No. 10-73450

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

**BARSTOW COMMUNITY HOSPITAL –
OPERATED BY COMMUNITY HEALTH SYSTEMS, INC.**

Respondent

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

FRED B. JACOB
Deputy Assistant General Counsel

KIRA DELLINGER VOL
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2971
(202) 273-0656

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board to enforce a Board order against Barstow Community Hospital – Operated by Community Health Systems, Inc. ("the Hospital"). The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a) (29 U.S.C. § 160(a)) of the National Labor Relations Act, as amended ("the Act," 29 U.S.C. §§ 151). The Decision and Order, issued on November 8, 2010, and

reported at 356 NLRB No. 15 (ER 222-23),[1] is a final order with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Court has jurisdiction over the Board's application pursuant to Section 10(e) of the Act because the unfair labor practices occurred in Barstow, California. It was timely filed, as the Act imposes no time limit for such filings.

STATEMENT OF THE ISSUES PRESENTED

This case raises the question of whether substantial evidence supports the Board's determination that the Hospital violated Section 8(a)(1) and (3) of the Act by suspending, coercively interrogating, and discharging Lois Sanders because of her union activities. Because the Hospital essentially admits the underlying violation, the issues directly before the Court relate to the Hospital's affirmative defenses. They are, first, whether substantial evidence supports the Board's finding that Sanders was not a statutory supervisor in her role as acting Clinical Coordinator and, second, whether the Board abused its discretion in denying the Hospital's request to reopen the record for hearings on a new supervisory defense. The Court lacks jurisdiction to consider the Hospital's remaining challenge, to the

[1] "ER" refers to the Hospital's Excerpts of Record, filed with its brief, and "SER" refers to the Board's Supplemental Excerpts of Record, filed with this brief. Where applicable, references preceding a semicolon are to the Board's findings; those following, to the supporting evidence.

Board's decision-making process on review, because the Hospital failed to raise that issue before the Board.

STATEMENT OF THE CASE

This unfair-labor-practice case came before the Board on an amended complaint issued by the Board's General Counsel on April 10, 2003, pursuant to charges filed by the United Nurses Association of California, Union of Health Care Professionals, NUHHCE, AFSCME, AFL-CIO ("the Union"). (ER 214; ER 1-4, 12-13.) Following a hearing, an administrative law judge issued an initial decision on August 29, 2003, finding that the Hospital had violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by investigating Lois Sanders' union activities and by interrogating her about them, and had violated Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) by suspending, and subsequently terminating, Sanders for those activities. (ER 211 n.1, 217-18.) In reaching her decision, the judge rejected the Hospital's affirmative defense that the Act did not protect Sanders because she engaged in the union activities while acting as statutory supervisor in her role as a fill-in clinical coordinator. (ER 217.) The Hospital filed exceptions to the judge's decision before the Board. (ER 211 n.1.)

On September 30, 2006, the Board remanded this case to the judge (ER 211 n.1, 219) for further consideration in light of its modification of the supervisory-status test in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), *Croft Metals, Inc.*,

348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).[2] On remand, the Hospital filed a Motion to Reopen the Record in a new attempt to show that Sanders was a supervisor, this time in her role as a registered nurse ("RN"). The judge denied the motion, and the parties filed briefs. (ER 211 n.1, 219-20; ER 205.) The judge issued a supplemental decision on February 23, 2007, reevaluating, and once again rejecting, the Hospital's defense that Sanders was a supervisor during her shift as acting clinical coordinator when she engaged in the union activities. (ER 211, 219-21.) The Hospital filed exceptions to the supplemental decision before the Board, and the General Counsel and the Union filed answering briefs. (ER 211.)

On August 18, 2008, Chairman Schaumber and Member Liebman, acting as a two-member quorum of a three-member group delegated all of the Board's powers under Section 3(b) of the Act (29 U.S.C. § 153(b))[3], issued an Order ("the 2008 Order") affirming the judge's finding that the Hospital's interrogation, suspension, and termination of Sanders violated the Act, and agreeing with the judge that Sanders was not acting as a statutory supervisor when she engaged in

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[2] *See Barstow Cmty. Hosp.*, 348 NLRB 957, 957 (2006).

[3] Effective December 28, 2007, Board Members Liebman, Schaumber, Kirsanow, and Walsh delegated all of the Board's powers to Members Liebman, Schaumber, and Kirsanow, in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. (ER 211 n.2.)

the union activities. (ER 211-12.) In that Order, the Board further affirmed the judge's denial of the Hospital's Motion to Reopen the Record, and declined to rule on whether Sanders qualified as a supervisor in her role as an RN, finding that the Hospital had waived that issue. (ER 211 n.3.)

On March 17, 2009, the Board filed an application in this Court to enforce the 2008 Order. The Hospital filed its opening brief and a supplemental, superseding brief, and the Board filed a responsive brief. The Court subsequently stayed the case in light of a challenge to the two-member Board's authority pending in the Supreme Court. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that Section 3(b) of the Act authorized the Board to delegate its powers to a three-member group, but required that the "delegee group maintain a membership of three in order to exercise the delegated authority of the Board."[4] On June 24, 2010, the Board filed a motion to remand the case so that a properly constituted Board could give it prompt consideration. The Court granted that motion on August 26, and mandate issued on October 18, 2010.

On November 8, 2010, a three-member panel of the Board issued a Decision and Order, reported at 356 NLRB No. 15 ("the Order"), adopting the administrative law judge's recommended order "to the extent and for the reasons

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[4] *Id.* at 2644.

stated in" its prior two-member decision, and incorporating the 2008 Order by reference, except for a small modification to the remedial notice and method of interest calculation. (ER 222-23.) The Board's application for enforcement of its Order is now before the Court.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Hospital is an acute-care facility in Barstow, California, with an emergency room ("ER"), two medical-surgical floors, and various specialty departments. (ER 214-16; ER 27, 65, SER 14.) Maureen Bodine, Director of Nurses, supervises the Hospital's operations, and each department also has a manager. (ER 215; ER 27, 72, 79, 104, SER 17-19.) In addition, the Hospital employs Clinical Coordinators ("CCs"), who schedule employees, ensure appropriate staffing for changing patient loads, act as point person for personnel disputes, patient conflicts, and other problems, and occasionally fill in as nurses when the Hospital is short-staffed. (ER 219; ER 34, 76-77, 101.)

B. The Acting Clinical Coordinator's Role

In the ER, RNs triage patients and effectuate doctors' patient-care orders. (ER 214, 219; ER 26.) When the Hospital has no permanent CC on duty, RNs also cover the CC position, receiving a 10-percent pay differential when they assume

that role. (ER 214-15; ER 30, 79, 82, SER 21, 23.) An RN learns of her additional CC duties – primarily staffing, pharmacy duty, and admissions, but also potentially dealing with other issues that arise or calling in a manager to do so – when she reports to work for the affected shift, or when the acting-CC duties commence. (ER 215-16; ER 31, 33, 116, 157, SER 25.) The RN performs the CC duties in addition to her normal RN workload, and those supplemental tasks account for only a fraction of the work she performs during her shift. (ER 216 & n.9; ER 112-13.)

When an RN is assigned to act as CC, she receives a book that one of the Hospital's managers referred to as "The Brains." (ER 129.) The Brains contains the Hospital's policies and guidelines, staffing grids dictating nurse-patient ratios, master employee schedules, daily assignment sheets (already prepared by the permanent CCs), a list of patients, an emergency call list, instructions for "stocking" the emergency rosters, and other relevant information. (ER 215-16; ER 31-33, 77, 89, 129, SER 12-13.) Acting CCs are "encouraged . . . absolutely" to follow the book's policies, and the manager handing over The Brains may also provide additional, often quite specific, oral or written instructions. (ER 216; ER 32, 81, 138, SER 5, 19, 27.)

Aside from supplying The Brains as a reference and guide, the only training the Hospital gives an RN to prepare her for CC duty consists of explaining how to

read the staffing grid and how to retrieve medicine when the pharmacy is closed, and possibly having the RN shadow another RN performing the role. (ER 216; ER 151-53, 173, SER 29.) Before shifts covered by acting CCs, the Hospital's management "usually trie[s] to make sure that things [a]re sorted out" but, in addition to comprehensive hospital policies, The Brains also contains contact numbers for all hospital supervisors should any problem arise requiring their assistance or advice. Acting CCs "certainly call" if they encounter any issues, and it is "not uncommon" for the Hospital's managers to come in or otherwise handle problems themselves. (ER 216; ER 89, 129, 131, 160, SER 13, 20, 24-26.) An acting CC has no disciplinary authority and is to refer any employee misconduct to the manager of the employee's unit. (ER 216; ER 77, SER 22, 24.)

C. The Hospital Interrogated, Suspended, and Ultimately Fired RN Sanders Because of Her Union Activities

In May 2001, the Hospital hired Lois Sanders to work as an RN in its ER. (ER 214, 219; ER 25-26, 28.) Starting a few months into her tenure, Sanders was assigned to fill in as CC once or twice a week, on an ad hoc basis. (ER 214, 219; ER 30, 38.) Like other acting CCs, Sanders still spent the bulk of her time performing her usual RN duties. As acting CC, she had no authority to discipline, never gave permission for any employee to leave work, and believed that she would need to contact management for authorization before doing so. (ER 216, 220; ER 35, 37-38.) The manager who assigned Sanders to cover as CC instructed

Sanders to call her at home if any problems arose. (ER 216; ER 39.) When calling in staff to work, Sanders followed the prepared list in The Brains. She had no authority to order anyone to work and could contact a manager if she encountered staffing difficulties. (ER 216, 220; SER 6, 18-19.)

Early Spring 2002, after discussing working conditions with some of her coworkers, Sanders contacted various unions to set up informational meetings for the Hospital's employees. (ER 214; SER 4.) On August 9, while acting CC, Sanders approached RN Mary Capolupo about the Union. Capolupo reported her discussion with Sanders to nursing director Bodine, and followed up that report with an August 9 memo claiming that Sanders had asked her to speak to the Hospital's nurses about the Union. (ER 214-15; ER 97-99, 176-77.)

On August 31, Bodine called Sanders at home and informed her that the Hospital was suspending her without pay, pending investigation. (ER 215; ER 40.) She provided no reason for the suspension. (ER 215; ER 40-41.) The Hospital subsequently sent Sanders a letter notifying her of a scheduled September 17 "investigatory interview . . . for the purpose of inquiring into [her] conduct while recently assigned as a Clinical Coordinator." (ER 215; ER 43, SER 31.) During that interview, Bodine asked Sanders questions off a list prepared in advance. (ER 215; ER 52-53, 82-83, SER 33-37.) In response to one question, Sanders stated her understanding that, when acting CC, her duties were to take care of

staffing for the following shift and to deal with pharmacy needs. She did not convey an impression that she had a sense of authority in the acting-CC role, and said that she often accepted that role under protest. (ER 215; ER 53, 84, SER 34.) In a September 26 letter, the Hospital terminated Sanders "based upon [its] recent investigation into [her] conduct while assigned as a Clinical Coordinator." (ER 215; ER 174, SER 3.) The Hospital later admitted that it discharged her for engaging in union activity while acting CC, in violation of the Hospital's "policy . . . to remain union-free." (ER 215; ER 74-76, 91, SER 30.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found (ER 212-13, 222), in agreement with the administrative law judge, that the Hospital had violated Section 8(a)(1) (29 U.S.C. § 158(a)(1)) by interrogating Sanders about her union activities, and had violated Section 8(a)(3) and (1) (29 U.S.C. § 158(a)(3) and (1)) by suspending, and subsequently discharging, Sanders due to those same activities.[5] The Board rejected (ER 212, 222) the Hospital's defense that Sanders was a statutory supervisor in her role as acting CC. It also held (ER 212 n.3, 222) that the Hospital had waived its belated defense, raised only after the Board's post-*Oakwood* remand, that Sanders was a statutory supervisor in her role as an RN.

[5] The Board did not rule on the judge's additional finding that the Hospital's investigation of Sanders' activities was unlawful, as it would not materially affect the remedy in this case. (ER 211 n.4, 222.)

Consequently, the Board affirmed the administrative law judge's denial of the Hospital's Motion to Reopen the Record to elicit evidence in support of that defense.

To remedy the Hospital's unfair labor practices, the Board's Order requires the Hospital to cease and desist from: interrogating employees about their union or other protected concerted activities; suspending any employee for engaging in union or other protected concerted activities; discharging any employee for engaging in union or other protected concerted activities; or, 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). (ER 213, 222.) Affirmatively, the Order requires the Hospital to: offer Sanders full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position; make Sanders whole for any loss of earnings and other benefits suffered as a result of the discrimination against her; remove from its files any reference to the unlawful suspension and discharge and, within three days thereafter, notify Sanders in writing that this has been done and that the suspension and discharge will not be used against her in any way; and post, and distribute electronically, a remedial notice. (ER 213, 222.)

SUMMARY OF ARGUMENT

There is no dispute as to the essential elements of the unfair labor practices at issue here: the Hospital admittedly suspended, coercively interrogated, and subsequently discharged RN Sanders because of her protected union activities. The Hospital defends its conduct by arguing that Sanders was outside of the Act's protection as a statutory supervisor, either in her role as acting CC or in her role as RN. With respect to the acting-CC position, however, the Hospital has dropped all but one half-hearted argument in support of Sanders' supervisory status, relying on conclusory testimony insufficient to meet its burden of proof, and little else. The Hospital focuses on its RN-supervisor defense, but cannot overcome the fact that it forfeited that defense by failing even to suggest it before the administrative law judge or in its initial appeal to the Board. The Hospital's further argument that the Board failed to consider the arguments it did properly raise is entirely without merit. In sum, this Court should have no trouble determining that ample evidence supports the Board's unfair-labor-practice findings and that the Board did not abuse its discretion in denying the Hospital leave to develop an entirely new defense on remand.

ARGUMENT

I. The Hospital's Interrogation, Suspension, and Discharge of Sanders Violated Section 8(a)(1) and (3) of the Act

A. The Hospital admittedly suspended Sanders because of her reported union activities, coercively interrogated her about those activities, and discharged her because of them

Section 7 of the Act (29 U.S.C. § 157) confers on employees "the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities . . . ." To protect those rights, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)), in turn, bars "discrimination in regard to . . . tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(1) when it coercively interrogates an employee about the employee's union activities.[6] It violates Section 8(a)(3) and (1) when it suspends or terminates the employee because of those activities.[7]

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[6] *Hotel & Rest. Employees v. NLRB*, 760 F.2d 1006, 1008-09 (9th Cir. 1985) (enforcing Board's totality-of-circumstances test for determining when interrogations are coercive).

[7] *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 394 (1983); *Nabors Alaska Drilling, Inc. v. NLRB*, 190 F.3d 1008, 1014 (9th Cir. 1999).

The undisputed facts of this case establish the elements of the Section 8(a)(1) and (3) violations that the Board found. Sanders' union activities admittedly motivated the Hospital's decisions to suspend and terminate her. And the circumstances of her interview were undeniably coercive: the Hospital summoned her in writing to an "investigatory interview" during an unexplained suspension. When she arrived at the interview, two high-level hospital officials asked her a series of pre-determined questions about her job duties and union activities, recording her answers and declining to answer her questions. After that interrogation, the Hospital's next communication with Sanders was a formal letter of termination.[8]

Understandably, the Hospital does not contest any of the elements of the violations found. Its challenge to the merits of the Board's Order rests exclusively on Sanders' alleged supervisory status, so the Board is entitled to enforcement of that Order if the Court agrees that Sanders is not a statutory supervisor. As this brief will demonstrate, the Hospital has not established that Sanders was a

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[8] *See Westwood Health Care Ctr.*, 330 NLRB 935, 939 (2000) (noting that factors such as appearance that interrogator is seeking information to use as a basis for action against questioned employee, interrogator holding relatively high position in employer's hierarchy, employee having been summoned to boss' office for questioning, and "an atmosphere of unnatural formality" during the interview tend to show unlawful coercion) (citing *Bourne Co. v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)). *Compare Hotel & Rest. Employees*, 760 F.2d at 1007, 1009 (holding employer's casual questions to avowed union adherent as to why he was organizing the union were not coercive).

supervisor in her role as acting CC, and it has forfeited its opportunity to argue that she was a supervisor in her role as an RN.

In reviewing the Board's Order, this Court will uphold the Board's legal determinations under the Act so long as they are "reasonable and not precluded by Supreme Court precedent."[9] It must also accept as conclusive Board findings of fact that are supported by substantial evidence in the record considered as a whole.[10] Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion."[11]

B. Sanders was not a supervisor in her role as acting CC

Having admitted to interrogating, suspending, and discharging Sanders due to her union activities, the Hospital asserts as an affirmative defense that it had the right to engage in such otherwise unlawful conduct because Sanders was acting as a supervisor in her role as CC when she engaged in those activities. This Court has

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[9] *East Bay Auto. Council v. NLRB*, 483 F.3d 628, 633 (9th Cir. 2007) (quotations omitted). *See also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts.") (citation omitted); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 551 (9th Cir. 1997) ("We defer to the Board's reasonably defensible interpretation and application of the [Act].") (quotations omitted).

[10] 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord East Bay*, 483 F.3d at 633; *Providence*, 121 F.3d at 551.

[11] *Universal Camera*, 340 U.S. at 477.

recognized the Board's "expertise in making the subtle and complex distinctions between supervisors and employees," and consequently accords the Board "particularly strong" deference regarding such supervisory determinations.[12] The Hospital utterly fails to establish its supervisory defense or even show that Sanders' status is a close call, much less demonstrate that the Court should disregard the Board's determination in this case despite the agency's particular expertise.

Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes "any individual employed as a supervisor" from the definition of "employee" protected under the Act. Section 2(11) of the Act (29 U.S.C. § 152(11)) defines a "supervisor" as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly 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.

An individual is a statutory supervisor, as defined in Section 2(11), if she holds the authority either to perform or effectively to recommend any one of the 12 supervisory functions enumerated in the statute, and if her "exercise of such authority is not of a merely routine or clerical nature, but requires the use of

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[12] *Providence*, 121 F.3d at 551 (quotations omitted).

independent judgment."[13] The burden to prove an individual's supervisory status by a preponderance of the evidence rests with the party asserting it.[14]

Before this Court, the Hospital has dropped any claim that Sanders engaged in the responsible direction of others (which it had argued before the Board), and now bases its defense entirely on the claim (Br. 31-34) that Sanders "assigned" with independent judgment as acting CC. In determining whether an individual exercises a supervisory function with "independent judgment," rather than in a "routine or clerical" manner, the Board looks at the "degree of discretion" involved in making the decisions at issue.[15] "[A]t a minimum," the alleged supervisor must "act . . . free of the control of others and form an opinion or evaluation by discerning and comparing data."[16] Judgments dictated or constrained by detailed written or oral policies or instructions are not "independent."[17]

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[13] *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712-13 (2001) (quotation omitted). *Accord Oakwood*, 348 NLRB at 687. A third requirement, that the authority be held "in the interest of the employer," *Kentucky River*, 532 U.S. at 713; *Oakwood*, 348 NLRB at 687, is not at issue here.

[14] *Oakwood*, 348 NLRB at 694. *Accord Kentucky River*, 532 U.S. at 710-12.

[15] *Oakwood*, 348 NLRB at 693 (emphasis omitted).

[16] *Id.*

[17] *Id.*

While the Board agreed that Sanders "assigned" work to others under the statute, it reasonably determined (ER 212) that the Hospital failed to show that she did so with the independent judgment necessary to qualify as a statutory supervisor. To show otherwise, the Hospital relies (Br. 32) on a few isolated statements in the record. It cites testimony that, in assigning work, CCs would sometimes consider how long nurses had been at the Hospital, their years of nursing experience, and whether they were experienced in a specialty required for a particular vacancy, and refers the Court to testimony that a CC might have to evaluate whether a department's resistance to taking a new patient is warranted. The record, however, also contains substantial evidence to the contrary, both in the form of Sanders' account of her actual experiences as acting CC and through the Hospital's witnesses' testimony regarding the primacy of The Brains and the sometimes limited responsibilities of acting CCs. *See, e.g.*, SER 1-2, 5-7, 8-10, 14-15, 28.

The Board explicitly declined to resolve that testimonial conflict. (ER 212.) Instead, it cited the paucity and conclusory nature of the Hospital's evidence suggesting discretion in the CC's implementation of The Brains, and reasonably found (ER 212) that evidence – *even assuming* it would be fully credited over contradictory testimony – insufficient to satisfy the Hospital's burden to prove independent judgment by a preponderance of the evidence.

The Board has long required specific evidence and concrete examples to establish supervisory status, and has made clear that broad assertions like the ones at issue here are inadequate.[18] In *Lynwood Manor*, for example, the Board held that testimony very similar to the Hospital's witnesses' here was insufficient to establish independent judgment.[19] In that case, a nurse testified that she "determine[d] staffing needs based on her assessment of patient acuity, the oral report of the prior shifts, and the 24-hour report." The Board noted the lack of any evidence that staffing decisions were tailored to account for patients' needs, the staff's abilities, or the time required to treat different medical conditions.[20] Both *Lynwood* and this case contrast with *Oakwood*, where the Board found independent judgment based on testimony – containing a number of specific examples – that charge nurses, guided by employer policies, had actually considered various

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[18] *See Avante at Wilson, Inc.*, 348 NLRB 1056, 1056-57 (2006) (holding employer failed to establish supervisory status where testimony generally asserted the existence of the supervisory function at issue but failed to "particularize" when or in what context it was exercised, which personnel were involved, whether management was consulted, or any other similar details); *Chevron Shipping Co.*, 317 NLRB 379, 381 n.6 (1995) (rejecting supervisory determination based on conclusory evidence); *Sears, Roebuck & Co.*, 304 NLRB 193, 193 (1991) ("[C]onclusionary statements made by witnesses in their testimony, without supporting evidence, do[] not establish supervisory authority.").

[19] 350 NLRB 489 (2007).

[20] *Id.* at 490.

factors in making assignments, including staff skills, work loads, and patient needs.[21]

In sum, even crediting the Hospital's witnesses, the Hospital failed to demonstrate that acting CCs enjoy the level of autonomy required to qualify as statutory supervisors. Many of the acting CCs' "discretionary" decisions closely track examples the Board specifically declared insufficient in *Oakwood*, notably maintaining the nurse-patient ratios set forth in The Brains or equalizing patient loads on the two medical-surgical floors.[22] More fundamentally, not only did the Hospital provide acting CCs with "detailed instructions and policies" by way of its aptly nicknamed book, The Brains, but there is also ample evidence that it expected the CCs to adhere to those hospital procedures. (SER 11, 12-13, 16, 19.)

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[21] *Oakwood*, 348 NLRB at 696.

[22] *Id.* at 693 (explaining that an assignment "dictated or controlled by detailed instructions" such as fixed nurse-patient ratios, or "made solely on the basis of equalizing workloads[,] . . . 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"). *Accord Lynwood Manor*, 350 NLRB 489, 490 (2007) (citing *Oakwood* and holding employer had "not established that the reassignment of a[n aide] from one nursing unit that is overstaffed to another that is understaffed involves anything more than the 'mere equalization of workloads'"); *Golden Crest Healthcare*, 348 NLRB 727, 730 n.9 (2006) (citing *Oakwood* and explaining that altering workloads to balance quantity of work is routine and does not implicate independent judgment).

C. The Board reasonably declined to reopen the record on remand to admit evidence relevant to an untimely affirmative defense

In order to prevail in its efforts to reopen the record, the Hospital would have to persuade this Court that the Board abused its "considerable discretion" in denying the Motion to Reopen.[23] But, far from constituting an abuse of discretion, that ruling is consistent with the Board's practice of remanding cases for development of further evidence in light of new law only for *already litigated* issues, exemplified by the cases the Hospital cites in its brief (Br. 23-25).[24] The

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[23] *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1300 (9th Cir. 1991) (quotations omitted).

[24] *See Solartec, Inc.*, 352 NLRB 331, 332 (2008) (explaining that Board had remanded case for further consideration, and to reopen record, regarding already litigated supervisory issue in light of Supreme Court decision), *enforced*, 310 F. App'x 829 (6th Cir. 2009); *United Cerebral Palsy of N.Y.C.*, 343 NLRB 1, 1 & n.2 (2004) (explaining that employer had argued employees' supervisory status in earlier proceeding, and that Board had remanded case and reopened record "for further consideration of whether the disputed employees are supervisors" in light of Supreme Court decision), *enforced*, 175 F. App'x 366 (2d Cir. 2005); *The Majestic Star Casino, LLC*, 335 NLRB 407, 408 (2001) (remanding for reopening of record regarding supervisory status issues already litigated by parties and decided by hearing officer, in light of Supreme Court decision); *Grandview Health Care*, 322 NLRB No. 54, 1996 WL 597873, *2 n.1 (1996) (describing remand and reopening of record upon grant of reconsideration of Board decision adjudicating fully litigated supervisory issue in light of Supreme Court decision), *enforced*, 129 F.3d 1269 (D.C. Cir. 1997); *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1192 & n.3 (1994) (noting part of case had been severed and remanded for new hearing to elicit *further* evidence regarding certain employees' supervisory status in light of Supreme Court decision but also holding RNs, were not supervisors, without

Hospital cites no case for the proposition that the Board must – or even regularly chooses to – reopen the record in its cases to receive evidence relevant to newly raised issues like the Hospital's RN-supervisor defense here.

Under well-established Board law, an argument not raised before the conclusion of the administrative hearing in a case is untimely.[25] In this case, the Hospital argued, before both the judge and the Board, only that Sanders was a supervisor *when acting as CC*. It did not suggest that she was a supervisor in her role as RN at any time before the close of the hearing, much less in its post-hearing brief to the judge or exceptions to the Board.

After deciding *Oakwood*, the Board remanded this case to the judge for reconsideration of the CC-supervisor argument in light of the newly announced supervisory standard. On remand, the Hospital sought to reopen the record to present evidence regarding a brand new defense, i.e., Sanders' supervisory status as an RN. Because the Hospital had long since forfeited any such RN-supervisor defense, the Board reasonably denied the Motion to Reopen and declined to give

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remand or rehearing, based on lack of any evidence of their supervisory status in original hearing).

[25] *See Yesterday's Children, Inc.*, 321 NLRB 766, 766 n.1 (1996), *enforced in relevant part*, 115 F.3d 36, 47 (1st Cir. 1997); *Nursing Ctr. at Vineland*, 318 NLRB 337, 337 (1995); *Cliffstar Transp. Co.*, 311 NLRB 152, 152 n.4 (1993). *Cf. United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

the Hospital a second crack at justifying its otherwise plainly unlawful interrogation, suspension, and discharge of Sanders. The Board's refusal to let the Hospital inject a new defense in the middle of this case is unexceptional, and the Hospital has not given this Court any valid reason to override that decision.

The Hospital argues (Br. 18, 25, 27) that it had no opportunity – and, implicitly, no reason – to raise the issue of Sanders' supervisory status as an RN before the Board issued *Oakwood*, contending (Br. 18) that it was constrained "to present its case based on the state of the law as it . . . existed" at the time of the hearing. Citing a 1996 case as defining that extant law, the Hospital asserts (Br. 18) that evidence regarding the RN-supervisor issue was irrelevant before *Oakwood* because neither technical nor professional judgment could establish supervisory status. Indeed, it describes (Br. 17) *Oakwood*'s "most important[]" change – presumably the basis for any assertion that the Board and this Court should ignore the Hospital's procedural waiver of the RN-supervisor defense – as the express abandonment of the Board's "previous position that a party could not prove a putative supervisor's independent judgment based upon her ordinary professional or technical judgment."

That argument is disingenuous in light of the Hospital's simultaneous acknowledgement (Br. 15-16 & n.6, 19) – even insistence – that the Board's supervisory standard was in fact unsettled at the time of the hearing in this case.

That uncertainty stemmed from the Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc.*,[26] which issued in 2001, nearly two years before the Complaint in this case (and well over a year before the Hospital unlawfully suspended, interrogated, and fired Sanders for union activities). As the Hospital itself acknowledges (Br. 14-15), *Kentucky River* held that the Board's technical/professional limitation on "independent judgment" was "unlawful," mandating a change in Board law.[27] *Oakwood* is the Board's response to *Kentucky River* and, like the employer in *Oakwood*, the Hospital could have participated in the Board's formulation of that response by advocating for its preferred standard in the wake of *Kentucky River*. It chose instead not to raise the RN-supervisory issue at all.

Finally, the Hospital's passing suggestion (Br. 23) that the Board may have reached outside of its statutory jurisdiction to decide this case is without merit. While the Board lacks authority to adjudicate an alleged unfair labor practice *once*

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[26] 532 U.S. 706 (2001)

[27] *Id.* at 714, 721. *Cf. Vineland*, 318 NLRB at 337 (rejecting argument that employer was "precluded" from raising supervisory status issue because trial predated Supreme Court decision that "reversed some aspects of Board law applicable to the supervisory status," noting that Court had already granted certiorari in case at time of trial).

it determines that the putative discriminatee is a statutory supervisor,[28] the initial supervisory determination is a highly factual one that lies squarely within the Board's expertise and jurisdiction under the Act.[29] When, as here, the party bearing the burden of proof and persuasion on a supervisory issue fails even to suggest it in a timely manner, the Board and the courts have had no trouble finding the issue waived.[30]

In sum, the Hospital asks this Court to accept the incredible proposition that, as it formulated its defense, it had no reason or opportunity to develop evidence or

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[28] *See Parker-Robb Chevrolet*, 262 NLRB 402, 402-04 (1982) (acknowledging "the general exclusion of supervisors from coverage under the Act," and discussing exceptions not relevant here), *rev. denied sub nom. Auto. Salesmen's Union, Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

[29] *See Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 551 (9th Cir. 1997) ("Because the Board has expertise 'in making the subtle and complex distinctions between supervisors and employees, ... the normal deference [we] give to the Board is particularly strong when it makes those determinations.'") (citation omitted). *Providence* also serves as an example of the sort of fact-intensive analysis required to make a supervisory determination.

[30] *See, e.g.*, *NLRB v. Konig*, 79 F.3d 354, 359-62 (3d Cir. 1996) (finding supervisory argument waived because it was not raised before the Board, and explaining that "the facts upon which the Board determines it has jurisdiction may be challenged only upon timely exception") (internal citations omitted); *Yesterday's Children, Inc.*, 321 NLRB 766, 766 n.1 (1996) (denying as untimely an employer's motion to amend answer and supplement record and brief to argue employee is statutory supervisor), *enforced in relevant part*, 115 F.3d 36, 46-47 (1st Cir. 1997) (agreeing that employer waived supervisory argument by failing to raise it in a timely manner under the Board's procedures). *Cf. St. Barnabas Hosp.*, 334 NLRB 1000, 1000 n.2 (2001) (declining to reopen record to examine discriminatees' supervisory status when employer had presented no evidence of such status at the hearing or in its brief), *enforced*, 46 F. App'x 32 (2d Cir. 2002).

present an argument regarding Sanders' role as an RN because of the Board's technical/professional limitation on "independent judgment," a limitation that the Supreme Court had squarely rejected years before the Complaint issued in this case. The bottom line is that the Hospital made a deliberate choice, for whatever reason, not to develop or argue the RN-supervisor defense. And it made that choice with the full knowledge that Board law on supervisory status, particularly in the healthcare context, was unsettled. It cannot use *Oakwood* to revisit that strategic decision even if it now believes it made a bad call.

II. The Court Has No Jurisdiction to Consider the Hospital's Renewed Challenge to the Board's Process Which Is, In Any Event, Meritless

The Hospital also partially renews its motion for a remand, which this Court has already denied, dropping any request for discovery before the Board, but urging (Br. 31) the Court to mandate that the Board "actually review [the Hospital's] exceptions" to the judge's decision. Like the rejected motion for remand, the Hospital's renewed request suffers from two fatal flaws. It is both procedurally barred and without substantive merit.

First, the Court lacks jurisdiction to consider the Hospital's remand request because the Hospital failed to raise any challenges to the Board regarding its decision-making process following this Court's remand of the two-member Board decision in this case. Section 10(e) of the Act (29 U.S.C. § 160(e)) provides: "[n]o objection that has not been urged before the Board . . . shall be considered by

the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."[31] Extraordinary circumstances adequate to avoid that jurisdictional bar "exist[] only if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time,"[32] and the Hospital has not even suggested that such circumstances exist here. Moreover, as this Court has explained, that narrow exception to the Section 10(e) bar "has been applied only in rare cases."[33]

Absent extraordinary circumstances, therefore, a reviewing court has no jurisdiction to consider an argument, like the Hospital's challenge to the Board's processes here, if that argument has not been raised before the Board.[34] Even aspects of a case that arise for the first time in a Board decision are properly

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[31] *Accord NLRB v. Sambo's Rest., Inc.*, 641 F.2d 794, 795 (9th Cir. 1981) (quoting Section 10(e)); *New York & Presbyterian Hosp. v. NLRB*, __ F.3d __, 2011 WL 2314955, *8 (D.C. Cir. June 14, 2011) (same).

[32] *NLRB v. Allied Prods. Corp.*, 548 F.2d 644, 654 (6th Cir. 1977).

[33] *Sambo's*, 641 F.2d at 796 (quotations omitted).

[34] *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) ("[T]he Court of Appeals lacks jurisdiction to review objections that were not urged before the Board."); *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1103 n.10 (9th Cir. 2008) ("Section 10(e) of the Act constitutes a jurisdictional bar to this court considering claims not raised before the NLRB.") (citing 29 U.S.C. § 160(e); *Woelke & Romero, supra*).

challenged before the Board in the first instance, through a motion for reconsideration.[35]

Here, after the Board issued its 2010 Order, the Hospital had an opportunity to raise any concerns it might have had regarding the agency's deliberative process. Specifically, the Hospital had 28 days from service of that Order to move the Board for reconsideration, rehearing, or reopening of the record, pursuant to Section 102.48(d)(1) & (2) of the Board's Rules and Regulations (29 C.F.R. § 102.48(d)(1) & (2)).[36] It failed to do so, however, and the fact that the Board applied for enforcement in this Court before the end of that 28-day period is irrelevant, as the Court of Appeals for the District of Columbia Circuit recently held in a materially identical case.[37] Section 10(e) of the Act vests a court with exclusive jurisdiction over a case only after the record is filed. The Board filed its

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[35] *See Woelke & Romero*, 456 U.S. at 665; *Int'l Ladies' Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). *Accord Sambo's*, 641 F.2d at 796 ("Since the Company failed to file a motion for reconsideration to contest the appropriateness of the additional remedies, it is barred from raising such arguments for the first time in this court."); *Allied Prods.*, 548 F.2d at 654 (holding Board's *sua sponte* adoption of remedy does not amount to "extraordinary circumstances" excusing failure to move for rehearing).

[36] *See also Woelke & Romero, supra*.

[37] *See New York & Presbyterian*, __ F.3d __, 2011 WL 2314955 at *8 (citing 28-day reconsideration period and concurrent jurisdiction in finding Section 10(e) barred hospital's challenge to Board's post-*New Process* decisionmaking process, and rejecting hospital's argument that Board's application for enforcement during 28-day period was "extraordinary circumstance" within meaning of Section 10(e)).

record in this case on January 3, 2011, allowing the Hospital the full 28 days after the 2010 Order to file a motion for reconsideration.

In conclusion, the Hospital neglected to challenge the Board's review of the judge's decision before the Board itself, and does not even assert that a change of law or other extraordinary circumstance prevented it from doing so. That choice deprived the Board of any opportunity to explain its decision-making process. Consequently, this Court has no jurisdiction to entertain any objections to that process at this juncture.

In any event, as described more fully in the Board's opposition to the Hospital's unsuccessful motion for remand, the Hospital's allegation (Br. 29) that the Board failed to consider its exceptions is specious. Courts apply a "presumption of regularity" under which they presume that public officials have properly discharged their official duties, absent "clear evidence to the contrary."[38] The Hospital has not even purported to provide any such evidence.

In its decision, the Board specifically stated (ER 222) that the three-member panel "considered the judge's decision and supplemental, and the record in light of

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[38] *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *see also Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967) ("A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the views of their colleagues.").

the exceptions and briefs . . . ." The Hospital counters the Board's representation, and asks the Court to set aside the settled judicial presumption of regularity in agency decision making, based on an inference that the Board misrepresented its deliberative process and "rubberstamped" a prior two-member decision without deliberation.[39] The Hospital urges the Court (Br. 30) to make that leap based solely on the fact that a three-member adjudicatory panel of the Board resolved an appeal in 21 days, but fails to provide any legal authority for such an inference. That failure is unsurprising, as courts have consistently rejected attempts to delve into administrative agencies' decision-making processes based on how quickly the agencies carried out their duties.[40]

In sum, the Court has no jurisdiction to consider the substance of the Hospital's renewed request for a remand and, if it did, no basis to remand the case.

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[39] *Cf. Braniff Airways*, 379 F.2d at 462 (A court "cannot allow the recital by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities to be overcome by speculative allegations.").

[40] *See, e.g.*, *NLRB v. Biles Coleman Lumber Co.*, 98 F.2d 16, 17 (9th Cir. 1938) (holding "bare allegation" that Board failed to read transcript or examine exhibits is not a viable allegation of denial of due process); *Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1146 (2d Cir. 1974) (FDA Commissioner issued new regulations 13 days after he took office; court rejected claims that Commissioner could not have reviewed and considered the more than 1,000 exceptions filed in opposition to the proposed regulations).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court grant its application for enforcement, and enter a judgment enforcing in full the Board's Order in this matter.

s/ Fred B. Jacob
FRED B. JACOB
Deputy Assistant General Counsel

s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Attorney

National Labor Relations Board
1099 14th St., NW
Washington, D.C. 20570
(202) 273-2971
(202) 273-0656

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

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STATEMENT OF RELATED CASES

There are no related cases currently pending in this Court. The Board notes, however, that *NLRB v. Barstow Community Hospital—Operated by Community Health Systems, Inc.* (9th Cir. No. 09-70771) involved the 2-member Board's 2008 Order incorporated in the 2010 Order at issue in this case. The Court granted the Board's motion to remand that case without addressing the merits of the Board's Order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	Case No. 10-73450
Petitioner	)	
	)	Board Case No.
v.	)	31-CA-26057
	)	
BARSTOW COMMUNITY HOSPITAL OPERATED BY COMMUNITY HEALTH SYSTEMS, INC.	)	
	)	
Respondent	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,545 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 21st day of September, 2011

9th Circuit Case Number(s) 10-73450

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