

COMMENTARY

SUPERVISORS OF THE WORLD UNITE!

THE NLRB TELLS NURSES AND PROFESSIONAL WORKERS WHICH SIDE THEY ARE ON

Harris Freeman

The National Labor Relations Board (NLRB) has finally issued the long-awaited *Oakwood Healthcare, Inc.*¹ decision, holding that registered nurses who nominally coordinate and guide the work of other nurses or health care workers are supervisory personnel who fall outside the coverage of the National Labor Relations Act. *Oakwood Healthcare* is a seminal NLRB decision, articulating a remarkably expansive rule for determining whether or not an employee is a supervisor. By radically redefining who is a worker and who is a boss, *Oakwood Healthcare* has the potential to do what no other single case in the history of the NLRB has ever done—deprive more than eight million professionals and skilled workers of their right to join a labor union. If *Oakwood Healthcare* is not reversed by the federal courts or undermined by statutory labor law reform, as many as eight million professional employees and skilled workers will join the 32 million members of the U.S. workforce—one out of four workers—who, according to the General Accounting Office², do not have the legal right to join unions. As dissenting Board member Wilma Liebman ominously noted, *Oakwood Healthcare* creates a class of workers existing in a legal limbo “hav[ing] neither the genuine prerogatives of management, nor the statutory rights of ordinary employees.”³

Oakwood Healthcare's pro-employer standard in determining supervisory status has deep roots in the 1947 Taft–Hartley Act, where Congress carved out two new legal classes of workers, supervisors and professionals. Congress excluded supervisors from the definition of statutory employees⁴ and classified any worker as a supervisor if they have the authority to engage in at least one of twelve supervisory functions (e.g., hire, assign, and responsibly direct), hold that authority in the “interest of the employer” and utilize “independent judgment” when exercising that authority.⁵ Congress broadened the definition of supervisor

to quash the widespread unionization of frontline factory foreman in the 1940s, embracing the employing class's fear that unionization would subvert foreman loyalty, compromise their ability to effectively discipline workers, and make them ineffective enforcers of practices designed to extract increases in productivity from the working class. At the same time, Congress took pains to include professional workers within the class of statutory employees entitled to labor rights, defining professionals as workers engaged in varied, "predominantly intellectual" work, "involving the consistent exercise of discretion and judgment" and premised on skills acquired "in an institution of higher learning or a hospital."⁶ The conceptually overlapping statutory definitions created an obvious tension; supervisors and professionals, by definition, both exercise judgment utilizing their acquired skills "directing" and "assigning" others. Of course, skilled trade workers, straw bosses, and lead persons routinely perform these same assigning and directing functions, but the legislative history of the Taft-Hartley Act makes it clear that these employees were not to be considered part of the boss class. After all, placing these blue-collar workers on the employer's side of the bargaining table in 1947 would have meant a head-on confrontation with the American Federation of Labor's (AFL) skilled trade unions and the Congress of Industrial Organizations' (CIO) industrial base.

The anti-union ramifications of Taft-Hartley's supervisor/professional employee provisions came into play in the 1970s when Congressional passage of the 1974 Health Care Amendments Act placed healthcare workers employed in nonprofit hospitals under NLRA jurisdiction⁷ and when structural changes in the U.S. economy effectively proletarianized the working conditions of a large number of professionals. By 1980, the Supreme Court articulated serious reservations about the employee status of professionals, ruling in *NLRB v. Yeshiva University*⁸ that college and university professors, a quintessentially professional workforce, were managers who could not unionize because they purportedly exercised "managerial control" over their own admissions decisions, curriculum, grading and teaching goals.

Yeshiva University made it clear that the real class tensions inherent in the nonfactory workplace of professional employees would be ignored under federal labor law and cleared the way for two decisions that called into question the right of nurses (LPNs or RNs) to join a union: *NLRB v. Health Care Retirement Corp.* (1994)⁹ and *NLRB v. Kentucky River Community Care* (2001)¹⁰. In each case, the NLRB offered the Supreme Court a definition of supervisor which preserved the union rights of professionals by distinguishing genuine supervisory prerogatives from the ordinary tasks of professionals.

The Supreme Court rejected the Board's position in both cases. First, in *Health Care Retirement* the Court broadly defined what it means to act "in the interest of the employer," holding that whenever a professional nurse uses "independent judgment to 'responsibly direct' another health care worker such direction is necessarily supervisory because it is being carried out 'in the interest of the employer.'" In the *Kentucky River* case, the Court held that a professional's use of "independent judgment" to direct others cannot be bifurcated into

supervisory and nonsupervisory judgments. Therefore, a professional can avoid supervisor status when exercising “independent judgment” only when that judgment falls below the statutory threshold as a result of, for example, detailed employer orders or regulations which, in effect, reduce the degree of judgment being exercised.

The Supreme Court’s statutory exegesis left two ambiguous terms undefined: “responsibly direct” and “assign.” *Oakwood Healthcare* defines both in a manner that excludes most hospital nurses and professionals from the Act’s protection. The importance of the ruling was signaled in July 2003 when the NLRB invited the parties and interested *amici* to file briefs addressing, among other questions, the following: (1) with respect to the term “independent judgment,” what is the “degree of discretion required for supervisory status?”; (2) is there any difference between the terms assign and direct?; (3) does the NLRA “contemplate a situation in which an entire group of professional workers may be deemed supervisors, based on their role with respect to less-skilled workers?”; and (4) what functions or authority distinguishes lead men or straw bosses from supervisors.¹¹ Almost a score of labor and employer organizations filed amicus briefs.¹² Impassioned pleas from pro-labor *amici* requesting oral argument on these issues were ignored. The NLRB issued its ruling three years later without the benefits that the give-and-take of oral argument affords an adjudicative body.

The ruling leaves some of the questions posed by the Board unanswered but does redefine two key concepts in the Act’s definition of supervisor, both of which will make it far easier for an employer to classify a worker as a supervisor. First, a worker becomes a supervisor if they “assign” another employee to work in a particular location or designate another worker to a particular shift or to overtime. Assign also means directing another employee to “certain significant overall tasks.” For example, the Board indicates that a retail worker morphs into a supervisor when directing another worker to stock shelves or when a charge nurse designates an LPN to administer medication to a particular patient or group of patients. The two Board dissenters explained that this interpretation of the term “assign” “threatens to sweep almost all staff nurses outside the Act’s protection.”¹³ The majority’s retort highlights their reality-blind approach: We “decline to start with an objective—for example, keeping all staff nurses within the Act’s protection—and fashioning definitions from there to meet that targeted objective. . . . We are not swayed to abandon . . . [our] interpretation by predictions of the results it will entail.”¹⁴ In other words, the Board will not let one of the Act’s statutory goals—protecting the right of professional workers to unionize—get in the way of a decontextualized interpretation of labor law.

The second term, “responsibly direct,” fares no better at the hands of the Board; a worker “responsibly directs” whenever they oversee the work of others; even a worker giving ad hoc instructions to perform certain tasks qualifies, as long as the employee who provides the instructions can be held accountable for the work of the employee being directed. The dissenters identify the absurdity of this test, pointing out that under the majority’s test, any nurse who tells a

nursing assistant to clip toenails, empty catheters, or change on incontinent resident becomes a supervisor as long as the nurse is ultimately responsible for those patients.¹⁵

Based on these standards, *Oakwood Healthcare* found that twelve RNs who worked full-time as charge nurses in five different units were supervisors because they used independent judgment to assign nursing personnel to patients (there was no finding that the charge nurses “responsibly directed” others). Supervisory status existed despite the fact that all the charge nurses spent the vast majority of their time doing direct patient care and played no role in resolving workplace grievances. Although the Board did not quantify how much time these nurses spent assigning tasks to others, the Board determined that assigning or directing others for as little as 10 to 15 percent of work time is enough to classify a worker as a supervisor. The Board also ignored the fact that all charge nurses carried out their job in accordance with the employer’s written policy on how to assign nursing personnel; apparently, the hospital’s work rules were not detailed enough to prevent these nurses from exercising judgment in their tasks. Nor did it matter that these nurses all worked under a clinical supervisor who made daily rounds to each unit and held the authority to determine unit staffing.

Oakwood Healthcare was loudly condemned by labor. Thirty thousand members of the California Nurses Association signed pledges to strike if hospital employers attempt to exploit the Board’s ruling.¹⁶ AFL–CIO President John Sweeney’s remarks typified the angry response of labor. He branded the decision as “devastating to workers in the health care industry and potentially other industries, where professional employees direct or assign the work of others.”¹⁷ Indeed, the new ruling presents a step-by-step blueprint on how to craft work rules that will classify a host of skilled and professional workers as supervisors. The employers’ arsenal now contains a new tool for challenging the scope and composition of bargaining units and a legal doctrine that will facilitate unionized employers excluding professional workers and even skilled trade workers from established collective bargaining units.

Not surprisingly, employer organizations downplayed the significance of the ruling. “I just don’t see this ruling having that dramatic an impact on workers . . .” remarked an attorney affiliated with the U.S. Chamber of Commerce.¹⁸ This understated, post-victory posture is belied by the large number of employer organizations that filed amicus briefs predicting dire consequences if the Board did not enlarge the supervisory status category for skilled nurses. The American Hospital Association’s friend of the court brief argued that if charge nurses are not deemed supervisors, a decline in the quality of patient care and staffing shortages will continue to plague American hospitals.¹⁹ Of course, no one is holding their breath waiting for this labor ruling to instigate improvements in the quality of American healthcare. Indeed, the 2.9-million-member American Nurses Association noted that depriving nurses of the right to collective bargaining will continue to drive down the quality of patient care since “supervisors” will be unable to band together to prevent “under-staffing, the used of untrained floaters and mandatory overtime.”²⁰

The prediction of Wilma Liebman and Dennis Walsh, the two dissenting Board members, however, seemed much closer to getting it right when they wrote that the adverse “consequences of [*Oakwood Healthcare*], amongst the most important [decisions] in the Board’s history, will take some time to play out.”²¹ Indeed, for the foreseeable future, union organizing will confront NLRB standards that deny employee status to millions of workers in a variety of labor markets and at all skill levels. Consider the last two years of NLRB rulings that preceded *Oakwood Healthcare*: Employee status was denied to graduate research and teaching assistants, placing them outside the protections of federal labor law.²²

Newspaper carriers were ruled to be independent contractors not employees despite extensive employer control of work conditions and complete economic dependence on their employer’s business model.²³ Temp agency workers were effectively denied the right to organize when the Board ruled that employers had the final say over whether or not workers hired through a temp agency have the right to be in the same bargaining unit with unionized workers they work with.²⁴ Furthermore, disabled janitors employed through a rehabilitation program, earning an hourly wage, and who work side-by-side with nondisabled workers, were deprived of employee status and the right to unionize because their job was “primarily rehabilitative.”²⁵ The cumulative impact of the Board’s rulings on employee status may rival the chilling impact of *Hoffman Plastics*,²⁶ the Supreme Court ruling that effectively deprived undocumented workers of the right to organize by eliminating the remedies of back pay and the right to reinstatement when an employer fires an undocumented worker who was engaged in union organizing.

It may be difficult to discern *Oakwood Healthcare*’s short-term impact on organizing or collective bargaining. Furthermore, while it may take time before the labor movement experiences the adverse impact of *Oakwood Healthcare* and the recent line of Board rulings on employee status, the long-term impact is likely to be severe. Consider the historic impact of the Supreme Court’s refusal to grant professors employee status; *Yeshiva University* signaled the end of efforts to unionize professors at private sector universities at a time when the unionization of professors at public sector universities significantly expanded. *Oakwood Healthcare* is another sign that effective organizing will increasingly take place outside of and in spite of federal labor law. Signs of this are everywhere.

Unions are using card check neutrality agreements to bypass the logjams and delays inherent in Board-run election procedures. Workers’ centers are proliferating in response to the exploitation of undocumented immigrant day laborers who fall outside NLRA’s jurisdiction. In New York City, the New York Taxi Workers Alliance has joined the local labor council despite the fact that these immigrant drivers are considered independent contractors and not workers entitled to union representation. Numerous states have witnessed successful labor-driven legislative initiatives to create governmental employers of record to unionize home health care aides and child care provider classified as independent contractors under federal labor law. *Oakwood Healthcare* indicates that

professionals and a potentially wide range of skilled workers will be joining the ranks of workers whose efforts to unionize are met with hostility at the NLRB.

Legal fixes for this fundamental crisis are questionable. At this time, the federal courts and even the Democrat-controlled Congress are, at best, uncertain allies in the fight to improve the legal climate for union organizing. For this reason, it is more likely than not that labor's fight to expand its ranks in the twenty-first century will require extralegal labor militancy. Indeed, it may be a necessary prerequisite to a major overhaul of labor law. This is certainly a main lesson to be drawn from the expansion of labor rights that *followed* the massive battles that gave rise to the CIO in the 1930s and the fact that massive mobilizations and campaigns of civil disobedience *preceded* the expansion of civil rights for African-American workers in the 1960s. Is labor ready to again embrace a winning program of mobilization that may entail some variant of outlaw status? Time will tell. But, in the mean time, "supervising" professionals, reject your bogus boss status—unite!

Harris Freeman is a long-term visiting professor at the Labor Relations and Research Center at the University of Massachusetts, Amherst and an assistant professor of legal research and writing at Western New England College Law School. He is a member of the Executive Board of the Massachusetts Society of Professors, University of Massachusetts, Amherst and a cooperating attorney with the American Civil Liberties Union of Massachusetts. Address all correspondence to Harris Freeman at Western New England College School of Law, 1215 Wilbraham Road, Springfield, MA 01119-2684. Telephone: (413) 796-2214. E-mail: hfreeman@law.wnec.edu.

Notes

1. *Oakwood Healthcare, Inc.*, 348 NLRB 37 (2006). *Oakwood Healthcare* is the lead case in a trilogy of decisions released by the NLRB on September 29, 2006 (see *Croft Metals, Inc.*, 348 NLRB 38; *Golden Crest Healthcare Center*, 348 NLRB 39). The new standard for evaluating supervisory status was set forth in *Oakwood Healthcare* and applied in the *Croft Metals* (holding employer did not meet the evidentiary burden necessary to find lead persons to be supervisors) and *Golden Crest* (charge nurses at nursing home not supervisors because they exercised no discretion in assigning others).
2. Collective Bargaining Rights, GAO-02-835 (2002).
3. *Oakwood Healthcare*, 348 NLRB 37, slip op. at 15.
4. 29 U.S.C. §152(3); see also 29 U.S.C. §152(2) which expanded the definition of employer to include supervisors, that is, any person "acting as an agent" of the employer.
5. 29 U.S.C. §152(11).
6. 29 U.S.C. §152(12).
7. Pub. L. No. 93-360, 88 Stat. 395 (1974).
8. 444 U.S. 672 (1980).
9. 511 U.S. 571 (1994).
10. 532 U.S. 706 (2001).
11. See NLRB's *Notice and Invitation to File Briefs (7/25/03)*, <http://www.nlr.gov/nlr/press/releases/kyriver.pdf>.

12. *Id.*
13. *Oakwood Healthcare*, slip op. at 20.
14. *Id.* at 5.
15. *Id.* at 23
16. *Sacramento Business Journal* (10/3/06)
17. BNA Daily Labor Report, *KY River Decision* (10/3/06).
18. *Id.*
19. [http://www.nlr.gov/nlr/about/foia/Oakwood%20KY%20River/7-RC-22141%20\(Brief%206\).pdf](http://www.nlr.gov/nlr/about/foia/Oakwood%20KY%20River/7-RC-22141%20(Brief%206).pdf)
20. American Nurses Association, Press Release “ANA Rejects NLRB Decision to Block Nurses’ Freedom to Unionize” (10/10/06).
21. *Oakwood Healthcare*, slip. op. at 25.
22. *Brown University*, 342 NLRB 42 (2004).
23. *St. Joseph News-Press*, 345 NLRB 31 (2005).
24. *Oakwood Care Center and N&W Agency*, 343 NLRB 76 (2004).
25. *Brevard Achievement Center*, 342 NLRB 42 (2004).
26. 535 U.S. 137 (2002).