Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc. a single employer *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW). Cases 10–CA–113669 and 10–CA–136190

April 2, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN AND EMANUEL

On March 27, 2015, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondents and the General Counsel filed exceptions and supporting briefs, and the Charging Party filed cross-exceptions and a supporting brief.[1] The Respondents filed an answering brief to the General Counsel's exceptions and the Charging Party's cross-exceptions, and the Charging Party filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision.[3]

The issues in this case arise from the Respondents' management takeover of the Ridgewood Healthcare Center (Ridgewood), a skilled nursing home facility in Jasper, Alabama, on October 1, 2013.[4] The principal issues are whether the Respondents had a successor employer's obligation to recognize and bargain with the Union that represented a bargaining unit of the predecessor employer's employees, and, if so, whether the Respondents also had an obligation to bargain prior to setting different initial terms and conditions of employment for unit employees when they began operations. The judge found both that the Respondents unlawfully failed to recognize the Union and that they unlawfully established different initial terms and conditions of employment. For the reasons that follow, we agree with the first finding but not with the second, and in reversing the judge on the latter point we overrule precedent that we find to be an unwarranted extension of the *Love's Barbeque*[5] remedial doctrine.

Background

Prior to October 1, Ridgewood had been operated by Preferred Health Holdings II, LLC (Preferred), and the Union represented a unit of Preferred employees consisting of licensed practical nurses (LPNs) and nurses' aides, along with housekeeping, laundry, maintenance, and dietary employees (including a food supervisor). The collective-bargaining agreement (CBA) covering these employees was effective from September 2010 to September 2016.

In the months preceding the October 1 takeover, the Respondents' officials delivered conflicting messages to Preferred unit employees about their prospects for continued employment and union representation. Joette Kelley Brown, the Respondents' President and Owner, informed employees in summer meetings that she expected to hire "99.9%" of them and adhere to the current Preferred-Union CBA. However, the Respondents' then-counsel James Smith contradicted Brown in a July 15 letter to the Union, stating that the Respondents would not accept the CBA and had not determined how many Preferred employees they would hire, but offering to bargain with the Union for a new CBA "to be in place when . . . [the Respondents] assume[d] operation[s]."[6] Then, in a July 29 letter, Preferred formally notified Ridgewood employees that its lease of the facility would terminate on September 30, and they would be laid off.

[1] After the judge's decision, the Charging Party withdrew its cross-exception to the judge's dismissal of the allegation that the Respondents violated Sec. 8(a)(3) and (1) by refusing to hire Paul Borden. The General Counsel withdrew complaint allegations underlying the judge's findings that the Respondents violated Sec. 8(a)(5) and (1) by disciplining and/or discharging Caitlyn Bolinger, Brooke Watson, and Misty Mauldin without notice to and bargaining with the Union. Pursuant to the General Counsel's request, those allegations were remanded to the Regional Director for further processing.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's finding that Respondents Ridgewood Health Services, Inc. and Ridgewood Health Care Center, Inc. constitute a single employer.

We also affirm the judge's findings that the Respondents violated Sec. 8(a)(1) by interrogating bargaining unit employees about their union membership during job interviews, notifying employees in writing on October 22, 2013, that they were no longer represented by the Union, and threatening an employee in January 2014 that she would be discharged if she engaged in activity in support of the Union.

[3] We have amended the judge's conclusions of law consistent with our findings.

[4] All dates are in 2013 unless otherwise noted.

[5] *Love's Barbeque Rest. No. 62*, 245 NLRB 78, 82 (1979), enfd. in part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

[6] Although the judge placed Brown's initial employee meeting before Smith's July 15 letter, we acknowledge the Respondents' argument on exception that most employees who relevantly testified stated only that the initial meeting occurred during the summer, and Brown testified that the first meeting took place in June or July.

Although Brown continued to assure Preferred employees during meetings in August that 99.9 percent of them would be hired, she changed her position concerning the Union, telling employees that she did not consider the Union necessary. At these August meetings, Brown also informed employees of the creation of a new "helping hands" job classification whose members would perform some of the duties that were currently performed by bargaining unit Certified Nursing Assistants (CNAs). Those duties did not require certified employees. On a different subject, when specifically asked whether current Ridgewood employees who had previously been discharged from Ridgeview, a separate facility also owned and operated by Brown for the prior five years, would be eligible for hire at Ridgewood, Brown responded that those employees would be considered along with everyone else.

The Respondents began interviewing applicants for positions at Ridgewood in early September. Several of the Preferred employees who applied were asked during their interviews whether they were Union members. Sixty-five of the 83 Preferred bargaining unit employees applied for jobs; of those, 51 received offers of "at-will" employment via letters dated September 11, requesting a response by September 16. Subsequently, 56 applicants not previously employed by Preferred were also sent offers of employment for job classifications performing unit work. Among the Preferred bargaining unit employees who applied but were denied employment were Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson.

In a September 23 letter, the Respondents' newly retained attorney, Ashley Hattaway, took a different tack than former counsel James Smith had taken as to the Respondents' willingness to bargain with the Union. Hattaway stated that the Union's mid-September demand for bargaining and request for information were premature, and she conditioned any future bargaining on whether the Respondents were determined to be a successor to Preferred at the conclusion of the hiring process.

On October 1, when the Respondents commenced management of Ridgewood, 101 employees accepted offers of employment and started in job classifications performing unit work. Of those, 49 were former Preferred unit employees, and 52 had never worked for Preferred. Nineteen of those 52 were hired into the newly created "helping hands" job classification. Without bargaining with the Union, the Respondents informed employees on October 1 of their new employment terms, which included several changes to the employment terms set forth in the Preferred-Union CBA.

In an October 7 letter, attorney Hattaway refused the Union's October 1 demand for bargaining and its renewed request for information relating to the transition. Hattaway rejected the Union's contention that the Respondents were a successor to Preferred, claiming that the majority of unit hires on October 1 were not previously employed by Preferred and that the Respondents anticipated hiring more employees. Hattaway justified the Respondents' hiring situation, in part, by asserting that "a lower than expected number of Preferred employees applied to work with Ridgewood."

The Respondents voiced increasingly antiunion positions following the transition. In an October 22 letter to employees, Brown stated that Ridgewood "is now operating without a union," expanded on her position that unions were unnecessary, and warned employees about the serious consequences of signing a union authorization card. In meetings several days later, Brown not only reinforced these sentiments, but also threatened employees that Ridgewood might close if the Union became their bargaining representative. In January 2014, Director of Nursing Sheila Cooper asked CNA Caitlin Bolinger whether she had been recruiting other CNAs to join the Union and warned Bolinger that if she engaged in such recruitment, it would cost Bolinger her job.

DISCUSSION

A. The Respondents Were a Burns Successor Obligated to Recognize the Union.

The judge found that in the course of hiring employees to begin operations at Ridgewood on October 1, the Respondents violated Section 8(a)(3) and (1) of the Act by refusing to hire four former Preferred employees. He further found that the Respondents would have hired a majority of their unit employees from Preferred absent this discrimination, and that the Respondents continued to operate Ridgewood without substantial change from the manner in which it had been operated by Preferred. The judge therefore found that under *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272 (1972), and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), the Respondents were a successor to Preferred, and violated Section 8(a)(5) and (1) since October 1 by refusing to recognize and bargain with the Union and to provide relevant bargaining-related information requested by it. We agree.

The test for determining whether a company is a successor to a predecessor employer with an obligation to recognize and bargain with an incumbent union depends on two factors: (1) whether there is substantial continuity of business operations, i.e., whether the new employer conducts essentially the same business as the predecessor employer, and (2) whether there is continuity in the workforce, i.e., whether a majority of the new employ-

er's substantial and representative complement of employees in an appropriate unit are former employees of the predecessor employer. *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 43-52; see also, e.g., *Emerald Green Building Services, LLC*, 364 NLRB No. 109, slip op. at 11 (2016).

The Respondents do not dispute the judge's finding that the first factor—substantial continuity of business operations—was established. The record demonstrates that the Respondents operated the same nursing home as Preferred, at the same location, with employees performing the same jobs and using the same work methods, and caring for the same clientele of elderly residents and patients.

The Respondents contend, however, that the second factor—continuity in the workforce—is not satisfied. The Respondents' primary contention in this regard is that a majority of its employees performing unit work on October 1 were not formerly employed by Preferred. We reject this contention. To the extent that former Preferred employees constituted less than a majority of the bargaining unit on October 1 (49 of 101 employees), this was the result of the Respondents' discriminatory refusal to hire four predecessor employee applicants in order to suppress the number of former Preferred employees below a majority of those hired. Had the Respondents not unlawfully refused to hire Preferred employees Davis, Eads, Sickles, and Wilson, the majority of hires in the same appropriate unit as when Preferred operated Ridgewood would have been composed of former Preferred employees, and thus the Respondents would have been a successor employer obligated to bargain with the Union.

It is well established that when a new employer would have hired a majority of its unit employees from the predecessor's unionized work force but for the new employer's discrimination based on antiunion animus, the Board will deem the new employer a successor with an obligation to recognize and bargain with the union that represented the predecessor's unit employees. *Downtown Hartford YMCA*, 349 NLRB 960, 984 (2007) (citing *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 655 (D.C. Cir. 2003)); accord *NLRB v. CNN America, Inc.*, 865 F.3d 740, 752 (D.C. Cir. 2017) ("[W]hen a successor refuses to hire predecessor employees because of antiunion animus, the Board presumes that but for such discrimination, the successor would have hired a majority of incumbent employees.") (internal quotations omitted). It is also well established that the Board applies its *Wright Line*[7] standard in such cases to determine whether an employer's failure to hire employees of its predecessor was motivated by antiunion animus. *Planned Building Services*, 347 NLRB 670, 673 (2006). In applying this standard, the Board considers such factors as

> lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

Id. (quoting *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989), enfd. en banc 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992)). "Once the General Counsel has shown that the employer failed to hire the employees of its predecessor and was motivated by antiunion animus, the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive." Id. at 674.

We agree with the judge that the record contains ample circumstantial evidence establishing that the Respondents' refusal to hire Davis, Eads, Sickles, and Wilson was motivated by antiunion animus. The Respondents initially demonstrated animus—and independently violated Section 8(a)(1)—by coercively interrogating Preferred employee applicants regarding their union membership during job interviews. The Respondents further demonstrated animus when, during an employee meeting held a few weeks after the transition, Brown threatened that she might close the facility if employees unionized. Finally, the Respondents clearly demonstrated animus again several months later when Director of Nursing Cooper threatened to fire CNA Bolinger for recruiting her coworkers to support the Union. The Respondents do not except to the judge's findings that these latter two incidents occurred, but argue only that it is improper to rely on such later-in-time incidents to demonstrate that animus motivated their earlier hiring decisions. Contrary to the Respondents, subsequent threats may, in certain circumstances, properly be deemed relevant in assessing whether a motivating factor in an employer's prior decision not to hire employees was their union membership or support. See, e.g., *R.J. Corman Railroad Construction*, 349 NLRB 987, 987–989 (2007) (unlawful interrogation, statements of futility, and threats of plant closure and loss of benefits that "closely followed" union members' attempted application for employment constituted

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

evidence of antiunion animus supporting finding that employer unlawfully refused to hire the union applicants), and *K.W. Electric, Inc.*, 342 NLRB 1231, 1231 (2004) (threats to close a facility made weeks after a layoff decision establish animus motivating the decision); accord *SCA Tissue North America, LLC v. NLRB*, 371 F.3d 983, 990 (7th Cir. 2004) (proper for the Board to consider post-termination behavior to infer animus). We find the circumstances of this case warrant doing so here. Thus, we affirm the judge's reliance on the unlawful threats of closure (by the Respondents' Owner-President) and job loss (by the Respondents' Director of Nursing), in addition to the Respondents' pre-transition interrogations, to establish the Respondents' antiunion animus as a motivating factor in their hiring decisions.[8]

We further agree with the judge that the Respondents failed to prove their affirmative defense that they would have refused to hire Davis, Eads, and Sickles (we address Wilson below) even absent the desire to avoid successorship. The Respondents claim that Davis, Eads, and Sickles were refused hire pursuant to a policy precluding the employment of workers at Ridgewood who had previously been terminated from the separate Ridgeview facility (which Brown also owned and operated). But the credited evidence shows that Brown was specifically asked at an employee group meeting, held before the application and interview process had begun, whether Preferred employees who had been previously discharged from Ridgeview would be eligible to be rehired at Ridgewood. Brown responded that such employees would be considered along with everyone else. She made no reference to applying Ridgeview's "no-rehire" policy, nor did she otherwise indicate that a different process would apply that would similarly screen out employees previously discharged from Ridgeview. Like the judge, we are not persuaded by the Respondents' strained explanation that Brown's statement to employees did not explicitly disavow the Ridgeview "no-rehire" policy. Further, it would be illogical for the Respondents to go to the time and expense of interviewing this pool of applicants at Ridgewood if they, in fact, intended to preclude their hire by applying the "no-rehire" policy from Ridgeview. Instead, Brown's post-interview decision to reverse course and apply Ridgeview's "no-rehire" policy to Ridgewood after all supports an inference of discriminatory hiring. Notably, Brown's reversal came after the Respondents had received fewer applications than expected from former Preferred employees, presenting the Respondents with an opportunity to manipulate the hiring process to ensure that a majority of newly hired employees within the unit were not former Preferred employees in order to avoid their bargaining obligation.[9]

We likewise agree that the Respondents failed to prove their affirmative defense that they would have refused to hire Wilson even absent the desire to avoid successorship because of Wilson's purported previous discharge from another workplace. The judge discredited Brown's claim that the Respondents refused to hire Wilson because then-new Director of Nursing Cooper allegedly told Brown that Wilson had been discharged from another workplace due to an altercation with a coworker. As the judge noted, Cooper did not testify, the Respondents did not offer notes of Wilson's interview, the alleged incident was not documented in Wilson's Preferred personnel file, and the Respondents admit that Wilson was neither asked about the incident nor given an opportunity to explain. Additionally, Brown offered few specifics as to when Cooper allegedly told her about Wilson's previous discharge, and she testified that she could not remember whether Cooper participated in Wilson's interview.[10]

Thus, the evidence credited by the judge concerning Davis, Eads, Sickles, and Wilson shows that each had satisfactory and well-documented work histories at Pre-

[8] Given this evidence of the Respondents' antiunion animus, we find it unnecessary to pass on whether that animus was further evidenced by Brown's creation of a "helping hands" job classification at Ridgewood and her post-transition letter to employees concerning unions.

We reverse the judge's apparent finding that Brown's pre-transition statement at August employee meetings that she saw no need for a union was a Sec. 8(a)(1) violation, inasmuch as this violation was not alleged in the complaint. We also find no need to rely on this statement as evidence of antiunion animus.

[9] Brown's hearing testimony further supports such an inference. See Tr. at 600:

> Q. Okay. Was there a point in time that you began to believe that you would not recognize the Union?
>
> A. Yes.
>
> Q. Okay. When was that?
>
> A. Around the end of August, first of September when not that many people had came from Preferred to apply.

Because we are not persuaded that the Respondents actually intended to rely on the no-rehire policy, we find it unnecessary to pass on the judge's attempt to distinguish the holding in *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), concerning a similar policy.

[10] This nebulous evidence concerning Wilson is in marked contrast to the specific and corroborated evidence of an alleged outside complaint concerning Preferred applicant Hope Kimbrell. Thus, the judge credited the Respondents' explanation for refusing to hire Kimbrell (who also made a poor impression in her interview) while simultaneously discrediting the Respondents' claims regarding Wilson, and we reject the Charging Party's exception to the judge's dismissal of the allegation that the Respondents' refusal to hire Kimbrell was discriminatorily motivated. (We likewise reject the Charging Party's exception to the dismissal of the allegation that the Respondents' refusal to hire Marcus Waldrop was discriminatorily motivated considering that the record contains no evidence of any hire who, like Waldrop, failed to appear for a scheduled physical without giving notice.)

ferred and uneventful interviews that should not have prevented their rehire (unlike other Preferred applicants, whom the judge found—and we agree—the Respondents reasonably refused to rehire). Because the Respondents' stated reasons for refusing to hire Davis, Eads, Sickles, and Wilson were pretextual, the Respondents have failed to establish their *Wright Line* defense. See, e.g., *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016), enfd. 871 F.3d 358, 374 (5th Cir. 2017). Accordingly, we find that the Respondents violated Section 8(a)(3) and (1) of the Act by refusing to hire Davis, Eads, Sickles, and Wilson. Moreover, because former Preferred employees would have constituted a majority of the Respondents' initial complement of unit employees had the Respondents not unlawfully refused to hire these four applicants, we conclude that the Respondents were a legal successor to Preferred.[11] Because the Respondents were a successor employer upon commencing operations on October 1, they were then obligated to recognize and bargain with the Union as the representative of their employees in the appropriate unit. By failing to do so on and after that date, the Respondents violated Section 8(a)(5) and (1) of the Act.[12]

B. The Respondents Were Not Obligated to Bargain Prior to Setting Different Initial Terms and Conditions of Employment.

In *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272 (1972), the Supreme Court held that successor employers are generally free to set initial terms and conditions of employment. The obvious and compelling rationale for this economic freedom was that

> [a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital…. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

Id. at 287–288. However, in dictum, the Supreme Court allowed for a possible exception to the general rule:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain *all of the employees in the unit* and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

Id. at 294–295 (emphasis added).

[11] In calculating the union's majority status, we find that because the Respondents completed their hiring of incumbent Preferred employees before hiring new, non-Preferred applicants, it follows that the Respondents would have hired fewer non-Preferred applicants had they lawfully extended job offers to the four discriminatees. Further, because we find that a majority of the Respondents' employees would have consisted of former Preferred employees absent the Respondents' unlawful refusal to hire Davis, Eads, and Sickles, we find it unnecessary to decide whether Wilson should be excluded from the October 1 successorship calculation because she appears to have been denied clearance to work at that time based on her physical examination. The hiring of Davis, Eads, and Sickles would have increased the total number of former Preferred employees on October 1 from 49 to 52, while simultaneously reducing the total number of non-Preferred employees from 52 to 49. See *Jennifer Matthew Nursing & Rehab. Ctr.*, 332 NLRB 300, 307 fn. 19, 308 (2000) ("[I]f the 36 discriminatees had been hired, one would assume that 36 replacements would not have been hired," and "one must assume that none or almost none of the replacements would have been hired but for the discrimination.").

Relatedly, because we find that former Preferred unit employees would have comprised a majority in the successor unit even if the 19 "helping hands" employees are counted as part of the unit, we find no need to pass on the judge's alternative rationale for finding majority continuity—i.e., that the 19 "helping hands" employees should not be counted as part of the unit.

There is clearly no merit in the Respondents' alternative contention that the judge erred in finding that October 1, the day the Respondents took over management of Ridgewood, was the date on which to determine whether a majority of employees were formerly employed by Preferred. The Respondents claim that they had not yet hired a substantial and representative complement of employees on that date. When the Respondents took control of Ridgewood, there was neither a hiatus in operations nor a plan to expand the business beyond the 98 beds for which the nursing home was licensed. Moreover, the Respondents must presumably have employed a substantial and representative complement on October 1 in order to continue providing adequate care for Ridgewood's elderly residents and patients. Indeed, on October 1 the Respondents employed more employees performing bargaining unit work (101) than the average full complement of Preferred bargaining unit employees over the preceding year (88) or the actual number of Preferred unit employees employed in August (83). Finally, despite the Respondents' continued hiring during their first 6 weeks of operation, Brown testified that the total number of employees performing unit work consistently remained at approximately 103 in the year following the transition. Thus, contrary to the Respondents, this case is nothing like *Myers Custom Prod. d/b/a Gibbons Enclosures, Inc.*, where the parties stipulated that the employer "planned, before commencing operations, to take 2 to 3 months to select and train a full employee complement," and by the end of that time period, the employer had nearly doubled its workforce. 278 NLRB 636, 637 (1987).

[12] We also affirm the judge's finding that the Respondents violated Sec. 8(a)(5) by refusing the Union's October 1 request for relevant bargaining-related information. Further, as previously indicated, we affirm the finding that the Respondents independently violated Sec. 8(a)(1) by informing employees in an October 22 letter that they were no longer represented by the Union.

In *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), the Board emphasized that the "perfectly clear" successor exception mentioned by the Supreme Court in *Burns* was a narrow one that would require an employer to bargain prior to setting initial terms of employment only "in circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would *all* be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Id. at 195 (emphasis added).

As indicated, the narrow *Spruce-Up* exception is consistent with the *Burns* "perfectly clear" dictum in that it applies only where the facts show that the employer indicated it would hire all (or substantially all, as applied in later cases) of the predecessor's employees. Subsequently, in *Love's Barbeque*, 245 NLRB at 78, the Board addressed the situation in which an employer's broad and unlawful discriminatory hiring practices, aimed at evading hiring any employees of the predecessor—indeed, "designed to conceal from" the predecessor's former employees "the fact that [the new employer] was hiring" at all, id. at 80—created an ambiguity making it impossible to determine whether that employer would have hired all or substantially all of the predecessor's unit employees had it not discriminated in hiring. Under these circumstances, the Board held that "any uncertainty as to what [r]espondent would have done absent its unlawful purpose must be resolved against [r]espondent, since it cannot be permitted to benefit from its unlawful conduct." Id. at 82. Thus, the Board found as necessarily implied in law that the respondent "would have retained *all* of the employees had it not decided to avoid hiring them because of their union activity" and, accordingly, that it was not entitled to set initial employment terms and conditions without first consulting the union. Id. (emphasis added); see also *U.S. Marine Corp.*, 293 NLRB at 671–672 ("[W]e conclude that absent their unlawful purpose, the [r]espondents would have retained *substantially all* the predecessor's employees, and therefore the [r]espondents were not entitled to set initial terms of employment without first consulting with the [u]nion.") (emphasis added). Constructively, therefore, a new employer's hiring discrimination against "all" or "substantially all" of the predecessor's unit employees makes that employer tantamount to a "perfectly clear" successor, requiring as a remedial matter the finding of a derivative Section 8(a)(5) violation for failure to bargain prior to setting initial terms of employment in the successor unit. This finding, in turn, results in an order directing the successor to restore the status quo ante terms that existed in the predecessor unit and to make unit employees whole for any losses resulting from the unlawful changes.

In *Love's Barbeque*, and virtually all of its progeny, the Board has applied this remedial doctrine in circumstances where a successor's widespread discriminatory hiring practices made it impossible to determine whether it would have hired all or substantially all of the predecessor unit employees absent the hiring discrimination. However, in *Galloway School Lines*, 321 NLRB 1422 (1996), a Board panel for the first time expressly held that the *Love's Barbeque* remedy should apply in a case in which "a successor employer discriminatorily failed to hire some, but not 'all,' predecessor employees in order to avoid a bargaining obligation, i.e., when some of the predecessor employees who applied but were *not* hired by the successor were not unlawfully denied employment by the successor." Id. at 1425. More specifically, as detailed in Member Cohen's dissenting opinion in that case, the successor employer hired 23 employees from the predecessor unit of 60–65 employees and discriminatorily failed to hire 10 others. For the other 27–32 predecessor unit employees who were not hired, there was either no allegation of discrimination or allegations were dismissed. Id. at 1429.

Consequently, the factual record in *Galloway* precluded any constructive finding of fact, based on ambiguity created by the successor's unlawful hiring practices, that the successor would have hired all or substantially all predecessor unit employees into the 55-employee successor unit. The two-member *Galloway* majority did not contest this. Instead, the majority construed the *Burns* "perfectly clear" exception dictum, quoted above, to "mean that a duty to bargain over initial terms can arise not only in situations where the new employer's plan is to retain virtually every predecessor employee, but also in cases where, although the plan is to retain a fewer number of predecessor employees, it is still evident that the union's majority status will continue." Id. at 1426. The majority reasoned that the imposition of the *Love's Barbeque* remedy was appropriate even in circumstances where it is perfectly clear that absent the successor's unlawful conduct, it *would not* have hired all or substantially all of the predecessor employees.[13]

To reach this conclusion, the *Galloway* majority claimed to be reading the *Burns* sentence referring to the

[13] Another 2-member panel majority, over a third member's dissent, followed *Galloway* to impose the *Love's Barbeque* remedy in similar factual circumstances in *Pacific Custom Materials*, 327 NLRB 75, 75 fn. 3, 86 (1998).

possibility of a "perfectly clear" exception, quoted above, in conjunction with the sentence immediately following, which states:

> In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9 (a) of the Act, 29 U. S. C. § 159 (a).

Galloway School Lines, supra at 1426 (quoting *Burns*, supra at 295). The majority interpreted this language as permitting application of the "perfectly clear" successor bargaining obligation in circumstances where the successor did not intend to hire all employees from the predecessor unit, but those hired from the predecessor unit would constitute all or substantially all of a smaller successor unit. Still, as previously explained, while the successor unit in *Galloway* was indeed smaller than the predecessor unit, all or substantially all of the predecessor employees would not have been hired in the absence of discrimination.[14] The *Galloway* majority nevertheless reasoned that the two *Burns* sentences, considered together, justified consideration of a broader set of circumstances in determining whether a wrongdoing successor should be deemed to have forfeited the usual *Burns* right to set initial terms of employment. According to the majority, "*Burns* principles cannot be neatly applied to such an employer because we simply do not know what its hiring plan would have been had it acted lawfully. In other words, it is uncertain whether, absent the Respondent's unlawful conduct, it would have planned to retain a sufficient number of predecessor employees to make it evident that the Union's majority status would continue." Id. at 1427. By this reasoning, it became irrelevant what number of predecessor employees were lawfully denied hire or what number should lawfully have been hired in the successor unit. Any hiring scheme designed to avoid the *Burns* majority-based successor obligation—even one that involved discrimination against a single employee—would result in not only the imposition of that obligation but also the forfeiture of the usual *Burns* right to set initial terms of employment unilaterally.

Citing *Love's Barbeque*, the judge in this case found that the Respondents, having engaged in a discriminatory hiring scheme to evade successorship, violated Section 8(a)(5) and (1) by unilaterally implementing initial employment terms that were different from those of Preferred. However, as previously stated, the *Love's Barbeque* doctrine involved a situation in which the successor employer's unlawful discriminatory hiring practices created an uncertainty whether it would otherwise have hired all or substantially all of the predecessor unit employees. In this case, as in *Galloway*, there is no such uncertainty. Only 65 Preferred employees even applied for jobs, and there is no claim that others were discriminatorily denied the opportunity to apply. Further, we have found, in agreement with the judge, that only 4 of the Preferred job applicants were discriminatorily denied hire. At most, then, even in the absence of discriminatory hiring practices, only 53 Preferred employees (including Wilson in the count) would have begun work on October 1 in a unit of 101 employees. Thus, the rationale for the derivative 8(a)(5) unilateral-change finding and resulting make-whole remedy retroactively imposing the terms of the predecessor's collective-bargaining agreement in this case derives only from *Galloway*'s extension of *Love's Barbeque* to an altogether different factual scenario that does not involve a wrongdoing successor's creation of uncertainty as to whether it might have been a perfectly clear successor in the absence of discriminatory hiring practices.

We find that *Galloway* and precedent applying its holding must be overruled. The majority there impermissibly tore the *Love's Barbeque* remedy from its doctrinal roots and, in doing so, went far beyond the limits of the narrow "perfectly clear successor" exception contemplated by the Court in *Burns*. Initially, we disagree with the *Galloway* majority's interpretation of the "full complement" language in *Burns* immediately following the "perfectly clear" exception. This reading cannot be squared with the Supreme Court's observation in *Fall River Dyeing & Finishing Corp.* that "in using the term 'full complement,' the [*Burns*] Court was distinguishing the exceptional situation, alluded to in the prior sentence, in which a successor should consult with the union before setting these terms and conditions, from the standard situation in which a successor could set its own terms free of the union's involvement." 482 U.S. at 47 fn. 14.[15] It was therefore appropriate that, in fashioning the *Love's Barbeque* remedy, the Board hewed so closely to the language of *Burns*, requiring that for an ordinary successor employer engaged in hiring discrimination to forfeit its right to set initial employment terms, the discrimination must create such uncertainty as to make it impossible to determine whether the exceptional "perfectly

[14] Moreover, absent the hiring discrimination in *Galloway*, the new employer's 55-employee workforce would have included only 33 employees formerly employed by the predecessor, so those hired from the predecessor unit would *not* have constituted all or substantially all of the smaller successor unit.

[15] The *Galloway* majority and our dissenting colleague similarly rely on this misreading of *Burns* in claiming that the majority-rule principle in Sec. 9(a) of the Act supports their position. See *Galloway*, supra at 1426.

clear" situation would otherwise have resulted. *Love's Barbeque*, supra at 82; *U.S. Marine Corp.*, supra at 671–672.[16]

More importantly, even if we were to accept the *Galloway* majority's interpretation of the *Burns* dictum as permitting the remedy imposed there, we would find that remedy inappropriate for more fundamental policy reasons. Expanding that remedy to encompass any successor employer who discriminates to any degree in hiring to avoid the *Burns* majority-based successor obligation goes too far. It effectively eliminates the otherwise customary *Burns* right to set initial employment terms unilaterally even for an employer whose hiring discrimination is limited to a single predecessor employee whose hiring would have established a continuing majority in the successor unit. Imposing the same statutory bargaining obligation as that typically reserved for the exceptional "perfectly clear" successor—and the same remedial obligation to rescind initial employment terms and to make employees whole at the predecessor's contractual wage rates—on employers who undisputedly would have been ordinary *Burns* successors had they not violated Section 8(a)(3) threatens to cross the line from the broad equitable relief permitted under Section 10(c) of the Act to punitive action that the Board is prohibited from taking.

Furthermore, the holding of the majority in *Galloway* undercuts the fundamental economic rationale in *Burns* for permitting successor employers to set initial employment terms. The wrong committed by the discriminatory hiring practices of a successor employer that would not in any event have hired all or substantially all of the predecessor's employees can be effectively addressed by the traditional make-whole remedies of reinstatement and backpay for affected employees. The wrong committed by the avoidance of a successor bargaining obligation can be effectively addressed by the imposition of a remedial bargaining obligation. But as the Supreme Court emphasized in *Burns*, many successors take over a distressed business that must undergo fundamental and immediate changes in employment terms to survive. Retroactive imposition of the predecessor's employment terms—with backpay and interest—on any employer who engages in discriminatory hiring to any degree runs counter to the principle that initial terms must generally be set by "economic power realities." The *Galloway* remedy may be a deterrent to employers contemplating unlawful hiring schemes, but it also risks job loss and consequent financial ruin for all employees in the successor's enterprise. Such a potential outcome threatens the labor relations stability that the Board is statutorily bound to protect.

The dissent contends that overruling *Galloway* will promote labor disputes. In our view, it will promote the survival of foundering businesses and preserve jobs. But

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[16] Citing *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977), our dissenting colleague makes much of a Board panel's cursory interpretation there of the *Burns* "perfectly clear exception" language as covering an employer's plan to hire fewer than all unit employees "but still enough to make it evident that the union's majority status will continue." However, the *Galloway* majority itself did not view *Spitzer* as controlling precedent. It stated in relevant part that

> [p]revious cases have not addressed the precise factual scenario presented in the instant case. In addition, there is language in prior Board cases arguably supporting both sides of this difficult issue. Some cases articulate the governing standard in terms of whether the new employer intended to retain all or substantially all of the predecessor employees. See, e.g., *Boeing Co*., 214 NLRB 541 (1974), affd. 595 F.2d 664, 671 (D.C. Cir. 1978), cert. denied 439 U.S. 1070 (1979). Other cases speak in terms of an intent to retain enough predecessor employees to make it evident that the union's majority status will continue. See, e.g., *Spitzer Akron, Inc*., 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976).

321 NLRB at 1425. Thus, the *Galloway* majority itself recognized that Board precedent predating *Galloway* was in conflict on the issue we address today.

Our dissenting colleague cites *State Distributing Co.*, 282 NLRB 1048 (1987), in support of her claim that the *Love's Barbeque* remedy is necessary where an employer unlawfully refuses to hire a targeted number of employees to avoid a successor bargaining obligation, even if the discrimination does not create an uncertainty whether the successor would have hired "all or substantially all" of the predecessor's workforce. There, however, an employer discriminatorily refused to hire 9 of 11 predecessor-unit employees to evade its successorship obligations. Id. at 1052–1053. Thus, the Board in *State Distributing* ordered the restoration of the predecessor's terms where the offending employer created uncertainty regarding whether it would have hired substantially all of the predecessor's employees absent the unlawful discrimination. Our colleague's view of *U.S. Marine Corp.*, supra, is similarly unpersuasive. In that case, the Board specifically rejected the "false full-complement projection" that the dissent here relies on to claim that the employer only discriminated against a few predecessor employees. Instead, the Board found that "the sham inflation of the full complement projection and the decision to stop rehiring former Chrysler employees once their number had reached 223 are complementary aspects of the same scheme sought to be carried out by [the employer]." Id. On these facts, the Board found that absent the employer's hiring discrimination, the employer "would have retained substantially all [(258) of] the predecessor's [262 unit] employees, and therefore . . . [was] not entitled to set initial terms of employment without first consulting with the Union." Id. at 672.

Other cases preceding *Galloway* that support the "all or substantially all" standard are *Canteen Co.*, 317 NLRB 1052, 1053 fn. 5 (1995) (employer planning to "hire *all* of the predecessor employees" and which offered employment to 3 of 4 predecessor unit employees was perfectly clear successor) (emphasis added), enfd. 103 F.3d 1355 (7th Cir. 1997); and *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052, 1053 (1976) (employer planning to hire "*all* of the people" from the predecessor's workforce and which actually hired 49 of 55 predecessor unit employees was perfectly clear successor) (emphasis added), enf. denied in relevant part sub nom. *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977).

even if the dissent is correct, we again take guidance from *Burns*. The Supreme Court stated that "[p]reventing industrial strife is an important aim of federal labor legislation, but Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal. When a bargaining impasse is reached, strikes and lockouts may occur. This bargaining freedom means both that parties need not make any concessions as a result of Government compulsion and that they are free from having contract provisions imposed upon them against their will." 406 U.S. at 287.[17]

Our dissenting colleague also claims that because *Burns* itself did not involve unlawful hiring discrimination, "[n]othing in *Burns*, then, can fairly be read to preclude the Board's approach in *Galloway*." But the *Burns* dictum containing the perfectly clear exception opened the door to the *Spruce Up* and *Love's Barbeque* remedies in the first place. Without it, there would be no apparent basis to deviate from the Supreme Court's general rule permitting successors to set initial employment terms. Accordingly, in the successorship context, the *Burns* dictum both yields the exception to the general rule of *Burns* and cabins the extent to which the Board may deviate from the general rule in fashioning remedies to address employer misconduct. See *Burns*, supra at 294-295.

Moreover, the dissent's point that *Burns* did not involve unlawful hiring discrimination is correct as far as it goes, but it ignores that *Burns* involved an employer that attempted to evade successorship through other unlawful means. Burns, the successor company in that case, hired 27 guards from the predecessor Wackenhut unit into a unit that also included 15 Burns guards from other locations. It then gave the former Wackenhut guards membership cards for AFG—a union that had collective-bargaining contracts with Burns at other locations but that did not represent the former Wackenhut guards—and "informed them that they had to become AFG members to work for Burns, that they would not receive uniforms otherwise, and that Burns 'could not live with' the existing contract between Wackenhut and the [incumbent Wackenhut] union." 406 U.S. at 275. Burns then recognized AFG instead of the incumbent Wackenhut union as the bargaining representative in the unit where former Wackenhut employees comprised a majority. The Board had found that Burns thereby violated Section 8(a)(2) of the Act. This finding was not in dispute before the Supreme Court, which stated, "It goes without saying, of course, that Burns was not entitled to upset what it should have accepted as an established union majority by soliciting representation cards for another union and thereby committing the unfair labor practice of which it was found guilty by the Board." Id. at –279280. Nevertheless, the Court proceeded to articulate a general rule permitting a successor to set initial terms and conditions of employment, subject only to the narrow "perfectly clear" exception suggested by the *Burns* dictum. And the Court applied this rule to Burns, despite Burns's patently unlawful and intended attempt to avoid the imposition of its successor obligation, by rejecting the Board's imposition of a make-whole remedy pursuant to the terms of the predecessor Wackenhut contract. There is not a hint in the Court's analysis that Burns's misconduct—indistinguishable in intent and much broader in scope than the unlawful discrimination in the present case—should have weighed in favor of enforcing that remedy. This result cannot be reconciled with the dissent's theory of a per se forfeiture of the fundamental *Burns* right in circumstances that do not involve a successor's hiring of "all or substantially all" predecessor employees.

Accordingly, because we conclude that the *Galloway School Lines* remedy constitutes an unwarranted extension of *Love's Barbeque* that is contrary to the rationale of *Burns*, we overrule that case, and any case subsequently applying it, in relevant part. Further, as previously stated, there is no uncertainty in the present case, unlike in *Love's Barbeque*, regarding how many former employees of the predecessor would have been hired absent the successor's discrimination. The Respondents would have hired 53 Preferred employees and 48 new employees but for the unlawful discrimination. Under these circumstances, the discriminatory failure to hire 4 Preferred employees created no uncertainty whether the Respondents planned to retain all or substantially all of the predecessor's unit employees. Accordingly, the Respondents, as an ordinary *Burns* successor, remained free to set initial employment terms for the unit employees.[18]

[17] Contrary to the dissent's suggestion, nothing in *Burns*' discussion of this overriding statutory concern for bargaining freedom suggests that the Board may ignore it as long as it does not seek to impose the predecessor's contract on the successor. In this respect, it is our colleague, not we, who seeks to override Congressional labor policy reflected in the Act.

[18] In light of this determination, we also reverse the judge and dismiss the allegation that the Respondents violated Sec. 8(a)(1) by informing bargaining unit members in August 2013 that they would unilaterally change their terms and conditions of employment.

In accord with the Respondents' exceptions, we reject the judge's alternative rationale that the Respondents were a *Spruce Up* "perfectly clear successor," allegedly because President Brown initially promised to hire 99.9 percent of the former Preferred employees prior to announcing new terms and conditions of employment. Neither the complaint nor any of the underlying charges alleged a violation based on this theory. The Union first raised the "perfectly clear successor" ar-

We therefore reverse the judge in relevant part and dismiss the allegation that the Respondents violated Section 8(a)(5) by failing to bargain with the Union prior to setting different initial terms.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for paragraph 1.

"1. The Respondents, Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc., constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As a single employer, the Respondents are a successor employer of a majority of the unit employees of their predecessor employer at the Ridgewood facility."

2. Substitute the following for paragraphs 4, 5, and 6.

"4. The Respondents violated Section 8(a)(5) and (1) of the Act by (1) refusing to recognize and bargain with the Union on October 1, 2013, and (2) refusing to provide the Union with information requested on October 1 that was relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the unit employees."

"5. The Respondents violated Section 8(a)(1) by (1) interrogating bargaining unit employees by inquiring about their union membership during job interviews during September 2013, (2) notifying employees in writing on October 22, 2013, that they were no longer represented by the Union, and (3) threatening an employee in January 2014 that she would be discharged if she engaged in activity in support of the Union."

"6. The Respondents violated Section 8(a)(3) and (1) of the Act in September 2013 by refusing to hire unit employees Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson in order to avoid a bargaining obligation with the Union."

3. Delete paragraph 7 and renumber the subsequent paragraphs accordingly.

AMENDED REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondents discriminatorily refused to hire Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson, we shall order the Respondents to offer to these employees instatement in the positions for which they would have been hired absent the Respondents' unlawful discrimination, or, if those positions no longer exist, in substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired in their place. The employees listed above shall be made whole for any loss of earnings they may have suffered due to the discrimination against them. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondents shall also be required to expunge from their files any reference to the unlawful refusals to hire the employees listed above and to notify the discriminatees in writing that this has been done.

In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall order the Respondents to compensate the employees listed above for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Having found that the Respondents violated Section 8(a)(5) and (1) of the Act by refusing to recognize, bargain with, and provide necessary information to the Union as the exclusive collective-bargaining representative of the unit employees, we shall order the Respondents to recognize and, upon request, provide the Union with requested information that is relevant and necessary to its role as the employees' bargaining representative, and to bargain in good faith with the Union as their employees' exclusive collective-bargaining representative concerning their wages, hours, benefits and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.[19]

gument at the hearing after close of the General Counsel's case in chief, but it is well established that a charging party may not expand the scope of the complaint without the General Counsel's support. See, e.g., *Planned Building Services, Inc.*, 330 NLRB 790, 793 fn. 13 (2000). The General Counsel did not present argument in support of this theory of violation until his post-hearing brief, and it is equally well established that due process principles preclude doing so at this late date. Id. Under these circumstances, we need not discuss whether we agree with our dissenting colleague's view that the record supports the judge's "perfectly clear successor" finding. We note only that, as stated in fn. 6, supra, the evidence is ambiguous as to whether the statement by President Brown to which the dissent gives dispositive weight preceded a contrary statement by the Respondents' counsel to the Union.

[19] The Respondents except to the judge's finding that they unlawfully refused to recognize and bargain with the Union in violation of Sec. 8(a)(5) and (1), but they do not argue that the judge's recommended affirmative bargaining order is improper if the Board affirms the judge's 8(a)(5) finding. We therefore find it unnecessary to provide a

The Respondents shall be required to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondents, Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc., Jasper, Alabama, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire the former employees of Preferred Health Holdings II, LLC in an attempt to avoid the obligation to recognize and bargain with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the Union) as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> [A]ll full time and regular part time employees employed by the facility, including LPN's, nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and the food supervisor (it is understood that in the event any of the preceding job titles change, they will remain in the bargaining unit) but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(c) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondents' unit employees.

(d) Coercively interrogating employees about their union membership.

(e) Informing unit employees that they are no longer represented by the Union.

(f) Threatening to discharge employees if they engage in activity in support of the Union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson full instatement in the positions for which they would have been hired absent the Respondents' unlawful discrimination or, if those jobs no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their place.

(b) Make Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days from the date of this Order, remove from their files any reference to the unlawful refusals to hire Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson, and within 3 days thereafter, notify the employees in writing that this has been done and that the refusals to hire will not be used against them in any way.

(e) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> [A]ll full time and regular part time employees employed by the facility, including LPN's, nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and the food supervisor (it is understood that in the event any of the preceding job titles change, they will remain in the bargaining unit) but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

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specific justification for that remedy. *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001). See also *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002). *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also substitute a new notice to conform to the Order as modified.

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at their facility in Jasper, Alabama, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 1, 2013.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. April 2, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER MCFERRAN, dissenting.

This should be a straightforward labor-law successorship case. Months before the new employers' takeover of the facility, their president and owner told predecessor employees that the new employers planned to hire "99.9 percent" of them and that employment terms would essentially remain the same. Thus, under well-established law,[1] the new employers are a "perfectly clear successor" (in Board terminology) required to recognize and bargain with the union, and the Board should order the new employers to restore the terms and conditions of employment set forth in the predecessor's collective-bargaining agreement. The same remedy applies, under a different line of Board successorship doctrine, when an employer discriminatorily refuses to hire a targeted number of predecessor employees to avoid successorship. The new employers did this, too, as the majority agrees. But this case has an unexpected twist. My colleagues dodge the "perfectly clear successor" issue. Then, unasked and without seeking briefing, they choose to overrule longstanding precedent[2] on the remedy for the discrimination violation they do find. There is no occasion, and no reason, to overturn precedent. Reaching out to decide an issue, the majority gets it wrong, adopting an approach that fails to fully redress discrimination against union-represented workers and that fails to minimize the potential for labor disputes.

I.

This case arises from the Respondents' takeover of skilled nursing home facility Ridgewood Healthcare Center (Ridgewood) from predecessor Preferred Health Holdings II, LLC (Preferred) on October 1, 2013.[3] For almost 40 years prior to the takeover, the Union represented a unit of Ridgewood employees. The evidence here shows that to avoid having to bargain with the Union, the Respondents engaged in a series of actions that amounted to an unlawful hiring scheme.

First, the Respondents misled former Preferred employees into thinking that everything would remain the same following the takeover, but then subsequently pulled the rug out from under them. In the months lead-

[1] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975).

[2] *Galloway School Lines*, 321 NLRB 1422 (1996).

[3] All dates are in 2013 unless otherwise noted.

ing up to the takeover, the Respondents' President and Owner, Joette Brown, repeatedly assured employees that there would be minimal changes. Specifically, in an early July meeting, Brown stated that the Respondents expected to hire "99.9 percent" of the current employees and that wages and benefits would essentially stay the same. When asked about the Union, Brown stated that the Respondents would have to recognize the Union and honor its contract with Preferred. During meetings in August, Brown reiterated that the Respondents expected to hire 99.9 percent of the current employees and that things would basically stay the same because the facility was working fine. Further, the Respondents' attorney even offered to bargain with the Union for a new contract in a July 15 letter, effectively forecasting the Respondents' expectation that the Union would continue to represent the employees following the managerial change. However, by the October 1 takeover (and after a change in counsel), the Respondents refused to recognize the Union and made several unilateral changes to the employment terms set forth in the Preferred-Union contract.

Second, the Respondents played a numbers game by discriminatorily refusing to hire four predecessor employees to suppress the number of former Preferred employees below a majority of those hired (which indisputably would have triggered a duty to recognize the Union). The Respondents assert that they refused to hire employees Betty Davis, Gina Eads, and Connie Sickles because they had been discharged from Ridgeview (a separate facility also owned and operated by Brown)—yet the Respondents interviewed them rather than automatically rejecting their applications (as would have been expected). Brown also told the employees that the Respondents would consider applicants who had been discharged from Ridgeview along with everyone else, further undercutting the Respondents' asserted defense. The Respondents also refused to hire employee Vegas Wilson supposedly because she had been discharged from another facility, but the Respondents provided scant evidence regarding Wilson's purported discharge (or their decision-making process in refusing to hire her). If the Respondents had hired these four employees, former Preferred employees would have constituted a majority of those hired, 53 of 101 employees, on October 1.

During and after the takeover, the Respondents expressed antiunion animus, unlawfully interrogating and threatening employees. The Respondents asked former Preferred employees whether they were Union members during their interviews and threatened to discharge an employee if she recruited her coworkers to support the Union.[4] Brown even threatened to close the facility if the employees unionized.

As I will explain, under Board law *both* aspects of the Respondents' effort to avoid a successorship bargaining obligation with the Union—both their deliberately misleading statements to predecessor employees, which establish "perfectly clear successor" status, as well as their discriminatory refusal to hire certain employees to avoid successorship status altogether—compel the same result: that the Respondents must restore the terms and conditions of the predecessor's contract to remedy their unlawful conduct.

II.

The majority declines to reach the "perfectly clear successor" issue on due-process grounds, but there is no such obstacle here. Instead, we should affirm the judge's well-supported finding that the Respondents are a perfectly clear successor. Before belatedly changing course, the Respondents clearly communicated a plan to hire enough predecessor employees for the Union's majority status to continue, without announcing new terms and conditions of employment. As a perfectly clear successor, the Respondents were obligated to recognize and bargain with the Union and to maintain existing employment terms.

A.

In *NLRB v. Burns Security Services*, 406 U.S. 272, 281–295 (1972), the Supreme Court held that a successor is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally. However, the *Burns* Court recognized that "there will be instances in which it is *perfectly clear* that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Id. at 294-295 (emphasis added).

The Board interpreted and applied the *Burns* "perfectly clear" caveat in subsequent cases. In *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the Board held that a new employer is a perfectly clear successor where it "has either actively or, by tacit inference, misled employees into believing

[4] I join my colleagues in affirming the judge's findings that the Respondents thereby violated Sec. 8(a)(1) of the Act. Further, I join the majority in affirming the judge's findings that the Respondents also violated Sec. 8(a)(1) by notifying employees that they were no longer represented by the Union and Sec. 8(a)(5) and (1) by failing to provide the Union with requested information. Finally, I join my colleagues in reversing the judge's finding that Brown's statement that she saw no need for a union was a 8(a)(1) violation.

they would all be retained without change in their wages, hours, or conditions of employment, or . . . where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." The Board has explained that an employer is a perfectly clear successor when it expresses an intent to retain the predecessor's employees, without making it clear that employment will be conditioned on acceptance of new terms. *Canteen Co.*, 317 NLRB 1052, 1053–1054 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997). And the Board has spelled out that the *Burns* Court's "phrase 'plans to retain *all* the employees in the unit,' . . . cover[s] not only the situation where the successor's plan includes *every* employee in the unit, but also situations where it includes a lesser number but still enough to make it evident that the union's majority status will continue." *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975) (emphasis added), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977).

B.

The Respondents are a textbook example of a perfectly clear successor. President and Owner Brown told Preferred employees that the Respondents planned to hire 99.9 percent of them and that employment terms would essentially remain the same. However, by the October 1 ownership transition, the Respondents made numerous unilateral changes to the terms and conditions of employment set forth in the Preferred-Union contract. Thus, not only did the Respondents fail to announce new employment terms prior to, or simultaneously with, their expression of intent to retain 99.9 percent of Preferred employees, but the Respondents also misled employees into thinking that everything would remain the same. In such situations, our cases illustrate, "perfectly clear successor" status is established. See, e.g., *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 3-6 (2016), enfd. 882 F.3d 510, 519-521 (5th Cir. 2018), cert. denied 139 S.Ct. 152 (2018); *Spruce Up Corp.*, 209 NLRB at 195.

There is no merit to the Respondents' argument that their attorney's July 15 letter to the Union (which, in part, rejected the Preferred-Union contract), constituted a timely announcement of new employment terms. As explained, a successor employer is permitted to unilaterally set initial employment terms if (but only if) it announces the new terms prior to or simultaneously with its expression of intent to retain the predecessor employees. See *Spruce Up*, 209 NLRB at 195; *Canteen Co.*, 317 NLRB at 1053–1054. Here, it was early July—before the July 15 letter—when (as the judge correctly found) Brown announced that the Respondents planned to retain essentially all the predecessor employees and maintain existing employment terms. Thus, the Respondents did not make a *timely* announcement of new employment terms.

Moreover, the July 15 letter supports the judge's "perfectly clear successor" finding. The letter reveals that the Respondents considered themselves to be a perfectly clear successor: they tellingly offered to bargain with the Union for a new contract, rather than claim a prerogative to unilaterally set initial terms and conditions of employment like an ordinary *Burns* successor. Thus, even if the letter had been sent before (not after) Brown's first meeting with employees, the evidence would still establish that the Respondents are a perfectly clear successor and that the Respondents violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union and by unilaterally setting initial employment terms.

C.

The majority avoids making this determination by invoking due process considerations, but this excuse is groundless. It makes no difference here that the General Counsel's complaint did not explicitly include a "perfectly clear successor" allegation because the issue is closely connected to the subject matter of the complaint and has been fully litigated by the parties, satisfying *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). To begin, the complaint alleged that "[s]ince about July, 2013, Respondents indicated its intent to hire a majority of Preferred's employees for employment at Respondents' facility." This key factual allegation put the Respondents on notice of the General Counsel's "perfectly clear successor" theory. Of course, such an allegation makes sense only if the General Counsel was seeking to prove that the Respondents were a perfectly clear successor. But if there was any doubt, the General Counsel dispelled it in his opening statement of the 3-day hearing, asserting that "[t]he evidence will show that Respondents are a perfectly clear successor." The General Counsel then elicited testimony from many witnesses about the facts underlying the "perfectly clear successor" allegation, and the Respondents had a full opportunity to examine and cross-examine these witnesses regarding this issue. The parties (including the Respondents) then relied on this evidence to address the merits of the "perfectly clear successor" allegation in their post-hearing briefs, and the judge predictably rendered a decision analyzing the issue.

My colleagues err in failing to grapple with these facts. The majority asserts that the General Counsel did not present argument in support of this allegation until his posthearing brief. They also imply that the Union at-

tempted to expand the scope of the complaint to include this allegation without the General Counsel's support. The majority is demonstrably wrong on both counts. The complaint and the General Counsel's explicit opening statement, not to mention the lines of testimonial inquiry, alerted the Respondents to the General Counsel's "perfectly clear successor" theory long before the post-hearing briefs. And because the General Counsel's litigation theory was obvious to the parties and the judge, it is simply not the case that the Union somehow usurped the General Counsel. Contrary to my colleagues, then, the requirements of due process were met here -- and easily.[5]

D.

In sum, there is a plain path under existing law to decide this case: affirming the judge's "perfectly clear successor" finding and ordering the standard remedy of restoring the predecessor's employment terms. Instead, the majority reaches out to overrule the remedial holding of *Galloway School Lines*, 321 NLRB 1422 (1996). Under *Galloway*, the Board orders the same restoration remedy when a successor discriminatorily refuses to hire a targeted number of predecessor employees to avoid successorship (as the Respondents did here). Of course, there is no need to reconsider whether a restoration remedy is appropriate in that situation if (as it should here) the Board is already ordering the same remedy as a consequence of a "perfectly clear successor" finding. Therefore, it is entirely unnecessary for the Board to address *Galloway* here. This decision, then, is yet another unfortunate example of using a straightforward case as a jumping off point to overrule well-established precedent.[6] Indeed, no party has asked the Board to revisit *Galloway*. Nor has the majority given the parties and the public notice and an opportunity to brief the issue, instead continuing a disturbing pattern of disregarding the Board's traditional norms to pursue changes to established law.[7]

III.

There is no disagreement here that the Respondents violated Section 8(a)(3) and (1) by discriminatorily refusing to hire employees Davis, Eads, Sickles, and Wilson, and Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union.[8] What divides the Board, rather, is whether—independent of a "perfectly clear successor" finding—the Respondents also violated Section 8(a)(5) and (1) by unilaterally setting initial terms and conditions of employment and should be ordered to restore the employment terms set forth in the Preferred-Union contract. Under *Galloway*, the indisputable answer is "yes." But, of course, the majority overrules that decision today. Aside from being unnecessary, the majority's overruling of *Galloway* is a mistake on its own terms.

A.

Galloway has a firm foundation in established successorship doctrine. In *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979), enfd. in rel. part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), the Board—drawing guidance from the Supreme Court's reference in *Burns* to "perfectly clear" successorship—held that the appropriate remedy when a successor discriminatorily refuses to hire *all* predecessor employees is to restore the employment terms that existed under the predecessor's collective-bargaining agreement (the same remedy that the Board applies in cases involving perfectly clear successors). The Board found that "any uncertainty as to what [r]espondent would have done absent its unlawful purpose must be resolved against [r]espondent, since it cannot be permitted to benefit from its unlawful conduct," and thus, the Board presumed that the respondent "would have retained all of the employees had

[5] See *Service Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 447–448 (2d Cir. 2011).

[6] See *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 12 & fn. 18 (2019) (Member McFerran, dissenting); *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 14, 16 (2017) (Members Pearce and McFerran, dissenting); *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156, slip op. at 36, 38 (2017) (Members Pearce and McFerran, dissenting), vacated 366 NLRB No. 26 (2018); *Boeing Co.*, 365 NLRB No. 154, slip op. at 30–31 (2017) (Member McFerran, dissenting).

[7] See id.; see also *Supershuttle DFW, Inc.*, 367 NLRB No. 75, slip op. at 15 & fn. 2 (2019) (Member McFerran, dissenting); *E.I. Du Pont de Nemours, Louisville Works*, 367 NLRB No. 12, slip op. at 3–4 (2018) (Member McFerran, dissenting); *Boeing Co.*, 366 NLRB No. 128, slip op. at 9–10 (2018) (Members Pearce and McFerran, dissenting); *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 22 (2017) (Members Pearce and McFerran, dissenting); *UPMC*, 365 NLRB No. 153, slip op. at 17–19 (2017) (Member McFerran, dissenting).

[8] I also join the majority in affirming the judge's dismissal of the complaint allegation that the Respondents violated Sec. 8(a)(3) and (1) by discriminatorily refusing to hire employees Hope Kimbrell and Marcus Waldrop. And I join the majority in finding it unnecessary to pass on the judge's alternative finding that the Union's majority status continued after the takeover because the 19 "helping hands" employees should not be counted as part of the unit.

Contrary to my colleagues, I would include employee Wilson in the October 1 successorship calculation. Any ambiguity as to Wilson's clearance to work is properly resolved against the Respondents. See *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1321 (7th Cir. 1991) (en banc), enfg. 293 NLRB 669 (1989), cert. denied 503 U.S. 936 (1992).

Additionally, I would order a notice reading here based on the nature of the unfair labor practices and the Respondents' President and Owner's involvement with them. See *Emerald Green Building Services, LLC*, 364 NLRB No. 109, slip op. at 1 fn. 3 (2016); *Voith Industrial Services, Inc.*, 363 NLRB No. 116, slip op. at 37 (2016).

it not decided to avoid hiring them because of their union activity." Id. Accordingly, an employer that discriminates against all of its predecessor's employees in hiring is treated as the equivalent of a perfectly clear successor.

In *Galloway*, the Board held that the *Love's Barbeque* remedy also applies when a successor discriminatorily refuses to hire a *targeted number* of predecessor employees. The Board recognized that it had previously determined—in the "perfectly clear successor" context—that the *Burns* Court's phrase "plans to retain all" also applies when an employer plans to "retain enough predecessor employees to make it evident that the union's majority status will continue," and that the same successorship obligations should arise in that situation. 321 NLRB at 1425 (citing *Spitzer Akron*, supra, 219 NLRB at 22).[9] After thoroughly reviewing *Burns*, the Board adhered to this position. Id. at 1426–1427. Turning to the facts of the case, the Board explained that it was uncertain whether, absent its unlawful conduct, the respondent employer would have planned to retain enough predecessor employees to preserve the union's majority status. Id. at 1427. As in *Love's Barbeque*, the Board found it appropriate to resolve this uncertainty against the respondent and to order the respondent to restore the employment terms set forth in the predecessor's contract. Id.

B.

The *Galloway* Board was correct: An employer that discriminatorily refuses to hire a targeted number of predecessor employees to avoid successorship violates Section 8(a)(5) and (1) by unilaterally setting initial employment terms, and the appropriate remedy is to order restoration of the predecessor's terms and conditions of employment.

As the *Galloway* Board explained, its decision is grounded in and fully consistent with the Supreme Court's decision in *Burns.* The Court's key statement—"there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms"—cannot be read in isolation. 406 U.S. at 294–295. The very next sentence of the Court's decision states that "[i]n other situations . . . it may not be clear until the successor has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by Section 9(a) of the Act." Id. at 295. Reading these two sentences together demonstrates that the employer's duty to bargain over initial employment terms arises when the employer plans to retain enough predecessor employees so that the union's majority status will continue. This interpretation is also supported by the Court's analysis. Rather than simply look at whether the employer retained all predecessor employees, the Court located the point at which it was apparent that the successor had a duty to bargain. Id.[10]

In addition, as the *Galloway* Board explained, a mechanical reading of *Burns*, focusing narrowly and literally on whether an employer plans to retain *all* predecessor employees, would lead to both overinclusive and underinclusive successorship findings. 321 NLRB at 1427. Where a new employer plans not only to retain all predecessor employees (triggering "perfectly clear" successorship), but also to dramatically increase the size of the workforce, such that new employees will outnumber predecessor employees, the employer obviously should not be required to bargain over initial employment terms. Id. On the other hand, a successor just as certainly *should* be required to bargain over initial employment terms where it plans to retain fewer than all predecessor employees, but also plans to *decrease* the size of the workforce, such that the union's majority status will continue. Id.

Moreover, as the *Galloway* Board recognized, *Burns* principles cannot be mechanically applied when a new employer's only *plan* with respect to hiring employees was to unlawfully avoid successorship. Id. When an employer so taints the successorship situation, equitable principles compel resolving uncertainty against the employer—and presuming that absent its unlawful motive,

[9] The majority asserts that the *Galloway* Board did not view *Spitzer Akron* as controlling precedent because the Board noted that "[s]ome cases articulate the governing standard in terms of whether the new employer intended to retain all or substantially all of the predecessor employees." Id. However, in *Boeing Co.*, the only such case cited by *Galloway*, the Board was not faced with the question of whether an employer is a "perfectly clear" successor when it plans to retain just enough predecessor employees for the union's majority status to continue. *Boeing Co.*, 214 NLRB 541 (1974) (finding employer was not a "perfectly clear" successor because it made a timely announcement of new employment terms), affd. 595 F.2d 664, 671 (D.C. Cir. 1978), cert denied 439 U.S. 1070 (1979). Similarly, the fact patterns in the other "perfectly clear"successorship cases cited by my colleagues, where the actual hiring closely matched the successor employers' stated intent to hire all of the predecessor employees, renders them of questionable utility in rebutting the claim that the *Galloway* principle, in fact, originated in *Spitzer Akron*. See Majority opinion, slip op. at 8 fn. 16.

[10] *Galloway* is also supported by the Sec. 9(a) majority-rule principle that underlies *Burns.* 321 NLRB at 1426 (citing *Burns*, 406 U.S. at 277, 295). Requiring a successor to bargain over initial employment terms where it is virtually certain that the union's majority status will continue is wholly consistent with this fundamental statutory policy. Id.

the employer would have hired a sufficient number of predecessor employees for the union's majority status to continue. Id.

C.

In addition to the reasons offered by the *Galloway* Board, there are several other compelling considerations that support the approach of that decision. Underlying these considerations is the critical fact that an employer that unlawfully discriminates in hiring to avoid a successor bargaining obligation stands in materially different shoes than a lawful *Burns* successor. From the employees' perspective, the employer discriminatorily refuses to hire a targeted number of their coworkers, refuses to recognize and bargain with their representative, and unilaterally imposes employment terms. The employer has not made a good faith mistake; but rather has intentionally engaged in an unlawful hiring scheme to get rid of the union. The employer's misconduct increases stress and uncertainty for the employees, heightens the risk of labor disputes, and certainly chills union activity. As I will explain, resetting initial employment terms in these circumstances is necessary to effectuate the Act's purposes by establishing stability for the employees, restoring the status quo, and removing an incentive for employers to break the law.

To begin, although *Burns* fully supports *Galloway,* it bears recalling that *Burns* is not directly applicable to the situation in cases like this one. *Burns* involved a successor that made *lawful* hiring decisions. See 406 U.S. at 275. The Supreme Court did not address what remedy is appropriate when the employer discriminatorily refuses to hire predecessor employees. Nothing in *Burns*, then, can fairly be read to preclude the Board's approach in *Galloway*.[11] Indeed, *Galloway* effectuates the core principles underlying the Act.

Galloway is wholly consistent with the Supreme Court's emphasis in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), on achieving the Act's policy of promoting workplace stability, by examining successorship issues from the perspective of union-represented employees. Transitions in ownership—which put working conditions, job security, and union representation in doubt—are fraught for employees and ripe for labor disputes. New employers that unlawfully discriminate against the predecessor's employees in hiring exacerbate this situation. On the one hand, employees are in a vulnerable position and may feel unduly pressured by their new employer to no longer support their union. Id. at 39–40. On the other hand, employees also have a reasonable expectation that their new employer will bargain with their union and honor existing employment terms. Id. at 43–44. When the employer fails to do so, employees are understandably dissatisfied, which may lead to labor unrest. Id. Thus, requiring the employer to recognize and bargain with the union and to restore the predecessor's terms and conditions of employment furthers the Act's twin goals of protecting employee free choice and promoting workplace stability.

[11] The majority emphasizes that the employer in *Burns* attempted to evade successorship through *other* unlawful means--recognizing a union that had not represented the predecessor employees in violation of Sec. 8(a)(2). But *Burns*' post-hire misconduct does not put it on the same analytical footing as the employers in *Love's BBQ*, *Galloway*, and other successorship cases in which the hiring process itself was unlawfully manipulated to avoid a bargaining obligation. It bears recalling that the *Burns* Court was rejecting a Board ruling compelling successor employers (regardless of misconduct) to assume in full the terms and durations of collective bargaining agreements negotiated by their predecessors. 406 U.S. at 276 & fn. 2. There was thus no occasion for the Court to consider the nuanced determinations made by the Board, and endorsed by the circuit courts, during the following decades to elucidate the obligations flowing from misconduct occurring earlier in time and thus calling into question how employers would have approached their hiring divorced from their unlawful motives.

The majority's effort to dispute this point is unavailing. My colleagues acknowledge, as they must, that "*Burns* did not involve hiring discrimination." The predecessor's employees were hired, not discriminated against. It is certainly true that the successor employer preferred that employees be represented not by their existing union but by a different, favored union, and that the employer violated Sec. 8(a)(2) of the Act by "soliciting representation cards for another union." 406 U.S. 279-280. But that finding, as the *Burns* Court, observed, "was not challenged" before the Court. Id. at 280. The Board, moreover, had not relied on the successor's violation of Sec. 8(a)(2) in connection with the violation findings that were reviewed by the Court. See *William J. Burns*, 182 NLRB 348 (1970). Nor did the Sec.8(a)(2) violation factor in any way into the Court's analysis of the issues before it: whether the Board erred in finding that the successor had violated the Act in refusing to assume the predecessor's collective-bargaining agreement and in making unilateral changes in terms and conditions of employment by deviating from that agreement.

The majority nevertheless insists that "in the successorship context, the *Burns* dictum both yields the exception to the general rule of *Burns* and cabins the extent to which the Board may deviate from the general rule in fashioning remedies to address employer misconduct." This assertion is mistaken. The Court's reference to "perfectly clear" successors was illustrative, not definitive. While the reference may have spurred the development of Board doctrine over the succeeding decades, the *Burns* Court did not attempt to resolve every possible question of successorship doctrine, including defining every circumstance in which the Board could require a successor to begin bargaining with the union from existing terms and conditions of employment as set by the predecessor's contract (as opposed to assuming the contract itself).

The Court itself pointed out that the "[r]esolution [of the issues before it] turn[ed] to a great extent on the precise facts involved [there]." 406 U.S. at 274. The "precise facts" in *Burns* did not involve an employer that unlawfully discriminated against predecessor employees in hiring. Thus, the Court did not consider the issue presented in this case, nor is the holding of *Burns* (that the Board may not require a successor employer to assume the predecessor's contract) implicated here. Meanwhile, nothing in the Court's "dictum"—to quote the majority here—even hints that the Board was precluded from adopting the rule applied in *Galloway*.

See id. at 38–40. Where employees see that their new employer has unlawfully discriminated against their coworkers because they were represented by a union, and yet is still permitted to set initial terms and conditions of employment as if it had acted lawfully, labor unrest is surely more (not less) likely and support for the union more (not less) likely to be chilled improperly. From the employees' perspective, then, there is an even greater need to establish stability in these circumstances by restoring the predecessor's employment terms.

Galloway's resetting of terms and conditions of employment is also necessary to restore the pre-discrimination status quo and to deter unlawful conduct. When an employer unlawfully refuses to hire a targeted number of employees to avoid a successor bargaining obligation, it is not enough for the employer to simply rehire the discriminatees, possibly years later. Failing to also restore the employment terms "would confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor." *State Distributing Co.*, 282 NLRB 1048, 1049 (1987). The employer would benefit from its unlawful scheme of targeting employees, by being permitted to set initial terms and conditions unilaterally. As the Board has recognized, "[f]ailing to return to the status quo ante in [these circumstances] would encourage the kind of subterfuge and falsification in which the Respondents engaged." *U.S. Marine Corp.*, 293 NLRB at 672. Indeed, the employer would "enjoy[] a financial position that is . . . more advantageous than the one it would occupy had it behaved lawfully." *State Distributing Co.*, 282 NLRB at 1049. And, for its part, contrary to the central remedial purposes underlying the Act, the Board would essentially be rewarding the employer for discriminating just enough, but not too much. Of course, whether the employer discriminates against all, substantially all, or a targeted number of predecessor employees should not affect the remedy. In each situation, the employer is acting unlawfully during the hiring process to avoid a successor bargaining obligation—and so the Board must order the employer to reset the employment terms to return the situation as nearly as possible to that which would have occurred absent the unlawful conduct. Doing so prevents the employer from enjoying the fruits of its unlawful conduct and also provides recompense to the victims of discrimination. See id.[12]

In sum, *Galloway* effectuates the purposes of the Act and fits well within successorship doctrine as traditionally understood by the Board and by the Supreme Court. Nevertheless, on their own initiative and without public participation, my colleagues overrule *Galloway* today. As I will explain, they offer no persuasive reason for this drastic step.

D.

The majority's decision to overrule *Galloway* is fundamentally flawed. The majority begins by mistakenly asserting that it was the *Galloway* Board that first interpreted the *Burns* Court's phrase "plans to retain all" predecessor employees as also applying when an employer plans to retain not every employee, but rather enough for the union's majority status to continue. In fact, as already explained, this principle predates *Galloway* by some two decades, originating in 1975 with *Spitzer Akron*, 219 NLRB at 22.[13] Further, the majority fails to acknowledge that this principle has been applied in numerous Board decisions and with court approval.[14]

In addition, my colleagues pointedly fail to acknowledge that the analysis they overturn in *Galloway* is equally applicable in the perfectly clear successorship context. They seek to bolster their reasoning regarding *Galloway's* alleged overreach by framing the *Love's BBQ* discriminatory hiring remedy as created to mirror the perfectly clear successorship remedy. However, they depart from current law by defining perfectly clear successorship restrictively, to encompass only situations where an employer plans to retain all or substantially all of the predecessor's employees. Only with perfectly clear successorship so narrowed would there be any logic in similarly cabining the discriminatory hiring remedy. But Board law is otherwise: for decades (both before and after *Galloway*), the Board has understood its perfectly clear successorship doctrine (with its attendant remedies) to apply to situations like the instant one—where future majority status is perfectly clear, despite hiring that does not actually rise to the level of "all or

[12] The majority errs in criticizing my reliance on *State Distributing Co.* simply because that case involved an employer that discriminatorily refused to hire substantially all of the predecessor's employees. Id. at 1048. The Board has applied the same remedial principles and policy considerations regardless of the number of predecessor employees that an employer discriminatorily refuses to hire to avoid a successor bargaining obligation. See, e.g., *U.S. Marine Corp.*, 293 NLRB at 672 (applying the same principles from *State Distributing Co.* where employer discriminatorily refused to hire a small portion of predecessor employee applicants to avoid successorship).

[13] *Galloway's* issuance as a decision by a panel of three Members rather than the full Board reflected its comparatively routine nature. And *Galloway* unquestionably did not implicate the Board's tradition of refraining from overruling precedent with a less than three-Member majority.

[14] See *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 2 fn. 6 (2016), enfd. 882 F.3d 510, 523 fn. 3 (5th Cir 2018) (collecting cases); *Adams & Associates, Inc.*, 363 NLRB No. 193 (2016), enfd. 871 F.3d 358 (5th Cir. 2017); *Brown & Root, Inc.*, 334 NLRB 628 (2001), enf. denied on other grounds 333 F.3d 628 (5th Cir. 2003); *Jennifer Matthew Nursing & Rehabilitation Center*, 332 NLRB 300 (2000); *Pacific Custom Materials, Inc.*, 327 NLRB 75 (1998).

substantially all" of the predecessor's employees.[15] Thus, to the extent that there is doctrinal imbalance between the Board's remedial schemes for perfectly clear successorship and discriminatory hiring, it is created by the majority decision today, and most certainly not by the Board's decision in *Galloway*.

The majority also mischaracterizes the discriminatory hiring caselaw preceding *Galloway*. Citing *U.S. Marine Corp.*, the majority claims that "a new employer's hiring discrimination against 'all' or 'substantially all' of the predecessor's unit employees makes that employer tantamount to a 'perfectly clear' successor" requiring the same remedy of restoring the predecessor's employment terms. But the employer in *U.S. Marine Corp.* only discriminated against a small subset of the predecessor's employees, a far cry from the "all or substantially all" discrimination standard the majority insists applies.[16] *U.S. Marine Corp.*, then, is actually similar to *Galloway* and the present case because the employers each discriminated against a targeted number of employees to avoid successorship and were appropriately ordered to reset their unilateral changes to their employees' terms and conditions of employment. Therefore, rather than support my colleagues' analysis, *U.S. Marine Corp.* undermines it.

My colleagues further err in asserting that *Galloway* imposes a punitive remedy that exceeds the Board's broad remedial powers under Section 10(c) and that undercuts the economic policy rationale of *Burns* of encouraging new employers to take over struggling businesses by giving them a free hand (a policy in no way implicated here, of course).[17] To begin, the majority fails to appreciate that the *Burns* Court's economic concerns were responsive to the Board's prior, broad holding that successor employers were obligated to assume in full the collective-bargaining agreements negotiated by their predecessors. See 406 U.S. at 276 & fn. 2. Thus, the language cited by the majority concerning parties' freedom "from having contract provisions imposed upon them" does not speak to the issue here. In the wake of *Burns,* the Board applies a much narrower standard: never requiring a successor involuntarily to assume the predecessor's contract and requiring only certain successors to bargain with the union before they may change their predecessors' employment terms. Thus, when the Board orders an employer to restore the predecessor's employment terms, the employer is not stuck with them forever. Rather, these employment terms are merely a starting point for the parties' bargaining. See *Pressroom Cleaners*, 361 NLRB 643, 646 (2014). And where warranted by the circumstances, such as economic exigency, the Board will permit an employer to take unilateral action or expedite bargaining (though not to discriminate against employees), as post-*Burns* decisions establish. See *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The majority's concerns that the *Galloway* remedy will somehow lead to employers' financial ruin are therefore unfounded and unmoored from the Court's concerns in *Burns*. Rather, the *Galloway* remedy effectuates the policies underlying the Act by fostering collective bargaining, protecting employee free choice, maintaining workplace stability, and restoring the status quo.[18]

Meanwhile, the majority can point to no authority supporting its position that *Galloway* must be overturned. No Board or court decision has criticized *Galloway* in more than 20 years.[19] In fact, there are many cases in which the Board and courts have ordered employers that discriminated against a targeted number of predecessor employees to restore the predecessor's employment terms consistent with *Galloway*.[20] If the *Galloway* reme-

[15] See, e.g., *Hospital Pavia Perea*, 352 NLRB 418, 418 fn. 2 (2008) (finding "no merit to the Respondent's contention that to constitute a 'perfectly clear' successor under [*Burns*], an employer must hire all of the former employees"), affd. 355 NLRB 1300 (2010).

[16] See 293 NLRB 669, 669–670 ("the Respondents unlawfully failed to hire the 34 employees [out of the 258 predecessor employee applicants] in order to keep the number of [predecessor employees] below 50 percent of the 460 figure that purportedly represented the full complement of employees to be attained"), enfd. 944 F.2d 1305 (7th Cir. 1991) (en banc), cert. denied 503 U.S. 936 (1992).

[17] Here, notably, the Respondents made no showing of economic need to unilaterally change initial terms and conditions of employment.

[18] The majority contends that overruling *Galloway* "will promote the survival of foundering businesses and preserve jobs." But this aim does not give the Board a license to override Congressional labor policy as reflected in the National Labor Relations Act. That policy is set forth in Sec. 1 which describes the fundamental purposes of the Act as "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment. . . ." *Galloway* effectuates these purposes,

The majority's argument regarding the importance of bargaining freedom also misses the mark. Ordering an employer that has discriminatorily refused to hire predecessor employees to restore the predecessor's employment terms does not impermissibly limit its bargaining freedom. As explained, resetting the employment terms in these circumstances is necessary to restore the status quo and the predecessor's employment terms are merely a starting point for negotiations.

[19] See *Adams & Associates, Inc.*, above; *Brown & Root, Inc.*, above; *Jennifer Matthew Nursing & Rehabilitation Center*, above; *Pacific Custom Materials, Inc.*, above.

[20] See, e.g., *Emerald Green Building Services, LLC*, 364 NLRB No. 109 (2016); *CNN America, Inc.*, 361 NLRB 439 (2014), enfd. in rel. part 865 F.3d 740 (D.C. Cir. 2017); *Galion Pointe, LLC*, 359 NLRB 699 (2013), affd. 361 NLRB 1167 (2014), enfd. 665 Fed.Appx. 443 (6th Cir. 2016); *MSK Cargo/King Express*, 348 NLRB 1096 (2006); *W&M Properties of Connecticut*, 348 NLRB 162 (2006).

dy somehow violated Section 10(c) or the Supreme Court's dictates in *Fall River*, 482 U.S. at 27, as the majority asserts, surely those arguments would have been raised and considered before today. To the contrary, *Galloway* falls well within the Board's broad remedial powers under Section10(c) and fully adheres to the Supreme Court's pronouncement in *Fall River* that the employees' perspective is key in determining a new employer's successor bargaining obligation.

Here, the Respondents did not make a good-faith mistake. Rather, they claimed not to be a successor based solely on the intended consequences of their unlawful conduct. When an employer must know that it is a successor, the Act requires it to respect and maintain existing terms and conditions of employment. When an employer fails to do so, the Board must order the employer to reset the terms and conditions of employment, undoing the effects of its unlawful conduct and restoring the status quo.

IV.

As the Supreme Court has made clear, the central remedial purpose of the Act is to restore the situation as nearly as possible to that which would have occurred absent the respondent's unlawful conduct. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941). Consistent with this goal, and for more than 20 years, the Board has required employers who sought to avoid a successorship bargaining obligation by discriminating against targeted predecessor employees to restore the employment terms set by the preexisting collective-bargaining agreement. Today, without being asked or inviting public participation, the majority overrules that well-established precedent and allows employers to enjoy the fruits of their unlawful conduct. The unfortunate result will be a potential increase in labor disputes and antiunion discrimination. Because the majority's decision is fundamentally at odds with the National Labor Relations Act and its policies, I dissent.

Dated, Washington, D.C. April 2, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire you because of your prior union-represented employment with Preferred Health Holdings II, LLC in an attempt to avoid the obligation to recognize and bargain with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the Union) as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full time and regular part time employees employed by the facility, including LPN's, nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and the food supervisor (it is understood that in the event any of the preceding job titles change, they will remain in the bargaining unit) but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT coercively question you about your union membership.

WE WILL NOT inform you that you are no longer represented by the Union.

WE WILL NOT threaten to discharge you if you engage in activity in support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson employment in the jobs for which they would have been hired absent our unlawful discrimination, or, if those jobs no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson whole for any loss of earnings and other benefits resulting from our unlawful refusal to hire them, less any net interim earnings, plus interest, and WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusals to hire Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusals to hire will not be used against them in any way.

WE WILL recognize, and on request, bargain with the Union as the exclusive representative of the employees in the above-described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

RIDGEWOOD HEALTH CARE ENTER, INC. AND RIDGEWOOD HEALTH SERVICES, INC.

The Board's decision can be found at www.nlrb.gov/case/10-CA-113669 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Jeffrey Williams, Esq., for the General Counsel.
Ashley H. Hattaway and *Ron Flowers, Esqs. (Burr & Foreman, LLP),* of Birmingham, Alabama, for the Respondents.
Richard P. Rouco, Esq. (Quinn, Connor, Weaver, Davies Rouco LLP), of Birmingham, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Birmingham, Alabama, on December 15–17, 2014. The complaint, based on timely filed charges by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) (the Union) alleges that the Ridgewood Health Care Center, Inc. (RHCC) and Ridgewood Health Services, Inc. (RHS) constitute a single business enterprise and violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act) when they assumed the operation a nursing home in Jaspar, Alabama, on October 1, 2013, and engaged in a discriminatory hiring scheme in order to avoid becoming a successor to the previous employer and then refused to recognize, bargain with and provide information to the Union as the employees' labor representative. The complaint further alleges that Respondents made unlawful statements to the predecessor's employees and unlawfully interrogated job applicants in violations of Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondents, and Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent RHCC is an Alabama corporation which owns property and a facility located in Jasper, Alabama. RHS, also an Alabama corporation, leases that facility from RHCC and operates it as a nursing home. In conducting their operations annually, each derives gross revenues in excess of $100,000. In operating the facility, RHS purchases and receive goods and services valued in excess of $5000 directly from points outside of Alabama. RHS admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act as a health care institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

RHCC denies that it is an employer or a health care institution engaged in interstate commerce. However, for the reasons explained below, RHCC and RHS constitute a single-integrated business enterprise. Consequently, since RHS is admittedly subject to the Board's jurisdiction, RHCC is also deemed to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. See *Precision Industries,* 320 NLRB 661, 667 (1996) (where one entity of single-employer is subject to the Board's jurisdiction, all entities part of that single employer are subject to the Board's jurisdiction). See also *Insulation Contractors of Southern California*, 110 NLRB 638

(1955) (all members of a multiemployer group who participate in, or are bound by, multiemployer bargaining negotiations are considered as a single employer for jurisdictional purposes.).

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Ridgewood Facility's Ownership and Operations

The Ridgewood Health Care Center, located at 201 Oakhill Road, Jasper, Alabama (the Ridgewood facility), is a skilled nursing home facility with 98 licensed beds.[1] The Ridgewood facility is owned and operated by RHCC, which was incorporated in 1977. In 2008, Joette Kelley Brown purchased RHCC and Ridgeview Health Care Center, Inc., another nursing facility in Jasper (the Ridgeview facility), and Ridgeview Health Services, which operates the Ridgeview facility). Brown owned 100 percent of RHCC until October 2013, when her sister, Alicia Stewart, obtained 10 percent ownership.[2]

From 2002 through September 30, 2013,[3] RHCC leased the Ridgewood facility to Preferred Health Holdings II, LLC (Preferred) to continue operating as a nursing home. James Walker was Preferred's owner and operated the Ridgewood facility during that time. In 2013 and 2014, RHCC's only revenue came from lease payments by Preferred prior to October 1, 2013, and by RHS subsequent to October 1, 2013.[4]

By 2012, the relationship between Brown and Walker deteriorated over unpaid rent and Brown decided that RHCC would not renew Preferred's lease for the Ridgewood facility after it terminated in December 2013. Further discussions resulted in an agreement to terminate the lease a few months early on September 30 and have RHCC assume operation of the Ridgewood facility on October 1. The appropriate Alabama licensing agency was notified.[5]

By letter, dated July 29, Walker notified employees that operations would cease on September 30, RHCC's lease agreement with Preferred would terminate and they would be laid-off.[6]

In order to operate the Ridgewood facility, Brown formed a new management company, RHS, in July 2013.[7] Since that time, Brown has served as owner and president. Brown owned 100 percent of RHS until October, when Stewart obtained 10 percent ownership. Since July, Stewart has served as vice-president and secretary of RHS. Brown and Stewart have been responsible for the formulation and effectuation of labor relations policy for RHS from October 1 to the present.[8]

Since October 1, RHS has operated the Ridgewood facility as a nursing home pursuant to a lease agreement with RHCC. Respondents also share a common liability insurance policy.[9]

B. The History of Employee Representation

Since 1976, certain job classifications at the Ridgewood facility have been represented by the Union and its predecessors. This recognition has been embodied in successive collective-bargaining agreements (CBA) with Preferred, the most recent of which is effective from September 24, 2010, to September 24, 2016.[10] The bargaining unit (Unit) consisted of the following Ridgewood facility employees:

> [A]ll full time and regular part time employees employed by the facility, including LPN's, nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and the food supervisor (it is understood that in the event any of the preceding job titles change, they will remain in the bargaining unit) but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.[11]

In operating the Ridgewood facility, Preferred did business under the name, "Ridgewood Health Care Center." Although Preferred used a business name similar to its landlord, RHCC (minus the "Inc."), RHCC and Preferred have always been distinct legal entities connected only through a lease for the operation of a nursing home at 201 Oakhill Road. During the term of Preferred's lease from 2002 to 2013, RHCC had no involvement in any collective-bargaining agreement between Preferred and the Union.

C. The Change in Ownership

Walker facilitated Brown's transition in assuming the operations of the Ridgewood facility by convening employees to meet her in July 2013. Walker introduced Brown, who was accompanied by Stewart. Brown proceeded to explain that the facility's operations were being evaluated, but anticipated that the changeover would result in minimal changes, with wages and benefits essentially staying the same. With respect to the workforce, she expected that RHCC would hire "99.9 percent" of current employees.[12] Brown also responded to an inquiry about the CBA by indicating that she would have to honor it and recognize the Union.[13]

On July 15, RHCC's attorney, James A. Smith, Esq., took a different approach in his formal notification to Dudley and Lyons about the change in management of the Ridgewood facility from "Preston Health Services" to the "Ridgeview Operating Company." He explained that his client had not yet de-

[1] The Respondents concede that the maximum number of beds certified by the State licensing agency is 98. (Tr. 547.)

[2] Brown and Stewart, as well as Stephen Brown, are statutory officers and agents of both companies within the meaning of Secs. 2(11) and (13) of the Act. (Jt. Exh. 2, Stipulated Facts 1–2, 5–6, 12–13.)

[3] All dates are in 2013 unless otherwise indicated.

[4] Stip. Fact 8.

[5] Jt. Exh. 23 at 2; CP Exh. 6 at 1.

[6] Stip. Facts 25-26.

[7] Stip. Facts 9.

[8] Brown and Stewart, as well as Stephen Brown, are admitted RHS supervisors and agents within the meaning of Section 2(11) and (13) of the Act. (Stipulated Facts 7, 9–11, 14.)

[9] CP Exh. 8.

[10] Jt. Exh. 3; Stip. Fact 17.

[11] Jt. Exh. 3 at 3.

[12] Brown testified that she wanted the majority of employees to remain employed and did not dispute the credible testimony of several employees present at the first meeting, including Stephanie Eaton, McPherson, Crystal Wilbert, Teresa McClain, Debra Puckett, and Chris Collette, that she mentioned the 99.9 percent hiring goal. (Tr. 25, 55, 58–59, 74–75, 77–78, 101–102, 131–132, 136–137, 148–149, 218–219, 260–262, 417–419, 549; Jt. Exhs. 2(5), (9)-(10) and (31)).

[13] Brown did not deny the credible testimony of Collette and Melissa Uptain that Brown expressed the belief at that point that RHCC was bound by CBA's terms and conditions. (Tr. 230, 353, 415–416.)

termined which incumbent employees would be retained and rejected the CBA then in effect as unacceptable. He added, however, that the "Ridgeview Operating Company nonetheless desires to engage in bargaining to develop an acceptable Collective-Bargaining Agreement to be in place when Ridgeview Operating Company assumes operation of Ridgewood Health and Rehabilitation. Please contact me at your earliest convenience so we may begin the bargaining process. We look forward to developing a mutually acceptable Agreement."[14]

On July 29, RHCC administrator Cindy Shifflett notified Lyons and facility employees that RHCC, as the "Landlord," would assume the facility's operations from Preferred, effective October 1 with a reduced number of employees. She further explained that RHCC had not agreed to rehire any of the Company's 141 employees and attached a spreadsheet outlining the affected positions.[15]

Brown, Stewart and Reverend David Wallace met again with Ridgewood facility employees in August to reassure that "99.9 percent" of them would be hired by RHCC. She expressed a belief that the Ridgewood facility was working fine and that things would basically stay the same.[16] Brown was also asked whether Preferred employees who had been previously discharged from the Ridgeview facility would be eligible to be rehired at the Ridgewood facility. She responded that those employees would be considered along with everyone else.[17]

When asked at these meetings about the role of the Union, Brown stated that she did not see the need for one and expected that management and employees would resolve any issues that arose. In support of her point, Brown mentioned that management and employees at the Ridgeview facility, where only nine of the Ridgeview facility's employees were unionized, were a close knit family.[18]

At this meeting, Brown also informed Preferred employees that she was creating a new job classification at the Ridgewood facility called "helping hands." Helping hands, already being used at the Ridgeview facility, were to perform some of the same duties performed by certified nursing assistants (CNA), such as cleaning closets and drawers, helping residents walk, transferring residents to different locations in the facility, picking up food trays, and distributing ice. However, unlike certified nursing assistants, helping hands are not certified.[19]

Brown's remarks certainly did not placate the Union, who proceeded to file an unfair labor practice charge against RHCC and "Ridgewood Operating Company" for repudiating the CBA.[20]

D. Interviews

A notice was posted at the Ridgewood facility instructing the 83 Preferred employees to call RHS by August 30 to schedule interviews between August 13 and August 30. Only requests for interviews received by August 30 were considered and Preferred applicants were interviewed by the first week of September.[21] The hiring process was coordinated by the Ridgeview facility's human resources director, SuLeigh Warren.[22]

Job interviews were conducted at the Ridgeview facility by two or three individuals from a management group that included Brown, Stewart, Warren, Kara Holland (Ridgeview's administrator), and Vicky Burrell (Ridgeview's director of nursing).[23] During this rushed and chaotic hiring process,[24] 65 Preferred employee/applicants were asked what they thought about working at the Ridgewood facility and their suggestions for improved operations.[25] Some employees were asked by Brown, Holland and/or Warren about their wages, benefits and paycheck deductions and/or whether they were members of the Union.[26] Drug tests were also performed and employees were scheduled for physical examinations.[27]

By letter, dated September 11, Brown sent 51 of the 65 Preferred employee/applicants letter offers of employment. Subsequently, 56 letter offers of employment were sent to applicants not previously employed by Preferred.[28] The form letters stated, in pertinent part, that employment with RHS would be "at-will" and that either party could terminate the relationship at any time with or without cause or notice. The letter also stated that employment would be subject to the terms and conditions of employment set by RHS, which could change from time to time.[29] Employees not offered employment were sent a brief

[14] Jt. Exh. 4.

[15] Jt. Exh. 5–6.

[16] Brown hazy recollection of what she said at these meetings was clarified by the credible testimony of Debra Puckett and Andrie Borden. (Tr. 260–261, 341–343, 418–419.)

[17] This finding is based on credible and undisputed testimony of Hope Kimbrell. (Tr. 58–59, 66–67.)

[18] Brown did not dispute the credible testimony of Teresa Haynes, Lynda Baker, Becky Ramos, Debra Thomas, and Debra Puckett regarding her statements at these meetings. (Tr. 25, 43, 75–76, 147–148, 158–159, 260.)

[19] It is not disputed that helping hands have declined since RHS took over operations on October 1 and perform only some, but not all, CNA-related duties. (Tr. 158, 162–163, 261, 271–272.)

[20] Jt. Exh. 23 at 2.

[21] Brown testified that interviews were extended by a week. However, with the exception of Marcus Waldrop, who reapplied in October, there is no evidence that applications from Preferred employees were accepted after August 30. (Tr. 421–422, 525; Jt. Exh. 10 at 2.)

[22] Most witnesses also testified that Warren was their initial contact at RHS. (Tr. 688.)

[23] I credited Brown's testimony that she consulted with the other four admitted statutory agents in making her hiring decisions. (Stipulated Facts 2–3, 15–16; Tr. 222, 425–428, 617–618, 620, 651- 653.)

[24] Brown conceded that the process was chaotic. Warren described it as "very busy." (Tr. 426, 687.)

[25] Stip. Fact 34.

[26] The credible testimony of Stephanie Eaton, Pam McPherson, Becky Davidson, Paul Borden, Betty Davis and Crystal Wilbert was corroborated by Brown, Holland and Warren, who conceded that employees were asked about their benefits. (Joint Exh. 7; Tr. 80, 102–103, 130–131, 137–138, 149–150, 221–222, 251, 339, 417, 424, 426–428, 617–618, 651–652.)

[27] It is undisputed that employees scheduled for physicals were "conditionally" offered employment based on those results as well as background and reference checks. (Tr. 567, 653, 680.)

[28] Stip. Fact 35.

[29] Jt. Exh. 12.

form letter with no explanation as to why they were not hired.[30]

The 51 Preferred employees offered employment with RHS accepted by September 16, the specified deadline for responses.[31] RHS decided not to offer employment to 18 Preferred employees. Preferred employees who applied, but were not hired, included Paul Borden, Lacey Cox, Betty Davis, Gina Eads (Harrison), Hope Kimbrell, Charlotte Kimbrough, Midge Lechey, Teresa Diane McClain, Connie Sickles,[32] Vegas Wilson, and Malcolm Waldrop. Each of these employees had satisfactory documented work histories at Preferred.[33]

Five of the 18 employees denied employment by RHS previously worked at the Ridgeview facility, but were discharged from there prior to their employment with Preferred: Lacey Cox, Betty Davis, Gina Eads, Charlotte Kimbrough, and Connie Sickles. Since the Ridgeview facility had a general policy of not rehiring employees previously discharged from that facility, Gina Eads asked her interviewers, Holland and Burrell, whether her previous discharge from that facility disqualified her from employment at the Ridgewood facility. They assured her that she had nothing to worry about and reflected that in their notes ("learned from the past, would like a chance.")[34] None of these other employee/applicants asked or were told about their prior discharges and the applicability of such a policy to the RHS's hiring process.[35]

Davis, Eads and Sickles had uneventful hiring interviews presenting no other obstacle to employment by RHS; Cox and Kimbrough did not, however, make good impressions. Cox was noted to be unfriendly, did not smile, initially omitted any reference to previous work at Ridgeview, and acted like she did not want to be there.[36] Kimbrough's interview attire was noted to be "dirty and she wore pajama shorts."[37]

The remaining six unit employees at issue were not previously employed at Ridgeview. One of those applicants, Vegas Wilson, had an uneventful interview and deserved to be rehired. Wilson was not hired because RHS's new director of nursing, Sheila Cooper, who worked previously with Wilson at another facility, told Brown that she had been terminated due to an altercation with a coworker. Such an incident was not documented in Wilson's Preferred personnel file and she was not given an opportunity to explain what happened.[38]

The remaining five applicants, however, did not merit offers of employment. Paul Borden, a maintenance worker, was interviewed by Brown and Holland. He presented as defensive, aggressive, disinterested, with poor communication skills and misrepresented his work history.[39]

Hope Kimbrell's interview notes indicated that she was "very evasive, short curt answers, aloof, curling eyes when asked direct questions, unprofessional."[40] In addition, Brown was aware of negative remarks by a friend, Stacy Alley, whose late father had been cared for at the Ridgewood facility. Alley had informed Brown, sometime prior to October 1, about Kimbrell's impolite and disrespectful treatment towards her father and family members.[41]

Similarly, Brown declined to hire McClain because of her inability to work well with others. During the interview process, three applicants—Lavetta Webster, Crystal Wilbert, and Lynda Baker—complained about continuous harassment and insults heaped on them by McClain.[42]

Midge Lechey's interview was satisfactory, but she was not hired based on Warren's recommendation because she did not have an Alabama license to practice as a CNA and failed to list a second job on her application. Lechey was informed that she needed such a license for the job, but did not respond or follow up by getting one.[43]

Lastly, Preferred employee Marcus Waldrop applied, was interviewed, drug tested, and offered employed conditioned on a

[30] Jt. Exh. 13.

[31] Jt. Exh. 12.

[32] Respondent's offered Sickles employment record from Ridgeview, but did not produce interview notes from her interview. (R. Exh. 17.)

[33] This finding as to their work histories at the Ridgewood facility is based on the absence of any documentation to the contrary. (Stip. Fact 40.)

[34] I based this finding on the credible and undisputed testimony of Eads, as corroborated by the interview notes (Tr. 181–183; R. Exh. 8.)

[35] The "ineligible for rehire" entry in several personnel files, as well as Kimbrell's inquiry at the August meeting, confirm that such a policy existed at Ridgeview. (Tr. 58–59. 66–67.) However, Brown's reliance on this policy as a basis for her refusal to rehire these employees was not credible. (Tr. 438–439.) Cox, Davis, Kimbrough and Sickles credibly testified that they were not asked about their previous employment at Ridgeview. (Tr. 181–183, 253, 436–440, 443–445, 467–468, 472–473, 535.) Nor was there any reference in the interview notes to any applicant's ineligibility for rehire. (Tr. 695–697.)

[36] Cox did not refute credible and corroborated testimony by Brown and Warren regarding his interview performance. (Tr. 656–658; R. Exh. 4.)

[37] I based this finding on the credible and undisputed testimony of Warren and Holland, as corroborated by their interview notes. (Tr. 626–627, 659–660; R. Exh. 13.) In addition, Warren made a similar recommendation with respect to non-Preferred applicant Debra Pittman. (Tr. 667.)

[38] In the absence of any notes of Wilson's interview, I do not credit Brown's testimony as to what Cooper, who did not testify, told her. (Tr. 475, 533–534.) Moreover, RHS's hiring assessment here was also less than credible because Wilson was not asked about this previous, undocumented incident, and given an opportunity to explain. Nor does RHS' reliance on a similar decision not to hire another applicant, Melissa Harrington, also based on Cooper's recommendation, provide further corroboration since there are no facts to compare the personnel history of the two employees. (R. Exh. 23.)

[39] While I did not credit uncorroborated hearsay about Borden's prior conduct, I found testimony by Brown and Holland regarding his interview performance to be credible and corroborated by the interview notes. (Tr. 429–431, 525–529, 618–621; R. Exh. 1.) In addition, Respondents presented credible evidence that other applicants were not rehired for similar reasons. (Tr. 485–486, 669–672; R. Exh. 25, 28, 31.)

[40] R. Exh. 9–10.

[41] Notwithstanding the fact that this background information was not noted in Kimbrell's interview notes, I credited Brown's testimony, as corroborated by Alley's credible testimony, that the latter passed along this information prior to October 1. (Tr. 445–448, 610–611.)

[42] I based this finding on the credible testimony of Brown and Warren, as corroborated by Wilbert and Baker. (Tr. 46–47, 132–133, 472, 532, 663.)

[43] Warren's credible testimony was not disputed. (Tr. 471–472, Tr. 661–662, 684–685; R. Exh. 14.) Nor do I credit the General Counsel's assertion that, since the process of getting such an Alabama license is quick and easy, that it was incumbent on RHS to provide that opportunity. (Tr. 682–683.)

satisfactory physical examination. However, Waldrop missed his scheduled physical and was not initially allowed to reschedule it. Waldrop did, however, reapply after October 1 and was hired on October 16, albeit at a lower wage than he earned while employed by Preferred.[44]

Applications from non-Preferred employees were received beginning September 1 and continued beyond October 1.[45] As RHS essentially concluded its hiring of Preferred employees by the second week in September, it began to interview from among 111 applicants not currently employed by Preferred.[46]

In conclusion, RHS declined to hire four (4) employees who merited offers of employment: Betty Davis, Gina Eads, Connie Sickles and Vegas Wilson.

E. The Union's Response

On September 10, Lyons formally responded to the communications from Smith and Shifflet by requesting that RHCC and its "alter ego Ridgeview Operating Company" bargain with the Union over the unit employees' layoffs and the effects of that decision. She referenced the extant CBA and the unlawfulness of its repudiation by the "Landlord" or the Ridgeview Operating Company. Lyons added that the Ridgeview Operating Company, as a successor employer was still obligated to bargain with the Union.[47]

On September 13, relying on the CBA, the Union followed up on its demand to bargain by seeking "a full account of the Company's plans with regards to its transition from operation by Preferred Health Holdlings II d/b/a/ Preston Health Services to self-operation." The request sought information relating to the following subjects within 7 days: job titles of positions and names of employees affected by the planned layoffs; termination benefits to be provided; hiring applications; hiring standards to be used; number of employees to be rehired; plans to change current terms and conditions of employment; and ownership, operational, financial, contractual, legal, and insurance documents explaining the relationship between RHCC and RHS.[48]

On September 23, Respondents' new attorney, Ashley H. Hattaway, Esq., rejected Lyons position in her letters of September 10 and 13, and sought to clarify the "confusion" over the changes at the Ridgewood facility. She explained that "Ridgewood Health Care Center, Inc.," which has owned the Ridgewood facility and the property where it is located, leased the property in 2002 to "Preferred Health Holdings II, LLC," which has no corporate relationship to RHCC. Hattaway also disavowed any connection between Brown, who purchased RHCC in 2008 and Preferred's operation of the Ridgewood facility since that time. Thus, neither RHCC nor RHS were bound by any CBA entered into between Preferred and the Union. Hattaway further explained that Smith's previous reference to a "Ridgeview Operating Company" was incorrect and the correct name of the new company formed by Brown to operate the facility on October 1 was "Ridgewood Health Services, Inc."

Hattaway reiterated Smith's July 15 comments rejecting the CBA under which Preferred has been operating and Brown's willingness to bargain with the Union "should Ridgewood be considered a successor of Preferred." She denied that RHS was an alter ego of RHCC or a joint employer with RHCC and again disavowed any obligations by RHCC under the CBA, noting that her client merely owns property and has no employees. As such, RHCC would "set terms and conditions of employment for the employees it hires to begin when it takes over operation of the facility." In conclusion, Hattaway explained that the Union's requests for information and to bargain over Ridgewood employees' terms and conditions of employment were premature until it was determined at the conclusion of the hiring process if RHS did, in fact, become Preferred's successor.[49]

On September 25, the Union's attorney, Keren Wheeler, responded to Hattaway's letter and disputed her assertion that RHCC was not bound by the Union's CBA with Preferred. Wheeler asserted that RHHC and RHS shared common ownership, management and legal counsel, and that RHS, as RHCC's alter ego, was bound by the CBA and would become a successor employer to Preferred on October 1. She also noted that the rehiring/application process was underway and Preferred employees hired by RHS comprised "a majority of employees who were previously part of the USW bargaining unit." Wheeler renewed her demand that RHS recognize the Union as the exclusive representative of the bargaining unit employees and included an information request in order to prepare for bargaining. The request sought detailed information, including Preferred employees offered and denied employment, employees hired and their terms and conditions of employment, including benefits.[50]

By letter, dated September 30, Hattaway again disagreed that RHCC was a party to the CBA. She conceded that Preferred did business as "Ridgewood Health Care Center," but denied that RHCC ever authorized Preferred to operate under that name. She also reiterated the lack of any previous relationship between the Union and RHCC during the term of the CBA and the prematurity of a successor employer claim prior to the conclusion of the hiring process.[51]

F. The Change in Operations

Based on the Ridgewood facility's average total number of employees reflected on the work schedules over a 1-year period, the average full complement consisted of 88 employees. In

[44] Waldrop's testimony is vague as to the timeframe when he called to reschedule his physical, but it was clearly sometime in September. Moreover, I credit his testimony that his request to retake it was initially denied by Warren. (Tr. 91–95.) In any event, similar treatment was applied non-Preferred applicant Connie Wood, who was denied employment because she missed her physical. (Tr. 492–493, 628–629; R. Exh. 32.)

[45] Stip. Fact 29.

[46] Stip. Fact 33; R. Exh. 22, 24, 26, 28, 30, 32–36.

[47] Jt. Exh. 8.

[48] Jt. Exh. 9.

[49] Jt. Exh. 10.

[50] Jt. Exh. 11.

[51] Jt. Exh. 12.

August 2013, the Ridgewood facility was still adequately staffed with 83 employees to cover 98 beds divided into three sections.[52]

On October 1, RHS assumed operational control of the Ridgewood facility. A total of 101 employees, out of the 107 applicants hired for positions in the nursing, housekeeping, laundry, dietary and/or maintenance departments, accepted employment and reported for work; 49 of the employees who reported were Preferred employees as of September; 52 of the new employees never worked for Preferred.[53] Only 82 of the 101 new employees, however, fell under the Preferred bargaining unit classifications; 19 of the 101 employees had been hired under the new "helping hands" job classification to assist CNA's with some of their duties.[54]

After assuming control of the Ridgewood facility, RHS changed several terms and conditions of employment, including the elimination of the seniority list, two holidays, the 401(k) retirement plan and payroll deductions for short term disability insurance. RHS also modified work schedules and postings, vacation accruals, and life insurance coverage.[55]

On October 1, Wheeler wrote to Brown and Hattaway reiterating her contention that RHS and RHCC were successor employers because a majority of its workforce as of "September 30 and on October 1, by which time Ridgewood Health Services, Inc. was operating normally, was composed of bargaining unit employees who have been covered by the CBA." She again submitted a request seeking the same hiring information requested on September 25 and asked to proceed with bargaining.[56]

Hattaway rejected Wheeler's contentions on October 7, noting that RHS began operating the Ridgewood facility on October 1 but "still is actively filling positions and anticipates hiring many more employees in the near future" since "a lower than expected number of Preferred employees applied to work with Ridgewood." She further noted:

> Moreover, even if it was assumed that the Company had hired a substantial and representative complement of its workforce by the first day of operations as you assert, the majority of employees hired in job positions that were in the bargaining unit represented by the USW were not previously employed by Preferred. Therefore, even if a substantial and representative complement had been hired, Ridgewood Health Services, Inc. would not be a successor and will not and indeed cannot recognize the USW as the representative of those employees. Likewise, it has no obligation to respond to your requests for documents.[57]

During the 6 weeks after October 1, RHS hired an additional 22 non-Preferred applicants into positions performing work which had been performed by Preferred's bargaining unit.[58]

G. Brown Reasserts Nonunion Position

On October 22, Brown sent each employee a letter reasserting her position that the Ridgewood facility was operating "non-union." The letter, which also included preemptive action to keep the Union out of the facility, stated in pertinent part:

> I am very excited about our first three weeks of operation at that Ridgewood- facility. I think we are off to a great start. I really appreciate the dedication that each of you has shown during this transition time.
>
> I am sending you this letter to address something that is very important to you, me, and the future of the Company. I wanted to explain to you the Company's position regarding unions and to give you some basic information about union cards, so that, if you are ever asked to sign a union card, you can make an informed decision. As you know, the Ridgewood facility is now operating without a union. We do not know of any union activity at Ridgewood at this time, but I want you to be informed should you be asked to make any decisions regarding a union in the future.
>
> Our position on unions is that they are unnecessary at our facility. We have a great group of managers and employees, and we are working together well to move this facility forward, I have a vision of creating an environment at Ridgewood that is a great place to be for our residents and our employees, and I think we can best accomplish this vision if we work directly together to make this happen. I think that without a union we can be our most productive, efficient and flexible so that this facility will prosper. I do not want you to have to pay monthly dues to the union when we can make Ridgewood a great place to work just by working together.
>
> I want to address union cards because asking employees to sign union cards is often how a union initiates the process of making the facility unionized. A union card is a legal document that gives the union the right to be your exclusive representative. Once you sign a card, the union does not have to give it back to you even if you change your mind. In my mind, it is like giving a blank check to a stranger as you have no guarantees of what will happen if you sign a card.
>
> A union card does not guarantee that employees will be able to vote for whether they want a union. If the USW gets a majority of our employees to sign these cards, it can ask the Federal government to force the union into Ridgewood without any election at all. In some cases employees get a vote to decide whether to bring in a union, but in other cases the unions

[52] Brown vaguely alluded to the need for more staffing in order to provide superior service and a hiring freeze at the time (Tr. 422–423, 490, 544.), and Debra Thomas, a CNA, conceded that she worked overtime in September because of a staffing shortage. (Tr. 170.) However, Brown confirmed Collette's credible testimony that the Ridgewood facility was adequately staffed when she assumed control on October 1. (Tr. 357, 366, 376–380, 390–391, 396–399; CP Exh. 1–4 and Appendix A, Summary Chart.)

[53] Stip. Facts 36–37.

[54] There is no credible evidence that RHS hired less CNA's than necessary to adequately staff the facility. (Jt. Exh. 21; Tr. 261, 271, 390–391.)

[55] These changes are not disputed. (Tr. 164–165, 267–269.)

[56] Jt. Exh. 15.

[57] Jt. Exh. 16.

[58] Stip. Fact 38.

> have used the signed cards alone to attempt to represent the employees of the facility. If a majority of the employees support the union, the union will represent all of the employees in the bargaining unit, including the ones that did not want them fu the facility.
>
> As you can see signing a union card is a serious matter. It is your choice whether to sign a card. No one should pressure you to sign a card. If you are ever asked to sign a union card, I urge you to ask questions and get all the facts before deciding whether to sign. I believe you deserve to be fully informed of what can happen if you sign a card.
>
> Unions have declined over the last few decades, and I think for good reason. Unions have not been able to provide employees with those things that employees value most including job security. I am sure you know of the many unionized plants that have shut down around this country. I believe that working together with exceptional care towards our residents and mutual respect among our employees, we can be our most competitive and prosperous.

Brown reinforced the message in her October 22 letter in meetings with employees several days later. In the meeting, she told employees that the Union was neither recognized nor needed as their labor representative because she expected employees to work issues out with management. Brown also stated, when asked what she would do if the Union ended up representing employees, that it was possible she would close the facility.[59]

RHS's antiunion sentiments resurfaced in January 2014, when Cooper, former director of nursing, told Bolinger, a CNA, that she overheard Bolinger and other CNA's discuss recruitment for the Union. Cooper warned that if she confirmed such discussion that it would cost Bolinger her job. Bolinger said she needed her job and denied engaging in such a conversation.[60]

H. RHS Implement Disciplinary Action

RHS effectively discharged Caitlyn Bolinger on January 30, 2014 when the RHS administrator sent her home and told her not to return to work until she was cleared by her psychiatrist. Bolinger complied with the directive and called RHS about a week later in order to return to work. However, RHS management never returned her call.[61]

In June 2014 and August 2014, without notice to or bargaining with the Union, RHS issued verbal warnings to employees Brook Watson and Misty Mauldin, respectively. The discipline escalated to written warnings to Watson in July 2004 and Mauldin in September 2014 without notice to or bargaining with the Union. The discipline graduated to the next level when RHS suspended Mauldin and Watson on September 25, 2014, and October 8, 2014, respectively, without notice to or bargaining with the Union. Finally, RHS terminated Mauldin on October 20, 2014 and Watson on October 27, 2014,[62] in both instances without prior notice to or bargaining with the Union.[63]

Pursuant to the Union's CBA with Preferred, the imposition of discipline, as a term and condition of employment pursuant to Article 7, was subject to bargaining pursuant to the grievance procedure set forth at Article 8.[64]

LEGAL ANALYSIS

I. SINGLE EMPLOYER

The General Counsel alleges that RHCC and RHS constitute a single employer. In support of this position, the General Counsel argues that both entities share common owners, common officers, and a common liability insurance policy. The Company argues that RHCC employs no individuals, has no control over labor relations, and is therefore not an employer.

Separate entities constitute a single employer when they fail to maintain an arm's-length relationship. *Bolivar Tees, Inc.*, 349 NLRB 720 (2007). Factors indicative of such failure include: (1) common ownership or financial control; (2) common management; (3) interrelation of operations; and (4) common control of labor relations. *Spurlino Materials, LLC*, 357 NLRB 1510, 1515 (2011). Absence of a common business purpose between the two entities is not dispositive. *Lederach Elec., Inc.*, 362 NLRB 62, 63 (2015).

In 2008, Brown purchased RHCC. She owned 100 percent of RHCC until October 2013, when her sister, Stewart, obtained 10 percent ownership. RHS was founded by Brown and incorporated in July 2013 solely for the purpose of operating the Ridgewood facility. To facilitate that objective, RHCC leased the Ridgewood facility to RHS to operate as a nursing home, effective October 1. Brown owned 100 percent of RHS until October, when Stewart obtained 10 percent ownership. Brown and Stewart have served as the principal officers of RHS and have been responsible for the formulation and effectuation of its labor relations policies. Since October 1, the Respondents have also shared a common liability insurance policy covering the Ridgewood facility's operations.

RHCC and RHS have common ownership, common management, and interrelated operations. The fact that RHCC has no control over labor relations carries little weight given that it has no employees. *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1993). Thus, RHCC and RHS constitute a single employer. *Imco/International Measurement Co*., 304 NLRB 738 (1991). Therefore, both entities are jointly and severally liable for remedying any violations of the Act. *Carnival Cart-*

[59] Brown had a vague recollection about the meeting, but did not dispute credible testimony by Debra Thomas, Joann Tidwell and Audrie Borden that she made such statements. (Tr. 164, 193, 343–344, 420.)

[60] Bolinger's credible testimony was not refuted. (Tr. 107.)

[61] Although the Company sought to establish on cross-examination that Bolinger resigned and was not discharged, she credibly explained that she was told by Sandy Prescott, an RHS administrator, not to return until she was cleared by a psychiatrist. She complied and called Prescott a week later, but Prescott did not return the call. (Tr. 106, 114, 119-124.) The Company did not offer testimony to the contrary.

[62] At the hearing, the General Counsel withdrew paragraph 25(e) of the complaint regarding Darlene Parker's discharge on November 13, 2014. (Tr. 320.) On January 26, 2015, the General Counsel withdrew paragraph 25(d) of the complaint regarding Keaton's discharge on October 30, 2014.

[63] Stip. Facts 48–52.

[64] Jt. Exh. 3 at 5–7.

ing, *Inc.,* 355 NLRB 297 (2010).

II. SUCCESSOR EMPLOYER

The General Counsel also alleges that Respondents are successors to Preferred. Respondents deny the charge on the grounds that a substantial and representative compliment of Preferred employees had not been hired prior to, and Preferred employees did not constitute a majority on, October 1.

During the operative period, where a majority of current employees were employed by the preceding employer, a change in ownership is not sufficient to affect the certification of a union and attending collective-bargaining contract. See *NLRB v. Burns International Security Services, Inc*., 406 U.S. 272, 278–279 (1972). Accordingly, the subsequent employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987).

A. Substantial continuity

The first factor in this analysis is whether there was a substantial continuity of operations. The General Counsel asserts that there is based on the continued operation of the Ridgewood facility, which has existed for nearly 40 years, as a licensed 98-bed nursing home. RHS does not dispute this contention.

Evaluation of successor status depends upon a fact-based totality-of-the-circumstances analysis. See *Fall River Dyeing & Finishing Corp*., 482 U.S. at 42. This substantial-continuity analysis is performed from the employees' perspective as to whether their job situations are essentially unaltered. Id. at 43 (internal quotation marks omitted). Factors include whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. Id.; *Great Lakes Chemical Corp*., 280 NLRB 1131, 1132 (1986).

Notwithstanding the injection of helping hands into the workforce, RHS and Preferred operated the same type of business, with the same processes and body of customers. There is no doubt that RHS's employees continued to view their jobs as essentially unaltered and, thus, there is a substantial continuity of operations between RHS and Preferred.

B. Majority status

The General Counsel, excluding the helping hands, alleges that Preferred employees constituted a majority of RHS's workforce on October 1. The Respondents, asserting that the helping hands performed bargaining unit work and should be included in the workforce analysis as of October 1, beg to differ.

Majority status is a necessary but not sufficient condition to successor status. See *Vermont Foundry Co.*, 292 NLRB 1003, 1009 (1989). Majority status is generally measured on the initial date of operation. Id.; *NLRB v. Burns International Security Services, Inc*., 406 U.S. at 278–279. An exception to this rule occurs when the successor starts with a few employees and requires a startup period to build operations and hire employees. *Fall River Dyeing & Finishing Corp*., 482 U.S. at 47–48. In such cases, majority status is evaluated when the successor hires a substantial and representative complement. Id. at 48–49. Majority status is a rebuttable presumption which continues despite a change in employers. Id. at 38.

The Respondents argue that the helping hands must be included in the bargaining unit. They premise this argument on the notion that helping hands perform bargaining-unit work, notwithstanding their inclusion in a new position title, because it is a circumstance which was contemplated by the CBA. The General Counsel argues that because the helping hands classification was not included in the historical bargaining unit, and neither the Union nor the predecessor requested that they be so included, helping hands employees may not be included in the current bargaining unit.

Complete analysis of majority status depends upon a prior determination of whether the bargaining unit of the predecessor employer remains appropriate for the successor employer. See *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994). Continued appropriateness is measured at the time the bargaining obligation attaches. *Cadillac Asphalt Paving Co*., 349 NLRB 6, 9 (2007). Absent compelling circumstances, an established bargaining relationship will not be disturbed. See *Columbia Broadcasting System, Inc*., 214 NLRB 637, 643 (1974). Consideration of whether the addition of a small group of employees to the existing unit is appropriate analyzes, as between the two groups: (1) interchange and contact; (2) similarities in skills, functions, interests and working conditions; (3) proximity; (4) bargaining history; and (5) degree of common supervision and control. See *Ready Mix USA, Inc*., 340 NLRB 946, 952–953 (2003). Such addition, or accretion, is thus appropriate only when the new employees have little or no separate identity and where the two groups share an overwhelming community of interest. See *NV Energy, Inc*., 362 NLRB No. 5, slip op. at 3 (2015). The two critical factors in this analysis are employee interchange and day-to-day supervision. See id. In light of the fact that accreted employees are absorbed into an existing bargaining unit without an election or other demonstrated showing of majority status, accretion analysis is more restrictive than a traditional community-of-interests analysis. See *Corbel Installations, Inc*., 360 NLRB 10, 24 (2013).

Helping hands perform some, but not all, of the same duties previously performed by Preferred's certified nursing assistants and are not certified. Thus, though there are some similarities of skill, functions, interests, and proximity, the two positions are not interchangeable and differ in regard to day-to-day supervision.

The Respondents, citing *Tarmac America, Inc*., 342 NLRB 1049, 1050 (2004), *Texaco Port Arthur Works*, 315 NLRB 828 (1994), and *Wiedemann Machine Co*., 118 NLRB 1616 (1957), contend that the duties, not the title, of a position are determinative. In *Tarmac America*, employees classified as "forklift operator" and "yard person" performed essentially the same work; additionally, neither party disputed that the two terms were used interchangeably to refer to the same position. 342 NLRB at 1049–1050. *Tarmac America* is thus not pertinent insofar as the parties' consensus obviated the burden of proof.

With respect to *Texaco Port Arthur Works* and *Wiedemann Mach Co*., the issue in each case was whether the employer had

validly excluded a new classification of employees from the bargaining unit. Therefore, the question was not one of accretion but rather, deletion, in which case the proponent bears the burden of proving dissimilarity. See *Texaco Port Arthur Works,* 315 NLRB at 830. The cases relied upon by the Respondents are thus "peripheral" to accretion analysis in that they involve instances in which the requisite burden of proving inclusion in the unit was either not at issue or was directly contrary to the burden of proof within an accretion analysis. Id. (internal citation omitted).

The Respondents also argue that the work performed by helping hands has always been performed by bargaining unit employees: certified nursing assistants perform certified nursing aide duties, while helping hands perform the noncertified portion of CNA duties. In so arguing, the Respondents confuse the part for the whole. The fact that helping hands performed a subset of duties performed previously by unit employees did not warrant the creation of a new job classification within the bargaining unit. The Respondents have thus failed to meet their burden of proof in establishing that helping hands must be included in the bargaining unit.

Accordingly, the 19 helping hands employees should not have been included within the bargaining unit and the appropriate bargaining unit as of October 1 is deemed to have consisted of 82 employees. Under those circumstances, former Preferred employees comprised 49 members of the unit and, thus, constitute a majority thereof.

Based on the foregoing, there was a substantial continuity of operations between Preferred and RHS, former Preferred employees/unit members constituted a majority of the employees hired into appropriate bargaining unit classifications by RHS, and RHS is deemed a successor employer who is obligated to bargain with the Union pursuant to the CBA.

C. Perfectly clear successor

Alternatively, the General Counsel contends that RHS failed to clearly enunciate new terms and conditions to employees and is, thus, a perfectly clear successor. RHS denies such a status because it did not hire a majority of Preferred employees; further, RHS argues that it repeatedly informed employees that they were subject to an application process, that new terms and conditions would apply, and that it was rejecting the collective-bargaining agreement.

Ordinarily, a successor employer is free to set initial terms on which it will hire the employees of a predecessor. *Burns International Security Services, Inc*., 406 U.S. at 294–295. However, a successor waives this right when it has either actively or tacitly misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. See *Spruce Up Corp.*, 209 NLRB 194, 195 (1974).

In July, Brown reassured Ridgewood employees that "99.9 percent" of them would be hired by RHS. Brown also responded to an inquiry about the CBA by indicating that she would have to honor it and recognize the Union. In so doing, Brown expressed a belief that things would basically stay the same. This impression was modified somewhat by Smith's subsequent letter in which he clarified that the rehiring issue was still under consideration. However, Smith essentially confirmed the collective-bargaining relationship with the Union in mid-July by insisting that the CBA be renegotiated. It was not until September 23, one week before the commencement of RHS's operations and weeks after bargaining unit members submitted to the hiring process, that RHS drastically changed its position by rejecting any notion of a collective bargaining relationship between RHS and the Union.

The suspect timing of these events reveals a scheme by the Respondents to avoid disrupting operations during the transition process while they figured out a way to circumvent potential obligations under the CBA. During the rushed and chaotic hiring process, some employees were asked about their wages, benefits, and paycheck deductions and/or whether they were members of the Union. They were also told about possible alterations in their wages and benefits. During this period of time, however, RHS never announcedt that it would alter the terms and conditions of employment. See *Cadillac Asphalt Paving Co*., 349 NLRB at 11 (2007). Thus, from the perspective of affected employees, RHS, by "tacit inference," misled them into believing that they would be retained without significant changes in their terms and conditions of employment. See *Dupont Dow Elastomers*, *LLC*, 332 NLRB 1071, 1074–1075 (2000).

Respondents, citing to *Banknote Corp*., 315 NLRB at 1043 (1994), argue that the change of heart made clear its intention to alter the terms and conditions of employment. See also *Marriott Management Servs*., 318 NLRB 144 (1995) (for perfectly clear analysis, communications with the union are deemed communications with the employees). In so arguing however, they fail to distinguish between concurrent and subsequent disavowals of the terms and conditions of employment. See *Starco Farmers Market*, 237 NLRB 373 (1978) (collecting cases). In *Banknote Corp*., the employer was not a perfectly clear successor given that it concurrently stated its intention both to hire incumbent employees and not to be bound by its predecessor's collective-bargaining agreement. 315 NLRB at 1043. In the instant case, however, Brown initially stated her intention to hire a substantial portion of the incumbent workforce; only subsequently did RHS, as RHCC's joint employer created for the purpose of operating the Ridgeview facility, alter this stance. Thus, RHS was a perfectly clear successor to Preferred. See *Grenada Stamping & Assembly*, *Inc.,* 351 NLRB 1152, 1155 (2007).

D. Discriminatory hiring

The General Counsel also alleges that RHS utilized a pretextual hiring scheme to avoid incurring a bargaining obligation, as evidenced when Brown exhibited antiunion animus in several meetings with employees, unlawfully refused to hire certain bargaining unit employees and hired employees into a new helping hands classification in order to displace bargaining unit employees. The Respondents deny the allegations, maintaining that RHS utilized neutral hiring criteria, a preferential hiring timeline for Preferred applicants, and hired roughly 80 percent of Preferred applicants.

A subsequent employer has a right not to hire its predecessor's employees. See *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 261–262 (1974). That right, however, does not extend to a refusal to hire a predecessor's employees solely because they were union members or to avoid having to recognize the union, which practices are unlawful. See id. at 261 fn. 8; *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989), enfd. En banc944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992). To establish that a successor has engaged in discriminatory hiring in violation of 8(a)(3), the General Counsel must show that the employer failed to hire employees of its predecessor and was motivated by union animus. *Planned Building Services*, *Inc.,* 347 NLRB 670, 673 (2006). The burden then shifts to the employer to show that it would not have hired the predecessor's employees even in the absence of an unlawful motive. If an employer is found to have discriminated in hiring, the Board assumes that, but for the unlawful discrimination, the successor would have hired the predecessor employees in their unit positions. Id. at 672 (citing *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom. *Kallmann v. NLRB,* 640 F.2d 1094 (9th Cir. 1981)). The Board also assumes that the union would have retained its majority status. *State Distributing Co.*, 282 NLRB 1048 (1987). Consequently, if the successor employer has refused to recognize and bargain with the union, it will be held to have violated Section 8(a)(5) and (1) of the Act and will be disqualified from setting initial terms and conditions of employment for the new workforce. *Planned Building Services*, 347 NLRB at 674 (citing *Love's Barbeque*, 245 NLRB at 82).

An unlawful refusal to hire may be shown by the absence of a convincing rationale for the refusal to hire, inconsistent hiring practices, overt acts, or conduct evidencing a discriminatory motive, including evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall workforce. *Planned Building Services*, 347 NLRB at 673 (quoting *U.S. Marine*, 293 NLRB at 670).

Brown, during meetings, stated that she did not see the need for a Union and expected that management and employees would resolve any issues that arose. She even went so far at one point as to say that the facility would close if the Union was involved. Brown later sent each employee a letter reasserting her position that the Ridgewood facility was operating "non-union." The letter, which also included preemptive action to keep the Union out of the facility, stated, inter alia, that "unions . . . are unnecessary at our facility. . . without a union we can be our most productive, efficient and flexible so that this facility will prosper. I do not want you to have to pay monthly dues to the union when we can make Ridgewood a great place to work just by working together . . .Unions have declined over the last few decades, and I think for good reason. Unions have not been able to provide employees with those things that employees value most including job security. I am sure you know of the many unionized plants that have shut down around this country."

Brown reinforced this message in subsequent meetings, during which she told employees that the Union was no longer recognized. Toward that end, Cooper, the former director of nursing, warned an employee that recruitment on behalf of the Union could result in termination. Those statements to employees by Brown and Cooper demonstrated antiunion animus. *Advanced Stretchforming International, Inc.*, 323 NLRB 529, 530–531 (1997); *Pressroom Cleaners*, 361 NLRB 643, 666–667 (2014) (collecting cases).

Additional evidence of animus has been demonstrated through RHS's creation of the helping hands classification. See *CNN America, Inc*., 361 NLRB 439 (2014) (creation of a hiring scheme which utilizes an inflated bargaining unit demonstrates discriminatory animus).

This preexisting animus factored into RHS's discriminatory hiring. During job interviews, most Preferred employees were asked about their payroll deductions, which included deductions for union dues. One would reasonably assume that a company assuming the operations of a facility would already have a sense of the total payroll and benefits costs involved in running the business. As such, individual inquiry into employees' payroll deductions appears suspect and no explanation was provided as to why RHS's agents needed such information when interviewing employees who performed bargaining unit work. If the circuitous approach to eliciting the information was not invasive enough, some employees were simply asked if they were members of the Union. The fact that these employees were later offered employment is not dispositive. In asking such questions to interviewees, the Company unlawfully restricted applicants in exercising their Section 7 rights in violation of 8(a)(1). *Bighorn Beverage*, 236 NLRB 736, 751 (1978); *Rochester Cadet Cleaners*, *Inc.,* 205 NLRB 773 (1973).

While the Respondents' demonstrated a business justification for refusing to hire 7 of the 11 employees at issue, their discriminatory hiring scheme is also evident in the refusal to hire four Preferred employees who warranted offers of employment. Betty Davis, Gina Eads and Connie Sickles had satisfactory documented work histories at Preferred and uneventful job interviews, but were denied employment because they were previously terminated at Ridgeview.

The Respondents assert that RHS's "no-rehire" policy was neutral and, thus, legitimate. Citing *Raytheon v. Hernandez*, 540 U.S. 44 (2003), the Respondents argue that a policy which refuses to hire individuals who have been terminated is by definition nondiscriminatory. The question in *Raytheon Co.*, however, was limited to a single employer; by definition, then, the policy was nondiscriminatory in that it applied to all employees equally. See *Raytheon*, 540 U.S. at 53–55. In the instant case, the question is whether RHS employed the no-rehire policy as a means to discriminate as between separate employers.

Brown and RHS interviewers, when asked, indicated that a previous discharge from Ridgeview would not be grounds for disqualification. At the hearing, the Respondents failed to rebut the inference that a no-rehire rule was subsequently applied as a discriminatory means by which to disqualify unit member applicants.

Wilson was refused employment on the flimsiest of rationales—that she was allegedly terminated from a previous facility due to an altercation with a coworker. No such incident, however, was documented in Wilson's Ridgeview personnel file,

nor is there any indication that she was asked about the incident during her job interview and given an opportunity to explain.

In conclusion, RHS has substantial continuity of operations with its predecessor. It misclassified helping hands and, in so doing, miscalculated the scope of the appropriate bargaining unit. Therefore, incumbent employees comprise a majority of the bargaining unit and RHS was, therefore, a successor employer. Moreover, by presenting itself to employees as a perfectly clear successor and then engaging in a discriminatory hiring scheme, RHS forfeited its right to unilaterally establish the initial terms and conditions of employment. By refusing to recognize the Union as the legal representative of unit employees, the Respondents, as a single employer, violated Section 8(a)(5) and (1) of the Act. In the course of that scheme, the Respondents violated also Section 8(a)(3) and (1) by refusing to hire four unit employees who merited offers of employment simply because Respondents wanted to reduce the number of Unit members hired. Finally, the Respondents' unlawful interrogation of Preferred employees and statements to Preferred employees that the Respondents would not recognize the Union as their labor representative and unilaterally set their terms and conditions of employment violated Section 8(a)(1) of the Act.

III. OBLIGATION TO MEET AND NOTIFY UNION IN REGARD TO DISCIPLINE

The General Counsel alleges that the Respondents unilaterally changed employees' initial terms and conditions of employment. The Respondents, relying on the lack of any collective bargaining relationship with the Union, do not dispute the allegations that RHS changed the terms and conditions of Preferred employees hired by RHS, and that RHS refused, despite several requests, to bargain with the Union over such changes and their effects.

A successor employer violates Section 8(a)(5) and (1) when it unilaterally changes the terms and conditions of employment. *Pressrom Cleaners*, 361 NLRB 643, 648 (2014). The remedy for such a violation is the restoration of the predecessor's terms and conditions until the parties bargain in good faith. Id.

RHS terminated employee Caitlyn Bolinger, and subsequently disciplined and ultimately terminated employees Brooke Watson and Misty Mauldin, all without notice to or bargaining with the Union. RHS's discipline and/or subsequent termination of these employees unilaterally changed the terms and conditions of their employment. Thus, by failing and refusing to bargain with the Union prior to engaging in such actions, RHS violated 8(a)(5) and (1) of the Act. *Rush University Medical Center*, 362 NLRB No. 23 (2015).

CONCLUSIONS OF LAW

1. The Respondents Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc. constitute a single employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. As a single employer, the Respondents are a successor employer of a majority of the unit employees, as well as a perfectly clear successor, of their predecessor employer at the Ridgewood facility.

2. The Union, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been, and continues to be, the exclusive bargaining representative of LPN's, nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and the food supervisor employed by the Respondents at the Ridgewood facility in Jasper, Alabama.

4. By (1) refusing to recognize and bargain with the Union on July 15, 2013 and continuously thereafter, (2) unilaterally changing terms and conditions of employment of the predecessor's employees commencing on October 1; and (3) refusing to provide the Union with information requested on September 13 and 25, and October 1, 2013, that was necessary and relevant to the collective-bargaining agreement, the Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The Respondents violated Section 8(a)(1) by: (1) interrogating bargaining unit employees by inquiring about their union membership during job interviews during September 2013; (2) informing bargaining unit members in August 2013 that they would not recognize the Union and would unilaterally change their terms and conditions of employment; and (3) warning an employee in January 2014 that she would be terminated if she supported the Union.

6. The Respondents violated Section 8(a)(3) and (1) of the Act in September 2013 by engaging in the following discriminatory hiring scheme in order to avoid its bargaining obligation with the Union: (1) creating a new job classification in order to create a workforce composed of less than a majority of the predecessor's employees in order to avoid its bargaining obligation with the Union; and (2) refusing to hire the following unit employees: Betty Davis, Gina Eads, Connie Sickles and Vegas Wilson.

7. The Respondents violated Section 8(a)(5) and (1) of the Act by disciplining and/or discharging Misty Mauldin, Brook Watson, and Caitlyn Bolinger without first notifying and offering the Union an opportunity to bargain over their discipline.

8. All other complaint allegations not included above are dismissed.

REMEDY

Having found that the Respondents engaged in certain unfair labor practices, I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents, having discriminatorily refused to hire employees Betty Davis, Gina Eads, Connie Sickles and Vegas Wilson, must offer them instatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

The Respondents shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or

more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

The Respondents shall recognize and, upon request, provide with the Union with information requested that is relevant and necessary to its role as employees' bargaining representative, and bargain in good faith with the Union as their employees' exclusive collective-bargaining representative concerning their wages, hours, benefits and other terms and conditions of employment. Additionally, the Respondents, upon request, shall rescind any and all changes the Respondents have made to employees' terms and conditions of employment and restore those that were in effect prior to those changes.

Finally, the Respondents shall be ordered to bargain with the Union regarding the discharges of unit employees Caitlyn Bolinger, Brooke Watson and Misty Mauldin. I decline to order the additional remedies of reinstatement and/or backpay. Although a nullity pursuant to the Supreme Court's decision in *Noel Canning,* 134 S. Ct. 2550 (2014), the Board's rationale in *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), since closed, provides some guidance on this issue. In that case, the Board held that an employer, whose employees are represented by a union at a time when the parties have not arrived at a first contract or an interim grievance procedure, must bargain with the union before imposing discretionary discipline on unit employees. While the parties, in this case, are bound to an extant CBA, the facts otherwise fall within the *Alan Ritchey* rationale – the discharges were within the employer's discretion, were subject to bargaining, and were implemented without affording the Union an opportunity to bargain.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[65]

ORDER

The Respondents, Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc., Birmingham, Alabama, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) or any other union.

(b) Failing and refusing to recognize and bargain with the Union as the exclusive collective- bargaining representative of its Unit employees.

(c) Failing to bargain with the Union concerning the discharges of Unit employees Misty Mauldin, Brook Watson, and Caitlyn Bolinger.

(d) Failing to furnish to the Union information it requested on September 13 and 25, and October 1, 2013.

(e) Coercively interrogating any employees about union support or activities, informing bargaining unit members that they will not recognize the Union and/or will unilaterally change their terms and conditions of employment, or threaten to terminate employees if they support the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> [A]ll full time and regular part time employees employed by the facility, including LPN's, nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and the food supervisor (it is understood that in the event any of the preceding job titles change, they will remain in the bargaining unit) but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(d) On request, bargain with the Union Misty Mauldin, Brook Watson, and Caitlyn Bolinger without first notifying and offering the Union an opportunity to bargain over their discipline.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility Jasper, Alabama copies of the attached notice marked "Appendix."[66] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical

[65] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[66] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 15, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. March 27, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting [*union name*] or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> [A]ll full time and regular part time employees employed by the facility, including LPN's, nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and the food supervisor (it is understood that in the event any of the preceding job titles change, they will remain in the bargaining unit) but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, within 14 days from the date of this Order, offer Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Betty Davis, Gina Eads, Connie Sickles, Vegas Wilson, Misty Mauldin, Brooke Watson, and Jonathan Keaton whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Betty Davis, Gina Eads, Connie Sickles, Vegas Wilson, Misty Mauldin, Brooke Watson, and Caitlyn Bolinger and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, on request, bargain with the Union over the discipline and discharges of Misty Mauldin, Brooke Watson, and Caitlyn Bolinger.

RIDGEWOOD HEALTH CARE CENTER, INC. AND RIDGEWOOD HEALTH SERVICES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-113669 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.