

Nos. 08-3092 & 08-3596

**UNITED STATES COURT of APPEALS
FOR THE THIRD CIRCUIT**

**LOYALHANNA HEALTH CARE ASSOCIATES t/d/b/a
LOYALHANNA CARE CENTER**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on the petition of Loyalhanna Health Care Associates t/d/b/a Loyalhanna Care Center (“the Center”) to review the National Labor Relations Board’s (“the Board”) Supplemental Decision and Order (Chairman Schaumber and Member Liebman) in *Loyalhanna Care Center*,

which issued on June 30, 2008, and is reported at 352 NLRB No. 105. (A 43-52.)¹ The Board has filed a cross-application for enforcement of its Order.

The Board's Supplemental Decision and Order (Chairman Schaumber and Member Liebman)² followed its decision on September 30, 2006, to remand its original decision in this case (*Loyalhanna Care Center*, 332 NLRB 933 (2000)(A 12-21)) to an administrative law judge for further consideration of certain issues relating to the alleged supervisory status under Section 2(11) of

¹ "A" refers to the Joint Appendix filed by the Center. The Board's Supplemental Decision and Order, including the consecutively-paginated decision of the administrative law judge, is located at pages 43-52 of volume 1 of the Joint Appendix. The Board's original decision in this proceeding, including the consecutively-paginated decision of the administrative law judge, is located at pages 12-21 of volume 1 of the Joint Appendix. The Board's Order remanding its original decision in this proceeding is located at pages 22-23 of volume 1 of the Joint Appendix. References preceding a semicolon are to the Board's finding; those following are to the supporting evidence. "Br" refers to the Center's brief.

² In 2003, the Board sought an opinion from the United States Department of Justice's Office of Legal Counsel ("the OLC") concerning the Board's authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. See *Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C. Mar. 4, 2003). The First Circuit has agreed, upholding the authority of the two-member Board to issue decisions. *Northeastern Land Services, Ltd v. NLRB*, ___ F.3d ___, 2009 WL 638248 (1st Cir. Mar. 13 2009).

The issue is being briefed before this Court in *J.S. Carambola v. NLRB* (Nos. 08-4729 & 09-1035).

the National Labor Relations Act (29 U.S.C. § 152(3) (“the Act”)) of Registered Nurses Cynthia Clark, Erica Lewis, and Melanie Fritz.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)) (“the Act”). The Board’s Supplemental Decision and Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is appropriate because the unfair labor practices occurred in Pennsylvania. The Center filed its petition for review on July 16, 2008, and the Board filed a cross-application for enforcement on August 25, 2008. Both filings are timely; the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board’s finding that the Center failed to carry its burden of proving that Registered Nurses Cynthia Clark, Erica Lewis, and Melanie Fritz are supervisors under Section 2(11) of the Act. If the Court upholds the Board’s finding that Clark, Lewis, and Fritz are not statutory supervisors, then the Board is entitled to summary enforcement of its finding that the Center violated Section 8(a)(1) of the Act by discharging Clark, Lewis, and Fritz; disciplining Lewis and Fritz; and threatening Lewis.

STATEMENT OF THE CASE

A. The Board's Original Decision and Order

Acting on unfair labor practice charges filed by Cynthia Clark, Erica Lewis, and Melanie Fritz, the Board's General Counsel issued a complaint against the Center, alleging that it committed numerous violations of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), including discharging Clark, Lewis, and Fritz for engaging in protected concerted activities.³ (A 17.) Following a hearing, an administrative law judge issued a decision. (A 17-21.) The judge found that, although the evidence strongly supported a conclusion that the Center's actions against Clark, Lewis, and Fritz were unlawfully motivated, all three were supervisors under Section 2(11) of the Act, and therefore were not entitled to the Act's protections.⁴ (A 17-21.) Specifically, the judge found that

³ Section 7 of the Act (29 U.S.C. § 157) grants employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that right by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in [S]ection 7."

⁴ Statutory supervisors are excluded from the Act's definition of "employee" in Section 2(3) of the Act (29 U.S.C. § 152(3)). Section 2(11) of the Act (29 U.S.C. § 152(11)) defines the term "supervisor" as follows:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to

Clark, Lewis, and Fritz were statutory supervisors based on their assigning and responsibly directing other employees, as those terms are used in Section 2(11) of the Act. (A 20-21.)

The General Counsel filed exceptions to the judge's decision. (A 12.) The Board (Members Fox and Liebman; Member Hurtgen dissenting) agreed with the judge's finding that the Center's actions against Clark, Lewis, and Fritz were unlawfully motivated, but disagreed with his finding that they were statutory supervisors. (A 12-15.) In reversing the judge's supervisory finding, the Board, relying in part on *Providence Hospital*, 320 NLRB 717, 729 (1996), found that Clark, Lewis, and Fritz did not exercise "independent judgment" in assigning or responsibly directing employees.⁵ The Board also rejected the Center's contention that Clark, Lewis, and Fritz were statutory supervisors based on their authority to discipline employees. (A 13.) The Board issued an Order remedying the Center's numerous unfair labor practices against Clark, Lewis, and Fritz. (A 15.)

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 .

⁵ In *Providence Hospital*, the Board had held that Section 2(11) supervisory authority "does not include the authority of an employee to direct another employee to perform discrete tasks stemming from the directing employee's experience, skills, training, or position" 320 NLRB at 729.

The Center subsequently filed with this Court a petition for review of the Board's Order, and the Board filed a cross-application for enforcement. In January 2001, the Board filed with this Court an unopposed motion to hold the case in abeyance, pending the Supreme Court's decision in *Kentucky River Community Care, Inc., v. NLRB*, 532 U.S. 706 (2001) ("Kentucky River"), because some of the issues to be addressed by the Supreme Court in that case would have a bearing on the dispositive issue of whether Clark, Lewis, and Fritz were statutory supervisors. (A 22). On May 29, 2001, the Supreme Court issued its decision in *Kentucky River*, in which, among other things, it rejected the rationale of *Providence Hospital* with respect to "independent judgment," as that term is used in Section 2(11). *Kentucky River*, 532 U.S. 706.

B. The Board Remands the Case for Further Consideration in Light of the Supreme Court's Decision in *Kentucky River* and a Trilogy of Board Cases Clarifying the Board's Framework of Analysis in Statutory Supervisor Cases

Following the issuance of *Kentucky River*, the Board filed with this Court an unopposed motion to remand these proceedings. On October 30, 2001, the Court granted the Board's motion, and remanded the proceedings to the Board for further consideration in light of *Kentucky River*. (A 22.)

The Board notified all parties that it had accepted the Court's remand, and invited the parties to file statements of position as to the issues on remand,

namely, whether Clark, Lewis, and Fritz exercised independent judgment in assigning or responsibly directing subordinate employees. The Center and the General Counsel filed statements of positions arguing, respectively, for and against supervisory status. (A 22, 43.)

On September 29, 2006, the Board issued decisions in *Oakwood Healthcare, Inc.*, 348 NLRB 686, *Croft Metals, Inc.*, 348 NLRB 717, and *Golden Crest Healthcare Center*, 348 NLRB 727, in light of *Kentucky River*. Consistent with the Board’s authority to interpret ambiguous language in the Act, and the Supreme Court’s instructions in *Kentucky River*, those three cases refined the Board’s analysis of the terms “assign,” “responsibly direct,” and “independent judgment” as those terms are used in Section 2(11). The next day, the Board remanded the instant proceeding to an administrative law judge for further consideration in light of *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest Healthcare*, including reopening the record, if necessary. The Board stated that “the issue before the Board on remand is whether Clark, Lewis, and Fritz exercise independent judgment in assigning or responsibly directing subordinate employees.” (A 22.) The merits of the underlying unfair labor practice finding—that is, the Board’s finding that the evidence demonstrated that the Center’s actions against Clark, Lewis, and Fritz were unlawfully motivated—were not a subject of the remand. (A 22, 47.) The administrative

law judge provided the Center and the General Counsel the opportunity to reopen the record to take additional evidence in light of the remand, but both parties declined to do so. (A 46.) The Center and the General Counsel filed briefs with the judge regarding the issues on remand. (A 46.)

C. The Board's Supplemental Decision and Order

On April 16, 2007, the judge issued a supplemental decision on remand. (A 46-51.) The judge found that Clark, Lewis, and Fritz did not exercise independent judgment in assigning or responsibly directing employees and were therefore not statutory supervisors. He also found that the Center's contention that Clark, Lewis, and Fritz had the authority to discipline employees was outside the scope of the remand and, in any event, was unproven. Having found that Clark, Lewis, and Fritz were not statutory supervisors, but were statutory employees protected by the Act, the judge concluded, consistent with the Board's original decision, that the Center had committed unfair labor practices against them. (A 46-51.)

The Center filed exceptions to the judge's supplemental decision, and the General Counsel filed limited cross-exceptions. In its Supplemental Decision and Order, the Board (Chairman Schaumber and Member Liebman) affirmed the judge's finding that Clark, Lewis, and Fritz did not exercise independent judgment in either assigning or responsibly directing employees, and were

therefore not supervisors. (A 43-46.) In agreement with the judge, the Board also found that the Center's contention that Clark, Lewis, and Fritz were statutory supervisors based on their alleged authority to discipline employees was an issue not encompassed in the remand order and was, in any event, unproven. The Board also rejected the Center's contention that Clark's, Lewis's, and Fritz's alleged possession of certain secondary indicia rendered them statutory supervisors. Accordingly, the Board entered an Order remedying the Center's unfair labor practices against them. (A 46, 51.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACTS

A. Background and Overview of the Center's Operations; the Center's Nursing Department

The Center operates a nursing center in Latrobe, Pennsylvania. (A 17, 47; A 61.) It provides a range of care to over 100 residents and employs 120 individuals in various departments. (A 17, 47; A 178-79.) The Center has approximately 116 beds and is divided into a north wing and a south wing. (A 47; A 179.) The north wing, which has two halls, is for residents who need skilled nursing care, and is generally staffed by RNs and aides. The south wing serves as a residential facility for individuals who require less intensive care, and is generally staffed by LPNs and aides. (A 17, 47; A 62, 64, 179.)

The Center's management team includes an administrator and an assistant administrator. (A 381.) In the nursing department, Director of Nursing Carol Miller, Assistant Director of Nursing Jacqueline Gaydar, and Resident Care Coordinator Jennifer Ream—all of whom are admitted statutory supervisors—supervise the care provided to residents by nurses, aides, and clerks. (A 18, 47; 63, 111, 113, 142.) All employees in the nursing department report directly to Miller. (A 47; 162, 184.) In the event that all of the nursing department managers are off-site, at least two of them remain available by telephone at all times. (A 15; 97.)

The nursing department includes approximately 20 registered nurses (“RNs”), 8 licensed practical nurses (“LPNs”), and 45 nurses’ aides (“aides”). (A 17, 47; A 178-79, 184.) Cynthia Clark, Erica Lewis, and Melanie Fritz all worked as RNs at the Center until they were discharged for raising their concerns about staffing and pay with management. (A 12-13; 117-31.) Aides assist with basic patient care: they pass out meals to residents, assist residents with feeding, change residents’ soiled clothes, distribute ice, bathe residents, and, sometimes, take residents’ vital signs. (A 100.)

The number of nursing department employees working at the Center at any given time varies by shift. (A 47; 105.) There are multiple shifts, and, by law, an RN must always be present at the Center. (A 47; 179.) During the day

shift, the north wing typically has two RNs as well as a treatment nurse, who changes residents' dressings. (A 105.) During the afternoon and night shifts, two RNs generally cover the north wing. (A 18; 164.) The RNs are often short-staffed, but cannot compel LPNs working in the less-busy south wing to help out in the north wing. (A 18; 137.) The number of aides working in the entire nursing department—that is, on both wings and elsewhere—fluctuates by shift. (A 180.) There are typically 14 aides on the day shift, 9 on the afternoon shift, and 6 on the night shift. (A 180.)

The RNs are responsible for delivering medications to residents. (A 98.) They also make sure that, consistent with federal and state standards, aides provide safe care to residents by, among other things, properly positioning residents' bed rails and call bells. (A 48; A 64.) The Center refers to each RN and LPN on its nursing department staff as a "nurse manager." (A 47; A 62.) The Center requires each RN to punch a time-card at the beginning and end of every shift they work. (A 17; A 62, 111.) Miller, Gaydar, and Ream do not punch time-cards. (A 164-65.) The Center's employee handbook states that "non-supervisors" have to give the Center two-weeks' resignation notice, but that "supervisors" must provide one-month's notice. The Center does not require RNs to provide it with one-month's notice; they may resign with two-weeks' notice. (A 108, 361.)

B. Resident Care Coordinator Jennifer Ream Assigns Nursing Department Employees to Work on Particular Days and Shifts; She Also Assigns Aides to Specific Residents, and Schedules Aides' Regular Break Periods

Resident Care Coordinator Jennifer Ream is responsible for making regular work assignments for employees in the nursing department. (A 48; 147, 193-94, 239.) This includes assigning all nursing department employees to work on particular days, shifts, and wings. (A 48; A 193.) The RNs have no role in making such assignments. (A 48; 193.) Ream either assigns aides to work with specific residents, or, sometimes, the aides decide among themselves who will attend to a particular resident. (A 99, 193.) Ream also schedules aides' regular break periods. (A 48; A 198.) The RNs have no role in this assignment of break periods. (A 48; A 198.) Aides have to inform an RN when they are going on a break, so that there will be enough aides to continue to provide care to residents. (A 198.)

If an aide calls in sick during a weekday, Ream, or Director of Nursing Carol Miller, will obtain a replacement. (A 48; 194.) During shifts when Miller, Ream, or Gaydar are not present, an RN could obtain a replacement by using the phone list of aides maintained by the Center. If a replacement could not be found, an RN could ask an aide with a lighter workload to attend to the residents who had been assigned to the absent aide. (A 48; 195-96.) The Center

requires an RN seeking a replacement aide to get approval from management if the use of a replacement would result in the payment of overtime. (A 48-49; 256-57.) The RNs do not have the authority to compel a replacement to fill in for someone else. (A 50.)

Disciplinary decisions are the responsibility of Director of Nursing Miller and Resident Care Coordinator Ream. (A 253-54.) The RNs are not expected to recommend disciplinary actions against aides or others. (A 188.) Clark, Lewis, or Fritz were never told they had the authority to discipline, reprimand, or discharge employees. And none of the three nurses ever did so. (A 66-67, 94, 114, 277-78.)

C. Clark, Lewis, and Fritz Share Their Concerns About Staffing and Pay Issues at the Center With Assistant Director of Nursing Gaydar; Soon Thereafter, the Center Discharges Clark, Lewis, and Fritz

On September 25, 1996, RNs Clark, Lewis, and Fritz gathered in the medication room to prepare for their upcoming shift. (A 47; A 68, 115-16.) Assistant Director of Nursing Gaydar entered the room. Clark told Gaydar that she was upset that Gaydar had scheduled her to work on the following Saturday, which was a day on which Clark was not typically scheduled to work. (A 12, 18, 47; A 116.) Gaydar ripped the work schedule off the wall, and stated that she hated her job and was going to quit. Gaydar then left the room. (A 18, 47;

A 70.) She returned about 10 minutes later, and showed Clark a piece of paper indicating that Clark had agreed to work on Saturday in place of another RN. (A 18, 47; A 116.) Clark immediately recognized her error and told Gaydar that she had forgotten about the switch. She apologized repeatedly to Gaydar about the misunderstanding. (A 18, 47; A 116.)

The conversation then turned to the RNs' concerns about staffing issues. Lewis told Gaydar it was going to be nice to have three RNs working on the upcoming shift instead of the usual two. (A 47; A 70, 117.) Clark added that it would be helpful to have three nurses every night. (A 47; A 71, 116.) Lewis and Fritz agreed. (A 135.) Gaydar stated that if the RNs needed extra help on a shift, they should tell an LPN to come over to the north wing, because things were often less busy on the south wing where the LPNs worked. (A 47; A 116.) Clark told Gaydar that the LPNs did not usually respond to such requests for assistance, and that, as a result of being short-staffed, RNs often got off work late. (A 18; A 116.) Gaydar stated that the RNs were not going to get an extra nurse, and that they should "just live with it." (A 18; A 116.)

Clark, Lewis, Fritz and Gaydar then began talking about wages. (A 12, 47.) Gaydar reported that the Center's administrator had stated that the nurses were not worth what the Center was paying them, that the nurses would never make "top dollar," and that the nurses were a "dime a dozen." (A 18; A 116.)

Gaydar said that the Center's administrator did not care about staffing or wage issues. She further stated that she did not understand why the RNs worked at the Center when other nursing homes in the area paid better wages. (A 18; A 72, 116-17.) Fritz asked Gaydar why management did not care about these matters, and why RNs could not get a raise. (A 18; A 72, 117.) During the course of the conversation, none of the participants raised her voice. (A 18; A 72, 140-50.) At the end of the conversation, Gaydar laughed, told Clark, Lewis, and Fritz to have a nice evening, and left the room. (A 72-73.)

The next day, Director of Nursing Miller told Fritz that she had heard about the conversation in the medication room. She told Fritz that she was not going to "put up with it." (A 18; 121.) Miller told Clark around that same time that she "had had enough of [Clark and Fritz]." (A 18; 150.) Miller met with Clark and Fritz in her office, where Gaydar was also present. Gaydar alleged that Clark had been "irate" during the conversation, and that Clark and Fritz had said disrespectful things about Gaydar and the administrator. (A 18; 151.) Clark and Fritz denied the allegations. (A 18; 151.) Miller discharged Clark and disciplined Fritz for allegedly treating a supervisor with disrespect and creating disharmony by complaining about wages and staffing. (A 12, 18-19; A 138, 152-53.) Lewis spoke to Miller, challenging Gaydar's factual account of

the conversation, but Miller did not repeal the actions against Clark and Fritz.

(A 12, 18-19.)

Clark sought unemployment compensation benefits as a result of her discharge from the Center. (A 12, 19; 126, 154.) The Center opposed her effort. (A 154-55.) At an unemployment compensation hearing, Fritz and Lewis testified on Clark's behalf. (A 12, 19; 126, 154; 354-55.) Gaydar also testified at the hearing. Director of Nursing Miller disciplined Fritz and Lewis immediately after they got back to the Center, claiming that a resident's relative had complained to the state about aspects of Fritz's and Lewis's job performance. (A 12, 19; 128-30.) The relative denied doing this. Gaydar threatened Lewis with the loss of her nursing license. (A 19; 130-31.) Simultaneous with the issuance of the discipline to Fritz and Lewis, Gaydar told them that she was not pleased about their testimony on Clark's behalf. Fritz and Lewis denied all accusations of wrongdoing. Upset over the discipline, Fritz and Lewis tendered 2-week resignation notices. Miller discharged both of them before they could work out their notice period. (A 12, 19-20; A 130-31.)

II. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

In its Supplemental Decision and Order, the Board (Chairman Schaumber and Member Liebman) affirmed, with certain modifications, the judge's findings on remand that Clark, Lewis, and Fritz were not statutory supervisors. (A 43-

45.) The Board, in agreement with the judge, found that the Center had failed to carry its evidentiary burden of demonstrating that the three RNs exercised independent judgment in assigning or responsibly directing employees. (A 43-45.) The Board also rejected the Center's remaining contentions, including its contentions that Clark, Lewis, and Fritz were statutory supervisors based on their authority to discipline employees, and their alleged status as the highest-ranking employee on duty for a period of time each day. (A 44-45.)

Having found that the three RNs were not statutory supervisors, the Board entered an order remedying the Center's unfair labor practices against them. The Board's Order requires the Center to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, coercing or restraining employees in the exercise of the rights guaranteed them by Section 7 of the Act. Affirmatively, the Board's Order requires the Center to reinstate Clark, Lewis, and Fritz to their former positions; make them whole for any loss of earnings; remove from their files any references to the unlawful discipline and discharges; and post a remedial notice. (A 45-46, 51.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Cynthia Clark, Erica Lewis, and Melanie Fritz are not statutory supervisors. It is settled that to establish supervisory status, an asserting party must provide specific, tangible

examples of supervisory authority. A party cannot rely on conclusory testimony, generalized testimony, or paper authority. As the Board reasonably found, the Center failed to meet its evidentiary burden of demonstrating that Clark, Lewis, or Fritz exercised “independent” judgment in “responsibly directing” or “assigning” employees.

The record simply does not support a finding that Clark, Lewis, or Fritz exercised independent judgment, as the Board defined that term in *Oakwood Healthcare*. For example, the Board reasonably found that Director of Nursing Miller’s testimony that RNs in general determine the acuity level of residents on the floor and reassign staff accordingly, such as by assigning more than one aide to a particular resident, was merely conclusory and hence insufficient to establish independent judgment. There is no evidence that, in deciding which aides to assign, Clark, Lewis, or Fritz exercised independent judgment by considering the particular aides’ skill sets and matched those skill sets to the condition and needs of particular residents. Further, Director of Nursing Miller could only offer conclusory and general testimony of cases where unnamed RNs released subordinates early in cases of illness or family emergencies; she could offer no specific examples. Likewise, the Center failed to provide any specific, tangible examples of Clark, Lewis, or Fritz exercising independent judgment in responsibly directing employees.

In addition, the Board reasonably rejected the Center’s argument that Clark, Lewis, and Fritz are supervisors based on their alleged authority to discipline other employees. As the Board noted in its original decision, the judge did not find supervisory status based on the authority to discipline. Moreover, the Center points to nothing more than “paper authority” in support of its claim.

The Center’s challenge to the Board’s finding revolves around nothing more than its continued—and misplaced—reliance on paper authority and employee job descriptions. To begin, the Board reasonably rejected the Center’s fanciful claim that it did not, in fact, have the evidentiary burden of demonstrating supervisory status. This claim is flatly belied by longstanding Board precedent—precedent that the Supreme Court explicitly approved in *Kentucky River Community Care, Inc. v. NLRB*, 532 U.S. 706 (2001).

Nevertheless, the Center, without pointing to any actual specific examples involving Clark, Fritz, and Lewis, continues to claim that they “assign” and “responsibly direct” employees with “independent judgment.” The Center’s argument fails because it is settled that an employer’s reliance on conclusory, generalized, or self-serving testimony of its administrator is an insufficient basis for finding supervisory status under the Act. Further, there is no merit to the Center’s claim that pre-*Kentucky River* cases decided by this Court *compel* the

Court to find that Clark, Lewis, and Fritz are statutory supervisors. Following *Kentucky River*, the Board issued a trilogy of cases refining its analysis of certain aspects of statutory supervisory status. The Center fails to acknowledge that, in those cases, the Board addressed courts' concerns—including those expressed by the Court—about its analytical approach toward such status. In any event, the cases cited by the Center are materially different from the present case which essentially turns on the Center's failure to provide non-conclusory, specific evidence to meet its burden of demonstrating supervisory status.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT REGISTERED NURSES CYNTHIA CLARK, ERICA LEWIS, AND MELANIE FRITZ ARE NOT STATUTORY SUPERVISORS; THEREFORE, THE BOARD'S FINDINGS THAT THE CENTER VIOLATED SECTION 8(a)(1) BY DISCHARGING ALL THREE, DISCIPLINING LEWIS AND FRITZ, AND THREATENING LEWIS, MUST BE ENFORCED

The Board found that the Center violated Section 8(a)(1) of the Act by discharging Clark, Lewis, and Fritz for engaging in protected concerted activities; disciplining Lewis and Fritz for engaging in protected concerted activities; and threatening Lewis for engaging in protected concerted activities. (A 45, 50-51.)

To avoid liability for these unlawful actions, the Center argues only that Clark, Lewis, and Fritz are supervisors under Section 2(11) of the Act, and therefore not covered by the Act's protections. As we show below, however, substantial evidence supports the Board's finding that the Center failed to carry its burden of proving that Clark, Lewis, and Fritz are statutory supervisors. Thus, if the Court upholds the Board's finding that Clark, Lewis, and Fritz are not statutory supervisors, the above-mentioned unfair labor practice findings, which the Center in its opening brief does not, and, in any event, cannot, challenge, are entitled to summary enforcement. *See, e.g., Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) (failure to raise argument in opening brief results

in abandonment of argument); *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 593 (2d Cir. 1994) (arguments are waived if not raised until the reply brief). In any event, judicial review of the findings that the Center violated Section 8(a)(1) would otherwise have been barred because the Center did not contest those findings before the Board. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Konig*, 79 F.3d 354, 356 n.1 (1996); *NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1125 (3d Cir. 1982).

A. Applicable Principles and Standard of Review

Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act (29 U.S.C. § 152(11)) defines the term “supervisor” as follows:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, 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.

In accordance with this definition, 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 the employer.’” *Kentucky River*, 532 U.S. at 712 (citation omitted); accord *Oakwood Healthcare*, 348 NLRB 686, 687 (2006).

Despite the fairly detailed definition of “supervisor” contained in Section 2(11), “the exact boundaries of the definition are not precise.” *American Diversified Foods, Inc. v. NLRB*, 640 F.2d 893, 894 (7th Cir. 1981). Consistent with well-settled principles of administrative law, it is for the Board, in its substantial and informed discretion, to address the boundaries of the definition, filling in the statutory “gaps” where necessary. *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (where a statute is “silent or ambiguous with respect to the specific issue,” a court will uphold an agency’s reasonable construction of the statute).

As the Supreme Court has explained, “the statutory term ‘independent judgment’ is ambiguous with respect to the degree of discretion required for supervisory status.” *Kentucky River*, 532 U.S. at 713. Accord *Hospital General Menonita v. NLRB*, 393 F.3d 263, 267 (1st Cir. 2004). Therefore, “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies” an employee for supervisory status. *Kentucky River*, 532 U.S. at 713. *See also NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 579 (1994) (it “is no doubt true” that “the Board needs to be given ample room to apply [terms like ‘independent judgment’] to different categories

of employees”). *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’” (internal citation omitted)); *Public Serv. Co. of Colorado v. NLRB*, 271 F.3d 1213, 1219 (10th Cir. 2001).

In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and its two companion cases, *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), the Board refined its standards for examining supervisory status in light of the Supreme Court’s decision in *Kentucky River*. The Board determined that “to exercise ‘independent judgment,’ an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning or comparing data.” *Oakwood Healthcare*, 348 NLRB at 693. The judgment must involve “a degree of discretion that rises above the ‘routine or clerical.’” *Id.* (internal quotation omitted). Thus, a supervisor is one who, for instance, assigns the job by making “[a] personal judgment based on personal experience, training, and ability.” *Id.* (quoting NLRB, Leg. Hist. of the Labor Management Relations Act of 1947, 1303 (remarks of Sen. Flanders)).⁶

⁶ The Board also refined its definitions of “assign” and “responsibly to direct.” In *Oakwood Healthcare*, 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

The Board’s interpretation of the term “independent judgment” follows, in part, from the general legislative purpose behind Section 2(11) 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.’” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)). 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,” which Congress sought to protect. *Beverly Enterprises-*

overtime period), of giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, 348 NLRB at 689-90. Further, in the health care setting, “the term ‘assign’ encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients.” *Id.* at 689. Assignment in the health care setting also refers to “the charge nurse’s designation of significant overall duties to an employee, not to the charge nurse’s ad hoc instruction that the employee perform a discrete task.” *Id.*

In *Oakwood Healthcare*, the Board also 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.’” *Id.* at 691. 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 properly.” *Id.* at 692.

Mass., Inc. v. NLRB, 165 F.3d 960, 962 (D.C. Cir. 1999). *Accord NLRB v. Grancare, Inc.*, 170 F.3d 662 (7th Cir. 1999). Indeed, “many 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.” *Kentucky River*, 532 U.S. at 713 (citation omitted).

It is settled that the burden of demonstrating employees’ Section 2(11) supervisory status rests with the party asserting it. *Kentucky River*, 532 U.S. at 711; *Oakwood Healthcare*, 348 NLRB at 687 (2006). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *See, e.g., Croft Metals*, 348 NLRB at 721. To meet its burden, the party seeking to prove supervisory status must support its claim with specific examples, based on record evidence. *See Oil, Chemical and Atomic Workers Int’l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority”). Merely conclusory or generalized testimony from an administrator is insufficient to establish “independent judgment” necessary for a supervisory finding. *See, e.g. Beverly Enterprises-Mass., Inc.*, 165 F.3d at 963 (D.C. Cir. 1999); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Lynwood Manor*, 350 NLRB 489, 490 (2007).

The Board's supervisory determination will be upheld as long as it is supported by substantial evidence, and will not be easily overturned on appeal. *See, e.g., NLRB v. W.C. McQuaid, Inc.*, 552 F.2d 519, 532-33 (3d Cir. 1977); *Beverly Enterprises-Mass*, 165 F.3d at 962 (D.C. Cir. 1999). Indeed, "determinations respecting supervisor status are particularly suited to the Board's expertise." *W.C. McQuaid, Inc.*, 552 F.2d at 532 (citing *Mon River Towing, Inc. v. NLRB*, 421 F.2d 1, 5 (3d Cir. 1969)). *See also Oil Chemical & Atomic Workers Int'l Union*, 445 F.2d at 241 (supervisory determinations "lie squarely within the Board's ambit of expertise" and are "entitled to great weight"). The determination of whether an individual is a supervisor under the Act is an intensely factual inquiry that calls upon "the Board's special function of applying the general provisions of the Act to the complexities of industrial life." *Dynamic Machine Co. v. NLRB*, 552 F.2d 1195, 1202 (7th Cir. 1977) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)).

Under the substantial evidence standard, the Board's findings of fact are entitled to affirmance if they are reasonable, and a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

B. The Board Reasonably Found that the Center Failed to Carry Its Evidentiary Burden of Proving that RNs Clark, Lewis, and Fritz Are Statutory Supervisors

The Board reasonably found that the Center failed to meet its burden of establishing that Clark, Lewis, and Fritz exercise independent judgment in either assigning or responsibly directing employees. (A 43-45.) Substantial evidence supports the Board's finding that the evidence relied on by the Center, which consisted only of conclusory testimony, generalized assertions, job descriptions, and operational policies, fell well short of the evidentiary mark.

On review, the Center essentially concedes that the only evidence it offered in support of its contentions was the generalized and conclusory testimony of its Director of Nursing and job descriptions or "paper authority." The Board and courts view this type of evidence as insufficient to prove supervisory status. *Res-Care, Inc.*, 705 F.2d at 1467 (no finding of supervisory status where the evidence was "limited very largely to the administrator's general assertions"); *Central Freight Lines, Inc. v. NLRB*, 653 F.2d 1023, 1025 (5th Cir. 1981) (finding "conclusory testimony" of supervisory status to be insufficient); *Lynwood Manor*, 350 NLRB 489, 490 (2007) (same).

In addition, the Center's reliance on paper authority (for example, job descriptions and an employee handbook) is misplaced, because it is settled that job descriptions and the like are insufficient; evidence of actual authority is

required to establish supervisory status. (A 44.) *See, e.g., Beverly Enterprises-Mass, Inc. v. NLRB*, 165 F.3d at 962-63 (“theoretical [or] paper power will not suffice to make an individual a supervisor”), *Edward Street Daycare Ctr., Inc. v. NLRB*, 189 F.3d 40, 47 (1st Cir. 1999).

As we now show, the Center has failed to support its assertion that Clark, Lewis, and Fritz are statutory supervisors with the requisite, specific tangible evidence that is necessary to remove them from the protection of the Act.

1. The Center failed to show that RNs Clark, Lewis, and Fritz exercise independent judgment in assigning or responsibly directing employees

The limited issue on remand was whether Clark, Lewis, and Fritz exercised independent judgment in assigning or responsibly directing employees, as those terms are used in Section 2(11) of the Act. Substantial evidence supports the Board’s finding that they did not.

“Independent judgment” applies to all of the indicia of supervisory authority under Section 2(11) of the Act. As the *Oakwood Healthcare* Board stated, “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 or comparing data.” 348 NLRB at 692-93. The judgment must involve “a degree of discretion that rises above the ‘routine or clerical.’” *Id.* at 693.

In *Oakwood Healthcare*, the Board found that a charge nurse exercised independent judgment when she made assignments based on her “analysis of an available nurse’s skill set and level of proficiency at performing certain tasks, and her application of that analysis, in matching that nurse to the condition and needs of a particular patient.” *Id.* at 695. The Board emphasized that supporting evidence must be sufficient to establish that nurses “make assignments that are both tailored to patient conditions and needs and particular [employees’] skill sets.” *Id.* Merely conclusory testimony that staffing needs are based on an assessment of “patient acuity” is insufficient to establish independent judgment. *Lynwood Manor*, 350 NLRB at 490.

In the present case, there is no evidence that Clark, Lewis, or Fritz exercise independent judgment in assigning aides (or any other employees) to their places of work, times of employment, particular residents, or overall duties. Instead, Resident Care Coordinator Ream is responsible for such matters. (A 48.) If, for some reason, Ream does not assign aides to particular residents, the aides will decide, among themselves, which residents they will attend to. Further, as the Board explained, although Director of Nursing Miller testified generally that nurses “determine the acuity level . . . of the residents on the floor,” and reassign staff accordingly—such as assigning more than one aide to a particular resident—this testimony was an insufficient grounds for finding that

Clark, Lewis, or Fritz exercised independent judgment. *See* cases cited at p. 28. Miller’s testimony said nothing, for example, about what Clark, Lewis, and Fritz did or did not do, or what they did or did not determine (if anything) with respect to residents. That is, there is *no evidence* that in deciding which aides to assign (or reassign)—which Miller generally alleged the RNs could do—RNs matched particular aides’ skill sets to the particular conditions and needs of residents. This stands in sharp contrast to *Oakwood Healthcare*, where the evidence showed that the charge nurses made their assignments based on an “analysis of an available nurse’s skill set and level of proficiency at performing certain tasks, and her application of that analysis, in matching that nurse to the condition and needs of a particular patient.” *Oakwood Healthcare*, 348 NLRB at 697.

The Board also reasonably rejected the Center’s contention that Clark, Lewis, and Fritz exercised independent judgment “based on their alleged authority to release subordinates early in cases of illness or family emergency.” (A 44.) Director of Nursing Miller broadly testified that “[w]e have had cases [at the Center]” in which RNs released subordinates early under such circumstances. She could point to no specific examples, however, let alone examples where Clark, Lewis, or Fritz allegedly took such actions. (A 44.) Thus, this evidence was insufficient to meet the Center’s burden. *See, e.g.*,

Lynwood Manor, 350 NLRB at 490; *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006) (finding a manager’s testimony that she was “familiar” with staff nurses sending a certified nursing assistant home insufficient to establish supervisory authority). Moreover, as the Board stated (A 44), a putative supervisor does not exercise independent judgment merely by permitting a sick employee to leave work early. *See, e.g., Shaw, Inc.*, 350 NLRB 354, 355 (2007).

The Board also reasonably concluded that the Center failed to show that Clark, Lewis, and Fritz exercise independent judgment in responsibly directing employees. The evidence shows that aides provide residents with basic patient care—they pass out meals, distribute ice, and bathe residents, among other things. (A 100.) The evidence also shows that, as a general matter, RNs at the Center deliver medications to residents, and work to make sure that aides provide safe patient care to residents. To this end, the evidence shows that RNs check to make sure that a resident’s bed rails and call bell are properly positioned. An RN may also help an aide lift a resident up to go to the bathroom. (A 100.) The Board reasonably found that such evidence did not demonstrate the type of independent judgment needed under Section 2(11) to rise above the routine. The Center completely failed to provide evidence with respect to what, if any, degree of discretion Clark, Lewis, or Fritz utilized in

such matters.⁷ See *Oakwood Healthcare*, 348 NLRB 686; *Golden Crest*, 348 NLRB 727.

2. The Board reasonably rejected the Center’s claim that Clark, Lewis, and Fritz had the authority to discipline employees, as that term is used in Section 2(11)

The Board reasonably rejected the Center’s contention that Clark, Lewis, and Fritz had the authority to “discipline” employees as that term is used in Section 2(11). In the original decision in *Loyalhanna Care Center*, the Board observed that, “having considered the evidence, the judge *did not* base his supervisory determination on the nurses’ participation in the [Center’s] disciplinary scheme. Nor could he have reasonably done so on the record evidence.” (A 13, emphasis added). Thus, the Board found, the Center’s “evidence showed mere ‘paper authority’ to discipline and not actual authority as required to establish supervisory status.” (A 45.) Under settled Board law, specific examples of supervisory authority are required. Reliance on mere “paper authority” is insufficient to establish supervisory status. (A 44.) See, e.g., *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

⁷ Because the Board found that three RNs did not exercise independent judgment, the Board found (A 44 n.3) it unnecessary to pass on the judge’s finding that the RNs did not possess the authority to assign but did possess the authority to responsibly direct other employees.

C. The Center’s Challenges to the Board’s Finding that It Did Not Meet Its Burden of Demonstrating That Clark, Lewis, and Fritz Exercised Independent Judgment in Assigning or Responsibly Directing Employees Are Without Merit

On review, the Center essentially raises three challenges to the Board’s finding that Clark, Lewis, and Fritz did not exercise independent judgment in assigning or responsibly directing employees. First, the Center argues, contrary to unequivocal Supreme Court precedent, that the Board erred in finding the Center had the evidentiary burden of establishing that Clark, Lewis, and Fritz were statutory supervisors. Second, the Center claims that it was not “clear” that it had any responsibility to provide anything more than generalized testimony and job descriptions to carry its evidentiary burden. Third, the Center claims that two pre-*Kentucky River* cases issued by this Court “compel” the Court to find that Clark, Lewis, and Fritz are statutory supervisors. These contentions—along with all the Center’s other attempts to unsettle the Board’s findings—are without merit.

1. The Center’s claim that it did not have the evidentiary burden of establishing the supervisory status of Clark, Lewis, and Fritz is flatly inconsistent with settled precedent

The Center devotes a significant portion of its brief (Br 30-34) to its argument that the Board applied an incorrect evidentiary standard. Specifically,

the Center argues that the Board incorrectly placed the evidentiary burden of establishing the supervisory status of Clark, Lewis, and Fritz on the Center. To this end, the Center raises the novel claim that, once it merely presented job descriptions and the general testimony of Miller, the burden somehow shifted to the General Counsel to disprove the supervisory status of Clark, Lewis, and Fritz.

The Center is simply wrong about this. As the Board emphasized (A 45), it “has never held . . . that the burden of going forward with evidence of supervisory status ever shifts to the nonasserting party.” *See* discussion at p.26, above. Rather, the party that asserts supervisory status retains the burden of proving that status by a preponderance of the evidence. Indeed, in *Kentucky River*, 532 U.S. at 711, the Supreme Court approved the Board’s longstanding approach of placing the evidentiary burden on the party asserting supervisory status. The Supreme Court found that the Board’s rule “is supported by ‘the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.’” *Kentucky River*, 532 U.S. at 711 (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)). *See also Croft Metals, Inc.*, 348 NLRB at 721.

2. The Center's contention that generalized testimony and job descriptions were previously sufficient to prove supervisory status is simply incorrect

The Center is simply wrong in claiming (Br 18-20) that it could not have known that its general testimonial and paper evidence would be insufficient to establish the RNs' supervisory status because at the time of the original hearing in 1996 (Br 19) "more evidence [than generalized testimony and job descriptions] was not needed to establish independent judgment." Thus, it has long been settled that a party seeking to establish the supervisory status of its employee must provide specific evidence of supervisory status. *See, e.g., Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) ("what the statute requires is evidence of actual supervisory authority translated into tangible examples demonstrating the existence of such authority"). Likewise, it has long been settled that conclusory testimony is not sufficient to establish supervisory status. *See, e.g., NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Central Freight Lines, Inc. v. NLRB*, 653 F.2d 1023, 1025 (5th Cir. 1981); *Federal Compass & Warehouse Co. v. NLRB*, 398 F.2d 631, 634 (6th Cir. 1968); *Sears Roebuck & Co.*, 304 NLRB 193, 193 (1991). And, contrary to the Center's suggestion, it has long been settled that paper authority, such as a job description, is not controlling. (A

44.) *See, e.g., NLRB v. Security Guard Serv., Inc.*, 384 F.2d 143, 149 (5th Cir. 1967); *Chevron, U.S.A., Inc.*, 309 NLRB 59, 69 (1992).

In a related vein, there is no merit in the Center's recurring theme (Br 13-14) that certain *pre-Kentucky River* cases issued by this Court (*NLRB v. Attleboro*, 176 F.3d 154 (3d Cir. 1999), and *NLRB v. Prime Energy Limited Partnership*, 224 F.3d 206 (3d Cir. 2000)) somehow compel the Court to find that Clark, Lewis, and Fritz are statutory supervisors. To begin, these cases in no way suggest that the Center did not have the burden of providing specific, tangible examples of supervisory authority. Indeed, as the *Attleboro* Court observed, "resolution of the question of whether a charge nurse exercises independent judgment is inherently factual in nature" *NLRB v. Attleboro*, 176 F.3d at 163. *See also Mon River Towing, Inc. v. NLRB*, 421 F.2d 1 (3d Cir. 1969) (the Board must be allowed to analyze, with substantial deference, the infinite variations of fact-intensive statutory supervisor status).

Most significantly, the cases cited by the Center are readily distinguishable from the present case. Thus, in *Attleboro*, in reversing the Board's finding that the nurses did not exercise independent judgment in assigning employees, the Court emphasized, in part, that the Board had relied on a definition of independent judgment that excluded judgment based on "the exercise of the [nurses'] greater skill and expertise in helping a less skilled

employee perform a job correctly.” *Id.* at 166-67. As explained above, the Supreme Court in *Kentucky River* addressed the *Attleboro* Court’s concern about the Board’s approach toward independent judgment, and the Board further responded in its trilogy of post-*Kentucky River* cases. Since the Supreme Court’s decision in *Kentucky River*, the Board no longer applies the definitional distinction between independent judgment and professional judgment that troubled the *Attleboro* Court. Further, in the present case, unlike in *Attleboro*, the Center provided no tangible examples of the putative supervisors’ re-assigning or assigning employees. Likewise, there is no evidence that the putative supervisors provide any oversight of the aides in a manner suggesting the exercise of independent judgment. In short, the Center’s claims largely ignore the development of the law, especially the Supreme Court precedent directing the Board to explain and apply the definition of the very terms at issue here.

Moreover, notwithstanding the Center’s assertion that it is “unclear” (Br 19) what other evidence it could have presented, the Center now seems to want it both ways. Thus, it complains that it did not have the opportunity to present additional evidence, stating (Br 19) that “[t]here was no subsequent hearing when the case was remanded” However, in raising this argument, the Center overlooks the central fact that, even though the judge, consistent with the

Board's remand order, provided the Center with a clear opportunity to reopen the record to take additional evidence, *the Center expressly declined the invitation.* (A 46.)

Perhaps recognizing that it declined the opportunity on remand for a hearing to take additional evidence and meet its burden, the Center seeks to undercut the Board's ultimate post-remand decision by arguing that the Board "ignored" the judge's fact-finding in the original decision. The Board did no such thing. As the remand judge explicitly stated, he was bound by the facts as found by the Board in the original decision. (A 47.) The remand was designed to apply modified legal principles to facts, and the remand judge and the Board did precisely that. In no way did the Board disturb the original judge's credibility findings. Nor did the Board ignore the existing facts. The absence of any additional facts to address the modified legal principles is solely the result of the Center's decision not to present more evidence in a hearing on remand.

3. The Center's remaining challenges to the Board's findings that Clark, Lewis, and Fritz did not exercise independent judgment in assigning or responsibly directing employees are without merit

The Center's specific claims (Br 16-18) that, based on the evidence it presented, Clark, Lewis, and Fritz exercised independent judgment by "assign[ing] aides to patients[,]” are unavailing. To begin, the Center

acknowledges, as it must, that Resident Care Coordinator Ream assigns all nursing department employees to particular days, wings, shifts, and, in the case of aides, specific residents. (Br 16.) The Center is only able to point to Director of Nursing Miller's generalized testimony that a RN could seek—but could not compel—a replacement for an absent aide, and assign the replacement to work with the absent aide's residents. This generalized, self-serving testimony is insufficient.

Likewise, it is undisputed that RNs could never reassign an aide during the day shift. If an RN had to reassign an aide during the night shift, she would do so solely on the basis of workload differentials—that is, the reassigned aide would be someone whose lighter workload, as measured by the number of residents, would allow her to help out. (A 50.) This is hardly indicative of independent judgment under *Oakwood Healthcare*, as there is no evidence that RNs—let alone Clark, Lewis, or Fritz—match aides' skills to residents' needs. And, RNs could *never* reassign an aide without management's approval if the reassignment would result in the payment of overtime. Although the Center asserts (Br 16) that Miller's generalized testimony “did not represent the sole evidence presented in an effort to establish that the Nurse Managers were supervisors . . .” it fails to identify the other evidence.

4. The Center's claims that Clark, Lewis, and Fritz are statutory supervisors based on their alleged authority to discipline employees are unsupported on the record

On review, the Center (Br 21-25) argues that Clark, Lewis, and Fritz are statutory supervisors because “they possessed the authority to discipline.” There has never been a finding in this case that the nurses possessed the authority to discipline.⁸ Indeed, as the Board stated (A 45), the Center’s “evidence showed mere ‘paper authority’ to discipline, not actual authority as required to establish supervisory status.” Director of Nursing Miller’s testimony that once, at some unspecified time during *her* days as a nurse, *she* sent an LPN home before the end of her shift says nothing about whether Clark, Lewis, or Fritz had the authority to discipline subordinates. (A 50.)

The Center’s argument (Br 25) that Fritz and Clark exercised disciplinary authority under Section 2(11) because they filled out, on one occasion and two occasions, respectively, the factual portion of “Employee Warning Reports” is unavailing. Fritz and Clark only filled out the factual portion of these reports after they asked Resident Care Coordinator Ream what to do. Ream instructed

⁸ Thus, the Center’s (Br 22-25) extended discussion of the *Attleboro* Court’s discussion of authority to discipline, as well as its reliance on *NLRB v. Prime Energy Limited Partnership* and other cases involving disciplinary authority, is irrelevant.

them to fill out the factual portions, and Fritz and Clark had no further role whatsoever in the matters. (A 112-14, 145-46.) Under settled Board law, such a restricted and reportorial role is not indicative of statutory supervisory status. *See, e.g., Jochims v. NLRB*, 480 F.3d 1161, 1170-71 (D.C. Cir. 2007); *Illinois Veterans Home*, 323 NLRB 890, 891 (1997).

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter a judgment denying the Center's petition for review and enforcing the Board's Order in full.

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April 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LOYALHANNA HEALTH CARE ASSOCIATES *
t/d/b/a LOYALHANNA CARE CENTER *

Petitioner/Cross-Respondent *

v. *

NATIONAL LABOR RELATIONS BOARD *

Respondent/Cross-Petitioner *

Nos. 08-3092,
08-3596

**COMBINED CERTIFICATES OF COMPLIANCE WITH TYPE-VOLUME
REQUIREMENT AND CONTENT AND VIRUS SCAN REQUIREMENT**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its brief contains 9,611 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Office Word 2003. Board counsel certifies that the contents of the pdf file containing a copy of the Board's brief that was filed with the Court is identical to the hard copy of the Board's brief filed with the Court and served on petitioner, and was scanned for viruses using Symantec Antivirus Corporate Edition, program 10.0.2.2000 version April 17, 2009 rev.5, and according to that program, was free of viruses.

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Dated at Washington, DC
this 20th day of April 2009

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CERTIFICATE OF SERVICE

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

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