

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: NATIONAL LABOR RELATIONS BOARD, Petitioner v.
HEALTH CARE & RETIREMENT CORPORATION OF
AMERICA

CASE NO: No. 92-1964

PLACE: Washington, D.C.

DATE: Tuesday, February 22, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL LABOR RELATIONS BOARD, :

4 Petitioner :

5 v. : No. 92-1964

6 HEALTH CARE & RETIREMENT :

7 CORPORATION OF AMERICA :

8 - - - - - X

9 Washington, D.C.

10 Tuesday, February 22, 1994

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:59 a.m.

14 APPEARANCES:

15 MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor
16 General, Department of Justice, Washington, D.C.; on
17 behalf of the Petitioner.

18 MAUREEN E. MAHONEY, ESQ., Washington, D.C.; on behalf of
19 the Respondent.

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

2 (10:59 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 92-1964, the National Labor Relations Board v.
5 Health Care & Retirement Corporation of America.

6 Mr. Dreeben.

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF THE PETITIONER

9 MR. DREEBEN: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This case involves the rule adopted by the
12 National Labor Relations Board for determining when nurses
13 are supervisors within the meaning of the National Labor
14 Relations Act. Now, the Board's rule is that a nurse's
15 direction of less-skilled employees, as a matter of
16 professional judgment incidental to the treatment of
17 patients, does not make the nurse into a statutory
18 supervisor.

19 In this case, the Board applied that rule to the
20 nurses employed in respondent's nursing home. The Board
21 found that the nurses employed by respondent in that
22 facility engaged in direct patient care, making rounds,
23 administering medicines, talking to physicians, and
24 maintaining records. As an incidental function of taking
25 care of patients, the nurses give some direction to the

1 nurse's aides who work with the nurses to bathe, dress,
2 and feed the residents in the home. The Board concluded
3 that the nurses' use of the aides in that fashion to carry
4 out their nursing responsibilities did not make the nurses
5 statutory supervisors.

6 QUESTION: Mr. Dreeben, does the Board's rule or
7 decisions in this area of nurses and who is a supervisor
8 and who isn't, are there analogous rules or principles in
9 other areas of employment?

10 MR. DREEBEN: Yes, Justice O'Connor. The
11 Board's rule in this case is really a particularized
12 application of a general principle that has found
13 expression in two different areas under the statute. The
14 first is that the Board has crafted a rule to deal with
15 the problem of minor supervisory personnel; those persons
16 who are characterized by Congress as being below the level
17 of foreman and not exercising the kind of supervision that
18 aligns them with management.

19 And in cases of that character, the Board has
20 found that when direction is given by leaders of groups
21 that work together or by journeymen to apprentice, that
22 when that direction is a function of superior skill or
23 greater experience and not the sort of supervision that
24 aligns the employee with management, that kind of employee
25 is not treated as a supervisor.

1 QUESTION: Well, in looking at the language of
2 the statute, it appears that the Board relies, primarily
3 at least in this context, on the language that it is --
4 that the nurses are not acting in the interests of the
5 employer, but rather in the interests of the patient.

6 MR. DREEBEN: That is one of the three means by
7 which the Board reaches the route that it does under the
8 statute.

9 QUESTION: But that seems to be the primary
10 reliance.

11 MR. DREEBEN: I think, Justice O'Connor, it's --
12 it is equally important with two other provisions of the
13 statute. The one that is most relevant here is the
14 requirement that a supervisor exercise one of the
15 functions listed in the statute, and the relevant one
16 here, the most important one here, is -- are the words
17 "responsibly to direct."

18 QUESTION: I read the opinions below the same
19 way Justice O'Connor did, that the Board seemed to be
20 principally relying on the idea that the claimed
21 supervisors acted in the patient's interest and not in
22 management's interest, which I frankly find quite a weak
23 read.

24 MR. DREEBEN: Chief Justice Rehnquist, that is
25 one of the ways that the Board has used to articulate the

1 point that it's trying to get across. The point that it's
2 trying to accomplish here is to distinguish and draw lines
3 between the kind of supervision that Congress intended
4 would disqualify a person from the protection of the Act
5 from the sort of direction that goes on a day-to-day basis
6 in a variety of workplace settings when minor supervisors,
7 who have greater skill or familiarity with the working
8 situation, are -- give some direction to people who work
9 on a team with them.

10 QUESTION: But, yes --

11 QUESTION: How does that, in any way, relate to
12 the distinction between acting in the client's interest or
13 the patient's interest and acting in the employer's
14 interest?

15 MR. DREEBEN: The Board is not taking the
16 position that the nurses are working contrary to the
17 employer's interest, but the words "in the interest of the
18 employer" have to have some meaning, because all
19 employees, as the Board has recognized, from the board of
20 directors right down to the maintenance staff, the lowest
21 levels, all work to further the employer's business
22 interests.

23 Those words were not put into the statute to be
24 a superfluous reiteration of that principle. They were
25 put in, as the original draftsman of the language

1 explained, to express the view that these are the type of
2 employees who are really expressing managerial authority
3 in their work. And the Board is not, in this case,
4 attempting to say that these nurses are somehow working
5 contrary to the employer's interest. It is simply
6 defining and interpreting the language "in the interest of
7 the employer" to give it the kind of meaning that Congress
8 had originally intended.

9 QUESTION: Are you saying that the nurses fall
10 into the same category as what your adversary calls the
11 straw boss?

12 MR. DREEBEN: Yes, the Board has said that.
13 And, in fact, in this very case at page 40a of the
14 petition appendix, the ALJ explicitly drew the analogy
15 between the kind of work direction that these nurses do
16 and the kind that is done in this minor supervisor line of
17 case that the Board has had under the statute for many,
18 many years.

19 QUESTION: Mr. Dreeben, I always envisioned the
20 so-called lead man or straw boss as someone who supervises
21 a single team. I mean, you may send five men out to chop
22 wood and you say one of them, you know, you take charge
23 and all he does is say, well, you chop this tree, I'll
24 chop the other tree.

25 But these nurses are doing much more. And if

1 nothing more were at issue here than a nurse directing the
2 nurse's aide with respect to the particular patient that
3 that nurse is working with at that moment, I would say
4 yes, the nurse -- you know, when she tells the nurse's
5 aide, you know, bring this, bring that, bring the other,
6 that's acting as a straw boss, that's acting as a lead
7 man. But not when she shifts, it seems to me, nurse's
8 aides from one patient to another, from perhaps one wing
9 of the hospital to another; when she authorizes overtime;
10 when she does all sorts of things that relate not to the
11 particular team that is working on a particular patient,
12 isn't -- I don't know any other way to distinguish the
13 straw boss or the lead man.

14 MR. DREEBEN: Well, first of all, the straw boss
15 cases do involve kinds -- the kinds of cases that you've
16 described, Justice Scalia, but they also involve cases
17 where you have the most skilled person, say, at a print
18 shop supervising a variety of lesser-skilled employees and
19 telling them what to do, telling them where to go, what --
20 when to do their various assignments in order to make sure
21 that the whole puzzle fits together.

22 But I think it's very important to focus on what
23 these nurses did at the nursing home in question, because
24 the ALJ made fact findings on it and the record supports
25 those fact findings. I don't think there's any question

1 here of substantial evidence.

2 The ALJ found that to the extent that the nurses
3 had any function at all to assign the aides, that was
4 purely a matter of routine that involved no independent
5 judgment. I believe that the assistant director of
6 nursing described it as being "pretty well cut and dried";
7 that's in the transcript at 1106. The floor was simply
8 split into sections and the aides were rotated from one
9 section to another. And as she put it, it was just a sort
10 of formula to be followed.

11 And the ALJ found, again at page 40a of the
12 appendix, that the assignment that these nurses did during
13 the relevant period in time was purely --

14 QUESTION: Whereabouts on -- whereabouts on page
15 40a are you referring to, Mr. Dreeben?

16 MR. DREEBEN: On page 40a of the petition
17 appendix, Chief Justice, that's at the top of the page.
18 It's a carry-over from the prior paragraph.

19 QUESTION: Thank you.

20 MR. DREEBEN: The ALJ says: "The eight
21 assignment duties of the nurses seem to me to fall well
22 short of requiring the use of independent judgment." And
23 that is an independent requirement for being a supervisor
24 under Section 2(11) of the Act. Without a showing of
25 independent judgment in the tasks that are described,

1 there is no supervisory status.

2 QUESTION: Is that a factual determination or a
3 legal determination?

4 MR. DREEBEN: I think it's a factual
5 determination which is subject to review under the
6 substantial evidence standard.

7 QUESTION: He surely doesn't put it that way,
8 does he?

9 MR. DREEBEN: And -- well, the ALJ referred to
10 Board cases and to a court of appeals case that make that
11 clear. The Board certainly has latitude under Chevron to
12 interpret what independent judgment and what routine is
13 within the context of reviewing the application of the act
14 to specific circumstances.

15 And in this case that's what these nurses did.
16 They did it as a matter of routine. The assignment
17 functions were not nearly as sophisticated as Your Honor
18 has implied. Now, there may be a change that's reflected
19 in the record where the director of nursing decided I want
20 things done in a different way, I want them -- I want you
21 to use much more judgment in the way you do it. If so,
22 nurses who do those sorts of things might be exercising
23 independent judgment, but these nurses with respect to
24 assignment were not doing that.

25 QUESTION: What about authorizing overtime? I

1 mean you --

2 MR. DREEBEN: They did not authorize overtime.
3 The ALJ again explicitly found that they did not have
4 authority to authorize overtime.

5 QUESTION: Where is that, Mr. Dreeben?

6 MR. DREEBEN: That's in the petition appendix.
7 I do not have the exact page at this moment. But the ALJ,
8 again, specifically found they do not have the authority
9 to authorize overtime. They initialed time cards.

10 QUESTION: Look at page 41a of the petitioner's
11 appendix where the opinion says: "The second way the duty
12 nurse may attempt to deal with an aide's failure to show
13 up for work is to ask the aides who are scheduled to go
14 off duty if one of them is willing to remain at the
15 facility on overtime."

16 MR. DREEBEN: That's correct. But the nurse
17 herself did not make any decision about whether the aide
18 would be authorized to obtain overtime. That was a
19 decision that was reserved by the director of nursing.

20 QUESTION: Oh, really? She -- you mean she can
21 ask the nurse's aide if she's willing to serve on
22 overtime -- and I assume this means at a time when there's
23 no one else around. During 75 percent of the day at the
24 time this case came up, as I understand it, if these
25 nurses were not supervisors, there was no supervisor --

1 MR. DREEBEN: Well --

2 QUESTION: -- Present at the hospital or at the
3 nursing home, isn't that right?

4 MR. DREEBEN: The director of nursing was always
5 available on call, as was the administrator. Most of the
6 hours --

7 QUESTION: Sure. Well, so are we. But I'm
8 saying that there were --

9 (Laughter.)

10 QUESTION: -- There was nobody at the nursing
11 home who was a supervisor during 75 percent of the working
12 day. That's the position that the Board is taking, right?

13 MR. DREEBEN: Well, yes, that is the position
14 that we're taking, and a large component of that time
15 consists of the night shift at which there is very little
16 staff at the hospital other than what is necessary and
17 nurses on duty at each --

18 QUESTION: Where was this, in Alaska, you have a
19 75 percent night?

20 MR. DREEBEN: No, I said a large component of
21 that. Obviously, Justice Scalia, there were times when
22 the director of nursing or the administrator were not
23 there. But there is testimony in the record, and the ALJ
24 again found that the director of nursing is available on
25 call at all times. And this is at page 47a of the

1 appendix. Since the administrator and the DON are always
2 on call and since the nurses do, in fact, call the
3 administrator and the DON at their homes when nonroutine
4 matters arise, that was an indication that, indeed, this
5 nursing home had a mechanism of supervising its aides.

6 QUESTION: Well, Mr. Dreeben, looking at the
7 language of this statute today, and in an attempt to
8 justify the Board's rule, what do you think the strongest
9 point is?

10 MR. DREEBEN: I think that --

11 QUESTION: Under the language of the statute?

12 MR. DREEBEN: Well, we do rely on the "interest
13 of the employer" language. We also rely on the language
14 "responsibly to direct," which the Board has
15 interpreted --

16 QUESTION: But that's just an alternative. The
17 statute also says if the nurse can assign or do other
18 things or responsibly direct.

19 MR. DREEBEN: That's correct. And in this case
20 the assignment --

21 QUESTION: And they did have some assignment
22 functions.

23 MR. DREEBEN: And those assignment functions
24 were found to be purely a matter of routine not requiring
25 the exercise of independent judgment. Now, if this were a

1 case in which the assignment functions did require some
2 judgment, then there would a supplemental inquiry for the
3 Board to make about whether those --

4 QUESTION: Well, then, is your strongest point
5 no independent judgment? Is that what your --

6 MR. DREEBEN: As to the assignment, that's what
7 the record in this case shows. There's no basis for
8 arguing that they're supervisors, since they fail that
9 threshold requirement, and there's never been a challenge
10 to that requirement.

11 There's another very important consideration in
12 the Board's interpretation of the statute, Justice
13 O'Connor. You asked me earlier what categories of
14 employees are treated analogously.

15 QUESTION: Uh-hum.

16 MR. DREEBEN: Another major category of
17 employees treated analogously are professional employees.
18 Now, the Act in Section 2(11) excludes supervisors from
19 coverage.

20 QUESTION: Well, do you -- do you take the
21 position that these nurses are professional employees
22 within the definition of the statute?

23 MR. DREEBEN: No, in this case they are not.
24 But the point of my reference to the professional
25 inclusion is that Congress specifically did want people

1 who exercise judgment and do so on the basis of superior
2 skill and knowledge to be covered by the Act, and that
3 creates some tension between Sections 2(11), which exclude
4 supervisors, and Sections 2(12) which includes
5 professionals, because --

6 QUESTION: Why are they not -- why are they not
7 professional employees?

8 MR. DREEBEN: They are considered technical
9 employees. These are licensed practical nurses. Licensed
10 practical nurses have a lesser educational requirement and
11 the Board is --

12 QUESTION: So a registered nurse would be
13 considered professional?

14 MR. DREEBEN: No question, a registered nurse
15 would be considered a professional. And the major
16 significance of that distinction I think would simply be
17 that the nurses who are registered nurses would have the
18 right to a unit that did not include nonprofessionals.
19 But for purpose of interpreting the Act and looking at the
20 interplay between the professional exemption and the
21 exclusion for supervisors, the important point is that the
22 Board has to make an accommodation.

23 Because virtually all professionals will
24 supervise some lesser-skilled employees in the course of
25 their duties. They do so as a matter of simply getting

1 the job done, and Congress could not have been ignorant of
2 the fact that architects have draftsmen, engineers have
3 machine operators, and the like. Lawyers have paralegals
4 and secretaries, and doctors have nurses.

5 And if Congress had not intended to accord
6 protection to the Act to these people because they engage
7 in such minor supervisory activities, the entire coverage
8 of professionals would have made very little sense. And
9 so the Board takes into account that structural aspect of
10 the statute in arriving at its construction of when nurses
11 should be deemed to fall on the supervisor side of the
12 line.

13 QUESTION: Can you tell us an opinion in which
14 the Board has done just that, has shown that it is playing
15 off the tension between these two sections?

16 MR. DREEBEN: Well, first of all, the Board
17 issued a decision in Northcrest Nursing Home which we cite
18 in our reply brief, which occurred after we filed our
19 opening brief in this case, that represents a
20 comprehensive review of the legal principles in this area
21 and explicitly draws the connections both to the straw
22 boss/lead man line of cases that I referred to earlier, as
23 well as the tension to the professional line of work.

24 QUESTION: Any case before this decision?

25 MR. DREEBEN: Well, there are also a series of

1 cases that this Court considered and discussed in its
2 Yeshiva University opinion at page 690 in footnote 30.

3 QUESTION: The footnote 30 cites Board opinions.

4 MR. DREEBEN: Yes, footnote 30 cites Board
5 opinions in which the Board had considered cases where
6 professionals were functioning as project captains or
7 group leaders, and in the words of the Court describing
8 the Board's cases, "they were deemed to be employees
9 despite substantial planning responsibility and authority
10 to direct and evaluate team members."

11 And if you read those cases, the Board is quite
12 conscious of the fact that this is the way professionals
13 operate, and it's necessary that they be given the
14 protection of the Act, notwithstanding this minor form of
15 direction. Otherwise it would have been pointless to
16 cover them. The court --

17 QUESTION: Is that Doctors' Hospital against --
18 of Modesto, is that the one?

19 MR. DREEBEN: And Doctors' Hospital of Modesto
20 was cited as one of the cases in that series, which is
21 really the case in which the Board gave its most complete
22 articulation of its current theory before 1974. That was
23 a case in which the Board examined the role of nurses who
24 worked at a hospital and gave some -- they were called
25 charge nurses. They had some responsibilities over a wing

1 of a hospital with respect to nurse's aides and other
2 nurses there to make sure that patient care was done
3 properly, and the Board did not consider that to
4 disqualify them from protection under the Act. It did not
5 view them as being made supervisors.

6 This Court explicitly took note of that when it
7 described Board cases favorably, saying that the Board has
8 not eliminated employees whose decision-making is limited
9 to the routine discharge of professional duties in
10 projects to which they assign them. That's -- the Court
11 characterized those decisions as accurately capturing the
12 intent of Congress. That is the line of decisions that
13 really supports the Board's analysis of the nurses in this
14 case.

15 And when you look at the sort of direction that
16 the nurses gave to aides in this case, it clearly is well
17 within the routine discharge of their professional or
18 technical duties. Many patients at a nursing home have
19 strict regimens of having to be turned every 2 hours. A
20 nurse might remind an aide that that needs to be done, or
21 ensure that it is done. Other patients need to have
22 cushions placed in particular ways to support them. A
23 nurse may correct an aide if the aide hasn't put the
24 pillow in the proper place, hasn't followed the doctor's
25 instructions with respect to the way the patient should be

1 treated.

2 QUESTION: A nurse can tell an aide to go work
3 with another nurse too, can't she?

4 MR. DREEBEN: Again, that relates to the
5 assignment function.

6 QUESTION: Right.

7 MR. DREEBEN: It's what happened in this case
8 when there was a shortage of aides, is that one of the
9 aides might be rotated from one --

10 QUESTION: By a nurse. A nurse would say don't
11 work with me, go and work with someone else, right?

12 MR. DREEBEN: Correct.

13 QUESTION: And a nurse could also say too few
14 people have reported for work today; we would like
15 someone, or two or three people, to work overtime. And
16 the nurse could say that and authorize that overtime,
17 isn't that right?

18 MR. DREEBEN: Well, I don't agree, Justice
19 Scalia, that she could authorize the overtime. I think
20 the findings are inconsistent with that.

21 QUESTION: The findings say that -- and, again,
22 it's page 40 -- 41a and 42a. What the opinion says is,
23 "the nurses otherwise" -- at the top of 42a, "the nurses
24 otherwise have no authority to grant overtime." And the
25 preceding paragraph makes clear that they do have

1 authority to grant overtime when it's necessary because of
2 absences.

3 MR. DREEBEN: Well, I think that the sentence
4 that follows that is equally important, Justice Scalia.
5 It says: "The nurses are not authorized to deal with an
6 unusually heavy workload by asking aides to work on an
7 overtime basis."

8 QUESTION: That's right.

9 MR. DREEBEN: So --

10 QUESTION: An unusually heavy workload is no
11 justification, but the failure of some people to report to
12 work does enable them to authorize overtime.

13 MR. DREEBEN: Well, I think the record says what
14 it says on this subject, Justice Scalia.

15 QUESTION: Well, you're not arguing with that
16 point, are you? You're not challenging the statement in
17 the opinion?

18 MR. DREEBEN: No, no, no. We are not state --
19 challenging the statement in the opinion.

20 QUESTION: So they can authorize overtime then.

21 QUESTION: Yes.

22 MR. DREEBEN: Well, to the extent reflected in
23 the opinion, yes.

24 QUESTION: Well, why don't you -- why don't you
25 admit it rather than fight it?

1 MR. DREEBEN: I think that whatever the
2 finding -- those findings on overtime are not inconsistent
3 with -- any way with the Board's ultimate conclusion that
4 these nurses are not supervisors. The nurses did not have
5 the kind of authority, in the Board's view, that aligned
6 them with management, and there were ample mechanisms in
7 place for the nursing home to conduct the supervision at
8 issue.

9 Now, again, we think that the Court's opinion in
10 Yeshiva University very strongly supports the Board's
11 approach in this case, its general legal approach,
12 regardless of how any particular fact situation may be
13 applied, whether correctly or incorrectly, under that
14 approach.

15 QUESTION: Mr. Dreeben, I don't read that
16 finding as saying a nurse is authorized to -- has the
17 authority to authorize overtime. But what I understand it
18 to say is that hospital policy is if somebody doesn't show
19 up for work and if you have to divide it up, the other --
20 the aides can decide among themselves which one shall work
21 overtime, and the nurse can let them do that.

22 MR. DREEBEN: Well --

23 QUESTION: It's this hospital policy that says
24 that somebody has to work overtime when somebody doesn't
25 show up, they'll ask them to do that.

1 MR. DREEBEN: Certainly all of this flows from
2 the hospital policies. And we're -- I don't think that
3 really, one way or the other, this point is dispositive of
4 the validity of the Board's legal role, which is the issue
5 that we're presenting for decision to this Court. The
6 Board's rule is a mechanism for attempting to distinguish
7 between those employees who are high enough up on the
8 chain of command to require them to be treated as
9 supervisors, and employees who are lower down and who
10 exercise some amount of direction, but not enough to align
11 them with management for purpose of collective bargaining.

12 QUESTION: And in this particular facility you
13 say there are four nurses that fit that category, the
14 director of nursing, assistant director, patient
15 assessment. There were four that you put in the
16 supervisory category?

17 MR. DREEBEN: I don't think findings were made
18 about whether the patient assessment and treatment nurse
19 qualified as supervisors, and that really isn't an issue
20 here. The director of nursing, the assistant director of
21 nursing, and the administrator were all found to -- I
22 think there is no dispute that they are supervisors in
23 this case.

24 And the director of nursing was actively
25 involved in supervising on the floor. She testified that

1 she was out of the floor an average of 50 percent of the
2 time. That's at page 913 of the transcript. That's an
3 average. There were ample mechanisms in place for the
4 supervisors to accomplish their goal. And, in fact, an
5 administrator at one point said to a nurse, don't ever
6 make a decision on this floor without my consent first. I
7 think the record amply bears up what the ALJ ultimately
8 found in this case, which is that respondent --

9 QUESTION: Well, what happens in that instance
10 if the supervisor isn't there, which is a substantial part
11 of the time.

12 MR. DREEBEN: That's when the telephone comes in
13 handily, Justice Kennedy. The director of nursing, the
14 assistant director of nursing, and the administrator are
15 available by phone --

16 QUESTION: Are these the kind of decisions that
17 the statute characterizes as decisions made which require
18 the use of independent judgment?

19 MR. DREEBEN: Well as to the assignment
20 functions, the ALJ found that they are not. As to the
21 question of whether to consult a supervisor, there was no
22 finding made about whether that required independent
23 judgment. I'd suggest that --

24 QUESTION: Well, let me put it this way; is your
25 understanding of the record that whenever independent

1 judgment is required, that the nurse must talk with the
2 supervisor?

3 MR. DREEBEN: We -- I don't think we would
4 disagree that independent judgment might have been
5 required in seeking the authority of a true supervisor in
6 this case, whether it is or not --

7 QUESTION: Can independent judgment ever be
8 exercised under the policy of this hospital without
9 consulting the supervisor?

10 MR. DREEBEN: Yes, I think that there are some
11 instances in which the nurse is exercising independent
12 judgment.

13 QUESTION: So that it's more than just arranging
14 a pillow and so forth.

15 MR. DREEBEN: Well, no, I think that itself is a
16 matter of independent judgment. The nurses there are
17 providing their medical judgment. They are -- they are
18 the ones who hear from the doctors what is required for
19 the patient's care. They read the materials that describe
20 it, and they are ultimately responsible for making sure
21 that the care is done in a professional manner.

22 QUESTION: Well, I take it they have to monitor
23 the condition of the patient.

24 MR. DREEBEN: That's correct. And, again, they
25 have to use judgment in whether to require that some aide

1 look in on a patient more often than not to make sure that
2 the patient doesn't suddenly spike a temperature. And
3 those are the kinds of independent judgment that the
4 nurses used in this case, but that's totally coextensive
5 with the sort of independent judgment that a professional
6 routinely uses in the kinds of projects that a
7 professional carries out. And Congress did not view that
8 sort of expression of professional judgment as
9 inconsistent with the treatment of the employee as a
10 protected employee under the statute.

11 Now, I wanted to mention again the case of
12 Yeshiva University, because we do think that the Court's
13 general approach in that case is precisely the same that
14 is at issue today. The Court said that if the faculty had
15 been simply exercising routine professional judgments in
16 the matter of their teaching work, that would not have
17 been a problem for coverage under the Act. The problem in
18 that case is the faculty were really managers and they
19 were really determining what the school would do, what
20 teach -- what courses it would teach, what students would
21 be admitted, and making all the decisions which would be
22 characterized as managerial in any other setting.

23 In this case the nurses are not doing what would
24 be characterized as managerial or supervisory in any other
25 setting. They are much more analogous to the type of

1 project captains that supervise other professionals and
2 other less-skilled employees, and they also fit within the
3 line of cases that dealt with lead men and straw bosses,
4 and for that reason the Board properly placed them on the
5 side of the line where they are protected rather than the
6 side where they are not protected.

7 I'd like to reserve the balance of my time.

8 QUESTION: Thank you, Mr. Dreeben.

9 Ms. Mahoney, we'll hear from you.

10 ORAL ARGUMENT OF MAUREEN E. MAHONEY

11 ON BEHALF OF THE RESPONDENT

12 MS. MAHONEY: Mr. Chief Justice and may it
13 please the Court:

14 I'd like to start out by saying that I really
15 did think that the issue in this case was not whether the
16 court of appeals had erred in its application of the
17 substantial evidence test under the traditional statutory
18 criteria for finding supervisory status, but rather that
19 the question that was presented in the petition was
20 whether the court of appeals had erred by rejecting the
21 Board's interpretation of the statute, not the application
22 of the evidence.

23 And, in fact, there is -- under Universal Camera
24 this Court has said, and repeatedly held, that the
25 application of substantial evidence to a settled statutory

1 meaning is something that's placed in the charge of the
2 court of appeals and it would rarely be disturbed by this
3 Court absent some indication that it was grossly
4 misapplied or misapprehended. So for the Government to
5 now come in today and suddenly start citing all these
6 transcript cites about how these people really didn't --
7 these nurses really didn't have any independent judgment
8 or meet the traditional statutory criteria seems not to
9 be, to me, the issue in this case.

10 And in fact, as the court of appeals found, if
11 you evaluate the activity that these nurses performed on
12 behalf of the nursing home under the traditional criteria,
13 look at the structure of the operations, look at what the
14 higher levels of management were expecting them to do, you
15 would find that they were, in fact, charged with the
16 overall direction, assignment, with the use of independent
17 judgment for the operation of the facility.

18 In fact, the findings of the ALJ specifically
19 say that these nurses were in charge of a wing of the
20 nursing home for much of the time. I think it's important
21 to emphasize here that there's only one floor nurse on the
22 floor on the wing of a hospital overseeing the care that's
23 being given to 50 residents at any time, and that the
24 director of nursing and the assistant director of nursing
25 are absent from the facility 75 percent of the time.

1 Similarly, to say that the ALJ found that they
2 didn't exercise independent judgment in connection with
3 the exercise of their responsibilities is not supported by
4 the -- either the findings of the judge or what he said at
5 page 40a. He finds -- he does not say they do not
6 exercise independent judgment in connection with the
7 direction of the work of the aides. He says he finds that
8 what they do doesn't equate to responsibly directing the
9 aides in the interests of the employer.

10 He never goes on to make some separate finding
11 that they didn't use independent judgment, and the
12 question, the way it's posed, seems to presume that they
13 did, by saying whether the Board reasonably determined
14 that employees, in the exercise of professional judgment,
15 were properly denied supervisory status. So --

16 QUESTION: Ms. Mahoney, may I just ask you a
17 question about the assumption you're making about the
18 statute, and I think I'll understand your argument better.
19 Do you agree that in each of the three categories covered
20 by the statute, the sort of assignment responsibility, the
21 direction responsibility when they're working, and the
22 grievance responsibility, that the statute seems to make a
23 distinction between levels of responsibility?

24 It seems to assume that a given professional,
25 for example, could do any of these three things

1 conceivably, but there are different levels of
2 responsibility. For example -- and just as an example, it
3 doesn't speak merely of directing other employee, it
4 speaks of responsibly directing them. Now, those may be
5 sort of opaque adjectives, but they seem to be -- at least
6 to be getting to the -- to make the point that there are
7 two different levels, and only if you meet the sort of
8 whatever the standards are for the highest level do you
9 fall into the supervisory category.

10 Do you accept that basic view of the statute?

11 MS. MAHONEY: That there is a?

12 QUESTION: That there's kind of a two -- there's
13 an assumption that there's a two-tier possibility for each
14 of these three categories?

15 MS. MAHONEY: I think so. Let me see if I
16 understand your question correctly. We would acknowledge
17 and agree that in order to be found to have engaged in
18 activity that could be called responsibly to direct the
19 activities of other employees on the site that, yes, you'd
20 need to do something more than just exercise independent
21 judgment. And that they are talking --

22 QUESTION: In other words, there can be some
23 direction which is not responsible direction?

24 MS. MAHONEY: There could be --

25 QUESTION: So the mere fact that a nurse says,

1 you know, go to bed one rather than bed two, that may not
2 get you to the point where you want to get.

3 MS. MAHONEY: Absolutely, Your Honor. In fact,
4 what the courts and the Board has traditionally done
5 outside of the health care area and some other
6 professional contexts, is they have looked at the
7 structure of the employer's operation and tried to locate
8 where that -- the person who's alleged to be a supervisor
9 falls on the hierarchy, and whether that person has
10 overall day-to-day responsibility for overseeing the
11 activities of other subordinate employees.

12 That's precisely the analysis that the court of
13 appeals said should apply in this case. In the Beverly
14 decision it said we're going to look at the structure of
15 the operations. We're not going to just exclude nurses
16 wholesale, because they might give some direction to an
17 aide in the course of performing their duties, but rather
18 we'll see what role they were play.

19 QUESTION: Do you see a disagreement between the
20 court of appeals and the Board on that general
21 proposition?

22 MS. MAHONEY: No, I do not.

23 QUESTION: Okay.

24 MS. MAHONEY: No, I think if you go back to the
25 Beverly opinion, which was the predicate for the court of

1 appeals analysis in this case, it very specifically said
2 our disagreement with the Board is that they are wholesale
3 denying protection -- or granting protection to persons
4 who under the traditional criteria would be engaged in
5 supervisory activity, and that's not just a nurse who is
6 giving some direction to a patient. In this case, for
7 instance --

8 QUESTION: And supervisory activity of the
9 higher rather than the lower degree.

10 MS. MAHONEY: Well, not a straw boss, not a
11 straw boss.

12 QUESTION: That's right, yeah.

13 MS. MAHONEY: Right. And not someone who just
14 directs someone on a team with independent judgment, you
15 know, in an occasional kind of way for a particular
16 patient.

17 QUESTION: How does it differ from a lawyer
18 giving instructions to a paralegal --

19 MS. MAHONEY: Well --

20 QUESTION: -- That would involve independent
21 judgment? Are there situations where a lawyer giving
22 instructions to a paralegal, the lawyer could still not be
23 a supervisor?

24 MS. MAHONEY: Yes, I think there could be, Your
25 Honor. I think you have to look at what the courts have

1 done and what the Board has done, is look to see what the
2 responsibility of the lawyer is for the overall management
3 of that paralegal's activities. If, in fact, the
4 lawyer's --

5 QUESTION: Suppose the paralegal is assigned to
6 an associate, first-year associate got this paralegal who
7 will do whatever the lawyer tells the paralegal to do.
8 Does that mean that the lawyer is a supervisor so you
9 could not have -- suppose we had a legal aid unit that was
10 operating that way; the lawyers would not be protected
11 under the Act?

12 MS. MAHONEY: Well, Your Honor, if the lawyer in
13 that assignment process also had the authority to
14 effectively recommend, for instance, whether that
15 paralegal would get a raise, then I think even under the
16 Board's rule they acknowledge that that person, in fact,
17 would be a supervisor.

18 QUESTION: Let's take out controlling pay.

19 MS. MAHONEY: Okay. And does the lawyer also
20 determine precisely what activities that paralegal is
21 going to perform on a day-to-day basis and assign that
22 paralegal to other lawyers when the workload is different
23 and essentially tell that paralegal when they can come,
24 when they can go, and that they really are the only
25 supervisor for that paralegal?

1 QUESTION: If this -- this description in this
2 record seems not unusual for a setup where you have
3 practical nurses, a relatively small staff, and a large
4 staff of nurse's aides. So is there anything in this
5 record that makes this an atypical setup? In other words,
6 you seem to be saying we have to look and see what these
7 nurses are doing, but I get the picture that anytime you
8 have a staff of practical nurses and a large staff of
9 nurse's aides, it's going to be roughly the same as this
10 setup.

11 MS. MAHONEY: No, Your Honor, I don't think so.
12 First of all, one of the important points here is that
13 this is structured in a very different way from a
14 hospital. You wouldn't see, ordinarily, the same kind of
15 ratios of lesser-skilled employees to higher-skilled
16 employees. And what you have here is --

17 QUESTION: Is typical of nursing homes.

18 MS. MAHONEY: It may be more typical of nursing
19 homes, but nursing homes also, for instance, may have
20 another level of supervision inbetween the licensed
21 practical nurses and may have some other RN's, for
22 instance, who are in fact the person in charge on the
23 floor at any given time.

24 QUESTION: The Board has had a number of nurses'
25 cases now. Is there something that shows whether this is

1 typical, not typical, or, as you say, are most of the
2 Board's decisions coming out the same way and the record's
3 more or less the same?

4 MS. MAHONEY: Well, Your Honor, the -- in the
5 Avon Convalescent Center case, which was decided after the
6 Doctors' Hospital case, they looked at a fact situation
7 that's almost identical to this, where the licensed
8 practical nurses were found to be supervisors because they
9 were exercising --

10 QUESTION: What year was that?

11 MS. MAHONEY: It was in 1972, I believe.

12 QUESTION: Since 1974, has there been any
13 deviation in the Board's rulings in this area?

14 MS. MAHONEY: I think that -- you mean have they
15 found some nurses to be supervisors?

16 QUESTION: In the -- since 1974 -- you pointed
17 out, quite correctly, that the Board seemed to be shifting
18 here and there before 1974, but for the last 20 years I
19 haven't noticed that they have, and correct me if I'm
20 wrong.

21 MS. MAHONEY: Well, the shift, Your Honor,
22 that's occurred is they've been finding more and more and
23 more nurses to be supervise -- not to be supervisors even
24 if they disciplined -- for instance, in the Riverchase
25 case -- even if they disciplined a nurse's aide in

1 connection with patient care. Because the Board took its
2 rationale to sort of its logical conclusion, which is that
3 anything done incidental to patient care is going to
4 disqualify them from supervisory status.

5 And, again, if we just look at the structure of
6 this nursing home and compare it to the structure of many
7 of the industries and facilities that the Board has
8 traditionally looked at, the Dale Operating case; Ohio
9 Power; Maine, Vermont and Yankee; what they do is they say
10 if the person who's in charge of the floor or the
11 facility -- even if they don't have the power to decide
12 whether to give someone a raise or whether to fire them or
13 hire them, if they really are responsible for the safety
14 of the operations and for ensuring that those people do
15 their work and keep to it and do it in a safe manner, that
16 an employer has got to be able to demand the undivided
17 loyalty of its representative on the floor of the plant or
18 on -- in this case, on the floor of the nursing home.

19 That's really what these cases are designed to
20 find, is whether the employer has a legitimate need in
21 order to rely upon the undivided loyalty. Because if we
22 back up and look at what Taft-Hartley was all about to
23 begin with, it was a reaction to the fact that the Board
24 has interpreted its authority to permit foreman to
25 unionize.

1 QUESTION: Are you saying --

2 QUESTION: So it's the need to ensure the
3 loyalty of the employee that is the touchstone for
4 determining whether they're acting in the interest of the
5 employer.

6 MS. MAHONEY: No, Your Honor, absolutely not. I
7 don't think that the phrase "the interest of the employer"
8 has anything to do with assessing the loyalty of the
9 employee, but that rather simply the fact that that's how
10 Congress sought to identify the categories of activity
11 that would require or -- or an employer to want to have
12 undivided loyalty. In other words, the people who do the
13 assignment, who do the responsible direction, the
14 employer's got to be able to count on them to report
15 infractions of rules to make sure that the operations are
16 run in a safe manner, because --

17 QUESTION: Well, you began your argument by
18 telling us that we were focusing too much on the facts in
19 the transcript, that this was a legal argument.

20 MS. MAHONEY: Yes, Your Honor, it is.

21 QUESTION: And I take it your principal legal
22 argument is that the Board is incorrect in the way it's
23 interpreted the phrase "interest of the employer."

24 MS. MAHONEY: Absolutely. And the reason is
25 that that phrase, looking at the statute, is used for --

1 as this Court found in Packard, for common law notions of
2 respondeat superior. Without it, the statute doesn't make
3 any sense. The Board suggests that our interpretation of
4 it is superfluous, and it's not. It --

5 QUESTION: But all -- almost all employees or
6 supervisors are both covered by respondeat superior. I
7 don't see how that helps us.

8 MS. MAHONEY: But, Your Honor, it doesn't.
9 That's not the way that this particular statutory
10 provision is written. And if I could just turn to the
11 language, the reason I think it's necessary is because it
12 doesn't define supervisor in terms of any employee that
13 works for a particular employer. If it said that, then
14 there -- they might have an argument that the additional
15 phrase "in the interest of the employer" was superfluous.
16 Instead it says the term "supervisor" means, "any
17 individual having authority."

18 And, of course, the term "employee" extends to
19 employees throughout industries, regardless of what
20 particular employer they work for. So unless you put in
21 this phrase, "in the interest of the employer," you don't
22 have any attribution to the particular employer who is
23 alleged to be denying the Section 7 rights.

24 And that's important in several circumstances.
25 First of all, it's important because if you take it out,

1 quite literally a union steward who is employed by an
2 employer and engages in, for instance -- effectively
3 recommends discipline of other employees, also adjusts
4 grievances, they would be found to be a supervisor under
5 the literal definition.

6 QUESTION: So you're saying that "interest of
7 the employer" is inserted to make sure that we're covering
8 employees?

9 MS. MAHONEY: Excuse me? I'm sorry.

10 QUESTION: You're saying that the function of
11 including the phrase "interest of the employer" in the
12 statute is to ensure that what we are dealing with are
13 employees, as opposed to independent contractors?

14 MS. MAHONEY: No. I'm saying that it draws a
15 number of lines. It makes sure that the supervisory
16 activities are being performed on behalf of the employer,
17 as opposed to on behalf of the employee in his personal
18 interests or in the collective interests of the union.
19 Second, it also makes sure that, for instance, with
20 respect to third parties who may be supervising the
21 employees of the employer, that they -- because it says
22 "any individual," that they also could be a supervisor as
23 long as their activity was done in the interest of the
24 employer.

25 QUESTION: Well, that is a very sweeping

1 interpretation of that phrase, and it seems to me to
2 contradict the rather common sense observation that all
3 employees to some extent are working for the interest of
4 the employer.

5 MS. MAHONEY: Well, Your Honor, in the -- if I
6 could just mention also the third place where it's
7 significant, is that if an employer -- I mean if an
8 employee works for two different employers and is a
9 supervisor for one and not a supervisor for the other, if
10 you don't have that phrase in there they actually would be
11 deemed a supervisor for all employers. Because this is
12 what -- the language that brings it back to the particular
13 employer who is alleged to have engaged in the wrongful
14 activity or denying the Section 7 right.

15 QUESTION: So, are you saying that the phrase,
16 then, has rather little to do with this case, or that it
17 has everything to do with this case?

18 MS. MAHONEY: It has all -- it has little to do
19 with this case in that it is -- it's -- in the situation
20 where you're dealing with employees, this phrase, prior to
21 the 1970's in the health care context, was never a
22 dispositive factor in the cases. We can go all the way
23 back to 1947, and the Board never used this phrase as an
24 additional prerequisite for an employee to be found to be
25 a supervisor, because it really is just a common law

1 agency kind of test. It serves a purpose, but it's
2 not -- it's not important to most of the cases that are
3 adjudicated under this section. It's certainly not
4 superfluous, though.

5 QUESTION: Ms. Mahoney, if we find that this
6 language is not entirely clear, is there a role for
7 deference to the Board and in taking -- and answering that
8 question, what credit, if any, should we give to the
9 Board's consistent rulings for the last 20 years in cases
10 of this nature?

11 MS. MAHONEY: Your Honor, first of all it is
12 unambiguous because Packard said it was unambiguous. It
13 interpreted precisely the same phrase prior to the
14 adoption of Taft-Hartley, said it was unambiguous, and
15 there's absolutely nothing in the legislature --

16 QUESTION: So that would mean for the last 20
17 years the Board has been essentially wrong, which I think
18 is --

19 MS. MAHONEY: Absolutely, Your Honor.

20 QUESTION: -- Your position, yes.

21 MS. MAHONEY: Absolutely.

22 QUESTION: But if we don't agree with that, then
23 we would owe some deference to the Board, is that not so?

24 MS. MAHONEY: Well, no, Your Honor, I -- well, I
25 mean if you found that it was a long term, long standing,

1 consistent interpretation that had a basis in the
2 language --

3 QUESTION: Yes.

4 MS. MAHONEY: -- Then I would have to say some
5 deference. But I'd like to emphasize that what the Board
6 is really trying to do here is to regain, reclaim
7 authority that Congress took away from it in 1947. That
8 what the whole purpose of Taft-Hartley was to do was to
9 say to the Board we don't want you out there just deciding
10 who's got conflicting interests and who doesn't, because
11 we don't like the way you've balanced those policies.

12 Instead what we're going to do, unlike Section 7
13 and Section 8 where we've given you sort of broad
14 delegations to come up with rules that make sense for
15 industry, here what we're going to do is we're going to
16 spell out the criteria, we're going to tell you what
17 categories of activity entitle an employer to demand
18 undivided loyalty. Because we find that the balance of
19 power has totally shifted under your interpretation of the
20 Act, and that it's of critical importance that employers
21 be allowed to have representatives with undivided loyalty
22 who will not fail to report disciplinary problems because
23 they're siding with the organized -- organizational
24 interests of the employees that they supervise.

25 That's what Taft-Hartley was about. They took

1 away the Board's authority to engage in some sort of broad
2 rulemaking as they have done in the health care area. And
3 I think --

4 QUESTION: Ms. Mahoney, isn't it arguable that
5 in 1947 Congress adopted the position of the dissenting
6 justice in the Packard case?

7 MS. MAHONEY: No, Your Honor, I don't think so.
8 First of all, as this Court recently said in Betts, that
9 unless Congress -- when this Court has interpreted a
10 phrase in a statute and said that it's unambiguous, the
11 fact that Congress changes the result in the case doesn't
12 mean that it disavowed the interpretation of the plain
13 language. This is identical to that situation.

14 Moreover, if you look at --

15 QUESTION: Of course, it did reject the holding
16 in the case.

17 MS. MAHONEY: It -- well it, what it -- no, it
18 actually didn't even reject the holding. It didn't --
19 what it said was the Court has found that the -- are you
20 talking in Packard?

21 QUESTION: Right.

22 MS. MAHONEY: What it said is that the Court has
23 found that the definition of employee, which essentially
24 has no limitations, allows the Board to decide that
25 foreman can unionize, even though we, the Supreme Court,

1 question that policy.

2 Congress didn't say the Court got it wrong.
3 Congress said we understand that we need to come forward
4 and we need to establish a definition that will take that
5 authority away from the Board. We don't want them to
6 decide who's an employee and who's not in accordance with
7 their own assessment of the policies of the Act. That's
8 what they did.

9 There's nothing in the legislative history of
10 that amendment, after Packard was decided, that suggests
11 that they were interpreting the "interest of the employer"
12 to be the dividing line between those who were super --
13 those who were minor supervisory employees and those who
14 were not. The only reference to the phrase "the interest
15 of the employer" is contained in a different section where
16 Congress was changing the definition of employer to --
17 from those who act in the interest of the employer to
18 those who act as an agent of the employer, saying that
19 they thought it was too loose a test.

20 And that is essentially what this Court found
21 that phrase meant in Carbon Fuel. It's hard to believe
22 that Congress would have known about the Packard
23 interpretation, changed it in one section because it was a
24 little loose, and then intended a totally different
25 meaning in this section of the Act without saying so

1 somewhere. That just does not conform with statutory
2 principles.

3 Even if it means something more than common law
4 agency, what does it mean? Maybe it means in the
5 interests of management. Well, we win under that test
6 too, because the whole point here is that what these
7 individuals were doing had to be in our interests. I mean
8 when they attended a disciplinary conference or when they
9 wrote up warning notices, whose interests were they acting
10 in? They were acting in the interests of management, they
11 weren't acting in the interests of -- the collective
12 interests of the employees.

13 QUESTION: Ms. Mahoney, suppose we were to agree
14 that maybe the Board's heavy reliance on the language "in
15 the interest of the employer" is not justified, what do we
16 do in this case? Are there other findings below that
17 would justify the result reached by the Board?

18 MS. MAHONEY: No, absolutely not, Your Honor.
19 If we look at what the court of appeals said, it said "the
20 interest of the employer" cannot be interpreted in the way
21 the Board has said because -- and I need to emphasize
22 this -- the Board has said that the only way that a nurse
23 is going to act in the interest -- that we're going to
24 find that they're acting in the interest of the employer
25 is if they take action or have the authority to affect job

1 status or pay.

2 And, of course, that's the key point here
3 because that's not the test for supervisors in any other
4 industry. Congress, in fact, made it clear that you
5 didn't have to have that authority. So the Court rejected
6 that definition of "the interest of the employer" because
7 it was inconsistent with the other provisions of the Act.

8 They then, under the Beverly analysis, looked at
9 how would these people be supervisors in other industries?
10 Do they meet the statutory criteria? Is the employer
11 vesting them with the type of authority to responsibly
12 direct its operations, oversee its work force, that they
13 would be found to be a supervisor in any other industry?
14 And they found that it was clear that they would be.

15 And, in fact, if you go through the Board's
16 cases from 1947 forward outside the health care area, on
17 analogous facts there are many cases without any reference
18 to "the interest of the employer," of course, where they
19 have found that precisely this kind of activity is
20 supervisory in character and that an employer is entitled
21 to demand the undivided loyalty of those people.

22 And one of the things, too, that the Board
23 referred now to say that its test is not whether they have
24 the authority to affect pay or job status. They claim
25 that now, although if we look back, for instance, at the

1 petition reply at page 4, it says: "The Board will find
2 nurses to be supervisors where in addition to performing
3 professional duties, they also possess the authority to
4 affect the job status or pay of employees." They have
5 never suggested what authority these nurses could have had
6 that would have made them eligible for supervisory status
7 under Section 2(11) that was not covered by one of the
8 other statutory criteria. They've rendered it
9 superfluous.

10 I should add in the reply there is one thing
11 they said, was well perhaps if the nurses had
12 responsibility to establish the job description of these
13 nurse's aides, that that might mean that they were engaged
14 in responsible direction. But no Board case has ever said
15 that that was a prerequisite for a finding of "responsibly
16 to direct," and, in fact, that's the kind of managerial
17 authority that ordinarily is exercised by a much higher
18 management level and not by the lower level that is the
19 supervisory level.

20 QUESTION: Ms. Mahoney, am I correct in thinking
21 that the Board's opinion in this particular case dealt
22 with the supervisor-employee issue only in a footnote, and
23 then simply discussed who had the burden of proof?

24 MS. MAHONEY: That's correct, Your Honor.
25 There's no indication of precisely what the Board was

1 doing. But I think that essentially if this Court rejects
2 the Board's rule, as the court of appeals does. If you
3 find that there's adequate room here to accommodate the --
4 you know, not excluding all professionals under the
5 statutory criteria the way that the court of appeals
6 found, that the court of appeals decision has got to be
7 affirmed because it really is just a question of whether
8 there was substantial evidence to support the judgment
9 under the statutory criteria.

10 And there the Board's decision -- the Board's
11 decision in the Avon Convalescent Center case and the
12 University Health Care case fully support, because the
13 facts are essentially indistinguishable with the court of
14 appeals' application of the law to the facts. The problem
15 here is that the Board stopped applying that test after
16 1974, and then went off on this -- this different kind of
17 analysis where everything that a nurse did that furthered
18 the interest of the patient was no longer supervisory.

19 I mean, the bottom line here is that the Board's
20 rule gives greater organizational rights to nurses than it
21 does to employees in any other industry. The lead
22 person -- not the lead man, but the senior personnel, for
23 instance, in the power plant example is entitled to
24 supervisory -- is not entitled to organizational rights
25 when they perform exactly the same job functions as the

1 licensed practical nurses in this case. And that's the
2 real irony in the way that the Board has interpreted the
3 statute to give --

4 QUESTION: Who was that, Ms. Mahoney? Give
5 me -- what is the example you're giving?

6 MS. MAHONEY: In the power plant cases, for
7 instance, what they will have is a lead control operator
8 who is the senior person that's responsible for overseeing
9 the work of others in the operation or in the control room
10 of the power plant. And they also perform work
11 themselves, but they have the responsibility -- they're
12 the one who's in charge. They have the responsibility to
13 decide, you know, what's going to be done in the event of
14 an emergency, whether they need to get additional
15 staffing, or whatever.

16 And even in the absence of the authority to
17 effectively recommend pay raises or, you know, personnel
18 authority under the other sections, they are found to be
19 the people who are in charge, they are found to be those
20 who are engaged in responsible direction. It doesn't make
21 any sense to say that those exact same activities are now
22 somehow not supervisory because they occur in the context
23 of a nursing home and the employer chooses to use a nurse
24 to perform those functions. That's really what is going
25 on here.

1 There's also no problem here with --

2 QUESTION: So you're saying there should be no
3 industry-by-industry distinction in when people are
4 working or not working for the interest of the employer --

5 MS. MAHONEY: No, Your Honor.

6 QUESTION: -- Despite the fact that in the power
7 company the people are not engaged in helping other
8 people, whereas in the nursing company they are?

9 MS. MAHONEY: Well, they're engaged in helping
10 the customers. They're acting pursuant to regulatory
11 standards, a lot of skill and training, and they're acting
12 in the interest of the power plant's customers. The
13 patients in this case are no different than the customers
14 of any other industry.

15 There's simply no rational distinction, I don't
16 believe, for that analysis. That instead you really have
17 to look at what are the functions they are performing;
18 where are they in the hierarchical structure; what is the
19 employer relying upon them to do? And here the ALJ
20 acknowledged they were the senior personnel, they were in
21 charge of the facility, but because of the Board's patient
22 care rule they could not go ahead and find that they were
23 supervisors.

24 Yeshiva is really exactly analysis -- exactly
25 analogous because what the Board did in Yeshiva, and, in

1 fact, what it did in Bell Aerospace, was it came to this
2 Court saying we want to find that managerial employees,
3 employees who meet the traditional criteria for managerial
4 status, are not managers. And they're entitled to the
5 protections of the Act because we don't think there's a
6 potential for conflicting loyalties, because in Yeshiva
7 they exercise professional judgment so it's our informed
8 discretion, looking at this industry, that really there's
9 no need to deny them the protection of the Act. They said
10 the same about buyers --

11 QUESTION: What do you make of footnote 30 in
12 Yeshiva which seems to say that nurses fall in this group
13 that are deemed employees despite substantial planning
14 responsibility and authority to direct and evaluate
15 others?

16 MS. MAHONEY: I think what Yeshiva is talking
17 about is they were asking the question that the court --
18 is consistent with the court of appeals, and that is to
19 say do these -- do the university professors only do those
20 things that all university professors do, or do they do
21 something beyond that.

22 And I think that what the Court was really
23 saying is that when they exercise decisionmaking authority
24 that goes beyond that which sort of every nurse or every
25 university professor inherently must have, that you go

1 ahead and you apply the criteria. Because if you didn't
2 do that, if you said, for instance, that the mere
3 direction, any direction of an aide or -- was
4 automatically supervisory activity, then you'd have a
5 wholesale exclusion. And Yeshiva --

6 QUESTION: What would you have to take away from
7 these nurses to make them nonsupervisors?

8 MS. MAHONEY: I'm sorry, Your Honor.

9 QUESTION: What would you have to take away?

10 MS. MAHONEY: What would you have to take away
11 from them?

12 QUESTION: In other words, you said --

13 MS. MAHONEY: You'd have to take away the
14 responsibility to be the senior personnel who's got the
15 oversight of all of the performance of their functions.
16 If you've got another hierarchical structure, I think that
17 that's the main distinction among the cases.

18 QUESTION: Thank you.

19 MS. MAHONEY: I'm sorry, my time is up.

20 QUESTION: Thank you, Ms. Mahoney.

21 Mr. Dreeben, you have 4 minutes remaining.

22 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

23 ON BEHALF OF THE PETITIONER

24 MR. DREEBEN: The burden of respondent is to
25 show that the Board's construction violates the statute,

1 that it is inconsistent with the statute. The terms that
2 appear in Section 2(11) of the Act are terms that are open
3 to more than one interpretation.

4 This is a Chevron case. The Board has examined
5 the facts of various industries in light of its power to
6 apply the Act to particular situations, and it has arrived
7 at an interpretation designed to draw the very distinction
8 that Congress intended between those with supervisory
9 authority that aligns them with management and those with
10 minor supervisory duties.

11 QUESTION: Has the Board found that any other
12 character of individual, in attending to the needs of the
13 customer of the employer, is not acting in the interest of
14 the employer but rather in the interest of the customer?
15 It is uniquely nurses that when they take care of
16 nursing-home customers, are not acting in the interest of
17 the employer?

18 MR. DREEBEN: No, it is not uniquely nurses.

19 QUESTION: What other fields has the Board
20 applied that theory to?

21 MR. DREEBEN: The Board has not applied a theory
22 that's phrased in the same terms to other categories of
23 professionals, but --

24 QUESTION: Why would that be if it's the central
25 feature of this section of --

1 MR. DREEBEN: What the Board has done is draw an
2 analogy between the -- what nurses do and what other minor
3 supervisory employees do. Our reply brief at page 5, note
4 7, collects cases that do, in fact, show that the Board's
5 rule in this case is fully consistent with the traditional
6 rule that it has applied. There are many factual
7 distinctions that get drawn between the various cases.
8 The Board tries to draw consistent distinctions.
9 Occasional cases are going to wander on one side of the
10 line or another, but the Board has done what it can to
11 generate a general category.

12 It does not mean that all nurses are supervisors
13 or are not supervisors. That depends on what they, in
14 fact, do. But the Board's principal rule here is designed
15 to test out what a nurse does as a professional doing what
16 professionals typically do, from what persons do who do
17 exercise genuine supervisory authority.

18 I thank the Court.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
20 Dreeben.

21 The case is submitted.

22 (Whereupon, at 11:58 a.m., the case in the
23 above-entitled matter was submitted.)

24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NATIONAL LABOR RELATIONS BOARD, Petitioner v. HEALTH CARE & RETIREMENT CORPORATION OF AMERICA, No. 92-1964

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

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