Licensed practical nurses: Protected "Employees" or statutory "Supervisors" under the NLRA? The impact of the 11th Circuit's Lakeland Health Care decision

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Licensed Practical Nurses: Protected "Employees" or Statutory "Supervisors" Under the NLRA? The Impact of the 11th Circuit's *Lakeland Health Care* Decision

By David P. Twomey

I. Introduction

With headlines like "Licensed Practical Nurses Ruled Ineligible for Union Representation",[1] and "Eleventh Circuit Rules Licensed Practical Nurses Are Supervisors, Providing Strong Ammunition to Long-Term Healthcare Facilities,"[2] Human Resources publications and law firm blogs welcomed the Eleventh Circuit Court of Appeals decision vacating the National Labor Relations Board's (NLRB) determination in its *Lakeland Health Care Associates, LLC v. NLRB* decision that the licensed practical nurses (LPNs) at Lakeland's Wedgewood Health Care Center were employees protected under the National Labor Relations Act (NLRA).[3]

LPNs complete a one year approved educational program and pass a state examination to obtain their nursing licenses.[4] Registered nurses (RNs), obtain their licenses usually taking one of three educational paths: a bachelor's degree in nursing, an associate's degree in nursing, or a diploma from an approved nursing program; and in all cases pass a national licensing examination.[5] LPNs, along with certified nursing assistants or aides (CNAs), are front line care givers at skilled nursing facilities.

The Eleventh Circuit Court of Appeals encompasses Florida, Georgia and Alabama. Florida has 683 certified Medicare and Medicaid nursing homes pro-

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viding 82,720 beds.[6] Georgia has 367 certified Medicare and Medicaid nursing homes with a total of 39,764 beds.[7] Alabama has 228 certified Medicare and Medicaid nursing homes providing 26, 697 beds.[8]

At the same time as the release of the Eleventh Circuit's *Lakeland* decision in October 2012, the Society of Professional Engineering Employees in Aerospace (SPEEA) which represents some 23,000 white-collar Boeing engineers and technical employees, including SPEEA-represented professional engineer project managers, were negotiating new collective bargaining agreements with Boeing, exercising their full rights under the NLRA.[9] Is it "right" that the *Lakeland Health Care* decision should provide "strong ammunition" for 1,278 nursing home owners in the Eleventh Circuit, some with existing LPN units, to negatively impact the collective bargaining rights of thousands of individuals, predominantly women, working at the bottom rung of the nursing profession as LPNs in the nursing home industry in Florida, Georgia and Alabama?

Part II of this paper presents the travel of the *Lakeland* dispute through the Board to the Court of Appeals. Part III details the law for determining statutory supervisory status, and the framework for court review of Board decisions. Part IV of this paper analyzes the Court's decision under the established standards for court review of Board decisions. Part V presents the impact of the decision for the workers directly involved, and the impact on workers throughout the judicial circuit. Part VI considers the options that could possibly provide LPNs the protections of the NLRA. And, Part VII contains a conclusion.

II. Proceedings before the NLRB and the court of appeals

On August 11, 2010 the United Food and Commercial Workers Union Local 1625 filed a petition with the NLRB seeking a representation election to establish the union as the collective bargaining representative for all of Lakeland's LPNs.[10] Lakeland opposed the petition, contending that all of the LPNs are "supervisors" within the meaning of the NLRA.[11] A Board hearing officer conducted a hearing devoted solely to the "supervisor" issue between August 25, 2010 and August 30, 2010.[12] On September 24, 2010, after reviewing the record and briefs of the parties, the Regional Director issued a 49 page Decision and Finding that the LPNs were not supervisors under the Act.[13] The Board denied Lakeland's request for review of this decision.[14] Thereafter, a representation election was conducted by the Board, where a majority of the LPNs voted for representation by the union. On January 6, 2011, the union was certified as the exclusive bargaining representative for Lakeland's LPNs.[15]

In order to seek judicial review of the Board's determinations, Lakeland refused to bargain with the union[16] and the matter was progressed to the United States Court of Appeals for the Eleventh Circuit.[17] The Board cross-appealed for enforcement of the decision.[18]

The Court of Appeals majority determined that substantial evidence of record did not support the Board's determination that LPNs employed by the nursing home were not supervisors within the meaning of the NLRA and it vacated the Board's decision, denying the petition for enforcement.[19] A dissenting opinion was filed.[20]

III. The law for determining supervisory status: the legal framework for court review of Board determinations

The outcome of Board-conducted elections to ascertain whether a majority of employees want a particular union to be their exclusive bargaining representative can be affected by the composition of the voting unit. Employers and unions aggressively pursue their legal options to obtain a voting unit that will most likely yield a favorable outcome from their respective points of view. A unit clarification hearing preceding a union election held before an NLRB hearing officer may resolve issues on who will be allowed to vote in the Board election.[21] Whether certain individuals are excluded as supervisors or managerial, or are protected as professionals, may be pivotal to the outcome of the election and the rights of indi-

vidual employees. In the *Lakeland Health Care* case, the employer contended that the entirety of the 28 full time LPNs of the petitioned-for LPN unit were supervisors.[22]

The Supreme Court in its landmark *NLRB v. Kentucky River Community Care, Inc.*[23] decision and the Board in *its Oakwood Healthcare, Inc.*[24] decision have articulated the law for determining supervisory status, and it is set forth below. The law regarding court review of the Board's factual findings and the application of the law to the *Lakeland* case is also presented.

A. Determining Supervisory Status

Section 7 of the NLRA identifies the collective bargaining rights of most employees in the private sector. It provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing ... and shall also have the right to refrain from any or all of such activities.[25]

Section 2(3) of the act states that an employee "shall include any employee ... but shall not include any individual ... employed as a supervisor."[26] An employee's job title does not determine whether the employee is a supervisor.[27] Rather, the term "supervisor" is defined to include any individual with the authority to perform any one of 12 specified functions, if the exercise of such authority requires the use of independent judgment and is not merely routine or clerical.[28]

Section 2(11) of the NLRA states:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[29]

Because the 12 functions and the words "independent judgment" are not further defined in the Act, the NLRB and the Supreme Court have sought to provide meaning for certain ambiguous terms in Section 2(11). At the same time Congress acted to exclude supervisors from the NLRA's protection with its Taft Hartley Amendments to the Act in 1947, it explicitly extended the Act's protections to professional employees in Section 2(12) of the Act.[30] The inclusion of professionals and the exclusion of supervisors give rise to some tension in the statutory text of the Act.

1. Kentucky River:

In *NLRB v. Kentucky River Community Care, Inc.*, the United States Supreme Court considered whether six registered nurses should be classified as supervisors for purposes of the NLRA when their judgment was based on professional or technical training or experience.[31] Kentucky River Community Care, the operator of a residential care facility, sought to exclude the nurses from a bargaining unit of 110 professional and nonprofessional employees on the grounds that they were supervisors.[32] The NLRB concluded that the nurses were not supervisors because they failed to exercise sufficient "independent judgment"[33] in directing less-skilled employees to deliver services in accordance with employer-specified standards.[34] The U. S. Court of Appeals for the Sixth Circuit rejected the Board's position, and the Supreme Court affirmed, in part, the Sixth Circuit's decision.[35]

The Supreme Court unanimously determined that the Court of Appeals improperly placed the burden of proving supervisory status on the General Counsel.[36] It determined that the burden is placed on the party claiming that the employee is a supervisor, in this case the employer.[37]

By a 5-4 majority the *Kentucky River* Court held that Section 2(11) of the NLRA set forth a three-part test for determining supervisory status. Employees will be considered supervisors if: (1) they hold the authority to engage in any

one of the 12 supervisory functions identified in section 2(11); (2) their exercise of authority is not of a "merely routine or clerical nature, but requires the use of independent judgment;" and (3) their authority is held in the interest of the employer.[38]

At issue before the Court in *Kentucky River* was the second part of the test – the employees do not use "independent judgment." The Court concluded that it was inappropriate for the Board to characterize judgment that reflects "ordinary professional or technical judgment" as failing to be independent judgment.[39]

2. *Oakwood Healthcare Inc.:*

On September 29, 2006, the full five member Board issued three decisions setting forth the analysis to be applied in determining supervisory status.[40] In the lead decision, *Oakwood Healthcare, Inc.*, the hospital employed approximately 181 staff RNs, 12 of whom served permanently as charge nurses, while other RNs may serve as charge nurses on a temporary basis to cover days off or vacations.[41] Oakwood sought to exclude all of the charge nurses, both permanent and temporary from a proposed bargaining unit, asserting that the RNs were supervisors under Section 2(11) of the Act.[42] The union disagreed.

The three member Board majority established definitions for the terms "assign", "responsibly to direct" and "independent judgment" as those terms are used in Section 2(11) of the Act.[43] It determined that "assign" in sum is "designation of overall duties to an employee, not the ad hoc instruction that the employee perform a discrete task."[44] The Board majority defined the function of "responsibly to direct" to apply to individuals who not only oversee the work being performed but are held responsible if the work is done poorly or not at all.[45] The Board stated to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary.[46] Moreover, it stressed it must also be shown that there is a prospect of adverse consequence for the putative supervisor if he/she does not take these steps.[47]

Regarding "independent judgment" the Board stated that at a minimum an individual must act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.[48] It directed that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies, rules or the verbal instructions of a higher authority.[49] Moreover, the Board pointed out that the judgments must invoke a degree of discretion "that rise above the routine or clerical".[50] Professional or technical judgments involving the use of independent judgments are supervisory if they involve one of the 12 supervisory functions."[51]

Applying the new definitions to the record before it, the Board concluded that the 12 permanent charge nurses at Oakwood were supervisors under the Act.[52] The Board found that none of the rotating charge nurses were supervisors.[53]

The Board majority applied its new definitional framework from *Oakwood Healthcare* in the companion *Croft Metals Inc.*[54] and *Golden Crest Healthcare Center*[55] cases. The Board concluded in *Croft Metals* that the lead persons and load supervisors were not supervisors, as they did not exercise "independent judgment" because the employees they directed performed the same job or repetitive tasks on a routine basis.[56] In *Golden Crest Healthcare Center,* the Board found that the charge nurses did direct aides to perform tasks when they determined tasks to be necessary, but found no evidence that the charge nurses were held accountable for their actions in directing the aides, and thus were not Section 2(11) supervisors.[57]

Two dissenting Board members to the *Oakwood Healthcare* decision stated that the majority's decision (and its definitions) threaten to create a new class of workers under Federal Labor law: workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees. Into this category, the dissent stated, may fall most professionals (among many other workers) who by 2012 could number

about 34 million accounting for 23.3 percent of the workforce.[58] The majority responded that they anticipated no such sea change in the law, and will continue to assess each case on its individual merits.[59]

B. Court Review of Board Determinations

The majority decision in the Court of Appeals' *Lakeland* case stipulates that when reviewing an order of the Board, the court is "bound by the Board's factual findings if they are supported by substantial evidence of record as a whole."[60] It recognized that the Board's inferences from the record evidence, if plausible, should not be overturned, even if the court would have made different findings upon a de novo review of the evidence.[61] And, importantly, the Supreme Court's *Kentucky River* decision requires that the burden of establishing the supervisory status of an employee is on the party asserting such status.[62]

IV. Did substantial evidence of record support the Board's determination that the LPNs at Lakeland lacked "supervisory authority using independent judgment"?

Deciding supervisory status is a highly fact intensive inquiry with a Board hearing officer in this case conducting a hearing over five days directed solely to the supervisory status issue.[63] Of course, there was conflicting evidence in the record established during the five day period. The Regional Director's 49 page decision was comprehensive in nature. Regional Directors are career, non-partisan employees of the Board, highly experienced in administration of representation activity under Section 9(c) of the NLRA. Because of the Board's special expertise, United States Courts of Appeal afford the Board broad discretion in determining whether an individual is a supervisor.[64] Accordingly, the Eleventh Circuit stated that this is an exceedingly narrow standard of review designed to allow disruption of the decision only when the Board exercises its decision in an arbitrary or capricious manner.[65]

A. Substantial Evidence Supports the Board's Finding that LPNs Lack the Authority to Discipline, Suspend, or Effectively Recommend the Termination of Certified Nursing Assistants

Rebecca Ward, an LPN, who worked at Lakeland for 10 years, and was one of the most senior LPNs testified that she did not consider herself a supervisor, nor had she nor any other LPN attended daily management meetings, and that she never hired, fired, transferred or promoted a CNA.[66] She testified that she never disciplined, suspended or had been instructed that she had the right to suspend a CNA.[67] Ward testified that on one occasion she issued a level one coaching form to a CNA who was rude to a resident, but did so only after her supervisor instructed her to do so, and both the supervisor and Ward met with the CNA to discuss the form.[68] The Board was entitled to resolve the conflict in the evidence between Ms. Ward and the ambiguous testimony by the Director of Nursing and a day shift supervisor regarding whether LPNs possess the authority to discipline, suspend and effectively recommend the terminations of CNAs. It was beyond the scope of the majority's reviewing authority to substitute its view of the facts for the contrary findings of the Board.[69]

B. Was there Substantial Evidence of Record to Support the Board's Finding that LPNs Do Not "Responsibly Direct" CNAs?

Because no LPN ever had been held accountable for the misconduct of a CNA tied to her failure to supervise a CNA, the Board was entitled to draw the plausible inference that LPNs at Lakeland did not "responsibly direct" CNAs.[70] The majority asserted that Lakeland established the "prospect" that LPNs could be disciplined for the misconduct of a CNA.[71] However, the Board heard evidence of gross misconduct by CNAs, but no LPN was ever held accountable for the misconduct.[72]

C. Was there Substantial Evidence of Record to Support the Board's Finding that LPNs Lack the Authority to Assign CNAs Using Independent Judgment?

While the court majority finds untenable the Board's position that the LPNs mechanically follow established procedure in assigning and reassigning CNAs even when they are the highest-ranking staff on the premises, such as the night shifts, this assertion does not make LPNs supervisors.[73] The record established that the Director of Nursing was on call 24 hours per day, seven days per week, and it is undisputed that the scheduling coordinator exercised the primary authority for scheduling CNAs.[74] Based on this evidence, the Board was entitled to draw the plausible inference that the LPNs do not exercise independent judgment in scheduling CNAs.

From a study of the entire record,[75] in the context of the legal framework set forth in Part III of this paper, the conclusion is compelling that substantial evidence of record supported the Board's determination that the 28 LPNs in question are not supervisors under the NLRA.

V. Impact of the *Lakeland* decision

The failure of the court majority to give proper deference to the informed determination of the Regional Director of the Board deprived 28 LPN team leaders of the choice they expressed by a Board-conducted representation election to have the UFCW union represent them in the pursuit of a collective bargaining contract with the employer. These women, serving the critical needs of the elderly and the infirm of society, were stripped of *all* of the rights set forth in the NLRA for "employees" through the court majority's misclassification of all the LPNs working in direct patient care at the facility as statutory "supervisors."

The LPNs lost the right through the leverage of collective bargaining to seek improved present and future wage rates, structured vacation time and possible sick days rather than a "paid time off" bank structure. They lost the right to seek tuition reimbursement for job-related course work to prepare them for authentic supervisory positions, and perhaps other economic benefits, depending on and restricted by the ability of the employer to pay. Moreover, they lost the right to seek to have seniority determine layoffs or recalls and seniority-based vacation choices and shift preferences. Very importantly, they were deprived of the right to seek to obtain a grievance–arbitration procedure to resolve, in an orderly way, issues that may arise under a collective bargaining agreement, with critical contractual protection against unjust discipline or discharge.

Misclassified as supervisors, Lakeland's LPNs are now employees at will who can be terminated at will, for good cause or no cause, subject only to the statutory anti-discrimination laws. Moreover, they have lost statutory protection granted all employees – union and nonunion – providing for the right to engage in protected concerted activities for "mutual aid or protection," such as going on Facebook after work with other LPNs to discuss perceived unfair circumstances or unfair treatment at work.[76]

It is not just the 28 LPNs working for Lakeland who are or will be affected by this decision. Human Resource consultants and industry publications have spread the word throughout the nursing home industry in Florida, Georgia, and Alabama that their federal appeals court has determined that LPN team leaders are nursing home supervisors and cannot legally form a union.[77] Union officials who would customarily represent LPNs in these states may well believe that it would be a futile act to attempt to unionize nursing homes in these states because of the *Lakeland* decision.

VI. The future: LPNs working in the nursing home industry — protected employees under the NLRA or statutory supervisors?

A number of possible options exist to provide the protections of the NLRA for LPNs working on the front line of the nursing home industry as team leaders with nursing aides, including (1) a legislative option providing new statutory protection, (2) a refining of two of the *Oakwood*

Healthcare definitions by the present Board, and (3) proper deference for Board case-by-case decisions on the supervisory status of LPNs by a federal circuit courts of appeals.

A. The Legislation Option

On March 7, 2012, Senator Richard Blumenthal introduced a bill to amend the NLRA to modify the definition of supervisor entitled the "Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers" or the "RESPECT Act".[78] The proposed act would eliminate the terms "assign" and "responsibly to direct" from the current definition, and add the limiting phrase "and for a majority of the individual's worktime" after the existing terms "interest of the employer."[79]

The proposed changes to the Section 2(11) definition of supervisor would ensure that LPNs would be classified as employees protected under the NLRA, but would also result in many foremen and similar workers in private industries throughout the United States obtaining coverage under the NLRA.[80] It is highly unlikely in the present political and economic climate that this legislation has any viability.

B. Refining or Modifying the Oakwood Healthcare Definitions

The Supreme Court has specifically emphasized that the NLRB has the primary responsibility for developing and applying national labor policy.[81] The Court has stated that it will uphold a Board rule as long as it is rational and consistent with the Act.[82] And, it has stated that a Board rule is entitled to deference even if it represents a departure from the Board's prior policy.[83] By refining the definitions of the Section 2(11) statutory terms "assign" and "responsibly to direct" in accordance with the *Oakwood* dissent, the present NLRB could provide new guidance for the appropriate classification of LPN team leaders as either protected employees or statutory supervisors on a case-by-case basis.

1. Assign

The dissent in the *Oakwood* decision would limit the phrase "assign employees" to denote authority to determine the *basic* terms and conditions of an employee's job, such as "assigning" an employee's position, work site or work hours.[84] When viewed alongside the other supervisory functions set forth in Section 2(11) "hire, transfer, suspend, lay off, recall, promote, discharge, *assign*, reward or discipline," all of which affect employment tenure itself or an employee's overall status, the *Oakwood* dissent believed that the term "*assign*" should thus be limited to the basic terms and conditions of employment.[85] In contrast to the majority's position which contemplates the assigning of tasks as supervisory, whether on a daily basis or task-by-task basis from among tasks already included within an employee's overall job responsibilities, the dissent asserted that such functions affect no real change in *basic* terms and conditions of employment.[86] The dissent stated that in including tasks – the majority sweeps nurses, as well as other professionals who work with assistants or work as team leaders, outside the Act's protections.[87]

2. Responsibly to Direct

The dissent in *Oakwood* advocated for the General Counsel's proposed definition of "responsibly to direct," which stated:

> An individual responsibly directs with independent judgment within the meaning of Section 2(11) when it is established that the individual:
>
> a. has been delegated substantial authority to ensure that a work unit achieves management's objectives and is thus "in charge;"
> b. is held accountable for the work of others; and
> c. exercises significant discretion and judgment in directing his or her work unit.[88]

The dissent believes that this test accurately captured the intent of Congress, requiring that supervisory status encompass oversight with respect to a work unit, rather than allowing any worker who instructs another person to perform a task, no matter how minor it may be, to be a statutory supervisor.[89]

3. Likelihood of Board Action Modifying Oakwood

While there is a high likelihood that a five-member Board appointed during the administration of President Obama would overturn the *Oakwood Healthcare* decision made by the Board appointed by President George W. Bush, perhaps knowing that some decisions made during the Bush administration would be overturned by Obama-appointed Board members, the nomination and appointment process before the Senate Labor Committee, "became dysfunctional."[90] On January 3, 2012, the five-member Board consisted of just two appointed members, Chairman Mark Gaston Pearce (D) and Member Brian E. Hayes (R). On January 4, 2012, President Obama made three recess appointments to the Board, Sharon Block (D), Richard F. Griffin (D), and Terrance Flynn (R).[91] Republicans claimed these appointments made during a intracession recess of the Senate were unlawful.[92] The U.S. Court of Appeals for the District of Columbia, in *Noel Canning Div. of Noel Corp. v. NLRB*, held that President Obama lacked constitutional authority to make the January 4, 2012 appointments.[93] In *Noel Canning*, the appeals court ruled that the Board decision made by a three-member panel that included Block and Flynn was unenforceable, because the two appointments were unconstitutional.[94] The *Noel Canning* decision appellate process will take time; and while the President with a Democratic-controlled Senate may opt to nominate a package of 5 members, including two Republicans, the deal making in the Senate will be time consuming. Moreover, it is NLRB practice not to reverse existing precedents unless three members in a majority vote for reversal.[95] Thus, the likelihood of Board action modifying *Oakwood* is uncertain.

C. Proper Deference for Board "Supervisory Status" Decisions

Federal circuit courts of appeal are in fact giving proper deference to the Board's case-by-case decisions on the supervisory status of LPN team leaders and other employees from other occupations who have minor supervisory duties. For example, in *Frenchtown Acquisition Co. v. NLRB*, involving a nursing home bargaining unit consisting of 43 charge nurses who worked with 45 nursing aides, the Sixth Circuit Court of Appeals deferred to the Board's decision that the charge nurses were not statutory supervisors under Section 2(11) of the NLRA.[96] The court stated that because of the Board's "special expertise" it will afford it broad discretion in determining whether an individual is a supervisor.[97]

The Board is not bound to and has not followed the *Lakeland* decision as a precedent. Circuit Judge Pryor, in his dissenting opinion in the *Lakeland* decision, stated that in reweighing the facts and setting aside the Board's order, the majority opinion improperly substituted its own views of the facts for those of the Board, and failed to adhere to the Eleventh Circuit's deferential standard of review.[98] The vigorous dissent has provided a red flag to any subsequent panel of the Eleventh Circuit dealing with a Board supervisory status decision to compel it to go behind the reported *Lakeland* decision and review the entire *Lakeland* record including the Regionals Director's decision. From the entire record, the accuracy of Judge Pryor's dissent should be evident.

The message contained in the title of the blog "Eleventh Circuit Rules Licensed Practical Nurses Are Supervisors, Providing Strong Ammunition to Long-Term Healthcare Facilities"[99] is questionable, because future Eleventh Circuit decisions should be properly decided with the burden of proof on the employer and with proper deference to the Board's special expertise in determining whether an individual is a supervisor.

Unions seeking to represent LPNs in the nursing home industry must make a preliminary evaluation of the status of LPNs at each specific facility under the current law. They should be aware that because of the notoriety of the *Lakeland* decision, some employers may well be reworking their employee handbooks, job descriptions and job titles to avoid union recognition or to challenge the status of LPNs in existing bargaining units. In appropriate cir-

cumstances, unions should aggressively pursue organizational activities, so as to vindicate the rights of LPN team leaders to the protections and benefits of the NLRA.

VII. Conclusion

The *Lakeland* decision adversely impacts the 28 LPNs serving 110 residents at the Wedgewood nursing facility in Lakeland Florida, but it also impacts the thousands of individuals, predominantly women, working as LPN team leaders in nursing homes in Florida, Georgia and Alabama. Moreover, the erroneous decision to some degree has an adverse impact on the organizational rights of LPN team leaders throughout the United States.[100]

Organized labor has to strategically organize itself, led by the president of the AFL-CIO, to seek to provide representation to LPN team leaders in accordance with existing law. It is likely that an Obama Labor Board will eventually contain a three member majority which may well modify the Bush II Board's *Oakwood* definitions of the terms "assign" and "responsibly to direct," properly adjusting the protections and rights of the NLRA in accordance with the legislative history of the Taft Hartley Act.[101] ■

ENDNOTES

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9 See Boeing 2012-13 SPEEA negotiations, http://boeing.com/speea-negotiations/about_this_site.html. Boeing's Jan. 17, 2013, contract proposal which was acceptable by the engineers' unit on February 19, 2013, provides actual salary ranges between $55,000 /yr ($26.44/hr) to $223,000/yr($107.21/hr.) See 34 Daily Lab. Rpt. A-13 (Feb. 20, 2013).

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13 *Id.*

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15 *Lakeland*, 696 F.3d at 1334.

16 Lakeland Health Care Assocs., 356 N.L.R.B. No. 147 (2011).

17 *Lakeland*, 696 F.3d at 1334.

18 *Id.*

19 *Id.* at 1350.

20 *Id.*

21 N.L.R.B. Regulations, Section 102.60(b).

22 Lakeland Health Care Assocs., No. 12-RC-9426 (N.L.R.B. Sept. 24, 2010) p. 1(decision and direction of election).

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24 Oakwood Healthcare, Inc., 348 NLRB No. 37 (Sept. 29, 2006).

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28 29 U.S.C. § 152(11).

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30 Id. § 152(12). The term "professional employee" means — (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge or an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; ...

31 *Kentucky River*, 532 U.S. at 708, 709.

32 *Id.*

33 *Id.* at 710.

34 *Id.* at 713.

35 *Id.* at 710.

36 *Id.* at 711.

37 *Id.* at 712.

38 *Id.* at 715.

39 *Id.* at 716.

40 Oakwood Healthcare, Inc. 348 N.L.R.B. No. 37 (2006). Croft Metals, Inc., 348 N.L.R.B. No. 38 (2006); and Golden Crest Healthcare Center, 348 N.L.R.B. No. 39 (2006).

41 *Oakwood*, 348 N.L.R.B. No. 37 at 2.

42 *Id.*

43 *Id.* at 3.

44 *Id.* at 4.

45 *Id.* at 6.

46 *Id.*

47 *Id.*

48 *Id.* at 8.

49 *Id.*

50 *Id.*

51 *Id.* at 7.

52 *Id.* at 32.

53 *Id.* at 33.

[54] 348 N.L.R.B. No. 38 (2006).
[55] 348 N.L.R.B. No. 39 (2006).
[56] 348 N.L.R.B. No. 38, at 6.
[57] 348 N.L.R.B. No. 39, at 5.
[58] 348 N.L.R.B. No. 37, at 15.
[59] *Id.* at 14.
[60] *Lakeland*, 696 F.3d at 1335 referencing Int. Bhd. of Boilermakers v. NLRB 127 F.3d 1300, 1306 (11th Cir. 1997)).
[61] *Id.*
[62] *Kentucky River*, 532 U.S. at 711.
[63] *Lakeland*, 649 F. 3d at 1334.
[64] See Williamson Piggly Wiggly v. NLRB 827 F.2d 1098, 1100 (6th Cir. 1987).
[65] *Lakeland*, 696 F.3d at 1350 (citing Cooper/ T. Smith, Inc. v. NLRB, 177 F. 3d 1259, 1261 (11th Cir. 1999)).
[66] *Id.* at 1351.
[67] *Id.*
[68] *Id.*
[69] NLRB v. Pipefitters of N.Y., Local *638*, 429 U.S. 507, 532 (1977).
[70] *Lakeland*, 696 F.3d at 1353.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id. at 1354.*
[75] The reader of this paper has ready access to the Court of Appeals decision, *Lakeland*, 696 F.3d 1332. Accordingly, authority for the positions set forth in this paper reference the Court of Appeals decision. In writing this paper, however, I have had access to a transcript of the August 2010 hearing, the Decision and Direction of Election by the Regional Director, the briefs of the parties before the Court of Appeals and other documents of record. Docket information and material can be found on the NLRB website: *Wedgewood Healthcare Center, Case number: 12-CA-027044*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/case/12-CA-027044#docket-footnote (last visited Mar. 27, 2013). A Freedom of Information Act request was used to obtain the transcript for the August 25, 2010 to August 30, 2010 hearing on the supervisory issue. The same request was also used to obtain the briefs of the NLRB and petitioner that were submitted to the Eleventh Circuit Court of Appeals.
[76] *See* DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW, 116-117 (15th ed. 2013).
[77] *See supra* note 2, listing numerous publications and blogs.
[78] Respect Act, S. 2168, 112 Cong. (2012).
[79] *Id.*
[80] GERALD MAYER, JON D. SHIMABUKURO, THE DEFINITION OF "SUPERVISOR" UNDER THE "NATIONAL LABOR RELATIONS ACT," RL 34350, Congressional Research Service (2012).
[81] Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987).
[82] NLRB v. J. Weingarten, Inc. 420 U.S. 251, 265-266 (1975).
[83] *Id.*
[84] 348 N.L.R.B. No. 37, p.1 (Sept. 29, 2006).
[85] *Id.*
[86] *Id.*
[87] *Id.* at 20.
[88] *Id.* at 22- 23.
[89] *Id.*
[90] *See* TWOMEY, *supra* note 76, at 62 note 3.
[91] *Id.*
[92] *Id.*
[93] 705 F. 3d 490 (D.C. Cir. 2013).
[94] *Id.*
[95] Statement of NLRB Chairman Pearce at a February 26, 2013 American Bar Association conference, 39 Daily Lab. Rep. (BNA Feb. 27, 2013) at C-1.
[96] 683 F.3d 298 (6 th Cir. 2012). *See also Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587 (7th Cir. 2012) where substantial evidence of record supported the Board's determination that an employee given the title "landfill supervisor" was not a statutory supervisor; *Mars Home For Youth v. NLRB*, 666 F.3d 850 (3d Cir. 2011) where substantial evidence of record supported the Board's determination that assistant managers at a residential facility for at risk juveniles were not statutory supervisors; and *NLRB v. Saint Mary's Home*, 358 Fed. Appx. 255 (2d Cir. 2009) where substantial evidence of record supported the Board's determination that charge nurses were not statutory supervisors.
[97] *Frenchtown*, 683 F.3d at 306 (internal quotation marks omitted). The *Frenchtown* court explained in a footnote:

Frenchtown ignores a decade of changed law in this Circuit by relying on a litany of historic cases to support its conclusion that we have "repeatedly confirmed" that nurses working in nursing homes are statutory supervisors. But these cases do not establish that the nurses in question are supervisors for two reasons. First, except for one published case, all of these cases were decided before the Supreme Court rejected this Circuit's reasoning and held that the *employer* bears the burden of proving supervisory status. *Kentucky River*, 532 U.S. at 711-12 (rejecting this Circuit's rule that the Board bore the burden of proving that the employees were not supervisors under the Act). Second, deciding who is a supervisor is a highly fact-intensive inquiry. So "rules designating certain classes of jobs as always or never supervisory are generally inappropriate." *Jochims*, 480 F.3d at 1168; accord *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 990, 346 U.S. App. D.C. 166 (D.C. Cir. 2001). The facts of the present case show that the charge nurses in question are not supervisors.

[98] *Lakeland*, 696 F. 3d at 1350.
[99] Nierman *et al*, *supra* note 2. The authors of the publication were the attorneys who represented Lakeland Healthcare, LLC before the Eleventh Circuit, Todd Nierman, Gregory Richters, and Christine Tenley.
[100] There were some 752,300 LPNs employed in the U.S. providing basic nursing care in nursing homes, hospitals, physicians' offices and private homes as of 2010, with employment projected to increase by some 168,500 over the subsequent decade. While the exact number of the LPN team leaders working in nursing home service is not known, the numbers are significant! See U.S. DEPT OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2012-2013 Ed.
[101] Marley S. Weiss, *Kentucky River at the Intersection of Professional and Supervisory Status: Fertile Delta or Bermuda Triangle?* In LABOR LAW STORIES 353-356 (Laura J. Cooper & Catherine L. Fisk eds., 2005).