

No. 09-0206-ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

SAINT MARY HOME

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement of its Order issued against Saint Mary Home (“the Company”). The Board’s Decision and Order issued on November 28, 2008, and is reported at 353 NLRB No. 53. (A 792-94.)¹ The

¹ “A” references are to the joint appendix; “SA” references are to the supplemental joint appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Order is final with respect to all parties. The Board filed its application for enforcement on January 14, 2009; this filing was timely because the Act imposes no time limit on such proceedings.

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 submits that this Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Board’s Order is a final order issued by a properly constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)), and the underlying unfair labor practices occurred in Connecticut, where the Company operates. (A 792 n.1.)²

As the Board’s Order is based, in part, on findings made in the underlying representation proceeding (Board Case No. 34-RC-2119), the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section

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). This Circuit has agreed. *Snell Island SNF LLC v. NLRB* __ F.3d __, 2009 WL 1676116 (2d Cir. June 17, 2009).

9(d), however, does not give the Court general authority over the representation proceeding, but authorizes review of the Board's actions in that 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." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the rulings of the Court. *See Freund Baking Co.*, 330 NLRB 17 n.3 (1999) (citing cases).

STATEMENT OF THE ISSUE

The ultimate issue in this case is whether the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(5) and (1)) by refusing to bargain with Teamsters Local 671 ("the Union"), as the certified representative of the Company's charge nurses. Specific subsidiary issues are:

1. Whether substantial evidence supports the Board's finding that the Company failed to carry its evidentiary burden of proving that its charge nurses are statutory supervisors within the meaning of Section 2(11) of the Act (29 U.S.C. § 152(11)); and
2. Whether the Board abused its broad discretion by certifying the election results rather than ordering a second election.

STATEMENT OF THE CASE

This case involves the Company's refusal to bargain with the Union after the Company's charge nurses expressed their desire for union representation in a validly conducted election. The Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to recognize and bargain with the Union. (A 793.) The Board ordered the Company to recognize and bargain with the Union. (*Id.*) The Company does not dispute its refusal to bargain. Instead, it contests the validity of the Board's certification of the Union based on the Company's contentions in the underlying representation proceeding that the charge nurses are statutory supervisors (Br 22-35) and that the Board should have ordered a second election based on the passage of time, unit employee turnover, and other considerations (Br 35-45). The procedural history of the case in the representation and unfair labor practice proceedings is set forth below.

I. THE REPRESENTATION PROCEEDINGS

A. An Election Is Conducted and the Company Claims that the Petitioned-for Unit Is Composed of Statutory Supervisors

On March 17, 2005, the Union filed a representation petition seeking certification as the collective-bargaining representative of the Company's approximately 35 full-time and regular part-time charge nurses. (A 633-34.) The petitioned-for-unit included both professional employees (the registered nurse or

“RN” charge nurses) and non-professional employees (the licensed practical nurse or “LPN” charge nurses). (*Id.*) The professional employees would either constitute a separate bargaining unit or be included in the unit of nonprofessional employees, depending on the results of the election.³

The Regional Director held a representation hearing on March 30, during which the Company contended that the charge nurses are supervisors within the meaning of Section 2(11) of the Act (29 U.S.C. § 152 (11)) and therefore ineligible to participate in the election. (A 634-35.) On April 14, the Regional Director issued a Decision and Direction of Election (“DD&E”) in which he found that the charge nurses are not statutory supervisors. (A 643-48.) Accordingly, he directed a secret-ballot election in the unit of charge nurses. (A 648.) On April 27, the Company filed a Request for Review of the DD&E, reiterating its claim that the charge nurses are statutory supervisors. (A 651.)

On May 9, 2005, the Board conducted a secret-ballot election among the unit employees. (A 792.) On May 11, the Board granted the Company’s Request for Review. (A 660.)

³ This type of election, called a *Sonotone* election, is in accordance with Section 9(b)(1) of the Act, 29 U.S.C. § 159(b)(1), which states that the Board may include professional employees in a unit with nonprofessional employees if “a majority of such professional employees vote for inclusion in such unit.” *See generally Sonotone Corp.*, 90 NLRB 1236, 1240-42 (1950).

B. The Board Remands the Case for Further Consideration Immediately After It Issued Decisions Clarifying the Framework of Analysis for Determining Supervisory Status

On September 29, 2006, while the instant representation proceeding was pending, 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 these cases, the Board clarified its framework of analysis in statutory supervisor cases. Specifically, the Board refined its analysis of the terms “assign,” “responsibly to direct,” and “independent judgment” as those terms are used in Section 2(11) of the Act. Accordingly, the next day, the Board remanded the instant proceeding to the Regional Director for further appropriate action consistent with these decisions, including reopening the record, if necessary. (A 661.)

On November 8, 2006, at the Company’s request, the Regional Director held a second representation hearing, during which the parties were allowed to present additional evidence regarding the charge nurses’ alleged supervisory status. (A 662-63.) On November 27, 2006, the Regional Director issued a Decision on Remand (“DOR”), reaffirming his finding, upon further consideration of the reopened record and the cases cited above, that the charge nurses are not supervisors. (A 662-81.)

On December 8, 2006, the Company filed a Request for Review of the DOR, again claiming that the charge nurses are supervisors. The Board granted that Request on April 25, 2007. On July 18, 2008, the Board issued a Decision on Review and Order, affirming the Regional Director's determination that the charge nurses are not supervisors and directing the Regional Director to take further appropriate action. (A 686-90.) Accordingly, the Regional Director notified the parties on July 22 that he intended to count the ballots on July 24. (A 691.)

On July 23, 2008, the Company filed an Objection to Counting Ballots and Motion for Second Election, arguing that a second election was necessitated by the passage of time, unit employee turnover, and change in unit size since the election. (A 692-98.) The Regional Director denied that motion the same day. That evening, the Company requested that the Regional Director reconsider his decision (A 704-05) and also filed a self-styled "Request for Review" of that decision with the Board (A 699-703).

C. The Union Wins the Election By a Wide Margin and is Certified as the Charge Nurses' Collective-Bargaining Representative

On July 24, 2008, the Regional Director denied the motion for reconsideration and proceeded to count the impounded ballots from the May 2005 election. (A 706.) The Tally of Ballots showed that the employees had voted 24 to 5 in favor of union representation, and that the professional employees had voted 9

to 4 in favor of being included with the nonprofessional employees. (A 707-08.)

On July 30, the Company filed election objections, which: (1) repeated its prior claim that the charge nurses are supervisors, and that a second election was required by the passage of time and changes in the composition and size of the unit since the election; and (2) further argued that the Regional Director was required to keep the ballots impounded pending resolution of the Company's self-styled "Request for Review" of July 23. (A 709-18.) On August 28, 2008, the Regional Director denied the Company's objections and certified the Union as the collective-bargaining representative of the charge nurses. *See* Supplemental Decision on Objections and Certification of Representative ("Supp. Decision and Certification") (A 768-76.)

On September 10, the Company filed a Request for Review of the Supp. Decision and Certification (A 777-79), which the Board denied on November 6. (A 791.) In addition, the Board found that the Company's July 23 "Request for Review" of the Regional Director's denial of the Company's Objection to Counting Ballots and Motion for Second Election was in fact a request for "special appeal." The Board granted permission to file that appeal, but denied the appeal on the merits. (*Id.*)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

The Company refused to recognize or bargain with the Union as the charge nurses' certified bargaining representative. Accordingly, the Board's General Counsel issued a complaint (Board Case No. 34-CA-12310) alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 792-93.) The Company admitted its refusal to bargain, but again disputed the validity of the certification based on its contentions in the underlying representation proceeding that the charge nurses are statutory supervisors and that a second election was required by the passage of time and changes in the size and composition of the unit since the election. (*Id.*) The Board found that the Company had violated the Act as alleged and ordered it to bargain with the Union. (*Id.*)

STATEMENT OF FACTS

I. THE FACTS ESTABLISHED IN THE REPRESENTATION PROCEEDINGS

A. Background; the Company's Operations

The Company operates a 217-bed sub-acute, rehabilitative and long-term skilled medical facility in West Hartford, Connecticut. The facility is divided into eight clinical units, each containing 24-40 beds. The facility operates 24 hours a day, 7 days a week pursuant to a three-shifts-per-day schedule. It is staffed by approximately 300 to 350 employees, including the 35 charge nurses in the

petitioned-for unit, and about 160-180 certified nurse's aides ("CNAs").

Generally, the Company staffs each shift at each unit with a single charge nurse and between 1.5 to 4 CNAs.⁴ There are about 22 CNAs for the day shift, 17 for the evening shift, and 11 for the night shift. (A 664; 21-26, 113-15, 328.)

In addition, the facility is at all times staffed by at least one nurse supervisor (or "shift supervisor"). (A 664; 24-27, 144.) There are two nurse supervisors on duty during the day shift on weekdays; at all other times, one nurse supervisor is regularly on duty. On all shifts, the nurse supervisor is responsible for the general oversight of all the clinical units. Such oversight is accomplished by making regular rounds of the units at least twice per shift to receive reports from the charge nurses, and by telephonic contact with the charge nurses throughout the shift. Unlike the charge nurses, the nurse supervisors must be RNs. (A 664-65.)

The Company's senior management team includes Administrator Patty Morse, who is primarily responsible for the operation and overall supervision of the facility. Reporting to Morse is Assistant Administrator Ann Praxton and Director of Nursing ("DON") Mary Frazier, who has overall responsibility for the facility's entire nursing department. (A 635.) Aysha Kuhlhor became DON in 2006, about a year after the instant election. (A 666; 310.) Among those who report to the DON are Assistant Director of Nursing ("ADON") Karen

⁴ Sometimes one CNA will split her shift between 2 units. (A 635 n.4.)

Cunningham, Staff Development Director Cheryl Dagadue, Human Resources Manager Lee Albrose, and the afore-mentioned nurse supervisors. (A635.) The charge nurses, in turn, report to their nurse supervisor and the senior managers. (A 636.)

B. The Charge Nurses' Assignment Decisions Are Controlled by the Routine Rotation of Patient-CNA Assignments, the Quantitative Balancing of CNA Workloads, and Company Policies and Government Regulations

The charge nurses establish the composition of patient groups on their unit and then assign a CNA to a particular patient group. (A 676.) These assignments are established by a roster that directs assignments based on each patient's room number. The roster apportions all resident rooms into groupings that align with the number of CNAs assigned to the unit, and, in creating these assignments, charge nurses simply "go by the room numbers." (A 665-66; 331.) The charge nurses are not authorized to change the assignment roster itself. Nor are they authorized to reassign CNAs to a different unit to fill vacancies created by absenteeism or approve time off, or to move residents from one room to another. (A 665-66; 161, 164, 182, 190-91, 197-98, 211-15, 226, 456-57.)

Patient-CNA assignments are routinely rotated among the CNAs on a weekly or biweekly basis. (A 668-69; 407, 412-13, 429-34.) In addition, according to charge nurses Roberta Neequaye and Carole Herzog, when changes in patient conditions make one assignment too onerous for a single CNA, they

“balance out the workload” of the CNAs by breaking up the assignment so that the overall workload is “split up” evenly. (A 668-69; 409, 429, 441, 456; *see also* A 262, 277.) The factors they consider in determining how to reassign work boil down to “rebalancing the workload essentially.” (A 669; 441.) Charge nurses also “equalize” CNA workloads by avoiding assigning several “difficult” residents to one CNA. (A 666; 331, 333, 342.)

The charge nurses’ assignment decisions are also dictated by company policy, state regulations, and simple geographic proximity. For example, in one instance, after a patient complained about the care she received from a CNA, charge nurse Herzog assigned a different CNA to that patient based on “who was more in proximity” to this resident and who “had a lighter caseload.” (A 669; 432-33.) Company policy required her to assign a new CNA in these circumstances. (*Id.*) In addition, a charge nurse is legally required to reassign a CNA who has been accused of resident abuse or providing improper care. (A 668; 353-54, 423.)

When reassigning work, charge nurses may consider the commonly known differences in the skills and experience levels of the CNAs. For example, because “with experience the CNAs get better,” those “who have been there for a long time” are generally more patient and adept at caring for difficult residents than those who are “right out of school.” (A 667; 323.) Similarly, it is common knowledge which CNAs are the most “patient” and that “most of the residents have

their favorite aides.” (A 668; 408, 423.) Accordingly, CNA-resident conflicts can be resolved by having favored and disfavored CNAs swap assignments. (*Id.*)

C. The Charge Nurses Direct CNAs to Perform Various Tasks

The charge nurses have the authority to direct CNAs in daily tasks. (A 687.) For example, charge nurses direct CNAs to take vital signs, obtain a urine sample if a resident shows signs of a urinary tract infection, keep a resident in bed if a resident is sick, perform 15-minute checks if a resident is wandering or agitated, and monitor fluid intake and output per doctors’ orders if a resident is dehydrated. (A 687; 347-50.) If a CNA does not perform an assigned task, the charge nurse may instruct the CNA to perform it, or to perform it properly. (*Id.*) The charge nurses, however, do not face adverse consequences if they fail to satisfactorily direct or supervise CNAs in performing these tasks. (A 689-90.)

D. Nurse Supervisors Handle Disciplinary Matters

If a charge nurse encounters a problem with how a CNA is performing her job, the charge nurse may ask the CNA to take corrective action. If the problem persists, the charge nurse would simply “let [her] supervisor know what’s going on” and the supervisor would “take it from there.” (A 680; 410-11, 435-36; *see also* A 169, 226-27). The charge nurse’s job in such instances essentially is to gather information and contact her supervisor. (*Id.*) The nurse supervisor then decides whether to impose discipline. (*Id.*)

II. THE FACTS ESTABLISHED IN THE UNFAIR LABOR PRACTICE PROCEEDING

After the Union was certified, it repeatedly requested that the Company meet and bargain in good faith. The Company, however, refused. (A 793.)

Accordingly, on September 24, 2008, the General Counsel issued a complaint based on a charge filed by the Union, alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

(A 792-93.) On October 7, the Company filed an answer admitting its refusal to bargain, but denying that it violated the Act based on its contentions in the

underlying representation proceeding that the charge nurses are statutory supervisors and that a second election was required by the passage of time and changes in the size and composition of the unit since the election. (*Id.*) On

October 21, the Board's General Counsel filed a motion for summary judgment.

(*Id.*) The Company opposed, admitting its refusal to bargain, but again contesting the validity of the certification based on its contentions in the underlying

representation proceeding. (*Id.*)

III. THE BOARD'S CONCLUSIONS AND ORDER

On November 28, 2008, the Board (Chairman Schaumber and Member Liebman) issued its Decision and Order in the unfair labor practice case, granting the General Counsel's motion for summary judgment. (A 792-94.) The Board found that "[a]ll representation issues raised by [the Company] were or could have

been litigated in the prior representation proceeding.” (A 792.) The Board also found that the Company did “not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceedings.” (*Id.*) Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union as the exclusive collective-bargaining representative of the charge nurses. (A 793.)

The Board’s Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board’s Order requires the Company, upon request, to bargain with the Union, and, if an understanding is reached, to embody it in a signed agreement. The Order also requires the Company to post a remedial notice. (A 793-94.)

SUMMARY OF ARGUMENT

The Company does not contest that it refused to bargain with the Union after the Union won a representation election by a 24 to 5 margin and was certified as the bargaining representative of the Company’s charge nurses. Rather, the Company defends its refusal by claiming that the charge nurses are supervisors

excluded from the Act's coverage, and that the Board should have ordered a second election, even if the charge nurses are employees under the Act, given the passage of time and changes in unit size and composition since the election.

However, as the Board reasonably rejected both claims, it also reasonably found that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act.

A. The Company failed to carry its evidentiary burden of proving that the charge nurses engage in a supervisory function with the requisite independent judgment. The Company only asserts that the charges nurses exercise such authority when they assign, responsibly direct, and discipline or effectively recommend discipline. At each turn, however, the Board reasonably found that the Company offered only conclusory testimony and generalized assertions which, settled law holds, are insufficient to prove supervisory status.

First, the Board reasonably found that, while the charge nurses assign within the meaning of the Act, the Company failed to prove they do so with independent judgment. Substantial evidence shows that the charge nurses' assignment decisions are controlled by the set rotation of assignments among CNAs, the simple balancing of CNA workloads, and company policies and governmental regulations. It is settled that charge nurses do not assign with independent judgment in these circumstances. The Company's claim to the contrary fails because it boils down to conclusory testimony and generalized assertions.

Next, the Board reasonably found that the Company failed to show that the charge nurses are held accountable for their direction of CNAs and, therefore, failed to prove that they responsibly direct within the meaning of the Act. The Company's purported evidence of accountability also boils down to general assertions based on inconclusive evidence.

Finally, the Company failed to prove that the charge nurses discipline or effectively recommend discipline using independent judgment. Rather, the charge nurse's role was limited to providing information to the supervisors who themselves decided whether to impose discipline. It is settled that supervisory discipline is not proven where the putative supervisor is merely a conduit of information. There was, however, no evidence showing that, in providing such information, the charge nurses had also effectively recommended discipline.

B. The Board acted within its broad electoral discretion when it certified the Union based on its election victory and declined to order a second election. The Company's claim to the contrary fails because it is settled that post-election turnover, passage of time, and changes in unit size and composition do not preclude certification of a union that prevailed in a validly conducted election. The Company provides no reason for departing from that settled principle.

The Company also fails to show that the Regional Director erred in counting the ballots while the Company's self-styled "Request for Review" was pending

before the Board. Contrary to the Company, the Board reasonably interpreted its own procedural rules in treating the Company's filing as a "special appeal," which, the Company concedes, does not require impounding ballots.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees"⁵ The Company does not contest (Br 18) that it refused to bargain with the Union. Rather, the Company contends (Br 18, 22-35) that the charge nurses are supervisors excluded from the Act's coverage, and that, even if the charge nurses are employees under the Act, the Board should have ordered a second election given the passage of time and changes in unit size and composition since the election (Br 35-45). Therefore, as long as the Board reasonably rejected those two claims, the Company's refusal to bargain with the Union violates Section 8(a)(5) and (1) of the Act. *See NLRB v. HeartShare Human Servs. of New York,*

⁵ A violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ," is "derivative" of a violation of Section 8(a)(5) of the Act. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Inc., 108 F.3d 467, 470 (2d Cir. 1997); *NLRB v. Arthur Sarnow Candy Co., Inc.*, 40 F.3d 552, 556 (2d Cir. 1994).

A. The Board Reasonably Found that the Company Failed To Carry its Evidentiary Burden of Proving that the Charge Nurses Are Statutory Supervisors

1. 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, 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.

In accordance with this definition, individuals are statutory supervisors only “if (1) they have the authority to engage in any of the 12 listed supervisor functions” *and* “(2) their ‘exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.’” *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712 (2001) (citation omitted); *accord Superior Baking, Inc. v. NLRB*, 893 F.2d 493, 496 (2d Cir. 1990); *NLRB v. Meenan*

Oil Co., 139 F.3d 311, 321 (2d Cir. 1998); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).⁶

In *Oakwood Healthcare*, and its two companion cases, *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), the Board clarified 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 and comparing data.” *Oakwood Healthcare*, 348 NLRB at 692-93. “[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 of a collective-bargaining agreement.” *Id. Accord Meenan Oil*, 139 F.3d at 321. Rather, the judgment must involve “a degree of discretion that rises above the ‘routine or clerical.’” *Oakwood Healthcare*, 348 NLRB at 692-93 (citations omitted).⁷

⁶ The third requirement for supervisory status—that the authority is held “in the interest of the employer,” *Kentucky River* 532 U.S. at 713—is not at issue here because the first two requirements are not met.

⁷ 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 (emphasis in original). Therefore, “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies” an employee for supervisory status. *Id.*

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)). *Accord NLRB v. Porta Sys. Corp.*, 625 F.2d 399, 402 (2d Cir. 1980). 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-Mass., Inc. v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999). *Accord NLRB v. Grancare, Inc.*, 170 F.3d 662, 666 (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).

In *Oakwood Healthcare*, the Board also refined its definitions of “assign” and “responsibly to direct.” 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), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, 348 NLRB at 689-90. Further, in the healthcare 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 employees perform a discrete task.” *Id.*

The Board further explained that responsible direction involves two distinct concepts. First, the putative supervisor must “direct” employees by, for example, deciding “what job shall be undertaken next or who shall do it.” *Id.* at 691. Second, the direction must be “responsible,” that is, the one who directs an employee “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 691-92.

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 711-12. *Accord NLRB v. Quinnipiac College*, 256 F.3d 68, 73 (2d Cir. 2001); *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 485 (6th Cir. 2003); *Oakwood*

Healthcare, 348 NLRB at 687. 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 this burden, the party seeking to prove supervisory status must support its claim with specific examples, based on record evidence. *See Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”) Accordingly, merely conclusory or generalized testimony is insufficient to establish “independent judgment” or any other element necessary for a supervisory finding. *See, e.g., Beverly Enterprises-Mass., Inc.*, 165 F.3d at 963; *NLRB v. Res-care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare*, 348 NLRB at 731. Moreover, it is settled that job descriptions and other “paper power” are insufficient to prove supervisory status. *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998).

The Board’s supervisory determination must be upheld as long as it is supported by substantial evidence, and will not easily be overturned on appeal. *Quinnipiac College*, 256 F.3d at 74. “Indeed, because of the Board’s expertise in deciding who is and who is not a supervisor within the meaning of [Section] 2(11) of the Act, ‘the Board’s findings in this area are entitled to “special weight.””

Superior Baking, Inc., 893 F.2d at 496 (citations omitted). *Accord Meenan Oil*, 139 F.3d at 320. Under the substantial evidence test, a reviewing court may not displace the Board’s 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.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *accord Quinnipiac College*, 256 F.3d at 74.⁸

2. The Company Failed To Carry its Evidentiary Burden of Proving that the Charge Nurses Are Statutory Supervisors

After thoroughly reviewing the evidence presented at two hearings, the Board reasonably found that the Company failed to carry its evidentiary burden of proving that its charge nurses assign, responsibly direct, or discipline or effectively recommend discipline using independent judgment.⁹ Specifically, the Board found that:

1. while the charge nurses assign, the Company failed to prove that they do

⁸ Accordingly, this Court has rejected the same argument that the Company makes (Br 20) that a less deferential or “more probing” review applies to the Board’s supervisory findings. Rather, as this Court has explained:

[T]he statutory standard of “substantial evidence on the record considered as a whole” provides us with a sufficient basis for approaching the task of reviewing Board decisions concerning supervisory status.

Quinnipiac College, 256 F.3d at 74.

⁹ The Company does not claim that the charge nurses perform any other supervisory function enumerated in Section 2(11).

so with independent judgment (A 675-77, 686);

2. while the charge nurses direct the work of CNAs, they do not do so “responsibly” because the Company failed to prove that they were held sufficiently accountable for their direction (A 688-90); and
3. the Company failed to prove that charge nurse discipline or effectively recommend discipline using independent judgment. (A 680, 686.)

As shown below, the Board’s findings are amply supported by the record and the Company’s claims to the contrary are based on conclusory testimony and generalized assertions.

a. The Charge Nurses Do Not Assign Using Independent Judgment

It is undisputed that the charge nurses “assign” within the meaning of Section 2(11) and *Oakwood Healthcare* because they establish the composition of the patient groups on their unit and then assign a CNA to a particular patient group. (A 676.) Therefore, the limited issue is whether the Company proved that the charge nurses assign with the independent judgment required for statutory supervisors. Substantial evidence supports the Board’s finding that they do not.

In order to prove that the charge nurses assign with “independent judgment” the Company must establish that their assignment decisions are both (1) free from control by another authority such as company policy and (2) involve a “degree of discretion” that rises above the “routine or clerical.” *Oakwood Healthcare*, 348 NLRB at 692-93. *Accord Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260,

266 (2d Cir. 2000); *NLRB v. Atlantic Paratrans of N.Y.C., Inc.*, 300 Fed.Appx. 54, 56 (2d Cir. 2008). In *Oakwood Healthcare*, for example, the Board found that a charge nurse exercised independent judgment when she made assignments based on her “analyses” of an available CNA’s particular skills and proficiency in performing certain tasks, and her application of that analysis, in matching that CNA to the condition and needs of a particular patient. 348 NLRB at 695. However, independent judgment cannot be established through conclusory testimony that assignments are based on an assessment of “patient acuity” or a particular CNA’s skills. *Lynwood Manor*, 350 NLRB at 490.

Moreover, *Oakwood Healthcare* cautions that an assignment that boils down to simply “equalizing workloads” is “routine and clerical in nature” and does not implicate independent judgment, “even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data.” *Id.* at 693. *See also id.* at 697 (reiterating that independent judgment is not proven by “the mere equalization of workloads,” i.e., where charge nurses essentially just “assess the *quantity* of work to be assigned” and split it evenly among the available CNAs) (emphasis in original). *Accord Lynwood Manor*, 350 NLRB at 490. In addition, the Board explained that an assignment does not involve independent judgment if there is one “self-evident choice.” *Id.* at 693. *See also Schnurmacher Nursing Home*, 214 F.3d at 266 (explaining that not every nursing-context

assignment involves independent judgment).¹⁰

Applying those principles, the Board reasonably found (A 675-77) that the Company failed to meet its burden of proving that the charge nurses exercise independent judgment in the assignment of CNAs. Rather, the charge nurse's assignment decisions are controlled by the routine rotation of patient-group assignments among available CNAs, the mere balancing of CNA workloads, company policies and governmental regulations, and the commonly known needs of patients and skills of CNAs. (*Id.*)

i. Assignments are based on a set rotation

It is undisputed that patient-group assignments are rotated weekly or biweekly among the available CNAs in each unit. (A 668-69; 407, 412-13, 429-34.) These routine rotations make the process of creating assignments nearly automatic, thereby leaving the charge nurse with little or no discretion in the matter. Thus, as charge nurse Roberta Neequaye explained:

You have Assignment 1, with assigned rooms, Assignment 2 with the rooms, and then Assignment 3 with the rooms. So let's say [CNA] A does Assignment 1 this week; she's going to do [Assignment] 2 next week, and then 3 the next week.

¹⁰ The Company therefore errs in presuming (Br 26) that *any* assignment of work to a CNA is "inseverable from the exercise of independent judgment." Rather, it is settled (*see* cases cited above at pp. 25-26) that the party asserting supervisory status must prove *both* that the charge nurses assign *and* that their assignments involve the exercise of independent judgment. Accordingly, as just shown, the Board and this Court have held that not every nursing-industry assignment involves the exercise of independent judgment.

(A 668; 413.) Likewise, DON Kuhlhor explained that, in creating assignments, charge nurses simply “go by the [patients’] room numbers.” (A 665-66; 331.) Indeed, there was no testimony or other evidence showing that this by-the-numbers approach left the charge nurses with “a degree of discretion that rises above the routine or clerical.” *Oakwood Healthcare*, 348 NLRB at 692-93. *See also Atlantic Paratrans of N.Y.C., Inc.*, 300 Fed.Appx. at 56 (assignments based on “mechanical” considerations do not involve independent judgment).

ii. Assignments are based on “balancing workload” and other routine factors

Substantial evidence also supports the Board’s finding (A 668-69, 677) that the charge nurses’ reassignment decisions boil down to simply assessing the overall quantity of work and splitting it evenly among the available CNAs. *See Oakwood Healthcare*, 348 NLRB at 693, 697 (finding no independent judgment in these circumstances). Thus, charge nurses Neequaye and Carole Herzog explained that when changes in patients’ conditions require reassignments, they essentially “balance out the workload” among the CNAs, i.e., they try to ensure that the overall quantity of work is “split up evenly.” (A 668-69; 409, 429, 441; *see also* A 262, 277.) Accordingly, Herzog acknowledged that the factors she would consider in reassigning work boiled down to “rebalancing CNA workloads essentially.” (A 669; 441.) Likewise, DON Kuhlhor underscored how reassignments are driven by

the equalization of workloads when she noted that a charge nurse would probably not assign all incontinent or “difficult” residents to one CNA. (A 666; 331, 333, 342.)

In addition, charge nurse Herzog further demonstrated the routine nature of these assignments when she added that, in reassigning work, she would consider who had the lighter patient load and who was in physical proximity. Therefore, she would not reassign a patient to a CNA who is “way down the hall” from the patient. (A 669; 432-33.) As this Court has explained, even a reassignment necessitated by unforeseen factors is routine where, as here, it is determined by rote geographical considerations. *See Atlantic Paratrans of N.Y.C., Inc.*, 300 Fed.Appx. at 56 (no independent judgment where reassignment of driving routes in response to changes in traffic and weather was based on geographic proximity of available drivers).

As the foregoing evidence shows, the Board reasonably found that the charge nurses do not exercise independent judgment when they assign work based on “balancing workloads” and other routine factors. The Company (Br 22-25) points to nothing that undermines that finding. Rather, it continues to erroneously rely (Br 23; A 331, 342) on DON Kuhlhor’s testimony that a charge nurse would avoid having one CNA care for, say, several combative or incontinent residents. However, as just shown, her testimony confirmed what the Board found, namely,

she agreed (A 333, 342) that charge nurses split up such assignments primarily to “equalize” the amount of work that each CNA received. And, more fundamentally, the Company simply ignores how the charges nurses repeatedly agreed that they reassign to “rebalance the workload essentially.” (A441; *accord* A 409, 429, 456).

iii. Assignments are dictated by company policies and government regulations

The Board also reasonably found (A 668-69) that the other instances in which the charge nurses had reassigned work failed to prove independent judgment because they were dictated by company policies or government regulations. *See, e.g., Oakwood Healthcare*, 348 NLRB at 692-93 (assignments dictated by such policies or regulations do not involve independent judgment). *Accord Meenan Oil*, 139 F.3d at 321. Thus, for example, the Company errs in relying (Br 24) on charge nurse Neequaye’s testimony (A 408, 423) about an incident in which she assigned a different CNA to a particular resident, because the resident had accused the CNA assigned to her of not “taking care of her.” Neequaye confirmed (A 423; *see also* A 353-54) that she was required by company policy to make this change. Moreover, she explained that she resolved the CNA-resident conflict simply by having the accused CNA switch room assignments with the CNA whom this resident was known to like. (A 423.) *See Oakwood Healthcare*, 348 NLRB at 693 (no independent judgment involved in making the “self-evident choice”). Thus,

her testimony does not establish that she exercised any discretion that rose above the routine or clerical in connection with this matter.

Likewise, the Company gains no ground by citing (Br 24; A 431-33) charge nurse Herzog's generalized testimony about an incident where, after a frightened resident complained that her CNA had turned her too abruptly, Herzog assigned a different CNA to that resident. Rather, no independent judgment was involved because Herzog acknowledged believing (A 433) that she was required by company policy to make this reassignment. Moreover, as discussed above (pp. 28-29), Herzog selected a replacement CNA based on routine considerations such as who had a lighter patient load and who was in physical proximity. (A 432-33.)

iv. Assignments are based on commonly known needs of patients or skills of CNAs

Next, the Board reasonably found (A 677) that the Company failed to prove its claim (Br 23) that the charge nurses exercise independent judgment when they assertedly assign based on their assessment of a particular patient's needs and the competency of a particular CNA to meet those needs. Rather, the Company offered only conclusory testimony and general assertions to support that claim.

See Lynwood, 350 NLRB at 490 (supervisory status cannot be proven by conclusory testimony or general assertions); *accord Golden Crest Healthcare*, 348 NLRB at 731. For example, while DON Kuhlör made the generalized observation (A 323-24) that CNAs have "different personalities" and years of experience that

could be considered in making assignments, nothing in the record clearly explains how charge nurses weigh or analyze these factors in making assignments, much less how this involved a “degree of discretion” that goes beyond the routine or clerical.” *Oakwood Healthcare*, 348 NLRB at 692-93. *Cf. id.* at 695-96 (finding independent judgment where, unlike here, the evidence clearly showed that charge nurses assigned based on their “analysis” of a particular CNA’s skills and a particular patient’s needs). Instead, DON Kuhlör merely reiterated the truism that “with experience the CNAs get better” so those “who have been there for a long time” are generally more patient and adept at caring for difficult residents than those who “are right out of school.” (A 667; 323.)¹¹

Moreover, the Board reasonably found (A 677) that, to the extent there was evidence that a charge nurse had considered the competence of a particular CNA in making an assignment, this, too, boiled down to generalized assertions about the well-known differences in the CNAs’ skills and experience levels. Thus, for example, the Company cannot succeed merely by citing (Br 23-24, A 334) an

¹¹ The Board also reasonably found (A 677, 668-69) that the other testimony on this point was too conclusory to prove independent judgment. For example, charge nurse Neequaye simply observed that it is well-known around the facility which CNAs are most “patient,” and that “most of the residents have their favorite aides.” (A 668; 422-23.) Likewise, charge nurse Herzog was equally vague when she claimed to have made reassignments based on the general idea that “some CNAs just are calm and have . . . more experience with [an agitated] patient,” whereas “a less experienced aid might be frightened” and not know how to calm an agitated patient. (A 669; 434.)

incident where, according to DON Kuhlor, a charge nurse determined that most CNAs could not adequately care for a particularly combative resident, and so the charge nurse reassigned a CNA with 20 years experience to that resident. Rather, Kuhlor observed (A334) that because it is well known that the 20-year CNA “is much better at caring for [the combative] resident,” a practice developed in which that experienced CNA has been “consistently assigned to this resident.” Indeed, the Company fails to cite any evidence proving that simply following this practice required a degree of discretion that rose above the routine or clerical. *See e.g., Schnurmacher Nursing Home*, 214 F.3d at 266 (no independent judgment involved in merely following “prior practice in making assignments”); *Clark Machine Corp.* 308 NLRB 555, 555-56 (1992) (no independent judgment in selecting employee who was obviously the most qualified worker for the assignment).

For similar reasons, the Company errs in relying (Br 24; A351) on DON Kuhlor’s vague, second-hand recollection of an incident where a charge nurse picked a different CNA to care for an agitated resident. Rather, Kuhlor could not specifically describe the factors that the charge nurse purportedly considered in selecting a replacement. (*Id.*) This was so, she admitted, because she was not directly involved in this incident and had little or no direct knowledge of how or

why the switch was made. (*Id.*) Once again, the Company forgets that such conclusory, gap-filled testimony is insufficient to establish supervisor status.¹²

Finally, the Company clearly errs when it relies (Br 25) on the Sixth Circuit's decision in *Integrated Health Serv. of Michigan v. NLRB*, 191 F.3d 703 (6th Cir. 1999), because that decision was founded on the since-rejected view (*see* cases cited above at p. 22) that “*the Board* has the burden of proving that employees are not supervisors.” 191 F.3d at 707 (emphasis added). Rather, as that decision explains, applying the wrong burden results in viewing the evidence “from an entirely wrongheaded perspective.” 191 F.3d at 707. Moreover, even putting aside that fundamental error, *Integrated Health* is factually distinguishable because it addressed a record “replete with examples of *uncontradicted* testimony *explicitly* describing the staff nurses’ supervisory role in scheduling, assigning and delegating work.” *Id.* at 708 (emphasis added). There simply is no such explicit and uncontradicted evidence here.

In sum, the Board reasonably found that the Company failed to meet its burden of proving that the charge nurses exercise independent judgment in the assignment of CNAs. Rather, as just shown, the charge nurse’s assignment

¹² Likewise, Kuhlör did not specify whether and how CNAs are selected for assignments based on specialized training such as in dementia and hospice care. (A 667.) *Cf. Oakwood Healthcare*, 348 NLRB at 696 (finding independent judgment where the record proved that charge nurses selected aides based on their specialized training in dialysis and vasoactive drug monitoring).

decisions are controlled by the set rotation of patient-group assignments among available CNAs, the mere balancing of CNA workloads, and company policies and governmental regulations. The Company's claims to the contrary are bottomed on nothing more than conclusory testimony and generalized assertions.

b. The Charge Nurses Do Not Responsibly Direct Using Independent Judgment

It is undisputed that the charge nurses direct CNAs. The limited issue is whether they "responsibly" direct as required by Section 2(11) of the Act.

In *Oakwood Healthcare*, the Board explained that for "direction" to be "responsible," the one who directs an employee "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." 348 NLRB at 692. The Board continued:

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Id.

In the present case, the Board thoroughly examined all of the Company's evidence and reasonably found (A 686-90) that the Company failed to show that the charge nurses are held accountable for their direction of CNAs and, therefore,

failed to prove that they responsibly direct within the meaning of the Act. As shown below, the Company once again relies on conclusory testimony and general assertions that are insufficient to prove supervisory status.

i. The Company failed to establish accountability

First, the Board reasonably found (A 689) that Charge Nurse Herzog's conclusory testimony (A 436-38; Br 27), that she would expect "some consequence" for not reporting a CNA's performance failure, is not sufficient to establish accountability. Herzog did not specify what "consequence" she was referring to, beyond her vague reference to being "written up," nor did she provide examples where a charge nurse actually suffered adverse consequences for her failure to properly inspect or direct CNA work.

Next, the Board reasonably found (A 687, 689) that the charge nurse evaluation forms the Company introduced (A 606-29; Br 12-13) failed to prove accountability. To the extent that accountability is predicated on charge nurse evaluations, there must be evidence that the charge nurse's rating for direction of subordinates may have an effect on that charge nurse's terms and conditions of employment. *See Golden Crest Healthcare*, 348 NLRB at 731. Here, the Company presented no such evidence. (A 687.)

Moreover, the Company proffered no evidence about the impact of handwritten comments on these forms concerning the charge nurse's direction of

CNAs. (A 689.) Rather, one such comment states that the charge nurse should “provide more direction” to CNAs, while another states that the charge nurse should be more assertive in delegation of tasks to CNAs, and a third states, under the heading “goals,” that the charge nurse should “enhance leadership skills by providing clear direction to staff.” (A 687, 689; 606-29.) However, the comments do not refer to any adverse impact on the charge nurse’s terms and conditions of employment, and the Company cites no evidence regarding the impact of the comments on those terms and conditions. (*Id.*)

The Board also reasonably found that the Education Intervention and Referral forms issued to charge nurses Olive Scott, Jackie McCall, and Jennifer Libassi (A 687-89; 481-83, 602, 604; Br 27-28) failed to prove accountability. As the Board explained (A 689), there was no evidence that the incidents documented therein resulted in any adverse consequence to any terms and conditions of the charge nurses’ employment. Indeed, the forms do not even clearly describe the underlying incident (A 687-89), much less show that it resulted in any adverse consequences for the charge nurse.¹³ Moreover, the forms state that they are

¹³ For example, one such form (A602) simply refers, without providing any background, to a complaint about the “length of time taken to answer call bell by staff,” while a second (A 604) mentions an “incomplete follow through with a Resident’s change of condition.”

educational not disciplinary, and the Company failed to provide any evidence to the contrary. Accordingly, these forms do not prove accountability.

Further, the Board reasonably found (A 688-89) that the handwritten notations on two Employee Reports issued to charge nurse Karolyn Zembko (A 603, 605; Br 27-28) failed to show accountability. Although one states that Zembko failed to update a resident's care plan, resulting in a fall (A 688; 605), and the other states that she gave a CNA Tylenol to give to a resident, which violated company policy and the Nurse Practice Act (A 688; 603), the Company introduced no evidence to clarify what occurred, whether it involved Zembko's alleged failure to direct or correct the CNA, or whether these comments adversely affected Zembko's terms and conditions of employment. Thus, the Board reasonably concluded (A 689) that the record of these incidents is not sufficiently developed to establish accountability.

Nor can the Company fill this significant gap by citing (Br 28; A 60-63, 392-98) the conclusory assertion of two senior managers that the foregoing documents are "disciplinary materials." Rather, nothing in their testimony clearly shows that these forms resulted in any adverse consequence to any terms and conditions of the charge nurses' employment.¹⁴

¹⁴ Likewise, the Company's reliance (Br 27-28) on a charge nurse job description and a "Nursing Assistant" newsletter (A 485-94) fails because neither shows that the Company actually disciplined charge nurses for their direction of CNAs.

Finally, the Board reasonably found (A 689-90) that the evidence regarding charge nurse Nancy Tierney's suspension (A 477-80) failed to prove that she responsibly directed employees using independent judgment. As the Board explained (A 689), even assuming her suspension may show accountability, she exercised no independent judgment in connection with the incident that led to the suspension, as the Company's policy and federal regulations left no room for discretion as to the direction that Tierney should have provided. Accordingly, Tierney was suspended for her role in keeping a resident belted to a wheelchair, which constituted resident abuse and violated a standard of conduct set by company policy and federal regulations. (A 689; 123-24.) *See, e.g., Oakwood Healthcare*, 348 NLRB at 691-93 (judgment not independent if dictated by regulations).¹⁵

It follows that the Company's reliance (Br 32-33) on this Court's decision in *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260 (2d Cir. 2000), is misplaced. There, the Court found that responsible direction was clearly proven because, unlike here, the record contained evidence of numerous "undisputed" instances of

Further, as to the job description, it is settled such "paper power" is insufficient to prove supervisory status. *See* cases cited above at p. 23.

¹⁵ The Company (Br 26-33), however, failed to separately challenge this finding (that Tierney did not exercise independent judgment in connection with this incident), and it has therefore waived the right to do so now. *See NLRB v. Star*

charge nurses being disciplined for failing to direct CNAs properly. That evidence included written disciplinary notices that expressly held the charge nurse accountable for her failure to adequately supervise staff *and* further warned that she would face adverse consequences, even termination, if she failed to improve her supervisory performance. *Id.* at 266-68. Tellingly, that documentary evidence was confirmed by the unrebutted testimony of charge nurses who equated their own authority to responsibly direct others to the authority held by the employer's admitted supervisors. *Id.* It was only in the context of such overwhelming evidence that the Court reversed the Board's finding of no responsible direction. *Id.*

ii. The Company's remaining contentions regarding responsible direction are without merit

The remainder of the Company's arguments (Br 28-31) fail because they simply ignore the necessity of proving responsible direction. First, the Company claims that the Regional Director overlooked "overwhelming evidence" that the charge nurses create an initial care plan for each resident, and it asserts that this fact alone proves they assign and direct using independent judgment. In making this argument, however, the Company merely argues that the charge nurses "direct" CNAs when they fill out these plans, but it does not even contend, much

Color Plate Serv., 843 F.2d 1507, 1510 n.3 (2d Cir. 1998) (claims not presented in initial brief are waived).

less prove, that they are held *accountable* for that alleged direction. As the essential element of responsible direction remains unproven, it is unnecessary to address whether the charge nurses responsibly direct using independent judgment.

In any event, the Regional Director did not overlook the evidence regarding the care plans. Rather, he reasonably explained why it failed to clearly prove the exercise of independent judgment. Thus, he noted that to the extent that the charge nurses fill out patient care plan forms, they essentially transfer doctor's orders and other diagnostic information contained in a pre-printed report that accompanies the patient upon her admission to the facility. (A 670; 126-27, 267-68, 315-17, 334-36, 389). *See VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (nurses did not exercise independent judgment in writing patient care plans because they "act within a framework established by the patient's doctor"). Moreover, the charge nurses' actions regarding these plans were dictated by rebalancing CNA workloads (A 262, 277) or following company protocols (A 347-50). In addition, the charge nurses' discretion is limited because they are expected to call for the attending physician's and nurse supervisor's intervention if a resident experiences a serious downturn in his or her condition, or a CNA staffing deficiency arises. (A 670; 42, 164, 205, 211-15.)

Second, the Company resorts to conjuring up, then attacking, a finding that the Board never made. It claims (Br 31) that the Board, in finding that the charge

nurses are not supervisors, effectively assumed that one admitted supervisor must single-handedly address “every change in the conditions of 251 residents” without a charge nurse “assigning and directing CNAs.” In fact, the Board made no such assumption. Rather, as the Company elsewhere admits (Br 22, 26), the Board found that the nurse supervisors are assisted by the charge nurses who assign, direct, and report the improper performance of the CNAs who help care for the patients.¹⁶

Finally, the Company grounds its argument on the record-distorting claim (Br 29) that “absolutely no evidence was presented” that any company policy or government regulation had any effect on the charge nurses’ exercise of independent judgment in assigning and directing CNAs. To the contrary, as shown above (pp. 30-31, 39, 41), there was ample evidence, including the testimony of the Company’s own witnesses, establishing that such policies and regulations often constrained the charge nurses’ assignment and direction of CNAs.

It follows that the Company has clearly failed to rebut the substantial evidence that supports the Board’s finding that the charge nurses did not assign or

¹⁶ Moreover, contrary to the Company (Br 31), the “ratio of supervisors to employees” is not “the test to determine supervisory status.” *NLRB v. Attleboro Assoc. Ltd.*, 176 F.3d 154, 163 n.5 (3rd Cir. 1999); *accord VIP Health Servs.*, 164 F.3d at 649-50 (if the putative supervisor lacks “Section 2(11) supervisory authority, the absence of anyone else [on the premises] with such authority does not automatically confer it”).

responsibly direct using independent judgment. Accordingly, those findings should be affirmed.

c. The Charge Nurses' Do Not Discipline or Effectively Recommend Discipline Using Independent Judgment

The record lacks any evidence establishing that the charge nurses discipline or effectively recommend discipline using independent judgment. (A 675, 680.)

The charge nurses testified that they lack the authority to discipline CNAs. (A169, 226.) Instead, their role was limited to providing information to the nurse supervisors who themselves decided whether to impose discipline. (A 680; 169, 226-27, 411-12, 435-36). Thus, the charge nurses explained that if they could not resolve a problem by asking the CNA to take corrective action, they would simply “let my supervisor know what’s going on,” and the supervisor would “take it from there.” (A 680; 411-12, 435-36). It is settled that supervisory discipline is not proven where, as here, the putative supervisor is merely “a conduit of information” for those who make the disciplinary decisions. *Meenan Oil*, 139 F. 3d at 322; *accord Atlantic Paratrans*, 300 Fed.Appx at 57; *Schnurmacher Nursing Home*, 214 F.3d at 266.

Likewise, while charge nurses may attempt to correct a CNA’s deficiency on an informal basis, they lack significant discretion in this regard because they are expected to bring any unresolved deficiencies to the attention of higher management. (A 680; 215, 227, 291-94, 411-12, 435-36). There was, however, no

evidence that, in providing such information, the charge nurses also effectively recommended that CNAs be disciplined. (A 680.) Accordingly, while ADON Cunningham generally asserted that the charges nurses are involved in the “initial” phase of the disciplinary process, she did not provide any specific examples of when and how they had effectively recommended discipline. Rather, she simply reiterated they would gather information and contact their supervisor. (A291-94.) *See Meenan Oil*, 139 F. 3d at 322 (reports of disciplinary problems containing no effective recommendation do not prove supervisory status).¹⁷

It follows that the Company’s reliance on this Court’s decision in *NLRB v. Quinnipiac College*, 256 F.3d 68 (2d Cir. 2001), is misplaced. There, the Court found that security department “shift supervisors” engaged in supervisory discipline because, unlike here, it was undisputed that they “may recommend that employees be disciplined” and had, in fact, made such recommendations. 256 F.3d at 76-77. However, the Court noted that the result would have been different if, as is the case here, the putative supervisors had merely acted as a conduit of information. *Quinnipiac College*, 256 F.3d at 77 (citing *Meenan Oil*, 139 F.3d at 322).

As the foregoing shows, the Company failed to prove that the charge nurses

¹⁷ Once again, the Company cannot prove supervisory status merely by citing a job description that refers to participating in counseling and disciplinary actions. (Br 5; 461-472.) Rather, as noted, it is settled that such “paper power” is insufficient.

engage in any supervisory function with the requisite independent judgment. The Company offered only conclusory testimony and generalized assertions which, settled law holds, are insufficient to prove supervisory status.

B. The Board Acted Within its Broad Discretion in Certifying the Union Rather than Ordering a Second Election

The Company challenges (Br 37-44) the Board's decision to certify the Union rather than hold a second election. Reiterating its claim from the underlying election proceedings (A692-718), the Company contends that the first election is invalid because of the passage of time and changes in the size and composition of the unit that occurred between the election and the certification. It also claims (Br 38) that the Regional Director erred in counting the impounded ballots while its self-styled "Request for Review" of July 23, 2008, was pending before the Board. We address these claims below.¹⁸

The Company faces a very heavy burden. The Court's role in reviewing the Board's decision to certify a union is limited to determining whether the Board acted within the "wide degree of discretion" entrusted to it by Congress in establishing the "safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). *Accord Heartshare Human Servs. v. NLRB*, 108 F.3d 467, 470 (2d

¹⁸ For the purposes of these claims, the Company assumes (Br 35) that the charge nurses were eligible to vote in the election.

Cir. 1997). Accordingly, the limited issue is whether the Company has shown that the Board “abuse[d] its discretion in certifying the election.” *NLRB v. Arthur Sarnow Candy Co., Inc.*, 40 F.3d 552, 556 (2d Cir. 1994) (citation omitted). The Company has failed to carry that burden.

1. The Board Reasonably Certified the Union Despite the Post-Election Passage of Time and Changes in Unit Size and Composition

Contrary to the Company (Br 37-40), the Board reasonably certified the Union after it won the election by a 24 to 5 margin. As the Board correctly observed (A 772), it is settled that post-election passage of time and changes in unit size and composition do not preclude certification of the union that prevailed in a validly conducted Board election. *See, e.g., NLRB v. Star Color Plate Service Div. of Einhorn Enterprises, Inc.*, 843 F.2d 1507, 1507-09 (2d Cir. 1988) (holding that certification of union was not precluded by 5-year delay and significant unit turnover that occurred between representation election and certification). *Accord Pearson Education Inc. v. NLRB*, 373 F.3d 127, 133 (D.C. Cir. 2004) (employee turnover and doubling in size of bargaining unit since representation election did not render union certification inappropriate); *King Electric, Inc.*, 343 NLRB No. 54 n.1 (2004) *enf’d in relevant part*, 440 F.3d 471, 474 (D.C. Cir. 2006)) (change in the size of the bargaining unit from 11 to 6 employees shortly after the election did not constitute “unusual circumstances” relieving employer of duty to bargain with

union).

There are good reasons for this rule. Otherwise, as this Court has explained, an employer could simply refuse to bargain and hope that the union's employee support would dissipate in the meantime. *See Star Color*, 843 F.2d at 1509. That logic applies with particular force here. After all, the Company effectively delayed the Union's certification by choosing to file several appeals in the election proceeding, only to then claim that the certification is invalidated by the passage of time and changes in unit size and composition that occurred while its appeals were being resolved.

Moreover, this Court has already rejected the same claim the Company makes (Br 37-39). *See Star Color*, 843 F.2d at 1509. In *Star Color*, an employer, much like the Company here, challenged a Board certification based in part on the 5-year delay between the election and the certification, and the significant unit turnover that occurred during that time (only a few of the employees who voted in the Board election remained in the unit by the time of the certification). *Id.* Like the Company (Br 37-42), the employer in *Star Color* argued, without success, that certifying the union in these circumstances would undermine employees' freedom of choice and frustrate the policies of the Act. This Court rejected that argument because:

Requiring another Board election in such a situation undermines the central purpose of the [Act], since it gives an

employer an incentive to disregard its duty to bargain in the hope that over a period of time the union will lose its majority status.

Star Color, 843 F.2d at 1509 (citation omitted).

Notably, this Court enforced the bargaining order despite its view that the 5-year delay was attributable to the Board's dilatory approach. *Id.* Thus, if anything, the rationale for certifying the Union is stronger here, where there was only about a 3-year interval between election and certification, which was due, at least in significant part, to the many appeals the Company filed in the election proceedings.¹⁹ Otherwise, the Company could invalidate an election merely by delaying the certification "in the hope that over a period of time the union will lose its majority status." *Star Color*, 843 F.2d at 1509.²⁰

There is also no merit to the Company's claim (Br 42) that this Court should extend the reasoning of "*Gissel*"²¹ bargaining order cases to situations where, as

¹⁹ For example, rather than engaging in undue delay, as the Company suggests (Br 44), the Board promptly remanded the representation proceeding to the Regional Director the day after it issued its controlling decision in *Oakwood Healthcare*. The Company then requested, and was granted, a second representation hearing during which it availed itself of the opportunity to present additional evidence and after which it filed additional briefs.

²⁰ This case is unlike *NLRB v. Long Island College Hosp.*, 20 F.3d 76, 83 (2d Cir. 1994), where this Court held that an employer did not have to bargain based on a Board order that was issued after a 15-year delay. The Court limited that holding to the extreme delay in that case, but also reaffirmed its holding in *Star Color* that a more modest delay, like here, would usually not invalidate an election. *Id.*

here, the union has won a Board election. Rather, as this Court has explained, those cases are “inapposite” precisely “because they involved bargaining orders issued where there had never been a representation election.” *Star Color*, 843 F.2d at 1509. *Accord Pearson Education Inc.*, 373 F.3d at 133 (noting the settled law that “apart from bargaining orders that arise in the *Gissel* context, turnover is not something that affects the ongoing validity of Board bargaining orders”).

2. The Board’s Decision to Count the Impounded Ballots Was Reasonable and Consistent with Its Rules and Regulations

Finally, the Company fails to show (Br 38) that the Regional Director misapplied the Board’s procedural rules by counting the ballots while the Company’s self-styled “Request for Review” (A699) was pending before the Board. *See* 29 C.F.R. § 102.67(b) (governing requests for review). Contrary to the Company, the Board reasonably treated that filing as a “special appeal,” which does not require that ballots remain impounded. *See* 29 C.F.R. § 102.65(c) (governing special appeals). It is settled that the Board has considerable latitude to interpret its own rules. *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). Thus, to succeed on appeal, the Company must do more than offer a reasonable view of the Board’s rules; rather, it must show that the Board’s view is unreasonable or precluded by the plain meaning of those rules. *Id.* The Company fails to meet that burden.

²¹ *See NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Section 102.67(b) of the Board's rules (29 C.F.R. § 102.67(b)) addresses when a party may file a request for review of a "decision by the Regional Director upon the record." That Section provides:

[I]f a pending request for review has not been ruled upon or has been granted, ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

Id. Here, the Regional Director reasonably found (A 774) that Section 102.67(b) is not applicable because that section does not contemplate the filing of a request for review following the issuance of a final Board decision or an action taken by the Regional Director to effectuate such a Board decision. Thus, in specifying when ballots must be impounded, Section 102.67(b) presumes that a final Board decision has not yet issued, i.e., it refers to "ballots whose validity might be affected by the final Board decision."

Moreover, Section 102.67(b) does not specify which "decision[s]" by a Regional Director are subject to a "request for review." Accordingly, the Board may reasonably interpret the term "decision" as including a Regional Director's findings and conclusions "upon the record," such as those in the Decision on Remand ("DOR") here, but excluding other, interlocutory administrative actions, such as the Regional Director's decision to count the ballots in accordance with the instructions in the Board's final decision. Otherwise, each of the numerous

decisions made by a Regional Director in each representation proceeding could result in an appeal that would require the delay entailed by impounding ballots.

Here, the Board reasonably found (A 791 & n.2) that the Company's so-called "Request for Review" did not challenge the Regional Director's DOR, but only his administrative determination to count the ballots in accordance with the Board's final decision. Accordingly, the Board reasonably deemed (*id.*) that "Request" to be a special appeal pursuant to Section 102.65(c) (29 C.F.R. § 102.65(c)).²² Moreover, as Section 102.65(c), in contrast to Section 102.67(b), does not provide for the impounding of ballots pending a Board ruling on a special appeal, it was appropriate for the Regional Director to open and count the ballots notwithstanding the Company's special appeal.

In any event, the Company fails to explain how the Regional Director's decision to count the ballots in July 2008 has any bearing on whether the Union was properly certified. Nor does it specify how it was harmed by that decision. Rather, the Company's so-called "Request for Review" (A 699-703) repeated its previously presented claim (A 692-98) that a second election was required by the passage of time and changes in unit size and composition. As just shown above

²² Section 102.65(c) provides that, as a general matter, rulings by the Regional Director or Hearing Officer shall not be appealed directly to the Board. In addition, however, that section sets forth the parameters under which a party may file a request for special permission to appeal such rulings.

(pp. 45-48), however, the Regional Director reasonably rejected the merits of that claim *before* he certified the election results. Moreover, the Company does not, and cannot, claim that the result would have been any different had the ballots been counted at a later time.²³ Likewise, while the Company objects to the Board's deeming its self-styled "Request for Review" to be a request for special permission to appeal, the relevant point is that the Board considered, and denied, all of the Company's claims on the merits. (A 791.)

²³ The Company's confusion is laid bare by its alternative claim (Br 38) that even if the ballots were properly counted in July, certification could not occur until after the Region considered the Company's objections. Simply put, the Regional Director *did* consider and reasonably overrule all of the claims made in these objections before he certified the Union.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

SAINT MARY HOME

Respondent

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* No. 09-0206-ag
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* Board Case No.
* 34-CA-12130
*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its final brief contains 12,315 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 6th day of July 2009

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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	*
Petitioner	*
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	*
SAINT MARY HOME	* Board Case No.
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Respondent	*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by e-mail to agencycases@ca2.uscourts.gov, and 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 listed below:

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