Testimony of Sarah M. Fox

Before the House Committee on Education and Labor
Subcommittee on Health, Education, Labor and Pensions
On the RESPECT Act of 2007 (H.R. 1644)

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My name is Sarah Fox and I am Of Counsel to the Washington DC labor law firm of Bredhoff and Kaiser. I am also a former member of the National Labor Relations Board, having served on the Board by appointment of President Clinton from 1996 through 2000. I appreciate the opportunity to testify today regarding the RESPECT Act (H.R. 1644), which would amend the definition of supervisor in the National Labor Relations Act.

At the outset, let me commend the Subcommittee for undertaking consideration of this bill as well as H.R. 800, the Employee Free Choice Act.

The National Labor Relations Act was enacted in 1935, but unlike virtually every other major federal statute of the New Deal era, it has not been subject to periodic updating and revision by Congress. Despite significant changes in the structure and organization of work that have transformed labor relations in many industries, a host of factors including political impasse at the federal level has prevented serious consideration of reforms to adapt the Act to changing circumstances and to address well-documented deficiencies in the Act's ability to protect the ability of workers to bargain collectively. As law professor Cynthia Estlund has written, the result is that "[t]he core of American labor law has been essentially sealed off - to a remarkably complete extent and for a remarkably long time - both from democratic revision and renewal and from local experimentation and innovation. The basic statutory language, and many of the intermediate level principles and procedures through which the essentials of self-organization and collective bargaining are put into practice, have been nearly frozen, or ossified, for over fifty years."[1]

Thanks to the work of the Chairman and others, and with the passage of the Employee Free Choice Act in the House, for the first time in a very long time we are seeing the beginnings of a national conversation about reform of our basic labor law to meet the desires of workers in the 21st Century who want and need collective bargaining as a means to achieve individual opportunity, restore economic fairness and rebuild America's middle class. And one of the areas most in need of reform is the statutory definition of supervisor, which was added to the Act in 1947.

For purposes of the NLRA, whether a worker is classified as an employee or as a supervisor can be a matter of enormous significance, not just for that worker but for her co-workers as well. The most obvious consequence is that workers classified as supervisors have no right to engage in collective bargaining, which means they cannot join and form unions to advance their interests in the workplace unless their employers permit it. But being a supervisor means not only that you have no affirmative rights

[1] Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1530 (2002)

under the Act but also that you have no protections. Because supervisors are not covered by the Act, a supervisor can be disciplined or fired for engaging in pro-union activity. And under current Board law, a supervisor can also lawfully be conscripted to participate in the employer's efforts to prevent workers from forming a union.[2]

In today's world of consultant-driven anti-union campaigns, employers typically are taught to use their front-line supervisors as the first line of attack against a union organizing campaign.[3] Supervisors are instructed to express the company's opposition to the union to the employees they supervise and to report to higher management on which employees they know or believe to be union supporters and on any union activity they observe in the workplace. Supervisors can lawfully be told that it is their responsibility to see to it that the unionization effort is defeated, and that their jobs will be on the line if the organizing drive succeeds. Supervisors who express qualms or are seen as insufficiently committed to the anti-union effort can and do lose their jobs.[4]

A finding that a particular individual is a supervisor and not an employee can also have a devastating effect on the organizational rights of the other employees in the workplace. Under a 2004 NLRB decision in a case called *Harborside Healthcare Inc.*[5], the participation by a supervisor in pro-union activities can be grounds for setting aside a vote by the employees in favor of unionization, even if the employer itself vigorously opposed the union and made that opposition known to the workforce. Thus in *SNE Enterprises*[6], decided last October, the Board overturned the results of an election in which the employees voted in favor of the union because two leadpersons—whose sole authority over the other employees consisted of the ability to assign workers to different production line tasks as needed —had participated in soliciting authorization cards used only to support the filing of a petition for an election. The Board held that the leads' actions on behalf of the union were "inherently coercive," even though the leads had voted as employees, without objection, in three previous NLRB elections, didn't regard themselves and weren't regarded by co-workers as supervisors, and ceased their card solicitation three months before the election, when the employer—who had meanwhile actively campaigned against the union—informed them that it considered them to be supervisors

Given the starkness of the consequences of being found to be a supervisor rather than an employee under the NLRA, it is imperative that the definition of supervisor be carefully limited and construed so as to exclude from coverage under the Act only those individuals who are in fact part of management and exercise genuine management prerogatives, and that is in fact what Congress intended when it enacted the supervisory

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[2] *See, e.g.,* Western Sample Book and Printing Co., 209 NLRB 384, 389-90 (1974)

[3] *See* Charles T. Joyce, *Comment: Union Busters and Front-Line Supervisors: Restricting and Regulating the Use of Supervisory Employees by Management Consultants During Union Representation Election Campaigns*, 135 U. Pa. L. Rev 453 (1987)

[4] Western Sample Book and Printing Co., supra; World Evangelism, Inc., 261 NLRB 609 (1982); Crouse-Hinds, 273 NLRB 333 (1984).

[5] 343 NLRB No. 100 (2004)

[6] 348 NLRB No. 69 (2006)

exclusion more than 50 years ago. And it is equally imperative that the test for determining whether an individual is a supervisor be relatively straightforward and easy to understand and apply, because workers need to know when they undertake a union organizing campaign whether they and their co-workers are employees entitled to the protections of the Act or supervisors whose participation in the organizing campaign would put both their own jobs and the ultimate outcome of the organizing campaign in jeopardy.

Unfortunately, a series of NLRB and court decisions over the last 15 years, culminating last October in *Oakwood Healthcare*[7] and two companion cases[8] issued by the NLRB, have produced a state of affairs that satisfies neither requirement. By broadly construing two of the terms in the statutory definition of supervisor—assignment and responsible direction—the *Oakwood* decisions have greatly expanded the scope of the supervisory exemption, threatening to create a new class of workers who, in the words of the *Oakwood* dissent, "have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees."[9] And because the decisions do not resolve the inherent tension between the literal words of the statute and Congress's expressed intent not to exclude supervisors and skilled employees who exercise minor supervisory authority from the statute, they fail to provide the clear guidance that workers need to be able to exercise their rights. Clearly it is time for Congress to step in and provide the clarity that is so desperately needed in this area.

A brief history of the supervisory exemption will help to explain why.

When Congress enacted the National Labor Relations Act in 1935, supervisors were not excluded from coverage under the Act. But in 1947, after the Supreme Court in *Packard Motor Car Co. v. NLRB*[10] upheld an NLRB decision permitting automobile company foremen to form foremen's unions, Congress responded to an outcry from the automobile manufacturers by enacting the so-called Taft-Hartley amendments to the Act, which created an express statutory exclusion for supervisors in what is now Section 2(11) of the Act.[11]

The statutory language enacted by the Taft-Hartley Congress defines a supervisor as an individual who has the authority (1) in the interest of the employer, (2) using

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[7] 348 NLRB No. 37(2006)

[8] Croft Metals, Inc., 348 NLRB No. 38 (2006); Golden Crest Healthcare Center, 348 NLRB NO. 39 (2006)

[9] 348 NLRB at 66.

[10] 330 U.S. 485 (1947)

[11] Although this issue is not addressed by the RESPECT Act, it should be noted that the denial to supervisors of the right to join unions violates the right of freedom of association embodied in the core labor standards that the United States, as a member of the International Labor Organization, is bound to respect. Freedom of association has been held to encompass the right of supervisors to join and form organizations to defend their interests, although a country's law may require supervisors to form unions separate from those of supervised employees. *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (2006), ¶247.*

independent judgment, (3) to perform one or more of 12 enumerated functions.[12] These enumerated functions include, in addition to such undeniably supervisory responsibilities as hiring, firing and imposing discipline, authority to "assign" and "responsibly to direct" other employees. But Congress made clear, notwithstanding the inclusion of those terms, that it did not intend for the new exclusion to sweep so broadly as to include employees who stand in closer proximity to the rank-and-file than to management even if they are referred to as "supervisors" and have some authority to assign and direct other employees.

Rather, in crafting the definition, Congress sought to distinguish between "straw bosses, lead men, set-up men, and other minor supervisory employees, on the one hand"—whom it did not intend to exclude—and "the supervisor vested with. . . . genuine management prerogatives . . . .", whom it did intend to exclude.[13] As Senator Taft explained, the exclusion for supervisors was "limited to bona fide supervisors. . . . to individuals generally regarded as foremen and employees of like or higher rank."[14]

For many decades following enactment of the supervisory exclusion, the NLRB was faithful to Congressional intent, classifying as employees rather than supervisors professionals, journeymen construction workers and other skilled and experienced employees who primarily worked at their profession or craft but also had limited authority to assign work and direct other employees to perform discrete tasks.[15]

Beginning in 1967, when the Board extended its jurisdiction to for-profit hospitals and nursing homes, the Board also had occasion to apply its construction of the

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[12] Section 2(11) states that 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."

[13] S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947). As the Supreme Court has noted, in enacting the exclusion for supervisors, Congress adopted both the Senate's version of the definition and the Senate's view of what the definition meant. NLRB v. Bell Aerospace Co., 416 U.S. 267, 283 (1974). Thus it is the Senate report that reflects Congressional intent with regard to the interpretation of the statutory language.

[14] 93 Cong. Rec. 6442 (1947).

[15] *See, e.g.,* General Steel Tank Co., 81 NLRB 1345, 1347 (1949) (authority exercised by leadman who operates several machines and has one to three helpers assisting him is not supervisory but "merely of the type normally exercised by a skilled workman"); Sonotone Corp., 90 NLRB 1236, 1239 (1950) (although engineers direct the work of the associate and assistant engineers, relationship is "primarily that of the more skilled to the lesser skilled employee rather than that of supervisor to subordinate"); Southern Bleachery and Printworks, Inc. 115 NLRB 787, 791 (1956) (highly skilled employees whose primary function is physical participation in the production or operating processes of their employers' plants and who incidentally direct the movements and operations of less skilled subordinate employees based on their working skill and experience not supervisors*)*.

*See also, e.*g., Skidmore, Owings & Merrill, 192 NLRB 920, 921 (1971)(architect who as project leader gave directions to others did so only to ensure quality of work on project and, in this capacity, was acting according to professional norms, not supervisory status); Golden-West Broadcaster-KTLA, 215 NLRB 762 n. 4 (1974) (employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor).

supervisor definition to so-called "charge nurses" who, as the Board explained in an early decision, is "the nurse, RN or LPN, on a particular shift who is responsible for seeing that the work is done, that medicines are administered to the patients, that the proper charts are kept, and that the patients receive whatever treatment has been prescribed."[16] Between 1967 and 1974, the Board decided numerous charge nurse cases, generally finding that the charge nurses were not supervisors, either because the nurse's actions were not performed with independent judgment, or in the case of RN's, because they directed others not as an exercise of supervisory power in the interest of the interest of the employer, but as a manifestation of their professional skill and training.[17]

In 1974, when Congress extended the jurisdiction of the Act to cover not-for-profit hospitals, it expressly relied on these and similar decisions by the Board as the basis for rejecting proposals that would have prohibited health care professionals, including registered nurses, from being considered supervisors because of the direction they routinely give to other employees. As the Senate report explained, because the Board, in its decisions, had "carefully avoided applying the definition of 'supervisor' to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer," the proposed amendment is "unnecessary."[18]

With this green light from Congress, the Board continued for the next 20 years its relatively consistent practice of interpreting the definition of supervisor so as not to exclude nurses and other professionals whose direction of other employees was "incidental to" the exercise of their professional duties. But the Board's mode of analyzing supervisory issues was thrown into disarray in 1994, by the Supreme Court's 5-4 decision in *NLRB v. Health Care & Retirement Corp. of America,*[19] which rejected the Board's approach as inconsistent with the "plain meaning" of the statutory language notwithstanding its specific endorsement by Congress in 1974.

In the 15 years since the Supreme Court's decision in *Health Care*, controversy over the application of the supervisor definition to nurses and other professionals as well as skilled employees and "team leaders" who provide direction to less skilled or experienced co-workers has split the Board and divided the courts, engendering expensive and wasteful litigation that has contributed greatly to the delays that plague the NLRB election process and depriving workers like Lori Gay of the right to choose

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[16] Abingdon Nursing Center, 189 NLRB 842, 850 (1971)

[17] *See, e.g.,* Madeira Nursing Center, 203 NLRB 323, 324 (1973) (finding that RNs and LPNs who issued work assignments to aides were not supervisors because independent judgment was not required as assignments either were in accord with scheduling issued by director of nursing or were dictated by needs of patients); Doctors Hospital of Modesto, 183 NLRB at 951-52 (distinguishing between nurses who exercise authority as a product of their professional duties and those who are vested with true supervisory authority such as power to affect job and pay status);

[18] S. REP. NO. 93-766, at 6 (1974). See also H.R. REP. No. 93-1051, at 7 (1974) (stating that amendment to supervisor definition is unnecessary given Board's prior precedent).

[19] 511 U.S. 571 (1994)

whether to be represented for purposes of collective bargaining that is supposed to be guaranteed them of the Act.

During the five years in the late 90's that I was a member of the Board, issues relating to whether particular individuals were or were not supervisors were surely the most litigated issues before the agency, accounting by my estimate for at least 25% of all the cases we decided during that period. And since I left the Board in 2000, the issue has been back again to the Supreme Court, resulting in another 5-4 decision in the case of *NLRB v. Kentucky River Community Care Inc.*,[20] in which the Court rejected yet another attempt by the Board to harmonize the literal language of the statute with Congress' expressed intent not to exclude professionals and others with minor supervisory authority from the protections of the Act.

Most recently, in *Oakwood Healthcare* and the companion cases decided last fall, the Bush appointees on the NLRB have essentially abandoned the effort to reconcile the statutory definition with Congressional intent, adopting a reading of the statutory terms that threatens to exclude from coverage countless nurses and other professionals like Lori Gay as well as skilled craft workers who typically direct the work of less skilled employees. But the closeness of these decisions, each of which was decided by a 3-2 vote, is a sure sign that unless Congress steps in, the controversy will continue—particularly if the next administration results in a change in the composition of the Board.

The RESPECT Act would address the problems created by the Supreme Court's decisions in *Health Care* and *Kentucky River* and the Bush Board's *Oakwood* decisions by eliminating from the statutory definition of supervisor the two terms that are most directly in tension with Congress's original intent to exclude as supervisors only those individuals exercising real management prerogatives: assignment and responsible direction. . To deal with additional difficulties created by the failure of the statutory definition to address the status of employees who ordinarily work as rank-and-file employees, but occasionally assume supervisory authority, the bill would also classify as supervisors only those individuals who possess supervisory authority during at least 50% of their work time. Together these changes would bring considerably greater clarity to the question of who is a statutory supervisor.

Most of the 12 enumerated supervisory duties in the current definition of supervisor involve the exercise of real authority to affect employees' terms of employment, such as the authority to hire, transfer, suspend, lay off, recall, promote, reward, and discipline. However, in the *Oakwood* trilogy, the Board radically expanded its construction of the terms "assignment" and "responsible direction" in a way that sweeps in whole classes of employees that Congress clearly did not consider to be supervisors of the type they wanted to exclude from the protections of the Act. .

The Board first defined "assign" in a manner not limited to assignment having a significant impact on employees' terms of employment (for example assignment to a shift or assignment to a particular job), but extending assignment that is as transitory as assigning a patient to a nurse for only the duration of a single shift. The Board then broadly construed the term "direct" to include direction to perform a single, discrete task.

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[20] 532 U.S. 706 (2001)

Congress clearly did not intend for the supervisory exclusion to swallow all professionals and skilled craftspersons who direct the work of aides, assistants and other less skilled personnel, yet that is the logical consequence of the Board's construction of these two terms.

As Judge Posner has observed, "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 aid, and so on." [21] But the Taft-Hartley Congress clearly did not intended for this routine assignment and direction by professionals and other skilled employees to lead to their exclusion from the Act's protections as supervisors. Nor was it Congress's intention to exclude skilled construction workers, even though it was fully aware that journeyman construction workers typically work with helpers and apprentices and give them assignments and directions based on the greater skill and experience of the journeyman level craftsperson. Congress was also specific in expressing its intent to protect nurses when it extended the coverage of the Act to proprietary hospitals in 1974. Yet it was fully aware that nurses and other health care professionals routinely give direction to other employees in the exercise of their professional responsibilities.

Since the 1970s, the application of the terms "assign" and "responsibly to direct" has bedeviled the Board, consumed the time of the federal courts of appeal, and twice reached the Supreme Court not only because of the tension between the broad, literal meaning of those terms and the clearly expressed intent of Congress, but also because the inherent ambiguity of those terms. As long as they remain in the definition of supervisor, litigation over their application in particular circumstance is likely to continue to consume significant resources and interfere with the ability of workers to exercise their statutory right

The bill's requirement that individuals classified as supervisors have supervisory authority for at least 50% of their working time will ensure that nurses like Lorie Gay, who serve as charge nurses on a rotating basis, sometimes assigning patients to fellow nurses and other times having patients assigned to them by fellow nurses, and other employees who work some of the time as supervisors will not be stripped of statutory protection unless they spend the majority of their worktime in a supervisory role. This approach, which is used in several state statutes,[22] creates a fair, appropriate and bright-line test for determining whether individuals who sometimes work as rank-and-file employees and sometimes work as supervisors are entitled to the protections of the Act.

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[21] NLRB v. Res-Care, Inc., 705 F.2d 1461, 1465 (7th Cir. 1983).

[22] Several state public sector bargaining laws contain similar provisions, including Connecticut (Con.. Gen. Stat. § 5-270(f) (position's "principal functions" must be supervisory); Hawaii (Hw. Rev. Stat. § 89-6(c) (must consider whether "a major portion of the working time of a supervisory employee is spent as part of a crew or team with nonsupervisory employees"); Illinois (5 Ill. Comp. Stat. 315/3 (r)) ("the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising that authority"); Maine (Me.R.S.A. § 979-E) ("principal functions of the position are characterized by performing [supervisory duties]"); Nevada (Nev. Rev. Stat. § 288.010-222.280 ("exercise of such authority occupies a significant portion of the employee's workday"); New Mexico (N.M. Stat. Ann. § 10-7E-4) ("employee who devotes a majority of work time to supervisory duties").[22]

In the 60 years since Congress added the definition of supervisor to the Act, we have had ample opportunity to observe the impact of its inclusion and to observe the impact it has had on workers and their right to organize and bargain collectively. The reforms proposed in the RESPECT Act will help to put an end to the litigation that, for the last 15 years, has consumed such a substantial proportion of the Board's time and resources. This is a positive and necessary reform, and should be expeditiously enacted.