

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

In the Matter of:

NEW VISTA NURSING & REHABILITATION
CENTER,

Case No. 22- CA-29845

Respondent,

And

SEIU 1199, NEW JERSEY HEALTH CARE UNION,
AFL-CIO,

Charging Party.

RESPONDENT'S EXCEPTIONS BRIEF

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INTRODUCTION

This memorandum is submitted by New Vista Nursing and Rehabilitation, LLC (“respondent”, “facility”, “employer”) in support of its position that the Administrative Law Judge’s (“ALJ”) decision in this case should be reversed, the recommended order should not be adopted by the Board and that instant complaint should be dismissed in its entirety.

STATEMENT OF FACTS

As the ALJ observed, the instant complaint is a narrow one. The ALJ reviewed the allegations of the complaint in this case.(tr- 8). The complaint deals with three dates where allegations are made; 1/27, 1/31 and 3/25 of 2011. All of the allegations are not section 8(a)5 ones. Furthermore, there was no relitigation of the supervisory issues contemplated or permitted.¹ (Tr-12, 83) The entire representation case transcript, however, was introduced into evidence *with no limitation put on its use*. (Tr-12) No objections or ULP’s concerning the election campaign that reflect animus were filed by 1199. There were no assertions of improper statements, threats etc. filed concerning the election.

¹ Of course, if ALJ were to have determined the supervisory issue, the representation case record in evidence in this case as well as the clear re-education of the nurses on their disciplinary authority on March 25, 2011, amply proved that the LPNs, and indeed all of the floor nurses, are supervisors. The General Counsel “admitted” that RN floor nurses, who do the same work as LPN floor nurses, are “all” supervisors.(see ALJ decision (“ALJD”) at 4-5.

The record reflects (tr-17) that at a meeting held on 1/27 between DNS Vicky Alfeche (“Vicky”) and LPN Abosede Adekanmbi (“Abi”), who works the 3 pm - 11 pm shift. (tr-18) Abi was called into Vicky’s office “about 3:30” (tr-18) Vicky told Abi that “she heard that I was passing the union cards to the organizers” (tr-18) Abi responded “...no, that she should bring the person that told her that I was passing the cards to my face right now” (tr-18) When asked, however, “had anyone from the employer told you that they knew you were--- had engaged in union activity” Abi answered “no” (tr-19). That was the extent of the General Counsel’s (“GC”) prima facie case supporting the allegations of paragraph 8 of the complaint and that date.

Referring to 1/31/11 (tr-19), Abi noted that she was working 3-11 that day (tr-19) and attended a meeting that day at about 3:30 pm. Newt Weinberger (“Newt”), Vicky and assistant administrator Ben Friedman (“Ben”) attended the meeting. (tr-20) There were “eight or nine” LPNs there (tr-20). There were also 2 RNs there.(tr-20). At the meeting, Abi testified, the “first statement that he (Newt) made was that he heard that we nurses weren’t happy and that we were trying to join—he heard we were joining the union and that we had some problems”. (tr-21) Abi continued that “he said he would like to know what our problems were”. (tr-21) Newt explained that he was prepared to give either a 2% or 1% increase. (tr-21) The amount of the raise was “depending on our evaluation...” (tr-22) Abi noted that the employees in attendance raised other issues about sick day payout, per diem raises, and holidays that were allegedly reduced. (tr-22) Another employee raised an issue about difficult residents. (tr-23) Newt replied that he

was trying to get such residents out of the facility as quickly as he could. (tr-23) Indeed, the employer's practice with regard to such patients was that "... the difficult residents have been taken away from the facility completely" (tr-26)

At the 1/31 meeting Abi also asserted that Vicky said that from "now on, the LPNs are, we are going to be responsible for disciplining and evaluating CNAs" (tr-26) However she later said that the "only issue" that Vicky spoke about was that from now on nurses would "evaluate the employees" (tr-32,33) Abi reiterated that evaluations was the "only thing she said". (tr-32)

Abi agreed that there are RN floor nurse that do the same work as she does. (tr-29, 32) Such RNS also attended the 1/31 meeting (tr-32) Abi agreed that the meeting was called on 1/31 "not for LPNs or RNs, [but] for nurses" (32)

Abi was aware that there was a union for the CNAs at the facility. (tr-34) That union was 1199, the instant Charging Party. (tr-35) She "thinks" that they have been representing the CNAs for a long time (tr-36) She vouched for her testimony in the representation case (tr-36) She asked Vicky "can we" join a union? (tr-34)

The GC agreed that even floor nurse RNs are "...admitted to be supervisors". (tr-30, ALJD at 4-5, fn 2) As noted *infra* these RNs do the exact same work as the LPNs petitioned for in this case.

Wendy Thompson ("Wendy") testified that she asked for a raise from the employer on her own about 2 years ago. (tr-38) She went to Vicky for it (tr-39). That was the only time that she asked for a raise. (Tr-54)

She attended a 1/31 meeting at about 10:30 am. (tr-39) Newt led the meeting (tr-39) Vicky, Ben, Toni Krug (a consultant to Vicky) also attended. (tr-40) LPN and RN staff were there (tr-40) Wendy, also, agreed that some of the RNs do the same work as she does (tr-50).

“[Newt] stated that he heard that the nurses were unhappy and he heard that the LPNs were considering joining the union and he asked us what was some issues, our concerns, what we were unhappy about”. (tr-43) Pat Edwards, an LPN, was the “first person to respond”. (tr-43) She said that the nurses “had not been given raises in a couple of years” (tr-43) Newt said that he “was prepared to give a wage increase based on our job performance. If our job performance was good, he would give us a two percent wage increase; if our job performance was poor, he would give us a one percent wage increase” (tr-44) Wendy raised her hand to advise about MLK holiday, she also mentioned President’s day. (tr-44) Another LPN asked about sick days and some per diems (who were *RNs*) asked about wages (tr-46)) Newt, Wendy agreed, gets rid of bad residents “he does his best” (tr-47).

Wendy testified that evaluations that were done by unit managers earlier were now to be done by floor nurses. (tr-51) Vicky said that effective February 2011, the nurses were to do CNA evaluations and Wendy told Toni Krug that if she had to write up CNAs, she would. (tr-46) The write ups that she was referring to was “CNA evaluations”. (tr-50)

Wendy noted that organizing was “done in private” *before* January 25, 2011 (tr-47) Yet Wendy said that she was an openly pro union person (tr-52) She is aware that dietary and CNAs are represented by 1199 while the RNs and LPNS were not. (tr-53)

Christiana Adeyoye (“Christiana”) also attended a 1/31 meeting at around 10 o’clock (tr-56) along with LPNs and some “3 or 4 RNs” as well. (tr-56, 75) At the meeting Newt said that he heard that the nurses were unhappy and wanted to know “more about why we are unhappy” (tr-58) He also stated that “some of the LPNs were trying to join the union” (tr-580) Pat Edwards was at the meeting. (tr-56)

Christiana also attended a March 25 meeting (tr-62) around 10 am. 2 or 3 RNS attended along with the LPNs (tr-63) (or, she testified, “three or four” Rns also attended the power point March meeting with her. (75)) At the meeting, a video played that reviewed something handed out by the nursing secretary. (tr-63) The video was the same content as the handout (tr-64) In recounting the events of the meeting, she notes that only the handout, and reviewing it on a dvd presentation, was discussed on that day; 3/25 (tr-69) That handout, *inter alia*, referred to job descriptions and employee handbooks (tr-72-74, aljd at 11) There were other meetings as well on the topic. (75) (see the handout at Respondent exhibit 1)

Uniquely, Christiana also claims that she was told at that meeting that “henceforth we would be evaluating the CNA...” (tr-64) She therefore differs with all others (and puts her credibility at issue), in saying that the evaluation issue did not come

up at the 1/31 meeting and asserts that the issue ONLY came up at the March 25 meeting (68-9)

Christiana, too, agreed that RNs do the same work as she does. (tr-67)

Those RNs do not work alongside her on her unit. (tr-68) A unit manager, not another “floor nurse” RN, would write up the LPNs, (tr-68) In the representation case transcript LPN witness “Marisol” testified that a floor nurse RN would not “write up” a floor nurse LPN. (Rep tr at 175-6)

Joyce Silva (“Joyce”) testified that on March 25 she attended the power point and received a handout (tr-81) The handout and the display content were the same. (tr-81) She was apparently on disability during the January 31st meetings. (tr-82) However, although she says that the issue of evaluations came up at the March meetings this cannot be, as she said that the handout and presentation were the same and were the total content of the meeting. Those did not speak to new evaluation responsibilities. It is more likely that she got the evaluation information from her supervisor when she returned from disability on February 3rd, a few days after the 1/31 meetings. (tr-82)

She also agreed that there are floor nurse RNs at the facility. (tr-85) They do the same work as the floor LPNs do. 1199 represented the other (non nurse) employees at New Vista for all of the 16 years that she worked there. (tr-90) However, in all those years there was no union for the RNs and LPNs. (tr-91) There was a review of the nurse job description at the March 25 meeting with the handouts and presentation. (tr-91) The

job descriptions were attached to the handout. (Res ex 1)² The job description was reviewed and people, as a result, complained about what was in it. (tr-93)

Newt Weinberger (“Newt”) testified that 1199 represents “[a]ll the employees besides supervisors” in the facility. (tr-99) The RNs and LPNs have not been represented at the facility. (tr-99) There is no anti union animus toward employees, who “do not supervise”, joining the union (tr-99) The facility, in fact, recognized the cooks without an NLRB election a year ago. (tr-100, ALJD at 2) Newt recognized the cooks because they weren’t supervisors “in my mind”. (tr-129) The facility’s dealings with the union heretofore have gone “very, very well” (tr-100)³ No witness disputed this testimony.

Newt testified that LPN Pat Edwards came over to him and told him that some of the nurses have complaints and he therefore agreed to meet with the nurses.(tr-100) (As above noted, Edwards was the first to speak at the meeting that was thereafter convened.) Edwards “told me that I should set up a meeting with the nurses”. (tr-121,122) Vicky, in the representation case transcript, also noted that one of the meetings’ functions on 1/31 was to deal with employees asking for raises. (Rep tr at 100 and 102) The nurses requested at the meeting uniformity in raises so that they “are guaranteed like on an annual basis...” raises. (tr-101) The nurses were unhappy to have to “...just come to me

² It is unclear why the ALJ asserts that they were not attached. (ALJD at fn18)

³ The ALJ regards this un rebutted testimony as “conclusionary”. (ALJD at 21 line 2)

and ask for it and it wasn't like more an automatic basis." (tr-101) Wendy, as noted above, asked Vicky for a raise in this way.

In October 2010, the MDS 3.0 took hold. (tr-102) The "amount of paper that has to be completed is just off the charts", Newt noted. (tr-131) This required that the nurses take over the annual *year end* evaluations of the CNAs working on their units. (See also representation transcript at 102-3) Vicky noted, in the representation case transcript that the last evaluations were done in September 2010 so that they will not be due again for completion before September of 2011. (Rep tr at 88, 231, see also at 163) Although the decision to require that these evaluations be taken over by the nurse was, undisputedly, made in the latter part of 2010, there was a reluctance to implement this policy (whose preparation would take place the *following year end*) before survey by the state which was still due for that year. (tr-102) Survey was expected in December or so of 2010. (tr-102) Once there was a meeting scheduled, however, the evaluation assignment change was transmitted to those in attendance. (tr-102) Newt stated that nothing about "union" was mentioned at the 1/31 meeting. (tr-101) Vicky, in the representation transcript, corroborated this. (Rep tr at 128)

The sign in sheets reflect that many of the nurses did not attend the 1/31 meeting. (tr- 103, see attendance sheets GC exhibit 8) The DDE (GC ex 2 at 15) states that a "handful" of nurses attended the 1/31 meetings. Thus the meeting's purpose could not have been to cause supervisory status, as alleged in the complaint, because it was left that the house supervisors would transmit this evaluation responsibility to the others, in

their own time, and that it was not urgent. Indeed, the representation case transcript reflects that Vicky told Supervisor “Alma” to relay the evaluation authority change information to the 11-7 shift. (Rep case tr at 99) Moreover, all categories of nurses, RNs and LPNs, attended. (tr-103) Newt agreed that both groups do the same work. (tr-103) Vicky in the representation case transcript *also* testified that all nurse categories were told, or were to be notified, of the evaluation changeover for late in the next year. (Rep tr at 99)

The March 25 meeting was precipitated by an earlier representation case hearing before the NLRB. (tr-104, ALJD at 12 lines 22-30) At the hearing, Newt noted, “...some of my nurses got up and they clearly said that they didn’t read what they were required to do, they didn’t read their employee handbook, they didn’t read their job description well and we wanted to re-educate all of our nurses as to what their responsibilities were”. (tr-104) This re-education “...did not alter anything”. (tr-104) In fact attached to the handouts were the job descriptions and nurse evaluation forms (that the *nurses*, in turn, are evaluated on) “to tell them here’s where it says that and we brought it to their attention”. (tr-104) The facility “wanted to just clarify it for them” that these duties were *always* part of the nurse responsibilities. (tr-104) Respondents exhibit 1 reflects what was transmitted at the 3/25 and the other “re-educating” meetings with nurses. (tr-105) Respondent exhibit 1 was given “out to all the nurses” (tr-106) The meetings were thus merely “reiterating to the employee what was in their job description and what they were required to do as part of their job requirements”. (tr-107) Respondent

exhibit 2 and 3 reflect sign in sheets for these meetings. (Tr-107) A review of the representation case testimony of Wendy Thompson, among others, reflects why this “re-education” was necessary. (See rep tr at 275, 279, 286, 294, 297, 299, **304, 306, 307, 309, 310, 312,313**) As these transcript pages show, some nurses were unaware of *their own* job descriptions or didn’t properly appreciate what “supervise” meant. Some of these meetings even took place *after the election*. (tr-107, see sign in sheets, *supra resp ex 2 and 3*, ALJD at fn 16)

Newt testified that the nurses were, at all times, supervisors at the facility. (tr-111) The facility is very large with 340 residents. (tr-112) The Director of Nursing is not there on weekends and at evening and night shifts. (tr-112) At first he thought that there were over 100 nurses aides. (113) After checking with the office, he noted that there were *over* 150 CNAs in the building.⁴ Apparently there are 38 LPN “floor” nurses and 17 RN floor nurses on the three facility shifts and seven days a week. (tr-133).

Both the 1/31 meeting and the 3/25 meeting were addressed to *both* RNs and LPNs. (tr-113) (Some LPNs, it should be noted, were excluded by stipulation as supervisors. (GC ex 2 at fn 5 There was only an LPN election petition, not one for RNs.) Newt was unaware that *a petition* was filed when he met with the nurses on 1/31 and had not yet received any NLRB petition. (tr-122) This is supported by there being no fax

⁴ That number, of course does not include evening and night, as well as weekend, dietary, housekeeping and other non nursing employees whose supervisors are not at the facility and are also therefore supervised by nurses.

receipt proof or return receipt of the petition. (tr-136, ALJD at fn 13) The ALJ regards this testimony as “improbable”, (ALJD at 13) since, the ALJ notes, the petition was mailed on January 26th. However, Newt’s testimony in this respect stands uncontradicted.

He has had nurse meetings before about a month or so before survey. (tr-132) These meetings prepare for survey and also as “supervisors on the floor they could point out different things for me” (tr-133) “Benefit or compensation issues” have come up at times. (tr-133)

Wendy Thompson on rebuttal agreed that there were nurse meetings before survey (tr-139) She also acknowledged that there was discussion about bonuses at these meetings. (tr-140)

Abi also testified that “before survey” she had attended meetings with nurses from different units. (tr-142) The 1/31 meeting, she noted, took place before survey as the survey was in February. (tr-143) Preparation for the survey was discussed at the 1/31 meeting. (tr-143)

Patricia Edwards testified in rebuttal. She was not sure who initiated the conversation, that she admittedly had, with Newt. (tr-147) However, there was a “short discussion on the nurses not receiving a pay raise in the past four or five years”. (tr-147) It seems quite likely that Newt would not initiate a conversation about nurses not receiving a pay raise. It should also be noted that at the 1/31 meeting, *Edwards* was the first to speak and, there as well, raised the issue of pay raises. She could not recall what was said “verbatim” but said “I *think* it was something to the effect that the nurses are

going to get in the union”. (tr-148) The meeting that Edwards had with Newt could have been any date in January.(tr-149) She testified that she could not pinpoint to beginning middle or end of January; only “I just know it was in January, it was snowing.” (tr-149) Edwards repeatedly testified that her meeting with Newt was in January “because it was snowing”. (tr-149)

Edwards acknowledged that she was subpoenaed to attend the representation case hearing but did not attend it. (tr-150) Since the “union will not benefit [her] whether it’s in or out and I have a right not to come, if I don’t want to because it didn’t show me where it was benefitting me” (tr-151), she ignored the subpoena. She told others that she did not want to attend the hearing and spoke to “Vicky, Mr. Robert and anyone else that would listen to me, my co-workers, everybody knew how I felt”. (tr-152) Edwards also stated when asked if she felt ostracized by her co-workers after she testified years ago in an earlier election campaign, that “[w]hat I felt was, after you go to one of these hearings, and you come back and it’s not private, it’s wide open. Things are said one way or another way. I may say it one way, you may take it another way, my co-worker may take it another way. So I’ve been through it and I didn’t want to go through it again and I didn’t have to.” (tr-153) Edwards testified at this trial, however, without subpoena, “at the drop of a hat”, and while she testified, attending the trial, (as “party representatives”), were co LPN employees Wendy and “Abi”. These employees avoided the sequestration order as they were denominated “party representatives” by the General Counsel and, separately, by the Charging Party. They therefore attended the entire trial

and heard the arguments and witnesses that were presented.

ARGUMENT

THERE IS NO PROOF OF IMPROPER MOTIVE, UNION ANIMUS OR CAUSAL RELATIONSHIP

This is not a case of *what* happened as much as a case of *why* it happened.

In this case it is undisputed that there was a long, animus free, good relationship between the employer and the charging party union. There is no dispute that the employer *recognized* a unit of cooks without an NLRB election. It is also undisputed that although the union represented the overwhelming majority of the employees at the employer's facility for *decades*, the LPNs (and RNs) were not represented. This is because they were *always* considered, by all parties, as supervisors. Indeed, one employee asked, apparently aware that the nurses were considered supervisors, if the LPNs could even be represented by a union.

While the Regional Director's decision⁵ and the Board's denial of review concerning supervisory status is *not* binding in this case⁶, it is not necessary to determine the supervisory status of the LPNs in order to dismiss this complaint.⁷ ("a finding in a representation case regarding supervisory status is not binding in a subsequent unfair labor practice proceeding involving, as here, allegations of independent violations of Section 8(a)(1). *JAMCO*, 294 NLRB 896, 899 (1989)..." even if the *Board* found in a representation case that the employees were not supervisors. *Extendicare Homes*, 348 N.L.R.B. 1062)⁸

⁵The Board recently granted summary judgment requiring bargaining but there is pending an extant motion for reconsideration before it. That motion has not been decided as of the writing of this memorandum. The Board recently asked the Third Circuit Court of Appeals *not* to require filing of the record in its enforcement petition to require bargaining *because* doing so would divest the Board of any ability to decide the motion. That motion had been pending for months. The Board denied the motion on 12/31/11 by two members; then member Becker and Member Hayes. Member Peirce has always been recused. A new motion for reconsideration has been filed asserting, *inter alia*, that this panel was unable to act since it effectively comprised two members.

⁶ As noted in footnote 1 above, if the Board were to determine the supervisory issue, the representation case record in evidence in this case as well as the clear re-education of the nurses on their disciplinary authority on March 25, 2011, amply proves that the LPNs, and indeed all of the floor nurses, are supervisors. The General Counsel, in fact, "admitted" that RN floor nurses, who do the same work as LPN floor nurses, are "all" supervisors. Moreover, Abi noted that Marisol, raised her hand as an LPN who had written up other employees. (tr-33) If the ALJ, notwithstanding the GC's protests against relitigating the supervisory issues, had properly overruled them, she would find that supervisory status exists. If she wished to reopen the record to take evidence on the issue, the ALJ could do so. (Board R&R at 102.43). The ALJ erred in not determining the issues, and remand to apply the proper standards is necessary.

⁷On the other hand, there must be a *final* finding that the LPNS are *not* supervisors in order to find a violation. This is because the employer could solicit grievances from, change the duties of, and promise benefits etc. to, supervisors. There is no assertion that what happened regarding the LPNs was otherwise an independent 8(a)1 violation.

⁸ This is why, *inter alia*, summary judgment was inappropriate in this case.

In this case, at all times, all parties felt, but particularly the employer, that the nurses were already supervisors. The employer litigated that premise before the Region and requested review of the Board. Review was denied in a 2-1 vote. However, at the representation hearing the parties stipulated to (some) LPNs being excluded as supervisors as well as RNs. The General Counsel stated *on the record* that RNs, *who admittedly do the same work “floor work” as LPNs*, were “admitted to be supervisors”. The employer also knew that these employees were excluded from the bargaining unit for decades.

Accordingly, as the Board has held in dismissing allegations as herein propounded;

The Respondent's actions here are not analogous to those cases where wholesale promotion of bargaining unit employees to supervisory positions is part of a pervasive pattern of misconduct clearly evincing an employer's animus and attempt to destroy a bargaining unit.

Bridgeport and Port Jefferson Steamboat Co. 313 N.L.R.B. 542 (N.L.R.B. 1993) Here there was, and is, no evidence of employer animus to the union. Rather, the employer continued the decades long, *mutual*, view that the LPNs were already supervisors.

However the employer, manifestly, did not have its meeting on January 31, 2011 *because* it wanted to make the LPNs supervisors (as the complaint alleges at paragraph 10(a)). The employer advised *all* the nurses, RNs (for whom there was no petition for an election) and LPNs during those meetings that there would be a need to do

CNA evaluations because of the new MDS 3.0 requirements. Moreover, the employer had, at the meetings, as the Regional Director noted, only a “handful”⁹ of the 55 floor nurses that the employer employed. Nobody bothered to even speak to the night shift but, rather, the employer relied on the night supervisor to transmit the information on evaluations. (ALJD at fn 6) If the motivation was really for a nefarious purpose, the employer would have seen to it that every LPN was aware of these new duties so that at an upcoming hearing they would be compelled to testify that they were aware of these new, supervisory “causing”, duties. Instead, the requirement in the future to do the CNA evaluations was noted only because there already was a meeting. (ALJD at fn 12)

There is no evidence that the facility was even aware of the filing of an election *petition*¹⁰. Patricia Edwards, “in January”, told Newt that he should meet with the nurses as they were complaining about not having raises for some years. Sure enough, at that meeting the *first* person to speak was Patricia Edwards complaining about the fact that the nurses had not gotten a raise in several years. It is not likely that Newt would raise the issue of the lack of raises with Edwards. It is much more likely that Edwards initiated such a conversation. Edwards was “not sure” who had initiated the conversation.

⁹ The ALJ quarrels with Respondent’s asserting that a “handful” of nurses attended the 1/31 meeting assigning evaluations to floor nurses. She states that “...as a factual matter, Respondent is incorrect”. (ALJD at fn 28 line 37-40) As noted above, this “handful” terminology is a direct quote from the *Regional Director’s* DDE.

¹⁰ The ALJ confuses knowledge of the **election petition** with knowledge that the LPNs were talking to a union. (ALJD at 13) Newt never denied that he had heard that the LPNs were interested in joining a union. He *only* denied 1) being aware of a *petition for an election* on January 31, and 2) that the word “union” was mentioned at that meeting.

It is unnecessary to resolve the dispute as to whether Newt mentioned the word “union” during the meeting. (see footnote 10 herein) If an employer hears that his supervisors want to join a union, he could easily say to them “I hear that you want to join a union; why?”. The statement would in no way undercut the employer’s belief that the employees were, in fact, supervisors. If an employer heard that his Director of Nursing wanted to join a union, for example, he could, also, easily say to her “I hear that you want to join a union, Why?”. All the while he would nevertheless be knowing that she could not actually do so.

Nevertheless, Edwards exhibited a real fear of saying the wrong thing in front of her co-workers. It is certain that this fear played a role in her attending the hearing without a subpoena when she steadfastly refused to comply with a duly served subpoena in the representation case. The rationale for that refusal that she articulated is also quite suspect and dubious.¹¹

Assuming, *arguendo*, that the LPNs are not supervisors, causation and motive are lacking to make out a violation. There is no doubt that “floor” RNs also attended the meeting on 1/31. As “admitted” supervisors, the *RNs also spoke up* about not getting raises. These admitted supervisors also attended and participated at the same meeting. (Tr-45) This was not an effort to subvert employees; it was a discussion with supervisory nurses. Even if the facility was wrong about the LPNs’ supervisory status, *it*

¹¹ Edwards’ denial to suggesting the meeting (ALJD at 8 line 38-40) is hardly therefore surprising.

was not instigating requests to pay more money to its nurses. *It* was not trying to “buy their vote”. The nurses were. All the nurses. Those who would later be involved in an election petition and those that would not. They asked the questions and, through Edwards, sought the meeting that the General Counsel now alleges was unlawful. Most significantly, the motive for the meeting was resolution for nurses’ gripes not trying to “turn” the LPNs. The Respondent considered them supervisors all along.

As the Board has held with Supreme Court approval;

Under Wright Line, the General Counsel must first make a prima facie showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" to take the action which allegedly violated Section 8(a)(3). Once the General Counsel has made such a showing, the burden then shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." Wright Line, 251 NLRB 1083, at 1089. If the General Counsel does not present evidence establishing such a prima facie case, the respondent does not have to demonstrate that it would have taken the adverse employment action anyway.

The General Counsel may establish the prima facie case by proving the following four elements: (1) The alleged discriminatee engaged in union or protected, concerted activities. (2) The respondent knew about such activities. (3) The respondent took an adverse employment action against the alleged discriminatee. (4) There is a link, or nexus, between the protected activities and the adverse employment action.

Manor Care, 1998 NLRB LEXIS 215 (N.L.R.B. Apr. 17, 1998). In *Manor Care*, the ALJ found that the LPNs *earlier certified by the Board as employees*, were actually found by

the ALJ as supervisors in the ULP case. The ALJ analyzed the case under *Wright Line*, however, assuming that the Board might disagree with him and find them employees.

As in *Manor Care*¹², where similar allegations were made as herein, there is no proof that the facility knew about the union activity. Testimony reflected that the organizing was “done in private”. (see ALJD at 17 line 19) There is no proof¹³ of the first and second test of *Wright Line*. The third test for a *prima facie* case is adverse employment action. As the ALJ noted in *Manor Care, supra*, “Assuming for analysis that Respondent did change the job duties of the LPNs, does that action constitute an "adverse employment action" which satisfies the third Wright Line requirement? This question raises issues of both law and fact.” In this case, similar to *Manor Care*;

Here, as in *Bridgeport & Port Jefferson Steamboat Co.*¹⁴ there is no evidence of animus.¹⁵ The complaint does not even

¹² The ALJ (ALJD at fn 5) does not even try to distinguish that case from this one.

¹³ Edwards could not pin down a date when she met Newt. (ALJD at 8 line 31-32)

¹⁴ In distinguishing *Bridgeport* the ALJ asserts that Respondent *in her opinion* had no supervisory shortfall to claim. (ALJD at 22 line 42-45). She fails to explain who are the facility supervisors on the 3-11, 11-7 and weekend (all) shifts at this large facility (when “...administrators, unit heads and [non floor, of course] registered nurses...” are not at the facility. Rather than a “sham” (ALJD at 23 line 3-4) the Respondent *at all times considered* the nurses to be supervisors and therefore had these shifts “covered” . .

¹⁵ There is no anti union animus here. Only a desire to have adequate non union supervisors to run a large health care institution properly. There is “animus” to having supervisors in a union that represents the other employees at the facility. The ALJ (ALJD at 19 lines 35 et seq.) thus misapplies *Wright Line*. There was no anti *union* animus, after all, in that the Respondent granting recognition to the union for its cooks without even an election. The ALJ again misapplied *Wright Line* by citing two clear “pretext” cases for the proposition that the burden of production is one of persuasion by the preponderance of the evidence to a respondent. (ALJD at 19 line 53)

allege that Respondent did any act or made any statement which independently violated Section 8(a)(1). Additionally, the record contains no evidence which would tie the conduct alleged to be violative to any unlawful motive. Therefore, I conclude that the *Bridgeport & Port Jefferson Steamboat Co.* precedent, rather than *Matson Terminals*, controls.

Based on that precedent, I find that none of the alleged discriminatees suffered an adverse employment action. Therefore, the government has failed to establish the third requirement for a prima facie case.
Id. The same reasoning applies to this case.¹⁶

Turning to the March 25th meeting, the representation case evidence amply reflected that some (Abi and Wendy who testified) nurses were inadequately versed *in their own* job descriptions and their duties. This was although they were evaluated each year on their performance of the duties *of those very job* descriptions¹⁷. There was no change in what the job description and evaluations said that was introduced at the March 25 (and other, even after the election) meetings. In contrast to the “handful” 1/31 meeting, *all* nurses were “re-educated” about their duties and responsibilities at this time. This was because nurses being aware of their responsibilities and duties were critical to the facility’s ability to operate as it should. This *mattered at once*. So *all* the nurses, RNS and LPNs had to attend these meetings. Since, as noted, these meetings even took place

¹⁶ This lack of “adverse action” alone, distinguishes the *McClendon* case cited by the ALJ. (ALJD at 20 line 25-26)

¹⁷ The ALJ apparently missed this fact. (ALJD at 12 lines 18-20, see also fn 27)

even after the election, and always included RNs and LPNs, the conclusion is inescapable that this re-education was unrelated to the election petition.

When the March 25th meeting took place the Board had not yet ruled on the request for review. Indeed, the request for review was sent two days *before* these meetings even took place. They, therefore, couldn't have been held to make the LPNs supervisors, as the complaint alleges, since the Board would be unaware of the events that occurred *after* the request for review was filed. Accordingly, there was no "alteration" of duties at all, as alleged in the complaint, and certainly not for the reason of attempting "...to convert the licensed practical nurses into supervisors." (Complaint at 10(c))

Most importantly, unlawful motive, an indispensable requirement for a violation in this case, has not been proven in this case. All of the conduct alleged occurred to *all* nurses for operational and other lawful reasons and not *because* of an LPN election petition.

THE ISSUE OF CREATING AN IMPRESSION OF SURVEILLANCE

The Board has also made clear that,

The Board has held that a respondent does not create an impression of surveillance by merely stating that it is aware of a rumor pertaining to the union activities of its employees so long as there is no evidence indicating that the respondent could *only have learned of the rumor through surveillance*. G.C. Murphy Company, 217 NLRB 34, 36 (1975).

South Shore Hospital 229 N.L.R.B. 363 (N.L.R.B. 1977) [*emphasis supplied*] see also *Clark Equipment Company* 278 NLRB 498 and *AsTro Container Company* 180 NLRB 815. Vicky, even if Abi was not a supervisor, did little more than discuss such a rumor. Abi's response reflected that it was impossible for Vicky to come to this erroneous information about her from surveillance. Thus, Abi negated that the information was received by surveillance! As the Board made clear in similar circumstances;

We agree with the judge, for the reasons stated in his decision, that Varney's statements did not create an impression of surveillance. As the judge correctly observed, Varney's statement--"he heard that I was going to organize . . . that the employees wanted me to organize a union"--could not have been reasonably understood to mean that Varney was monitoring employee conversations or somehow eavesdropping. A statement as to what someone has *heard* could be based on (1) what he had heard from the grapevine or (2) what he had picked up from spying. There is no reason to infer the latter as the source over the former. And, particularly in the instant case, where Cole had been an open union supporter, there is even less basis to suggest to Cole that Varney had been spying on her union activity. Accordingly, we do not agree that the Respondent created an impression of surveillance.

SKD Jonesville Division L.P., 340 N.L.R.B. 101 (N.L.R.B. 2003) [*emphasis supplied*]

Vicky was alleged to have said to Abi that she "heard" that Abi was passing out cards *to* the union organizer. There is no indication that the information came from "spying" as opposed to the rumor mill. In fact, Abi said to bring the person who had "told" Vicky that to confront her. There was no feeling on Abi's part that she was being spied on; merely spoken about. She could have even just as easily been asking her about

giving *CNA* cards to the union organizer. If she was asking this question of a supervisor and even if referring to the nurses, once again this could have been background to next ask “why, what’s wrong”? If Abi was not a supervisor, looking at the totality of the circumstances, it is respectfully submitted, that there is no legal restraint or coercion made out in this scenario.

Once again, moreover, most of the *Wright Line* requirements for a prima facie case are lacking in the paragraph 8 allegations of the complaint *assuming* that the LPNs were not supervisors.

THE ALJ’S DECISION

THE ALJ WAS REQUIRED TO DETERMINE THE ISSUE OF SUPERVISORY STATUS. THE CASE MUST BE REMANDED FOR SUCH A DETERMINATION

The ALJ takes issue with the Respondent’s assertions concerning the “re-litigation” of the supervisory issues in a subsequent ULP case. (ALJD at fn 5) The ALJ, while asserting that “...a representation proceeding is akin to an investigatory process rather than an adversarial one...” (ALJD at 14 line 4-5), still wants the representation case findings on supervisory status to be not subject to determination or challenge in a ULP case. (ALJD at fn 5) Yet, now the Respondent is being charged with violating the

National Labor Relations Act. However, the ALJ still refuses to consider whether the LPNs are, in fact, supervisors.¹⁸ (ALJD at fn 5)

The ALJ cites three case to distinguish those cited by the Respondent above. All the cases are, themselves, singularly distinguishable from this one.

In *Hafadai Beach Hotel*, the first case cited by the ALJ, the *only* issue left for litigation was the one decided in the representation case. The respondent there had *withdrawn its answer* to all of the substantive allegations of the complaint and had decided to “sink or swim” based on the issue that had already been determined in the representation case; whether the Board could assert jurisdiction over a unit of residents and non residents of the Northern Mariana Islands. The Board, with no ALJ decision before it, held that the Respondent could not relitigate that very issue in the ULP case. However, that case also stated the following

In *Verland*, the General Counsel alleged that the respondent had engaged in conduct violative of Sec. 8(a)(1) and (3) of the Act. ***Although noting that certain subsidiary issues, such as supervisory status, could be relitigated in a subsequent unfair labor practice proceeding***, the judge found that the unfair labor practice case was "related" to the prior representation proceeding because both cases were "premised on the issue of jurisdiction of the Respondent." *Verland Foundation*, 296 N.L.R.B. at 443.

321 N.L.R.B. 116, 117 (N.L.R.B. 1996) [*emphasis supplied*] In contrast to that case, in this one the Respondent is vigorously defending the “other” allegations of the complaint.

¹⁸This is particularly problematic in this case since the Board has not decided the motion for reconsideration which seeks of the Board the reversal of the certification issued by it.

Moreover, it is litigating the very issue that the Board recognized *could* be re-litigated; “supervisory status”.

The ALJ’s second citation is to *Cutter of Maui* . In that case the

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to recognize and bargain with the Union and failing and refusing to furnish information requested by the Union that was relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of an appropriate unit of Respondent's employees....This is a refusal to bargain case in which Respondent is contesting the certification in an underlying representation case, 37-RC-4033. The only difference from the usual test of certification case is that in the instant case Respondent attacked the certification collaterally by filing a petition in Case 37-RM-377. As stated above, Respondent has refused to bargain with the Union based on the sale of its Hana dealership and relocation of its parts and service department. This issue was raised by the Respondent and litigated in the representation proceeding in Case 37-RM-377.

Cutter of Maui, Inc., 344 N.L.R.B. 1197 (N.L.R.B. 2005). The “relocation” issue was there fully litigated in the representation case. That case, therefore, was, as described by the Board as merely a *routine refusal to bargain case*. It cannot be seriously argued that this case is comparable to *Cutter*. In this case there is no 8(a)5 complaint, no assertion of a refusal to bargain, no test of a certification, no claim of a refusal to provide information. This case asserts unrelated 8(a)1 and 8(a)3 allegations that were not resolved in the representation case. The General Counsel must therefore prove all elements of his case and the Respondent must be permitted, pursuant to his due process rights, to fully defend

these claims that it violated the law. The Respondent must be able to show, and the ALJ must consider whether, the LPNS are supervisors. If they are supervisors the complaint allegations of 8(a)1 and 8(a)3 violations must be dismissed.

Finally, the ALJ cites to *Verland*. In that case, the ALJ, with Board approval, noted that;

while I told Respondent's Counsel at the hearing that I would not allow relitigation of the issue, I did state that I would consider any evidence not previously known and which could not have been known to Respondent at the time of the representation case hearing. No such evidence was offered. I further informed Respondent that I would review *any part of the representation case record to which Respondent might refer me for the purposes of reconsideration of the issue by the Board*. n4 Respondent made no such reference to the representation case record at the hearing or in its brief.

n4 Such procedure was approved by the court in *Amalgamated Clothing Workers of America Workers of America v. NLRB*, as quoted supra.

296 N.L.R.B. 442 (N.L.R.B. 1989) [*emphasis supplied*] Because the respondent in *Verland* did not allude to the representation case hearing record at hearing or in its brief, the ALJ determined “[t]herefore, there is no new evidence to consider and no review of the underlying representation case record to make. Accordingly, I am bound by the Board's previous decision and reject Respondent's contention that, because of state regulations to which Respondent is subject, the Board should decline to assert jurisdiction.” In this case, the ALJ has pointedly and unabashedly refused to consider the representation case *which was stipulated into the record by the parties*, and to even make

a determination as to whether the LPNs were supervisors. She has stated clearly that she will *not*, in any way, see if anything in that record would warrant “reconsideration of the issue by the Board”. *Verland, supra* at 443. (ALJD fn 28 lines 47-49 where the ALJ states “...such an argument appears to be yet another invitation to revisit the issue of supervisory status of the LPNs which I decline to accept.”)

By contrast, in *Bon Harbor* 348 NLRB 1062 (2006), The Board did the exact opposite. The Board noted that the ALJ “...rejected the Respondent’s argument that no violations could be found with respect to the LPNs...because they are supervisors” The Board reversed. This was notwithstanding that the “...judge’s finding that LPNs...are not statutory supervisors...based exclusively on the ...prior representation proceeding involving the same facility.”

The Board stated:

In that proceeding, the Union petitioned for certification as the representative of a unit of employees at the facility that included LPNs. The Respondent argued for the exclusion of LPNs, contending that they were 2(11) supervisors based on, among other things, their supervisory authority to discipline employees. The Regional Director, however, concluded that the Respondent had failed to carry its burden to establish the LPNs' claimed 2(11) status. The Respondent filed a request for review, which the Board (Chairman Battista dissenting) denied.

In the present case, the parties did not introduce any new evidence regarding the supervisory status of the Respondent's LPNs, but *stipulated to the introduction of the representation case hearing transcript and exhibits into the record*. The judge adopted without discussion the Regional Director's conclusion that the Respondent's LPNs are not

supervisors. The Respondent has excepted to the judge's conclusion, again arguing, among other things, that its LPNs, including Lemon and Adkisson, possess the supervisory authority to discipline employees.

Extendicare Homes dba Bon Harbor, 348 N.L.R.B. 1062 (N.L.R.B. 2006)¹⁹ [**emphasis supplied**] As noted above the Board reversed the ALJ, considered the representation record and held the LPNs as supervisors.

This case, in order to comply with due process, must be remanded to the ALJ with instructions to consider, *de novo*, (*Bon Harbor, supra* at 1063) and make a determination on, whether the LPNs are supervisors. The sort of parsing of the Board's "re-litigation" rules that the ALJ engages in (ALJD at fn 5), does not comport with due process or the APA.

THE ALJ'S EVIDENTIARY RULINGS AND RESULTANT CREDIBILITY FINDINGS MUST BE REVERSED

The parties in this case, as above noted, stipulated that the representation case record would be admitted into evidence and into the record of this case. This stipulation was in no way limited. It is therefore error for the ALJ to state (ALJD at 5 lines 17) that "Alfeche did not testify in this proceeding". It is, also, unfair, a denial of

¹⁹ Also as in *Bon Harbor* (at fn 5) "the General Counsel does not argue that the Respondent's actions taken against the LPNs...would be unlawful even if they were statutory supervisors..." see also there that the stipulation of duties in the representation case that all the lpns had the same duties did not stop the Board from finding supervisory status for two lpns nonetheless. (*Id* at fn 6) This must be contrasted with the instant ALJ's refusal to consider such a course. (ALJD at fn 24)

due process and prejudicial for the ALJ to then state, in her decision, that she does “not rely upon such testimony. Insofar as Respondent is concerned, such testimony is hearsay evidence”. (ALJD at 14) The error is then compounded when the ALJ draws repeated adverse inferences in the Respondent’s failure to call the very witnesses that testified in the stipulated record! (ALJD at 14 lines 8-19 and fn 21) These adverse inferences must be reversed as do the credibility findings that flow from them. At the very least, a remand is needed so that the ALJ decides the credibility issues without using faulty adverse inferences.

The ALJ, while noting that virtually everyone, including the General Counsel, agreed that RN floor nurses (admitted supervisors) do the *exact same* work as the LPN floor nurses (ALJD at 4 lines 11-12) tries to distinguish the two by stating that the LPN testimony at the hearing “...was to the effect that RNs are authorized to “write up” LPNs for infractions” The ALJ immediately thereafter acknowledges that; “. [t]he evidence is unclear, however, as to whether this is limited to instances of substandard patient care or extends to other personnel practices or procedures.” (ALJD at 4 lines 23-25) The ALJ, however, forgets about this concession in fn 28 where she states that “...the record is undisputed that RNS have additional responsibilities which include the authority to “write up” LPNs for infractions.” These inconsistent reviews of the record put the ALJ’s findings into question. Also as noted earlier, no “floor” nurse RN, writes up another floor nurse LPN.

The ALJ's findings regarding the March 25th ²⁰ meeting must also be rejected. The ALJ asserts that "...Respondent took a wholly inconsistent approach, and as the Board noted, specifically argued that the job responsibilities of the LPNs had indeed been altered on that date and that, based upon these new duties, the Regional Director might well have found the LPNs to be supervisors" (ALJD at 21 lines 36-39) The ALJ then finds that these "admissions" by Respondent undercut its assertion that the March 25 meeting was solely to re-educate the nurses (not just the LPNs) to their responsibilities.²¹ The ALJ then goes on to find in these "shifting defenses" "evidence of unlawful motive". (ALJD at 21 line 42) The ALJ in quoting counsel's response to the order to show cause (ALJD at fn 4) is disingenuous and her conclusions derived from that response are wrong.

General Counsel exhibit 6 is the response to the notice to show cause why summary judgement should not be granted. The response pointed out that the Respondent "...allegedly "...altered the duties of its licensed practical nurses by requiring them to monitor the performance of, and to discipline CNAs" see complaint in case number 22-

²⁰ As noted earlier, and as acknowledged by the ALJ (ALJD at 5 lines 22-24), the January 31st meeting was also attended by *both* RN and LPN floor nurses. The ALJ's statement that "although there were RNs in the room, nothing was said about their having new responsibilities..." has no record support whatsoever. (ALJD at 6 lines 30-31)

²¹ The ALJ's finding that it "defies credulity" (ALJD at 22 line 12) that "38" nurses went to the meetings before and after the election for this re-education and therefore were "oblivious to their extant job responsibilities" is illogical. *All* the nurses were re-educated because two or three reflected that they did not know their duties. The Respondent was not going to leave any nurse out of the re-education process. Nor was the Respondent going to question each of them as to their knowledge of their responsibilities. The logical procedure was to re-educate them all; RNs and LPNs.

CA-29845 dated April 28, 2011." The response continued; " The complaint in case number 22-CA-29845 therefore asserts that there has been a factual change in the duties of the LPNs since March 25, 2011." The penultimate paragraph in the response read; "These factual changes make summary judgement improper in this case. There are changed facts in the case, the facts are in dispute and the impact of these factual changes are not capable of being resolved by summary judgement."

The premise for the assertion that there are factual disputes is the *complaint* in case number 22-CA-29845. Respondent has not "admitted" that it changed the LPNs duties; the *complaint* asserted that it did. The argument being made against summary judgement was therefore based solely on the assertions made in the complaint (which it should be noted, Respondent *denied* in its answer to the complaint.) Accordingly, there is nothing to rebut Respondent's assertion that it was merely re-educating its nurse, RNs and LPNs, to their duties.

Similarly, the ALJ does not credit Weinberger in the undisputed testimony that changes in MDS charting caused the evaluations to have to be done by the floor nurses. (ALJD at 21 lines 15-21) She faults Respondent for not introducing the MDS forms. (ALJD at 21 lines 20-21) But the general Counsel or the Charging Party should have rebutted this testimony by subpoenaing those documents. Since they did not, and called no witnesses to rebut Weinberger's testimony, there is no basis for discrediting it. The ALJ states that Weinberger's "...assertion that there was a significant end of year burden is called into question by his admission, on cross examination, that the forms must

be completed on a monthly basis.” (ALJD at 21 lines 17-20) The ALJ just missed the point. The *evaluations* are done at year end, while the MDS forms are filled out monthly. The MDS co-ordinators, who work on the day shift, would no longer do the employee evaluations on *all* shifts because of the heavy burden that the new MDS forms entailed²². Vicky’s announcement would not take practical effect the following month, as the ALJ erroneously asserts (ALJD at 20 line 9) but at the end of the year.

**THE REMEDY IS INAPPROPRIATE AS IT PERPETUALLY
PROHIBITS ANY ALTERATION OF DUTIES**

Although the ALJ repeatedly states that the Respondent’s LPNs were neverrequired to assume any additional duties, their mere announcement, the ALJ finds, effected a violation of sections 8(a)1 and 8(a)3. While Respondent also excepts to that determination²³, the remedy is even more problematic.

²² This amply explains why this was never “implemented”; because these were *year end* requirements. (ALJD at fn 29, see also ALJD at 22 line 47, ALJD at 9 lines 7-8, ALJD at 11 lines 49-51) Indeed, the handouts at the March 25th meeting noted specifically that evaluations were due 30 days “...prior to the due date...” (ALJD at 10 line 32-35)

Similarly, the March 25 re-education was not pressed to a confrontation (and possible discharges for failure to comply) because of the **pendency** of this case, *not* because the duties are a “scheme” “sham” or “mere pretense.(ALJD at 23 line 1,3 and 10) The Respondent would be a fool to press the issue (to LPN discharges) if this trial would soon thereafter resolve the Respondent’s rights.

²³ Board law provides that the statute of limitations does not commence to run from a current announcement of possible later implementation. *Chinese American Planning* 307 NLRB 410 (1992)

The ALJ directs that the Respondent “rescind and give no further effect to the new duties announced and assigned to its licensed practical nurses on January 31 and March 25, 2011”.

The ALJ also directs the Respondent to *cease and desist* from “...altering the duties of its licensed practical nurses by requiring them to complete employee evaluations of, to monitor the performance of and discipline its certified nursing assistants in an attempt to convert the licensed practical nurses into supervisors within the meaning of Section 2(11) of the Act in order to prevent them from obtaining union representation.”

As the Board can see, the affirmative directive is *much* broader than the cease and desist order. The affirmative direction means that the rescission must be forever, and under all circumstances. Moreover, the cease and desist order, while narrower, is so nuanced and multi layered that it is not clear enough to be part of an injunction. For instance, if there was no unlawful motivation problem, the Respondent could, of course, alter the LPN duties. Can the Respondent effect these changes if it, in doing so, does not “...attempt to convert the licensed practical nurses into supervisors...”? If so, the requirements should not be ordered rescinded forever. If the Respondent recognizes the union as the representative of its “supervisory” LPNs, can it implement these duties since the implementation will not be done “...in order to prevent them from obtaining union representation”?

After reviewing every case that the ALJ cited, *none* provided for a remedy as recommended by the ALJ²⁴. Moreover, the Board has never held that an employer, for valid operational reasons, cannot assign needed work duties and responsibilities to its employees *even if* those duties render the employees supervisors. This recommended order does just that. These duties must forever be rescinded.

In section 8(a)2 cases, for instance, the Board has prohibited recognition unless the assisted union is certified in a Board conducted election. In *Matson Terminals* 321 NLRB 879, cited by the ALJ, the Board ordered reinstatement of the old positions “...until such time as an election is held and the results are certified...” The Board noted that “The judge's recommended Order is specifically crafted to the facts of this case. It provides that the Respondent may not unilaterally proceed with its plan, which it utilized to avoid a representation election, until it is clear that it has no bargaining obligation.” 321 N.L.R.B. 879 In this case, a Unit Clarification petition, for instance, could result in a finding of supervisory status and would terminate any bargaining obligation. Yet, nothing would change under the ALJ’s recommended order.

²⁴ In *AMFM OF Summers County*, cited by the ALJ (at 19 line 25), for instance, there is no affirmative relief. The same for *Hospital Motor Inn* and *United Oil*. In *United Oil, Regency Manor* (CNAs in issue) and other cases, moreover, the changes were made to employees who *admittedly* were not considered supervisors before the union activity. In *Dickerson Chapman* and *Venture Packaging* the gravamen of the violation was a bargaining violation, not an 8(a)3 claim. Changes had to be restored *until there was bargaining* about them with the union. The order was, therefore, limited.

The Board should carefully tailor any remedy that it requires so that it is viable, remedial and clear and does not interminably restrict the Respondent's rights to, lawfully, run its business.

CONCLUSION

Based on the forgoing the complaint should be dismissed in its entirety.

Respectfully submitted,

Dated: New York, New York
January 10, , 2012

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 12 th day of January 2012, I mailed a copy of the foregoing Respondents Exceptions Brief in Case No. 22-CA-29845 on the parties designated below hereof by UPS, Next Day Air, to the last known address of the parties as set forth herein below:

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