Pressroom Cleaners *and* Service Employees International Union, Local 32BJ. Case 34–CA–071823

September 30, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND SCHIFFER

On March 29, 2013, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Union each filed an answering brief. The Union filed cross-exceptions, the Respondent filed an answering brief, and the Union 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,[1] and conclusions[2] and to adopt the recommended Order as modified below.[3]

The allegations in this case arise from the Respondent's successful bid for a janitorial service contract previously held by Capitol Cleaning. We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire six Capitol Cleaning employees because of their union affiliation,[4] that the Respondent is the statutory successor to Capitol Cleaning, and that the Respondent violated Section 8(a)(5) and (1) by unilaterally imposing new terms and conditions of employment on the employees it hired. We differ with the judge, however, on an important issue regarding application of the remedy. Applying *Planned Building Services*, 347 NLRB 670 (2006), the judge directed that the Respondent have the opportunity in compliance to limit its liability by showing that, even absent its unfair labor practices, it would not have agreed to the monetary provisions of the Union's contract with Capitol Cleaning. The Charging Party excepts, arguing that this portion of *Planned Building Services* was wrongly decided and should be overruled. After careful consideration, we agree with the Charging Party.

I. THE RESPONDENT'S UNFAIR LABOR PRACTICES

As explained by the judge, the Respondent conducted essentially the same business as Capitol Cleaning at the same location, and former Capitol Cleaning employees would have constituted the majority of the Respondent's unit employees absent the Respondent's discriminatory refusals to hire. Accordingly, the Respondent, as a statutory successor, was obligated to recognize and bargain with the Union. See *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); accord: *NLRB v. Burns Security Services*, 406 U.S. 272, 280–281 (1972). It is well settled that a statutory successor is not bound by the substantive terms of the predecessor's collective-bargaining agreement and is ordinarily free to set initial terms and conditions of employment. *Burns*, 472 U.S. at 284. But that right is forfeited where, as here, the successor unlawfully refuses to hire the predecessor's employees. See *Advanced Stretchforming International*, 323 NLRB 529, 530–531 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000), cert. denied 534 U.S. 948 (2001); *Love's Barbeque*, 245 NLRB at 82. In such cases, the successor must, as a matter of law, maintain the status quo by continuing the predecessor's *terms and conditions of employment* (as distinct from assuming an existing collective-bargaining agreement) until the parties have bargained to agreement or impasse.[5] The Respondent's unilateral changes to terms

[1] The Respondent has 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.

We agree with the judge that Vice President Steve Lilledahl's statements on November 8, 2011, violated Sec. 8(a)(1). In doing so, we note that the credited testimony establishes that Lilledahl said the Respondent was "nonunion, does not work with unions, does not deal with unions," and "does not want a union at all." The judge discredited testimony that Lilledahl's remarks were limited to a statement that the Respondent was "nonunion."

[2] There are no exceptions to the judge's dismissal of an impression-of-surveillance allegation or to the judge's finding that the Respondent, by Supervisor Francisco Teran, violated Sec. 8(a)(1) by threatening and coercively interrogating employees.

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the modified Order, the Board's standard remedial language, and the Board's decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[4] In adopting the refusal-to-hire violations, we find it unnecessary to rely on Supervisor Teran's statements as evidence of animus.

[5] The rationale for holding that the successor in such circumstances has forfeited his right to set initial terms was explained in *Love's Barbeque*. There, the Board observed that the Supreme Court has recognized that there are situations in which it is "perfectly clear" that the new employer will retain the predecessor's employees and in "which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 245 NLRB at 82 (quoting *NLRB v. Burns Int'l Security Services*, 406 U.S. 272, 294–295 (1972)). A new employer's unlawful refusal to hire the predecessor's employees, however, creates uncertainty as to what would have happened absent its unlawful conduct. In that circum-

and conditions of employment therefore violated Section 8(a)(5) and (1).

To remedy the violations, the judge recommended that the Respondent recognize and bargain with the Union, extend offers of employment to the affected employees and make them whole, and restore the status quo—including rescission of the unilaterally imposed terms and conditions of employment—until the parties bargain to agreement or impasse. We agree that this is the appropriate remedy; it has been applied ever since the Board first held, in *Love's Barbeque,* that an employer that attempts to avoid successorship though discriminatory hiring practices forfeits its right to set initial terms and conditions of employment. 245 NLRB at 82. We disagree with the judge's remedy only insofar as it allows the Respondent the opportunity to show in compliance that, if it had lawfully bargained with the Union, "at some identifiable time" it would have reached impasse or agreement on terms less favorable than those in the Union's contract with Capitol Cleaning. The judge is correct that *Planned Building Services* permits such a showing. We find, however, that *Planned Building Services* is based on a misunderstanding of the Board's traditional remedy in successorship-avoidance cases, inconsistent with other Board precedent, and flawed as a matter of policy.[6]

II. BOARD LAW BEFORE PLANNED BUILDING SERVICES

Section 10(c) of the Act gives the Board broad discretionary power to devise remedies that effectuate the Act's policies, subject only to limited judicial review. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898–899 (1984); *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 216 (1964)**.** In exercising its authority under 10(c), the Board is guided by the principle that remedial orders should "restor[e] the situation, as nearly as possible, to that which would have obtained but for" the unfair labor practice. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Thus, since the Act's inception, a make-whole remedy for employees injured by unlawful conduct has been "part of the vindication of the public policy which the Board enforces."' Id. at 197.[7]

Where, as here, a successor employer has discriminatorily refused to hire incumbent employees and thereby unlawfully established initial terms and conditions of employment without bargaining, determining how to restore the situation that would have existed but for the unlawful conduct is not easy. It is well settled that the monetary portion of the remedy must be measured by the predecessor's terms and conditions of employment (which may or may not be set out in a labor contract) for at least some period of time, because those terms represented the status quo before the unlawful changes. See *State Distributing*, 282 NLRB 1048, 1049 (1987). And, until *Planned Building Services*, it was clear that the remedy should continue at the predecessor's rate until the parties reached agreement or impasse. See *State Distributing*, supra; *Love's Barbeque*, supra.[8]

In *State Distributing*, the Board considered and rejected the suggestion of the *Kallman* court that, because "in all probability" the parties would have reached impasse, backpay at the predecessor's rate should continue only for "a reasonable time of bargaining." Id. at 1049 (quoting *Kallmann v. NLRB*, 640 F.2d 1094). The Board reasoned that if the parties had bargained lawfully, they might have reached a compromise—rather than impasse—on terms that differed from either the predecessor's rate or the unilaterally imposed rate. Making that determination after the fact, however, would be "virtually impossible" and would "involve[ ] imposing contractual terms based on this Agency's conjecture without an adequate factual basis." Id. Recognizing that the employer's misconduct had left the Board with a set of "less-than-perfect remedial choices," the Board followed the well-established principle that the burden of uncertainty should be placed on the wrongdoer—here, the successor employer.[9] Id. Accordingly, the Board held that the

stance, the uncertainty must be resolved against the new employer, which "cannot be permitted to benefit from its unlawful conduct." Id.

One of our dissenting colleagues, Member Miscimarra, states his disagreement with the rule of *Love's Barbeque*, while our other dissenting colleague, Member Johnson, declines to address the rule because it is not at issue here. We will not address it, either, other than to observe that in the 35 years since *Love's Barbeque* was decided, it has not been questioned by any Board or judicial decision.

[6] We reject the Respondent's argument that this issue is not ripe for Board review. The judge's recommended remedy expressly provides that the Respondent shall have the opportunity to limit its liability in compliance in accordance with *Planned Building Services*. Accordingly, the validity of that decision is properly before the Board now, even though this case is not yet in compliance.

[7] See also *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346–347 (1953) (a Board backpay order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.") (quoting *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

[8] To be sure, the successor is never bound to the predecessor's labor contract, in whole or in part, although such a contract may provide the *measure* for a monetary remedy.

[9] *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."); *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 872 (3d Cir. 1938) (it appropriately "rest[s] upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune"), cert. denied 304 U.S. 576 (1938); *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973) ("the backpay claimant should receive the benefit of any doubt rather than the Respondent, the

predecessor's terms and conditions should continue until the parties bargained to agreement or impasse. Id. The majority of the appellate courts that reviewed this approach approved it.[10]

This approach is consistent with the Board's standard remedial scheme in 8(a)(5) unilateral change cases: rescission of the change, restoration of the status quo terms and conditions, and bargaining to agreement or impasse. See, e.g., *Mi Pueblo Foods*, 360 NLRB No. 116, slip op. at 4 (2014). In such cases, the employer must maintain the status quo until it reaches agreement or a good-faith impasse in bargaining; the employer is not permitted to show in compliance that it would have agreed to different terms, or reached impasse earlier, if it had bargained lawfully in the first place.[11] Our approach to successorship cases treats successor employers who have unlawfully refused to bargain in the same manner.

Nevertheless, the Board retreated from this approach in *Planned Building Services*. There, the Board held that it would permit the successor employer, in a compliance proceeding, to present evidence that it would not have agreed to the monetary provisions of the predecessor's collective-bargaining agreement, and to further establish one of the following: (1) the date on which the parties would have bargained to agreement and the terms they would have reached, or (2) the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals. *Planned Building Services,* 347 NLRB at 675–676. The Board's rationale rested on two principles. First, the Board cited three courts of appeals' decisions that found the traditional remedy punitive to the extent it required the employer to adhere to the predecessor's terms and conditions of employment for longer than "a reasonable bargaining period." See *Capital Cleaning Contractors, Inc. v. NLRB,* supra; *Armco, Inc. v. NLRB,* supra; and *Kallmann,* supra at 1103. Second, the Board reasoned that determining what the parties "would have agreed to" is not impossible because it was accomplished in *Armco*, 298 NLRB 416 (1990), where the Board, applying the law of the case on remand from the court, found that a successor employer proved it would not have agreed to the monetary terms of the predecessor's contract.

We acknowledge that *Planned Building Services* was a well-meaning attempt to balance two competing principles: placing the burden of the uncertainty on the wrongdoer and avoiding a potentially punitive remedy. For the following reasons, however, we find the result and rationale in *Planned Building Services* fundamentally flawed.

III. THE BOARD'S TRADITIONAL APPROACH IS WELL WITHIN ITS REMEDIAL AUTHORITY

To begin, we emphasize that continuing backpay at the predecessor's rate until agreement or impasse is not punitive. As articulated by the Second Circuit, "the requirement that the Company pay former employees at the prior rates was plainly intended to be remedial, for it is temporally limited: the Board's order requires payment at the prior rates only until the Company negotiates in good faith with the Union, either to agreement or to impasse." *NLRB v. Staten Island Hotel*, supra, 101 F.3d at 862.[12] Of course, where a successor has evaded its obli-

wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved").

[10] See, e.g., *Pace Industries v. NLRB,* 118 F.3d 585 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998); *NLRB v. Staten Island Hotel,* 101 F.3d 858 (2d Cir. 1996); *Horizon Hotel Corp. v. NLRB,* 49 F.3d 795 (1st Cir. 1995); *U.S. Marine Corp. v. NLRB,* 944 F.2d 1305 (7th Cir. 1991) (en banc), cert. denied 503 U.S. 936 (1992); *Systems Management, Inc. v. NLRB,* 901 F.2d 297 (3d Cir. 1990). But see *Capital Cleaning Contractors, Inc. v. NLRB,* 147 F.3d 999, 1011 (D.C. Cir. 1998); *Armco, Inc. v. NLRB,* 832 F.2d 357 (6th Cir. 1988); and *Kallmann,* supra, 640 F.2d at 1103 (discussed below).

[11] For example, an employer that has violated Sec. 8(a)(5) by unilaterally subcontracting unit work is required to restore the status quo; we do not permit it to try to prove that, had it bargained lawfully, it would have reached a lawful impasse and subcontracted the work. See, e.g., *Fibreboard*, supra, 379 U.S. at 216.

[12] The dissent seizes on a single sentence in the Second Circuit's *Staten Island* decision that supposedly expresses a preference for a remedy that avoids imposing the predecessor's contract rates on the successor. The sentence, beginning "If it were possible," appears in the following paragraph:

> [I]f the Company had not violated the Act, it would indeed have been free to offer former employees wages at whatever levels it chose, *see, e.g., NLRB v. Burns Intern. Security Services,* 406 U.S. 272, 287–288, 92 S. Ct. 1571, 1582–1583, 32 L.Ed.2d 61 (1972); but those applicants, in turn, would have been free to accept or decline those offers, or to negotiate for different wages. *If it were possible to determine the terms of employment contracts to which former employees might have agreed, we might prefer an award of backpay at those hypothetical contracts' rates. Cf. Kallmann v. NLRB,* 640 F.2d 1094, 1103 (9th Cir.1981). But the fact is that the Company made its hiring decisions on a basis that unlawfully discriminated against former employees on the basis of their union membership, and it is hardly clear what terms would have been reached had the Company not so discriminated. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 265, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946). The choice between imposing a predecessor's contract terms and fashioning reasonable hypothetical contract terms that the successor might have obtained had no unfair labor practices occurred presents
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> > a set of less-than-perfect remedial choices. The [make-whole] remedy . . . has the drawback of retroactively imposing on the [wrongdoing successor its predecessor's] terms and conditions of employment . . ., but it has the advantage of giving some recompense to the victims . . . and preventing the [successor] from enjoying a financial position that is quite possibly more advantageous than the one it would occupy had it behaved lawfully.

gations under the Act, lawful bargaining—and, ultimately, agreement or impasse—likely will not begin until the Board issues its Order and the employer complies. Thus, the length of time between the initial refusal to bargain and good-faith agreement or impasse may well be longer than it would have been had the parties bargained lawfully from the start. We see no reason, however, that the employees should bear the burden of this delay, which resulted from the employer's unlawful conduct. The wrongdoer, rather than the victim of wrongdoing, should bear the consequences of its unlawful conduct. *NLRB v. Remington-Rand, Inc.,* 94 F.2d 862 (2d Cir. 1938).[13]

The dissent contends that the Board's traditional approach contravenes the principle underlying Section 8(d) and *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970), that the Board cannot impose substantive contractual terms on the parties. We reject the argument as fundamentally mistaken. In *H.K. Porter*, the Court declined to require the employer to agree to a dues-checkoff provision, an issue over which the Board found that the employer had refused to bargain in good faith. Id. at 102. Citing Section 8(d), the Court held that the Board had the authority to order the parties to negotiate, but not to impose a substantive contract term. Id. In the present case, by contrast, the successor is never bound to the predecessor's contract; rather, the successor is obligated to maintain the status quo—the predecessor's terms and conditions of employment—subject to bargaining. The parties are free to bargain to agreement, without Board intervention, for any changes to the predecessor's terms and conditions of employment. Should they instead reach a lawful impasse, the successor will then be free to implement its proposal unilaterally—as in any other case in which the Board orders the status quo restored until good-faith bargaining occurs. Backpay at the predecessor's wage rates continues *only until* that time, in furtherance of both the make-whole remedy and freedom-of-contract principles.

IV. THE RATIONALE OF PLANNED BUILDING SERVICES IS FLAWED

Having concluded that some adjustment of its remedial approach was needed, the Board in *Planned Building Services* modeled its new approach after *Armco*, supra. In that case, the Board reiterated its preference for the traditional remedy, but interpreted the Sixth Circuit's remand as requiring the Board to determine what would have happened if the successor had fulfilled its bargaining obligation at the time of the takeover. The Board stated: "In accepting the [court's] remand as the law of the case . . . we are required to apply this alternative formula, despite its difficulty and the Board's past reluctance to do so." 298 NLRB at 418. After a reopening of the record and further hearing before an administrative law judge, the Board concluded that the employer proved that, if it had negotiated lawfully at the time of the takeover, it would not have agreed to the monetary terms of the predecessor's contract. Because it was "virtually impossible to determine with any certainty when postpurchase bargaining would have resulted in an agreement or impasse," the Board concluded that the "most reasonable approach" was to limit backpay liability under the predecessor's terms to a period of 15 months, the length of time it took the parties to reach an agreement once they actually began negotiations. Id. at 419–420. At best, *Armco* represents the findings of a

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State Distributing Co. v. Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 313, 282 NLRB 1048, 1049, 1987 WL 90211 (1987). Because it was the Company's discriminatory acts that created the uncertainty as to what terms and conditions of employment would have been agreed, we conclude that it was within the discretion of the Board to place on the Company the burden of that uncertainty. The Board's decision to give the discrimination victims the benefit of the doubt is remedial rather than punitive.

101 F.3d at 862. (Ellipses original; emphasis added.) Read in context, the meaning of the sentence is clear: *If* it were possible to determine the "hypothetical" rates, then those rates would be the preferable measure, but it is not, in fact, possible to make that determination.

The dissent then argues that the approach of *Planned Building Services* is different from the one the *Staten Island* court rejected, because *Planned Building Services* contemplated the successor showing what the outcome of timely bargaining would have been, as opposed to the Board "fashioning reasonable hypothetical terms." Id. But the fashioning of hypothetical terms by the Board is precisely what would result if the Board were to accept a respondent successor's proffer under *Planned Building Services*.

[13] The dissent nevertheless asserts that the Board's traditional approach is punitive. It points out that the employer bore a lengthy backpay obligation at the predecessor's wage rates in *Planned Building Services*, and that the successor employers in *Kallman, Dent,* and *Overnite* each paid predecessor wage rates for more than 2 years, due in part to the time it took the Board to process those cases. *Kallmann v. NLRB,* above; *NLRB v. Dent*, 534 F.2d 844 (9th Cir. 1976); *Overnite Transportation Co. v. NLRB*, 372 F.2d 765 (4th Cir. 1967), cert. denied 389 U.S. 838 (1967). But requiring the successor employer rather than the employees to bear the cost of that delay does not make the Board's remedy punitive. In *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), a case involving the unlawful refusal to reinstate strikers, the Board issued a backpay award that covered a period of more than 4 years, in part because of the Board's delay in processing the compliance specification. Id. at 260–261. In an effort to balance competing interests, the court of appeals modified the Board's Order to provide an earlier backpay cutoff date. The Supreme Court reversed, holding that "the Board is not required to place the consequences of its own delay . . . upon wronged employees to the benefit of wrongdoing employers." Id. at 264–265; accord: *NLRB v. Ironworkers, Local 480*, 466 U.S. 720, 724–725 (1984); *NLRB v. Katz*, 369 U.S. 736, 748 fn. 16 (1962) (rejecting as meritless employer's request to place certain conditions on Board's order "because of the lapse of time between the occurrence of the unfair labor practices and the Board's final decision and order").

Board constrained by the law of the case on remand—not a rationalized basis for a change in the law.[14]

In *Planned Building Services*, the Board also failed to resolve—or even address—the inconsistency between its holding and the results reached in other refusal-to-bargain cases. For example, in cases where an employer refuses to bargain with a newly certified union, the Board has explicitly rejected the argument that employees should be made whole for the difference between the wages and benefits imposed by the employer and those that would have existed if the employer had bargained lawfully. See *Tiidee Products*, 194 NLRB 1234 (1972); *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), enfd. 449 F.2d 1058 (D.C. Cir. 1971). In *Tiidee Products*, the Board ordered the Respondent to cease and desist and to bargain with the Union. The Board rejected the Union's request to determine what the parties "would have agreed to" in bargaining and to order the Respondent to make employees whole accordingly. Id. at 1235. The Board reasoned: "We know of no way by which the Board could ascertain with even approximate accuracy" what the parties "*would* have agreed to" if they had bargained in good faith.[15] Id. (emphasis in original). The Board in *Ex-Cell-O* reached the same conclusion, reasoning: "Who is to say in a specific case how much an employer is prepared to give and how much a union is willing to take? Who is to say that a favorable contract would, in any event, result from the negotiations?" Supra at 110. The Board concluded that it "would be required to engage in the most general, if not entirely speculative, inferences" to determine what the parties would have agreed upon if the employer had bargained lawfully. Id. Although *Tiidee Products* and *Ex-Cell-O* are not successorship-avoidance cases, they nevertheless demonstrate the Board's appropriate and longstanding resistance to necessarily speculative determinations about what would have occurred in lawful bargaining. Moreover, *Planned Building Services*, considered in conjunction with *Tiidee* and *Ex-Cell-O*, creates both an inconsistency and an inequity in Board precedent: a successor employer that has unlawfully refused to bargain has the opportunity to prove the terms it would have agreed to (or imposed upon impasse), but a union that is subjected to an employer's refusal to bargain has no such opportunity. *Planned Building Services* is an anomaly in Board law. It presents a wrongdoing successor employer with an option that is not available—to employers or to unions—in any other refusal-to-bargain scenario. Indeed, the decision creates a one-sided opportunity that can only benefit the wrongdoer: the employer is permitted to reduce its liability by proving the bargaining would have resulted in less favorable terms than the predecessor's, but the union is not permitted to prove that bargaining would have resulted in more favorable terms.[16]

In addition to its legal flaws, as a practical matter, *Planned Building Services* both prolongs litigation by greatly complicating the compliance phase and discourages meaningful bargaining. In Board litigation, the unfair labor practice phase is completed before the compliance phase begins. Under *Planned Building Services*, compliance issues may well be litigated while the parties are bargaining—a scenario that is all but guaranteed to affect the employer's bargaining approach. The employer has an incentive to push hard for a quick impasse, and then use that as evidence in the compliance proceeding to prove that it would have reached impasse quickly had it bargained lawfully from the beginning. Alternatively, bargaining will be significantly delayed pending resolution of the difficult compliance issues.

V. A RETURN TO STATE DISTRIBUTING IS THE BETTER APPROACH

In sum, we find that the *Planned Building Services* approach is fundamentally flawed. As we have long recognized, successorship-avoidance cases leave the Board with remedial options that are clearly "less than perfect." *State Distributing*, 282 NLRB at 1049. We find, however, that it is within the Board's remedial discretion—and

[14] *Armco*, moreover, highlights the inherent difficulty in determining what would have resulted from lawful bargaining. Even after a reopening of the record and "extensive litigation" (298 NLRB at 418), the Board in *Armco* was unable to reach a unanimous conclusion on when the parties would have reached agreement or impasse. See id. at 421–422 (Member Devaney, dissenting).

[15] Although the Board noted the sparsity of the record, the judge in the original case had made clear that he "allowed the Union to develop fully in the record all evidence necessary to sustain its position on this issue." *Tiidee Products*, 174 NLRB 705, 714 (1969). That lack of evidence—even where the matter was fully litigated—further highlights the speculation required to make such a determination.

[16] At least one of the three court decisions cited in *Planned Building Services* was based on a misunderstanding of the Board's remedy. The court in *Capital Cleaning* mischaracterized the Board's remedy as relying on an "implicit assumption" that the parties would have agreed to the predecessor's terms if they had bargained in good faith. 147 F.3d at 1010. But that is not what the Board held in *State Distributing*. Rather, the Board reasoned that because it is virtually impossible to determine what would have occurred in lawful bargaining, the wrongdoer who created the uncertainty should bear the burden of that uncertainty. The court in *Capital Cleaning* further stated that "the best evidence of the wage [the successor] would have had to pay" is "the rate it . . . actually paid the new employees who did the work previously done by" the predecessor's employees. 147 F.3d at 1011. Respectfully, we disagree. Presuming that the rate unilaterally imposed by the employer is the "best evidence" both rewards the employer for its unlawful unilateral conduct and presumes that lawful bargaining would have had no effect whatsoever.

the better practice—not to permit the wrongdoer to establish, through what amounts largely to speculation, the terms and conditions of employment that the parties would have agreed to if the employer had not violated its duty to bargain. Returning to the practice outlined in *State Distributing* will both restore consistency to our jurisprudence and better effectuate the policies of the Act. Accordingly, we hold that, when a successor employer has violated Section 8(a)(5) and (1) by unilaterally changing the predecessor's terms and conditions of employment, the make-whole remedy will include restoration of the predecessor's terms and conditions until the parties bargain in good faith to agreement or impasse. An employer may no longer attempt to prove what the terms and conditions would have been if it had complied with its obligation to bargain. We overrule *Planned Building Services* to the extent that it conflicts with our decision here.

Finally, we find it appropriate to apply our decision retroactively. The Board's usual practice is to apply new policies and standards "to all pending cases in whatever stage."[17] The "propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'"[18] Pursuant to this principle, the Board applies a new rule retroactively to the parties in the case in which the new rule is announced and to parties in other cases pending at that time as long as this would not work a "manifest injustice."[19]

There is no basis here for departing from the Board's usual practice. We are deciding a remedial issue, not adopting a new standard concerning whether certain conduct is unlawful.[20] Accordingly, we shall apply our new policy in this case and in all pending cases that are not already in the compliance stage as of the date of this decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pressroom Cleaners, Inc., Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following after paragraph 2(g) and reletter the subsequent paragraphs.

> "(f) Compensate the employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 30, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA and MEMBER JOHNSON, concurring in part and dissenting in part.

Introduction

Our position in this case flows from several cardinal principles embedded in the National Labor Relations Act and in controlling Supreme Court case law interpreting the Act. First, under Section 10(c), the Board's authority is remedial, not punitive.[1] Second, under Section 8(d) of the Act, the Board may not impose any term of an agreement on the parties to a collective-bargaining relationship. Indeed, the Supreme Court held that "[i]t is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bar-

[17] *Aramark School Services, Inc.*, 337 NLRB 1063, 1063 fn. 1 (2002) (quoting *Deluxe Metal Furniture Co*., 121 NLRB 995, 1006–1007 (1958)).

[18] Id. (quoting Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 203 (1947)).

[19] Pattern Makers (Michigan Model Mfrs.), 310 NLRB 929, 931 (1993).

[20] See *Kentucky River Medical Center*, 356 NLRB No. 9, slip op. at 5 (2010).

[1] *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940); *Consolidated Edison Co. v. NLRB,* 305 U. S. 197, 235–236 (1938); *NLRB v. Pennsylvania Greyhound Lines,* 303 U. S. 261, 267–268 (1938). More than 70 years ago, the Supreme Court held that the purpose of the Board's remedies is the "restoration of the situation, as nearly as possible, to that which would have obtained but for" the unfair labor practices. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Applying this principle to monetary remedies, the Court subsequently held that under Sec. 10(c), a "backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (emphasis in original).

gaining, leaving the results of the contest to the bargaining strengths of the parties." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970). Third, in cases involving a sale or succession of employers,[2] even if the new employer is a legal "successor" obligated to recognize and bargain with the predecessor's union, the successor employer is *not* required to adopt the predecessor's collective-bargaining agreement, and the successor employer generally has the right to unilaterally establish its initial employment terms *without* bargaining. *Burns*, 406 U.S. at 280–281; *Fall River Dyeing*, 482 U.S. at 43.[3]

In *Planned Building Services*, 347 NLRB 670 (2006), the Board aligned its precedent with these foundational principles *in a unanimous five-member decision*. There, the respondent-employer challenged its successor-employer status, but it was found to be a successor with an obligation to engage in post-transition bargaining with the predecessor's union. The respondent's successor status was based on a finding that it had discriminated in hiring to avoid a successor bargaining obligation. Accordingly, under *Love's Barbeque*, supra, it was found to have forfeited its right to set different initial terms of employment, and to have violated Section 8(a)(5) by setting initial terms without bargaining.[4] For this violation, the judge imposed a backpay obligation—*based on wage rates in the predecessor's labor contract*—that persisted for 8 or 9 years *after* the transition in employers.[5] The backpay order was unaffected by the black-letter legal principles described above (which preclude imposing a predecessor's contract terms on a post-transition successor), nor did the judge allow for any consideration of the *overwhelming* likelihood that bargaining would have resulted in an impasse or agreement on different wage rates much earlier than the end of the backpay period imposed by the judge.

The Board in *Planned Building Services* adjusted the judge's backpay remedy, described above, to comply

[2] Successorship cases are those involving a transition in employers, most often caused by the sale of a business or contract rebidding (for example, where an employer provides maintenance or cleaning services pursuant to a contract that ends, and where the next contractor employs some or all of the predecessor contractor's employees). See, e.g., *NLRB v. Burns Security Service*s, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). In these cases, the potential existence of a post-transition obligation to bargain (and certain other obligations) turns on whether there is sufficient business continuity and whether the successor employer has a workforce majority of union-represented employees previously employed by the predecessor, but the successor employer has no obligation to adopt or apply employment terms set forth in the predecessor's contract. Also, the successor employer typically has the right to unilaterally set initial employment terms (see fn. 3 infra), although the Board held in *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), that the successor's right to set different initial employment terms is forfeited if the successor engages in discriminatory hiring in order to defeat a successor bargaining obligation.

[3] According to the Supreme Court in *Burns*, an exception to the successor employer's right to unilaterally set initial employment terms may arise where "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." 406 U.S. at 294–295. The Board interpreted this exception in *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975). See infra fn. 11.

[4] Member Johnson agrees that, under *Love's Barbeque*, supra, the Respondent forfeited the right to set initial employment terms unilaterally and thus also violated Sec. 8(a)(5) when it established initial terms of employment different from its predecessor's without giving the Union notice and an opportunity to bargain. No party asks the Board to reconsider *Love's Barbeque* in this case. Accordingly, Member Johnson does not here reach whether *Love's Barbeque* was correctly decided.

As he stated in his separate opinion in *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 43–44 (2014), Member Miscimarra disagrees with the holding of *Love's Barbeque* that an employer forfeits the right to set different initial terms if it engages in antiunion discrimination in connection with hiring decisions to avoid a successorship bargaining obligation. See also *Pacific Custom Materials, Inc.*, 327 NLRB 75, 75–76 (1998) (Member Hurtgen, dissenting). In Member Miscimarra's view, the holding in *Love's Barbeque* inappropriately deviates from the Supreme Court's holdings in *Burns*, supra, and in *Fall River Dyeing*, supra, that a predecessor's contractual obligations are inapplicable to legal successors, even though the successors are required to recognize and bargain with the predecessor's union. If the successor engages in discriminatory hiring decisions that defeat successor status, the appropriate remedy is to order instatement and make-whole relief for the individuals adversely affected by such discrimination and, to the extent otherwise warranted by relevant facts, to require the successor to recognize and bargain with the predecessor's union. Apart from these remedies, Member Miscimarra believes the Board remains constrained by *Burns* and *Fall River Dyeing*, in addition to Sec. 8(d) of the Act, from imposing substantive contract terms on the successor. See also *H.K. Porter*, 397 U.S. at 108. Thus, he agrees with the reasoning of former Member Hurtgen in *Pacific Custom Materials*, who stated: "The 8(a)(3) violations yield their own compensatory remedy of reinstatement and backpay. It is excessive and punitive to use those 8(a)(3) violations to take away the legitimate defense to an 8(a)(5) allegation concerning the setting of initial terms. . . . In addition, even if the Board's position [in *Love's Barbeque*] is a permissible one, it would seem that the position set forth herein is a more prudent one, more balanced concerning a successor employer's obligations, and is more consistent with the Supreme Court's language." 327 NLRB at 75–76 (Member Hurtgen, dissenting) (paragraph structure modified). To the extent the Board continues to apply *Love's Barbeque*, however, Member Miscimarra supports the standard articulated in *Planned Building Services* because, as described in the text, it aligns the Board's backpay remedy with statutory constraints on the Board's remedial authority.

[5] The backpay period commenced in 1997 and 1998. There were three bargaining units at issue in *Planned Building Services* at three different buildings in New York, New York. The judge found that although the union "may not have made demands for recognition at all of the buildings, this failure [was] inconsequential" because "any request for bargaining would [have been] futile." 347 NLRB at 718. PBS commenced operations at the three buildings on December 23, 1997, February 14, 1998, and June 24, 1998, respectively. Id. at 693, 696–697, 700. The union began picketing at each location immediately after those dates.

with the legal principles described above, including the fact that "[t]he Act does not authorize the Board to impose punitive measures." 347 NLRB at 675.[6] Accordingly, "to strike a better balance between two principles that guide the Board's remedial discretion: placing the burden of uncertainty on the wrongdoer and avoiding a remedy that is, in fact, punitive," id., the Board held that the successor employer—while bearing the burden associated with any uncertainty resulting from its violation—retained the right to introduce evidence that might provide "an adequate factual basis" for proving that timely bargaining would have produced an impasse or agreement regarding wage rates different than those required under the predecessor's agreement. Id. at 676.

What the *Planned Building Services* Board did *not* do bears emphasis. It did *not* shorten the duration of the backpay period in successorship-avoidance cases. It did *not* remove the burden of uncertainty from the party found to have violated the Act. It merely recognized that punitive remedies are beyond the Board's authority, which warranted recognizing the respondent's right to present evidence "that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement, and further establishing either the date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals." Id. Moreover, the *Planned Building Services* Board correctly rejected arguments that such a determination would be (as now described by our colleagues) "necessarily speculative." In *Planned Building Services*, the Board pointed out that it "*has* been able to make such a determination," and, indeed, the Board made such a determination in *Armco, Inc.*, 298 NLRB 416 (1990).[7] Following the *Armco* approach, the Board in *Planned Building Services* preserved "the core of the Board's traditional make-whole remedy, while at the same time helping to ensure that the Board's remedy does not, in fact, amount to a penalty, as applied in a particular case." 347 NLRB at 676.

For these reasons and those that follow, we would adhere to the holding and remedial structure set forth in *Planned Building Services*, and we dissent from our colleagues' decision to overrule that case. However, we concur in our colleagues' finding that the Respondent engaged in unlawful discrimination in hiring that violated Section 8(a)(3), and in an unlawful failure to recognize and bargain with the Union that violated Section 8(a)(5).

Relevant Facts

Respondent, Pressroom Cleaners, a nonunion company, provides industrial cleaning services to newspaper facilities across the United States. As relevant here, it has had a contract for approximately 8–10 years with the Hartford Courant (Courant) to provide janitorial services for the Courant's pressroom at the Courant's Broad Street facility in Hartford, Connecticut. In 2011, the Respondent won a separate contract to clean the other areas of the Broad Street facility, and it commenced operations there on December 12, 2011. Capitol Carpet & Specialty Cleaning (Capitol Cleaning) had previously performed this work. The Union represented Capitol Cleaning's eight employees who performed the work, as well as other Capitol Cleaning employees not at issue here, under a collective-bargaining agreement between the Union and the Hartford Cleaning Contractors Association, of

[6] The Board in *Planned Building Services* did not expressly rely on Sec. 8(d) or *H.K. Porter*. It did, however, rely in part on the D.C. Circuit's decision in *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999 (D.C. Cir. 1998). In that decision, the court of appeals rejected the remedial approach our colleagues adopt today as inconsistent with "*two* cardinal principles" of labor law: that "the Board's remedial order must be just that—remedial—and not punitive," *and* that "an employer cannot be required to accept contractual terms to which it did not agree." Id. at 1012 (emphasis added).

[7] In *Armco, Inc. v. NLRB*, 832 F.2d 357 (6th Cir. 1987), cert. denied 486 U.S. 1042 (1988), the court of appeals enforced the Board's order in the underlying decision (279 NLRB 1184 (1986)), in which the Board found that Armco violated Sec. 8(a)(5) by unilaterally changing the terms and conditions of its predecessor's employees when it purchased the predecessor's plant. However, the court did not enforce the Board's backpay remedy. It found that remedy "may be too harsh," as it would require Armco to pay the predecessor's employees up to $3 an hour more from the time that Armco purchased the predecessor's plant until the parties reached agreement or impasse. Id. at 365. Relying on the Ninth Circuit's decision in *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), discussed below, and finding that Armco may not have agreed to the union's demands for higher wages, the court held that Armco was "responsible for the pay difference for the time which would have been required for bargaining." Id. The court remanded the case to the Board to determine how long that period of time would have lasted. As noted above, the Board addressed that issue in its Second Supplemental Decision (298 NLRB 416 (1990)) and determined when the parties would have reached an agreement and on what terms.

The majority asserts that *Armco* represents at best "the findings of a Board constrained by the law of the case on remand—not a rationalized basis for a change in the law." Law of the case or not, the fact remains that *Armco* demonstrates that the showing *Planned Building Services* provides for *may* be made because it *has* been made. While the majority and the dissent in that case disagreed on how much time bargaining would have required—the majority relied on how long the parties took to reach an agreement, and the dissent on the expiration date of the predecessor's union contract—the point is that both majority and dissent found that Armco's make-whole obligation ended well before it would have if the Board had applied its traditional remedy. Since *Armco* shows that it is *possible* to make the remedial determination *Planned Building Services* allows, it supports giving parties the *opportunity* to do so—an opportunity the majority does away with today.

which Capitol Cleaning was a member, effective from January 1, 2008, to December 31, 2011. The Respondent refused to hire Capitol Cleaning's employees. The judge and our colleagues find, and we agree, that the Respondent violated Section 8(a)(3) by discriminatorily refusing to hire six of the eight (it lawfully declined to hire the other two based on their poor references) in order to avoid an obligation to bargain with the Union.[8]

Planned Building Services: The Legal Setting

Several circuits have already rejected the remedial approach our colleagues adopt today. In our view, these cases demonstrate that *Planned Building Services* was correctly decided. Moreover, it is helpful to review the broader legal framework that helps explain why the Board's traditional remedy, as applied in the *Love's Barbeque* context, conflicts with the Act's prohibition of remedies that (i) are punitive, or (ii) impose contract terms on unconsenting parties.

In *H.K. Porter Co. v. NLRB*, supra, the Supreme Court considered the issue of whether the Board had the authority to require an employer to agree to a term of a contract the parties were negotiating. The Court held that the Board lacked that authority, principally relying on Section 8(d).[9] The Court observed that in enacting Section 8(d) in 1947, Congress sought to check what it viewed as the Board's tendency to "set[ ] itself up as the judge of what concessions an employer must make." 397 U.S. at 105 (internal quotations omitted). Although acknowledging that Section 8(d) may not forbid the Board from compelling agreement "as a matter of strict, literal interpretation," the Court held the Board's remedial powers were also "limited by the same considerations that led Congress to enact Section 8(d)." Id. at 107. The Court concluded that "[i]t is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." Id. at 107–108.

In *NLRB v. Burns Security Service*s, supra, the Supreme Court decided whether, as the Board had found, an employer that acquires and continues (in substantially unchanged form) the business of a unionized predecessor, and hires as a majority of its workforce the predecessor's union-represented employees, must bargain with the union *before* setting initial terms and conditions of employment different from those of its predecessor. Relying on Section 8(d) and its decision in *H.K. Porter*, supra, the Court in *Burns* reversed the Board and held that although a legal successor does have a duty to recognize and bargain with the incumbent union, it "is ordinarily free to set initial terms on which it will hire the employees of a predecessor." 406 U.S. at 294. In reaching this conclusion, the Court distinguished the circumstances of the case before it from those in which an employer violates Section 8(a)(5) by unilaterally changing a term of employment without bargaining with the union:

> It is difficult to understand how Burns could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1 [when Burns commenced operations], no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed *its* terms and conditions of employment when it specified the initial basis on which employees were hired on July 1.

Id. (emphasis in original).[10] However, the Court created an exception to the rule that a successor employer is ordinarily

[8] In agreement with the majority, we do not rely on statements made by Supervisor Francisco Teran as evidence of antiunion animus. In this regard, we note that while there were no exceptions to the judge's finding that the Respondent, through Teran, violated Sec. 8(a)(1) by threatening and coercively interrogating employees, the Respondent did not hire Teran until January 2012, *after* the Respondent refused to hire the predecessor's employees. We also agree with our colleagues, for the reasons stated in their opinion, that the Respondent violated Sec. 8(a)(1) through Vice President Steve Lilledahl's November 8, 2011 statements to employees.

[9] As relevant here, Sec. 8(d) states (emphasis added):

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession*[.]

[10] The Court also cited substantial policy reasons for its holding:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. 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. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. 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.

free to set its own initial terms. "[T]here will be instances," it said, "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.[11]

Next, in *Love's Barbeque*, supra, the Board held that an employer who resorts to unlawful discrimination in hiring to avoid a legal successor's bargaining duty will have backpay liability under Section 8(a)(5) based on any initial failure to pay the wage rates specified in the predecessor's collective-bargaining agreement. The Board acknowledged that it was uncertain whether the employer would have hired all or substantially all of the predecessor's employees absent the unlawful discrimination. But the Board adopted a presumption that the would-be successor would have hired all or most of them, and "[t]herefore, it was not entitled to set initial terms of employment without first consulting the [u]nion." 245 NLRB at 82.[12]

The Ninth Circuit upheld the basic holding of *Love's Barbeque*. *Kallmann v. NLRB,* 640 F.2d 1094, 1102–1103 (9th Cir. 1981). However, the court denied enforcement of the Board's order requiring the respondent to make employees whole for the 8(a)(5) violation at the predecessor's wage rates until it bargained with the union to agreement or impasse. As explained more fully below, the court found that the traditional remedy applied by the Board was impermissibly punitive. Id. at 1103. Notwithstanding *Kallmann*, however, the Board adhered to its traditional remedy in *State Distributing Co.*, 282 NLRB 1048 (1987).

Judicial Criticism of the Board's Traditional Make-Whole Remedy

In the instant case, the Board has found that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union before changing the terms and conditions of employment set out in Capitol Cleaning's contract with the Union. That brings us to the issue presented here: whether, in fashioning a remedy for this violation, the Board should apply a backpay obligation that inflexibly imposes the predecessor's contract wage rates on the successor employer for a period of years (thereby marking a return to *State Distributing*), as the majority finds, or whether the Board should adhere to *Planned Building Services*, which recognizes that (i) the successor's duty is to bargain, not to adopt the predecessor's contract wage rates, and (ii) had bargaining occurred, it may have produced an impasse or agreement on different contract wage rates in a fraction of the *State Distributing* backpay period. A review of Board and court decisions that have considered the issue demonstrates, in our view, that *Planned Building Services* should remain controlling in this important area.

As stated above, in *Kallmann*, supra, the Ninth Circuit, while agreeing with the Board that Kallmann (the owner of the restaurant) "had a duty to consult with the union before unilaterally changing the terms of employment," held that Kallmann had no obligation to accept its predecessor's labor agreement. (640 F.2d at 1103.) And yet, the court observed, "[t]he effect of the Board's order is to force Kallmann to abide by the terms of his predecessor's contract with the employees for the entire period of time Kallmann has owned the enterprise." (Id.) The court found that "*to the extent that a back pay order requires payment at the higher rate for the entire period of ownership, it acts as a penalty*." Id. (emphasis added). The court concluded "that an appropriate back pay remedy cannot require Kallmann to pay the higher rate beyond a period allowing *for a reasonable time of bargaining*." Id. (emphasis added).

In reaching this conclusion, the Ninth Circuit was guided by its decision in *NLRB v. Dent*, 534 F.2d 844 (9th Cir. 1976), where it considered a similar remedial order. In *Dent*, the successor—the Dents, who acquired Chico Convalescent Hospital (CCH)—retained the predecessor's employees and continued the predecessor's contractual terms for 2 weeks after commencing operations, and then reduced wages unilaterally in violation of Section 8(a)(5). The Board ordered the Dents, in relevant part, to make the employees whole by paying them the amounts lost as a result of the wage cuts for all hours worked since the reductions. The court of appeals re-

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> 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.

[11] The Board interpreted the "perfectly clear" exception to the general rule of *Burns* in *Spruce-Up Corp.*, supra. There, the Board held that the exception is to be "restricted to 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 "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." 209 NLRB at 195. As the D.C. Circuit has emphasized, "[t]he 'perfectly clear' exception is and must remain a narrow one because it conflicts with 'congressional policy manifest in the Act . . . 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.'" *S&F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 359 (D.C. Cir. 2009) (quoting *Burns*, 406 U.S. at 288).

[12] The *Love's Barbeque* holding has been called a "corollary" to the "perfectly clear" exception mentioned in *Burns*. See *Capital Cleaning Contractors*, 147 F.3d at 1008.

fused to enforce the backpay award, relying on both of the limitations on the Board's authority that we find dispositive here—it cannot prescribe contract terms, and it cannot impose punitive remedies:

> Congress has directed that the obligation to bargain does not compel the making of a concession by either party. This factor was persuasive in the Supreme Court's holding in *Burns* that a successor employer is not bound by the terms of his predecessor's collective bargaining agreement. Yet, the effect of the Board's back pay award, if enforced, is to force the Dents to abide by the wage provisions of their predecessor's contract with the [u]nion retroactively for the three and a half years that they have owned CCH. This is a longer period of time than the contract period in the union's agreement with [the predecessor].

534 F.2d at 847. The court also found that the Dents would not have agreed to the contractual wage rates: they had determined from an informal study of prevailing wage rates in the community that the predecessor's rates were too high. Thus, it concluded that the Board's backpay award "act[ed] as a penalty." Id. In support, the court in *Dent* cited the dissenting opinion in *Overnite Transportation Co. v. NLRB*, discussed in the margin.[13]

As *Kallmann*, *Dent*, and the dissenting opinion in *Overnite* demonstrate, the Board exceeds its remedial authority under the Act when it imposes on a successor its predecessor's contractual terms for so extended a period—in *Kallmann*, over 3 years; in *Dent*, 3 1/2; in *Overnite*, more than 2—as to effectively compel the successor to adopt its predecessor's collective-bargaining agreement. This result contravenes Section 8(d) and the teachings of *H.K. Porter*, supra. Further, when the facts may support a finding that the parties would have reached agreement or impasse far earlier and at wage rates less generous than the predecessor's, it defies both reason and the prohibition against punitive remedies to rely on the uncertainty principle to deny successors the *opportunity* to establish such facts—particularly given that "the vast portion" of the backpay period under the *State Distributing* rule our colleagues return to today "occurs in the protraction of the refusal-to-bargain-time by the Board" itself.[14]

As we have already noted, in *State Distributing*, 282 NLRB at 1048, the Board rejected the *Kallmann* court's analysis of the remedial issue and continued to apply its traditional remedy in the successor-avoidance context. The Board acknowledged record evidence that the union was "flexible" about wage rates, and that it was "entirely possible" that had the parties bargained, "they very well might have reached a compromise." Id. at 1049. Nonetheless, whether they would have done so and on what terms remained uncertain, and uncertainties are resolved "against the one whose unlawful acts have created" them. Id. As a result, the Board required State Distributing to make whole its predecessor's employees at the predecessor's contractual rate from February 1982 until it negotiated to agreement or impasse with the union—a period of at least 5 years, for the Board did not issue its decision until February 1987.

That brings us to *Capital Cleaning Contractors*, 147 F.3d at 999, in which the D.C. Circuit disagreed with the Board's reasoning in *State Distributing*. In particular, the court rejected the Board's "implicit assumption" that had the respondent not violated Section 8(a)(5) by unilaterally setting initial employment terms, "it would have agreed to the CBA into which its predecessor had entered." Id. at 1010–1011. Our colleagues say that the D.C. Circuit mischaracterized *State Distributing*. They say that, rather than making the "implicit assumption" the court described, the *State Distributing* Board "reasoned that because it is virtually impossible to determine what would have occurred in lawful bargaining, the wrongdoer who created the uncertainty should bear the burden of that uncertainty." But our colleagues miss the court's point. The court was simply stating the practical effect of applying the *State Distributing* remedy: in virtually every case, the respondent ends up *bound to the terms of its predecessor's contract* from the date it acquired the business and for years thereafter, even though its duty was merely to *bargain* with the union, not to accept the predecessor's contract.[15] This is exactly the same criticism of the Board's traditional remedy as the

[13] *Overnite Transportation Co. v. NLRB*, 372 F.2d 765 (4th Cir. 1967), cert. denied 389 U.S. 838 (1967), was a pre-*Burns* case in which the court applied the rule the Supreme Court rejected in *Burns*—i.e., that a legal successor was *not* free to set initial terms without bargaining. Applying its traditional make-whole remedy, the Board had ordered Overnite to restore the predecessor's wage rates from the date it took over the predecessor's operations until the parties reached agreement or impasse. The court majority enforced, but Judge Bryan in dissent disagreed with the "extent" of the remedy, finding "the period of restoration [i.e., the backpay period] . . . too great, a span not justified by the evidence." Id. at 770. In this regard, he did not believe that the backpay period could be viewed "exclusively as a part of the remedy resting in the discretion of the Board [when, in fact,] *the vast portion of it occurs in the protraction of the refusal-to-bargain-time by the Board*" itself. Id. (emphasis added). Judge Bryan would have remanded "for a redetermination of the period of restoration in accordance with the evidence." Id.

[14] *Overnite Transportation*, 372 F.2d at 770 (Bryan, J., dissenting).

[15] It is no answer for the majority to deny such a result by asserting that, as a matter of law, "the successor is never bound to the predecessor's contract" when, by its practical effect, the *State Distributing* remedy achieves the same result.

Ninth Circuit made in *Kallmann* and *Dent*, and as Judge Bryan made in his dissenting opinion in *Overnite*. The D.C. Circuit acknowledged that its view conflicts with that of several other circuit courts, but it concluded that *State Distributing*'s remedial standard conflicts with "two cardinal principles of labor law: (1) an employer cannot be required to accept contractual terms to which it did not agree, and (2) the Board's remedial order must be just that—remedial—and not punitive." Id. at 1012. We agree with the D.C. Circuit.[16]

It bears emphasis that, although the Board in *Planned Building Services* agreed with criticisms levied by the Ninth and D.C. Circuits regarding the Board's more expansive remedial approach in *Love's Barbeque* successorship cases (as exemplified by *State Distributing*), the *Planned Building Services* Board did not adopt the more extreme standard those courts proposed of limiting the duration of the backpay period to a reasonable period for bargaining. Instead, the Board adopted the more modest approach articulated by the Sixth Circuit in *Armco*, which merely provides the respondent with an *opportunity* to prove when any required bargaining would have resulted in an impasse or agreement on different terms than those set forth in the predecessor's collective-bargaining agreement.

Conclusion

We believe the Board in *Planned Building Services* appropriately balanced the competing interests of resolving uncertainty against a party whose conduct violates the Act, while recognizing black-letter legal principles that constrain the Board's remedial authority. As noted previously, (i) the Board's remedies cannot be punitive or otherwise exceed make-whole relief authorized by the Act; (ii) the Board may not impose substantive contract terms not agreed to by the parties; and (iii) the Board may not require successor employers to adopt the contract terms set forth in the predecessor's collective-bargaining agreement. The Board's decision in *Planned Building Services* recognizes these principles and sets forth a moderate, reasonable standard that our colleagues reject today in favor of an unbalanced approach we believe cannot be reconciled with what the D.C. Circuit characterized as "cardinal principles of labor law." 147 F.3d at 1012. Accordingly, we respectfully dissent.[17]

Dated, Washington, D.C. September 30, 2014

Philip A. Miscimarra, Member

Harry I. Johnson, III, 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.

[16] The majority also contends that the holding in *Planned Building Services* is inconsistent with cases where an employer refused to bargain with a newly certified union, and the Board declined the union's request to determine what the parties would have agreed to if the employer had not refused to bargain. In this regard, we believe the majority compares apples and oranges. Where an employer refuses to bargain with a newly certified union, for the Board to determine the terms the parties would have agreed to had they bargained would contravene Sec. 8(d) and *H.K. Porter*, which require that "the Board . . . oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." 397 U.S. at 107–108. By contrast, Sec. 8(d) and *H.K. Porter* are contravened by *not* permitting the showing provided for by *Planned Building Services* because the alternative—which our colleagues embrace—imposes the predecessor's contract terms for the entire make-whole period.

Our colleagues cite *NLRB v. Staten Island Hotel Ltd. Partnership*, 101 F.3d 858, 862 (2d Cir. 1996), as authority for the proposition that *State Distributing*'s remedial standard is not punitive. However, the *Staten Island* court itself expressed its preference for a remedy that avoids imposing the predecessor's contract rates on the successor. The court stated: "If it were possible to determine the terms of employment contracts to which former employees might have agreed, we might prefer an award of backpay at those hypothetical contracts' rates. *Cf. Kallmann v. NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981)." Id. at 862. *Planned Building Services* provided an opportunity—nothing more—to fashion a backpay award the *Staten Island* court preferred. Our colleagues respond that the court concluded that it is not possible to make this determination. We note, however, that the court framed the choice as one "between imposing a predecessor's contract terms *and fashioning reasonable hypothetical contract terms*." Id. (emphasis added). That is not the choice at issue here. *Planned Building Services* does not empower the Board to "fashion[ ] reasonable hypothetical contract terms." It gives *Love's Barbeque* successors an opportunity to furnish "an adequate factual basis" for concluding that timely bargaining would have produced an impasse or agreement at wage rates different than the predecessor's, 347 NLRB at 676, which is possible to do because it has been done, see *Armco*, supra. The choice here is between continuing to provide that opportunity and resolving uncertainty against the wrongdoer if the employer fails to furnish "an adequate factual basis," versus imposing the predecessor's contract terms in every case. This choice the Second Circuit's *Staten Island* decision did not address.

[17] Because we would not overrule *Planned Building Services*, a fortiori, we would not apply the majority decision retroactively.

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 coercively interrogate you concerning your membership in or activities on behalf of Service Employees International Union, Local 32BJ (the Union).

WE WILL NOT threaten you with discharge if you engage in activities in support of the Union or if they speak to representatives of the Union.

WE WILL NOT inform you or applicants for employment that we are a nonunion business or that we intend to operate as a nonunion business.

WE WILL NOT refuse to hire bargaining unit employees of Capitol Carpet and Specialty Cleaning Company (Capitol Cleaning), the predecessor employer, because they were members of and supported the Union, and to discourage you from engaging in these activities.

WE WILL NOT refuse to recognize and bargain in good faith with Service Employees International Union, Local 32BJ as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All building service employees employed by the Respondent to clean the offices at the Hartford Courant building located at 285 Broad Street, Hartford, Connecticut, excluding employees, who maintain and clean the pressroom at that building, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of the employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

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 notify the Union in writing that we recognize the Union as the exclusive representative of its unit employees under Section 9(a) of the Act and that we will bargain with the Union concerning terms and conditions of employment for employees in the above-described appropriate unit.

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

WE WILL, on request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to our takeover of predecessor Capitol Cleaning's operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and welfare and pension contributions, and other benefits, until we negotiate in good faith with the Union to agreement or to impasse.

WE WILL make whole the unit employees for losses caused by our failure to apply the terms and conditions of employment that existed immediately prior to our takeover of predecessor Capitol Cleaning's operation.

WE WILL within 14 days of the date of this Order, offer employment to the following former unit employees of the predecessor, Capitol Cleaning, who would have been employed by us but for the unlawful discrimination against them, in their former positions or, if such positions 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.

> Epifania De Jesus
> Razmik Hovhannisyan
> Mariana Lubowicka
> Anahit Zhamkochyan
> Emilio Figueroa
> Daniel Korzeniecki

WE WILL make the above-named employees referred whole for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to hire them, less any net interim earnings, plus interest.

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

WE WILL compensate the above-named employees 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 refusal to hire the above-named employees and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

PRESSROOM CLEANERS

The Board's decision can be found at www.nlrb.gov/case/34-CA-071823 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.

Sheldon Smith, Esq. and *Thomas E. Quigley, Esq.,* for the General Counsel.

Raymond R. Aranza, Esq. (Scheldrup Blades Schrock Smith Aranza PC), of Omaha, Nebraska, for the Respondent.

Andrew Strom, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Service Employees International Union, Local 32BJ (the Union) or Charging Party, on January 4, 2012, and March 9, 2012,[1] respectively, the Director for Region 34 issued a complaint and notice of hearing on May 31, alleging that Pressroom Cleaners, herein called Respondent, violated Section 8(a)(1) of the Act by interrogations, threats, creating impression that their union activities were under surveillance, and informing employees that it would be futile to select the Union as their bargaining representative and Section 8(a)(1) and (3) of the Act by refusing to hire six employees[2] because these employees joined and assisted the Union and Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union as the successor to Capitol Carpet & Specialty Cleaning, Inc. (Capitol Cleaning), and by establishing terms and conditions of employment of its employees that vary from the terms set forth in the collective-bargaining agreement between the Union and Capitol Cleaning.

The trial with respect to the allegations in the above complaint was held before me on July 23 and 24 and August 21. Briefs have been filed by all parties and have been carefully considered.

Based upon the entire record,[3] including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent is a Nebraska corporation, which provides janitorial services at various facilities throughout the United Sates, including at Hartford Courant building in Hartford, Connecticut (the Courant facility).

During the 12-month period ending April 30, 2012, Respondent purchased and received at the Courant facility goods valued in excess of $50,000 directly from points outside the State of Connecticut.

Respondent admits, and I so find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I so find, that the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Respondent's Operations

Respondent is a family run corporation with its headquarters in Omaha, Nebraska, and it provides industrial cleaning services and decorative services to newspaper facilities all over the United States. While its primary business involves maintaining and redecorating pressrooms, it has recently branched out to perform janitorial work for portions of facilities, where newspapers are printed, warehoused, and distributed.

Respondent's president is Roy Lilledahl. His son, Steve,[4] is the vice-president, who performs an essential role in overseeing the operations at each contracted facility.

Sierra McSharry is Steve Lilledahl's daughter (and granddaughter of Roy Lilledahl) and has the title of promotions director, where she is involved with marketing, human resources and supply management of Respondent's operations. Steve Lilledahl and McSharry are the "eyes and ears on the road" for Respondent at the facilities, where they perform services. Their responsibilities include hiring and firing employees at these locations.

Respondent began janitorial operations at the Hartford Courant facility, located at 285 Broad Street in Hartford, on December 12, 2011.[5] At that time, Joe Pena, an official from its Nebraska headquarters, became the site supervisor. In early January of 2012, Pena left the position to return to Nebraska, and Respondent promoted Francisco Teran, one of the employees whom it hired to replace Pena as site supervisor. Teran was an admitted 2(11) supervisor of Respondent from January 9, 2012, through May 18, 2012. Teran was terminated at that time and replaced by Elias Rosario, another employee, who was promoted from his position as a janitor.

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[1] All dates, unless otherwise indicated, are in 2012.

[2] The employees were Razmik Hovhannisyan, Epifania De Jesus, Mariana Lubowicka, Daniel Korzeniecki, Anahit Zhamkochyan, and Emilio Figueroa.

[3] General Counsel has filed a motion to correct transcripts, which was not opposed. The motion is granted, as modified, based on my evaluation of the record. The transcript is corrected as follows:

P. 30, line 6 "bit" should read "bid"

P. 60, line 23 "Thirteen dollars, fifteen cents" should read "Thirteen dollars, fifty cents"

P. 66, line 4 "talk" should read "take"

P. 81, line 9 "Ramon" should read "Razmik"

P. 178, line 11 "Yes" should read "No"

P. 510, line 19 "research" should read "resources"

P. 531, line 6 "Lubowska" should read "Lubowicka"

[4] Steve Lilledahl is also half owner of the company.

[5] Respondent had a contract to clean and maintain the pressroom at that facility for approximately 8–10 years.

B. Bargaining History

Capitol Cleaning held a janitorial service contract to clean all of the Hartford Courant's facilities, including its main facility, located at 285 Broad Street. In addition to that facility, the Hartford Courant also had two other facilities in Hartford, plus five other leased facilities in other cities in Connecticut. Capitol Cleaning's contract encompassed janitorial services at all of these facilities.[6]

The service contract with Capitol Cleaning provided that Capitol Cleaning was "solely responsible for the management of the cleaning services on the premises including but not limited to general supervision of areas to be cleaned."

The Union has been the collective representative of the Capitol Cleaning employees employed at the 285 Broad Street facility for many years. That recognition is based on Capitol Cleaning's membership in the Hartford Cleaning Contractors Association and authorizations signed by Capitol Cleaning, authorizing the association to represent Capitol Cleaning in collective bargaining with the Union.

The association and the Union entered into a collective bargaining agreement, effective from January 1, 2008, to December 31, 2011. The Union and Capitol Cleaning entered into a memorandum of agreement on February 22, 2008, which incorporated the terms of the contract between the association and the Union with some modifications.

Capitol Cleaning employed eight janitorial employees, who were covered by the collective-bargaining agreement between Capitol Cleaning and the Union, and the Union was the collective-bargaining representative for the Capitol Cleaning employees employed at the Hartford Courant's 285 Broad Street facility. The Union did not represent any of Capitol Cleaning's employees employed at other Hartford Courant facilities, located both in Hartford and in other cities in Connecticut.

C. Respondent Bids for Janitorial Contract at the Board Street Facility

On or about April 15, the Tribune Company, which is the parent company of the Hartford Courant, sent out requests for bids to various companies, including Respondent, for janitorial services at a number of its business units. The facilities included in the bid covered the Hartford Courant facilities located in Hartford as well as those facilities located outside of Hartford.

Respondent subsequently submitted janitorial bids for three Hartford Courant facilities, the main Board Street location, and the Elliot Street and Wormley Street locations. Respondent also submitted a bid for cleaning and maintaining the production pressroom at Broad Street, which was a rebid for a service contract that it already held at that time. According to McSharry, when Respondent bid on the contract for the office portion of the work, it was calculated on the basis of 6.25 full-time employees at a salary of $9 per hour. She further asserted that this was based on the intention to hire one supervisor, one full-time day porter, one full-time night porter and the rest as part-time cleaners to reach Respondent's goal of 6.25 full-time employees.

[6] That excludes the pressroom at 285 Broad Street, where, as noted, Respondent had the contract for maintenance for many years.

D. The Applications for Employment by Capitol Cleaning Employees.

In early September of 2011, Wojciech Pirog, field representative and organizer for the Union, was informed by one of the Capitol Cleaning employees that there was as rumor going around that the janitorial contract might be going out for bids and that there was a possibility that the bid could go to another company that was in the building doing industrial cleaning. Pirog did not know anything about Respondent at the time but after a Google search, he ascertained that Respondent was performing industrial cleaning at the Hartford Courant facility and that the person to contact from the Hartford Courant was Bernard Gulotta, the Hartford Courant's facility and engineering manager.

Pirog left several messages with Gulotta to call him and find out if the rumor was true. Gulotta did not return Pirog's calls.

On September 12, 2011, Pirog sent two documents to Gulotta. The first document was a letter signed by all of the Capitol Cleaning employees, stating that they wanted to inform the Hartford Courant that they will be losing their jobs and asked Gulotta to provide them with the name of the contact person as well as the telephone number of the new company in order to file applications with the new employer. The letter asked Gulotta to provide the information "to our Service Employees International Union, Local 32JB Representative Wojciech Pirog at 196 Trumbell Street, Hartford, CT 06103 via phone at 860–560–8674 at your earliest convenience."

The second document, also dated September 12, 2011, was printed on the Union's letterhead. This document contains the signatures of all eight Capitol Cleaning employees and reads as follows:

> The undersigned building service employees are currently employed at The Hartford Courant facility at 285 Broad Street, Hartford, CT 06115. Each of us hereby makes an unconditional application for employment with the newly contracted cleaning contractor, which we understand will be at the facility beginning September 30, 2011.

Please advise our collective-bargaining representative, Service Employees International Union Local 32 BJ how we may obtain an application.

Gulotta did not respond to either of these documents nor make any attempt to contact the Union.

Shortly after not hearing from Gulotta, Pirog, along with other members of the bargaining unit, began leafleting at the employee entrance to the Hartford Courant building. The leaflets distributed by Pirog and the employees to tenants in the building and to the public asked them to reach out and call Gulotta to help save jobs for the workers in the building. During the leafleting, Gulotta rushed out of the building with a security guard and asked Pirog why the Union was leafleting, adding that the Capitol Cleaning crew were still in the building and they were still working there and that the Union "don't need to do this."

Pirog asked Gulotta about the rumors that there was going to be a change of contractors. Gulotta admitted that Capitol Cleaning was doing a month-to-month contract at the time, which was different than before, but Gulotta did not confirm or deny

that Capitol Cleaning would be replaced. Gulotta merely repeated his comments that everything is fine and that the employees are working and asked Pirog to "go away." The Union continued to leaflet the premises.

On or about September 28, the Union conducted a rally on Flower Street across the street from the Hartford Courant parking lot to protest the expected job loss if the paper terminated its contract with a unionized cleaning company.

The Union issued a press release, describing the rally, which included a quote from Epifania De Jesus, one of the employees involved. The press release is as follows:

> FOR IMMEDIATE RELEASE
> Wednesday, September 28, 2011
>
> BUILDING CLEANERS AT HARTFORD COURANT RALLY TO SAVE THEIR JOBS
> -Protest Aims to Keep Courant's Unionized Cleaning Company, Protect Good Jobs-
>
> Hartford, CT-Building cleaners at Connecticut's largest newspaper rallied Wednesday to protest their expected job loss if the paper terminates its long-time contract with a unionized cleaning company.
> "These cleaners have worked hard to keep the building of this major newspaper well-maintained, sanitary and safe," said Wojciech Pirog of 32BJ SEIU, which represents the workers. "They deserve to keep their jobs, and not be thrown out on the street."
>
> The workers learned recently that the Hartford Courant could end its contract with Capitol Cleaning as early as October 1, which would throw the building's eight cleaners out of work. Some of these men and women have been at the building more than 20 years.
>
> The noon rally on Flower Street, across from the Hartford Courant's parking lot, drew workers and supporters from around the area. The workers said they have reached out to the Courant to apply to continue working under any new contractor. The company has not responded to their requests.
>
> Kurt Westby, Connecticut State Director for SEIU 32BJ, said in a statement that it is significant all of the workers are full-time with health benefits and a retirement plan. "These are good jobs that have given these workers and their families a toehold in the middle-class," Westby said. "Hartford needs its employers to help in creating more good jobs, not destroying them. We call on the Courant to retain Capitol Cleaning, and not throw hard-working members of our community out on the street."
>
> Epifania DeJesus, who has worked cleaning the Courant building for 16 years said her husband suffered a stroke a few years ago and now they both depend on her health insurance and income. She learned recently that she might lose her job as early as Friday: "I'm stressed out because I think, 'What am I going to do?'"
>
> With more than 120,000 members in eight states and Washington, D.C., including 4,500 in Connecticut, 32BJ SEIU is the largest union of property service workers in the country.

On September 19, Pirog decided to contact Respondent directly. He telephoned Respondent's corporate office in Omaha, Nebraska, and spoke with Linda Mason, Respondent's human resources director. Pirog used a fictional name of "Tom" and told Mason that he lived in Hartford and was interested in applying for work in Hartford. Mason informed Pirog that Respondent was interested in hiring people and would send him a job application. Mason faxed Pirog a job application immediately. Pirog made copies of the application submitted to him by Respondent and distributed them to each of the eight employees to fill out. Some of the employees needed some help in filling out the applications, so Pirog provided assistance to them in that regard. All eight employees filled out applications and returned them to Pirog.

On September 26, Pirog sent the completed applications to Respondent, accompanied by the following letter:

> Pressroom Cleaners
> 5709 South 60th Street
> Omaha, NE 68117
>
> To Whom It May Concern:
>
> Enclosed please find eight completed job applications from all of the janitors currently working at The Hartford Courant for Capitol Cleaning. They would like to apply for work with your company since it has been brought to SEIU Local 32BJ's attention that your company has either been awarded or will be awarded the cleaning contract.
>
> Sincerely,
> Wojciech Pirog
> SEIU Local 32BJ
> 196 Trumbull Street, 4th Floor
> Hartford, CT 06103
> (860)–560–8674

Another 6 weeks passed and neither Pirog nor any of the Capitol Cleaning workers received any communications from Respondent. Thus, on November 2, Pirog sent an email to Respondent, entitled "Hartford Courant job applications for Custodians." Along with the email, he resent the eight completed applications.

The email stated that the eight janitors "would all like to apply to work with your company since it has been brought to SEIU 32 BJ's attention that our company was awarded the cleaning contract. I have already sent your company a paper copy of these applications on September 26, 2011."

Pirog received a return email from Theresa Frangoulis, an admitted agent of Respondent, which states as follows: "Thank you for the applications. I will make sure Mr. Lilledahl is aware that we have them."

E. The November 8 Meeting

On November 8, McSharry contacted Augie Madiera, the site supervisor for Capitol Cleaning, and informed him that Respondent was interested in speaking with some of Capitol Cleaning's employees about possible employment with Respondent. Madiera called her back a half-hour later and suggested that evening at 7 pm. McSharry agreed to that time and

informed Madiera that she would be interested in interviewing employees Lubowicka, Figueroa, Hovhannisyan, Zhamkochyan, De Jesus, and Korzeniecki. According to McSharry, Respondent excluded employees Ramon Garcia and Eddie Williams form this process because it had decided not to consider them for employment because of negative recommendations from Gulotta.

McSharry instructed Madiera to inform the employees that Respondent had been notified that it had won the bid to take over the contract for cleaning the facility and that Respondent would want to interview these Capitol Cleaning employees for positions as Respondent's employees. Madiera subsequently informed McSharry that he had notified all six of the employees about the meeting.

The meeting was held at 7 pm, as scheduled, at the Hartford Courant facility. Present were Steve Lilledahl, McSharry and employees Lubowicka, Figueroa, Hovhannisyan, Zhamkochyan, and De Jesus. Korzeniecki, although invited to attend the meeting, was not present because he was working the night shift and was not at work yet. At the start of the meeting, Lubowicka informed Lilledahl and McSharry that Korzeniecki was not there because his shift starts later. Neither Lilledahl nor McSharry made any comments about Korzeniecki's absence.

Lilledahl did all of the talking on behalf of Respondent. He informed the employees present that he was the half-owner of the new company that will be replacing Capitol Cleaning as the contractor as the Courant Building. Lilledahl explained that the Hartford Courant was having financial problems and that Respondent charges less for its services than Capitol Cleaning and that is why Respondent won the bid. He added that if employees agreed to work for Respondent, they would be paid $9 per hour with no benefits, no holidays and no paid vacations.[7]

De Jesus asked who was going to work the overnight shift. This was the shift filled by Garcia and Williams at Capitol Cleaning. Since Williams and Garcia were not at the meeting, De Jesus was concerned about who would be doing that work. Lilledahl replied that Respondent was not interested in hiring either Garcia or Williams and the Respondent was going to bring their own people to cover the third shift.

Lilledahl then informed the employees that Respondent does not work with unions, does not deal with unions and does not want a union at all.

De Jesus commented that her husband was very sick and had a stroke and that she as well as all of the employees rely on the health insurance that Capitol Cleaning had provided.

Zhamkochyan inquired if it would be possible to be hired without having to clean bathrooms because that job is hard on her hands. Lilledahl responded that Respondent would look into that request if the employee was hired.

Hovhannisyan commented that Respondent must not be much of a company if it could only afford to pay $9 per hour.

Lilledahl informed the employees that Respondent would give them a few days to talk with their families before deciding whether they were interested in working for Respondent.

[7] The employees had been earning at Capitol Cleaning between $13 and $13.80 per hour and had health insurance and other benefits under the contract between Capitol Cleaning and the Union.

De Jesus asked how the employees were supposed to contact Respondent. McSharry responded by distributing her business card to each employee in the room with her cell number and office number listed on the card. At the close of the meeting, De Jesus informed Respondent that they would be hearing from the employees.[8]

F. Employees Respond to Respondent

Subsequent to the November 8 meeting, the employees met and discussed among themselves whether to accept jobs with Respondent. Although there was discontent expressed due to the reduced wages, De Jesus reminded the employees that most of them were close to retirement and it would be better for them to accept the job. The employees all agreed to accept. De Jesus then called the Union and explained the situation to Union Representative Juan Hernandez. Hernandez advised the employees that if Respondent offers them a job, they should take it.

Consequently, De Jesus called McSharry's cell phone number and left a message stating that all six former Capitol Cleaning employees were interested in accepting jobs with Respondent. De Jesus left her name and phone number. McSharry did not return the call.

About a week after the November 8 meeting, Hovhannisyan telephoned McSharry, introduced himself and informed her that he, on behalf of all of the employees, would like to accept Respondent's offer of employment. McSharry responded that Respondent was still looking into its options and would let the employees know of its decision.

In fact, Respondent never let the employees know about its decision on whether to hire them. Rather, as will be described more fully below, it did not hire any of them and filled its staff with all new employees, starting on December 12, 2011.

G. Statements Made by Teran in January and February of 2012

As noted above, Respondent staffed its operations at the Hartford Courant with new employees, starting on December 12, 2011. In January of 2012, the Union began an organizational campaign at the facility, and a union representative named Gabriel began speaking to employees as they entered the building about the Union and handing out literature and union cards to the employees.

On a day during the first week of January 2012, Respondent's employees Elias Rosario and Juan Cruz were walking toward the entrance to the building when Gabriel approached them and introduced himself and began telling them about the Union. Gabriel gave them union cards to sign, and they took

[8] The above findings with respect to the meeting of November 8 are based on a compilation of the credited portions of the testimony of De Jesus, Lubowicka, Figueroa, Hovhannisyan, Zhamkochyan, McSharry, and Lilledahl. Most of the facts described are not disputed. There is a dispute concerning what Lilledahl said about the Union but I have credited the version of De Jesus, substantially corroborated by Lubowicka and Figueroa. While Hovhannisyan and Zhamkochyan did not recall any discussion of the Union at the meeting, even Lilledahl and McSharry conceded that he said that Respondent is a nonunion company. According to Lilledahl, "I would have introduced us and explained that we were non-union because I knew that they were. I didn't want them disillusioned or not understanding what we were offering them."

them. Rosario could see Teran watching the employees and Gabriel through the Courant entrance's glass doors.

When Cruz and Rosario entered the building, Teran approached them. He said to the employees that they "couldn't talk to him (referring to Gabriel) because he was from the Union."[9] Teran added that if the employees talked to him (Gabriel), they would get fired. Teran also mentioned that the crew that used to work here had the Union and that is why they weren't working at the Hartford Courant.

Madelyn Castro was hired by Respondent on January 8, 2012. She was interviewed by Teran and had been recommended for the job by her sister and her sister's husband, who were already employed at Respondent. Castro's sister and sister's husband were also present at the interview. Castro had no previous experience as a janitorial or maintenance worker. When Castro was asked about prior experience as a cleaner before this job, she replied, "I cleaned my house."

Castro began her employment on January 9, 2012. She worked Friday, Saturday, and Sunday and at times, other days if called by Teran. On January 10, Castro, Cruz and Rosario were coming into the building together along with two other employees (Felipe and David). They were approached by Gabriel, and Gabriel discussed joining the Union with the employees, telling them about the benefits and gave out union cards to the employees. Gabriel also handed out a document entitled, "Cleaning Workers Know Your Rights." This document is as follows:

Cleaning Workers KNOW YOUR RIGHTS

The National Labor Relations Act guarantees you the right to join a Union and speak up for your rights.

It is illegal for your bosses to:

- Ask what you think about the Union, if you signed a Union card or ask you who else signed a card or is involved in the Union campaign.
- Promised or give you a raise, a promotion, or additional benefits if you oppose the Union.
- Threaten to fire you, lay you off, cut your pay, reduce your hours or benefits because you support the Union.
- Discriminate or treat employees differently because they support the Union, including making assignments, disciplinary actions or transfers.

It is illegal for Building Owners to:

- Threaten to have you fired, laid off or get rid of cleaning workers because your support the Union.

Your bosses and the building owners have to respect your rights. If they violate your rights, call SEIU Local 32BJ at (860) 560–8674.

Our union represents more than 70,000 cleaning workers in commercial and residential buildings in NY, NJ and CT.

SEIU Local 32BJ * 196 Trumbull Street, Hartford, CT 06103

When Castro, Cruz, and Rosario entered the building, Teran confronted them. Teran asked the employees what that gentleman (referring to Gabriel) was asking them or telling them. One of the employees answered that he was telling us about a union. Teran told the employees that if the employees kept talking to the Union they would be fired. Teran added that the employees who worked beforehand (at Capitol Cleaning) "were fired because of that."

A few minutes later, Cruz and Rosario were in Teran's office. Teran asked Rosario if he was talking to Gabriel again, and Rosario added that Gabriel had given him a union flyer. Teran asked Rosario to give him the flyer because he was going to save it for evidence. Rosario gave Teran the flyer that he had received from Gabriel, set forth above.

On February 9, Teran was speaking with Rosario and Cruz about various work-related issues. Teran criticized Rosario because a new employee that Teran had asked Rosario to train had forgotten to remove pizza boxes from the recycling bin. Rosario replied to Teran that he (Rosario) was just a regular employee and was helping him (Teran) out in giving training. Rosario stated that if he was going to be in charge of the night crew that he deserved a raise. After some further discussion about a raise, Rosario mentioned that by law the employees were supposed to be paid $12 an hour. Teran then stated that it sounds like Rosario was talking to the Union and added that he (Rosario) could get fired because of that. Teran also informed Rosario that he (Teran) was going to call McSharry and inform her that Rosario was talking with the Union.

The next day, Teran approached Rosario and informed him that he did call McSharry and told her that Rosario had spoken to the Union. Teran related to Rosario that McSharry had told Teran that Rosario had his own rights and that he can talk to the Union or to whomever he wants.[10]

Rosario ultimately received a raise from Teran in March. Teran was terminated in May of 2012 for alleged sexual harassment. He was replaced as site supervisor by Rosario.

The above findings with respect to the comments made by Teran to employees of Respondent in January and February of 2012 are based on a compilation of the mutually corroborative and undenied testimony of Rosario, Cruz, and Castro. As noted above, Teran did not testify.

H. Respondent's Hiring Decisions

Respondent presented three witnesses, who testified in regard to its hiring process and decision. Gulotta testified that the Tribune Company, the parent company of the Hartford Courant sent out a national bid covering newspapers owned by the Tribune in various parts of the country, including the Hartford Courant properties. As noted above, Capitol Cleaning was the incumbent contractor at the Courant's Broad Street facility as well as at two other facilities in Hartford, Wormley Street and

[9] Rosario further testified that Teran already knew Gabriel because "he is from the Union and he already knew him." Rosario did not testify how he became aware that Teran knew that Gabriel was from the Union.

[10] McSharry denies ever speaking to Teran about this conversation between Teran and Rosario or about Rosario's speaking to the Union. Teran did not testify.

East Elliott Street.[11]

According to Gulotta, the bids were awarded facility by facility and were decided in a conference call with Tribune officials, in which he participated, sometime in November.[12] Respondent was awarded the janitorial contract at 285 Broad Street as well as the contract to clean and maintain the pressroom at that facility, which it had been previously performing.

Capitol Cleaning as the low bidder for the Courant's Wormley and East Elliott facilities retained those locations, and Respondent was not successful in its bids to service those facilities.

Gulotta conceded that although he received the letter from the Union with the applications of Capitol Cleaning employees for employment to be forwarded to Respondent that he did not turn it over to Respondent. Gulotta further testified that he was aware of Respondent's meeting on November 8 at the Courant with Capitol Cleaning employees as a result of a conversation with Steve Lilledahl on that day.

Lilledahl informed Gulotta that he was interviewing the Capitol Cleaning employees that evening and according to Gulotta, Lilledahl said that "I'm going to offer them jobs working for me as Pressroom Cleaners employees." Gulotta further testified that he was not asked by Lilledahl nor any Respondent official about any of the Capitol Cleaning employees and that he did give any opinions, recommendations or information about any of the Capitol Cleaning employees to Respondent. The only item that Gulotta testified that he mentioned to Lilledahl about employees was a complaint that he made to Lilledahl several weeks before about Respondent's employees at the pressroom not signing in, which was a similar complaint that he had made to Bob Smylon, president of Capitol Cleaning, about Capitol Cleaning's employees also failing to sign in when working at the facility.

Gulotta testified further that about a week after the November 8 meeting, he saw Lilledahl and asked him how did the meeting go with the Capitol Cleaning employees. According to Gulotta, Lilledahl responded that Respondent was not successful in hiring any Capitol Cleaning employees. Gulotta also testified that Lilledahl said to him that he was disappointed that the employees didn't accept his offer.

Gulotta testified further that after November 8 he was pushing Respondent to get started at the Broad Street location as soon as possible because he wanted that location to be the first one of the Tribune bids to be up and running. Ultimately, the Respondent was given a start date of December 12, and he received several emails from McSharry in December, detailing Respondent's progress in that regard.

Finally, Gulotta testified about "shadowing," which he described as a process "where the contractor that was awarded the bid comes in and they walk around the building and they see how the building is being cleaned." He further asserts that once the contractors has "shadowed" the operation, they tell him that they have seen what goes on and now were ready to start the cleaning process. Gulotta further believed that the "shadowing" by Respondent started in mid-November after the meeting with the Capitol Cleaning employees.

Steve Lilledahl testified about the November 8 meeting with the Capitol Cleaning employees. He testified that after he introduced himself and McSharry and informed the employees that Respondent would be the new contractor, he informed the employees that Respondent would pay $9 per hour with no benefits and no union. According to Lilledahl, the employees did not "react too good" to these comments. He added, "They were not happy campers." Lilledahl stated that he could tell from their "body language" that they were unhappy and they were sitting with arms crossed and were obviously upset. Lilledahl added that one of the employees stated, "We must not be much of a company if that's all we can afford to pay." Based upon the above facts, Lilledahl testified that after this meeting, it was his impression that these employees did not want to work for Respondent.

Lilledahl insisted that he did not offer any jobs to anyone at the meeting but merely informed the employees of what Respondent was offering and that the employees asked for time to decide if they were interested. Respondent agreed and informed them to get back to Respondent if they were interested.

Lilledahl testified further that McSharry placed ads in craigslist immediately after the November 8 meeting for jobs at the facility, and Respondent received 35–40 applications.

Lilledahl testified further that after the meetings with the Capitol Cleaning employees, he and McSharry were both upset about what happened at the meeting and they were both stating how sorry they felt for the employees. According to Lilledahl, there was no discussion between Lilledahl and McSharry about whether to hire these employees at that time, but he conceded that, as of that time, Respondent was ready to hire them if they were willing to work for $9 an hour and no benefits. Indeed, Lilledahl further conceded that in many of the contracts that Respondent acquires, it will normally hire the employees previously working at the particular locations.[13]

Lilledahl recalled that about a week after the November 8 meeting with the Capitol Cleaning employees, McSharry received notification from the Capitol Cleaning employees that all of these employees were interested in working for Respondent. Lilledahl was uncertain and vague about how the process continued and the ultimate decisions made, testifying that McSharry was primarily responsible for the subsequent interviews and decisions. Lilledahl did testify finally, after some prompting, that he and McSharry, at some point, decided to continue with the interviewing, notwithstanding the acceptance by the Capitol Cleaning employees of jobs, to see what Respondent had and then would make a decision.

Lilledahl further testified that, at some point in December, he and McSharry "shadowed" the Capitol Cleaning employees for two or three days, and both concluded that the Capitol Cleaning employees were "slow," and he did not believe that they would

[11] The employees at East Elliott Street and Wormley Street facilities, although employed by Capitol Cleaning, were not represented by the Union and did not have a union contract.

[12] The contract was not actually signed with Respondent until November 18.

[13] Notably, Lilledahl further conceded that none of these prior locations, where Respondent hired the workforce employed by the prior contractor, involved employees, who had been represented by a union.

be able to do the job quickly enough. Finally, Lilledahl testified that when Respondent decided not to hire any of the former Capitol Cleaning employees, their union affiliation played no part or role in that decision.

McSharry was Respondent's final witness. She testified that the contract for the job at 285 Broad Street was bid by Respondent based on a projection of 6.25 FTEs at a salary of $9 per hour with no benefits. She also testified that sometime in September, she was informed by her grandfather, Roy Lilledahl, that Respondent had received job applications from the Union on behalf of the former Capitol Cleaning employees. However, at that time, Respondent had not been awarded the contract as of yet.

According to McSharry, at the end of October, she participated in conference calls with Tribune representatives, wherein it was disclosed that Respondent had been awarded the bid to clean offices at 285 Broad Street (replacing Capitol Cleaning) as well as that it had retained its previous contract for cleaning and maintaining the pressroom at that facility, plus that it had also won bids at several other Tribune sites in the State of Florida for cleaning offices, where it had previously serviced only the production sites for those papers.

At that time, Respondent had just lost its contract for work at the Tampa Tribune in Florida, resulting in an entire crew being out of work. Pursuant to the Tribune contract, described above, Respondent was awarded the bid for the Orlando Sentinel contract. Therefore, Respondent decided to take care of these matters first and arrange to put the crew that had been working for Respondent at Tampa to transfer to the Orlando site. This process required the attention of McSharry and Lilledahl, so it decided to hold off staffing the Hartford location until it completed the transition between Tampa and Orlando.

According to McSharry, Gulotta was pressing Respondent to get moving on starting up in Harford because he wanted to be one of the first of the Tribune contract locations to start operations. Notwithstanding that fact, Respondent did not make any efforts to staff the Hartford location until November 8 when finally McSharry and Lilledahl came to Hartford to check out the premises, inventory and other start-up issues and to conduct interviews. This was, as McSharry testified, because "Bernie wanted to start sooner than later."

Pursuant, therefore, Respondent placed an ad on craigslist[14] on November 8, the date that Respondent's representatives arrived at the facility. McSharry testified that she had been using craigslist for about 18 months and found it to be a great resource. Prior to that time, McSharry states that Respondent would primarily obtain staff from recommendations, often from the contractor.

In that regard, McSharry testified that she had spoken to Gulotta about the Capitol Cleaning employees prior to setting up the interviews and that Gulotta had made "insinuations" that there had been issues with employees Eddy Williams and Ramon Garcia. More specifically, McSharry testified that Gulotta informed her that they had been observed sleeping on the job.

Subsequently, McSharry spoke to Madiera and told him to instruct only the six employees to show up for the interviews on November 8, According to McSharry, Respondent decided it would not be necessary to interview Garcia or Williams, and therefore, to eliminate them from consideration or employment "because of the recommendation from our bosses."[15]

McSharry's testimony about the interviews is relatively consistent with the facts described above as to what was stated during the meeting. McSharry testified that it was obvious to her that employees were very upset about the reductions in wages and benefits and that they reacted negatively towards Respondent. McSharry testified, "At that point in time, I felt like I killed their pets or something." Thus, she asserts that she was uncertain whether any of the employees were interested in working for Respondent.

McSharry admitted that about a week after the meeting, she was notified by both De Jesus and Hovhannisyan that all six of the former Capitol Cleaning employees were interested in working for Respondent at $9 per hour with no benefits.

When asked on direct testimony by her counsel why Respondent didn't hire them at the time, she explained Respondent's reasons. This exchange is set forth below:

> Q: At that time, did you tell either—Well, did you tell Razmik okay, you're hired?
>
> A: No.
>
> Q: Why not?
>
> A: Because there were some issues as far as the flexibility that they would have as employees for us, as far as, when you're starting these, it's very difficult. We're working all kinds of hours.
>
> Q: Any other concerns that you had?
>
> A: They were extremely disgruntled with us. When me and my dad start a contract, we're usually only there as long as we need to be and then, we walk away and they usually run themselves. I mean, this is how we bid them. This is why we are so much cheaper is because we go out, we start them, we manage them from afar and I do quarterly visits in and check in with everybody.
>
> So, when you're walking away from something, you want to make really, really sure you have the utmost confidence in your people.

McSharry further testified Respondent had received a "stellar" response from the ads that it placed on craigslist on November 8. Nonetheless, McSharry did not interview or contact any of the individuals, who responded to the November 8 ad in craigslist at that time.

She testified that she and her father were busy on a job in Uniontown, Pennsylvania, and then in completing the transition between Tampa and Orlando, as described. Thus, Respondent did not get around to returning to Hartford until December 6

[14] Craigslist is a website that runs ads for various types of items.

[15] Referring to Gulotta's alleged complaints about these two employees. As I have noted above, Gulotta denied making any negative comments to Respondent about any employees, although he was not asked specifically if he made any comments about Garcia or Williams or if they had been observed sleeping on the job.

when McSharry decided to run another ad in craigslist for jobs.

According to McSharry, she did so to again see what the hiring market in Hartford was like and added that at that time, no decision had been made concerning who would be employed at the Hartford facility. She replied, "No, and from my position, it would have been easier if we could have gone. You know if we did go with the Capitol Cleaning employees."

When asked why was Respondent concerned that they were not the right people for the job, McSharry asserted that Respondent had spent a few days "shadowing the employees" and concluded that they were moving too "slow" and that Respondent concluded based on these observations that the employees "were not going to be able to cut it with what they were showing us." She further noted that Respondent's bid the job based on 6.25 FTEs and that Capitol Cleaning based its bid on 8 FTEs. Thus, she contends that she and her father believed that these employees worked too slowly to be able to meet the bid requirements. McSharry testified that she, her father and Joe Pena shadowed the employees for 3 days, Wednesday, Thursday, and Friday, December 6–8, before the job started on Monday, December 12. According to McSharry, she personally "shadowed" five of the former Capitol Cleaning employees[16] and that Pena and Lilledahl shadowed these employees as well.

She further testified that as a result of the "shadowing," she and her father concluded that the former Capitol Cleaning employees would not be hired and that Respondent would hire its staff through the interview process and the ads from craigslist.

McSharry furnished testimony about the individuals that Respondent decided to hire while rejecting the former Capitol Cleaning employees.

McSharry stated further that Respondent again received significant numbers of responses to the December 6 craigslist ad. She added that in the November ad she had not posted a phone number but in the December ad, she did so and received numerous phone calls, emails, and resumes. According to McSharry, the first two applicants whom she interviewed in December were Rosario and Joel Buhanji, whom she met with at Friendly's Restaurant on December 8, both of whom came through the craigslist ads. McSharry testified that both Rosario and Buhanji had prior experience in the cleaning field and seemed to her to be motivated, energetic, and that they would be flexible. She believed that they would be good employees but contends that she did not offer either of them a job during the interview. She did ask them to fill out paperwork, and it was necessary to conduct a background check before offering anyone a job.[17]

McSharry testified further that after the Thursday, December 8 interviews with Buhanji and Rosario, Respondent "shadowed" the five employees once again that evening and concluded that these five worked too slowly. According to McSharry, she and her father had a discussion on Thursday evening, December 8, and decided not to hire any of the former Capitol Cleaning employees. She testified that "this contract isn't going to work if they're moving the way that they're moving now. We'll have to hire a lot. I mean we're looking at a lot more full-time employees than we had originally bid."

Accordingly, McSharry contends that on Friday, December 9 and Saturday, December 10, Respondent conducted interviews with a number of applicants and eventually hired an initial crew of nine employees plus Supervisor Pena, starting on Monday, December 12.

On Friday, December 9, McSharry sent an email to Gulotta at 3:40 pm as follows:

> From: Sierra Lilledahl [hartfordjobsprc@llve.com]
> Sent: Friday, December 09, 2011 3:40 PM
> To: Gullotta,Bernie; theresa@pressroomcleaners.com
> Subject: Update
>
> Bernie,
> I wanted to update you on our progress. We currently have a crew of six. I have four more interviews on Saturday (to fill p/t weekend positions and one more third shift position). I am very excited about the employees! All have over 2+yrs experience in the janitorial field. We are conducting staff safety training and orientation Saturday morning at 9am. All of our paper products, chemicals, and equipment are onsite and being put away/assembled. Joe's email and computer are up and running! We shadowed Capitol Cleaning last night ad will do the same Saturday and Sunday night (full crew).
>
> Hope you have a great evening!!!!!!
>
> Sincerely,
> Sierra
> 402–290–6455
>
> As always, if you have any questions and/or concerns please do not hesitate to contact me ANYTIME!

McSharry testified that the crew of six referred to in her December 9 email included supervisor Pena, Rosario, Buhanji and applicants Paige James, Heriberto Ramirez, and Juan Cruz. Cruz and Ramirez were, according to McSharry, both recommended to Respondent by Rosario during his interview.

Cruz was interviewed (in a group) on December 9 by McSharry, Lilledahl, and Pena. Cruz had no experience in the janitorial field. As noted, he had been recommended by Rosario, who was interviewed by Respondent on December 8. Rosario informed McSharry during the interview that he had some friends that were interested in employment for any available positions. Rosario, therefore, arranged for both Cruz and Ramirez to interview with Respondent the next day, December 9.

Cruz, as noted above, was hired by Respondent and was part of its initial crew that started on December 12 and is still employed by Respondent. Cruz, as also reflected above, had no experience in the industry[18] but, according to McSharry, was hired by Respondent because she had gotten a good feeling from Rosario and that she decided to hire Cruz based on Rosario's recommendation, plus the fact that Rosario stated to her

[16] All except Daniel Korzeniecki, who worked as a day porter.

[17] Rosario, who, as noted, was eventually promoted to supervisor in May of 2012, testified, contrary to McSharry, that he was offered a job by McSharry on the same day of this interview, December 8, 2012.

[18] His job application listed his previous jobs as picking fruit and delivering pizza.

that he would assist in training Cruz if Cruz were to be hired.

Respondent also hired Ramirez on December 9, who was also recommended by Rosario. According to McSharry, Ramirez was very experienced in the janitorial field, and Respondent wanted to hire him as a full-time day porter.[19]

Paige James was interviewed and hired on December 9. According to McSharry, she answered Respondent's craigslist ad and had cleaning experience. McSharry stated that James and her sister-in-law had their own subcontracting company, where they did building cleaning.[20] McSharry also testified that James seemed to her during the interview to be "extremely motivated, a self-started." James was hired for a full-time position on the "graveyard" shift, where she would be working by herself.

The rest of Respondent's initial crew (starting on December 12) was interviewed over the weekend of December 9 through 11. They were Francisco Teran, Felix Roman, Christopher Martinez, and Wesley Mendez.

McSharry testified that Teran had 14 years of experience in the janitorial field,[21] and he was interviewed and hired on December 10 for a part-time position as a cleaner. According to McSharry, Teran was extremely energetic and was working at a dealership at the time and only wanted part-time work. However, Teran express, according to McSharry, during the interview, that he was flexible and anytime Respondent needed him, he would be available.[22]

Felix Roman was also interviewed and hired on December 10. According to McSharry, Respondent hired him because he was "extremely flexible" and indicated during the interview that he would work whenever Respondent wanted him and was okay with $9 per hour. Further, he had done some janitorial work before.[23]

Christopher Martinez was also interviewed and hired on December 10. According to McSharry, during his interview, he appeared to be flexible, really wanted to work and was very energetic. She did not testify that Martinez had any previous janitorial or cleaning experience and his job application did not so reflect.[24] Martinez started out on the evening shift as a part-time employee, and then after James was terminated, Martinez was transferred to her full-time position on the "graveyard" shift.

The final employee hired by Respondent as part of its initial crew was Wesley Mendez. According to McSharry, Mendez was recommended to her by Respondent's pressroom manager at the Hartford facility. McSharry testified that Mendez had previous experience working and loading fruit and had maintenance rather than cleaning experience. McSharry added that like Martinez, Mendez was very energetic during the interview and appeared to her to be really wanting to work for Respondent.

McSharry further testified that of its initial crew of 8 employees, plus Pena, the supervisor, only two were full-time employees, the day and night porters (James and Ramirez). The rest were all part-time employees.

McSharry also testified that she had interviewed and hired Lizzette Escobar for the night porter position (11 pm to 7 am shift) because Escobar had excellent experience cleaning at hotels but that Escobar would not start work on December 12 due to some medical issues, so she was not part of Respondent's initial crew. McSharry also testified that Escobar was extremely motivated and really wanted the night shift, graveyard position, which is difficult to fill.[25]

Subsequent to the initial start date, the record establishes, and McSharry concedes, that Respondent experienced a significant amount of turnover requiring Respondent to hire a number of new employees. For example, Mendez, Ramirez, and James were all terminated by Respondent after a short time as employees of Respondent.

McSharry testified that Respondent did not consider for hire or hired any of the former Capitol Cleaning employees for these openings for the same reasons that she testified that it did not have them initially. These new employees were hired on various dates in January through April of 2012.

The bulk of these employees were hired by Respondent's supervisors, Teran or Pena. One of these employees was Jonas Borja, hired on December 21, 2011. His job application listed a previous position as driver and paver on machines and trucks, but no experience as a cleaner.

Evelyn Martinez was hired on January 6, 2012. Her job application did not list any previous cleaning experience.

Ruth Rodriguez was hired on February 3, 2012, and her job application lists a previous job at a company named DMS Systems in Windsor, Connecticut, but does not reflect what her position or job responsibilities were at that job.[26]

Aponte Celliness was hired on January 20, 2012, and her job application did not disclose any janitorial experience. The only position that she listed was a temporary position at an agency doing gift fill out and putting food in baskets. She added that she cleaned her area of work in that position. Celliness, according to the document submitted by Respondent, resigned on February 5, 2012.

Ricardo Lopez was hired on January 20, 2012. His job application listed that he had been employed by the Hartford Hospital but did not list the position, job duties performed or dates of service at this employer. Lopez was terminated on April 15, 2012, according to Respondent's document.

Catherine Roman was hired on December 26, 2011, and the

[19] I note, however, that Ramirez's job application did not list any experience in the janitorial field. The jobs listed were fork lift operator and receiver (and loading merchandise).

[20] James's job application did list a company named T&D Cleaning Service, where she worked from February through September of 2011.

[21] I note that his job application did not list any such experience. The only job listed was his position at Liberty Mazda.

[22] As also related above, Teran was subsequently promoted to site supervisor in January of 2012 when Pena left to return to Nebraska.

[23] Roman's job application reflected, in fact, that he had worked at Capitol Cleaning between 2005 and 2006, cleaning offices and bathrooms before moving to Puerto Rico.

[24] It listed a previous job at Price Rite as a cashier, produce and carts and at a bug company.

[25] The resume submitted by Escobar reflects that she had previous experience as a housekeeper, cleaning and maintaining rooms, removing trash, sweeping and mopping for both a nursing home and hotel.

[26] A document submitted by Respondent reflected that she was terminated on April 15, 2012.

document submitted to the Region referred to above, prepared by Respondent's human resources department, reflected that she was terminated on January 8, 2012. Her job application listed previous positions as a cashier at Hometown Buffet and at Holiday Inns, listing a job title as maintenance and duties or skills as transportation and at a convention center as a on-call position as bar tender.

The aforementioned document of Respondent submitted by it to the Region also reflected the names of Edison Martinez and Bryan Escobar, stating that both of these individuals were hired by Respondent on December 12, 2011, and terminated by Respondent on January 8, 2012. There were no job applications for these individuals in the record.

As detailed above, Madelyn Castro, who testified in this proceeding, was hired on January 8, 2012. She was recommended by relatives of hers, who worked for Respondent, and was interviewed and hired by Teran. As also reflected above, Castro had no prior experience in the cleaning industry, testifying that she cleaned her house.

McSharry, who had, as noted, emphasized the "flexibility" of the employees whom she hired and her perception that the Capitol Cleaning employees lacked such flexibility, in her direct testimony, backed off that assertion when pressed in questioning by the undersigned and admitted that this alleged flexibility was not a reason why Respondent did not hire the former Capitol Cleaning employees. She candidly conceded, "I didn't know what their flexibility was. I never got an opportunity to ask them that." Thus, McSharry, at that point, stated that the only reason that Respondent decided not to hire the Capitol Cleaning employees was the "shadowing" that she had testified about and "how fast they moved" when Respondent shadowed them.

In regard to the alleged "shadowing," as I related above, McSharry admitted that she never "shadowed" or observed Korzeniecki, who did not work the night shift, and Respondent presented no evidence that either Lilledahl or Pena shadowed Korzeniecki and reported on his performance.

Additionally, employee De Jesus testified that none of Respondent's supervisors watched or observed her working in December of 2011 or at any other time. Furthermore, McSharry insisted that she and Respondent's officials shadowed all five of the Capitol Cleaning employees, who were present at the November 8 meeting, including Lubowicka.

However, the record reflects based on Lubowicka's unrefuted testimony that her last day at work at the Hartford Courant facility was November 23, 2011, and that she left the country at that time to go to Poland due to a health crisis involving her sister. She did not return to the United Sates until December 18, 2011, when she was informed by De Jesus that the new company (Respondent) had taken over on December 12 and did not hire any of the former Capitol Cleaning workers.

Additionally, McSharry conceded in her testimony that normally the reasons for shadowing of the prior contractor were to get familiar with the building and obtain information, such as where the janitor's closets are and where the keys are to the toilet paper canister. That admission is consistent with Gulotta's testimony as well as Respondent's own emails to Gulotta on December 9, set forth above, when McSharry informed Gulotta that Respondent had shadowed Capitol Cleaning last night and will do the same Saturday and Sunday as well as another email from McSharry to Gulotta, dated Sunday, December 10 at 6:46 pm. This email is as follows:

> From: Sierra Lilledahl [hartfordjobsprc@live.com]
> Sent: Saturday, December 10, 2011 6:46 PM
> To: Gullotta, Bernie
> Subject: Re: Update
>
> Good evening Bernie,
>
> We are fully staffed, with a crew of 8 and Joe. The new evening crew is here shadowing the staff and going through the motions. The weekend day porter starts tomorrow morning @ 7:30 am. Tomorrow I will supply you with a copy of our schedule for review.
>
> HAVE A GREAT NIGHT!
>
> -Sierra

Finally, Respondent's attorney submitted a letter and supporting documents in connection with the investigation. In these documents, Respondent explained its reasons for not hiring any of Capitol cleaning employees and for hiring others instead.

With respect to Williams and Garcia, the letter stated that although Respondent had received job applications from all eight Capitol Cleaning employees, that Respondent "was advised by the Hartford Courant not to interview" Garcia and Williams and that, therefore, Respondent did not interview or consider these two individuals for employment.

The document further reflects that Respondent interviewed the remaining Capitol Cleaning employees on November 8, 2011. According to the letter, the employees at the meeting "appeared disgusted with the offer of $9.00 per hour," they were rude and visibly upset and were clearly unhappy with the wages Respondent was offering. The letter further states that McSharry and Lilledahl "were greatly concerned when this group of employees left that they would not be interested in working for the company at $9.00 per hour and would not comprise a happy crew. . . It was critical that there be some enthusiasm and flexibility for those in the group to work this job. All in the group displayed a disgruntled attitude toward Sierra and Steve Lilledahl."

The letter goes to say that, subsequently, Respondent received notification that three of the individuals were willing to work at $9 per hour.[27]

However, by that time, according to the paper, Respondent had run its first advertisement in craigslist, had received communications from a number of applicants, who had expressed to Respondent "flexibility and enthusiasm to work at this job," which "were key components of these discussions with potential candidates."

The paper also noted that ultimately the staff hired consisted of only three full-time positions and all other jobs filled were part-time or supervisory. It further stated that Respondent reduced the number of man hours to equal 7.5 full-time positions

[27] These three were, according to the document, were Lubowicka, Hovhannisyan, and Zhamkochyan.

while previously Capitol Cleaning utilized 8–9 full-time employees.

It goes on to state that Respondent filled its crew in during interviews conducted on December 8–11, 2011, and hired its staff. It explained its reasons for hiring those ultimately hired and for not hiring the former Capitol cleaning employees as follows:

> The reasons the individuals identified in Attachment 9 were hired was that they had a willingness to be flexible with the demands that Pressroom places on its employees and would work as a team. Except for those who accepted lead positions, all were willing to work part-time. The candidates chosen had experience in the janitorial field and exhibited an eagerness to work at this position at a rate of $9.00 per hour. Since these jobs did not require much skill, experience working as a janitor was not a high priority; flexibility and a willingness to work with Pressroom's guidelines with little supervision. The former Capitol employees who said they were willing to work were considered to the very end. However, the other candidates chosen were a better fit for the work and for Pressroom's demands. The Capitol employees were not happy with the compensation. Pressroom was concerned that these individuals would not be willing to work a part-time position for any length of time as they had previously worked full-time at Capitol. Most of those individuals who accepted part-time employment had full-time jobs during the day.
>
> Pressroom's intention was to provide services on a more streamlined basis, reducing the crew by one to two full-time positions. More flexibility is demanded of the crew, many times being required to come back to work at the request of the Hartford Courant.

At another point in the paper, Respondent explained its reason for not hiring Figueroa, as follows:

> Mr. Emilio Figueroa applied as the day porter (lead man) for a full-time position. Mr. Figueroa was not hired for that position because he could not read or write in the English language. These skills are critical for this position as it is necessary for the day porter to be able to communicate with the Hartford Courant both verbally and in writing if any issues arise during a given work day.

Finally, in another section of the document argues further why it did not hire the former Capitol Cleaning employees. It stated:

> When these individuals left the meeting on November 8, 2011, they had not accepted a position at $9.00 an hour. It did not appear that they would be willing to accept a job at $9.00 an hour, stated they would get back to Pressroom a day later. They did not get back to Pressroom for several days. The Lilledahls were left with the impression that if they hired these applicants they would not have a group that was satisfied with working there which would make it difficult for the cleaning team to work cohesively. An individuals' enthusiasm for the position is important for Pressroom as they maintain high standards as relates to the quality of their work and their responsiveness to the Hartford Courant and its staff. Since neither Steve nor Sierra Lilledahl could be there overseeing their work, an eagerness to work at the location was important.

Most significantly, there is not a single word in this document that refers to Respondent "shadowing" the former Capitol Cleaning employees or that it observed any of these employees working or that such "shadowing" or observation of these employees played any role in Respondent's decision not to hire them.

ANALYSIS AND CONCLUSIONS

A. The Conduct of Steve Lilledahl

On November 8, Respondent conducted a meeting with five former Capitol Cleaning employees, who had applied for jobs with Respondent. Lilledahl, in the course of informing the applicants that Respondent paid employees $9 per hour with no benefits, also told them that Respondent is nonunion, does not work with unions, does not deal with unions and does not want a union at all. I note that Respondent's own representatives admitted that Lilledahl informed the five Capitol Cleaning employees that Respondent was a nonunion company.

I find in agreement with Charging Party and General Counsel that the comments made by Lilledahl to the prospective employees were coercive and unlawful, even crediting the version of Respondent's witnesses that he merely stated that Respondent was nonunion.

In *Kessel Food Markets*, 287 NLRB 426, 427 (1987), enfd. 868 F.2d 881 (6th Cir. 1989), the Board found that statements made to applicants for employment by officials of the prospective successor employer that the stores would operate nonunion were coercive and violative of Section 8(a)(1) of the Act. The Board reversed the judge, who had found such comments not to be unlawful or coercive since absent a successor obligation the employer was free to operate on a nonunion basis. The Board observed as follows:

> The Charging Parties contend that the judge misinterpreted *Burns* and *Howard Johnson,* and that an employer is not always free to commence operations on a nonunion basis. They further argue, contrary to the judge's finding, that the Respondent, not the applicants, in most instances initiated the discussion about the stores' nonunion status. They also contend that even if the applicants did initiate the discussion, the statements are nevertheless coercive and violate Section 8(a)(1). We agree with the Charging Parties. *Burns* and *Howard Johnson* hold that although a purchasing employer has no obligation to hire the seller's unionized employees, it may not refuse to hire those employees because they are union members or to avoid being required to recognize the union. Under *Burns*, the purchasing employer has an obligation to recognize and bargain with the union if a majority of the purchaser's employees were previously employed by the seller and were represented by the union. Thus, the employer does not know whether it will be union or nonunion until it has hired its work force. When an employer tells applicants that the company will be nonunion before it hires its employees,

> the employer indicates to the applicants that it intends to discriminate against the seller's employees to ensure its nonunion status. Thus, such statements are coercive and violate Section 8(a)(1). See *Potter's Chalet Drug,* 233 NLRB 15, 20 (1977), enfd. mem. 99 LRRM 3327 (9th Cir. 1978); *Love's Barbeque Restaurant No. 62,* 245 NLRB 78, 124 (1979), enfd. in pertinent part 640 F.2d 1094 (9th Cir. 1981). Id at 429.

The principles and analysis of *Kessel Food*, supra has been followed and applied in numerous subsequent Board and court decisions. *Smoke House Restaurant*, 347 NLRB 192, 193, 203 (2006) (statement that employer was a non-union restaurant and that it would not be a "union house"); *Eldorado Inc.*, 335 NLRB 952, 953 (2001), statement by employer in response to question by prospective employees about "retaining the union" that "the business would be non-union," unlawful and coercive, even though he added "if you guys want a union it's up to you." Board citing *Kessel Food*, reiterates that such comments made by a potential successor employer, who does not know whether it will hire a majority of the predecessor's employees, tells applicants that it will be nonunion, it indicated that it intends to discriminate against the predecessor's employees to insure its non-union status); *Advanced Stretchforming Inc.*, 323 NLRB 529, 530 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000) (informing potential applicants for employment that it intends to operate nonunion, unlawful, and coercive. Board observes, "A statement to employees that there will be no union at the successor employer's facility blatantly coerces employees in the exercise of their Section 7 rights to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment.");[28] *Commercial Erectors, Inc.*, 342 NLRB 940, 942 (2004) (statement to job applicants that company will not go union, unlawful threats that attempts to unionize employer would be futile); *Brown & Root Inc.*, 334 NLRB 628, 630 (2001), enf. denied 333 F.3d 628 (5th Cir. 2003) (statement by employer representative that it was a "non-union" company and "intended to stay that way," violative of Section 8(a)(1) of the Act); *Galloway School Lines*, 321 NLRB 1422, 1432 (1996) (statement by employer that company was not union and that it will never be union); *Ryder Truck Rental*, 318 NLRB 1092, 1094–1095 (1995) (statements made to job applicants that facility was to be a nonunion shop, unlawful citing *Kessel Food*, supra); *Williams Enterprises*, 301 NLRB 167 (1991), enf. in pert. part 956 F.2d 1226, 1234 (DC Cir. 1992) (statement by potential successor employer that "it intended to operate the Richmond plant as a non-union plant," coercive and unlawful since it announces to prospective employees its intention to remain nonunion and implicitly conveyed a message to those individuals that "any conduct which is not consistent with that stance may jeopardize their employment possibilities or security," 301 NLRB 167–168); *Worcester Mfg.*, 306 NLRB 218 (1992) (informing employees that it expects to operate nonunion); *Bay Area Mack*, 293 NLRB 125 (1989) (Board reverses judge and finds based on *Kessel Food*, supra that employer's statements to applicants that it was starting up as a nonunion company to be violative of the Act).

Respondent cited *Brown & Root, t*he Fifth Circuit's decision in *Brown & Root*, supra, 333 F.3d 628, wherein it denied enforcement of a Board decision and concluded that statements by a management official of *Brown & Root*, a potential successor employer, who was in the process of interviewing applicants at a previously unionized portion of a facility, that *Brown & Root* was a nonunion company, intended to stay that way and if the applicants come to work for them, "they would be non-union" were protected by Section 8(c) of the Act and employees could not be reasonably threatened by such comments.

I observe, initially, that I, as an administrative law judge, am bound by Board law and not the Circuit's reversal of the Board decision in *Brown & Root*, which decision is still binding Board precedent, particularly, since it is supported by the numerous other cases that I have cited above.

Nonetheless, the facts in *Brown & Root*, supra are significantly distinguishable from the instant case in several respects. It is noted that the court therein relied on the fact that the company official's response came from a question from one of the applicants and that he did not make any unsolicited comments about the union's future. In contrast, here, Lilledahl's statements about the Union and the Union's future were made in unsolicited comments, not in response to questions, and were much stronger definitive and coercive.[29]

Moreover, the Court noted that the statements were made in the context of the plant, where Brown & Root already employed 200 nonunion employees, and if there were only one bargaining unit, 20 union employees would not change Brown & Root's nonunion status. Indeed, the Court relied on the Board's decision in *P.S. Elliott Services*, 300 NLRB 1161, 1162 (1990), also cited by Respondent, wherein it dismissed an 8(a)(1) allegation when a potential successor employer's representative, in response to a question from a predecessor's employee, stated that the employer was a "non-union company." The Board in *P.S. Elliott* reversed the judge, who had found the comments to be unlawful, citing *Kessel Food*, supra. The Board emphasized, in finding the statement to be lawful and noncoercive, that it was made in response to an employee question and not accompanied by any threats, interrogations or other unlawful coercion. Further, the Board observed that in light of the employer's preexisting operation as a nonunion company, its official's statement continued "a truthful statement of an objective fact." Id at 1162.

Notably, in *P.S. Elliott*, supra the Board also dismissed the judge's finding of an 8(a)(5) violation for the employer's refusal to recognize and bargain with the union, despite it having hired a majority of its employees from the predecessor's unit. The Board concluded that the predecessor's unit was not an appropriate unit in circumstances therein. Thus, the employer services 90 cleaning accounts and employed 175 employees.

[28] The Ninth Circuit's opinion enforcing in relevant part the Board's order observed, "Having been informed when invited to apply for work with ASI that there would be no union at the new company, aeroworkers may well have believed that employment with ASI was contingent on abstaining from union representation." 233 F.3d at 1181.

[29] Lilledahl told the Capitol Cleaning employees that Respondent is nonunion, does not work with unions, does not deal with unions, and does not want a union at all.

Further, the evidence disclosed centralized management, frequent transfers of employees between jobsites from building to building[30] and uniform personnel and benefits to each location. Further, there was no on-site supervisor so that all employees were commonly supervised out of the central office. Based on such evidence, the Board concluded that employees at the particular location when the employer was awarded the contract[31] did not have a community of interest sufficiently distinct and separate from the employer's other employees to warrant the establishment of a separate appropriate unit.

According, the Board dismissed the entire complaint. Id at 1162.

Clearly, the facts, herein, are far different from both *Brown & Root* and *P.S. Elliott* relied upon by Respondent. Notably, the Board in *Brown & Root* distinguished *P.S. Elliott* on the grounds that there the employer stated only that the company was nonunion but that it in *Brown & Root*, it added an unlawful threat of futility by commenting that "it intended to stay that way," 334 NLRB at 630, citing *Galloway School Lines*, supra, 321 NLRB at 1433.

Furthermore, I note that the Board in *Williams Enterprises*, supra, a post-*P.S. Elliott* case, affirmed a judge's finding that a statement by a prospective successor that it "did intend to operate the Richmond plant as a non-union plant" was coercive, as I detailed above. Notably, that case was appealed to the DC Circuit, where the Court affirmed the Board's finding of a violation and distinguished *P.S. Elliott*, which had been relied upon by Williams Enterprises. The Court instead relied upon *Kessel Food*, supra in finding the employer's conduct unlawful since in *P.S. Elliott*, unlike *Williams Enterprises*, and unlike here, the employer had an "objective basis" on which it would base its statement that it would remain nonunion, 956 F.2d at 1235 (i.e. that the employer in *P.S. Elliott* knew that it would not be a successor employer obligated to bargain with the union since the predecessor's unit, therein, was inappropriate).

The Court's opinion in that regard is set forth below:

> This statement, the ALJ concluded, was the sort of statement that indicates to employees that "any conduct by them which is not consistent with the ukase may jeopardize their employment possibilities or security." ALJ Opinion at 12. We find no reason to disturb that finding.
>
> Williams argues that *Kessel* does not apply here because Barnes's statement at the August meeting did not say that Williams intended to remain nonunion "at all costs." But we do not read the Board's decision in *Kessel* to require an intention to remain nonunion at all costs. *Kessel* simply states that "[w]hen an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against [them] to ensure its nonunion status." *Kessel*, 287 NLRB at 429. A successor employer need not necessarily say that it intends to remain nonunion "at all costs" to send the coercive message to potential employees.
>
> Williams also argues that this case is more like *P.S. Elliott Services, Inc.*, 300 NLRB No. 162, slip op. at 6 (Dec. 31, 1990), where the Board held that an employer's statement to potential employees that it was "a nonunion company" was not an 8(a)(1) violation. However, in *P.S. Elliott*, the new employer knew, when it absorbed seven of the predecessor's eight employees into its workforce of approximately 175 employees, that it would never reach successor status. Therefore, as the Board in *P.S. Elliott* explained, the employer had an "objective basis" on which it could base its statement that it would remain nonunion. Id.
>
> But Williams did not have an objective basis for its statement that the plant would be nonunion. Unlike the employer in *P.S. Elliott*, Williams did not know, before it made its hiring decision, whether a majority of its production staff would be former Bristol workers. Id at 1235.

Notably, the Court's opinion in *Brown & Root*, reversing the Board's finding of a violation, relied on the fact that the statements of the *Brown & Root* official "were made in the context of a plant where Brown & Root already employed 200 nonunion employees, and if there were only one bargaining unit, 70 union employees would not change Brown and Root's nonunion status." 333 F.3d at 639. Thus, the Court found the acts similar to *P.S. Elliott* and its statement that it intended to stay nonunion was not coercive since the hiring of the predecessor's employees would not change Brown & Root's nonunion status. Thus, the Court reasoned that as in *P.S. Elliott*, the employer in *Brown & Root* was merely stating an objective fact and was not coercive or unlawful.

Clearly, the facts, here, are significantly different from *Brown & Root* and *P.S. Elliott* and are closer to *Kessel Food* and its progeny. Thus, here, Respondent, like the employers in *Kessel Food* and *Williams Enterprises*, did not know whether a majority of its staff would be made up of former Capitol Cleaning workers. Further, unlike, *P.S. Elliott* and *Brown & Root*, there can be no question that the predecessor's bargaining unit at the Hartford Courant is an appropriate unit. While Respondent does have facilities throughout the United Sates, no evidence was presented of centralized supervision labor relations and interchange between facilities that might make such a unit inappropriate as in *P.S. Elliott*.

Furthermore, Lilledahl's statements, as I have found, went beyond merely stating that it was nonunion but included additional coercive statements of threats of futility. *Commercial Erectors*, supra, 342 NLRB at 942 (it does not work with unions, it does not deal with unions).

Accordingly, based on the foregoing analysis and precedent, I conclude that Respondent's comments by Lilledahl on November 8 were coercive and violative of Section 8(a)(1) of the Act. *Kessel Food*, supra; *Smoke House*, supra; *Williams Enterprises*, supra; *Commercial Erectors*, supra; *Galloway School Lines*, supra; *Ryder Truck*, supra, *Eldorado*, supra; *Advanced Stretchforming*, supra; *Bay Area Mack*, supra.

[30] Even though no transfers were made to the location in question. The employer testified that it did not make anyone such transfers because of the litigation of the Board matter.

[31] There were seven employees from the predecessor's workplace hired by the employer, which constituted its entire workforce at the building.

B. The Conduct of Francisco Teran

I have found above that during the first week of January of 2012, Respondent's employees, Rosario and Cruz, were walking towards the entrance to the Hartford Courant facility when they were approached by Gabriel, who identified himself as a union representative. Gabriel talked to the employees about the Union, gave them union cards to sign and they took them. Rosario observed that Teran was watching the employees through the Courant's glass doors as they were talking to Gabriel.

When Cruz and Rosario entered the building, Teran approached them and said that they could not talk to "him" (referring to Gabriel) because he was from the Union. Teran told the employees that he knew Gabriel and knew that Gabriel was from the Union, Teran added that if the employees continue to talk to the union representative, they would get fired. Additionally, Teran informed Cruz and Rosario that the crew that used to work there had the Union and that is why they weren't working at the Hartford Courant.

General Counsel contends, and I agree, that Teran's statement to employees that they would be fired if they continued to talk to the Union is a classic and blatant unlawful threat to discharge employees. *C.P. Associates*, 336 NLRB 167, 172 (2001*); Swardson Painting Co.*, 340 NLRB 179, 185 (2003); *Omsco Inc.*, 273 NLRB 872 fn. 2 (1984).

I also conclude that Teran's informing the employees that the former workers at the Hartford Courant (i.e. the Capitol Cleaning employees) were not working at the facility because they had been represented by the Union was similarly violative of Section 8(a)(1) of the Act. *T.C. Broome Construction Co.*, 347 NLRB 656, 665 (2006) (informing employees that employer had laid off another employee because that employee was trying to organize for the union, unlawful threat to discharge employees because of their union activity).

The complaint alleges, and the General Counsel contends, that Teran created the impression of surveillance that its employees' union activities were under surveillance by Teran's comments and conduct. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57 slip op at 6 (2011), affirming previous decision issued by two-member Board, 353 NLRB 1294 (2009) (asking employees during a shop meeting who paid for pizza at the previously held union meeting).

I do not agree. Here, Teran observed Cruz and Rosario talking to the union representative and obtaining union cards, looking through the glass of the facility. The employees, here, were conducting their activities openly at or near company premises. In such circumstances, open observation of such activities by an employer is not unlawful. *Roadway Package System Inc.*, 302 NLRB 961 (1991).

General Counsel's assertion that Teran's comments that the employees should not talk to the union representative constituted an unlawful giving the impression of surveillance of employees' union activities is not correct. The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether "under all the relevant circumstances reasonable employees would assume from the statement in question that their or other protected activities had been placed under surveillance." *Stevens Creek Chrysler*, supra, 353 NLRB at 1295, quoting *Frontier Telephone of Rochester*, 344 NLRB 1270, 1276 (2005).

Here, there is no basis to conclude that the employees would assume that Teran's statement that he knew that Gabriel was a union representative was obtained through unlawful surveillance. To the contrary, it is clear that the employees observed that Teran was watching them conducting their union activities openly in front of the facility and that Teran so informed the employees not to talk to the union representative. There can be no reasonable inference than Teran obtained information about Gabriel's identity through unlawful surveillance of employees' union activities. *Sunshine Piping*, 350 NLRB 1186 (2007) (no violative of creation of impression of surveillance by supervisor's comments, detailing knowledge of union's success on obtaining cards. Board reverses judge and notes that although supervisors comment that 80 percent of employees signed cards indicated awareness of union's success, it was based on open conducted card drive and "reasonably suggested that Respondent had observed this open activity on its premises"); *Michigan Roads Maintenance Co.*, 344 NLRB 617 at fn. 4 (2005) (dismissing impression of surveillance allegation, where employer's statement revealed awareness of employee's open union activity on employer's property).

Stevens Creek Chrysler, supra cited by General Counsel is not to the contrary. There, the Board found that the statement made by the supervisor, revealing knowledge about a union meeting by asking who paid for the pizza created the impression of surveillance. Because it involved a union meeting away from the premises and employees would reasonably assume that the employer had obtained its information about the union meeting by placing the employees' union activities under surveillance.

Here, as noted, and in contrast to *Stevens Creek Chrysler*, supra and other cases, where such violations have been found, the union activities, referred to by Teran, took place openly in front of the facility.

Accordingly, I shall recommend dismissal of this complain allegation.

On January 10, 2012, a larger group of employees, including Castro, Cruz and Rosario were once again talking to Gabriel about the Union, and he handed out union cards and union flyers to the employees. As the employees were entering the building, Teran questioned them as why they were talking to the man outside. Employees responded that the man was speaking to them about the Union. Teran informed the employees that if they keep talking to the Union that they would be fired, just like the workers, who worked beforehand, were fired because of that.

A few minutes later, Teran saw Rosario and Cruz in his office and asked them to tell him what the union representative had given them. Rosario showed Teran the union card and union flyer that Gabriel had given him, and Teran asked if he could keep it as "evidence."

The above evidence demonstrates multiple 8(a)(1) violations by Teran.

His questioning of the employees about why they were talking to the man outside constituted a coercive interrogation in violation of Section 8(a)(1) of the Act, particularly, where, as here, it is accompanied by an unlawful threat to discharge em-

ployees if they continued to talk to the union representative and a statement that the prior employees at the site (i.e. the former Capitol Cleaning employees) were terminated for union activities, which are both independently unlawful threats to discharge employees.[32] *Swardson Painting*, supra.

On February 9, Rosario complained to Teran about not receiving a raise and observed that by law he should be getting paid $12 per hour. Teran responded by commenting that Rosario must have been talking to the Union and that Respondent could fire him for that. Teran's threat to again fire employees for talking to the Union is once more violative of Section 8(a)(1) of the Act. *Swardson Painting*, supra; *C.P. Associates*, supra; *Bestway Trucking Co.*, 310 NLRB 651, 671 (1993).

I so find.

C. The Refusal to Hire

It is clear that a new owner of a business or a successor contractor, like Respondent, is not obligated to hire all or even any of the employees employed by the predecessor contractor. However, it may not refuse to hire the predecessor's employees because they were represented by a union or to avoid having to recognize and/or bargain with the Union. *NLRB v. Burns Security Services,* 406 U.S. 272 (1972); *Howard Johnson's v. Detroit Local Joint Executive Board,* 417 U.S. 249 (1974). Some of the factors relied on by the Board in establishing such a violation include evidence of union animus; lack of a convincing rationale for the 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 or contractor 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. *Weco Cleaning Specialists*, 308 NLRB 310 (1992); *U.S. Marine Corp.,* 293 NLRB 669 (1989), citing *Houston Distribution Service*, 227 NLRB 960 (1977); *Lemay Caring Centers*, 80 NLRB 60 (1986), enfd. mem. 815 F.2d 71 (9th Cir. 1987).

In *Planned Building Services*, 347 NLRB 670 (2006), the Board clarified the applicable framework for considering refusals to hire in successorship contexts, resolving the confusion that had existed in analyzing such cases subsequent to *FES*, 331 NLRB 9 (2000). In *FES*, the Board changed the evidentiary burden in refusal to hire cases and added requirements to the *Wright Line* standard for proving discriminatory conduct.[33] General Counsel, under *FES*, must prove that the employer was hiring or had concrete plans to hire at the time of the unlawful conduct and that the applicants had experience or training relevant to the announced positions.

Subsequent to *FES*, some Board cases continued to apply a *Wright Line* analysis to refusals to hire in successorship contexts[34] without considering *FES* criteria, and in others the Board referred to *FES* and stated that *FES* standards were met without addressing whether an *FES* analysis should be applied in a successorship context.[35]

The Board, therefore, in *Planned Building Services*, supra clarified the confusion by concluding that the additional *FES* requirements of proving that the applicants met the employer's qualifications for hire and the employer was hiring or had plans to hire were not necessary to be proved in a successorship context, essentially because these matters are essentially assumed or not in dispute in such cases. *Planned Building Services*, supra, 347 NLRB at 673.

There, the Board made clear that the appropriate analysis for refusal to hire allegations arising in a successorship context encompasses principals applying *Wright Line* and General Counsel has the initial burden to prove that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. Once the General Counsel has shown that the employer failed to hire 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. In establishing its *Wright Line* defense, the employer is free to show, for example, that it did not hire particular employees because they were not qualified for the available jobs and that it would not have hired them for that reason, even in the absence of the unlawful considerations. Similarly, the employer is free to show that it had fewer unit jobs than there were unit employees of the predecessor. Id at 673–679.

In applying the *Planned Building Services* analysis, here, I find that General Counsel has adduced strong and compelling evidence that antiunion animus motivated Respondent's decision not to hire the six discriminatees.

Here, I have found that at the November 8 "interview" of the discriminatee-applicants, Lilledahl informed those applicants that Respondent was a nonunion company, does not work with unions, does not deal with unions and does not want a union at all. These comments, as I have detailed above, are coercive and violative of 8(a)(1) of the Act. Indeed, as the Board had observed on more than one occasion, such statements represent an unlawful message to employees that it would not permit them to be represented by a union and constitutes a "facially unlawful condition of employment." *Advanced Stretchforming*, supra, 323 NLRB at 530 (statement by general manager at interview that they will be a nonunion facility); *W&M Properties of Connecticut*, 348 NLRB 162, 163 (2006) (informing employees that if they accept a job it would be nonunion, thereby, conditions their employment on refraining from union activities, thereby, violating 8(a)(1) of the Act); *The Concrete Co.*, 336 NLRB

[32] The fact that former Capitol Cleaning employees were not discharged but merely not hired by Respondent is of no consequence. The statement equating the union membership or activities of the former Capitol Cleaning employees with their failure to be employed by Respondent is a clear threat to Respondent's current employees that union activities on their part could result in a similar loss of their employment.

[33] To establish a violation under *Wright Line*, 251 NLRB 1083 (1980), General Counsel must prove that an employer's actions were the result of its animus toward union or protected activity. Once the General Counsel has met this burden, the Board will find a violation unless the employer proves that it would have taken such action, even in the absence of the protected activity.

[34] *Waterbury Hotel Mgmt. LLC*, 333 NLRB 482 (2001); *Jennifer Matthew Nursing & Rehabilitation*, 332 NLRB 300 (2000).

[35] *The Concrete Co.*, 336 NLRB 1311, 1311–1312 (2001).

1311 (2001) (informing employees of its predecessors, "there's no union, the union's gone").

Such comments by the hiring officials of the employers have been found to be highly indicative of discriminatory motivation and often sufficient without more to establish that antiunion animus motivated the refusal to hire. *W&M Properties*, supra; *Concrete Co.*, supra. See also *Mammoth Coal Co.*, 354 NLRB 687, 689 fn.13, 704 (2009) (statements made at job interview that company was going to be a nonunion mine held to be evidence of antiunion animus); *Galloway School Lines*, supra, 321 NLRB at 1424 (statements by employer official that it was not and would never be union provides strong evidence of union animus); *Williams Enterprises*, supra, 301 NLRB at 167–168, 178 (statement that employer "did not intend to operate the Richmond plant as a nonunion plant").

The evidence of antiunion motivation, here, does not end with Respondent's pronouncements that it would operate union free. *Mammoth Coal*, supra, 354 NLRB at 704. I have found above that Francisco Teran, who was part of Respondent's workforce as an employee, but who was promoted to site supervisor in January of 2012 to replace its initial supervisor, who opted to return to Nebraska shortly after Respondent began operations at the facility, violated the Act by making several coercive statements to Respondent's employees. Thus, once Respondent began operations, cleaning the offices at the Hartford Courant facility, the Union began a campaign to attempt to organize its newly hire employees. The campaign consisted of a union representative (Gabriel) speaking to employees outside the premises prior to their entering the facility, discussing the Union with them and handing out union cards and union flyers. Teran observed conduct through the glass window of the facility. On several occasions during January of 2012, Teran confronted employees as they were entering the premises after these employees were observed by Teran speaking to the union official, interrogated them about their conversations with the Union, threatened them with discharge if they continued to talk to the union representative, and most significantly, informed them that the prior employees working at the Courant had not been hired because of their union support.

These 8(a)(1) violations that I have found, as described above, represent extremely substantial evidence of antiunion animus in Respondent's decision not to hire the discriminatees. *TCB Systems Inc.*, 355 NLRB 883, 884–885 (2010) (statement made by supervisor of successor, who had been employed by employer when hiring decisions were made, that these employees, who were not working for employer because of their strong support for the union, and the employee to whom statement was made was lucky to have been hired because the employer knew that he too was involved with the union, "provide ample evidence" of employer's animus).

I recognize, as did the Board in *TCB Systems*, that Teran was not involved in Respondent's hiring decisions and, in fact, was not even employed by Respondent when it made its decision not to hire the six discriminatees. Nonetheless, as the Board observed in *TCB Systems*, Teran's statements provide an explanation for those hiring decisions, and it is reasonable to infer that Teran, as a supervisor, did know why the decisions were made, even if he did not make them. There is nothing in these comments by Teran to suggest that they were statements of personal opinion and nothing in the record supports the inference that Teran was fabricating. I note further in this connection that Teran was promoted to supervisor when Respondent's initial supervisor went to Nebraska shortly after Respondent started operations at the facility on December 12, 2011. Thus, it is likely, and I so find, that Teran's comments to the employees were based on statements made to him by either the Lilledahls or by his predecessor as an on-site supervisor. In such circumstances, I conclude that Teran's remarks (which also included independent threats to discharge employees if they continued to talk to the Union) to be substantial evidence of unlawful motivation by Respondent. *TCB Systems*, supra; *Grand Canyon Mining Co.*, 318 NLRB 748, 748 fn. 2 (1995), enfd. 116 F.3d 1039 (4th Cir. 1997) (relying in part on supervisor's edifice post-layoff statement that a particular employee had been laid off because of his union activity).

Furthermore, Respondent's own witness, Steve Lilledahl, conceded that normally when Respondent starts up a new job at a facility that it hires the existing workforce. Indeed, even Sierra McSharry conceded that it would have been easier if Respondent had hired the former Capitol Cleaning workers. Yet, Respondent failed to hire any of the experienced crew at the facility[36] and hired a crew of new employees "off the street" without any experience at the facility and some without any experience in the industry. This departure from Respondent's prior practices is another indication of discriminatory motivation. *Planned Building Services*, supra, 347 NLRB at 708 (hiring practice contrary to prior practice of offering jobs to incumbent employees as long as owners were satisfied with the prior performance of the workers); *MSK Cargo/King Express*, 348 NLRB 1096, 1102 (2006) (in previous transitions from contractor to contractor, employer hired complement of existing employees); *Waterbury Hotel Management LLC*, 333 NLRB 482, 550 (2001) (deviation from employer' normal practice of interviewing and hiring existing workforce, where there is an existing workforce).

I conclude, therefore, that based on the above, that General Counsel had adduced compelling evidence that Respondent's decision not to hire the six discriminatees was motivated by antiunion animus. The burden then shifts to Respondent to establish by a preponderance of the evidence that it would have taken the same action, absent their union activities and support. I conclude that Respondent has fallen far short of meeting its burden in that regard, in fact, in my view, as Respondent's purported defenses are pretextual and only reinforce General Counsel's strong prima facie showing.

The reasons given by Respondent's witnesses, Gulotta, Lilledahl, and McSharry, for Respondent's decision not to hire the six discriminatees were internally inconsistent with their own testimony on direct and on cross-examination, inconsistent between and among Respondent's witnesses, particularly Gulotta versus the Lilledahls, and most importantly, with the position paper submitted by Respondent's counsel to the Region.

[36] These employees had from 5–15 years of experience working at the location.

Thus, the evidence discloses that Respondent received job applications from the Union on behalf of the discriminatees in September of 2011, even before Respondent was notified that it had been successful in its bid for the job. Respondent ignored the request from the Union to hire these employees or even to contact them for interviews, even after it had been notified that it had won the bid, until November 8, 2011.

Yet, it did not hire any of them on that day or thereafter and subsequently hired a crew of 8 employees, none of whom had worked at the facility and some of whom had no experience in the industry.

Immediately after this November 8 meeting, Lilledahl informed Gulotta that Respondent was not successful in hiring any Capitol Cleaning employees and that he (Lilledahl) was disappointed that the employees did not accept Respondent's offer.

Gulotta's testimony, in that regard, is totally at odds with that of Lilledahl and McSharry, who insisted that no offer of a job was made to the employees at the meeting but that they were merely informed of Respondent's proposed wages of $9 an hour with no benefits and that the employees were told to get back to Respondent as soon as possible to notify it if they were interested in employment under those conditions.

Lilledahl further conceded in his direct testimony that Respondent was ready to hire the six discriminatees if they were willing to work for these wages and no benefits, consistent with its normal prior practice of hiring incumbent employees when it takes over a contract. Lilledahl testified further that from the events of the meeting, such as the "body language" of the employees and their comments about Respondent,[37] it was his impression that these employees did not want to work for Respondent.

Lilledahl also conceded that Respondent became aware within a week after the November 8 meeting that his impression was not correct and that all six of the employees had notified Respondent that they were willing to work for Respondent at its proposed wage with no benefits.

Lilledahl could not provide any convincing rationale for Respondent's decision not to acknowledge the employees' acceptance of its offer and hire an admittedly experienced crew. He was vague and uncertain about why that decision was made, essentially testifying that McSharry was primarily responsible for the decision. Finally, after some prompting from his counsel, he testified that Respondent decided to continue the interviewing process "to see what we had and then would make the decision."

Lilledahl further testified that, at some point in December, he and McSharry returned to the facility and "shadowed the employees" for 2 to 3 days and concluded that the Capitol Cleaning employees were "slow" and that they did not believe that these employees would be able to do the job quickly enough. This later assertion was consistent with McSharry's ultimate testimony but not with her initial testimony on direct examination.

McSharry testified, in that regard, that at the November 8 meeting the employees reacted negatively towards Respondent and that she "was uncertain whether any of the employees were interested in working for Respondent."

After conceding that shortly after the meeting, Respondent was notified that all six discriminatees were interested in working for them at $9 per hour with no benefits, she was asked by Respondent's counsel why Respondent did not hire the employees at that time. She replied that "there were some issues as far as the flexibility that they would have as employees for us," and they were extremely disgruntled, and Respondent did not have confidence in employing such employees.

Significantly, McSharry said nothing about any "shadowing" of employees at that time, although Gulotta had testified that he believed that the "shadowing" had commenced on November 8, immediately after the interviews.

Thus, based on McSharry's testimony, within a week after November 8, Respondent was aware that an experienced crew of six employees willing to work for it at substantially reduced wages and no benefits, and yet it still did not hire any of them at that time.

Her reasons for not doing so at that time make little sense and are not consistent with the testimony of either Gulotta or Lilledahl, i.e. that employees did not demonstrate flexibility and they were disgruntled. I note in this connection that Lilledahl admitted in his testimony that had the employees accepted Respondent's "offer" at the November 8 meeting, Respondent would have hired them (disgruntled or not).

Ultimately, both McSharry and Lilledahl and, in fact, Respondent's brief fell back on the alleged "shadowing" as the sole reason for Respondent's decision not to hire any of the discriminatees.

Significantly, in this regard, McSharry abandoned her testimony on direct examination that Respondent did not hire the employees in part because of their lack of flexibility or their potential for being "disgruntled" employees and testified that the shadowing was the only reason for the decision.[38]

Notably, this decision (not to hire the discriminatees) by Respondent was made at a time in early December, when it was engaging in a frenzied hiring effort to recruit, screen and train a new workforce in order to meet the pressure imposed by Gulotta to be the first Tribune contractor to be up and running and to meet its proposed start date of December 12. See *New Concept Solutions*, 349 NLRB 1136, 1154 (2007). Indeed, it seems obvious that Respondent's decision to "ignore the obvious choice" of hiring an experienced and available workforce supports a reasonable inference that its decision was motivated by animus towards the Union. Id at 1154.

The "shadowing" defense advanced by Respondent as the sole reason for its decision not to hire the Capitol Cleaning employees is undermined by several factors. Initially, I note the lack of specificity or details with respect to the testimony of McSharry and Lilledahl that the employees were "slow." Neither of Respondent's witnesses presented any specific testimony as to what they observed about the employees' performance

[37] "We must not be much of a company if that's all we can afford to pay."

[38] Indeed, McSharry volunteered that Respondent never asked the discriminatees in the interviews any questions about their flexibility or willingness to work part-time hours.

that lead them to conclude that they were working too "slow" to be able to perform the work required by Respondent during the times that they would be employed. Such vague and conclusionary testimony is hardly sufficient to meet Respondent's burden of proof. Moreover, if it was so important for Respondent to determine how "slow" the workers were performing their jobs, why did they not "shadow" them immediately after the interviews to give them sufficient time to assess their performance rather them wait until a few days before it made its decision in mid-December to allegedly "shadow" them? Respondent provided no explanation for its failure to do so.

Further, Respondent's witnesses' testimony concerning the purpose of "shadowing" and its extent is undermined by Gulotta's testimony as well as by documentary evidence of emails between Gulotta and Respondent. Thus, Gulotta testified that the purpose of "shadowing" is generally to permit the new contractor to see how the prior contractor operated, where various items are stored and other matters. This description of shadowing's purpose was, in fact, conceded by Respondent's own witnesses. Thus, I find that shadowing is not done for the purpose of making decisions or to evaluate the performance of the prior contractor's employees but to simply see how they conducted its operation.

The emails between Respondent and Gulotta serve to confirm this fact as well as contradicting McSharry's testimony as to the frequency and timing of the "shadowing." Thus, on Friday afternoon on December 9, 2011, McSharry emailed Gulotta, giving him an update on Respondent's progress. She informed him that as of that time Respondent had a crew of six[39] and that it was conducting more interviews on Saturday to fill additional positions. She added that "we shadowed Capitol Cleaning last night and will do the same Saturday and Sunday night (full crew)." Further, on Saturday evening, December 10, McSharry emailed Gulotta once more to announce that Respondent was fully staffed with a crew of 8, plus Joe (the supervisor). She added that the "evening crew is here shadowing the staff and going through the motions."

It is obvious from these emails that the purpose of the shadowing was not to assess performance of Capitol Cleaning workers to determine whether or not to hire them but to observe their work to see how they operate to enable the employees hired by Respondent to do their work. It is clear that the shadowing was conducted principally after the decision was made by Respondent not to hire the former Capitol Cleaning workers. Thus, McSharry and Lilledahl's testimony that Respondent conducted shadowing for two or three days is undermined and contradicted by its emails and McSharry's own admission that she did not arrive at the facility until Thursday, December 8, and the email dated December 9 states that Respondent shadowed Capitol Cleaning last night (meaning December 8). Therefore, Respondent "shadowed" the employees for only one night, not two or three as Respondent's witnesses assert, before it made its decision not to hire the former Capitol Cleaning workers on Thursday evening, December 8, according to McSharry's testimony.

[39] According to McSharry, this number referred to five employees, plus the site supervisor, whom it had hired.

Additionally, Lilledahl furnished no testimony as to which employees he "shadowed," and McSharry testified that she shadowed five of the six discriminatees, admitting that she did not shadow Korzeniecki and presented no evidence that either Lilledahl or Pena shadowed Korzeniecki or reported to her otherwise on his performance. Pena did not testify. Thus, Respondent presented no evidence at all that it ever shadowed or observed Korzeniecki, so it, therefore, could not have considered him to be "slow" or otherwise incapable of performing the work required by Respondent.

Also, McSharry insisted that she shadowed all five employees (excluding Korzeniecki), which included Lubowicka. However, Lubowicka testified credibly without contraction that she was in Poland in December of 2012 when McSharry insisted that she "shadowed" her and that "she (Lubowicka) did not return to the United States until December 18, 6 days after Respondent started its operations with new employees. Accordingly, this finding brings the number of employees that Respondent could not have, and did not, shadow to two and further undermines the validity of Respondent's defense that its decision not to hire the discriminatees was based on the "shadowing."

Finally, and perhaps most importantly, Respondent's attorney submitted a position paper to the Region during the investigation, in which it detailed its reasons for not hiring the former Capitol Cleaning employees. This document provided several reasons for its decision. They included that the employees were rude and upset at the meeting, they were disgusted with the offer of $9 per hour and Respondent did not believe that they would be interested in working for Respondent and would not comprise a happy crew. It also stated that it was critical that there be enthusiasm and flexibility for those in the group and these employees displayed a disgruntled attitude towards the Respondent.

The paper then goes on to admit that after the meeting Respondent was notified that the employees were willing to work for $9 per hour but stated that by that time Respondent had run its first advertisement and had received communications from a number of applicants, who had expressed to Respondent "flexibility and enthusiasm to work at this job," which "were key components of these discussions with potential candidates."

The paper further explained that it eventually hired a staff of only three full-time and the rest part-time employees. Finally, it stated that Respondent filled its positions during interviews between December 8 and December 11 and hired its staff. It specially detailed the reasons why this staff was chosen. They included that these individuals hired "had a willingness to be flexible with the demands" that Respondent places on employees and all exhibited an eagerness to work at $9 per hour. The paper added that the former "Capitol Cleaning employees were considered to the very end." However, Respondent stated that the other candidates were a better fit and the Capitol Cleaning employees were not happy with the compensation. It added that Respondent was concerned that these individuals would not be willing to work a part-time position for any length of time as they had previously worked full time at Capitol Cleaning.

It is striking that among the myriad of reasons stated in the position paper, as detailed above, for its decision not to hire the

Capitol Cleaning crew and instead hire employees off the street, there is not one word about any "shadowing" of the former workers or any observations or indeed any criticism of their work performance as a reason for Respondent's decision. *Planned Building Services*, supra, 347 NLRB at 714. Such omissions I find to be particularly significant and highly damaging to Respondent's attempt to meet its burden of proof. Position papers submitted by attorneys for Respondent are admissible as admissions and have frequently been considered significant, where, as here, it contradicts record testimony of Respondent's witnesses as to the reasons for the action taken by it. *Planned Building Service*, supra; *Black Entertainment Television*, 324 NLRB 1161 (1997); *Steve Aloi Ford*, 179 NLRB 229 fn. 3, 230 (1969).

The above evidence demonstrates that Respondent had advanced shifting reasons for its decision not to hire the incumbent employees, which substantially detracts from the validity of its defense and demonstrates the pretextual nature of its explanation for its actions. *Planned Building Service*, supra; *Douglas Foods*, 330 NLRB 821 (2000).

Where, as here, an employer has vacillated in offering a consistent explanation for its actions, an inference is warranted that the real reason for its actions is not among those asserted. *Planned Building Services*, supra; *Black Entertainment Television*, supra; *Sound One Corp.*, 317 NLRB 854, 858 (1995).

I find such an inference is clearly warranted here and conclude that the real reason for Respondent's conduct in not hiring the experienced incumbent employees was because of their union membership and support and Respondent's desire to avoid union representation amongst its workforce.

Accordingly, I find, as explained above, that Respondent had fallen well short of meeting its burden of establishing that it would not have hired the discriminatees, absent their union membership and support, and it has, thereby, violated Section 8(a)(1) and (3) of the Act.

D. The Refusal to Recognize and Bargain with the Union

The complaint alleges that Respondent would be the legal successor to Capitol Cleaning operation but for the unlawful refusal to hire the Capitol Cleaning unit employees. Respondent does not deny that it refused to recognize and bargain with the Union but argues that no obligation existed because it is not the legal successor to Capitol Cleaning's operations at the Hartford Courant facility at 285 Broad Street.

The threshold test for determining successorship is: (1) whether the new employer conducts essentially the same business as the predecessor employer and (2) whether a majority of the new employer's work force in an appropriate unit are former employees of the predecessor employer. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Mammoth Coal*, supra, 354 NLRB at 726.

The appropriate analysis for assessing whether the new employer conducts essentially the same business as the predecessor employer is whether the similarities between the two operations manifest a substantial continuity between the enterprises. *Hydrolines Inc.*, 305 NLRB 416, 421 (1991), citing *Fall River Dyeing*, supra, 482 U.S. at 41–43 and *Burns Security Services*, supra, 406 U.S. 280, fn. 4.

The factors enumerated in *Fall River Dyeing* for determining these issues are whether the business is essentially the same, whether the employees of the new company are doing the same jobs under the same supervisors and whether the new entity has the same production process, produces the same products and has the same body of customers. Id at 430.

These factors are assessed primarily from the perspective of the employees, that is whether those employees, who have been retained (or, as here, should have been retained) will view their job situation was essentially unaltered. *Hydrolines*, supra.

Based on these factors, I find it clear that Respondent engaged in essentially the same business as Capitol Cleaning (cleaning the offices at the Hartford Courant) and the employees were performing the same jobs and performing the same functions as the Capitol Cleaning employees (dusting, sweeping, mopping, vacuuming, and taking out trash).

In this regard, Respondent argues it cannot be considered a successor because it was a "different business model" than that of Capitol Cleaning. It asserts that Respondent uses primarily part-time employees while Capitol Cleaning utilized only full-time employees[40] and that, therefore, its employees were expected to perform more duties within a shorter timeframe as compared to Capitol Cleaning's workforce. Further, Respondent notes that it uses more automated machinery than Capitol Cleaning in its cleaning functions and has different work schedules than Capitol Cleaning employees had when they performed the work.

None of these factors, singularly or collectively, come close to overcoming the conclusion, which I make, that Respondent was essentially conducting the same business as Capitol Cleaning and that there was a substantial continuity between the enterprises. *Mammoth Coal*, supra, 354 NLRB at 727; *Planned Building Services*, supra, 347 NLRB at 674, fn. 1; *Van Lear Equipment Inc.*, 336 NLRB 1059, 1063–1064 (2001); *Hydrolines*, supra, 305 NLRB 422–423; *Commercial Forgings*, 315 NLRB 162, 165 (1994).

The Third Circuit opinion in *Systems Management Inc. v. NLRB*, 901 F.2d 297 (3rd Cir. 1990), enf. in pert. part. 292 NLRB 1075 (1989), where it rejected an employer's contention that its change from full-time to part-time employees, resulted in a change in the nature of its operations, sufficient to find that it is not a successor is extremely persuasive on this issue, particularly since it involves the same type of industry (janitorial contractor at a building).

The Court held:

> In particular, the seven factors which we have identified reveal that Systems must be held to have engaged in the same operation as had Pritchard. The record discloses that, although Systems employed part-time, rather than the full-time workers employed by Pritchard, Systems remained committed to the same type and nature of business

[40] The record reveals that Respondent's initial staff consistent of eight employees, three full time and five part time. Capitol Cleaning, on the other hand, employed eight employees full time to perform the work required.

as Pritchard operated and has merely substituted its part-time workers and management for Pritchard's full-time workers and management. Systems does not allege that a new technique was used or a new practice was employed or that a different product was manufactured or service offered.[10]

Systems' defense is that the nature of the work force employed is sufficiently different from that employed by Pritchard that it should not be deemed a successor employer. Systems maintains that since it hires only part-time employees and only employees who seek no career in the janitorial business, Systems cannot be deemed a "successor employer" because the difference between part-time and full-time employees constitutes a substantial difference in the enterprise. We find this argument to be meritless.

Systems may not avoid its obligation under the Act to negotiate with a properly recognized union by merely changing the hours of work by its employees while still maintaining the same nature and type of services previously provided by Pritchard. To allow a "successor employer" to escape its duty to bargain notwithstanding the continuation of the identical business—in our case, using the same technique and supplies, servicing the same customers and supplying the same product, and indeed doing so in the same buildings—would eviscerate the doctrine of "successor employer."

Systems fundamentally misunderstands the nature of being a "successor employer." In order to prevent the label, and consequent obligations of, "successor employer" from attaching, a fundamental change in the *nature* of the business enterprise must occur. It must be more than a mere restructuring of the hours[11] or conditions of employment.[12]

The First Circuit stated this principle aptly in *NLRB v. Band-Age, Inc.,* 534 F.2d 1, 3 (1st Cir. 1976) when it held:

> The central question in a successorship case is whether there has been "a change of ownership not affecting the essential nature of the enterprise," if no essential change is found "the successor employer must recognize the incumbent union and deal with it as the bargaining representative." In deciding this issue the Board must examine the "totality of the circumstances,"

(Emphasis added) (citations omitted).

The indicia which we have recognized to conclude that Systems continued the existence of the Pritchard enterprise, and that the difference in scheduling employees on a part-time, rather than a full-time basis, did not convert a "continued enterprise" into a new or a different one because the nature of the employment remained substantially and essentially the same as the business Pritchard had conducted. Moreover, if we were to hold that a mere reduction in working hours would negate the obligations of a "successor employer" we would encourage the intentional manipulation of a work force so as to eliminate the "successor employer's" obligation to negotiate.

Therefore, applying the seven factor analysis to the instant record leads to conclude that both of the criteria leading to successorship have been satisfied, and that accordingly, Systems must be deemed a successor to Pritchard. As such, Systems became liable under the Act for its discriminatory conduct.

[10] Only one of the indicia was not found in that Systems employed different supervisors than those employed by Pritchard. The second indicia, "whether the new employer uses the same plant or equipment," is inapplicable in the janitorial and maintenance business as no goods are manufactured. To the extent relevant, Systems cleaned and maintained the same buildings as Pritchard.

[11] This is particularly so in a case like this one where Systems, in violation of the Act, did not extend offers to the Local 29 workers.

[12] Systems' purported change in the continuity of its cleaning and maintenance enterprise can be readily distinguished from the interrupted enterprise described in the Seventh Circuit case of *In Re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 658 F.2d 1149 (7th Cir. 1981). That court declined to impose successor employer status on a railroad which had entered bankruptcy and ceased operations for a number of years. Upon revival, the Seventh Circuit ruled that there was no continuity of business since the business had ceased operating for a number of years.

Id at 304–305.

See also *Mammoth Coal*, supra, 347 NLRB at 727 (changes in machinery used and use of fewer employees, insufficient to establish change in business operations); *Tree-Free Fiber*, 328 NLRB 389, 390 (1999) (successorship found when new employer continued with workforce of only 50 workers as compared to pre-purchase complement of 500 workers); *Commercial Forgings*, 315 NLRB 162, 165 (1994), enf. 77 F.3d 482 (6th Cir. 1996) (successorship established where changes eliminated most of predecessor's nonunit jobs, but jobs of unit employees not altered); *Planned Building Services*, supra, 347 NLRB at 674 fn. 17 (successor bargaining obligation where new employer planned to employ a smaller workforce consisting solely of predecessor's employees); *Capital Steel & Iron*, supra, 299 NLRB at 485–489 (changes in job classifications, reduction in size of workforce, insufficient to establish change in nature of operation, even where there was an 8-month hiatus between shutdown of predecessor and commencement of successor's operation).

I, therefore, conclude that Respondent conducted essentially the same business as Capitol Cleaning at the Hartford Courant facility.

Another requirement for the establishment of a successor relationship is that the unit sought to be an appropriate unit for collective bargaining. In that connection, the evidence discloses that historically Capitol Cleaning employees, who cleaned the offices at the Hartford Courant facility, have been represented by the Union. When Respondent assumed control of this opera-

tion, it continued to use employees to perform the same unit work. In such circumstances, the Board has consistently held that a long-established bargaining relationship will not be disturbed, where they are not repugnant to the Act. *Mammoth Coal*, supra at 728; *Ready Mix USA Inc.*, 340 NLRB 946 (2003). The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate. *Mammoth Coal*, supra; *Mayfield Holiday Inn*, 335 NLRB 38, 39 (2001) (historical unit consisted of housekeeping employees at two hotels; each hotel was sold to separate new owners; separate unit of housekeeping employees at each hotel found to be historically appropriate units of housekeeping employees, both new employers found to be successors and ordered to bargain with the union). See also *Planned Building Services*, supra at 717–718 (single location for each building, where employees performed unit work, found to be appropriate units).

Respondent has adduced no evidence nor has it made any arguments or contentions that the historically recognized unit is repugnant to the Act or that it is no longer appropriate. I, therefore, find based on the above precedent and analysis that such a unit, consisting of building service employees, who clean and maintain the offices at the Hartford Courant facility at 285 Broad Street in Hartford, Connecticut, is an appropriate unit.

With respect to the second prong of the successorship test, as described above, where, as here, the employer has unlawfully refused to hire its predecessor's employees, the Board infers that these employees would have been retained, absent the discrimination against them. *Mammoth Coal*, supra at 728; *Planned Building Services*, supra at 674; *New Concept Solutions*, supra, 349 NLRB at 1157.

Here, I have found that Respondent discriminatorily refused to hire six employees formerly employed by Capitol Cleaning and that it staffed its operations with eight employees when it commenced operation at the facility on December 12. This represents a majority of Respondent's workforce, and it is presumed that these employees continued to support the Union and would have continued to work for Respondent but for the discrimination. Thus, the second prong for successorship has been met, and Respondent is the legal successor to Capitol Cleaning's operation at the facility. *Mammoth Coal*, supra at 729; *Planned Building Services*, supra at 674; *New Concept Solutions*, supra, 349 NLRB at 1157; *Love's Barbeque Restaurant*, 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

Respondent also argues that it cannot be found to be a successor to Capitol Cleaning since the Union never made a demand upon Respondent for recognition or bargaining on behalf of the employees. *Prime Service v. NLRB*, 266 F.3d 1233 (DC Cir. 2001); *Williams Enterprises v. NLRB*, 956 F.2d 1226, 1233 (DC Cir. 1992).

I do not agree. It is well settled that no bargaining demand was necessary, here, because Respondent's unlawful refusal to hire the predecessor's employees rendered any request for bargaining futile. *Mammoth Coal*, supra at 729; *Planned Building Services*, supra at 718; *Smith & Johnson Construction Co.*, 324 NLRB 970 (1997); *Triple A Services*, 321 NLRB 873, 877 fn. 7 (1996).

Based upon the foregoing analysis and precedent, I conclude that Respondent has violated Sections 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union.

E. The Unilateral Changes

Although under *Burns*, supra, a successor employer is generally free to set initial terms of employment without bargaining with the union, here, Respondent has forfeited that right for two reasons. First, Respondent had discriminatorily refused to hire the predecessor's employees. In such circumstances, Respondent loses the right to unilaterally set initial terms and conditions of employment, it must first bargain with the Union. *Planned Building Services*, supra at 674; *Mammoth Coal*, supra at 729; *Capitol Cleaning Contractors Inc. v. NLRB*, 147 F.3d 999, 1008 (DC Cir. 1998); *Love's Barbeque*, supra, 245 NLRB at 82. Secondly, Respondent, by informing applicants for employment that it intends to operate nonunion at the facility, also forfeits the right to unilaterally set initial terms and conditions of employment, even if it had hired all of the former Capitol Cleaning employees. *Mammoth Coal*, supra at 729; *Stretchforming*, supra, 323 NLRB at 530; *Smoke House Restaurant*, 347 NLRB 192, 204–205 (2006); *Concrete Co.*, supra, 336 NLRB at 1311. Accordingly, Respondent was required to follow the terms and conditions of employment established by Capitol Cleaning's contract with the Union, pending bargaining with the Union. *Mammoth Coal*, supra; *Smoke House*, supra.

I find, therefore, that Respondent has further violated Section 8(a)(1) and (5) of the Act since December 12, 2011, by unilaterally imposing new terms and conditions of employment for its unit employees.

CONCLUSIONS OF LAW

1. Respondent, Pressroom Cleaners, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Service Employees International Union, Local 32BJ, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has been and is the exclusive collective-bargaining representative for Respondent's employees in the following appropriate unit:

> All building service employees employed by Respondent to clean the offices at 285 Broad Street, Hartford, Connecticut, excluding employees, who clean and maintain the pressroom at that location, guards and supervisors as defined in the Act.

4. Respondent has violated Section 8(a)(1) of the Act by informing employees that it intends to operate its business as a nonunion entity and/or that it is a nonunion business, threatening its employees with discharge because of their support for or activities on behalf of the Union and by coercively interrogating its employees concerning their activities on behalf of and support for the Union.

5. Respondent has violated Section 8(a)(1) and (3) of the Act by refusing to hire six former employees of Capitol Cleaning

for positions in the above bargaining unit.[41]

6. Respondent has violated Section 8(a)(1) and (5) of the Act since December 12, 2011, by refusing to recognize and bargain with the Union and by unilaterally changing the terms and conditions of employment of its employees in the unit without prior notification and bargaining with the Union.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent had engaged in certain unfair labor practices, I shall recommend that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent unlawfully refused to hire the individuals named above, I shall recommend the Respondent to offer to these employees positions for which they would have been hired, absent the Respondent's unlawful discrimination, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges 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 practiced 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 for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also be required to expunge from its files any reference to the unlawful refusal to hire and to notify the discriminatees in writing that this has been done.

Respondent 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, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

Further, having found that Respondent unlawfully refused to bargain collectively with the Union, I shall recommend that the Respondent, on request, recognize and bargain with the Union concerning wages, hours, benefits, and other terms and conditions of employment, and if an agreement is reached reduce the agreement to a signed written contract. Additionally, the Respondent shall on request of the Union, rescind any departures from terms of employment that existed before the Respondent's takeover and retroactively restore preexisting terms and conditions of employment, including wage rates and contributions to benefit funds, that would have been paid, absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse. *New Concepts Solutions LLC*, 349 NLRB 1136, 1161 (2007). Backpay shall be computed as in *Ogle Protection Service*, 183 NLRB 602 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Respondent shall also remit all payments it owes to employee benefit funds in the manner set forth in Merryweather Optical Co., 240 NLRB 1213 (1979), and reimburse its employees for any expenses resulting from the Respondent's failure to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

The Respondent's backpay liability for both its unlawful discrimination in hiring and its unlawful unilateral changes in employees' preexisting terms and conditions of employment shall be subject to the Respondent's demonstrating in a compliance hearing that, had it lawfully bargained with the Union, it would have, at some identifiable time, lawfully imposed or reached agreement on less favorable terms than those that existed prior to its commencing operations at the Hartford Courant building. See *Planned Building Services*, 347 NLRB 670, 676 fn. 25 (2006).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[42]

ORDER

The Respondent, Pressroom Cleaners, Hartford, Connecticut, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their membership in or activities on behalf of Service Employees International Union, Local 32BJ (the Union).

(b) Threatening its employees with discharge if they engage in activities in support of the Union or if they speak to representatives of the Union.

(c) Informing employees or applicants for employment that it is a nonunion business or that it intends to operate as a nonunion business.

(d) Refusing to hire bargaining unit employees of Capitol Carpet and Specialty Cleaning Company (Capitol Cleaning), the predecessor employer, because they were members of and supported the Union, and to discourage employees from engaging in these activities.

(e) Refusing to recognize and bargain in good faith with Service Employees International Union, Local 32BJ as the exclusive collective-bargaining representatives of its employees in the following appropriate unit:

> All building service employees employed by the Respondent to clean the offices at the Hartford Courant building located at 285 Broad Street, Hartford, Connecticut, excluding employees, who maintain and clean the pressroom at that building, guards and supervisors as defined in the Act.

[41] The discriminatees are Razmik Hovhannisyan, Epifania De Jesus, Mariana Lubowicka, Daniel Korzeniecki, Anahit Zhamkochyan, and Emilio Figueroa.

[42] 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.

(f) Unilaterally changing wages, hours, and other terms and conditions of employment of the employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

(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) Notify the Union in writing that it recognizes the Union as the exclusive representative of its unit employees under Section 9(a) of the Act and that it will bargain with the Union concerning terms and conditions of employment for employees in the above-described appropriate unit.

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

(c) On request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to the Respondent's takeover of predecessor Capitol Cleaning's operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and welfare and pension contributions, and other benefits, until it negotiates in good faith with the Union to agreement or to impasse.

(d) Make whole, in the manner set forth in the remedy section of this decision, the unit employees for losses caused by the Respondent's failure to apply the terms and conditions of employment that existed immediately prior to its takeover of predecessor Capitol Cleaning's operation.

(e) Within 14 days of the date of this Order, offer employment to the following former unit employees of the predecessor, Capitol Cleaning, who would have been employed by Respondent but for the unlawful discrimination against them, in their former positions or, if such positions 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.

Epifania De Jesus
Razmik Hovhannisyan
Mariana Lubowicka
Anahit Zhamkochyan
Emilio Figueroa
Daniel Korzeniecki

(f) Make the employees referred to in paragraph 2(e) whole for any loss of earnings and other benefits they may have suffered by reason of the Respondent's unlawful refusal to hire them, in the manner set forth in the remedy section of the decision.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire the employees named in the paragraph 2(e) and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(h) 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, 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.

(i) Within 14 days after service by the Region, post at its Hartford, Connecticut facility copies of the attached notice marked "Appendix."[43] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 12, 2011.

(j) 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 Respondent has taken to comply.

Dated, Washington, D.C. March 29, 2013

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 coercively interrogate our employees concerning their membership in or activities on behalf of Service Employees International Union, Local 32BJ (the Union).

WE WILL NOT threaten our employees with discharge if they engage in activities in support of the Union or if they speak to

[43] 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."

representatives of the Union.

WE WILL NOT inform our employees or applicants for employment that we are a nonunion business or that we intend to operate as a nonunion business.

WE WILL NOT refuse to hire bargaining-unit employees of Capitol Carpet and Specialty Cleaning Company (Capitol Cleaning), the predecessor employer, because they were members of and supported the Union, and to discourage employees from engaging in these activities.

WE WILL NOT refuse to recognize and bargain in good faith with Service Employees International Union, Local 32BJ as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All building service employees employed by the Respondent to clean the offices at the Hartford Courant building located at 285 Broad Street, Hartford, Connecticut, excluding employees, who maintain and clean the pressroom at that building, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of the employees in the above-described unit without first giving notice to and bargaining with the Union about these changes.

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

WE WILL notify the Union in writing that we recognize the Union as the exclusive representative of its unit employees under Section 9(a) of the Act and that we will bargain with the Union concerning terms and conditions of employment for employees in the above-described appropriate unit.

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

WE WILL, on request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to the our takeover of predecessor Capitol Cleaning's operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and welfare and pension contributions, and other benefits, until we negotiate in good faith with the Union to agreement or to impasse.

WE WILL make whole the unit employees for losses caused by our failure to apply the terms and conditions of employment that existed immediately prior to our takeover of predecessor Capitol Cleaning's operation, subject to our demonstrating in a compliance hearing that had we lawfully bargained with the Union, we would have, at some identifiable time, lawfully imposed less favorable terms than those that had existed under our predecessor.

WE WILL within 14 days of the date of this Order, offer employment to the following former unit employees of the predecessor, Capitol Cleaning, who would have been employed by us but for the unlawful discrimination against them, in their former positions or, if such positions 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.

Epifania De Jesus
Razmik Hovhannisyan
Mariana Lubowicka
Anahit Zhamkochyan
Emilio Figueroa
Daniel Korzeniecki

WE WILL make the above-named employees referred whole for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to hire them, less any net interim earnings, plus interest, subject to our demonstrating in a compliance hearing that, had we lawfully bargained with the Union, we would have, at some identifiable time, lawfully imposed less favorable terms than those that had exited under our predecessor.

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

WE WILL compensate the above-named employees 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 refusal to hire the above-named employees and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

PRESSROOM CLEANERS