

**Nos. 18-2220 and 18-2619**

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**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

**CORAL HARBOR REHABILITATION AND NURSING CENTER**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**1199 SEIU UNITED HEALTHCARE WORKERS EAST**

**Intervenor**

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

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**RUTH E. BURDICK**  
*Deputy Assistant General Counsel*

**DAVID A. SEID**  
*Attorney*

**National Labor Relations Board**  
**1015 Half Street SE**  
**Washington, DC 20570**  
**(202) 273-7958**  
**(202) 273-2941**

**PETER B. ROBB**  
*General Counsel*

**JOHN W. KYLE**  
*Deputy General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

**National Labor Relations Board**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Coral Harbor Rehabilitation and Nursing Center (“the Center”) to review an order issued by the National Labor Relations Board (“the Board”) against the Center, and the Board’s cross-

application to enforce that order. The Board’s Decision and Order issued on May 2, 2018, and is reported at 366 NLRB No. 75. (A. 3-27.)<sup>1</sup> The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the Act, 29 U.S.C. 160(a), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Order is final with respect to all parties. The Court has jurisdiction over this appeal under Section 10(e) and (f) of the Act, 29 U.S.C. §160(e) and (f). Venue is proper because the Center transacts business in this Circuit. The petition and application were both timely because the Act imposes no time limits for such filings. The charging party before the Board, 1199 SEIU United Healthcare Workers East (“the Union”) has intervened on the Board’s behalf.

### **STATEMENT OF THE ISSUE PRESENTED**

The ultimate issue in this case is whether the Board reasonably found that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the representative of the Center’s LPNs and by changing their wages and certain benefits without first notifying the Union and giving it an opportunity

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<sup>1</sup> “A” references are to the Joint Appendix filed by the Company. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

to bargain. Resolution of that issue turns on the subsidiary question of whether substantial evidence supports the Board's finding that the Center failed to carry its burden of proving that its LPNs are statutory supervisors.

### **STATEMENT OF RELATED CASES**

This case has not been before this Court previously, and the Board is unaware of any related case as defined in L.A.R. 28.1(a)(2).

### **STATEMENT OF THE CASE**

This case involves a successor employer, the Center, which purchased an existing nursing facility where the Union represented two separate units of employees—a unit of licensed practical nurses (“LPNs”), and a unit of service employees that includes certified nursing assistants (“CNAs”). There is no dispute, as the Board determined, that the Center as a successor-employer under *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), had the right to set the LPNs' initial terms of employment when it took over operations of the nursing home. (A. 3, 13-14.) The dispute on appeal is the Center's claim that it had no obligation to bargain because the LPNs, under the initial terms set by the Center, were converted from employees with bargaining rights under the Act, to statutory supervisors excluded from the Act's protections.

After investigation of unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Center violated

Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the representative of the LPNs, and by later making unilateral changes to their wages and benefits without notice to the Union or providing the Union an opportunity to bargain. (A. 6-7; 70-76, 85-86, 685-86.) After a hearing, an administrative law judge issued a decision and recommended order finding that the Center committed those violations. (A. 6-27.) Specifically, the judge found that the Center failed to carry its burden of establishing that its LPNs are statutory supervisors on the claimed bases that they have the authority to assign, responsibility to direct, to discipline, evaluate employees, and adjust grievances. (A. 19-25.)

On exceptions filed with the Board, the Center limited its challenge to the judge's findings regarding the LPNs' role in discipline and adjusting grievances. (A. 3 and n.4.) On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted the recommended order, with modifications. (A. 3-5.) Now before the Court, the Center has further limited its challenge only to the Board's finding that the LPNs do not discipline or effectively recommend discipline of the CNAs with whom they care for residents.

## I. THE BOARD'S FINDINGS OF FACT

### A. Background; the Center Begins Operating a Nursing Home; a Majority of Its LPNs Had Worked for the Predecessor Employer; The Center Changes the LPNs' Wages and Benefits

Since at least 2008, the Union has represented a unit of service employees, including the CNAs, working at the nursing facility and rehabilitation center in Neptune, New Jersey, known as Medicenter. The parties' collective-bargaining agreement covering that unit expired on June 15, 2014, but was extended by the parties through 2015. (A. 7; 256-57, 813-907.) On June 30, 2015, the Union was certified as the collective-bargaining representative of an additional unit at the nursing facility comprised of LPNs. By early September, Medicenter and the Union had not yet reached a collective-bargaining agreement covering the LPNs or a successor agreement for the service employees. (A. 7-8 and n.6; 72, 106, 248-52, 261-62, 700-03.)

On September 11, 2015, the Center entered into an asset purchase agreement to acquire the nursing facility. (A. 8; 72, 106, 709-18.) In mid-December, the Center's counsel informed the Union of its intent to hire the facility's LPNs as supervisors and to exercise its rights under *Burns* to unilaterally set their initial terms of employment, including their conversion to supervisors. (A. 8; 777-78.) By letter, the Union's counsel objected to the Center's conversion of LPNs to supervisors and demanded that the Center bargain with the Union on behalf of the

LPNs. (A. 8; 267-71, 781-82.) In a December 23 letter, the Center's counsel informed the Union that it had made job offers to LPNs and reiterated that as a *Burns* successor it could set the LPN's initial terms of employment, including their conversion to supervisors. (A. 8; 783-84.) The Center, however, agreed to continue recognizing the bargaining unit that included the CNAs. (A. 8; 266-67, 719-64.)

On January 1, 2016, the Center began operating the facility. A majority of the LPNs hired by the Center had formerly worked as LPNs at Medicenter. (A. 8; 71-72, 105, 107, 281, 625-26, 679-80.) In mid-January, the Center increased the LPNs' wages. (A. 4 n.9, 10, 17; 601-04.) After the Center began operations it also changed the LPNs' paid time-off benefits and health benefits. (A. 4 n.8; 579-80, 680-81, 1190.)

## **B. The Center's Operations**

The Center's facility contains 120 beds and operates as a long-term care and sub-acute nursing facility. Residents are housed on both floors of the two-story facility. The first floor contains a sub-acute unit and a long-term care unit. The second floor houses long-term care residents split into two-wings. The facility operates 24 hours a day, 7 days a week, on three shifts. (A. 312-14, 633.)

Administrator Jeremy Schuster oversees the facility. The Director of Nursing ("DON") Marcie Nowicki oversees the nursing department. The Assistant

Director of Nursing (“ADON”), two unit managers, and RN supervisors all report to the DON. Unit managers assign work to the LPNs and ensure that they perform their jobs. On weekends, LPNs report to RN weekend supervisors. (A. 71-72, 106, 313-14.)

During the day shift from Monday to Friday, the DON and ADON are at the facility along with the two unit managers, one for each floor. The evening and weekend shifts have one house supervisor who is responsible for the facility, although the DON remains ultimately in charge and can be reached by telephone, if necessary. (A. 313-14, 632-33.)

The Center employs approximately 25 LPNs who work as floor nurses, and 36 CNAs. (A. 8; 549.) LPNs are paid hourly and the DON approves any overtime for them. (A. 335, 343, 398, 428-29.) The day shift includes two LPNs and four CNAs on the first and second floors. LPNs distribute medication, perform treatments on residents, and ensure that their needs are met. (A. 330-32, 377, 487.) CNAs provide basic care to residents and assist with daily living functions, such as feeding, bathing, grooming, dressing, hygiene, and walking. (A. 376, 487, 615.)

### **C. Scheduling and Assignment of Resident Rooms**

The staffing coordinator, or DON Nowicki, prepares a master schedule for the CNAs’ work which includes their assignments to particular shifts and locations. (A. 12, 13, 19, 20; 330-36, 425-31, 628-29.) The LPNs receive the

completed master schedule and on occasion may add or subtract CNAs on the chart to ensure an even distribution of workers to residents for each assignment. (A. 12, 13, 20; 337-42, 426-27.) The LPNs do not attend morning staff meetings, nor do they plan resident care. (A. 12, 20; 345-46, 429-30, 497, 519-20.) At DON Nowicki's direction, LPNs may call or text CNAs about their work schedule and find a replacement when a CNA calls in sick. (A. 12, 20, 21; 373-75.) The LPNs do not approve overtime or leave requests for the CNAs. (A. 12, 13, 20, 21; 343-44, 373-75, 429.)

#### **D. The LPNs' Role in the Center's Disciplinary Process**

The Center uses a form entitled "Notice of Disciplinary Action" to issue disciplinary actions to employees. (A. 1300-26.) The disciplinary notice contains different boxes for the "Nature of the Violation" including: absence, lateness, resident care, resident safety, work not satisfactory, and other. Below the boxes for the type of violation, are four blank lines where a written narrative may be added, and an additional line for a signature. (A. 1300-26). Below the narrative section, the notice states "immediate satisfactory improvement is necessary," and "additional violations will result in further disciplinary action and may result in [employee] termination." (A. 1300-26.) The notice then contains boxes to be checked for the type of discipline to be imposed, including: verbal warning, first written warning, second written warning, suspension, and termination. Below that,

the notice contains a signature line for the person issuing the discipline, and a statement that the person has “reviewed the personnel file” of the named employee.

(A. 1300-26.) The next section of the notice contains several blank lines for the employee to comment and sign, followed by signature lines for a supervisor and the DON. (A. 1300-26.)

Administrator Schuster or DON Nowicki determine the severity of discipline to issue. (A. 14, 21; 362, 438, 441-42, 491, 638-39, 647, 665, 673.) If DON Nowicki receives a report from an LPN about a CNA’s potential misconduct, she “need[s] to investigate it and [she] would ask the CNA [about it].” (A. 651.) Based on her investigation, and the CNA’s disciplinary record, Nowicki determines the appropriate level of discipline. (A. 638-39, 647, 649, 657, 665.) Similarly, DON Nowicki determines when a CNA has been late too many times that discipline is warranted. Nowicki prepares the disciplinary notice. (A. 405-07, 1304.) LPNs do not have access to blank disciplinary notices, but can only receive them from Administrator Schuster, DON Nowicki, or a unit manager. (A. 21; 360, 434, 447, 638.) Nor do LPNs have access to the CNAs’ personnel files that contain their disciplinary record. (A. 14, 21; 360-62, 438, 441-42, 491, 638-39, 647, 665, 673.)

The Center's employee handbook, which was issued when it assumed operations on January 1, 2016, sets forth different categories of disciplinary violations with examples. (A. 1191, 1214-20.) The handbook states that:

[The examples] are grouped by general severity to help employees understand what may be considered less or more serious, and consequently which may (in the Facility's discretion) result in less or more severe disciplinary action; however all violations are determined on a case-by-case basis and disciplinary action will be determined in the Facility's sole and exclusive discretion based upon the facts and circumstances of each infraction.

(A. 1214.) Further, the handbook places emphasis on the Center's policy that "[e]mployees may be disciplined for any conduct that a supervisor determines warrants disciplinary action . . . and inclusion within any particular [group of examples] does not indicate or guarantee that any particular disciplinary action short of immediate termination will result." (A. 1219, capitalization, bolding, and underlying omitted).

On May 4, 2016, the Center and the Union agreed to adopt the terms of the expired collective-bargaining agreement between the Union and Medcenter, with a few modifications. (A. 862-910.) That agreement states that the employer "shall generally utilize the process of progressive discipline in disciplinary actions applied to bargaining unit members," but that "consistent with the commitment to utilize progressive discipline, the Employer may advance the levels of discipline it believes appropriate under the circumstances." (A. 828.) "Disciplinary action may

include any one of the following as determined by the Employer,” including counseling, verbal warning, written warning, unpaid suspension, and discharge.

(A. 828.)

**E. The Testimony of LPNs Regarding Specific Instances of Discipline**

At the hearing, LPNs Jennifer Higgins, Christina Tursi, Mimosa Laroc, and Roberta Bernard testified regarding specific instances of discipline. The testimony of each of them is summarized in the following paragraphs for the Court’s convenience.

**LPN Higgins:** On one occasion, Administrator Schuster informed LPN Higgins that a family member had complained about CNA James Daye on a day that Higgins had not worked. Schuster gave Higgins a disciplinary notice and told her to “do what she feels is appropriate,” but also instructed her to “educate him” and to do so in writing. (A. 12, 21; 360-62, 380, 387.) After Schuster told Higgins what to do, she then met with DON Nowicki who told her “how to write” the narrative. Higgins proceeded to sign the notice below the narrative. (A. 12; 361, 1313.) Higgins left the disciplinary-action box blank because she did not know what discipline should issue given that “only the [s]upervisors have access” to the employee files, and because Nowicki has to “sign off” on the discipline. (A. 12, 21; 362.) Nowicki decided to issue an “education” and signed the notice below the discipline-issued section. (A. 12; 362, 1313.) On another occasion, a family

member complained to Higgins about CNA Daye. DON Nowicki went to Higgins and informed her that Daye “needed to be written up for the second event because he already had [an] education on the first event. So he needed the verbal warning for the second event.” (A. 12, 21; 364-65.) Higgins wrote and signed the narrative section of the notice. DON Nowicki signed the disciplinary action section that imposed the verbal warning. (A. 1315.) In both instances, Higgins handed the disciplinary notices to Daye. (A. 12; 387.)

**LPN Laroc:** On two occasions, LPN Laroc received fully completed disciplinary notices from DON Nowicki. Laroc then signed the narratives prepared by Nowicki and gave the notices to the CNAs. (A. 11, 21; 403-07, 1303-04.) In one instance, Nowicki issued a “first” written warning to CNA David Tucker for clocking in early one day and being late a second day. In the other instance, Nowicki issued a “first” written warning to CNA N. Robinson for being late one day and leaving early, and then not showing up for work the next day without calling. (A. 11, 21; 403-07, 1303-04.)

**LPN Bernard:** The Center’s officials instructed LPN Bernard on three occasions to write a narrative or to sign a narrative prepared for her. (A. 13, 21; 669-75, 1317, 1322, 1324.) On one occasion, the Center directed Bernard to meet with Administrator Schuster and a social worker who told her about inappropriate language by CNA Tatiana Desinon that occurred on a day that Bernard had not

worked. (A. 13, 21; 667-70.) After “explain[ing] . . . the totality of th[e] particular situation [they] asked [her] if [she] felt it warranted a disciplinary action,” and “then they asked her to write up the disciplinary action.” (A. 13, 21; 669-70.) Based on the information they provided to Bernard, she wrote and signed the narrative section on the disciplinary notice. Schuster decided to suspend the CNA and signed the discipline-imposed section. (A. 13; 669-70, 1317.) On another occasion, CNA Vera Gary received two disciplinary notices after Bernard provided information to the unit manager that Gary was off the floor for an excessive amount of time and had failed to follow protocol for residents who smoked cigarettes. The unit manager investigated, verified the provided information, determined that a “first” written warning was warranted in both instances, filled out the disciplinary notices, and gave the notices to Bernard to sign the already prepared narratives. (A. 13, 21; 671-73, 676-77, 1322, 1324.)

**LPN Tursi:** On two occasions, LPN Tursi received fully completed disciplinary notices from then ADON Michelle King. King instructed Tursi to sign the prepared narratives and to give the notices to the CNAs. King issued a “first” written warning to CNA Vanisha Wilson and a verbal warning to CNA Kaila Brown. (A. 13, 21; 71, 106, 438-40, 1314, 1316.) No approving official signed Brown’s discipline. (A. 1314.) In one instance, Unit Manager Lauren Sutton instructed Tursi to prepare a disciplinary notice for CNA Jahasia Weston, who had

failed to respond to multiple pages. Sutton directed Tursi to write the narrative, and Tursi signed the narrative. Tursi did not recommend any specific discipline. The disciplinary notice does not set forth any discipline and no approving official signed the notice. (A. 13, 21; 440-41, 1323.) In one instance, Tursi observed CNA Debbie Bartee not following protocol for a resident who wanted to smoke a cigarette. Tursi went to DON Nowicki to “let her know” and asked if she could write up Bartee. Tursi then wrote and signed the narrative on a disciplinary notice. Tursi had no role in Nowicki’s decision to issue a verbal warning. Nowicki signed the disciplinary action. (A. 13, 21; 433-38, 452, 1307.)

## **II. THE BOARD’S CONCLUSIONS AND ORDER**

On May 2, 2018, the Board (Members Pearce, Kaplan, and Emanuel) issued its Decision and Order finding, in agreement with the administrative law judge, that the Center’s refusal to bargain with the Union as the representative of the Center’s LPNs violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (A. 3-4.) The Board further found, in agreement with the judge, that the Center violated Section 8(a)(5) and (1) by changing certain terms of the LPNs’ employment after it began operating the facility on January 1, 2016, without first notifying the Union and giving it an opportunity to bargain. (A. 4.)

The Board’s Order requires the Center to cease and desist from the unfair labor practices found, and in any like or related manner interfering with,

restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (A. 5.) Affirmatively, the Board's Order directs the Center to bargain with the Union, on its request, and to embody any resulting understanding in a signed agreement. (A. 5.) The Order also requires the Center, on the Union's request, to rescind the unilateral changes, including those affecting the LPNs' paid time-off benefits, health benefits, and wages. The Order further requires the Center to make the LPNs whole for any loss of earnings or benefits suffered as a result of the unlawful unilateral changes, and to post a remedial notice. (A. 4-5 and n.9.)

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board's finding that the Center failed to carry its burden of proving that its LPNs are statutory supervisors on the claimed bases that they have the authority to discipline the CNAs or effectively recommend their discipline. Accordingly, the Board is entitled to affirmance of its finding that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the representative of its LPNs and making the otherwise uncontested unilateral changes to their wages and benefits.

To establish authority to discipline or effectively recommend discipline the Board requires a party to show that the putative supervisors submit actual disciplinary recommendations that are regularly followed without independent

investigation or review by others. Here, the Board reasonably relied on testimony and documentary evidence which establishes that in all instances it was the Center's officials, and not the LPNs, who determined the appropriateness and severity of discipline. Thus, in some instances the Center provided LPNs with completed disciplinary forms which the LPNs simply signed and gave to the offending employees. In other instances, the LPNs learned of infractions and were thereafter instructed by the Center to prepare written narratives of the misconduct, but otherwise had no role in the disciplinary decisions. Finally, even when the LPNs observed misconduct, they reported the matter to the DON or a manager who then investigated the matter and determined whether and what type of discipline to issue. In sum, the LPNs limited role in the Center's disciplinary process falls far short of establishing the statutory authority to discipline or effectively recommend discipline.

The Board also reasonably found that the same result would be obtained under the three factors set forth in *NLRB v. New Vista Nursing and Rehabilitation v. NLRB*, 870 F.3d 113 (3d Cir. 2017), which, taken together, may show that an individual is a statutory supervisor. First, the Board found that the LPNs do not have discretion to decide whether to fill out disciplinary notices. Rather, the evidence established that in all instances of discipline a manager had instructed the LPN to fill out and sign the disciplinary notice, had filled out the disciplinary

notice and simply asked the LPN to sign, or informed the LPN of an infraction and suggested that a disciplinary notice was warranted. Second, the Board reasonably found that the Center also failed to establish that the LPNs initiate a progressive disciplinary policy. Rather, the Center retains discretion to impose any level of discipline, and the record evidence fails to establish that the Center followed a progressive disciplinary policy. Third, the Board reasonably found that the LPNs' limited role in the disciplinary process does not increase the severity of discipline for future rule violations. Rather, employees have received the same level of discipline for multiple infractions.

### **ARGUMENT**

#### **THE CENTER VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AS THE REPRESENTATIVE OF ITS LPNs AND BY MAKING UNILATERAL CHANGES**

Section 8(a)(5) of the Act prohibits an employer from refusing to bargain with the duly certified bargaining representative of an appropriate unit of its employees. 29 U.S.C. § 158(a)(5). Here, the Center admittedly refused to bargain with the Union as the representative of its LPNs and admittedly made unilateral changes to the terms of the LPNs' wages and benefits after it began operating the facility. Before the Court, the Center's sole claim is that it had no obligation to bargain because the LPNs are statutory supervisors excluded from the Act's

protections because they have the authority to discipline CNAs or effectively recommend their discipline.

As set forth below, substantial evidence supports the Board's finding that the Center did not carry its burden of proving that the LPNs have the authority to discipline or effectively recommend discipline. Accordingly, the Board reasonably found (D&O 1-3) that that the Center's refusal to bargain with the Union as the representative of its LPNs, and its unilateral changes to their wages and benefits after it began operating the nursing home, violated Section 8(a)(5) and (1) of the Act. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30 (1946).<sup>2</sup>

#### **A. Applicable Principles and Standard of Review**

“To be entitled to the Act's protections and includable in a bargaining unit, one must be an ‘employee’ as defined by the Act.” *Mars Home for Youth v. NLRB*, 666 F.3d 850, 853 (3d Cir. 2011). Section 2(3) of the Act, 29 U.S.C. § 152(3), excludes from the definition of the term “employee” any individual employed as a “supervisor.” In turn, the Act defines a supervisor as follows:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, 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

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<sup>2</sup> A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3d Cir. 2001).

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).

In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel vested with “genuine management prerogatives” and workers—such as “straw bosses, leadmen, and set-up men, and other minor supervisory employees”—who enjoy the Act’s protections even though they perform “minor supervisory duties.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

The Supreme Court has explained that individuals are statutory supervisors “if (1) they have the authority to engage in any 1 of the 12 listed supervisory functions, (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.’” *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712 (2001) (citation omitted); *accord Mars Home*, 666 F.3d at 853-54.

The party, such as the Center, asserting supervisory status bears the burden of proving that status by a preponderance of the evidence. *Kentucky River*, 532 U.S. at 711-12; *Mars Home*, 666 F.3d at 854. The party must support its assertion with specific examples, based on record evidence. Conclusory or generalized testimony fails to establish that individuals actually possess supervisory authority.

*Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012); *Golden Crest Healthcare*, 348 NLRB at 731. Likewise, theoretical or “paper power”—as in a job description—fails to prove supervisory status. *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 962-63 (D.C. Cir. 1999); *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998).

Whether an individual is a statutory supervisor is a question of fact particularly suited to the Board’s expertise and therefore subject to limited judicial review. *Mars Home*, 666 F.3d at 853. The Court must uphold the Board’s supervisory-status finding as long as it is supported by substantial evidence, “even if [the Court] would have made a contrary determination had the matter been before [it] *de novo*.” *Citizens Publ’g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001).

**B. Substantial Evidence Supports the Board’s Finding that the Center Failed To Carry Its Burden of Proving that Its LPNs Are Supervisors Under the Act**

The Center’s sole claim (Br. 26-53) is that its LPNs are statutory supervisors because they have the authority to discipline CNAs or effectively recommend their discipline based on their involvement with employee disciplinary notices. To the contrary, the Board reasonably concluded on the evidence presented that the Center “failed to establish that the LPNs have the supervisory authority to discipline or effectively recommend discipline.” (A. 3.)

For the Center to have shown that the LPNs have the authority to discipline, it would have had to present evidence—which it failed to do—that the LPNs exercised that authority with “the use of independent judgment.” *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. at 712; accord *Mars Home*, 666 F.3d at 853-54. To exercise independent judgment, “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006). 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.* Further, the judgment must involve a degree of discretion that rises above the “routine or clerical” in order to indicate supervisory status under Section 2(11). *Id.* at 693 & n.42; see also *Kentucky River*, 532 U.S. at 713-14

Before the Court, the Center does not seriously contend—nor could it on this record—that the LPNs exercise the authority to discipline the CNAs using independent judgment. Rather, its arguments focus on whether the LPNs effectively recommend discipline. The effective recommendation of discipline under settled Board law requires a showing that putative supervisors submit actual recommendations that are regularly followed and result in personnel action

“without independent investigation or review by others.” *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007) (quoting *Ten Brock Commons*, 320 NLRB 806, 812 (1996). “An individual who has a mere ‘reportorial’ authority, in which it is ‘higher-ups who make the disciplinary decisions,’ is not a supervisor.” *Thyme Holdings, LLC v. NLRB*, \_\_\_ F. App’x \_\_\_ (D.C. Cir. 2018), 2018 WL 3040701, at \*3 (quoting *Allied Aviation Serv. Co.*, 854 F.3d at 55, 59 (D.C. Cir. 2017)). And the mere fact that putative supervisors report misconduct that later results in discipline does not alone warrant a different finding. *NLRB v. Meena Oil Co.*, 139 F.3d 311, 322 (2d Cir. 1998) (holding that it is not enough to show that discipline “may result” from employee’s factual report.)

Here, the record contains ample evidence supporting the Board’s finding that the LPNs do not effectively recommend the discipline of CNAs. For instance, as the Board found, “[a]ll discipline must be cleared with the DON or manager and the DON or manager must approve all recommendations of discipline of employees.” (A. 22.) Indeed, LPNs Higgins (A. 360-62), Tursi (A. 438, 441), and Bernard (A. 665, 673) all testified that they do not fill out the level of discipline on disciplinary forms. As Higgins explained, DON Nowicki has to “sign off” on the level of discipline to be imposed, and that she would not know what discipline would be appropriate given that “only the [s]upervisors have access” to employee personnel files. (A. 12; 362.) Moreover, the Center’s officials who testified at

hearing confirmed LPN Higgins' testimony. Thus, Administrator Schuster acknowledged (A. 491) that it is "not appropriate" for the LPNs to "decide" on or sign the level of discipline, rather he or DON Nowicki make that decision.

Similarly, Nowicki acknowledged (A. 649) that LPNs do not have authority to determine the extent of discipline imposed or to sign that section of the disciplinary form. And both Schuster (A. 491) and Nowicki (A. 638-39, 647) also confirmed that LPNs have no access to the CNAs' personnel files that are used to determine the level of discipline. Nowicki further acknowledged that if she receives a report from an LPN about a CNA, she investigates the matter, talks to the CNA, and based on the investigation and disciplinary record, determines the appropriate level of discipline.

The above testimony, taken together with the documentary evidence, demonstrates, as the Board found, that "in all instances of record, the [Center] has determined whether discipline was appropriate and if so, the severity of the discipline." (A. 22.) Indeed, in some instances, the Center, as the Board found, provided LPNs with completed disciplinary notices that included both the written narrative and the level of discipline. (A. 22.) Thereafter, the LPNs simply signed the completed narrative and, as the Board further found, followed the Center's "instruct[ions] to issue the discipline." (A. 22.) For example, LPN Laroc received two disciplinary forms completed by DON Nowicki, who directed her to sign the

prepared narratives, and to give the forms to the CNAs. Similarly, on two occasions, LPN Tursi received disciplinary notices prepared by then ADON Michelle King. On both occasions, King filled out the narrative, determined the level of discipline to issue, and signed the disciplinary action. Tursi simply signed the already completed narratives and handed the notices to the CNAs. In sum, as Nowicki acknowledged, simply because an LPN's name appears on a disciplinary notice does not mean that the LPN filled out any part of the form. (A. 634-41.)

Similarly, in some instances, the LPNs were informed that CNAs had committed infractions and subsequently were instructed by the Center to write narratives on the disciplinary notices based on the information provided to them. In turn, the DON or administrator determined the type and level of discipline. For example, twice LPN Higgins prepared written narratives after she was informed of misconduct by CNA Daye, but had no role in the disciplinary decisions. In one of those instances, after learning of the misconduct from Administrator Schuster she wrote the narrative with DON Nowicki's assistance. Schuster and Nowicki both determined that an education was appropriate. In the second instance, Nowicki decided to issue a verbal warning. Higgins simply prepared the narrative, but had no role in the disciplinary decision. Similarly, after LPN Bernard learned of a CNAs' misconduct from Administrator Schuster and a social worker she wrote the information they provided to her on the narrative lines of the disciplinary form.

She also provided an undisclosed opinion to Schuster regarding whether discipline should issue, but otherwise had no role in Schuster's decision to suspend the CNA. Likewise, LPN Tursi followed Unit Manager Sutton's direction to write the narrative on a disciplinary form but did not make any recommendation. Thus, in these circumstances, the LPNs simply acted as a conduit for the Center's decision to discipline an employee.

Finally, even in situations where LPNs have observed misconduct or poor performance they simply report the matter to a Center manager and may suggest that discipline is warranted but have no role in the discipline issued. For example, on one occasion LPN Tursi informed DON Nowicki of an infraction she had observed and asked permission to write up the CNA. After consulting with Nowicki, Tursi wrote the narrative on the disciplinary notice. Tursi, however, had no role in Nowicki's decision to issue a verbal warning. Significantly, DON Nowicki confirmed Tursi's limited role, by acknowledging, as set forth above, that she independently investigates any matter brought to her attention by an LPN. Likewise, after LPN Bernard informed the unit manager of a CNA's misconduct, she had no role in the disciplinary decision. Rather the unit manager investigated, verified the provided information, determined that the CNA's conduct warranted two "first" written warnings, filled out the disciplinary forms in their entirety, and gave the forms to Bernard to sign the narrative.

Thus, in sum, the Board reasonably concluded on the record evidence presented that the Center failed to prove its claim that the LPNs have the authority to discipline or effectively recommend discipline. *See Thyme Holdings*, 2018 WL 3040701, at \*3 (employer “failed to show [that putative supervisors] exercise anything beyond an essentially reportorial disciplinary authority” where they report observed infractions, issue minor corrective actions, and lack access to personnel records); *Pac Tell Group v. NLRB*, 817 F.3d 85, 93 (4th Cir. 2015) (Putative supervisors do not exercise independent judgment in disciplining employees where “managers provided blank warning forms to the putative supervisors, advised them of possible infractions, and instructed them to complete a form every time a worker disobeyed safety rules. All warnings were subject to approval by management before issuance.”)

**C. Board Reasonably Found that the Same Result Would Obtain Under the Factors Listed in *NLRB v. New Vista***

In *NLRB v. New Vista Nursing & Rehabilitation v. NLRB*, 870 F.3d 113 (3d Cir. 2017) (“*New Vista*”), the Court specified that, in its view, three factors taken together in the disciplinary context may show an employee is a statutory supervisor: “(1) the employee has the discretion to take different actions, including verbally counseling the misbehaving employee or taking more formal action; (2) the employee’s actions ‘initiate’ the disciplinary process; and (3) the employee’s action functions like discipline because it increases severity of the consequences of

a future rule violation.” *Id.* at 132. Here, the Board reasonably found that “[n]one of th[ose] facts is established on this the record.” (A. 4 n.6.) Accordingly, the Board concluded that the “same result would obtain under the standards employed by the [Court]” in *New Vista*. (A. 3 n.6.)<sup>3</sup>

First, the Board reasonably found that “[t]he LPNs plainly do not have the discretion to decide whether to fill out a Notice of Disciplinary Action.” (A. 4 n.6.) Rather, as the Board found, “[i]n every instance where an LPN-witness was questioned about a specific disciplinary notice, the witness testified, without contradiction that a manager had instructed the LPN to fill out and sign the disciplinary notice, had actually filled out the disciplinary notice and simply instructed the LPN to sign it, or had brought a CNA’s infraction to the LPN’s attention and suggested that a disciplinary notice was warranted.” (A. 4 n.6.) Indeed, in the first instance, as shown above (p. 25), the evidence establishes that after LPN Tursi observed misconduct by a CNA, she sought DON Nowicki’s permission before writing a narrative of the CNA’s conduct on a disciplinary form, but otherwise had no role in Nowicki’s disciplinary decision. In the second instance, as shown above (pp. 23-24), LPN’s Laroc and Tursi set forth multiple

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<sup>3</sup> Given the Center’s recognition (Br. 36) that the Board determined that the same result would obtain under the Court’s *New Vista* test, the Center is in no position to suggest (Br. 26, 28-29) that the Board erred by failing to consider the Court’s test.

occasions where their only role in the disciplinary process was to follow the Center's direction to sign narratives on already completed disciplinary forms. Finally, in the third instance, as shown above (pp. 24-25), LPNs Higgins, Bernard, and Tursi testified as to multiple occasions where the Center brought CNA misconduct to their attention. The LPNs then prepared narratives on the disciplinary notices based on the information provided to them.

Second, the Board reasonably found that “[t]he [Center] has also failed to establish that the LPNs ‘initiate’ a progressive disciplinary process.” (A. 4 n.6.) As an initial matter, as the Board explained, “[u]nder [the Center’s] written disciplinary policy, [it] retains discretion to impose whatever level of discipline it determines is appropriate . . . .” (A. 4 n.6.) Indeed, the Center’s handbook states that “disciplinary action will be determined in the Facility’s sole and exclusive discretion based upon the facts and circumstances of each infraction.” (A. 1214.) And it then proceeds to emphasize that how the Center groups examples of misconduct within its four categories “does not indicate or guarantee that any particular disciplinary action short of immediate termination will result.” (A. 1219.) Likewise, the Center’s collective-bargaining agreement with its service employees, which includes the CNAs, provides the Center with discretion to “advance the levels of discipline it believes appropriate under the circumstances.” (A. 828.)

Moreover, as the Board further explained, “the disciplinary notices in the record do not follow any defined progression.” (A. 4 n.6.) Indeed, the disciplinary notices given to CNAs that are contained in the record include approximately 1 education, 10 verbal warnings, 10 first written warnings, 1 second written warning, 2 suspensions, and 1 instance where no discipline was imposed. (A. 1300-26.) The Center, however, has offered no explanation in its brief for how these disciplinary actions followed a progressive disciplinary policy.

Third, as the Board noted, “the [Center] has not demonstrated that the LPNs’ perfunctory involvement with disciplinary notices ‘increases severity of the consequences of a future rule violation’ given that, as noted above, the [Center] has authority to impose any level of discipline at any time, and there is record evidence of individual CNAs receiving the same level of discipline for multiple infractions.” (A. 4 n.6.) For example, CNA Gary committed multiple infractions, but received “first” written warnings for each of act of misconduct. (A. 1305, 1322, 1324.) Likewise, CNA Bartee received three verbal warnings for three separate acts of misconduct. (A. 1302, 1306, 1307.) Similarly, CNA Jones received two verbal warnings and a “second” written warning for three acts of misconduct. (A. 1309, 1310, 1320.) Moreover, “the record does not reveal any instances where a disciplinary notice initiated at the discretion of an LPN was used to increase the severity of discipline for a subsequent infraction.” (A. 4 n.6.)

**D. The Center's Challenges to the Board's Factual Findings, and Its Remaining Contentions, Are Without Merit**

The Center first asserts (Br. 37-41) that the Board's findings regarding the disciplinary role of LPNs Higgins, Tursi, and Bernard are "unsupported." The Center, however, has shown no reason to disturb the Board's factual findings. Rather, the weight of the evidence amply supports the Board's findings with respect to these three LPNs.

The Center (Br. 37-40) presents a convoluted argument regarding LPN Higgins. It appears to claim that in one instance Administrator Schuster simply told Higgins to do what she felt was "appropriate" and that Higgins confirmed that it was her decision to issue an "education." The Center also appears to claim that in a second instance Higgins made the decision to issue a verbal warning. The Center's claims, which apparently refer to two instances where CNA Daye received discipline, cherry picks Higgins' testimony, and mischaracterize the Board's findings. The record makes abundantly clear that Higgins did not make the disciplinary decisions.

Thus, Higgins in a portion of her testimony stated that in one instance Administrator Schuster told her to proceed "as appropriate," and that she made the decision to educate Daye. (A. 21; 380.) In proper context, her overall testimony establishes that Schuster and DON Nowicki actually made the decision to educate Daye. Thus, Higgins' clarified that after Schuster informed her of a family

complaint against Daye he also directed her to “educate [Daye],” and to do so in writing. (A. 12; 380, 387.) Higgins further clarified that she thought she was responsible for the disciplinary decision “because I’m the one handing [the disciplinary notice] to [Daye].” (A. 387.) Handing a disciplinary notice to Daye, however, falls far short of establishing that Higgins made the disciplinary decision. Significantly, the Company does not dispute that after Schuster’s directive Higgins then met with DON Nowicki who told her “how to write” the narrative. (A. 12; 361.) Nor does the Center dispute, as Higgins further testified, that she left the disciplinary-action box blank because she did not know what discipline should issue given that “only the [s]upervisors have access” to the employee files, and because Nowicki had to “sign off” on the discipline. (A. 12, 21; 362.)

Likewise, the Center does not dispute that Nowicki decided to issue an “education” and signed the disciplinary notice below the discipline-issued section. (A. 12, 21; 362, 1313.) Similarly, in the second instance, the evidence establishes that DON Nowicki informed Higgins that Daye needed a verbal warning (A. 12, 21; 364-65), that Higgins simply wrote and signed the narrative on the disciplinary notice, and that Nowicki signed the disciplinary action setting forth the verbal warning (A. 1315). In these circumstances, the Board was fully warranted to find “that DON Nowicki was responsible for reviewing the personnel file, to which Higgins did not have access, and in determining the appropriate severity of the

discipline.” (A. 21.) In turn, as the Board further reasonably found, Nowicki simply informed Higgins “as to the type of severity of the discipline.” (A. 21.)

The Center’s claim (Br. 40-41) that the Board erred by finding that LPN Tursi “cannot discipline without first discussing the matter with the DON or supervisor,” is similarly without merit. Thus, Tursi testified that she can issue discipline by herself but “like[s] to ask.” (A. 469.) She also acknowledged, however, that before preparing a narrative on a disciplinary notice she “either go[es] to the Unit Manager or DON.” (A. 21; 433-34.) Indeed, Tursi further acknowledged that she cannot even obtain a disciplinary form without going to them first. And, in the only instance where she prepared a narrative, she first spoke with DON Nowicki. (A. 21; 433-35.) Moreover, the Center does not dispute that on two occasions the Center simply gave Tursi already completed disciplinary notices to sign the prepared narrative. In these circumstances, the record amply supports the Board’s finding that Tursi “could not independently issue discipline without first consulting with the manager.” (A. 21.)

Finally, with respect to LPN Bernard (Br. 41), the Board recognized that she testified that she made a formal disciplinary recommendation to write up a CNA. (A. 13, 21; 662-64.) Bernard further acknowledged, however, that she does not recommend the type of discipline to the unit manager or DON. (A. 665.) Moreover, the only testimony supported by documentary evidence establishes that

on three occasions the Center's officials instructed Bernard to write a narrative or to sign a narrative prepared for her. (A. 13, 21; 669-77, 1317, 1322, 1324.)

The Center next claims (Br. 43-44, 52) that the Board erred by finding that the LPNs do not have discretion to decide whether to fill out a disciplinary notice. In making this claim, the Center does not dispute that in many instances the Center brought completed disciplinary notices for the LPNs to sign, or that the Center brought CNA misconduct to the LPNs' attention and directed them to prepare a disciplinary narrative. Instead, the Center appears to rely on instances where an LPN brought CNA misconduct to its attention. In these circumstances, however, the evidence does not support the Company's suggestion (Br. 43) that LPNs exercise independent judgment because they have a choice to do nothing. Rather the evidence establishes that at most whenever the LPNs observe CNA misconduct they simply inform Center managers, who then provide the LPNs with a disciplinary notice to write the narrative. There is no evidence of LPNs ignoring misconduct or informally talking with CNAs about misconduct at their own discretion. And DON Nowicki's conclusory assertion (Br. 52, 490-92) that the LPNs have such discretion fails to establish that the LPNs actually have that discretion. *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012); *Golden Crest Healthcare*, 348 NLRB at 731.

Nor is there any merit to the Center's contention (Br. 44-45) that the Board erred by failing to establish that the LPNs "initiate" a progressive disciplinary system. Although the Company's handbook and bargaining agreement both refer to a progressive disciplinary system, the Center does not dispute that it retains discretion to impose any level of discipline for any act of misconduct. The Company further does not dispute the Board's finding, above at p. 29, that "the disciplinary notices in the record do not follow any defined progression." (A. 4 n.6.)

The Board's finding regarding the progressive disciplinary system is not undermined by the Center's claim (Br. 45) that a disciplinary notice initiated at an LPNs' discretion was used to increase the severity of discipline for a subsequent infraction. Presumably, the Company meant to reference LPN Higgins, not LPN Tursi. In any event, the evidence establishes, as shown above, that LPN Higgins did not initiate at her discretion the education issued to CNA Daye that formed the basis for his subsequent verbal warning. Rather, the discipline was initiated by Administrator Schuster who informed Higgins of the incident and instructed her to educate him. DON Nowicki then confirmed and completed the discipline.

Nor is the Board's finding regarding the Center's disciplinary system undermined by the Company's claim (Br. 31-32, 45-46) that the policy had not existed for a long enough time period to establish that it would apply a progressive

discipline to repeated misconduct. Simply put, the Company does not dispute the Board's finding, above at p. 29, that there are multiple examples of CNAs receiving the same level of discipline for multiple infractions, which belies the existence that discipline is imposed progressively.

Finally, in the fact section of the Center's brief (Br. 12-15) it references the LPNs' job offers, the Center's handbook, and the Center's training for the LPNs. The argument section of its brief, however, does not mention those factors, let alone suggest in any way that they establish that LPNs are statutory supervisors. Accordingly, any argument that such factors are evidence of supervisory authority is not properly before the Court. *See* Rule 28(a)(8)(A) of the Federal Rules of Appellate Procedure; *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) ("An issue is waived if it is not both raised in the statement of issues and pursued in the brief."); 16AA Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure*, § 3974.1 ("to assure consideration of an issue by the court, the appellant must both raise it in the 'Statement of the Issues' and . . . pursue it in the 'Argument' portion of the brief").

In any event, in the absence of specific evidence affirmatively establishing the LPNs' alleged supervisory authority on the basis of one of the 12 statutory indicia set forth in Section 2(11) of the Act, the Company cannot meet its burden through indirect means—that is, by relying on such "secondary indicia" of

supervisory status which is sometimes used as additional evidence supporting a primary, statutory indicium. *Frenchtown Acquisition*, 683 F.3d at 315; 735 *Putnam Pike Operations, LLC v. NLRB*, 474 F. App'x 782, 784 (D.C. Cir. 2012). Thus, there is nothing magical or transformative about an employer simply giving an employee the title of “supervisor.” “[T]he Act, by its terms, focuses on what workers are authorized to do, not what they are called.” *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 11 (1st Cir. 2015); accord *Allied Aviation*, 854 F.3d at 59 (“it is job function, not title, that confers supervisory status”). “Were [it] not so, an employer could give an employee with no supervisory duties a supervisory title and thereby deny that worker the protection that Congress intended the Act to provide.” *NSTAR*, 798 F.3d at 12.

Along the same lines, the fact that the Company issued “supervisory” job offers to the LPNs, purporting to give them supervisory authority that they did not previously have, does not demonstrate that the LPNs actually possess supervisory authority. See *Frenchtown*, 683 F.3d at 307-08, 314 (job descriptions are insufficient to establish supervisory status because “theoretical or paper power does not a supervisor make”). Nor does it matter that the Center may have told some LPNs about their proposed expanded range of authority. “Statements by management purporting to confer authority do not alone suffice” to establish supervisory status under the Act. *Beverly Enters.-Mass.*, 165 F.3d at 963; accord

*Jochims*, 480 F.3d at 1168. That is particularly true here, where the Center does not dispute the Board’s finding “that the hiring process was designed to limit the LPNs’ ability to assess critical information before accepting the position.” (A. 17.)

Indeed, the Center’s intent to confuse the LPNs is amply illustrated by the record evidence. As the Board noted, “some job offers did not include any mention of a supervisory position,” or “were not acknowledged and signed by the applicants,” and while some applicants “were informed that there would be no changes in their job duties from their former position with Mediacenter,” others were told that “the individual distributing the job offers was not in a position to answer questions.”

(A. 17.)

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

Respectfully submitted,

/s/Ruth E. Burdick  
RUTH E. BURDICK  
*Deputy Assistant General Counsel*

/s/David A. Seid  
DAVID A. SEID  
*Attorney*

National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570  
(202) 273-7958  
(202) 273-2941

PETER B. ROBB  
*General Counsel*

JOHN W. KYLE  
*Deputy General Counsel*

LINDA DREEBEN  
*Deputy Associate General Counsel*

National Labor Relations Board

October 2018



s/David Seid  
David Seid  
Attorney  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2941

Dated at Washington, DC  
this 17th day of October, 2018



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

Dated at Washington, DC  
this 17th day of October 2018

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

CORAL HARBOR REHABILITATION AND  
NURSING CENTER

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

1199 SEIU UNITED HEALTHCARE WORKERS  
EAST

Intervenor

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\*  
\* Nos. 18-2220  
\* 18-2619  
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\* Board Case No.  
\* 22-CA-167738  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 17, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Louis J. Capozzi, Jr.,  
Capozzi Adler  
2933 North Front Street  
Harrisburg, PA 17110

Katherine H. Hansen, Esq.  
Jessica E. Harris, Esq.  
William S. Massey, Esq.  
Gladstein Reif & Meginniss  
817 Broadway  
6th Floor  
New York, NY 10003

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

Dated at Washington, DC  
this 17th day of October, 2018