SUPREME COURT OF THE UNITED STATES

No. 99–1815

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v. KENTUCKY RIVER COMMUNITY
CARE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 29, 2001]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in part and dissenting in part.

In my opinion, the National Labor Relations Board correctly found that respondent, Kentucky River Community Care, Inc., failed to prove that the six registered nurses employed at its facility in Pippa Passes, Kentucky, are "supervisors" within the meaning of the National Labor Relations Act. While we are unanimous in holding that the Court of Appeals set aside that finding based upon an incorrect allocation of the burden of proof, we disagree as to whether the Court of Appeals correctly concluded that the Board misinterpreted the provision of the NLRA excluding supervisors from the Act's coverage. Moreover, even if I agreed with the majority's view that the Board's interpretation was error, that error would not justify affirming the erroneous decision of the Court of Appeals.

I

In the proceedings before the Board, respondent relied heavily on the fact that two registered nurses (RNs) served as "building supervisors" on weekends, and on the second and third shifts. However, as the Regional Direc-

tor who considered the evidence noted, the RNs received no extra compensation for serving as building supervisors and did not have keys to the facility. Instead, the only additional responsibility shouldered by the RNs when serving as building supervisors was that of contacting other employees if a shift was not fully staffed according to preestablished ratios not set by the RNs. However, the RNs had no authority to compel an employee to stay on duty or to come to work to fill a vacancy under threat of discipline.

With respect to the RNs' regular duties, while they might "occasionally request other employees to perform routine tasks," they had no "authority to take any action if the employee refuse[d] their directives."[1] App. to Pet. for Cert. 51a. In their routine work, they had no "authority to hire, fire, reward, promote, or independently discipline employees or to effectively recommend such action. They did not evaluate employees or take any action which would affect their employment status." *Id.*, at 52a. Indeed, the RNs, even when serving as "building supervisors," for the most part "work[ed] independently and by themselves without any subordinates." *Ibid.*

Based on his evaluation of the evidence, the NLRB's Regional Director applied "the same test to registered nurses as is applicable to all other individuals in determining supervisory status." *Ibid.* Under that test, he concluded that "only supervisory personnel vested with 'genuine management prerogatives' should be considered supervisors and not 'straw bosses, leadmen, set-up men and other minor supervisory employees.'" *Id.*, at 53a (quoting *Chicago Metallic Corp.*, 273 N. L. R. B. 1677, 1688 (1985)). He did, however, exclude from the bargain-

[1] The RNs did have the authority to file "incident reports, but so [could] any other employee." App. to Pet. for Cert. 51a.

ing unit 10 specific supervisors including the nursing coordinator. App. to Pet. for Cert. 54a.

Over the dissent of Judge Jones, the Court of Appeals set aside the Board's order. The panel majority first criticized the Board for ignoring its "repeated admonition" that the NLRB "has the burden of proving that employees are not supervisors." *Id.,* at 15a. After acknowledging that "whether an employee is a supervisor is a highly fact-intensive inquiry," that majority concluded that the RNs' duties as building supervisors involved "independent judgment which is not limited to, or inherent in, the professional training of nurses." *Id.,* at 18a–19a. The panel majority also criticized the NLRB for interpreting the admittedly ambiguous statutory term "independent judgment" inconsistently with Sixth Circuit precedent.[2]

II

Although it is not necessary to do so to overturn the Court of Appeals' decision, the NLRB has asked us to reject the Sixth Circuit's interpretation of the term "independent judgment." In contrast to the Sixth Circuit, the NLRB interprets the term "independent judgment" as not including the exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.[3]

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[2] "According to NLRB interpretations, the practice of a nurse supervising a nurse's aide in administering patient care, for example, does not involve 'independent judgment.' The NLRB classifies these activities as 'routine' because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with 'management.'" App. to Pet. for Cert. 17a.

[3] Oddly, the majority in this Court omits one element– namely, "in accordance with employer-specified standards." *Ante*, at 8–9. In so doing, it ignores a key nuance in the NLRB's position. That, however, is characteristic of the majority's treatment of the NLRB's position, which is at once more fact specific and far less categorical than the

Providence Hospital and Alaska Nurses Assn., 320 N. L. R. B. 717 (1996), enforced, 121 F. 3d 548 (CA9 1997); *Nymed, Inc.,* 320 N. L. R. B. 806 (1996); see also, *e.g., Graphics Typography, Inc.,* 217 N. L. R. B. 1047, 1053 (1975), enforced mem., 547 F. 2d 1162 (CA3 1976). The Board's interpretation is a familiar one, which has been routinely applied in other employment contexts. See *Providence*, 320 N. L. R. B., at 717; *Graphics Typography*, 217 N. L. R. B., at 1053. Applying that interpretation, the NLRB has concluded that in some cases the employees in question are supervisors, and that in others they are not.[4] See Brief for Petitioner, 17–19, nn. 5–7 (collecting cases); see also Brief for Respondent Kentucky State District Council of Carpenters 36, n. 16 (collecting cases).

The question before us is whether the Board's interpretation is both "rational and consistent with the Act."[5] *NLRB* v. *Curtin Matheson Scientific, Inc.,* 494 U. S. 775, 796 (1990); see *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U. S. 27, 42 (1987). To my mind, the Board's test is both fully rational and entirely consistent with the Act.

The term "independent judgment" is indisputably ambiguous, and it is settled law that the NLRB's interpretation of ambiguous language in the National Labor Rela-

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majority makes it out to be.

[4] The majority, however, pays scant heed to the adjudicative record when it asserts that the Board's interpretation would in essence eliminate the supervisory exception with respect to the "responsibly to direct" function. See *ante*, at 7–8.

[5] "'[I]n many . . . contexts of labor policy, [t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.'" *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 501 (1978) (quoting *NLRB* v. *Truck Drivers*, 353 U.S. 87, 96 (1957)).

tions Act is entitled to deference.[6] See *NLRB* v. *Health Care and Retirement Corporation (HCR),* 511 U. S. 571, 579 (1994); *Auciello Iron Works, Inc.* v. *NLRB*, 517 U. S. 781, 787–188 (1996); *Curtin Matheson Scientific, Inc.*, 494 U. S., at 786–787. Such deference is particularly appropriate when the statutory ambiguity is compounded by the use of one ambiguous term– "independent judgment"– to modify another, equally ambiguous term– namely, "responsibly to direct."

Moreover, since Congress has expressly provided that professional employees are entitled to the protection of the Act, there is good reason to resolve the ambiguities consistently with the Board's interpretation. At the same time that Congress acted to exclude supervisors from the NLRA's protection, it explicitly extended those same protections to professionals, who, by definition, engage in work that involves "the consistent exercise of discretion and judgment in its performance."[7] 29 U. S. C. §152(12)(a)(ii). As this Court has acknowledged, the inclusion of professional employees and the exclusion of supervisors necessarily gives rise to some tension in the statutory text. Cf. *NLRB* v. *Yeshiva Univ.*, 444 U. S. 672, 686 (1980). Accordingly, if the term "supervisor" is construed too broadly, without regard for the statutory context, then Congress' inclusion of professionals within the Act's pro-

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[6] The majority suggests that the Board's interpretation of the term "independent judgment" is particularly problematic in light of this Court's decision in *NLRB* v. *Health Care & Retirement Corp. of America*, 511 U. S. 571 (1994) *(HCR).* But in *HCR*, this Court concluded that the terms "independent judgment" and "responsibly to direct" were ambiguous, while the term at issue in that case, "in the interest of the employer," was not. *Id.*, at 579.

[7] As the American Nurses Association point out in its *amicus* brief, the scope of nursing practice routinely involves the exercise of judgment and the supervision of others. Brief for the American Nursing Association as *Amicus Curiae* 2–6.

tections is effectively nullified.[8] See *HCR*, 511 U. S., at 585 (GINSBURG, J., dissenting). In my opinion, the Court's approach does precisely what it accuses the Board of doing– namely, reading one part of the statute to the exclusion of the other.

The Court acknowledges today that deference is appropriate when the Board determines both the degree of discretion required for supervisory status as well as the significance of limitations on the alleged supervisor's discretion imposed by the employer. Thus, in a case like this, a court should not second-guess the Board's evaluation of the authority of the nurses as building supervisors, or of the significance of the employer's definition of that authority.

However, in a *tour de force* supported by little more than *ipse dixit*, the Court concludes that *no* deference is due the Board's evaluation of the "kind of judgment" that professional employees exercise. *Ante*, at 7. Thus, under the Court's view, it is impermissible for the Board to attach a different weight to a nurse's judgment that an employee should be reassigned or disciplined than to a nurse's judgment that the employee should take a patient's temperature, even if nurses routinely instruct others to take a patient's temperature but do not ordinarily reassign or discipline employees. The Court's approach finds no support in the text of the statute, and is inconsistent with our case law. See, *e.g.*, *Yeshiva*, 444 U. S., at 690 ("Only if an employee's activities fall outside of the scope of the duties

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[8] Moreover, so broad a reading seems contrary to congressional intent in enacting the supervisory exception. Rather, the definition of "supervisor" was intended to apply only to those employees with "genuine management prerogatives" so that those employees excluded from the Act's coverage would be "truly supervisory." S. Rep. No. 105, 80th Cong., 1st Sess., 19 (1947), 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, pp. 410, 425 (1948).

routinely performed by similarly situated professionals will he be found aligned with management").[9]

The Court further argues that the Board errs by not applying its limiting interpretation of the term "independent judgment" to all 12 functions identified by the statute as supervisory in nature. *Ante*, at 8–9. But of those 12, it is only "responsibly to direct" that is ambiguous and thus capable of swallowing the whole if not narrowly construed. The authority to "promote" or to "discharge," to use only two examples, is specific and readily identifiable. In contrast, the authority "responsibly to direct" is far more vague. Thus, it is only logical for the term "independent judgment" to take on different contours depending on the nature of the supervisory function at issue and its comparative ambiguity.

Simply put, these are quintessential examples of terms that the expert agency should be allowed to interpret in the light of the policies animating the statute. See, *e.g.*, *Curtin Matheson*, 494 U. S., at 786; *Chevron U. S. A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984). Because the Board's interpretation is fully consistent both with the statutory text and with the policy favoring collective bargaining by professional employees, this Court is obligated to uphold it.

III

Even if I shared the majority's view that the term "independent judgment" should be given the same meaning when applied to each of the 12 supervisory functions and when applied to professional and nonprofessional employees, I would not simply affirm the judgment of the Court of Appeals. Cf. *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267,

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[9] In fact, in *Yeshiva*, 444 U. S., at 690, this Court concluded that the NLRB's decisions adopting such an approach "accurately capture[d] the intent of Congress."

289–290 (1974); *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87–88 (1943). The Court's rejection of the Board's interpretation of the term "independent judgment" does not justify a categorical affirmance of the Sixth Circuit's decision, which rests in part on an erroneous allocation of the burden of proof.[10]

In any case, I do not agree with the majority's view. Given the Regional Director's findings that the RNs' duties as building supervisors do not qualify them as "supervisors" within the meaning of 29 U. S. C. §152(11), and that they, "for the most part, work independently and by themselves without any subordinates," it is absolutely clear that the nurses in question are covered by the NLRA.[11] The Court's willingness to treat them as supervisors even if they have no subordinates[12] is particularly ironic when compared to the Board's undisturbed decision

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[10] Even under the Court's approach, since the NLRB might well prevail under the correct allocation of the burden of proof, the appropriate course of action in this case would be to return the case to the NLRB for further proceedings. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 295 (1974); see also *Electrical Workers* v. *NLRB*, 366 U. S. 667 (1961); *Ford Motor Co.* v. *NLRB*, 305 U. S. 364 (1939). *HCR*, on which the majority relies, see *ante*, at 15, is not to the contrary. In that case, unlike in this one, we found no error in the lower court's decision. Here, however, the lower court erred in its allocation of the burden of proof, a fact which would seem to make a remand to the NLRB in order to apply what the majority deems to be the correct legal principle particularly appropriate.

[11] Nor do the RNs exercise any of the other supervisorial functions listed in §152(11). They play no role in assigning staff to shifts on a permanent basis or in setting the staff-to-resident ratio. App. 18–19, 23–24. As noted above, the RNs, whether functioning in their ordinary capacity or as "building supervisors," do not have authority to hire, fire, reward, promote, or independently discipline employees, or to effectively recommend such action. Nor, for that matter, do they evaluate employees or take action that would affect their employment status.

[12] Neither the licensed practical nurses nor the rehabilitation assistants report to the RNs. *Id.*, at 30, 34, 45, 61.

to deny supervisory status to the other group of professionals employed by respondent– namely, the 20 rehabilitation counselors who supervise the work of 40 rehabilitation assistants.

Accordingly, while I join Part II of the Court's opinion, I respectfully dissent from its holding. I would reverse the judgment of the Court of Appeals.