

**JLL Restaurant, Inc., d/b/a Smoke House Restaurant
and Hotel Employees and Restaurant Employees
Union, Local 11, AFL-CIO**

**Smoke House Restaurant, Inc. and Hotel Employees
and Restaurant Employees Union, Local 11,
AFL-CIO.** Cases 31-CA-26240, 31-CA-26418,
and 31-CA-26285

May 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On April 6, 2004, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent and the Union filed exceptions and supporting briefs. The General Counsel filed a brief in support of the judge's decision and an answering brief to the Respondent's exceptions, and the Respondent filed a brief in opposition to the Union's exceptions.

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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, and to adopt the recommended Order as modified below.²

¹ The Respondent Smokehouse has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of an answer, and upon failing to appear at the hearing, the judge found that the Respondent predecessor employer, JLL Restaurant (JLL), violated Sec. 8(a)(1), as detailed in sec., IV., A of her decision. We adopt those findings.

² We shall modify the judge's recommended Order to comply with all of the time limits set forth in our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We will also substitute new notices to the employees in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enf'd. 354 F.3d 534 (6th Cir. 2004).

We agree with the judge, for the reasons she stated, that the Respondent is a successor to JLL within the meaning of *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), and that it is liable to remedy the unfair labor practices committed by JLL. We reject the Respondent's arguments that equity considerations require that it not be held liable for its insolvent predecessor's unlawful conduct. The Respondent relies on *Steinbach v. Hubbard*, 51 F.3d 843 (9th Cir. 1995), a Fair Labor Standards Act case. Among the many factual distinctions that may be drawn between that case and this, most notable are that JLL's transfer of assets to the Respondent was permanent rather than temporary and that the remedy for JLL's unlawful conduct—notice posting and mailing—will not impose an undue financial hardship. Hence, we discern no reason for releasing the Respondent from successor liability. See also *Lebanite Corp.*, 346 NLRB 748, 751 fn. 12 (2006).

The judge found that Respondent Smokehouse (Respondent) violated Section 8(a)(1) of the Act by advising the employees of its predecessor, Respondent JLL, and other applicants for employment that it intended to operate nonunion, and by telling a JLL employee not to speak to the Union about employment with the Respondent.³ The judge also found that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Frederico Cruz, Tomas Garcia Rodriguez, Raul Martinez, and Alex Vaquerano because they engaged in union activity. However, she dismissed allegations that the Respondent violated Section 8(a)(3) by failing to hire former JLL employees Lori Barnes, Alice Colon, and Hector Uribe. Additionally, the judge found that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union, failing to apply the terms of the collective-bargaining agreement between JLL and the Union, and unilaterally changing certain contractual terms and conditions of employment. As explained below, we agree with her findings.

I. THE RESPONDENT'S UNLAWFUL REFUSAL TO
RECOGNIZE THE UNION

It is undisputed that the Respondent refused to recognize the Union, even though it had been the collective-bargaining representative of the JLL employees and a majority of the employees whom the Respondent hired were former JLL employees. The Respondent purportedly based its refusal on a petition signed by a majority of the employees, stating that they did not want the Union to represent them.

The judge found that the refusal to recognize the Union violated Section 8(a)(5). She found that the Respondent violated Section 8(a)(1) by telling JLL employees and other applicants, before it took over the Restaurant, that it would operate nonunion.⁴ She also found that the Respondent could not rely on the decertification petition in refusing to recognize the Union because these unlawful statements tainted the petition.⁵

³ The Respondent argues in its brief in support of exceptions that Felipe Sanchez' advising Jesus Sanchez that he would have a job with the Respondent but not to tell the Union was not unlawful because both are supervisors. We disagree. The party asserting supervisory status bears the burden of establishing it. *Kentucky River Community Care*, 532 U.S. 706 (2001); *National Steel Supply, Inc.*, 344 NLRB 973 (2005). Nothing in the record establishes that Jesus Sanchez possessed or exercised supervisory authority within the meaning of Sec. 2(11).

⁴ In affirming this finding, Chairman Battista and Member Schaumber note that the Respondent's exception that it did not make such statements is credibility based and the Respondent does not argue that the statements were lawful, if made.

⁵ 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 of recognition from, an incumbent union. *Williams Enterprises*,

The Respondent argues that the judge erred in finding that its statements about operating nonunion tainted the employee petition. Specifically, the Respondent asserts that there is no evidence that the statements, if made, were disseminated widely enough to affect a significant number of petition signers. The record does not support the Respondent's assertion.

Two employees testified that in early or mid-April they gave applications to either the Respondent's president and chief executive officer, Martha Spencer, or Daniella Schwartz, and were told that when the Respondent took over there would be no more union or medical insurance.⁶ Frederico Cruz said that about a week or two before his last day of work for JLL, he stood in line in the cocktail lounge with a group of applicants waiting to turn in his application, and that Schwartz said, "[T]here was not going to be [a] union anymore." Judith Denniss specifically testified that Martha Spencer "told us that they were going to take over the restaurant and reopen it or whatever, but that they weren't going to be Union. . . ." Thus, although only a few employees testified about the nonunion comment, it is clear that the admonitions were made to Cruz and Denniss in the presence of other employees and applicants. Moreover, in a June 3, 2003 letter to the Board's Regional Office, the Respondent's vice president, Leland Spencer, acknowledged that "[a]ny applicant who asked was told that we had no connection with the previous tenant and that we would not be a 'union house.'" And, in a July 14 position statement, Spencer said that each person interviewed was advised that the Respondent was a nonunion restaurant. Accordingly, we agree that the nonunion statements were widely disseminated and that they tainted the petition.

Although the judge did not expressly cite *Master Slack Corp.*, 271 NLRB 78 (1984), she did consider the factors enumerated in that case for determining whether a loss of majority status is attributable to an employer's unfair labor practices. That is, she examined (1) the length of time between the unfair labor practices and the loss of majority; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the

312 NLRB 937 (1993), enfd. as supplemented 50 F.3d 1280 (4th Cir. 1995).

⁶ Schwartz was a bilingual employee of another restaurant owned by the Spencers. She accompanied Martha Spencer because of her ability to converse with applicants in Spanish. Although Schwartz is not alleged to be an agent of the Respondent, we find that under the circumstances applicants would reasonably have thought that Schwartz spoke for the Respondent when she said that the Respondent would operate nonunion, and therefore, that her remarks are attributable to the Respondent. (The Respondent does not contend otherwise.)

unlawful conduct on employee morale, organizational activities, and membership in the union. *Id.* at 84. She found that the employees circulated their petition within days of the Respondent's unlawfully informing them the Respondent would operate nonunion and JLL's unlawful threats of closure and job loss, and that these unfair labor practices created a reasonable fear that continued union support would result in the general loss of jobs: "The inescapable conclusion is that fear of job loss unlawfully instigated by JLL and promoted by [the] Respondent inspired and tainted the [d]ecertification [p]etition."⁷ We agree.

We further agree, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), and *Williams Enterprises*, 312 NLRB 937 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995), that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful refusal to recognize and bargain with the Union. We adhere to the view, reaffirmed by the Board in *Caterair*, that such an order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." 322 NLRB at 68.⁸

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of

⁷ The judge also found that the Respondent's telling prospective employees that it would operate nonunion vitiated its right to set initial terms and conditions of employment under *NLRB v. Burns Security Services*, 406 U.S. 272, 294 (1972), and that by failing to adhere to the terms of the most recent collective-bargaining agreement between its predecessor JLL and the Union, the Respondent violated Sec. 8(a)(5) and (1). (This is not to say that it is bound to that contract, but rather that it is obligated to adhere to the terms and conditions of employment established by the contract.) In agreeing with these findings, Chairman Battista and Member Schaumber note that the Respondent did not take issue with the judge's reliance on *Advanced Stretchforming International, Inc.*, 323 NLRB 529 (1997), enfd. in part on other grounds, remanded in part 208 F.3d 801 (9th Cir. 2000), amended and superseded on rehearing and enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000), cert. denied 534 U.S. 948 (2001), remanded by the Board 336 NLRB 1153 (2001). They recognize that there have been differing opinions concerning whether the Supreme Court's dicta in *Burns* actually imposes a requirement that a successor who discriminates in the hiring of predecessor employees must bargain before fixing initial terms. See then-Member Hurtgen's dissent in *Pacific Custom Materials, Inc.*, 327 NLRB 75 (1998). However, in view of the Respondent's position, they will apply extant Board law.

⁸ Chairman Battista and Member Schaumber do not agree with the view expressed in *Caterair International*, supra, that an affirmative bargaining order is "the traditional, appropriate remedy" for an 8(a)(5) violation. They agree with the United States Court of Appeals for the District of Columbia Circuit that a case-by-case analysis is required to determine if the remedy is appropriate. *Saginaw Control & Engineering*, 339 NLRB 541, 546 fn. 8 (2003). They recognize, however, that the view expressed in *Caterair International* represents extant Board law. See *Flying Foods*, 345 NLRB 101 fn. 23 (2005).

such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, the court summarized the court's law as requiring that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (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." 209 F.3d at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful refusal to recognize and bargain with the Union. An affirmative bargaining order and its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation, because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violations. The Respondent never recognized or bargained with the Union after its May 1 opening, despite the demands by the Union that it do so. Moreover, beginning on May 1, the Respondent discontinued the employees' contractual health benefits coverage, and in December it unilaterally implemented a new health insurance plan. These actions clearly signaled to employees the Respondent's continuing disregard for their bargaining representative and would likely have a long-lasting effect.

(2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition or by the Respondent's withdrawal of recognition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charge and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations because it would permit a decerti-

fication petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such result would be particularly unfair in circumstances such as those here, where the Respondent's unfair labor practices have already given rise to a tainted petition expressing the employees' coerced disaffection with the Union. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued representation.

For all of the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.

II. THE RESPONDENT'S REFUSALS TO HIRE FORMER JLL EMPLOYEES

The complaint alleges that the Respondent unlawfully failed and refused to hire several former JLL employees because of their union activities. As previously stated, the judge found that the Respondent unlawfully failed to hire Frederico Cruz, Tomas Garcia Rodriguez, Raul Martinez, and Alex Vaquerano. She also found that the Respondent committed no violation in failing to hire Lori Barnes, Alice Colon, and Hector Uribe. We agree with the judge's findings, for the reasons discussed below.

A. *The Unlawful Refusals to Hire*

While negotiations for the sale of the Restaurant from JLL to the Respondent were still in progress, Cruz, Garcia, Martinez, and Vaquerano joined union representatives who were picketing outside the Restaurant. The picketers distributed fliers urging customers to sign a petition and boycott the restaurant because the employees' ". . . union contract expired and . . . [they] had no contract to protect [their] rights in the event that the restaurant is sold." The judge found, and we agree, that the Respondent refused to hire these four individuals because they had engaged in protected picketing, in violation of Section 8(a)(3) and (1).

The Respondent asserts that the picketing activity was unprotected because it had an unlawful secondary object: to cause JLL to cease doing business with the Respondent by discontinuing negotiations with the Respondent over the sale of the restaurant. It also argues that the picketing was directed at the Respondent and was unlawfully carried out at the situs of JLL, a neutral employer.

We reject these contentions. The purchase negotiations between JLL and Spencer did not constitute "doing business" within the meaning of Section 8(b)(4)(B) or 8(e) of the Act. *Operating Engineers Local 71 (Cascade Employers Assn.)*, 221 NLRB 751, 752 (1975) ("[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.”). Accordingly, Respondent has not established that the picketing had an unlawful secondary object. Thus, the situs of the picketing is irrelevant.

In its brief in support of exceptions, the Respondent suggests for the first time that an object of the picketing was to force JLL to pressure the Respondent to accede to the Union’s demand for recognition. As the Respondent did not raise this argument to the judge, we deem it to be untimely raised and thus waived. See, e.g., *Yorkaire, Inc.*, 297 NLRB 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990).

B. *The Lawful Refusals to Hire*

1. Lori Barnes

The judge found that Barnes was not refused hire or constructively discharged, but instead that she rejected the Respondent’s offer of employment. We agree. Barnes was a member of the union committee, but she did not picket as the other discriminatees did. The credited testimony establishes that, unlike any of the discriminatees, Barnes was assigned to work the lunch shift that appeared on the new schedule but refused because she previously worked the more lucrative dinner shift.

Although the Respondent unlawfully failed to apply the provisions regarding seniority and work shifts of the JLL-union contract, we reject the Union’s argument that the Respondent’s failure to schedule Barnes for the shift she had previously worked constitutes a discharge violation. That theory was not alleged or litigated, and the fact that the General Counsel has not excepted to the dismissal of this allegation is consistent with the view that he did not intend to proceed on that theory. The General Counsel controls the complaint, and the Union cannot enlarge upon or change the General Counsel’s theory of the case. See, e.g., *Desert Aggregates*, 340 NLRB 289 fn. 2 (2003), modified on other grounds 340 NLRB 1389 (2003).

2. Alice Colon and Hector Uribe

The judge found that the General Counsel failed to establish that the Respondent discriminatorily refused to hire Colon and Uribe on April 30, 2003, a day before it commenced operations, because they were unavailable for work at that time owing to workplace injuries. We adopt the judge’s conclusion, as explained below.

As an initial matter, the judge correctly set forth the Board’s test in refusal to hire cases. That is, the General Counsel must establish (1) that the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had ex-

perience and training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer had not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. *FES*, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). Once the General Counsel establishes the elements of his case, the burden shifts to the Respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. *Id.*

The judge found that the General Counsel’s initial burden under *FES* implicitly included the requirement to show that the alleged discriminatees were available to start work on the date for which the employer was hiring. The Board in *FES* did not address this issue.⁹ However, the record in this case establishes that availability was, in fact, a prerequisite of employment. Just as an employer is entitled to employ nondiscriminatory hiring criteria such as experience and training requirements, so too is it entitled to require, as a condition of employment, that applicants be able to start work at a specific time. Where an employer has shown that the ability to start work on a certain date was an actual, consistently applied condition of employment imposed by the employer, the General Counsel then has the burden to demonstrate that alleged discriminatees met that requirement.¹⁰

We find that the Respondent has shown that the ability to work on May 1, when it took over the operation of the restaurant, was a consistently applied prerequisite for employment. The record establishes that the Respondent commenced operations on May 1 with a full complement of employees. Everyone who was hired started work when the Respondent opened its doors. Accordingly, the record establishes, and we find, that availability to work the week of May 1 was a “requirement of the position.”¹¹

⁹ In *Starcon, Inc.*, 344 NLRB 1022, 1023 (2005), the Board was presented with this question. Applying the court’s view as the law of the case, the Board majority found that because the General Counsel failed to establish the availability of certain alleged discriminatees to fill vacancies at the times the openings arose, the General Counsel failed to establish a refusal-to-hire violation under *FES*. In so finding, however, the Board stated that this result was “dictated by the court’s opinion” in the underlying case and that “it was unnecessary to decide whether the same result would follow independently from the application of *FES*.”

¹⁰ However, we disavow any implication in the judge’s decision that the General Counsel must demonstrate applicants’ availability as of a date certain where that was not a requirement consistently imposed by the employer.

¹¹ Member Liebman expresses no view as to whether the General Counsel should have to demonstrate that union applicants were available to work on a specific date, even assuming that the employer imposed such a requirement. In her view, the record here establishes that the Respondent had no such requirement. First, former JLL employee

The record further establishes that Colon and Uribe were both unable, and thus unavailable, for work that week. Colon, an 8-year pantry cook, did not work at the Restaurant after April 22 because of a disabling back injury, and she was not available for work until September, months after the Respondent commenced business. Uribe, who over the course of 5 years had been a dishwasher, pantry cook, and chef, likewise was temporarily disabled because of a work injury and could not perform the duties of a chef at the time the Respondent opened its doors.¹² Because Colon and Uribe were not able to work when the Respondent commenced operations, the General Counsel could not demonstrate that they met the requirements of the positions for which the Respondent was hiring. Accordingly, we find that the General Counsel did not meet his initial burden under *FES*.

The dissent contends that the Respondent did not require all employees to be able to start work when it opened its doors. It relies on the speculation by Leland Spencer, the Respondent's chief financial officer, that due to the excellent work of longtime JLL employee Yvonne Crimo, who had been on disability status before the Respondent commenced operations, he would have made an exception for her were she unable to work when the Respondent commenced operations. Based on this statement, the dissent contends that the record shows that availability to start work on May 1 was not a condition of employment.

We find no merit in this argument. As stated, the Respondent *actually* hired only those who were available to start work when it began operating the restaurant. In-

Yvonne Crimo was on disability just prior to JLL's cessation of business and the Respondent's commencement. When asked at the hearing about her disability status and whether she was still on leave, Leland Spencer responded that Crimo was going to be hired even if she wasn't "eligible" to work. Spencer, inexplicably, did not grant similar consideration to Colon and Uribe. *FES*, supra at 13 (failure to adhere uniformly to announced requirements). Second, in explaining its refusals to hire the picketers, the Respondent asserted in position statements to the Board that it chose better qualified individuals for jobs, that there were cutbacks, and finally that it hired a reduced staff due to the economy. Only at the hearing did the Respondent raise Colon's and Uribe's unavailability on the date operations commenced. Such shifting defenses are indicators that the reasons asserted by the Respondent for the refusals to hire are pretextual. *Tracer Protection Services*, 328 NLRB 734 (1999); *Food Cart Market*, 286 NLRB 1016, 1018 (1987). The majority has rejected those defenses in the cases of discriminatees Cruz, Garcia, Martinez, and Vaquerano. Member Liebman dissents from the majority's finding that the Respondent's failure to hire Colon and Uribe was lawful.

¹² The record is unclear when Uribe applied for employment with the Respondent. He testified that he completed and submitted an application in April prior to JLL's going out of business, but also said he was sure the date on the application, May 26, was correct. The judge did not resolve the discrepancy, presumably because she determined that there was no initial showing of discrimination in any event.

deed, Crimo began work on May 1 along with the other newly-hired employees. Thus, the Respondent in fact adhered to its policy that only those who were available to commence work on May 1 were hired. Spencer's speculative comment was never put to the test.

Further, even had Crimo been unable to report on May 1, and was nonetheless hired by Spencer, this single variance from its policy would not compel a finding that the Respondent did not consistently require applicants to be available for work when it commenced operations. Crimo was not just any applicant. She previously had worked for the Spencers and was well known by them as an excellent employee. She was temporarily disabled prior to the opening of the restaurant. The Respondent thus opined in testimony that she may have been worth waiting for, at least temporarily. The same could not be said for either Colon or Uribe. Neither had worked at the Restaurant when the Spencers owned it previously, and Spencer expressed no familiarity with either individual's performance, much less any personal praise. In our view, Spencer's willingness to hold open a position for a top performing, highly valued employee with whom he was personally acquainted is not incompatible with our finding that the Respondent consistently required applicants to be available for work when it opened its doors.¹³

For these reasons, we affirm the judge's finding that the Respondent's failure to hire Colon and Uribe was lawful.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, JLL Restaurant, Inc. and Smoke House Restaurant, Burbank, California, their officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified below.

1. Substitute the following for paragraph 2(e) of the section of the Order directed to the Respondent Smoke House Restaurant.

"(e) Within 14 days of the date of this Order, remove from its files any reference to the unlawful refusal to hire Frederico Cruz, Tomas Garcia Rodriguez, Raul Martinez, and Alex Vaquerano, and within 3 days thereafter notify the employees in writing that this has been done and that the refusal to hire them will not be used against them in any way."

¹³ As with hiring policies that favor former employees and applicants recommended by current managers and employees, it is human nature to want to hire "known quantities." See *Zurn/N.E.P.C.O.*, 345 NLRB 12, 15 (2005), citing *Brandt Construction Co.*, 336 NLRB 733 (2001), enf. sub nom. *Operating Engineers Local 150 v. NLRB*, 325 F.3d 818, 833-834 (7th Cir. 2003).

2. Substitute the attached notices for those of the administrative law judge.

APPENDIX A

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 tell you to stop engaging in union or other protected concerted activities.

WE WILL NOT threaten to discharge you for engaging in protected union activity such as picketing or other protected concerted activities during nonworktime.

WE WILL NOT ask you about your union or other protected concerted activities.

WE WILL NOT threaten to discourage any employer who takes over our business from hiring you because you engaged in union or other protected concerted activity.

WE WILL NOT tell you that you will lose your jobs or that we will close our business because you engaged in union or other protected concerted activity.

WE WILL NOT coerce or pressure you into signing a petition saying you do not want Hotel Employees and Restaurant Employees Union, Local 11, AFL-CIO, or any other union to represent you.

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

JLL RESTAURANT, INC., D/B/A SMOKE HOUSE
RESTAURANT

APPENDIX B

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with Hotel Employees and Restaurant Employees Union, Local 11, AFL-CIO (the Union) as the collective-bargaining representative of employees in the following unit (the unit):

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.

WE WILL NOT fail and refuse to apply the terms of the collective-bargaining agreement between JLL Restaurant, Inc. and the Union to employees in the unit.

WE WILL NOT change terms and conditions of employment as set by the collective-bargaining agreement between JLL and the Union without notifying and bargaining with the Union.

WE WILL NOT refuse to hire any individual because he or she has engaged in union or other concerted protected activities.

WE WILL NOT tell our employees or other individuals that we intend to operate our Restaurant as a nonunion business or that it is a nonunion business.

WE WILL NOT tell any employee or other individual not to speak to the Union about employment with us.

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 on request, bargain with the Union as the exclusive representative of our employees in the unit concerning terms and condition of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL on request of the Union, retroactively restore the terms and conditions of employment of our employees in the unit as established by the collective-bargaining agreement between JLL and the Union and make our employees whole for any losses caused by our unilateral changes.

WE WILL, within 14 days from the date of the Board's Order, insofar as we have not already done so, offer em-

ployment to Frederico Cruz, Tomas Garcia Rodriguez, Raul Martinez, and Alex Vaquerano at the former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed had they been hired on April 30, 2003.

WE WILL make Frederico Cruz, Tomas Garcia Rodriguez, Raul Martinez, and Alex Vaquerano whole for any loss of earnings and other benefits suffered as a result of our failure to hire them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to hire Frederico Cruz, Tomas Garcia Rodriguez, Raul Martinez, and Alex Vaquerano, and WE WILL within 3 days thereafter notify them in writing that this has been done and that the refusal to hire them on April 30, 2003 will not be used against them in any way.

SMOKE HOUSE RESTAURANT, INC.

Brian D. Gee, Esq., for the General Counsel.

Leon Jenkins, Vice President, Lee Spencer, CFO, and Martha Spencer, President and CEO, of Burbank, California, for the Respondent.

Ellen Greenstone, Esq. (Rothner, Segall & Greenstone), of Pasadena, California, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Los Angeles, California, on January 26 through 29, 2004, upon an amended consolidated complaint (the complaint) issued December 17, 2003,¹ by the Regional Director for Region 31 of the National Labor Relations Board (the Board) based upon charges filed by the Hotel Employees and Restaurant Employees Union, Local 11, AFL-CIO (the Union). The complaint, as amended, alleges JLL Restaurant, Inc., d/b/a Smoke House Restaurant² (JLL) violated Section 8(a)(1) of the National Labor Relations Act (the Act), and Smoke House Restaurant, Inc. (Respondent) violated Section 8(a)(1), (3), and (5) of the Act.³ JLL did not file an answer to the allegations of the complaint.⁴ Respondent essentially denied all allegations of unlawful conduct.

¹ All dates herein are 2003, unless otherwise specified.

² The complaint was amended at the hearing to reflect the correct name of the restaurant: Smoke House Restaurant.

³ At the hearing, counsel for the General Counsel withdrew par. 21 of the complaint.

⁴ I granted the General Counsel's Motion for Summary (Default) Judgment against JLL for its failure to file an answer in these proceedings. Jenkins argued Respondent's answers covered both entities. As neither Jenkins nor Respondent has authority to act for JLL, I find JLL did not file an answer herein, and summary judgment is appropriate. Consequently, JLL is deemed to have admitted all complaint allegations relating to it. See *CCY New Worktech, Inc.*, 229 NLRB 194 (1999).

II. ISSUES

1. Is Respondent a successor to JLL?
2. At relevant times, was Javier Solis a supervisor or agent of Respondent within the meaning of the Act?
3. Did Respondent violate Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees?
4. Did Respondent violate Section 8(a)(5) and (1) of the Act by discontinuing and later changing unit employees' medical insurance without prior notice to or offering to bargain with the Union?
5. Did Respondent violate Section 8(a)(3) and (1) of the Act by refusing to hire Lori Barnes, Alice Colon, Frederico Cruz, Tomas Garcia Rodriguez, Raul Martinez, Hector Uribe, and Alex Vaquerano?
6. Did Respondent engage in independent violations of Section 8(a)(1) of the Act by telling employees and job applicants there would be no union at the business, by telling a job applicant she would not be hired because of union activity, and by telling employees and job applicants the Union no longer represented employees at the business?

III. FACTS

At relevant times prior to April 30, JLL, a California corporation, with a place of business in Burbank, California, called Smoke House Restaurant (the Restaurant) was engaged in the operation of a public restaurant. During its operation of the Restaurant in the 12-month period prior to April 30, Respondent annually derived gross revenues in excess of \$500,000 and annually received at the Restaurant goods and services valued in excess of \$5000 directly from points outside the State of California. JLL is deemed to have admitted, and I find, that it was at all relevant times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent, a corporation, with a place of business at the Restaurant, has been engaged in the operation of a public restaurant. Based on a projection of its operation of the Restaurant since May 1, Respondent will annually derive gross revenues in excess of \$500,000 and will annually receive at the Restaurant goods and services valued in excess of \$5000 directly from points outside the State of California. Respondent admits, and I find, that it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.⁵

Leland Spencer (L. Spencer), currently chief financial officer of Respondent, owned the Restaurant from 1982 to 1985. Mr. Spencer and his wife, Martha Spencer (M. Spencer, collectively the Spencers), currently president and chief executive officer of Respondent, assumed ownership from 1985 to 1992. At relevant times from 1992 through April 30, JLL owned and operated the Restaurant. For some years prior to 2003 through April 30, the Union and JLL were signatory to a collective-

⁵ At the hearing, Respondent entered into stipulations of these facts and conclusions. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

bargaining agreement effective September 15, 1996, through September 14, 2001, with automatic yearly renewal thereafter absent termination or reopening. The contract provided for medical benefits through the Hotel and Restaurant Employees Welfare Fund, covering employees in the following unit (the unit):

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.

Commencing sometime in late 2002, JLL operated the Restaurant as a “debtor in possession” during bankruptcy proceedings. During the bankruptcy period, Sandy Morriss (Morriss) served as JLL’s operations manager. On February 26, Respondent confirmed its offer to purchase the assets of JLL. On March 26, Morriss posted a memorandum to employees at the Restaurant as follows:

Today, the Bankruptcy Court approved the sale of the restaurant to Martha Spencer. . . . The sale is expected to close around April 30, 2003. Until then it is business as usual. . . . In the next few weeks, as the process evolves, we will keep you informed of the plans for the transition of ownership

On April 3, the bankruptcy court issued an order authorizing the sale of the assets of JLL to M. Spencer.⁶ On that same day, M. Spencer received a letter from the Union dated April 2, which stated the Union’s knowledge of Respondent’s purchase plan, set out the bargaining history between JLL and the Union, and requested a meeting.

Following receipt of the Union’s letter on April 3, L. Spencer left a voice-mail message for Robin Brown Rodriguez (Rodriguez) lead organizer of the Union. In the message, L. Spencer said the only reason Respondent had purchased the restaurant was to be able to buy it without the Union, that the high union benefits and high rent had caused JLL’s bankruptcy, that Respondent would open the Restaurant as a new restaurant with all new employees, and Respondent would appreciate the Union’s replacing its “people” at the restaurant into other union jobs. In response, Rodriguez left a voice-mail message requesting a meeting because the Union represented JLL’s employees. A responsive voice-mail message from L. Spencer on April 9 essentially repeated Respondent’s position that if Respondent had to have the Union, it would not pursue the purchase of the Restaurant, saying he had no personal animosity toward the Union, that it was strictly an economic consideration.

In early April, JLL posted a memorandum signed by Morriss at the Restaurant informing employees in pertinent part as follows:

We are not involved in who [the prospective owners of the Restaurant] hire to work at the restaurant after the sale closes,

⁶ Following the purchase, M. Spencer owned 70 percent of Respondent’s shares; Shelly Lucero and Ray Lucero (S. Lucero and R. Lucero, respectively, collectively the Luceros), Respondent’s corporate vice president and secretary, respectively, owned the remaining 30 percent.

which is targeted to happen around April 30. Until that date you are employees of JLL Restaurant, Inc. On the closing date, we will pay you any compensation due you through the closing date. Legally, you will be terminated from our employment as of that date. Whether the new owner hires you is up to them. We have no control over their decisions.

Respondent accepted applications from prospective employees. Applications from JLL employees generally bore the notation “rehire,” which JLL supervisors had instructed employees to write. Both Felipe Sanchez and Javier Solis handed out and retrieved some applications, apparently turning them over to Respondent.⁷ Some employees submitted their applications directly to Respondent’s representatives. The following employees of JLL (collectively called JLL employee applicants) were among those who submitted applications for employment with Respondent in April:

NAME	POSITION WITH JLL
Lori Barnes (Barnes)	Server
Alice Colon (Colon)	Pantry Cook
Raul Martinez (Martinez)	Sauté Cook
Hector Uribe (Uribe)	Pantry Chef
Tomas Garcia Rodriguez (Tomas Garcia) ⁸	Prep Cook
Frederico Cruz (Cruz) ⁹	Expeditor
Alex Vaquerano (Vaquerano)	Sauté Cook

With permission of Morriss, on two occasions in early to mid-April S. Lucero, Restaurant investor, and Daniella Schwartz (Schwartz), a bilingual employee of another restaurant owned by the Spencers, interviewed prospective employees, including JLL employees, in the Restaurant’s cocktail lounge with M. Spencer participating on one occasion. According to M. Spencer, in response to applicant questions, she said Respondent was taking over a bankrupt business, and there would be differences: Respondent would “not be operating under the Union”;¹⁰ conditions and benefits would be changed; the building was in disrepair; there were health department problems, and when those were cared for, Respondent would address benefits. Employees recalled that M. Spencer and/or Schwartz said the Restaurant would not be “union” or would be “nonunion” and there probably would not be any insurance. Witnesses to this effect included Judith Denniss, called as a witness by Respondent. I conclude Respondent informed JLL employees generally that upon reopening the Restaurant would

⁷ JLL employed Javier Solis as kitchen supervisor. Respondent employed Javier Solis as chef manager and Felipe Sanchez as night supervisor. Javier Solis testified that since Respondent assumed ownership of the Restaurant, he has hired various kitchen employees. I find him to have been a supervisor of Respondent within the meaning of Sec. 2(11) of the Act since at least April 30.

⁸ Respondent represented it had no application from Tomas Garcia. I accept Tomas Garcia’s testimony that he turned a completed application in to Solis.

⁹ Barnes, Tomas Garcia, Cruz, and Colon also served on a 10-member union-employee committee at JLL during 2003.

¹⁰ In a statement of position furnished to the Board July 14, M. Spencer stated, “During the employment interview, each person was advised that we were not a union restaurant. . . . We felt an obligation to let them know in advance that we would not be a union restaurant.”

operate as a nonunion enterprise. After others, including S. Lucero, her husband and coinvestor, S. Lucero, Javier Solis, and Felipe Sanchez evaluated prospective employees, L. Spencer made all hiring decisions.

On about April 10, M. Spencer executed an asset sale and purchase agreement with JLL. By facsimile transmission dated April 16, Morriss notified L. and M. Spencer that JLL intended to close the Restaurant Wednesday, April 30, to inventory the food and beverage assets.

On April 21 and 23, the Union picketed the Restaurant. On April 21, about 25 to 30 individuals, some with picket signs, patrolled in front of the Restaurant from about 11 a.m. to 1 p.m. Rodriguez was present for the Union. Employees involved in the picketing included Tomas Garcia, Colon, Uribe, Vaquerano, Martinez, Cruz, Alberto Solis, and Jesus Hernandez. Colon and Martinez joined the pickets at about 11 a.m. during their breaks. Alberto Solis took no break that day and joined the pickets briefly at about 11 a.m. The other picketing employees were off duty at the time. When Rodriguez arrived at the picket line, Felipe Sanchez told her she needed to stop the picketing, that the people had no right to be out there, and he did not know what would happen to them if they continued.

When Martinez joined the line, Felipe Sanchez told him he should not be on the picket line because he was working. Martinez said he was on his lunchbreak. During the brief period Colon picketed during her lunchbreak, Felipe Sanchez told her to return to the Restaurant. Colon asked why she should do so since her coworkers were outside. Felipe Sanchez told her she was still on the clock, and she was to go inside, which instruction Colon followed and returned to work. When back inside, Felipe Sanchez told her he could fire her for picketing and that the Restaurant was going to close because of the Union. A few minutes later, as Colon spoke to fellow employee, Alberto Solis, Felipe Sanchez approached, asked Alberto Solis what he had been doing outside (referring to the picket line) and said, "This restaurant is going to close because of this." Walking farther into the kitchen, Sanchez announced at large, "This restaurant is going to close because of the union."

Later that day, JLL posted the following notice, signed by Morriss, on a kitchen wall at the Restaurant referred to as the bulletin board:

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.

Barnes did not participate in the picketing. When she arrived at work the first day of picketing, April 21, Felipe Sanchez told her he could make a list of the people picketing, give it to the

new owners, and recommend they not be hired. Barnes said she did not know about or participate in the picketing and did not intend to participate in the picketing set for the following Wednesday.

On the following day, April 22, JLL posted the following notice, signed by Morriss, on the bulletin board wall:

The 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.

On the same day, April 22, L. Spencer left a voice mail message for Rodriguez, stating he had heard of that "little cute trick" the day before, and because of it Respondent had decided not to buy the Restaurant.

Beginning at about that same time, a petition concerning employees' dissatisfaction with the Union (so called the decertification petition) circulated among JLL's employees at work, which read as follows:

To Local 11:

Since we have NEVER received support from this Union (most recently in the 3 months that left us without health insurance), we choose to end our relationship with Local 11 when the Smoke House acquires new ownership on May 1, 2003.

On the evening of April 22, a coworker told Barnes there was a petition in the manager's office she could look at and sign. When she went to the manager's office, she saw the decertification petition on the desk with 29 signatures affixed.

On April 23, the second day of the Union's picketing at the Restaurant, Mirzayans faxed the decertification petition (with 29 signatures) to the Union at the request of Guillermo (Willie) Mier (Mier), server/bartender of JLL. Mirzayans included a cover page on which he wrote:

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.

On April 23, the Union filed with the Board the first of its unfair labor practice charges herein. On April 24, JLL's attorney, Edward M. Wolkowitz, informed Respondent, by fax, that he had met with representatives of the Union following their filing of unfair labor practice charges with the Board, and that they would like to meet with M. Spencer "to fashion a mutually acceptable agreement that will preserve jobs and benefits for the employees."

On April 25, at about 5:30 p.m., while Barnes was working, Felipe Sanchez, who was standing with two employees, called her to him. One of the employees handed Barnes the decertification petition, and she signed it. Later that evening, while the Spencers and the Luceros were dining at the Restaurant, Mier showed them the decertification petition, which contained 43 signatures, individually dated April 22 through 25. Mier told the foursome that employees did not want the Union. The Luceros and the Spencers looked at the petition and returned it to Mier. When the Spencers saw the decertification petition, they decided to continue with their plan to purchase the Restaurant.

Prior to April 27, JLL and Respondent entered into an agreement giving Respondent early access to the Restaurant following JLL's cessation of business on Sunday, April 27. Respondent officially took over the Restaurant on April 28.

When JLL ceased business, it employed 70 individuals in nonsupervisory positions, 63 of whom Respondent employed upon taking over the business. In determining which of the former JLL employees Respondent would hire, L. Spencer said he reviewed employee personnel files on about April 28 and 29, and considered the following in determining whether or not to hire the following individuals:

Barnes	Mr. Spencer considered that Ms. Barnes had twice given the Spencers and the Luceros unsatisfactory service when they dined at the Restaurant prior to its purchase. Mr. Spencer said Ms. Barnes was surly, did not smile, knew nothing about the specials, and referred to the Restaurant as "they" and not "we." Mr. Lucero agreed with Mr. Spencer that Ms. Barnes's knowledge of the menu, her general demeanor, and her service were unsatisfactory. Mr. Spencer also reviewed her file, which contained several warning notices and a customer complaint. Primarily because of their dissatisfaction with Ms. Barnes's service, the Spencers did not want to hire her. Notwithstanding this, Mr. Spencer told Felipe Sanchez that if he were short on servers, he could use her. ¹¹
Martinez	Mr. Spencer believed that because Mr. Martinez had prior write-ups in his personnel file and had been terminated in the past for not showing up and not calling, another applicant was a better choice.
Tomas Garcia	Mr. Spencer relied on the opinion of Mr. Mirzayans, who told him Tomas Garcia had a history of fighting with management and on one occasion following his 1996 termination, Tomas Garcia slashed booths in the Restaurant with a knife.
Cruz	Mr. Spencer did not realize Mr. Cruz had applied for employment. During the course of the hearing, Respondent offered him employment with full seniority and benefits.
Vaquerano	In reviewing Mr. Vaquerano's personnel file, Mr. Spencer saw his I-9 (INS) form was incomplete. Mr. Spencer affixed a post-it-note to his file stating he could be hired but could not be scheduled until he completed an I-9 form. Following Mr. Vaquerano's testimony at the hearing, Respondent offered him employment with full seniority and benefits.
Colon	When he reviewed Ms. Colon's file, Mr. Spencer noticed she had filed for Workers' Compensation benefits and State Disability

¹¹ I credit L. Spencer's testimony regarding Barnes's unsatisfactory service.

and that her physician statement said she would be unable to work until May 12 secondary to musculo-skeletal dysfunction.¹² Not only was Mr. Spencer leery of employing someone with low back problems, Ms. Colon was then unavailable for work, and Respondent needed to fill her position immediately.

Uribe

Mr. Spencer's review of Mr. Uribe's personnel file showed he had filed for Workers' Compensation benefits for injuries occurring during the period "3/23/88-4/27/03" secondary to "[s]tress & strain of job duties, low back," from which Mr. Spencer inferred Mr. Uribe was unavailable for work.¹³ Further, the file showed Mr. Uribe to have voluntarily terminated employment in 1999 and to have left on vacation and never returned in 2000. Although Mr. Uribe was rehired after both absences, Mr. Spencer considered such "stopper/starter" employees to be expensive.

L. Spencer's testimony is inconsistent with his statement of position furnished to the Board November 7, in which, referring to employees Lori Barnes, Alice Colon, Frederico Cruz, Carlos Garcia, Tomas Garcia, Raul Martinez, Antonio Morales, Hector Uribe, and Alex Vaquerano, he stated, "[Applicants other than Lori Barnes] were not hired because of the [economic] cut-backs. I am sure that they are fine workers and, if they like, we would be happy to have their new applications." It is also inconsistent with Respondent's answer to the complaint, in which Respondent asserted its failure to hire rejected JLL employees was due to a reduction in staff due to the economy, and/or a more qualified candidate was hired for the position. It is even inconsistent with Respondent's contentions at the hearing and in its posthearing brief that it offered employment to both Cruz and Vaquerano, but Cruz failed to see his name on the schedules and Vaquerano's residency forms were incomplete. Because of the inconsistent positions taken by Respondent, I cannot accept L. Spencer's testimony that he reviewed personnel files prior to hiring JLL employees or that he considered past misconduct in rejecting applicants for employment.

On April 30, Respondent posted schedules at the Restaurant stating the names and shifts of employees slated to work beginning May 1. Various former employees of JLL went to the Restaurant to pick up their final paychecks. Colon, who had been on disability since April 22, went to the Restaurant on April 30.¹⁴ When she observed her name was not on the schedule for the upcoming week, she asked Javier Solis why, saying that even though she was off for 3 weeks (on disability), her name should appear on the schedule with "off" designated.

¹² By physician report of May 14, the period of inability to return to work was made indeterminate.

¹³ Uribe was denied workers' compensation benefits, apparently sometime after April 30.

¹⁴ Colon had not returned to work since the first day of picketing, April 21. On April 23, she went to the Restaurant only to give Javier Solis a doctor's notification that she could not work for 3 weeks.

Javier Solis did not answer, and Colon asked, "Javier, am I fired because of the Union?" According to Colon, Javier Solis answered, "Yes. I'm very sorry, Alice." Javier Solis testified he did not say Colon was fired because of her union activity; rather, he said he was really sorry but it wasn't his decision, and that was all he told her. I accept the testimony of Javier Solis whom I found to be a forthright and sincere witness. Moreover, I note his asserted response to Colon is consistent with the responses other employees attributed to him as set forth below, namely, that hiring decisions were not his. I find it unlikely he deviated from his standard answer to admit unlawful motivation to Colon.

Felipe Sanchez telephoned Jesus Sanchez (unrelated), lead cook with JLL, at home on April 30, and told him he had a job with Respondent but that he should not talk to other employees or say anything to the Union. Following the conversation, Jesus Sanchez went to the Restaurant at about 2 p.m. He saw his name on the posted schedule but not those of the employees to whom he had been leadman: Vaquerano, Uribe, and Martinez. Jesus Sanchez asked why Respondent had "fired" those workers. Javier Solis said it was not his decision. Jesus Sanchez told Javier Solis he wanted to have the people who worked with him also employed because they were very good workers; otherwise, he would not work for Respondent.

Martinez, Uribe, and Tomas Garcia also went to the Restaurant on April 30, to check the schedule and pick up paychecks. Javier Solis told Martinez he was sorry his name was not on the schedule, that it was not his decision. Tomas Garcia asked Felipe Sanchez why his name was not on the schedule, and Felipe Sanchez said he had already explained that if his name was on the list, it meant he was rehired, but if not, Respondent would probably call him at a later time. Uribe did not see his name on the posted schedule but asked no questions about its omission. He considered himself unable to work at that time.

Cruz and Vaquerano went to the Restaurant on April 30 at about 11 a.m. Both picked up their checks and checked the posted schedules for the following week. Neither saw his name on the schedules.

Barnes picked up her paycheck at about 1 p.m. She saw on the schedule that she had been assigned to lunch shifts whereas previously she had worked dinner shifts, which she preferred. According to Barnes, she complained to Felipe Sanchez saying she was in the top 10 of seniority, she had a permanent schedule, and she should have dinner shifts. She told him employees were still in the Union, and she could file a grievance. Another employee, Lynn Pearson, also dissatisfied with her schedule, told the bookkeeper, Mirzayans, she was going to the Labor Board and she would sue the Restaurant. Barnes and Pearson left the area briefly to talk to a union representative. When they returned, Barnes saw a new schedule had been posted, which omitted her name entirely. Barnes denied telling Felipe Sanchez she would not work the previous schedule. When she left to talk to the union representative, she believed she had been hired and was prepared to work the lunch and banquet schedule assigned her.

Hector Salomon, who was also present at the Restaurant on April 30 to pick up his paycheck and look at the schedule, said he heard Barnes ask Felipe Sanchez why he did not put her on

the same schedule she had before because she was in the top 10 of server seniority. When Felipe Sanchez said he wanted to see what was going on in the Restaurant and then maybe she could have her former schedule, she said she could not work the posted schedule, and she did not want to work it; she said she wanted her previous schedule. Mary de la Cruz testified Barnes said she did not like the schedule and told Felipe Sanchez she would refuse to work those hours. When Felipe Sanchez asked her to give him a chance because the schedule was new for him, and he would fix it later, Barnes said she would see him in court.¹⁵

Respondent reopened the Restaurant for business on May 1. Since then Respondent has continuously operated the Restaurant at the same location, with the same furniture, equipment, fixtures, and food and liquor inventories as JLL. Respondent operated under the same liquor license as JLL and assumed its lease of the premises. Nearly all employees who began working at the Restaurant for Respondent on May 1 had been employed there by JLL when it ceased business on April 27.

On May 1, a group of union representatives, including Rodriguez, Tom Walsh (Walsh), and Julie Willis (Willis), community figures, including a clergyman, and former employees of JLL, including Barnes, Colon, Tomas Garcia, and Cruz (the delegation) entered the Restaurant and approached M. Spencer. Walsh told her the group would like to talk to her about why Respondent had not rehired all the employees. M. Spencer told the delegation the Restaurant was not a union business, that it had nothing to do with the Union, that she would speak with employees individually but to no others. She addressed the employees in Spanish, saying the Restaurant would not talk to anyone from the Union, that the Restaurant was not a union restaurant, but they would be happy to talk to any individuals who would like to apply for employment.

At the suggestion of R. Lucero, the group moved to the fire-side room near the entrance. Several witnesses testified to an exchange there between R. Lucero and Colon:

COLON: she asked Mr. Lucero when her name would be put back on the schedule. Mr. Lucero said he did not know. Ms. Colon asked him if she had been fired because of the Union, and he said, "Yes."

BARNES: Ms. Colon asked Mr. Lucero why she did not have a schedule, to which he replied, "This is not a union restaurant." Ms. Barnes recalled Ms. Colon asked Mrs. Lucero what she did wrong, and he replied he did not know.

RODRIGUEZ: when Ms. Colon asked Mr. Lucero why he wasn't hiring the delegates, Mr. Lucero said "something to the effect, 'this is—you know, we're not a union restaurant anymore. You know, I'm sorry. I'm sorry.'" Whereupon Ms. Colon asked, "Is it because we were in the picketing?" As to Mr. Lucero's response, Ms. Rodriguez testified, ". . . you know, kind of—you know, [he said] 'yes.'" Ms. Rodriguez said Ms. Colon told him she

¹⁵ I accept the testimony of Hector Salomon and Mary de la Cruz. Both were direct and sincere witnesses, and there is no evidence either was motivated by self interest.

didn't understand why and Mr. Lucero said he was sorry; that was the way it was.

WILLIS: Ms. Colon asked Mr. Lucero why the delegates didn't have jobs and was it because of the union? According to Ms. Willis, Mr. Lucero "quietly but audibly said yes to the question of is it because of the union and the picketing that we don't have our jobs."

LUCERO: denied having any such conversation.

After a careful review of this testimony, I cannot conclude R. Lucero told Colon Respondent had not hired employees because they picketed or because of the Union. Barnes's testimony was that R. Lucero told Colon she had not been scheduled because Respondent was not a union restaurant and that he did not know what Colon did wrong, neither of which answer can be taken as an admission that Colon was not hired because of union activity.¹⁶ Rodriguez's testimony was vague as to R. Lucero's response to Colon. Her assertion that R. Lucero "kind of" said yes suggests she inferred that from the words he used. Without knowing what R. Lucero actually said, I cannot join in such an inference. As to Willis's testimony, her qualifying R. Lucero's answer as being quiet but audible suggests there was, at least in her mind, some question about what she had heard. I note Willis did not recount the interchange in affidavits given to the Board during the investigation of this matter, which I would expect her to have done if R. Lucero had, in fact, so clearly admitted unlawful motivation. In sum, I do not accept testimony to the effect that R. Lucero told Colon in the fireside room that Respondent had failed to hire her or other employees because of their union activities.

After this exchange, the group walked back to the Restaurant's lobby area where S. Lucero addressed the group, telling them the business was not a union restaurant anymore, but openings existed and they would be happy to take applications and interview anyone who wanted to be interviewed individually. None of the employee participants applied for employment or solicited an interview. Cruz said he did not follow up with any further employment inquiry because "we wanted to return to work, but with the union in order to have or keep the benefits."

In facsimile transmission to M. Spencer on May 9, the Union again requested recognition and bargaining, stating, in pertinent part, as follows:

Based on your hiring of former employees of the Smokehouse restaurant under the previous owner as a majority of your workforce and your continuous operation of the restaurant as a successor, [the Union] hereby demands that you recognize [the Union] as the bargaining representative of the employees of the Smokehouse in the same bargaining unit and continue in effect all terms and conditions of employment as under the predecessor owner.

Based on the decertification petition, M. Spencer concluded a majority of JLL's employees did not want to be represented by the Union. Because of that and economic considerations,

¹⁶ While its import is at best unclear, R. Lucero's answer that Respondent was not a union restaurant most likely reflects Respondent's position that it had no obligation to hire former JLL employees.

Respondent refused to recognize and bargain with the Union. Respondent did not adopt the health plan provided for in the Union's agreement with JLL. From May 1 to December, Respondent did not provide any health benefit coverage for the Restaurant's employees. Respondent instituted a new health plan for employees effective sometime in December without prior notification to or bargaining with the Union.

IV. DISCUSSION

A. JLL's 8(a)(1) Conduct

Under the Board's Rules and Regulations Section 102.20 complaint allegations are deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. Notification of this rule was set forth in the complaint, which was served on JLL and Respondent. JLL filed no answer to the complaint and did not appear at the hearing. I granted the General Counsel's Motion for Summary (Default) Judgment against JLL, pursuant to which all complaint allegations regarding JLL are deemed admitted. Accordingly, JLL engaged in the following unlawful conduct:¹⁷

1. On April 21, through Felipe Sanchez, JLL:
 - a. Directed employees, including Ms. Colon and Mr. Martinez, to cease union activity (picketing) during non-work time.
 - b. Threatened to discharge employees for engaging in union activity during non-work time.
 - c. Interrogated employees about their union activity.
 - d. Threatened employees that Felipe Sanchez would discourage Respondent from hiring employees because they engaged in union activity.
2. On April 21, through Mr. Morriss, threatened employees with loss of employment and closure of the Restaurant because they engaged in union activity.
3. On April 25, through Felipe Sanchez, coerced Ms. Barnes into signing a decertification petition.
4. On April 30, through Felipe Sanchez, restrained Jesus Sanchez by telling him not to speak to the Union.

B. Respondent's 8(a)(1) Conduct

During its early April interviews of prospective employees, Respondent informed applicants, including JLL employees, that it intended to reopen the restaurant as a nonunion business entity. By so informing applicants, Respondent "imposed a facially unlawful condition of employment [and] coerced the employees in the exercise of their Section 7 rights." Respondent repeated its unlawful conduct on May 1 when M. Spencer and the Luceros told employees the Restaurant was not a union business. *Eldorado, Inc.*, 335 NLRB 952, 953 (2001); *Concrete Co.*, 336 NLRB 1311 (2001); *Advanced Stretchforming International*, 323 NLRB 529 (1997).

Felipe Sanchez, as Respondent's supervisor, offered Jesus Sanchez employment with Respondent on April 30, and enjoined him not to talk to the Union about the offer. Such a restriction on Jesus Sanchez' right to impart information to or

¹⁷ I have modified the following deemed admissions where specific testimony has provided additional or clarifying evidence.

discuss employment matters with the Union is a restraint in violation of Section 8(a)(1) of the Act. *Care Initiatives, Inc.*, 321 NLRB 144, 156 (1996).

The General Counsel also argues that alleged statements by Javier Solis and R. Lucero to Colon violate Section 8(a)(1) of the Act. As I find no credible evidence those statements were made, I find no violation of the Act.

C. Successorship of Respondent to JLL

The Board's well-established application of *NLRB v. Burns Security Services*, 406 U.S. 272, 281 (1972), is "that a 'successor employer'—an employer that 1) assumes the operations of another employer, maintaining substantial continuity with the predecessor's operations, and 2) hires a majority of its employee complement from among the predecessor's employees—has an obligation to recognize and bargain with the union that was . . . the bargaining representative of the predecessor's employees." *MV Transportation*, 337 NLRB 770 (2002); *Ready Mix USA, Inc.*, 340 NLRB 946, 947 (2003); *Monterey Newspapers, Inc.*, 334 NLRB 1019 fn. 4 (2001).

Here, Respondent took over the operations of the Restaurant from JLL with essentially the same employees as JLL in the same classifications. Respondent used the same equipment, inventories, and facilities as JLL, assuming JLL's building lease. Respondent provided the same dining services for the same customer community with essentially the same type of food. Respondent officially took over the Restaurant on April 28 pursuant to its agreement with JLL. It did not, however, effectuate employee hiring until April 30 when it posted schedules for those individuals who had been selected for hire.¹⁸ In these circumstances, when Respondent hired a majority of its employee complement from JLL's employees on April 30, and commenced operation of the Restaurant on May 1, it did so as a successor to JLL. See *Crown Textile Co.*, 335 NLRB 201 (2001).

D. Respondent's Refusal to Recognize and Bargain with the Union

The Board has held "an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status, which will not serve as a bar to an otherwise valid decertification . . . or other valid challenge to the union's majority status." *MV Transportation*, supra at 770, overruling *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999).¹⁹ As successor to JLL, Respondent was obligated to recognize

¹⁸ It is not clear whether Respondent hired JLL employees on April 30 or May 1. Both job offer and acceptance must exist to create a "mutual understanding" of permanent employment. *Consolidated Delivery & Logistics, Inc.*, 337 NLRB 524, 526 fn. 5 (2002); *Solar Turbines, Inc.*, 302 NLRB 14 (1991). Respondent's April 30 schedule postings constituted offers of employment to those individuals whose names appeared on the schedules, but there is no evidence acceptance took place that day. It may be that acceptance did not occur until scheduled individuals showed up to work their shifts. However, I have presumed that scheduled employees were, in fact, hired on April 30.

¹⁹ In *St. Elizabeth*, the Board had created a "successor bar," which required a successor employer to bargain with an incumbent union for a reasonable period of time during which the incumbent union's majority status was immune from challenge.

and bargain with the Union unless it possessed a good-faith doubt of the Union's majority status, which Respondent has the burden of proving. *MSK Corp.*, 341 NLRB 43, 43 (2003).

Here, Respondent relies on the decertification petition presented by JLL employee, Mier, to the Spencers and the Luceros on April 23 to extinguish any bargaining obligation it might have accrued upon becoming a *Burns* successor to JLL. If the decertification petition is valid, Respondent's reliance is justified as the petition clearly sets out the desire of a majority of JLL's unit employees to cast off union representation. The decertification petition can only be valid if it is untainted by the unfair labor practices of JLL and Respondent.

By mid-April, Respondent had informed numerous JLL employees in the course of applicant interviews that it intended to operate the Restaurant as a nonunion entity. During the Union's lawful picketing on April 21, JLL's supervisor, Felipe Sanchez, impliedly threatened to fire two employees who had joined the picketing and announced generally that the picketing would cause the Restaurant's closure. Later that day, JLL's manager posted a notice that any reduction in business because of the picketing would result in immediate closure of the Restaurant and that the picketing might scuttle the Restaurant's impending sale, "in which case you will be responsible for the end of The Smokehouse." JLL's warning coupled with Respondent's stated intent to operate without a union could only have created reasonable employee fear that continued union support would result in general job loss. The almost immediate employee response was to circulate the decertification petition.²⁰ The inescapable conclusion is that fear of job loss unlawfully instigated by JLL and promoted by Respondent inspired and tainted the decertification petition.²¹ Respondent was therefore not entitled to rely on the decertification petition to sanction its refusal to recognize the Union upon assuming ownership and control of the Restaurant on April 30. Respondent's obligation to recognize and bargain with the Union matured on April 30, at which time Respondent had selected for its employee complement a majority of former JLL unit employees, and the Union had made and continued to make a demand for recognition and bargaining. *MSK Corp.*, supra at 44. Accordingly, Respondent has been obligated to recognize and bargain with the Union since April 30, and by its refusal to do so Respondent has violated Section 8(a)(5) of the Act.

E. Respondent's Obligation to Comply with the Terms of the Predecessor Bargaining Agreement

Normally, a successor employer is not obligated to adopt the terms of the collective-bargaining agreement between the predecessor and the union. *MV Transportation*, supra at 771;

²⁰ The probable impetus for the decertification petition is reflected by the following statement in the cover page to the faxed transmission of the petition to the Union on April 23: "We do not want to lose our jobs for [the union] cause."

²¹ I find it unnecessary to consider whether supervisory involvement also tainted the petition. Respondent argues that testimony from numerous former JLL employees shows JLL employees were not pressured or coerced to sign the decertification petition. Such testimony is irrelevant as the test for determining coercion is objective, not subjective.

Burns, supra at 291. Rather, “a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor.” *NLRB v. Burns Security Services*, supra at 294. In setting initial terms and conditions of employment different from the predecessor’s, a successor does not make unlawful unilateral changes as “a successor employer has a right [under *Burns*] to establish unilaterally its own initial terms of employment.” *Monterey Newspapers, Inc.*, supra at 1020–1021.

Notwithstanding a successor’s permission, under *Burns*, to set initial terms and conditions of employment, the privilege can be lost through unlawful conduct. The Board’s rationale is that:

A statement to employees that there will be no union at the successor employer’s facility blatantly coerces employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment. Nothing in *Burns* suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine other legitimate initial terms and conditions of employment. A statement that there will be no union serves the same end as a refusal to hire employees from the predecessor’s unionized work force. It “block[s] the process by which the obligations and rights of such a successor are incurred.”²²

Therefore, when a successor informs the predecessor’s employees that it will operate the successor business *sans* the Union, it is thereafter “not privileged to unilaterally set initial terms and conditions of employment.” *Concrete Co.*, 336 NLRB 1311 (2001); *Eldorado, Inc.*, supra at 952–953.

As a consequence of Respondent’s unlawful conduct in telling JLL employees it would operate the Restaurant without a union, Respondent lost the privilege of setting initial terms and conditions of its employees when it assumed control of the Restaurant on April 30. Instead, Respondent was required to follow the terms and conditions of employment established by JLL’s contract with the Union until such time as Respondent negotiated a new contract with the Union or negotiated to impasse. By failing to do so and by unilaterally changing terms and conditions of employment as set by the collective-bargaining agreement between JLL and the Union, Respondent violated Section 8(a)(5) of the Act.

F. Respondent’s Failure to Hire JLL Employees

The General Counsel alleges Respondent unlawfully refused to hire the JLL employee applicants (Barnes,²³ Colon, Cruz, Tomas Garcia, Martinez, Uribe, and Vaquerano). In such cases, the General Counsel bears the burden under *FES*²⁴ of showing Respondent was hiring at the time the JLL employee applicants applied for employment, that the JLL employee ap-

plicants had experience and training relevant to the requirements of the positions for hire, and that antiunion animus contributed to Respondent’s decision not to hire them. If the General Counsel satisfies its burden, the burden shifts to Respondent to demonstrate it would not have hired the applicants even in the absence of their union activity or affiliation. The General Counsel has indisputably met its burden as to the first element for all the JLL employee applicants. The General Counsel has also met its burden as to the second element for Barnes, Cruz, Tomas Garcia, Martinez, and Vaquerano. Whether the General Counsel has established the second element for Colon and Uribe is discussed below.

As to the third element, “the allegations of unlawful discrimination . . . must be supported by affirmative proof establishing by a preponderance of the evidence that the Respondent’s conduct was unlawfully motivated.” *Ken Maddox Heating & Air Conditioning, Inc.*, 340 NLRB 43, 45 (2003). As concluded above, Respondent demonstrated general animosity to union representation of its employees. Inasmuch as Respondent hired the majority of JLL employees, however, that general animosity is not persuasive evidence per se of animosity that precluded the hiring of individual employees. Accordingly, the General Counsel must show either that the general animosity was a basis for the refusal to hire the JLL employee applicants or that Respondent bore specific and independent animosity toward them. The General Counsel has not produced evidence that Respondent’s general animosity toward union representation affected its selection of any specific JLL employee for hire. It remains to determine whether evidence supports a conclusion that Respondent harbored specific animosity toward any of the JLL employee applicants. As the circumstances surrounding Respondent’s failure to hire Colon, Cruz, Tomas Garcia, Martinez, Uribe, and Vaquerano and its failure to offer Barnes her former schedule, differ individually, I have considered each separately.

Barnes: Although Barnes was one of 10 members on the employee-union committee during her employment with JLL, there is no evidence either JLL or Respondent bore her animosity for it. Barnes did not join in the picketing, disavowed any intention of picketing to Felipe Sanchez, and signed the decertification petition. Neither Respondent nor JLL agents directed statements of union animus toward her, and, although she was dissatisfied with the schedule Respondent assigned her, Respondent did, in fact, proffer her employment. There is no evidence Respondent allocated Barnes an undesirable schedule to constrain her to refuse employment. I conclude the General Counsel did not meet its burden of showing union animus contributed to Respondent’s scheduling of Barnes, and that Respondent did not refuse to hire or otherwise violate Section 8(a)(3) of the Act by scheduling Barnes as it did on April 30.²⁵

The General Counsel did not allege that Felipe Sanchez’s removing Barnes’s name from the April 30 schedule was an unlawful withdrawal of its employment offer. However, as the

²² *Advanced Stretchforming International, Inc.*, 323 NLRB 529 (1997), *enfd.* in relevant part 233 F.3d 1176 (9th Cir. 2000), quoting *State Distributing*, 282 NLRB at 1049.

²³ Barnes was, in fact, offered employment albeit at a reduced and less desirable schedule. I have considered whether such constituted a constructive refusal to hire Barnes.

²⁴ 331 NLRB 9 (2000), *affd.* 301 F.3d 83 (3d Cir. 2002).

²⁵ I do not find it necessary to consider Respondent’s reasons for not wanting to hire Barnes. However, in light of the Spencer’s negative experiences with Barnes’s service, I consider L. Spencer had legitimate reasons for not wanting to hire her.

facts surrounding this conduct were fully and fairly litigated, and as the issue is closely connected to the subject matter of the complaint, i.e., refusal to hire, I have considered the lawfulness of Respondent's withdrawal of its employment offer to Barnes. See *Gallup, Inc.*, 334 NLRB 366 (2001); *Letter Carriers Local 3825*, 333 NLRB 343 fn. 3 (2001); *Parts Depot*, 332 NLRB 733 (2000).

Respondent's withdrawal of its employment offer to Barnes is appropriately analyzed under *Wright Line*.²⁶ Respondent deleted Barnes's name from the schedule immediately after her protected threat to file a grievance, which as counsel for the General Council argues, evidences antiunion animosity and motivation. The General Counsel has therefore made a showing sufficient to support an inference that Barnes's protected activity was a motivating factor in Respondent's decision to strike her name from the schedule. The burden must, therefore, shift to Respondent to demonstrate it would have withdrawn its employment offer to Barnes irrespective of her stated intention to file a grievance. Respondent presented evidence that although Pearson made complaints similar to Barnes's, Respondent did not withdraw its offer of employment to her. Moreover, Hector Salomon and Mary de la Cruz credibly testified, respectively, that Barnes told Felipe Sanchez she could not work and would refuse to work the hours posted on the April 30 schedule. By her statements that she could not and would not work the posted schedule, Barnes declined to accept Respondent's proffered employment, and Respondent was justified in removing her name from the schedule. Accordingly, I conclude Respondent has met its burden and that it did not unlawfully withdraw its employment offer to Barnes.

Martinez: Martinez engaged in the picketing. Felipe Sanchez's animosity toward that protected activity was demonstrated by his telling Martinez he should not be on the picket line and in his unlawful statements to Colon and Alberto Solis.²⁷ Further, when the picketing occurred, Felipe Sanchez told Barnes he could make a list of the people picketing, give it to the new owners, and recommend they not be hired, a compelling threat since Felipe Sanchez was responsible for evaluating JLL employees for employment consideration and later became Respondent's manager. I conclude, therefore, the General Counsel has met his burden of showing antiunion animus contributed to Respondent's decision not to hire Martinez. The burden thus shifts to Respondent to demonstrate it would not have hired Martinez even in the absence of his union activity.

At the hearing for the first time, L. Spencer asserted he declined to hire Martinez because of Martinez's prior writeups and attendance problems. In previous statements, Respondent has maintained variously:

1. that it had not hired Mr. Martinez because it hired a better-qualified person,
2. that Mr. Spencer knew nothing about any rejected JLL employee except Ms. Barnes, and while he was sure

²⁶ 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

²⁷ Respondent argues the picketing was not protected as it had a secondary object of causing JLL to cease negotiations with Respondent and was thus unlawful under Sec. 8(b)(4) of the Act. Neither the facts nor the case law cited by Respondent supports this argument.

they were fine workers, they were not hired because of cutbacks,

3. that failure to hire rejected JLL employees was due to a reduction in staff due to the economy, and/or a more qualified candidate was hired for the position.

Respondent's shifting reasons for the failure to hire Martinez erode the credibility of its defense. Moreover, Martinez' personnel file evidenced no discipline in the past 7 years, and lead cook Jesus Sanchez had considered Martinez to be a good worker. Although there is no evidence Jesus Sanchez' good opinion was known to Spencer, it is reasonable to assume it was known to Felipe Sanchez, whose employee evaluations Respondent considered. Further, the JLL employees Respondent declined to hire were also the JLL employees who picketed, a strong indicator of union animus. The fact that Respondent hired Alberto Solis who also picketed does not vitiate the evidence of animus, particularly where Alberto Solis' familial relationship to supervisor, Javier Solis, may have procured his pardon. In these circumstances, Respondent has not met its burden of demonstrating it would not have hired Martinez even in the absence of his union activity. Accordingly, I conclude Respondent violated Section 8(a)(3) of the Act by failing to extend an employment offer to Martinez.

Tomas Garcia: The analysis relative to Respondent's failure to hire Martinez applies to its failure to hire Tomas Garcia. For the reasons set forth above, I find the General Counsel established a prima facie showing under *FES* that Respondent refused to hire Tomas Garcia because of his protected activity. The burden properly shifts to Respondent to demonstrate it would not have hired Tomas Garcia even in the absence of his protected activity. Respondent has not met that burden. Tomas Garcia's misconduct allegedly relied on by L. Spencer occurred in the distant past, which casts doubt on Respondent's asserted reliance, but more compellingly, Respondent failed to assert such a defense until the hearing. Respondent's shift from its earlier defenses, described above, prevents me from accepting its asserted reasons for failing to hire Tomas Garcia. As I cannot accept Respondent's defense, I cannot find Respondent has met its burden with regard to Tomas Garcia. Accordingly, I conclude Respondent violated Section 8(a)(3) of the Act by failing to extend an employment offer to Tomas Garcia.

Vaquerano: The above analyses also apply to Vaquerano. The burden having shifted to Respondent, I have examined L. Spencer's assertion at the hearing that Respondent intended to hire Vaquerano upon his updating his I-9 form, but inadvertently failed to follow up on it. Respondent failed to assert such a defense until the hearing. Respondent's shift from its earlier defenses, described above, prevents me from accepting its explanation for failing to hire Vaquerano. As I cannot accept Respondent's defense, I cannot find Respondent has met its burden with regard to Vaquerano. Accordingly, I conclude Respondent violated Section 8(a)(3) of the Act by failing to extend an employment offer to Vaquerano.

Cruz: For the reasons stated in the above analyses, the burden of proof under *FES* shifts to Respondent with regard to Cruz. I have examined L. Spencer's assertion at the hearing that Respondent did not realize Cruz had applied for employ-

ment. I have also considered the apparently alternate argument that Respondent, in fact, offered employment to Cruz. I reject both arguments. Respondent failed to assert such defenses until the hearing. Respondent has given no viable explanation as to why it waited until the hearing to announce its willingness to employ Cruz and why it specifically stated in its August 16 investigation response to the Board that Cruz was not offered employment. Respondent's shift from its earlier positions prevents me from accepting any of its explanations for failing to hire Cruz. As I cannot accept Respondent's defenses, I cannot find Respondent has met its burden with regard to Cruz. Accordingly, I conclude Respondent violated Section 8(a)(3) of the Act by failing to extend an employment offer to Cruz.

Colon: As stated above, the General Counsel bears the burden under *FES* of showing, inter alia, that JLL employee applicants, including Colon, had experience and training relevant to the requirements of the positions available for hire. Implicit in that evidentiary requirement, I believe, is that the General Counsel must show the applicant was available, that is ready and able to work at the job applied for, on the date for which Respondent was hiring. There is no question Colon had the experience and training for the job she sought, as it was the same job she had performed for JLL. There is also no dispute Colon was temporarily disabled for that job and hence unavailable to work in that position on May 1, Respondent's employment start date, and for a period of at least 2 weeks thereafter. The General Counsel has, therefore, failed to prove one critical element of a prima facie case under *FES*. While there is no credible evidence Respondent considered or even knew of Colon's unavailability before declining to offer her employment, that does not alter this conclusion as the General Counsel must establish the necessary elements of a refusal to hire under *FES* before any unlawful conduct can be found. The General Counsel has met two essential elements of *FES*, i.e., that Respondent was hiring and that Respondent bore animus toward Colon's union activities. The General Counsel has not shown Colon was ready and able to work and has not, therefore, met his burden of proof. In light of Colon's unavailability for work on the date of intended hire, I cannot find Respondent violated the Act when it failed to offer her employment.

Uribe: On April 30 when Respondent posted its employment schedules, and presumably for a period of time after that, Uribe did not consider himself physically able to work at the job for which he had applied. Consistent with my analysis above regarding Colon, I conclude the General Counsel has failed to prove one critical element of a prima facie case under *FES*. Although the General Counsel has met the other two elements, i.e., that Respondent was hiring and that Respondent bore animus toward Uribe for his protected activity in picketing, the General Counsel has not met his full burden of proof. In light of Uribe's unavailability for work on the date of intended hire, I cannot find Respondent violated the Act when it failed to offer him employment.

In sum, I find Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Martinez, Tomas Garcia, Cruz, and Vaquerano. Further, I do not consider Respondent made subsequent valid offers of employment to any discriminatee by its professions to the delegation on May 1 of its willingness to

accept applications from and consider for employment any employees it had not hired. Not only did Respondent make no concrete offers of employment, the limited offers were premised on the unlawful condition that employees return to work for a nonunion business.²⁸

G. Respondent's Obligation to Remedy JLL's Unfair Labor Practices

On April 24 or 25, M. Spencer received a letter from JLL's attorney, Edward Wolkowitz, notifying Respondent that unfair labor practice charges had been filed with the Board against JLL. Thereafter, Respondent continued the Restaurant without significant interruption or substantial change in operation, employee complement, or supervisory personnel. Consequently, Respondent is jointly and severally liable with JLL for remedying JLL's unfair labor practices. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). It does not matter that Respondent did not see the actual unfair labor practice charges before it succeeded to JLL's business. "In determining whether a successor had notice of its potential liability, the Board does not consider whether the successor has seen the particular charges or complaints, but rather, whether the successor was aware of conduct that the Board ultimately found unlawful. [Citations omitted]." *S. Bent & Bros.*, 336 NLRB 788, 790 (2001). Accordingly, Respondent being the *Golden State* successor to JLL, Respondent is jointly and severally liable with JLL for remedying JLL's unlawful 8(a)(1) conduct.

CONCLUSIONS OF LAW

1. Respondent JLL violated Section 8(a)(1) of the Act by:
 - (a) Directing employees to cease engaging in union activities.
 - (b) Threatening to discharge employees for engaging in union activity during nonworktime.
 - (c) Interrogating employees about their union activities.
 - (d) Threatening to discourage a successor employer from hiring employees because they engaged in union activity.
 - (e) Threatening employees with job loss and business closure because they engaged in union activity.
 - (f) Coercing an employee into signing a union disaffection petition.
2. The Union has been at all times since April 30, and is, the exclusive bargaining representative of Respondent's employees in the following unit (the unit) for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

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.

3. Respondent violated Section 8(a)(5) and (1) of the Act by:
 - (a) Refusing to recognize and bargain with the Union as the representative of its employees in the unit.

²⁸ The question of whether Respondent made valid offers of employment to Cruz and Vaquerano at the hearing is left to compliance.

(b) Failing and refusing to apply the terms of the collective-bargaining agreement between JLL and the Union to its employees in the unit.

(c) Unilaterally changing terms and conditions of employment of unit employees as set by the collective-bargaining agreement between JLL and the Union.

4. Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire Frederico Cruz, Tomas Garcia Rodriguez, Raul Martinez, and Alex Vaquerano because they engaged in union or other protected concerted activities.

5. Respondent violated Section 8(a)(1) of the Act by:

(a) Informing employees of JLL and other individuals that it intended to operate its business as a nonunion entity and/or that it was a nonunion business.

(b) Telling a JLL employee not to speak to the Union about employment with Respondent.

6. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent JLL and Respondent have engaged in certain unfair labor practices, I find they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Further, Respondent is jointly and severally responsible to remedy the unfair labor practices of Respondent JLL.

Respondent having discriminatorily refused to hire Frederico Cruz, Raul Martinez, Tomas Garcia Rodriguez, and Alex Vaquerano, it must offer them reinstatement insofar as it has not already done so and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of refusal to hire to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The recommended Order will also provide that Respondent bargain in good faith with the Union as the exclusive collective-bargaining representative of the above-described unit and make whole unit employees for losses resulting from its unlawful unilateral changes in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁹

ORDER

A. Respondent JLL, Burbank, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing employees to cease engaging in union activities.

²⁹ 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.

(b) Threatening to discharge employees for engaging in union activity during nonworktime.

(c) Interrogating employees about their union activities.

(d) Threatening to discourage a successor employer from hiring employees because they engaged in union activity.

(e) Threatening employees with job loss and business closure because they engaged in union activity.

(f) Coercing employees into signing a union disaffection petition.

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

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

(a) Within 14 days after service by the Region, post at its place of business wherever situated, copies of the attached notice marked "Appendix A."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 31 after being signed by Respondent JLL's authorized representative, shall be posted by Respondent JLL immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent JLL to ensure that the notices are not altered, defaced, or covered by any other material. Inasmuch as Respondent JLL has gone out of business at the facility involved in these proceedings, Respondent JLL shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by Respondent at the Restaurant at any time since April 21, 2003.

(b) 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 Respondent JLL has taken to comply.

B. Respondent, Smoke House Restaurant, Burbank, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Hotel Employees and Restaurant Employees Union, Local 11, AFL-CIO (the Union) as the representative of its employees in the following appropriate unit (the unit):

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.

(b) Failing and refusing to apply the terms of the collective-bargaining agreement between JLL and the Union to its employees in the unit.

³⁰ 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."

(c) Unilaterally changing terms and conditions of employment of its employees in the unit as set by the collective-bargaining agreement between JLL and the Union.

(d) Failing and refusing to hire individuals because they engage in union or other protected concerted activities.

(e) Informing employees of JLL and other individuals that it intends to operate its business as a nonunion entity and/or that it is a nonunion business.

(f) Telling any JLL employee or other individual not to speak to the Union about employment with Respondent.

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

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

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

(b) On request of the Union, retroactively restore the terms and conditions of employment of the employees in the unit as established by the collective-bargaining agreement between JLL and the Union and make employees whole for any losses they incurred as a result of unilateral changes made thereto.

(c) Within 14 days from the date of this Order, insofar as it has not already done so, offer Frederico Cruz, Tomas Garcia Rodriguez, Raul Martinez, and Alex Vaquerano full reinstatement to the jobs they applied for or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to seniority or any other rights or privileges they would have enjoyed had they been hired on April 30.

(d) Make Frederico Cruz, Tomas Garcia Rodriguez, Raul Martinez, and Alex Vaquerano whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(e) Expunge from its files any reference to the unlawful refusal to hire Frederico Cruz, Tomas Garcia Rodriguez, Raul Martinez, and Alex Vaquerano and thereafter notify them in writing that this has been done and that the refusal to hire them on April 30 will not be used against them in any way.

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

(g) Within 14 days after service by the Region, post at its Restaurant in Burbank, California, copies of the attached notice marked "Appendix II."³¹ Copies of the notice, on forms provided by the Regional Director for Region 31 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by 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, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since April 2003.

(h) 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 Respondent has taken to comply.

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

³¹ See fn. 30, supra."