

**No. 07-74755**

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**UNITED STATES COURT of APPEALS  
FOR THE NINTH CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**and**

**UNITE HERE, LOCAL 11**

**Intervenor**

**v.**

**JLL RESTAURANT, INC., d/b/a SMOKEHOUSE RESTAURANT AND  
SMOKE HOUSE RESTAURANT, INC.**

**Respondents**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND APPELLATE  
JURISDICTION**

The National Labor Relations Board (“the Board”) had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the National Labor Relations

Act, as amended (“the Act”) (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Decision and Order issued on May 31, 2006 and is reported at 347 NLRB No. 16. (SER 1.)<sup>1</sup> The Board’s Decision and Order is final under Section 10(f) of the Act (29 U.S.C. § 160(f)).

This case is before the Court on the Board’s application for enforcement of its Order. The application was timely, as the Act imposes no time limitation on applications for enforcement.<sup>2</sup> This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices took place in Burbank, California. Smoke House Restaurant, Inc. (“the Company”) was a Respondent before the Board. JLL Restaurant, Inc., d/b/a Smoke House Restaurant (“JLL”) was the other Respondent before the Board, but failed to file an answer to the complaint or any other responses before the Board or Court in this matter. Unite Hotel Employees and Restaurant Employees Union, Local 11, AFL-

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<sup>1</sup> “SER” refers to Supplemental Excerpts of Record filed by the Board with this Brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. The Board has a motion pending to strike the Company’s opening brief for failing to file Excerpts of Record, and to require the Company to file such excerpts.

<sup>2</sup> Accordingly, the Company’s objection (Br 1) to the timeliness of the Board’s application is without merit.

CIO (“the Union”) was the Charging Party before the Board and has intervened on the side of the Board.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the Board is entitled to summary enforcement of its uncontested findings that JLL committed numerous violations of Section 8(a)(1) of the Act.

2. Whether the Board is entitled to summary enforcement of its uncontested findings that the Company violated Section 8(a)(1) of the Act by informing JLL employees that it intended to operate nonunion and telling an employee not to speak to the Union.

3. Whether substantial evidence supports the Board’s findings that the Company became a successor employer to JLL with an obligation to recognize and bargain with the Union, maintain terms and conditions of employment, and remedy JLL’s unfair labor practices. Subsidiary issues are:

a. Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union because it maintained substantial continuity with JLL’s former business and hired as a majority of its work force former JLL employees, and further violated the Act by unilaterally changing terms and conditions of employment after committing uncontested unfair labor practices.

b. Whether substantial evidence supports the Board's finding that the Company is jointly and severally liable for JLL's unfair labor practices as a successor who acquired the business with knowledge of JLL's unfair labor practices.

4. Whether this Court lacks jurisdiction to consider the Company's untimely challenges to the Board's remedial order.

5. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily failing and refusing to hire former JLL employees Frederico Cruz, Tomas Garcia Rodriguez, Raul Martinez, and Alex Vaquerano because they engaged in protected union picketing.

### **STATEMENT OF THE CASE**

Based on charges filed by the Union, the Board's General Counsel issued a consolidated unfair labor practice complaint on December 17, 2003 against JLL and the Company. (SER 7; SER 150.) The complaint alleged that JLL violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) numerous times by coercing an employee to sign a decertification petition and by threatening and interrogating employees for engaging in protected activities. It further alleged that the Company violated Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)) by telling employees it would operate nonunion and telling an employee not to talk to

the Union, and failing to hire seven employees because of their union activities. (SER 7-17, SER 150.) The complaint also alleged that the Company violated Section 8(a)(5) of the Act as a successor to JLL by refusing to recognize and bargain with the Union and unilaterally changing terms and conditions of employment. Finally, the complaint alleged that the Company, as a successor to JLL, was liable for JLL's unfair labor practices.

Following a hearing, the administrative law judge issued a decision finding that JLL, who failed to answer the complaint and appear before the hearing, violated the Act as alleged. The judge additionally found that the Company violated the Act in almost all alleged respects, except for the failure to hire three of the seven employees, which allegations the judge dismissed. (SER 14-16.) Finally, the judge found that the Company, as a successor to JLL, was liable for JLL's unfair labor practices. The parties, except JLL, filed exceptions and briefs in support of exceptions. (SER 1.)

On May 31, 2006, the Board issued its Decision upholding the judge's findings and recommended Order. (SER 1-6.)

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### A. Introduction: the Restaurant, JLL, and the Union

“The Smoke House” is a restaurant (“the restaurant”) in Burbank, California. (SER 7; SER 159.) The restaurant has been in existence since 1946, and has been located in its present location across from Warner Brothers Studio since 1954. (SER 160.)

From 1992 to the relevant time in 2003 discussed herein, James Lucero owned the restaurant. (SER 8; SER 41, 161.) He operated the restaurant through the corporation known as JLL. (SER 41, 161.)

For several decades, the Union has represented the relevant bargaining unit employees at the restaurant. (SER 8; SER 126.) That unit, consisting of about 70 employees, includes:

Full-time or part-time chef, sous chef, night chef, second cook, head butcher, roast cook, broiler cook, sauté cook, head fry cook, line cook, fry cook, head pantry, butcher, pantry, dish up, assistant and helpers, and utility employees, head dining room attendants, food servers, attendants (aka bus persons), host persons, bartenders, and service bartenders.

(SER 8, 10; SER 97-98.)

The Union's most recent collective-bargaining agreement (“CBA”) was with JLL for the term September 15, 1996 through September 14, 2001. (SER 8; SER

173, 235.) The CBA was extended through September 15, 2002. (SER 8; 173, 235.)

Pursuant to the CBA, the unit employees received medical benefits under the Los Angeles Hotel Restaurant Employer-Union Welfare Fund. (SER 8; SER 115-116, 126, 218-20.) The medical benefits had been in effect for 30 to 40 years. (SER 126.)

**B. JLL Files for Bankruptcy and the Company—Whose Principals Are the Restaurant’s Former Owners—Offers to Purchase the Restaurant’s Assets**

On November 18, 2002, JLL declared Chapter 11 bankruptcy. (SER 8; SER 161.) The bankruptcy court appointed Seth “Sandy” Morriss to assume operational control of JLL. (SER 8; SER 161.) In January 2003,<sup>3</sup> Morriss distributed written solicitations to prospective purchasers of the restaurant’s assets. (SER 8; SER 42, 159.)

On February 26, the Company confirmed an offer to purchase the assets of JLL. (SER 8; SER 43.) Leland Spencer (“Mr. Spencer”) is the Company’s chief financial officer. (SER 8; SER 38, 40, 62, 241.) His wife, Martha Spencer (“Mrs. Spencer”), is the president and chief executive officer, and after the eventual

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<sup>3</sup> All remaining dates are in the year 2003 unless otherwise indicated.

purchase of the restaurant, she owned 70 percent of the Company's shares.<sup>4</sup> (SER 8; SER 38, 39-41, 62, 241.) The Spencers were not new to the restaurant; from 1982 to 1985, Mr. Spencer had owned the restaurant, and Mrs. Spencer joined him as an owner when they were married in 1985. (SER 8; SER 46.) Together, the Spencers owned the restaurant from 1985 to 1992, when they sold it to JLL. (SER 9; SER 43.)

**C. The Bankruptcy Court Confirms Sale of JLL Assets to the Company; The Union Requests a Meeting with the Company; The Company Tells the Union It Will Not Recognize the Union**

On April 3, the bankruptcy court issued an order authorizing the sale of the assets of JLL to the Company. (SER 8; SER 44, 169.) That same day, Mrs. Spencer received a letter from the Union, dated April 2. (SER 8; SER 45, 173.) The letter stated that the Union knew of the Company's purchase plan, set out the bargaining history between JLL and the Union, and requested a meeting with the Company. (SER 8; SER 45, 173.)

Following receipt of the Union's letter, Mr. Spencer left a voice-mail message for the Union's lead organizer, Robin Brown Rodriguez ("Rodriguez"). (SER 8; SER 132-133.) In the message, Mr. Spencer said that the only reason the

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<sup>4</sup> Mr. Spencer ran the business for his wife despite not holding any shares individually. (SER 8; SER 49-51, 62.) After the eventual purchase, Ray Lucero ("Mr. Lucero") and his wife Michelle Lucero ("Mrs. Lucero") (collectively, "the Luceros") owned the other 30 percent of shares in the Company. (SER 8, n.6; SER 40-41.)

Company had purchased the restaurant “was to be able to buy it without the Union,” the high union benefits and high rent had caused JLL's bankruptcy, the Company would open the restaurant as new with all new employees, and the Company would appreciate the Union’s placing its members at the restaurant into other union jobs. (SER 8; SER 132-133.)

In response, Rodriguez left a voice-mail message requesting a meeting, stating that the Union still represented JLL’s employees. (SER 8; SER 127-128.) On April 9, Mr. Spencer left a responsive voice-mail message reiterating the Company’s position that if the Company had to have the Union, it would not pursue the purchase of the restaurant. (SER 8; SER 133-34.)

**D. The Company Accepts Applications From and Interviews JLL Employees, And Tells Employees the Company Will Operate Without the Union**

In early April, JLL posted a memorandum at the restaurant. (SER 8; SER 189.) The memorandum, signed by Morriss, stated that the sale of the restaurant was “targeted to happen around April 30,” and “[u]ntil that date you are employees of [JLL].” It further stated that JLL did not have control over the Company’s hiring decisions. (SER 8; SER 189.)

Around this same time, the Company began accepting applications from prospective employees. (SER 8; SER 48, 138, 239.) JLL supervisor Felipe Sanchez, who eventually became a supervisor for the Company, distributed and

retrieved some of these applications. (SER 8; SER 48, 138-139.) Applications from JLL employees generally bore the notation “rehire,” which JLL supervisors had instructed employees to write. (SER 8; SER 208.) Raul Martinez, Tomas Garcia Rodriguez (“Garcia”), Frederico Cruz, and Alex Vaquerano were among the JLL employees who submitted applications to the Company. (SER 8-9; SER 239.)

On two occasions in early to mid-April, Mrs. Spencer and other Company representatives interviewed prospective employees, including JLL employees, in the restaurant's cocktail lounge. (SER 9; SER 106-108, 138-142.) In response to applicant questions, Mrs. Spencer said that the Company was taking over a bankrupt business and that the Company would “not be operating under the Union.” (SER 9; SER 101-102.)

**E. The Union and Employees Picket on April 21; JLL Threatens to Discharge Employees, Recommend that the Company Not Re-Hire Them, and Close the Restaurant; The Company Tells the Union Will Not Buy the Restaurant Due to Picketing**

On April 21, about 25 to 30 individuals from the Union, including bargaining-unit employees, picketed in front of the restaurant from 11 a.m. to 1 p.m. (SER 3, 9; SER 67-69, 87-88, 92-93, 110, 129, 136.) Picketers also distributed fliers urging customers to sign a petition and boycott the restaurant because the employees’ union contract had expired and they had no contract to protect their rights in the event that the restaurant was sold. (SER 3, 9; SER 206.)

Garcia, Vaquerano, Martinez, and Cruz were among the employees involved in the picketing. (SER 9; SER 69, 87-96, 103-104, 110-111, 143.)

Supervisor Sanchez reacted negatively to the picketers. (SER 9; SER 69-75, 117, 144-145.) For example, he told Rodriguez that she needed to stop the picketing, the picketers had no right to be out there, and he did not know what would happen to them if they continued. (SER 9; SER 69-75, 117, 144-145.) Supervisor Sanchez told employee Lori Barnes that he could make a list of the people picketing, give it to the new owners, and recommend they not be hired. (SER 9; SER 117.) He asked employees what they were doing on the picket line. (SER 9; SER 74-75, 144.) In addition, Supervisor Sanchez told employee Alice Colon that he could fire her for picketing. (SER 9; SER 73, 144-145.) He also told Colon that the restaurant was going to close because of the Union. (SER 9; SER 73.) Supervisor Sanchez made the same statement to employees in the kitchen. (SER 9; SER 74-75.)

Later that day, JLL posted the following notice, signed by Morriss, on a kitchen wall at the restaurant:

Whatever issues you have regarding the future of the restaurant have nothing to do with us. You should take them up with the new owners once they officially purchase the restaurant.

The restaurant cannot afford a drop in business. If we see any reduction in business as a result of the actions being taken by the union, we will immediately shut the restaurant down. If we are forced into that decision, no one will have a job until the restaurant is sold.

In addition, your actions may result in the sale not going through in which case you will be responsible for the end of The Smokehouse. No one wins if that is the outcome. (SER 9; SER 76-77, 209.)

The following day, April 22, JLL posted another notice at the restaurant stating that “[t]he Union actions resulted in a significant reduction in our business. Should such an action be taken again, the restaurant will be immediately closed and all employees terminated.” (SER 9; SER 78, 210.)

On the same day, Mr. Spencer left a voice-mail message for Rodriguez, stating he had heard of that “little trick” the day before, and, because of it, the Company decided not to buy the restaurant. (SER 9; SER 134-135.)

**F. The Union Pickets Again; A Decertification Petition Is Faxed to the Union; The Union Files an Unfair Labor Practice Charge Against JLL, and JLL Informs the Company**

On April 23, the Union again picketed the restaurant. (SER 10; SER 52.) Morriss told the Spencers about the second picket. (SER 10; SER 52.) That same day, a petition discussing employees’ dissatisfaction with the Union (“decertification petition”) was faxed to the Union with 29 signatures on it. (SER 10; SER 246.) The cover page stated:

We the undersigned employees of the Smoke House choose to end our relationship with the union. We will be getting more and more signatures and advise you seriously not to picket! We do not want to lose our jobs for this cause. (SER 10; SER 246.)

Also on April 23, the Union filed an unfair labor practice charge with the Board. (SER 10; SER 205.) On April 24, JLL's attorney at the time, Edward M. Wolkowitz, informed the Company by fax that he had met with representatives of the Union following their filing of unfair labor practice charges with the Board, and they would like to meet with Mrs. Spencer "to fashion a mutually acceptable agreement that will preserve jobs and benefits for the employees." (SER 10; SER 53-54, 205.) Mrs. Spencer received this letter on April 24 or 25. (SER 53-54.)

**G. More Employees Sign the Decertification Petition in the Presence of Supervisor Sanchez; An Employee Shows the Decertification Petition to Company Principals**

On April 25, at about 5:30 p.m., while employee Lori Barnes was working, Supervisor Sanchez, who was standing with two employees, called her to him. (SER 10; SER 118-119.) One of the employees handed Barnes the decertification petition, and she signed it. (SER 10; SER 120-122.)

Later that same evening, the Spencers and the Luceros were dining at the restaurant. (SER 10; SER 146-147.) An employee showed them the decertification petition, which now contained 43 signatures, individually dated April 22 through 25. (SER 10; SER 146-147.) The Luceros and the Spencers looked at the petition and returned it to the employee. (SER 10; SER 148-149.) When the Spencers saw the decertification petition, they decided to continue with their plan to purchase the restaurant. (SER 10; SER 63-66, 149.)

**H. The Company Takes Over JLL, Offers Former JLL Employee Jesus Sanchez a Job And Tells Him Not to Talk to Other Employees or the Union; the Company Hires Most of JLL's Employees But Not Cruz, Garcia, Martinez, or Vaquerano; the Company Operates the Restaurant in Substantially the Same Way as Had JLL, and Again Tells Employees It is Not a Union Restaurant**

The Company officially took over the restaurant on April 28.<sup>5</sup> (SER 97.)

On April 30, Supervisor Sanchez (whom the Company had hired from JLL as a supervisor) telephoned cook Jesus Sanchez at home. (SER 11; SER 84-86.) After informing Jesus that he was going to be hired by the Company, Supervisor Sanchez told Jesus not to talk to other employees or to the Union. (SER 11; SER 84-86.)

That same date, the Company posted schedules at the restaurant listing the names and shifts of employees slated to work beginning May 1. (SER 11; SER 79.) Employees including Cruz, Garcia, Martinez, and Vaquerano were either told they were not rehired, or left after not seeing their names on the schedule. (SER 11; SER 79-80.)

On May 1, the Company began actual operation of the restaurant. (SER 11; SER 55.) At that time, the Company employed 63 of 70 individuals who had worked for JLL in nonsupervisory positions immediately prior to the Company's

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<sup>5</sup> Prior to April 27, JLL and the Company entered into an agreement giving the Company early access to the restaurant following JLL's cessation of business on April 27. (SER 10; SER 97.)

acquiring the restaurant. (SER 10, 11; SER 99-100.) From that time on, the Company continuously operated the restaurant as a public facility, just as JLL had. (SER 11; SER 112, 114.) The Company opened the restaurant for business 7 days a week, just as JLL had. (SER 11; SER 113, 114.) The Company continued the same job positions as JLL had: cooks, kitchen helpers, servers, bussers, and hosts. (SER 113.) The Company continued to serve the same type of food as JLL had served. (SER 11; SER 56-57.)

On May 1, the Union led a delegation, including former JLL employees who had not been rehired, to the restaurant to speak to the Company. (SER 12; SER 81, 105, 123, 130, 136.) Mrs. Spencer told the delegation that the restaurant was not a Union business. (SER 12; SER 82-83, 124-125, 130-131, 137.)

**I. The Union Requests Bargaining; The Company Refuses to Bargain, Discontinues Health Plan Coverage, and Unilaterally Implements New Health Coverage**

On May 9, the Union again requested recognition and bargaining. (SER 12; SER 58, 207.) The Company refused. (SER 12; SER 59.) The Company discontinued the health plan provided for in the Union's agreement with JLL. (SER 12; SER 61.) From May 1 to December, the Company did not provide any health benefit coverage for the restaurant's employees. (SER 12; SER 61.) Without prior notification to or bargaining with the Union, the Company instituted

a new health plan for employees effective sometime in December. (SER 12; SER 60-61.)

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

Based on the foregoing facts, the Board (Chairman Battista and Members Liebman and Schaumber), in agreement with the administrative law judge, found (SER 1 n.1, 13) that JLL violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by telling employees to stop engaging in protected activity, threatening them with job loss and other retaliation for engaging in such activity, interrogating them about such activity, coercing an employee into signing a decertification petition, and telling an employee not to speak to the Union.

The Board found (SER 1, 13) that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by telling employees it would operate nonunion and telling an employee not to talk to the Union. Moreover, the Board found (SER 1, 2, n. 7, 17) that the Company violated Sections 8(a)(1) and (5) of the Act (29 U.S.C. § 158(a)(1) and (5)) by refusing to recognize and bargain with the Union, failing to apply the terms and conditions of employment established by the CBA to its employees, and unilaterally changing terms and conditions of employment. In agreement with the judge, the Board found (SER 1, 14-16) that the Company violated Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) by refusing to hire Cruz, Garcia, Martinez, and Vaquerano, but did not violate the Act (SER 1, 14-16)

by refusing to hire three additional employees. The Board (SER 1), in agreement with the judge, found the Company, as a successor to JLL, was jointly and severally liable for remedying JLL's unfair labor practices.

The Board's Order (SER 1, 17-18) requires JLL and the Company to cease and desist from engaging in the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Order requires (SER 1, n.2, 17-18) JLL to post and mail a notice. It requires (SER 1, n.2, 2-3, 18) the Company, on request, to bargain with the Union, restore terms and conditions of employment prior to its takeover of JLL, and make employees whole for any losses incurred from the unilateral changes. In addition, the Order requires (SER 5-6, 18) the Company to reinstate Cruz, Garcia, Martinez, and Vaquerano and make them whole for losses they incurred, expunge any references to its unlawful refusal to hire them from their records, and post a notice. The Board also ordered (SER 1, n.2, 17) the Company to remedy JLL's unfair labor practices by posting and mailing a notice.

## SUMMARY OF ARGUMENT

When the Company took over the restaurant from JLL, substantially continued JLL's business, and hired most of JLL's employees in April 2003, it became a successor employer to JLL. As such, it acquired legal obligations to former JLL employees. Notwithstanding a number of confusing claims that the Company appears to assert in order to avoid these obligations, this case involves a straightforward application of well-settled law to the facts.

To begin, the Board reasonably found that the Company violated the Act by failing to meet its obligation to recognize and bargain with the Union. Moreover, the Board reasonably found that the Company was not privileged to set new terms and conditions of employment because it committed uncontested unfair labor practices—to wit, telling employees it would operate nonunion and restricting an employee from speaking to the Union.

In finding that the Company violated its obligations to bargain with the Union and maintain employment terms and conditions for the former JLL employees, the Board properly rejected the Company's attempt to justify its actions based on the decertification petition. Indeed, substantial evidence demonstrates that the petition was fatally tainted by the Company's uncontested unfair labor practices as well as uncontested unfair labor practices committed by JLL.

Moreover, the Company's obligation as a successor to JLL requires it to remedy JLL's uncontested unfair labor practices because the Company had knowledge of those unfair labor practices prior to taking over the restaurant. As the Board reasonably found, the Company is jointly and severally liable with JLL for these violations. Contrary to the Company's argument, equity considerations do not preclude imposing joint liability on the Company for the Board's notice and mailing remedies.

The Company's brief devotes significant time to challenging the Board's remedial order. However, these challenges are jurisdictionally barred because the Company failed to object at the appropriate time before the Board. Finally, the Board reasonably found that the Company unlawfully failed to hire four employees because they engaged in protected union picketing. The Company's only challenge to this finding—that the picketing was unprotected—is meritless.

## ARGUMENT

### **I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT JLL COMMITTED NUMEROUS VIOLATIONS OF SECTION 8(a)(1) OF THE ACT**

As the Board found (SER 1 n.1, 12-13), and the facts above set forth, JLL told employees to stop engaging in protected picketing activity during non-work time, interrogated employees about their protected picketing activity, threatened employees that it would discharge them, close the restaurant, and recommend that the Company not hire them because they engaged in such protected activity, coerced Lori Barnes into signing a union decertification petition, and told an employee not to speak to the Union. It is well-settled, as the Board found (SER 1, n.1, 12-13), that such employer activity violates Section 8(a)(1) of the Act, which provides that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in [S]ection 7” of the Act.<sup>6</sup> *See NLRB v. Davis*, 642 F.2d 350, 353 (9th Cir. 1981) (employer violated Section 8(1)(1) by threatening and interrogating employees for engaging in union activity).

It is also undisputed that JLL failed to answer the complaint, and did not demonstrate good cause for its failure. As the judge found (SER 12), Board Rule

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<sup>6</sup> That section of the Act secures employees’ right to form, join and assist labor unions. *See* Section 7 of the Act (29 U.S.C. § 157).

and Regulation § 102.20 (29 C.F.R. § 102.20) provides that a party admits complaint allegations against it if it does not file an answer within 14 days of service of the complaint, unless it shows good cause. *See* 29 C.F.R. § 102.20. Courts, including this one, consistently “have upheld Board decisions deeming allegations admitted.” *KBI Security Service, Inc. v. NLRB*, 91 F.3d 291, 295 (2d Cir. 1996), *citing, e.g., NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 831 (9th Cir. 1991) (affirming Board grant of default judgment where employer failed to file answer to complaint before Board administrative law judge). Indeed, JLL did not appear at the hearing or otherwise seek to defend itself. Nor did JLL file a brief in this Court.<sup>7</sup>

For all of these reasons, the Board is entitled to summary enforcement of its unfair labor practice findings (SER 1, n.1) against JLL. *See KBI Security Service, Inc.*, 91 F.3d at 295 (upholding Board finding of liability against employer who failed to answer complaint).

These findings do not disappear simply because they have not been contested. Rather, they remain in the case, “lending their aroma to the context in

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<sup>7</sup> The Company makes a series of confusing arguments in its brief contesting its liability. At times, it appears to raise a defense for JLL, challenging whether JLL is responsible for the unfair labor practices or if the bankruptcy administrator is liable. These arguments, to the extent they can be fairly discerned from the Company’s brief (Br 10-15, 18-22), do nothing to alter the Company’s liability here. As noted, JLL failed to file an answer before the Board and thus long ago

which the [contested] issues are considered.” *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1315 (7th Cir. 1991) (*en banc*), quoting *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982). These uncontested findings against JLL lend a particularly foul odor to the Company’s claim (Br 21-25) that it was privileged to rely on the Union’s decertification petition, which, as discussed below at pp. 30-34, the Board properly found (SER 2, 14) was fatally tainted by these and the Company’s own unfair labor practices.

**II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INFORMING FORMER JLL EMPLOYEES THAT IT INTENDED TO OPERATE NONUNION AND TELLING AN EMPLOYEE NOT TO SPEAK TO THE UNION**

As the Board found (SER 1, 9, 12, 13), and the facts above set forth, the Company told job applicants, including JLL employees, that it intended to open the restaurant as a nonunion business entity. The Company did so both in early April, during its interviews of prospective hires and rehires, as well as on May 1, when Mrs. Spencer told the employees that the restaurant was not a union business.

These statements violated Section 8(a)(1) of the Act. *See Advanced*

*Stretchforming Int’l Inc.*, 323 NLRB 529, 530-31 (1997) (“statement to employees that there will be no union at the successor’s facility blatantly coerces employees . .

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waived any challenges. Moreover, notwithstanding these arguments, the Company concedes (Br 18) that JLL committed the unfair labor practices at issue.

. and constitutes a facially unlawful condition of employment”), *enf’d in rel. part, NLRB v. Advanced Stretchforming Int’l Inc.*, 233 F.3d 1176, 1180 (9th Cir. 2000).

Moreover, the Board found (SER 1, 11, 13), and the facts above demonstrate, that on April 30, the Company, by Supervisor Sanchez, unlawfully told Jesus Sanchez not to speak to the Union, in violation of Section 8(a)(1) of the Act. *See Care Initiatives, Inc.*, 321 NLRB 144, 156 (1996) (unlawful to restrict employee from imparting information to union.)

The Company fails to challenge the above Board findings in its opening brief.<sup>8</sup> Thus, it has waived the right to contest them and the Board is entitled to enforcement with respect to the portions of its Order that are based on the uncontested findings. *See Fed. R. App. Proc. 28(a)(9)(A)* (party waives claims it fails to raise in opening brief); *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992) (party waives issues it does not contest in opening brief). Again, these uncontested findings do not disappear, but remain in the case, “lending their aroma to the context in which the [contested] issues are considered.” *U.S. Marine Corp. v. NLRB*, 944 F.2d at 1315.

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<sup>8</sup> Although the Company attempts to defend (Br 19-21) Mr. Spencer’s statements on Union Organizer Rodriguez’s answering machine, nowhere does it contest the Company’s statements to applicants and employee Sanchez, which are the relevant statements on which the Board based (SER 1, 13-14) the Company’s Section 8(a)(1) violations.

**III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY BECAME A SUCCESSOR EMPLOYER TO JLL WITH AN OBLIGATION TO RECOGNIZE AND BARGAIN WITH THE UNION, MAINTAIN TERMS AND CONDITIONS OF EMPLOYMENT, AND REMEDY JLL'S UNFAIR LABOR PRACTICES**

The Board made the undisputed findings (SER 10, 13) that when the Company took over the restaurant, it became a successor to JLL because it maintained substantial continuity between the two enterprises, continuing JLL's restaurant business without significant change in operations and hiring as a majority of its work force former JLL employees. Accordingly, as we show below, the Company was obligated to recognize and bargain with the Union. Moreover, the Board reasonably found (SER 1, 2 n.7) that the Company forfeited its right to set initial terms and conditions of employment by unlawfully proclaiming to employees that it would operate nonunion. Finally, as shown below, the Board reasonably found (SER 1 n.2, 16-17) that the Company, as a successor to JLL, was liable for JLL's unfair labor practices because it had knowledge of them prior to purchasing JLL's assets.

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

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." Section 8(d) of the Act (29 U.S.C. § 158(d)) defines the duty to bargain collectively as "the performance of the mutual obligation of the

employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .” It is well settled under those provisions that, upon acquiring a business, a new employer becomes a successor obligated to bargain in good faith with the established collective-bargaining representative of its predecessor’s employees, if the employer conducts essentially the same business as the former employer and if a majority of the work force in a “substantially representative complement” of its ultimate work force was formerly employed by the predecessor. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987); *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 279-81 (1972) (“*Burns*”); *Kallman v. NLRB*, 640 F.2d 1094, 1100 (9th Cir. 1981) (enforcing *Love’s Barbeque Restaurant*, 245 NLRB 78 (1979)).

In determining whether substantial continuity between two enterprises exists, the Board looks at the totality of circumstances, “with an emphasis on the employees’ perspective.” *Fall River*, 482 U.S. at 43. The Board’s analysis “focus[es] on whether the new company has ‘acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business operations.’” *Fall River*, 482 U.S. at 43. In particular, the Board considers whether the business of both employers is essentially the same, whether the employees of the new employer are performing the same work under

the same conditions and supervisors, and whether the new employer has the same production process, the same products, and generally the same customers. *See Fall River*, 482 U.S. at 43; *Pa. Transformer Tech., Inc. v. NLRB*, 254 F.3d 217, 222 (D.C. Cir. 2001) (“*Pa. Transformer*”).

Moreover, although a successor employer with a duty to bargain in good faith is ordinarily free to establish unilaterally the initial terms and conditions under which individuals are offered employment, in certain factual exceptions, the duty to bargain in good faith requires a successor at least “to . . . initially consult with the employees’ bargaining representative before he fixes terms.” *Burns*, 406 U.S. at 294-95. The Board has consistently held that one such exception is when a successor seeks to avoid having to recognize the predecessor employees’ union altogether by deliberately “block[ing] the process by which the obligations and rights of a [*Burns*] successor are incurred.” *See State Distributing Co.*, 282 NLRB 1048, 1049 (1987). Specifically, the Board, affirmed by this Court, has held that a successor unlawfully “block[s] the process by which the obligations of a successor are incurred” when it proclaims to employees that it will operate nonunion. *NLRB v. Advanced Stretchforming Int’l Inc.*, 233 F.3d 1176, 1181 (9th Cir. 2000).

The Board may also order a successor employer to remedy a predecessor’s unfair labor practices if the successor employer acquired the business with knowledge of the unfair labor practice. *See Golden State Bottling Co. v. NLRB*,

414 U.S. 168, 170, 183 n.5 (1973) (liability may be imposed where a new employer purchases assets of the predecessor). Because employees who have been retained by a successor “understandably view their job situations as essentially unaltered,” they “may well perceive the successor’s failure to remedy the predecessor employer’s unfair labor practices . . . as a continuation of the predecessor’s unfair labor policies.” *Golden State*, 414 U.S. at 184. Thus, imposing liability on a successor who purchases a business with knowledge of the predecessor’s unfair labor practices serves the policies of the Act to “avoid[ ] [ ] labor strife, prevent[ ] [ ] a deterrent effect on the exercise of rights guaranteed employees by Section 7 of the Act . . . and protect[ ] [ ] the victimized employees.” *Golden State*, 414 U.S. at 185.

The determination of whether an employer is a successor is “primarily factual in nature.” *Fall River*, 482 U.S. at 43; *accord Pa. Transformer*, 254 F.3d at 222. In determining whether a successor has knowledge of its predecessor’s unfair labor practices, the Board may infer that the successor knew of the predecessor’s unlawful acts based on the circumstances. *See Golden State*, 414 U.S. at 172-74. The Board’s factual findings are “conclusive” if they are supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)).

Courts will defer to the Board's conclusion under the Act "so long as it is reasonable and not precluded by Supreme Court precedent." *NLRB v. Advanced Stretchforming, Inc.*, 233 F.3d at 1180. Thus, a reviewing court may not displace the Board's choice between conflicting views, even if it could justifiably have made a different choice de novo. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

**B. Substantial Evidence Supports the Board's Findings That the Company Violated Section 8(a)(1) and (5) by Refusing to Recognize and Bargain with the Union Because It Maintained Substantial Continuity With JLL's Former Business and Hired as a Majority of Its Work Force Former JLL Employees, And By Unilaterally Changing Terms and Conditions of Employment After Committing Uncontested Unfair Labor Practices**

**1. The Company unlawfully refused to recognize and bargain with the Union and unlawfully changed employees' terms and conditions of employment**

As the Board reasonably found (SER 1, 2, 2 n. 7) under the above principles, the Company was required to recognize the Union as the exclusive bargaining representative of its employees because it continued essentially the same business as JLL and almost its entire employee complement was made up of former JLL employees. *See Burns*, 406 U.S. at 279-81. Indeed, the Company does not dispute that as of May 1, the Company's first day of ownership, it continued to conduct the same restaurant business that its predecessor, JLL, conducted during its tenure as the employer. (SER 11; SER 112, 114.) As the judge specifically found (SER 13),

the Company “took over the operations of the [r]estaurant from JLL with essentially the same employees as JLL in the same classifications . . . . used the same equipment, inventories, and facilities as JLL . . . provided the same dining services with essentially the same type of food.” Moreover, the undisputed evidence shows that 63 of the Company’s 70 employees were former JLL employees. (SER 10, 11, SER 99-100.) Hence, the Company was a successor with an obligation to recognize the Union, and it violated the Act by failing to do so.

Although the Company asserts in its statement of the issues (Br 2) that it challenges the Board’s finding that it is a successor to JLL, its arguments (Br 10-15, 18-22) do not challenge the Board’s successor findings. Nowhere in its brief has the Company pointed to evidence that contradicts the Board’s finding that it substantially continued the restaurant business in the same manner as JLL, using the same employees. Rather, its challenge (Br 10) to successor liability seems based on a claim of its alleged lack of knowledge of JLL’s unfair labor practices, a claim discussed *infra* at pp. 34-35, which is utterly devoid of merit.<sup>9</sup>

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<sup>9</sup> To the extent that the Company takes issue (Br 10) with its successor liability for “acts [that were] allegedly committed on the United States Bankruptcy Court watch,” it has failed to make a proper argument with citation to authorities and the parts of the record on which it relies. *See* Fed R. Proc. 29(a)(9)(A) (argument in opening brief must contain citation to authorities and parts of the record).

In addition, the Board reasonably found (SER 2, 2 n.7, 13, 14 n.22), relying on *Advanced Stretchforming*, that the Company forfeited the right to set initial terms and conditions of employment by unlawfully telling employees that it would not operate as a union business. The Company has not contested the Board's finding that it unlawfully made such statements to employees. Nor has the Company ever challenged (SER 2 n.7) the *Advanced Stretchforming* holding that such statements preclude a successor from setting new terms and conditions of employment.<sup>10</sup> Thus, the Company also violated the Act by unilaterally changing the employees' former terms and conditions of employment.

## **2. The tainted decertification petition is no defense to the Company's actions**

The Company's only defense (Br 21-25)—that the employees' decertification petition privileged it to refuse to recognize and bargain with the Union and thus to take unilateral action—ignores the Board's finding (SER 2 n.5,

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<sup>10</sup> The Company makes a passing reference (Br 25) to principles allowing an employer to set initial terms and conditions of employment if an employer has not misled employees into believing conditions will remain stable or has affirmatively announced its intention to retain the employees under new conditions. However, the Company never raised this argument below in its exceptions or exceptions brief, and is thus precluded from making such an argument to this Court. *See* Section 10(e) of the Act, providing that “no objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e); *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1992).

10, 13-14) that the uncontested unfair labor practices committed by JLL and the Company fatally tainted the petition. Thus, as shown below, the Company was not entitled to rely on it to obviate its bargaining responsibilities.

The employee petition was signed by 43 unit employees and stated, in relevant part, that they “cho[]se to end [their] relationship with [the Union].” (SER 10; SER 246.) Normally, a petition of this type, signed by a majority of the unit employees, would constitute objective proof of an actual loss of majority support sufficient to justify a withdrawal of recognition. *See Hotel, Motel & Restaurant Employees Local 19 v. NLRB*, 785 F.2d 796, 800 (9th Cir.1986); *Lexus of Concord, Inc.*, 343 NLRB 851, 852 n.5 (2004) (finding that such a petition would satisfy requirement of proof of actual loss of majority as well as requirement of reasonable doubt of majority status); *see also Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717 (2001) (setting forth actual loss of majority test).

However, an employer may not rely on such a petition to escape its bargaining obligation if its unfair labor practices caused the loss of majority. *See NLRB v. B.C. Hawk Chevrolet, Inc.*, 582 F.2d 491, 495 (9th Cir 1978) (an employer cannot challenge a union’s majority status when it has “committed unfair labor practices which tended to undermine union support”); *see also Williams Enterprises, Inc.*, 312 NLRB 937, 939-40 (1993) (it is well-settled that an employer may not rely on a tainted decertification petition to refuse to extend

recognition to, or to justify withdrawal from, an incumbent union), *enf'd NLRB v. Williams Enterprises, Inc.*, 50 F.3d 1280, 1288 (4th Cir. 1995).

In evaluating the causal connection between unfair labor practices and employee disaffection, the Board, as affirmed by this Court, considers, among other factors, (1) the length of time between the unfair labor practices and the disaffection; (2) the nature of the illegal acts and the possibility of their having a lasting detrimental effect on employees; (3) their tendency, if any, to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and union membership. *See Master Slack Corp.*, 271 NLRB 78, 84 (1984); *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 634 (9th Cir. 2007). The Board found (SER 2 n.5, 10, 13-14), and the Company does not contest, that each of these factors indicated a causal relationship between the unlawful conduct and the employees' antiunion petition.<sup>11</sup>

Indeed, the April 23 decertification petition was accompanied by a cover sheet explicitly stating that the employees "do not want to lose [their] jobs for [the

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<sup>11</sup> The Company asserts (Br 23) that the judge improperly rejected its offers to have former JLL employees testify to their reasons for signing the antiunion petition. However, the judge's action (SER 14, n.21) was correct. The test is not the subjective reaction of employees to the employer's unfair labor practices, but the objective tendency of the unfair labor practices to undermine the union. *See AT Systems West*, 341 NLRB No. 12, 2004 WL 210362, \*5-\*6 (2004). An employee's testimony concerning his subjective motivation for signing an antiunion petition involves "an endless and unreliable inquiry." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969).

union] cause.” (SER 14 n. 20, SER 246). The Board found (SER 2, 14, 14 n.20) that this petition was unreliable because it followed on the heels of the Company’s mid-April unlawful statements to JLL employees during interviews that it intended to operate the restaurant as a nonunion entity. In addition, during the Union’s picketing on April 21, JLL’s supervisor, Sanchez, “impliedly threatened to fire employees who had joined the picketing and announced generally that it would cause the [r]estaurant’s closure.” (SER 13; p. 11, above.) Later that day, JLL’s manager posted a notice that any reduction in business because of picketing would result in closure. (SER 13-14.)<sup>12</sup> The employees were informed that “these actions” might result in the sale not going through. Two days later, the circulated petition, preceded by the statement that employees did not want to lose their jobs, was signed by employees. Thus, the record amply bears out the link between the Company’s and JLL’s unfair labor practices and the disaffection petition.

Moreover, the Board (SER 2, 14) found that the nature of the acts, in creating fear of job loss and communicating that there would be no Union at the Company, led to “the inescapable conclusion [ ] that fear of job loss unlawfully instigated by JLL and promoted by [the Company] inspired and tainted the

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<sup>12</sup> The Company’s meritless challenge (Br 16-17) to the lawful, protected nature of the picketing is addressed in Section VI, below.

decertification petition.” (SER 2, 13-14.) Therefore, the Company “was not entitled to rely on the decertification.” (SER 14.)

**C. Substantial Evidence Supports the Board’s Finding That the Company is Jointly and Severally Liable for JLL’s Unfair Labor Practices as a Successor Who Acquired The Business With Knowledge of JLL’s Unfair Labor Practices**

Substantial evidence supports the Board’s finding (SER 1, 1 n. 2, 10, 13, 16-17) that the Company was a successor employer liable for JLL’s uncontested unfair labor practices because it substantially continued the predecessor’s business and had knowledge of JLL’s unfair labor practices when it acquired the business. The record establishes (SER 10, 16-17; SER 53-54, 205) that Mrs. Spencer received a letter from JLL informing the Company of the alleged unfair labor practices against JLL at least as of April 24 or 25, a few days before the Company took over the restaurant’s assets from JLL. Thus, the Board reasonably found (SER 1, 1 n.2, 16-17) that the Company was liable for JLL’s unfair labor practices under well-settled standards discussed above.

The Company’s claim (Br 11-12) that it in fact lacked requisite notice of JLL’s unfair labor practices, is not only refuted by ample evidence, discussed above at p. 13 , but also barred by Section 10(e) of the Act (29 U.S.C. § 160(e)), as discussed above in n. 10. Nowhere in the Company’s Exceptions to the judge’s decision or in its brief in support of exceptions—which the Board has moved to

lodge with this Court—did the Company object to the judge’s notice finding.

Thus, the Court lacks jurisdiction to consider this argument.

The Company’s remaining attempt (Br 9-11, 13-15) to avoid liability is based on inapplicable caselaw. As the Board (SER 1, n.2) found, cases such as *Steinbach v. Hubbard*, 51 F.3d 843 (9th Cir. 1995), on which the Company heavily relies (Br 11, 13-15), are in a dramatically different posture. These cases (*see* Br 13-14, citing the employment discrimination case *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 750 (7th Cir 1975), and *Peters v. NLRB*, 153 F.3d 289, 301 (6th Cir. 1988)) involve the imposition of significant monetary liability on employers with equitable reasons to be released from such monetary obligations. Here, in contrast, the Company is not required to provide any monetary relief as a result of its liability for JLL’s actions. As the Board stated (SER 1, n.2), “the remedy for JLL’s unlawful conduct—notice posting and mailing—will not impose an undue financial hardship.” Accordingly, this Court should affirm the Board’s finding that the Company is liable for JLL’s uncontested unfair labor practices.

#### **IV. THIS COURT LACKS JURISDICTION TO CONSIDER THE COMPANY’S UNTIMELY CHALLENGES TO THE BOARD’S REMEDIAL ORDER**

The Board, in agreement with the judge, ordered (SER 2, 2 n.7, 3, 17) the Company to take remedial action for the above unfair labor practices. The Board’s remedy included an affirmative bargaining order, for which the Board (SER 2-3)

fully explained its reasoning after considering all relevant factors.<sup>13</sup> Before this Court, the Company (Br 25-35) argues for the first time that the Board's make whole relief and affirmative bargaining order are punitive and inconsistent with the Act. As we now show, however, judicial consideration of these issues is precluded by Section 10(e) of the Act (29 U.S.C. § 160(e)), which, as discussed above at p. 30 n. 10, provides in relevant part that "no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary circumstances not present here.

This Court has recognized that a party cannot for the first time raise an objection to a remedy in this Court absent previous objection before the Board. *NLRB v. Sambo's Restaurant, Inc.*, 641 F.2d 794, 795-96 (9th Cir. 1981). Even when the Board issues a remedy *sua sponte*, a party must file an objection in the form of a motion for reconsideration prior to raising the issue in Court. *Sambo's*, 641 F.2d at 795-96.

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<sup>13</sup> The Board, citing *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000), explicitly analyzed "(1) the employees' section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act," and reasonably found (SER 2-3) that an affirmative bargaining order was necessary. This Court has upheld bargaining orders in similar circumstances where employer unfair labor practices caused loss of support for the union. See *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 634-35 (9th Cir. 2007).

This is because the need for “orderly procedure and good administration” requires that “courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice.” *Harvard Indus. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)); *see also Sambo’s*, 641 F.2d at 796 (“[t]he rationale for . . . section 10(e) . . . is that it affords the Board the opportunity to bring its labor relations expertise to bear on the problem so that the court may have the benefit of the Board’s opinion when the court reviews its determinations”).

Here, the judge included in her recommended Order a provision (SER 18) requiring the Company, on request of the Union, to bargain with the Union, retroactively restore employees’ terms and conditions of employment as they had been at JLL, and to “make employees whole for any losses they incurred as a result of unilateral changes made thereto.” The Company did not file any exceptions to the judge’s recommended Order, which the Board adopted (SER 1-3), after further explaining (SER 3) its reasons for issuing the affirmative bargaining order with a decertification bar.

Thus, the Company took no issue with the remedial Order recommended by the judge at the time appropriate under the Act and the Board’s practice—that is, when its exceptions to the judge’s decision were filed with the Board. *See NLRB*

Rules and Regulations, 29 CFR §102.46(a) (exceptions to the recommended order are to be filed “within 28 days . . . from the date of service transferring the case to the Board” unless the Board extends the time for filing). Indeed, nowhere in the Company’s exceptions or brief—which the Board has moved to lodge with this Court—does it so much as mention any alleged defect in the judge’s proposed remedial Order. Moreover, the Company never filed with the Board a motion for reconsideration after the Board explained its reasons for the affirmative bargaining order in greater detail. *See* NLRB Rules and Regulations, 29 CFR §102.48(d)(2) (motions for reconsideration “shall be filed within 28 days . . . after service of the Board’s decision and order” unless the Board extends the time for filing).

Accordingly, under well established precedent, this Court lacks jurisdiction to consider the untimely challenges to the Board’s remedies articulated for the first time in the Company’s appellate brief. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Sambo’s Restaurant, Inc.*, 641 F.2d at 795-96.<sup>14</sup>

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<sup>14</sup> The determination of the amount of the Company’s financial liability will be made in a subsequent Board compliance proceeding. In that proceeding, the Company will be able to present evidence in support of any claim (Br 26-27, 33-34) that it would not have agreed to monetary provisions of the predecessor employer’s collective-bargaining agreement, and further establishing when it would have reached agreement on a new bargaining agreement or reached impasse. *Planned Building Services*, 347 NLRB No. 64, slip op. at 7, 7 n. 23 (2006), 2006 WL 2206975, at \*\* 8, 9, 14 n. 23 (noting that the Board’s new approach was “the approach endorsed by the Ninth Circuit” in *Advanced Stretchforming*).

**VI. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCRIMINATORILY FAILING AND REFUSING TO HIRE FORMER JLL EMPLOYEES FREDERICO CRUZ, TOMAS GARCIA RODRIGUEZ, RAUL MARTINEZ, AND ALEX VAQUERANO BECAUSE THEY ENGAGED IN PROTECTED UNION PICKETING**

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it unlawful to discriminate against employees in regard to hire because of their union activity.<sup>15</sup>

As a threshold matter, nowhere in its brief does the Company challenge the Board's finding (SER 1, 3, 14-16) that the Company failed to hire Frederico Cruz, Tomas Garcia Rodriguez ("Garcia"), Raul Martinez, and Alex Vaquerano because of their picketing activity in support of the Union. Accordingly, the Company has waived any challenge to this finding. *See* Fed. R. App. Proc. 28(a)(9)(A).

Instead, the Company argues (Br 4-5, 16-17, 19, 22) that the picketing was unprotected because it had an unlawful secondary object to cause JLL to stop doing business with the Company over the sale of the restaurant. It also appears to argue (Br 16-17) that the picketing was directed at the Company and unlawfully carried out at the situs of JLL, a neutral employer. To be sure, if the picketing had

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<sup>15</sup> Section 8(a)(1) establishes that it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under Section 7 of the Act. A violation of Section 8(a)(3) results in a "derivative violation" of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

such a secondary object to cause JLL to “stop doing business” with the Company, then the Company’s apparent challenge (Br 1, 3, 9, 35) to the Board’s Section 8(a)(3) finding against it would have some legs. Picketing for this purpose is not protected—indeed, it is prohibited—by the Act, and refusing to hire employees because they have engaged in such unprotected activity does not violate the Act. *See* Sections 8(b)(4)(B), 8(e) of the Act. (29 U.S.C. § 158(b)(4)(B) and §158(e)). However, contrary to the Company’s claim (Br 16-17), this was not the type of picketing that occurred here.

As the Board found (SER 3-4), citing *Operating Engineers Local 71 (Cascade Employers Assn.)*, 221 NLRB 751, 752 (1975), “the purchase negotiations between JLL and [the Company] did not constitute ‘doing business’ within the meaning of Section 8(b)(4)(B) or 8(e) of the Act.” *See Cascade Employers Assn.*, 221 NLRB at 752 (“[T]he sale or transfer of an enterprise has been viewed not as a business transaction, but as a substitution of one entity for the other while the conduct of business continues without interruption.”) Thus, the Board reasonably found (SER 4) that the Company did not establish that “the picketing had an unlawful secondary object.” Moreover, the Board further found (SER 4) that because the Company did not so establish, “the situs of the picketing is irrelevant.”

The Company has done nothing to impugn the Board’s findings. Not only does it completely ignore the holding of *Cascade Employers Assn.*, but it improperly relies (Br 17) on *Limbach Co. v. Sheet Metal Workers Int’l Ass’n*, 949 F.2d 1241, 1249-50 (3d Cir. 1991), to claim that the Company and JLL were “doing business” within the meaning of the Act’s prohibition on secondary boycotts. *Limbach*, which, as a threshold matter, dealt with a wholly different situation—a union repudiating an 8(f) prehire agreement in the construction industry—involved the business relationship between an employer and its subsidiary. Here, however, the situation is as it was in *Cascade*, where one entity (the Company) substituted for the other (JLL) while the conduct of business continued without interruption.<sup>16</sup> Thus, the Board properly applied *Cascade* and found (SER 3-4) that Cruz, Garcia, Martinez, and Vaquerano engaged in protected union picketing. Accordingly, the Board is entitled to enforcement of its finding that the Company violated the Act by refusing to hire them because they engaged in such activity.

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<sup>16</sup> The other cases cited (Br 17) by the Company are also inapplicable. *Lebus v. International Brotherhood of Elec. Workers*, 192 F. Supp 485 (W.D. La 1961), addresses the situs of picketing, which, as discussed above, the Board found (SER 4) to be irrelevant here, and *Kim’s Trucking Co., v. General Chauffeurs, Sales, Drivers and Helpers Local 179*, 13 F. Supp. 2d 715, 717 (N.D. Ill. 1998), is the same.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that judgment should enter enforcing the Board's Order in full.

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October 2008

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*
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	* No. 07-74755
and	*
	* Board No.
UNITE HERE, LOCAL 11	* 31-CA-26240, et al.
	*
Intervenor	*
	*
v.	*
	*
JLL RESTAURANT, INC., d/b/a SMOKEHOUSE*	*
RESTAURANT, AND SMOKE HOUSE	*
RESTAURANT, INC.	*
	*
Respondents	*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,783 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC  
this 22nd day of October, 2008

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by electronic filing and first-class mail the required number of copies of the Board's brief and has served two copies of that brief by first-class mail upon the following parties and counsel at the addresses listed below:

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