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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL LABOR RELATIONS BOARD, :
Petitioner :
v. : No. 99-1815
KENTUCKY RIVER COMMUNITY CARE, :
INC., ET AL. :
- - - - - X

Washington, D.C.
Wednesday, February 21, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:40 a.m.

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Petitioner.

MICHAEL W. HAWKINS, ESQ., Cincinnati, Ohio; on behalf of
the Respondents.

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1 P R O C E E D I N G S

2 (11:40 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 99-1815, National Labor Relations Board v.
5 Kentucky River Community Care, Inc.

6 Mr. Wallace. Mr. Wallace and Mr. Hawkins, we
7 will recess at noon, come back at 1:00 and finish up.

8 Mr. Wallace.

9 ORAL ARGUMENT OF LAWRENCE G. WALLACE

10 ON BEHALF OF THE PETITIONER

11 MR. WALLACE: Thank you, Mr. Chief Justice, and
12 may it please the Court:

13 The National Labor Relations Act confers
14 organizational, representational, and bargaining rights on
15 employees, broadly defined, including professional
16 employees, but it expressly excludes supervisors from that
17 protected class.

18 The term, supervisors, is defined in section 211
19 of the Act, which is set forth on page 2 of our brief, or
20 also on page 2 of our petition, and to be a supervisor
21 under this provision an employee must have authority in
22 the interest of the employer to perform one of 12
23 specified supervisory functions, or effectively to
24 recommend that such action be taken, and the employee's
25 exercise of that authority must not be of a merely routine

1 or clerical nature, but must require the use of
2 independent judgment.

3 In 1994, in NLRB v. Health Care and Retirement
4 Corporation, this Court held that the board had mistakenly
5 applied a special test of supervisory status for the
6 health care industry based on an incorrect interpretation
7 of the phrase, in the interest of the employer.

8 The Court held that the board had set up a false
9 dichotomy between action taken in connection with patient
10 care and action taken in the interest of the employer,
11 which is in the business of patient care, and in so doing,
12 the Court did not at all suggest that the problem of
13 reconciling the coverage of professional employees with
14 the exclusion of supervisors was an insuperable one for
15 the board.

16 It suggested some possible approaches that
17 might result in a defensible solution. It specifically
18 agreed with the proposition that phrases in section 211
19 such as independent judgment and responsibly to direct,
20 are ambiguous, and the board needs to be given ample room
21 to apply them to different categories of employees.

22 QUESTION: So there were those three phrases
23 that could possibly justify the exclusion of registered
24 nurses generally, and one of them was disposed of in the
25 earlier case. There are two left, independent judgment,

1 and responsibly to direct, but the Government has chosen
2 not to put both in play in the present case, right? Only
3 independent judgment is at issue here, so that if you lose
4 on this one, you still have the third swing, right?

5 MR. WALLACE: Well, this was a determination
6 made by the board in going back to the drawingboard, so to
7 speak.

8 QUESTION: Well, that's the Government, right.
9 I understand.

10 MR. WALLACE: Yes, of course, but the board made
11 a determination that responsibly to direct in the abstract
12 need not be defined because it is always qualified by the
13 exercise of independent judgment not of a routine nature
14 in order for these determinations to be made, and early
15 on, after Taft-Hartley was passed, the board got burned by
16 courts of appeals in trying to interpret responsibly to
17 direct, particularly in a case called Ohio Power.

18 QUESTION: The trouble is that hanging it all on
19 independent judgment is -- that's much the broader way to
20 go. I think that suggests that no professional exercises
21 independent judgment if he is acting on the basis of
22 knowledge that is peculiar to his profession, or her
23 profession, in the case of nurses, for the most part.
24 What -- you really think you can sustain that position?

25 MR. WALLACE: Well, the board I think quite

1 properly on the basis of textual analysis of this
2 provision holds that there must be a nexus between the
3 exercise of independent judgment and the exercise of one
4 of the 12 categories of authority that define who is a
5 supervisor, because that is what is qualified by the
6 phrase, requiring the exercise of independent judgment.

7 QUESTION: But your basic position is that
8 professional judgment is not independent judgment, that if
9 something is required to be done, and any qualified
10 professional would do it that way, this is not independent
11 judgment. It comes closer to routine.

12 MR. WALLACE: Well, the -- if we're talking
13 about when an employee is performing his own functions,
14 his trade or his profession, carrying out his own tasks,
15 that is not one of the functions that makes one a
16 supervisor.

17 QUESTION: No, but let me give you a
18 hypothetical, one that concerns me.

19 Let's say that you have a registered nurse in
20 charge of a health care facility, and one of her tasks is
21 to assign the other health care personnel to one or
22 another patient. She says, we need more help here. This
23 patient is in more need of help. The other patient is in
24 less need of help.

25 That seems to me to be supervisory activity,

1 even though it is based upon her medical expertise.
2 That's opposed to the situation in which the registered
3 nurse is merely supervising one of the practical nurses in
4 the care of a particular patient, and she says, you know,
5 put a bandage here, you know, or give him two aspirins.
6 There, you're not directing the employee to one task or
7 another. You're telling that employee how to do the task
8 that employee is doing.

9 Well, if the registered nurse is really
10 assigning all of the people, and saying, we need three
11 more over here, we need two more down there, I don't know
12 why that is not supervisory work.

13 MR. WALLACE: Well, assignment is a separate
14 category in this, but let me respond more directly to your
15 question. If the nurse did not have anyone assisting her
16 and had to decide which patient was in more acute need of
17 care, the nurse would be making a professional judgment
18 and carrying it out. If the nurse has an extra pair of
19 hands available with which the nurse has to communicate by
20 more than brain waves in order to exercise the same
21 professional responsibility, and this is a less-skilled
22 employee, and the direction to that employee once that
23 professional determination has been made falls into the
24 category of routine, in giving the directions to the
25 assistant, so that it would be in -- for purposes of

1 dividing labor and management, which is what this is
2 about, in the category that also would include the
3 journeyman directing his apprentice --

4 QUESTION: Sure, I understand. I'm not sure
5 where you came out on the hypothetical I gave you. Is
6 that nurse who is assigning other health care personnel to
7 one patient or another, on the basis of her expert medical
8 judgment of which patients need help more, is she in a
9 supervisory position, or not?

10 MR. WALLACE: That would depend on further
11 inquiry about whether she is making determinations about
12 how the staff is to be deployed beyond direction that she
13 got from her --

14 QUESTION: Yes. No, no. It's her independent
15 judgment. The owner of the home tells her, you know, we
16 have 30 personnel here, and you know, some of them are in
17 this ward, some in that ward. We don't know which ones
18 are -- should be where. It's up to you to assign them
19 where they should be.

20 MR. WALLACE: That would be much further along
21 what I think of as a spectrum between the journeyman
22 apprentice and the managerial employees.

23 QUESTION: Mr. Wallace, maybe you can tell us
24 when an RN, under the board's current definition, when
25 would an RN not -- would be an uncovered employee and

1 would be ranked a supervisor, so that she would not come
2 under the Act's protection. Maybe that would be better.
3 Give us examples of RN's under this test who would not
4 qualify as employees, but would be excluded as
5 supervisors.

6 MR. WALLACE: Well, it was stipulated that the
7 nursing coordinator here, who had authority to hire and
8 fire, and made staffing decisions about who would be
9 working in the wings of this facility was a supervisor.

10 QUESTION: Isn't that just the question that
11 Justice Scalia asked about staffing, making staffing
12 decisions, who goes to which ward?

13 MR. WALLACE: If it became comparable to that,
14 yes. I mean --

15 QUESTION: Well, I thought in this very case,
16 and maybe I'm wrong, but there is a mechanism whereby
17 there's a registered nurse who's the building supervisor
18 when the other folks aren't there, and that that amounts
19 to about 72 percent of the time, in terms of total hours
20 that the building is open, 24 hours a day, and there is an
21 internal memo which states that these registered nurses,
22 as building supervisors, are in charge of the facility,
23 and all rehabilitation staff, and are ultimately
24 responsible for quality patient care.

25 Now, why isn't that using independent judgment?

1 I have a hard time understanding why a person under those
2 instructions, who is in charge, and the only person there
3 at the building, isn't exercising independent judgment
4 under your proposal.

5 MR. WALLACE: Well, there's also a finding that
6 these registered nurses usually work on their own, without
7 any assistance in performing their duties, and the other
8 employees who may be present -- we're talking about the
9 evening hours when less is going on, are -- do not report
10 to the nurse, whether she's the building supervisor or
11 not, and are performing tasks that are laid out for them
12 by management in the facility, so of course she would be
13 using judgment in performing her own nursing services, to
14 the extent they're called for.

15 But what the board found in this case, the
16 regional director found in the representation hearing, was
17 that all that the building supervisor designation meant in
18 practice was that she was to try to see to it that
19 prescribed numbers of staff, and we're talking about
20 rather small numbers, were met, previously prescribed
21 staffing --

22 QUESTION: Mr. Wallace, I am less concerned
23 about, you know, the outcome of this case, whether these
24 particular nurses were, indeed, supervisory, as I am with
25 the rationale that the board used, and the rationale that

1 it used -- I'll quote it from your brief.

2 It is that an employee's exercise of ordinary,
3 professional or technical judgment in directing less-
4 skilled employees to deliver services in accordance with
5 employer's specified standards is not the exercise of
6 independent judgment.

7 Now, if that's the principle on which the board
8 is proceeding, it seems to me that would say that in the
9 hypothetical I gave you before, that nurse, who is using
10 her expert judgment to direct the less-skilled employees,
11 you go here, you go there, she would not be a supervisory
12 personnel, because she's using her professional judgment
13 to know, you know, which medical services are needed
14 where, and it seems to me she is a supervisor, on any
15 reasonable analysis.

16 In other words, I think maybe you have to take
17 the third swing, and go back and, you know, try to resolve
18 this case under the remaining test, which is, what is it,
19 authority to direct.

20 MR. WALLACE: Well, what -- that standard that
21 we've articulated was based on longstanding board
22 experience with other employment situations involving
23 skilled crafts, team leaders, lead men, group members, who
24 they on their experience, or their superior technical
25 knowledge, direct discrete tasks to be performed by other

1 members of the group that management has assigned to be
2 members of that team. They're not deciding for themselves
3 who should be members of the team to perform the function.
4 This has come up in a wide variety of --

5 QUESTION: But most supervisors don't
6 necessarily decide who shall compose the people that
7 they're going to supervise. That's usually a given by
8 management.

9 MR. WALLACE: That's precisely my point, Mr.
10 Chief Justice, that management is deciding who the team
11 shall be and who shall be in the position of the leader.

12 QUESTION: Why should the fact that management
13 gives you a team of, say, 30, be fatal to your position as
14 a supervisor, the fact that you don't pick them yourself?
15 That can't be right.

16 MR. WALLACE: Well, if you're exercising one of
17 the 12 kinds of supervisory authority, of course you would
18 be a supervisor, regardless of whether management
19 prescribed the team, but that's one indication of the
20 limited role that the team leader is playing.

21 QUESTION: Well, doesn't this turn on what the
22 authority to direct consists of? If all the supervisor
23 has -- the purported supervisor has authority to do is to
24 tell the mechanic, no, turn the screw clockwise, not
25 counterclockwise, okay, if that's all he has authority to

1 do, you're turning the screw the wrong way, that's not
2 supervision.

3 But if, on the basis of his expert knowledge, he
4 says, listen, I want you to go over to this other job
5 which needs immediate assistance, I want to take three
6 fellows off of this job, put them over there, that's
7 supervision, and -- but that's not the basis on which the
8 board decided this case. It decided it on the basis that
9 there's no independent judgment when you're using your
10 professional standards, and that seems to me to be much
11 too broad.

12 MR. WALLACE: Well, it is qualified by the
13 degree of discretion that the particular skilled employee
14 or professional is given, and the degree to which the
15 exercise of any direction to others or assignment of
16 people who had been put on the shift to discrete tasks is
17 cabined by standards both express and implicit in the --

18 QUESTION: Is --

19 QUESTION: Well --

20 QUESTION: I thought that what Justice Scalia is
21 talking about is not really involved in this case, so I
22 must not understand it, because I thought there were three
23 separate things. One is a situation where you have a
24 carpenter, and he has an assistant carpenter.

25 Now, the assistant carpenter may tell the

1 carpenter a lot of things, all about carpentry, and if
2 that's what's going on, that isn't supervision, because
3 they're experts, they're carpenters, and as long as
4 they're talking about carpentry, that falls within the
5 rule we're talking about. Am I right?

6 And that describes the relationship between the
7 registered nurse and the licensed practical nurse. The
8 licensed practical nurse does things, gives shots or
9 whatever, so that's the expertise point, but I thought
10 this case primarily involved two other things. One is,
11 what does the woman do who is the nurse, let's say, during
12 the night hours? Now, if she's ordering building people
13 around, like maintenance people or others, maybe she's a
14 supervisor, but there was a finding she did nothing.
15 She's just there, doing her nurse's job.

16 And then there was a second thing. It isn't
17 quite true she does nothing. In fact, she can call in
18 substitutes, but when she calls in the substitutes, they
19 don't have to come, or she has little discretion there.
20 Now, that I thought was the key question. When she deals
21 with those substitutes who are coming in when there's a
22 shortage, that if I'm right, that doesn't have much to do
23 with that aspect of the case that Justice Scalia's talking
24 about.

25 That's a little long, but that's how I was

1 seeing it, and I'd like you to correct me if I'm wrong.

2 MR. WALLACE: I think what you have said
3 reflects the facts at issue in this case very accurately,
4 Justice Breyer.

5 QUESTION: Then maybe your opponent will correct
6 me.

7 MR. WALLACE: And the findings and the record
8 are quite clear that her responsibility as the building
9 supervisor is just to see that the prescribed head count
10 that management has prescribed is there, so to speak, and
11 in doing that she first asks for a volunteer that's
12 falling short.

13 QUESTION: Thank you, Mr. Wallace. We'll resume
14 at 1:00.

15 (Whereupon, at 12:00 noon, the Court recessed,
16 to reconvene at 1:00 p.m.)

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3 QUESTION: You may continue, Mr. Wallace.

4 MR. WALLACE: Thank you, Mr. Chief Justice, and
5 may it please the Court:

6 If I may briefly mention a couple of other
7 hypotheticals along the spectrum which may shed some light
8 on what the board has to decide here, supposing a nurse
9 either has a broken arm, or has her hands tied up with
10 another patient, and another -- and a different patient
11 needs something administered that requires two hands, and
12 she directs someone to do that, even selecting from among
13 the staff assigned to her someone that she knows knows how
14 to do that, that would be very similar to the team leader,
15 the skilled electrician or carpenter who is doing one
16 thing and asks another man of his team to do the other
17 thing that's required.

18 Moving much more toward management on the
19 spectrum, if the nurse is anticipating a difficult night,
20 and can authorize someone to stay overtime in addition to
21 the regular staff, and therefore commit the employer's
22 resources to decide how the business should be run, rather
23 than what happens here, just seeing to it that the
24 preordained head count is met, that would move the
25 judgment much more toward the managerial side along the

1 spectrum. Perhaps it would move back a bit if this
2 discretion were cabined by rather specific criteria from
3 the employer.

4 The task of the board is to place these various
5 fact-intensive situations, and we've shown them in many
6 other areas of the workforce, to place them accurately
7 along this spectrum and to decide where the line is to be
8 drawn, and if there is to be coherence in the
9 administration of the Act in this respect, it is important
10 that when the board reasonably does so the court defer
11 rather than second-guess those judgments.

12 QUESTION: Mr. Wallace, I agree with that, but
13 my -- again, my problem is, why is it that the phrase,
14 independent judgment, is the key to distinguishing among
15 those various hypotheticals? Why is that the key?
16 Independent of what? I gather the Government's position
17 is, independent of the professional expertise of the
18 individual, and I don't see how that distinguishes among
19 the various hypotheticals along the spectrum that you've
20 described.

21 MR. WALLACE: Independent of managerial
22 directives, or the implicit understanding of the way that
23 particular supervisory functions should be utilized,
24 because the same question arises with respect to the
25 function of assigning, with respect to the function, other

1 functions that appear in section 211.

2 QUESTION: No, but with respect, it's not
3 independent of managerial judgment, because even in the
4 case where, in the first hypothetical, where she clearly
5 is not supervisory, she's just telling another nurse to do
6 this or that, that's independent of the managerial
7 judgment. It's her judgment as to whether this nurse
8 should do this or that, so it isn't independent of
9 managerial judgment.

10 The position of the Government has been that it
11 has to be independent of her professional expertise, and
12 for the life of me I can't understand how that has
13 anything to do with distinguishing among these various
14 hypotheticals.

15 MR. WALLACE: Well, because the exercise of her
16 own professional expertise in carrying out her
17 professional tasks is not one of the 12 functions of a
18 supervisor, and the judgment that she's exercising in
19 selecting the helping hands, if it's merely of a routine
20 nature within the meaning of the other part of the
21 independent judgment clause, would not make her a
22 supervisor.

23 If I may, I'd like to reserve the balance of my
24 time.

25 QUESTION: Very well, Mr. Wallace.

1 Mr. Hawkins, we'll hear from you.

2 ORAL ARGUMENT OF MICHAEL W. HAWKINS

3 ON BEHALF OF THE RESPONDENTS

4 MR. HAWKINS: Mr. Chief Justice, and may it
5 please the Court:

6 This Court must reject the board's
7 interpretation of independent judgment and the definition
8 of supervisory status in this case in order to assure
9 Americans throughout this country that when they put their
10 loved ones in nursing homes, health care facilities, and
11 home care facilities such as our client, that they are
12 assured of an environment which will be supervised and
13 well-managed.

14 No one in this room, or this country, would put
15 themselves or their family or loved ones into a nursing
16 home or health care facility where, unknowing to them,
17 there was no one in supervision for 72 to 75 percent of
18 the time.

19 QUESTION: But that's the description that the
20 regional director gave. I looked back at it, and he said
21 that the only thing that the building manager, or -- what
22 was the term that was used?

23 MR. HAWKINS: Building supervisor, Your Honor.

24 QUESTION: Building super -- the only thing that
25 she did was to make sure that the count was met, that she

1 had no discretion to order anybody to show up, that she
2 just counted how many people were there. She was to
3 assure that the shifts were fully staffed, period, and
4 that she had no further authority than that, so those are
5 the fact-findings that were made.

6 MR. HAWKINS: Well, Your Honor, all I can say is
7 that the regional director must have read some different
8 record, because he didn't read the record in this
9 particular case.

10 QUESTION: Are you saying that finding is
11 clearly erroneous? The only additional duty assumed by a
12 building supervisor is to obtain needed help if for some
13 reason a shift is not fully-staffed.

14 MR. HAWKINS: Yes, Your Honor, I would say that
15 that is completely erroneous.

16 QUESTION: Did you raise that before the board?

17 MR. HAWKINS: We raised it in --

18 QUESTION: And then the board has said what, in
19 response to your statement that that statement's clearly
20 erroneous? What did the board say?

21 MR. HAWKINS: They take the position that they
22 take, and that they're right.

23 QUESTION: You raised, as a matter of objection,
24 there's a finding, the only additional, et cetera, which
25 Justice Ginsburg raised.

1 MR. HAWKINS: Well --

2 QUESTION: All right. You say, you raised to
3 the board that that finding was clearly erroneous. My
4 question to you is, in response to that statement to the
5 board, what did the board say?

6 MR. HAWKINS: The board gave the rhetoric that
7 it gave in this case.

8 QUESTION: Did it say, it is clearly erroneous,
9 or it isn't?

10 MR. HAWKINS: No, they did not find -- the board
11 did not find it erroneous, but the Sixth Circuit did.

12 QUESTION: Did the board address it
13 specifically?

14 MR. HAWKINS: The Sixth Circuit did. The board
15 did not address it.

16 QUESTION: The board did not address your
17 statement, so when I read the record I'll find, objection,
18 it was clearly erroneous, and the board just didn't
19 address it.

20 MR. HAWKINS: Your Honor, the way this process
21 works, this was our case hearing, and what ends up taking
22 place is, it goes to the board, and then they issue a
23 complaint for summary judgment for the employer's refusal
24 to bargain, so you don't have a full, adjudicative burden
25 of proof, burden of evidence hearing before the NLRB

1 itself.

2 QUESTION: They don't have a system where you
3 raise an -- you object to an ALJ's finding, and -- they
4 don't? This is the first time I've heard --

5 MR. HAWKINS: Well, the employer in this case
6 raised an objection to the regional director's decision.
7 That was just rubberstamped by the NLRB. We appealed to
8 the --

9 QUESTION: I'm not used to words like,
10 rubberstamped. I'm used to words like, there's a
11 statement, somebody objects to that, and then there's a
12 finding by the higher administrative body.

13 MR. HAWKINS: Well, what I'm getting at, Your
14 Honor, is that there is not a formal determination by the
15 board. It is a, we reviewed it, we agree with the
16 regional director, the employer technically refuses to
17 bargain to get this issue before the Sixth Circuit, and
18 that's what this employer did in that situation.

19 QUESTION: It's an enforcement action.

20 MR. HAWKINS: So -- it's an -- yes, sir.

21 QUESTION: So there was no -- I take it --
22 implicit in what you're saying is, there was no way for
23 you to raise a specific objection to that finding before
24 the board itself, is that correct?

25 MR. HAWKINS: Other than raising the issue about

1 the board's regional director's determination. You raise
2 it with the board, the NLRB --

3 QUESTION: You say, okay, I object to the
4 regional director's determination. Do you have an
5 opportunity to say, and, in particular, the finding that
6 Justice Ginsburg just read was clearly erroneous?

7 MR. HAWKINS: In the --

8 QUESTION: You have the opportunity to say that?

9 MR. HAWKINS: In odd case situation, which this
10 arises out of, the employer's ability to challenge it is
11 by refusing to bargain. The NLRB --

12 QUESTION: Is the answer to my question, then,
13 no?

14 MR. HAWKINS: The answer to your question is no.

15 QUESTION: Okay.

16 MR. HAWKINS: You do not have a formal process
17 to resolve it before the board.

18 QUESTION: So the first opportunity you had to
19 make a specific claim that this was clearly erroneous was
20 before the Circuit?

21 MR. HAWKINS: No, Your Honor. You have the
22 ability to raise the erroneous nature of it before the
23 board, but you do not get a hearing before the board.

24 QUESTION: Do you have an opportunity to make a
25 specific objection with respect to the specific finding

1 that it is clearly erroneous?

2 MR. HAWKINS: Yes, you do, Your Honor.

3 QUESTION: Okay, and you did not do that?

4 MR. HAWKINS: No, that was done, to my
5 understanding. I did not handle the case at the board
6 level.

7 QUESTION: Well, regardless of who did it, was
8 it done before --

9 MR. HAWKINS: To my knowledge, it was, Your
10 Honor.

11 QUESTION: Well, let's get into how this
12 practice works. The evidentiary hearing is before the
13 regional director, or before an ALJ?

14 MR. HAWKINS: It's -- no, it's not before an
15 AL -- it's before a hearing officer --

16 QUESTION: Before a hearing officer.

17 MR. HAWKINS: -- of that particular region.

18 QUESTION: And he makes findings.

19 MR. HAWKINS: Yes.

20 QUESTION: And then what happens?

21 MR. HAWKINS: And then the -- well, he doesn't
22 make findings. He apparently makes some recommendations
23 to the regional director, and the regional director writes
24 up a report based on those recommendations.

25 QUESTION: And then, if that is unsatisfactory

1 to a party, the party has a right to appeal it to the
2 NLRB?

3 MR. HAWKINS: It's not really an appeal. You
4 raise your objections about that determination, i.e., in
5 this case that these individuals were supervisors, as
6 opposed to were not supervisors. That process then ends
7 up forcing an election. You don't have a choice about it.
8 They hold --

9 QUESTION: Okay, but -- so you're dissatisfied
10 with the regional director's finding. Does that go
11 automatically to the board, without any submission on your
12 part?

13 MR. HAWKINS: No. You -- they order an election
14 and schedule an election. You're stuck with that process.

15 QUESTION: So there's no way that you can ask
16 the NLRB to change the finding of the regional director?

17 MR. HAWKINS: Not in that process, no. They
18 direct an election, the regional director directs an
19 election, and -- he has an election. The way you
20 challenge that issue is by refusing to bargain and they
21 end up filing a technical 8(a)(5) charge against the
22 employer, the employer refuses to bargain, and then if
23 your way of -- they file a motion for summary judgment.
24 On a motion for summary judgment --

25 QUESTION: A motion for summary judgment where?

1 MR. HAWKINS: The NLRB general counsel files a
2 motion for summary judgment with the NLRB, and the NLRB --
3 I mean, every case, our case I've had, they end up
4 granting the motion for summary judgment.

5 QUESTION: But you opposed the motion for
6 summary judgment, I take it?

7 MR. HAWKINS: Yes, I did, in the lower level.

8 QUESTION: May I ask, in the unfair labor
9 practice proceeding against you for refusal to bargain,
10 are you limited to the evidence that was adduced
11 originally?

12 MR. HAWKINS: No, Your Honor.

13 QUESTION: It's a de novo proceeding. You can
14 bring in new evidence about --

15 MR. HAWKINS: Well, you don't have a new
16 hearing. You're stuck with the record.

17 QUESTION: Oh, you are stuck with that. That's
18 what I was asking.

19 MR. HAWKINS: Yes, you are stuck with the
20 record.

21 QUESTION: You are stuck with that record?

22 MR. HAWKINS: Correct, and -- so the way in
23 which you get review of it by a court is with the refusal
24 to bargain, and then you end up with --

25 QUESTION: Yes, but in answer to the board's

1 complaint you can assert as a defense one of the findings
2 of fact was clearly erroneous, can't you?

3 MR. HAWKINS: Yes, and the Sixth Circuit so
4 agreed that they were clearly erroneous.

5 QUESTION: And you did do that before the board?

6 MR. HAWKINS: Pardon, Your Honor?

7 QUESTION: You did, in your answer to the
8 complaint before the board, on the refusal to bargain, you
9 did make the point that this finding of fact was clearly
10 erroneous.

11 MR. HAWKINS: That's my understanding.

12 QUESTION: On what did you base --

13 QUESTION: And did they rule on that?

14 MR. HAWKINS: They grant summary judgment.

15 QUESTION: But they did not make a ruling
16 specifically --

17 MR. HAWKINS: They don't issue you a formal
18 decision and write-up, and we find this, and we find that.

19 QUESTION: Mr. Hawkins, could you please tell me
20 on what basis you urged it was clearly erroneous, because
21 I went back to read Mr. Eichol's testimony, and it
22 corroborates what the regional director reported exactly.

23 He said that the only authority that they had as
24 building supervisor was to call employees, and they could
25 use a list of employees who live nearby, the building

1 supervisor had no authority to compel -- Mr. Eichol's
2 testimony is perfectly consistent with what the regional
3 director found.

4 MR. HAWKINS: Your Honor, I believe this Court's
5 standard is the record as a whole, and it's not on one
6 particular page of a transcript. If you look at the
7 record as a whole --

8 QUESTION: Well, isn't that -- that's not in
9 the -- where is it in the joint appendix?

10 MR. HAWKINS: Where's what in the joint
11 appendix?

12 QUESTION: Is there anything in the joint
13 appendix?

14 MR. HAWKINS: Yes --

15 QUESTION: Everything that I read in the joint
16 appendix is consistent with what the regional director
17 reported.

18 MR. HAWKINS: Well, Your Honor, if I may I'll be
19 glad to point out some things to you. Some 11 times in
20 the transcript, in the administrator's testimony from
21 transcript 138 to 221 he references responsible or
22 responsibility 11 different times. He talks about
23 judgment, or judgment calls --

24 QUESTION: I would like to know specifically,
25 what --

1 MR. HAWKINS: Okay. Pages 140 --

2 QUESTION: Mr. Hawkins, a statement was made
3 that she has no authority to order anyone to stay, that
4 yes, she can write somebody up, but anybody else can write
5 anybody up.

6 Is there any -- anything that contradicts the
7 statement that -- what was the expression that was used,
8 that it was just to count, to make sure that the count was
9 met, and that she could ask people to stay, if they said
10 no, she had no authority to compel them to stay, she got
11 not one penny extra for that building supervision --

12 MR. HAWKINS: Your Honor, there's nothing in
13 section 211 that talks about pay being an issue. I would
14 submit to you at J.A. -- joint appendix 62, 63, and 64,
15 which are the three memos in question, and if you take all
16 of Mr. Eichol's testimony in total, you will find that
17 these individuals clearly had supervisory authority, and
18 clearly had authority under 211 that surpassed and was not
19 routine, and much more significant than anybody else in
20 that building during the time that they supervised.

21 They had the ability to call in people for
22 overtime, and even the hearing officer --

23 QUESTION: If a person said no, then what
24 happened?

25 MR. HAWKINS: According to the memo, they have

1 the authority to write them up, and I know the regional
2 director made a to-do, well, they didn't write anybody up,
3 but that assumes that all your employees must totally
4 disrespect you as a supervisor, and that you have to be
5 writing everybody up.

6 QUESTION: But where is it that says that
7 somebody is obliged to say yes to the request for
8 overtime? I didn't find that.

9 MR. HAWKINS: Well, it says in the J.A. 63,
10 please write up anyone who does not comply with the
11 request immediately. There was also testimony --

12 QUESTION: With what request?

13 MR. HAWKINS: The request to work, or to cover
14 the unit, or to pull someone from one unit to another, and
15 so therefore, if -- it was also testified that -- and it's
16 in the record, that every employee in the facility had to
17 sign all three of these memoranda, read them, to
18 acknowledge -- I mean, a company and an employer cannot do
19 anything more significant and more strongly to communicate
20 to every one of their employees, this person is the
21 supervisor, they are in charge of the building and you
22 will follow their lead, to the point that --

23 QUESTION: We're talking about a legal
24 definition. We're not talking about who you can call a
25 supervisor or not. Call anyone you want. And I didn't

1 know until you started, which is why I was asking, that
2 there were any facts in dispute in this case.

3 I thought, when I read the Sixth Circuit, that
4 it was perfectly consistent with what the ALJ had found,
5 and I thought the key facts are that KRCC directs that the
6 registered nurses, 1) may direct the LPN in dispensing
7 medicine. I didn't think that was in dispute. I thought
8 that, 2) they regularly serve as the highest ranking
9 employees in the building. I didn't think that was in
10 dispute.

11 MR. HAWKINS: Correct, Your Honor.

12 QUESTION: I thought 3) they seek additional
13 employees in the event of a staffing shortage, all right.

14 MR. HAWKINS: Yes, Your Honor.

15 QUESTION: And I thought that they move
16 employees between units as needed. That I better put a
17 question mark on, but I suppose if I read that carefully
18 in the ALJ I'll find they have some authority to do that.

19 MR. HAWKINS: Correct, Your Honor.

20 QUESTION: And they have the authority to write
21 up employees who do not cooperate with staffing
22 assignments.

23 MR. HAWKINS: That's correct, Your Honor.

24 QUESTION: All right. Now, I didn't know that
25 there is a factual dispute.

1 MR. HAWKINS: I'm not disputing those facts. I
2 guess really more what the issue, then, is, is the
3 substantial evidence issue, and that's --

4 QUESTION: Why is it substantial evidence? I
5 thought that the issue is whether the legal label called
6 supervising can fit on those facts, as the record will
7 support them, I imagine to some extent, and so we're
8 dealing with a question of law, and normally you'd say
9 it's -- on that kind of a question we'd give a lot of
10 deference to the board.

11 MR. HAWKINS: Unless there --

12 QUESTION: But here, you wanted -- the Sixth
13 Circuit said, the board does not have the legal power to
14 say that the other side has the burden of proof, namely
15 you. They didn't have that legal power, and the other
16 thing they said was that they have been saying certain
17 things in the past, mouthing a standard but doing
18 something the opposite, so we're not going to give them as
19 much attention as normal.

20 MR. HAWKINS: Well, Your Honor, if we look at
21 these --

22 QUESTION: Is that -- am I right? What are
23 we --

24 MR. HAWKINS: Well, you certainly --

25 QUESTION: I'm trying to get what our issue is

1 here.

2 MR. HAWKINS: This Court in Chevron and a number
3 of the other cases said you certainly do not give the
4 board deference when their interpretation of the Act and
5 application of it is irrational --

6 QUESTION: Obviously not --

7 MR. HAWKINS: -- and is not consistent with the
8 law.

9 QUESTION: -- but the classic case was the case
10 of the newsboys, wasn't it -- they were called newsboys at
11 that time -- are they employees, or are they supervisors,
12 and I believe that this Court in that first case said that
13 the board gets a lot of deference because they know about
14 these things, and we don't.

15 MR. HAWKINS: This Court in HCR and Yeshiva, and
16 Bell --

17 QUESTION: Yeah, a lot of them --

18 MR. HAWKINS: -- all these cases, is not giving
19 deference to the board.

20 QUESTION: You mean you're saying we shouldn't
21 give deference to the board on such a question?

22 MR. HAWKINS: No, you should not give deference
23 to the board in this case because their interpretation of
24 this particular statute is so irrational and so
25 inconsistent with the Act.

1 In fact, addressing Justice Scalia's point
2 earlier, you raised the question, Justice, about this
3 issue of responsibly direction, the board go back, and
4 come back, is that going to be the next one we're going to
5 have.

6 If you read the definition that they have of
7 independent judgment, and I would really address this and
8 tell the -- suggest to the Court that you pay attention to
9 this -- the board continues with employers to not be
10 proactive. They just keep telling employers what it's
11 not. It's a shell game. What it's -- they never say --
12 if I read through the enter carpenter's brief you can't
13 find where they say what independent judgment is. They
14 keep saying what it's not.

15 But in looking at their definition of it, and if
16 you stack that up against Senator Flanders' comparison of
17 what responsibly direct is, they have literally written
18 out of the Act, responsibly direct.

19 QUESTION: What is the board's definition?

20 MR. HAWKINS: The board's definition --

21 QUESTION: Is that found in the briefs
22 somewhere?

23 MR. HAWKINS: Yes. They set it forth in the
24 petition for cert, item number 1 and index 1, which is the
25 reverse of, it's not independent judgment if an RN

1 exercises ordinary professional technical judgment in
2 directing less-skilled employees to deliver services in
3 accordance with employer's specified standards.

4 Well, what did Senator Flanders say in the -- at
5 pages 14 and 15 of our brief, what did Senator Flanders
6 say was responsibly direct? Guess what? He said, it's
7 exercise personal judgment based on personal experience,
8 training, and abilities. He says, it's the direction of a
9 department and the men under him, the less-skilled people.
10 He says he determines under general orders what to do, and
11 he gives instructions for its proper performance.

12 QUESTION: Mr. Hawkins, then every professional
13 employee would be excluded, because everything that you've
14 read to me is what professional employees do.

15 MR. HAWKINS: No, I disagree, Your Honor, and
16 let me explain why. If you look at what Senator Flanders
17 was talking about as to the definition of responsibly
18 direct, he's hit all of these points.

19 He has hit the fact that you exercise personal
20 judgment based on your skill and training, i.e., a
21 professional. He has hit -- this is not what all
22 professionals do, direct their men under them, do it
23 pursuant to general orders of the employer, and gives
24 instructions for its proper adoption.

25 QUESTION: The typical thing, I thought, that

1 the RN who says to the LPN, do this injection, and
2 supervises that process. I thought that that would fall
3 within the definition of professional employee, but not
4 supervisor.

5 MR. HAWKINS: Well, Your Honor, I'm aware of the
6 concern and the dissent that you wrote in HCR about this
7 issue concerning when is someone --

8 QUESTION: There, the board was trying to have
9 some special definition just for nurses and health care
10 people. Now, as I understand it, they're saying, we're
11 not creating any different definition for nurses than any
12 other professional employee. We're trying to distinguish
13 between professional employees on the one hand, and
14 supervisors on the other.

15 MR. HAWKINS: And I would submit, Your Honor,
16 they have not done that. In fact, all they've done is, in
17 different terms, defined professional. If you look at
18 their definition of independent judgment, and if you took
19 it and put it up on a board next to definition of
20 supervisor and definition of professional, and said, which
21 one does this fit, you'd say, it fits professional. Their
22 definition of independent judgment is a professional.
23 That's why it's wrong, and that's why it's inconsistent
24 with the Act.

25 QUESTION: Can I come back to the facts in this

1 case?

2 MR. HAWKINS: Yes, Your Honor.

3 QUESTION: Is it really uncontested that the
4 building supervisor had the ability to, as one of these
5 memos say, if necessary, pull from one unit to another.

6 MR. HAWKINS: They had the ability to do that.

7 QUESTION: Well, you say they had. Is that
8 conceded? I thought that the accuracy of these memoranda
9 as a description of what their genuine authority was, was
10 contested by the board. They said these memoranda is just
11 words on paper, and that's in fact not how it worked.

12 MR. HAWKINS: Your Honor, those memoranda were
13 introduced without objection. In fact, it was -- when
14 they were introduced --

15 QUESTION: Well, that's okay. I mean, you can
16 introduce -- basis for -- so on, right. The point still
17 remains, did they reflect the actual duties of the,
18 responsibilities of the building supervisor, and the board
19 said that in fact they didn't. Isn't that what the board
20 said?

21 MR. HAWKINS: Well, they may -- yes, they did
22 say that they didn't.

23 QUESTION: Okay. Now, how can we say that that
24 was wrong?

25 MR. HAWKINS: On the substantial evidence

1 standard. This Court --

2 QUESTION: Well, what evidence do you have that
3 it did represent --

4 MR. HAWKINS: I'll give you a few examples, Your
5 Honor.

6 QUESTION: Well, maybe the burden's on them, I
7 guess. It is a memoranda that goes to all nurses. They
8 don't deny that it went to all nurses.

9 MR. HAWKINS: And they don't deny that all the
10 board signed for it.

11 QUESTION: And they -- but they're just saying,
12 it never happened?

13 MR. HAWKINS: No, Your Honor, they're not saying
14 those different things did not happen. Let me go through
15 a few of these points in the record, and these are some
16 questions that were posed by the hearing officer herself
17 in this case.

18 In the record, it's very clear that there
19 typically was oftentimes one individual on duty. There
20 was one question at J.A. 36 where the administrator was
21 asked, even if you're on duty, say, beyond 3:00 and this
22 building supervisor is there, what ends up happening, and
23 would you handle it? He says, no.

24 In other words, if I'm in the building, I would,
25 you know, be surprised if they came to me and said, looks

1 like we're going to be a little short on night shift, what
2 do you think we should do? In other words, the question
3 is going to be asked of the building supervisor, not me,
4 the administrator. She's in charge of that issue. That's
5 as strong a granting of the right to independent judgment
6 and section 211 duties as any.

7 QUESTION: Well, that just concerns being short
8 on night shift, and that is really just a mathematical
9 call. That doesn't take any independent judgment there.
10 You're supposed to have 30 people there, we have only 29,
11 pick up the phone and see if you can get a thirtieth in.
12 That's just not independent judgment.

13 MR. HAWKINS: Your Honor, if you apply that
14 principle, then the vast array of supervisors throughout
15 the United States are not going to be supervisors, because
16 I believe, as Mr. Chief Justice indicated, it's very
17 frequently the exact situation, where management tells
18 you, these are how many people are allocated to your
19 department, you're going to get the job done, if enough
20 people don't show up, call people in, hold people over for
21 overtime -- that is an inherent part of supervision,
22 making those judgments. We can get the production out
23 today with less people, so I won't call anybody in. No,
24 we can't get the production out today, we need to call
25 someone in.

1 QUESTION: She wasn't given that discretion. As
2 I understood it, she had to make the call when they were
3 understaffed.

4 MR. HAWKINS: Your Honor, at page, transcript
5 206, concerning overtime without restriction, the question
6 by the hearing officer again was, so is there no
7 restriction on that concerning overtime assignment and
8 calling people in, and the answer was no.

9 Even a question at transcript --

10 QUESTION: What is the that, no restriction
11 on -- yeah, she was supposed to try to get them up to the
12 full count, and to call people, but where is there --

13 MR. HAWKINS: But there's no -- the point there
14 is no restriction on overtime, and then at 208 she's got
15 the ability to call in to increase the unit above five,
16 and at transcript 334 one of the residence assistants
17 says, yeah, I've been asked to stay over and called in a
18 lot, so she clearly had those responsibilities.

19 QUESTION: I don't see how to deal with the case
20 unless we're like a super-NLRB, unless -- I could go this
21 far, we take the facts as stated in the Sixth Circuit, you
22 know, and we say that insofar as those are conclusory,
23 what they actually mean, as long as it allows it, is what
24 the board said.

25 I mean, we'd go back to the opinions of the

1 board, which I agree is just a summary affirmance, so
2 you'd go back to the opinions of the district director and
3 say that's what the words mean, so when they talk about
4 it, you know, when they talk about her super -- how --
5 unless you want us to go -- you're saying we should go
6 read through the whole record and decide whether all
7 these --

8 MR. HAWKINS: Your Honor, I'm not saying that
9 you have to go read through the whole record. I'm saying
10 that, absent showing that the Sixth Circuit was in some
11 way arbitrary and capricious about the way in which they
12 handled this matter, they should be affirmed.

13 The other point I would make, and I would like
14 to propose, and I've been doing this work for some 25
15 years, and not unlike what this Court did in Ellerith &
16 Ferriger, it provided good determinative standards for
17 employers to follow to be able to comply with the law, to
18 define in this situation what is a supervisor, and I'd
19 like to propose six points for this Court that I think
20 address these issues.

21 One is that the individual in question should
22 have the authority from their employer to engage in one of
23 the twelve activities. In our case, they had the
24 authority to assign, transfer, and responsibly direct the
25 employees by those definitions.

1 Two, the individual should be responsible for
2 other employees, a shift, a department, a unit, a
3 facility. In our case, the RN was in charge of the
4 building and the shift, and of the residents, and the
5 facility in general.

6 Senator Flanders talks about that in terms of
7 direction of department, men under him.

8 QUESTION: Well, and you say it was her judgment
9 as to how many of the extant employees would be in each of
10 the various units. She said, you know, we need eight
11 here, rather than just five, so I'm going to pull three
12 from the next-door units. She could do that.

13 MR. HAWKINS: If the census was down in a
14 particular period of time, if it was up she had those
15 sorts of abilities.

16 QUESTION: No, no. Everybody's there, the full
17 complement of the staff is there, and you say she had
18 authority to say, we need more in this unit than they need
19 in the other unit.

20 MR. HAWKINS: Yes, she did.

21 QUESTION: I'm going to transfer three people to
22 this unit.

23 MR. HAWKINS: Yes, she did, Your Honor.

24 QUESTION: And that, and the evidence for that
25 is the memorandum which says, if necessary, pull from one

1 unit to another.

2 MR. HAWKINS: It's more than that, Your Honor.
3 It's also at transcript 155. It's also at transcript 140,
4 142, 43, 45, 146, 150, 206, 220 to 221, 227 --

5 QUESTION: Well, could you give us an example of
6 what those citations -- is that the testimony of a witness
7 that you're referring to?

8 MR. HAWKINS: These are testimony of various
9 witnesses about being assigned, calling people in, keeping
10 them over --

11 QUESTION: I'm not talking about calling people
12 in. I'm not talking about that. I'm talking about
13 assigning the employees that are there and saying, I am
14 going to make the independent judgment that we should have
15 more people in this unit than the employer originally put
16 there, because this unit has special needs today, and I am
17 making that judgment, three people come from this unit and
18 go here.

19 MR. HAWKINS: At --

20 QUESTION: Now, what evidence is there for that,
21 beyond the statement in the memorandum?

22 MR. HAWKINS: At joint appendix 24, for
23 situational issues building supervisors can decide if
24 staffing is inadequate and that additional employees are
25 needed. Building supervisors can situationally ask for an

1 increase.

2 QUESTION: Well --

3 MR. HAWKINS: I'd also like to address --

4 QUESTION: Let me ask one question. You've
5 given us so much detail it's really kind of hard to follow
6 the argument.

7 Am I correct in assuming that the factual basis
8 for your position is entirely found on page 18a and 19a of
9 the appendix to the cert petition? That's what the Sixth
10 Circuit relied on, as I understood it.

11 MR. HAWKINS: Yes, Your Honor, we rely on what
12 the Sixth Circuit --

13 QUESTION: And so you don't think it's necessary
14 to call our attention to any other facts than those that
15 the Sixth Circuit relied on?

16 MR. HAWKINS: Well, I do to the extent the
17 board's wanting to say these people aren't engaged in
18 independent judgment, because I think these --

19 QUESTION: They have said, though, that these
20 facts are sufficient to establish their status as
21 supervisors.

22 MR. HAWKINS: Right.

23 QUESTION: And so either -- it seems to me you
24 either agree or disagree with what they say on that page.

25 MR. HAWKINS: With the Sixth Circuit, correct,

1 Your Honor.

2 QUESTION: Your six points on what's the
3 correct -- are they in your brief, because I'd like to --

4 MR. HAWKINS: No, they're not, Your Honor, and
5 I'd like to finish those quickly. The fourth one is the
6 authority they have in exercise under section 211 is
7 different from those they supervise and thus not routine,
8 and I think that addresses the routine issue. It also
9 addresses Yeshiva at 690 about it not being routine, and
10 when you look at the totality of the activities that these
11 RN's are engaged in, they're not routine as compared to
12 the others they supervise.

13 Fifth, that the authority to exercise does not
14 consist only of record-keeping or filing, and thus not
15 clerical, and sixth, in exercising their authority they
16 are not subordinate to those that they supervise, and use
17 their personal judgment based upon experience, training,
18 and ability, thus they use independent judgment, and these
19 standards are rational, they're reasonable, they alleviate
20 any concern that we're trying to suggest that all
21 professionals are supervisors, or that somehow or
22 another --

23 QUESTION: What RN under those standards -- what
24 RN would ever be professional and not supervisory?

25 MR. HAWKINS: Well, certainly in large health

1 care facilities you'll have a floor in a hospital, as an
2 example, where everybody's an RN, and you'll have one unit
3 supervisor. You wouldn't say all of those RN's, just
4 because they simply periodically tell another nurse aide
5 or LPN, oh, adjust this --

6 QUESTION: Well, typically isn't it so in
7 hospitals nowadays that you have a lot of subpeople under
8 -- who are not RN's but are LPN's, and then other
9 categories, and that the nurse on the shift would be
10 telling those people -- she wouldn't be the nurse in
11 charge of assigning anybody any place, but she certainly
12 would be directing the nurse's aides and the LPN's.

13 MR. HAWKINS: Well, Your Honor, if the RN is
14 directing the facility, as this one was in this situation,
15 they would be a supervisor.

16 QUESTION: I asked you to tell me who, under
17 your definition, what nurse, assuming that the nurse is
18 going to give instructions to an LPN, to a nurse's aide,
19 and to other people who work in the hospital, what nurse
20 would not fit the standards that you just read?

21 MR. HAWKINS: A nurse that doesn't have the
22 authority from the employer to direct those employees. A
23 nurse that's not been told you're in charge of the unit.

24 QUESTION: What nurse in any hospital setup
25 would not have the authority to direct the LPN, supervise

1 the LPN in the way a treatment is administered, a
2 treatment ordered by a doctor?

3 MR. HAWKINS: Your Honor, as an example, in some
4 of the other cases that this Court has dealt with you
5 talked about whether the individual is aligned with
6 management or not. That is a key component. Is a nurse
7 just performing her duties in a project sort of the
8 straw-boss lead person, or are they actually aligned with
9 management and charged with the responsibility of
10 directing the facility or the unit or the group of
11 individuals.

12 QUESTION: Thank you, Mr. Hawkins.

13 MR. HAWKINS: Thank you, Your Honor.

14 QUESTION: Mr. Wallace, you have 6 minutes
15 remaining.

16 QUESTION: Mr. Wallace, I hope at some point in
17 your 6 minutes you'll tell us on what basis the board
18 disregarded and apparently didn't accept the truth of the
19 memorandum which said that these nurses had authority, if
20 necessary, to pull from one unit to another.

21 REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE

22 ON BEHALF OF THE PETITIONER

23 MR. WALLACE: Well, the only nurse who testified
24 said she had not read two of the three memoranda that had
25 been introduced and had never been shown it. The -- on

1 page 16 of our reply brief we respond --

2 QUESTION: What does that prove?

3 MR. WALLACE: -- with record citations to some
4 of these factual claims.

5 I do think, to put this in context, it's
6 important that the Sixth Circuit did not set aside any of
7 the board's findings in this case as erroneous. It just
8 reached different legal conclusions based on its view of
9 what constitutes supervision, based on the board's --

10 QUESTION: The Sixth Circuit did say that, in
11 its opinion, that they have the authority to move
12 employees between units as needed, and I don't think the
13 board said that.

14 MR. HAWKINS: The board did not say that, and
15 that is not my understanding of the findings. I will say,
16 I'm holding in my hand here the response to the general
17 counsel's motion for summary judgment in the unfair labor
18 practice proceeding before the board, and there was no
19 effort to introduce any further evidence on any of the
20 matters that we're talking about.

21 The only request to introduce further evidence
22 was on the question of whether the employer was exempt
23 from coverage because it was an arm of the State
24 government, or because its board was controlled by public
25 officials. They --

1 QUESTION: Well, do you -- Mr. Wallace, do you
2 challenge the Sixth Circuit's -- you say the Sixth -- you
3 agree the Sixth Circuit said there was the authority to
4 move. Now, do you challenge that finding?

5 MR. WALLACE: Well, to --

6 QUESTION: You can answer that yes or no. Try,
7 anyway.

8 (Laughter.)

9 MR. WALLACE: I -- the board did not make such a
10 finding, and I don't know the basis on which the Sixth
11 Circuit made the finding.

12 QUESTION: Well, you have the memos in the
13 record, and to follow up on Justice Scalia's question, you
14 say that a nurse, one nurse testified she had read only
15 one of the two memos. Was there other -- what was the
16 other factual basis for the board saying these memos were
17 not accurate, or were not used?

18 MR. WALLACE: Well, they -- what the regional
19 director said was that paper authority differs from
20 authority in practice, and --

21 QUESTION: What was his authority for saying
22 that? I mean, what was the testimony, or reason that he
23 said that?

24 MR. WALLACE: All of the testimony was about
25 what, in practice, the nurses understood their authority

1 to be when they were acting in the capacity of building
2 supervisor as well as in conducting their other
3 activities.

4 The board does have a procedure for review of
5 the regional director's findings, and that review was
6 denied in this case, and that is in an order in our
7 appendix to the petition for certiorari, which appears on
8 page 34a, because they found that nothing requiring review
9 had been presented, no substantial issues had been
10 presented.

11 There is a practice of not receiving new
12 evidence in the unfair labor practice proceeding unless
13 there is something newly discovered, or there are special
14 circumstances warranting it, because otherwise the
15 contestants in the representation proceeding would not
16 have sufficient incentive to present all of the relevant
17 evidence and get that proceeding decided accurately.

18 QUESTION: Can I take it as some concession on
19 this? The Sixth Circuit says, they have, the registered
20 nurse has authority to, quote, move employees between
21 units as needed.

22 In respect to that -- that's the only one that
23 wasn't there before. In respect to that, you say on page
24 16 of your brief, the building supervisors, namely the
25 nurses here, transfer employees from one unit to another

1 simply, quote, to make sure the head count is there, end
2 quote.

3 MR. WALLACE: That is --

4 QUESTION: So I don't really see the conflict.

5 MR. WALLACE: That is our view, and we have
6 citations on page 6 of our brief as well.

7 QUESTION: So they do have authority to move
8 people to make sure the head count is --

9 QUESTION: Well, wait, I don't understand that.
10 As needed means to make sure the head count is there.
11 They have a full complement of people. How -- if you're
12 short-staffed, moving it to another unit can't increase
13 the head count. I mean, it clearly means in that
14 memorandum that they can decide they need more in one unit
15 than are assigned to that unit normally. Doesn't it
16 clearly mean that?

17 MR. WALLACE: I don't think it's clear. There
18 certainly is indication that it's for the head count, and
19 the burden wasn't sustained, and the burden is on the
20 proponent of the exception.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
22 Wallace. The case is submitted.

23 (Whereupon, at 1:40 p.m., the case in the above-
24 entitled matter was submitted.)

25