

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

THE SAGE COMPANY, LLC d/b/a THE  
VILLAGE HEALTH CARE CENTER, an  
affiliate of THE GOODMAN GROUP<sup>1</sup>

Employer

and

Case 19-RC-14169

AMERICAN FEDERATION OF STATE,  
COUNTY & MUNICIPAL EMPLOYEES,  
MONTANA STATE COUNCIL NO. 9,  
AFL-CIO<sup>2</sup>

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>3</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute appropriate voting groups:

(A) All registered nurses employed by the Employer at its Missoula, Montana, facility; but excluding all licensed practical nurses, guards and supervisors as defined by the Act, and all other employees.

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<sup>1</sup> The name of the Employer appears as corrected at hearing.

<sup>2</sup> The name of Petitioner appears as corrected at hearing.

<sup>3</sup> The parties filed briefs, which have been considered.

(B) All licensed practical nurses employed by the Employer at its Missoula, Montana, facility; but excluding all registered nurses, guards and supervisors as defined by the Act, and all other employees.

**Facts:**

The Employer is engaged in the operation of a long-term health care facility in Missoula, Montana. Petitioner seeks a unit of all registered nurses (RNs) and licensed practical nurses (LPNs) employed by the Employer. The Employer contends that all of its nurses, both RNs and LPNs, are statutory supervisors. The Employer does not contend that the unit is otherwise inappropriate. The parties stipulated that, absent a finding of supervisory status, a unit including all RNs and all LPNs is an appropriate unit. The parties stipulated that the RNs are professional employees within the meaning of section 2(12) of the Act, and I accept the parties' stipulation thereon.

The facility has 174 beds and is under the overall direction of administrator DeAnn Smallwood. Denise Licata is the director of nursing, and Polly Shepherd is the assistant director of nursing. There are five nursing units in the facility, and each has a unit manager. The parties stipulated that the administrator, director of nurses, assistant director of nurses, unit managers, quality assurance manager, education coordinator, social service director, activity director, food service manager, human resources manager, who is also the business office manager and admissions coordinator, and housekeeping laundry supervisor, are all supervisors within the meaning of the Act, and I accept the parties stipulation thereon.

Oscar Bernard is the unit manager for the North Unit and the Skilled Unit. Polly Shepherd, in addition to being assistant director of nursing, is acting unit manager for the Alzheimer's unit. Tammy Tally is unit manager for the End-of-life unit, also called the TLC unit. Heidi Marshall is unit manager of the Sub-acute unit.

There are one or two nurses, either RNs or LPNs, on duty in each unit at all times. In addition, there are from one to four certified nursing assistants (CNAs) on duty in each unit on all shifts. The Employer is contending that the nurses are the supervisors of the CNAs.

In addition to the nursing department, other departments in the facility include admissions, business office, medical records, activity, dietary, housekeeping and laundry, maintenance, social services, and therapy. There is no contention that any employees in any department other than the nursing department should be included in the Unit.

The nurses and CNAs are assigned to specific units on a permanent basis. They work either 8-hour or 12-hour shifts. Staffing on each unit is the same each day, except for the bath aide position. There are about 20 RNs and about 20 LPNs. The North unit has 62 beds, and is divided into two teams with 31 beds each. Each team has a nurse and three CNAs. It appears that the Sub-acute unit also has two nurses: a 12-hour nurse who is the charge nurse, and an 8-hour nurse who is the medication nurse. Nurses and CNAs are all scheduled by Carlene Brauer, the nursing department scheduler, who is a CNA.

The Employer provides a two-week training course which leads to certification for nursing assistants. The training includes a full explanation of their duties and how such duties are to be carried out. CNAs are thus able to work on their own, without the need for constant

monitoring and instruction, although new CNAs of course need more direction than those who are experienced.

In each unit there are a certain number of beds, which varies by the unit. On some units, the night shift nurse assigns nurses and CNAs to patients for the next two shifts; on other units, a CNA prepares the assignment sheet for the next shifts. Nurses and CNAs are assigned on a daily basis, but usually to the same patients.

For the most part, the duties of the CNAs are routine; that is, they do the same things for each patient every day. However, variations occur. The nurse informs the CNA at the beginning of a shift, or sometime early in the shift, about patients who need to be gotten ready to go to the hospital for an x-ray, or to a physician's office for an appointment. The nurse may want vital signs taken more often on a particular patient, and will tell the CNA to do that. At times, a unit may be short-staffed because of absentees; in such cases, the nurse can reassign CNAs to additional patients to cover the gap. There is an example in the record of a nurse who chose a CNA to assist her in giving a resident a bath, rather than designating two CNAs to give the bath. The nurse chose to participate in the bath giving so that only one CNA would be off the floor instead of two.

CNAs are assigned to perform non-patient care tasks such as emptying the garbage, washing wheelchairs, and washing other equipment. It is unclear in the record whether the nurse on duty during a shift assigns these tasks, or if they are assigned in advance at the time patients are assigned. The nurse is responsible for making sure that the tasks are performed on her shift.

There is general testimony that nurses are held accountable for the work performed on their shift. In November 1997, a nurse was reprimanded by her superior in a "verbal warning documentation" which was placed in her personnel file. A CNA on her shift had performed substandard work, and the nurse was reprimanded for not having overseen the work of the CNA properly. Much earlier, in 1992, a nurse was given a written warning notice concerning substandard work performed by the CNAs on her shift, and told to make certain that they fulfilled their duties correctly.

CNAs are instructed to call the nurse on the shift proceeding their own if they are going to be absent. That nurse then seeks a replacement by calling CNAs on a call list consisting of all CNAs that are part-time and on-call. The nurse may make the calls in any order she chooses. If a substitute is not found, the nurse can ask CNAs on her own shift for a volunteer to work all or part of the next shift. Nurses can also contact nurses on other units and arrange between the two of them for a CNA to be transferred temporarily to the short-staffed unit.

Lunch and break times are assigned on each unit. CNAs must notify the nurse on the unit before going on break or to lunch; the nurse can instruct the CNA to postpone the break, perhaps because one or more other CNAs have not returned from their breaks, or because there is an immediate need to assist a patient.

The Employer has an established grievance procedure which is published in the employee handbook distributed to all employees. The procedure provides that an employee must first bring the problem to the attention of his or her department manager in writing no later than seven days after the problem occurred. There is no evidence that nurses are ever the recipients of such writings. CNAs bring minor complaints, such as personality conflicts with another CNA or with a patient, to the attention of nurses, who generally resolve the difficulty through discussions with the parties involved, and if necessary by reassigning the patient to a different CNA.

Nurses who discover CNAs performing their duties incorrectly or who perhaps are derelict in their duties, speak to the CNAs, instructing them in the correct performance of the task, or in the need to perform the task. Nurses also write memos to higher authority reporting misconduct of CNAs, using a generic memo form, no examples of which appear in the record. The Employer also has printed "Written Warning Notice" forms, of which only one example appears in the record. It is addressed to three CNAs, signed by nurse Sarah Leighton, and concerns an incident which occurred on October 21, 2001. There is one example in the record of a nurse sending an employee home for misconduct, in connection with allegations of patient abuse.

CNAs who wish to leave work early ask the nurse for permission. The nurse, at her own discretion, may grant the request, may deny it, or may grant it with modification, such as "Don't leave for an hour yet."

CNAs sometimes are called upon to work through their lunch times. The nurse signs a "time correction edit" form verifying that the CNA did not get a lunch break, so that the CNA will be paid for the time. In addition, there is general testimony CNAs are sometimes asked to work for an hour or so into the next shift. There is an example of the record of a CNA on the evening shift who worked an additional hour on the night shift, but the record does not specifically establish why this occurred.

Nurses complete a "Skills Inventory Checklist" as part of the regular formal evaluation process for CNAs, but there is no evidence that nurses make any recommendations for reward or discipline in connection with the evaluations. In general, when the nurse has identified a deficiency on the checklist, a follow-up is made 30 days later as to whether there has been correction or improvement. If there has not, the employee may receive a written warning from the unit manager or the director of nursing. There is no evidence that the nurse makes any recommendation of discipline in this regard.

### **Supervisory Issues:**

Section 2(11) of the Act defines a "supervisor" as: "any individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

At hearing, the parties stipulated that the nurses do not hire, fire, give wage increases or rewards, promote, recall, layoff, or effectively recommend such actions. We are left to consider whether the nurses, using independent judgment, assign, adjust grievances, discipline, reward or responsibly direct.

The supervisory status of nurses similarly situated to the nurses at issue herein has been the subject of litigation in many cases before the Board and the Courts, including the recent decision in *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001). With respect to the burden imposed on a party contending supervisory status, the Board has consistently held that absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991); *Quadrex Environmental Company, Inc.*, 308 NLRB 101

(1992). The burden is on the party asserting supervisory status to establish same, a standard approved by the Court in *Kentucky River*.

A key issue has been whether the nurses involved exercise “independent judgment” in directing other employees. See, for example, *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996).

In *Kentucky River*, the Court rejected the Board’s holding that employees do not use “independent judgment” under section 2(11) when they exercise “ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.”

What the Court did *not* say in *Kentucky River*, or in the earlier *Health Care & Retirement* case, is that nurses are invariably statutory supervisors when they give even the most minor direction to less skilled employees, such as the CNAs herein. In *Kentucky River*, the Court acknowledged that the statutory term “independent judgment” is “ambiguous with respect to the *degree* of discretion required for supervisory status.” Stated another way, the exercise of *some* degree of independent judgment does not necessarily warrant a finding of statutory supervisory status; there is a minimum threshold.

The statute states that any of the listed supervisory indicia must require “independent judgment”, to a degree that “the exercise of such authority is not of a merely routine or clerical nature....”

I interpret “judgment” to be “independent” when the alleged supervisor makes his decision concerning the exercise of a statutory indicium alone, without hindering oversight/control from other decision makers, and beyond the mere application of standard rules and procedures set by other authority, such a higher management or regulatory entities. The complexity (or lack thereof), of the judgment-making does not affect the independence of the judgment.

I further interpret the word “judgment” not to include *every* decision an alleged supervisor might make regarding a statutory indicium, even if that decision be made independently. Rather, only those decisions which are more then “merely routine or clerical” in nature are “judgments”. Thus, in simplest terms, a supervisor must make the supervisory judgments “alone”, and the judgments must be more than “no-brainers”.

The nurses herein assign and direct the work of the CNAs to the extent that they instruct CNAs to perform any necessary tasks which vary from the normal daily routine; they can temporarily assign more than the usual number of patients to CNAs to accommodate short staffing; they can tell CNAs to perform necessary non-patient care tasks such as taking out the garbage; they can tell CNAs to postpone their breaks and lunch periods; they can permit, deny, or modify a request to leave work early. Further, as a general proposition, as nurses and CNAs go about their normal work during a shift, if a nurse observes a CNA performing poorly, the nurse can and does take some action to correct the CNA, either on the spot, or with subsequent additional training. The record establishes, however, that there is no necessity for nurses to give CNAs specific instructions every day regarding their duties for that day, or to closely monitor their performance. The CNAs have been trained by the Employer in their duties.

The foregoing does not establish that the nurses are required to use true judgment and true independence in assigning and directing the work of the CNAs. It appears that most of the

work is repetitive, routine and self-directed. The decisions made by the nurses -- assigning additional tasks, adjusting breaks, assigning a CNA to another or different patient temporarily -- do not require true independence and judgment. Thus, if a patient will be going out to an appointment with a physician, a CNA will have to get the patient ready to go. If a patient's condition is such that the nurse needs to monitor that person's vital signs more closely than usual, a CNA will have to take the vital signs more often. If too few CNAs have reported for work on a shift, an additional someone will have to be called in off the list, or patient assignments rearranged, in order to provide care for all patients.

The nurses do have some discretion in their dealings with CNAs. A nurse can instruct a CNA to postpone a break. There are no specific examples in the record, but there is general testimony that the nurse might do this because one or more other CNAs had not returned from break, or because of an immediate need to assist a patient. This evidence does not establish any need to exercise true judgment. Similarly, CNAs ask the nurse for permission to leave work early, and the nurse may grant the request, deny it, or grant it in part. There is no evidence that the nurse makes her decision on any basis other than having sufficient staff remaining to meet the needs of the patients for the remainder of the shift.<sup>4</sup>

In calling in CNAs to replace absentees, a nurse uses a call list of all CNAs that are part-time or on-call. The nurse may make calls in any order she chooses. Thus the nurse has the discretion to choose who to call, but the evidence does not establish that the nurse must exercise any degree of discretion sufficient to establish the need for true judgment. There are no specific examples in the record, nor any evidence with regard to how often this happens, nor any evidence that there are any significant differences among the CNAs on the call-in list, such that a nurse might be choosing between CNAs based on her assessment of which one would be the best available employee, considering the particular constellation of circumstances found that day on that shift on that part of the Unit.

It is contended that the nurses "responsibly direct" in that they are held accountable if CNAs fail to fulfill their job duties. The Employer cites *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 267 (2<sup>nd</sup> Cir., 2000) in this regard: "Accountability for another's failure to perform establishes as a matter of law an employee's supervisory power responsibly to direct." The evidence here regarding the nurse's accountability amounts only to two written reprimands issued in the distant past, and conclusionary testimony regarding hypothetical examples. There is no specific evidence of any recent, regular occurrences of nurses being held accountable for the job performance by the CNAs, such as statements in job descriptions, rewards or recognition for fine work by subordinates, discipline for prior work of subordinates, discussion in the nurses' appraisals of the functioning of "their" Unit, or records of Unit performance by the nurse and her CNAs.

The nurses do not participate in the Employer's established grievance procedure, but they do resolve or attempt to resolve minor complaints such as personality conflicts brought to their attention. The Employer contends that this evidence establishes that the nurses have statutory authority to adjust grievances, citing *Passavant Retirement & Health Center*, 149 F.3d 243 (1998), wherein the Third Circuit found that nurses who resolved minor complaints had statutory authority to adjust grievances. However, the Board has found that nurses who had authority limited to informally resolving minor disputes between employees or minor complaints, and who

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<sup>4</sup> It is noted that the record does not demonstrate that the nurses are managing a complex unit with constant, life-threatening changes in patient activity requiring rapid response, shuffling, triaging, such as one might find in an emergency room or in intensive care unit.

did not perform any role in any formal grievance procedure, lacked statutory authority to “adjust grievances”. *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997). Note that the record does not distinguish whether these resolutions are by fiat, or by arranging a consensus, or just by “caving in” to whatever request is made. Moreover, it does not appear that, say, separating two bickerers on a given day, - perhaps switching one of them to work with a third employee for the day - requires true judgment. See *Ken-Crest Services* 335 NLRB No. 63 (2001).

There is no evidence other than conclusionary testimony that the nurses have any authority to discipline. Nurses who find an inadequate job performance by a CNA speak to the CNA to correct the work. Nurses also write reports of CNA misconduct on informal memo forms, which they pass along to higher authority. There is no evidence that nurses make any recommendation for discipline. Verbal reprimands and counseling do not constitute “discipline” within the meaning of Section 2(11) of the Act absent some showing of impact on employees’ job status. *Hydro Conduit Corporation*, 254 NLRB 433 (1981). I.e., absent evidence that such reprimands have a significant impact on the employee’s employment status or that they impair a reasonably expected employment benefit, they do not amount to “discipline” as the phrase is used Section 2(11). *Tucson Gas & Electric Company*, 241 NLRB 181, 182 (1979). Absent evidence that at the employees disciplinary warnings have any effect on an employee’s employment status and evidence as to what happened to the warning after it was given to the employee, the mere issuance of a written warning is insufficient to establish supervisory authority. *Azuza Ranch Market*, 321 NLRB 811 (1996). See *Ken-Crest*, *supra*.

Nurses participate in the evaluation process, but there is no evidence that they make any recommendations for reward or discipline. The Board observed in *Northcrest Nursing Home*, 313 NLRB 491, 498 (1993) that, “we have consistently declined to find supervisory status when charge nurses performed evaluations that did not, by themselves, affect other employees' job status and thus did not, by themselves, constitute effective recommendations for personnel actions. Whether implicitly or explicitly stated in our decisions, it has always been our policy that for evaluations to constitute evidence of supervisory status they must effectively recommend personnel action.” [Citations omitted.]

I conclude that the Employer has failed to meet its burden in establishing that the nurses are statutory supervisors. Therefore, I find that, on this record, the nurses are not supervisors within the meaning of Section 2(11) of the Act.<sup>5</sup>

#### **“Professional” Considerations:**

The Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with employees who are not professional unless a majority of the professional employees vote for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. Accordingly, I shall direct elections in the following voting groups: (A) all registered nurses employed by the Employer at its Missoula, Montana, facility, but excluding all licensed practical nurses, guards and supervisors as defined by the Act, and all other employees; and (B) All licensed practical nurses employed by the Employer at its Missoula, Montana, facility, but excluding all registered nurses, and guards and supervisors as defined by the Act, and all other employees.

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<sup>5</sup> I also note that there would be only a total of 1-4 employees assigned to the 1-2 nurses on any shift, an unusually high ratio of supervisor to employee(s). Surely the record does not evidence any particular need for such close supervision. Nurses are free to call their Unit Manager at home.

The employees in voting group (A), i.e., the professional employees, will be asked two questions on their ballot: (1) Do you desire the professional employees to be included with the non-professional employees in a unit composed of all registered nurses and licensed practical nurses employed by the Employer at its Missoula, Montana, facility, for the purposes of collective bargaining? (2) Do you desire to be represented for the purposes of collective bargaining by the American Federation of State, County and Municipal Employees, Montana State Council No. 9, AFL-CIO?

If a majority of the professional employees in voting group (A) vote “Yes” to the first question, indicating their wish to be included in a unit with the nonprofessional employees, they will be so included. Their votes on the second question will then be counted together with the votes of the nonprofessional voting group (B) to decide the representative for the whole nurse unit. If, on the other hand, a majority of the professional employees in voting group (A) vote against inclusion, they will not be included with the nonprofessional employees. Their votes on the second question will then be separately counted to decide whether they wish to be represented separately for purposes of collective bargaining.<sup>6</sup>

If a majority of the professional employees vote for inclusion in the unit with the nonprofessional employees, the following employees will constitute a unit appropriate for collective bargaining:

All registered nurses and licensed practical nurses employed by the Employer at its Missoula, Montana, facility; but excluding all guards and supervisors as defined by the Act, and all other employees.

If a majority of the professional employees do not vote for inclusion in the nurse unit with the nonprofessional employees, the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining:

(A) All registered nurses employed by the Employer at its Missoula, Montana, facility, but excluding all licensed practical nurses, guards and supervisors as defined by the Act, and all other employees.

(B) All licensed practical nurses employed by the Employer at its Missoula, Montana, facility; but excluding all registered nurses, guards and supervisors as defined by the Act, and all other employees.

There are approximately 20 employees in voting group A and approximately 20 employees in voting group B.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the voting groups found appropriate at the time and place set forth in the notice of election to

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<sup>6</sup> If Petitioner does not desire to represent the professional employees in a separate unit even if those employees vote for such representation, Petitioner may notify the Regional Director to that effect within ten (10) days of the date of this Decision and Direction of election.

be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL WORKERS, MONTANA STATE COUNCIL NO. 9, AFL-CIO.

### **NOTICE POSTING OBLIGATIONS**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29<sup>th</sup> Floor, Seattle, Washington 98174, on or before December 12, 2001. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

**RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by December 19, 2001.

**DATED** at Seattle, Washington this 5<sup>th</sup> day of December 2001.

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177-8580-8050