17-2330-ag(L), 17-2579-ag(XAP)

United States Court of Appeals

for the

Second Circuit

2850 GRAND ISLAND BOULEVARD OPERATING COMPANY, LLC,
DBA Elderwood at Grand Island,

Petitioner-Cross-Respondent,

– v. –

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR *AMICUS CURIAE* 1199 SEIU UNITED HEALTHCARE WORKERS EAST IN SUPPORT OF RESPONDENT-CROSS-PETITIONER

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PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

This brief is submitted, along with a Motion for Leave to File an Amicus brief, by 1199 SEIU United Healthcare Workers East (hereinafter "Union") in support of the Cross-Application for enforcement of an Order of the National Labor Relations Board (hereinafter "NLRB" or "Board").[1] Before Petitioner 2850 Grand Island Boulevard Operating Company, LLC, d/b/a Elderwood at Grand Island (hereinafter "Petitioner" or "Elderwood") filed the instant Petition, the Union was a participant in this matter, as the labor union that originally filed a petition for representation of the employees at the Elderwood at Grand Island facility. The Union opposed Elderwood's position before the election, at a post-election hearing, and in multiple stages of argument and briefing before the various levels of the NLRB.

The Union supports the NLRB's cross-motion for enforcement of the Board's Order. The Union's interests will be directly affected by the granting of the motion. The Union started an organizing drive to represent the majority of employees at the facility in mid-2016, and waged an organizing campaign for several months before filing a petition to be certified as the exclusive collective bargaining representative of those employees. Enforcement of the Board Order will mean the Union will finally be able to begin bargaining with Elderwood.

[1] Pursuant to Local Rule 29.1, this brief was authored in full by the undersigned counsel for 1199 SEIU, and is in full conformity with FRAP 29 and FRAP 32.

Despite the employees voting in favor of being represented by the Union in the fall of 2016, Elderwood's persistent refusal to recognize the legitimacy of the employees' choice has meant the parties still have yet to meet to bargain a collective bargaining agreement. Ironically, Elderwood has framed its years-long violation of its employees' wishes in terms of protecting employee free choice. The Union submits this brief and supports the NLRB's cross-motion because Elderwood's actions must not result in the undermining of the fundamental purposes of the National Labor Relations Act and the wishes of the facility's employees any further.

Petitioner has no colorable argument, and never has. Its claim that the LPNs at the facility are supervisors under the National Labor Relations Act (hereinafter "the Act") has no basis in the well-developed record, and is refuted absolutely by decades of case law on the question of which health care employees can be denied the protections of the Act. Its argument that conduct by pro-Union employees up to and during the NLRB-facilitated election interfered with employees' rights also has no basis in the record, in addition to being ironic. Elderwood raises no new legitimate arguments in support of its Petition before this Court, and it failed to preserve those few aspects of its position that are new.

For these reasons, as described below, the decision of the Board was well supported by substantial evidence and was not an abuse of its discretion. Therefore,

the Union respectfully requests the Petition be dismissed and the NLRB's cross-motion be granted in full.

ARGUMENT AND ANALYSIS

The Order of the National Labor Relations Board correctly decided the issues of whether LPNs at the Elderwood facility are supervisors under the Act, and thus exempt from the law's protections, and whether any conduct surrounding the union election justifies overturning its results. In reviewing a decision by the Board, this Court asks whether it was supported by evidence that a rational mind might accept as adequate to support the conclusion. *See Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260 (2d Cir. 2000). Under this analysis, the Board's Order should be enforced in full. The parties had many chances to develop the record at the early stages of the proceedings, including over the course of three days of hearings. This allowed the Hearing Officer, the Regional Director, and finally the Board itself to examine the merits of both parties' contentions. The conclusions the Board reached were more than adequately supported by the record and relevant case law. Thus, as described here, the Union requests the Board's Order be enforced in full.

I. THE BOARD'S FINDING THAT ELDERWOOD FAILED TO DEMONSTRATE THE LPNS ARE STATUTORY SUPERVISORS IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The party asserting that employees have supervisory status under the Act has the burden of proving so by a preponderance of the evidence. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). As such, any lack of evidence on the subject of supervisory status in the record is construed against the party that contends there is supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 n. 8 (1999). Since statutory supervisors do not have protections under the Act, the Board is conservative in excluding groups of employees. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996).

Section 2(11) of the Act, 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.

29 U.S.C. § 152(11).

The U.S. Supreme Court established the basic modern framework for interpretation of Section 2(11) in *Kentucky River Community Care*. *NLRB v. Kentucky River Community Care*, 511 U.S. 571 (1994). The Court there stated an employee is a statutory supervisor if (1) they hold the authority to engage in any 1

of the 12 listed supervisory functions found in the Act, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer." *Id*. at 574 (2001) (citing *Northcrest Nursing Home*, 313 NLRB 491, 493 (1993)).

Since the Supreme Court's *Kentucky River* decision, the NLRB has clarified several aspects of this analytical framework. In doing so, the Board has consistently interpreted Section 2(11) and the relevant case law to rest on a critical distinction between workers who exercise "genuine management prerogatives" and those that act merely as leaders among proximate groups of workers. *See Oakwood Healthcare, Inc.*, 348 NLRB 686, 688, 690 (2006). Similarly, the NLRB has established a key distinction between decisions that come from an employee's professional judgment and those that involve managerial power. *Providence Hospital*, 320 NLRB 717, 729 (1996).

The Board has held that for an employee to "assign" under the meaning of the Act, he or she must designate "significant overall duties" to other employees, not "ad hoc instruction that the employee perform a discrete task." *Oakwood Healthcare, Inc.*, *supra*, at 689. Along the same lines, the Board has held that putative supervisory activity must be a regular occurrence, not sporadic. *See Bowne of Houston*, 280 NLRB 1222, 1223 (1986). In defining "responsibly to direct," the

Board held that the supposed supervisor must be accountable for the performance of employees she directs, with negative consequences for her if the employee performs improperly. *Oakwood Healthcare, Inc.*, *supra*, at 692.

Crucially, the Board has also held that a showing of "independent judgment" must include a degree of discretion that rises above mere routine or clerical work. *Id*. Thus, "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." *Id*., at 693; *see Dynamic Science, Inc.*, 334 NLRB 391, 391 (2001). An employee also does not exercise independent judgment if a decision is the only obvious choice or merely in order to distribute workloads equally. *Oakwood Healthcare, Inc.*, *supra*, at 693. In a party's attempt to meet its burden of proof, "[t]he Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue." *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

This body of authority by the U.S. Supreme Court and the NLRB establishes that an employer who asserts a group of employees are supervisors must meet a heavy burden. This is particularly true in the context of a health care facility, since *Oakwood Healthcare, Inc.*, one of the foundational cases on point, established clear

guidelines for determining when a health care worker is a supervisor. *See Oakwood Healthcare, Inc.*, 348 NLRB 686, 688, 690 (2006) (hereinafter "Oakwood"). Critically, Petitioner does not challenge the validity or effect of *Oakwood*, even when it makes a generalized request for the overturning of more recent case law on supervisory status in health care facilities.

In asserting LPNs at the Elderwood and Grand Island facility are statutory supervisors, Petitioner admits that LPNs do not have the authority to: (1) hire; (2) transfer; (3) suspend; (4) layoff; (5) recall; (6) promote; (7) issue written discipline; or (8) discharge CNAs. Elderwood relies on six of the statutory functions in seeking to exclude the LPNs. It alleges LPNs assign work to the CNAs, responsibly direct the CNAs, discipline, recommend discipline, adjust grievances, recommend rewards, and recommend transfer of employees.

Before examining why Elderwood's arguments on this issue must fail, it is worth noting that in 2013, years before the union organizing drive and election at issue, the NLRB held an election in a unit of employees which included LPNs at the Elderwood facility. At that time, the Employer did not contend that the LPNs were supervisors. However, since the Union did not receive a majority of the votes, the unit was not certified at that time.

The record as a whole demonstrates the LPNs' relationship with CNAs is very limited. LPNs and CNAs' duties overlap somewhat, but each group functions on its

own, mostly without the need to ask for assistance, let alone instruction. To the extent there is discussion between the two groups regarding the subjects listed in Section 2(11), the record shows the titles collaborate, rather than having one title direct or lasting authority over the other. At every stage of this proceeding, Elderwood has failed to provide sufficient evidence to show these LPNs perform even one of the supervisory duties with the independent judgment required under the law. *See Oakwood*, *supra*, at 693.

Now before this Court, Petitioner again fails to meet its burden of proving any of the grounds for a finding of supervisory status under the Act. The Board's conclusion that Elderwood failed to prove the LPNs at the facility are statutory supervisors is a finding of fact that is determinative as long as it supported by substantial evidence. *NLRB v. Quinnipiac Coll.*, 256 F.3d 68, 73-74 (2d Cir. 2001); *Schnurmacher Nursing Home v. NLRB* , 214 F.3d 260, 265 (2d Cir. 2000). Under the well-established standard, then, as long as there is evidence a reasonable mind might accept as adequate to support the conclusion, the NLRB's finding must stand. *Schnurmacher Nursing Home*, *supra*, 214 F.3d at 265; *see also NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1310 (2d Cir. 1990). "The Board's findings regarding supervisory determinations are entitled to special weight." *J.L.M., Inc. v. NLRB*, 31 F.3d 79, 82 (2d Cir. 1994). Elderwood cannot show the Board's conclusion was not supported by substantial evidence. Since supervisory status is the linchpin of

Petitioner's remaining arguments, its Petition must therefore be dismissed and the Board's certification of the Union should be affirmed.

A. LPNs do not carry out the supervisory function of assigning CNAs to residents under the meaning of the Act.

The evidence on the record of LPNs making so-called assignments of CNAs to residents demonstrates that such activity is extremely limited and devoid of the independent judgment necessary to constitute supervisory conduct. Board law has established that the routinized, mechanical following of guidelines or policies cannot establish the independent judgment needed to show supervisory status under the Act. Because they do not exercise independent judgment in the conduct to which Petitioner points, the LPNs cannot be considered statutory supervisors. *See Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006); *Dynamic Science, Inc.*, 334 NLRB 391, 391 (2001); *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994). The Board correctly found that Petitioner failed to meet its burden in proving this point.

Elderwood's main source of argument in this case, John Mbaki's testimony, was clear that the primary concerns in matching CNAs with residents were residents' gender preferences for CNAs and residents' families' requests for certain CNAs. While Mr. Mbaki briefly alluded to acuity of care, he also testified that all CNAs are qualified to care for every resident in the facility. The clear implication of this is that acuity does not play a tangible role in matching CNAs and residents. Mr. Mbaki

also testified that full-time CNAs, a large portion of the workforce at the facility, have residents to whom they are always assigned, meaning there is no assignment required for them at all. Mr. Mbaki also testified that such duties take up only a few minutes of his working day, making it a *de minimus* part of his working day. *See Oakwood*, *supra*, at 689.

Mr. Mbaki's repetition of gender preferences and families' requests as the main parameters determining with whom CNAs should be assigned made clear that the task of assigning CNAs requires no independent judgment, under the Supreme Court's framework. *See id*. at 693; *NLRB v. Kentucky River Community Care*, 511 U.S. 571 (1994). This activity involves no real discretion for LPNs, and certainly not the kind of professional, independent judgment required to prove supervisory status.

The remaining conduct that Petitioner argues constitutes supervisory assignment is similarly lacking in independent judgment. For example, as another Elderwood witness, Ms. Stumpo testified, the order in which CNAs float to another floor is determined by the next person in the "float book." She testified any deviation from this order would have to be decided by the RN Supervisor on duty, not an LPN. LPNs plainly have no actual role in this process, let alone any decision making power. *See Oakwood*, *supra*, at 693; *Dynamic Science, Inc.*, 334 NLRB 391, 391 (2001); *Bowne of Houston*, 280 NLRB 1222, 1223 (1986).

B. LPNs do not carry out the supervisory function of responsibly directing CNAs.

The record is clear that LPNs do not responsibly direct CNAs, and the Board had substantial evidence to reach this conclusion. Much of the testimony upon which Elderwood relies was conclusory, such as flat declarations that LPNs are CNAs' bosses, that LPNs supervise CNAs, or that LPNs direct CNAs. Such evidence cannot be the basis for a finding that a party has met its burden of proving a supervisory function under the Act. *See Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). The other grounds upon which Elderwood has argued LPNs responsibly direct CNAs must also fail, since there is insufficient evidence LPNs exercise independent judgment or are held accountable for the conduct of CNAs.

Throughout the various iterations of Elderwood's arguments, it failed to provide concrete evidence that LPNs direct CNAs throughout their shifts on a consistent basis. The Board has held that giving "ad hoc instruction that the employee perform a discrete task," does not constitute supervisory activity. *Oakwood*, *supra*, at 689. The few instances to which witnesses alluded that involved direction were less than sporadic, and thus cannot be the basis of a finding LPNs were acting as supervisors. *See Bowne of Houston*, 280 NLRB 1222, 1223 (1986) (holding that supervisory conduct must be a regular occurrence to deem an employee

a supervisor). Instead, the record demonstrates that LPNs and CNAs work alongside each other as peers.

It should also be noted that Employer witness Tonya Sumpo, in addition to several other witnesses from both parties, testified that when there must be some deviation from a resident's care plan, the role of CNAs and LPNs is essentially the same. Both groups may deviate from the care plan on a common-sense basis when such a change is needed on the spot, but only titles above the LPNs may actually change the plan.

Even more importantly, the NLRB has held that an employee's actions do not involve independent judgment if they are "controlled by detailed instructions . . . set forth in company policies or rules . . . ." *Oakwood*, *supra*, at 693; *Dynamic Science, Inc.*, 334 NLRB 391, 391 (2001). Similarly, "[i]f there is only one obvious and self-evident choice . . . then the assignment is routine or clerical in nature and does not implicate independent judgment . . . even if it . . . involves forming an opinion or evaluation." *Oakwood*, *supra*, at 693; *see J.C. Brock Corp.*, 314 NLRB 157, 158 (1994).

Such authority applies in this case because the record made clear the care plan gives detailed instructions to CNAs and LPNs in caring for residents. In other words, neither group exercises independent judgment as that term is used in the relevant case law. *See Oakwood*, *supra*, at 693. Elderwood's Director of Nursing reinforced

this when she testified that if she tells an LPN a resident must get an additional shower and the resident does not, she will hold the LPN responsible. This does not constitute the independent judgment or accountability required under the Act. Rather, it shows LPNs must follow rote instructions, and if they do not they face a penalty. *See Oakwood Healthcare, Inc.*, *supra*, at 693; *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

Finally, Petitioner's reliance on minor references to supervision in LPNs' evaluations should also be unconvincing, since the record never actually showed LPNs were held accountable for CNA conduct. The record contained no evidence that the two references in the evaluations have ever had any effect on LPN job status, or indeed held the possibility of any tangible effect at all. When answering such a question, the Board has held:

> [I]n determining whether accountability has been shown, we shall similarly require evidence of actual accountability. This is not to say that there must be evidence that an asserted supervisor's terms and conditions of employment have been actually affected by her performance in directing subordinates. Accountability under Oakwood Healthcare requires only a prospect of consequences. But there must be a more-than-merely-paper showing that such a prospect exists. That is, where accountability is predicated on employee evaluations, there must be evidence that a putative supervisor's rating for direction of subordinates may have, either by itself or in combination with other performance factors, an effect on that person's terms and conditions of employment.

Golden Crest Healthcare Center, 348 NLRB 727, 731 (2006).

Here, Petitioner has failed to make such a showing, regarding either LPNs' evaluations or any other part of the record. It did not, for instance, offer examples of when any LPN was disciplined for failure to supervise a CNA. Ms. Stumpo despite her long years with the company, could not remember one example. The only concrete attempt at providing an example on the record was Mr. Mbaki's testimony about when he was disciplined for a resident being left alone. Contrary to Petitioner's arguments, though, this merely showed that Mr. Mbaki was disciplined because of something he did in connection with the incident, not that he was held accountable *because of* the CNA's conduct or his failure to supervise the CNA. For all of these reasons, Elderwood has failed to meet its burden of showing LPNs perform this supervisory function under the Act.

C. LPNs cannot discipline or effectively recommend discipline of CNAs.

The three instances Elderwood provided in attempting to show LPNs have some disciplinary role regarding CNAs show no such thing, and fall far short of the evidence required to prove supervisory status. Thus, the Board's decision that LPNs do not exercise this supervisory function was supported by substantial evidence and the Board did not abuse its discretion.

Under established case law, an LPN must be shown to have the authority to recommend discipline and have that recommendation followed, or that they can cause disciplinary consequences for an employee without another investigation first

taking place. *See Children's Farm Home*, 324 NLRB 61, 61 (1997). Critically, the putative supervisor's rule cannot be simply to report problems to those above his or her, which might in turn lead to the superiors deciding to issue discipline. *See Veolia Transp. Serv., Inc.*, 363 NLRB No. 188, 2016 WL 2772296, at *8 (May 12, 2016); *NLRB v. Meenan Oil Co.*, 139 F.3d 311, 322 (2d Cir. 1998).

The instances of alleged discipline do not meet these requirements. Two of the supposed disciplines occurred after the union election, and thus have no probative value. Even if they had been from earlier, the record showed that the LPN who issued them worked on an entirely different shift from the CNAs involved and never spoke with them. In fact, there is no evidence on the record that anyone spoke with the CNAs about the supposed discipline. Most importantly, though, Ms. Harris made clear that she filed the write-ups merely because her repeated requests that a resident's bed be lowered had been ignored by management, and to alert the RN supervisor to the ongoing problem so she could solve it. This testimony, in other words, clearly shows Ms. Harris was not acting with any authority to discipline, and in fact did not even wish for the write-ups to lead to discipline.

The other instance of discipline on the record occurred in 2012. Again, the LPN who allegedly filled out the paperwork never spoke with the CNA involved, Jessica Vrba. Ms. Vrba, in fact, was only notified of the document by the RN

Supervisor. Again, this means there is no evidence of any contact between the LPN and CNA in question.

These three instances, spaced over several years, cannot be the basis for a finding that LPNs are statutory supervisors. *See Bowne of Houston*, 280 NLRB 1222, 1223 (1986). Even if the record contained evidence resembling a consistent practice, it would not have shown that LPNs exercise any independent judgment. Instead, the examples offered show that LPNs are simply reporting information to the RN Supervisor, which does not involve the decision-making required to be a supervisor under Section 2(11) of the Act. *See Oakwood*, *supra*, at 693; *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Furthermore, since all three instances clearly involved LPNs simply reporting problems, which report might in turn lead to discipline imposed by someone above the LPNs, they cannot be the basis for a finding that they were acting as statutory supervisors. *NLRB v. Meenan Oil Co.*, 139 F.3d 311, 322 (2d Cir. 1998).

D. LPNs do not effectively recommend rewards in a manner that makes them statutory supervisors.

The Board's conclusion that LPNs do not effectively recommend rewards for CNA performance was supported by substantial evidence and should stand. The minimal participation LPNs have when management evaluated CNA performance, if any, does not confer supervisory status.

Board authority states that evaluations will not confer supervisory status if the alleged supervisor's actions do not affect the evaluated employees' job status. *Ten Brock Commons*, 320 NLRB 806, 813 (1996); *Northcrest Nursing Home*, 313 NLRB 491, 498 fns. 36 & 37 (1993); *Bayou Manor Health Center*, 311 NLRB 955 (1993). The evaluations must "lead directly to personnel actions affecting those employees, such as merit raises." *Ten Broeck Commons*, *supra*, at 813.

Other than vague conclusory statements, there was no evidence in the record before the Board that LPNs directly evaluate CNAs at all. Although Ms. Stumpo testified that LPNs are sometimes asked by the RN Supervisor about a particular CNA when the RN Supervisor fills out their evaluations, Ms. Kerrison testified that this never occurred during her sixteen years with the Employer. Mr. Mkabi stated that a supervisor may ask him how a CNA is working in an informal way, but this is clearly distinct from evidence that LPNs actually evaluate CNAs. The Employer presented no evidence showing that an LPN's informal feedback about a CNA had any practical effect on a CNA's evaluation or job status. For example, the record contains no evidence to support the vague and conclusory statement that an evaluation affects a CNA's tuition reimbursement. Similarly, Elderwood alleges that the LPNs' evaluation of CNAs can lead to selection for employee of the month, yet the testimony was that any employee or any family member can nominate a

person for employee of the month. Such a recommendation by an LPN makes her a statutory supervisor no more than it would make a family member one.

Since Petitioner presented no evidence that LPNs' extremely limited input in the evaluation of CNAs has any palpable effect on CNAs' job status, the Employer cannot meet its burden of showing they are supervisors under Section 2(11) of the Act. The Board was supported by substantial evidence in reaching this conclusion.

E. LPNs do not adjust CNAs' grievances under established NLRB authority.

The record contains only two instances where LPNs supposedly became involved in adjusting CNA grievances, neither of which involved any exercise of independent judgment, and which thus cannot prove LPNs are supervisors under Section 2(11). *See Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006)

One of these instances, related by Mr. Neyra, involved Mr. Mbaki holding a short meeting where he reminded the CNAs on his floor to "do their jobs" and not to abuse their break times. There is no evidence suggesting any employee received discipline before or after this meeting.

The other example involved Ms. Kerrison bringing two CNAs who had a disagreement to meet with the facility's administration, including Thomas DiJohn. Mr. DiJohn testified that he threatened to send one of the CNAs home if the issue were not resolved, inadvertently revealing that he, not Ms. Kerrison, had the

authority to resolve the CNAs' disagreement, as well as the ability to discipline them.

Neither example shows any exercise of independent judgment, and thus cannot be the basis for arguing LPNs have supervisory status. *Oakwood*, *supra*, at 693; *Dynamic Science, Inc.*, 334 NLRB 391, 391 (2001). Furthermore, insubstantial evidence about two instances falls short of showing LPNs engage in such conduct on any sort of regular basis. LPNs evaluations contain no clear reference to such a duty and none of the many witnesses cited any other alleged example of adjusting grievances. In light of this dearth of evidence, LPNs are not statutory supervisors under the stablished framework.

F. LPNs lack the authority to effectively recommend transfers of CNAs.

Finally, the Board was correct in rejecting Elderwood's argument that LPNs have the supervisory duty of effectively recommending transfers of CNAs, in the form of recommending they float to certain unit.

It is undisputed that LPNs may not transfer CNAs themselves. Beyond this, Petitioner offered no evidence that LPNs even recommend the transfer of a CNA. Elderwood's own witness, Ms. Stumpo, testified that CNAs are transferred among parts of the facility according to a float book. The float book is kept in the nuse manager's office and is not available to LPNs, let alone etermined by them. John Mkabi confirmed on cross examination that he does not have the authority to float

CNAs between units, and that the nursing supervisor addresses the issue of short staffing on particular units. Even when asked a leading question on direct examination, Mr. Mbaki admitted that the nursing supervisor does not seek his or other LPNs' opinions about floating decisions. Ms. Kerrison reinforced this, testifying she does not take part in float decisions whatsoever.

The Board has found that a putative supervisor's recommendation must be binding upon upper management. *See Ten Brock Commons*, 320 NLRB 806, 813 (1996). Here, the record clearly shows that this standard was not met. Management does not seek LPNs' input regarding floating, and any recommendation is taken as non-binding. In the face of this evidence, the Board's finding that Elderwood had failed to meet its burden of proof was supported by substantial evidence and not an abuse of its discretion.

II. THE BOARD WAS CORRECT TO OVERRULE ELDERWOOD'S OBJECTIONS TO THE ELECTION AND IN CERTIFYING THE UNION

To the extent Elderwood relies on a finding of supervisory status of LPNs in arguing the election should be overturned, those arguments must fail. As described above, Board did not abuse its discretion in finding Elderwood had failed to meet its burden regarding LPNs' supervisory status under Section 2(11) of the Act. Since the LPNs were not statutory supervisors, no LPN conduct surrounding the election,

either in favor or against the Union, could be the basis of a valid objection to its results.

However, should this Court find LPNs are statutory supervisors, their conduct still would not approach the kind of coercive behavior that can be grounds for overturning an election. The foundational NLRB law applicable to Petitioner's arguments essentially asks whether the alleged misconduct, if proven, has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). To answer this question, the Board looks to several factors: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Cedars-Sinai Medical Center*, 342 NLRB 596 (2004) (citing *Cambridge Tool*, *supra*); *Harsco Corp.*, 336 NLRB 157 (2001); *Crown Coach Corp.*, 284 NLRB 1010 (1987). Also relevant is the framework the Board has established to find whether conduct was "so aggravated as to create a

general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *Cal-West Periodicals, Inc.*, 330 NLRB 599, 600 (2000).

In addition, it is important to note that Board authority holds that a person is deemed to be acting on behalf of a party when either actual or apparent agency is proven by the party making the allegation. *See Longs Drug Stores California, Inc.*, 347 NLRB 500 (2006); *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, fn.4 (1991); *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). It is critical to note that Elderwood has presented no evidence that any of the LPNs were acting as agents of the Union when engaging in any alleged behavior. As such, the LPNs cannot be considered Union agents should the Court engage in analysis of these objections.

In its brief, Petitioner argues that the whole of the misconduct is greater than the sum of its parts, and that the Board, as well as the Regional Director, ignored this. The Union objects to this line of argument in the strongest terms. The Board's analysis, as well as that of the Hearing Officers and Regional Director, was proper and complete. The Hearing Officer's Report, which was later adopted by the Regional Director and affirmed by the Board, meticulously explained that each aspect of the Employer's allegations failed because of a lack of credible evidence, a lack of specific evidence, a lack of evidence containing direct knowledge, because

the LPNs were not Union agents, because Board case law does not support Petitioner's position, or, most often, for all these reasons at once. Neither the Hearing Officer nor the Regional Director found merit to any of the Objections. The Board, in turn, examined the entire record and reached the same conclusions. In other words, whether taken as the sum of zero and zero, or as a series of zeroes forming a unified mass, both the whole and each component part of Petitioner's objections failed utterly at every stage of this proceeding.

Elderwood disagrees with this outcome, but none of its arguments against it have merit. Making these determinations is, of course, the exact role the Hearing Officer, Regional Director, and Board serve after a union election. As detailed below, the Board was fully justified in finding Elderwood had failed to meet its burden of showing conduct that justified overturning the election results, and in certifying the Union.

A. LPN Acting as Union Observer

Elderwood's claim that a purported LPN acting as the Union's observer is irrelevant. The Employer made no such objection at the time of the election and cites no case law regarding how such a situation could be grounds for overturning the election results. *See U-Haul*, 341 NLRB No. 26 (2004) (holding that an election should not be overturned, and rely in part on the fact that an employer Objection regarding the union observer was not raised at the time of the election). As such, the

argument should not be entertained by this Court and cannot be the basis for overturning the election results.

B. Electioneering near polling area

Regarding Petitioner's allegation that LPN Christine Von Reyn engaged in electioneering on the day of the election, it presents no authority to support its argument the election should be set aside. Since Ms. Von Reyn was not a Union agent, the Employer had the burden of showing her conduct substantially interfered with employees' free choice. *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992); *see Millard Processing*, 304 NLRB 770, 771 (1991). Elderwood's brief does not explain how her conduct would have a coercive effect on any voters, even the one she escorted, and it is certainly not obvious on its face.

Since Ms. Von Reyn escorted one voter and there was no proof she solicited her vote or disobeyed any NLRB agent's instructions at any point, the Employer failed to meet its burden. Even if Ms. Von Reyn were an agent of the Union, her conduct would not have been grounds for overturning the election. Board case law has allowed a party to escort voters to the polls when there is no evidence it solicited votes or of other coercive behavior. *See Santa Fe HIW, Inc.*, 349 NLRB 478 (2007).

C. Harassment and Coercion

Petitioner's allegations regarding harassment and threatening promises by LPNs are stated in vague terms, and any specific conduct it alleges does rise to the level of interference with the NLRB election.

Elderwood's allegation related to an LPN falsely accusing an anti-union co-worker of working under the influence, if Elderwood attempts to preserve this allegation, lacks merit for several reasons. On this question, the Board reached the only reasonable conclusion possible. First and most importantly, there was simply no credible evidence that Von Reyn was tracking an employee's attendance.

Second, Elderwood's witnesses made clear that the two employees in question had a personal conflict that went back at least ten years – long before the Union campaign. Ms. Stadelmaier was clear in her testimony that the alleged tracking of attendance had been happening for many years. Lisa Nice, the alleged target of this conduct, explicitly confirmed this in her testimony. Based on the length of time of the conflict and the many issues through which the personal conflict manifested, common sense would tell any fact finder that it had nothing to do with Ms. Nice's stance on the Union. The Board was thus justified in reaching this conclusion.

The allegation that an LPN said a co-worker was under the influence of drugs or alcohol – again, assuming Elderwood attempts to preserve this argument in its generalized allegation of harassment – also lacks credible and convincing evidence.

As with other parts of Petitioner's allegations, the record on this point is clouded by many layers of hearsay, vagueness, and biased guesswork. The witness who was closest to having direct knowledge of the alleged accusation appeared to be Ms. Nice. After stating flatly that her knowledge of the incident was only hearsay, she testified clearly that the alleged conflict had nothing to do with the Union organizing campaign. Beyond this, it is also worth briefly noting that the law, professional guidelines, and common sense demand that a health care professional has an obligation to be vigilant against dangerous conduct like substance abuse in the facility.

Through any lens, though, none of the alleged conduct was harassment related to the upcoming election. Furthermore, even accepting the testimony that is in Petitioner's favor on these points, there is no evidence that word of the allegedly wrongful conduct reached any other employees. Under *Cambridge Tool* and other foundational case law, the Board must consider how many employees were the subject of alleged misconduct and "the extent of dissemination of the misconduct among bargaining unit employees." *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004) (citing *Cambridge Tool*); *Harsco Corp.*, 336 NLRB 157 (2001).

Since only a handful of employees were even alleged to have heard about the supposed misconduct, the Board would have needed evidence of it spreading to far more than five people to conclude it had any noticeable effect on the election at

issue. *See Cedars-Sinai Medical Center, supra*. Since Elderwood presented no such evidence, the Board correctly rejected the allegation and denied the company's objections to the election.

D. Signing Cards and Attendance at Union Meetings:

There is also no evidence on the record of any LPN engaging in impermissible conduct related to co-workers signing authorization cards. On this point, the record contains any substantive evidence. Shannon Horne's testimony that an employee felt almost pressured into signing a card should be disregarded as hearsay and overly vague. The other reference consists of Ms. Stadelmaier flatly alleging an employee was forced to sign, with no further specific information. Both statements are self-serving conclusions, rather than credible evidence that could have been the basis for a different finding by the Board. Similarly, Petitioner's allegation that LPNs' attendance at Union organizing meetings should be grounds for overturning the election is supported by no credible evidence, and Petitioner presents no legal authority upon which it bases this argument. Thus, both arguments should be rejected outright.

E. Promise of Benefit:

Petitioner's claim that Ms. Kerrison's conversation with an employee about the nature of just-cause protection should be grounds for overturning the election has no merit, and the Board did not abuse its discretion in rejecting it.

First, the record is clear that Ms. Kerrison could not have been acting as an agent for the Union during this conversation. *See Longs Drug Stores California, Inc.*, 347 NLRB 500 (2006); *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, fn.4 (1991); *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). Furthermore, at the hearing, Ms. Kerrison testified numerous times that Nicole Ricketts approached her with a question about a union workplace and the difference between at-will employment and a just cause standard, and that Ms. Kerrison described the difference as she understood it. Even when counsel for Elderwood attempted to lead her into testifying that she made a promise several times, Ms. Kerrison continued to testify clearly and consistently that she did not. The Board reached the only reasonable conclusion based on the record when it found Ms. Kerrison's conversation was not appropriate grounds for overturning the election.

Under well-established precedent, even if a union's agent makes a promise of a benefit, it is not objectionable unless it is within the union's power to grant that benefit. *El Monte Tool & Die Casting*, 244 NLRB 40 (1979). The Board assumes that employees understand that any benefit that would require bargaining between

the parties (including a just cause discipline standard) could not be granted by the Union alone, meaning such a promise would be meaningless. *See id.*, *Aleyska Pipeline Service Co.*, 261 NLRB 125 (1982).

In addition, the analysis of potential wrongful conduct still requires a showing of a more prevalent effect on the voting group. *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004). The record showed merely that Ms. Kerrison had a conversation with one co-worker on one occasion. Even if this had been somehow disruptive or coercive, there is no evidence she or Ms. Ricketts referenced or repeated the conversation with anyone else.

F. Union did not engage in objectionable conduct

Under *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), the Board considers the nature and extent of alleged electioneering near the polls and whether it was conducted within a "no electioneering" area or against a Board agent's instructions. All of the conduct here was far from the polling area, which was below ground and had no windows. In addition, there was no evidence any voter found the presence of the bus or the Union representatives in the street intimidating or that it had any effect on the election. *Id.*, at 1119. There was no allegation at any point that the Union violated any Board instructions or that a representative of Petitioner raised any concerns about the Union's presence on the day of the election.

Here, the situation is more closely analogous to that in *Lucky Cab Co.*, 360 NLRB No. 43 (2014). In that case, an employer's anti-union poster was not grounds for setting aside the election results, since it was not visible from where employees stood on line, it was not in a "no electioneering zone," and its presence did not violate any Board Agent instructions. *Id*. Under *Boston Insulated Wire*, the poster could not have interfered with employees' sense of free choice as to affect the election. *Id*. As in that case, the Union bus and the Union representatives on the street were not present or even visible anywhere near the polling area or the hallway leading to the polling area. As such, the Board reasonably concluded that none of the alleged conduct affected employee free choice and Elderwood had thus failed to meet is burden of showing conduct that merited overturning the election.

CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of the word processing program, this brief contains 7041 words and therefore is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B).

/s/Ian Hayes