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ability to determine freely the critical issue of the defendant's credibility.[116] The Fourth Circuit's decision in *Tello* appears to expand the ill-defined boundaries of permissible judicial comment at the expense of the integrity of jury verdicts, and therefore impinges upon a defendant's constitutional right to trial by jury.

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X. LABOR

A. *Mass Action Liability of Local Unions*

Congress enacted the Labor Management Relations Act (LMRA)[1] to promote the peaceful settlement of labor disputes.[2] The LMRA encourages

116. *See supra* notes 90-103 and accompanying text (trial judge's remarks on defendant's testimony interfered with jury's ability to independently determine defendant's credibility).

1. Labor Management Relations Act (LMRA), 1947, Pub. L. No. 101, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1976 & Supp. V 1983)). The LMRA amended the National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-166 (1976 & Supp. III 1979)).

2. *See* 29 U.S.C. § 171(a) (1976) (settlement of labor disputes through collective bargaining between employers and employees enhances industrial peace and national welfare). Prior to the passage of the LMRA, Congress limited the power of federal courts to issue injunctions. *See* Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 70 (1932) (codified as 29 U.S.C. §§ 101-115 (1976)) (no court shall issue restraining order in case involving labor dispute except in strict conformity with terms of Norris-LaGuardia Act). During the course of any labor dispute, the LMRA seeks to minimize obstructions to the flow of commerce and thereby serves to protect the national interest. *Id.* § 151; *see also* Cox, *Some Aspects of the Labor Management Relations Act*, 61 HARV. L. REV. 274, 283 (1948) (union's duty under LMRA to discuss terms of employment discourages strikes); Note, *The Rise and Fall of the Employer's Quid Pro Quo Under Section 301(a) of the Taft-Hartley Act*, 4 WHITTIER L. REV. 247, 252 (1982) (contrasting policy underlying Norris-LaGuardia Act with goals of LMRA) [hereinafter cited as *Rise & Fall*].

While the NLRA and Norris-LaGuardia Act also sought to promote collective bargaining, the major effect of those acts was to limit federal judicial interference with labor's attempts to organize. *See* 29 U.S.C. § 101 (1976) (§ 101 restricted court's jurisdiction to issue temporary or permanent injunctions); *Id.* § 102 (NLRA recognizes workers' rights to associate, organize, and designate representatives); *see also id.* § 151 (workers' right to organize is necessary to provide mutual protection to parties when negotiating terms and conditions of employment). The union movement gained momentum from 1935 until the enactment of the LMRA because the government was reluctant to regulate the formation and development of unions during that period. *See* Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 285 (1960-61) (contrasting legislative laissez-faire toward unions with additional restraints imposed on management by NLRA). Congress enacted the LMRA in response to the rapid increase in labor strikes following World War II. *See* Note, *Labor Law - § 301 of the Labor Management Relations Act - Individual Liability of Wildcat Strikers*, 49 TENN. L. REV. 179, 182 n.19 (1981)

employers and labor unions to enter into collective bargaining agreements.[3] In a typical collective bargaining agreement, a union agrees to refrain from unauthorized work stoppages[4] in exchange for an employer's promise to submit disputes to binding arbitration.[5] Section 301 of the LMRA provides a means to enforce the terms of collective bargaining agreements.[6] A union's breach

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(labor strikes claimed more lost work days in first two months of 1946 than during entire war).

The LMRA favors binding arbitration and grievance procedures over strikes as means of dispute settlement. *See* 29 U.S.C. § 171 (1976) (tenet of United States labor policy is encouragement of voluntary arbitration and mediation between employer and employees when determining working conditions); *see also Rise & Fall, supra,* at 252 (LMRA is product of congressional desire to maintain industrial peace). The enactment of the NLRA and LMRA sought to equalize the powers of labor and management in settling disputes. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW, 1-6 (1976) (general history of American labor law).

3. *See* 29 U.S.C. § 158(d) (1976) (collective bargaining agreements place mutual obligation on employees' representative and employer to confer in good faith on all issues affecting employment conditions). The usual product of collective bargaining is a written agreement that establishes the relationship between the employer and the union. *See* R. GORMAN, *supra* note 2, at 540 (typical collective bargaining agreement covers matters like wages, hours, promotions, pensions, seniority, holidays, and work assignments). The collective bargaining agreement applies not only to workers employed at the time the agreement takes effect but also governs the terms of employment of any employee who joins the work force during the term of the agreement. *Id.* Most collective bargaining agreements require its parties to arbitrate disputes privately before resorting to judicial remedies. *Id.* at 541. Collective bargaining is an exchange of ideas and theories between employers and employees in an honest attempt to come to terms. *Compare* Glomac Plastics, Inc. v. NLRB, 592 F.2d 94, 97-98 (2d Cir. 1979) (statutory duty to bargain requires parties to demonstrate serious intent to adjust differences) *with* Aluminum Ore Co. v. NLRB, 131 F.2d 485, 487 (3d Cir. 1942) (employer's determination of employee pay increases without consulting union does not amount to collective bargaining as required by NLRA).

4. *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1956) (employees' waiver of rights to strike facilitates flow of commerce and bolsters employer's production schedule). When a collective bargaining agreement specifies arbitration as the manner by which parties will settle disputes, an employer cannot refuse to arbitrate. *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960) (employer surrenders managerial autonomy in exchange for union's guarantee not to strike over issues expressly subject to arbitration). A collective bargaining agreement calls for submission of specified grievances to arbitration regardless of the apparent merit of the claim. *Id.* A union's no-strike obligation is the *quid pro quo* for an employer's agreement to submit grievance disputes to arbitration. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957); *see* Fishman & Brown, *Union Responsibility for Wildcat Strikes*, 21 WAYNE L. REV. 1017, 1017 (1975) (authors speculate whether employer actually receives benefit from collective agreement equal to benefit received by union).

5. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957) (agreement by employer to arbitrate grievance disputes is *quid pro quo* for union's promise not to strike). In *Lincoln Mills*, the Supreme Court ordered an employer to arbitrate an employee grievance in accordance with the collective bargaining agreement. *Id.* at 451. The LMRA encourages parties to settle grievance disputes by a method agreed to within their collective bargaining agreement. *See* 29 U.S.C. § 171(c) (1976) (LMRA provides full government assistance to parties in formulating agreements that provide adequate notice of proposed changes to other party); *id.* § 173(d) (LMRA favors final settlement of grievance disputes by parties through application of procedures outlined in collective bargaining agreement over government intervention and mediation). *See generally* R. GORMAN, *supra* note 2, at 543-53 (discussing court decisions interpreting legislative intent behind LMRA).

6. *See* Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1976 & Supp. V 1981). Section 301 enables federal district courts to entertain suits brought for violations

of a collective bargaining agreement entitles an employer to bring an action under section 301 for damages[7] or injunctive relief.[8] To recover damages from a labor union for a violation of a collective bargaining agreement, an employer must prove union responsibility for the violation under a recognized theory of union liability.[9] The mass action theory of union liability renders a union

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of contracts between an employer and a labor organization, or between labor organizations. *Id.* Any district court that possesses jurisdiction over the parties may hear the case, regardless of the amount in controversy or the citizenship of the parties. *Id.* The importance of § 301, however, reaches beyond jurisdictional matters. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957) (§ 301 authorizes federal courts to develop federal common law for enforcement of collective bargaining agreements); *see also Rise & Fall, supra* note 2, at 254-61 (*Lincoln Mills* decision signalled revitalization of federal courts as strong force in resolution of labor disputes).

7. *See* LMRA § 301(b), 29 U.S.C. § 185(b) (1976) (any labor organization is liable for acts of its agents). Money judgments against a union are enforceable only against the organization as a whole. *Id.; see* Atkinson v. Sinclair Refining Co., 370 U.S. 238, 247 (1962) (employer's action for damages is permissible under § 301), *overruled on other grounds*, Boys Markets v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970). The *Atkinson* Court ruled that a union, but not its members, may be liable for damages caused by a union-authorized, illegal strike. 370 U.S. at 247.

In *Complete Auto Transit, Inc. v. Reis*, the Supreme Court held that an employer cannot collect damages from individual union members who engage in wildcat strikes. *See* 451 U.S. 401, 417 (1981) (§ 301 does not allow damage action against union members who violate no-strike provision of collective bargaining agreement). The *Reis* Court emphasized that Congress only intended § 301 to support an action for damages against a union. *Id.* at 412-13.

8. *See* Boys Markets v. Retail Clerks Union, Local 770, 398 U.S. 235, 254 (1970) (Norris-LaGuardia Act does not bar injunctive relief when contract requires parties to arbitrate issue). If an employer will suffer irreparable harm due to a union's refusal to arbitrate, a court should issue an injunction. *Id.; S. Cabot, Labor Management Relations Act Manual—A Guide to Effective Labor Relations*, § 17.2[4], at 17-10 (1978) (employer's primary remedy for union violation of no-strike clause is injunction).

9. *See* Note, *Wildcat Strikes - The Need For An Enforceable Damages Remedy*, 1980 UTAH L. REV. 493, 494-96 (employer may demonstrate union responsibility for wildcat strike through common-law agency principles or mass action theory) [hereinafter cited as *Enforceable Remedy*]. The LMRA specifically recognizes that a union may be liable for the illegal actions of its members under common-law agency principles. 29 U.S.C. § 185(b) (1976) (employer may sue union for wrongful acts of union agents). The presence of actual union authorization or ratification is not necessary to hold a union liable for the actions of its members. *Id.* § 185(e) (actual authorization or ratification does not control question of whether agency exists). The unauthorized actions of a union member acting within the scope of his employment also will bind a union. *See Enforceable Remedy, supra*, at 494-95 (union is responsible for acts of agent committed within scope of his employment regardless of whether union specifically authorized or ratified those acts); *cf.* United Construction Workers v. Haislip Baking Co., 223 F.2d 872, 878 (4th Cir.) (union is not liable when evidence clearly shows that scope of officer's employment did not include authority to encourage or adopt wildcat strikes), *cert. denied*, 350 U.S. 847 (1955). *See generally infra* note 34 (discussing Fourth Circuit's application of common-law agency principles in *Consolidation Coal Co. v. Local 1702 United Mine Workers of America*).

A second method by which an employer may establish union liability is the mass action theory. *See* United States v. International Union, UMWA, 77 F. Supp. 563, 566 (D.D.C. 1948) (basis of mass action theory is notion that large groups of men do not act collectively without leadership), *aff'd*, 177 F.2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949). The mass action theory has gained wide acceptance by other federal courts as a method to affix union liability when large numbers of union members act in concert. *See infra* note 46 (discussing cases that have recognized mass action theory as method of imposing liability upon union for unauthorized

liable for acts undertaken by union members even when the union apparently did not direct the members' actions.[10] In *Consolidation Coal Co. v. Local 1702, United Mine Workers of America*,[11] the Fourth Circuit addressed the issue of local union liability for an illegal work stoppage under the mass action theory.[12]

In *Consolidation Coal,* a wildcat strike resulted after the suspension of a union member who allegedly had stolen Consolidation Coal Company (Consolidated Coal) property from a coal mine.[13] Since the walkout threatened irreparable harm to Consolidated Coal,[14] the United States District Court for

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acts of members); *infra* notes 50-67 and accompanying text (discussing cases that have recognized continued validity of mass action theory after Supreme Court's decision in *Carbon Fuel*). *See generally* Fishman & Brown, *supra* note 4, at 1027 (collective action of union members presumes union responsibility); Note, *International Union Liability for Wildcat Strikes: The* Carbon Fuel *Case*, 31 SYRACUSE L. REV. 1007, 1039 (1980) (mass action theory survives *Carbon Fuel* at least as factual presumption of local union liability) [hereinafter cited as *International Union*].

A third theory under which courts have imposed union liability is the "best efforts" theory. *See Enforceable Remedy, supra*, at 495 ("best efforts" theory stems from union's no-strike promise in collective bargaining agreement). The major premise of the "best efforts," or contract sanctity theory is that a union's no-strike guarantee includes the responsibility to employ all available means to end a wildcat strike by union members. *See* Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951, 963 (3d Cir. 1975) (no-strike clause obligates union to use best efforts to terminate illegal strikes), *cert. denied*, 424 U.S. 935 (1976). The Supreme Court, however, recently held that a union's duty to use its best efforts to end an illegal strike does not arise from a no-strike clause. Carbon Fuel Co. v. UMW, 444 U.S. 212, 221-22 (1979). The *Carbon Fuel* Court stated that to impose such a duty on the union effectively would rewrite the terms of the collective bargaining agreement. *Id.* at 221; *see also infra* notes 30-38 and accompanying text (discussing Supreme Court's decision in *Carbon Fuel*). *See generally Enforceable Remedy, supra* at 497-98 (discussing *Carbon Fuel's* prohibition against implying duty to end strike from union's promise to maintain integrity of contract).

10. *See* United States v. International Union, UMWA, 77 F. Supp. 563, 566 (D.D.C. 1948) (union easily may employ subtle means to instigate illegal strike without formally calling strike), *aff'd*, 177 F.2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949). In the absence of the mass action theory, a union could use secret signals to call a strike and thereby avoid liability under agency principles. *Id.* at 567; *see also* Fishman & Brown, *supra* note 4, at 1026-27 (chaos would result if unions lawfully could call strikes through secret means). The collective action of members is a fair indicator for determining whether union involvement is present in an illegal activity. *Id.* at 1027.

11. 709 F.2d 882 (4th Cir.), *cert. denied*, 104 S.Ct. 487 (1983).

12. *See infra* notes 13-18 and accompanying text (discussing involvement of local union members in wildcat strike in *Consolidation Coal*); *infra* notes 35-43 and accompanying text (discussing Fourth Circuit's analysis of local union's liability under mass action theory in *Consolidation Coal*).

13. 709 F.2d 883.

14. *Id.* An employer must meet the injunction requirements set forth in *Boys Markets v. Retail Clerks Union, Local 770,* 398 U.S. 235, 254 (1970), to be eligible for a temporary no-strike injunction. R. GORMAN, *supra* note 2, at 610. The requirements outlined in *Boys Markets* include the existence of a collective bargaining agreement that contains a mandatory arbitration procedure. *Id.* In addition, the strike must involve a subject covered by the arbitration procedure. *Id.* at 611. The collective bargaining agreement must oblige the union to refrain from strikes and require the employer to submit the issue to arbitration. *Id.* at 610. Finally, the employer must demonstrate a threat of irreparable harm should the court deny the injunction. *Id. See generally id.* at 610-15 (discussing subsequent federal cases interpreting *Boys Markets*).

the Northern District of West Virginia issued a temporary restraining order (TRO) directing the members of Local 1702 to return to work.[15] When the miners failed to return to the mines, the district court assessed civil contempt fines against Local 1702 and its officers.[16] Union members then returned to work, ending a four-day strike.[17] Consolidation Coal subsequently sued Local 1702 to recover damages sustained by the company as a result of the illegal work stoppage.[18]

The district court concluded that the strike was a breach of the no-strike clause in the collective bargaining agreement between Consolidation Coal and Local 1702 because the dispute over the allegedly stolen property was an issue expressly subject to mandatory arbitration.[19] Notwithstanding the district court's determination that all union officers and committeemen had participated in the wildcat strike to some degree,[20] the district court in *Consolidation Coal* refused to hold Local 1702 liable under the mass action theory.[21] Instead, the court relied on the Supreme Court's decision in *Carbon Fuel v. United Mine Workers of America*[22] for the proposition that the mass action theory no longer existed to impose liability upon a union for an unauthorized strike.[23]

In *Carbon Fuel*, local United Mine Workers (UMW) members participated in a series of forty-eight wildcat strikes at Carbon Fuel Company (Carbon Fuel) mines.[24] Carbon Fuel brought suit against the local, district and international unions in federal district court for damages the company sustained during the strikes.[25] At trial, the jury found all three union organizations liable for damages on the basis of the district judge's instruction that liability attached to each union entity if the evidence showed that each organization failed to use all reasonable means to prevent or terminate the illegal strikes.[26] On appeal from the district court, the Fourth Circuit affirmed the liability of the local unions under the mass action theory.[27] The Fourth Circuit deter-

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15. 709 F.2d at 883. Rule 65 of the Federal Rules of Civil Procedure governs injunction procedures. FED. R. CIV. P. 65; *see* United States Steel Corp. v. UMWA, 456 F.2d 483, 488 (3d Cir.) (history behind § 301 suggests that accommodation of LMRA with Federal Rules of Civil Procedure is proper), *cert. denied*, 408 U.S. 923 (1972); United States Steel Corp. v. Operating Eng'rs, Local 18, 69 Lab. Cas. (CCH) ¶12,959 (S.D. Ohio 1972) (rule 65 governs hearing on motion for labor injunction). *But see Fed. R. Civ. P.* 65(e) (Federal Rules of Civil Procedure do not alter any statute relating to temporary restraining orders (TRO) in actions between employers and employees).

16. 709 F.2d at 883.

17. *Id.* at 883-84.

18. *Id.* at 883.

19. *Id.*

20. *Id.*

21. *Id.; see supra* note 9 (discussing mass action theory).

22. 582 F.2d 1346 (4th Cir. 1978), *aff'd*, 444 U.S. 212 (1979).

23. 709 F.2d at 888.

24. 444 U.S. at 213.

25. *Id.* at 214.

26. *Id.*

27. 582 F.2d at 1350. In *Carbon Fuel*, the Fourth Circuit vacated the judgments against the local unions for seventeen of the work stoppages but affirmed local union liability for the remaining thirty-one wildcat strikes. *Id.* at 1349-50.

mined that the mass action theory represents a sensible and pragmatic approach to the problem of local wildcat strikes.[28] After imposing mass action liability on the local unions in *Carbon Fuel*, however, the Fourth Circuit refused to hold the district and international unions liable because neither of those unions had participated in the strikes nor had a duty to use their resources to stop local wildcat strikes.[29]

On appeal, the Supreme Court affirmed the non-liability of the district and international unions in *Carbon Fuel* because neither organization participated in the wildcat strikes.[30] In *Carbon Fuel*, the Supreme Court held that an international or district union only incurs liability for a wildcat strike if an agent of the union participates in the strike.[31] The Supreme Court's decision, however, did not address local union liability because the local unions in *Carbon Fuel* did not appeal their liability to the Supreme Court.[32] Since the issue of local union liability under the mass action theory was not before the Supreme Court, the local unions remained liable for the wildcat strikes after the Supreme Court's decision in *Carbon Fuel*.[33]

Upon the company's appeal in *Consolidation Coal*, the Fourth Circuit reversed the district court's holding that the mass action theory did not survive the Supreme Court's decision in *Carbon Fuel*.[34] The *Consolidation Coal*

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28. *Id.* at 1349-50.

29. *Id.* at 1351.

30. 444 U.S. at 218.

31. *Id.*

32. *See id.* at 215 n.3 (local unions in *Carbon Fuel* did not seek review of adverse judgments in Supreme Court).

33. *See id.* at 215.

34. 709 F.2d at 884. *See also infra* notes 35-43 and accompanying text (discussing *Consolidation Coal* court's analysis of mass action liability). In *Consolidation Coal*, the Fourth Circuit's also reversed the district court's finding that Local 1702 was not liable under common-law agency principles. *See id.* at 885-86. The Fourth Circuit considered evidence presented by Consolidation Coal at trial to prove the local union's authorization, support, or ratification of the wildcat strike and determined that efforts made by union officials to end the strike were minimal and foreseeably ineffective. *Id.* The court relied on the Fifth Circuit's decision in *United States Steel Corp. v. UMWA*, 598 F.2d 363 (5th Cir. 1979), for the proposition that a local union incurs liability when its efforts to end an illegal strike have no reasonable chance of success. 709 F.2d at 886.

In *United States Steel*, union members had participated in an average of one wildcat strike a month during 1977 and one every other month over the previous five-year period. 598 F.2d at 365-66. During the strike at issue in *United States Steel*, the local union conducted two meetings at which officers instructed the miners to return to work. *Id.* at 366. The Fifth Circuit ruled that in light of the strike-prone history of the mine, these meetings were foreseeably ineffective as a means of ending the strike and that the local union ratified the strike through its inaction. *Id.* The *United States Steel* court stated that a union must make a credible demonstration of union disapproval to avoid liability under the agency principle of ratification. *Id.*

The *Consolidation Coal* court considered Local 1702's attempts to end the strike less effective than the measures employed by union officials in *United States Steel*. 709 F.2d at 886. The court conceded that Local 1702 did conduct one meeting to encourage the miners to return to work. *Id.* The Fourth Circuit, however, enunciated numerous preventive actions that the union failed to try. *Id.* Union officials in *Consolidation Coal* did not return to work during the strike or attempt to lead the strikers back into the mines. *Id.* In addition, Local 1702 did not employ radio, TV or newspaper advertisements to encourage an end to the wildcat strike. *Id.* Union

court stated that the sole issue before the Supreme Court in *Carbon Fuel* was whether an international union was liable for damages sustained by an employer as a result of a wildcat strike by local union members if the international union failed to use all reasonable means to end the strike.[35] In *Consolidation Coal*, the Fourth Circuit explained that its decision in *Carbon Fuel* had held the local unions liable under the mass action theory but that the local unions did not appeal their liability to the Supreme Court.[36] Since the issue of local union liability did not reach the Supreme Court in *Carbon Fuel*, the *Consolidation Coal* court refused to construe the Supreme Court's decision in *Carbon Fuel* as affecting application of the mass action theory to local unions.[37] In *Consolidation Coal*, the Fourth Circuit strongly emphasized that the Supreme Court's *Carbon Fuel* decision did not prevent the continued use of the mass action theory to attach responsibility to a local union for the unauthorized mass activity of its members.[38]

Having determined that the mass action theory had survived *Carbon Fuel*, the *Consolidation Coal* court compared the actions of Local 1702's members and officers with the actions of local union members in the Fourth Circuit's decision in *Carbon Fuel*.[39] The *Consolidation Coal* court accepted the district court's factual determination that because all members of Local 1702 had participated in the wildcat strike, the same type of mass action existed as was present in *Carbon Fuel*.[40] The Fourth Circuit in *Consolidation Coal* court then reiterated its *Carbon Fuel* statement that the mass action theory provided a sensible and pragmatic approach to the problems associated with wildcat strikes.[41] The Fourth Circuit also stressed, as it had done in *Carbon Fuel*, that mass action liability ordinarily attaches only to the local union because the local union is usually the group whose members act in concert.[42] Since

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officials refrained from threatening the strikers with disciplinary action, even though the UMWA constitution and Local 1702's by-laws imposed a duty on local officials to end unauthorized work stoppages. *Id.* From Local 1702's inaction during the period of the illegal strike, the *Consolidation Coal* court inferred union ratification. *See id.* at 885-86.

35. *See id.* at 884; 444 U.S. at 221. The Supreme Court affirmed the Fourth Circuit's decision in *Carbon Fuel*. *Id.* at 215. The Court concluded from the history of the collective bargaining agreements that the international and district unions specifically bargained for the removal of a clause requiring affirmative action on their part to end wildcat strikes. *Id.* at 220. The *Carbon Fuel* Court then examined a clause in the parties' contract that obligated UMWA and District 17 to maintain the integrity of the contract. *Id.* at 218. The Court concluded that the integrity clause did not require the international or district union to halt wildcat strikes. *Id.* at 221.

36. 709 F.2d at 884.

37. *Id.* at 885.

38. *Id.*

39. *Id.; see also Carbon Fuel* v. UMWA, 582 F.2d 1346, 1349 (4th Cir. 1978) (local unions are liable when evidence overwhelmingly shows mass participation of union members in wildcat strikes); Comment, *Unauthorized Work Stoppages*, 81 W. VA. L. REV. 805, 810 (1979) (uncontradicted evidence that entire union membership engaged in strikes supports application of mass action theory) [hereinafter cited as *Work Stoppages*].

40. 709 F.2d at 885. In *Consolidation Coal*, the Fourth Circuit explicitly relied on its decision in *Carbon Fuel* as support for the continued viability of the mass action theory. *Id.*

41. *Id.; see also Carbon Fuel*, 582 F.2d at 1349-50.

42. 709 F.2d at 885; *see also Carbon Fuel*, 582 F.2d at 1349. Local unions are most likely

the uncontradicted evidence showed mass participation in the wildcat strike by member and officers of Local 1702, the *Consolidation Coal* court held Local 1702 liable on the basis of the mass action theory and remanded the case to the district court for a determination of damages.[43]

In *Consolidation Coal*, the Fourth Circuit correctly determined that the mass action theory of local union liability survives *Carbon Fuel*[44] Prior to the Supreme Court's decision in *Carbon Fuel*, the Fourth Circuit had recognized the mass action theory.[45] The majority of federal courts also had accepted the mass action theory, especially as applied to local unions.[46] Since the issue

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to encounter mass action liability. *See, e.g.*, United States Steel Corp. v. UMWA, 598 F.2d 363, 365 (5th Cir. 1979) (only local union is liable under mass action theory unless evidence shows complicity on part of district or international union); United States Steel Corp. v. UMWA, 534 F.2d 1063, 1074 (3d Cir. 1976) (same); Wagner Electric Corp. v. Local 1104, Int'l Union of Elec. Workers, 496 F.2d 954, 956 (8th Cir. 1974) (local union is responsible for wildcat strike by 2700 members as long as union was functioning as entity at time of strike).

43. 709 F.2d at 856; *see also supra* note 34 (*Consolidation Coal* court also held Local 1702 liable on common-law agency principles).

44. *See infra* notes 45-48 and accompanying text (Fourth Circuit's decision in *Consolidation Coal* is consistent with Supreme Court's decision in *Carbon Fuel*); *supra* notes 50-67 and accompanying text (Fourth Circuit's decision in *Consolidation Coal* is consistent with decisions of other federal courts addressing mass action theory).

45. *See* Carbon Fuel Co. v. UMWA, 582 F.2d 1346, 1349-50 (4th Cir. 1978) (proper application of mass action theory represents sensible and pragmatic approach to wildcat strikes); *aff'd on other grounds*, 444 U.S. 212 (1979); United Construction Workers v. Haislip Baking Co., 223 F.2d 872, 877 (4th Cir. 1955) (local union held liable for informal strike that local union unquestionably had approved); *see also supra* notes 24-33 and accompanying text (discussing decisions of Fourth Circuit and Supreme Court in *Carbon Fuel*); *International Union, supra*, note 9, at 1038 (discussing practical effects of *Carbon Fuel* decision); *Work Stoppages, supra* note 39, at 810 (Fourth Circuit was correct in holding local unions liable in *Carbon Fuel* under mass action theory).

46. *Compare* United Steelworkers of America v. Lorain, Division of Koehring Co., 616 F.2d 919, 922 (6th Cir. 1980) (union is not liable for failure to end illegal strikes in absence of specific language requiring union to end strike), *cert. denied*, 451 U.S. 983 (1981) *and* Southern Ohio Coal Co. v. UMWA, 551 F.2d 695, 701 (6th Cir. 1977) (union is not responsible for mass action of members), *cert. denied*, 434 U.S. 867 (1978) *with* Carbon Fuel Co. v. UMWA, 582 F.2d 1346, 1349-50 (4th Cir. 1978) (mass action theory represents sensible and pragmatic approach to wildcat strike), *aff'd on other grounds*, 444 U.S. 212 (1979) and Turnkey Constructors v. Cement Masons Local 685, 580 F.2d 798, 800 (5th Cir. 1978) (union is liable when officer arranged meeting with management during strike); *see also* Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951, 963 (3d Cir. 1975) (court realistically must regard mass action of individual union members as union action), *cert. denied*, 424 U.S. 935 (1976); Wagner Electric Corp. v. Local 1104, Int'l Union of Elec. Workers, 496 F.2d 954, 956 (8th Cir. 1974) (local union is responsible for wildcat strike by 2700 members as long as union functioned as entity at time of strike); Consolidation Coal Co. v. International Union, UMWA, 500 F. Supp. 72, 77 (D. Utah 1980) (same); Adley Express v. Highway Truck Drivers Local 107, 365 F. Supp. 769, 778 & n.8 (E.D. Pa. 1972) (union is liable for mass action of members unless collective bargaining agreement stipulates that union will not be responsible for unauthorized activities); United States v. International Union, UMWA, 77 F. Supp. 563, 566 (D.D.C. 1948) (mass action theory is based on premise that large numbers of men do not act collectively without leadership), *aff'd*, 177 F.2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949).

The Sixth Circuit is the only circuit court that expressly has rejected the mass action theory for local union liability. *See* North American Coal Corp. v. Local 2262 UMWA, 497 F.2d 459,

of local union liability did not reach the Supreme Court in *Carbon Fuel*, the *Consolidation Coal* court was correct to conclude that the Supreme Court's decision in *Carbon Fuel* has no effect on the continued validity of the mass action theory at the local union level.[47] The Fourth Circuit's determination that Local 1702 was responsible for the mass action of its members therefore is not inconsistent with *Carbon Fuel*.[48]

The *Consolidation Coal* decision also is consistent with the decisions of other federal courts that have addressed the mass action theory after *Carbon Fuel*.[49] In *North River Energy Corp. v. UMWA, District 20*,[50] the Eleventh Circuit considered whether a local union was liable for a wildcat strike in which all local union members participated.[51] Although the *North River* court did not refer to the *Carbon Fuel* decision, the court nonetheless considered the mass action theory as a proper means of affixing local union liability.[52] After

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466-67 (6th Cir. 1974) (union is only responsible for authorized actions of union officers and agents). *But cf.* Riverton Coal Co. v. UMWA, 453 F.2d 1035, 1042 (6th Cir.) (situation may occur when union's studied ambivalence in face of unauthorized strike would constitute sufficient condonation to expose union to damages), *cert. denied*, 407 U.S. 915 (1972). The Sixth Circuit's refusal to accept the mass action theory *per se* apparently does not preclude the possibility that mass action by union members may impose a duty upon union leadership to end the strike. *See* Southern Ohio Coal Co. v. UMWA, 551 F.2d 695, 701 (6th Cir. 1977) (liability may result if union allows wildcat strike to continue for purpose of bringing economic pressure upon employer), *cert. denied*, 434 U.S. 867 (1978); *see also infra* note 78 (discussing similarity between common-law agency analysis and mass action analysis).

47. *See* Carbon Fuel Co. v. UMWA, 444 U.S. 212, 215 n.3 (1979) (issue of mass action liability of local unions was not before the Supreme Court in *Carbon Fuel*). The widespread acceptance of the mass action theory before *Carbon Fuel* strongly supports the Fourth Circuit's decision in *Consolidation Coal*. *See supra* note 46 (discussing acceptance of mass action theory by all but one of circuits that have addressed theory's validity); *infra* notes 50-67 and accompanying text (discussing continued recognition of mass action theory by federal courts after Supreme Court's decision in *Carbon Fuel*); *see also Enforceable Remedy*, *supra* note 9, at 498 (local unions still may incur liability under mass action theory after *Carbon Fuel*).

48. *See supra* notes 44-47 and accompanying text (discussing support for mass action theory and inapplicability of Supreme Court's *Carbon Fuel* decision to local unions).

49. *See infra* notes 50-73 and accompanying text (discussing cases that have addressed mass action theory in light of Supreme Court's decision in *Carbon Fuel*).

50. 664 F.2d 1184 (11th Cir. 1981).

51. *Id.* at 1189. In *North River*, a wildcat strike erupted in response to a new company (North River) policy permitting bodily searches of miners in an effort to combat theft of company property. *Id.* at 1187. The local president directed the miners to return to work. *Id.* The president then informed the North River mine superintendent that the strikers would return to work when North River abolished the search policy. *Id.* North River responded by filing a complaint for injunctive relief and damages under § 301 of the LMRA. *Id.* Despite the issuance of the TRO by the district court, local union officers and committeemen refused to return to work. *Id.*

52. *Id.* at 1193-94. In *North River*, the court reviewed the history and rationale for the mass action theory as applied to local unions. *Id.* The *North River* court noted that a union is only liable under the mass action theory when a correlation exists between the actions and speech of union officers and the resulting mass conduct of union members. 664 F.2d at 1194. *Compare* Consolidation Coal Co. v. Int'l Union, UMWA, 500 F. Supp. 72, 77 (D. Utah 1980) (mass action theory inapplicable when violent threats by members demonstrate that union officers no longer controlled membership) *with* Turnkey Constructors, Inc. v. Cement Masons Local 685, 580 F.2d 798, 800 (5th Cir. 1978) (union officer's arrangement of meeting between boycot-

recognizing the validity of the mass action theory to impose union liability, the *North River* court determined that the evidence was insufficient to hold the local union liable.[53] The Eleventh Circuit refused to impose mass action liability because the facts in *North River* disclosed that the local union did not operate as a functioning entity at the time of the wildcat strike.[54] The Eleventh Circuit's implicit assumption in *North River* that *Carbon Fuel* did not affect the legitimacy of the mass action theory, however, does support the Fourth Circuit's decision in *Consolidation Coal*.[55]

In *Keebler v. Bakery Workers Union*,[56] the district court for the Eastern District of Pennsylvania expressly refused to interpret the *Carbon Fuel* decision as a repudiation of local union liability for the unauthorized mass action of its members.[57] In *Keebler*, the company sought a preliminary injunction to enjoin a wildcat strike by members of the local union.[58] The *Keebler* court rejected the union's argument that the *Carbon Fuel* decision had vitiated the mass action theory of union liability.[59] The *Keebler* court concluded that the *Carbon Fuel* decision does not prevent an application of the mass action theory to local unions.[60] Since the work stoppage involved every union member employed at the *Keebler* plant, the court held the union responsible for the mass action of its members and issued a preliminary injunction.[61] The *Keebler*

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ting union members and company representative supports conclusion that local union directed boycott).

53. 664 F.2d at 1194. The *North River* court found little evidence that the local union functioned as a union entity during the wildcat strike. *Id.* The Eleventh Circuit refused to affix liability to the local because the evidence also suggested that the wildcatters may have acted independently. *Id.; see also* Eazor Express Inc. v. International Bhd. of Teamsters, 520 F.2d 951, 960 (3d Cir. 1975) (district union membership functions as union entity when members of one local honor picket line established by second local); Vulcan Materials Co. v. Steelworkers, 430 F.2d 446, 455 (5th Cir. 1970) (refusal of union members at adjacent plant to work during strike by members of different plant constitutes proof that union operated as entity), *cert. denied*, 401 U.S. 963 (1971).

54. 664 F.2d at 1194. In *North River*, the Eleventh Circuit concluded that the local union did not function as an entity at the time of the wildcat strike because the union had lost control over the actions of union members. *Id.; see* Consolidation Coal Co. v. International Union, UMWA, 500 F. Supp. 72, 77 (D. Utah 1980) (mass action theory does not apply if union leadership clearly has lost control over union members).

55. *See supra* notes 50-54 and accompanying text (discussing Eleventh Circuit's analysis in *North River Energy Corp. v. UMWA, District 20*).

56. 104 L.R.R.M. 2625 (E.D. Pa. 1980).

57. *Id.* at 2627-28. The *Keebler* court stated that the *Carbon Fuel* decision involved application of a reasonable efforts standard to measure international and district union liability. *Id.* The *Keebler* court concluded that *Carbon Fuel* did not apply either to the mass action theory or liability of a local union for wildcat strikes. *Id.*

58. *Id.* at 2625. In *Keebler*, the Keebler cookie company sought injunctive relief under § 301 of the LMRA for the union's alleged breach of the no-strike provision of the collective bargaining agreement. *Id.*

59. *Id.* at 2627-28. In *Keebler*, the court stated that the Supreme Court clearly did not address the mass action theory of liability in *Carbon Fuel*. *Id.* at 2628; *see also* Carbon Fuel Co. v. UMWA, 444 U.S. 212, 215 n.3 (1979) (Supreme Court did not review judgments rendered against local unions on basis of mass action theory in *Carbon Fuel*).

60. 104 L.R.R.M. at 2628.

61. *Id.* In *Keebler*, the district court concluded that most local union members engaged in the work stoppage. *Id.*

decision therefore is entirely consistent with the Fourth Circuit's holding in *Consolidation Coal.*[62]

In *Dresser Industries v. United Steelworkers of America, Local 4601,*[63] the United States District Court for the Western District of New York also considered whether a local union encountered liability under the mass action theory for work stoppages that violate a no-strike clause in a union's collective bargaining agreement.[64] The *Dresser* court concluded that collective action by the vast majority of union members creates a presumption that a local union directed illegal actions.[65] Since less than one-half of local union members participated in the illegal walkout in *Dresser*, however, the court refused to impose mass action liability.[66] The *Dresser* court's willingness to analyze union liability under the mass action theory nonetheless reinforces the *Consolidation Coal* court's position that the mass action theory survives the *Carbon Fuel* decision.[67]

The sole federal court to conclude that *Carbon Fuel* had repudiated the mass action theory was the district court for the Western District of Pennsylvania in *Lakeshore Motor Freight Co. v. International Bhd. of Teamsters Local 800.*[68] In *Lakeshore,* all the members of Local 800 participated in a wildcat strike in retaliation for the employer's (Lakeshore) refusal to settle a fuel surcharge dispute.[69] The president of Local 800 threatened the wildcat strikers with disciplinary sanctions and termination if the strikers did not return to work.[70] Union members ignored the local president's orders to end the

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62. *See supra* notes 56-61 and accompanying text (discussing *Keebler* court's conclusion that mass action theory of liability still exists).

63. 110 L.R.R.M. 2661 (W.D.N.Y. 1981).

64. *Id.* at 2664 n.5.

65. *Id.* In *Dresser*, the court denied the company's request for an injunction because the company failed to demonstrate a probability of success on the merits. *Id.* at 2664. If the company has shown that the majority of union members participated in the work stoppage, the court would have issued the injunction. *Id. See generally supra* note 14 (discussing criteria for obtaining injunction as outlined by Supreme Court in *Boys Markets v. Retail Clerks Union Local 770*).

66. 110 L.R.R.M. at 2664.

67. *See supra* notes 63-66 and accompanying text (comparing *Dresser* decision with Fourth Circuit's holding in *Consolidation Coal*). The United States District Court for the Northern District of Alabama also faced the issue of local union liability under the mass action theory in *Encino Shirt Co. v. International Ladies Garment Worker's Local 577*, 108 L.R.R.M. 2543 (N.D. Ala. 1980). In *Encino Shirt*, approximately one-half of the employees of Encino Shirt Company (Encino Shirt) walked off the job in breach of their collective bargaining agreement. *Id.* at 2546. Encino Shirt sued Local 577 to recover damages caused by the illegal walkout. *Id.* at 2544. Although only two-thirds of the employees at the plant belonged to Local 577, the *Encino Shirt* court determined that nearly all of the employees who engaged in the walkout were union members. *Id.* at 2548. From the presence of such large-scale involvement by union members, the *Encino Shirt* court concluded that mass action by Local 577 was present. *Id.* The *Encino Shirt* court simply assumed the continued validity of the mass action theory without making reference to the Supreme Court's decision in *Carbon Fuel. Id.*

68. 483 F. Supp. 1150 (W.D. Pa. 1980).

69. *Id.* at 1151.

70. *Id.* at 1152. In *Lakeshore*, the local president instructed the wildcatters to return to work and warned the strikers that their continued defiance would result in expulsion from the

strike.[71] Lakeshore subsequently brought an action against Local 800 to recover damages that Lakeshore incurred during the course of the wildcat strike.[72] The *Lakeshore* court held that *Carbon Fuel* had diffused the mass action theory, and the court therefore refused to impose mass action liability.[73]

The *Lakeshore* decision does not detract from the soundness of the Fourth Circuit's decision in *Consolidation Coal*.[74] The *Lakeshore* court's interpretation of *Carbon Fuel* is overexpansive because the Supreme Court did not consider local union liability under the mass action theory in *Carbon Fuel*.[75] Since the issue of local union liability was not before the Supreme Court in *Carbon Fuel*,[76] the *Lakeshore* court erred in concluding that *Carbon Fuel* invalidated the mass action theory at all levels of union hierarchy.[77] Several circuit and district court decisions both before and after *Carbon Fuel* also strongly support the *Consolidation Coal* court's continued recognition of mass action liability of local unions.[78]

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union. *Id.* The local union president immediately appealed to his superiors at the district level for assistance in quelling the strike. *Id.* In addition, the president told Lakeshore's management to fire all the employees participating in the wildcat strike. *Id.* at 1153. The union president also informed all the strikers by letter that he was filing charges against the strikers for violation of their collective bargaining agreement. *Id.* The strikers returned to work approximately two weeks later. *Id.* at 1152.

71. *Id.*

72. *Id.*

73. *Id.* at 1153 n.1. The *Lakeshore* court did examine Local 800's potential liability under common-law agency principles. *Id.* at 1152-53. The *Lakeshore* court cited *Carbon Fuel* for the proposition that a union must condone, instigate, encourage or ratify an illegal strike before liability attaches to the union. *Id.* at 1152. Emphasizing the extraordinary efforts made by the president of Local 800 to return union members to their jobs, the *Lakeshore* court absolved Local 800 of responsibility for the strike. *Id.* at 1153; *see supra* note 70 (detailing union president's efforts to terminate work stoppage in *Lakeshore*).

74. *See infra* notes 75-84 and accompanying text (discussing reasons that mass action theory survives Supreme Court's decision in *Carbon Fuel*).

75. *See* Carbon Fuel Co. v. UMWA, 444 U.S. 212, 215 n.3 (1979) (local unions did not seek review of adverse judgments in Supreme Court); *International Union, supra* note 9, at 1039 n.192 (*Lakeshore* decision is overbroad).

76. 444 U.S. at 215 n.3.

77. *See supra* note 42 (discussing cases holding local unions liable under mass action theory).

78. *See id. supra* notes 50-67 (discussing cases recognizing continued validity of mass action theory at local union level after *Carbon Fuel*). The mass action theory continues to exist as a presumption of union involvement when large groups of union members engage in formally unauthorized, illegal activity. *See International Union, supra* note 9, at 1039 (mass action theory's factual presumption of union responsibility continues to exist after *Carbon Fuel*). To overcome the presumption of involvement and escape liability, a union simply must demonstrate non-involvement. *Id.* Indeed, the mass action theory only gains meaning when the court examines the union's efforts to end illegal activity. *See* United States Steel Corp. v. UMWA, 534 F.2d 1063, 1074 (3d Cir. 1976) (mass action of union members combined with minimal union efforts to halt wildcat strikes may result in union liability for strikes).

The evidence relevant to mass action liability thus overlaps with evidence that will determine whether a union has ratified an illegal strike due to its failure to take measures to end the strike. *See Work Stoppages, supra* note 39, at 809-10 (collective action of individual union members presents solid basis for liability). Although the mass action theory and common-law agency theory comprise separate bases of liability, the underlying legal theory is identical. *See* Consolidation

Considering the obstacles that an employer must overcome when attempting to demonstrate union approval of a wildcat strike under agency principles, retention of the mass action theory for imposing liability for illegal work stoppages at the local union level provides a necessary safeguard for employers.[79] In a collective bargaining agreement, an employer surrenders managerial autonomy over his business in exchange for the union's guarantee not to strike.[80] Union members' disregard for their no-strike promise entitles an employer to compensation for damages caused by the strike.[81] A local union easily may call a strike by use of covert means so that an employer would have great difficulty proving that the union has authorized the illegal strike.[82] The mass action theory justifiably facilitates an employer's recovery by placing the burden of disproving union involvement upon the union when union members have acted *en masse* in wildcat activity.[83] Continued availability of the mass action theory is especially important in view of the Supreme Court's reluctance to allow damage actions against individual wildcat strikers.[84]

Coal Co. v. International Union, UMWA, 500 F. Supp. 72, 75-76 (D. Utah 1980) (threats of bodily harm made by wildcat strikers to union officers relieve local union of duty to discourage wildcat strikes). In *Consolidation Coal Co. v. International Union UMWA*, the United States District Court for the District of Utah stated that union activity through officer action or inaction must be present before liability attaches under either mass action or common-law agency principles. *Id.* at 75. The court also considered mass action by union members an evidentiary base toward finding the presence of officer action. *Id.; see International Union, supra* note 9, at 1039 (mass action theory is essentially evidentiary rule with basis in objective reasoning).

The failure of union leaders to implement measures to discourage illegal strikes is an adoption of the strike. *See* United States v. International Union, UMW, 77 F. Supp. 563, 567 (D.D.C. 1948) (union can avoid liability under mass action theory by taking actions that demonstrates non-responsibility), *aff'd*, 177 F.2d 29 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949). The theory underlying the common-law principle of ratification is also that union inaction in the face of an illegal strike constitutes adoption of the strike. *See supra* note 9 (discussing union ratification of illegal strikes); *cf.* Penn Packing Co. v. Meat Cutters Local 195, 85 L.R.R.M. 2022, 2024 (E.D. Pa. 1973) (court refused to impose liability when union convinced members to return to work by paying salaries of two discharged stewards pending arbitration), *aff'd*, 497 F.2d 888 (3d Cir. 1974). The use of mass action as evidence of union involvement and responsibility therefore is necessarily part of any inquiry into union liability under the common-law agency theory. *See* Fishman & Brown, *supra* note 4, at 1027 (mass action theory effectively views wildcat strikers as agents of union); *International Union, supra* note 9, at 1039 (primary usefulness of mass action theory is as evidentiary presumption).

79. *See infra* notes 80-84 and accompanying text (discussing employer's uncertainty that union members will honor no-strike commitment). *But see Enforceable Remedy, supra* note 9, at 498 (recovery from local union does not assist mine operator greatly because most local unions do not have assets sufficient to pay damages incurred). District or international unions usually are the only organizations with enough money to fully compensate an employer. *Id.* at 499.

80. *See supra* notes 4-8 (discussing employer's promise to submit grievances to arbitration and remedies available should union violate no-strike promise).

81. *See supra* note 7 (discussing employer's action for damages under § 301 of LMRA).

82. *See supra* note 10 (union may employ subtle means to instigate illegal strike); *see also* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 423 (1981) (Powell, J., concurring) (only foolish union would invite liability by specifically endorsing strike).

83. *See supra* note 78 (discussing primary importance of mass action theory as presumption of union involvement in illegal activity).

84. *See* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 417 (1981) (individual union

In *Consolidation Coal Co. v. Local 1702 UMWA*, the members of Local 1702 engaged in a strike over an issue expressly subject to arbitration.[85] All officers and committeemen of Local 1702 also participated in the wildcat strike.[86] The *Consolidation Coal* court's conclusion that Local 1702 was liable for damages resulting from the mass action of its members is consistent with the decisions of other circuits.[87] In addition, the Fourth Circuit correctly held that *Carbon Fuel* did not abrogate the mass action theory at the local union level.[88] The mass action theory will help employers to secure a remedy against local wildcat strikes when a remedy otherwise might be unobtainable.[89] The Fourth Circuit's decision in *Consolidation Coal* will serve to protect an employer's no-strike assurance under a collective bargaining agreement and encourage labor organizations to maintain stricter control over the actions of union members.

RONALD THOMAS BEVANS, JR.

B. *Scope of Appellate Review of NLRB Determination of Employee Supervisory Status*

Under section 158(a) of the National Labor Relations Act ("the Act") an employer's firing of an employee for participation in union-related activity constitutes an unfair labor practice.[1] An employee who believes that his employer fired him on account of the employee's union activity may petition

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members are not liable for damages under § 301 LMRA for breach of collective bargaining agreement). *But see Enforceable Remedy, supra* note 9, at 503-04 (*Reis* decision deprives employers of excellent enforcement mechanism); *see also* Note, *An Employer's Recourse to Wildcat Strikes Includes Fashioning His Own Remedy: Section 301 Does Not Sanction an Individual Damage Suit*, 57 NOTRE DAME LAW. 598, 610-11 (1981-82) (only way that employer will receive *quid pro quo* for his grievance concession is by inserting explicit recovery clause in collective bargaining agreement).

85. *See supra* note 19 and accompanying text (suspension of employee was expressly subject to arbitration under parties' collective bargaining agreement).

86. *See supra* note 20 and accompanying text (district court determined that union officials participated in wildcat strike).

87. *See supra* notes 50-73 and accompanying text (comparing Fourth Circuit's application of mass action theory in *Consolidation Coal* with decisions of other circuit and district courts).

88. *See supra* notes 35-43 and accompanying text (discussing Fourth Circuit's analysis of effect of *Carbon Fuel* on mass action theory).

89. *See supra* notes 79-84 and accompanying text (discussing importance of mass action theory's availability to employer as protection of his no-strike guarantee).

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1. *See* National Labor Relations Act, § 8, 29 U.S.C. § 158(a) (1976). Section 158(a) of the National Labor Relations Act ("the Act") states that an employer's interference with or restraint of employees in the exercise of the rights guaranteed to employees in § 157 of the Act by firing an employee who exercises his § 157 rights constitutes an unfair labor practice. *Id.; see* § 157(a). Section 157(a) of the Act guarantees employees the right to form, join, or assist labor organiza-

the National Labor Relations Board (NLRB or Board) to order reinstatement of the employee.[2] Before the Board can reach the merits of the employee's unfair labor practice claim, however, the Board first must determine whether the employee is a "supervisor" under section 2(11) of the Act.[3] The NLRB

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tions, to bargain collectively through their chosen representatives and to engage in other activities for the purpose of collective bargaining. *Id.*

2. *See* 29 U.S.C. § 160 (1976). Section 160(a) of the Act empowers the National Labor Relations Board (NLRB or Board) to prevent any person from engaging in an unfair labor practice within the meaning of § 158 of the Act. *Id.* § 160(a); *see id.* § 158(a); *see also supra* note 1 (discussing § 158). When an employee charges an employer with an unfair labor practice, the Board may issue and serve upon the employer a complaint stating the details of the unfair labor practice claim and containing a notice of hearing before the Board, or member, or agent of the Board. *See* 29 U.S.C. § 160(b) (1976). The accused employer has the right to file an answer to the complaint and appear in person at the hearing to offer testimony. *Id.* At the Board's direction, any other person may intervene in the proceedings and present testimony. *Id.* The Board conducts the hearing in accordance with both the Federal Rules of Evidence and Civil Procedure. *Id.* If the Board finds that the preponderance of evidence indicates that the employer named in the complaint has committed or is committing an unfair labor practice, the Board will issue and serve upon the employer an order to cease and desist from the unfair labor practice and/or take affirmative action, such as reinstatement of the employee with or without back pay. *See id.* § 160(c). The Board also may require the employer to make periodic reports showing the extent to which the employer has complied with the order. *Id.* On the other hand, if the Board finds that the preponderance of evidence indicates that the employer did not commit an unfair labor practice, the Board will dismiss the complaint. *Id.* The term "order" is rather misleading because Board orders do not have the force of law. *See* A. Cox, D. Bok & R. Gorman, Labor Law, Cases and Materials 109 (9th ed. 1980). If the respondent does not comply with the Board's order, the Board must seek enforcement by filing a petition in a federal court of appeals, generally in the circuit in which the unfair labor practice occurred. *See id.* The Board may secure an enforcement order even if a respondent has not refused to comply with the Board's order. *See id.* Section 160(e) of the Act empowers the Board to petition the court of appeals for enforcement of the Board's order, as well as for appropriate temporary relief, such as a restraining order. *See* 29 U.S.C. § 160(e) (1976). Upon the Board's filing of a petition for enforcement, a court of appeals will serve notice of the filing upon the respondent and thereafter the court will have jurisdiction over the proceedings. *See id.* Similarly, any "person aggrieved" by the Board's order may petition a court of appeals to review the Board's order by filing with the court a written petition requesting the court to modify or set aside the Board's order. *See id.* § 160(f); *see also, e.g.*, NLRB v. Local Union No. 180, 462 F.2d 1321, 1322-24 (9th Cir. 1972) (discussion of Board procedure); F.J. Buckner Corp. v. NLRB, 401 F.2d 910, 913 (9th Cir.) (same), *cert. denied*, 393 U.S. 1084 (1969); NLRB v. Grieder Mach. Tool & Die Co., 142 F.2d 163, 165-66 (6th Cir.) (same), *cert. denied*, 323 U.S. 724 (1944).

3. *See* 29 U.S.C. § 152(11) (1976). Section 2(11) of the Act defines "supervisor" as any individual who has the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or to recommend such action effectively. *Id.* The Board will characterize an individual as a supervisor under § 2(11) if the individual's exercise of any one of the enumerated indicia of supervisory authority meets two express conditions. *See id.* First, the individual's exercise of the supervisory function or functions must not be of a routine or clerical nature but must require the use of independent judgment, and second, the individual must exercise the supervisory function or functions in the interest of the employer. *See id.; see also* Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1714-18 (1981) [hereinafter cited as *Supervisory Status*] (discussing Board's application of § 2(11) to employees).

has jurisdiction to hear the aggrieved employee's claim only if it finds that the employee is not a supervisor within the meaning of section 2(11).[4]

The Board's case-by-case determination of employee supervisory status under section 2(11) is difficult because the line between the exercise of supervisory and nonsupervisory control is extremely vague.[5] The Board has had particular difficulty in determining whether health care professionals, such as nurses, constitute supervisors under section 2(11).[6] The determination of a nurse's supervisory status is particularly difficult because nurses often exercise supervisory authority in connection with their treatment of patients but do so in the exercise of independent professional judgment that is not always in the interest of the employer.[7] A nurse's exercise of supervisory authority in directing subordinate employees to provide certain care and treatment to the employer's patients is obviously in the best interest of the employer, but is not necessarily supervision "in the interest of the employer" in the sense that the nurse's direction of subordinate employees serves the end of maintaining employee discipline, productivity, and loyalty to the employer.[8] The Board will find that an

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4. *See* 29 U.S.C. § 152(3) (1976) ("employee" under Act does not include "supervisor"); *see also* Misericordia Hosp. Medical Center v. NLRB, 623 F.2d 808, 815 (2d Cir. 1980) (supervisors are not employees under Act and therefore not entitled to Act's protection).

5. *See, e.g.,* NLRB v. Scott Paper Co., 440 F.2d 625, 628 (1st Cir. 1971) (determination of employee supervisory status is difficult question of fact); NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169, 1172 (2d Cir. 1968) (same); Furr's Inc. v. NLRB, 381 F.2d 562, 565 (10th Cir.) (same), *cert. denied*, 389 U.S. 890 (1967).

6. *See* NLRB v. Res-Care, Inc., 705 F.2d 1461, 1468 (7th Cir. 1983) (Board's application of § 2(11) has led to extensive but fact-bound litigation); Beverly Enter. v. NLRB, 661 F.2d 1095, 1098-99 (6th Cir. 1981) (§ 2(11) difficult to apply to health care professionals, such as nurses); *see, e.g.,* Sunset Nursing Homes, Inc., 224 N.L.R.B. 1271, 1272-74 (1976) (Board found that licensed practical nurses were not supervisors); Diversified Health Serv. Inc., 180 N.L.R.B. 461, 461-62 (1969) (Board found registered nurse was not supervisor); New Fern Restorium Co., 175 N.L.R.B. 871, 871 (1969) (Board found that licensed practical nurse was not supervisor).

7. *See* Beverly Enter. v. NLRB, 661, F.2d 1095, 1099 (6th Cir. 1981).

8. *See* S. REP. No. 766, 93rd Cong., 2d Sess. 6, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS, 3946, 3951. A nurse's direction of employees that is incidental to the nurse's treatment of patients is not the exercise of supervisory authority in the interest of the employer. *See id.; Beverly Enterprises*, 661 F.2d at 1103. While a nurse's exercise of discretion in directing employees to provide treatment to patients is not strictly the exercise of authority in the interest of the employer, the exercise of professional judgment in directing employees and the employer's interest are not always mutually exclusive. *See* 661 F.2d at 1103. A nurse who has the authority to act in the interest of the employer by implementing disciplinary action and enforcing major personnel policies and rules in addition to the power to direct employees regarding what care to provide which patient is a supervisor under § 2(11). *See id.* The crucial determination is whether the nurse's exercise of authority in the interest of the employer is merely incidental to the nurse's power to direct employees in patient care, or is so extensive as to constitute the exercise of authority in the interest of the employer in addition to the nurse's patient care responsibilities. *See id.* at 1101-03; *cf.* NLRB v. Yeshiva Univ., 444 U.S. 672, 695 (1979) (Brennan, J., dissenting). The touchstone of managerial status, which is analogous to supervisory status, is the individual's alliance with management. *See id.* An employee who makes decisions for the purpose of implementing the employer's policies is a manager and is not within the protection of the Act. *See id.* at 696.

employee is a supervisor under section 2(11) only if the employee exercises independent professional judgment "in the interest of the employer."[9] Congress recognized the distinction between the exercise of true supervisory authority by a professional employee, such as a nurse, and the exercise of responsibilities that, without statutory clarification, would constitute supervision under the Act.[10] Congress amended the Act in 1947, adding section 2(12), which includes professional employees within the coverage of the Act and section 2(11), which excludes supervisors from the Act's coverage.[11] The Board's ascertainment of a nurse's supervisory status requires the Board to balance sections 2(11) and 2(12).[12] Since Congress has delegated the resolution of professional and nonprofessional supervisory status to the Board, courts must uphold the Board's conclusions if substantial evidence supports the Board's findings.[13] The Fourth Circuit

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9. *See supra* note 3 (discussing Board's application of § 2(11) to employees).

10. *See infra* note 11 and accompanying text (discussing congressional recognition of distinction between professional and nonprofessional employees).

11. *See* 29 U.S.C. § 152(12) (1976). Under § 2(12) of the Act, a "professional employee" is an employee whose work is predominately intellectual and varied in character and requires the exercise of discretion as well as advanced specialized education. *See id.; see also supra* note 4 and accompanying text (discussing § 2(11)'s exclusion of supervisors from Act's coverage). Professional employees are "employees" under the Act and thus within the Act's coverage. *See* 29 U.S.C. § 152(3) (1976) (term "employee" includes any employee unless otherwise specified in the Act); *supra* note 1 (discussing § 157's inclusion of employees within Act's protection). Nurses are professional employees. *See* Beverly Enter. v. NLRB, 661 F.2d 1095, 1102-03; S. REP. No. 766, *supra* note 8, at 3951. Congress fashioned § 2(11)'s supervisory exclusion to apply primarily to industrial workers. *See* Finkin, *The Supervisory Status of Professional Employees*, 45 FORDHAM L. REV. 805, 807-09 (1977) [hereinafter cited as *Professional Employees*]. Congress based § 2(11)'s test of supervisory status upon the assumption that workers operate in a bureaucratic and hierarchical industrial setting. *See id.* Professionals, on the other hand, typically do not work in a rigidly organized, bureaucratic setting. *See id.* In industry, the legitimacy of a decision rests upon the decision-maker's position in the company hierarchy. *See id.* Unlike industrial workers, professionals possess authority by virtue of their expertise derived from lengthy, specialized education and not from their position in the employer's hierarchy. *See id.* Congress recognized that professionals operate in an alternate system of authority and provided in § 2(12) that the Board was to treat professionals differently from other workers. *See id.* A significant amount of professional work, however, involves the exercise of responsibilities that otherwise would be supervisory under the Act. *See id.* at 805. Thus, a tension exists between § 2(11) and § 2(12). *See id.* Congress delegated the responsibility for resolving the tension between § 2(11) and § 2(12) to the Board. *See id; see also supra* notes 2-3 and accompanying text (discussing Board's function). In attempting to resolve the tension between the two conflicting sections, the Board has treated the various categories of professional employees rather differently from one another. *See Professional Employees, supra*, at 810. The Board seldom compares its analysis in cases governing one group of professional employees with that of others. *See id.* Congress explicitly approved of the Board's record of analyzing professionals, particularly health care professionals. *See infra* note 25 (discussing legislative history to 1974 health care amendments to Act).

12. *See supra* note 11 (discussing §§ 2(11) and 2(12) of Act).

13. *See* Beverly Enter. v. NLRB, 661 F.2d 1095, 1098-99 (6th Cir. 1981) (application of § 2(11) to health care professionals belongs to usual administration routine of Board, and court's function limited to determining whether substantial evidence on record as whole supports Board's findings); *see also* Universal Camera Corp. v. Labor Board, 340 U.S. 474, 487-89 (1951) (Black and Douglas, J.J., concurring in part and dissenting in part) (Board's findings of fact conclusive if substantial evidence on record as whole supports Board's findings); 29 U.S.C. § 160(e) (1976)

in *NLRB v. St. Mary's Home*[14] considered whether substantial evidence supported the Board's findings that a nurse was not a supervisor under section 2(11).[15]

In *St. Mary's Home*, an employer fired a licensed practical nurse (LPN) allegedly because of the nurse's efforts to unionize other LPN's and auxiliary workers at the nurse's place of employment.[16] The Board found that the LPN, Sheila Mitchell, was not a supervisor and the the employer, St. Mary's Home (St. Mary's), discharged Mitchell because of her union-related activities.[17] Accordingly, the Board ordered St. Mary's to reinstate Mitchell with back pay.[18] When St. Mary's refused to reinstate Mitchell, the NLRB petitioned the Fourth Circuit to enforce the order and compel St. Mary's to return Mitchell to her job with back pay.[19] The Fourth Circuit refused to enforce the Board's order and found, over a vigorous dissent, that contrary to the Board's

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(same).The Supreme Court in *Universal Camera v. Labor Board* set the standard of appellate review that circuit courts are to apply to all Board findings of fact. *See* 340 U.S. at 487-89. The *Universal Camera* Court reviewed the Second Circuit's enforcement of an NLRB order directing reinstatement of an industrial employee. *See id.* at 475-76. The Supreme Court reversed the Second Circuit's grant of enforcement and remanded the case to the Second Circuit, concluding that the Second Circuit had applied a superficial standard of review. *See id.* at 491-97. The *Universal Camera* Court concluded that the statutory "substantial evidence" test was vague and did not provide courts with an adequate standard by which to review Board findings. *See id.* at 477-78, *see also* 29 U.S.C. § 160(e) (1976). In defining the parameters of the "substantial evidence" test, the *Universal Camera* Court stated that an appellate court must examine the entire record of the Board's findings, including any evidence contradictory to the Board's holding, but may not displace the Board's choice between two fairly conflicting views even though the court justifiably would have made a different choice had the mater been before the court initially. *See* 340 U.S. at 487-88. The *Universal Camera* Court found that the Board is particularly equipped to deal with the various specialized types of employment within the labor field, and therefore, the Board's findings with respect to labor practices carry the weight of expertise that courts do not possess and thus must respect. *See id.* at 488. A reviewing court may set aside a Board decision only when the court cannot conscientiously find that the evidence supporting the Board's decision is substantial when the court views the evidence in light of the record as a whole. *See id.*

14. 690 F.2d 1062 (4th Cir. 1982).

15. *See id.* at 1065-69.

16. *See id.* at 1064.

17. *Id.* at 1065.

18. *See id. NLRB v. St. Mary's Home, Inc.* is actually the consolidation of two cases. *See id.* at 1064-65. In the first case, the Board charged St. Mary's Home, Inc. (St. Mary's) with an unfair labor practice for refusing to bargain with a union after the union had won a certification election at St. Mary's. *Id.* at 1064. A certification election is an election in which the employees vote whether or not to select a union as their bargaining agent. *See* 29 U.S.C. § 159 (1976). The Board oversees the election and certifies the results. *See id.* If the union wins the election, the employer must bargain with the union. *See id; see also* 29 U.S.C. § 158(a)(5) (1976) (refusal to bargain with union is unfair labor practice). The Board found that St. Mary's violated the Act by refusing to bargain with the union. 690 F.2d at 1064-65. The Board ordered St. Mary's to bargain with the union. *Id.* at 1065. In the second case, the Board found that St. Mary's violated the Act by engaging in coercive and improper conduct both before and after the union election and by discriminatorily discharging a licensed practical nurse (LPN), Sheila Mitchell, for her union-related activity. *Id.* at 1064-65. *See supra* note 1 (discussing unfair labor practices).

19. 690 F.2d at 1065. The Board petitioned the Fourth Circuit to enforce its order compelling St. Mary's to reinstate Mitchell with back pay, to bargain with the union, and to grant remedial relief from St. Mary's coercive and improper conduct. *See id.* at 1064-65.

determination, Mitchell was in fact a supervisor under section 2(11) of the Act.[20]

The Fourth Circuit acknowledged that the application of factors indicating an employee's supervisory status to a nurse requires flexibility because the nursing field is unique in that nurses normally exercise "independent judgment" in rendering patient care.[21] Thus, according to the Fourth Circuit, the court must determine whether the nurse's exercise of independent professional judgment is merely an incident of the nurse's professional services or is in addition to her professional services.[22] The *St. Mary's Home* court also conceded that the determination of an employee's supervisory status is within the Board's assumed expertise and that courts must accept the Board's holding if substantial evidence on the record as a whole supports the Board's findings.[23] The Fourth Circuit stated, however, that when a careful review of the record renders the court unable to find substantial evidence supporting the Board's findings, the court may decline to enforce the Board's order.[24] The *St. Mary's Home* court reasoned that since the Board's inconsistent application of section 2(11) displayed a pro-labor bias on the part of the Board, courts must scrutinize carefully the Board's findings of employee supervisory status.[25]

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20. *Id.* at 1067, 1070. The *St. Mary's Home* court enforced the Board's order compelling St. Mary's to bargain with the union and granted remedial relief from St. Mary's coercive and improper conduct. *Id.* at 1070.

21. *See id.* at 1066.

22. *See id.* at 1066-67.

23. *See id.* at 1067 (citing *Universal Camera*); *see also supra* note 13 (discussing substantial evidence scope of review).

24. *See* 690 F.2d at 1067 (citing *Universal Camera*).

25. *See id.* The Fourth Circuit in *St. Mary's Home* complained that the inconsistent pattern of Board decisions applying the supervisory definition displayed a pro-labor bias on the part of the Board. *See id.* The *St. Mary's Home* court noted that Board decisions on record indicated that the Board adopts the definition of "supervisor" that will provide for the widest coverage of the Act in order to maximize both the number of unfair labor practice findings the Board makes and the number of unions the Board certifies. *See id.* (citing *Supervisory Status, supra* note 3, at 1713-14). *But see* S. REP. No. 766, *supra* note 8, at 3948-51. In the legislative history accompanying the 1974 amendments to the Act, the Senate Labor and Public Welfare Committee indicated approval of the Board's cautious application of § 2(11) to health care professionals. *See id.* at 3951; *see also supra* note 3 (discussing § 2(11)). The purpose of the 1974 amendments to the Act was to remove a provision in § 2(2) of the Act that excluded employees of nonprofit hospitals from the Act's coverage. *See* S. REP. No. 766, *supra* note 8, at 3948. In discussing the applicability of § 2(11) to health care professionals, the Senate Committee commented that various organizations representing health care professionals previously had urged Congress to amend § 2(11) to exclude health care professionals from the definition of "supervisor". *Id.* at 3951. The Committee concluded that the proposed amendment was unnecessary because the Board carefully had avoided applying § 2(11) to health care professionals, including registered nurses, whose direction of other employees in the exercise of professional judgment is incidental to the professional's patient care responsibilities and thus not in the interest of the employer. *See id.* The Committee expected the Board to continue to carefully apply § 2(11) to health care professionals. *See id.; see also* NLRB v. Yeshiva Univ., 444 U.S. 672, 690 (1980) (citing congressional approval of pre-1974 Board rulings and Board's method of analysis in applying § 2(11) to professionals); Beverly Enter. v. NLRB, 661 F.2d 1095, 1099, 1101-03 (6th Cir. 1981) (citing congressional approval of pre-1974 Board rulings and Board's method of analysis in applying § 2(11) to nurses, thus giving pre-1974 Board decisions great precedential value); NLRB v. St. Francis Hosp. of Lynwood, 601 F.2d 404, 411-13 (9th Cir. 1979) (same); *infra* notes 53-58 and accompanying text (discussing Board's findings in *St. Mary's Home*).

After reviewing the record of the Board hearing, the Fourth Circuit concluded that substantial evidence did not support the Board's determination that Mitchell was not a supervisor.[26] The *St. Mary's Home* court found no dispute that on two of the five nights of the shift Mitchell worked, Mitchell was the highest ranking employee present at St. Mary's and was in charge of the other employees on duty at the time.[27] The Fourth Circuit disagreed with the Board's conclusion that while in charge, Mitchell's activities related exclusively to patient care.[28] Rather, the *St. Mary's Home* court found that Mitchell's power to recommend discipline, assign employees, make assignment changes, excuse employees, and handle emergencies involved the exercise of supervisory authority.[29] The Fourth Circuit found that Mitchell performed these activities on a regular basis.[30] The *St. Mary's Home* court's principle reason for according Mitchell supervisory status was the Board's finding that on the two nights per week that Mitchell was in charge of her shift, Mitchell's duties were exactly the same as the duties of Georgia Patillo, a registered nurse and Mitchell's immediate supervisor.[31] The Fourth Circuit found that while the Board refused to characterize Mitchell as a supervisor, the Board did not find that Patillo was a supervisor.[32] The *St. Mary's Home* court determined that the Board's inconsistent conclusions with respect to Mitchell and Patillo's supervisory status illustrated the Board's pro-labor bias.[33]

The dissent in *St. Mary's Home* took issue with both the majority's factual findings and, more importantly, with the standard of review that the majority applied.[34] The dissent found substantial evidence supporting the Board's findings, but conceded that ample evidence also existed to support the majority's conclusion that Mitchell was a supervisor.[35] The dissent noted,

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26. *See* 690 F.2d at 1067; *infra* notes 44-58 and accompanying text (discussing Board's findings in *St. Mary's Home).*

27. *See* 690 F.2d at 1067.

28. *See id.* at 1068; *infra* notes 44-58 and accompanying text (discussing Board's findings in *St. Mary's Home*).

29. *See* 690 F.2d at 1067-68. In determining whether Mitchell was a supervisor, the *St. Mary's Home* court found that Mitchell had the authority to recommend discipline, assignments, shifts of assignment, handle emergencies, and excuse employees. *See id.* The Fourth Circuit also found that Mitchell had the authority to "direct responsibly" the employees on the shift Mitchell was in charge of two nights per week. *See id.* According to the *St. Mary's Home* court, Mitchell spent 40% of her work time exercising supervisory responsibilities and that Mitchell's activities were not merely incidental to Mitchell's professional services but "intimately involved" supervisory responsibilities in addition to Mitchell's professional services. *See id., infra* notes 44-58 and accompanying text (discussing Board's findings in *St. Mary's Home*).

30. *See supra* note 29 (discussing Fourth Circuit's findings that Mitchell exercised supervisory authority regularly); *infra* notes 44-58 and accompanying text (discussing Board's findings in *St. Mary's Home*).

31. *See* 690 F.2d at 1068; *infra* notes 53-58 and accompanying text (discussing Board's findings in *St. Mary's Home*).

32. *See* 690 F.2d at 1068; *infra* notes 53-58 and accompanying text (discussing Board's findings in *St. Mary's Home*).

33. *See* 690 F.2d at 1068; *infra* notes 53-58 and accompanying text (discussing *Board's* findings in *St. Mary's Home*).

34. *See* 690 F.2d at 1070-72 (Murnaghan, J., concurring in part and dissenting in part).

35. *See id.* at 1070.

however, that the majority had disregarded a significant body of evidence supporting the Board's determination.[36] The dissent argued that the role of a court reviewing an NLRB supervisory determination is not to weigh items of conflicting evidence to reach a result contrary to the Board's findings.[37] Since the court's sole function is to determine whether substantial evidence supports the Board's findings,[38] the dissent contended that the majority overstepped the court's limited function on appeal.[39] The dissent noted that the majority was unable to cite a single case in which a court had reversed a Board finding that a nurse was not a supervisor.[40] Additionally, the dissent found that courts consistently have accepted Board findings that nurses with substantially more authority than Mitchell were not supervisors.[41]

As the dissent correctly noted, the majority in *St. Mary's Home* could not cite a single case in which an appellate court overturned a Board finding that a nurse was not a supervisor under section 2(11) of the Act.[42] The *St. Mary's Home* court is the first circuit court to overrule a Board determination that a nurse is not a supervisor.[43] A review of the Board's findings in *St.*

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36. *See id.* at 1070-71. The *St. Mary's Home* dissent contended that the majority disregarded the fact that when unexpected situations arose that Mitchell could not handle, Mitchell contacted her superiors for direction. *Id.* Moreover, the dissent argued that the majority also ignored the fact that Mitchell gained permission from her superiors whenever she needed to replace an absent aide, as well as the fact that Mitchell had no authority to discipline aides, but merely reported misconduct to her superiors. *Id.* The dissent also noted that the majority took a statement by Mitchell that she "got the heat when something went wrong on the shift" out of context, for Mitchell went on to say that the hospital administration held her responsible for an aide's failure to perform in a fashion compatible with patient care. *See id.* at 1071 n.1. Mitchell never acknowledged any authority with respect to matters not pertaining to patient care. *See id.*

37. *See* 690 F.2d at 1071 (Murnaghan, J., concurring in part and dissenting in part). The *St. Mary's Home* dissent disagreed with the majority's insistence on consistency between the case at hand and several Board decisions in which the Board found that nurses with authority similar to that of Mitchell were supervisors. *See id.* The dissent found the apparent inconsistency in Board determinations irrelevant because the sole issue on appeal was whether substantial evidence supported the Board's findings in the instant case. *See id.*

38. *See id.; see also supra* note 13 and accompanying text (discussing "substantial evidence" test).

39. *See* 690 F.2d at 1072 (Murnaghan, J., concurring in part and dissenting in part).

40. *See id.* at 1071; *see also infra* notes 42-43 and accompanying text (discussing cases upholding Board determination that nurse was not supervisor).

41. *See* 690 F.2d at 1071 (Murnaghan, J., concurring in part and dissenting in part) (citing *Misericordia Hosp. Medical Center v. NLRB*, 623 F.2d 808, 815-18 (2d Cir. 1980)); *NLRB v. St. Francis Hosp. of Lynwood*, 601 F.2d 404, 420-22 (9th Cir. 1979); *NLRB v. Doctors' Hosp. of Modesto, Inc.* 489 F.2d 772, 776 (9th Cir. 1973); *see also infra* notes 62-85 and accompanying text (discussing *Misericordia Hospital, St. Francis Hospital, Doctors' Hospital* and other relevant cases).

42. *See infra* note 43 (citing cases concerning supervisory status of nurses).

43. *Cf.* Medical Center at Bowling Green v. NLRB, Nos. 82-1437, 82-1566, slip op. at 4 (6th Cir. Aug. 4, 1983) (upholding Board determination that nurse was not supervisor); NLRB v. Res-Care, Inc., 705 F.2d 1461, 1468 (7th Cir. 1983) (same); NLRB v. Clark Manor Nursing Home Corp., 671 F.2d 657, 659 (1st Cir. 1982) (same); Misericordia Hosp. Medical Center v. NLRB, 623 F.2d 808, 818 (2d Cir. 1980) (same); NLRB v. St. Francis Hosp. of Lynwood, 601 F.2d 404, 422 (9th Cir. 1979) (same); NLRB v. Doctors' Hosp. of Modesto, Inc., 489 F.2d 772, 776 (9th Cir. 1973) (same). *But see* Beverly Enter. v. NLRB, 661 F.2d 1095, 1101-03 (6th Cir.

Mary's Home reveals that the dissent correctly concluded that the Fourth Circuit disregarded a substantial body of evidence supporting the Board's decision that Mitchell was not a supervisor.[44] The majority in *St. Mary's Home* found that Mitchell had the authority to deal with emergencies but disregarded the Board's finding that when unexpected situations arose that Mitchell could not handle, Mitchell contacted her superiors for direction.[45] The Fourth Circuit also ignored the Board's finding that Mitchell had neither the authority to schedule aides nor the authority to replace aides who failed to report to work or who left early.[46] Rather, the Board found that Mitchell gained permission from her superiors whenever she needed to replace an aide.[47] While the *St. Mary's Home* majority found that Mitchell had the authority to recommend that the hospital administration discipline as aide for misconduct, the Board found that Mitchell merely reported employee misconduct to her superiors.[48]

In addition to ignoring several crucial Board findings of fact, the Fourth Circuit mischaracterized the Board's determination regarding Mitchell's supervisory status.[49] Contrary to the Fourth Circuit's contention, the Board did not find that Mitchell's activities related exclusively to patient care.[50] The Board

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1981) (remanding case to Board due to Board's improper analysis of nurses' supervisory status); St. Anthony Hosp. Sys. v. NLRB, 655 F.2d 1028, 1031 (10th Cir. 1981) (court did not reach § 2(11) issue).

44. *See infra* notes 45-48 and accompanying text (discussing Board's discussion of nurse's supervisory status in *St. Mary's Home*); *see also supra* notes 35-41 and accompanying text (discussing *St. Mary's Home* dissent's criticism of majority's holding in *St. Mary's Home*).

45. *See supra* note 29 and accompanying text (discussing Fourth Circuit's finding that Mitchell had authority to handle emergencies). *But see* St. Mary's Infant Home, 258 N.L.R.B. 1024, 1038 (1981) (Board found Mitchell contacted superiors for advice when unexpected situations arose).

46. *See supra* note 29 and accompanying text (discussing Fourth Circuit's finding that Mitchell had authority to schedule and excuse aides). *But see* St. Mary's Infant Home, 258 N.L.R.B. 1024, 1038 (1981) (Board found Mitchell did not have authority to schedule or excuse aides).

47. *See* 258 N.L.R.B. at 1038.

48. *See supra* note 29 and accompanying text (discussing Fourth Circuit's finding that Mitchell had authority to recommend discipline). *But see* 258 N.L.R.B. at 1038. The Board noted that Mitchell testified that when aides misbehaved, Mitchell would make no disciplinary recommendations but simply would report the incident to her superiors. *See id.* The Board found that the authority to report misconduct does not constitute the effective recommendation of discipline. *See id.* Although summaries of hospital administration meetings disclosed that Mitchell's superiors instructed Mitchell to recommend discipline, the Board found that Mitchell never made disciplinary recommendations nor did Mitchell possess the authority to effectively recommend discipline. *See id.*

For an employee's authority to recommend discipline to constitute supervision under § 2(11), the employee must have the authority to recommend discipline effectively, in the sense that the employee's superiors implement the employee's disciplinary recommendations. *See supra* note 3 (discussing § 2(11) of the Act); *infra* note 75 and accompanying text (discussing nurse's authority to recommend discipline). The Fourth Circuit also disregarded Mitchell's testimony before the Board that Mitchell spent 95% of her time engaged in patient care duties. *See* 690 F.2d at 1067-68 (Fourth Circuit discussing Mitchell's supervisory status). *But see* 258 N.L.R.B. at 1038 (Board's discussion of Mitchell's testimony).

49. *See infra* notes 50-58 and accompanying text (discussing Fourth Circuit's mischaracterization of Board's findings in *St. Mary's Home*).

50. *See supra* text accompanying note 28 (discussing Fourth Circuit's determination that

conceded that many of Mitchell's responsibilities were supervisory in nature, but concluded that Mitchell's exercise of supervisory authority involved the performance of routine functions that did not require Mitchell to use independent judgment.[51] The Board also found that Mitchell's supervisory responsibilities were incidental to her patient care duties rather than in addition to her patient care duties.[52]

The Fourth Circuit's most serious mischaracterization of the Board's findings concerns Mitchell and Patillo's respective power and authority.[53] The Fourth Circuit's holding rests on the majority's conclusion that the Board found that two nights per week, Mitchell exercised exactly the same powers and performed exactly the same duties as did Patillo, yet determined inconsistently that only Patillo was a supervisor.[54] The Board, in fact, did not find that Mitchell and Patillo possessed exactly the same authority.[55] The Board found that Mitchell and Patillo exercised the same authority only in regard to the direction of aides in patient care.[56] The Board found that Mitchell was subordinate to Patillo at all times, as evidence by the fact that Mitchell reported work infractions to Patillo and Patillo, not Mitchell, evaluated the aides.[57] Thus, the Fourth Circuit's holding rests on an inconsistency that does not exist.[58]

Even if the Fourth Circuit had characterized the Board's findings concerning Mitchell's supervisory status accurately, serious analytical flaws exist in the Fourth Circuit's application of section 2(11) to Mitchell's job responsibilities.[59] First, although the *St. Mary's Home* court acknowledged that nursing is a unique field, the court rejected the Board's determination that Mitchell was not a supervisor by analogizing Mitchell's exercise of supervisory authority to cases dealing with industrial, rather than health care employees.[60] Second, as the *St. Mary's Home* dissent contended, other circuit

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Board found Mitchell's duties related exclusively to patient care). *But see infra* text accompanying notes 51-52 (discussing Board's findings in *St. Mary's Home*).

51. *See* 258 N.L.R.B. at 1038-39; *see also supra* note 3 (discussing § 2(11) of the Act).

52. *See* 258 N.L.R.B. at 1038-39; *see also supra* note 3 (discussing § 2(11) of the Act).

53. *See infra* text accompanying note 54 (discussing Fourth Circuit's holding that Board's findings concerning supervisory status of Mitchell and Patillo were inconsistent).

54. *See supra* text accompanying notes 31-33 (discussing Fourth Circuit's finding concerning Mitchell and Patillo's supervisory status).

55. *See* 258 N.L.R.B. at 1038 n.63. The Director of Nursing at St. Mary's testified before the Board that Mitchell's authority was no different from Patillo's when Mitchell was in charge of the shift. *See id.* The Board construed the Director of Nursing's testimony as limited to Patillo and Mitchell's direction of aides in patient care. *See id.* The Board found that Patillo was the supervisor of the shift even when Mitchell was on duty without Patillo and that Mitchell was subordinate to Patillo at all times because Patillo, rather than Mitchell, evaluated the aides and because Mitchell reported work infractions to Patillo. *Id.*

56. *See supra* note 55.

57. *See id.*

58. *See supra* notes 53-57 and accompanying text.

59. *See infra* notes 60-96 and accompanying text (discussing flaws in Fourth Circuit's analysis of nurse's supervisory status).

60. *See* 690 F.2d at 1066-69 (citing *Monongahela Power Co. v. NLRB*, 657 F.2d 608, 613

courts have found that nurses with more supervisory authority than Mitchell were not supervisors.[61]

Unlike the *St. Mary's Home* court, the Sixth Circuit in *Beverly Enterprises v. NLRB*[62] isolated each of several nurses' supervisory powers and analyzed each power individually.[63] The employer in *Beverly Enterprises* had refused to bargain with a certified union representing several LPNs.[64] The employer contended that the LPNs were supervisors and thus did not belong in the bargaining unit.[65] The Board found that the LPNs were not supervisors and ordered the employer to bargain with the union.[66] The Sixth Circuit declined to enforce the Board's order, finding that the Board improperly analyzed the nurses' authority to assign other workers.[67] The Sixth Circuit, however, agreed with the Board that the nurses' authority to adjust employee schedules and participate in disciplining and rewarding employees did not constitute supervision within the meaning of section 2(11).[68] The *Beverly Enterprises* court found that the nurses' authority to adjust employee schedules was supervisory in nature but stated that in order to determine whether the authority to adjust employee schedule constituted supervision under section 2(11), the crucial question was not merely whether the LPNs possessed the power to adjust employee schedules.[69] The Sixth Circuit found that the crucial question was whether

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(4th Cir. 1981) (power company foremen); *American Diversified Foods, Inc. v. NLRB,* 640 F.2d 893, 895-96 (7th Cir. 1981) (fast food shift managers)). *But see* NLRB v. Doctor's Hosp. of Modesto, Inc., 489 F.2d 772, 776 (9th Cir. 1981) (nurse). In determining that Mitchell was a supervisor, the *St. Mary's Home* court relied upon the *NLRB v. Doctor's Hosp. of Modesto, Inc.* court's holding only peripherally. *See* 690 F.2d at 1067. The Fourth Circuit stated that Mitchell exercised greater supervisory authority than the nurse whom the *Doctor's Hospital* court found to be a supervisor. *Id.; see* 489 F.2d at 776; *supra* note 11 and accompanying text (discussing distinction between industrial and professional employees). Cases dealing with the supervisory status of industrial employees provide a poor analogy to the supervisory authority of health care professionals, such as nurses, because industrial employees and health care professionals work in radically different environments. *See supra* note 11. Even the *St. Mary's Home* court recognized that nursing is a unique form of employment. *See supra* text accompanying note 21; *see also supra* notes 5-12 and accompanying text (discussing difficulty of applying § 2(11) to nurses due to nursing's unique character).

61. *See infra* notes 62-85 and accompanying text (discussing cases dealing with supervisory authority of nurses); *supra* note 41 and accompanying text (discussing *St. Mary's Home* dissent's finding that other courts have held nurses with more authority than Mitchell to be supervisors).

62. 661 F.2d 1095 (6th Cir. 1981).

63. *Compare St. Mary's Home,* 690 F.2d at 1067-68 *with Beverly Enterprises,* 661 F.2d at 1100-04 (comparing Fourth and Sixth Circuit's analyses of nurses' supervisory status); *see infra* notes 69-77 and accompanying text (discussing Sixth Circuit's analysis of nurse's supervisory status in *Beverly Enterprises*); *infra* notes 86-90 and accompanying text (discussing Fourth Circuit's analysis of Mitchell's supervisory status in *St. Mary's Home*).

64. *See* 661 F.2d at 1098.

65. *See id.*

66. *See id.*

67. *See id.* at 1101-04; *infra* notes 76-77 and accompanying text (discussing *Beverly Enterprises* court's review of Board findings).

68. *See* 661 F.2d at 1100-01.

69. *See id.* at 1100. The authority to adjust employee schedules includes the power to call in extra help, approve overtime, approve absences, and release employees early. *See id.* at 1099-1100.

the LPNs' exercise of this authority was routine or involved independent judgment.[70] The Sixth Circuit agreed with the Board that the LPNs' exercise of authority to adjust employee schedules was merely routine.[71] After disposing of the nurses' authority to adjust employee schedules, the *Beverly Enterprises* court addressed the LPNs' authority to participate in disciplining and rewarding employees.[72] The Sixth Circuit found that the LPNs had the authority to recommend discipline.[73] The *Beverly Enterprises* court noted, however, that the crucial question was not whether the nurses participated in disciplinary action, but whether the nurses' participation in disciplinary action amounted to the "effective recommendation" that management retain, reward, or dismiss employees.[74] The Sixth Circuit found substantial evidence supporting the Board's determination that the LPNs did not effectively recommend disciplinary action because the employer did not follow the nurses' recommendations with any regularity.[75] The *Beverly Enterprises* court refused to enforce the Board's order because the Board had not analyzed properly the LPNs' authority to assign employees.[76] The Sixth Circuit remanded the case to the Board and

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Mitchell, in *St. Mary's Home*, possessed the authority to excuse employees, reassign employees to replace absent employees, and to make general assignment changes, according to the Fourth Circuit. *See supra* note 29 and accompanying text (discussing Fourth Circuit's findings concerning Mitchell's supervisory authority). The distinction between the authority to adjust employee schedules and the authority to assign nurses is vague, and some overlap exists between the functions that fall within a nurse's authority to adjust employee schedules and the functions that fall within a nurse's authority to assign employees. *See* NLRB v. Res-Care, Inc., 705 F.2d 1461, 1467-68 (7th Cir. 1983) (characterizing nurses' authority to pass on employees' requests to be excused, excuse sick aides, and schedule aides for overtime work as authority to assign nurse's aides). The Seventh Circuit in *NLRB v. Res-Care* found that the LPNs at issue possessed the authority to assign nurses aides. *See* 705 F.2d at 1467-68; *infra* notes 78-85 and accompanying text (discussing *Res-Care*).

70. *See* 661 F.2d at 1100.

71. *See id.*

72. *See id.* at 1100-01.

73. *See id.*

74. *See id.*

75. *See id.; see also* NLRB v. Res-Care, Inc., 705 F.2d 1461, 1467 (7th Cir. 1983) (court upheld Board determination that LPN did not have authority to effectively recommend discipline because LPN's superiors seldom acted upon LPN's recommendations); Misericordia Hosp. Medical Center v. NLRB, 623 F.2d 808, 817 (2d Cir. 1980) (court upheld Board determination that nurse did not have authority to effectively recommend discipline, finding insubstantial evidence that nurse's superiors acted upon nurse's recommendations); NLRB v. St. Francis Hosp. of Lynwood, 601 F.2d 404, 421 (9th Cir. 1979) (court found nurses' participation in disciplinary functions consisted of merely reporting offenses to management or exercising temporary authority delegated from head nurses).

76. *See* 661 F.2d at 1101-04. The Sixth Circuit in *Beverly Enterprises v. NLRB* concluded that the Board's analysis of nurses' authority to assign and direct the work of employees indicated that the Board misunderstood congressional intent that the Board distinguish true supervisory authority from the professional judgment and discretion involved in patient care. *See id.* at 1107; *see also supra* notes 8 & 25 (discussing congressional distinction between true supervisory authority and professional's exercise of independent judgment not in interest of employer). The *Beverly Enterprises* court concluded that the Board may have found that the LPNs were not supervisors simply because the LPNs' supervisory activities in assigning and directing subordinate

directed the Board to determine whether the nurses' authority to assign and direct employees required the nurses to exercise independent professional judgment and, if so, whether the nurses exercised independent professional judgment primarily in connection with patient care or primarily in the interest of the employer.[77]

The *Beverly Enterprises* court's analysis of the LPNs' authority to assign employees was similar to the Seventh Circuit's analysis of the issue in *NLRB v. Res-Care, Inc.*[78] The employer in *Res-Care* had refused to bargain with a certified union, contending that because the union represented seven LPNs who were supervisors, the employer had no duty to bargain.[79] The Board found that the nurses were not supervisors and ordered the employer to bargain.[80] After the employer refused to comply with the Board's order, the Board petitioned the Seventh Circuit to compel the employer to bargain.[81] The Seventh Circuit enforced the Board's order, finding substantial evidence supporting the Board's determination that the LPNs were not supervisors.[82] The *Res-Care* court found that the nurses' most significant possession of supervisory power in the interest of the employer was the authority to assign nurse's aides.[83] The Seventh Circuit, however, determined that the LPNs' exercise of the authority to assign nurse's aides was merely routine and did not involve the exercise of independent judgment since the assignment of nurse's aides required the LPNs to use little discretion.[84] The *Res-Care* court found that the LPNs' duty to decide what task to assign which aide did require the nurses to exercise discretion but that the discretion the LPNs exercised in assigning tasks to aides was not managerial discretion in the interest of the employer,

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employees were "in conjunction with their patient care responsibilities." *See* 661 F.2d at 1101. The *Beverly Enterprises* court stated that the LPNs were not supervisors either because the LPNs did not exercise independent judgment in assigning employees, or because the LPNs exercised independent judgment professionally, but not in the interest of the employer. *See id.*

77. *See id.* at 1104-05. The *Beverly Enterprises* court directed the Board to find that the LPNs were supervisors only if the LPNs exercised independent professional judgment in the interest of the employer. *See id.* at 1105.

78. 705 F.2d 1461 (7th Cir. 1983); *see supra* notes 76-77 and accompanying text (discussing *Beverly Enterprises* court's analysis of LPNs' authority to assign employees); *infra* notes 83-85 and accompanying text (discussing Seventh Circuit's analysis of nurses authority to assign employees in *NLRB v. Res-Care, Inc.*).

79. *See* 705 F.2d at 1465.

80. *See id.*

81. *See id.*

82. *See id.* at 1472.

83. *See id.* at 1467-68. The Seventh Circuit in *NLRB v. Res-Care, Inc.* found that the LPNs' most significant supervisory powers were the authority to assign tasks to aides, pass on nurses' aides' requests to be excused from work, excuse sick aides, advise management if fewer aides are needed on a shift, and schedule aides for overtime work. *See id.; see also supra* note 69 (discussing vague distinction between authority to adjust employee schedules and authority to assign employees).

84. *See* 705 F.2d at 1468. The *Res-Care* court noted that if the LPNs needed to replace an aide or schedule an aide for overtime work, the LPNs merely picked a name from a list of aides. *Id.*

but rather professional discretion in the best interests of the patients.[85]

In contrast to the Sixth and Seventh Circuit's discreet and careful analysis of the supervisory status of nurses under section 2(11), the *St. Mary's Home* court's analysis of Mitchell's supervisory authority was superficial.[86] Although the Fourth Circuit acknowledged that courts should apply section 2(11) to nurses in a flexible manner, the *St. Mary's Home* court merely listed Mitchell's various responsibilities, concluded that the aggregate of Mitchell's duties involved the exercise of supervisory power, and noted that Mitchell performed the supervisory tasks on a regular basis.[87] In other words, the Fourth Circuit inquired only into the supervisory nature of Mitchell's authority and the frequency of Mitchell's exercise of supervisory authority.[88] The *St. Mary's Home* court did not take its analysis further and ask whether Mitchell's authority to adjust employee schedules and assign nurses was routine or required independent professional judgment and, if Mitchell's authority to adjust employee schedules and assign nurses required independent judgment, whether Mitchell exercised independent judgment primarily in connection with patient care or in the interest of the employer.[89] Nor did the Fourth Circuit ask whether Mitchell's recommendations of discipline were effective in the sense that St. Mary's followed Mitchell's recommendations with any regularity.[90]

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85. *See id.* The *Res-Care* court saw no difference between an LPN telling an aide what task to do and a doctor telling a nurse what care to provide which patient. *See id.* The *Res-Care* court found that neither a nurse's nor a doctor's patient care instructions render the nurse or doctor a supervisor under § 2(11) of the Act. *See id.; see also supra* notes 3 & 25 (discussing § 2(11) of the Act and legislative history to 1974 health care amendments to Act respectively); *supra* notes 76-77 and accompanying text (discussing *Beverly Enterprises* court's analysis of nurses' authority to assign aides); Misericordia Hosp. Medical Center v. NLRB, 623 F.2d 808, 816 (2d Cir. 1980) (nurse's duty to assign employees incidental to nurse's primary duty to maintain welfare of patients).

86. *See supra* notes 62-85 and accompanying text (discussing *Beverly Enterprises* and *Res-Care* analysis of supervisory status of nurses). *But see infra* notes 87-90 and accompanying text (discussing Fourth Circuit's analysis of Mitchell's supervisory status in *St. Mary's Home*).

87. *See St. Mary's Home*, 690 F.2d at 1067-68.

88. *See id.*

89. *See id.*

90. *See id.* In addition to analyzing Mitchell's supervisory responsibilities in a cursory fashion, the Fourth Circuit also found great significance in Mitchell's status as the highest ranking employee on the premises two nights per week. *See id.* at 1068-69. The *St. Mary's Home* court cited with approval a case involving the supervisory status of fast food shift managers, in which the Seventh Circuit overturned a Board determination that the shift managers were not supervisors on the ground that the shift managers were the ranking employees on the job-site when they were in charge of their shifts. *Id.; see* American Diversified Foods, Inc. v. NLRB, 640 F.2d 893, 895-96 (7th Cir. 1981). Unlike the *St. Mary's Home* court, other courts that have considered the supervisory status of nurses have found the fact that a nurse was the highest ranking employee on the premises to be of little significance. *See Res-Care*, 705 F.2d at 1467 (although LPNs were highest ranking employees on premises, fact alone did not make LPNs supervisors); *Beverly Enterprises*, 661 F.2d at 1097 (court accorded no special significance to nurses' occasional status as highest ranking employees on premises); Misericordia Hosp. Medical Center v. NLRB, 623 F.2d 808, 816 (2d Cir. 1980) (court found substantial evidence supporting Board's determination that nurse was not supervisor, even though nurse had 24 hour responsibility for her shift); *see also*

While the *St. Mary's Home* court acknowledged that Congress sought to distinguish between the exercise of professional judgment that is incidental to patient care and that which is in addition to patient care, the Fourth Circuit's superficial treatment of Mitchell's various responsibilities indicates that the Fourth Circuit did not appreciate fully the distinction that Congress sought to make in the health care field between true supervisory authority and the exercise of professional judgment implicit in patient care.[91] According to the *Beverly Enterprises* court, the distinction is crucial, not because patient care is merely a routine matter requiring no independent professional judgment, but because the independent judgment necessarily involved in patient care is not always strictly in the interest of the employer.[92] Thus, a nurse's exercise of independent judgment in directing employees alone should not confer supervisory status upon the nurse.[93] Once a court has identified a nurse's supervisory duties, a full analysis of the nurse's supervisory status involves a two part approach. A court must first ask whether the nurse's activities require independent professional judgment.[94] If the nurse's activities require the exercise of independent professional judgment, a court then must ask whether the nurse exercises judgment primarily in connection with patient care not in the interest of the employer or in the interest of the employer and not merely pursuant to patient care.[95] A nurse is a supervisor under section 2(11) only if the nurse's supervisory duties require the nurse to exercise independent professional judgment in the interest of the employer.[96]

The Fourth Circuit prefaced its analysis of Mitchell's supervisory status by conceding that courts must defer to the Board's expertise and uphold the Board's result if substantial evidence supports the Board's findings.[97] Nevertheless, the Fourth Circuit's groundbreaking rejection of a Board finding that a nurse was not a supervisor, flawed analysis, and omission and mischaracterization of crucial Board findings indicates that the *St. Mary's Home* dissent correctly concluded that the majority merely paid passing reference to the court's limited appellate function of determining whether substantial evidence supports the Board's findings.[98] The Fourth Circuit not

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supra notes 11 & 60 (discussing inapplicability of cases dealing with supervisory status of industrial employees to determination of supervisory status of nurses).

91. *See* St. Mary's Home, 690 F.2d at 1066-67, 1067 n.11 (citing S. REP. No. 766, *supra* note 8, at 3951); Beverly Enter. v. NLRB, 661 F.2d 1095, 1101 (6th Cir. 1981) (discussing congressional direction to Board to distinguish between true supervisory authority and independent professional judgment involved in patient care); *supra* notes 86-90 and accompanying text (discussing shortcomings of Fourth Circuit's analysis of Mitchell's supervisory status); *see also supra* notes 8, 11 & 25 (discussing legislative history to 1974 health care amendments to the Act).

92. *See Beverly Enterprises*, 661 F.2d at 1101.

93. *See id.*

94. *See supra* notes 76-77 and accompanying text (discussing *Beverly Enterprises* court's review of proper analysis of nurses' supervisory status).

95. *See id.*

96. *See id.*

97. *See* 690 F.2d at 1067.

98. *See supra* notes 42-61 & 86-96 and accompanying text (discussing shortcomings in Fourth