

Labor News

What Constitutes A 'Supervisor'?

*National Labor Relations Board
Decision Has Impact On Work World,
But Impact On Construction Is Limited*

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At the end of September, 2006, the National Labor Relations Board (NLRB or Board) issued a series of decisions which redefined who is and who is not a supervisor under the National Labor Relations Act (the Act). This determination is critical, as employees who meet the definition of a supervisor are not entitled to union representation.

The Board's decisions garnered a lot of publicity and were widely considered to be a victory for employers--though the companies involved in the cases didn't fare so well--largely because labor unions made loud noises about the decisions being unfair to unions and to workers.

And while that perception may or may not prove correct for some employers and industries, many contractors have asked whether the decisions will likely have much impact on the unionized segment of the construction industry. Only "time will tell" in the final analysis, but at least at first blush it does not appear that the effect of these decisions will be very pronounced for union contractors.

LEGAL BACKGROUND

The Act states that "supervisors" are excluded from the definition of "employee" and, as a result, are not entitled to the protections of the statute, including the right to organize. The Act defines a supervisor as "an individual having the authority . . . 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."

As noted by the Board, the definition is so detailed because the Act's goal was to distinguish true supervisors (those possessing management authority) from "straw bosses, lead men, and set-up men" (those that only perform minor supervisory duties). This has proven, however, to be a very difficult task for both the NLRB and the courts. In fact, in 2001 the U.S. Supreme Court issued a ruling directing the NLRB to define several of the key terms in this definition -- specifically "assign," "responsibly to direct," and "independent judgment." That is the task the NLRB assumed in these recent cases.

THE NEW STANDARDS

According to the NLRB, the term assign refers to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties,

i.e., tasks, to an employee." For example, assigning an employee to perform certain duties may constitute assigning -- but telling the worker in which order to perform previously assigned tasks would not.

The NLRB then turned to defining "responsibly to direct." The ruling first notes that this provision was included to ensure that the exemption included individuals who "exercise basic supervision but lack the authority or opportunity to carry out any of the other statutory supervisory functions." In light of this, the Board found that to establish "responsible direction" two elements must be shown: 1) the employer delegated to the individual the authority to direct the work and the authority to take corrective action; and 2) there is accountability for the individual -- in other words he or she may experience adverse consequences if this authority to direct the work is not properly applied.

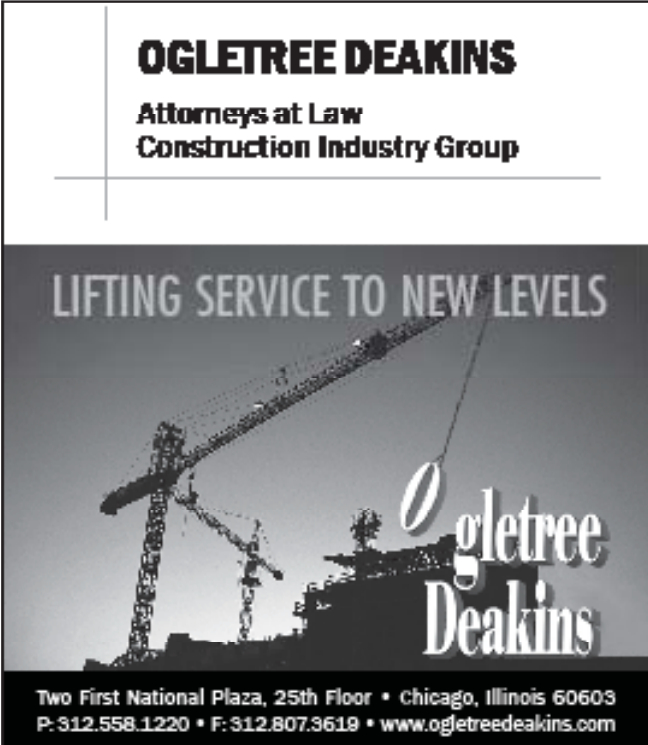
Finally, the NLRB evaluated "independent judgment." The first point made is that in evaluating independent judgment the key issue is the degree of discretion involved -- not the kind of discretion exercised. Therefore, professional or technical judgments involving independent judgment are supervisory if they involve one of the 12 supervisory functions listed in the definition.

In defining independent judgment, the NLRB evaluated

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the impact of employer policies, rules, or directives on the assessment of supervisory status. A judgment is not independent, the Board ruled, if “it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.”

APPLYING FACTS TO THE LAW

The next step for the NLRB was to apply these new standards to the three cases before it, none of which arose in the construction industry. The first case, brought against Oakwood Healthcare, Inc., involved charge nurses. These registered nurses are responsible for overseeing certain patient care units and assigning nurses and other hospital employees to patients on their shifts. They also monitor the unit and respond to unusual situations.

The NLRB held that the charge nurses “assign” within the intended meaning of the statute by directing other hospital employees to engage in specific tasks. Further, in assigning nurses (and their often unique talents) to specific patients, the charge nurses exercised “independent judgment.”

However, the NLRB concluded that the charge nurses are only held accountable for their own performance and not the performance of those they supervise – therefore there is no “responsible direction” and the charge nurses are not “supervisors” under the Act. Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006).

The second case also involved charge nurses – this time employed at a nursing home. Again the Board found that the charge nurses were not held accountable for the actions of the other employees that they directed; therefore they cannot be classified as supervisors. Moreover, the NLRB concluded that

the charge nurses didn’t even have the authority to require that other nurses shift their work assignments, and as a result they did not “assign” either. Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center, 348 NLRB No. 39 (2006).

The third case involved lead persons in the manufacturing sector. These individuals oversaw production and had authority to determine in which order the work would be performed. In addition, they were held accountable for their group – which established that they responsibly directed workers. However, the NLRB continued, the responsibility that they exercised was routine in nature (generally stemmed from pre-established guidelines) and thus they could not be classified as supervisors.

PRACTICAL IMPACT

Though these standards are far from “crystal clear,” they do better define who will be considered to be a “supervisor.” Moreover, these standards – while not particularly helpful to the three employers involved in these cases – may well help employers in some settings and industries to classify workers as supervisors (and therefore outside the coverage of the Act).

But that is not likely to be the case in the unionized segment of the construction industry, in our view.

The law permits supervisors to be union members and the law permits employers to agree to cover supervisors, foremen, general foremen or job superintendents in labor agreements. These new decisions do not change the law on those points. As a result, most unionized contractors will probably not want to change the status quo by trying to remove any foremen, general foremen, supervisors or job superintendents from the coverage of their labor agreements, regardless of what the definition of supervisor is under the National Labor Relations Act.

As a practical matter, when supervisors “come out of” the trades, they continue to be covered by at least certain portions of the union agreements (particularly fringe benefits) and to change that status quo would likely be met with resistance by the supervisors themselves. For open shop contractors, however, the situation is different. These new decisions will provide open shop construction employers with added support for excluding foremen, supervisors, and job superintendents who satisfy the new definition of supervisor from being part of the group of workers a construction union is entitled to represent, when that union is trying to gain representation rights among a group of non-union construction workers.

On the flip-side, these decisions may also give the petitioning union the ability to exclude such foremen, etc., from the list of persons eligible to vote in a Board election—potentially depriving the contractor of the votes of those who may have worked their way “up through the ranks” and who might be expected to be loyal to the company. And, finally, these decisions make it imperative to determine in the context of a union election campaign “who” meets the new criteria, because the employer will be held responsible for any misconduct of such “supervisors” in the campaign.

This is our initial reaction to the Board’s new “supervisor” decisions and how they may affect the construction trades and contractors, but there are many unanswered questions about the impact of these new rulings that will only be answered over time. Employers looking to assess the impact of the decisions on their specific operations should consult with their labor attorney.



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