17. STATUTORY EXCLUSIONS

In defining "employees," Section 2(3) of the Act specifically excludes agricultural laborers, domestic service employees, individuals employed by their parent or spouse, independent contractors, supervisors, individuals employed by employers subject to the Railway Labor Act, and employees of any other person who is not an employer within the meaning of the statutory definition.

We consider these statutory exclusions in the order in which they appear in Section 2(3).

17-100 Agricultural Employees

177-2484-1200 et seq.

460-7550-1200

Annually, since July 1946, Congress has added to the Board's appropriation a rider which in effect directs the Board to be guided by the definition set forth in Section 3(f) of the Fair Labor Standards Act in determining whether an employee is an agricultural laborer within the meaning of Section 2(3) of the National Labor Relations Act.

The Board has frequently stated that its policy is to consider, whenever possible, the interpretation of Section 3(f) adopted by the Department of Labor, which is charged with the responsibility for administering the Fair Labor Standards Act. See, for example, *Bayside Enterprises v. NLRB*, 429 U.S. 298 (1977); *Davis Grain Corp.*, 203 NLRB 319 (1973); *Jack Frost, Inc.*, 201 NLRB 659 (1973); *CPA Trucking Agency*, 185 NLRB 452 (1970); *D'Arrigo Bros. Co. of California*, 171 NLRB 22 (1968); *Samuel B. Gass*, 154 NLRB 728 (1965); *Bodine Produce Co.*, 147 NLRB 832 (1964); and *Imperial Garden Growers*, 91 NLRB 1034 (1950).

Thus, in *Jack Frost*, supra, the Board referred to Section 3(f) of the Fair Labor Standards Act which reads, in pertinent part, as follows:

> [A]griculture includes farming in all its branches and among other things includes . . . the production, cultivation, growing and harvesting of any agricultural . . . commodities . . . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

As the truckdrivers and egg processing plant employees involved in this case were not engaged in direct farming operations of the type enumerated in the primary definition of agriculture, the question was whether they were engaged in activities included in the secondary definition of that term (see *Farmers Reservoir Irrigation Co. v. McComb, Wage & Hour Administrator*, 337 U.S. 755, 762 (1949)). The Board then relied on a Labor Department Interpretive Bulletin (see 29 CFR § 780.135), indicating that when processors enter into contractual agreements with independent farmers whereby the farmers agree to raise poultry to marketable size and the processor supplies the baby chicks, furnishes the required feed, and retains title to the chickens until they are sold, the activities of the independent farmers and their employees in raising the poultry are clearly exempt, but the activities of the processors are not considered "raising of poultry" and their employees are therefore not exempt on that ground. The Board's position was affirmed by the Supreme Court in *Bayside Enterprises*, supra. See also *Holly Farms Corp. v. NLRB*, 116 S.Ct. 1396 (1996).

The burden of proving that individuals are exempt as agricultural laborers rests on the party asserting the exemption. *Agrigeneral L.P.*, 325 NLRB 972 (1998). And the question of employee status is not decided on an employerwide basis, but on a classification by classification analysis. Id. at fn. 1.

A thorough discussion of several of the criteria used by the Board in determining whether or not employees are "agricultural laborers" may be found in *Bodine Produce Co.*, supra. These depend in major measure on the nature of the employer's business.

One criterion is whether the operation is an established part of agriculture, is subordinate to the farming aspect involved, and does not amount to an independent business. See Labor Department Interpretive Bulletin, 29 CFR § 780; *Jack Frost, Inc.*, supra, and *Bayside Enterprises*, supra.

Where the employer produced and supplied the feed which enabled the production of the poultry and then processed and marketed the product, with the agricultural function of tending and feeding the live birds performed by the independent growers intervening in the chain, the agricultural phase of the entire operation was an incident of the employer's nonagricultural activities rather than the converse. *CPA Trucking Agency*, supra. See also *Draper Valley Farms*, 307 NLRB 1440 (1992), finding that chicken catchers are not agricultural when working on the farms of independent growers. The Supreme Court upheld as reasonable, the Board's conclusion that "livehaul crews" are employees. The Court found that the work of these crews was tied to the employers processing operations rather than incidental to farming operations. *Holly Farms Corp. v. NLRB*, supra.

Another criterion is whether the employer confines the operation in question to his own produce.

Where the employer was engaged in the production, processing, and wholesaling of eggs, had been purchasing about half of its eggs from outside sources, and could not substantiate his claim that new production facilities would be able to replace the outside sources, the Board could not find that the employer came within the terms of the agricultural exemption. *Cherry Lane Farms*, 190 NLRB 299 (1971). See also *CPA Trucking Agency*, supra; *D'Arrigo Bros. Co. of California*, supra. More recently, the Board has declined to set a standard based on the percentage coming from outside sources. Rather the Board will assert jurisdiction "if any amount of farm commodities other than those of the employer-farmer are regularly handled by the employees in question." *Camsco Produce Co.*, 297 NLRB 905 (1990). See also *Campbells Fresh*, 298 NLRB 432 (1990); *Cal-Maine Farms*, 307 NLRB 450 (1992); and *Agrigeneral L.P.*, supra.

A different test applies when considering whether workers who perform agricultural and nonagricultural work are exempted from the definition of "employee." In these cases, the test is substantiality, not regularity. Thus, where cutter packers spent 50 percent of their time performing nonagricultural work, they were considered to be employees because the amount of nonagricultural work was substantial. *Produce Magic, Inc.*, 311 NLRB 1277 (1993). But in *Pictsweet Mushroom Form*, 329 NLRB 852 (1999), the Board denied review of a Regional Director finding that mushroom slicers were agricultural employees. In doing so, the Regional Director relied on the fact that all the other workers were agricultural laborers, that the slicing did not essentially change the natural state of the mushroom and that the slicers were only a small part of the employers operation.

Other cases holding that employees were not exempt from the coverage of the Act: *Mario Saikhon, Inc.*, 278 NLRB 1289 (1986) (field packing employees); *Davis Grain Corp.*, 203 NLRB 319 (1973) (grain elevator employees); *Batley-Janss Enterprises*, 195 NLRB 310 (1972) (drivers of freshly cut alfalfa); and *John Bagwell Farms*, 192 NLRB 547 (1971) (feed mill employees).

A Fifth Circuit decision rejected a distinction between workers on large mechanized farms and those employed on family farms. The court held that both groups are excluded from the Act's coverage because the agricultural exemption "is not measured by the magnitude of [the farmer's] planting nor in the prolificacy of his harvest." *Food & Commercial Workers Local 300 v. McCulloch*, 428 F.2d 396, 399 (5th Cir. 1970).

Adverting again to the legislative rider to the Board's appropriation act, mention should be made of the fact that annually, since 1954, Congress has added in the definition of agricultural laborers, and, thus, exempts from the Board's jurisdiction "employees engaged in the maintenance and operation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, nonprofit basis and at least 95 percent of the water stored or supplied thereby is used for farming purposes."

Thus, where employees were found by the Board to have engaged solely in the functions here described and more than 95 percent of the water stored or supplied by their employer was used for farming purposes, the Board found that it was precluded from asserting jurisdiction by reason, inter alia, of the fact that these employees were agricultural employees as defined in the rider to the Board's current appropriation act. *Minidoka Irrigation District*, 175 NLRB 880 (1969). See also *Truckee-Carson Irrigation District*, 164 NLRB 1176 (1967); and *Sutter Mutual Water Co.*, 160 NLRB 1139 (1966).

Similarly, employees engaged in the revegetation of mined land as a part of a reclamation project, are exempt from Board jurisdiction. *Drummond Coal Co.*, 249 NLRB 1017 (1980).

17-200 Domestics

177-2484-2500

Individuals who are in the domestic service of any family or person at his home are excluded from the coverage of the Act. See the definition of "employees" in Section 2(3). Individuals employed by a business rather than a family are employees. The Board's "focus is on the principals to whom the employer-employee relationship *in fact* runs and not merely to the undisputely 'domestic' nature of the services rendered." *Ankh Services*, 243 NLRB 478, 480 (1979). See also *NLRB v. Imperial House Condominiums*, 831 F.2d 999 (11th Cir. 1987).

17-300 Individuals Employed by Their Parent or Spouse

177-2484-3700

The problems encountered by the Board under this heading go beyond problems with the statutory language. The question is in some cases one of Board policy underlying the unit treatment of "relatives of management" when corporate ownership is involved. This is treated specifically in section 19-300, infra.

17-400 Independent Contractors

177-2414

177-2484-5000

460-7550-6200

Section 2(3) of the Act excludes from the definition of "employee," as spelled out in that section, "any individual having the status of an independent contractor."

In meeting this provision, Congress did not define the status, but intended that in each case the issue should be determined by the application of general agency principles. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). The party asserting independent contractor status bear the burden of establishing that status. *Community Bus Lines*, 341 NLRB 474 (2004).

Under agency principles, each case is determined on its own facts. *Frito-Lay, Inc. v. NLRB*, 385 F.2d 180 (7th Cir. 1967).

Restatement 2d, *Agency* § 220(2), sets out the following factors for determining whether one acting for another is a servant or an independent contractor:

(a) the extent of control which . . . the master may exercise over the details of work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the . . . occupation;
(e) whether the employer or top workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

With respect to item (c) above—Community Custom—see *Amerihealth Inc./Amerihealth HMO*, 329 NLRB 870 (1999), holding physicians to be independent contractors.

The major principle, regularly enunciated by the Board and the courts in this phase of the law, is that the appropriate test to apply in determining whether certain individuals are independent contractors (and not under the Act) or "employees" (and therefore under the Act) is the common law of agency. *NLRB v. United Insurance Co.*, supra; *Ace Doran Hauling Co. v. NLRB*, 462 F.2d 190 (6th Cir. 1972); *Gary Enterprises*, 300 NLRB 1111 (1990); *Portage Transfer Co.*, 204 NLRB 787 (1973); and *Associated General Contractors*, 201 NLRB 311 (1973).

Under this test, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in achieving such ends. See for example *Lakes Pilots Assn.*, 320 NLRB 168 (1995). On the other hand, when control is reserved only as to the result sought, an independent contractor relationship exists. *Gold Medal Baking Co.*, 199 NLRB 895 (1972).

The Board does not consider requirements imposed by the government to constitute employer control; it is considered government control, *Air Transit*, 271 NLRB 1108, 1110 (1984), and *Elite Limousine Plus*, 324 NLRB 992 (1997).

In *Standard Oil Co.*, 230 NLRB 967, 968 (1977), the Board described the test:

> Among factors considered significant at common law in connection with the "right to control" test in determining whether an employment relationship exists are (1) whether individuals perform functions that are an essential part of the Company's normal operation or operate an independent business; (2) whether they have permanent working arrangement with the Company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the Company's name with assistance and guidance from the Company's personnel and ordinarily sell only the Company's products; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the Company; (5) whether they account to the Company for the funds they collect under a regular reporting procedure prescribed by the Company; (6) whether particular skills are required for the operations subject to the contract; (7) whether they have proprietary interest in the work in which they are engaged; and, (8) whether they have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss.

The Board does not regard as determinative the fact that the written agreement defines the relationship as one of "independent contractor" (*National Freight*, 153 NLRB 1536 (1965), and *Big East Conference*, 282 NLRB 335, 345 (1986)); or that the employer does not make payroll deductions and the drivers pay their own social security and other taxes (*Miller Road Dairy*, 135 NLRB 217, 220 (1962)); or that the drivers are free to solicit their own passengers in addition to complying with the employer's dispatch orders, or that the employer does not give the drivers written driving instructions (*Southern Cab Corp.*, 159 NLRB 248 fn. 4 (1966)); and *Diamond Cab*, 164 NLRB 859 (1967)). In *BKN, Inc.*, 333 NLRB 143 (2001), the Board found the freelance writers, designers and artists for a television production company to be employees noting extensive supervision by that company.

In any analysis of the cases presenting independent contractor issues, once the general rule has been stated, its application can only be discussed in empiric terms for, as the Seventh Circuit, among others, has said, each case must be determined on its own facts (*Frito-Lay, Inc. v. NLRB*, supra at 188). In these circumstances, several illustrative cases will be considered here in the light of the factual content in which they were decided. It may be helpful to divide our examples along

the more typical industry lines. As the independent contractor issue arises with some degree of frequency in the trucking industry, we shall begin with that industry.

Before doing so, note that the Board held oral argument on two independent contractor cases and then found the pickup and delivery drivers in *Roadway Package System*, 326 NLRB 842 (1998), to be employees and the customer delivery drivers to be independent contractors in *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998). In *Argix Direct, Inc.*, 343 NLRB 1017 (2004), the Board found independent contractor status in a unit of truckdrivers on facts similar to *Dial-A-Mattress*.

17-410 Trucking Industry

177-2484-5067

The trucking industry has generated a large number of cases presenting the independent contractor issue. Because, as indicated, the determinations are so fact-based, little purpose is served by summarizing the facts of particular cases. Rather, we have listed below a series of cases presenting independent contractor issues with different results. Among the factors considered by the Board in reaching its decisions are: (1) right to reject loads; (2) right to perform hauling for other carriers; (3) right to determine work schedules; (4) obligations to pay for fuel and maintenance; and (5) requirements to run predetermined routes.

Cases Finding Independent Contractor Status

– *Central Transport, Inc.*, 299 NLRB 5 (1990).
– *Precision Bulk Transport*, 279 NLRB 437 (1986).
– *Don Bass Trucking*, 275 NLRB 1172 (1985).
– *Austin Tupler Trucking*, 261 NLRB 183 (1983).
– *C. C. Eastern, Inc.*, 309 NLRB 1070 (1992).
– *Diamond L Transportation*, 310 NLRB 630 (1993).
– *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998).
– *Argix Direct, Inc.*, 343 NLRB 1017 (2004).
– *AAA Cab Services*, 341 NLRB 462 (2004).
– *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846 (2004).

Cases Finding Employee Status

– *Corporate Express Delivery System*, 332 NLRB 1522 (2000).
– *Slay Transportation Co.*, 331 NLRB 1292 (2000).
– *R. W. Bozel Transfer*, 304 NLRB 200 (1991).
– *Roadway Package System*, 288 NLRB 196 (1988).
– *North American Van Lines*, 288 NLRB 38 (1988).
– *Redieh's Interstate*, 255 NLRB 1073 (1980).
– *Standard Oil Co.*, 230 NLRB 967 (1977).
– *Roadway Package System*, 326 NLRB 842 (1998).
– *Metro-Taxicab Co.*, 341 NLRB 722 (2004).

17-420 Newspaper Industry

177-2484-5033-0133

177-2484-5076

177-8540-2700

Persons in the "motor routemen" classification ordinarily delivered to single subscribers in rural areas but also delivered in bulk to carriers and dealers. In holding them to be "employees," the Board addressed itself to "the result to be accomplished," i.e., the circulation and sale of newspapers, as well as the right to control the manner and means. Thus, it found that they must purchase the newspapers at the cost established by the employer and sell them at a price no higher

than the published price in the area or territory defined and controlled by the employer; their risk of loss and capacity to draw on personal initiative to increase earnings were minimized significantly by the extent of the employer's practices and policies of preventing competition between the motor routemen, of accepting return for credit, of adjusting the wholesale rate, and of granting subsidies, apparently to compensate for added expenses, thus affecting their earnings; and the motor routemen had no proprietary interest in their routes. *Beacon Journal Publishing Co*., 188 NLRB 218 (1971). Compare *Las Vegas Review Journal*, 223 NLRB 744 (1976).

In a case involving carrier boys, the Board found that their opportunities for profits were limited by the company's regulation and control of their work, having, to a large extent, reserved the right to control the manner and means, in addition to the result, of their work. They were therefore held to be "employees." *A. S. Abell Co.*, 185 NLRB 144 (1970). *St. Louis Post-Dispatch*, 205 NLRB 316 (1973).

For other "employee" findings in the newspaper industry, see *Vindicator Printing Co.*, 146 NLRB 871 (1964) (contract distributors engaged in the sale and distribution of newspapers to newstands and carriers); *Sacramento Union*, 160 NLRB 1515 (1966) (district dealers); *Citizen-News Co.*, 97 NLRB 428 (1951) (carrier boys); *News Syndicate Co.*, 164 NLRB 422 (1967) (franchised dealers); *El Mundo, Inc.*, 167 NLRB 760 (1967) (newspaper dealers who, under contract, distribute and sell the employer's newspapers to stores, newsstands, and newsboys, and by means of vending machines); *Herald Co.*, 181 NLRB 421 (1970), enfd. 444 F.2d 430 (2d Cir. 1971) (distributors); *News-Journal Co.*, 185 NLRB 158 (1970), enfd. 447 F.2d 65 (3d Cir. 1971); *Long Beach Press-Telegram*, 305 NLRB 412 (1991) (area managers and district advisers); *Evening News*, 308 NLRB 563 (1992); and *North Shore Weeklies, Inc*., 317 NLRB 1128 (1995) (comparing press supervisors and press operators).

In *Hearst Corp.*, 174 NLRB 934 (1969), distributors were found to be supervisors rather than either "employees" or "independent contractors." The fact that several news deliverers threatened suit to enforce "their individual contractor status" was held insufficient, when weighed against other factors, to change the finding that they were "employees" and not "independent contractors." *News-Journal Co.*, supra. On the other hand, in *Denver Post*, 196 NLRB 1162, 1164 (1972), the Board held that "distributors" engaged principally in the delivery of newspapers to subscribers, either directly or through carriers, were independent contractors.

In two recent cases the Board found newspaper carriers to be independent contractors. In *St. Joseph News-Press*, 345 NLRB 474 (2005), the Board found that five of the common-law factors weighed in favor of independent contractor status: (1) the company exercised little control over the carriers; (2) the carriers, not the company, provided the tools necessary to perform the work at issue: (3) the carriers had entrepreneurial control over the amount of compensation; (4) the carriers performed their duties with little company supervision; and (5) the parties intended to create an independent contractor relationship. The Board found that four other factors weighed in favor of finding that the carriers were employees: (1) the carriers' work was an integral part of the company's business; (2) the work was unskilled; (3) the parties relationship was for an indefinite period; and (4) the company performed similar—though not identical—work. The Board concluded that, on balance, the factors weighed in favor of finding independent contractor status. Accord: *Arizona Republic Co.*, 349 NLRB 104 (2007).

17-430 Taxi Industry

177-2482-5067-6000

Cabdrivers' status presents a frequent occasion for litigation of the independent contractor issue.

As with any determination of this issue, the right to control test will apply. The Board has, however, been inclined to find independent contractor status where the cabdrivers lease their own cabs and there is no relationship between their base fees and the fares generated. For cases

holding independent contractor status see *City Cab of Orlando*, 285 NLRB 1191 (1987); and *Air Transit*, 271 NLRB 1108 (1984).

In *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300 (2004), an administrative law judge found most of the cabdrivers in New York are independent contractors. In doing so, he recounts the history of the conversion of these drivers from employees to independent contractors. See also *AAA Cab Services*, 341 NLRB 462 (2004), finding independent contractors status and *Metro-Taxicab Co.*, 341 NLRB 722 (2004), find employee status.

In *Yellow Taxi of Minneapolis*, 262 NLRB 702 (1982), in which the Board, sua sponte, reconsidered its original decision that the drivers were employees and reached the same result notwithstanding adverse decisions by the courts in other factually similar cases.

The Board was reversed by the court in *Suburban Yellow Taxi Co. v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983). The Board later distinguished *Suburban Yellow Taxi* and a number of other taxi cases in which the courts refused to enforce Board orders. See *Yellow Cab of Quincy*, 312 NLRB 142 (1993).

In *Stamford Taxi, Inc.*, 332 NLRB 1372 (2000), the Board found taxi drivers to be employees based on a *Roadway Package System*, 326 NLRB 842 (1998), analyses.

For an analysis of limousine drivers see *Elite Limousine Plus*, 324 NLRB 992 (1997).

17-440 Other Industries

177-2484-5033-0167

177-2484-5067

Where American Oil Company leased a service station to a lessee, and the lease contained no requirements or limitations on the method or manner of operating the station; the lessee being free to set his own hours, hire and fire whomever he pleased, set his employees' wage rates, and, except for the sale of American Oil gasoline, sell either its products or those of its competitors at his own prices, the lessee was found to be an independent contractor. The Board did not regard a "Financial Assistance Plan" available to the lessee as a sufficient basis for changing the result. *American Oil Co.*, 188 NLRB 438 (1971).

A franchisee was held to be an independent contractor in the factual context of the case. Citing *Clark Oil & Refining Corp.*, 129 NLRB 750 (1960), the Board pointed out that it has never held that the right to terminate a franchise agreement, standing alone, negates the existence of independent contractor status. *Speedee 7-Eleven*, 170 NLRB 1332 (1968).

Where a photographer used his own equipment, paid for his own photographic supplies, received payment only for each picture accepted for publication, stood the loss for each picture not accepted, sold copies of pictures to any customers other than the employer's competitors, he was found to be an independent contractor, particularly since the employer did not control the manner or means by which he was to perform the work. *La Prensa, Inc.*, 131 NLRB 527 (1961). See also *Young & Rubicam International*, 226 NLRB 1271 (1976).

In *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846 (2004), the Board found that artists models were independent contractors. In doing so, the Board panel majority relied on the facts that these models could choose the classes before which they will model, that they were paid by the class and not by the hour, that they supply their own robes and that they can work for other schools or independent artists. The Board also noted the high degree of skill of the models in striking and holding a pose.

On the other hand, where contract salesmen at a dairy products plant were used exclusively in the company's service, and the company built up their routes, limited the prices they could charge, made charge accounts subject to its approval, and required daily reports and cash settlements each day of the day's receipts, the salesmen were found to be employees. *Albert Lea Creamery Assn.*, 119 NLRB 817 (1957).

Consideration was accorded the fact that the employers "reserved the right to control the manner and means as well as indirectly the result of the work performed" in finding drivers "employees" rather than independent contractors. *Okeh Caterers*, 179 NLRB 535 (1969).

A factor in arriving at a finding that "auto shuttlers," also known as "car transporters," were not independent contractors was that no opportunity existed for the individuals in question "to make business decisions affecting their profit or loss." *Avis Rent-A-Car System*, 173 NLRB 1366 (1968). See also *Avis Rent-A-Car System*, 173 NLRB 1368 (1968); and *A. Paladini, Inc.*, 168 NLRB 952 (1967).

In *Lakes Pilots Assn.*, 320 NLRB 168 (1995), the Board found that pilots in training—applicant maritime pilots—were employees not independent contractors. The Board noted that the employer retained the right to control the manner in which these pilots performed their services.

See also *Cardinal McCloskey Services*, 298 NLRB 434 (1992), in which the Board found day care providers to be independent contractors. Compare *People Care, Inc.*, 311 NLRB 1075 (1993), finding the providers there to be employees.

In *Ameri Health HMO*, 326 NLRB 509 (1998), the Board remanded for further proceedings the question of whether physicians are employees of a health maintenance organization.

17-500 Supervisors

177-8501

177-8540

177-8580

Supervisory status under the Act depends on whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, which defines the term "supervisor" as:

> 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.

In discussing the above statutory definition, the Sixth Circuit declared that Section 2(11) is to be interpreted in the disjunctive and that "the possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). See also *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994); *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002); *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), cert. denied 335 U.S. 908 (1948); *Harborside Healthcare Inc.*, 330 NLRB 1334 (2000); *Pepsi-Cola Co.*, 327 NLRB 1062 (1999); *Allen Services Co.*, 314 NLRB 1060 (1994); and *Queen Mary*, 317 NLRB 1303 (1995).

It is axiomatic, of course, that the existence of the power determines whether an individual is an employee or a supervisor (see, for example, *West Penn Power Co. v. NLRB*, 337 F.2d 993, 996 (3d Cir. 1964)), but the real task which confronts the Board is the difficult one of finding whether the supervisory power in fact exists, and this can only be ascertained as a result of a painstaking analysis of the facts in each case.

Supervisory issues are among the most common in representation cases, and the Board volumes are replete with findings of both supervisory and nonsupervisory status in a veritable myriad of factual situations, sometimes simple but more often complex. A number of factors are considered in resolving supervisory issues. These, of course, include the statutory requirements described above. The problem, however, lies mainly in the application of these factors in order to

ascertain from the relevant facts and circumstances whether or not the terms of the statutory definition are met. It is an individual's duties not job title that determines status. *Dole Fresh Vegetables, Inc.*, 339 NLRB 785 (2003).

Supervisory status cannot be measured in individually distinct terms, nor can hard-and-fast rules be laid down. In each case, the differentiation must be made between the exercise of independent judgment and the routine following of instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact. See, e.g., *Chevron Shipping Co.*, 317 NLRB 379 (1995); *J. C. Brock Corp.*, 314 NLRB 157 (1994); *Clark Machine Corp.*, 308 NLRB 555 (1992); *McCollough Environmental Services*, 306 NLRB 565 (1992); and *Quadrex Environmental Co.*, 308 NLRB 101 (1992), all of which involved finding of no independent judgment. Compare *Virginia Mfg. Co.*, 311 NLRB 992 (1993), and *Allen Services Co.*, supra.

The burden of establishing supervisory status rests on the party asserting that status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *Alois Box Co.*, 326 NLRB 1177 (1998); and *Youville Health Care Center, Inc.*, 326 NLRB 495 (1998). And, any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535 fn. 8 (1999). Conclusionary statements without supporting evidence do not establish supervisory authority. *Volair Contractors, Inc.*, 341 NLRB 673 (2004).

Listed below is a series of cases in which the Board found that the burden was not met. *Spentonbush/Red Star Cos.*, 319 NLRB 988 (1995) (tugboat captains), enf. denied 106 F.3d 484 (2d Cir. 1997); *Northwest Florida Legal Services*, 320 NLRB 92 (1995) (supervisory attorney); *K.G. Knitting Mills*, 320 NLRB 374 (1995); *Azusa Ranch Market*, 321 NLRB 811 (1996) (department manager in grocery store); *New Jersey Newspapers*, 322 NLRB 394 (1996) (pressroom foremen); *Pine Brook Care Center*, 322 NLRB 740 (1996) (charge nurses); *PECO Energy Co.*, 322 NLRB 1074 (1997) (lead maintenance technicians at a public utility); *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997) (registered nurses); and *Chrome Deposit Corp.*, 323 NLRB 961 (1997) (crew leaders).

A discussion of criteria follows:

17-501 Supervisory "Authority" as Defined in Section 2(11)

177-8520

177-8560

Individuals who possess the authority spelled out in the statutory definition contained in Section 2(11) are, of course, "supervisors" and can be held to be supervisors even if the authority has not yet exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 fn. 8 (2001). *U.S. Gypsum Co.*, 93 NLRB 91 (1951), and *Wasatch Oil Refining Co.*, 76 NLRB 417 fn. 17 (1948).

Accordingly, supervisory findings resulted where "news producers" at a television station, among other responsibilities, assigned overtime (*Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972)), or made work assignments (*Westinghouse Broadcasting Co.*, 188 NLRB 157 (1971)); "strip supervisors" and "dispatchers" discharged drivers in a trucking operation for serious misconduct, which was one indication of their authority (*Pennsylvania Truck Lines*, 199 NLRB 641 (1972)); an individual in a welding operation scheduled work, assigned it to employees, gave them orders, and had sole responsibility for the workload (*Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972)); a personnel manager actively engaged in the hiring process (*Lawson Milk Co.*, 143 NLRB 916, 919–920 (1963)); an individual had the authority to grant time off and furlough employees during slack periods (*Birmingham Fabricating Co.*, 140 NLRB 640, 642 (1963)); "shift leaders" had the responsibility for transmitting work orders and for seeing to it that these orders were carried out (*Little Rock Hardboard Co.*, 140 NLRB 264, 265 (1962)); a

"working foreman" who, among other indicia of authority, granted employees time off (*Western Saw Mfrs.*, 155 NLRB 1323, 1329 fn. 11 (1965)); "line leaders" who had the authority to maintain discipline (*Lee-Rowan Mfg. Co.*, 129 NLRB 980, 984 (1960)); department and line supervisors who have disciplinary authority and who could make effective hiring recommendations (*Venture Industries*, 327 NLRB 918 (1999)); licensed practical nurses who had disciplinary authority (*Heartland of Beckley*, 328 NLRB 1056 (1999)); and assistant supervisors whose evaluations led to automatic wage increases (*Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995)). Compare *Arizona Public Service Co.*, 310 NLRB 477 (1993).

Nonsupervisory findings resulted in situations where a dentist's reassignment authority was a means of assuring compatibility. (*Robert Greenspan, D.D.S., P.C.*, 318 NLRB 70 (1995)); where the authority to order intoxicated employees to leave was not disciplinary (*Chevron Shipping*, supra); where "associate architects" had no authority as statutorily defined, the firm principal reserving for himself "the final determination on all architectural decisions" (*Howard A. Friedman & Associates*, 192 NLRB 919 (1971)); work assignments are routine in nature (*Sears, Roebuck & Co.*, 292 NLRB 753, 754 (1989)); authority had not in fact been exercised (*Northwest Steel*, 200 NLRB 108 (1972)); airport bus dispatchers were not required to exercise independent judgment or test their own initiative (*Greyhound Airport Services*, 189 NLRB 291 (1971)); "district managers" employed by a newspaper publishing company possessed minimal discretion (*Suburban Newspaper Group*, 195 NLRB 438 (1972)); telephone company "traffic supervisors" who, despite enlarged responsibilities and new title, nonetheless did not possess the kind of responsibility contemplated by Section 2(11) (*Hawaiian Telephone Co.*, 186 NLRB 1 (1970)). See also *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991), in which the Board held that "batchers" employed by a concrete producer do not exercise independent judgment; and *Hogan Mfg.*, supra, testing welders was not authority to recommend hire. The presence or absence of the exercise of independent judgment is an important factor weighed by the Board in making its supervisory determinations. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

Moreover, although an individual's duties may include relaying to management complaints against other employees, also reports of inefficiency, if these are investigated independently by higher management, he is not a supervisor within the meaning of the statutory definition. *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493–494 (1965). Nor is he a supervisor if the control he exercises is merely that which is derived from job experience. *Sanborn Telephone Co.*, 140 NLRB 512, 515 (1963). Similarly, the authority to evaluate is not a supervisory indicia if the evaluation does not affect employee status or tenure. *Volair Contractors, Inc.*, supra; *Williamette Industries*, 336 NLRB 743 (2001). Compare *Trevilla of Golden Valley*, 330 NLRB 1377 (2000).

Quality control work—inspecting and reporting the work of others—is not supervisory. Nor is the testing of welds. *Brown & Root, Inc.*, 314 NLRB 19, 21 fn. 6 (1994). Authority to issue instructions and minor orders based on greater job skills does not amount to supervisory authority, *Byers Engineering Corp.*, 324 NLRB 740 (1997).

In an unfair labor practice case, the Board described the proper balancing of interests in assessing supervisory authority. The case involved a series of disciplinary actions by the alleged supervisor. The Board found that some of the incidents did not establish supervisory authority but concluded that one incident was sufficient to find supervisory status rejecting an argument that it was a sporadic exercise of authority. *Biewer Wisconsin Sawmill*, 312 NLRB 506 (1993).

The Board has found that distribution and system dispatchers in the utility industry are not supervisors. *Mississippi Power & Light Co.*, 328 NLRB 965 (1999), reversing *Big Rivers Electric Corp*., 266 NLRB 380 (1983).

Section 2(11) requires that the alleged supervisor exercise authority "in the interest of the employer." In *Allstate Insurance Co.*, 332 NLRB 759 (2000), the Board found that the individual in question had complete discretion whether to work alone or to have assistance. The Board found that the essential components of the employers business were not affected by such a decision and therefore the individual was not exercising authority in the interest of the employer.

For a full discussion of "interest of the employer" see *NLRB v. Health Care & Retirement Corp. of America,* 511 U.S. 571 (1994).

17-502 Assignment/Responsible Direction/Independent Judgment

177-8520

177-8560

Employees who must and do use independent judgment in directing other employees are supervisors within the meaning of Section 2(11). See, e.g., *Sears, Roebuck & Co*., supra. See also *DST Industries*, 310 NLRB 957 (1993). Similarly, those who use independent judgment in effectively recommending discipline are supervisors. *Progressive Transportation Services*, 340 NLRB 1019 (2003). See also *Mountaineer Park, Inc*., 343 NLRB 1473 (2004). Compare *Armstrong Machine Co.,* 343 NLRB 1149 (2004).

Recently, the Board had occasion to consider its policies with respect to the 2(11) phrases, "responsibly to direct," "the use of independent judgment" and the term "assign." This review was engendered by the adverse decision of the Supreme Court in *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001). The Court rejected the Board's interpretation of "independent judgment" finding that the Board incorrectly held that "employees do not use independent judgment," when they exercise ordinary professional or technical judgment in directing less skilled employees to deliver services in accordance with employer specified standards. The Court saw this as a "categorical exclusion" and rejected it. Thus, the Court found that the nature of the judgment, whether professional, technical, or experimental, does not determine whether a judgment is "independent" in the sense used in Section 2(11). The Court's holding did not reject the Board's traditional holding that the judgment of a subordinate is "routine" if it is limited by the directions of higher officials who have not delegated the power to make significant judgments or if the subordinates' judgments are constrained by employer specified standards.

Following the *Kentucky River* decision the Board, after extensive briefing by the parties and amici issued decisions in three cases *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006); *Croft Metals, Inc*., 348 NLRB 717 (2006); and *Golden Crest Healthcare Center,* 348 NLRB 727 (2006).

Oakwood was the lead case and in it the Board majority defined "assign" as the act of "designating an employee to a place (such as a location, department or wing), appointing an individual to a time (such as a shift or overtime period) or giving significant overall duties to an employee." 348 NLRB at 689.

The majority stated that it did not see the terms "assign" and responsibly to direct" as synonymous. Noting that the Board "rarely" has sought to define the parameters of the term "responsibly to direct" the Board examined the decisions of the courts and adopted their holding that "for direction to be responsible, the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other such that some adverse consequence may befall the one providing the oversight if the tasks . . . are not performed properly." 348 NLRB at 692.

Finally, the *Oakwood* Board majority defined "independent judgment" to be "at a minimum" the authority to "act or effectively recommend action, free of the control of others" and to "form an opinion or evaluation by discerning and comparing data." Independent judgment "contrasts with actions that are of a merely routine or clerical nature."

The Board majority used this analytic framework to find that certain of the charge nurses in *Oakwood* were supervisors. In the two companion cases the Board found that the disputed classifications of charge nurses in *Golden Crest* and lead persons in a manufacturing plant in *Croft Metals* were not supervisors.

Post *Oakwood* decisions have repeatedly emphasized the point that supervisory status must be proven and that conclusory evidence will not satisfy the burden of proof. *Lynwood Manor*, 350 NLRB 489 (2007); *Austal USA, L.L.C.*, 349 NLRB 561 (2007); and *Avante at Wilson, Inc.*, 348 NLRB 1056 (2006).

In two cases the Board has found individuals to be supervisors where they used independent judgment in the exercise of a Section 2(11) indicia. See *Metropolitan Transportation Services*, 351 NLRB No. 43 (2007) (discipline), and *Sheraton Universal Hotel*, 350 NLRB 1114 (2007) (discipline).

And in two other cases the Board found independent judgment to be lacking. *Shaw, Inc.*, 350 NLRB 354 (2007) (assignment), and *CGLM, Inc.*, 350 NLRB 974 (2007) (direction).

See also two pre-*Oakwood* cases *American River Transportation Co.*, 347 NLRB 925 (2006), and *Marquette Transportation/Bluegrass Marine*, 346 NLRB 449 (2006), where tug boat captains (*American*) and river pilots (*Marquette*) were found to be supervisors.

In *Dynamic Science, Inc.*, 334 NLRB 391 (2001). The Board found that test leaders of a military test facility were not supervisors applying the *Kentucky River* analysis. Accord: *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002) (tugboat pilots).

Kentucky River was a health care case involving registered nurses. The Court did not rule that all nurses are supervisors. See *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001).

The facts in *Custom Bronze & Aluminum Corp.*, supra, are illustrative of Board analysis in traditional industrial settings. While it was not contended that the individual in question had the authority to hire or discharge, reward, promote, suspend, layoff, discipline, reprimand employees, effectively recommend such action, or handle grievances, it was nonetheless found that he alone was responsible for the work of the shop employees and the daily production of the shop; he was in charge of the shop and its workload, exercised responsibilities and duties that his colleague did not, scheduled and assigned work, gave employees their orders and instructions, helped them in performing their jobs, made certain that the work was done and done properly, and determined whether overtime or additional help was needed. Compare *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003) (being in charge of store does not evidence supervisory authority in absence of showing of use of independent judgment). *Croft Metals, Inc.*, supra.

For other pre-*Oakwood* cases, in which a supervisory finding was made on the basis of responsible direction or independent judgment, see *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003); *Wal-Mart Stores*, 335 NLRB 1310 (2001); *Venture Industries*, 327 NLRB 918 (1999); *Superior Bakery*, 294 NLRB 256 (1989); *Rose Metal Products*, 289 NLRB 1153 (1988); *Illini Steel Fabricators*, 197 NLRB 303 (1972); *Consolidated Freightway Corp.*, 196 NLRB 807 (1972); *Wolverine World Wide*, 196 NLRB 410 (1972); and *Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972).

Illustrative of the opposite result under this heading is *Mid-State Fruit, Inc.*, 186 NLRB 51 (1970). While the individual in question recruited substitute drivers and occasionally directed "an extra delivery to a good customer," a company principal was always on call and was reached on the telephone for instructions in matters involving substitution of drivers or other emergencies. He worked the same hours and received the same benefits as other members of the crew. In assigning overtime, he did so at his principal's specific instructions. And although the individual in question claimed to have discharged an employee, there was no evidence that he actually did, and it was clear from the facts that he possessed no such authority. As he was "not free to use his own independent judgment," concluded the Board, "he could not be said to responsibly direct other employees." See also *Wal-Mart Stores*, 340 NLRB 220 (2003).

In two television station cases, a divided Board found that producers did not have the independent authority to make work assignments and thus were not supervisors. *KGW-TV*, 329 NLRB 378 (1999), and *KGTV-TV*, 329 NLRB 454 (1999).

For other cases decided along similar lines, see *Dynamic Science, Inc.*, supra; *Health Resources of Lakeview,* 332 NLRB 878 (2000); *Arlington Electric*, 332 NLRB 845 (2000); *Carlisle Engineered Products*, 330 NLRB 1359 (2000); *Freeman Decorating Co.*, 330 NLRB 1143 (2000); *Fleming Cos.*, 330 NLRB 277 fn. 1 (1999); *Crittenton Hospital*, 328 NLRB 879 (1999); *Tree-Fiber Co.*, 328 NLRB 389 (1999); *Millord Refrigeration Services*, 326 NLRB 1437 (1998); *Ryder Truck Rental*, 326 NLRB 1386 (1998); *Alois Box Co.*, 326 NLRB 1177 (1998); *Greenhorne & O'Mara, Inc.*, 326 NLRB 514 (1998); *Youville Health Care Center, Inc.*, 326 NLRB 495 (1998); *General Security Services Corp.*, 326 NLRB 312 (1998); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426 (1998); *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Suburban Newspaper Group*, supra; *Willis Shaw Frozen Food Express*, 173 NLRB 487 (1968); *John Stalfort & Sons*, 156 NLRB 84, 86 (1965); and *Bakersfield Californian*, 316 NLRB 1211 (1995).

In *Armstrong Machine Co.*, 343 NLRB 1149 (2004), a panel majority found no supervisory status for the most senior employees in the department who answered questions concerning work and who made work assignments based on "a priority list generated by management." In absence of the owner, the employee answered customer inquiries. The panel found that the work assignments were routine not "based on anything other than the common knowledge, present in any small workplace, of which employees have certain skills and which employees do not work well together." Citing *Hausner Hard Chrome of KY, Inc.*, supra, the panel found that the employees work did "not demonstrate the exercise of independent judgment as envisioned by Section 2(11) of the Act."

Direction of work that is routine in nature and typical of a leadperson was held not to be supervisory in the following cases: *Croft Metals, Inc.*,, supra; *Central Plumbing Specialties*, 337 NLRB 973 (2002); *Byers Engineering Corp.*, 324 NLRB 740 (1997); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996); *Consolidated Services*, 321 NLRB 845 (1996); *Azusa Ranch Market*, 321 NLRB 811 (1996); and *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). Authority to initial timecards is not generally considered supervisory authority. *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232 (2003).

17-503 Power Effectively to Recommend

177-8520

Persons with the power "effectively to recommend" the actions described in Section 2(11) are supervisors within the statutory definition. See, e.g., *Entergy Systems & Service*, 328 NLRB 902 (1999); *Detroit College of Business*, 296 NLRB 318 (1989); and *Westwood Health Care Center*, 330 NLRB 935 (2000).

In *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004), a divided panel found two individuals to be supervisors where they could "on their own volition . . . bring a potential disciplinary issue" to their superiors and discipline is imposed at the level recommended.

A supervisory finding was made, based in part, on the power effectively to recommend hiring and firing. A factual situation served as a predicate: When an employee was discharged, he asked a company official for another chance and was told that the company official must abide by the decision of the individual found to be a supervisor. *Elliott-Williams Co.*, 143 NLRB 811, 816 (1963). On the other hand, where recommendations concerning discipline and reward "were not shown to be effective or to result in personnel action being taken without resort to individual investigation by higher authority," a nonsupervisory determination followed. *Hawaiian Telephone Co.*, supra. See also *Mower Lumber Co.*, 276 NLRB 766 (1985). Compare *Oak Park Nursing Care Center*, 351 NLRB No. 9 (2006), holding that filling out counseling form was an effective recommendation.

The Board has rejected the contention that mere suggestions are effective recommendations. *Brown & Root, Inc.*, 314 NLRB 19 (1994), and that signatures on a discipline form amounted to an effective recommendation. Rather in this latter case, the Board adopted the hearing officer's

conclusion that such signatures were for witness purposes. *Necedah Screw Machine Products*, 323 NLRB 574 (1997). See also *Children's Farm Home*, 324 NLRB 61 (1997). Accord: *Los Angeles Water & Power Employees' Assn.*, supra (initialing timecards).

The Board has held that the mere issuance of a directive to alleged supervisors setting forth supervisory authority is not determinative of their supervisory status. *Connecticut Light & Power Co.*, 121 NLRB 768, 770 (1958). See also *Bakersfield Californian*, supra. In *Security Guard Service*, 154 NLRB 8 (1965), despite some evidence that certain "sergeants" had at one time been advised that they had supervisory authority, including the power to make effective recommendations, there was no evidence that this had been exercised. See also *World Theatre Corp.*, 316 NLRB 969 (1995), where unit employees routinely recommended hires.

Authority to submit reports on employee conduct that are merely records of instruction or are investigated independently, does not establish supervisory status. *Williamette Industries*, 336 NLRB 743 (2001); *Ken-Crest Services*, 335 NLRB 777 (2001); *Tree-Fiber Co.*, 328 NLRB 389 (1999); *Green Acres Country Care Center*, 327 NLRB 257 (1998); *Custom Mattress Mfg.*, 327 NLRB 111 (1998); *Ryder Truck Rental*, 326 NLRB 1386 (1998); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426 (1998); *F. A. Bartlett Tree Expert Co.*, 325 NLRB 243 (1997); *MJ Metal Products*, 325 NLRB 240 (1997); and *Mount Sinai Hospital*, 325 NLRB 1136 (1998). Nor is the assessment of an applicant for employments technical skills an effective recommendation to hire that individual. *Aardvark Post*, 331 NLRB 320 (2000). In *Hogan Mfg.*, 305 NLRB 861 (1991), the testing of welders as part of the hiring process was not considered to be an effective recommendation.

Individuals must have been notified of their authority if they are to be supervisors. *Volair Contractors, Inc.*, 341 NLRB 673 (2004).

17-504 Limited, Occasional, or Sporadic Exercise of Supervisory Power; Part-Time Supervisors

177-8560-5000

Employees who spend a substantial part of each workday or workweek as supervisors are customarily excluded as such from the bargaining unit. *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999), and *U.S. Radium Corp.*, 122 NLRB 468 (1958). Those who exercise supervisory authority for a portion of the year and perform rank-and-file functions for the remainder are described as "seasonal supervisors" and are included in the bargaining unit with respect to their rank-and-file duties. *Great Western Sugar Co.*, 137 NLRB 551 (1962). This does not mean that persons exercising only sporadic or irregular supervisory functions meet the statutory definition of supervisor. *Latas de Alumino Reynolds*, 276 NLRB 1313 (1985); *Meijer Supermarkets*, 142 NLRB 513 (1963); and *Indiana Refrigerator Lines*, 157 NLRB 539 (1966).

Occasional isolated instances of actions which might otherwise be indicative of supervisory authority are generally insufficient to predicate a supervisory finding. *Volair Contractors, Inc.*, supra. . *Kanawha Stone Co.*, 334 NLRB 235 (2001). *Commercial Fleet Wash*, 190 NLRB 326 (1971). Thus, where a "crew leader" had occasionally been consulted about an employee's progress and an employee had been granted a raise after his crew leader had recommended the raise, these isolated instances, without more, were not regarded sufficient to establish supervisory indicia. *Highland Telephone Cooperative*, 192 NLRB 1057 (1971). See also *Robert Greenspan, D.D.S., P.C.*, 318 NLRB 70 (1995); *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127 (1971); *Billows Electric Supply*, 311 NLRB 878 (1993); *Biewer Wisconsin Sawmill*, 312 NLRB 506 (1993); and *Brown & Root, Inc.*, supra. Compare *Union Square Theatre Management, Inc.*, 326 NLRB 70 (1998), where the Board reversed a Regional Director's finding of sporadic hiring by an individual. Instead the Board found that that authority was "part and parcel" of their duties.

In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006), the Board majority held that an individual who "spends a regular and substantial portion of his/her worktime performing supervisory functions" is a supervisor. The Board noted that it "has not adopted a strict

numerical definition of substantiality" but that 10–15 percent of total worktime is sufficient to find supervisory status.

17-505 Substituting for a Supervisor

177-8520-8500

177-8560-1800

Where an employee completely takes over the supervisory duties of another, he is regarded as a supervisor under the Act. *Birmingham Fabricating Co.*, 140 NLRB 640 (1963); and *Illinois Power Co.*, 155 NLRB 1097 (1965). However, isolated supervisory substitution does not warrant a supervisory finding. *Latas de Alumino Reynolds*, supra. The Board has stated that, where intermittent supervision of unit employees is involved, the test is whether the part-time supervisors spent a "regular and substantial" portion of their time performing supervisory duties, or whether such substitution is sporadic and insignificant. *Carlisle Engineered Products*, 330 NLRB 1359 (2000), and *Aladdin Hotel*, 270 NLRB 838 (1984). This test applies even if there is a clear demarcation between the individuals' supervisory and rank-and-file duties. *Canonie Transportation*, 289 NLRB 299 (1988). See also *Billows Electric Supply*, 311 NLRB 878 (1993); *Brown & Root, Inc.*, supra; and *OHD Service Corp.*, 313 NLRB 901 (1994).

In *St. Francis Medical Center-West*, 323 NLRB 1046 (1997), the Board found that substitution for a substantial period of time (5 of the 10 months before the election) was not regular because it was caused by extraordinary circumstances and was not likely to reoccur. Thus, the Board found that the individual was not a supervisor. Merely being "in charge" of store on weekends is not sufficient to establish supervisory authority in absence of use of independent judgment. *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003).

For an interesting discussion of this point see *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999), where the Board found that an employee who quit on the day of the election but who had been promoted to a supervisory position at that time would not have spent a substantial portion of his time as a supervisor even if he had not quit.

17-506 Promotions to Supervisory Positions and Management Trainees

177-8520-6200

177-8560-6000

The possibility of promotion to a supervisory position in the future does not in and of itself warrant exclusion from a unit. *Weaver Motors*, 123 NLRB 209 (1959). See also *International General Electric*, 117 NLRB 1571 (1957). Thus, individuals whose future assignment to supervisory status is contingent on demonstration of required qualifications are, if otherwise warranted by the facts, included in the unit. *Continental Can Co.*, 116 NLRB 1202 (1956).

Management trainees are generally treated the same as other individuals who are in line for elevation to supervisory positions. Thus, "manager trainees" who were in a training program ranging from 3 to 6 years, a period devoted to learning all store duties, but who had no indicia of supervisory authority and shared the same fringe benefits and working conditions with other employees, were included in the unit. *Neisner Bros., Inc*., 200 NLRB 935 (1972). Compare however, *M. O'Neil Co.*, 175 NLRB 514 (1969). The latter case involved "management trainees," who were given broad experience in the employer's operation with the hope that they would eventually qualify for positions as supervisors, management personnel, or administrative personnel. Gradually, those who did not so graduate left the company. Finding that these employees had a community of interest different from that of regular employees, the Board excluded them from the unit. Note, however, that the exclusion was not on a supervisory ground. See also *Gibson Discount Center*, 191 NLRB 622 (1971).

A person in supervisory training who exercises some supervisory authority, is excluded from the unit. *Augusta Chemical Co.*, 124 NLRB 1021 (1959). The probationary character of

supervisory authority does not affect supervisory status, and probationary supervisors are excluded from the unit. *Shelburne Shirt Co.,* 86 NLRB 1308 (1949). Nor will the fact that an individual may in the future exercise supervisory authority on a sporadic basis support a supervisory determination. *Indiana Refrigerator Lines*, .supra. See also *Du-Tri Displays*, 231 NLRB 1261 (1977).

For an excellent summary of the four-part test for determining whether management trainees (nonsupervisory) are included in the unit under community-of-interest principles, see *Nationsway Transport Service*, 316 NLRB 4 (1995).

See also section 20-620 (Trainees).

17-507 Secondary Indicia

Nonstatutory indicia can be used as background evidence on the question of supervisory status but are not themselves dispositive of the issue in the absence of evidence indicating the existence of one of the primary or statutory indications of supervisory status. See *Training School of Vineland*, 332 NLRB 1412 (2000), and *Chrome Deposit Corp.*, 323 NLRB 961, 963 fn. 9 (1997). Three such secondary indicia are the ratio of alleged supervisors to employees, differences in terms and conditions of employment and attending management meetings.

a. Ratio of supervisors to nonsupervisors

The ratio of supervisors to rank-and-file employees is a background factor which may enter into Board consideration when resolving a supervisory issue, but it is not itself statutory indicia. *Ken-Crest Services*, 335 NLRB 777 (2001). Where the ratio is unrealistic, a practical evaluation of employees' functions in this context is normally made.

The Board pointed out, for example, in *Pennsylvania Truck Lines*, 199 NLRB 641 (1972), that "if strip supervisors and dispatchers were found to be nonsupervisory, there would be no more than three supervisors . . . at any of the employer's terminals, some of which have as many as 100 drivers, and there would be no supervisors at the terminals on weekends, when a dispatcher or strip supervisor is in charge."

See also *Harborside Healthcare, Inc*., 330 NLRB 1334 (2000); *Naples Community Hospital*, 318 NLRB 272 (1995); *Essbar Equipment Co.*, 315 NLRB 461 (1994); *Sears, Roebuck & Co.*, 292 NLRB 753 (1989); *Washington Beef Producers*, 264 NLRB 1163 (1982); *Ridgely Mfg. Co.*, 198 NLRB 860 (1972); *Maryland Cup Corp.*, 182 NLRB 686 (1970); *U.S. Gypsum Co.*, 178 NLRB 85 (1969); *Welsh Farms Ice Cream*, 161 NLRB 748 (1966); and *West Virginia Pulp & Paper Co.*, 122 NLRB 738 (1958).

b. Difference in terms and conditions of employment

177-8250-5500

A substantial difference in terms and conditions of employment, while also not a statutory indicia, may be condensed as a background factor or secondary critira militating in favor of finding supervisory status. *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002); *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995); *Essbar Equipment Co.*, supra; *Illini Steel Fabricators*, 197 NLRB 303 (1972); *Grand Union Co.*, 193 NLRB 525 (1971); and *Little Rock Hardboard Co.*, 140 NLRB 264 (1962). It is, however, a secondary indication and is not dispositive. *General Security Services Corp.*, 326 NLRB 312 (1998); *St. Francis Medical Center-West*, supra, and *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 fn. 2 (1996). *Tri-City Motor Co.*, 284 NLRB 659 (1987). See also *Waterbed World*, 286 NLRB 425 (1987). Compare *Brown & Root, Inc.*, 314 NLRB 19 (1994), and *Custom Mattress Mfg.*, 327 NLRB 111 (1998), where the difference in pay was due to technical skills not supervisory duties. See also *Ken-Crest Services*, supra, difference in salary and being highest ranking person on premises did not establish supervisory status. *Central Plumbing Specialties*, 337 NLRB 973 (2002).

In *Illini Steel Fabricators*, supra, the Board considered as one of the elements the higher rate of pay received by the individual found to be a supervisor. Among the factors relied on for a supervisory finding in *Grand Union Co.*, supra, was the fact that the employer raised the scale of salaries to accord with newly assigned "supervisory responsibilities." And in *Little Rock Hardboard Co.*, 140 NLRB 264 (1962), the Board took into consideration, among other factors, the higher rate of pay, as compared with the pay of the production employees, which the disputed "shift leaders" received.

c. Attendance at management meetings

The fact that an individual may attend management meetings is a secondary indicator of supervisory authority and does not in and of itself establish such authority. *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003).

17-508 Ostensible or Apparent Authority

177-8520-7000

Ostensible or apparent authority can be a basis for making the supervisory determination. *Poly-America, Inc.*, 328 NLRB 667 (1999), and *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426 (1998).

For example, where two "all around" men and four "floor girls" were in dispute, it appeared that all six were held out as supervisors to employees by the respective department foremen and the employees were instructed to do as they were told by them. That was one circumstance noted by the Board in making a supervisory finding. *Wolverine World Wide*, 196 NLRB 410 (1972). See also *SAIA Motor Freight, Inc.*, 334 NLRB 979 (2001), where the Board said that "the test is whether under all the circumstances," the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. Accord: *Facchina Construction Co.*, 343 NLRB 886 (2004); *Ready Mix, Inc.*, 337 NLRB 1189 (2002); *Mid-South Drywall Co.*, 339 NLRB 480 (2002); and *D&F Industries*, 339 NLRB 618 (2002).

The Board found an individual was reasonably perceived by the employees to be a supervisor where the employer permitted him to continue to function as a supervisor during a transition period between his supervisory position and a nonsupervisory position. *A. O. Smith Automotive Products Co.*, 315 NLRB 994 (1994).

Where the employees looked on the individual in question as a supervisor and "there is valid basis for such judgment on their part," this was given some weight in the resolution of the supervisory question. *Bama Co.*, 145 NLRB 1141 (1964). However, the fact that an individual is held out as a supervisor is not necessarily dispositive of supervisory status. *Williamette Industries*, 336 NLRB 743 (2001); *Pan-Oston Co.*, 336 NLRB 305 (2001); and *Blue Star Ready-Mix Concrete Corp.*, 305 NLRB 429 (1991). In *Carlisle Engineered Products*, 330 NLRB 1359 (2000), the Board stated: "It is well established that rank and file employees cannot be transformed into supervisors merely being invested with that title."

See also *Spirit Construction Services*, 351 NLRB No. 56 (2007); *SKC Electric, Inc.*, 350 NLRB 857 (2007); *G.E. Maier Co.*, 349 NLRB 1052 (2007); *Suburban Electrical Engineers/Contractors*, 351 NLRB No. 1 (2007); *Thriftway Supermarket*, 276 NLRB 1450 (1985); *Washington Beef Producers*, supra; and *G.T.A. Enterprises*, 260 NLRB 197 (1982); *Waterbed World*, supra, for other ostensible authority holdings.

17-509 Supervision of Nonunit Employees

177-8501-7000

The Board is often confronted with the question of whether an individual is a supervisor when only a portion of the individual's time is spent in supervising nonunit employees. In *Detroit College of Business*, 296 NLRB 318 (1989), the Board rejected what it believed had become a misapplication of its decision in *Adelphi University*, 195 NLRB 639 (1972). *Adelphi* involved the

status of the director of admissions in a unit of faculty where the director supervised his secretary, an out-of-unit employee. As more fully described in *Detroit College*, supra, the *Adelphi* principle soon became the 50-percent rule, "any individual who supervises nonunit employees less than 50 percent of his time is not a supervisor."

In *Detroit College*, supra, the Board rejected "any such shorthand approach" to the resolution of these cases. Instead, the Board stated that it would "make a complete examination of all the factors present to determine the nature of the individuals alliance with management."

The Board described these factors as including:

> [T]he business of the employer, the duties of the individuals exercising supervisory authority and those of the bargaining unit employees, the particular supervisory functions being exercised, the degree of control being exercised over the nonunit employees and the relative amount of interest the individuals at issue have in furthering the policies of the employer as opposed to those of the bargaining unit in which they would be included.

See also *Pepsi-Cola Co.*, 327 NLRB 1062 (1999); *Union Square Theatre Management, Inc.*, 326 NLRB 70 (1998); *Rite Aid Corp.*, 325 NLRB 717 (1998); and *Legal Aid Society of Alameda County*, 324 NLRB 796 (1997).

In the case of supervision of employees of another employer, the Board will not find the individual to be 2(11) supervisor. In order to qualify as a supervisor, one must supervise the employees of the employer in question. *Crenulated Co.*, 308 NLRB 1216 (1992).

17-510 Supervisory Issues Affecting Educational Institutions

177-8540-8200

177-8540-8200

A concomitant to the Board's assertion of jurisdiction over colleges and universities in recent years has been the need for resolving supervisory issues in cases involving such institutions. Some of the more typical determinations in this area follow:

"Department chairmen" with authority effectively to recommend the hire and reappointment (or nonreappointment) of all part-time faculty members, and to allocate merit increases without the approval of the department's faculty, were found to be supervisors within the meaning of Section 2(11). *Berry Schools*, 234 NLRB 942 (1978); *University of Vermont*, 223 NLRB 423 (1976); and *Adelphi University*, supra. See also *C. W. Post Center*, 189 NLRB 904 (1971). It should be noted, however, that in *Fordham University*, 193 NLRB 134 (1971), the "department chairmen" were found to be nonsupervisory and included in the unit. The distinction is explained in the text and in footnote 19 in the decision in *Fordham*. And in *University of Detroit*, 193 NLRB 566 (1971), the university was said to regard the "department chairmen" as faculty members, not administrators. They did not sign an administrative agreement on being appointed; they represented the faculty at university senate meetings; they received no additional compensation; and they taught courses albeit fewer than their fellow faculty members. Thus, as in *Fordham*, they were held not to be supervisors within the meaning of the statutory definition.

In *Adelphi University*, supra, the Board also considered, inter alia, whether the members of a "personnel committee" and those of a "grievance committee" are supervisors within the statutory definition and concluded that, "[w]e are not disposed to disenfranchise faculty members merely because they have some measure of quasi-collegial authority either as an entire faculty or as representatives elected by the faculty." Accordingly, several members of these committees were held *not* to be supervisors within the meaning of the Act "solely by reason of such membership" and were included in the bargaining unit (supra at 648). Consult the text of this decision for a thorough discussion of supervisory and nonsupervisory determinations in an educational institution. On the other hand, consider the effect of the Supreme Court's *Yeshiva* decision, there regarding managerial status, on the concept of collegiality as a factor to be considered. (*NLRB v. Yeshiva University*, 444 U.S. 672 (1980).)

A contention that the bargaining unit cannot consist of faculty members because they are supervisors and managerial employees was rejected in *C. W. Post Center*, supra, and in *Manhattan College*, 195 NLRB 65 (1972). The Board observed in the latter: "That faculty members participate, by various means, in decisions regarding the operation of the college is no more persuasive here than it was in the earlier cases in establishing faculty members as members of management or as supervisors. As in those cases we find the faculty members to be professional employees under the Act who are entitled to vote for or against collective-bargaining representation." See also *Fordham University*, supra at 135.

The relationship between a faculty member and a graduate student is basically a teacher-student relationship which does not make the faculty member a supervisor. *Fordham University*, supra at 136. See *Detroit College of Business*, supra, for analysis of the effect of supervisory authority over nonunit clerical employees. See also section 17-510 of this chapter.

17-511 Health Care Supervisory Issues

177-8540-8000

177-8560-2800

177-8580-8000

Health care jurisdiction has occasioned considerable litigation of a number of supervisory issues especially those involving charge nurses. The litigation often centered on a line drawn by the Board between decisions and actions taken as part of patient care and more general 2(11) actions.

In *Northcrest Nursing Home*, 313 NLRB 491 (1993), the Board discussed at length the issue of whether LPN charge nurses responsibly direct nurses aides. In finding the nurses not to be statutory supervisors, the Board reaffirmed its "patient care" analysis, i.e., a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients, is not authority exercised "in the interest of the employer." *Northcrest*, 313 NLRB at 493–497.

Shortly thereafter, however, in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), the Supreme Court considered the Board's patient care analysis for determining the supervisory status, specifically the phrase "in the interest of the employer." In a five to four decision, the Court found the Board's test to be inconsistent with the statutory criteria of Section 2(11). Succinctly put, the Court majority found no basis for the Board's assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer. "Patient care is the business of a nursing home and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer." *Health Care & Retirement*, supra at 577. The Court also admonished the Board for devising a test that was industry specific. According to the Court, the Board erred in giving such statutory terms as "responsibly to direct" and "independent judgment" a different meaning in the health care industry than it does in other industries.

Recently the Supreme Court decided important issues of healthcare supervisory analysis on the independent judgment question. For more detail see, *NLRB v. Kentucky River Community Care*, 532 U.S.706 (2001), and the *Oakwood* trilogy discussed at section 17-502.

For "effective recommendation" cases see *Oak Park Nursing Care Center*, 351 NLRB No. 9 (2007) (filling out counseling forms is effective recommendation); *Coventry Health Center*, 332 NLRB 52 (2000) (nurse role in evaluation procedure not effective recommendation); *Trevilla of Golden Valley*, 330 NLRB 1377 (2000) (nurse evaluations had direct linkage to merit pay increase); *Third Coast Emergency Physicians*, P.A., 330 NLRB 756 (2000) (physicians did not make effective recommendation to hire, discipline or evaluate); and *Michigan Masonic Home*, 332 NLRB 1409 (2000) (recommendations for discipline not effective).

In a nonnurse health care case the Board rejected a contention that a maintenance employee was a supervisor. The Board found that his involvement in discipline was reportorial only.

In *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995), the Board did find that that authority of assistant supervisors with respect to annual evaluations was sufficient to conclude that they were supervisors.

For discussion of related supervisory issues involving the exercise vel non of independent judgment, see section 17-501.

17-600 Railway Workers

177-1683-7500

177-2484-7500

460-7550-3700

Individuals employed by employers subject to the Railway Labor Act are excluded from the coverage of the National Labor Relations Act.

The definition of an employer subject to the Railway Labor Act is reasonably clear, and individuals employed by such employers are, of course, not covered by the National Labor Relations Act.

In interpreting this statutory exclusion, a question arose in relation to individuals employed by a labor organization which regularly acts as bargaining agent for railway workers. As the union was acting "in its capacity of an employer" with respect to its employees, the considerations appropriate to other employers under the National Labor Relations Act were applicable, and the union was found not to be "an employer subject to the Railway Labor Act." Neither the National Mediation Board nor the National Railroad Adjustment Board had jurisdiction because "the Railway Labor Act is only applicable to carriers and employees of carriers, and does not regulate labor unions and their employees as such." *Locomotive Firemen & Enginemen*, 145 NLRB 1521 (1964).

For a fuller discussion of the interplay between the National Labor Relations Act and the Railway Labor Act, see chapter on Jurisdiction, ante.

17-700 Employees of "Nonemployers"

177-1683

Individuals employed by employers who do not come within the meaning of the definition of "employer" in Section 2(2) of the Act are excluded from its coverage. Similarly, individuals who "supervise" persons who are not employees are not supervisors. See *North General Hospital*, 314 NLRB 14 (1994), where attending physicians who "supervise nonemployee" residents and interns were held not to be supervisors.