the decisions regarding whether extra help was warranted.³⁹ The same was found to be the case when a charge nurse determined that the area was overstaffed. The Board stated that "[t]here is no evidence that the charge nurses have the authority to order an RN to leave early."⁴⁰ Instead, it was the charge nurses' duty to inform the shift coordinator, who subsequently made the decision whether to send the RNs elsewhere in the hospital or send them home. Similar to decisions regarding personnel at the beginning of and throughout the shift, the charge nurses' decisions regarding the needs of the next shift were also limited. In regards to other personnel decisions made by the charge nurse, such as authorizing breaks, the Board found them to be limited to routine functions of determining a rotational system for breaks, and concluded that such decisions did not require independent judgment.⁴¹

Instead of viewing the charge nurses' duties as those of a supervisor, the Board labeled their work as "a classic example of team leaders responsible for

33. *See id.* at 718.

34. *See id.* at 719.

35. *See id.* at 720.

36. *Id.* at 731, 733.

37. *Id.* at 718 (alteration added) (quoting an RN charge nurse in the surgical unit).

38. *See id.* at 730.

39. *See id.* at 718-19.

40. *Id.* at 731.

41. *See id.*

coordinating the team's work and for serving as a center for communication."⁴² The key findings that allowed the Board to plausibly make this conclusion were that no RN served as a permanent charge nurse, the charge nurses and staff nurses were all professionals with similar advanced training, and the discretion used by the charge nurses was, in all cases, tempered by the active presence of higher management and supervisory personnel. As discussed in the next subsection, these findings cannot be supported as easily in the nursing-home setting.

B. The Nursing Home and the Licensed Practical Nurse

Whereas the RN is usually the most disputed member of the proposed bargaining unit⁴³ in the hospital setting, the most disputed member in the nursing-home setting is the licensed practical nurse ("LPN"). Under the same state regulations that govern RNs, aspiring LPNs are required to gain specialized training, although the training is usually less than is required of the RN.⁴⁴ The distinctions between RN and LPN charge nurses are most evident after an analysis of the LPNs' job requirements and work environment within the nursing home.

The typical hierarchy of nursing personnel at a nursing home is far different from that at a hospital. Unlike the hospital, certified nursing assistants ("CNAs" or "aides"), who are nonregistered, nonprofessional, and minimally regulated, make up the vast majority of the nursing personnel in the typical nursing home.⁴⁵ In most facilities, the nursing department consists of the director of nursing ("DON"), the assistant director of nursing ("ADON"), shift coordinators, charge nurses that are typically LPNs, and CNAs.⁴⁶ Most facilities are divided into departments, variously called wings, halls, or units. Many facilities supplement the LPN charge nurses with a few RNs who serve as unit or hall managers for each unit in the facility.⁴⁷ Although the exact job titles vary from facility to facility, the primary hierarchy for nursing homes is: RNs serving administrative

42. *Id.* at 733-34. The Board stated that, although such "team leaders" utilized some discretion in directing other employees, they should nonetheless be termed nonsupervisory. *See id.*

43. Oversimplified, a "bargaining unit" is a group of employees with a satisfactory degree of shared interests that makes them appropriate for bargaining as a unit. For a more in-depth look at the requirements and purposes of the bargaining unit, see COX ET AL., *supra* note 11, at 271-77.

44. *See, e.g.*, IND. CODE ANN. § 25-23-1-12 (Michie 1995); KY. REV. STAT. ANN. § 314.051 (Michie 1995).

45. In the average long-term nursing facility, of the 72 members in the average nursing staff, 44 of them are CNAs. *See* AMERICAN HEALTH CARE ASS'N, *supra* note 4, at 46.

46. *See id.*

47. However, in many facilities, the benefit of these additional RN supervisors is reduced by the fact that these RNs often have responsibility for more than one hall and are usually only present during the day shift. *See* Nymed, Inc. (Ten Broeck Commons), 320 N.L.R.B. 806, 807 (1996). Therefore, if a facility has two RN supervisors present only during the day, as at Ten Broeck Commons, and if the nursing home cares for the U.S.-average 90 residents, the limits on their supervision are clear.

and management roles, LPNs serving combined roles as charge and treatment nurses,⁴⁸ and CNAs working under the direction of the LPNs, taking care of the residents' basic daily needs.

The duties of the charge nurse in the nursing home are fundamentally different from those of an RN serving as a charge nurse in a hospital. Unlike the RN in the hospital who might serve a portion of his or her time as a charge nurse and the remaining portion as a staff nurse, an LPN in a nursing home serves *all* of his or her time as a charge nurse.⁴⁹ This creates a clear division of power between those directed—the aides, and those directing—the LPNs. Another important distinction is that while RN charge nurses in the hospital “coordinate” fellow professionals (i.e., other RN staff nurses), the LPNs in the nursing home direct lesser-trained and lesser-paid CNAs. Furthermore, these LPNs never work side by side with those they direct as aides. These factors further solidify the division of power between the aide and the charge nurse and support the perception by both the workers and industry that the charge nurse does act as a supervisor.⁵⁰

There is much dispute, depending on who is giving the opinion, over the precise individual duties and the boundaries of these duties invested in the nursing-home charge nurse. Since 1994, there have been decisions on this issue by the Supreme Court, courts of appeals, and the NLRB, all of which presented the range of duties of similarly situated LPN charge nurses very differently. The finding of a particular worker's responsibilities is a factual finding from the particular record.⁵¹ This allows for such a varied treatment of seemingly like workers in different cases. To add to this dispute over duties, there are also the actual job descriptions of the individual facilities or affiliated facilities that describe the charge nurses' duties differently once again.⁵² Various objectives drive these different descriptions. These objectives vary from supporting the eventual decision of the court or agency to justifying a facility's actions in regard to a class of workers. Therefore, this Note draws from all of the above listed sources in its analysis of a charge nurse's range of duties in the nursing-home setting.

48. See AMERICAN HEALTH CARE ASS'N, *supra* note 4, at 44. In some facilities, RNs will serve as charge nurses with roughly the same pay and the same duties as the LPN. *See id.*

49. In *Ten Broeck Commons*, the Board characterized the position as a combination of charge, treatment, and medication nurse, *see Ten Broeck Commons*, 320 N.L.R.B. at 807, but most in the industry simply list the treatment and medication duties under the general responsibilities of the charge nurse. *See, e.g.*, Current (Jan. 1997) Official Charge Nurse Job Descriptions for Georgetown Manor Nursing and Rehabilitation Center (Georgetown, Ky.), Klondike Manor Health Care Center (Louisville, Ky.), and Northfield Centre for Health and Rehabilitation (Louisville, Ky.) (on file with author).

50. *See generally* Wayne D. Ford, *Shoring Up Nurse Supervisors*, NURSING HOMES, May 1996, at 14 (explaining the need for facilities to clarify the supervisory roles for nurses through instruction).

51. *See* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 60 (1976).

52. *See* Health Care & Retirement Corp. (Valley View Nursing Home), 310 N.L.R.B. 1002, 1005-06 (1993); *see also* Current Official Charge Nurse Descriptions cited *supra* note 49.

In *Health Care & Retirement Corp. of America*, a case that arose in a nursing-home setting, the Supreme Court made a brief finding of the duties of the disputed LPN "staff" nurses.⁵³ The Court stated:

The staff nurses have responsibility to ensure adequate staffing; to make daily work assignments; to monitor the aides' work to ensure proper performance; to counsel and discipline aides; to resolve aides' problems and grievances; to evaluate aides' performances; and to report to management.⁵⁴

This brief description of the duties of this particular facility's "staff" nurses served as the foundation for the Court's conclusion that the NLRB's test for the supervisory status of charge nurses was inconsistent with the Act.⁵⁵ Because this was merely a factual finding concerning the nurses only in the particular facility involved, the Court's decision did not bind the Board in subsequent Board descriptions of nurses' responsibilities.

In order to avoid the same result that occurred in *Health Care & Retirement Corp.*—where charge nurses were deemed supervisors and left unprotected under the Act—the Board would have to characterize the charge nurses' responsibilities differently than the Court had done in that case. The Board did just that in *Ten Broeck Commons*, by elaborating on the individual nurses' responsibilities and by focusing on the limits to these responsibilities.⁵⁶ Although considerably larger, the Ten Broeck facility was very similar in structure and nursing personnel to the facility in *Health Care & Retirement Corp.* Unlike the Court's characterization, the Board's characterization not only focused on the LPNs' responsibilities of overseeing the aides but also discussed the LPNs' independent duties concerning patient care. These responsibilities included consulting with physicians, ordering and administering medication, filling out charts, updating patient information, and performing limited medical treatments.⁵⁷ These duties supplemented the LPNs' fundamental duties of assigning work to the CNAs and monitoring their performance, although the Board construed these fundamental duties much more narrowly than had the Supreme Court in *Health Care & Retirement Corp.*

Like many other industries and businesses, the nursing-home industry relies on documented job descriptions for many purposes ranging from basic organizational structure, training, and reference, to discipline. The industry also uses documented job descriptions as evidence to assist in defending various legal claims brought against the corporation or facility.⁵⁸ Although these descriptions may be formatted in different ways, the basic structure of these descriptions is an explanation of the position through a list of qualifications, responsibilities,

53. *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 575 (1994). Although the facility used the title "staff" nurses, in every aspect their duties were the same as those of a charge nurse. *See id.*

54. *Id.*

55. *See id.*

56. *Nymed, Inc. (Ten Broeck Commons)*, 320 N.L.R.B. 806, 807 (1996).

57. *See id.*

58. For discussion on the need for current job descriptions in order to comply with the Americans with Disabilities Act, see Richard T. Sampson, *The Job Description Defense: What Is It?*, 39 FED. B. NEWS & J. 67 (1992).

and other factors that affect the work environment of the particular class of employees. One such job description appeared in *Valley View Nursing Home*,⁵⁹ a Board case decided before *Health Care & Retirement Corp.* In addressing the nurses' duties, the Board stated:

According to their job descriptions, unit supervisors have the following authority and responsibilities:

- (a) Have authority to assign nursing assistants to patients;
- (b) Recommend and/or prepare revised work schedules;
- (c) Have authority to call in off-duty employees or transfer employees to cover understaffing;
- (d) Have authority to recommend transfers;
-
- (f) Have authority to evaluate employee performance;
- (g) Recommend and communicate[] pay adjustments;
- (h) Recommend or communicate promotions;
- (i) Have authority to adjust grievances or make effective recommendations for adjustment of grievances;
- (j) Have authority to discipline or recommend discipline of an employee;
- (k) Have authority to issue, sign and communicate disciplinary actions to employees;
- (l) Have authority to suspend, suspend subject to discharge, layoff or recall employees or effectively recommend these actions;
- (m) Participate in recruiting or referring, interviewing, screening and/or hiring employees;
- (n) Responsible for orientation and/or training new employees;
- (o) Responsible for informing employees of new policies and procedures;
- (p) Have authority to release employees from immediate work assignments; and
- (q) Have authority to approve time cards or overtime.⁶⁰

Although there may be some advantage gained by the employer by granting these broad duties in documented job descriptions whether or not the charge nurses

59. *Health Care & Retirement Corp. (Valley View Nursing Home)*, 310 N.L.R.B. 1002 (1993).

60. *Id.* at 1005-06.

actually utilize these powers,⁶¹ this practice may also be a disadvantage in many types of labor disputes.⁶² Furthermore, facilities, like other businesses, face other, more common disputes beyond organizational disputes concerning the supervisory status of nurses where such documentation could be a hindrance in settling the matter.⁶³ Therefore, the facilities have a disincentive to grant broad discretion to these nurses if, in actuality, they are authorized to use little of it. Because of this, although these industry descriptions should not be taken as the final authority on the duties these nurses perform from day to day, these descriptions are important evidence in showing how the LPN charge nurse in the nursing home is fundamentally different from the RN charge nurse in the hospital.

Part II of this Note has shown the basic differences between the RN charge nurse in the hospital setting and the LPN charge nurse in the nursing-home setting. These fundamental differences in education, work environment, and responsibilities should seemingly result in a corresponding difference in how the Board analyzes these nurses' employment status. As the remaining portion of this Note shows, however, the Board has not yet made such a meaningful analysis.

III. "PATIENT CARE" ANALYSIS AND ITS REJECTION

As explained in the Introduction, the finding of supervisory status requires the affirmative answer to three questions: whether the employee engaged in one of the twelve activities listed in § 2(11), whether the exercise of this responsibility required "independent judgment," and finally, whether the employee exercised this responsibility "in the interest of the employer."⁶⁴ This Part of the Note addresses how the Board and the Supreme Court have addressed this three-prong test. The Note first presents the Board's twenty-year practice of addressing the issue of the supervisory status of charge nurses through the "interest of the employer" language of § 2(11) and, secondly, addresses the Board's response to the Supreme Court's rejection of this twenty-year approach. This response shifts the Board's attention and analysis away from the § 2(11) requirement that the worker complete supervisory duties "in the interest of the employer" to the

61. See generally Sampson, *supra* note 58 (discussing the benefits of written job descriptions under the ADA).

62. Oversimplified, § 8(a)(1) of the NLRA makes it an unfair labor practice to impede an employee in his or her practice of organizational rights. Furthermore, the employer is bound by the actions of its supervisors in these matters. Therefore, in these cases it would behoove the facility not to grant supervisor status to individuals unless it truly meant them to be supervisors because if they are supervisors, these individuals will bind the facility in their actions. For a more in-depth analysis of how § 8(a) works, see COX ET AL., *supra* note 11, at 113.

63. An example would be if a nurse brought a claim for wrongful discharge based on being fired for doing something that, according to the job description, he or she had authority to do. In such a case, a broad grant of authority in the description would be against the facility's best interests.

64. See *supra* text accompanying note 15.

section's requirement that the worker complete the duties through the use of "independent judgment."⁶⁵

A. The Board's Patient-Care Analysis, 1974-1994

The Board first gained jurisdiction over labor disputes occurring in some hospitals and nursing homes in 1967 when the NLRA was amended to cover for-profit health-care facilities.⁶⁶ However, it was not until the Health Care Amendments of 1974,⁶⁷ which further extended the Board's jurisdiction to all health-care facilities, that the Board became actively involved in addressing the tension between the NLRA's disparate treatment of supervisors and professional employees.⁶⁸ The Board countered this tension by formulating, through a series of cases, the patient-care analysis as an aid in determining the supervisory status of charge nurses.⁶⁹

In 1975, the Board stated that the purpose behind the patient-care analysis was to determine "whether [an] individual, who may give direction to other employees in the exercise of professional judgment which is incidental to the professional's treatment of patients, also exercises supervisory authority in the interest of the employer."⁷⁰ The test created a distinction between things done in the interest of the employer and things done in the interest of the patient. An example would be a surgeon who necessarily "directs" assistants for the purpose of completing his or her professional task of a successful operation without necessarily intending to direct those assistants for the benefit of his or her employer. The Board felt this distinction was necessary to ensure that health-care professionals would not be excluded from coverage simply because of their professional responsibility, which might require incidental direction of other employees.⁷¹

A major criticism of this approach was that since the patient is, in essence, the only customer of a health-care facility, things done in the interest of the patient are necessarily also in the interest of the employer.⁷² The Board's response to such criticism was that it was "too simplistic"⁷³ and ignored the "legislative intent of allowing professional health care employees to be covered by the

65. See *supra* notes 9-13 and accompanying text.

66. See *Butte Med. Properties (Medical Ctr. Hosp.)*, 168 N.L.R.B. 266 (1967) (addressing for-profit hospitals); *University Nursing Home, Inc.*, 168 N.L.R.B. 263 (1967) (addressing for-profit nursing homes).

67. National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395 (codified as amended at 29 U.S.C. § 158(g) (1994)).

68. See *Beverly Enters.—Ohio (Northcrest Nursing Home)*, 313 N.L.R.B. 491, 492 (1993).

69. See, e.g., *Newton-Wellesley Hosp.*, 219 N.L.R.B. 699 (1975) (applying standard to RNs in a hospital); see also *Pleasant Valley Health Servs. Corp. (Centralia Convalescent Ctr.)*, 295 N.L.R.B. 42 (1989) (applying standard to LPNs in a nursing home).

70. *Northcrest Nursing Home*, 313 N.L.R.B. at 492 (citing *Newton-Wellesley Hosp.*, 219 N.L.R.B. at 700).

71. See *id.*

72. See *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 577 (1994).

73. *Northcrest Nursing Home*, 313 N.L.R.B. at 494.

Act.”⁷⁴ The Board said such legislative intent could be found in the Senate and House committee reports of the 1974 amendments to the Act.⁷⁵ These reports address the question of whether an amendment to § 2(11) was needed to ensure that professional health-care employees would not be automatically deemed supervisors due to their use of professional judgment. The committee addressed this question as follows:

Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of “supervisor.” The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board decisions. The Committee notes that the Board has carefully avoided applying the definition of “supervisor” to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] the professional’s treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.⁷⁶

The Board viewed this excerpt as acceptance of its patient-care analysis and thus felt it would be a sufficient defense against any criticism that the test was illogical.⁷⁷ This approach was used by the Board for twenty years to address the Act’s unequal treatment of supervisors and professionals.⁷⁸ However, the Supreme Court ended its long life when the Court addressed the issue of the supervisory status of charge nurses in *Health Care & Retirement Corp. of America*.

B. Health Care & Retirement Corp.: Striking Down the Board

The Supreme Court in *Health Care & Retirement Corp.* held that the Board’s patient-care test for determining whether nurses were supervisors was irrational and inconsistent with the NLRA.⁷⁹ In deciding this narrow issue, the Court addressed each of the Board’s defenses for the test and held that none of these reasons overshadowed the test’s inconsistency with the plain language of the Act.⁸⁰ The fact that this decision struck down an established twenty-year Board practice made it a very important case. However, the most important aspect of the case, in terms of the future of organization in the health-care field, was the Court’s “invitation” to the Board to shift its attention to other aspects of §

74. *Id.*

75. *See id.* at 492.

76. S. REP. NO. 93-766, at 6 (1974).

77. *See Beverly Cal. Corp. v. NLRB*, 970 F.2d 1548 (6th Cir. 1992) (criticizing approach on the ground that anything done in the interest of the patient will also be in the interest of the employer).

78. *See Northcrest Nursing Home*, 313 N.L.R.B. at 493.

79. *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 578 (1994).

80. *See id.* at 580-82.

2(11).⁸¹ As will be shown following this analysis of *Health Care & Retirement Corp.*, the Board did not delay in taking the Court up on its offer. .

The Court began its analysis of the patient-care test by drawing a parallel between that test and the Board's approach to "managerial employees," which the Court rejected in *NLRB v. Yeshiva University*.⁸² Managerial employees, like supervisors, are excluded from the protection of the Act.⁸³ Much like its arguments with respect to the patient-care analysis, in *Yeshiva* the Board argued that the faculty members' discretion and judgment were "exercised in the faculty's own interest rather than in the interest of the university."⁸⁴ The Court stated that it was impossible to separate the faculty's professional interests from the university's interests because the "'business' of a university is education."⁸⁵ The Court therefore held that the faculty were indeed managerial employees and outside the Act.

Likewise, the Court stated that the Board's reasoning in its patient-care analysis created a "false dichotomy" that "fares no better here than it did in *Yeshiva*."⁸⁶ The Court stated that there was no difference between acts taken in the course of patient care and acts taken in the interest of the employer. The Court reasoned that since the patients are the employer's customers, the creation of any such dichotomy for the purpose of analysis "makes no sense."⁸⁷ This quick treatment of the central tenet of the patient-care analysis forced the Board to defend its test on nonstatutory grounds.⁸⁸

The first nonstatutory reason for the test given by the Board and rejected by the Court was the importance of granting organizational rights to nurses whose professional authority "does not threaten the conflicting loyalties that the supervisor exception was designed to avoid."⁸⁹ The Court denounced this reasoning and stated that the Act's language did not create such a distinction between those supervisors whose duties pose a threat of conflicting loyalties and those supervisors whose duties do not pose such a threat. The Court added that the "statute must control the Board's decision, not the other way around."⁹⁰ It is important to note, especially in regards to the Board's response to *Health Care & Retirement Corp.*, that the Supreme Court did not share the Board's conclusion that there was no danger of divided loyalty in the nursing-home setting.⁹¹ Although recognizing that there may be "some tension between the Act's exclusion of [supervisory and] managerial employees and its inclusion of

81. *See id.* at 583.

82. 444 U.S. 672 (1980).

83. *See NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974).

84. *Yeshiva*, 444 U.S. at 685.

85. *Id.* at 688.

86. *Health Care & Retirement Corp.*, 511 U.S. at 577.

87. *Id.*

88. *See id.* at 580.

89. *Id.*

90. *Id.* at 580.

91. *See id.* at 580-81. This Note addresses the danger of divided loyalty with charge nurses in Part V.

professionals,"⁹² the Court stated that it was not within the power of the Board to attempt to resolve such tension by "distorting" the statutory language.⁹³

The Board's final argument for the need of its patient-care analysis was based on the oft-cited statements in the legislative history of the 1974 amendments to the Act that the Board claimed expressed "apparent approval" of the Board's test.⁹⁴ In response to this argument, the Court first expressed its doubt that the test which the committee reports referred to was in fact the patient-care test.⁹⁵ The more fundamental response however was that the committee report did not "represent an authoritative interpretation of the phrase 'in the interest of the employer.'"⁹⁶ The Court concluded that the duty of interpretation falls solely within the jurisdiction of the courts.⁹⁷

After rejecting all of the Board's arguments on the rationality of the patient-care analysis, the Board used the last section of its opinion to call attention to the limited scope of its decision. The Court was not holding that all charge nurses were supervisors but that the Board could not manipulate § 2(11) to ensure that one group of workers falls within the protection of the Act.⁹⁸ Instead, the Court invited the Board to address the supervisory status of nurses in the same manner it addressed the supervisory status of other workers, namely, through an examination of whether those workers had met the other requirements of § 2(11). The Court stated that when the Board determined an employee in another industry was not a supervisor, it was because "the employee in question had not met the other requirements for supervisory status under the Act, such as the requirement that the employee exercise one of the listed activities in a non-routine manner."⁹⁹ But underlying this invitation for the Board to continue in its quest for organizational rights for charge nurses lays the principal reasoning of *Health Care & Retirement Corp.*—that no matter how important of a result the Board is seeking to achieve, it cannot manipulate or "shoehorn" this result under the Act by straining the plain language of the statute.¹⁰⁰ As will be seen, however, the Board's response to *Health Care & Retirement Corp.* focused more on the invitation than the warning.

92. *Id.* at 581 (alteration in original) (quoting *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980)).

93. *Id.*

94. *Id.* at 581-82.

95. The Court stated that it was not certain the Board had a consistent test for nurses in 1974. *See id.* at 582 (comparing *Avon Convalescent Ctr., Inc.*, 200 N.L.R.B. 702 (1972), with *Doctors' Hosp. of Modesto, Inc.*, 183 N.L.R.B. 950 (1970)).

96. *Id.*

97. *See id.*

98. *See id.* at 582-83.

99. *Id.* at 583.

100. *Id.*

IV. TAKING THE COURT UP ON ITS OFFER: THE BOARD'S
RESPONSE IN *PROVIDENCE* AND *TEN BROECK COMMONS*

As many people in the health-care and legal communities talked about how much of a drastic impact the Court's decision in *Health Care & Retirement Corp.* would have on the organizational rights of nurses and professionals, the Board was busy accepting the Court's challenge to find other ways within § 2(11) to allow charge nurses to be protected under the Act. First in *Providence*¹⁰¹ and then in *Ten Broeck Commons*,¹⁰² the Board shifted its approach from the "benefit of the employer" language of § 2(11) to the requirement of "independent judgment" also found in § 2(11). Although the approach of the new standard was different from its predecessor, the result has been the same—almost per se findings that charge nurses are not supervisors in both hospital and nursing-home settings.

A. Providence and the Hospital RN Charge Nurse

Providence arose from an election dispute concerning whether charge nurses could be included within the union's proposed bargaining unit. The employer in *Providence* operated a 341-bed acute-care hospital that employed among its 1600 workers, 700 RNs that worked in various departments within the hospital.¹⁰³ The union petitioned for a representational election for a bargaining unit that included all RNs.¹⁰⁴ The hospital contested this bargaining unit as inappropriate because it contained banned supervisory charge nurses, and requested the Board to review the proposed unit.¹⁰⁵ The central question before the Board, therefore, was whether these charge nurses were supervisors. In deciding that they were not supervisors, the Board explicitly stated: "[W]e apply the Board's traditional analysis for determining the supervisory status of employees in other occupations and conclude that the employees at issue do not exercise the 'independent judgment' essential to a finding of supervisory status."¹⁰⁶

The power to assign and the power to direct employees are two of the twelve supervisory duties listed in § 2(11).¹⁰⁷ Finding that an employee has any *one* of these responsibilities is the first step to concluding that the employee is a statutory supervisor.¹⁰⁸ The next requirement is that this duty or duties be completed with "independent judgment" and that it not merely be a routine or clerical function.¹⁰⁹ These were the issues before the Board in *Providence*. The employer argued that the contested charge nurses had the duty both to assign and

101. *Providence Hosp.*, 320 N.L.R.B. 717 (1996).

102. *Nymed, Inc. (Ten Broeck Commons)*, 320 N.L.R.B. 806 (1996).

103. *See Providence*, 320 N.L.R.B. at 717.

104. *See id.* For a discussion of the election procedure, see COX ET AL., *supra* note 11, at 264-303.

105. *See Providence*, 320 N.L.R.B. at 717.

106. *Id.*

107. *See supra* text accompanying note 14.

108. *See Beverly Cal. Corp. v. NLRB*, 970 F.2d 1548, 1552 (6th Cir. 1992).

109. *See supra* note 15.

direct other nurses, and that this duty required the use of independent judgment.¹¹⁰ The Board disagreed, saying that the nurses' completion of these duties was not done with independent judgment, but instead was done merely in a routine manner. In arriving at this conclusion, the Board was concerned once again with the familiar issues of the distinction between true supervisors and "straw bosses,"¹¹¹ and the Act's disparate treatment of professionals and supervisors.

The Board began its legal analysis by addressing how the term "assignment" from § 2(11) should be interpreted and how it related to the facts in this case. The Board defined the term "assignment" as "refer[ring] to the assignment of an employee's hours or shift, the assignment of an employee to a department or other division, or other overall job responsibilities," including "calling in an employee or reassigning the employee to a different unit."¹¹² Whether the term "assignment" also includes assigning an employee to a particular *task* was not decided by the Board but was instead handled under the interpretation of the duty to "direct."¹¹³ The Board did not decide whether the nurses at issue engaged in the "assigning" of other employees because the issue became moot after the Board's decision that these nurses did not complete these duties with independent judgment.¹¹⁴

The Board decided that whatever "assigning" the charge nurses did, it was not done with independent judgment, but instead was merely a routine function and was not supervisory. In deciding this, the Board placed importance on certain "guiding principles."¹¹⁵ The Board described these "guiding principles" in the following way:

work assignments made to equalize employees' work on a rotational or other rational basis are routine assignments; assignments based on assessment of employees' skills when the differences in skills are well known have been found routine; asking, without authority to require, employees to come in early or work late is routine; and adjusting employees' schedules to meet the vagaries of manpower needs is not necessarily supervisory.¹¹⁶

Without explaining what duties were left for "true" supervisors, the Board applied these "guiding principles" to the nurses at hand and decided that the authority given to the RN charge nurses did not "requir[e] the use of independent judgment within the meaning of section 2(11)."¹¹⁷ Instead, the Board said that these RNs' "assignment" duties, consisting primarily of monitoring staff RNs' attendance, assigning daily work, and making sure the unit did not become under- or overstaffed, were merely routine clerical tasks.¹¹⁸ For example, in regards to

110. *See Providence*, 320 N.L.R.B. at 717.

111. *Id.* at 733.

112. *Id.* at 727.

113. *See id.*

114. *See supra* note 15.

115. *Providence*, 320 N.L.R.B. at 727.

116. *Id.* (footnotes omitted).

117. *Id.*

118. *See id.* at 733.

the duty of determining breaks, the Board described the responsibility in the following manner:

The charge nurse's approval or disapproval of the [break] requests is based on their view of the workload of the entire unit rather than the RNs' views of their own workloads. This is a routine clerical judgment. A break is not given if RNs are needed elsewhere in the unit; otherwise it is.¹¹⁹

The Board essentially boiled the charge nurses' assignment duties down to the counting of workers and available tasks. After simplifying the responsibilities to this level, the Board necessarily found these duties to be routine and thus nonsupervisory.

The Board then turned its attention to interpreting and applying the § 2(11) statutory indicium of "responsibly to direct" to the contested charge nurses. The Board explained its long-standing analytical approach to this component. This approach, much like the one for "assignment," placed the analysis of whether the statutory duty existed in secondary importance behind whether this duty was performed with independent judgment. The Board defended this approach by stating that "it does not ignore the indicium but rather recognizes the overriding requirement expressed in the qualifier."¹²⁰

Unlike its analysis of the statutory indicium "assignment," the Board stated that this primary concern with whether independent judgment was utilized may not be appropriate in all cases dealing with the "responsibly to direct" language in § 2(11). Once again referring to the Act's unclear but extremely important distinction between professional and supervisory employees, the Board stated that this "overriding requirement" of independent judgment is not to be confused with a professional employee's use of professional judgment in the line of his or her work.¹²¹ In order to address the confusion of whether discretion was exercised as a product of independent supervisory judgment or professional judgment, the Board stated that in some cases it might be appropriate to make the primary concern of the analysis whether or not the worker's duties fit within the proper interpretation of "responsibly directed" and make the traditional independent judgment secondary.¹²² The Board did not interpret the terms in this case. Instead, it stated that it was "preferable not to develop a full analysis of the term,"¹²³ and asserted that the meaning and breadth of "responsibly to direct" should only be interpreted in those cases where the traditional analysis "does not fully account for the facts presented."¹²⁴ After announcing the possibility of a new approach, the Board decided that the immediate case was not one which required its use. Instead, it returned to the analysis of whether independent judgment was used by the contested nurses.¹²⁵

119. *Id.* at 732.

120. *Id.* at 728.

121. *Id.*

122. *See id.*

123. *Id.* at 729.

124. *Id.*

125. The Board gave no further hint as to what sorts of cases were appropriate for such analysis, other than saying it might be appropriate in "those cases in which the traditional analysis does not fully account for the facts presented." *Id.*

Under the traditional independent-judgment analysis, the Board held that the contested nurses did not use independent judgment in responsibly directing the work of the staff nurses.¹²⁶ In deciding this, the Board once again relied on certain "guiding principles."¹²⁷ The most central of these principles states that true supervisors who are identified with management should be distinguished "from skilled non-supervisory employees whose direction of other employees reflects their superior training, experience, or skills."¹²⁸ The Board presented a related principle that decisions requiring expert judgment are the "quintessence" of professionalism and the "mere communication of those decisions and coordination of their implementation do not make the professional a supervisor."¹²⁹ The common theme behind all of these principles and cases that applied them, the Board argued, is that § 2(11) does not encompass the skilled employee who "direct[s] another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position."¹³⁰

In applying these principles, the Board viewed the RN's "considerable" discretion in determining patients' needs and how best to direct work to meet these needs as being a product of an RN's professional judgment no matter if the RN was serving as a charge or staff nurse.¹³¹ To support this, the Board put a great deal of reliance on the fact that all RNs, including staff nurses, had the ethical obligation to intervene in situations if they felt there was a serious problem, and that staff nurses also had the authority to make entries on the end-of-shift report if they felt it necessary. The Board did not address the fact that while the staff nurses were given opportunities of input, the charge nurses had an employment *duty* to give input daily and to intervene into situations which were totally unrelated to situations where their ethical duty would require action. Instead, the Board concluded that since all the nurses had the same baseline ability and duty to direct work, the charge nurses should not be deemed supervisors and should not be denied the protection to which staff nurses were entitled. The Board, therefore, ruled that the RNs who served as charge nurses could be included in the proposed bargaining unit at Providence Hospital.¹³²

Board Member Cohen dissented on the grounds that he felt the RN charge nurses were clearly supervisors under § 2(11) and therefore should be excluded from the bargaining unit.¹³³ He based his dissent on his claim that the Board was manipulating the phrase "independent judgment" in the same manner that it had manipulated the "in the interest of the employer" language from the rejected

126. *See id.* at 733.

127. *See id.* at 729.

128. *Id.* (citing Southern Bleachery & Print Works, Inc., 115 N.L.R.B. 787 (1956)).

129. *Id.*

130. *Id.* A clear example of such a professional would be a surgeon directing his or her assistants during a surgery. The direction would not come from "supervisory-type" independent judgment, but would instead come from his or her professional expertise in completing the work objective.

131. *Id.* at 730.

132. *See id.* at 733.

133. *See id.* at 737 (Cohen, M., dissenting).

patient-care approach.¹³⁴ In its “effort to transform charge nurses into employees,” Cohen said the Board ignored the “substantial” degree of independent judgment that the charge nurses possessed.¹³⁵ He also downplayed the tension between the Act’s disparate treatment of supervisors and professionals that the majority used as its fundamental reason for its decision.¹³⁶ He stated that if the Board would follow the rule that “each and every section of the Act is to be given effect, and the corollary rule that the Act is to be construed as to avoid conflicts between sections,”¹³⁷ the tension could be avoided. He described the difference between the two classes of workers in the following way: “The supervisor exercises independent judgment with respect to the functions listed in Section 2(11), and he or she does so vis-à-vis employees. By contrast the professional exercises discretion and judgment with respect to the task that he or she performs.”¹³⁸ An example of such a distinction would be the “professional” nurse who uses his or her discretion to complete the task of devising a patient-treatment plan, and the “supervisory” nurse who administers the plan through the responsible direction and assignment of other employees. In regards to the contested nurses in *Providence*, Cohen stated that the discretion utilized by the charge nurses in both the realms of “assigning” and “responsibly directing” other nurses was a product of subjective independent judgment and not the product of “adding up points on a numerical scale” as the majority presented it.¹³⁹ As a result, he stated, the nurses’ tasks were not routine and because they met all the requirements of § 2(11), they should be deemed supervisors under the Act.¹⁴⁰

When the Board issued the *Providence* decision, it was clear that the doomsayers had been wrong in their prediction that *Health Care & Retirement Corp.*¹⁴¹ would effectively end the ability of many nurses and other professionals to organize. It was not clear, however, if the approach the Board used to decide *Providence* would apply to charge nurses in nursing homes as the previous patient-care analysis had. Unlike the central component in the patient-care approach (i.e., the patient), which was present in both the hospital and nursing-home settings, it was not clear whether the factors relied on by the Board in *Providence* would apply with equal force in the nursing home.¹⁴² The Board ended this speculation one month later when it issued its decision in *Ten Broeck Commons*.

134. *See id.* at 736 (Cohen, M., dissenting).

135. *Id.* at 737 (Cohen, M., dissenting).

136. *See id.* at 736 (Cohen, M., dissenting).

137. *Id.* (Cohen, M., dissenting).

138. *Id.* at 737 (Cohen, M., dissenting).

139. *Id.* (Cohen, M., dissenting).

140. *See id.* (Cohen, M., dissenting).

141. *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571 (1994).

142. Primarily, it was not clear whether the facts that RN charge nurses oversaw other RNs and that they only did this for a portion of their time would apply in the nursing-home setting. *See supra* Part II.A.

*B. The Board's Extension of the New Approach to
Nursing Homes in Ten Broeck Commons*

On the same day that the Board heard arguments in the hospital-based *Providence* case, it also heard arguments for the nursing-home-based case of *Ten Broeck Commons*.¹⁴³ The procedural stance in this case was the same as in *Providence*, except that the contested unit consisted of LPN charge nurses (as is typical in most nursing homes).¹⁴⁴ Also, in addition to responsibly directing and assigning other employees, the employer also contended that the charge nurses disciplined, evaluated, and transferred other employees,¹⁴⁵ all duties which are additional statutory indicia of supervisory status under § 2(11).¹⁴⁶ Notwithstanding the fundamental differences between the RN charge nurses in *Providence* and the LPN charge nurses in this case, the Board, after applying its new approach, found that these nurses were not supervisors and thus could not be included in the bargaining unit.¹⁴⁷

There were forty-five LPN charge nurses at issue in this case whose duties consisted primarily of overseeing CNAs as well as updating patient information, completing and obtaining approval for a long-term plan for new residents, and performing limited medical treatments.¹⁴⁸ Unlike the hospital-RN charge nurses who only served in the charge-nurse capacity part-time, these contested nurses functioned as charge nurses full-time. Also, unlike the RNs in *Providence*, who one day could be directing a fellow RN and on the next be directed by the same RN, the LPN charge nurses in the nursing home directed the same class of workers, the CNAs, every day. Yet another distinction was that while the RNs directed other RNs, who had similar training and compensation, the LPNs directed lesser-trained and lesser-paid CNAs. In order to understand the duties and environment of the LPN charge nurses, it is necessary to discuss the duties of the CNAs whom the LPNs supervised.

The CNAs were responsible for "attending to the daily needs of the residents."¹⁴⁹ The Board stated that the CNAs were primarily directed in these duties by referring to the particular patient's long-term health plan which listed the patient's precise needs.¹⁵⁰ These plans were completed whenever a new resident was admitted into the facility and were collected in a book dubbed the "Aidex."¹⁵¹ The charge nurses' primary duties of supervision were assigning the CNAs to "runs," filling out assignment sheets, and performing limited

143. *Nymed, Inc. (Ten Broeck Commons)*, 320 N.L.R.B. 806 (1996).

144. *See supra* text accompanying note 46.

145. *See Ten Broeck Commons*, 320 N.L.R.B. at 806.

146. *See supra* text accompanying note 14.

147. *See Ten Broeck Commons*, 320 N.L.R.B. at 813-14.

148. *See id.* at 807.

149. *Id.* This duty may include, depending on the needs of the particular patient, dressing, bathing, toileting, and feeding. *See AMERICAN HEALTH CARE ASS'N, supra* note 4, at 11-12, 14-15.

150. *See Ten Broeck Commons*, 320 N.L.R.B. at 808.

151. *See id.*

disciplinary and evaluation duties.¹⁵² These were the Board's findings of fact that were plugged into the framework of analysis provided in *Providence*.

The Board first addressed the statutory supervisory indicia of the "assigning" of other employees and applied the "guiding principles" discussed for these indicia in *Providence*.¹⁵³ The Board held that the assignment of CNAs to runs was routine because it was based primarily on a rotation created by management and only minimally upon the LPNs' judgment concerning the CNAs' skills or personalities.¹⁵⁴ The Board further stated that little judgment was necessary regarding the CNAs' skills since "all the CNAs have the same skills."¹⁵⁵ The Board based this conclusion concerning the CNAs' equality of skill on the fact that all aides completed the same *two-day* orientation class when hired.¹⁵⁶ Since, as stated in *Providence*, assignments based on a set rotation do not involve independent judgment, the LPNs' responsibility of assigning particular CNAs to particular patients through the use of runs was not an indicator of supervisory status under § 2(11) because it lacked independent judgment.¹⁵⁷ The Board used the same logic in summarily concluding that the responsibilities of assigning lunch breaks and extra duties, such as cleaning the lunchroom, lacked independent judgment and were merely routine.¹⁵⁸

The Board then addressed the nurses' direction of the aides' work and whether this showed supervisory status under § 2(11). In concluding that it did not, the Board placed much importance on the CNAs and their *unskilled, repetitive, and unpleasant* job of taking care of the daily needs of the residents.¹⁵⁹ The Board presented these tasks as being the same every day without aberration or special needs.¹⁶⁰ Because of this repetitiveness, the Board concluded that the actual judgment used by the charge nurses in directing the aides' work was also repetitive and routine.¹⁶¹ The Board further stated that whatever direction was necessary was facilitated primarily by the Aidex and not the charge nurse.¹⁶² The Board also defended its conclusion that the direction of the aides was routine on the fact that the charge nurses had additional duties beyond the direction of aides, such as the administration of medication. Because of these additional

152. *See id.* at 808-09.

153. *See id.* at 809-10.

154. *See id.* at 810-11.

155. *Id.* at 810. *See infra* text accompanying notes 211-18 for further discussion concerning the claim that all CNAs have the same skills.

156. *See Ten Broeck Commons*, 320 N.L.R.B. at 808.

157. *See id.* at 808, 810. The Board downplayed the nurses' responsibility of reconfiguring runs due to absences and other unplanned occurrences based on its conclusion that all the CNAs had the same skills and, therefore, could simply be substituted for each other. *See id.* at 810-11.

158. *See id.* at 811. While conceding that CNAs liked to take breaks in certain groups—for example, those who smoked would like to take breaks together—the Board said this type of discretion was ultimately based on a rotation and therefore routine, even if it changed daily. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *See id.*

duties, the Board concluded that the employer intended the charge nurses' direction of the aides to be "narrowly circumscribed" and to be "rather general [and] routine."¹⁶³ Based on these conclusions, the Board compared the charge nurses' direction to that of the "industrial straw boss and leadman,"¹⁶⁴ rather than that of a true supervisor.

Next, the Board turned to the supervisor indicia which were not addressed in *Providence*: the disciplining, evaluating, and transferring of other employees.¹⁶⁵ Unlike its approach to the indicia "assigning" and "responsibly direct," the Board addressed these statutory indicators primarily by interpreting the meaning and scope of the terms and then deciding whether the nurses' actions fit within its interpretation of the terms. Therefore the Board made the analysis of whether independent judgment was utilized secondary to this analysis. In this way, this analysis resembled the "new" approach the Board introduced, but did not apply, in *Providence*.¹⁶⁶

In regards to the disciplining of other employees, the Board found, on this particular record, that the LPN charge nurses did not discipline or "effectively recommend disciplinary action."¹⁶⁷ The Board based this finding on the fact that discipline did not arise "automatically" from a charge nurse's filing of a disciplinary report or write-up warnings.¹⁶⁸ Instead, these reports were reviewed by the DON or ADON before any discipline was instituted against the aide.¹⁶⁹ Due to this review process, the Board held that a nurse's role in initiating the disciplinary proceedings and actually writing the reports was not supervisory, even if the report ultimately led to the disciplining of the particular aide.¹⁷⁰

The Board used this lack of immediate action to conclude that the charge nurses' evaluating of aides was not supervisory.¹⁷¹ To reach this conclusion, the Board interpreted the requirement for immediate action in a very narrow manner. For example, at Ten Broeck Commons, the charge nurses' six-month evaluation led directly to wage increases, discharge, or additional training.¹⁷² The Board

163. *Id.* at 811-12.

164. *Id.* The terms "industrial straw boss" and "leadman" come from the legislative history of the Act. These groups of workers, although having some duty to direct and so forth, were not to be considered supervisors and deprived of the protection of the Act. In other words, they were the Board's vision of the charge nurse in the 1940s. *See S. REP. NO. 80-105*, at 3-4 (1947).

165. *See Ten Broeck Commons*, 320 N.L.R.B. at 812-13.

166. This approach resembled the new approach the Board announced in *Providence* for the analysis of the term "responsibly direct." *See supra* text accompanying notes 120-25. The Board did not announce that it was using a new approach, but it is clear from its analysis that the Board put the presence of independent judgment secondary to whether the nurses' actions fit within the Board's interpretation of the statutory indicium. *See Ten Broeck Commons*, 320 N.L.R.B. at 812-13.

167. *See Ten Broeck Commons*, 320 N.L.R.B. at 812.

168. *Id.*

169. *See id.*

170. *See id.* at 812-13.

171. *See id.* at 813.

172. *See id.* The Board did not explain why the threshold of "automatic" action did not apply to the six-month evaluations that led directly to discharge, wage increases, or additional training.

however, felt this was not enough evaluating or immediate action to meet the statutory threshold of § 2(11). Instead, the Board focused on the lack of systematic annual appraisals at the nursing home (although the home's policy called for them) and testimony from employees that such evaluations would lead directly to merit raises.¹⁷³ The Board rejected this evidence as "speculative."¹⁷⁴ Furthermore, the Board stated that because the existence of written warnings against a particular aide was considered in combination with the LPN's evaluation before a merit raise was given, and because these warnings were reviewed by management, the evaluation did not lead directly to action in regards to the evaluated aide.¹⁷⁵ Therefore, under this interpretation of "evaluation," even if the LPN charge nurse wrote the warning *and* the evaluation that led to the aide's discipline, the Board would hold this to be nonsupervisory, merely because management at some point reviewed the written warning. The likelihood that any nursing home would grant this enormous amount of discretion to a charge nurse to write warnings and evaluations that were not reviewed by management and that would lead directly to immediate action against (or for) the aide or aides involved is slight.¹⁷⁶ As a result, the Board has made the indicium of "evaluating" inapplicable to nursing homes unless the facility can show that this incredible amount of power is vested in and used by LPN charge nurses.

In regards to the charge nurses' ability to transfer or effectively recommend the transfer of aides,¹⁷⁷ the Board held that because these recommendations were not "automatically granted," they were not "effective" and therefore, were not sufficient indicators of statutory supervisory status.¹⁷⁸ Because the DON ultimately decided whether to transfer the aide, even though based solely on the LPN's recommendation,¹⁷⁹ the LPN was not directly responsible for the transfer. In a footnote, the Board conceded that there was "no evidence that an LPN's recommendation ha[d] not been followed."¹⁸⁰ Nonetheless, the fact that the DON was involved in reviewing the recommendation and making the final decision regarding the transfer, the LPN's role in the process, no matter how significant a part it played in the result, was not supervisory under § 2(11).¹⁸¹ Therefore, the Board's interpretation of the power to transfer was very similar to its interpretation of the power to discipline, evaluate, and direct in that it required unhindered discretion in the charge nurse and no review by the DON or other member of management in order to be deemed supervisory.

173. *See id.*

174. *Id.*

175. *See id.*

176. It is difficult to imagine *any* industry placing this much discretion in a front-line supervisor.

177. *See supra* note 14.

178. *Ten Broeck Commons*, 320 N.L.R.B. at 813.

179. *See id.*

180. *Id.* at 813 n.13. The Board dealt with this fact by stating that there was also no evidence that the aides were transferred *solely* due to the recommendations, but instead that the decision of the DON was based on "all factors involved." *Id.*

181. *See id.* at 813.

In his dissent, Board Member Cohen repeated the attack he leveled at the majority's logic and its interpretation of § 2(11) in *Providence*. He further extended this criticism to the majority's interpretation of "evaluate," "discipline," and "transfer."¹⁸² In regards to the LPNs' assignment of work to the aides, he relied on the nurses' authority to reconfigure the "runs" that in turned changed the aides' assignments.¹⁸³ As for the majority's reliance on the fact that the runs changed systematically every month, Cohen responded by stating that he "kn[ew] of no case, and none [was] cited, standing for the proposition that an assignment is not an assignment if it is for a short duration."¹⁸⁴ Unlike the majority, he saw the subjective judgment used in considering an aide's personality and capabilities when reassigning runs as equaling "independent judgment" and thus, meeting the requirements for supervisory status under § 2(11).¹⁸⁵

The dissent also argued that the LPNs responsibly directed the CNAs in their work. As one basis for this argument, Cohen addressed the LPNs' role of filling out the long-term care plan for a new resident that directed every facet of the particular patient's future care.¹⁸⁶ The LPN also used the Aidex, which included all the patients' care plans, to make sure the CNAs were properly following the Aidex's instructions and, if not, directed the aide to follow the plans.¹⁸⁷ Like the majority in both this case and *Providence*, Cohen looked to the legislative history of the Act for support. He argued that the majority's view, that the use of a person's "greater skill and experience" does not involve independent judgment, did not comport with House and Senate reports.¹⁸⁸ Instead, the dissent said this use of a person's greater skill and experience coupled with personal judgment was the essence of independent judgment and since the LPNs utilized such judgment daily in directing the work of the aides, they were necessarily supervisors.¹⁸⁹

Cohen then turned his attention to the Board's interpretation of those qualities not addressed in *Providence*. In regards to the disciplining of CNAs, Cohen pointed to the nurses' authority to orally warn the aides and fill out written reports regarding their misconduct.¹⁹⁰ In response to the majority's point that the DON actually decided the issue of discipline, the dissent pointed out that the DON ordinarily did not conduct an independent investigation but instead relied

182. *See id.* at 814-16 (Cohen, M., dissenting).

183. *See id.* at 814 (Cohen, M., dissenting).

184. *Id.* (Cohen, M., dissenting).

185. *See id.* (Cohen, M., dissenting). He also concluded that the assigning of extra duties equaled "assignments" even if they were often changed according to the plain meaning of the term. *See id.* (Cohen, M., dissenting).

186. *See id.* (Cohen, M., dissenting).

187. *See id.* (Cohen, M., dissenting).

188. *See id.* (Cohen, M., dissenting). He based this argument on Senator Flanders's inclusion of the indicium "direction" to account for those persons like the LPN charge nurse, who "exercise . . . personal judgment based on personal experience, training and ability." Senator Flanders was essentially describing the qualities of the LPNs *Id.* at 815 (Cohen, M., dissenting) (omission in original) (quoting Sen. Flanders).

189. *See id.* (Cohen, M., dissenting).

190. *See id.* (Cohen, M., dissenting).

on the written report of the LPN and possibly a discussion with the charge nurse.¹⁹¹ Regarding the majority's reliance on the fact that management reviewed the disciplinary and evaluation reports the LPNs wrote, Cohen stated that this review process did not take away from the importance of the LPNs' role as a supervisor.¹⁹² The majority and dissenting opinions seem to describe two completely different sets of employees and duties even though they address exactly the same charge nurses. This fundamental disagreement will not likely occur in future cases, however, because Cohen retired from the Board in 1996.¹⁹³ Therefore it is unlikely that the Board's new approach will be struck down internally in the near future.

Notwithstanding the dissent, the Board's narrow interpretation and application of the § 2(11) terms "evaluate," "transfer," and "discipline,"¹⁹⁴ and its extension of the guiding principles from *Providence*, in regards to the terms "directing" and "assigning," make it very unlikely that many LPN charge nurses will be deemed supervisors in future cases. This is especially true considering that the lone dissenter in both *Providence* and *Ten Broeck Commons* is no longer on the Board. Furthermore, although the application of § 2(11) to particular disputes is a factual analysis¹⁹⁵ and therefore capable of different results in different cases, the Board's ultranarrow interpretation of the statutory indicators of § 2(11) and willingness to rely on "guiding principles" make such factual analysis almost predetermined.

V. PROBLEMS WITH THE NEW APPROACH

From 1974 to 1994 the Board used the patient-care analysis as a tool to ensure that the distinction between professional employees and supervisors was not destroyed in the health-care field. Because this test was as applicable in the nursing-home setting as it was in the hospital setting, there was no problem grouping charge nurses from both settings together regarding the application of the test. This saved the Board from having to address the reality that there were fundamental differences between the RN charge nurse in the hospital setting and the LPN charge nurse in the nursing-home setting that might require different results as to their employment status. When the Supreme Court struck down the patient-care approach, the Board faced the dilemma of having to find a new approach that allowed it to continue to treat these two groups of workers in the same general framework. The Board accomplished this through its interpretation of "independent judgment," its reliance on "guiding principles," and its narrow interpretation of § 2(11)'s statutory indicia of supervisory duty. This Part of the Note addresses the fundamental problems with the Board's new approach as seen in *Providence* and, more importantly, the short-sightedness of the Board in

191. See *id.* at 815 (Cohen, M., dissenting).

192. See *id.* at 815-16 (Cohen, M., dissenting).

193. See *NLRB Member Cohen Plans to Leave Aug. 27, Administration Seeks Republican to Fill Seat*, 120 DAILY LAB. REP. (BNA) d13 (June 21, 1996).

194. See *Ten Broeck Commons*, 320 N.L.R.B. 806.

195. See GORMAN, *supra* note 51, at 36-37.

extending its new approach to nursing homes without analyzing the fundamental differences between the hospital and nursing-home settings.

B. How the New Approach Eviscerates § 2(11) in Providence

In its mission to protect the organizational rights of professional employees, in this case nurses, the Board has lost sight of the important reasons behind § 2(11) and its exclusion of supervisors from the Act, principally the guarantee of "single-minded loyalty"¹⁹⁶ of supervisors to the employer. By deferring to "guiding principles" that narrowly construe § 2(11), and interpreting professional discretion broadly, the Board has left very little activity that could be considered supervisory. When coupled with the fact that the Board announced alternate approaches it may take in future cases,¹⁹⁷ *Providence* now leaves little chance that charge nurses will ever be deemed supervisors.¹⁹⁸ While the *Providence* approach might advance a particular policy goal of protecting the organizational rights of nurses, it suffers from the same fault that doomed the patient-care analysis—the refusal to adhere to the plain language of the statute.¹⁹⁹

The possibility of a division of loyalty between the supervisor's allegiance to his or her fellow members of the union and the supervisor's duty to act solely as a representative of the employer was one of the fundamental reasons for excluding supervisors from the Act.²⁰⁰ When the Board labeled the charge nurses in *Providence* as employees and not supervisors, the Board implied that no such danger of divided loyalty existed in that situation.²⁰¹ In its opinion, the Board listed the charge nurses' duties as monitoring staff nurses' attendance, assigning daily work, making sure the particular unit did not become over- or understaffed, and assigning breaks. The opportunity for divided loyalty is present in each of these duties. For instance, if the union members engaged in a slow-down of work,²⁰² the charge nurse's job responsibilities would likely *require* him or her

196. *See id.* at 98.

197. *See supra* text accompanying note 125.

198. It is difficult to imagine a facility being able to overcome this standard and application. This is supported by the Board's decision in *Caremore, Inc. (Altercare of Hartville)*, 321 N.L.R.B. 847 (1996), the only other nursing-home case to apply this new standard to date. In a brief analysis that relied on the principles of *Ten Broeck Commons*, the Board found the LPN charge nurses at issue not to be supervisors due to the routine nature of their discretion. *See id.* at 847-48.

199. *See Providence Hosp.*, 320 N.L.R.B. 717, 736 (1996) (Cohen, M., dissenting).

200. *See COX ET AL.*, *supra* note 11, at 98.

201. The Board made such an argument explicitly in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 579-82 (1994).

202. This activity would be unprotected by the Act but its use as an economic weapon would not excuse the hospital from bargaining with the union. *See NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490-96 (1960) (holding it unlawful for employer to refuse to bargain solely because employees engaged in a work "slow-down" or "sit-in," even though the use of such economic weapons by employees is not protected under the Act). It is not difficult to imagine the serious ramifications of such a work slow-down in a nursing-home setting—especially if the nursing-home charge nurses felt the need to "protect" their fellow union members conducting the slow-down.

to report such a slow-down and those who engaged in it in an end-of-shift report.²⁰³ This report would likely result in the disciplining of those involved or other correctional measures.²⁰⁴ If the charge nurse was a fellow member of the union there would certainly be pressure on him or her not to report such action. Although the charge nurse might then be open to discipline for not reporting the action, the perceived economic or bargaining benefits that might result from shielding the other nurses could conceivably overshadow this possibility of discipline. If, however, the charge nurse is dubbed a supervisor and not a member of the union, no such economic or bargaining benefits would be present.²⁰⁵ Although this possibility of divided loyalty and its effects should not be outcome determinative, it is central enough that any test for supervisory status should at least address it. The Board's new approach does not do so.

The Board's reliance on broad "guiding principles" leaves very little room for meaningful factual analysis and leaves few activities that would be deemed supervisory under its analysis. One such principle is that workers whose direction of other employees reflects the director's "superior training, experience, or skills,"²⁰⁶ should not be deemed supervisors but instead professionals utilizing professional discretion. Common sense would seem to suggest that a *reason* a person might be promoted or hired as a supervisor, in any industry, would be because he or she has superior training, more experience, or more skills than those workers whom he or she supervises.²⁰⁷ This would remain true regardless of the fact that all involved are also deemed professionals. Under the Board's standard, however, an argument could be made that whenever an employee is promoted due to his or her superior training, experience, or skills, he or she is not to be considered a supervisor, but instead should still be considered a professional employee whose work objective has merely been altered. Under this argument, therefore, whatever direction takes place is merely done to accomplish his or her professional objectives. This "principle" advances the policy concerns behind § 2(12) and its inclusion of professionals, while in turn ignoring the policy concerns of § 2(11) and its exclusion of supervisors. This unequal treatment of the statutory sections also goes against long-standing principles of statutory interpretation.²⁰⁸

In applying these principles to the hospital setting, the Board placed much importance on the fact that all nurses involved, charge nurses and staff nurses, were technically equal in that they were all RNs who had similar training and education and that none of the charge nurses served in that capacity all the time.

203. For an example of such a requirement, see the Supreme Court's factual findings as to the charge nurses' duties in *Health Care & Retirement Corp.*, 511 U.S. at 575.

204. See *supra* text accompanying note 60.

205. There would be a division of power between the charge and staff nurses in this circumstance and no incentive to risk discipline or termination for furthering union goals since the union would not be representing him or her.

206. *Providence Hosp.*, 320 N.L.R.B. 717, 729 (1996).

207. In the medical, surgical, and oncology care center at Providence Hospital, for instance, nurses were picked for charge-nurse duty because of their "clinical competence and leadership abilities." *Id.* at 718.

208. See *id.* at 736 (Cohen, M., dissenting).

Although this internal feature inherent in hospital-personnel structure *may* be enough to offset any detrimental effects of granting organizational rights to charge nurses in hospitals, the broader harm it creates is clear. The route taken by the Board in getting to this result by relying on broad "guiding principles" fails to preserve the role of § 2(11) for future cases. Instead of meaningful factual analysis in every case as *Health Care & Retirement Corp. of America* mandates,²⁰⁹ the Board will likely, as evidenced in *Ten Broeck Commons*, simply plug the new facts of a particular case into the framework of "guiding principles" announced in *Providence*.²¹⁰ Ultimately, this placement of policy over the plain language of the Act does not further stability or equality of bargaining but instead only gives incentive for gamesmanship and litigation.²¹¹

*B. How Ten Broeck Commons Ignores the Realities of the
Nursing Home*

Whereas the Board's formulation and application of its new approach in *Providence* presents a slanted reading and presentation of the facts regarding the RN charge nurses, the Board's application of this approach in *Ten Broeck Commons* shows its ignorance of, or more likely, its refusal to address the basic realities within, a nursing home. The most important reality the Board ignored is that rarely anything in a nursing home is routine, due to its environment, its employees, and the special needs of its residents. In order to function on a daily basis, nursing homes rely on the supervision of CNAs by LPN charge nurses. Instead of addressing these realities, the Board made them subservient to the policy of protecting the organizational rights of LPN charge nurses. While this policy may be worthwhile, the danger of ignoring the needs of the nursing home, the nursing home's special reliance on the LPN charge nurses, and LPNs' supervision of CNAs should have been addressed in a meaningful analysis. This Part of the Note presents how the Board, in *Ten Broeck Commons*, failed to address these issues and instead attempted to "shoehorn" the LPN charge nurses and their duty into the analytical framework for the RN charge nurses in *Providence*.

The first major flaw of the Board's analysis was its application of the § 2(11) supervisor indicium of "assigning" other employees to jobs. As presented in Part IV, the Board held that the charge nurses' assignment of other employees in *Ten Broeck Commons* was merely a routine clerical task and thus not supervisory. In support of this conclusion, the Board stated that little judgment was necessary in assigning the CNAs to patients because "all the CNAs have the same skills."²¹² This conclusion was in turn based on the fact that all of the aides completed a

209. 511 U.S. 571, 582 (1994).

210. *See, e.g.*, *Bozeman Deaconess Found. (Bozeman Deaconess Hosp.)*, 322 N.L.R.B. 1107 (1997) (using *Providence* factors to support decision that RN charge nurses were not statutory supervisors).

211. *See generally* J. Duncan Moore, *Alaska Hospital Disputing Nurse Labor Law*, MODERN HEALTHCARE, Aug. 19, 1996, at 6 (discussing hospital industry's plan to continue litigating and contesting findings that charge nurses are employees).

212. *Nymed, Inc. (Ten Broeck Commons)*, 320 N.L.R.B. 806, 810 (1996).

uniform two-day orientation when hired. Therefore, the Board claimed that the act of assigning the particular CNAs to "runs" took little discretion other than plugging the CNAs into a preplanned rotation.²¹³

The claim that all CNAs, in any nursing home, have the same skills is simply not supported by statistical data or common sense. In a survey completed by the American Health Care Association, the CNA was listed as the lowest paid²¹⁴ and most transient²¹⁵ of any employee in the average nursing home. They are also, as a group, the least educated and least regulated of the nursing employees at a nursing home.²¹⁶ In short, the job enlists a wide variety of people who have not received any substantial formal training before or after being employed as an aide. The compensation for the job gives no incentive for this sort of training.²¹⁷ Instead, CNA skills are gained through experience and not academic training. This, in turn, produces a group of workers who have wide-ranging levels of abilities and skills, depending on the experience of particular aides. Therefore, the range of skills available on a particular day depends on which aides are working. However, the Board ignored this fact by its claim that these aides can be equally trained through the use of a two-day orientation. Common sense does not support this and neither does industry practice. The variation in the skill of CNAs directly affects the responsibility of the charge nurses in assigning the aides to tasks. More so than patients in a ward or hall in a hospital, residents in a nursing home have highly varied daily needs ranging from little assistance to assistance in dressing, feeding, and toileting.²¹⁸ Some aides will be better skilled at some of these tasks than others and it is the duty of the LPN charge nurse to make an effective assignment. As a result, the task of assigning aides to runs is

213. *See id.* at 808-10.

214. In 1995, the average salary for the nursing aide nationwide was \$6.51 per hour as opposed to the average rate of \$11.13 for the LPN charge nurse. *See AMERICAN HEALTH CARE ASS'N, supra* note 4, at 44. Compare this with the minor distinction between the RN charge nurse and staff nurse in the hospital setting, \$24.32 per hour and \$18.73 per hour respectively. *See id.* at 45.

215. Not only did the CNAs have the highest turnover rate within the nursing personnel, they also had the highest turnover rate of any nursing-home employee, 106% in 1995. *See id.* at 46.

216. Although federal regulations mandate training for nurses aides in nursing homes, these regulations require only minimal on-site training and no formal academic training. *See* 42 C.F.R. § 483.152 (1996) (requiring 75 hours of training in, among other things, basic nursing skills, measuring and recording height and weight, and respecting residents' rights).

217. *See AMERICAN HEALTH CARE ASS'N, supra* note 4, at 44; *see also* Steve Twedt, *Ill-Trained Aides Doing Nurse Work*, COM. APPEAL (Memphis), Feb. 25, 1996, at A7 (stating that in hospitals, an experienced nurse can earn \$60,000 while an aide is likely to earn less than \$20,000).

218. The national average, in 1995, for residents who needed assistance in bathing was 48.77%, with 46.10% being totally dependent, and only 5.1% needing no assistance. *See AMERICAN HEALTH CARE ASS'N, supra* note 4, at 11. The fluctuation between individual states ranged from only 31.05% needing assistance in Kentucky to 66.14% requiring assistance in South Dakota. *See id.* The percent of residents who needed assistance in other daily functions is similarly large. For instance, 46.06% of residents required assistance in dressing with only 12.67% being independent in this function. *See id.* at 12. The smallest dependence level was with eating, where 34.84% of nursing-home residents nationwide were dependent on others to assist them with eating. *See id.* at 15.

much more than a pure mathematical exercise, and charge nurses use much more subjective judgment than the Board acknowledges.²¹⁹

Another factor downplayed by the Board in regard to the charge nurses' assigning of other employees was the nurses' responsibility to assign breaks and extra duties such as cleaning the lunchroom. Once again, the Board viewed these tasks as routine because they consist of no more than counting the aides on duty and giving available breaks. The Board neglected, much like it did in *Providence*, the possibility of favoritism and pressure that could be exercised by a union-member charge nurse in giving the extra duties to a nonunion member or antagonistic aide. No matter how trivial "lunchroom duty" or badly timed breaks may seem to the NLRB, these small acts could play a major role in a strike vote or representation election.²²⁰ Furthermore, unlike the RN charge nurses in the hospital, these LPN charge nurses do not have to worry about the possibility that the aides they pressure today will be in the position to gain retribution tomorrow. Therefore, no inherent check exists to protect against a charge nurse using his or her power to pressure aides in their representational decisions.

The most fundamental flaw in the Board's analysis occurred in its application of the § 2(11) term "direction" to the work of the LPN charge nurse. The Board found this to be nonsupervisory due in large part to the repetitive nature of the CNAs' daily duties. These daily duties consist primarily of dressing, feeding, toileting, or any other needs the residents might have.²²¹ The Board characterized these duties as repetitive and requiring little skill.²²² Because the aides often repeat the same run or assignment for a month at a time, the Board viewed these tasks as needing little direction other than occasionally checking the Aidex to ensure everything is being done properly.²²³

This conclusion neglects the inherent danger that this repetitiveness has in the nursing-home setting and how the danger increases the need for supervision by the charge nurse. Unlike the hospital where a highly trained and ethically regulated RN staff nurse will usually see new patients after a determinate stay, the lowly paid, minimally trained, and unregulated aide sees the same residents day after day.²²⁴ Due to the average resident's extended stay in the nursing home,²²⁵ many residents and their families treat the residents' room at the facility

219. The location of the LPNs' nursing station also increases the direction he or she is required to do on a daily basis. Family members or friends who request immediate action in regards to a resident, such as changing a wet bed, will not likely search out a management member, especially at night, but instead will go directly to the nurses' station located in every hall or wing. As a result, the LPN must respond to numerous situations and make numerous decisions daily, all requiring the use of subjective judgment, without waiting for approval from management.

220. When one couples this authority with the way many aides see the job (i.e., as only temporary), charge nurses could effectively use the ability to show favoritism in assigning duties and breaks to get rid of union antagonists within the ranks of the CNAs.

221. See AMERICAN HEALTH CARE ASS'N, *supra* note 4, at 12-15.

222. See Nymed, Inc. (Ten Broeck Commons), 320 N.L.R.B. 806, 811 (1996).

223. See *id.* at 811 & n.8.

224. See *id.* at 811.

225. One survey listed the median stay for all residents in nursing homes in 1985 at 614 days. See AMERICAN HEALTH CARE ASS'N, *supra* note 4, at 36.

as their home, even if only implicitly, and place personal belongings of the residents in the room. Coupled with the fact that many of these residents are disoriented,²²⁶ aides with bad intentions have many opportunities to take advantage of them.²²⁷ Such abuse could range from theft to physical, verbal, or mental abuse. Because the CNAs are by far the most numerous employees in the nursing home and have by far the most contact with the residents on a daily basis, countering this threat of abuse is not easy. By allowing LPNs to join the same unions as the CNAs, this task is only made more difficult.

Most nursing homes rely on the front-line LPN charge nurses to control this threat of abuse. The administrators of these homes use the charge nurse in numerous ways to accomplish this goal ranging from basic supervision, evaluation, and training, to including the nurses in management committees.²²⁸ These charge nurses are the only personnel who have the opportunity to supervise aides in more than a cursory manner. They are also the only personnel whose location in the nursing home allows them to intervene immediately if a situation demands it.²²⁹ Through this front-line exposure, these nurses are also the best tool for evaluating the situation and having ideas for improving it. The basic job description for charge nurses at nursing homes supports the argument that nursing homes rely heavily on the charge nurse.²³⁰

Although the charge nurses play a critical role in the daily operation of the nursing home especially in regards to matters that affect the residents most, many of these LPNs' decisions or opinions concerning the performance of CNAs will not cause "immediate action." Instead, most often these recommendations or opinions will be reviewed or be part of a collaborative effort.²³¹ An example of this is the employee evaluation form which many of these charge nurses have a duty to fill out. These evaluations most likely do not cause immediate action but instead are generally reviewed before any action is taken in response to the evaluation. The same is true for disciplinary reports or "write-ups."²³²

The fact that these reports do not cause immediate action should not automatically qualify them as nonsupervisory. Rarely does an employer, in any industry, give anyone the ultimate authority to make decisions, whether they be evaluations or disciplinary reports, that are immediately acted upon without being reviewed by someone. Nonetheless, the Board, in *Ten Broeck Commons*,

226. The national average for residents with some form of dementia was 40.26% in 1996. *See id.* at 18.

227. *See* Bonnie Harris, Editorial, *Tighten Checks on Nurse Aides*, INDIANAPOLIS NEWS, Mar. 15, 1996, at A12 (discussing the need for tighter criminal checks on nurses' aides who care for elderly residents in nursing homes).

228. By including charge nurses among the ranks of employees, facilities may lose the ability to include charge nurses in these management committees for fear that the committees will be dubbed labor organizations. The result would likely be an unfair labor charge against the facility for attempting to assist or dominate the labor organization. *See* *Electromation, Inc.*, 309 N.L.R.B. 990 (1992).

229. The charge nurses usually have nurses' stations located in every hall or wing of the facility.

230. *See supra* text accompanying note 60.

231. *See* *Nymed, Inc. (Ten Broeck Commons)*, 320 N.L.R.B. 806, 812 (1996).

232. *See id.* at 812-13.

stated that unless these reports or evaluations cause immediate action without being reviewed, they are not to be deemed supervisory.²³³ This logic would seemingly support a finding that the facility administrator is a statutory employee because he or she is required to get approval for many decisions made on a day-to-day basis. This very narrow analysis simply does not occur in other types of cases,²³⁴ but instead, is used solely to advance the Board's chosen policies by deeming charge nurses nonsupervisors.

The overall flaw of the Board's decision in *Ten Broeck Commons* is that it adheres to the logic and approach announced in *Providence* without considering the basic differences between the environment and contested nurses in each setting. Although the analysis of whether a worker is a statutory supervisor should be fact intensive, the Board relies on general "guiding principles" that simply do not account for the realities of a typical nursing home. Unless the facility in *Ten Broeck Commons* is far different from the average nursing home, this approach by the Board shows its willingness to sacrifice meaningful analysis in these types of cases to protect the organizational rights of LPN charge nurses.

VI. CONCLUSION

Although the policy reasons for granting organizational rights and protections to all employees who are truly not supervisors are very important,²³⁵ the policy reasons for excluding individuals who fit under the definition of supervisor in § 2(11) are just as important.²³⁶ In both *Providence* and *Ten Broeck Commons*, the Board considered the protection of the organizational rights of charge nurses a higher priority than ensuring against the dangers § 2(11) was meant to avoid. Although the effect of this decision in the hospital setting will likely be negated by the nursing-personnel hierarchy of the typical hospital, the effect in the nursing home is far from clear. However, the possible effects are clearly dangerous to anybody whose loved one is a resident of a nursing home.

Anyone who has entered a nursing home knows that it is a far different environment than a hospital. The only service the nursing home offers is providing for the needs of its residents, a service that is challenged by certain realities. These realities are that many of the long-term residents suffer from dementia and are cared for daily by a minimally trained and unregulated work force of nurses' aides. This reality demands that the charge nurse, who is the facility's most critical tool in ensuring that the residents are properly cared for, be aligned with management and have an absolute duty of loyalty to the policies of the particular facility. The Board ignored this reality in *Ten Broeck Commons* by holding that the duties of these charge nurses are routine and that of

233. *See id.* at 812.

234. Namely, § 8(a)(1) proceedings, where it is necessary to find supervisory status in order to hold the employer responsible for the individual's actions. *See id.* at 815 (Cohen, M., dissenting).

235. These are the same policies that justify the Act in its entirety, namely, to equalize bargaining power and regulate the use of economic weapons. *See* 29 U.S.C.A. § 151 (West 1997).

236. *See* COX ET AL., *supra* note 11, at 98.

nonsupervisors. If the Board were to accept the realities of the nursing home, there would certainly be a sacrifice on the part of the LPN charge nurse. These nurses would lose the ability to choose whether or not to organize and the Act's protection of this choice. However, the possibility of divided loyalty in charge nurses, by allowing them to organize with the aides they direct, will not be borne primarily by the facility's management but by those individuals most vulnerable—the residents.