

DAILY LABOR REPORT – KY RIVER DECISION – October 3, 2006

Long-Awaited Ruling on Supervisors Prompts Flood of Reaction from Unions, Management – By Michelle Amber

The long-awaited rulings by the National Labor Relations Board Oct. 3 on the definition of "supervisors" under the National Labor Relations Act were met with outrage by organized labor, which had been gearing up for months to respond to the rulings, while employer advocates were more cautious in describing the scope of the rulings.

In *Oakwood Healthcare Inc.*, the lead case of three related rulings released the same day, the board in a 3-2 decision issued new guidance for determining who is a supervisor and found that permanent charge nurses, but not temporary charges nurses, at a Michigan hospital were supervisors under the NLRA (see related story in this issue).

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Unions representing nurses blasted the decisions, saying the NLRB has set up a road map by which employers can deny union rights to nurses and other skilled workers. The decision "welcomes employers to strip millions of workers of their right to have a union by reclassifying them as 'supervisors' in name only," AFL-CIO President John J. Sweeney said. Supervisors are not protected under the NLRA.

According to Sweeney, the immediate implications of the *Oakwood* case are "devastating to workers in the health care industry and potentially in other industries, where professional employees direct or assign the work of others." The AFL-CIO president said the board has rewritten "broad definitions of supervisory duties, such as assigning work, responsibility to direct, and use of independent judgment. In fact, the board decided that if an employee spends as little as 10 to 15 percent of their time performing supervisory functions that they will be considered to be supervisors, and thus likely stripped of their right to have a union," he said.

Former NLRB Member Sarah M. Fox, now with labor firm Bredhoff & Kaiser in Washington, D.C., said the ruling "has the potential for quite sweeping consequences" and that many nurses and other employees could be treated as supervisors. Fox, who was on the board from 1996 to 2000, said the ruling meant that employees "low down on the totem pole" could be considered supervisors for giving the most simple directions.

Management Sees More Limited Impact

But Stephen A. Bokart of the National Chamber Litigation Center in Washington, D.C., said he was surprised by Sweeney's remarks, because the ruling was not nearly as far-reaching as Sweeney suggested. The NCLC is affiliated with the U.S. Chamber of Commerce. "I just don't see this ruling having that dramatic of an impact on workers and I think Sweeney is overstating the breadth of the ruling," said Bokart.

Former NLRB member John Raudabaugh, now a management attorney with Baker & McKenzie in Chicago, agreed that the decision was not as sweeping as many in the labor movement feared it would be. "This isn't the tsunami predicted by organized labor, but it does indicate isolated thunderstorms," suggested Raudabaugh, who was on the board from 1990 to 1993. Bokart and Raudabaugh said that the rulings were consistent with the direction provided by the U.S. Supreme Court in its prior rulings on the issue and the NLRB interpreted the statute without overreaching.

Pointing out that three of the four groups scrutinized in the three rulings were deemed to be nonsupervisors, Shane Brennan--also at NCLC--said that the ruling was not "the strong win for employers everyone thought it would be" but that the ruling did give guidance to employers trying to determine who is a supervisor.

In the two other cases released the same day as *Oakwood*, the board ruled that all charge nurses at a nursing home in Hibbing, Mont., and lead persons at an aluminum and vinyl products manufacturing plant in McComb, Miss., are not supervisors.

Unions See 'Road Map' for Excluding Workers

In critiquing the *Oakwood* ruling, advocates for nurses said the ruling provided specific steps employers could take to have nurses be considered supervisors and thus not eligible for union representation.

Candice Owley, chair of AFT Healthcare, a division of the American Federation of Teachers, said that the rulings provided a "road map for excluding workers from a union" and that the "Bush-dominated board is giving employers the blueprint to make workers supervisors."

Suggesting that hundreds of thousands of RNs could lose their rights, Rose Ann DeMoro, the executive director of the California Nurses Association/National Nurses Organizing Committee said the decision "forces RNs to choose between protecting their patients or keeping their job."

The ruling also has the potential to transform many nurses into supervisors because of the focus on independent judgment, said Cheryl Johnson of the United American Nurses.

"Nurses make decisions every day that are critically important, including decisions that require directing other staff," Johnson argued. "But that doesn't mean we are suddenly transformed into hospital supervisors."

Anna Burger, chairwoman of Change to Win, called the decisions "illogical, dishonest, and anti-democratic."

By narrowly defining several broad phrases of the NLRA the NLRB majority "has created a blueprint for eliminating the right to union representation for most professionals and from millions of leadpersons and employees who are currently represented," Burger said. "Contrary to what the Bush majority says, this decision is not legally required, but is another in a growing string of decisions that further narrow the right to organize.," she added.

Realities of the Modern Workplace

Management advocates dismissed the suggestion that most nurses would suddenly have their status changed because of the ruling, but they did agree that employers will now have greater incentive to evaluate their workplaces and determine who is a supervisor and who is not.

"These are decisions that deal with the realities of the modern workplace," said management attorney Hal Coxson of Ogletree, Deakins, Nash, Smoak & Stewart in Washington, D.C. Coxson authored an amicus curiae brief on behalf of the Council on Labor Law Equality. "It's hard to guess how many workers will be affected by the ruling, but it will certainly raise questions for employers about the status of their employees."

The impact of the decisions will likely be felt most strongly in workplaces where there is currently a union organizing effort or there is the potential for such an effort, said Raudabaugh. He said that workplaces that already have an existing union would likely not take significant efforts to challenge the classification of workers just to remove one or two people from the unit. Bokot and Brennan agreed.

"If you look at the specific cases, in one situation only 12 out of 181 nurses were considered supervisors," said Brennan. "That's not many people in a unit and an employer with an existing union is going to have to question whether it's worth going after such a small number of people." In contrast, Bokot said, eliminating even a small number of potential unit members in an organizing effort could have a dramatic effect on a union election, especially if those supervisors have significant influence on others in the unit. In those cases, he added, it would be worthwhile to "bring in the lawyers and sort out who is a supervisor."

Union Mobilizing in Reaction to Rulings




The labor movement does not plan to quietly accept the decisions, according to several officials. AFL-CIO Organizing Director Stewart Acuff told BNA that the affiliates of the federation will be mobilizing and demonstrating across America over the next week to 10 days. In addition, he said, labor already is meeting with congressional staff to work on legislation to overturn the decision, he added.

CNA's DeMoro vowed a "comprehensive response to this disgraceful decision." Initially, she said, the union will put employers on notice that its members will strike if any employer that has a contract with CNA attempts to exploit the current NLRB decisions. According to DeMoro, more than 30,000 CNA members already have signed pledges to strike. The union also plans to hold protests or other public events beginning Oct. 5 in cities around the country including Los Angeles, Chicago, St. Louis, Louisville, Ky., and Bangor, Maine.

Contending that the labor movement will not "silently stand by and let the NLRB hand over workers' rights to opportunistic employers without a fight," AFSCME President Gerald McEntee said that workers will participate in the mid-term elections "like never before.... We're going to elect U.S. Senators who will insist that nominees to the NLRB be fair and impartial and ultimately get this decision reversed."

Leo Gerard, president of the United Steelworkers, also said that union members can immediately "fight back by encouraging voters in this November's mid-term election to hold accountable those legislators who helped to give us this pro-corporate Supreme Court and Board." In addition, the unions in RNs Working Together, a coalition of the 11 AFL-CIO unions that represent nurses, said they will be actively encouraging hospitals and other facilities in the health care industry to "allow nurses to choose for themselves whether they want to be members of a union." AFT's Owley said, "Hospitals don't have to, and shouldn't, take the bait from the NLRB and deny nurses the right to union protection."

Leading up to the decision, unions in several states including New Jersey and California negotiated language in collective bargaining contracts designed to preserve the employee status of bargaining unit members despite any new definition of supervisor created by the NLRB (171 DLR A-13, 9/5/06

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