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Bashar H. Malkawi

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LABOR AND MANAGEMENT RELATIONSHIPS IN THE TWENTY-FIRST CENTURY: THE EMPLOYEE/SUPERVISOR DICHOTOMY

*Bashar H. Malkawi**

INTRODUCTION

A core principle in labor organization has been the notion that unions are for workers and not for management—that in any union organization, the interests of labor and the interests of management must be kept separate by excluding the latter from the ranks of the former.¹ While this principle was not expressed in the body of the United States National Labor Relations Act (“NLRA” or “Act”), it did achieve expression more than a decade later in the Taft-Hartley Act of 1947. Here, the concept of supervision was formally defined—and those deemed “supervisors” were then comprehensively deprived of the right to organize, a right given to all other employees under Section 7 of the NLRA.

The definition of “supervisor” has been subject to different interpretations over the last six decades. The agency charged with formulating these interpretations—the National Labor Relations Board (“NLRB” or “Board”)—has displayed a lack of consistency in regards to the supervisor exemption. One factor has also been absent from the NLRB calculus: the changing nature of work itself.

Over the six decades in which the legislative, executive and judicial branches have wrestled with what it means to be a “supervisor,” the stratum upon which this definition is built has undergone a dramatic shift. Work in the twenty-first century is less about repetitive performance of an algorithm and much more about teamwork, creativity, and flexibility. Just as the industrial era that gave birth to the union movement has turned into an information age in which organized labor seems irrelevant, so too has the self-directed knowledge worker of the information age increasingly replaced the ubiquitous factory worker of the industrial era.

This Article’s analysis of the supervisory exemption concludes with the uneasy realization that the nature of supervision has

* Department of Law, Yarmouk University, LL.B. 1999; James E. Rogers College of Law, University of Arizona, LL.M. 2001; Washington College of Law, American University, S.J.D. 2005.

¹ See Jared S. Gross, *Recognition of Labor Unions in a Comparative Context*, 78 CHI-KENT. L. REV. 357, 361–66 (2003).

changed in a fundamental manner that was unforeseen by the creators of Taft-Hartley and that this change cannot be fully accommodated under the current laws. If the protection given to millions of American workers under the Act is to be continued safely far into this new century, a legislative remedy may be required. This legislation could serve to reconcile the differences between the changing nature of American work and the true intent of the NLRA.

I. HISTORICAL PERSPECTIVE

In 1935, the United States was in the depth of the Great Depression, and after five straight years of hard times, rents and rips were beginning to show in the fabric of society. The American birth rate had declined for the first time in the history of the nation.² Popular resentment against the government and the rich had reached an all-time high and had led the nation to “share the wealth.”³ Unemployment had reached national levels as high as twenty-five percent and, in some factory towns, could be found at levels as high as seventy-five percent.⁴ It seems almost inconceivable today, but it is important to remember that we are dealing with a time period when it was possible to see gangs of unemployed men fighting for scraps of discarded food outside restaurants.⁵

In that time-honored tradition of American politics, President Roosevelt sought to co-opt the positions of his rivals and, through assimilating them, tone them down enough to make them palatable to a wider spectrum of the citizenry. In such a “share the wealth” spirit, 1935 witnessed both the creation of the Social Security Program and the Works Progress Administration. To complete this New Deal portfolio, President Roosevelt also signed into law the National Labor Relations Act in July of that same year.⁶

The NLRA defined for the first time exactly what constituted unfair labor practices. It gave both employers and unions strict

² FREDERICK ALLEN, *SINCE YESTERDAY: THE 1930S IN AMERICA* 107 (Harper & Row) (1940) (cataloguing the falling birth rate and noting however, that marriage rates of the time were rising, perhaps because divorce was simply too expensive).

³ *Id.* at 69–70.

⁴ PIERS BRENDON, *THE DARK VALLEY: A PANORAMA OF THE 1930S* 86 (Random House 2002) (2000).

⁵ LOUISE ARMSTRONG, *WE TOO ARE THE PEOPLE* 10 (De Capo 1972) (1938) (describing a scene in which a crowd of some fifty men were fighting over a barrel of garbage that had been set outside the back door of a restaurant).

⁶ See ARTHUR M. SCHLESINGER JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 151 (1958).

guidelines and rules for worker organization.⁷ The NLRA established a new federal agency, the National Labor Relations Board, to investigate claims of unfair labor practices and ensure fair union elections. Perhaps most importantly, section 7 of the NLRA gave American workers the basic right to organize.⁸ The revolutionary impact of the NLRA was that it provided a peaceful, orderly mechanism by which labor could organize, a mechanism unlike the earlier preferred tool of labor—the strike, which was chaotic and costly.

The impact of the NLRA did not arrive immediately. Other classic Roosevelt constructions had been dismissed by the Supreme Court as unconstitutional, including the National Recovery Administration. Thus, both labor and management did not change their tactics the day after the NLRA was signed into law—instead they waited for the Court to have their say.⁹ This dramatic event took place in 1937 as the Court heard *NLRB v. Jones & Laughlin Steel*.¹⁰ Here, the argument revolved around whether intrastate economic activity could be regulated by Congress under the Wagner Act. The Supreme Court decided that even purely intrastate activity might have serious implications on later interstate commerce and thus could indeed be regulated by Congress.¹¹ With this, the NLRA assumed the full force of law.

A. *The Early Years of the NLRA*

In the first decade of its existence, the NLRA—if judged solely upon the number of workers on the union rolls—can only be seen as an unqualified success. Union membership, beginning at approximately three million members representing about twelve percent of the workforce in 1935, had skyrocketed to almost twelve million members representing a full *one-third* of the workforce by

⁷ See William C. Green, *Negotiating the Future: The NLRA Paradigm and the Prospects for Labor Law Reform*, 21 OHIO N.U. L. REV. 417, 424 (1994).

⁸ National Labor Relations Act of 1935, 29 U.S.C. § 157 (2004) (“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 to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”).

⁹ See SCHLESINGER, *supra* note 6.

¹⁰ See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). This decision came within weeks of Roosevelt’s “Court Packing” proposal and ran so counter to earlier Supreme Court decisions that it has been referred to as “the switch in time that saved nine.” See ALLEN, *supra* note 2, at 238–39.

¹¹ *Jones & Laughlin Steel Corp.*, 301 U.S. at 37.

1945.¹² Ironically, this dramatic growth in union membership had been accomplished without any reference in the NLRA to the role of supervisors. It seemed to many as if the Section 7 right to organization could be extended to practically anyone in a corporation below the level of director.¹³ This seemingly limitless granting of Section 7 rights would come to haunt the NLRB in the late 1940s in a case involving the Packard Motor Company.

Workers at Packard unionized shortly after the NLRA was confirmed constitutional in 1937. The union had enrolled 32,000 members by the mid-1940s, but about 1200 employees who held the rank of “foreman” were not part of the union at Packard.¹⁴

These foremen were obviously supervising rank-and-file workmen and were treated more like management in that they were compensated through salary as opposed to hourly pay, had access to paid vacation and sick leave, and were also responsible for disciplining the workers in their units—although ultimate decisions on firing or hiring were made by other departments. Still, the NLRB recognized their right to organize under Section 7, and Packard refused to bargain. The core dispute revolved around how exactly to classify the foremen under the NLRA. The NLRB argued that the foremen were employees¹⁵ while Packard countered with the argument that the foremen were actually employers.¹⁶ This dispute over Section 7 rights reached the Supreme Court in early 1947.

The Supreme Court rejected Packard’s argument that the foremen were more employers than employees. In its opinion, the Court pointed out that both arguments had relatively equal merit, but it was not within the Court’s power to set policy, only to interpret legislation.¹⁷ Justice Douglas, in a scathing dissent, pointed out the basic flaw in the NLRA legislation—that without a firm definition of “supervisor,” such parties as the Packard foremen could be legitimately placed in either camp.¹⁸ He went on to point out some basic absurdities with the NLRA as it currently stood, positing

¹² U.S. Department of Labor: Bureau of Labor Statistics, <http://www.bls.gov/bls/blsuniondata.htm> (last visited on Nov. 18, 2008).

¹³ See Alan L. Zmija, *Union Organizing After Lechmere Inc. v. NLRB—A Time to Reexamine the Rule of Babcock & Wilcox*, 12 HOFSTRA LAB. & EMP. L.J. 65, 75–76 (1994).

¹⁴ See *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 487 (1947).

¹⁵ *Id.* at 488.

¹⁶ *Id.*

¹⁷ These arguments are policy matters, therefore, the Court is not authorized to base a decision of a question of law on them. “They concern the wisdom of the legislation; they cannot alter the meaning of otherwise plain provisions.” *Id.* at 494.

¹⁸ *Id.* at 496 (Douglas, J., dissenting).

the notion that if foremen are to be seen as employees, so too must every corporate employee up to the level of vice-president.¹⁹

Thus, after *Packard*, the basic right to organize would be seen as a right belonging to every wage-earning employee, no matter how closely his or her duties were aligned with company management. In that decision, the Court pointed out the logical contradictions but also made clear that unless Congress were to amend the NLRA to account for the problem of supervisors, there was no action that the Court could take to remedy this flaw. It would not be long before Congress took action.

B. The Taft-Hartley Act and the Supervisor Exemption

Again, history must color the analysis. By 1947, Democrats had controlled the executive branch for fifteen years. Labor unrest, held to a nearly non-existent minimum during the World War, had increased exponentially in the years following the defeat of the Axis, with almost five million American workers involved in strikes during 1946 alone.²⁰ The Republican Party had chafed under the employee-based NLRA. Formally known as the Labor-Management Relations Act, Taft-Hartley passed contentiously in June of 1947, over President Truman's veto.²¹

Just like the NLRA, the Taft-Hartley Act defined a slate of "unfair labor practices." But if the NLRA used this term to define unfair management practices against labor, Taft-Hartley defined unfair practices by labor against management. Where the NLRA granted workers the right to organize, the Taft-Hartley Act gave employers the right to oppose union organization. Some Taft-Hartley highlights include allowing states to pass right-to-work statutes, requiring unions to give notice prior to striking, the prohibition of closed shops, and the outlawing of secondary boycotts.

Most importantly, the Taft-Hartley Act responded to the Supreme Court by amending the NLRA to include a specific definition of the term "supervisor" and excluding such supervisors from the right to organize. The definition, hereby referred to as 2(11), is designed to be interpreted in the disjunctive and reads as follows:

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

¹⁹ *Id.* at 498.

²⁰ See BERT COCHRAN, LABOR AND COMMUNISM 254 (1977).

²¹ See FRED A. HARTLEY JR., OUR NEW NATIONAL LABOR POLICY 102 (1948).

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.²²

Needless to say, Taft-Hartley was not well received by the members and leadership of organized labor. Typical of the response would be this quote from the National Maritime Union: “[T]he Taft-Hartley Law [is] aimed at crippling and destroying not only our Union but all trade unions.”²³ However, union membership continued to climb, albeit much more slowly than in those days following first passage of the NLRA. Union membership as a percentage of the total workforce would peak in 1960, with thirty-seven percent of the workforce on the union rolls, amounting to almost eighteen million American workers.

The repeal of Taft-Hartley became a campaign issue in the 1948 presidential race, but after the election, President Truman chose not to pursue it, distracted as he was by the outbreak of hostilities abroad. With Taft-Hartley now the law of the land, the role of the NLRB lay in exactly how to interpret it and to separate the obvious supervisory exclusion now written into law from the more implicit managerial exclusion that arose through interpretation. In *Denver Dry Goods*, one of the first cases to come before it since the passage of Taft-Hartley, the NLRB decided to specifically exclude from bargaining workers whose interests were more aligned with the interests of management as opposed to the interests of the rank-and-file.²⁴ This exclusionary standard was further expanded in 1956 when in the case of *Swift and Company*, the NLRB not only excluded managerial employees from a union composed of rank-and-file workers, but refused to acknowledge these same managerial employees as having any access to Section 7 rights.²⁵

II. EVOLVING STANDARDS: THE “COMMUNITY” OR “CONFLICT OF INTEREST” TEST

In the wake of Taft-Hartley, the Board felt it had a clear, three-part supervisory test due to the precise wording of 2(11). An em-

²² See 29 U.S.C. § 152(11) (2004).

²³ See NATIONAL MARITIME UNION, IN THE BACK: ANALYSIS OF THE TAFT-HARTLEY LAW 2 (1947). In this union booklet, the cover illustrates the spirit of the times: a grimacing dockworker is shown with an axe buried deep in his back, thrown by a smiling man in a business suit.

²⁴ See *Denver Dry Goods*, 74 N.L.R.B. 1167 (1947).

²⁵ See *Swift & Company*, 115 N.L.R.B. 752 (1956).

ployee must engage in at least one of the supervisory acts as defined by statute; then that authority must be held in the interest of the employer; and finally, this act must have occurred through the use of independent judgment.²⁶ If those three conditions were met, the employee was a supervisor and exempt from their Section 7 rights. Other Board practices that evolved during this time period included the use of secondary indicia to make the determination, like perceptions of other workers, differences in pay rates, and the amount of actual time spent supervising.²⁷ The burden of proving supervisory status lay with the party asserting that status—which was almost always an employer refusing to bargain with what they felt was an improperly formed union.

During the decades to follow, the Board gradually began to adopt a test centered on a “community of interest.” If an employee was found to share interests of management over the interests of the rank-and-file, such an employee was deemed “supervisory” and excluded from a union of the rank-and-file in most cases. In some cases, like *Swift*, such employees might be denied Section 7 rights altogether if the Board felt their interests were so closely allied with management as to make them more “employers” as defined under the NLRA.²⁸

In 1970, the Board, after suffering a reversal from the Eighth Circuit, made an effort to clarify its position regarding management in the case of the *North Arkansas Electric Cooperative*.²⁹ At issue was the fate of Jack Lenox, a supervisory employee at North Arkansas who was terminated for expressing a favorable opinion of the union during a hotly-contested union election and against direct orders from management not to express any opinion during negotiations. Initially, the NLRB had ruled for Lenox’s reinstatement, arguing that he fell into a protected “employee” classification under the Act. The Eighth Circuit rejected the Board’s rationale, and in response, the NLRB then attempted to define at what precise level an employee could be excluded from Section 7 organization rights. This level, according to the Board, was reached when

²⁶ Eric J. Wiesner, *Voices from the Workplace: Oakwood Healthcare, Inc. and the Rollback of Labor Rights Under the Current National Labor Relations Board*, 42 U.S.F. L. REV. 457, 468–69 (2007).

²⁷ Michael W. Hawkins & Shawn P. Burton, *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (2006): *How Textualism Saved the Supervisory Exemption*, 9 U. PA. J. LAB. & EMP. L. 1, 14 (2006).

²⁸ See Bryan M. Churgin, Comment, *The Managerial Exclusion Under the National Labor Relations Act: Are Worker Participation Programs Next?* 48 CATH. U. L. REV. 557, 560 (1999).

²⁹ See *N.L.R.B. v. North Ark. Elec. Co-op.*, 412 F.2d 324 (8th Cir. 1969).

the employee participated in the formulation, determination, or effectuation of policy with respect to employee relations.³⁰ In that case, Lenox did not reach this level and was protected under the Act as an employee. The Board went even further by acknowledging that such determinations were not based on any part of the NLRA but were solely a creation of the Board. To make matters even more confusing, the Board declined to set comprehensive standards and reserved for itself the right to make such determinations on a case-by-case basis.³¹

The new formulation was also rejected by the Eighth Circuit who upbraided the Board for trying to read legislative intent into an area where no clear intent could be found.³² The order to reinstate Jack Lenox was rejected and the stage was now set for a new conflict over who was and who was not protected under the Wagner Act.³³

In one case in the early 1970s, Bell Aerospace buyers had organized their own union. Bell executives, taking their cue from the recent Eighth Circuit decision in *North Arkansas*, refused to bargain, citing the buyers' status as managerial employees as exempting them from the normal Section 7 protections. The Board not only recognized the buyers' union as a legitimate one and ordered Bell to bargain with it; they also attempted to articulate a new standard regarding managerial employees. The Board morphed the older "community of interest" test into a "conflict of interest" test in which the employee-manager line was crossed if the employee's membership in a union created a clear conflict of interest with the employee's role as an agent of the company. Finding no such clear conflict with the Bell buyers, the Board certified their union.³⁴ The Board made it very clear in their decision that for any employee—no matter how much managerial or supervisory responsibility they carried—if membership in a union did not create an obvious and significant conflict of interest with the company, then that employee had the protected right to organize or join a union. Again, the Board's ruling was rejected at the appellate level and in

³⁰ See *North Ark. Elec. Co-op.*, 185 N.L.R.B. 550, 550–51 (1970).

³¹ *Id.* at 550.

³² See *N.L.R.B. v. North Ark. Elec. Co-op.*, 446 F.2d 602, 610 (8th Cir. 1971) (“[W]e conclude that it was not the intent of Congress to provide managerial employees with protection from being discharged for refusing to obey instructions to remain neutral in a union election, and we deny enforcement of the Board's order.”).

³³ *Id.*

³⁴ See *Bell Aerospace Corp.*, 185 N.L.R.B. 214 (1970).

1974, the *Bell* case made its way to the Supreme Court.³⁵

The Supreme Court ruled against the NLRB, with the majority opinion coming from Justice Powell who pointed out that various trends—the legislative history of Taft-Hartley, the various related court decisions, and the Board’s own earlier (if inconsistent) rulings—all pointed to an exclusion of managerial employees from coverage under the Act. Justice Powell further enforced a textual interpretation of the Act upon the Board in that they were not free to read a new and more restrictive meaning into the Act.³⁶ Unfortunately, Justice Powell stopped short of articulating a crystal-clear standard for what constituted managerial activity.³⁷ Moreover, Justice Powell refrained from drawing a clear line demarcating where Section 7 rights ended.³⁸ Justice White, writing in dissent, pointed out the obvious: “The Board’s decisions in this area have not established a cohesive and precise pattern of rulings.”³⁹ Justice White felt that the Act gave the Board expansive power to interpret the meaning of the NLRA and found no good reason in the *Bell* case to hamper the Board’s power or overturn their ruling. Despite the dissent, the ruling in *Bell* put an end to “community of interest” and “conflict of interest” touchstones and the Board would now be confined to an increasingly textual and specific interpretation of the Act.

For the next decades, the Board seemed primarily occupied with answering questions involving the extension of union organization to places it had never gone before—like halls of academe.⁴⁰ Such diversions into the realm of the professional employee on the

³⁵ See *N.L.R.B. v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 267 (1974).

³⁶ *Id.* at 274.

³⁷ *Id.* at 288. Instead, Powell merely stated the obvious, that a manager or supervisor was one who “formulate[d] and effectuate[d] management policies by expressing and making operative the decisions of their employer[s].” *Id.* This tautology is certainly true for any employee and was of no real help in defining the precise supervisory boundary where Section 7 rights were lost.

³⁸ *Id.* at 290. (“We express no opinion as to whether these buyers fall within the category of ‘managerial employees.’”) (White, J. dissenting). We should also note that *Bell* was a partial “win” for the Board in that the Court upheld the right of the NLRB to set new standards through adjudication of cases rather than through a formal rule-making process. It is rather as if the Court said, “We defer to the Board’s judgment in these matters—except in cases like this one where your judgment is wrong.” Apparently, you can have your cake and eat it too. See *id.* at 294.

³⁹ *Id.* at 311 (White, J. dissenting).

⁴⁰ See *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980) (determining whether or not faculty at a private university have a right to organize). The Court ruled that when faculty teach, they are professional employees and are covered under the Act, but when faculty meet to make any sort of recommendation, they transform into managers and are thus excluded from protection. *Id.* In that faculty members are naturally

part of the Board also coincided with the high-water mark of union activity in the United States. The 1970s and 1980s would see organized labor enter a period of long, slow but steady decline; until by the turn of the new century, fewer than eight percent of the workforce would belong to a union, down from a high of almost thirty-five percent reached in the 1960s. Labor and management would wait until the early 1990s for the next major development in the definition of “supervisor,” which would come from the health care industry.

A. *A New Standard or False Dichotomy? Nurses as Supervisors*

In the health care industry, registered nurses had long been considered “professional employees” under the NLRA and thus, protected in their right to organize.⁴¹ The problem area comes when professional duties and supervisory duties overlap—when does a nurse lose her Section 7 rights as a professional employee? How much supervision is routine and how much involves the exercise of independent judgment as required under 2(11)? When do these employees act in the interest of the employer and when do they act solely in the interest of their patients? To further complicate the matter—how should licensed practical nurses be treated?

The Board got a chance to answer this question and articulate a new standard in a case involving a union being organized at a nursing home in Ohio, owned by the Health Care and Retirement Corporation of America. The corporation refused to negotiate with the newly formed union, citing that four of the union members were licensed practical nurses who performed supervisory functions and thus were not protected by the Act and should have been excluded from the union.⁴² The Board ruled against the company, finding that the nurses were employees—not supervisors—and were indeed protected under the NLRA.⁴³

loathe to forego regular expression of their opinion, union impact on private college campuses has been relatively minor. *Id.*

⁴¹ See 29 U.S.C. § 152(12)(a) (2004) (A “professional employee” is defined as one whose work is “predominantly intellectual and varied in character”; “involv[es] the consistent exercise of discretion and judgment in its performance”; produces a result which cannot be “standardized in relation to a given period of time”; and “require[es] knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction . . .”).

⁴² See R. Jason Straight, Note, *Who’s the Boss?: Charge Nurses and “Independent Judgment” After National Labor Relations Board v. Health Care & Retirement Corporation of America*, 83 MINN. L. REV. 1927, 1935 (1999); see also *Health Care & Ret. Corp. of Am.*, 306 N.L.R.B. 63 (1992).

⁴³ See *N.L.R.B. v. Yeshiva Univ.*, 444 U.S. 672.

The Board, seemingly never hesitant to articulate a new standard, zeroed in on the “interest of the employer” requirement for supervision under 2(11). If the nurses used their training to direct the nurse’s aides and other lower-echelon employees to act in the best interests of the patients, then the nurses were employees. If that training was used to direct the aides in ways that were solely in the best interests of management, then the nurses were supervisors.⁴⁴ In that these licensed practical nurses consistently directed other employees on behalf of their patients, the Board recognized them as employees and recognized their right to organize.

Health Care & Retirement Corporation of America appealed the case, and the Board’s ruling was overturned by the appellate court.⁴⁵ Then in 1994, the case was brought before the Supreme Court. Justice Kennedy, writing for the majority, summed up the Court’s prevailing opinion of the Board test for employer interest quite succinctly: “[This] dichotomy makes no sense.”⁴⁶ At the heart of Kennedy’s opinion is the rejection of the Board’s method of deciding *Health Care*: rather than analyzing the facts, the Board chose to formulate a standard—a standard which the Court rejected as having no basis in legislation or legislative intent.⁴⁷ Yet, while the Court may have indeed proven their point regarding the logical flaws in the Board’s standard on employer interest, the Court left unanswered the larger issue of precisely defining that long-elusive boundary between the duties of an employee and the duties of a supervisor in situations where these duties overlapped in the same employee. Justice Kennedy felt that the Court’s decision had no impact beyond the healthcare industry.⁴⁸ On the other hand, Justice Ginsburg, in her dissent, felt that the Court’s actions could lead to a situation in which few professionals in any industry could ever hope to receive their Section 7 rights.⁴⁹

In 1947, following the heady days of *Packard*, it seemed as if every employee had the right to organize. In the aftermath of the 1994 decision, at least as far as Justice Ginsburg was concerned, it now seemed as if very few employees still had their Section 7 rights. A few more years would elapse before the Board tried to define the employee–supervisor boundary. Again, it would involve a situation

⁴⁴ *Health Care & Ret. Corp. of Am.*, 306 N.L.R.B. at 70.

⁴⁵ See *Health Care & Ret. Corp. of Am. v. NLRB.*, 987 F.2d 1256 (6th Cir. 1993).

⁴⁶ See *N.L.R.B. v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 577 (1994).

⁴⁷ *Id.* at 582.

⁴⁸ Justice Kennedy writes: “Any parade of horrors about the meaning of this decision for employees in other industries is quite misplaced.” *Id.* at 584.

⁴⁹ *Id.* at 598 (Ginsburg, J., dissenting).

in the health care industry, but here the Board would look to the “independent judgment” requirement to craft a new test.

B. Independent Judgment: Kentucky River

The case that would become known as “Kentucky River” began at a nursing home for the mentally handicapped in Pippa Passes, Kentucky known as the Caney Creek Developmental Complex. Caney Creek employed about one hundred workers, of which twelve were managers of one form or another.⁵⁰ In 1997, the employees at Caney Creek unionized with six registered nurses being included in the union.⁵¹ The owners of Caney Creek refused to negotiate with the union, citing that the registered nurses were supervisors under the Act and thus did not have Section 7 rights. This refusal to bargain triggered an unfair labor practice complaint, which made its way to the NLRB.⁵²

The Board spent much time reviewing the registered nurses’ assigned duties as “building supervisors.” Such a role means that the registered nurses are frequently the highest-ranking employee in the building, and this role further demands that these nurses shift personnel from one unit to another, as demand dictates. It should further be noted that the registered nurses received no additional pay for these “building supervisor” duties.⁵³ The Board was emphatic in their opinion that such building supervisor duties on the part of the registered nurses did not meet the statutory definition of “supervisor” under 2(11). A new standard was also articulated by which a registered nurse directing other employees to do something involving patient care and which fell within the nurse’s own scope of training was routine and not indicative of supervision.⁵⁴ If a nurse then directed another employee to undertake a task not directly related to patient care and not within the scope of her training, then such direction was indicative of independent judgment on the part of the nurse and thus met the supervisory criteria under 2(11). The exact phrasing used by the Board went as follows: “[T]he employees do not use independent judgment when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance

⁵⁰ See *N.L.R.B. v. Ky. River Cmty. Care Inc.*, 532 U.S. 706 (2001).

⁵¹ They sought to be represented by the Kentucky State District Council of Carpenters. *Id.* at 707.

⁵² *Id.*

⁵³ See *Ky. River Cmty. Care v. N.L.R.B.*, 193 F.3d 444 (6th Cir. 1999).

⁵⁴ *Id.* at 453.

with employer-specified standards.”⁵⁵

The Board’s Acting Regional Director rejected this decision, finding in favor of including nurses in the bargaining unit, and the case found its way into the Sixth Circuit in 1999.⁵⁶ The attorneys for Kentucky River claimed that as a non-profit entity, the nursing home was a quasi-governmental agency and therefore immune from the Act. Alternatively, they argued that if the Act did indeed apply, the nurses were supervisors not employees. The Sixth Circuit quickly rejected the first argument but readily embraced the latter. The Sixth Circuit already had a precedent in which it found that nurses do become supervisors when they engage in any one of three acts: directing other employees to give patient care or to rectify staffing shortages, filling out any sort of evaluation on the employees they were directing, or finally, acting as a building supervisor.⁵⁷ That the Board had not accounted for any of the Sixth Circuit’s prior decisions in articulating its new “independent judgment” standard did not sit well with the court, and the Sixth Circuit summarily rejected the Board’s new standard, stating: “This [supervisory] definition is a substantially binding rule of law in this court that is no longer open to question.”⁵⁸ They went even further by rejecting the Board’s long-standing practice of placing the burden of proving supervisory status upon the party disputing such status, finding that in any issue of a supervisory-status dispute, the burden of proving that status lay with the Board.⁵⁹ The case was granted certiorari and was argued before the Supreme Court in early 2001.⁶⁰

Justice Scalia wrote the majority opinion for the Supreme Court. He was quick to point out that *Kentucky River* was first and foremost about the way in which the Board had interpreted the Act beyond the Act’s original textual boundaries.⁶¹ The two issues in play—the burden of proof issue and the interpretation of “independent judgment” in relation to supervision—were not fully and comprehensively addressed by the Act and thus subject to varying

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See *Mid-Am. Health Care Found. v. N.L.R.B.*, 148 F.3d 638, 641 (6th Cir. 1998).

⁵⁸ See *Ky. River Cmty. Care* 193 F.3d at 456–57 (Jones, J., dissenting). Judge Jones pointed out that he felt the “substantial evidence” standard held in judicial review of Board decisions controls, and the Board had more than met that standard by proving that the registered nurses received no extra compensation for their building supervisor duties nor were able to hire or fire employees.

⁵⁹ *Id.* at 453.

⁶⁰ See *N.L.R.B. v. Ky. River Cmty. Care Inc.*, 532 U.S. 706, 713–15 (2001).

⁶¹ *Id.*

degrees of interpretation. Justice Scalia felt that the Board's interpretation of "independent judgment" lacked any consistency with either the stated text of the Act or the Board's previous decisions on the matter. He further wrote that the Board had overstepped its authority regarding the nature of "independent judgment" in that it was the Board's role to decide matters of degree, not invent categorical exclusions unsupported by the Act.⁶² In short, the Board had once again failed to find a standard to measure supervision that would meet the approval of the Supreme Court. On a brighter note, Justice Scalia took the Board's side on the burden of proof issue finding that although no clear textual imperative for the practice was contained within the Act, the Board's behavior here was consistent with decades of prior Board decisions and thus congruent with the Act.⁶³

It is perhaps more interesting to look at what was not resolved by *Kentucky River*. Following the decision, there was still no clear definition of "supervisor" that was readily understood and accepted by both labor and management. More importantly, we still had no definition of "supervisor" that was supported by the courts. The Board did not know exactly how to resolve the situation or whether it even possessed the necessary interpretive power to resolve any situations not expressly laid out in the text of the Act.

In an unprecedented action, the Board requested amicus briefs from the stakeholders in this area of labor law in July of 2003 with input being requested on a range of targeted issues. Some of those issues included were raised specifically by *Kentucky River* including: the differences between "assigning" and "directing," the meaning of the word "responsibly," and the meaning of the term "independent judgment."⁶⁴ These opinions were gathered by the Board and studied, and by 2006, there was finally an action that provides the current culmination of the long legislative and judicial history of the supervisory exemption.

III. THE YEAR 2006: THE *KENTUCKY RIVER* TRILOGY

By 2006, the Board had several cases from previous years that

⁶² *Id.* at 713. The Board's policy regarding the proper balance of labor-management power cannot be given effect through the statutory text. Because this Court may not enforce the Board's order by applying a legal standard the Board did not adopt, the Board's error precludes the Court from enforcing its order. *Id.* at 707.

⁶³ *Id.*; see JEFFREY M. SMITH, *The Prospect for Continued Protection for Professionals under the NLRA: Reaction to the Kentucky River Decision and the Expanding Notion of the Supervisor*, 2003 U. ILL. L. REV. 571, 581-583 (2003).

⁶⁴ Weisner, *supra* note 26, at 475-79.

involved some interpretation of the supervisory exemption. Armed with the data and opinions from the *amicus briefs* and the *Kentucky River* Supreme Court decision, the Board issued three landmark decisions on September 29, 2006 intended to articulate a new vision of the supervisory exemption that was true to the legislative intent of Taft-Hartley and that squared with the Supreme Court's decision on *Kentucky River*. These three decisions—*Croft Metals*, *Golden Crest Healthcare* and *Oakwood Healthcare*—became known as the “Kentucky River Trilogy” and provided what former Board Chairman William Gould called a “seismic shift” in statutory interpretation.⁶⁵ While all three decisions were released simultaneously, the true sequence is to begin with *Oakwood* and then follow with *Croft* and *Golden Crest* as the former articulates a standard that is referred to in the latter two decisions.

Oakwood Heritage Hospital employs almost 200 registered nurses spread out over ten patient units at the hospital. While the registered nurses report to various levels of stipulated supervisors, they also direct other hospital employees in the performance of routine patient care tasks like feeding, cleaning, bathing, and walking.⁶⁶ This scenario is similar to the facts of *Kentucky River* in that these nurses spend part of their time acting as employees, following direction from doctors and titled supervisors, and spend the rest of their time in directing less-skilled employees in which they take on a more supervisory role. Once again, just like *Kentucky River*, the question remained: At what point do these registered nurses cease to be employees and become supervisors under 2(11)?

To further complicate matters, in *Oakwood* we are introduced to the concept of “charge nurses.” These nurses oversee the various patient care units and assign other employees, including registered nurses, licensed practical nurses, nursing assistants and technicians to minister specific patients within the hospital. The charge nurses do not assign employees to shifts. Once the employee reports for duty, they go to the charge nurse to find out which patients within a unit with whom they will be dealing. In sum, the charge nurse determines the “who” and “how” while the staffing office sets the “when” and “where.” These charge nurses receive an extra level of compensation for these increased duties,

⁶⁵ See Steven Greenhouse, *Board Redefines Rules for Union Exemption*, N.Y. TIMES, Oct. 4, 2006, at A16, available at <http://www.nytimes.com/2006/10/04/washington/04labor.html>.

⁶⁶ See *Oakwood Healthcare*, 348 N.L.R.B. 686, 687 (2006).

and while approximately ten percent of the Oakwood registered nurses were designated as *permanent* charge nurses, the majority of the remaining registered nurses take turns rotating as temporary charge nurses.⁶⁷ The dilemma confronting the Board was whether the permanent charge nurses were employees or supervisors.

The conflict occurred along traditional lines: the union sought to include all charge nurses (permanent and rotating) within the registered nurses unit while the corporate owners of Oakwood Hospital sought to exclude all charge nurses on the basis of their supervisory duties.⁶⁸ The Regional Director for the NLRB found in favor of the union, included the registered nurses in the election, which was then contested by the corporation. The Board decision sought to define the nature of supervision at a level of clarity unprecedented in previous Board decisions going back over five decades. The result was a three-prong test involving definitions for “assign,” “independent judgment,” and “responsibly to direct”.

In the majority Board decision, a connection was made between the ordinary meaning of the word “assign” and the list of functions in 2(11) that share a commonality involving a term or condition of employment.⁶⁹ Specifically, the Board found that the act of “assigning” occurred when a charge nurse assigned an employee to a specific location or place, a specific time or shift, or specific tasks or duties.⁷⁰ In short, “assigning” occurs when one employee tells another to go to a certain place, at a certain time to perform a certain task. Here, the Board majority felt the charge nurses were indeed engaging in assignment as defined under 2(11).⁷¹

For such direction to be “responsible,” the Board found that the responsible employee must bear some burden or carry some risk of adverse consequences if the directed employee fails to perform properly. This requires a further two-part test: the supervisor must have authority to both assign and take corrective action if required as well as carry a chance of adverse consequences for the supervisor if the employee does not perform as directed.⁷² Here,

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 689. The majority consisted of Board members Battista, Schaumber and Kirsanow.

⁷⁰ *Id.*

⁷¹ *Id.* at 694. Specifically, it was the assignment of other nurses to specific locations by the charge nurses that met the assignment test.

⁷² *Id.* at 692.

the majority decision found that the hospital failed to prove that the charge nurses bore any true accountability for the actions of the employees they were directing and thus did not meet the “responsible direction” standard.⁷³

Finally, the Board dealt with the notion of “independent judgment,” which the majority defined as the ability to act independently based on decisions made by comparing available data, free from outside control.⁷⁴ While most of the permanent charge nurses were found to meet this qualification, the charge nurses in the emergency room were found not meeting the “independent judgment” criterion. The difference in the emergency room was that the charge nurses do not take into account outside factors in making their decisions but are operating solely on the basis of pre-set policy. This difference was defined by the Board as the “discretionary” component of independent judgment.⁷⁵

The *Oakwood* decision concludes with a look at the rotating charge nurses. The majority opinion pointed out that past precedent meant that a rotating supervisor would be considered a supervisor if a “regular and substantial” portion of their work-time was spent in supervisory activities.⁷⁶ In that the rotation of charge nurses at Oakwood was accomplished without the use of a regular schedule but in an irregular and *ad hoc* manner, the Board quickly excluded the rotating charge nurses from the supervisory exemption.⁷⁷

As the dust settled, the Board’s majority had articulated three new standards for supervision: *assignment* (place, time, duty), *responsibility* (must be accountable for the actions of those being assigned), and *independence* of judgment (must have the discretion to make judgments free of outside influences). The majority of the Board had also confirmed their preference for case-by-case decisions that hung on interpretation of the statutes rather than a re-

⁷³ The evidence showed that the charge nurses are accountable for their own performance or lack thereof, not the performance of others and consequently, was insufficient to establish responsible direction. *Id.* at 695.

⁷⁴ *Id.* at 698. Where the charge nurse makes an assignment based on the skill, experience, and temperament of other nursing personnel, that charge nurse has exercised the requisite discretion to make the assignment a *supervisory* function.

⁷⁵ *Id.* at 693.

⁷⁶ See *Brown & Root, Inc.*, 314 N.L.R.B. 19, 20–21 (1994), (defining “regular” as “according to a pattern or schedule,” while “substantial” could mean as little as ten to fifteen percent of the total work-time); *Archer Mills, Inc.*, 115 N.L.R.B. 674, 676 (1956), available at http://www.nlr.gov/shared_files/Board%20Decisions/115/VOL115-098.pdf. This “ten percent rule” would prove to be quite inflammatory.

⁷⁷ See *Oakwood Healthcare*, 348 N.L.R.B. at 689.

sults-oriented approach that would stretch and distort the Act.⁷⁸ As for the Oakwood Hospital registered nurses, the Board found that most of the permanent charge nurses were supervisors under the Act and thus excluded from union membership, while none of the rotating charge nurses met the supervisory criteria and thus could be included in the union.⁷⁹

The Board then used these standards to articulate decisions in the other two cases in the Trilogy: *Golden Crest* and *Croft Metals*. *Golden Crest* revisits familiar territory in that it deals with registered nurses organizing a union at a nursing home facility in Minnesota.⁸⁰ Here, again, the employer was refusing to bargain with the constituted union based on its contention that the registered nurses in the union were actually supervisors as defined by the Act.⁸¹ The primary contention of the company was that the nurses met the supervisory criteria of 2(11) through their ability to assign. Registered nurses assigned nursing assistants to specific floors of the facility, sent nursing assistants home if the facility was perceived to be overstaffed, and called assistants in to work from home if conditions warranted.⁸² The Board, in their decision, felt that the assignment prerogatives of the “assignment” or “direction” test as articulated in *Oakwood* were met.⁸³ The next prong of the three-part test was responsible direction or accountability of the nurses for their direction of their assistants. Despite evidence that such ability to direct was an integral part of the nurse’s yearly evaluation process, the Board found that the employer had not met the burden of required proof in that the accountability was prospective rather than actual when it came to direction of subordinates.⁸⁴ Although the nurses received ratings on their perceived ability to direct subordinates, these performance ratings had no real “teeth” and did not result in pay raises for those who directed well or termination for those nurses who directed poorly. The ratings were not proof of accountability as required under the newly-minted

⁷⁸ *Id.* at 699. (“If our adherence to the text of and intent behind the Act should lead to consequences that some would deem undesirable, the effective remedy lies with the Congress.”).

⁷⁹ *Id.* at 699.

⁸⁰ *Golden Crest Healthcare Center*, 348 N.L.R.B. 727, 727 (2006).

⁸¹ *Id.* The union was formed as a unit of the United Steelworkers of America in early 1999. Just like *Oakwood*, the Board’s Regional Director issued a ruling that the nurses were employees and not supervisors.

⁸² *Id.* at 729.

⁸³ *Id.* at 732.

⁸⁴ *Id.* at 731 (“Thus, we find that the ‘prospect of adverse consequences’ for the charge nurses here is merely speculative and insufficient to establish accountability.”).

Oakwood standard.⁸⁵ Without meeting the “responsibility” test, the employer’s claim for supervisory status on the nurses fails.

Croft Metals, the final part of the Trilogy, represents a failure by the employer to prove supervisor status on the part of “lead” employees at an aluminum and vinyl door and window factory in Mississippi.⁸⁶ The lead employees at the factory were responsible for telling other employees how to perform their tasks, in what locations to perform their tasks, and the specific order in which to perform their tasks. Thus, the lead employees comfortably met the “responsibly direct” piece of the test as defined by *Oakwood*.⁸⁷ However, the evidence showed that the lead employees made their decisions based on prior routines or standard patterns and that any evidence of independence or discretion on the part of the supervisors was lacking.⁸⁸ Again, like *Golden Crest*, with the company failing to meet all three prongs of the *Oakwood* test, the Board’s conclusion was that the lead employees at *Croft* were employees, not supervisors under 2(11).⁸⁹

The reaction to the Trilogy was based more on the implications of the decisions rather than on their immediate impact on the parties involved. The Trilogy gave a new three-part test for supervision but only in its particulars. However, while the permanent charge nurses at *Oakwood* were indeed supervisors, the charge nurses at *Golden Crest* and the lead employees at *Croft* were not supervisors. The immediate reaction from organized labor was overwhelmingly negative; the main points of contention being that the *Oakwood* test would leave millions of Americans unable to join unions.⁹⁰ The AFL-CIO President, John Sweeney, referred to the decision as “outrageous and unjustified,” noting with dismay that under the ruling employees could be considered supervisors with as little as ten percent of their time spent supervising, and planned protests outside the Board’s headquarters.⁹¹ Other commentators called into question the way the decision split along political lines—with the three Republican members of the Board in the ma-

⁸⁵ *Id.*

⁸⁶ See *Croft Metals*, 348 N.L.R.B. 717, 717 (2006).

⁸⁷ *Id.* at 722.

⁸⁸ *Id.* “The Employer’s own witnesses, to the extent that they testified about the lead persons’ judgment involved in directing the crews, described such directions as ‘routine.’”

⁸⁹ *Id.* at 717.

⁹⁰ See posting of James Parks, AFL-CIO Now Blog, <http://blog.aflcio.org/2006/10/03/labor-board-ruling-may-bar-millions-of-workers-from-forming-unions/> (Nov. 11, 2008, 6:29 EST).

⁹¹ *Id.*

majority and the two Democratic members of the Board in dissent.⁹² The dissent in *Oakwood* was particularly stinging with Board members Liebman and Walsh citing the risk that the majority decision would, by the year 2012, deprive as many as thirty-four million employees of their Section 7 rights under the Act.⁹³

In 1935, when the Act itself was written, the notion of what constituted “management” and what constituted “employee” seemed so self-evident that the drafters of the Act did not bother inserting precise definitions. The *Packard* case demonstrated the need for a definition of “supervisor” which was then promptly supplied by Taft-Hartley and the creation of the 2(11) supervisory exemption. In the sixty years that span the creation of 2(11) and the *Kentucky River* Trilogy, there is no consistent application or interpretation of what it means to be a “supervisor.” More importantly, while the Board has wrestled with this question over the last six decades, dramatic economic changes have occurred in the United States, especially in the nature of employment.

IV. THE CHANGING NATURE OF SUPERVISION

Working for a wage is a comparatively recent phenomenon. This way of keeping body and soul together was so novel that Adam Smith found it a worthy way of introducing his book, *The Wealth of Nations*, to the public in 1776.⁹⁴ Prior to the creation of large concerns employing hundreds of individuals, the working class in the Western world earned their daily bread by making and selling small crafts or by farming.⁹⁵ By the early nineteenth century, as the industrial revolution spread across the United States from its genesis in the eastern seaboard cities, wage work was often seen as little better than slavery.⁹⁶ These tensions, caused primarily by the tran-

⁹² See Steven Greenhouse, *Board Redefines Rules for Union Exemption*, N.Y. TIMES, Oct. 4, 2006, at 16.

⁹³ See *Oakwood Healthcare*, 348 N.L.R.B. at 700 (“Most professionals have some supervisory responsibilities in the sense of directing another’s work—the lawyer his secretary, the teacher his teacher’s aide, the doctor his nurses, the registered nurse her nurse’s aide, and so on.”).

⁹⁴ Adam Smith begins his great work by discussing the heretofore-unimaginable productivity of wage-earning laborers at a pin factory who practiced division of labor. See ADAM SMITH, *THE WEALTH OF NATIONS* 3–4 (Barnes & Noble Books 2004) (1776).

⁹⁵ Multiunit businesses administered by a professional managerial class and containing a distinct class of wage-earning employees did not exist in America in the 18th and 19th Centuries. See ALFRED CHANDLER, *THE VISIBLE HAND* 3–6 (1977) (“Such enterprises did not exist in the United States in 1840.”). The primary economic revolution of the late nineteenth century transmitted the U.S. economy from an agricultural one to an industrial economy.

⁹⁶ See ROBERT REICH, *THE FUTURE OF SUCCESS* 90 (VINTAGE BOOKS 2002) (2000)

sition of the U.S. economy from agriculture to industry, erupted in the large levels of labor unrest seen in the decades following the Civil War.⁹⁷

The level of unrest did not stop the rapid transformation of America's workforce from a position of relative self-sufficiency to one of wage dependence. Between 1870 and 1910, the U.S. population doubled while the number of wagedworkers quadrupled.⁹⁸ These tensions acted upon the American body politic, forcing policymakers to come to terms with this new demographic and their demands. Child labor prohibitions were passed, minimum wage laws and overtime rules were established, and the culmination of this process of accommodation between wagedworkers and management was reached in 1935 with the passage of the Act, which established the right to organize for labor and imposed the obligation to bargain in good faith.

Human social evolution is not a process with a beginning or an end. The continuing transformation of the U.S. workforce did not cease with the adoption of the Act in 1935. To see how dramatically conditions have shifted, it will be instructive to look at what former Secretary of Labor Robert Reich refers to as the "Three Rules of Employment" that were established in the decades following the adoption of the Act.⁹⁹ These rules are: work is steady with predictable pay raises (the "job-for-life" or "salary man" mentality); next, effort is limited (you work eight hours a day, five days a week); and finally, a steady job of any kind is a ticket to the middle class.¹⁰⁰ These rules form the backbone of the U.S. "Golden Age" of the 1950s and 1960s.

The next step is to look at these "Rules" as we enter the first decade of the twenty-first century. Work now seems anything but steady—the employee who will begin and end a career with the same company is so rare as to be practically non-existent.¹⁰¹ In-

(explaining that wages are a cunning device of the devil for the benefit of tender consciences who would retain all the advantages of the slave system without the expense, odium, and trouble of being slave holders).

⁹⁷ *Id.* at 90–91 (citing the Pullman Strikes of 1894 as an illustrative example: federal troops were deployed and martial law was declared in Chicago as the leaders of the strike were beaten and jailed).

⁹⁸ *Id.* at 91.

⁹⁹ *Id.* 93–97 (arguing in part that there is a time delay between problem and action in political endeavors and that because we are still in the mind-set of our youth, we often do not react properly to current conditions).

¹⁰⁰ *Id.* at 91. It is also instructive to note the compression of wages between those at the top of the corporation and those at the bottom. Such income disparities were at low levels in the decades following World War II.

¹⁰¹ *Id.* at 98.

comes have also become unreliable as paychecks are increasingly tied to variable money sources like sales results or grant funding—and this does not include the startling statistic that as of 1999, one-third of the workforce was employed in some sort of temporary capacity.¹⁰² The days of the company man appear to be over, and the freelancer is now at center stage in the workplace.

As far as “limited effort” goes—this no longer seems to exist. Boundaries between home and work are vanishing. The last few decades have also seen the introduction and absorption of the majority of American women into the workforce.¹⁰³ This has caused a vicious circle of sorts: Americans are working longer, have more unpredictable hours, and thus need to run their vital household errands at all hours of the day and night. This creates a “24-7” economy that requires “24-7” workers, which further increases the length and relative unpredictability of the workweek.¹⁰⁴

Now for the middle class: “under siege” might be the best way to describe the trends of the last few decades. For Americans with only a high school education, absolute earnings reached a high-water mark in 1979 and have been on the decline ever since.¹⁰⁵ For many years, only those without a college degree seemed to feel this pinch, but since 2000, the relative incomes of all Americans—except for those in the top one percent of earnings—have lost ground in absolute terms.¹⁰⁶ To summarize, in the early twenty-first century, wage work is transient, time-consuming and in terms of absolute income, rather terrible. The “rules” of work that reigned supreme in the 1950s and 1960s have not just been broken but trampled, thrown out, and forgotten. Yet, this vastly different workplace is still governed by the regulations of the Act—an Act designed and built for a different time.

One aspect of wage work during the golden years of the “rules” was its algorithmic nature. An algorithm merely means a step-by-step process that is used to accomplish a task or solve a problem. “Wash, rinse, repeat” is an algorithm for hair washing,

¹⁰² Temporary status includes part-timers, freelancers, and independent contractors. *Id.*

¹⁰³ *Id.* at 100–01.

¹⁰⁴ While the average workweeks of European employees has been on the decline since the 1980’s, the typical American workweek has continued to increase over the same time period with Americans working more than 300 hours a year.

¹⁰⁵ See Martin Hutchinson, *America’s Disappearing Middle Class*, ASIA TIMES, Nov. 15, 2007 at A1, available at http://www.atimes.com/atimes/Global_Economy/IK15Dj01.html.

¹⁰⁶ The American dream, in which hard work can propel ordinary people into a comfortable, even affluent, lifestyle is becoming ever more distant. *Id.*

and “heat at 350 degrees for thirty minutes” is an algorithm for cooking a frozen pizza. In the workplace, algorithms lend themselves to automation. The complex, but sequential process that turns a hunk of steel into a wrench can easily be programmed into a computer or industrial robot, and the same productivity gains that Adam Smith saw with the human division of labor can be further increased by removing the human factor entirely and replacing it with a machine.¹⁰⁷ Scholars predict that any algorithmic or routine work that can be automated will be automated, and any algorithmic work that cannot be automated will soon be outsourced overseas.¹⁰⁸

The value of industries based around algorithmic work has also declined. The steel industry provides an illustrative example in that it is a quintessential algorithmic industry. The jobs on the floor of a mill are defined by slavish adherence to protocol and procedure. Deviation from the rules can cost a worker their limbs or even their lives. Yet, as of 2000, the market value of the entire steel industry in the United States was less than half the stock market value of the internet store, Amazon.com.¹⁰⁹ In that there is a connection between union membership and algorithmic work, simply one has to consider union membership as a percent of the workforce. The decline of jobs featuring such routine work has been in decline, and so has union membership: it peaked at thirty percent in the late 1960s and has been on a steady decline ever since, with less than ten percent of the workforce enjoying union protections by the year 2000.¹¹⁰

To find out where the economy is headed and what the future holds for the nature of work in America, it is instructive to look at various secondary school curriculum initiatives that are designed to help the next generation of high school graduates find jobs in the ever-changing twenty-first century economy. One of the largest is “Route 21,” created by the Partnership for 21st Century Skills.¹¹¹ Here, businesses (including Apple, Adobe, Cisco and Intel) have teamed with various national educational organizations to create

¹⁰⁷ See Arnold H. Packer & Gloria K Sharrar, *Linking Lifelong Learning, Corporate Social Responsibility and the Changing Nature of Work*, 5 ADVANCES IN DEVELOPING HUM. RESOURCES, 332, 333 (2003).

¹⁰⁸ See generally Brandon Fish, William Allen Rees, Robert Trumble & S. Daniel West, *International Outsourcing of Knowledge Based Jobs*, 14 WTR INT'L HR J. 2 (2005).

¹⁰⁹ See REICH, *supra* note 96, at 77.

¹¹⁰ *Id.* at 78.

¹¹¹ Welcome to Route 21, <http://www.21stcenturyskills.org/route21/> (last visited Jan. 1, 2009).

curriculum goals for the nation's secondary schools that will allow American high school graduates to become productive employees in the new economy.¹¹² The career skills that are being stressed all revolve around flexibility in the workplace. The goals are broken down into five sub-categories, beginning with "adaptability," which is taken to mean "working effectively in a climate of ambiguity and changing priorities."¹¹³ Next is "self-direction," which is defined as "defining, prioritizing and completing tasks without direct oversight," followed by "social skills," taken to mean, "working appropriately and productively with others."¹¹⁴ "Reliability" comes next, and the recommendations conclude with "leadership," which is defined as "using interpersonal skills to influence and guide others towards a goal."¹¹⁵

When these five curriculum goals are compared to the three-part supervision test as defined in the Trilogy, "independent judgment" would seem to be satisfied by the "self-direction" goal while "leadership" seems to cover "assignment." Only "responsibility" is left unmet by the curriculum, but this is in the hands of the employer in that all they have to do is create conditions where negative consequences exist if the assignment actions of the employees fail to meet employer-defined standards. To rephrase: the United States is entering a stage of the economy and an evolution of the workforce where, if "Route 21" and others like it are successful in their efforts to re-engineer the next generation of employees, the boundary between "supervisor" and "worker" will be blurred beyond recognition.

The conclusion is inescapable: society is entering an era where algorithmic work will be a small piece of the U.S. economy where practically every American employee will be a self-directed one, who may lead a work-group one week and be a member of another work-group the next week.

It took six decades for the Board to find a functional interpretation for 2(11) but all that effort seems increasingly meaningless in a workplace where everyone will share some measure of supervisory duties as defined by the Trilogy. In such a workplace where

¹¹² Welcome to Route 21, About Route 21, http://www.21stcenturyskills.org/route21/index.php?option=com_content&view=article&id=48&Itemid=44 (last visited on Jan. 1, 2009).

¹¹³ Welcome to Route 21, Life and Career Skills, http://www.21stcenturyskills.org/route21/index.php?option=com_content&view=article&id=11&Itemid=11 (last visited on Jan. 1, 2009).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

everyone is a supervisor, will anyone have Section 7 rights under the Act? In a fascinating, ironic turn of events, we have come full circle from the days of *Packard* where even vice presidents had the right to organize. Now it seems in a self-directed twenty-first century workplace, no one may have a clear, undeniable right to join a union, free of challenge by an employer.

V. THE RESPECT ACT—A POSSIBLE REMEDY?¹¹⁶

In the spring of 2007, in the 110th Congress, a bill was introduced and then referred to the Committee on Education and Labor entitled the “Re-Empowerment of Skilled and Professional Employees and Construction Trades workers Act” (“the RESPECT Act”).¹¹⁷ The bill, sponsored by Senator Dodd and Representative Robert Andrews, seeks to literally tear the heart out of the Kentucky River Trilogy by amending the language of 2(11). This proposed bill would strike the word “assign” from 2(11), eliminate the phrase “or responsibly to direct them,” and insert a phrase stating that the remaining supervisory duties must occupy a majority of an individual’s work time for that individual to be considered a supervisor.¹¹⁸

The bill would solve the sixty years of judicial agonizing over 2(11) in one fell, legislative swoop. The contentious terms, “assign” and “responsibly to direct” would be eliminated by the RESPECT Act. The bill also eliminates the “ten percent standard” for supervision articulated in *Oakwood*. The bill would leave 2(11) to read as follows:

The term “supervisor” means any individual having authority, in the interest of the employer and for a majority of the individual’s work time, to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, 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.¹¹⁹

Hiring, firing, transferring, suspending, recalling, laying off, promoting, rewarding, or disciplining are all prerogatives long associated with management in general or supervision in particular. Supervision carries three basic attributes: first, that the individual is

¹¹⁶ The RESPECT Act was not passed in the 110th Congress.

¹¹⁷ See H.R. 1644 and S. 969, 110th Cong. (2007), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1644ih.txt.pdf.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

involved in rating performance or in setting compensation; secondly, that the individual has the capacity or is directly involved in hiring and firing decisions; and finally, that the individual is also involved in making schedules.¹²⁰

The RESPECT Act would solve all the clarity problems associated with assigning or responsibly directing that have occupied the Board for the better part of six decades. The RESPECT Act would also shift the focus to more traditional supervisory prerogatives like hiring, firing or, disciplining and away from the fuzzy areas of *Kentucky River* like assigning or responsibly directing. In a coming future bereft of algorithmic work, the RESPECT Act would allow the “self-directed” and “flexible” employees of the future the right to organize under the Act.

CONCLUSION

As originally written, the Wagner Act made no provisions for the exclusion of supervisors from the right to organize unions. This situation reached a climax during the *Packard* case of 1947 and was remedied by the adoption of the Taft-Hartley Act that same year. The Taft-Hartley Act created a supervisory exemption, which, over time, became the nexus of many a crisis for the NLRB. The Board tried over the years to find an interpretation of the supervisory exemption that would meet with Supreme Court approval. Finally, after the Court’s rejection of *Kentucky River* in 2001, the Board requested *amicus* briefs and released a landmark ruling in the fall of 2006, known as the *Kentucky River* Trilogy.

The Trilogy established a three-part test for supervisory status, involving direction (place, time, duties), responsibility (the employee must face real and serious consequences for the failures of subordinates), and independent judgment. The Trilogy was also notable for the articulation of a time-based standard and a very low one at that, in that as little as ten percent of an employee’s time could be spent in supervision for that employee to be considered a supervisor. Response to the Trilogy from organized labor was negative, with cited fears that the Trilogy would deprive as many as one-third of America’s workforce from Section 7 rights.

¹²⁰ See *Testimony on RESPECT Act of 2007: Hearing on H.R. 1644 Before the Subcomm. on Health, Employment and Labor of the H. Comm. On Education and Labor, 110th Cong. (2007)* (statement of William Tambussi, Labor Counsel, Cooper University Hospital), <http://edlabor.house.gov/testimony/050807BillTambussitestimony.pdf> (Tambussi felt that the RESPECT Act would provide “clarity to the current situation in light of recent conflicting decisions by the NLRB.”).

These fears are further exacerbated by a cursory analysis of changes in the workplace. Routine manufacturing work, the staple of union membership in the middle of the twentieth century, is fast disappearing. Such algorithmic work is increasingly being automated or outsourced. The “rules of employment” articulated by former Secretary of Labor Robert Reich (steady jobs, limited effort, and ease-of-entry into the middle class) that held sway during the peak union membership years of the 1950’s and 1960’s have now all been broken. Today’s workforce will work for multiple employers over the span of their lifetime, put in longer hours, and have no guarantee of a middle-class income. The future of the workplace can be seen in the various efforts to train twenty-first century workforce skills to secondary school students. These skills all revolve around self-directed employees leading various small work groups who move from one task to the next, forming and re-forming with no clear boundary between employer and supervisor as defined by the Trilogy.

The nature of the workforce and supervision in particular has evolved at a pace much faster than the judicial interpretations of the Wagner Act. The Trilogy shows that even after six decades under the heat of Board rulings and court decisions, the definition of supervisor has not kept pace with the events and trends of the outside world.

Given the changing nature of supervision in the twenty-first century workforce, the Trilogy ruling leaves us in the exact opposite position of *Packard* sixty years ago. If the intent of the Wagner Act is to be fully carried out, the Trilogy decision is unworkable in the light of current workplace trends where every self-directed employee will spend some time directing others. As judicial remedies appear to be exhausted after six decades of effort, a legislative remedy is possible under the proposed RESPECT Act. It would steer the supervisory definition away from assigning and directing and back to the more familiar territory of hiring, firing, and disciplining.

