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Corbel Installations, Inc. and Communications Workers of America, AFL–CIO and Local 1430, International Brotherhood of Electrical Workers, AFL–CIO, Party to the Contract. Case 29–CA–090466

September 19, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On May 15, 2013, Administrative Law Judge Mindy E. Landow issued the attached decision. The Acting General Counsel and the Charging Party each filed limited exceptions, and the Charging Party filed a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge’s rulings, findings, and conclusions,¹ to modify the remedy, and to adopt the recommended Order as modified and set forth in full below.²

AMENDED REMEDY

In addition to the remedies ordered by the judge, the Acting General Counsel and Charging Party, Communications Workers of America, AFL–CIO (the Union), request that the Board extend the certification year and amend the Union’s certification. We find merit in both requests.

Generally, following Board certification, a union’s majority status is conclusively presumed for 1 year. *Mar-Jac Poultry Co.*, 136 NLRB 785, 786 (1962). Where the employer has frustrated the union’s right to good-faith bargaining during that initial certification year, the Board has exercised its discretion to extend the certification year to ensure at least 1 year of good-faith bargaining. See *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289–1290 (2004), *enfd.* 156 Fed. Appx. 331 (D.C. Cir. 2005). The Acting General Counsel and the Union argue that the Board should extend the Union’s certification for a

¹ No exceptions were filed to the violations found by the judge. The Acting General Counsel’s and the Union’s limited exceptions concern only the judge’s recommended remedy.

² We shall modify the judge’s recommended Order to be consistent with our modifications to the remedy, the violations found by the judge, and the Board’s standard remedial language. We shall substitute a new notice to conform to the Order as modified.

10-month period, and the Respondent has not opposed this request.

As the judge’s findings support the requested 10-month extension, we amend the remedy to provide for the extension. The Respondent acquired Falcon Data Com, Inc., the predecessor employer, in September 2012, less than 2 months after the Board’s July 31, 2012 certification of the Union as the exclusive bargaining representative for a unit of Falcon’s employees. As the successor, the Respondent was obligated to recognize and bargain with the Union. Instead, the Respondent refused to bargain with the Union, unlawfully recognized and entered into a contract with a different union, and attempted to coerce employees into accepting the other union. It was not until May 9, 2013—2-1/2 months before the initial certification year would expire—that the Respondent finally began to bargain in good faith with the Union.³ The Respondent’s prior unlawful conduct, however, prevented bargaining and undermined the Union until almost 10 months into the certification year. A 10-month extension, measured from the end of the original certification year, would thus allow the Union the 1-year period of good-faith bargaining to which it is entitled.

The Acting General Counsel and the Union also filed unopposed exceptions requesting that the Board amend the July 31, 2012 certification of representative to reflect the Respondent’s name because the judge found it to be the successor employer. Because the judge did find the Respondent to be the successor and the request is unopposed, we amend the certification of representative accordingly. See *Miami Industrial Trucks, Inc.*, 221 NLRB 1223, 1224–1225 (1975).

ORDER

The National Labor Relations Board orders that the Respondent, Corbel Installations, Inc., Mount Vernon, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Communications Workers of America, AFL–CIO (CWA), as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Changing the terms and conditions of employment of its unit employees without first notifying the CWA and giving it an opportunity to bargain.

(c) Recognizing and bargaining with Local 1430, International Brotherhood of Electrical Workers, AFL–CIO

³ The Respondent apparently commenced bargaining as part of a stipulation approved by a Federal district court in 10(j) proceedings involving this case.

(Local 1430), as the collective-bargaining representative of its unit employees, unless and until Local 1430 is certified by the National Labor Relations Board as their exclusive collective-bargaining representative.

(d) Giving effect to or enforcing the September 1, 2012 collective-bargaining agreement that it executed with Local 1430, or to any extension, renewal, or modification of the agreement; provided, however, that nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase, or other improved benefits or terms and conditions of employment, that may have been implemented pursuant to the performance of the above collective-bargaining agreement.

(e) Deducting dues for Local 1430 from the compensation of employees who have not authorized such deductions.

(f) Telling or directing employees or applicants for employment, as a condition of employment, to sign cards authorizing Local 1430 to represent them.

(g) Telling employees that they will not receive benefits if they do not sign union authorization cards in support of Local 1430.

(h) Delaying in hiring employees because of their support for the CWA.

(i) 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) Recognize and, on request, bargain with the CWA as the exclusive collective-bargaining representative of the employees in the following unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

All full and part time technicians, warehouse workers and dispatchers employed by Corbel Installations, Inc. at or out of its facility at 2400 East 69th Street, Brooklyn, NY, excluding all managerial employees, guards and supervisors as defined under the Act.

(b) Withdraw and withhold all recognition from Local 1430 as the collective-bargaining representative of its unit employees, unless and until Local 1430 has been certified by the National Labor Relations Board as their exclusive collective-bargaining representative.

(c) Refrain from applying the terms and conditions of employment of the September 1, 2012 collective-bargaining agreement with Local 1430 and, at the request of the CWA, rescind any or all departures from the terms and conditions of employment that existed prior to the agreement.

(d) Make unit employees whole for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the September 1, 2012 collective-bargaining agreement with Local 1430 in the manner set forth in the remedy section of the judge's decision.

(e) Make Kirk Collins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(f) Compensate Kirk Collins for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

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

(h) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, 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 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 September 25, 2012.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the

⁴ 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."

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Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the period of certification and recognition of the CWA as the exclusive collective-bargaining representative of the unit employees is extended for a 10-month period beginning July 31, 2013, as if the initial year of certification had not expired.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 19, 2013

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to recognize and bargain with Communications Workers of America, AFL-CIO (CWA), as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT change your terms and conditions of employment without first notifying the CWA and giving it an opportunity to bargain.

WE WILL NOT recognize and bargain with Local 1430, International Brotherhood of Electrical Workers, AFL-

CIO (Local 1430), as the collective-bargaining representative of our unit employees, unless and until Local 1430 is certified by the National Labor Relations Board as the employees' exclusive collective-bargaining representative.

WE WILL NOT give effect to or enforce the September 1, 2012 collective-bargaining agreement that we executed with Local 1430, or to any extension, renewal, or modification of the agreement; but the Board's Order does not authorize or require us to withdraw or eliminate any wage increase, or other improved benefits or terms and conditions of employment, that we may have implemented in applying the Local 1430 collective-bargaining agreement.

WE WILL NOT deduct dues for Local 1430 from the pay of employees who have not authorized such deductions.

WE WILL NOT tell or direct employees or applicants for employment, as a condition of employment, to sign cards authorizing Local 1430 to represent them.

WE WILL NOT tell employees that they will not receive benefits if they do not sign union authorization cards in support of Local 1430.

WE WILL NOT delay in hiring employees because of their support for the CWA.

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

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

All full and part time technicians, warehouse workers and dispatchers employed by Corbel Installations, Inc. at or out of its facility at 2400 East 69th Street, Brooklyn, NY, excluding all managerial employees, guards and supervisors as defined under the Act.

WE WILL withdraw and withhold all recognition from Local 1430 as the collective-bargaining representative of our unit employees, unless and until Local 1430 has been certified by the National Labor Relations Board as the employees' exclusive collective-bargaining representative.

WE WILL refrain from applying the terms and conditions of employment of the September 1, 2012 collective-bargaining agreement with Local 1430 and, at the request of the CWA, WE WILL rescind any or all changes to the terms and conditions of employment that existed prior to the agreement.

WE WILL make unit employees whole, with interest, for all initiation fees, dues, and other moneys paid by them or withheld from them under the September 1, 2012 collective-bargaining agreement with Local 1430.

WE WILL make Kirk Collins whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL compensate Kirk Collins for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

CORBEL INSTALLATIONS, INC.

Sharon Chau, Esq., for the Acting General Counsel.

Joel S. Barras, Esq. (Reed Smith, LLP), of Philadelphia, Pennsylvania, for the Respondent.

Gabrielle Semel, Esq. (CWA District 1 Legal Department), of New York, New York, for the Charging Party.

Brian S. McCarthy, Esq. (O'Connor & Mangan, PC), of New Rochelle, New York, for the Party to the Contract.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. Based upon a charge filed by the Communication Workers of America, AFL-CIO (CWA or Charging Party), the Acting General Counsel of the National Labor Relations Board, by the Regional Director of Region 29, issued a complaint and notice of hearing (complaint) on December 19, 2012 and a Notice of Motion to Amend the Complaint on January 22, 2013.¹ The complaint alleges that Corbel Installations, Inc. (Corbel or Respondent) committed various violations of Section 8(a)(1), (2), (3), and (5) of the Act.

The complaint, as amended, alleges in essence that Corbel is a successor to Falcon Data Com, Inc. (Falcon) with respect to a bargaining unit of employees previously represented by the CWA; that Corbel unlawfully rendered assistance and support and granted recognition to Local 1430, International Brotherhood of Electrical Workers, AFL-CIO (Local 1430); failed and refused to recognize and bargain with the CWA as the exclusive bargaining representative of the employees in the unit of employees formerly employed by Falcon and unilaterally changed terms and conditions of employment for employees without notice to or bargaining with the CWA.² The complaint

¹ The Acting General Counsel's motion to amend the complaint was granted at the hearing. Respondent filed an oral answer denying the amendments.

² On March 1, 2013, counsel for the Acting General Counsel submitted a motion seeking approval to withdraw certain complaint allegations relating to the change in pay and benefits for employees insofar as they relate to Respondent's setting of initial terms and conditions of employment. The General Counsel has stated that the withdrawal of these allegations does not relate to any alleged unilateral change made after the initial terms and conditions of employment were set. Respondent has not objected to the motion and it is hereby granted.

further alleges that Corbel unlawfully assisted Local 1430 and interfered with employees' Section 7 rights by: telling job applicants that if they wished to be hired they must become members of Local 1430; directing employees to sign union authorization cards in support of Local 1430; threatening employees that they would not receive benefits if they did not sign authorization cards in support of Local 1430; and threatening never to negotiate with the CWA. The complaint further alleges that since September 30, 2012, Corbel has unlawfully maintained and enforced a collective-bargaining agreement with Local 1430 containing union security and dues checkoff provisions at a time when Corbel did not have lawful authorization to deduct dues from its employees' wages. The complaint additionally alleges that, during the period from September 30 through October 5, Respondent unlawfully failed and refused to hire employee Kirk Collins.

Respondent filed an answer denying the material allegations of the complaint and further alleging that the bargaining unit which is the subject of the complaint is a lawful accretion to its comprehensive bargaining unit represented by Local 1430.

On the entire record, including my observation of the demeanor of the witnesses,³ and after considering the briefs filed by the Acting General Counsel,⁴ Respondent, the CWA and Local 1430, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a domestic corporation, with offices located at 800 South 3d Avenue, Mt. Vernon, New York, and a place of business located at 2400 East 69th Street, Brooklyn, New York, where it is engaged in the business of providing cable installation services. During the past year, which is representative of its annual operations generally, Respondent has provided services valued in excess of \$50,000 for Cablevision, an enterprise directly engaged in interstate commerce within the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is also admitted, and I find that the CWA and Local 1430 are labor organizations within the meaning of Section 2(5) of the Act.

³ My credibility determinations are based upon a variety of factors, including the context of the witness' testimony, his or her demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D. Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001); see also *Roosevelt Memorial Hospital Center*, 348 NLRB 1016, 1022 (2006), noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed toward a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent. In addition, as is well established, it is not unusual to credit some, but not all, of any particular witness' testimony. *Daikichi Sushi*, supra at 622.

⁴ Hereafter referred to as the General Counsel.

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II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Predecessor bargaining units

a. The IBEW unit

Corbel provides service installation and repairs for Cablevision at and out of five locations throughout the New York metropolitan region. In May 2012, after a Board-conducted election, Local 1430 was certified as the collective-bargaining representative in a unit comprised of commercial and residential service technicians based out of Corbel's Bronx, New York facility. Subsequently, Corbel and Local 1430 entered into a collective-bargaining agreement (the Local 1430 CBA) effective from September 1, 2012, through August 31, 2015.

Shortly thereafter, Corbel and Local 1430 entered into a memorandum of agreement dated September 17, 2012, which includes the following language concerning additional facilities operated and/or acquired by Corbel during the term of the Local 1430 CBA:

ARTICLE 1(B): ACCRETION

The Employer agrees to the accretion of any and all Cablevision installation companies which come to be owned and/or managed in the metropolitan area, which includes the Bronx, Brooklyn, Connecticut, New Jersey, and Westchester, to the bargaining unit presently or hereafter covered by the CBA or any successor collective bargaining agreement thereto and that all of the terms and conditions set forth in the CBA or its successor shall be immediately applicable to the accreted bargaining unit. The parties acknowledge that they have negotiated and exchanged valuable consideration in reliance upon the lawfulness and validity of their agreement but recognize the complexity and change inherent in the legal doctrine of accretion. Nevertheless, in the event that any accretion of Cablevision installation companies pursuant to these provisions, applied to the fullest extent of that legal doctrine, should be ruled ineffective, invalid, or unenforceable by competent legal authority, then the parties hereto agree to a neutrality and card count agreement for the acquired company. For the purposes of this provision, "competent legal authority" shall mean the Regional Director for the applicable National Labor Relations Board (NLRB), the United States District Courts for the Southern or Eastern Districts of New York, or the United States Court of Appeals for the Second Circuit.

At the time the foregoing accretion clause was entered into, Corbel had approximately 180 technicians in total operating out of its facilities in the Bronx,⁵ northern New Jersey, Bridgeport, Connecticut and Mamaroneck, New York.⁶

The Local 1430 CBA contains a union security clause, as

⁵ The Bronx facility straddles the border with Mount Vernon, NY and is referred to in the record by both designations. The Bronx/Mt. Vernon facility is also where Corbel maintains its administrative offices.

⁶ More specifically, approximately 80 technicians were employed in the Bronx, 40 in New Jersey and 30 in each of the Mamaroneck and Bridgeport locations.

follows:

It shall be a condition of employment that all employees covered by this Agreement who are members of the Union in good standing on the execution date of this Agreement shall remain members in good standing and that any unit employee who is not a member in good standing in the Union on the execution date hereof shall become and remain members in good standing in the Union on the 31st day following their employment, the execution or effective date of this Agreement, whichever is later. The Employer shall not retain in employment any person unless he is or becomes a member of the Union as hereinbefore set forth, and, upon notification by the Union that any such employee is not a member in good standing, shall discharge said employee. In the event of any change in the law during the terms of this Agreement the Employer agrees that the Union will be entitled to receive the maximum Union security provision which the law allows.

b. The CWA unit

Falcon had been engaged in the business of providing cable installation services for Cablevision out of its facility located at 6055 Strickland Avenue, Brooklyn, New York. After an NLRB-conducted election, on July 31, 2012, the CWA was certified by the Board as the exclusive collective-bargaining representative of the following unit of employees:

All full- and part-time technicians, warehouse workers, and dispatchers employed by the Employer at or out of Falcon's Strickland Avenue facility, excluding all managerial employees, guards, and supervisors as defined under the Act.

There is no evidence of any bargaining between Falcon and the CWA between the time of certification and the cessation of Falcon's operations in Brooklyn.

B. Respondent's Operations

Respondent was established in October 2003. Its owners and officers are Angelo Pino (president), Robert Cipolla (vice president), and Paul Mucci (vice president).⁷ At present, Cablevision is its sole customer. Company headquarters are located in the Bronx/Mt. Vernon facility which contains administrative offices and houses the company's dispatchers, and its payroll, human resources, and labor relations departments. Cipolla and Mucci maintain offices there as do two of Corbel's supervisors, Sam Harris and Alphonse Robinson. Mucci is primarily involved in overseeing the day-to-day operations of the company and both Harris and Robinson report to him.⁸ The dispatchers who are situated in the Bronx facility serve all areas. Generally speaking, new employees receive a company orientation in the Bronx facility, although this was not a requirement or implemented for the former Falcon employees.

There are specific geographical regions which each facility services. The Bronx and Brooklyn regions cover those entire boroughs. The Bridgeport, Mamaroneck, and New Jersey re-

⁷ Of the three co-owners, only Mucci testified.

⁸ As discussed below, Respondent maintains that Harris and Robinson are the sole supervisors of the service technicians in its five facilities. Neither Harris nor Robinson testified herein.

gions service the counties in which they are located as well as adjoining areas. As will be discussed below, at times employees are transferred either on a short-term or long-term basis to deal with operational needs. In each region, there is an individual, referred to by Mucci as a lead technician/supervisor (also referred to in the record as “manager”) who reports directly to Harris and Robinson. These are: Tony Pollino (Bridgeport), Douglas Grant (Mamaroneck), Charles Jackson (New Jersey), Sean Coley (Bronx/Mount Vernon), and Colin Lovelace (Brooklyn).⁹

Each week, typically on Wednesday, Corbel will be told the approximate number of job orders that will be received from Cablevision for the following week. Corbel will assess the number of employees scheduled to work for that period and establish a work force planner. If more work is required in a particular area, Harris and Robinson will decide how it should be covered. Corbel will then submit to Cablevision the names of those employees that will be working on any particular day, along with their identification (referred to as “tech”) numbers. Cablevision enters this information into their computer system which then generates “routes” or a series of assignments based upon the number of technicians who are expected to be working on any particular day. Cablevision then prepares job orders which are sent to each individual facility, where they are printed and distributed on a daily basis. In the event a region is over or under-booked, Harris and Robinson will move employees around.

As Mucci testified, the facility managers are in charge of distributing the work to their respective technicians each morning, and overseeing their work throughout the day. They may make adjustments to the routes assigned to employees after the orders print and may do so without obtaining permission from either Robinson or Harris. Mucci also testified that it is Robinson and Harris who are responsible for the performance of the different facilities; the managers are responsible for quality control and to assist at the direction of the dispatcher, Harris or Robinson, should a problem arise. The managers may also serve as a liaison with Cablevision as necessary.

Facility managers have clerical assistants to help with day-to-day paperwork and work orders. Reporting to the managers are individuals variously referred to in the record as lead technicians, supervisors, or field technicians (I will call them lead technicians) who are assigned to monitor the work of field personnel and assist technicians with problems as they arise.

Although employees’ time and attendance is monitored at their assigned facilities, the company has converted to an electronic time system which enables employees to punch in and out of work at any Corbel location. The company’s inventory is managed by an employee named Marian Barion, who is stationed in the Bronx, through a central computer server.

According to Mucci, Corbel determines the pay grade of its

⁹ To distinguish these individuals from other employees who were also termed to be lead technicians/supervisors, I will refer to them as “managers.” My use of this term is not intended to denote any legal conclusion: however, I find that the use of this term has support in the record, as it is used in the course of Corbel’s customary operations, as will be discussed below.

employees through performance. Should a technician request a pay upgrade, recommendations will be forwarded up the chain of command¹⁰ and made to Mucci. Mucci also testified that he developed a “report card” for each facility, listing five different metrics, whereby a technician is provided with an overall grade. These are reviewed by Robinson and Harris prior to distribution to the facility managers. The Local 1430 CBA provides for incentive pay based on job performance which is subject to change at the Employer’s discretion.

The record reflects that, to a large measure, Corbel employees are required to purchase their own tools, except for meters. In this regard, I note that the Local 1430 CBA provides for an equipment allowance to employees.

C. Corbel’s Assumption of Brooklyn Operations and Recognition of Local 1430

Mucci testified that Falcon’s owner, Matt Spiewack, had been a former employee and Mucci learned that he wanted to cease operations in Brooklyn. Falcon planned to wrap up at the end of September and Corbel had discussions with Cablevision about assuming operations at that time.

On about September 21, 2012,¹¹ Corbel purchased certain assets of Falcon which included trucks and equipment. There was no agreement entered into between the parties regarding what, if anything, would happen to the Falcon employees. However, Corbel had agreed with Cablevision that it would seamlessly continue to provide services to Brooklyn customers including those who had been previously serviced by Falcon. As Mucci testified, it would be easier to hire as many Falcon employees as they could. This was because the technicians were already certified and approved, had “tech numbers,” the requisite experience and Cablevision identification, all required for employment. At the time, Falcon had between 50 and 60 employees working out of its Brooklyn facility.

On the same day that the aforementioned asset agreement was entered into, counsel for Corbel advised Local 1430 that Corbel had purchased certain assets of Falcon and intended to accrete the employees it planned to hire for its new Brooklyn operation into the existing Local 1430 bargaining unit and apply the CBA to these new employees. On September 24, a sign was posted at the Falcon facility announcing a “mandatory meeting” scheduled for the following day.

D. The February 25th Meeting

On February 25, Falcon convened a meeting for its employees. Present were Corbel co-owners Mucci and Cipolla. Also present were two representatives from Local 1430, Jordan el-Hag and Josh Gottlieb, who had been invited to the meeting and two representatives from the CWA, Chris Calabrese and Timothy Dubnau, who had not. Employees were told that as of Sunday, September 30, Corbel would assume operations in Brooklyn; that Corbel wanted to fill approximately 60 routes; that employees who filed job applications would be hired; that they would retain the same tech numbers; would drive the same

¹⁰ It appears from the record that such requests are initially made to the employee’s facility manager.

¹¹ All dates hereafter are in 2012, unless otherwise specified.

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trucks albeit with a new Corbel logo, and that their schedules and routes would remain essentially unchanged. Employees were also told that they were required to complete the Corbel application form, which was rather extensive, in its entirety. The application form distributed to employees included membership cards for Local 1430 as well as dues-checkoff authorization cards.

Employees were also told about certain changes in their terms and conditions of employment. They were informed that they would receive gas cards so that they would be compensated for expenditures for gasoline on the road; that they would be eligible to participate in a 401(k) plan and the IBEW health plan. There was also some discussion of the Corbel pay structure, which varied from Falcon's. According to certain witnesses, the meeting was somewhat chaotic in nature.

According to Dubnau, there was concern that not everyone would be hired, so the CWA representatives asked for confirmation of that fact on several occasions. As he testified, it was made apparent that anyone who wanted to work for Corbel would be hired, but that they were required to complete the entire employment application.

Dubnau testified that he told Mucci that the workers were represented by the CWA, that the CWA had a habit of bargaining upward and he looked forward to bargaining with Corbel over terms and conditions of employment. According to Dubnau, Mucci "made it clear" that he did not recognize and would not bargain with the CWA, and that his employees were represented by Local 1430.

Initially, it was not apparent that the IBEW application and dues-checkoff authorization cards were part of the application package, as they were located at the very end. Once the CWA representatives became aware that these documents were part of the application, they advised employees not to fill them out. Falcon employee Kirk Collins also told employees not to complete the union cards, and stated that they had recently voted for the CWA and were members of that union. He also inquired as to whether Falcon had provided Corbel with a "hit list" of employees not to hire. He was told that there was no such list.

It is admitted and otherwise undisputed that employees were told by Corbel representatives that if they did not fill out the IBEW cards attached to the employment application they would not receive benefits. According to Dubnau, Mucci made such comments to him in the presence of employees and IBEW representatives and Mucci acknowledged doing so. Calabrese similarly testified that both Mucci and Cipolla made such comments to employees.

On cross-examination, Dubnau acknowledged that employees were also told that Corbel would bring in employees from other regions, in particular the Bronx, should they not have enough manpower to fulfill Cablevision work requirements in Brooklyn.

E. The CWA Again Requests Recognition and Bargaining

On the following day, September 26, Dubnau sent the following letter to Cipolla:

I represent the Communication Workers of America ("CWA"). We met yesterday at the meeting you held with

Falcon employees doing installation work for Cablevision in Brooklyn, New York. At the meeting you advised that Corbel had bought some of the assets of Falcon and would now be doing the Brooklyn Cablevision installation work. You also gave out job applications to the Falcon workers and advised that every former Falcon employee who wanted a job would be hired.

You also advised that the terms and conditions of employees at Corbel would be different from the terms and conditions these employees had with Falcon. Additionally you stated that at Corbel they would be represented by IBEW Local 1430. You included IBEW Local 1430 sign-up cards as part of the employment application.

As I and other CWA representatives advised you yesterday, CWA represents these workers. As Corbel is a successor employer our representation rights continue at Corbel. We hereby request bargaining for these workers and request that you contact me to set up a meeting as quickly as possible. Further, while CWA applauds any improvements to the terms and conditions of employment for these workers, they must be bargained with CWA. That is the law. It is also critical that any bargained improvements are reduced to writing and are enforceable.

F. Corbel Expedites the Hiring of Falcon Employees and Assumes Brooklyn Operations

Mucci testified that because Corbel had to process between 50 and 60 applications from the former Falcon employees in time for the start of its Brooklyn operation, it developed an expedited hiring process. Once an employment application was submitted, that employee was deemed hired. Even employees with incomplete applications were sent out to work because it was understood that those employees had an interest in coming to work for Corbel. It appears from the record that by Tuesday, October 2, virtually all the Falcon employees who had applied for jobs had been hired by Corbel. These included the technicians, warehouse employees, lead technicians, and Lovelace. There was one exception: Kirk Collins, whose situation is discussed below.

Corbel began operations in Brooklyn on September 30. It did not continue to operate from the former Falcon facility located on Strickland Avenue. It had, at some prior point in September, entered into a lease for a facility located on Avenue X and 69th Street in Brooklyn. Apart from its location, this facility varied from the former Falcon facility in various respects. At Falcon, employees reported to a parking lot with a trailer and several shipping containers. Technicians were often required to load and unload their vehicles outdoors. Indoor plumbing was limited and employees were at times obliged to use a port-a-potty. By contrast, Corbel's Brooklyn facility has space for employees to load and unload their vehicles indoors and has indoor plumbing.

There is no dispute that, after the September 25 meeting, Corbel hired a majority of the former Falcon employees and that they continued doing essentially the same jobs as previously performed: i.e., the installation and servicing of cable as a contractor to Cablevision. In addition, during the period from

October 31, through November 18, five technicians were transferred from the Bronx to Brooklyn.

The record establishes that the former Falcon employees began their employment with Corbel working, as had been previously represented to them, their same schedules, with the same Cablevision tech ID numbers and driving the same trucks.¹² They received necessary equipment and supplies from Corbel's Brooklyn warehouse. Customer and quality control issues were dealt with locally: either by a lead technician or one of two former Falcon local managers: Lovelace or William "Country" McFarlane. Although Lovelace testified that he does not currently have a job title, as will be discussed in further detail below, it appears that employees, as well as Cablevision continue to consider him to be the manager of the facility.

Every technician employed by Corbel is certified to do residential work, and there are additionally five or six who are certified to perform commercial work as well, as they were under Falcon. All the commercial technicians report to a lead technician by the name of Shamroy Powell, who held this position under Falcon. The residential technicians report to one of four other lead technicians: McFarlane, Horace Peart, Cornwallis Glover, and Glen Byron. These lead technicians have the same job responsibilities they had under Falcon, which include quality control, assisting the technicians, resolving issues which may arise in the field, taking on extra work which may arise and ensuring that technicians perform their work up to company standards. There are also five warehouse employees who are all former Falcon employees.

Regarding employee contact with the central Bronx office, current (and former Falcon) employees Donnell Slay and Kirk Collins testified that such contact was limited to occasional inquiries about an estimated time of arrival or to notify them of job cancellations. A witness called by the Respondent, Phillip Watt (whose testimony is discussed in further detail below), similarly testified that when assigned to the Brooklyn region, he primarily dealt with the people there, in particular lead technician McFarlane.

There is also no dispute that the Local 1430 CBA has been applied to the former Falcon employees. In addition, both Collins and Slay testified that, while they did not execute a dues-checkoff authorization form authorizing Corbel to deduct dues for Local 1430, such union dues have been deducted from their pay.¹³ Slay testified that when he saw that his pay stub reflected a \$44 dues deduction for Local 1430, he asked Lovelace about it and, after some apparent initial confusion, Lovelace told him that the union dues were being reimbursed to employ-

¹² According to Respondent, many of these trucks became inoperable due to damage from Hurricane Sandy and had to be replaced. For the initial month of operation, the trucks employed by the Corbel Brooklyn technicians were the same ones they had used when employed by Falcon.

¹³ Counsel for the General Counsel issued a subpoena to both Respondent and Local 1430 seeking membership and dues-authorization cards. Respondent produced one membership card, contained in an employee personnel file. Local 1430 provided 32 dues-authorization cards, executed on various dates between September 25 and November 20, and represented for the record that it did not have any membership cards in its possession.

ees in the form of an equipment allowance. I note that article 12(c) of the Local 1430 CBA requires Corbel to provide an equipment allowance of \$45 per month to its employees; however this is seemingly unconnected to any purported offset for union dues. I note that Lovelace, who testified in this proceeding, did not offer any rebuttal to Slay's testimony.

G. Corbel's Relationship with Cablevision and the Assignment of Work to Employees

Respondent maintains that Corbel is obliged to be a "flex work force" for Cablevision, providing service installation and repairs throughout the metropolitan region as dictated by Cablevision's short- and long-term requirements.

The contract between Cablevision and Corbel provides that it is required to have crews at work at least 8 hours per day, 7 days per week upon 5 days written notice from Cablevision. It also provides that Corbel shall:

Employ at least one (1) nonworking supervisor for every ten (10) working field technicians. Such supervisory personnel shall be responsible for responding to and investigating customer complaints and promptly and courteously resolving the same. On a weekly basis, each supervisor shall inspect no fewer than ten percent (10%) of the work performed by each field technician for the previous week and for contacting the owners of such locations to ensure customer satisfaction. Inspection results shall be electronically submitted on a weekly basis to the Contractor manager responsible for oversight of the work in the region where the work was performed or was to have been performed. . . .

The agreement also provides that:

Contractor shall make such advance arrangements as may be necessary and appropriate, including but not limited to the preparation for training and hiring, or firing, temporarily reassigning or layoff off of supervisory personnel or labor, making arrangements for tools, equipment and warehousing and such other arrangements as may be appropriate in order to meet Cablevision's anticipated future requirements. Further Contractor agrees and understands that Cablevision makes no guarantee hereunder to provide Contractor with any certain amount of Work.

Corbel's contract with Cablevision also mandates that it:

. . . assign tech numbers to each Contractor employee and/or permitted subcontractor working for on behalf of its company and Contractor will keep records by tech number capable of identifying the individual Employee or permitted subcontractor that performed any particular job or Work at any point in time in which Contractor is performing Work for Cablevision;

Corbel is further required to:

On a weekly basis, [] supply Cablevision with a written list of each Employee who will perform Work together with the information required in Section 12(k) hereof.¹⁴

In support of its contention that Corbel is a flex force for Ca-

¹⁴ It does not appear that the contract in evidence contains a sec. 12(k).

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blevision which requires it to promptly effect short- and long-term transfers of employees, Respondent relies, in part, upon Mucci's testimony regarding two occasions which occurred during the course of the hearing. Regarding a requested transfer of employees to New Jersey, Mucci testified:

Last night I received an email from Cablevision in North New Jersey indicating that they're seeing a spike in work. They're overbooking our technicians that are out there working now and they want us to bring more vehicles, more technicians into New Jersey. So that's what we're looking to do today in looking at all of our facilities and all of our different locations, and see who we can move to New Jersey to assist.

In another instance during the course of the hearing, Cablevision asked Corbel to provide additional manpower in the Brooklyn region. As Mucci testified:

And today I think is a perfect example. There is Cablevision has a work stoppage or some kind of labor issue with CWA going on. We received a text while we were in here this morning. I received a text on one of our breaks demanding that we send 10 techs and 10 trucks from Bronx to Brooklyn today, this morning. So that was immediately pull them out of the field or take/call in extra guys that weren't working today, move them to Brooklyn, and more to come. You know we're slowly digesting the information, potentially putting more technicians into Brooklyn if this continues.

As Mucci testified, Corbel tools and equipment are interchangeable and may be switched from service region to service region as needed. Employees wear similar company uniforms.

H. The Management and Supervision of Corbel's Brooklyn Operations

Mucci testified that at Corbel's Brooklyn facility Lovelace is a supervisor who used to work for Falcon as management. Lovelace is the highest level full-time employee at the facility, and his role is analogous to that of other supervisors and lead technicians at other Corbel facilities. Lovelace ensures that employees get their routes and are working up to company standards.

Mucci also testified as to certain limitations on Lovelace's authority. For example, Lovelace has no authority to fire or discipline employees, unless directed to do so by Harris or Robinson, or to hire employees, raise or lower compensation or otherwise affect employee pay level, grant leave, or approve or deny grievances. Rather, such authority lies with Harris or Robinson who are the only individuals within the company (other than its owners) who have the authority to effectuate any of the foregoing personnel actions.

With regard to a routine request for time off, Mucci testified that Lovelace is not authorized to grant such a request and, although he will sign off on a written request submitted by an employee, this must go to the Bronx for approval. In this regard, it should be noted that under the Local 1430 CBA, employees are not entitled to paid time off until after 1 year of employment. Thus, at the present time any leave taken by Corbel's Brooklyn employees would be unpaid.

Mucci initially maintained that he did not know whether

Lovelace was authorized to interview job applicants or whether he had, in fact, spoken with anyone before their applications were processed in the Bronx. Mucci pointed to the fact that in November or December, the company switched over to an online application system. On cross-examination, however, Mucci acknowledged that, in his pretrial affidavit, he stated that if a lead tech/supervisor interviewed an applicant for a position and provided the requisite approval, the paperwork would then proceed to the Bronx where a background check, drug test, and other investigation would take place. After clearance, the applicant's paperwork would then be submitted to Cablevision for review and approval. Once such approval was received, a tech number would be issued to the applicant and he would be hired.

Wilton ("Country") McFarlane reports to Lovelace and is considered a lead technician. It appears from the record generally that he had previously been considered by employees to be Falcon management at the Brooklyn facility.

Lovelace testified that he had previously been employed as a manager by Falcon for about 1 year. While he claimed to hold no official position with Corbel, he did state that he works in "management." While Lovelace had been employed with Falcon, Company Owner Spiewack had been onsite on a daily basis. At Corbel, the individuals in charge—Mucci, Harris, and Robinson—do not have the same level of interaction with employees: either Harris or Robinson visit Brooklyn approximately once or twice per week.

Lovelace also drew certain distinctions between his former and current job responsibilities. At Falcon, while the decision to actually hire someone fell within Spiewack's control, Lovelace could decide whom to hire. He does not fulfill this function at Corbel as various facilities are involved and the company needs to assess the full scope of operations to decide where employees are required. Lovelace attested to the fact that, at Falcon, he could fire an employee for misconduct, although he rarely did so. By way of example, he recalled, without any specificity, one instance where he received an order from Cablevision to discharge an employee. He provided no others.

Lovelace acknowledged that on one occasion while employed by Corbel he received an email from Cablevision addressed to him as "manager," which was sent to Harris and Robinson as well, regarding an employee who was the subject of a customer complaint, whereby Cablevision directed that this employee be removed from the field. Robinson instructed Lovelace to remove the technician and confiscate his keys, identification, and related material and return them to Cablevision. As Lovelace testified, the email from Cablevision came to everyone "in the upper level."

Lovelace testified that while employed at Falcon he had the authority to suspend employees without pay, although he did not recall any specific occasion where he did so. He attested that he did not have such authority at Corbel. He further stated that at Falcon he could approve requests for paid leave, but at Corbel such requests must be submitted to either Harris or Robinson for approval. Lovelace further stated that he is without authorization to adjust timecards and employee pay. All such inquiries are to be submitted to either Harris or Robinson. He similarly testified that requests for unpaid leave are submitted

through him but must be approved by Harris or Robinson. In the event of a last-minute call out, he will contact Harris or Robinson to approve the employee's absence.

Lovelace also admitted, however, that when employees are unable to report to work they will simply call him. On occasion, employees have also called out by sending a text message; however, he has advised employees that this is not an acceptable form of call out because he may not pick up the message in a timely fashion. Lovelace further admitted that in the event an employee reports to work late (i.e., after 8 a.m.) he has the discretion to send the employee home for the day without pay.

The General Counsel presented certain testimony from employees Slay, Collins, and Justin Taylor seeking to rebut Respondent's contentions as to the limitations of Lovelace's authority, and to otherwise show that operations under Corbel are substantially the same as they were under Falcon. While some of this testimony does rebut the categorical assertions made by Mucci and Lovelace, other evidence adduced is equivocal.

Slay, who had been employed by Falcon since March 2012, commenced working for Corbel on or about October 1. He testified that after Corbel assumed operations, Lovelace had assured him that he continued to be the manager of the facility and that McFarlane was the assistant manager. According to Slay, his workday remains essentially unchanged. The primary difference is that Corbel has installed an automated system to provide employees with equipment for their routes. Slay drives the same truck he drove for Falcon and the number has remained the same. Slay maintained that in the course of his workday he has minimal contact with the Bronx office. On occasion, he may contact that office to get information about picking up a job or if he does not have the appropriate paperwork.

Slay testified that if he needs to take a day off from work, he will approach McFarlane or Lovelace, fill out a time off request form, sign it, and submit it. Slay did not know, however, whether either Lovelace or McFarlane would have to speak with anyone else prior to giving approval. Although Slay testified that Lovelace can deny permission to an employee for a day off, he did not offer any particular details about if or when this might have occurred to him.

On cross-examination, Slay testified to a time that he had once complained to Lovelace that commercial technicians were being paid at the (lower) residential rate. However, that issue was resolved by Robinson and Mucci. In particular, Robinson came to the Brooklyn facility, spoke with the affected employees and assured them the issue would be resolved, which it was. Slay also referenced a time when he complained to Lovelace that he had not been paid for certain jobs performed. He was instructed to submit paperwork to Lovelace, who would then forward it on to have the discrepancy corrected.

Employee Kirk Collins testified that he can go for days or weeks without any contact with the dispatchers in the Bronx. On occasion they will call him and ask for an estimated time of arrival at a particular job. Collins testified that on one particular occasion, in connection with an initial dispute over pay rates, Lovelace asserted he was the manager of the facility and that this was reiterated by Mucci who stated that Lovelace and McFarlane were the managers and would determine employee

pay rates. Neither Mucci nor Lovelace specifically rebutted this testimony.¹⁵

According to Collins, Lovelace runs the facility, hands out work, administers discipline and deals with pay issues. The General Counsel attempted to adduce hearsay evidence regarding discipline Lovelace had administered to other employees. At some point I cut this area of inquiry off inasmuch as it was vague, without foundation and uncorroborated by any other probative evidence. When directed to address instances which affected him personally, Collins asserted that when he attempted to speak with Harris about a payroll issue, Harris advised him that if he had problems with his compensation he should go through the "chain of command" and speak first to Lovelace or McFarlane.

Field technician Taylor testified that when he began working for Corbel, and was late in reporting to work, Lovelace would send him home without his route, and that this had occurred, on occasion, as frequently as once or twice per week. He also contended that on recent occasions he has been sent home by Lovelace when work was not available and that, to his understanding, this has happened to others as well. Taylor further testified to a time when he took a company truck home, without permission. When Lovelace found out that he had done so, he instructed Taylor to leave his truck at the shop for the week and ask him at the end of that period whether he could resume his practice of taking it home.¹⁶ Taylor was unaware whether Lovelace had consulted with any other Corbel manager prior to making any of these disciplinary decisions, but did not see him do so. I note that Lovelace, who testified on the same day as Taylor, did not rebut or offer any explanation to provide context to the foregoing testimony.

1. Evidence of Employee Interchange

Respondent contends that the accretion of the Brooklyn employees into the Local 1430 bargaining unit is lawful based, in significant measure, due to the amount of long- and short-term functional integration among its facilities including extensive employee interchange. Respondent relies upon Mucci's testimony that Cablevision frequently exercises its authority to dictate work levels on short notice. In addition, Mucci testified that advance notice of shifting work levels is provided when Cablevision plans certain large scale projects, and Corbel is expected to meet those demands.¹⁷

Respondent adduced testimony from employee Phillip Watt

¹⁵ In this regard I note that Mucci testified on several occasions during the course of the hearing and would have had ample opportunity to do so.

¹⁶ As Taylor testified, the truck he typically used became damaged and had to go into the shop. He was then provided with a loaner truck which he took home. Taylor was out of work for the following week and the truck was unavailable for use by another employee. When Lovelace learned about this situation, he told Taylor that he could not take his truck home for the week.

¹⁷ Respondent points to the after-effects of Hurricane Sandy, where Cablevision was faced with restoring service to numerous customers who had lost service in Brooklyn. As it happened, Corbel's new facility was in a vulnerable area and they lost the majority of the trucks they had purchased from Falcon to the destructive effects of salt water. This required a major shuffling of equipment and personnel.

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regarding his work history and claims it is illustrative of its pattern and practice of transferring employees. Watt commenced working for Corbel in June 2012, and was assigned to the Bronx. After about 1 month, he was reassigned to Mamaroneck. Three months later he was sent to Brooklyn and 3 weeks later reassigned to Mamaroneck. After 1 month, Watt went to Brooklyn and subsequently returned to Mamaroneck.

Pursuant to a subpoena issued by the General Counsel, Respondent produced documents to show work assignments for its employees for a 15-week period from September 2012, through mid-January 2013. Of the records produced to the General Counsel, which were voluminous in nature, Respondent sought to (and did) introduce into evidence 159 reports, which represent temporary employee transfers among its facilities for this period of time. Respondent contends that these records show that Corbel directed technicians to perform work in multiple regions within a period of a single week on at least 150 occasions; but provided no specific analysis of these records for my review.

Based upon the records produced by the Respondent, the General Counsel maintains that 16 of these 159 reports show employees from other regions working in the Brooklyn region for a total of 56 days during the representative 15-week period.¹⁸ In addition, one report shows that a Brooklyn-based technician, Gelpis Diaz, worked out of the Bronx facility from October 16 to 20. He was then permanently transferred to the Bronx facility effective October 22.¹⁹

In a similar vein, the Charging Party conducted an analysis of the documents and arrived at the same conclusion: that there were 56 daily occasions on which technicians assigned to other facilities worked in Brooklyn during the 15 weeks between September and January.

Reviewing the records in evidence regarding employee interchange during the 15-week period at issue; again, without any analysis provided by the Respondent, I find that the records fail to show any interchange involving the New Jersey region. Relying upon the analysis of the records provided by the General Counsel, the Charging Party, and my own review, it appears that there were companywide short-term transfers that involved approximately 36 employees in total (8 of whom performed work in Brooklyn). These instances of interchange occurred primarily between the Bronx and Mamaroneck regions, which the two are most geographically proximate. As noted above, there were 56 identified days where employees from other regions worked in Brooklyn. To a far lesser extent the records reflect some interchange with Bridgeport.

Mucci testified that during this same period, Corbel had longer term transfers, for which records were not available, which constituted between 10 and 15 percent of its work force. Such transfers would range from a week to several months. Although Mucci claimed that no documents exist which could

¹⁸ It appears that there are eight such employees: Trevor Best, Osbert Daniel, Rowan Johnson, Bevan McFarlane, Vivian McIntosh, Durraine McKenzie, Whitney Titus, and Phillip Watt.

¹⁹ In addition, as noted above, five employees from the Bronx region were transferred on a long-term basis to Brooklyn during the period between October 31 and November 18.

easily and accurately reflect such long-term assignments, there was no specific explanation provided as to why this would be the case.

J. The Alleged Change in Terms and Conditions of Employment

As noted above, sometime after Corbel hired the former Falcon employees, and after Dubnau requested bargaining over terms and conditions of employment, Respondent began receiving complaints from its Brooklyn employees regarding their compensation. It appears that the Falcon and Corbel pay levels were not consistent and certain employees hired at the "B" level thought they should be receiving pay at Corbel's "C" level. As both Collins and Lovelace testified, to address these concerns, Mucci held a meeting with employees and told them that changes in their compensation rate would be made. Lovelace said that Mucci told employees that Corbel would be looking at everyone's statistics and would adjust pay based upon experience and that he would be working with Lovelace to compile a list of how employees should be compensated, based, in part, upon Lovelace's knowledge of their skills and experience. As Collins testified, his compensation was adjusted thereafter. Respondent has offered no evidence to show that it did not adjust the pay level of certain of its employees, as had been represented to them during the meeting. Although Lovelace asserted that he did not know what Respondent did with the information he had provided, there is no evidence that Corbel conducted any further investigation regarding the skills and experience of this particular group of employees prior to making salary adjustments.

K. The Alleged Delay in Hiring Kirk Collins

Collins had previously been employed by an entity owned and operated by Mucci and Cipolla (Muc-Cip) from 1990 to 2005. During this period of time, he served as a shop steward for Local 3, IBEW, the union representing Muc-Cip's employees. He was also a bargaining committee member while in their employ.

He was active in the CWA campaign under Falcon and served as the union observer during the election. At the mandatory meeting held on September 25, Collins questioned Respondent's owners about an alleged "hit list" of certain employees, an allegation they denied at the time and which Mucci denied at the hearing.²⁰ When Mucci told employees that they must complete the employment applications in their entirety, Collins, along with the CWA representatives, told employees not to sign Local 1430 cards because they had already voted for the CWA and were members of that union.

As Collins testified, he did not submit a job application at the time. Rather, on September 29, he gave one to McFarlane, who placed it in the office with a stack of others. On the following day, September 30, Collins went to the Falcon Strickland Avenue facility where he encountered CWA representatives Calabrese and Dubnau. The facility was empty. Collins contacted certain coworkers and learned that Corbel had moved its opera-

²⁰ Mucci denied having any discussions with Spiewack about whom to hire.

tions to the 69th street lot and the three men proceeded to that location.

When they arrived, McFarlane came out and asked Collins what he was doing there. He replied that he was there to check out the new place. McFarlane told Collins that he was not scheduled to work and to leave. He closed the gate in Collins' face. That night certain coworkers called Collins and informed him that they had been told to come in to pick up their gas cards, but Collins received no such call.

Collins returned to the Corbel facility the following day, and asked Lovelace if he could pick up his gas card. Lovelace told him that it was not his scheduled workday and he did not know if Collins would be working there as he had not received an employment application from him. Collins replied that he had left one with McFarlane on Saturday; but Lovelace replied he did not know about that. Collins approached McFarlane and asked him whether he had received an employment application from him and he said that he had. McFarlane then said that he had given the applications to Robinson and that they would be in his office. Collins provided this information to Lovelace, who insisted that there had been no application received from him. Collins then offered to complete another application at the time and Lovelace told him to take one with him and complete it off premises. Lovelace then escorted Collins from the facility, without affording him an opportunity to obtain an employment application.

Collins testified that while present at the Corbel facility on that day he encountered other workers who had work orders, gas cards, and keys with applications visibly rolled up in their back pockets.²¹ He further observed that two employees were allowed to proceed upstairs to the office area where they were intending to complete the application process.

On the following day, Tuesday, October 2, Collins reported to the Corbel facility as it was his regularly scheduled workday. Lovelace and Cipolla were in the warehouse distributing routes and told Collins that there was no work for him. Cipolla stated that there had been no application received from him and that he was hiring only 12 men and was planning to bring the others in from the Bronx. Collins asked whether he was being blackballed and Cipolla stated that he was not going to say that; but he didn't have an application for Collins. Collins offered to fill out another, but he was escorted off the premises by Cipolla. Collins testified that on this occasion he saw lead technician Delano Peart and asked him if he had completed his application, and Peart replied he had not; that it was his first day in.²² Peart had his keys and his vehicle was running. He removed the uncompleted application from his pocket and showed it to Collins. Collins also had a conversation with Local 1430 representative Josh Gottlieb and asked him to find out why Corbel was not hiring him. On the following day, October 3, Collins received a phone call from another Local 1430 representative

²¹ Collins identified these employees as Thurman Joseph and George Gallon.

²² Peart's application is dated October 4.

who advised him to file an unfair labor practice charge.²³

On October 3, at about 6:30 p.m., Collins returned to the Corbel facility to submit another job application. He completed it while sitting in the upstairs reception area. Also present were employee Derrick Vaz, who was doing the same, and lead technician Cornwallis Glover. Glover received a phone call and reported that Collins was submitting an application. After Glover got off the phone, he told Collins that he had to lock up and asked Collins how much longer he would be there. Collins replied that he was almost finished. Shortly thereafter, McFarlane appeared and collected the employees' applications.

The following evening, Collins received a telephone call from McFarlane, instructing him to call Harris.²⁴ When they spoke the following morning, on Friday, October 5, Collins was told to come to the Bronx office for a meeting. He met with Harris and Robinson. Harris told Collins that they wanted to see where Collins' head was at; that the CWA was gone and they were with Local 1430. Collins replied that this was something for the courts to decide. He spoke about the poor working conditions at Falcon that had prompted the employees to seek union representation and complained that he should not have been blackballed because of his organizing efforts and attempts to help employees. While there, Collins filled out another employment application. He was called the following day and offered employment and began working for Respondent on Tuesday, October 9.²⁵

Lovelace did not address the circumstances involving the employment of Collins in his testimony. The only evidence adduced in this regard from Respondent was the following testimony from Mucci:

Q: [BY RESPONDENT'S COUNSEL] To your knowledge, did Mr. Collins immediately file a written application for employment with Corbel after the September 25th meeting?

A: He did not.

Q: Did he eventually submit a written application?

A: Yes, he did.

Q: Do you know when he submitted that written application?

A: It was a few days after we began working in Brooklyn. I don't know the exact day of the week, but I, I do remember seeing him at the Bronx office sometime that week, meeting with Alphie Robinson and Sam Harris.

Q: Was Mr. Collins eventually hired by Corbel?

A: Yes.

²³ The CWA had filed an unfair labor practice charge on October 2 which, among other things, referenced Respondent's failure to hire Collins.

²⁴ Collins also testified about a telephone call he received from coworker George Cowan that evening who recounted the details of a meeting held with Harris where he had been about Collins' union activities with the CWA. Although this testimony is clearly hearsay, I find it to be of some probative weight as it is corroborated by the direct and un rebutted evidence relating to Collins' subsequent discussion with Harris, an admitted supervisor of Respondent.

²⁵ Collins was initially told to report to work on Sunday, October 7, but he declined to do so as it was not his regularly scheduled day for work.

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Q: When was he hired by Corbel?

A: I think after the meeting with Mr. Harris and Mr. Robinson. They talked to him the following morning and told him that he, you know, gave him a schedule to start work.

Q: Did Corbel delay the process of hiring Mr. Collins in any way because of his activities on behalf of the CWA?

A: No.

Q: Did Corbel inhibit or delay the hiring of Mr. Collins because of his activities for a company that you previously owned?

A: No.

Q: Did Corbel inhibit or delay the hiring of Mr. Collins because of his activities on behalf of the union when he was employed by Falcon?

A: No.

In reply to Respondent's asserted position regarding the reason it did not initially hire Collins, the General Counsel adduced evidence that a number of employees worked for Corbel prior to the date of their applications.²⁶ In response, Mucci testified that it might have been the case that the initial applications submitted by these employees were incomplete and they were asked to complete another, which would have a later date. Mucci failed to supplement such speculation with specific evidence as to whether this occurred with regard to any particular employee.

III. ANALYSIS AND CONCLUSIONS

A. Contentions of the Parties

Respondent, joined by Local 1430, argues that the Brooklyn region is a valid accretion to the existing Local 1430 bargaining unit. As an initial matter, Corbel asserts that it does not operate its facilities as individual independent bargaining units because of the need to transfer technicians from shop to shop to fulfill its commitment to be a "flex force" for Cablevision. Moreover, Corbel argues that it is not a successor to Falcon because it has instituted significant operational changes from Falcon's model.

Corbel disputes the assertion that it continued Falcon's operation without substantial interruption or change. In support of these contentions, Respondent argues that it opened a new facility unaffiliated with Falcon, which offers superior conditions; that the Brooklyn facility is a field service facility rather than a primary base of operations; that Corbel moved trucks and equipment to supplement those purchased from Falcon; that its dispatch, human resource and office operations are centralized in the Bronx; that Brooklyn technicians are required to

²⁶ For example, technician Geatjens Boutros' application was dated October 15, but work orders show that he worked from October 2 through 6. Delano Peart's application was dated October 4, but he worked on October 2 through 6 (I note that this corroborates Collins' account of their interaction regarding this matter). Chad Sears' application was dated October 1 and was sent to work on the same day. In addition, Marlon Wright's application was dated October 17, but Respondent's work orders show that he worked on September 30, and October 3 through 6.

perform work throughout the metropolitan region; that Corbel's timekeeping and warehouse management systems are electronic and different from those maintained by Falcon; that its compensation scheme and policy manuals and procedures are different from Falcon's and that employees wear Corbel rather than Falcon uniforms.

Respondent next argues that, even if Corbel is found to be a successor to Falcon, it properly accreted the former Falcon employees into a single bargaining unit of service technicians. In support of this contention, Respondent argues that its IBEW-represented employees predominate over the employees formerly represented by the CWA; that its functional integration requires a single bargaining unit of service technicians; that its overall and daily operations are centralized and controlled from its Bronx operations; that Corbel's human resources and labor relations are centralized with no local autonomy over such matters; that Corbel's service technicians possess the same skills, functions, and working conditions regardless of working location; that Corbel's bargaining history weighs in favor of a single bargaining unit; that its facilities are in close geographic proximity and that there is substantial employee interchange among the service technicians working in different regions.

Respondent further denies providing unlawful assistance to Local 1430 or unlawfully delaying the hiring of Kirk Collins.

The General Counsel and the CWA argue that Respondent is a successor to Falcon; that Corbel assumed the bargaining obligations of its predecessor; that the Brooklyn region continues to be a separate appropriate single-location bargaining unit and, accordingly Respondent unlawfully recognized and assisted Local 1430. This unlawful assistance included maintaining and enforcing a collective-bargaining agreement which contained union security and dues-checkoff provisions. The General Counsel further contends that Respondent changed the pay for its Brooklyn technicians without notifying the CWA or providing it with an opportunity to bargain; that Respondent delayed in hiring Collins because of his protected concerted and union activities and that Respondent further violated the Act by unlawfully assisting Local 1430 during the September 25 meeting.

B. Successorship

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court upheld the proposition that a mere change in employers or ownership of an enterprise did not mean that the new employer had no obligation to bargain with the representative of its predecessor's employees. In the circumstances of that case, where the bargaining unit remained unchanged and a majority of employees hired by the new employer were represented by a certified bargaining agent, the Court found a duty to bargain on the part of the new employer. This doctrine was further refined in the Court's holding in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), where the Court explained that where an 8(a)(5) violation is alleged in the context of an employer assuming the operations of a predecessor employer, the General Counsel must demonstrate both the majority status or constructive majority status of the union in an appropriate unit, and a "substantial continuity" between the employing enterprises. In following the direction of the Court, the Board has found the threshold test for determining successorship is:

(1) whether a majority of the new employer's work force in an appropriate unit are former employees of the predecessor employer; and (2) whether the new employer conducts essentially the same business as the predecessor employer. See *GFS Bldg. Management, Inc.*, 330 NLRB 747 (2000); *Sierra Realty Corp.*, 317 NLRB 832 (1995).

The above factors are to be assessed from the perspective of the employees, "whether those 'employees who have been retained will . . . view their job situations as essentially unaltered.'" *Fall River Dyeing*, supra, quoting *Golden State Bottling Co. v. NLRB*, 414 U.S.168, 184 (1963).

Here, in agreement with the General Counsel and the CWA, I find that Corbel is a *Burns'* successor to Falcon.²⁷ By September 30, Respondent had hired the vast majority of Falcon's employees, as it had told employees it would. At this point in time, Corbel's Brooklyn work force consisted solely of former Falcon technicians and warehouse employees. As Falcon ceased its operations, Corbel initiated theirs without any hiatus and utilized the former Falcon employees to continue the same installation work, within the same geographic region, assuming virtually identical operations for the same customer. As was told to the technicians at the September 25 meeting, and not demonstrated otherwise, the technicians maintained their same work schedules, retained the same technician identification and, at least at the outset, drove the same trucks as they had for Falcon. The facility manager (Lovelace) and the lead technicians were all former Falcon employees, who had occupied substantially similar positions. Generally, employees obtained work supplies at Corbel's Brooklyn facility. The employees who testified at the hearing stated that, in their view, their jobs remained essentially unchanged after Corbel assumed operations.

Respondent maintains that there were various fundamental changes in operations sufficient to rebut a finding of successorship. One specifically pointed to is the nature of the supervision of the service technicians. Respondent maintains that they are supervised by personnel based in the Bronx who make visits to the Brooklyn facility once or twice per week. Respondent also argues that terms and conditions of employment are set by personnel located in the Bronx for all technicians and that the authority to hire, discipline, and discharge employees is centrally determined as well. As will be discussed in further detail below, I find these claims to be somewhat overstated. While it may be the case that Harris and Rob-

²⁷ I do not find that Corbel was a "perfectly clear" successor to Falcon, which would have required it to consult with the employees' bargaining representative prior to setting initial terms and conditions of employment. *NLRB v. Burns Security Services*, 406 U.S. at 294-295. This doctrine applies when the successor employer has represented or led employees to believe that they would be retained without any change in their terms and conditions of employment or when the successor employer has failed to announce such changes prior to inviting the predecessor's employees to accept employment. *Garden Grove Hospital & Medical Center*, 357 NLRB No. 63, slip op. at 4 (2011). Here, as the evidence shows, and as the General Counsel apparently concedes, Respondent announced certain changes to the terms and conditions of employment at its initial meeting with employees on September 25. See *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enf'd. 529 F.2d 516 (4th Cir. 1975).

inson oversee various personnel matters, the fact remains that Corbel hired Lovelace, a former Falcon manager, not as a field technician but rather, to run the Brooklyn facility. While Lovelace's authority to take independent action may be more circumscribed than it was under Falcon, he continues to oversee the day-to-day operations much in the same fashion. In particular, I note that even though the company's dispatchers are located in the Bronx, Brooklyn technicians obtain their daily work assignments from Lovelace, who has the authority to adjust employee workload and routes as required. Similarly, the lead technicians were also hired and for the most part have continued to do the same jobs in the same manner they did under Falcon, in accordance with Corbel's contractual undertaking with Cablevision. With respect to terms and conditions of employment for Corbel employees, I note that for the most part these are established by the Local 1430 CBA. For Respondent to argue that there is no successorship because such terms have been applied to the Brooklyn-based employees is simply an exercise in circular reasoning.

The other changes cited by Respondent relating to changes in its facility including the computerization of its timekeeping and equipment management system are not persuasively significant to the foregoing analysis.

In general, as set forth above, Corbel has continued to operate in Brooklyn in very much the same fashion as did Falcon. The distinctions pointed to by the Respondent, in addition to those outlined above,²⁸ are simply insufficient to rebut the foregoing evidence of "substantial continuity" in operations.

C. The CWA's Representation of Former Falcon Employees

The Board has held, consistent with Supreme Court precedent, that a successor employer inherits the collective-bargaining obligation of its predecessor if a majority of the successor's employees in an appropriate bargaining unit were employed by the predecessor, and if there exists substantial continuity between the enterprises. *Specialty Hospital of Washington-Hadley, LLC*, 357 NLRB No. 77, slip op. at 2 (2011); *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063 (2001).

Moreover, it is well-settled that the representation rights of an incumbent union are protected for 1 year following an NLRB certification of that union as the collective-bargaining representative for an appropriate unit of employees. *Brooks v. NLRB*, 348 U.S. 96 (1954); *NLRB v. Star Color Plate Service*, 843 F.2d 1507, 1509 (2d Cir. 1988). Here, where the CWA was certified in July 2010, it ordinarily would have been insulated from challenge for a period of approximately 10 months after Corbel assumed operations.

Moreover, the evidence is undisputed that at the September 25 meeting the CWA requested that Corbel recognize it as the collective-bargaining representative of its Brooklyn employees

²⁸ These include the fact that Corbel operates from a new, improved facility; that technicians are not required to unload their trucks at the end of the workday; the centralized location of dispatch, human resources, and other company personnel and the institution of electronic timekeeping and warehouse management systems. To the extent it is contended that Corbel maintains companywide policies and procedures apart from the IBEW CBA, specific evidence of such was not adduced in this record.

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and bargain over terms and conditions of employment. The CWA was told that Local 1430 would be representing the Corbel employees. Dubnau reiterated the CWA's demands by letter on the following day, and there is no evidence of any response.

D. Respondent's Accretion Defense

As noted above, Respondent contends that even if Corbel is deemed a successor to Falcon, it properly accreted the former Falcon employees into a single bargaining unit of service technicians, represented by Local 1430.

With regard to the issue of accretion, the Board has held that the fundamental purpose of the accretion doctrine is to "preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473 (2d Cir. 1985). However, because accreted employees are absorbed into an existing bargaining unit without an election or other demonstrated showing of majority status, the accretion doctrine's goal of promoting industrial stability places it in tension with the right of employees to freely choose their bargaining representative. Accordingly, the Board follows a restrictive policy in applying the accretion doctrine. *Safeway Stores*, 256 NLRB 918 (1981); *Wackenhut Corp.*, 226 NLRB 1085, 1089 (1976). One aspect of this longstanding restrictive policy, set forth in *E. I. Du Pont de Nemours, Inc.*, 341 NLRB 607, 608 (2004), has been to permit accretion "only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted" (quoting *Ready Mix USA, Inc.*, 340 NLRB 946, 954 (2003)).

As the Board has observed:

This test is different than the traditional community-of-interest test that the Board applies in deciding appropriate units in initial representation cases. In that context, the Board will certify any unit that is an appropriate unit, even if it is not the most appropriate unit. *Bartlett Collins*, 334 NLRB 484 (2001). In the accretion context, however, "[a] group of employees is properly accreted to an existing bargaining unit when they have such a close community of interest with the existing unit that they have no true identity distinct from it."

Frontier Telephone of Rochester, 344 NLRB 1270, 1271 fn. 6 (2005) (quoting *NLRB v. St. Regis Paper*, 674 F.2d 104, 107-108 (1st Cir. 1982)).²⁹

²⁹ Even in the context of representation cases, the Board will not, "under the guise of accretion compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret-ballot election or by some other method that they wish to authorize the union to represent them." *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969). And, "when the relevant considerations are not free from doubt," the Board and courts are in agreement that "it would seem more satisfactory to resolve such close questions through the election process rather than seeking an addition of the new employees by a finding of accretion" because "as a general rule, the

In determining, under this standard, whether the requisite "overwhelming community of interest" exists to warrant an accretion, the Board will consider many of the same factors relevant to unit determinations in initial representation cases, i.e., integration of operations, centralized control of management and labor relations, geographic proximity, similarity of terms and conditions of employment, similarity of skills and functions, physical contact among employees, collective-bargaining history, degree of separate daily supervision, and degree of employee interchange. *E. I. Du Pont*, supra at 608; *Compact Video Services*, 284 NLRB 117, 119 (1987). However, as stated in *E. I. Du Pont*, the "two most important factors" which have been identified as "critical" to an accretion finding are employee interchange and common day-to-day supervision. *Super Valu Stores*, 283 NLRB 134, 136 (1987), citing *Towne Ford Sales*, 270 NLRB 311, 312 (1984).

In this case, there are certainly some community of interest factors that favor accretion. This is not unusual, as cases are "rare" in which every factor points to or against accretion. *E. I. Du Pont*, supra. Many of the arguments advanced by Respondent are set forth above in the context of the successorship issue. Additionally, Respondent contends that further factors favoring accretion are: that Corbel's senior executives and management make all significant decisions affecting business affairs, that the same executives and managers are the primary contact with Cablevision involving all but ancillary company issues; that financial and other records are centrally maintained; and that timecard information, tools and equipment, and inventory management are centralized.³⁰

In its posthearing brief, Respondent argues that 43 technicians formerly employed by Falcon were merged with approximately 180 "legacy" Corbel technicians thereby comprising approximately 24 percent of the total work force and that this is less than the 30 percent of the bargaining unit that the Board would conclude would be needed to establish a substantial claim of interest by the CWA. As an initial matter, it is unexplained how Respondent arrived at this precise number (43), particularly since at various points throughout the hearing Mucci continually indicated that Corbel had hired between 50 and 60 of Falcon's employees.³¹ In any event, the thrust of this argument is generally inapposite insofar as it addresses the percentage of employee support (i.e. the "showing of interest") which is sufficient to support a petition for a representation election, and does not address itself to the issue of accretion.

accretion doctrine should be applied restrictively since it deprives the new employees of the opportunity to express their desires regarding membership in the existing unit." *Westinghouse Electric Corp. v. NLRB*, 440 F.2d 7, 11 (2d Cir. 1971).

³⁰ In this regard, Respondent has made additional assertions in its posthearing brief which are unsupported by any reference to the transcript or exhibits in this matter. After reviewing the record, I find that they are unsubstantiated and decline to consider them.

³¹ In fact, Mucci testified that as of the time of the hearing there were 65 technicians at the Brooklyn facility. The record shows that five employees were permanently transferred from the Bronx thereby indicating that Corbel had initially hired approximately 60 former Falcon employees. He later testified that there were 50 technicians reporting to a team of lead technicians and an additional 5 warehouse employees.

Contrary to Respondent, I find that the significant number of employees operating out of the Brooklyn region may be viewed as a factor which militates against accretion and toward a finding of separate appropriate unit.

Respondent further argues that Corbel's human resources and labor relations are centralized with no local autonomy over such matters. Respondent, relying primarily upon *Petrie Stores Corp.*, 266 NLRB 75 (1983), and *Queen City Distributing Co.*, 272 NLRB 621 (1984), argues that any single unit presumption which the Board may apply is rebutted by evidence of centralized labor relations and personnel policies and procedures. These cases, involving initial petitions for an election, are arguably distinguishable on that basis. As noted above, the Board has stated that it will apply a more stringent standard when a group of employees is accreted into an existing unit. *Frontier Telephone of Rochester*, supra. These cases are otherwise distinguishable. Thus, in *Petrie Stores Corp.*, the issue was not one of single facility versus a companywide unit. Rather, the employer took the position that the units should be no smaller than the clothing stores located within the same and adjacent malls. Moreover, the individual store manager had strictly circumscribed authority—to the extent that he was not even involved in the scheduling of employees. Similarly, in *Queen City Distributing*, the local manager's authority was limited. Respondent also relies upon *Ohio Valley Supermarkets*, 269 NLRB 355 (1984). In that case, the Board held that a unit limited to one of the employer's retail stores was not an appropriate unit for collective bargaining, where there were three stores that were the only ones operated by the employer, located several miles apart and where a manager visited each store on a daily basis and called at 3-hour intervals for sales readings. It was also found that individual store managers had limited authority.³²

Respondent argues that the Brooklyn technicians share an overwhelming community of interest with its other employees due to the similarity in their terms and conditions of employment. In *Deaconess Medical Center*, 314 NLRB 677, 677 fn. 1 (1994), the employer argued accretion based, in part, on the fact that the two groups of employees in question shared the same wage and benefit structure after a merger. The Board found such an argument to beg the question, noting that the employees shared the same wage and benefit structure because there, as here, the employer refused to bargain with the union representing the employees and had unilaterally imposed such terms and conditions of employment.

Respondent further contends that, due to the centralization of Corbel's human resources and labor relations operations, the highest ranking employee at its various service depots are without supervisory or managerial authority, and that Harris and Robinson function as supervisors for all employees in the Bronx, Mamaroneck, New Jersey, Connecticut, and Brooklyn regions. Centralized functions pointed to by Respondent in-

clude: grievance processing, payroll, timekeeping, wages, assignment of daily routes, personnel policies and forms, employee evaluations, fringe benefits, the assignment of work and disciplinary rules, investigation of misconduct, requests for paid or unpaid leave, processing of employment applications, determination of company seniority by date of hire and Bronx-based orientation of employees.

As the General Counsel has acknowledged, the evidence shows that Respondent has a centralized operation with most decisions regarding policies, procedures, and labor relations being made at its Bronx facility. The General Counsel further maintains, however, that the evidence regarding the two most significant factors: common day-to-day supervision and employee interchange is insufficient to warrant a finding of accretion here.

In assessing the issue of local autonomy generally, I note that Corbel's contract with Cablevision, the relevant terms having been set forth above, requires it to maintain a certain level of local supervisory authority, including maintaining 1 non-working supervisor for every 10 working field technicians. These supervisors are responsible for investigating and responding to customer complaints, inspecting 10 percent of the technicians' field work on a weekly basis and reporting the results to the manager responsible for oversight of the work in the region where the work was performed. In this regard, I note that at the outset of his testimony, Lovelace stated that, although he did not presently have a job title, he worked for Corbel in "management." It appears from the record that Cablevision continues to consider him a manager under Corbel, as an email requesting the removal of a technician was sent, not only to Harris and Robinson, but to Lovelace as "manager" as well. Moreover, it was he who effectuated the discharge of the employee in question. Further, employee testimony is that Lovelace continues to hold himself out to them as the "manager" of the facility.

The foregoing discussion brings me to an analysis of the actual role that Lovelace plays in the day-to-day operation of the Brooklyn region. As has been noted above, Respondent adduced testimony from Lovelace to the effect that he had a certain level of authority when employed by Falcon which he no longer possesses as an employee of Corbel. For the most part, I find that such testimony was generally conclusionary and without specific probative detail. Moreover, the General Counsel adduced testimony from its witnesses which, in part, rebuts these categorical assertions.

Notwithstanding Respondent's general denials of local supervisory or managerial authority, it appears from the record that Lovelace continues to manage the day-to-day affairs of the Brooklyn region much as he had done in the past. Lovelace does not drive a truck or install or remove cable; rather, he runs the operations of the Brooklyn facility. In this regard, he distributes routes to the technicians, and has authority to adjust or alter them as necessary. In the event employees are unable to come to work, the evidence establishes they will contact Lovelace directly. Written requests for timeoff are submitted initially to, and signed off on, by Lovelace. Employees Slay and Collins testified that payroll issues would be addressed to Lovelace, or to McFarlane. It was Collins' un rebutted testimony

³² I note that in a subsequent case involving the same employer, the Board found a single facility unit to be appropriate based, in part, upon the increase in the number of stores operated by the employer and the increased authority of local management. *Foodland of Ravenswood*, 323 NLRB 665 (1997).

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that, when he approached Harris with a payroll issue, he was instructed to discuss these issues with Brooklyn and follow the “chain of command.” Both Slay and Collins testified that their encounters with the Bronx office were occasional in nature, and that their primary contacts for personnel and other matters were with Lovelace and McFarlane.³³

The General Counsel further adduced evidence that Lovelace has, on several occasions, refused to assign a route (which according to Corbel and Cablevision protocol, would have previously been designated to an employee on the work force planner for the day) to employee Justin Taylor because he was late to work. While Taylor admitted that he did not know whether Lovelace consulted with either Harris or Robinson about such discipline it appears from Taylor’s testimony that the nature of his encounters with Lovelace were spontaneous in nature, and that Lovelace was acting on his own initiative; thereby denying Taylor a paid work day on repeated occasions. Moreover, Lovelace, who testified on the same day as Taylor, failed to rebut Taylor’s testimony or to explain any contact he may have had with or approval he received from Corbel upper management about such disciplinary actions. It is apparent that such testimony was clearly available, relevant to the issues under consideration and it would have been in Respondent’s interest to produce such evidence had it been supportive of Respondent’s contentions here. In this regard I note that Lovelace generally admitted that he has discretion to send employees home without work.³⁴

I further note that Mucci acknowledged that, while employ-

³³ I note that several provisions of the employment application that Corbel distributed to the Falcon employees (GC Exh. 7) tend to support this testimony. For example, the “Corbel Installations Parking Ticket Policy” assures that Corbel will be responsible for certain parking and traffic lane violations if the employee complies with certain procedures which include submitting the ticket and work order to “your manager or supervisor” for signature. The “Benefit Day Policy” requires an employee to “call into a manger to report that you will be out sick. A request for the paid sick day must be submitted on your first day back and approved by the manager you called.” As noted above, the evidence adduced in this record is that the practice in the Brooklyn region has been and continues to be to call Lovelace. Corbel’s “Equal Employment Opportunity Policy” advises employees that to request a reasonable accommodation to their religious beliefs they should “contact your Supervisor or Paul Mucci or Robert Cipolla.” In a similar vein employees are directed to report allegations of “Sexual and Other Harassment” to “their Supervisor, Paul Mucci or Robert Cipolla.” Nowhere in any of these policies are employees directed to refrain from reporting such matters to their regional supervisor or manager or direct inquiries solely to the Bronx office. Rather, these policies, on their face, contemplate that the “chain of command” commences with local managerial or supervisory personnel.

³⁴ I further note that Collins, Slay, and Taylor are all current employees of the Respondent. This tends to make their testimony reliable, as it is arguably against their interests. *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006), quoting *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. *NLRB v. Flexsteel Industries*, 83 F.3d 419 (5th Cir. 1996) (current employees area likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests); see also *American Wire Products*, 313 NLRB 989, 993 (1994) (current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully).

ment applications are currently submitted online, it has been the case that, under Corbel ownership and control, Lovelace has been authorized to interview job applicants and forward their applications to the Bronx for further processing. Lovelace was also relied upon to make recommendations on employee skill levels in conjunction with adjustments to their pay. I infer from the record that these recommendations were relied upon as there is no evidence that either Mucci, Harris, or Robinson had the requisite familiarity with the Falcon work force as a whole or conducted any independent investigation with regard to the appropriate level of employee compensation.

Moreover, I find Respondent’s contention that Harris and Robinson are the only two supervisors for Corbel’s approximately 245 field employees and that, in addition to overseeing work assignments and transfers, they address all matters relating to payroll and personnel, sign off on all timeoff requests and address all issues of employee discipline no matter how routine or minor is, frankly, inherently improbable. See *Flamingo Hilton-Laughlin*, 324 NLRB 72, 122–123 (1997), citing *Iron Mountain Forge Corp.*, 278 NLRB 255 (1986) (disproportionately high employee to supervisor ratio). I further note that Respondent has failed to provide specific evidence, documentary or otherwise, of any timeoff request, disciplinary action, hour or wage adjustment (other than what has been discussed above) or other supervisory or managerial matter submitted by Lovelace to either Harris or Robinson for their review, approval, or rejection.

Respondent’s contention that Lovelace is without local authority is further undermined by the fact that he is the highest-ranking employee present for most, if not virtually all, of Corbel’s daily operations in the Brooklyn region. Assuming it to be the case that either Harris or Robinson visits the facility once or twice per week, that leaves Lovelace in charge of the facility for the remainder of this time. By contrast, I note that under Falcon, where Lovelace presumably had more independent authority, company owner Spiewack was there on a daily basis.

In sum, while there is testimony to the effect that Lovelace’s authority under Corbel may be more circumscribed than it appears to have been under Falcon,³⁵ I do not credit Respondent’s contention that he is without local authority. It is apparent from the testimony of various witnesses, including Lovelace, and the documentary evidence in the record, that he manages the regular daily operations of the Brooklyn region and does so in a fairly autonomous manner. See, e.g., *Esco Corp.*, 298 NLRB 837, 838 (1990), where the Board found it “significant” that the employer relied upon a leadman who exercised “limited local autonomy” to oversee operations.³⁶

³⁵ As discussed above, such contentions are supported predominantly by conclusory, generalized evidence and to the extent particular instances were adduced in the record they call such categorical assertions into question. For example, Lovelace testified to one occasion where he discharged an employee when employed by Falcon. As he explained, however, the instruction to do so came from Cablevision. Similarly, the single discharge effectuated by Lovelace under Corbel was also requested by Cablevision.

³⁶ The General Counsel has not alleged in the complaint that Lovelace is a statutory supervisor or agent within the meaning of the Act. In

E. Employee Interchange and Related Factors

Respondent contends that the centralized nature of its operations and the extent of employee interchange establishes that the Brooklyn region was properly accreted into its larger unit of service technicians. In support of these arguments Respondent points to Mucci's testimony that the tools and equipment used by Corbel are interchangeable and both service technicians and equipment are switched from region to region as needed. In this regard, the warehouse manager located in the Bronx regularly audits inventory and directs that equipment be transferred as needed. Service technicians are temporarily assigned to different sites based upon company need and when so transferred, their work is supervised by the lead technicians based in that region.

In its posthearing brief, Respondent has contended that at any given time approximately 10 to 15 percent of the Corbel work force is on long- or short-term transfer. The citation to the record which supports this assertion is Mucci's testimony to such effect. As noted above, Respondent also adduced records showing short-term (within the timeframe of one workweek) transfers of employees between or among various regions.

Regarding long-term transfers, Respondent contends that, "given the centralized nature of Corbel's operations and the ease of technician interchange between service depots, Corbel has no reason and does not track exact statistics of technicians who have been transferred for a week or longer." The record fails to support this assertion. In particular, as set forth above, Corbel's contract with Cablevision specifically requires it to assign tech numbers to each employee, keep records by technician number capable of identifying any individual employee performing particular work at any point in time in which Corbel is performing work for Cablevision and, further, supply Cablevision with a written list of employees who will perform work on a weekly basis.

The thrust of these provisions, which is natural and logical, is that Corbel is obliged to keep records of and track those employees it sends into people's homes and businesses and to document when and where they are assigned to work. For Respondent to claim to the contrary is simply not credible.³⁷

Further, Respondent's claim that its operations are centralized and computerized tends to undermine its assertion that it would be unable to discern within any particular timeframe which of its employees had been reassigned to any particular region. With respect to the Brooklyn region in particular, Respondent had a clear baseline to work from: the initial contingent of employees hired from Falcon. Respondent clearly could have identified who, if anyone, had been transferred in or out of this region. I note that the only specific evidence on this issue, adduced from subpoenaed records, was presented by the General Counsel.

Thus, I find that Respondent has failed to substantiate its claims regarding the long-term transfer of employees generally.

my view, this does not obviate the evidence supporting a conclusion that he is charged with the oversight and operation of Corbel's Brooklyn facility, and exercises his authority in such regard.

³⁷ In addition, I found Mucci's testimony on this issue to be evasive and equivocal.

See *New Britain Transportation Co.*, 330 NLRB 397 (1999) (where employer provided neither documentation to support its claim nor specific testimony regarding the context surrounding alleged instances of interchange, such assertions are of little evidentiary value). With respect to the Brooklyn region in particular, I find that there is evidence of five long-term transfers from the Bronx to Brooklyn, and one instance where an employee was transferred from the Brooklyn to the Bronx, which have been discussed above.³⁸

Regarding short-term transfers, Respondent relies upon certain records placed into evidence involving approximately 159 weekly work reports which, as asserted in its posthearing brief, demonstrates approximately 25 to 30 short-term transfers per week. Respondent does not, however, offer any meaningful analysis of these records to substantiate its claim. Even assuming this to be the case, however, the focus here is not whether an overall unit of Corbel facilities would be an appropriate unit, or even the most appropriate unit, but whether the Brooklyn region remains in and of itself an appropriate unit. *Melbet Jewelry Co.*, 180 NLRB 107 (1969); *Frontier Telephone of Rochester, Inc.*, supra. In this regard, temporary transfers in and out of that particular region are significant, far more so than transfers among other Corbel facilities.

As noted above, both the General Counsel and the CWA conducted an analysis of the weekly work summaries introduced into evidence by both the General Counsel and the Respondent. In sum, there were 16 weekly reports found within a 15-week period which demonstrated that eight technicians otherwise assigned to other regions performed work in Brooklyn for a total of 56 workdays during this period of time. In addition, according to the records, companywide short-term transfers involved approximately 36 employees in total (including the 8 who worked in Brooklyn) involving work primarily performed in Mamaroneck, the Bronx, and to a far lesser extent Bridgeport, Connecticut.³⁹

The parties have each cited cases where particular numbers, in conjunction with various other factors, were found sufficient or insufficient to establish employee interchange. Respondent and Local 1430 rely upon *Petrie Stores Corp.*, supra at 76 (3 to 4 transfers per week out of a work force of approximately 200 employees). Respondent additionally cites to *Dayton Transport Corp.*, 270 NLRB 1114 (1984) (sufficient interchange where there were 400 to 425 temporary transfers in a single year for a work force of 87 employees—approximately 8 per week). The General Counsel, by contrast, relies upon *Purolator Courier Corp.*, 265 NLRB 659, 661 (1982) (50 percent of the work force came within the jurisdiction of other branches on a daily basis and were supervised at those loca-

³⁸ I note that the Board distinguishes between permanent and temporary transfers and regards the latter as a more significant indicator of employee interchange. *Novato Disposal Services*, 330 NLRB 632 fn. 3 (2000).

³⁹ Although there is no specific evidence to this effect in the record, both Local 1430 and the CWA have represented that the distance between the Bronx and Brooklyn facilities is in excess of 20 miles. I take administrative notice of the fact that the Bronx and Mamaroneck regions are more proximate to each other. The regional facilities in New Jersey and Bridgeport are further away.

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tions) and distinguishes *Dayton Transport*, supra, by noting the temporary employees there were directly supervised by the terminal manager from the point of dispatch. The CWA relies in part on *Cargill, Inc.*, 336 NLRB 1114 (2001), where the Board found that 13 or 14 instances of interchange between two facilities in an 8-month period were not sufficient to defeat the petitioned for unit.⁴⁰

As the General Counsel has noted, Corbel employs approximately 65 technicians assigned to the Brooklyn region, who each work approximately 5 days per week as a normal work schedule. This amounts to well over 4000 work days in total for all Brooklyn employees during the 15-week period encompassed by the records entered into evidence. Looking at the numbers in another way, the 56 days of short-term employee transfers amount to an average of slightly less than 4 instances per week during the 15-week period after Corbel initiated its Brooklyn operations, a period which included an increase in workload in that region due to the effects of Hurricane Sandy. I further note that Respondent has pointed to no evidence that Corbel's Brooklyn employees regularly or even occasionally perform work in other Corbel facilities.

While the foregoing evidence of work performed in Brooklyn by employees from other Corbel regional facilities is indisputably some degree of employee interchange, I agree with the General Counsel that taken within context it is not sufficient to establish that the Brooklyn region fails to maintain its status as a separate appropriate unit. "There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit or the ultimate unit or the most appropriate unit; the act only requires that the unit be appropriate." *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950). I further note that, as Phillip Watt testified, transferred employees deal primarily with local supervision.

It is also the case that the Board has continued to affirm a longstanding concept that "the issue of whether a group of employees constitutes an accretion to an existing bargaining unit must be determined on the facts that existed on the date of the Union's demand." *Ready Mix USA*, supra at 954, and cases cited therein. Here, at the time the CWA made its demands for recognition and bargaining, on September 25 and 26, no interchange of any kind had occurred between the Brooklyn region and any other Corbel facility. The first short-term transfers occurred on October 6, a week after Corbel commenced operations. There were no long-term transfers to or from Brooklyn until later in that month. And, as employees testified without rebuttal, essentially nothing else changed for the former Falcon employees but for the location of the new facility they were to

report to and operate out of.

To the extent Respondent relies upon anecdotal evidence from Mucci about the prospect of transferring employees from other regions to New Jersey and Brooklyn due to anticipated increases in work demands, I find such evidence to be unpersuasive. There is no evidence that Respondent transferred any Brooklyn employee to New Jersey during the course of the hearing, and Respondent has pointed to no documentation that any such transfers occurred at any point since Corbel initiated its operations in Brooklyn. As for the prospect of supplementing the Cablevision work force due to a labor dispute, again there was no specific evidence presented that transfers had been made or that specific plans had been drawn to effect those transfers. In all fairness, the timing of events might not have allowed Respondent the opportunity to adduce evidence to show who was transferred and when. Nevertheless, Respondent has failed to show that this sort of large-scale transfer of employees is a regular aspect of its business operations.

Respondent and Local 1430 have argued that to allow the CWA to remain as the bargaining representative of the Brooklyn-based technicians would be unfeasible from a business standpoint. These arguments are speculative in nature. Nevertheless, I am not unsympathetic to the position advanced by Respondent that it would be to their business advantage to deal with one collective-bargaining representative and agreement covering all its employees. And, it may well be the case that under other circumstances a geographically comprehensive unit of Corbel employees in the New York metropolitan area and surrounding environs would constitute an appropriate unit. However, as noted above, this does not compel the conclusion that this is the only appropriate unit.

The Board and the courts have recognized that in evaluating community of interest, "the overriding policy of the act is in favor of the interest of employees to be represented by a representative of their own choosing for the purposes of collective bargaining." *Meijer, Inc. v. NLRB*, 564 F.2d 737, 743 (6th Cir. 1977). Here, the Brooklyn technicians had recently voted and chosen the CWA to be that representative. Their having done so is a fundamental Section 7 right that cannot be summarily discarded particularly where, as here, it has not been shown that the Corbel Brooklyn employees have such a close community of interest with the existing Local 1430 unit that they have no true identity distinct from it. *Frontier Telephone of Rochester*, 344 NLRB at 1261 fn. 6; *Ready Mix, USA*, 340 NLRB at 954.

Based upon the foregoing, I find that the Brooklyn region is and continues to be an appropriate single location unit.⁴¹ While the Employer has centralized control over personnel and labor relations policies, payroll, wages and benefits, formal discipline, and new hire training, such matters have been found not to be necessarily determinative, where the evidence also demonstrates significant local autonomy. See, e.g., *New Britain Transportation Co.*, supra. In addition to the apparent geo-

⁴⁰ All of the foregoing cases involved initial organizing situations where employees would have had the opportunity to indicate their desire to be represented by and then to vote on whether or not they wished to be represented by the petitioning labor organization, a circumstance not present here. I further note that in *Purolater*, cited by the General Counsel, the petition was filed by a union representing nonguards. The Board found that the unit sought was of employees found to be guards within the meaning of Section 9(b)(3) of the Act, and although the Board did discuss the unit issue, the petition was dismissed on this statutory basis.

⁴¹ As is well settled, a single facility unit is presumptively appropriate unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity, *J&L Plate, Inc.*, 310 NLRB 429 (1993); *Red Lobster*, 300 NLRB 908 (1990).

graphical separation of the Brooklyn region from other Corbel facilities, here there is significant evidence of local autonomy including: decisionmaking over employee work assignments; handling and resolving problems encountered by technicians and customers in the course of the workday; interviewing job applicants and forwarding their applications for further processing; making recommendations regarding employee compensation; otherwise managing payroll issues at the initial stage; processing and approval of timeoff requests and the imposition of discipline including sending employees home without pay. Lovelace is also the highest-ranking employee onsite for the majority of the workweek and is responsible for carrying out Respondent's decisions involving formal discipline. In addition, the record establishes that, when employees from other regions perform work in Brooklyn, they are accountable to the supervisory personnel there. And, as noted above, I do not find that the record evidence regarding employee interchange mandates any other conclusion. Accordingly, I cannot conclude that the Brooklyn region has lost its "true identity" such that it must be accreted into the larger unit of Corbel employees.

F. Respondent's Unfair Labor Practices

1. The failure to recognize and bargain with the CWA

Having found that the Brooklyn region remains a separate appropriate unit, there are several conclusions which flow from this determination. Because Corbel is a successor to Falcon and inherited its bargaining obligation, Respondent has failed and refused to recognize and bargain with the CWA as the certified exclusive collective-bargaining representative of the employees in the Brooklyn region in violation of Section 8(a)(5) and (1) of the Act. Respondent further violated the Act by thereafter unilaterally changing certain terms and conditions of employment (in particular, the wage rates of employees) without notice to and bargaining with the CWA. See *Banknote Corp. of America*, 315 NLRB 1041 (1994), *enfd.* 84 F.3d 637 (1996), *cert. denied* 519 U.S. 1109 (1996).

2. The unlawful recognition of and assistance to Local 1430

I further find that Respondent unlawfully recognized Local 1430 in violation of Section 8(a)(2) and (1) of the Act. In this regard, it is well established that an employer violates Section 8(a)(2) of the Act when it extends recognition to a union that does not represent an uncoerced majority of employees. *Ladies Garment Workers v. NLRB (Bernhard-Altman)*, 366 U.S. 731 (1961); *Dairyland USA Corp.*, 347 NLRB 310, 311 (2006), *enfd.* 273 Fed Appx. 40 (2d Cir. 2008). Respondent further maintained and enforced a collective-bargaining agreement with Local 1430 containing union security and dues-checkoff provisions at a time when Local 1430 did not represent an uncoerced majority of employees in the unit in violation of Section 8(a)(1), (2), and (3) of the Act. *Duane Reade, Inc.*, 338 NLRB 943, 944 (2003), *enfd.* 99 Fed. Appx. 240 (D.C. Cir. 2004).

The evidence further establishes that on September 25, both Mucci and Cipolla informed employees that they must, as a condition of employment, complete employment applications containing membership cards for Local 1430. I find that such

conduct was coercive, an unlawful interference with employees' rights to select their own representative, and constitutes unlawful assistance to Local 1430, in violation of Section 8(a)(2) and (1) of the Act. *Duane Reade*, *supra*; *Meyers Transport of New York*, 338 NLRB 958, 970 (2003); *Baby Watson Cheesecake, Inc.*, 320 NLRB 779, 786 (1996).⁴²

Moreover, even if Respondent's recognition of Local 1430 had been lawful, Board law would not permit Respondent to direct applicants for employment to sign cards for that union or to tell them they must sign union cards to work for Respondent. Under the Local 1430 CBA, an employee has 30 days to join that union. In any event, since I find that both the recognition and application of the Local 1430 CBA to the Brooklyn facility were unlawful, Respondent's instructions to employees were unlawful as well.⁴³

It is undisputed that Respondent further told employees that they would not receive benefits unless they signed Local 1430 membership cards. Such conduct is coercive and constitutes unlawful assistance in violation of Section 8(a)(2) and (1) of the Act. *Baby Watson*, *supra*, *Christopher Street Owners Corp.*, 286 NLRB 253, 254 (1987); *Mar-Jam Supply Co.*, 337 NLRB 337, 350 (2001).

The un rebutted testimony of Collins and Slay, as well as the documentary evidence in the record, further establishes that Respondent deducted union dues from the salaries of its employees, even though they had not executed Local 1430 checkoff authorizations. This is a violation of Section 8(a)(2) and (1) of the Act. *Mashkin Freight Lines*, 261 NLRB 1473, 1481 (1987), *American Geriatric Enterprises*, 235 NLRB 1531 (1978).⁴⁴

3. The delay in hiring Kirk Collins

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) and (1) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer's decision was the employee's union or other protected activity. *Pro-Spec Painting, Inc.*, 339

⁴² I note that the distribution of union cards to employees with a request that they be signed is deemed coercive and unlawful even in the absence of any threat or benefit. *Baby Watson*, *supra* at 705; *Famous Castings Corp.*, 301 NLRB 404, 407 (1991).

⁴³ Although the complaint does not specifically allege that Respondent unlawfully required employees to sign dues-checkoff authorization cards, I note that it is well-settled that dues-checkoff authorizations must be voluntary, even with a valid union-security clause. Thus, where, as here, employees were told they must complete such forms in order to be employed by Respondent, such conduct would be further violative of Section 8(a)(1) and (2) of the Act. *Service Employees Local 74 (Parkside Lodge of Connecticut)*, 323 NLRB 289, 293 (1997); *Rochester Mfg. Co.*, 323 NLRB 260, 262 (1997); *Zurn Nepco*, 316 NLRB 811, 819 (1995).

⁴⁴ In disagreement with the General Counsel, I find that the evidence fails to support the allegation that Respondent stated that it would "never" bargain or deal with the CWA, and recommend that the allegations of the complaint relating to such conduct (pars. 17(c) and 18) be dismissed.

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NLRB 946, 949 (2003). The General Counsel satisfies an initial burden by showing that (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer bore animus towards the employee's union activity. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), *enfd.* 577 F.3d 467 (2d Cir. 2009). Unlawful motivation may be demonstrated not only by direct evidence, but by a variety of circumstantial evidence such as timing, disparate or inconsistent treatment, departure from past practice and shifting or pretextual reasons being offered for the action. *Real Foods Co.*, 350 NLRB 309, 312 fn. 17 (2007). In addition, proof of an employer's animus may be based upon other circumstantial evidence, such as the employer's contemporaneous commission of other unfair labor practices. *Amptech, Inc.*, 342 NLRB 1131, 1135 (2004). If the General Counsel meets its initial burden, the employer may defend by proving that it would have taken the adverse action even in the absence of the employee's union activity. See, e.g., *Consolidated Bus Transit, Inc.*, *supra* at 1066; *Pro-Spec Painting*, *supra* at 949. If, however, the General Counsel shows that the reasons the employer provides for its action are pretextual—that is, false, or not in fact relied upon—the employer fails to carry its rebuttal burden by definition. *Id.*

The evidence shows that Collins was a supporter of the CWA and, under all the circumstances I infer that Respondent was aware of that fact. Mucci admitted that he was aware that the CWA represented the Falcon employees. Everyone knew of Collins' union activities on behalf of that union. Under the circumstances, it is simply not credible that Spiewack and Corbel would not have had a discussion of these facts.⁴⁵ Nevertheless, it remains the case that even assuming Mucci and Cipolla did not know of Collins' activities in support of the CWA prior to the September 25 meeting, it would have been apparent to them at that time when Collins joined the CWA representatives in urging employees not to complete Local 1430 applications and dues-checkoff authorization cards, citing their membership in the CWA. He also questioned Mucci and Cipolla about whether there was a blacklist of certain employees who would not be hired. I note that Respondent's knowledge of Collins' support for the CWA is also evident in his subsequent interview with Harris and Robinson where he was questioned as to "where his head was at" and specifically told that the CWA was out.

Evidence of animus toward the CWA is apparent in the unlawful recognition of and support for Local 1430, the demands that employees sign cards for Local 1430 as a condition of employment, and threats to employees that they would not receive benefits should they fail to do so. There is additional evidence of animus in the manner in which Respondent dealt with Collins when he attempted to visit Corbel's new facility and fill out additional employment applications.

In this context it must be noted that Corbel had expedited its hiring process and was, by its own admission, interested in hiring anyone who expressed an interest in coming to work for

that company. In addition, there is evidence that certain technicians were hired prior to completing employment applications. In this regard, Collins testified, without rebuttal, that he spoke with certain technicians who had not submitted applications who, nevertheless, had been provided with routes, trucks, and keys.

I credit Collins that he submitted his initial employment application on September 29, and that it was placed with others in the facility office. Respondent then claimed that it had not received an application from Collins, and he was repeatedly escorted from company premises. I further credit Collins that he completed a second employment application which he gave to Supervisor Cornwallis Glover on the evening of October 3.

I find additional evidence of animus in Collins' un rebutted testimony that, when he confronted Cipolla about his employment situation, Collins was told that Respondent was hiring only 12 technicians, clearly a falsehood. Collins was then again escorted from the premises.

On October 2, the CWA filed an unfair labor charge alleging that Corbel had unlawfully refused to hire Collins. Two days later, Collins received a call from a coworker directing him to contact Harris; he received a similar instruction from McFarlane. At a meeting at Corbel's Bronx headquarters, held with Harris and Robinson, Collins' support for the CWA was discussed, and he was instructed in no uncertain terms that the CWA was out, and Local 1430 represented the Corbel employees. On these terms and after completing yet another application, Collins was subsequently offered employment to commence on Sunday, October 6.

Respondent has claimed that it did not initially hire Collins due to his failure to complete an employment application. I find that this is not supported by the evidence. Rather, Collins credibly offered detailed, specific testimony about his application process and various interactions with company managers, including Lovelace, to which no meaningful rebuttal was offered. Mucci's testimony, that "to [his] knowledge" (counsel's words) Collins did not "initially" submit an application for employment fails to successfully rebut Collins' precise account of his attempts to apply for work. In addition, the General Counsel adduced evidence that certain other employees commenced working prior to the dates listed on their employment applications. Although Mucci attempted to minimize the significance of this evidence by asserting that certain employees may have initially submitted an incomplete application, which was then returned to them for further processing, this vague and speculative testimony is inconclusive and without probative force. Even if I were to credit Mucci, however, this would not help Respondent's position here, as it would be apparent that Respondent allowed a number of employees to commence work without submitting a complete application, something they had been clearly instructed to do.

Accordingly I find that Respondent's excuse for not initially hiring Collins is pretextual in nature. Moreover, even if I were to find that it was not pretextual, it is clear from the credible evidence that Collins was treated in a disparate fashion from other employees who were allowed to commence work even though their employment applications were not yet complete or

⁴⁵ I also note that Collins served as a union shop steward when previously employed by Mucci and Cipolla.

submitted to Respondent.

Thus, I find that the General Counsel has adduced the requisite elements of union activity, knowledge, and animus and Respondent has failed to show, by a preponderance of the credible evidence that it would have treated Collins in the same fashion absent his union activities. Accordingly, I find that Respondent's delay in offering employment to Collins was discriminatory in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Corbel Installations, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Communication Workers of America, AFL-CIO (CWA) and the International Brotherhood of Electricians, Local 1430 (Local 1430) are both labor organizations within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (2), (3), and (5) and Section 2(6) and (7) of the Act.

(a) By failing and refusing to recognize and bargain with Communications Workers of America, AFL-CIO (CWA), as the collective-bargaining representative of the employees in the following unit at its facility located in Brooklyn, New York (Brooklyn facility), Respondent violated Section 8(a)(5) and (1) of the Act:

All full- and part-time technicians, warehouse workers, and dispatchers employed by the Employer at or out of Falcon's Strickland Avenue facility, excluding all managerial employees, confidential employees, guards, and supervisors as defined under the Act.

(b) By unilaterally changing the terms and conditions of employment for the employees in the above-described unit without first giving notice to and bargaining with the CWA about such changes, Respondent violated Section 8(a)(1) and (5) of the Act.

(c) By recognizing and contracting with Local 1430, International Brotherhood of Electrical Workers, AFL-CIO (Local 1430) as the bargaining representative of employees in the unit, Respondent violated Section 8(a)(2) and (1) of the Act.

(d) By giving effect to and enforcing the September 1, 2012 collective-bargaining agreement with Local 1430, including a union security provision, or any modification thereof, at a time when Local 1430 did not represent an uncoerced majority of the unit, Respondent violated Section 8(a)(2) and (1) of the Act.

(e) By enforcing a dues-checkoff provision in its collective-bargaining agreement with Local 1430 by deducting dues from the salaries of employees at a time when the CWA represented the unit and Respondent did not have lawful authorization to deduct dues from employee wages, Respondent has violated Section 8(a)(1), (2), and (3) of the Act.

(f) By telling or directing employees or applicants for employment, as a condition of employment, to sign cards authorizing Local 1430 to represent them Respondent violated Section 8(a)(2) and (1) of the Act.

(g) By telling employees that they would not receive benefits

if they did not sign union authorization cards in support of Local 1430, Respondent violated Section 8(a)(2) and (1) of the Act.

(h) By delaying in hiring Kirk Collins because of his support for the CWA, Respondent violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent should be ordered to recognize and, upon request, bargain with the Communication Workers of America, AFL-CIO (the CWA), as the collective-bargaining representative of the employees in the above-described unit and if such an agreement is reached embody such understanding in a signed agreement. Respondent should be required to provide notice to and bargain to agreement or impasse with the CWA prior to instituting any change to the terms and conditions of employment for unit employees. Respondent should also be ordered to withdraw recognition from the International Brotherhood of Employees, AFL-CIO, Local 1430 (Local 1430), as the representative of the employees in the unit and cease enforcing or giving effect to its September 1, 2012 collective-bargaining agreement with Local 1430 or to any related memorandum of agreement including all renewals, extensions and modifications and to cancel it entirely. However, nothing in the Board's Order herein should be deemed to authorize or require the withdrawal or elimination of any wage increase or other improved terms and conditions of employment that may have been established pursuant to any agreements with Local 1430, absent a request by the CWA. Respondent should be ordered to reimburse all present and former unit employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the September 1, 2012 collective-bargaining agreement 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 (2011). However, reimbursement shall not extend to those employees who voluntarily joined and became members of Local 1430 prior to September 25, 2012. Respondent should also be ordered to cease and desist from delaying in hiring employees because of their support for the CWA and to make Kirk Collins whole for any loss of wages or benefits he may have suffered due to Respondent's discriminatory conduct, with interest, as set forth in *New Horizons for the Retarded* and *Kentucky River Medical Center*, supra. Respondent shall also file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate Collins 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).

On these findings of fact and conclusions of law and on the

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entire record, I issue the following recommended⁴⁶

ORDER

The Respondent, Corbel Installations, Inc., Mt. Vernon, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Communications Workers of America, AFL-CIO (CWA), as the collective-bargaining representative of the employees in the following unit of employees employed at its facility located at 2400 East 69th Street, Brooklyn, New York (Brooklyn facility):

All full- and part-time technicians, warehouse workers, and dispatchers employed by the Employer at or out of Falcon's Strickland Avenue facility, excluding all managerial employees, confidential employees, guards, and supervisors as defined under the Act.

(b) Unilaterally changing the terms and conditions of employment for the employees in the above-described unit without first giving notice to and bargaining with the CWA about such changes.

(c) Recognizing and contracting with Local 1430, International Brotherhood of Electrical Workers, AFL-CIO (Local 1430), as the bargaining representative of employees in the unit.

(d) Giving effect to and enforcing the September 1, 2012 collective-bargaining agreement with Local 1430, or any modification thereof, at a time when Local 1430 does not represent an uncoerced majority of the unit.

(e) Enforcing a dues-checkoff provision in its collective-bargaining agreement with Local 1430 by deducting dues from the salaries of employees at a time when the CWA represents the unit and Respondent does not have lawful authorization to deduct dues from employee wages.

(f) Telling or directing employees or applicants for employment, as a condition of employment, to sign cards authorizing Local 1430 to represent them.

(g) Telling employees that they will not receive benefits if they do not sign union authorization cards in support of Local 1430.

(h) Delaying in hiring employees because of their support for the CWA.

(i) 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) On request, bargain with the Communication Workers of America, AFL-CIO (CWA), as the exclusive representative of the employees in the above appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Withdraw recognition from International Brotherhood of Electricians, Local 1430, AFL-CIO (Local 1430), as the representative of its employees in the unit and cease enforcing or giving effect to its September 1, 2012 collective-bargaining agreement with Local 1430 or to any related memorandum of agreement including all renewals, extensions, and modifications and to cancel it entirely. However, nothing herein should be deemed to authorize or require the withdrawal or elimination of any wage increase or other improved terms and conditions of employment that may have been established pursuant to any agreements with Local 1430, absent a request by the CWA.

(c) Make unit employees whole for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the September 1, 2012 collective-bargaining agreement with Local 1430 in the manner set forth in the remedy section of the decision.

(d) Make Kirk Collins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

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

(f) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."⁴⁷ Copies of the notice, on forms provided by the Regional Director for Region 29 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 internet site, and/or other electronic means, if the Respondent customarily communicates by 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. In the event that, during the pendency of these proceedings, 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 September 25, 2012.

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

⁴⁶ 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.

⁴⁷ 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."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 15, 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 fail or refuse to recognize and bargain with Communications Workers of America, AFL-CIO (CWA), as the collective-bargaining representative of the employees in the following unit located at and out of our facility located at 2400 East 69th Street, Brooklyn, New York (Brooklyn facility):

All full- and part-time technicians, warehouse workers, and dispatchers employed by the Employer at or out of Falcon's Strickland Avenue facility, excluding all managerial employees, confidential employees, guards, and supervisors as defined under the Act.

WE WILL NOT unilaterally change the terms and conditions of employment for the employees in the unit without first giving notice to and bargaining with the Union about such changes.

WE WILL NOT recognize or contract with Local 1430, International Brotherhood of Electrical Workers, AFL-CIO (Local 1430), as the bargaining representative of our employees in the unit.

WE WILL NOT give effect to or enforce our September 1, 2012

contract or memorandum of agreement with Local 1430, or any modification thereof; provided, however, we will not eliminate any wage increase, or other improved benefits or terms and conditions of employment, that may have been established pursuant to the performance of the above collective-bargaining agreements without a request from the CWA.

WE WILL NOT deduct dues for Local 1430 from the salaries of our employees unless or until Local 1430 has been certified by the National Labor Relations Board as the collective-bargaining representative of our employees at the Brooklyn facility.

WE WILL NOT tell or direct our employees or applicants for employment, as a condition of employment, to sign cards authorizing Local 1430 to represent them.

WE WILL NOT tell our employees that they will not receive benefits if they do not sign union authorization cards in support of Local 1430.

WE WILL NOT delay in hiring employees because of their support for CWA.

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

WE WILL, upon request, recognize and bargain collectively with CWA as the exclusive bargaining representative of the employees in the unit described above, with regard to your wages, hours, working conditions, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL withdraw and withhold all recognition from Local 1430 as the collective-bargaining representative of our employees.

WE WILL make whole Kirk Collins for any loss of earnings and other benefits suffered as a result of our discrimination against him, less any net interim earnings, plus interest.

WE WILL reimburse, with interest, all our present and former unit employees for all initiation fees and dues, plus interest, paid by them or withheld from them pursuant to the dues check-off and union-security clauses in the September 1, 2012 contract with Local 1430.

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