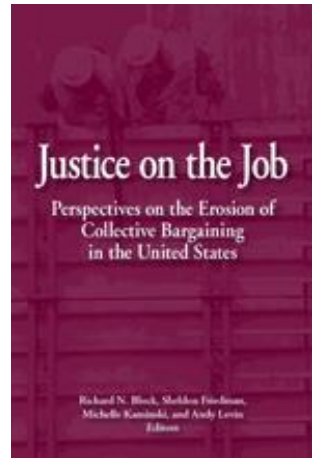

Upjohn Institute Press

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Chapter 8 (pp. 163-190) in:

**Justice on the Job: Perspectives on the Erosion of Collective Bargaining
in the United States**

Richard N. Block, Sheldon Friedman, Michelle Kaminski, Andy Levin, eds.
Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2006
DOI: 10.17848/9781429454827.ch8

8

Supreme Court Supervisory Status Decisions

The Impact on the Organizing of Nurses

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Registered nurses (RNs) have become attracted to union representation in recent years, and by 2003, 16.9 percent were union members (in contrast to 15.6 percent in 1985). Licensed practical nurses (LPNs) had a 10.8 percent unionization rate in that same year. Health care is clearly a major arena in which many professionals and technicians are now attempting to organize.¹ The National Labor Relations Act (NLRA) explicitly defines professionals as employees and grants them organizing and collective bargaining rights. The Supreme Court, however, has interpreted U.S. labor law in a way that puts barriers in the path of health care professionals who seek to join unions.²

Supervisory employees are excluded from coverage in the statute itself, and managerial employees have been excluded by judicial interpretation of the act. On the other hand, professionals often act in a supervisory or managerial capacity at times, insofar as they direct the work of less-skilled employees (e.g., nurses often direct nursing assistants). Thus, the NLRB and the courts have struggled with where to draw the line with regard to which professionals are employees whose rights to organize are protected by the law. In the last 10 years, the Supreme Court has reduced the number of health care professionals

who have such protection in two decisions, *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001) and *NLRB v. Health Care and Retirement Corp. of America*, 511 U.S. 571 (1994). Both decisions find certain groups of nurses to be supervisors and hence not employees with protected organizing rights. While these decisions were widely decried by the labor movement and clearly had an impact on the nurses in the two facilities concerned, their wider impact is less certain. In this chapter, we assess the effect of the more recent *Kentucky River* decision on organizing, with a primary focus on nurses and related health care professionals. We look at two different types of evidence: interviews with union organizers and attorneys and post-*Kentucky River* legal decisions.

THE DEFINITION OF SUPERVISORS ACCORDING TO THE NLRA AND THE SUPREME COURT

While the NLRA provides certain protections to workers (e.g., the right to join unions, the right to strike), those protections only apply to “employees,” as defined by Section 2(3) of the act. According to that section, “The term ‘employee’ shall include any employee . . . but shall not include . . . any individual employed as a supervisor (29 U.S.C. §152(3) (2001).” Thus, an individual employed as a “supervisor” as defined in section 2(11) is *not* considered an employee and is therefore *not* entitled to the act’s protections. However, professional employees are expressly included as employees in section 2(12).³

The terms *employee*, *supervisor*, and *professional employee* are defined by the text of the NLRA itself, but the Supreme Court has further defined their meanings in a number of decisions, two of which have been especially important in the field of health care. The first was *NLRB v. Health Care and Retirement Corp. of America*, a case that began with employer discipline of four LPNs in the context of an organizing drive. In response, the LPNs filed unfair labor practice charges with the NLRB.

Initially, the administrative law judge (ALJ) and the board had found that the nurses were not supervisors (*Health Care and Retirement Corp. of America*, 306 NLRB 63, 1992). In reaching that conclusion, the ALJ

and the board relied on “patient care analysis” (see Keller [1996] and Straight [1999] for a fuller discussion). To be considered a supervisor under section 2(11) of the act, a person has to exercise 1 of the 12 supervisory functions *in the interests of the employer*.⁴ Patient care analysis drew a distinction between “the interests of the employer” and “the interests of the patient.” According to patient care analysis, when a nurse utilized independent judgment in connection with his (her) professional judgment, (s)he would be considered a professional employee and not a supervisor. In applying that analysis, the ALJ held that the four LPNs were entitled to protection under the NLRA because their work did “not equate to ‘responsibly . . . directing’ the aides in the interest of the employer” and that “the nurses’ focus [was] on the well-being of the residents rather than [that] of the employer” (306 NLRB at 70).

In its 5–4 decision upholding the Sixth Circuit Court’s reversal of the board and determining that the LPNs were supervisors, the Supreme Court noted that there is a three-part test for determining whether individuals are supervisors: Individuals are deemed to be “supervisors” if 1) they hold the authority to exercise 1 of the 12 supervisory functions listed in section 2(11); 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and 3) their authority is held “in the interest of the employer.” Writing for the majority, Justice Anthony M. Kennedy concluded that the board impermissibly distorted the statutory language in trying to distinguish between “the interest of patients” and “the interest of the employer.” Kennedy stated

. . . the Board has created a false dichotomy—in this case, a dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer. That dichotomy makes no sense. 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. (511 U.S. at 577)

The second case in which the Supreme Court held that nurses were supervisors and therefore not entitled to the NLRA’s protections was *NLRB v. Kentucky River Community Care Inc., et al.* In *Kentucky River*, the Kentucky State District Council of Carpenters petitioned the NLRB in 1997 to represent a unit of professional and nonprofessional employees. The employer objected to the inclusion of six registered nurses in

the bargaining unit, arguing that they were supervisors under the act. The regional director found that the employer had not carried its burden of proof demonstrating that the nurses were supervisors—hence, he included them in the bargaining unit. The union won the election and was certified as the employees’ bargaining representative.

The board held that the nurses involved were employees and not supervisors because they did not exercise “independent judgment.” In its brief before the Supreme Court, the board stated

[t]he National Labor Relations Board has long held that an employee does not exercise “independent judgment” that triggers supervisory status under Section 2(11) of the National Labor Relations Act when he uses ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. That interpretation, which the Board has applied to a variety of industries and employees, is entitled to deference because it is rational and consistent with the Act. (Citations omitted; NLRB brief to Supreme Court at 11.)

In other words, the board made a distinction between independent judgment, which the board found as warranting supervisor status, and ordinary professional or technical judgment in accordance with employer specified standards, which the board found to be not supervisory.

The Supreme Court, however, in another 5–4 decision, affirmed another Sixth Circuit reversal of the NLRB. Justice Antonin Scalia, writing for the majority, found the board’s distinction to be without basis in law.

The Board, however, argues further that the judgment even of employees who are permitted by their employer to exercise a sufficient degree of discretion is not “independent judgment” if it is a particular kind of judgment, namely, “ordinary professional or technical judgment in directing less-skilled employees to deliver services.” (Brief for Petitioner 11.) The first five words of this interpretation insert a startling categorical exclusion into statutory text that does not suggest its existence. The text, by focusing on the “clerical” or “routine” (as opposed to “independent”) nature of the judgment, introduces the question of degree of judgment that we have agreed falls within the reasonable discretion of the Board to resolve. But the Board’s categorical exclusion turns on factors that have nothing to do with the degree of discretion an employee exercises. (532 U.S. at 714)

Acknowledging that the board has the discretion to determine the degree to which an employee's exercise of judgment places her within the exemption, Scalia nonetheless pointed out that the text of section 2(11) focuses on the clerical or routine nature of the judgment, not whether it is professional or technical. "What supervisory judgment worth exercising, one must wonder, does not rest on professional or technical skill or experience?" he asked (532 U.S. at 714). These two cases, combined with the ongoing reorganization of nursing work to include more supervisory duties in the job of the typical nurse, raise questions about whether or not nurses will be able to avail themselves of their rights granted by the NLRA.

OPINIONS OF UNION ORGANIZERS, ORGANIZING DIRECTORS, AND UNION LEGAL COUNSEL

We began to investigate the impact of *Kentucky River* by interviewing practitioners who are in a position to evaluate what effects, if any, the ruling is having on nurse organizing. We talked to union staff involved in organizing or supporting organizing from groups that represent nurses in two states and one metropolitan area: California, Illinois, and greater New York City. The purpose was not to do a statistically valid survey but rather to explore what effects, if any, *Kentucky River* may be having "on the ground" in three major geographic areas that have seen a great deal of interest in representation among nurses.

We talked to eight individuals in the following organizations: United American Nurses, California Nurses Association, New York State Nurses Association, Illinois Nurses Association, Health Professionals and Allied Employees/AFT and the Service Employees (the international and two of its California locals); we also received a brief e-mail response from the Steelworkers, who stated that they were organizing nurses primarily in other states. The specific questions we posed varied somewhat depending on the main responsibility of the individual to whom we were speaking, but questions focused primarily on whether or not the union had seen an increase or decrease of interest in organizing among nurses in the 18 months following the *Kentucky River* decision, whether or not the union had witnessed a change in employer tactics as

a result of the decision, whether or not the union had changed what it was doing to organize in light of the decision, and whether or not the union was involved in litigation as a result of *Kentucky River*.⁵

Most union staff stated they had not see any diminution of interest in representation on the part of nurses. Some claimed that, if anything, interest in unionization has increased, as a result of the workload pressures on nurses occasioned by the shortage of nurses and continued cost-cutting by hospitals affecting staffing levels.⁶ Others argued that, although *Kentucky River* appears to have had little impact on interest in organizing among nurses, there has been some diminution of interest in the recent period due to the increased individual bargaining power of nurses stemming from the nursing shortage, the efforts of hospitals to avoid unionization by granting large increases in wages and benefits, and the rise of opportunities to work desired hours as an agency nurse.⁷

No organization has changed the groups that it was targeting for organizing as a result of the *Kentucky River* decision; organizations were not shifting organizing resources from the private to the public sector, from one type of health care worker to another, or from one type of health care provider (acute care, long-term care, etc.) to another. In at least one case, this was because a sector was already union-saturated (the public sector in the New York City metropolitan region), so sectoral shifts were not possible. Interestingly, in this case, the earlier *Health Care Retirement* decision had caused a shift away from organizing RNs in nursing homes and toward nurses in hospitals; *Kentucky River*, however, has made little difference.⁸

Naturally, all the union staff saw the *Kentucky River* decision as problematic, but its effects on employer tactics, on union tactics, and on the ultimate ability of nurses to organize were seen as being incrementally negative rather than as disastrous. Several staff pointed out that employers began contending that nurses are supervisors well before the decision. *Kentucky River* deepened the problem but did not fundamentally change the situation. A number of organizers did report, however, that *Kentucky River* has lengthened delays in elections and/or first contract bargaining. This is potentially a serious problem in that election delays have long been associated with union losses (Roomkin and Block 1981).

Some organizers reported that *Kentucky River* has lengthened delays because it has increased the ability of hospitals to challenge bargaining units before the election on the grounds that charge nurses are really supervisors. New York State Nurses Association organizer John O’Conner spoke of two hospitals in the New York City area that have done this and said, “I believe the employer, in both cases, used the supervisory status as a stall-tactic based on the *Kentucky River* decision.” SEIU Associate General Counsel Diana Ceresi also emphasized the problems that were being caused by uncertainty over whether or not individuals would be considered supervisors and the accompanying delay:

Nurses are organizing because of real concerns about their working conditions—systematic understaffing resulting in forced overtime, floating out of specialty areas and lack of adequate time for individual patients. Instead of welcoming nurse input, some employers go to great lengths to instill fear and fight the nurses’ organizing efforts. In one case, they have gone so far as to claim that every nurse in a hospital is a supervisor . . . Even if the argument is a losing one in the end for the employer, hashing out the supervisory questions through the various levels of appeal results in months if not years of delay before nurses can even get to the table to negotiate for simple workplace changes.

As suggested by this quote, the delay can come after a successful representation election but before bargaining. Nicole Fefferman, a staff organizer for SEIU Local 121 in Los Angeles, cited the situation at one employer subsequent to the decision. This employer refused to come to the bargaining table for a unit that contained charge nurses, even though the NLRB earlier had found them to be eligible to vote in an election when the employer challenged their eligibility at that time. The uncertain legal situation, in her opinion, was adding to the delay. This view was echoed by Beth Kean of the California Nurses Association, who stated, “If unions get caught up in the *Kentucky River* legal trap, union recognition and first contracts could be delayed for many, many years, with the continued uncertainty during that time about charge nurse/team leader eligibility and even whether or not recognition will ever happen at all.”

Unions are finding ways to cope with this difficult environment, however. Several organizations told us that they were responding by

applying community pressure on the employers involved. For instance, the CNA said that it was getting groups of charge nurses who want union representation to step down from their charge positions into regular staff positions before the eligibility cutoff date to ensure their eligibility. This happened, for example, at St. Joseph's Hospital in Eureka, California, where a 300-RN unit refused the extra pay and responsibilities of the charge nurse position. Kean claimed that, after this, another hospital in the same chain did not challenge the charge nurse/team leader union eligibility at all, apparently deciding that it did not want to receive the bad publicity accompanying the Eureka job action. Similarly, Andrew Strom, Associate General Counsel for the SEIU in Los Angeles, stated that, in at least one case, his organization attempted to mount community pressure rather than turn to litigation as a way to counteract employer claims that charge nurses were supervisors. John O'Connor of the New York State Nurses Association talked about a current campaign where the health care agency had claimed many nurses to be supervisors:

Our strategy will be to apply community pressure on the employer. We plan to picket the hospital board members' businesses and we have obtained the support and participation from other community organizations . . . We plan to use the militancy of the nurses to get what they want. In addition, we plan to educate the nurses on their collective bargaining power in the workplace.

It would appear that *Kentucky River* is reinforcing a tendency among labor organizations to utilize community organizing strategies and membership-mobilization in order to counteract the general problems occasioned by the current legal process for representation.

Attorney Andrew Strom, of the SEIU in Los Angeles, pointed out that the *Kentucky River* decision is having ramifications for other types of workers besides nurses:

The issue goes beyond the nurses and hospitals. We have a group of security officers who are organizing. Every building has a lead person. The existence of a lead person could cause the employer to push the issue of supervisory status. I don't think it was the intention of the act to turn 'lead' people into supervisors.

It is interesting to note that Strom's opinion is borne out by the case analysis that we conducted for this study, which demonstrates as much impact of *Kentucky River* outside health care as within that sector.

IMPACT OF *KENTUCKY RIVER* ON SUBSEQUENT LEGAL DECISIONS

We assessed the importance of *Kentucky River* on subsequent legal decisions by reading every opinion that mentioned the case after the Supreme Court's decision and evaluating the extent to which the Court's decision in *Kentucky River* influenced the outcome. We used Lexis to locate all cases that mentioned *Kentucky River* for the period from the decision until November 1, 2004. Our goal was not to do a statistical analysis of cases but rather to gain an understanding of how *Kentucky River* is affecting subsequent decisions by the NLRB and the courts. We also were interested in determining whether or not the effects of *Kentucky River* are being felt in other industries besides health care and by other occupational groups besides nurses.

Court of Appeals Cases

According to Lexis, *Kentucky River* has been cited in 14 court of appeals decisions and in a 15th case by the dissenting judge. Table 7.1 lists all 15 decisions. According to our reading of these decisions, the Supreme Court's opinion does seem to be of some import at the circuit court level. While it is too early to determine with certainty just how much the case has mattered, it is clear that *Kentucky River* is influencing the decisions of the circuit courts. Two of the 14 decisions in which *Kentucky River* was cited involved health care. In both, the NLRB had found certain nursing professionals to be employees protected by the act but the court reversed and remanded the cases back to the board to reconsider its decision in light of *Kentucky River*. One recent decision involving a health care facility was rendered in *Evergreen New Hope Health & Rehab. Ctr. v. NLRB*, 2003 U.S. App. LEXIS 10644 (9th Cir. May 27, 2003), a case that has been very heavily influenced by *Kentucky River* throughout. An election was held in a bargaining unit that included "[a]ll full-time and regular part-time licensed vocational nurses, nurses aides, certified nursing assistants" and a small number of registered nurses. Since the regional director had found that to be an appropriate unit prior to *Kentucky River*, the board, in light of the Supreme Court's decision, granted the employer's request for review. Following

Table 7.1 Appellate Court Cases Referring to *Kentucky River*

	Industry; employees	Effect of <i>Kentucky River</i> (KR)
Circuit court cases		
<i>Albertson's v. NLRB</i> , 301 F. 3d 441 (6th Cir. 2002)	Grocery; n/a	None. Procedural citation.
<i>Beverly Enterprises-Minnesota, Inc. v. NLRB</i> , 266 F 3d 785 (8th Cir. 2003)	Health care (nursing home); RN/LPN	Some. Remanded to NLRB.
<i>Brusco Tug & Barge v. NLRB</i> , 247 F 3d 273 (DC Cir. 2001)	Inland shipping; mates	None.
<i>Coastal Lumber v NLRB</i> , 117 L.R.R.M 3215 (4th Cir. 2001)	Lumber; n/a	Some. Remanded to NLRB.
<i>Coursen v. United States Postal Serv.</i> , 256 F. 3d 1353 (Fed. Cir. 2001)	Postal service; postal worker	None.
<i>Entergy Gulf States v. NLRB</i> , 253 F. 3d 303 (5th Cir. 2001)	Elec. power; operations coordinator	Probably none. Reversed NLRB but KR not important.
<i>Evergreen New Hope Health & Rehab. Cr.</i> , 2003 U.S. App. LEXIS 10644 (9th Cir. 2003)	Health care; charge nurses	Matters. Court reversed NLRB citing KR.
<i>Multimedia KSDK, Inc. v. NLRB</i> , 271 F.3d 744 (8th Cir. 2002)	Television; editors/producers	None.
<i>NLRB v. Dole Fresh Vegetables</i> , 2003 U.S. App. LEXIS 10788 (6th Cir. 2003)	Vegetable packing; maintenance leads	None. Cited on burden of proof.
<i>NLRB v. Interstate Builders</i> , 351 F. 3d 1020 (10th Cir. 2003)	Iron works; n/a	None. Cited on procedural issue on dissent.
<i>NLRB v. Quinnipiac College</i> , 256 F 3d 68 (2nd Cir. 2001)	College; sec. officers and shift supervisors	Probably none. Reversed NLRB but KR not important.
<i>Nathan Katz Realty LLC v. NLRB</i> , 251 F 3d 981 (DC Cir. 2001)	Real Estate; apartment supervisors	None. Cited on burden of proof.

<i>Public Service Co. v. NLRB</i> , 271 F.3d 1213 (10th Cir. 2001)	Utility; transmission workers	Matters. Refused to enforce bargaining order. Because of KR; remanded to NLRB.
<i>Webco Industries, Inc. v. NLRB</i> 90 Fed. Appx. 276 (10th Cir. 2003)	Steel manufacturing; trainer	None. Cited on burden of proof.
<i>Westchester Iron Works v. NLRB</i> , 2002 U.S. App. LEXIS 20755 (DC Cir. 2002)	Iron works; n/a	None.
California appellate court case		
<i>Rodney Lee Roth et al., Bice, et al.</i> 2002 Cal. App. Unpub. LEXIS 3368	Construction; foremen	None. Would have been supervisor prior to KR.
Arizona court of appeals		
<i>Smith v. Cigna Health Plan of Arizona</i> , 2002 Ariz. App. LEXIS 120	Health care; chief of staff (MD)	None. Clearly supervisory before KR.

a hearing on remand, the regional director issued a supplemental decision and direction of election in which he, applying *Kentucky River*, reaffirmed his finding that the employer had failed to establish that its registered nurses were statutory supervisors. On September 21, 2001, the board denied the employer's request for review of this supplemental decision. When the 9th Circuit heard the case, however, it reversed the decision and remanded the case to the regional director, ordering him to review his finding on the supervisory status of the registered nurses, stating:

That these decisions rely on the charge nurses' professional training and experience does not mean that it is not also an exercise of independent judgment . . . There is substantial evidence in the record that the charge nurses exercise independent judgment and that they are 'responsibly to direct' the other employees. There is not substantial evidence in the record to support the regional director's conclusion that the charge nurses are not 'supervisors' as defined by 29 U.S.C. § 152(11) (2003 U.S. App. LEXIS 10655 at p. 5) (citations omitted)

Similarly, in *Beverly Enterprises-Minnesota, Inc. v. NLRB*, 266 F.3d 785, (8th Cir. 2001) the 8th Circuit remanded the case to the board for reconsideration in light of *Kentucky River*. This case became one of the three lead cases designated for decision by the board in July, 2003, and has yet to be determined by the board on remand. It will be discussed further below.

Kentucky River also has had an impact on court of appeals decisions outside of health care. In two cases at this level, the courts specifically relied on *Kentucky River* in reversing an NLRB decision. The clearest negative outcome for employee rights came in *Public Service Company of Colorado v. NLRB*, 271 F. 3d 1213 (10th Cir. 2001), a case in which the 10th Circuit Court refused to enforce the board's bargaining order or even remand the case:

[The Board's] decision specifically traces the standard that it applies to the line of charge nurse cases overturned by *Kentucky River*. Rather the finding was by necessity based on the very categorical distinction struck down by the Supreme Court. Hence the Board's erroneous interpretation of "independent judgment" precludes us from enforcing its order in this case. Accordingly we reverse the Board's entry of summary judgment, vacate its bargaining order di-

recting the Company to negotiate with a Union bargaining unit that includes the transmission employees, and deny enforcement. The Board's request for remand is also denied. (271 F/ 3d., p. 1218)

Similarly, in *Coastal Lumber v. NLRB*, 2001 U.S. App. LEXIS 23424; 24 Fed. Appx. 120 (4th Cir. 2001), the NLRB had certified a bargaining unit in 2001, but the employer appealed to the 4th Circuit, contending that six employees in the unit were supervisors and therefore not entitled to organize and bargain collectively. The board cross-petitioned for enforcement of its order. The Circuit Court remanded the case to the board for reconsideration in light of *Kentucky River*, “[b]ecause the decision in this case can be read to have been premised in part on an incorrect legal standard” (24 Fed. Appx., p. 121). Here again, *Kentucky River* was the basis for a court of appeals’ refusal to enforce a bargaining order.⁹ In this case however, the remand to the board may or may not result in an ultimate change in the board’s decision as to the supervisory status of the employees.

In the remaining court of appeals decisions, the courts cite *Kentucky River* in a routine way, as the Supreme Court’s latest pronouncement on supervisory status. The outcomes in these cases do not appear to turn on *Kentucky River*, however.

NLRB Cases

In examining the impact of *Kentucky River* at the NLRB level, we divide our discussion into two periods. On July 24, 2003, the NLRB invited the parties and interested *amici* to file briefs addressing supervisory issues in light of the *Kentucky River* decision for three lead cases: *Oakwood Healthcare*, *Beverly Enterprises—Minnesota, d/b/a Golden Crest Healthcare Center*, and *Croft Metals*. This announcement signaled a decision by an NLRB increasingly dominated by appointees of President Bush, as opposed to those appointed by President Clinton, to reexamine its approach to the entire question of supervisory status. While the NLRB has not issued a decision or ruling in these three lead cases upon completion of this chapter in late 2004, its general counsel, Arthur F. Rosenfeld, filed an amicus brief on September 18, 2004 and the perspective espoused in this brief may well be adopted by the NLRB, in whole or in part. Since the board’s notice in July 2003 may well indicate a shift in its views, we discuss this brief and the few cases

in the area decided by the board after July 2003, separately from our discussion of its position up to July 24, 2003.

Cases prior to July 24, 2003

According to LEXIS, *Kentucky River* was cited in 39 NLRB decisions prior to July 24, 2003.¹⁰ Table 7.2 contains the cases for this period. Ten of the cases involve the health care industry, broadly construed to include hospitals, long-term care facilities/nursing homes, medical clinics, group homes, and home health care workers. In most of these cases, the supervisory status of nurses is at issue, although two involve doctors and one involves the program managers of group homes for the developmentally disabled. Further, outside health care, there are some major industrial/occupational groupings that have been analyzed under the rationale announced in *Kentucky River*: a number of cases involve mates, pilots, and captains in boats/casinos operating in inland waterways, and another group involves coordinators for electric utilities. We divide our discussion by industry beginning with health care.

Throughout this period, the board generally continued to classify nurses as employees rather than supervisors despite *Kentucky River*, even in cases that had been remanded to the board after the Supreme Court decision. The board reached this conclusion by focusing on the nonindependent nature of the nurses' decisions, rather than on their professional nature—and in nursing, direction of nurses' aides and other employees is often carried out in accord with detailed guidelines established by the employer. For example, *Nurses United for Improved Patient Healthcare*, 2002 NLRB LEXIS 319 (2002), dealt with a clinical coordinator's eligibility for inclusion in a bargaining unit over the employer's contention that she was a supervisor. Despite *Kentucky River*, the ALJ found her to be an employee, stating: "The degree of discretion which O'Roark exercises is simply too minimal for her to be considered a supervisor" (2002 NLRB LEXIS 319 at p. 11). Similarly, in *Norton Health Care, Inc.* 2003 NLRB LEXIS 96 (NLRB Mar. 14, 2003), the board conducted an extensive analysis on the status of two clinical coordinators (charge nurses) in light of *Kentucky River* and still found them to be employees, protected by the act.

Kentucky River influenced the outcome in several cases at the board outside of health care during this period, however. In two cases, the Court's decision in *Kentucky River* caused an ALJ to issue a "supple-

mental decision on remand” reversing an earlier decision that had found several people associated with a shipping company to be employees rather than supervisors. (*Marquette Transportation/Bluegrass Marine*, 2001 NLRB LEXIS 655 (2001) and *American Commercial Barge Line Co.*, 2001 NLRB LEXIS 591 [2001]). These cases were part of a larger group of cases, all arising from a multiemployer recognition strike by a pilots union. In two of these cases, the ALJ had decided that the pilots were supervisors and, although *Kentucky River* was decided in the interim, the board affirmed the ALJ decision without any reliance on the new decision. In both *Marquette* and *American Commercial Barge*, a different ALJ had come to the opposite conclusion—that the pilots were employees (the original decisions were (*Marquette Transportation/Bluegrass Marine*, 1999 NLRB LEXIS 462 [1999] and *American Commercial Barge Line Co.*, 1999 NLRB LEXIS 662 [1999]). After the Court’s decision in *Kentucky River*, the board remanded these cases to the ALJ who, after reconsidering the evidence, found the same people to be employees. While *Kentucky River* was cited in the new decisions, however, the ALJ actually relied more on an earlier line of cases in the maritime industry. The board itself, in affirming the second ALJ decision in *American Commercial Barge*, more clearly relies on *Kentucky River* (2002 NLRB LEXIS 355). Thus, in these cases, *Kentucky River* was clearly the stimulus for reconsideration of an earlier decision, but appears to have been less important in the actual substance of the new decisions. At the same time, the ultimate outcome was the loss of jobs and rights by all these pilots.

Similarly, in *Majestic Star Casino*, 335 NLRB No. 36 (2001), the regional director had determined that the mates on the employer’s riverboat were employees rather than supervisors, and the employer appealed the regional director’s finding to the NLRB. In August 2001, the board remanded the case to the regional director, stating: “In light of *Kentucky River*, the Board has decided to remand this proceeding to the Regional director to reopen the record on the issue of whether the Employer’s mates ‘assign’ and ‘responsibly direct’ and on the scope and degree of ‘independent judgment’ used in the exercise of such authority” (335 NLRB No. 36, at p. 9).

The large number of cases in our sample in which *Kentucky River* is merely cited on burden of proof or in which it merely results in a remand for reconsideration either by the board or the ALJ may be reflect-

Table 7.2 NLRB Cases Referring to *Kentucky River* before July 24, 2004

	Industry; employees	Effect of <i>Kentucky River</i> (KR)
Health care cases		
<i>Beverly Health & Rehabilitation Services</i> , 335 NLRB No. 54	Long-term care; LPN	None
<i>Franklin Hosp. Med. Ctr d/b/a Franklin Home Health</i> , 337 NLRB No. 132	Health care; staff nurses	None
<i>Ken-Crest Services</i> , 335 NLRB No. 63	Health care; program manager	None
<i>Lutheran Home at Moorestown</i> , 334 NLRB No. 47	Long-term care; RN & LPN	None
<i>Maui Medical Group, Inc.</i> , 2002 NLRB LEXIS 125	Clinics; nurses	None
<i>Norton Health Care Inc.</i> , 2003 NLRB LEXIS 96	Hospital; clinical coordinator	None
<i>Nurses United for Improved Patient Health care</i> , 2003 NLRB LEXIS 107	Home health care agency; IV clinical coordinator	None. Cited on burden of proof.
<i>St. Barnabas Hosp.</i> , 334 NLRB No.125	Hospital; doctors	None
<i>Staten Island Univ. Hosp.</i> , 2001 LEXIS 519	Hospital; charge nurse	None. Cited on burden of proof.
<i>Wilshire at Lakewood</i> , 2002 NLRB LEXIS 301	Long-term care center; RN	Probably none. Probably would have been supervisor prior to KR.
Non-health care cases		
<i>Adriana Distributors, Inc.</i> , 2001 LEXIS 551	Pharmaceutical distributor; general manager	None
<i>Alter Barge Lines, Inc.</i> , 336 NLRB No. 132 (2001)	Inland shipping; pilots	None. Ingram Barge is key.
<i>American Commercial Barge Line Co.</i> , 2001 LEXIS 591	Inland shipping; pilots	Matters. ALJ reversed decision.
<i>Arlington Masonry Supply</i> 2003 NLRB LEXIS 398	Building materials; maintenance supervisor	Matters. NLRB reversed ALJ decision.

<i>B&A Associates</i> , 2003 NLRB LEXIS 267	Building management; service manager	None
<i>Bay Harbour Electric</i> , 2002 NLRB LEXIS 577	Construction; foremen	None. Cited on burden of proof.
<i>Brad Snodgrass, Inc.</i> , 2003 NLRB LEXIS 157	Construction; foremen	None
<i>Chardon Rubber Company</i> , 335 NLRB No. 92 (2001)	Rubber; production and maintenance workers	None. Cited on burden of proof.
<i>Citywide Corporate Transportation</i> , 2002 NLRB LEXIS 537	Limo service; driver	None
<i>Clock Electric</i> , 2003 NLRB LEXIS 123	Construction; project manager	None
<i>David Van Os & Assocs. PC</i> , 2002 NLRB LEXIS 16	Law firm; attorney and administrative staff	None
<i>Dist. No. 1, Marine Engrs Ben. Asso.</i> , 2003 NLRB LEXIS 36	Shipping; licensed assistant marine engineers	Unclear. Possibly some. Union used to support case.
<i>Dole Fresh Vegetables</i> 2003 NLRB Lexis 395	Cannery; maintenance leads	None. Cited on burden of proof
<i>Ducommun Aerostructures</i> , 2002 NLRB LEXIS 312	Aerospace mnfg; leadmen	None
<i>Dynamic Science, Inc.</i> , 334 NLRB No. 57 (2001)	Military contractor; artillery test leaders	None
<i>E.C. Waste, Inc.</i> , 2001 LEXIS 718	Waste collection; customer service reps.	None. Cited on burden of proof
<i>Ferguson Enterprises</i> , 2002 NLRB LEXIS 504	Construction supply; foremen	None
<i>Freeman Decorating Co.</i> , 336 NLRB No.1(2001)	Construction; carpenters	None. Procedural cite.
<i>Fuji Foods US, Inc.</i> , 2002 NLRB LEXIS 313	Meat processing; quality control assistant	None. Cited on burden of proof
<i>GFC Crane Consultants, Inc.</i> , 2002 NLRB LEXIS 121	Crane repair; port engineers	None
<i>Ingram Barge Co.</i> , 336 NLRB No. 131 (2001)	Inland shipping; pilots	None
<i>Inter-con Security Systems, Inc.</i> , 2003 NLRB LEXIS 329	Guard services; various	None. Cited on NLRB determines degree of discretion.

Table 7.2 (continued)

	Industry; employees	Effect of <i>Kentucky River</i> (KR)
Non–health care cases		
<i>Majestic Star Casino, LLC</i> , 335 NLRB No. 36 (2001)	Riverboat casino; mates	Some. NLRB remanded to ALJ.
<i>Marquette Trans/Bluegrass Marine</i> , 2001 NLRB LEXIS 655	Inland shipping; pilots	Matters. ALJ reversed decision.
<i>New York Law Publishing Co</i> , 336 NLRB No. 93 (2001)	Publishing; production & editorial	None
<i>Quality Mechanical Insulation</i> , 2003 NLRB Lexis 367	Insulation contractor; foreman in warehouse	None. Cited on burden of proof.
<i>Rhee Brothers</i> , 2003 NLRB LEXIS 3	Food warehouse; assistant & section managers	None. Cited on burden of proof.
<i>Sheet Metal Wkrs Local U 102 & 105</i> , 2003 NLRB LEXIS 270	Construction; jobsite foreman	None.
<i>Williamette Industries</i> , 336 NLRB No. 59 (2001)	Manufacturing; leadmen	None. Cited on burden of proof.

ing the recentness of the decision given the length of time that it takes cases about supervisory status to go through the NLRB and the courts.

More recently, in *Arlington Masonry Supply*, 339 NLRB No. 99 (2003), the board overturned an ALJ decision that a “maintenance supervisor” was not a supervisor under the act in a case that hinged on the degree of independent judgment that was involved. The board found that the individual in question used independent judgment because he assigned work—“a primary indicia of supervisory authority” according to the board. In overturning the ALJ, the board stated (339 NLRB No. 99, footnote 9 at p. 717): “In *Kentucky River*, supra, the Supreme Court rejected the rationale relied on by the hearing officer here that judgment involving assignment and direction of work which is based on technical skill and experience does not constitute ‘independent judgment’ within the meaning of Sec. 2(11).”

CHANGE IN THE NLRB’S APPROACH TO SUPERVISORY STATUS?

As mentioned earlier, on July 24, 2003, the NLRB invited parties and interested *amici* to file briefs addressing supervisory status issues in light of *Kentucky River* for three “lead cases,” *Oakwood Healthcare*, *Beverly Enterprises—Minnesota, d/b/a Golden Crest Health Care Center* and *Croft Metals*. Clearly the board is reconsidering its approach to the question of supervisory status in light of *Kentucky River*, and nurses are especially likely to be affected; two of the three cases involve nurses—RNs acting in a charge nurse capacity in a hospital (*Oakwood*) and charge nurses (both RNs and LPNs) in a long-term care facility (*Beverly Enterprises*). The third case involves “leadmen” and “load supervisors” in a manufacturing facility. All three cases turn on the degree of “independent judgment” used by the individuals in question in assigning work and/or directing other employees (the issue in *Kentucky River*) and all are cases in which ALJs and regional directors, applying the earlier criteria of the NLRB, found individuals not to be supervisors under the act. While the board has not yet issued its decisions in these three cases, it would seem fairly certain that it will attempt to apply similar standards to health care and other employees.

Given that the NLRB could rule at any moment, we will discuss these cases only briefly. Our discussion will necessarily be speculative—only time will tell what the Bush NLRB will decide is sufficient “independent judgment” for an individual to be considered a supervisor under the act. We view the brief filed by General Counsel Arthur F. Rosenfeld (Rosenfeld 2003) as likely giving an indication of the direction of the board, but it is not evident that its recommendations will be adopted in their entirety.

Oakwood Healthcare is a case involving charge nurses at a Minnesota acute-care hospital. While a few charge nurses fill the position on a continuing basis, most are RNs who rotate into the job temporarily once or twice every two weeks; while they function in that capacity they earn an additional \$1.50 per hour. The charge nurses have various responsibilities, including meeting with a doctor if the doctor has an issue with a particular nurse or patient, meeting with a patient or a patient’s family if they have a complaint, and filling out an incident report if there is an error or an accident (like a fall). Most importantly, the charge nurse assigns staff nurses to work with individual patients. Much of the assignment, however, is done in accordance with detailed written hospital policies to equalize workloads and maintain continuity of care from one day to the next. The ALJ ruled and the regional director agreed, that this level of independent judgment did not make these nurses supervisors—but the board’s ruling in *Arlington Masonry Supply* and the Rosenfeld brief indicate that NLRB may be about to change its standard in this area. Rosenfeld proposes, “The Section 2(11) power to assign with independent judgment is demonstrated by evidence that the alleged supervisor has discretion to assign work of differing degrees of difficulty or desirability on the basis of his or her own assessment of an employee’s ability or attitude” (Section 2a).

Beverly Enterprises involves RNs and LPNs acting as charge nurses in a skilled nursing facility. As far back as 1999, a union sought an election in a unit of LPNs and RNs, but the employer sought to exclude as supervisors all 8 RNs and 11 of the 12 LPNs who served as charge nurses. In March 1999, the regional director issued a decision and direction of election in which he included all of the disputed personnel in the unit, finding that they possessed no indicia of supervisory authority. Eventually, the cases were appealed to the 8th Circuit, which, as mentioned above, remanded the case to the board because it had “employed

an improper legal standard in finding that the nurses were not statutory supervisors.” The board further remanded the case back to the regional director to examine whether the nurses in question utilized “independent judgment” under the standard adopted by the Court in *Kentucky River*. Then, in a decision rendered in August 2002, the regional director again found the nurses to be employees rather than supervisors. The bulk of his decision turned on whether or not they “exercise independent judgment to assign and responsibly direct other employees.” In concluding that they did not, he relied on the fact that their judgments “are so circumscribed by existing policies, orders and regulations of the Employer that they do not exercise independent judgment within the meaning of Section 2(11).”

It is difficult to predict how the board will decide *Beverly*. In ruling that the nurses were not supervisors in his most recent decision, the regional director took great pains to point out the minimal amount of independent judgment they exercise in making their decisions. For example, he pointed out that many of their decisions are dictated by a collective bargaining agreement, while others must be approved by the director of nursing or her assistant. On the other hand, the employer argued that the charge nurses can make changes in the room and floor assignments of the certified nursing assistants. While the regional director found the employer had not met the burden of proof in this regard, the board may disagree.

Croft Metals involves “lead persons” at a facility manufacturing aluminum and vinyl doors and windows. One group of lead persons are load supervisors. Load supervisors work with three others who load merchandise onto trucks. In addition to counting and scanning the merchandise, the load supervisor instructs the other employees on where and how to place the material in the truck, which is dictated largely by the delivery schedule. Other lead persons work in particular areas in the plant, like the tool room, or ensure that production lines run properly, for instance, by calling maintenance if a machine needs a repair.¹¹ The ALJ and regional directors found that the employer had not met its obligation, under *Kentucky River* to prove that the independent judgment of these individuals is sufficient to render them supervisors. While we cannot be certain what the NLRB will do with this case, it seemed to us that the extremely low level of authority and judgment involved

makes it likely that that the board will uphold the earlier decisions of the agency.

CASES DECIDED BY THE NLRB AFTER JULY 2003

The NLRB cited *Kentucky River* in 36 decisions between July 24, 2003, and November 1, 2004,¹² and while NLRB may be signaling a change in its approach to supervisor status, as evinced by its call for briefs in the three cases discussed above, we do not see a significant change in the board's approach as of yet. In other words, the board has not expanded its interpretation of who is a supervisor to date. For example, the most recent board decision as of this writing was *Wilshire at Lakewood*, 343 NLRB No. 23, (September 30, 2004). One of the issues in that case was whether an RN who acted as a weekend supervisor was a supervisor, and in 2002, relying on *Kentucky River*, an ALJ had found that she was. In 2004, however, the board, in a 2–1 decision, reversed the ALJ and found her to be an employee, not a supervisor. It may be interesting to note, however, that the one dissenting board member was Chairman Battista, a Bush appointee.

United Cerebral Palsy of New York City, Inc., 343 NLRB No. 1, is another health care case involving supervisory status. The procedural history in that case alone is worthy of note. In 2001, a regional director found that certain personnel were employees but on February 15, 2002, the respondent filed a cross-motion for summary judgment, contending that in light of the U.S. Supreme Court's decision in *Kentucky River*, the board should find that all the individuals in the two voting groups (teachers, rehabilitation specialists, developmental specialists, and pool coordinators) are statutory supervisors. By unpublished order dated October 29, 2002, the board denied both the general counsel's and respondent's motions and ordered the region to reopen the record in the case for further consideration of whether the disputed employees are supervisors in light of *Kentucky River*. On August 6, 2003, the acting regional director issued a supplemental decision, again finding that the disputed employees were not supervisors. On September 2, 2003, the respondent filed a request for review of the supplemental decision, which the board denied by unpublished order dated May 28, 2004. Thus, while *Kentucky River*

led the board to reconsider the status of various employees in light of the Court's decisions, and the resulting delay hurt employee's chances of unionizing, the legal outcome was unchanged. In fact, in none of the 36 cases decided between July 24, 2003, and November 1, 2004, does it appear that persons who might have been found to be employees prior to *Kentucky River* were found to be supervisors because of the Supreme Court's decision.

FINAL OBSERVATIONS

The U.S. courts have, over time, reduced the number of persons who are deemed to have rights under the NLRA by gradually expanding the supervisory exclusion, and by making it applicable to those professional employees who direct the work of less-skilled employees. The decision of the Supreme Court in *Kentucky River* initially struck us as being potentially very damaging to nurses who were attempting to organize. Arguments about the actual degree of independent judgment used by nurses (many of whom operate in a work environment characterized by detailed written employer standards for care), however, have been persuasive to numerous ALJs and regional directors of NLRB. To date, *Kentucky River*, has not caused a sea-change in NLRB rulings regarding the status of nurses as employees under the law. Rather, it appears to be one more case in a long line of cases that gradually have eroded the rights of certain individuals to choose whether or not they wish to be represented by a labor organization.

The case has been important in adding to delays in numerous representation cases—delays that decidedly harm employees who want union representation. Unions are finding tactics to counteract employers' use of the law to delay and to block collective bargaining for nurses and other health care professionals, but the problem persists. Unions in health care, like unions elsewhere, are trying to pressure employers to both enforce and expand rights under the NLRA through the negotiation of neutrality and card check agreements.

Things are likely to get more problematic in the next few months, with a more conservative NLRB and with a judiciary that is quite willing to find tugboat pilots and other relatively low-level employees to

be without the right to organize simply because they direct the work of other employees and in so doing exercise a degree of independent judgment. While it is unclear how the NLRB will rule in each of the three “lead cases” discussed in this chapter, it is clear that the board will apply the same standard in health care as it has in other industries, most likely to the detriment of some nurses.

Ultimately, labor law needs to be changed in a number of respects; one particularly problematic aspect of the law that is ripe for reconsideration is its narrow coverage. It is not clear why the right to organize on the part of nurses, tugboat pilots, and electrical transmission employees should even be subject to hair-splitting legal contention. *Kentucky River* made it harder for such employees to organize, but as yet has not made a major change in the existing legal situation. It may provide the excuse for a major change in policy on the part of the Bush-appointed-dominated NLRB.

Notes

1. In 2003, 18.1 percent of all professionals were union members, in contrast to 12.9 percent of all wage and salary workers. Recently there has been a marked increase in interest in unionization among pharmacists (McHugh and Bodah 2002) and physicians (9 percent of pharmacists and 5 percent of physicians are now members). See Hirsch and MacPherson (1996, 2001) for detailed occupation unionization rates based on the Current Population Survey, or the Web site maintained by them at <http://www.unionstats.com/>. Data here were obtained from that site on November 18, 2004.
2. Particularly important decisions include *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974) and *NLRB v. Yeshiva University*, 444 U.S. 672 (1979).
3. Section 2(12) provides, that “The term ‘professional employee’ means (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of

- a professional person to qualify himself to become a professional employee as defined in paragraph (a).
4. Section 2(11) of the act states, “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.”
 5. Interviews were conducted by a University of Illinois graduate student, Lisa Roan, who is a registered nurse, as part of an independent study on her part. We thank her for her persistence and dedication in exploring these issues with union staff.
 6. Beth Kean, Director of Organizing, California Nurses Association; telephone interview. L. Roan, June 19, 2002.
 7. Mike Slott, Education Director, HPAE/AFT, New Jersey; conversation. P. Voos, August 2, 2002.
 8. See previous note.
 9. Of course, we cannot say with certainty that the bargaining order in either of these cases would have been enforced in the absence of *Kentucky River*.
 10. Two authors read each case and made an assessment of whether or not *Kentucky River* made a difference in the outcome of the case; if the two readers disagreed (an unusual outcome), then the third author read the case and we talked in order to come to a consensus on our understanding of the impact of *Kentucky River*.
 11. In earlier years, a different labor organization than the one petitioning for representation represented some employees at this same manufacturing facility. Leadmen were included with other plant employees in one bargaining unit at that time.
 12. Mays Elec. Co., 343 NLRB No. 20 (Sept. 30, 2004); Duer Constr. Co., 2004 NLRB LEXIS 594 (NLRB Sept. 30, 2004); Valley Slurry Seal Co. And Constr. And General Laborers’ Local 185, 343 NLRB No. 34 (Sept. 30, 2004); Wilshire at Lakewood, 343 NLRB No. 23 (Sept. 30, 2004); United Cerebral Palsy of N.Y. City, Inc., 343 NLRB No. 1 (Sept. 28, 2004); K. W. Elec., Inc., 342 NLRB No. 126 (Sept. 24, 2004); John T. Jones Constr. Co., 2004 NLRB LEXIS 536 (NLRB Sept. 24, 2004); Brevard Achievement Ctr., Inc., 342 NLRB No. 101 (Sept. 10, 2004); Wackenhut Corp., 2004 NLRB LEXIS 493 (NLRB Sept. 7, 2004); Deffenbaugh Disposal Servs., 2004 NLRB LEXIS 443 (NLRB July 30, 2004); Taylor, 2004 NLRB LEXIS 387 (NLRB July 13, 2004); Sara Lee Bakery Group, 342 NLRB No. 12 (June 25, 2004); Kelly Bros. Sheet Metal, Inc., 342 NLRB No. 9 (June 21, 2004); Donaldson Bros. Ready Mix, Inc., 341 NLRB No. 124 (May 19, 2004); K. W. Elec., 2004 NLRB LEXIS 252 (NLRB May 18, 2004); Volair Contrs., Inc., 341 NLRB No. 98 (Apr. 30, 2004); Serv. Spring Corp., 2004 NLRB LEXIS 196 (NLRB Apr. 29, 2004); Trane, an Operating Div. of Am. Std., Emplr., 2004 NLRB LEXIS 124 (NLRB Mar. 19, 2004); Mays Elec. Co., 2004 NLRB LEXIS 73 (NLRB Feb. 20, 2004); Solvay Iron Works,

Inc., 341 NLRB No. 25 (Feb. 17, 2004); Safe Disposal Sys., 2003 NLRB LEXIS 814 (NLRB Dec. 29, 2003); Allied Mech., Inc., 2003 NLRB LEXIS 810 (NLRB Dec. 19, 2003); Sheet Metal Workers Int'l Ass'n, Local Unions 102 & 105, 340 NLRB No. 149 (Dec. 11, 2003); Sara Lee Bakery Group, 2003 NLRB LEXIS 776 (NLRB Dec. 2, 2003); L.A. Water & Power Emples. Ass'n, 340 NLRB No. 146 (Nov. 28, 2003); Flat Dog Prods., 2003 NLRB LEXIS 743 (NLRB Nov. 24, 2003); Jewish Home for the Elderly of Fairfield County, 2003 NLRB LEXIS 745 (NLRB Nov. 21, 2003); Quality Mech. Insulation, Inc., 340 NLRB No. 91; Int'l Transp. Serv. (ITS), 2003 NLRB LEXIS 604 (NLRB Sept. 10, 2003); Kelly Bros. Sheet Metal, Inc., 2003 NLRB LEXIS 527 (NLRB Sept. 3, 2003); Barstow Cmty. Hosp., 2003 NLRB LEXIS 536 (NLRB Aug. 29, 2003); Univar USA, Inc., 2003 NLRB LEXIS 528 (NLRB Aug. 28, 2003); Solvay Iron Works, Inc., 2003 NLRB LEXIS 471 (NLRB Aug. 20, 2003); Lenawee Long Term Care, Inc., 2003 NLRB LEXIS 459 (NLRB Aug. 14, 2003); Arlington Masonry Supply, Inc., 339 NLRB No. 99 (July 21, 2003); Dole Fresh Vegetables, Inc., 2003 NLRB LEXIS 395, 339 NLRB No. 90 (July 17, 2003); Quality Mech. Insulation, Inc., 2003 NLRB LEXIS 367 (NLRB July 7, 2003); Inter-Con Sec. Sys., 2003 NLRB LEXIS 329 (NLRB June 23, 2003).

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Justice on the Job

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2006

W.E. Upjohn Institute for Employment Research
Kalamazoo, Michigan

Library of Congress Cataloging-in-Publication Data

Justice on the job : perspectives on the erosion of collective bargaining in the United States / Richard N. Block . . . [et al.].

p. cm.

Includes bibliographical references and index.

ISBN-13: 978-0-88099-278-7 (pbk. : alk. paper)

ISBN-10: 0 88099-278-6 (pbk. : alk. paper)

ISBN-13: 978-0-88099-279-4 (hardcover : alk. paper)

ISBN-10: 0-88099-279-4 (hardcover : alk. paper)

1. Collective bargaining—United States. 2. Labor unions—United States. 3. Job security—United States. 4. Employee rights—United States. 5. Industrial relations—United States. I. Block, Richard N.

HD6508.J87 2006

331.890973—dc22

2005033299

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Kalamazoo, Michigan 49007-4686

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Cover design by Alcorn Publication Design.

Index prepared by Diane Worden.

Printed in the United States of America.

Printed on recycled paper.