

Law Offices of
MORRIS TUCHMAN

134 Lexington Avenue, New York, New York 10016 - Telephone (212) 213-8899
Telefax (212) 213-6308

Morris Tuchman
J. Ari Weiss

Correspondence to New York

Long Island Office
35 Dune Road
Westhampton Beach, New York 11978

September 7, 2011

Office of Executive Secretary
National Labor Relations Board
By Electronic Mail only

Re: New Vista Nursing and Rehabilitation 22-CA-29988
Motion for reconsideration

May it please the Board:

Please be advised that the undersigned represents the above referenced Respondent and submits this motion for reconsideration of the Board's order dated August 26th, 2011 in this matter.

A) The Board should reconsider its order as it was issued after Member Liebman's departure from the Board

Notwithstanding being *dated* August 26, 2011, the (two) postage machine dates on the (two) envelopes that held the decision were August 31, 2011. Moreover, Collette Sarro of Region 22 advised the undersigned that she received the decision, apparently by electronic mail, on August 31, 2011. The Board's web site did not list this decision until after August 31, 2011. This decision was listed in the Board's summary of decisions for the "Week of August 29-September 2, 2011". All the evidence, therefore, suggests that this decision issued after Member Liebman's departure from the Board and her "signature", and participation, on the decision is *ultra vires*. Since a board decision requires at least a 3 member quorum, the order should be reconsidered and vacated.

B) The Board overlooked the procedural posture of the case and misapplied its precedent

In this case, the March 25 events with the LPN's (and other nurses) took place *before* the Board issued any ruling on the employer's request for review in the representation case. In the *East Michigan Care* case, relied on in the instant decision, *all alleged factual events* occurred *after* the *election took place* and, of course, well after the *Board had denied review* of the Regional Director's finding that the employees in the case were not supervisors. Moreover, in the subsequent investigation on challenges, *East Michigan* notes that the employer did not seek to adduce evidence of changed duties during the three and a half month period from the election to the certification.

In this case the period from the election to certification was *ten days*. The period from the filing of the request for review to the election was about two weeks. The factual events alleged in the Board's (22-CA-29845) complaint took place two *days* after the filing of the request for review or about 13 days before the Board denied review. It is respectfully submitted that requiring the employer to seek to reopen the record in this short time period in the run up to an election is unreasonable and hardly excuses denying the employer a fact hearing with the assertion that the employer should have asked to reopen the record.

In fact, although not alleged in the complaint, such meetings alleged in the complaint did not *just* take place on March 25, 2011 but continued *after* the election. It exalts, unfairly, form over substance and tries, with a "gotcha", to deny due process by imposing unrealistic and onerous requirements on the employer. No reading of the *Pittsburgh Plate Glass* citation in the Board's decision herein could reflect that the employer would be precluded in *this* case from (first) litigating (not "**re**-litigating") what *could not* be litigated in the representation hearing (since those facts did, as alleged by the Board, not yet exist when the representation hearing closed). There is a public policy vindication if the Act's statutory framework is protected. Supervisors are, statutorily, not to have divided loyalty between the employer and a union. If facts reflect that a person is a supervisor, the Board should see to it, upon an employer's objection, that such a person is not lumped into a bargaining unit

It should also be noted that the *Board* asserted that there were *factual* changes to the duties of the LPNs in its complaint in case number 22-CA-29845. The Board's web site states that the "filing" in case number 22-CA-29845 took place on February 14, 2011. The complaint, issued by the *same* Regional Director that determined the supervisory status of the LPNs, is dated April 28, 2011. It is, therefore, reasonable to believe that the Regional Director, and certainly "the Region", was aware of these factual change assertions *before* he issued the certification in this case on April 18th. Accordingly, before this motion for summary judgement was filed, and before the certification was issued, the Regional Director *knew* that there were alleged factual changes in the duties of the LPNs *that he was alleging*. It was, after all, only on June 9th, 2011, that the Regional Office's general counsel, the same general counsel that investigated, and subsequently litigated, the complaint in case 22-CA-29845,

made the instant motion for summary judgment. Thus, the Board, having acknowledged in the instant decision that it may take notice of its own proceedings, or at least its general counsel, knew *when the motion for summary judgment was made* that there were extant asserted factual changes in the duties of the LPNs. The Regional Director and the General Counsel, being aware of their own assertion that there were factual changes in the LPNs duties, were dutibound to alert the Board in the motion for summary judgment that such allegations existed and were to be tried at hearing.

In fact, the hearing just concluded in case number 22-CA-29845, should have been a hearing on the impact of the alleged, *and known to the Board*, changes on the supervisory status of the LPNs. At such a hearing, the Board could establish the facts to determine whether an “essential factor” underlying its certification had changed. *Frito Lay* 177 NLRB 820, 821. The Board, after a trial establishing the facts, could have determined that it was satisfied that the events alleged were “...clearly not for the purpose of avoiding compliance with the Board’s unit finding” *Id.* In fact, in the trial on the complaint, the employer, *inter alia*, argued as much.

In *Frito Lay* **with the case in an identical posture**, the Board **denied** summary judgement and sent the case to trial. After the trial it *vacated* the certification and dismissed the complaint. *See also UFCW, AFL-CIO, Local 540 v. NLRB*, 519 F.3d 490 (DC Cir, 2008) which cited *Frito Lay* with approval; *Wal-Mart Stores, Inc.*, 348 N.L.R.B. 274 (trial after certification). Indeed, it seems that most of the cases citing *Frito Lay* were determined *after trial*.

The complaint also alleged, and the *underlying representation case transcript* reflects, meetings in late January to assign annual evaluation of the nurses aides to the LPNs (along with *all* the employer’s nurses; RNs and LPNs). This would have been relevant at trial to determine if the actions taken were triggered before or after the representation petition was filed; another critical *Frito Lay* requirement.

In the over thirty two years since *East Michigan Care* was decided the Board has cited it about five times. It is not an oft cited case. In no case has its application been more draconian. In no case has the Board relied on it to deny a hearing for changes that took place *before* an election¹, after the close of the fact hearing, and certainly not where the Board was already aware of those changes even before the motion for summary judgment was filed. Moreover,

¹ The Board’s footnote 5 is thus glaringly inapplicable to this case as there has not been an election, let alone a certification, when the events occurred. Respondent has not conceded those charges, rather it brought them to the Board’s attention in order to have a trial on the facts.

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there is a huge difference in requesting that an employer seek to reopen a record in a three and a half month period from asking an employer to do so, on pain of being denied a trial before an administrative agency, in a 2-3 *week* period. It is respectfully submitted that such a draconian result would not come about in a federal court and certainly should not occur before the board, an administrative, quasi judicial, agency.

It is also respectfully submitted that the (preferably full) Board revisit *East Michigan Care* to state clearly when, and under what parameters, it will be applied and whether it should be overruled. This is especially so since *Frito Lay denied summary judgment* where *East Michigan* granted it and the two cases' handling of summary judgment cannot be reconciled.

Accordingly, the Board should reconsider this decision, deny summary judgement and order a trial on the refusal to bargain charges.

Very truly yours,

A handwritten signature in black ink, appearing to read 'MT', with a stylized flourish extending from the bottom right.

MORRIS TUCHMAN

MT:pf
cc: Collette Sarro Region 22
William Massey, Esq.