

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**NEW VISTA NURSING AND
REHABILITATION, LLC**

and

Case 22-CA-29988

**1199 SEIU UNITED HEALTHCARE
WORKERS EAST, NJ REGION**

ORDER DENYING MOTION FOR RECONSIDERATION

On September 9, 2011, the Respondent filed a Motion for Reconsideration of the Board's August 26, 2011 Decision and Order¹ granting the Acting General Counsel's Motion for Summary Judgment and, inter alia, ordering the Respondent, on request, to bargain with 1199 SEIU United Healthcare Workers East, NJ Region as the certified collective bargaining representative of its unit employees.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

Having duly considered the matter, the Respondent's motion is denied for the following reasons.

¹ *New Vista Nursing and Rehabilitation, LLC*, 357 NLRB No. 69.

² Chairman Pearce, who is recused and did not participate in the underlying decision, is a member of the present panel but did not participate in deciding the merits of this proceeding.

In *New Process Steel v. NLRB*, __ U.S. __, 130 S. Ct. 2635 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 130 S. Ct. at 2644; see also *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 1 fn. 1 (2010).

The Respondent advances two arguments in support of its motion. First, the Respondent contends that the above-referenced Decision and Order decision issued *after* Chairman Wilma B. Liebman's departure from the Board and is therefore void as ultra vires. The Respondent notes that, although the Decision and Order is dated August 26, 2011, the postmark on the decision mailed to the Respondent was August 31, 2011; a Region 22 Board agent stated that she received the decision on August 31; the decision did not appear on the Board's website until after August 31; and the decision was listed in the Board's summary of decisions for the week of August 29-September 2. Thus, the Respondent contends, the Decision and Order issued after the end of the term, on August 27, 2011, of former Chairman Liebman, who was on the panel that decided the case. Even assuming, *arguendo*, that these factual representations are accurate, we find this argument without merit.

There is no dispute that the Board dated the above-referenced Decision and Order August 26, 2011. Consistent with Board practice, the date of the Decision and Order reflects the date on which all members had voted on the final draft. At that point, the Decision and Order was ready for issuance to the public and service on the parties. The reproduction, mailing, and uploading of the decision to the Board's website are purely ministerial functions that did not affect the date certain on which the Decision and Order issued. Such an approach has found approval in the courts. See, e.g., *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453, 459 (D.C. Cir.1967) ("[T]he crucial time for testing the validity of an order to be the time when it is adopted and entered, and not when it comes into the

hands of the parties. This approach seems entirely reasonable.”) (internal footnote omitted). Thus, the Respondent’s allusion to the dates of ministerial functions is irrelevant with respect to when final action was taken in this proceeding. August 26, 2011 is the date on which final action was taken by the Board, and that is the date on which the Board’s Decision and Order became effective.

The Respondent also contends that the Board erred in failing to order a hearing on its contentions that it changed the duties of unit employees after the Regional Director issued his Decision and Direction of Election finding that those employees are not supervisors, and that those changes establish that the employees currently possess supervisory authority and the unit is now inappropriate. For the reasons set forth in the Board’s August 26, 2011 Decision and Order, we reject the Respondent’s contentions.

Dated, Washington, D.C., December 30, 2011

Craig Becker, Member

Brian E. Hayes, Member