

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD)	
)	
)	No. 12-3524
Petitioner)	
)	
v.)	
)	
NEW VISTA NURSING AND)	Board Case No.
REHABILITATION, LLC)	22-CA-029845
)	
Respondent)	

STATUS REPORT OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Third Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, hereby files this status report in light of the Court’s recent remand in *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113 (3d Cir. 2017) (“*New Vista I*”).

In the instant case, the Board found that New Vista Nursing and Rehabilitation, LLC, violated Section 8(a)(1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(1)) (“the Act”) and Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) by taking certain actions directed at its licensed practical nurses (“LPNs”). On November 14, 2012, the Court stayed the briefing scheduled in the instant case pending a decision in *New Vista I*, and directed the

parties to advise the Court within 14 days of mandate issuing in *New Vista I* of the effect, if any, of a decision in *New Vista I* on the instant case.

In *New Vista I*, the Board sought enforcement of an Order requiring New Vista to recognize and bargain with 1199 SEIU United Healthcare Workers East, NJ Region, as the collective-bargaining representative of the LPNs. In so holding, the Board found that the LPNs were statutory employees under the Act, and not, as New Vista claimed, supervisors excluded from the Act's coverage. On August 29, 2017, the Court determined that the Board relied on "inappropriate factors" under circuit law in finding that the LPNs were not supervisors. Accordingly, the Court vacated the Board's Order in *New Vista I* and remanded the case "for the Board to apply the correct legal test on the [supervisory] issue." On October 5, 2017, mandate issued in *New Vista I*.

A continued stay is appropriate in the instant case because the supervisory issue in *New Vista I* remains unresolved. As the Board argued in its support for a stay on November 5, 2012, "the Court must decide the predicate issue raised in *New Vista I*—whether the Board properly found that the LPNs are employees protected by the Act. If the Court enforces the Board's Order in *New Vista I*, then the issues in the instant case remain viable for the Court's review, and the parties could properly proceed with briefing. If the Court reverses the Board in *New Vista I* and determines that the LPNs are, in fact, statutory supervisors, New Vista's

actions in the instant case are lawful because supervisors are not protected by the Act.” (Board Response to Motion for Stay at 3.)*

The Board respectfully requests that the Court keep the stay in place until a final resolution of the supervisory status of the LPNs is reached.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half St, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, D.C.,
this 16th day of October 2017

* A copy of the Board’s response to the motion for stay is attached to this status report.

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, I electronically filed the foregoing document with Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half St SE
Washington, DC 20570

Dated at Washington, D.C.
this 16th day of October, 2017

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**RESPONSE OF THE NATIONAL LABOR RELATIONS BOARD TO NEW
VISTA’S MOTION TO STAY THE BRIEFING SCHEDULE**

To the Honorable, the Judges of the United States
Court of Appeals for the Third Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, hereby responds to the Motion to Stay the Briefing Schedule filed by New Vista Nursing and Rehabilitation, LLC (“New Vista”), pending the Court’s resolution of a related case, *NLRB v. New Vista Nursing & Rehabilitation*, Docket No. 11-3440 (“*NVI*”). The Board does not oppose staying the briefing schedule, because, as explained below, resolution of the unfair labor practice issues in *NVI* may critically affect enforcement of the Board’s order in this case.

1. In the instant case, the Board found that New Vista violated Section 8(a)(1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151,

158(a)(1)) (“the Act”), by interrogating employees about their union activities, creating the impression of surveilling employees’ union activities, and by soliciting employee complaints and grievances to encourage them to refrain from organizational activities. The Board also found that New Vista violated Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) by altering the duties of employees in an attempt to convert them to statutory supervisors under Section 2(11) of the Act (29 U.S.C. § 152(11)) and, thereby, to prevent them from obtaining union representation. Each of those findings relates to actions directed at New Vista’s licensed practical nurses (“LPNs”).

2. In *NVI*, the Board seeks enforcement of its Order requiring New Vista to recognize and bargain with 1199 SEIU United Healthcare Workers East, NJ Region, as the collective-bargaining representative of the LPNs. In so holding, the Board found that the LPNs were statutory employees under the Act, and not, as New Vista claims, supervisors excluded from the Act’s coverage.

The issue before this Court in *NVI* is whether substantial evidence supports the Board’s finding that the LPNs are not supervisors. New Vista also raises procedural challenges, including the President’s January 4, 2012 recess appointments to the Board. New Vista filed its opening brief on June 13, and the Board filed its brief on October 25. New Vista’s reply brief is due by November 13. Oral argument is not yet scheduled.

3. The Court's disposition of the supervisory status of the LPNs in *NVI* could critically affect the resolution of the instant case. Specifically, before reaching the issues presented in the instant case, the Court must decide the predicate issue raised in *NVI*—whether the Board properly found that the LPNs are employees protected by the Act. If the Court enforces the Board's Order in *NVI*, then the issues in the instant case remain viable for the Court's review, and the parties could properly proceed with briefing. If the Court reverses the Board in *NVI* and determines that the LPNs are, in fact, statutory supervisors, New Vista's actions in the instant case are lawful because supervisors are not protected by the Act. For those reasons, the Board does not oppose New Vista's request to stay the briefing schedule in this case pending the resolution of *NVI*.

WHEREFORE, the Board does not oppose New Vista's request to hold the briefing schedule in the instant case in abeyance pending the Court's decision in *NVI*.

/s/ Linda Dreeben
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Dated at Washington, D.C.,
this 5th day of November 2012