

**Nos. 08-10664-JJ, 08-11019-JJ**

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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**v.**

**RICHMOND HEALTH CARE d/b/a SUNRISE HEALTH AND  
REHABILITATION CENTER**

**Respondent/Cross-Petitioner**

---

**ON APPLICATION FOR ENFORCEMENT AND  
CROSS-PETITION FOR REVIEW OF  
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**NATIONAL LABOR RELATIONS BOARD** )  
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 **Petitioner/Cross-Respondent** ) **Nos. 08-10664-JJ**  
 ) **08-11019-JJ**  
 **v.** )  
 ) **Board Case No.**  
 **RICHMOND HEALTHCARE d/b/a SUNRISE** ) **12-CA-25504**  
 **HEALTH AND REHABILITATION CENTER** )  
 )  
 **Respondent/Cross-Petitioner** )  
 )

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1-1 of the Court’s Rules, Petitioner National Labor Relations Board (the “Board”), by and through its undersigned attorneys, hereby certifies that the following persons and entities have an interest in the outcome of this case:

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this 19th day of June 2008

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce, and the cross-petition of Richmond Health Care d/b/a Sunrise Health and Rehabilitation Center (“the Company”) for review of, a Board Order issued against the Company on December 31, 2007, and

reported at 351 NLRB No. 95. (Vol.V-Doc.71.)<sup>1</sup> The Board filed its application for enforcement on February 14, 2008. The Company filed its cross-petition for review on March 6. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

The Board's unfair labor practice order is based, in part, on findings made in the underlying representation proceedings. Pursuant to Section 9(d) of the National Labor Relations Act, as amended ("the Act"),<sup>2</sup> the record before this Court therefore includes the record in those proceedings.<sup>3</sup> Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to "enforc[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board," but does not give the Court general authority over the representation proceeding.<sup>4</sup> The Board retains authority

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<sup>1</sup> Record references are to the Volume, document number (if relevant), and exhibit number or transcript page(s). "ERX" refers to exhibits introduced by the Company (the employer) at the March 1997 hearing. References preceding a semicolon are to the Board's or Regional Director's findings (affirmed by the Board); those following are to the supporting evidence.

<sup>2</sup> 29 U.S.C. § § 151, 159(d).

<sup>3</sup> See *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79, 84 S.Ct. 894, 896-98 (1964).

<sup>4</sup> 29 U.S.C. § 159(d).

under Section 9(c) of the Act<sup>5</sup> to resume processing the representation cases in a manner consistent with the ruling of the Court in the unfair labor practice case.<sup>6</sup>

### **STATEMENT OF THE ISSUES PRESENTED**

The ultimate issue in this case is whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act<sup>7</sup> by refusing to bargain with and provide relevant requested information to Service Employees International Union, Florida Healthcare Union, Local 1999 (“the Union”) after the Board certified it to represent the Company’s employees following Board-supervised elections. The Company admits (Br. 5) that it has failed to bargain with and provide information to the Union. Its defense is that the Board erred in certifying the Union as the employees’ bargaining representative.

The underlying issues are whether (1) substantial evidence supports the Board’s finding that the licensed practical nurses (LPNs), whom the Company calls charge nurses, are not supervisors under Section 2(11) of the Act such that they can be represented by the Union, and (2) whether the Board reasonably exercised its wide discretion in overruling the Company’s objection that the use of LPNs as

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<sup>5</sup> 29 U.S.C. § 159(c).

<sup>6</sup> See, e.g., *Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina County Publications*, 274 NLRB 873, 873 (1985).

<sup>7</sup> 29 U.S.C. § 158(a)(5) and (1).

observers at the election in their own bargaining unit tainted the Union's election victory in the separate certified nursing assistant ("CNA")/service unit.

### **STATEMENT REGARDING ORAL ARGUMENT**

Because this case involves the application of the Board's clarified standards for determining supervisory status under the Act, the Board believes that argument may be of material assistance to the Court. The Board submits that 10 minutes per side would be sufficient.

### **STATEMENT OF THE CASE**

This case involves the Company's refusal to bargain with and provide information to the Union after the Company's employees, including LPNs and CNAs, voted in favor of union representation in Board-conducted elections. The Board found that the Company's refusal violated Section 8(a)(5) and (1) of the Act.<sup>8</sup> (Vol.V-Doc.71-p.3.)

The Company does not dispute (Br. 5) its refusal to bargain and provide information. Instead, it mainly contends that the Board erred in the representation case in finding that the LPNs were not supervisors. The Board's findings in the representation and unfair labor practice proceedings, as well as the Decision and Order under review, are summarized below.

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<sup>8</sup> 29 U.S.C. § 158(a)(5) and (1).

## **STATEMENT OF FACTS**

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. The Representation Proceeding**

##### **1. Background and procedural history**

The Company operates an extended care nursing home in Sunrise, Florida. (Vol.V-Doc.71-p.2.) The Union filed petitions to represent employees in three separate bargaining units; only two of those are at issue in this case—the LPN unit and the CNA/service unit. The latter unit includes CNAs, dietary employees, cooks, maintenance employees, medical records employees, unit secretaries, activities employees, social services assistants, and central supply employees. (Vol.V-Doc.71-p.2.)

The Company contends that the LPNs cannot be represented by a union because they are supervisors. Based on its claim that the LPNs are supervisors, the Company also argues that the LPNs were ineligible to serve as observers in their own election, and that their service tainted the election in the CNA/service unit. Due to the evolution of Board and Supreme Court law on the standards for determining supervisory status, the case has had a complicated procedural history resulting in multiple remands and three separate decisions from the Board's Regional Director, all of which found that the LPNs were not supervisors under the Act.

In March 1997, the Board's regional office in Miami held a pre-election hearing to take evidence on the supervisory issue. The Board's Regional Director issued a Decision and Direction of Election in April 1997 (Vol.V-Doc.10), finding the LPNs were not statutory supervisors.

On May 9, 1997, the regional office conducted separate elections in the LPN and CNA/service units, which the Union won. The Company filed several objections to the conduct of the elections, only one of which is at issue before the Court. The regional office held a hearing in June to take evidence on those objections. The regional hearing officer issued reports (Vol.V-Docs.32-33) overruling each of the objections. The Board affirmed and certified the Union as the employees' certified bargaining representative (Vol.V-Docs.39-40).

The Company refused to bargain with the Union, precipitating an unfair-labor-practice case to test the validity of the Union's certifications on both the supervisory and election-objections issues. While that case was pending before this Court, the Supreme Court issued its decision in *NLRB v. Kentucky River Community Care, Inc.*<sup>9</sup> which rejected, in part, the Board's then-existing supervisory analysis. Accordingly, the parties moved to remand the case to the Board to analyze the case under *Kentucky River*. The Court granted that motion.

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<sup>9</sup> 532 U.S. 706, 121 S.Ct. 1861 (2001).

Pursuant to the remand, the Board's Regional Director issued a Supplemental Decision in 2003, finding that the LPNs remained nonsupervisory employees under *Kentucky River* (Vol.V-Doc.44).

While that decision was pending on review before the Board, in September 2006, the Board issued its decisions in a trio of cases to clarify its analysis of supervisory status.<sup>10</sup> Thus, the Board again remanded the case to the Regional Director to determine whether the LPNs were supervisors under its clarified standards. The Company submitted a written request to reopen the record, but did not provide any reasons to support the request.

The Regional Director then issued an order to show cause (Vol.V-Doc.52), requesting the parties to address "with specificity" the issues of whether the record should be reopened to take additional evidence regarding the LPNs' authority and any changed circumstances. In response (Vol.V-Doc.53), the Company stated that it believed that the record should be reopened, but again did not specify what evidence it wished to present. Accordingly, the Regional Director determined that another hearing was not warranted and, in January 2007, issued her decision on

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<sup>10</sup> *Oakwood Health Care, Inc.*, 348 NLRB No. 37 (2006); *Croft Metals*, 348 NLRB No. 38 (2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006).

remand (Vol.V-Doc.55), again finding that the LPNs were not supervisors.<sup>11</sup> The Board denied the Company's request for review of that decision. (Vol.V-Doc.61.)

## **2. The Company's management structure and the LPNs' duties and authority**

The Company's facility is headed by its administrator, under whom is an executive director of nurses, six unit managers, shift supervisors for the evening and night shifts, LPNs (whom the Company calls "charge nurses"), and CNAs. (Vol.V-Doc.8-p.2; Vol.I-Tr.123-24,288-89.) There are approximately 60 charge nurses, each of whom works with 3 to 4 CNAs and cares for about 30 residents. (Vol.I-Tr.101,124.)

The six unit managers supervise the LPNs, coordinate all functions for the unit and make rounds of their units. Unit managers are responsible for what occurs on their respective units 24 hours a day. LPNs are responsible for their 30

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<sup>11</sup> Although the Company contends (Br. 50) that the Regional Director erred in not allowing it to supplement the record on remand, it offers no explanation or argument in support of that claim. Accordingly, the Court must disregard that contention. *See Doe v. Moore*, 410 F.3d 1337, 1349 n.10 (11th Cir. 2005) (appellate brief must not only state contentions, but must also give reasons for them, with citations to authority and to the record, to preserve an issue on appeal); *Flanigan's Enters., Inc. of Ga. v. Fulton County*, 242 F.3d 976, 987 n.16 (11th Cir. 2001) (failure to elaborate upon an issue raised in an appellate brief or to provide citation of authority in support results in a waiver of that argument); Fed. R. App. P. 28(a)(9)(A) (argument must contain party's contentions with citation to authorities and record).

residents only on their shifts. Unit managers are salaried and LPNs are hourly paid. (Vol.V-Doc.55-p.6; Vol.I-Tr.20-22,38-39,220-24,288-89.)

The LPNs care for the facility's residents pursuant to interdisciplinary care plans ("ICPs"), which detail the residents' needs and goals and the approach the facility will take to meet those needs. The ICPs—written by various people in different departments and finalized by the care plan coordinator—list all the tasks that must be completed in caring for each resident. They are very specific in their details, stating, for example, that a resident needs to be repositioned from left to right or needs a special mattress or adaptive equipment. (Vol.V-Doc.55-pp.6,13; Vol.I-Tr.28-31,65-69,262,287-88.)

The CNAs perform most of the routine and repetitive functions required by the ICPs, such as bathing, dressing, feeding, changing a resident's position in bed, using adaptive equipment, and assisting with exercises. They have the most contact with the residents and report any incidents or changes in a resident's condition to the LPN. (Vol.V-Doc.55-pp.6-7; Vol.I-Tr.23,27.) To ensure continuity of care, the CNAs generally have permanent assignments to particular residents such that they know each one and have the skill to take care of them. Yet, all CNAs are trained to meet the needs of any resident. (Vol.V-Doc.55-pp.8,11; Vol.I-Tr.61,70-72,76,316.)

Accordingly, because the CNAs know what they need to do, the LPNs typically do not observe the CNAs' work. The LPNs can correct CNAs if they do not provide adequate care in accordance with the ICPs and the Company's safety and emergency policies and procedures. (Vol.V-Doc.55-p.15; Vo.I-Tr.99-100,316.) The LPNs complete evaluations of the CNAs, but are not personally held accountable for the deficient performance of CNAs. (Vol.V-Doc.55-p.16; Vol.I-Tr.302-04.)

In emergencies—such as fires, bomb threats, and hurricanes—the Company has specific emergency and safety procedures that must be followed. In such situations, the LPNs assess the medical conditions of the residents and make sure they are placed in the proper location according to the emergency procedures. (Vol.V-Doc.55-p.15; Vol.I-Tr.147-49.) In other unusual situations, including residents' skin tears or falls, the LPNs and CNAs work together to respond. (Vol.V-Doc.55-p.15; Vol.I.-Tr.33-34, 41-43.)

The facility's staffing coordinator determines the overall assignment and scheduling of CNAs, pursuant to the Company's detailed policies and procedures for scheduling. The shift supervisors deal with the schedule after the staffing coordinator has left for the day. The unit managers review the schedules prepared by the staffing coordinator. (Vol.V-Doc.55-p.7; Vol.I-Tr.156,212-13,305-08,Vol.II-ERX4.) When CNAs need to call in sick or have to take a day off, they

call the staffing coordinator or shift supervisor. (Vol.V-Doc.55-p.7; Vol.I-Tr.62-64,206-10,305-08.)

When a unit is short staffed, the staffing coordinator or shift supervisors generally handle the situation and call in additional staff. (Vol.V-Doc.55-p.7; Vol.I-Tr.229-32,306-08.) LPNs must ask the staffing coordinator or unit manager for permission to request CNAs to work overtime. If a CNA refuses to work overtime, the problem is referred to the unit manager or staffing coordinator. (Vol.V-Doc.55-p.9; Vol.I-Tr.305-08,322-24.)

To cover shortages with already-present staff, CNAs from another unit can assist. Although LPNs can decide among themselves to move CNAs to cover shortages, the unit manager or staffing coordinator usually performs that task because LPNs are too busy caring for residents. The Company has “pool” staff CNAs (as well as LPNs) who fill in on an as-needed basis. The pool staff takes the assignments of the missing staff. (Vol.V-Doc.55-pp.8,12; Vol.I-Tr.69-75,152-53,234,307-08.) For permanent transfers, which are infrequent, an LPN may make a recommendation to the staffing coordinator, unit manager, or another LPN, but the staffing coordinator makes the final determination. (Vol.V-Doc.55-pp.8-9; Vol.I-Tr.174-76,231.)

There is no consistent practice regarding when CNAs take their meals and breaks. CNAs typically take their meal breaks when their assigned residents eat.

Alternately, some CNAs take breaks on a random or rotating schedule. Also, while some LPNs may tell CNAs when to take breaks, other times the CNAs decide on their own when to take their breaks. (Vol.V-Doc.55-p.8; Vol.I-Tr.215-17,310-11,328.)

With regard to corrective action for CNAs, the LPNs can complete warning reports for infractions of company rules. Those reports list the infraction(s), but do not contain any recommendations as to the type or severity of discipline to be imposed. The Director of Nursing (DON) and administrator sign off on the reports before they go into CNAs' personnel files. (Vol.V-Doc.10-p.7;Vol.I-Tr.166-69,251-56,296-301,328-29,Vol.II-ERX5.)

### **B. The Unfair Labor Practice Proceeding**

The Union requested that the Company recognize and bargain with it and provide information relevant to negotiations, including a list of employees and company policies, procedures, and wage and fringe benefit plans. (Vol.V.-Doc.71-p.1.) The Company refused to bargain with the Union or provide the requested information. (Vol.V.-Doc.71-p.1.)

The Union filed an unfair labor practice charge and the Board's General Counsel issued a complaint alleging that the Company's refusal to bargain with the

Union and provide information violated Section 8(a)(5) and (1) of the Act.<sup>12</sup> (Vol.V.-Doc.71-p.1.) The Company admitted its refusals, but attacked the validity of the Union's certifications as the employees' bargaining representative. (Vol.V.-Doc.71-p.1.)

The General Counsel filed a motion for summary judgment. (Vol.V.-Doc.71-p.1.) The Board issued a notice to show cause, and the Company filed a response contending that the Union's certifications were invalid. (Vol.V.-Doc.71-p.1.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Members Liebman, Schaumber and Kirsanow) found that the Company violated Section 8(a)(5) and (1) of the Act<sup>13</sup> by refusing to bargain with the Union and refusing to provide the requested relevant information. (Vol.V.-Doc.71-p.3.) The Board found that "[a]ll representation issues raised by the [Company] were or could have been litigated in the prior representation proceeding," and that the Company did not offer to adduce "any newly discovered and previously unavailable evidence, nor [did] it allege any

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<sup>12</sup> 29 U.S.C. § 158(a)(5) and (1).

<sup>13</sup> 29 U.S.C. § 158(a)(5) and (1).

special circumstances” that would require the Board to modify its decision in the representation proceeding. (Vol.V.-Doc.71-p.1.)

The Board’s Order requires the Company to cease and desist from the unfair labor practice found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (Vol.V.-Doc.71-p.3.) Affirmatively, the Board’s Order requires the Company, upon request, to bargain with the Union and provide the requested information. (Vol.V.-Doc.71-p.3.) The Board’s Order also requires the Company to post a remedial notice. (Vol.V.-Doc.71-pp.3-4.)

### **SUMMARY OF ARGUMENT**

The Company failed to meet its burden of showing that the LPNs are statutory supervisors such that they cannot be represented by the Union. The Court grants considerable deference to the Board’s supervisory findings which, in this case, are amply supported by the record. Also, the Company failed to meet its heavy burden in seeking to overturn the Union’s victory in the CNA/service unit. The facts do not support the Company’s claims that the LPNs’ alleged supervisory status precluded them from serving as election observers in their own election and tainted the CNA/service unit election.

First, the record fails to support the Company’s argument that the LPNs assign and responsibly direct CNAs using independent judgment. The LPNs do

not assign the CNAs to places of work, times of employment, or overall duties as required under the Board's clarified supervisory standards. Further, the LPNs do not exercise independent judgment in assigning and directing CNAs because the LPNs' involvement is constrained by detailed policies and procedures, including ICPs that specify the tasks that CNAs perform in caring for their residents.

Because the CNAs care for the same residents day in and day out and know what to do in following the ICPs, the LPNs provide little, if any, oversight of the CNAs. Also, the Company did not demonstrate that the LPNs responsibly direct the CNAs because the LPNs are not accountable for the CNAs' work. The Company offered no evidence showing that the LPNs suffer adverse consequences for poor CNA work or, conversely, are rewarded for exceptional CNA work.

Second, the Board reasonably exercised its wide discretion in overruling the Company's claim that the use of LPNs as election observers in their own election tainted the results of the separate election in the CNA/service unit because, it wrongly asserts, the LPNs are supervisors. Even accepting the Company's supervisory claim, the facts do not support its claim that the CNA/service unit election was tainted by the LPNs. The LPNs served as observers only in their own separate election, the Company itself selected an LPN to be its observer, and the Company failed to timely raise the issue before the election. Indeed, the Company has not explained how employees in the CNA/service unit would be influenced by

seeing LPNs serving as observers in the LPNs' own election, and has cited no authority holding that supervisory observers in one election taint an election in another unit. In any event, Board law in effect at the time of the elections held that the use of supervisory observers by a union was not objectionable. Although the Board subsequently determined in a later case that the better practice is for neither side to use supervisors as observers, the Company does not present any arguments challenging the Board's reasonable determination not to apply the new rule here.

## ARGUMENT

### I. THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AFTER ITS ELECTION VICTORIES IN THE LPN AND CNA/SERVICE UNITS

The Act prohibits an employer from refusing to bargain collectively with the representative of its employees.<sup>14</sup> An employer's statutory duty to bargain also encompasses the duty "to provide information that is needed by the bargaining representative for the proper performance of its duties."<sup>15</sup>

Here, the Company admittedly (Br. 5) refused to bargain with the Union in order to contest the validity of its certification as the employees' bargaining representative. It also admits (Br. 5) that it refused to provide information relevant to bargaining that the Union requested. Because, as we now show, the Board acted reasonably in finding that the LPNs are not statutory supervisors and in overruling the Company's objection to the elections, the Company's refusals violated Section 8(a)(5) and (1) of the Act.<sup>16</sup>

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<sup>14</sup> 29 U.S.C. § 158(a)(5).

<sup>15</sup> *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36, 87 S.Ct. 565, 568 (1967).

<sup>16</sup> 29 U.S.C. § 158(a)(5) and (1); *Shore Club Condo. Ass'n v. NLRB*, 400 F.3d 1336, 1338 (11th Cir. 2005).

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7." Section 7 (29 U.S.C. § 157), in turn,

## II. THE COMPANY FAILED TO SHOW THAT THE LPNS ARE STATUTORY SUPERVISORS

### A. Applicable Supervisory Principles and Standard of Review

Section 2(3) of the Act<sup>17</sup> excludes from the definition of the term

“employee” “any individual employed as a supervisor.” Section 2(11) of the Act<sup>18</sup>

defines the term “supervisor” as follows:

[a]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Accordingly, individuals are statutory supervisors “if (1) they have the authority to engage in any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of

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grants employees “the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing ....” A violation of Section 8(a)(5) constitutes a derivative violation of Section 8(a)(1). *See generally Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4, 103 S.Ct. 1467, 1471 n.4 (1983).

<sup>17</sup> 29 U.S.C. § 152(3).

<sup>18</sup> 29 U.S.C. § 152(11).

the employer.”<sup>19</sup> In *Kentucky River*, the Supreme Court held that “the statutory term ‘independent judgment’ is ambiguous with respect to the *degree* of discretion required for supervisory status,” and that “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies.”<sup>20</sup> The burden of demonstrating employees’ Section 2(11) supervisory status rests with the party asserting it—here, the Company.<sup>21</sup>

In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel, who are vested with “‘genuine management prerogatives,’” and employees—such as “‘straw bosses, leadmen, and set-up men, and other minor supervisory employees’”—who enjoy the Act’s protections even though they perform “‘minor supervisory duties.’”<sup>22</sup> Accordingly, in implementing that congressional intent, “the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights,”

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<sup>19</sup> *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-13, 121 S.Ct. 1861, 1867 (2001) (citation omitted).

<sup>20</sup> *Id.* at 713, 121 S.Ct. at 1867 (emphasis in original). *See also VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (independent judgment is ambiguous term that “Board must be given ‘ample room to apply.’” (citation omitted)).

<sup>21</sup> *Kentucky River*, 532 U.S. at 711, 121 S.Ct. at 1866.

<sup>22</sup> *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81, 94 S.Ct. 1757, 1765 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

which Congress sought to protect.<sup>23</sup> Indeed, “[m]any nominally supervisory functions may be performed without the ‘exercis[e of] such a degree of ... judgment or discretion ... as would warrant a finding’ of supervisory status under the Act.”<sup>24</sup>

In *Oakwood Healthcare, Inc.*,<sup>25</sup> and its two companion cases, *Croft Metals, Inc.*,<sup>26</sup> and *Golden Crest Healthcare Center*,<sup>27</sup> the Board clarified its standards in examining supervisory status. First, the Board stated that “to exercise ‘independent judgment,’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.”<sup>28</sup> Further, “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions

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<sup>23</sup> *Beverly Enterprises-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999). *Accord NLRB v. Grancare, Inc.*, 170 F.3d 662, 666 (7th Cir. 1999).

<sup>24</sup> *Kentucky River*, 532 U.S. at 713, 121 S.Ct. at 1867 (citation omitted).

<sup>25</sup> 348 NLRB No. 37, WL 2842124 (2006).

<sup>26</sup> 348 NLRB No. 38, WL 2842125 (2006).

<sup>27</sup> 348 NLRB No. 39, WL 2842126 (2006).

<sup>28</sup> *Oakwood*, slip op. at 8.

of a collective-bargaining agreement.”<sup>29</sup> Rather, the judgment must involve “a degree of discretion that rises above the ‘routine or clerical.’”<sup>30</sup> Also, as discussed below (pp. 24-25, 33-34), the Board clarified its views on the authority to assign and responsibly direct.<sup>31</sup>

The Board’s supervisory determination is “conclusive if it is supported by substantial evidence on the record as a whole.”<sup>32</sup> Substantial evidence consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>33</sup> The interpretation of Section 2(11) “calls upon the Board’s ‘special function of applying the general provisions of the Act to the complexities of industrial life.’”<sup>34</sup> Generally, a reviewing court may not displace the Board’s

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at slip op. 4-7.

<sup>32</sup> *TRW-United Greenfield Div. v. NLRB*, 716 F.2d 1391, 1395 (11th Cir. 1983).

<sup>33</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 459 (1951).

<sup>34</sup> *TRW*, 716 F.2d at 1395 (citation omitted). *See also Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1269 (11th Cir. 1999) (“judges, who are generalists, should respect the specialized knowledge of the Board and accede to its factbound determinations as long as they are rooted in the record.” (citation omitted)); *NLRB v. Big Three Indus. Equip. Co.*, 579 F.2d 304, 309 (5th Cir. 1978) (granting deference to the Board’s determination of “the infinite gradations of authority within a particular industry”). Fifth Circuit decisions issued prior to October 1, 1981, are precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it de novo.”<sup>35</sup>

**B. The Company Failed To Meet Its Burden of Proving the LPNs’ Supervisory Status**

The Company primarily contends that the LPNs are statutory supervisors because they assign and responsibly direct employees using independent judgment. The Board reasonably found that the Company failed to prove that the LPNs possess the authority and discretion that confer supervisory status. Substantial evidence supports the Board’s finding that the LPNs’ role in assigning and directing employees is circumscribed by company policies and procedures or is routine and requires no independent judgment.

To meet its burden, an employer must support its claims with *specific examples* based on record evidence, which the Company failed to do.<sup>36</sup> Instead, it mistakenly relies on evidence that courts have recognized as insufficient to prove supervisory status, such as “[s]tatements by management purporting to confer

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<sup>35</sup> *Universal Camera*, 340 U.S. at 488, 71 S.Ct. at 465. *Accord Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428 (11th Cir. 1985).

<sup>36</sup> *Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“beyond the statements or directives themselves, what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority”).

authority,”<sup>37</sup> “conclusory testimony” of supervisory status,<sup>38</sup> and evidence “limited very largely to the administrator’s general assertions.”<sup>39</sup>

Similarly, the Company’s reliance (Br. 8-11) on the LPNs’ job descriptions is misplaced. It is well settled that job descriptions are not controlling on the issue of supervisory authority.<sup>40</sup> The job descriptions are only relevant to the extent that the evidence shows that the LPNs actually exercised the authority described. Further, the mere delegation of authority to an individual does not necessarily make that person a statutory supervisor. In other words, paper authority is insufficient.<sup>41</sup>

As we show in the following sections, the Company has failed to meet its evidentiary burden, relying on claims not supported by the record and on the

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<sup>37</sup> *Beverly Enterprises-Mass.*, 165 F.3d at 963.

<sup>38</sup> *Central Freight Lines, Inc. v. NLRB*, 653 F.2d 1023, 1025 (5th Cir. 1981).

<sup>39</sup> *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983).

<sup>40</sup> *See Edward Street Daycare Ctr., Inc. v. NLRB*, 189 F.3d 40, 47 (1st Cir. 1999) (no weight given to job descriptions without independent evidence of possession and exercise of authority); *NLRB v. Security Guard Serv., Inc.*, 384 F.2d 143, 149 (5th Cir. 1967) (“job descriptions do not vest powers”).

<sup>41</sup> *Beverly Enterprises-Mass., Inc. v. NLRB*, 165 F.3d 960, 962-63 (D.C. Cir. 1999) (“theoretical [or] paper power will not suffice to make an individual a supervisor” (internal quotations omitted)). *See also Chevron, U.S.A., Inc.*, 309 NLRB 59, 69 (1992) (no weight given “job descriptions that attribute supervisory authority where there is no independent evidence of its possession or exercise”).

generalized testimony of its administrator and a consultant who infrequently visited the facility. It also failed to provide the requisite specific, tangible examples of LPNs assigning, responsibly directing, and disciplining employees using independent judgment, and failed to show any real link between the LPNs' evaluation of the CNAs and the CNAs' employment conditions.

- 1. The Company failed to show that the LPNs assign employees using independent judgment**
  - a. The record amply supports the Board's finding that the LPNs do not "assign" using independent judgment under *Oakwood***

In *Oakwood*, the Board stated that "assign" under Section 2(11) means "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), of giving significant overall duties, i.e., tasks, to an employee."<sup>42</sup> Further, in the "health care setting, the term 'assign' encompasses the charge nurses' responsibility to assign nurses and aides to particular patients."<sup>43</sup> Assignment in the health care setting also refers to "the charge nurse's designation of significant overall duties to an

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<sup>42</sup> 348 NLRB No. 37, slip op. at 4.

<sup>43</sup> *Id.*

employee, not to the charge nurse's ad hoc instruction that the employee perform a discrete task."<sup>44</sup>

Here, substantial evidence supports the Board's finding that the LPNs do not assign CNAs to their places of work, times of employment, particular residents, or overall duties. (Vol.V-Doc.55-pp.9-10.) Instead, the facility's staffing coordinator determines the CNAs' overall assignments and scheduling following the Company's detailed policies and procedures regarding scheduling. In order to ensure continuity of care, the CNAs' assignments to particular residents usually are permanent and changes rarely occur.<sup>45</sup> The overall tasks the CNAs perform are set forth in their residents' ICPs. Any changes to the ICPs are based on doctor's

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<sup>44</sup> *Id.*

<sup>45</sup> The Company attempts (Br. 36-37) to downplay the significance of the permanence of the CNAs' assignments to their residents by noting that in *Oakwood*, the Board found that the nurses exercised independent judgment and were supervisors even though those patient-staff assignments were permanent. *Oakwood*, however, is distinguishable from this case because *Oakwood* involved an acute-care hospital not a nursing home. Here, the CNAs care for the same residents for an extensive period of time such that they know their daily needs far better than would the staff at an acute-care hospital. Thus, given the long-term nature of the CNA-resident relationship, the LPNs necessarily need to provide little oversight and do not exercise independent judgment in monitoring the CNAs' performance of routine tasks dictated by the ICPs. Because *Oakwood* involved shorter-term patients in an acute-care hospital, those charge nurses necessarily would have to provide more oversight and exercise independent judgment in monitoring the care of those patients.

orders. Thus, the LPNs do not “assign” as described in *Oakwood* because they do not assign CNAs to their places of work, hours, residents, or overall duties.

Further, the Board found (Vol.V-Doc.55-pp.10-11) that, even assuming LPNs assign CNAs to overall tasks, they do not exercise independent judgment in doing so. Because, as described, the ICPs determine the CNAs’ tasks in caring for their residents, the LPNs do not assign overall tasks to them or use independent judgment in that regard. The Board, in *Oakwood*,<sup>46</sup> stated that “a judgment is not independent if it is dictated or controlled by detailed instructions ....”<sup>47</sup> Thus, because the ICPs are so detailed, the LPNs do not exercise any discretion in assigning overall duties to the CNAs.

**b. The record does not support the Company’s arguments**

In its brief, the Company argues (Br. 32-37) that the LPNs assign CNAs using independent judgment under *Oakwood* because: the LPNs assign CNAs to particular residents, reassign CNAs, determine how to cover staffing shortages including assigning overtime, and assign discrete tasks to CNAs. As we now show, however, the Company has failed to meet its evidentiary burden of proving those claims.

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<sup>46</sup> 347 NLRB No. 37, slip op. at 8.

First, the record does not support the Company's argument (Br. 32, 35-36) that the LPNs have "unfettered authority" to determine which CNA will be assigned to a particular resident based on their assessment of the CNAs' skills. Instead, the facility's staffing coordinator determines the CNAs' overall assignments and scheduling. Indeed, the Company admits (Br. 38) that the LPNs "do not make the schedule" and "assign CNAs as needed when things do not go as planned on the schedule ...."<sup>48</sup> Accordingly, this case is distinguishable from *Oakwood* where certain charge nurses were found to be supervisors in part because they assigned nursing staff to patients at the beginning of each shift based on a "myriad of factors" and gave the staff significant overall tasks.<sup>49</sup> And, as the Board found (Vol.V-Doc.55-p.10), the Company failed to show, and the record does not reflect, that the CNAs possess any unique skills requiring the LPNs' use of independent judgment to assess those skills. On the contrary, all CNAs are trained to meet the needs of any resident. For example, although an LPN can send a CNA to help on the Medicare unit because she previously worked there (Br. 35), the record does not indicate that the CNAs' abilities and skills vary significantly.

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<sup>47</sup> See also *Kentucky River*, 532 U.S. at 713-14, 121 S.Ct. at 1867 (detailed orders may reduce judgment below the statutory threshold).

<sup>48</sup> The reassignment of CNAs is discussed below at pp. 28-29.

<sup>49</sup> 348 NLRB No. 37, slip op. at 10, 11.

Indeed, that scenario is akin to that described in *Oakwood*: assigning an available nurse fluent in American Sign Language to a patient dependent upon ASL did not involve the use of independent judgment.<sup>50</sup>

Next, the Company's claim (Br. 32-33) that the LPNs have unfettered authority to reassign the CNAs to different patients or units is equally unsound. The record shows that the normal practice is to give CNAs permanent assignments to their residents and any changes are infrequent. Moreover, as the Board found (Vol.V-Doc.55-p.8), when reassignments are required, the unit managers and shift manager typically handle the situation because the LPNs are too busy with resident care. In cases of short staffing, the reassigned CNA simply fills the slot of the missing CNA (Vol.I-Tr.307-08); thus, the LPN does not need to match the CNA's skills to the resident's needs, as claimed (Br. 35-36) by the Company. Further, as in *Golden Crest*, the record here does not establish that the LPNs can require CNAs to be reassigned or fill in or that any adverse consequences will result for the CNA if she does not accept the change in her assignment.<sup>51</sup> For permanent reassignments, the staffing coordinator or unit manager makes the final decision. Moreover, the LPNs do not exercise independent judgment on those occasions because, as described above, the Company failed to show that the CNAs' skills

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<sup>50</sup> *Id.* at slip op. 8-9.

vary such that the LPNs need to assess them. Instead, the record shows that any CNA has the ability to care for any resident.

The record also does not support the Company's next claim (Br. 17, 39) that the LPNs assign overtime to the CNAs. The record shows only that the LPNs can *ask* CNAs to work overtime, not that they have the authority to *require* overtime work. As the Company concedes (Br. 30), to establish supervisory authority, the putative supervisor must have the ability to require, not simply request, that a certain action be taken.<sup>52</sup> Further, if CNA overtime is necessary, LPNs have to ask the staffing coordinator for permission to make the request. On the occasions in which a CNA refused to work overtime, the staffing coordinator, not the LPN, resolved the situation. (Vol.I-Tr.307-08,322-24.)

The Company's argument (Br. 32, 39) that the LPNs assign discrete tasks to CNAs is not relevant under *Oakwood*. Assignment, as defined by the Board in *Oakwood*, requires the assignment of significant overall duties, not *ad hoc* instructions to perform discrete tasks.<sup>53</sup> Contrary to the Company's claim (Br. 38, 39), the LPNs' instruction to a CNA in response to a change in situation does not

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<sup>51</sup> *Golden Crest*, 348 NLRB No. 39, slip op. at 4.

<sup>52</sup> *Id.* at slip op. 3 (RN charge nurses not supervisors; did not have authority to require CNAs to stay past their shift).

<sup>53</sup> *Oakwood*, slip op. at 4.

render the LPN a supervisor. The Board in *Oakwood* stated that, for example, “the charge nurse’s ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment.”<sup>54</sup> As shown, the ICPs dictate the CNAs’ overall tasks for each resident’s care.

Overall, the Company simply failed to provide specific examples of the LPNs’ using independent judgment to assign CNAs to overall duties, shifts or overtime, or particular units or residents. Although the Company assails (Br. 33) the Board for relying on the testimony of the LPNs instead of its witnesses, it ignores the generalized nature of Administrator Hanson’s testimony compared to the accounts of the LPNs who actually perform the job in dispute. Hanson eschewed specific examples of LPNs’ exercising supervisory authority in lieu of offering hypothetical situations of what “could” happen “in most cases,” “typically,” “for the most part,” or “on occasion,” and of what action the LPNs “might” take. (Vol.I-Tr.145-46,154,173-76.) For example, in attempting to paint the LPNs as assessing individual skills or traits of CNAs to determine reassignments, Hanson testified that “[p]erhaps the CNA had a personality conflict with other CNAs on the unit. *Perhaps* the Charge Nurse identified skills in a particular CNA and felt like they would be better utilized on a higher acuity level

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<sup>54</sup> *Id.*

or in the Alzheimer's unit. It *could be* any number of reasons.” (Vol.I-Tr.174-75, emphasis added.) In another example, Hanson opined (Vol.I-Tr.154-55,232-35) that LPNs exercise independent judgment in determining which CNA is best to accompany a resident to a medical appointment. Yet, the LPNs testified in detail that the facility's social services department actually makes the arrangements for a CNA to accompany the resident and that usually one of the CNAs on the unit volunteers to go because the resident's family pays them. The LPNs do not order CNAs to go to the appointments. (Vol.I-Tr.308-10,328.)

The Company also relies heavily on the testimony of an outside consultant, Connie Cheren, who visits the facility about once a *month* to review the facility's documentation to ensure compliance with regulations. (Vol.I-Tr.18,59-61.) Thus, even assuming that the Regional Director weighted more heavily the testimony of the LPNs who actually do the job in question on a daily basis than that of the administrator and a consultant, it was perfectly reasonable to do so here and courts agree with that approach.<sup>55</sup>

Finally, the Company's citations (Br. 39-40) to several cases finding disputed individuals to be supervisors are not persuasive. First, several of its citations (Br. 38, 40) are to dissenting opinions of former Board members and,

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<sup>55</sup> See cases cited above at pp. 22-23.

therefore do not reflect Board law.<sup>56</sup> Two other cases, dealing with reassignments due to staff shortages, are distinguishable.<sup>57</sup> In *Quinnipiac College*, the Second Circuit found that, in addition to effectively recommending discipline and responsibly directing employees, the shift supervisors had ultimate responsibility for the assignment of all employees, including overriding the dispatcher's assignments, and redistributed work based on employees' experience.<sup>58</sup> In *American Commercial Barge*, the Board found that pilots determined how many staff should be posted, changed the priority of the crew's work, gave directions to the deckhands who were required to follow those orders, and called in extra help even if it resulted in overtime.<sup>59</sup> Further, the pilots were held responsible for any errors.<sup>60</sup> In contrast, the record here shows that the staffing coordinator is responsible for the overall assignment and scheduling of CNAs. As described (pp. 27-29), the LPNs' minimal role in temporary or permanent reassignments of CNAs

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<sup>56</sup> *Loyalhanna Health Care Assocs.*, 332 NLRB 933, 937 (2000) (Member Hurtgen dissent); *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1337 (2000) (Member Hurtgen dissent); *Providence Hospital*, 320 NLRB 717, 736-38 (1996) (Member Cohen dissent).

<sup>57</sup> *NLRB v. Quinnipiac College*, 256 F.3d 68, 75 (2d Cir. 2001); *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002).

<sup>58</sup> 256 F.3d at 75.

<sup>59</sup> 337 NLRB at 1071.

falls far short of demonstrating supervisory status. Similarly, the LPNs cannot require CNAs to work overtime and obtain permission from the staffing coordinator or unit manager before even making the request.

**2. The Company failed to show that the LPNs responsibly direct employees using independent judgment**

**a. The record amply supports the Board’s finding that the LPNs do not “responsibly direct” using independent judgment under *Oakwood***

The term “responsibly to direct” was included in Section 2(11) to encompass individuals who exercise “basic supervision but lack the authority or opportunity to carry out any of the other statutory functions,” but it was not meant to include “minor supervisory functions performed by lead employees, straw bosses, and set-up men.”<sup>61</sup> In *Oakwood*, the Board stated that responsible direction exists when a “person on the shop floor has ‘men under him,’ and ... that person decides ‘what job shall be undertaken next or who shall do it.’”<sup>62</sup> For direction to be “responsible,” the putative supervisor “must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed

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<sup>60</sup> *Id.*

<sup>61</sup> *Oakwood*, slip op. at 5-6.

<sup>62</sup> *Id.* at slip op. 6 (citation omitted).

properly.”<sup>63</sup> The Board explained that, in following several courts of appeal, the accountability requirement distinguishes between those individuals aligned with management and those who simply direct employees in completing a certain task.<sup>64</sup>

The Board’s conclusion that the Company failed to show that the LPNs responsibly direct the CNAs using independent judgment is well supported by the record. As we show below, contrary to the Company’s claim (Br. 40), the CNAs require little, if any, direction from the LPNs because the CNAs work with the same residents day in and day out and therefore know them and their needs. Next, the LPNs are not held accountable for the CNAs’ work. Finally, the LPNs do not exercise independent judgment in directing CNAs.

The Board found (Vol.V-Doc.55-p.15) that the CNAs—all of whom are trained in restorative care—know what their residents need, given that they typically care for the same residents daily, and know how to do their jobs. The CNAs follow the ICPs’ detailed direction in caring for each resident. Thus, the LPNs do not observe and direct the CNAs while they work. One LPN stated (Vol.I-Tr.316) that, because the CNAs’ assignments to residents are permanent,

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<sup>63</sup> *Id.* at slip op. 7.

<sup>64</sup> *Id.*

they know what to do and she does not need to monitor the CNAs.<sup>65</sup> In fact, the amount of work the LPNs perform in directly caring for the residents necessarily limits their monitoring of the CNAs' work.<sup>66</sup> For example, in an 8-hour workday, the LPNs spend about 3 hours dispensing medication to residents, at least another hour-and-a-half on charting, another hour on skin treatment, with additional time spent going on rounds and communicating with physicians.<sup>67</sup> (Vol.I-Tr.312-16.)

Next, the Company failed to show that the LPNs are accountable for the performance of the CNAs. Thus, any direction that they provide is not "responsible" under *Oakwood*. There is no evidence that LPNs' terms and conditions of employment are affected by their failure to supervise CNAs

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<sup>65</sup> Accordingly, the Company errs in relying (Br. 46-47) on *NLRB v. Attleboro Assoc., Ltd.*, 176 F.3d 154, 168-69 (3d Cir. 1999), to show that charge nurses, due to their superior rank and license, necessarily assign and direct CNAs. Here, the record shows that the LPNs actually provide little, if any, oversight of the CNAs. Further, in *Attleboro*, the Third Circuit reversed the Board in part because it disagreed with the Board's distinction between professional judgment and independent judgment in the supervisory sense. Since the Supreme Court's decision in *Kentucky River* (see pp.18-19), the Board no longer applies that distinction, and it is therefore not relevant in this case.

<sup>66</sup> *Beverly Health & Rehab. Servs., Inc.*, 335 NLRB 635, 669 (2001), *enforced in relevant part*, 317 F.3d 316, 323-24 (D.C. Cir. 2003) (LPNs at nursing home who "spend the bulk of their workday performing hands-on resident care" were not supervisors).

<sup>67</sup> *Id.* at 666 (similar workday for LPNs at nursing home).

effectively. Similarly, there is no evidence that the LPNs are rewarded for effective direction of CNAs.

Although the Company claims (Br. 45) that the “LPNs are evaluated, in part, on their ability to supervise the CNAs . . . .,” the record reflects only one LPN evaluation (Vol.II-ERX7) with simply a handwritten comment that she “supervises nursing assistants effectively.” No section of the evaluation is dedicated to assessing the quality of the LPNs’ “supervision” of the CNAs. Thus, the Company relies only on one *ad hoc* comment in one LPN’s evaluation to support its claim that it evaluates the LPNs on the quality of their “supervision” of the CNAs. Moreover, it utterly failed to show any tangible link between those evaluations and the LPNs’ terms and conditions of employment. Indeed, the Company asserts (Br. 45-46) only that the evaluations are “considered” in determining the LPNs’ raises and promotions and that the LPNs’ failure to enforce company policies “can be” the basis for adverse action. There must be a “more-than-merely paper showing” that there is a prospect of consequences for the purported supervisor.<sup>68</sup> Thus, the Company has not shown that it actually holds the LPNs accountable for the CNAs’ work.

Further, the Board found (Vol.V-Doc.55-p.14) that the LPNs do not exercise

independent judgment in any direction of the CNAs. While the LPNs can correct CNAs when they do not provide adequate care and can tell CNAs to perform routine tasks when necessary, that direction is in accordance with the ICPs and company policies. Changes to the ICPs are made pursuant to physicians' orders, which the LPNs communicate to the CNAs. Where direction is so constrained by extant policies and procedures, the requisite level of independent judgment is absent.<sup>69</sup>

**b. The record does not support the Company's arguments**

The Company's arguments before the Court do not detract from the force of the Board's decision. As we show below, the record does not support the

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<sup>68</sup> *Golden Crest*, 349 NLRB No. 39, slip op. at 5 (no evidence of any action taken due to evaluation of nurses' direction of CNAs).

<sup>69</sup> See *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 649 (D.C. Cir. 1999) (field nurses did not exercise independent judgment in directing home health aides where constrained by established care plans); *Beverly Ents. v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998) (nurses' authority to adjust aides' duties and priorities in response to changes in patient condition and in staff availability "does not require the use of independent judgment but is instead narrowly circumscribed by an elaborate system of procedures, policies, and protocol regarding patient care"); *NLRB v. Meenan Oil Co.*, 139 F.3d 311, 321-22 (2d Cir. 1998) (dispatchers did not exercise independent judgment where direction of employees was pursuant to the employer's procedures).

Company's claim that the LPNs responsibly direct the CNAs because the LPNs assertedly are "shift responsible" and licenses held by the LPNs and the facility itself could be jeopardized by deficient CNA performance. The Company also does not further its cause by relying on secondary indicia of supervisory authority—namely, the absence of some upper management during evenings and nights and the ratio of supervisors to employees. Further, the Company has failed to demonstrate the LPNs' use of independent judgment where the CNAs' tasks are routine and dictated by the ICPs. Finally, the LPNs' limited role in following established policies and procedures in responding to emergencies likewise fails to demonstrate the use of independent judgment.

First, the Company's argument (Br. 41) that the LPNs are "shift responsible" is unavailing because that does not demonstrate that the LPNs are accountable for the CNAs' performance. As shown, the record is devoid of any evidence demonstrating that the LPNs suffer adverse consequences for deficient CNA performance or, conversely, are rewarded for exceptional work by the CNAs. While the Company is correct (Br. 47) that the prospect of adverse consequences shows accountability, the only support for that prospect here is the Company's say-so.

Equally ineffective in demonstrating accountability are the Company's claims (Br. 45) that the LPNs' licenses "could be at risk" and that the facility could

lose funding or be cited if the LPNs fail to properly supervise the CNAs. Those claims are highly speculative—the Company has offered no evidence of such consequences occurring or even the threat of such repercussions. Moreover, the consequences for the *Company* for failing to meet the standard of care are not probative of the *LPNs*' individual accountability or supervisory status.

Presumably, the Company is equally responsible for any substandard care performed by the CNAs, who are, by all accounts, nonsupervisory.

Next, the Company's reliance (Br. 32-33, 41-42) on the absence of unit managers and the DON during evenings and nights is not relevant under the Board's clarified standards. The Board made clear, in *Golden Crest*, that the status of being the highest-ranking employee on-site is merely a secondary indicium of supervisory authority and, in the absence of any primary indicia (*i.e.*, that specifically mentioned in Section 2(11)), is insufficient to show supervisory status.<sup>70</sup> Moreover, although the unit managers are not always on-site, they remain responsible for conduct on their units 24 hours per day, as the Company admits (Br. 7). The fact that the unit managers are not physically present in the evening

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<sup>70</sup> *Golden Crest*, slip op. at 4 n.10. Unlike *Beverly Ents.-Va., Inc. v. NLRB*, 165 F.3d 290, 297 (4th Cir. 1999), cited (Br. 41, 44) by the Company, the LPNs here are not “responsible for everything that happens on the unit.” Instead, the unit managers are responsible for the conduct of the unit at all times. Further, in

and at night does not render the LPNs supervisors in their absence. In those circumstances, the Seventh Circuit has found that LPNs were not supervisors.<sup>71</sup> The D.C. Circuit agrees, finding that an employer's argument that the disputed nurses were the only on-site supervisors lacked any "basis in the statutory definition of supervisors."<sup>72</sup> Finally, the Company overlooks the fact that in the evening (3:00 to 11:00 p.m.) and at night (11:00 p.m. to 7:00 a.m.), there are undisputed supervisors at the facility. The shift supervisors, who are LPNs or RNs, are responsible for the shift, can discipline employees, can call in extra staff or reallocate staff among the units, and direct employees in an emergency or crisis. (Vol.I-Tr.198-213,230-32,288-92.)

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*Beverly-Va.*, the Court relied on the fact that, unlike here, those LPNs had no guidelines in undertaking that responsibility. *Id.* at 298.

<sup>71</sup> *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) ("[a]lthough on the evening (3 p.m. to 11 p.m.) and night (11 p.m. to 7 a.m.) shifts the licensed practical nurses are the highest-ranking employees on the premises, this does not ipso facto make them supervisors. A night watchman is not a supervisor just because he is the only person on the premises at night, and if there were several watchmen it would not follow that at least one was a supervisor"). *See also Children's Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 133 (7th Cir. 1989) (nurses in charge of night shift were not supervisors where actual supervisors were "only a telephone call away;" rejected argument that if charge nurses were not supervisors there would be no supervision).

<sup>72</sup> *VIP Health Servs.*, 164 F.3d at 649-50 ("[t]here is no necessary nexus between the [Act's] definition of a supervisor and personnel management principles or perceptions.").

The Company's argument (Br. 42) that six unit managers cannot supervise all the LPNs and CNAs also misses the mark. The ratio of supervisors to employees is, at best, only a secondary indicium of supervisory authority.<sup>73</sup> Moreover, accepting the Company's view does not yield a more reasonable result. If the LPNs are supervisors, then a large proportion of the staff is supervisory, which is no less imbalanced.<sup>74</sup> Also, as described above (pp. 19-20), the Act contemplates that employers can vest individuals with minor supervisory roles, such as leadmen, but that they remain employees within the meaning of the Act. Thus, even assuming that the LPNs provide some oversight of the CNAs, the record still does not show that they either are held accountable for the CNAs' work or exercise independent judgment.

Contrary to the Company's arguments (Br. 42), the existence of detailed policies and procedures does limit the LPNs' exercise of independent judgment.<sup>75</sup>

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<sup>73</sup> See, e.g., *NLRB v. Prime Energy Ltd. Partnership*, 224 F.3d 206, 209 (3d Cir. 2000) ("We do not consider the ratio of supervisors to employees when determining the supervisory status of a position").

<sup>74</sup> There are approximately 60 charge nurses that work with 3 to 4 CNAs each. (Vol.I-Tr.101,124.) See *Res-Care*, 705 F.2d at 1468 (if LPNs were supervisory, "almost one-third of nursing home's staff would be barred from the protections of the Act, and the Board could reasonably believe that the balance of power would shift too far toward the employer").

<sup>75</sup> *Hospital General Menonita v. NLRB*, 393 F.3d 263, 268 (1st Cir. 2004) (RNs' direction of LPNs was "constrained by physicians' orders and detailed protocols

While the care of the facility’s residents is not equivalent to “flipping burgers” (Br. 43), the record does establish that the tasks involved in providing that care—such as adjusting residents’ bed positions, assisting with toileting and dressing, and helping with exercises—are indeed routine. Again, the ICPs—written by an interdisciplinary committee—determine what the CNAs do for each resident. Physicians make changes to the ICPs and the LPNs merely communicate those changes to the CNAs.<sup>76</sup> The Board’s recognition that those tasks are routine does nothing to diminish the importance of the care the LPNs and CNAs provide for the residents, contrary to the Company’s suggestion (Br. 42-43). Indeed, the Board often has observed that the care of nursing home residents involves routine tasks.<sup>77</sup>

The LPNs’ role in responding to emergency situations (Br. 43-44)—such as fire alarms, bomb threats, and hurricanes—likewise does not demonstrate that they

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which set forth in detail the diagnostic and treatment standards, in effect, negating the need for any meaningful supervisory discretionary supervision by the RNs”).

<sup>76</sup> *Beverly Health & Rehab. Servs., Inc.*, 335 NLRB 635, 669 (2001), *enforced in relevant part*, 317 F.3d 316, 323-24 (D.C. Cir. 2003) (LPNs at nursing home merely reviewed pre-determined care requirements with aides).

<sup>77</sup> *See id.* (day in and day out, LPNs performed duties in the same manner for same people); *Evangeline of Natchitoches, Inc.*, 323 NLRB 223, 223-24 (1997) (LPNs in nursing home did not responsibly direct with independent judgment where tasks were routine and familiar).

responsibly direct the CNAs using independent judgment.<sup>78</sup> The staff has to follow the Company's specific emergency and safety procedures. In *Oakwood*, the Board stated that a charge nurse may exercise independent judgment if she has the discretion to make material deviations from the employer's emergency policy.<sup>79</sup> The Company made no such showing here. The record shows only that LPNs assess the residents' medical conditions and ensure that they are placed in the proper location per the emergency procedures. (Vol.I-Tr.147-49.) The record also shows that in the evenings or at night when the DON and unit managers are not at the facility, the shift supervisors can direct the staff in responding to emergencies or crises. (Vol.I-Tr.199.) Moreover, emergency situations do not occur frequently so the LPNs' direction, if any, at those times is sporadic and insufficient to make them statutory supervisors.<sup>80</sup>

**3. With its remaining arguments, the Company failed to show that the LPNs exercise supervisory authority using independent judgment**

The Company's brief focuses on assignment and responsible direction, but raises additional arguments in a limited fashion. As we now show, in relying (Br.

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<sup>78</sup> See e.g., *Springfield Jewish Nursing Home*, 292 NLRB 1266, 1267, 1272 n.6 (1989) (nurse did not become a supervisor because of responsibilities during a fire).

<sup>79</sup> *Oakwood*, slip op. at 9.

15-17, 34, 37, 41) on the LPNs' role in the discipline and evaluation of CNAs, the Company has still failed to meet its burden of demonstrating the LPNs' supervisory status under Section 2(11) of the Act.

**a. The Company failed to show that the LPNs discipline employees using independent judgment**

The Board found (Vol.V-Doc.10-pp.7-8) that the LPNs do not independently impose or effectively recommend discipline for the CNAs. As we now show, the record fails to support the Company's claims that the LPNs independently discipline and terminate CNAs and exercise supervisory authority by ordering CNAs to clock out and go home.

The record does not support the Company's claim (Br. 15) that the LPNs can discipline CNAs "on the spot" without the approval of higher management. At best, the LPNs complete warning reports (Vol.II-ERX5) that do not recommend the type or severity of discipline to be imposed for the violation. Moreover, the DON and administrator review and sign off on the reports before they are placed into the employee's personnel file. The DON initiates any action beyond a warning. For example, the record (Vol.V-Doc.10-p.7, n.14; Vol.I-Tr.251-56, Vol.II-ERX5) related to the termination of CNA Muriel Thermidor demonstrates that DON Staub reviewed the January 29 warning, attempted to give

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<sup>80</sup> *Id.* (sporadic supervision insufficient under Section 2(11)).

the warning to Thermidor who refused it, and then was the only official to sign the January 30 notice of termination. Accordingly, the record demonstrates that upper management approves the warning reports and issues any discipline stemming from those reports.

Moreover, the warnings themselves—even if issued independently by the LPNs—do not constitute the type of discipline that renders them statutory supervisors. The D.C. Circuit recently recognized that “[a] long line of Board precedent, dealing specifically with nursing homes, establishes that written reprimands do not, in and of themselves, constitute discipline or serve as evidence of supervisory authority.”<sup>81</sup> That Court continued: “[u]nder Board precedent, such authority [to complete warning reports kept in personnel files] is not supervisory unless it results in ‘personnel action ... taken without independent investigation or review by others.’”<sup>82</sup> Here, the written warnings in the record (Vol.II-ERX5) did not independently result in any personnel action and were reviewed by upper management before being placed into personnel files.

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<sup>81</sup> *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007).

<sup>82</sup> *Id.* (citation omitted). *See also NLRB v. St. Clair Die Casting*, 423 F.3d 843, 849 (8th Cir. 2005) (“[t]he Board has stated that for the issuance of reprimands or warnings to constitute statutory supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors” (internal quotations omitted)).

In addition to erroneously relying on the LPNs' limited role in completing warning reports, the Company cites (Br. 16) a single incident of an LPN purportedly terminating a CNA on her own. The record once again fails to support that claim. The testimony of the Company's consultant, who visits the facility about once a month, regarding that incident lacked any relevant details—the names of the LPN and CNA involved, the infraction, and, most importantly, the circumstances of how the termination came about. Further, the consultant conceded that her knowledge of the incident was based only on reviewing paperwork and that she did not know if anyone reviewed the decision prior to the CNA's being terminated. (Vol.I-Tr.93-94.) The remaining record documents do not reflect that an LPN either initiated or recommended the suspension or discharge of a CNA. Indeed, the LPN witnesses testified that they have never taken such action. (Vol.I-Tr.296-301,328-33.)

Next, the Company's claim (Br. 15) that LPNs can require a CNA to "clock out" and go home likewise does not demonstrate the LPNs' supervisory status. LPNs can ask CNAs to stop working if they abuse a resident or endanger staff or residents. (Vol.V-Doc.10-p.8; Vol.I-Tr.333.) Sending employees home for obvious violations of work rules does not demonstrate independent judgment in

disciplining employees.<sup>83</sup> Telling an abusive or dangerous CNA to stop working or to go home is self-evident and hardly requires the LPNs to exercise independent judgment.

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<sup>83</sup> *Jochims*, 480 F.3d at 1171-72; *Vencor Hosp.-L.A.*, 328 NLRB 1136, 1139 (1999) (“Although there was testimony that the RN team leaders have the authority to send an employee home, such authority is limited to situations involving egregious misconduct, i.e., behavior which endangers the health or safety of the patients. Such authority when limited to flagrant employee conduct is typically found by the Board not to constitute statutory supervisor authority.”).

**b. The LPNs' role in evaluating employees does not demonstrate their supervisory status**

Next, the Company's reliance (Br. 37) on the LPNs' evaluation of the CNAs is equally misplaced. First, Section 2(11) does not include evaluation as a supervisory authority. Second, to be relevant to Section 2(11), the evaluations must be directly correlated to the CNAs' employment conditions. It is well settled that "[f]illing out forms related to performance issues, without more, does not qualify employees for supervisory status."<sup>84</sup> Also, "[e]valuations that do not affect [the] job status of the evaluated person are inadequate to establish supervisory status."<sup>85</sup> What is required is specific evidence of "a 'direct correlation' between the evaluations" and the resulting change in employment terms, such as wage increases or bonuses.<sup>86</sup> Here, the Company failed to show any direct correlation between the LPNs' evaluation of CNAs and the CNAs' employment terms.

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<sup>84</sup> *Hospital General Menonita v. NLRB*, 393 F.3d 263, 267-68 (1st Cir. 2004). *See also Beverly Health & Rehab. Servs., Inc.*, 335 NLRB 635, 668 (2001) ("[l]ongstanding Board precedent holds that when, as here, charge nurses perform evaluations that do not, by themselves, affect other employees' job status, the charge nurses are not supervisors"), *enforced in relevant part*, 317 F.3d 316, 323-24 (D.C. Cir. 2003).

<sup>85</sup> *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 413 (2d Cir. 1998).

<sup>86</sup> *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 145 (1st Cir. 1999). *See also Edward Street Daycare Ctr., Inc. v. NLRB*, 189 F.3d 40, 51-52 (1st Cir. 1999) (specific evidence needed that evaluations had a real impact on wages, promotions, or other terms of employment).

The LPNs complete performance evaluation forms for the CNAs, after 90 days for new employees and then annually. The forms (Vol.V-Doc.10-p.9; Vol.II-ERX6) include ratings in 10 categories. At the end of the form, there are boxes to check to indicate whether a pay increase is recommended or not. The LPNs recommend raises for all CNAs and do not determine the amount of the raises. The CNAs, LPNs, and department head sign the evaluations. (Vol.V-Doc.10-p.9; Vol.I-Tr.302-04.) A separate document—the Personnel Change Form—effects pay increases and determines the amount of the increase. Upper management, not LPNs, complete the personnel change forms. (Vol.V-Doc.10-p.9; Vol.I-Tr.304, Vol.II-ERX6.)

On those facts, the Board reasonably concluded (Vol.V-Doc.10-p.9) that the LPNs' involvement in the evaluation process does not render them statutory supervisors. The LPNs' "recommendation" of wage increases in the evaluations are not independently effective because upper management signs off on the evaluations, issues the personnel change forms to effect the increases, and determines the amount of the raises. The LPNs' checking of the boxes on the evaluation form does not independently grant raises or effectively recommend them. Accordingly, the requisite direct correlation between the evaluations and wages increases is missing.

**III. THE BOARD ACTED WITHIN ITS WIDE DISCRETION IN OVERRULING THE COMPANY’S ELECTION OBJECTION THAT THE USE OF LPNS AS OBSERVERS IN THEIR OWN ELECTION TAINTED THE ELECTION IN THE CNA/SERVICE UNIT**

**A. Principles Applicable to Election Objections and Standard of Review**

The Company, as the party filing the election objections, bears a heavy burden because, in order to overturn the Board’s decision to uphold the election results, it must overcome the presumption that the ballots cast in Board elections “reflect the true desires of the participating employees.”<sup>87</sup> It “must prove by specific evidence that the election results did not reflect the unimpeded choice of the employees.”<sup>88</sup>

The establishment and application of the standards by which allegations of election misconduct are to be judged “require a quality and degree of expertise uniquely within the domain of the Board.”<sup>89</sup> Accordingly, the Board has a “wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees.”<sup>90</sup> The

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<sup>87</sup> *NLRB v. IDAB, Inc.*, 770 F.2d 991, 998 (11th Cir. 1985).

<sup>88</sup> *Certainfeed Corp. v. NLRB*, 714 F.2d 1042, 1060 (11th Cir. 1983).

<sup>89</sup> *Id.* at 1047.

<sup>90</sup> *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 328 (1946). *Accord Certainfeed*, 714 F.2d at 1052.

Court may not “encroach upon this exclusive power of the Board ....”<sup>91</sup>

Consequently, Board determinations as to whether “employee elections have been fairly conducted ... warrant special respect on review.”<sup>92</sup>

**B. The Use of LPNs as Observers at Their Own Election Did Not Taint the Election in the CNA/Service Unit**

The Company argues (Br. 47-49) that the use of LPNs as election observers tainted the results of the election in the CNA/service unit because, it contends, the LPNs are supervisors or, alternately, individuals closely identified with management.<sup>93</sup> First, as shown, the record amply supports the Board’s finding that the LPNs are not statutory supervisors. In any event, regardless of the LPNs’ status, the Board reasonably exercised its wide discretion in overruling the Company’s objection because the facts do not support the Company’s argument that the CNA/service unit election was tainted. Specifically, separate elections

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<sup>91</sup> *NLRB v. Dynatron/Bondo Corp.*, 992 F.2d 313, 315 (11th Cir. 1993) (per curiam). See also *NLRB v. Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2d Cir. 1970) (“the conduct of representation elections is the very archetype of purely administrative function with no quasi about it, concerning which courts should not interfere save for the most glaring discrimination or abuse.”).

<sup>92</sup> *Dynatron/Bondo*, 992 F.2d at 315 (upholding Board decision allowing discharged employee to serve as election observer) (internal quotes omitted).

<sup>93</sup> “[O]bservers represent their principals, carrying out the important functions of challenging [the eligibility of] voters and generally monitoring the election process. They also assist the Board agent in the conduct of the election.” NLRB

were held in the LPN and CNA/service units. Thus, the LPNs served as election observers only in their own election, not in the CNA/service unit election. Indeed, the Company itself selected an LPN to be its observer in that election. Further, the Company waived any such objection by failing to raise it at the pre-election conference as Board law requires. Also, Board law in effect at the time of the elections supports the Board's conclusion that the LPNs' service as election observers was not objectionable.

First, the Company admits (Br. 2) that separate elections were held in the two units. Yet, it has not explained how employees in the CNA/service unit would be influenced by seeing LPNs serving as observers in the LPNs' own election. Similarly, it has cited no authority holding that supervisory observers in one election taint an election in another unit. Regardless of the LPNs' service as observers in their own election, they inevitably would have been present in the polling area as voters. The Company has not claimed that the holding of simultaneous elections was improper or shown that it objected to those arrangements. Further, the Company has not identified who it believes would have been appropriate observers for the LPN unit.

Next, the Company waived any objection to the use of LPNs as election observers by failing to raise it before the election. An employer that objects to the union's use of an alleged supervisor as an election observer must do so at the time of the pre-election conference; otherwise, that claim is waived.<sup>94</sup> Here, the Company does not assert, and the record does not show, that it raised the issue at the pre-election conference. Indeed, the Company used an LPN as its own observer, obviating any such objection.

The Company's claim (Br. 48) that it raised this issue prior to the election is incorrect. It raised the issue of the LPNs' supervisory status, which was addressed in the March 1997 hearing. It did not, however, object to the use of LPNs as observers at the pre-election conference. Simply disputing the supervisory status of the LPNs did not preserve the claim that their service as *observers* in the LPN-unit election would taint the results of the CNA/service-unit election. To preserve that claim, the Company had to raise its objection at the pre-election conference.

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<sup>94</sup> *Liquid Transporters, Inc.*, 336 NLRB 420, 420 (2001); *Monarch Bldg. Supply*, 276 NLRB 116, 116 (1985). The Board agent conducting the election holds a pre-election conference, attended by the parties and their observers, at the polling place about 30 to 45 minutes before the polls open. At that time, the parties may examine the polling area, the Board agent instructs the observers, and the parties discuss any issues relating to the election arrangements. See NLRB Casehandling Manual, Representation Proceedings, §11318 (2007), available at [www.nlr.gov/publications/manuals](http://www.nlr.gov/publications/manuals).

In addition to those compelling facts, Board law in effect at the time of the elections supports the Board's conclusion. The Board recognized (Vol.V-Doc.55-p.17) that, at the time of the elections in this case, Board law held that an employer's use of a supervisor as an observer was objectionable conduct because a supervisor's presence may unduly influence employees to vote against the union.<sup>95</sup> Conversely, a union's use of a supervisor as an observer was not likely to influence employees to vote for the union.<sup>96</sup>

Three years after the elections here, the Board altered that precedent in *Family Service Agency* and found that the use of a supervisor by either the employer or union was objectionable.<sup>97</sup> In doing so, however, the Board noted that it had "no quarrel with the rationale underlying the Board's distinction between a union's use of a supervisor as an observer and an employer's, [but] we have decided that a rule barring supervisors from serving as observers for *any* party to an election represents the better practice."<sup>98</sup>

The Board here found (Vol.V-Doc.55-p.17) that "the facts militate against" applying *Family Service Agency* to this case. The Board's conclusion was

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<sup>95</sup> *Plant City Welding & Tank Co.*, 119 NLRB 131, 132 (1957).

<sup>96</sup> *Family Service Agency*, 331 NLRB 850, 850 (2000).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (emphasis in original).

reasonable where the change in precedent came years after these elections and reflected its view of the “better practice,” rather than a finding that the prior law was erroneous. Also, the Board further observed (Vol.V-Doc.55-p.17) that both parties elected to use LPNs as observers, and that they served as such only in the LPN election, not the CNA/service election. While relying (Br. 48) on *Family Service Agency* to support its claim that a union cannot use supervisors as its election observers, the Company has not argued that the Board erred in declining to apply that decision to this case. Nor has the Company set forth any basis for the Court to overturn the Board’s determination not to apply *Family Service Agency* to this case. Accordingly, by not making that argument in its opening brief, the Company has waived it.<sup>99</sup>

Lastly, the Board reasonably rejected the Company’s alternative claim (Br. 49) that, even if not supervisors, the LPNs are closely aligned with management. The Board found (Vol.V-Doc.55-p.18) that the record fails to “establish any facts arguably showing a close alignment between the LPN observers and [the Company] aside from the LPNs’ regular LPN duties.”<sup>100</sup> As the Company admits

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<sup>99</sup> See cases cited above, pp. 8-9 n.11.

<sup>100</sup> The Company never asserted this argument in its post-election objections (Vol.V-Doc.21). At that time, it claimed only that the LPNs, as *supervisors*, should not have been election observers. Further, at the hearing on its election objections, it did not raise the argument that, independent of the supervisory issue,

(Br. 49), the LPNs and CNA/service-unit employees work “side by side,” thereby making them more akin to coworkers rather than dividing them into management and labor. Further, even assuming *arguendo* that the LPNs are closely identified with management, the Company has not offered any authority or explanation as to why their service as observers in their own election necessarily tainted the election in the CNA/service unit, particularly where the Company itself selected an LPN to be its observer in that election and it failed to object to those arrangements at the pre-election conference. Thus, the Company has not met its burden of “prov[ing] by specific evidence that the election results did not reflect the unimpeded choice of the employees”<sup>101</sup> in the CNA/service unit.

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the LPNs were closely identified with management. Thus, it did not even attempt to introduce any evidence on that point. (Vol.III-Tr.62-69.)

<sup>101</sup> *Certainfeed Corp. v. NLRB*, 714 F.2d 1042, 1060 (11th Cir. 1983).

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full and denying the Company's cross-petition for review.

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National Labor Relations Board

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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

<b>NATIONAL LABOR RELATIONS BOARD</b>	)	
	)	
<b>Petitioner/Cross-Respondent</b>	)	<b>Nos. 08-10664-JJ</b>
	)	<b>08-11019-JJ</b>
<b>v.</b>	)	
	)	<b>Board Case No.</b>
<b>RICHMOND HEALTH CARE d/b/a SUNRISE</b>	)	<b>12-CA-25504</b>
<b>HEALTH AND REHABILITATION CENTER</b>	)	
	)	
<b>Respondent/Cross-Petitioner</b>	)	
	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board Certifies that its final brief contains 12,269 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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this 19th day of June, 2008

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	)	
<b>Respondent/Cross-Petitioner</b>	)	
	)	

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address[es] listed below:

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