

JAG Healthcare, Inc. d/b/a Galion Pointe, LLC and Service Employees International Union, District 1199, WV/KY/OH. Cases 08–CA–039029, 08–CA–039112, and 08–CA–039133

March 28, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On July 27, 2012, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions with supporting argument, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.³

Given the judge's thorough treatment of the issues presented in this case, we find it necessary to add only the following points:

1. The judge found that, because of the Respondent's unlawful statement that there would not be a union at the Galion Pointe facility, it was not entitled under *NLRB v. Burns Security Services*, 406 U.S. 272, 278–279 (1972), unilaterally to set initial terms and conditions of employment. Under the present circumstances, we agree.

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

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

³ We shall modify the judge's recommended Order to conform to our findings and to conform to the Board's standard remedial language. In regard to the judge's remedy for the Respondent's unlawful changes to unit employees' contractual benefits, we add that, to the extent that an employee has made personal contributions to a fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund. In addition, in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB 518 (2012), we shall order the Respondent to compensate discriminatees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters. We shall substitute a new notice to conform to the Order as modified.

In the absence of exceptions to the judge's grant of an affirmative bargaining order to remedy the Respondent's unlawful refusal to recognize and bargain with the Union, we find it unnecessary to pass on whether a specific justification for that remedy is warranted. See *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007).

Here, as in *Advanced Stretchforming International*, 323 NLRB 529, 530 (1997), enfd. 208 F.3d 801 (9th Cir. 2000), cert. denied 534 U.S. 948 (2001), the Respondent made the unlawful statement and then hired a majority of its bargaining unit employees from the predecessor employer, Village Care. In any event, the Respondent's discriminatory hiring practices independently made unlawful its unilateral setting of initial terms. See *Planned Building Services*, 347 NLRB 670, 674 (2006); *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979), enfd. in relevant part sub. nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

2. The judge found that the Respondent orally issued and maintained an unlawful rule prohibiting employees from discussing the Union with each other. We find it unnecessary to decide whether the Respondent established a formal rule. The Respondent issued discipline to an employee because the employee made comments supportive of the Union, but it allowed discussion of other nonwork-related subjects during working time. Whether or not the Respondent can be said to have established a rule, the Respondent's actions had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights and thus violated Section 8(a)(1). See *Jensen Enterprises*, 339 NLRB 877, 878 (2003).

3. In adopting the judge's finding that the Respondent unlawfully discharged Natalie Archer, Traci Atkins, and Diana Nolen, we reiterate that, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the lawfulness of the Respondent's motive is examined in light of all the surrounding circumstances. See, e.g., *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001). The Respondent's union animus is established both by evidence specific to each discharged employee and also by evidence of other violations of the Act, including its coercive statements and its efforts to avoid incurring a bargaining obligation by engaging in hiring discrimination against the predecessor's employees. See *Flagstaff Medical Center*, 357 NLRB 659, 665 (2011); *Huck Store Fixture Co.*, 334 NLRB 119, 120 (2001), enfd. 327 F.3d 528 (7th Cir. 2003). Notably, the Respondent's exceptions to the judge's unlawful discharge findings are based solely on disagreement with the judge's credibility resolutions, which we adopt in full.

ORDER

The National Labor Relations Board orders that the Respondent, JAG Healthcare, Inc. d/b/a Galion Pointe, LLC, Galion, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire bargaining unit employees of Village Care, the predecessor employer, because of their union-represented status during the predecessor's operation or because of their union activity, or otherwise discriminating against these employees to avoid being obligated to recognize and bargain with Service Employees International Union, District 1199, WV/KY/OH (the Union).

(b) Refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time service and maintenance employees, including nurses' aides, housekeepers, dietary aides and cooks, laundry employees, activity aides, environmental aides, and maintenance helpers employed by the Respondent, but excluding all registered nurses, licensed practical nurses, department managers/supervisors, office clerical employees, technicians, professional employees, confidential employees, management employees, guards and supervisors as defined in the Act.

(c) Changing bargaining unit employees' wages, hours, and other terms and conditions of employment without first giving the Union notice and an opportunity to bargain about those changes.

(d) Telling employees that there will be no union at the Galion Pointe facility.

(e) Orally issuing or maintaining an unlawful no-solicitation/no-distribution policy.

(f) Disciplining employees or otherwise restraining, coercing, or interfering with their exercise of the rights guaranteed by Section 7 of the Act because they talk about the Union during worktime, despite allowing other nonwork-related discussions by employees.

(g) Discharging or otherwise discriminating against employees for supporting the Service Employees International Union, District 1199, WV/KY/OH, or any other union, or for engaging in union or protected concerted activities that are covered by Section 7 of the Act.

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

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

(a) Notify the Union in writing that the Respondent recognizes the Union as the exclusive representative of the bargaining unit employees under Section 9(a) of the Act and that it will bargain with the Union concerning

terms and conditions of employment for the bargaining unit employees.

(b) On request, bargain with the Union as the exclusive representative of bargaining unit employees at Galion Pointe regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(c) On the Union's request, rescind any or all of the changes in the terms and conditions of employment for the unit employees that were unilaterally implemented on or after July 1, 2010.

(d) Make bargaining unit employees whole for losses caused by the Respondents' failure to apply the terms and conditions of employment that existed immediately before the Respondent began operations at Galion Pointe, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Before implementing any changes in bargaining unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

(f) Within 14 days from the date of this Order, offer employment to the former employees of Village Care named below, in their former jobs or, if those jobs no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places:

Julie Barnhart, Martha Bair (Swiger), Martha Bishop, Sharon Brady, Jolene Dennis, Ceileata Dotson, Vicky Ely, Wanda Haney, Kathleen Mcle, Sandra Nolen, Sandra Ohler, Brenda Peterman, Brandi Riley, Shirley Sedmak, Mary Siegenthal, Bobbie Stephens, Cassandra Storer, Delena Teeter, Judy Watts, and Jackie Zent.

(g) Make the employees named in paragraph 2(f) whole for any loss of earnings and other benefits suffered because of the Respondent's unlawful refusal to hire them, in the manner set forth in the remedy section of the judge's decision as amended in this decision, less any net interim earnings, plus interest.

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

(i) Within 14 days from the date of this Order, offer Natalie Archer, Traci Atkins, and Diana Nolen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(j) Make Natalie Archer, Traci Atkins, and Diana Nolen whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision, less any net interim earnings, plus interest.

(k) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Natalie Archer, Traci Atkins, and Diana Nolen, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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

(m) 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.

(n) Within 14 days after service by the Region, post at its facility in Galion, Ohio, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure

that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 23, 2011.

(o) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire bargaining unit employees of Village Care, the predecessor employer, because of their union-represented status during the predecessor's operation or because of their union activity, or otherwise discriminate against these employees to avoid being obligated to recognize and bargain with Service Employees International Union, District 1199, WV/KY/OH (the Union).

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time service and maintenance employees, including nurses' aides, housekeepers, dietary aides and cooks, laundry employees, activity aides, environmental aides, and maintenance helpers employed by the Respondent, but excluding all registered nurses, licensed practical nurses, department managers/supervisors, office clerical employees, technicians, professional employees, confidential employ-

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ees, management employees, guards and supervisors as defined in the Act.

WE WILL NOT change bargaining unit employees' wages, hours, and other terms and conditions of employment without first giving the Union notice and an opportunity to bargain about those changes.

WE WILL NOT tell employees that there will be no union at the Galion Pointe facility.

WE WILL NOT orally issue or maintain an unlawful no-solicitation/no-distribution policy.

WE WILL NOT discipline you or otherwise restrain, coerce, or interfere with your exercise of the rights listed above because you talk about the Union during work-time, despite allowing other nonwork-related discussions.

WE WILL NOT discharge or otherwise discriminate against you for supporting the Service Employees International Union, District 1199, WV/KY/OH, or any other union, or for engaging in union or protected concerted activities.

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 notify the Union in writing that we recognize it as the exclusive representative of our bargaining unit employees and that we will bargain with it concerning terms and conditions of employment for the bargaining unit employees.

WE WILL, on request, bargain with the Union as the exclusive representative of bargaining unit employees at Galion Pointe regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, on the Union's request, rescind any or all of the changes in the bargaining unit employees' terms and conditions of employment that we unilaterally implemented on or after July 1, 2010.

WE WILL make bargaining unit employees whole for losses caused by our failure to apply the terms and conditions of employment that existed immediately before we began operations at Galion Pointe.

WE WILL, before implementing any changes in bargaining unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit described above.

WE WILL, within 14 days from the date of the Board's Order, offer employment to the former employees of Village Care named below, in their former jobs or, if

those jobs no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places:

Julie Barnhart, Martha Bair (Swiger), Martha Bishop, Sharon Brady, Jolene Dennis, Ceileata Dotson, Vicky Ely, Wanda Haney, Kathleen Mcle, Sandra Nolen, Sandra Ohler, Brenda Peterman, Brandi Riley, Shirley Sedmak, Mary Siegenthal, Bobbie Stephens, Cassandra Storer, Delena Teeter, Judy Watts, and Jackie Zent.

WE WILL make the employees named in the preceding paragraph whole for any loss of earnings and other benefits suffered because of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire the above-named employees and, WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Natalie Archer, Traci Atkins, and Diana Nolen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Natalie Archer, Traci Atkins, and Diana Nolen whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Natalie Archer, Traci Atkins, and Diana Nolen, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each bargaining unit employee.

JAG HEALTHCARE, INC. D/B/A GALION POINTE,
LLC

Gregory Gleine and Catherine Modic, Esqs., for the Acting General Counsel.

Scott Salsbury and Pooja Bird, Esqs.,¹ for the Respondent.

Michael J. Hunter, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Cleveland, Ohio, on March 26–29 and May 14–16, 2012. The Service Employees International Union, District 1199, WV/KY/OH (the Union) filed the charge in Case 08–CA–039029 on July 13, 2010. The Union filed the charge in Case 08–CA–039112 on August 24, 2010, and filed the charge in Case 08–CA–039133 on September 8, 2010. The Acting General Counsel issued the consolidated complaint covering all three cases on December 29, 2011.²

The complaint alleges that JAG Healthcare, d/b/a Galion Pointe, LLC (JAG Healthcare or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: on or about June 30,³ telling employees that there would be no union acting as their collective-bargaining representative when JAG Healthcare took control of nursing home operations on July 1; on or about June 30, announcing and issuing a rule prohibiting its employees from discussing the Union with each other, and announcing and maintaining an overbroad no-solicitation/no-distribution policy; and on or about July 2, directing an employee to stop discussing the Union outside of the employee breakroom or resign.

The complaint also alleges that JAG Healthcare violated Section 8(a)(3) and (1) of the Act by: on or about June 30, terminating or refusing to hire 21 employees because they were members of the Union and because JAG Healthcare sought to avoid retaining a majority of former Village Care employees in the bargaining unit; on or about July 12, terminating employees Diana Nolen and Natalie Archer because it believed that they discussed the Union and engaged in concerted activities, and JAG Healthcare wished to discourage employees from engaging in those activities; and on or about July 13, terminating employee Traci Atkins because she was a union member and JAG Healthcare wished to discourage employees from supporting the Union.

Finally, the complaint alleges that JAG Healthcare violated Section 8(a)(5) and (1) of the Act by: on or about June 30, unlawfully withdrawing recognition from, or alternatively (from

¹ Initially, the Respondent was represented by G. Roger King, Theresa M. Dean, and Kye D. Pawlenko, Esqs. However, on April 20, 2012, King, Dean, and Pawlenko withdrew as counsel, and Respondent's current attorneys took over as new counsel.

² The consolidated complaint also covered Case 08–CA–039031, involving Respondent 925 Wagner Operating, LLC, d/b/a Village Care Center (Village Care). On March 15, 2012, the Regional Director for Region 8 issued an order severing Case 08–CA–039031 from the other cases covered by the complaint because Village Care signed an informal Board settlement agreement that fully addressed the allegations against it in the complaint. (Acting General Counsel Exhibit (GC Exh.) 1(x).)

³ Unless stated otherwise, all relevant events in this case occurred in 2010.

June 30 onward) failing and refusing to recognize and bargain with, the Union as the exclusive collective-bargaining representative of the bargaining unit; and on or about June 30, unilaterally changing the terms and conditions of employment for unit employees (including changes to mandatory subjects of bargaining, such as wages, shift hours, and benefits), without prior notice to the Union or giving the Union an opportunity to bargain about the changes.

The Respondent filed a timely answer denying each of the alleged violations in the complaint. On the entire record,⁴ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates multiple skilled nursing home facilities that provide inpatient medical care in the State of Ohio, including a skilled nursing facility located in Galion, Ohio. During the 12-month period ending on June 30, 2011, the Respondent derived gross revenues in excess of \$100,000 and received products, goods, and materials valued in excess of \$5000 directly from points located outside of the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

1. Early 2010—Village Care Center operates the nursing home

In early 2010, 925 Wagner Operating, LLC, d/b/a Village Care Center (Village Care) operated a skilled nursing facility

⁴ The trial transcripts and exhibits generally are accurate, but I make the following transcript corrections to clarify the record: Transcript (Tr.) p. 464, Line (“L.”) 24: “unreasonable” should be “reasonable”; Tr. 1070, L. 8: “years” should be “hours”; Tr. 1084, L. 20: “implanted” should be “employment”; Tr. 1348, L. 22: “effective” should be “disruptive”; and Tr. 1648, L. 5: “for all” should be “free to argue.” GC Exh. 40(h) should be removed from the record because the Acting General Counsel did not seek to introduce it into evidence. (Tr. 434.)

I also note that on June 12, 2012, I issued an order directing the parties to file corrected versions of certain exhibits to redact personal identifiable information. Pursuant to that order, the parties submitted the following corrected exhibits: GC Exhs. 10, 25; Respondent (“R.”) Exhs. 18, 20–21. I have replaced the original copies of those exhibits in my exhibit file with the corrected versions, and I have placed the original copies in a sealed envelope in case they are needed for review. Since the electronic file still contains both the original and corrected exhibits, I recommend that the Board take appropriate steps to ensure that the original exhibits are handled in a way that will ensure they (and the personal identification information they contain) remain confidential.

Finally, although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based my review and consideration of the entire record for this case.

providing inpatient medical care in Galion, Ohio. ((General Counsel Exhibit (GC Exh.) 1(n), par. 4(A).) From March 1, 2008, to June 30, 2010, the Union served as the exclusive collective-bargaining representative of the following bargaining unit at Village Care:

All full-time and regular part-time service and maintenance employees, including nurses' aides, housekeepers, dietary aides and cooks, laundry employees, activity aides, environmental aides, and maintenance helpers employed by [Village Care], but excluding all registered nurses, licensed practical nurses, department managers/supervisors, office clerical employees, technicians, professional employees, confidential employees, management employees, guards and supervisors as defined in the Act.

(GC Exh. 2, art. 4.) Village Care and the Union were parties to a collective-bargaining agreement that was intended to be in effect from April 1, 2009, to April 30, 2012. (GC Exh. 2.)

Village Care leased the 45-bed Galion nursing home building from Cardinal Nursing Homes for approximately 2 years, with the lease set to expire on June 30, 2010.⁵ (Tr. 1075, 1445, 1450.) The initial few months of the lease period went smoothly, but Village Care then began having trouble keeping up with its monthly rental payments. (Tr. 1451–1452.) Accordingly, Cardinal Nursing Homes Owner George Mathews began exploring the possibility of finding a new tenant to operate the nursing home once Village Care's lease expired. (Tr. 1452, 1454–1455.)

2. JAG Healthcare explores taking over the Galion nursing home

JAG Healthcare⁶ is a management company that specializes in acquiring and operating small nursing homes, and in particular, nursing homes that may be struggling financially. (Tr. 1483–1484.) In late 2009 or early 2010, JAG Healthcare spoke with a broker about potential nursing home deals, and learned that Cardinal Nursing Homes was looking for a new tenant for its facilities in Galion and Shelby, Ohio. (Tr. 1509–1510.) The broker also advised JAG Healthcare that the employees at Village Care were unionized. (Tr. 1568.) After reviewing some of Village Care's financial data and determining that it might be able to operate the facility more efficiently (and perhaps at a profit), JAG Healthcare decided to explore leasing and operating the facility after Village Care's lease expired. (Tr. 1515–1518; see also R. Exhs. 12–13.)

On February 26, Cardinal Nursing Homes Owner George Mathews, JAG Healthcare CEO James Griffiths, and other JAG Healthcare administrators visited Village Care for a walk-

⁵ Cardinal Nursing Homes also owns a second nursing home building in Shelby, Ohio, that JAG Healthcare leased in 2010 and now operates as Shelby Pointe. (Tr. 1509; see also Tr. 144; GC Exh. 31, p. 1 (noting that the Shelby, Ohio facility was previously known as Heritage Care).)

⁶ JAG Healthcare began formal operations on July 1, 2010. Before that date, Griffiths Healthcare Group was the management company for James Griffiths' nursing homes. (Tr. 1480, 1486.) For ease of reference, in this decision I generally will use JAG Healthcare to refer to both entities (JAG Healthcare and Griffiths Healthcare Group).

through tour of the facility. (Tr. 255, 1099–1100, 1598.) After the tour, JAG Healthcare concluded that although the nursing home was not running well, there were enough potential financial upsides (e.g., cost savings that could result from eliminating waste and staffing the facility differently) for JAG Healthcare to move forward with taking over the facility. (Tr. 1100–1101, 1520, 1598–1599.) Accordingly, at the end of the tour, Cardinal Nursing Homes and JAG Healthcare prepared and signed a Nonbinding Letter of Intent to lease the Village Care facility in Galion, Ohio, and the Heritage Care facility in Shelby, Ohio. (Tr. 1520, 1598; GC Exh. 31.) Although it was nonbinding, the letter of intent did require Cardinal Nursing Homes to give JAG Healthcare access to certain financial information, and also refrain from "shopping" the nursing homes to other potential operators for 30 days. (GC Exh. 31, p. 4.)

In the following months, JAG Healthcare and Cardinal Nursing Homes continued to take steps towards JAG Healthcare leasing the Village Care facility. For example, on May 3, JAG Healthcare CFO David Cooley filed articles of organization with the State of Ohio for Galion Pointe, LLC.⁷ (GC Exh. 15.) In addition, on May 14, Cardinal Nursing Homes filed a Change of Operator Notice with the State of Ohio to provide notice that Galion Pointe, LLC would begin operating the Village Care facility on July 1. (GC Exh. 11; see also Tr. 1492–1493, 1601 (noting that the Change of Operator Notice could be rescinded if the nursing home deal fell through).)

3. Uncertainty arises about whether JAG Healthcare and Cardinal Nursing Homes will be able to make a deal

In late May, Griffiths began to question whether it made sense to proceed with acquiring Village Care, primarily because he was going through a divorce at the time. (Tr. 1599–1600.) Because of that issue, Griffiths withdrew the February 26 Notice of Intent. (Tr. 1550–1551, 1599.) JAG Healthcare and Cardinal Nursing Homes did continue to discuss the possibility of a deal, but Cardinal Nursing Homes also began contacting other nursing home facility operators to assess their interest in the Village Care facility. (Tr. 1462–1463, 1551.)

4. JAG Healthcare agrees to lease the Village Care facility

On or about June 25, Mathews received a phone call from Continium⁸ that it planned to cease operations at Village Care as soon as the lease expired on June 30. The Continium representative also advised Mathews that it planned to notify the

⁷ Instead of keeping the name "Village Care," JAG Healthcare planned to operate the nursing home under the new name of Galion Pointe.

⁸ JAG Healthcare's chief financial officer, David Cooley, explained that, frequently, multiple entities play a role in operating nursing homes. One common framework is that one company owns the nursing home building and serves as the landlord (Cardinal Nursing Homes, in this case), another company serves as the operating company and runs the nursing home (Village Care, and later, Galion Pointe, LLC), and a third company (such as JAG Healthcare) serves as the management company and handles administrative functions such as bookkeeping, billing, and management of senior staff. (Tr. 1482, 1487–1489.) Continium, a Florida-based company, was the management company for Village Care. (Tr. 1446–1447.)

State of Ohio that it was shutting down the nursing home. (Tr. 1465–1467.) When Mathews mentioned the telephone call to his attorneys, he learned that if Continuum followed through with its plans, the State of Ohio would likely revoke Cardinal Nursing Homes’ license to have nursing home beds in the Galion and Shelby facilities. (Tr. 1467–1468.)

With that risk in mind, Mathews contacted Griffiths and offered to waive the \$60,000 security deposit and provide JAG Healthcare with a \$100,000 loan if JAG Healthcare agreed to sign a lease and operate the Village Care and Heritage Care nursing homes effective July 1.⁹ (Tr. 1468, 1472, 1474, 1572, 1604.) Griffiths accepted the offer, and thus on June 29, JAG Healthcare and Cardinal Nursing Homes signed a lease for the Village Care facility. (Tr. 1106, 1475; GC Exh. 12.)

5. Galion Pointe, LLC and Village Care sign an Operations Transfer Agreement

Also on June 29, Village Care and Galion Pointe, LLC signed an Operations Transfer Agreement (OTA) to ensure a smooth transition when Galion Pointe took over as the new tenant and nursing home operator. (Tr. 1495–1496; GC Exh. 13.) Regarding Village Care’s employees, the OTA stated as follows:

Termination of Employees. [Village Care] shall terminate the employment of all employees at the Facility, including, without limitation, persons temporarily absent from active employment by reason of disability, illness, injury, workers’ compensation, approved leave of absence or layoff (“Exiting Operator’s Employees”), as of 11:59 p.m. on June 30, 2010 (“Termination Date”).

(GC Exh. 13, p. 5.)

B. JAG Healthcare Prepares to Operate the Nursing Home

1. Village Care announces that the nursing home has been sold

On June 29, Director of Nursing Amanda (Mandi) Ronk posted a notice by the employee timeclock and in the employee breakroom. The notice advised employees that Village Care had been sold, and invited employees to come to a meeting at 4 p.m. on June 30 to meet the new owners. (Tr. 689, 777, 824–825.)

2. JAG Healthcare administrators meet with Village Care administrators to discuss employees

In the late morning or early afternoon on June 30, JAG Healthcare administrators went to the Village Care facility to prepare to take control of operations on July 1. Corporate Director of Nursing Services Miriam Walters¹⁰ took the lead for JAG Healthcare on making hiring decisions for the clinical

⁹ The purpose of the \$100,000 loan was to provide JAG Healthcare with the funds to make its first payroll payments, since there would be a delay before JAG Healthcare began receiving reimbursements from insurance providers such as Medicare and Medicaid. (Tr. 1472, 1604.)

¹⁰ Unless stated otherwise, references to “Walters” in this decision refer to Miriam Walters, and not to Director of Plant Operations Doug Walters. (See Tr. 256.)

department (i.e., nurses and State tested nursing assistants (STNAs)), and to that end met separately with Ronk and Human Resources/Payroll Manager Connie Knight to learn more about the current roster of Village Care employees and decide who JAG Healthcare should hire for its staff. (Tr. 257–258, 263; see also Tr. 262, 265 (noting that after Walters consulted with Director of Plant Operations Doug Walters and made her recommendations, Griffiths made the final decision as the owner and president of JAG Healthcare).) Knight gave Walters access to employee personnel files, but Walters admitted that due to the compressed decision timeline that she had, she did not have the opportunity to review each employee file, much less inspect each file in its entirety.¹¹ (Tr. 258, 267, 268–269, 286; see also Tr. 1309 (noting that the employee files were not in good shape).) Knight also provided Walters with a roster of employees, on which Knight wrote each employee’s job title and whether the employee was a member of the Union. (Tr. 262, 470, 475–476, 1112, 1115, 1118; GC Exh. 56; R. Exh. 18.)¹² Walters did not ask Knight for any input on employee job performance or which employees JAG Healthcare should hire. (Tr. 267, 1319, 1408.)

Walters also met with Ronk on June 30, and described Ronk’s input about employee performance as “very valuable.” (Tr. 269; see also Tr. 517.) Walters relied on Ronk (and Walters’ own limited observations of employees on June 30) to determine which Village Care employees were the best clinicians, as demonstrated (according to Walters) by being a good team player, having a demonstrated ability to care for patients and residents, having a good attitude, and maintaining good attendance. (Tr. 262–263.) Based only on her own impressions and memory, and without reviewing any personnel files, Ronk

¹¹ It is important to remember that Walters was evaluating *all* Village Care employees—not just employees in the bargaining unit. (See, e.g., Tr. 289 (indicating review of nonbargaining unit employees); R. Exh. 18 (same).) In addition to evaluating the current roster of employees, Walters needed to assess the overall status of the nursing home. Specifically, Walters “needed to assess the relative acuity of the patients and residents,” and “needed to assess the materials that they had, the supplies they had available from things like . . . your typical dressing change supplies, to I.V. pumps, tube feeding pumps, to the staffing that they had available, regulatory status, [and] compliance with regulations.” JAG Healthcare did not assess any of those issues before June 30. (Tr. 253–254.)

¹² During trial, the Acting General Counsel asked me to exclude R. Exh. 18 from the record because Respondent did not provide it to the Acting General Counsel in response to subpoena. (Tr. 1120–1124.) As Walters explained, however, she lost the documents that comprise R. Exh. 18 for an extended period of time, and did not discover them until May 2, 2012, after doing some spring cleaning. (Tr. 1114–1115.) Walters provided R. Exh. 18 to Respondent’s new attorney on May 11, 2012, and Respondent presented the documents during trial on May 14, 2012.

Based on that factual predicate (which shows that the delay in disclosing the documents was inadvertent), and on Respondent’s general good-faith compliance with subpoenas in this case, I find that no sanction is warranted for the late disclosure of R. Exh. 18. See *People’s Transportation Service*, 276 NLRB 169, 225 (1985) (describing the factors that are relevant when assessing whether subpoena sanctions are warranted for belatedly disclosed materials).

made the following comments (that Walters recorded almost verbatim) about employees in the bargaining unit:

Employee Name & Job Title (37 total) ¹³	Ronk's Comment About Job Performance	Hired by JAG Healthcare on July 1? (15 total)
Natalie Archer STNA	"Playa"	Yes
Martha Bishop STNA	"90+"	No
Ky. B. STNA	Good	Yes
Ka. B. STNA	Good	Yes
Ca.D. STNA	Good, but a little slow	Yes
Jolene Dennis STNA	Good	No
Ceileata Dotson STNA	Good, but laid off. Volunteered because pregnant.	No
Vicky Ely STNA	Rumor starter	No
J.H. STNA	Good	Yes
B.H. STNA	Just started as prn [as needed], but 0 hours	No (but was hired on July 2)
Kathleen Mcle STNA	Good	No
Diana Nolen STNA	Wonderful	Yes
Sandra Ohler STNA	Big fat no	No
K.P. STNA	Wonderful	Yes
Brenda Peterman STNA	Restorative wonder . . .	No
Brandi Riley STNA	Also laid off	No
M.R. STNA	Good	Yes
K.S. STNA	Wonder . . .	Yes
Bobbie Stephens STNA	Laid off & terrible	No
Cassandra Storer STNA	Good but bad attitude	No
Me.S. STNA	Good	Yes
Martha Swiger STNA	Good	No
Delena Teeter STNA	Good	No
Judy Watts STNA	Laid off, not wonderful, very lazy	No

¹³ Only 31 of the 37 employees listed in this table were dues-paying union members on July 1. The following employees were not dues-paying union members on July 1: Ceileata Dotson, B.H., K.P., Brandi Riley, Cassandra Storer, and Judy Watts. (GC Exh. 10(c).) However, Knight identified all 37 employees as union members on the employee roster that she provided to Walters on June 30. (R. Exh. 18.)

Employee Name & Job Title (37 total) ¹³	Ronk's Comment About Job Performance	Hired by JAG Healthcare on July 1? (15 total)
Jackie Zent STNA	Attitude	No
Traci Atkins Dietary	Very avg.	No
Julianne Barnhart Dietary	[No remarks made]	No
M.D. Dietary	[No remarks made]	Yes
Wanda Haney Dietary	Attitude	No
M.M. Dietary	Wonderful	Yes
Shirley Sedmak Dietary	Attitude	No
J.S. Activity Assistant	Wonderful	Yes
K.A. Housekeeping & Laundry	Good	Yes
H.B. Housekeeping & Laundry and Dietary	Hskp/dietary. Better in dietary	Yes
Sharon Brady Housekeeping & Laundry	Good	No
Sandra Nolen Housekeeping & Laundry	Good but has some health problems	No
Mary Siegenthal Housekeeping & Laundry	Not good. Gossiper.	No

(R. Exh. 18; see also Tr. 519, 1117–1118.) Walters did not ask Ronk for specific recommendations about which employees JAG Healthcare should hire.¹⁴ (Tr. 525–526.)

3. JAG Healthcare's reasons for not hiring former Village Care employees

The record indicates that in deciding which former Village Care bargaining unit employees to hire on July 1, JAG Healthcare considered whether the employee:

- had a poor attitude (Tr. 262, 517; GC Exh. 20; R. Exh. 18);
- had a history of good or poor performance (Tr. 516; R. Exh. 18);
- was old, or "acted" old (Tr. 1125–1126, 1244–1245; R. Exh. 18, p. 10 (Walters wrote "age" and "90+" next to Martha Bishop's name); GC Exh. 20 ("90+" written next to Martha Bishop's name));¹⁵

¹⁴ Walters also did not consult with Restorative Nurse Rhonda Davey, Dietary Manager Valerie McKelvey, or Maintenance, Housekeeping and Laundry Director Al Claypool about staffing on June 30. (Tr. 260–261, 401, 415–416, 421.)

¹⁵ Despite these explicit references to Bishop's age in Walters' notes, Walters denied that age was a factor in deciding whether to offer employment to Bishop on June 30. (Tr. 1245.) I do not credit Walters' denial.

- was a smoker (Tr. 164–165; see also GC 20 and Tr. 305–309, 694–695, 784 (Walters wrote the letter “s” next to the names of two discriminatees (McLe and Peterman) who testified that they were smokers, and also next to two other discriminatees (Swiger and Teeter)); and/or
- was on layoff status (GC Exh. 20; R. Exh. 18).

Walters relied on Ronk to provide information about all of these criteria. Ronk complied, but did so only based on her memory (and without reviewing any personnel files).¹⁶ (Tr. 262, 269, 516–518.)

JAG Healthcare also kept track of the total number of bargaining unit members that it was identifying for hire. While deciding who to hire on June 30, Walters made handwritten annotations on a list of STNAs. Below the list, Walters wrote “10 + 4 = 14” (and crossed out “11 + 4 = 15”), numbers that are identical to the number of STNAs (10) and dietary plus housekeeping/laundry employees (4) that JAG Healthcare hired from the roster of former Village Care bargaining unit employees.¹⁷ (Tr. 305–309; GC Exh. 20; see also sec. II,(B),(2), *supra* (indicating that JAG Healthcare ultimately hired 10 STNAs who worked for Village Care, plus a total of 4 employees who worked in Village Care’s dietary and housekeeping/laundry departments; JAG Healthcare also hired 1 activity assistant).)¹⁸

¹⁶ There was some suggestion during the course of the trial that JAG Healthcare did not consider any Village Care employees who failed to submit an application for employment. However, both Griffiths and Walters dispelled that notion when they each admitted that because of the compressed transition timetable, JAG Healthcare hired at least some employees who did not submit their job applications beforehand. (Tr. 162–163, 187, 268; see also Tr. 871–872 (Walters called Wanda Haney for an interview on October 4 even though Haney’s July 1 job application could not be found)). Consistent with Griffiths’ and Walters’ admissions, the evidentiary record includes several applications that JAG Healthcare employees submitted days or weeks after JAG Healthcare hired them on July 1. (Compare GC Exh. 23 (showing July 1 dates of hire) with GC Exhs. 42(a), 43, 45, 49(a), and 50(a) (applications submitted between July 4 and 16).)

In addition, although Griffiths, Ronk, and Walters testified that absenteeism was a factor in JAG Healthcare’s hiring decisions (see Tr. 165–166, 262, 287, 518), Walters’ June 30 notes contain little information about the time/attendance performance of Village Care employees. (See GC Exh. 20; R. Exh. 18.) Indeed, Walters’ June 30 notes identify time/attendance as an issue for only three employees, and none of those employees were members of the bargaining unit. (See R. Exh. 18, pp. 5, 22, 24.) Because JAG Healthcare did not review personnel files on June 30, it ended up hiring at least three bargaining unit employees (Natalie Archer, and employees K.A. and Ca.D) that had records of absences and tardies that led to warnings when Village Care was operating the facility. (GC Exhs. 35, 36, 40(i)–(k).)

¹⁷ I have considered the fact that there are four LPNs/RNs listed on GC Exh. 20. However, all four of the LPNs and RNs on the list were crossed out because they were not selected for hire. I do not find that the “4” in the “10 + 4 = 14” notation refers to the LPNs and RNs on GC Exh. 20 because it would not make sense for Walters to add the number of STNAs selected for hire (10) to the number of LPNs/RNs who were not selected for hire (4).

¹⁸ I did not give weight to the explanations for JAG Healthcare’s June 30 hiring decisions that are stated in Walters’ undated notes about bargaining unit employees (GC Exh. 22) and in JAG Healthcare’s

4. Union organizer Dawn Courtright learns that nursing home has been sold, visits the facility and meets Griffiths

Also on June 30, dietary employee and Union Delegate Julie Barnhart called SEIU Organizer Dawn Courtright and advised her that a new owner was going to operate the nursing home, and that the new owners would be conducting a staff meeting that afternoon. Courtright responded that she would come to the facility. (Tr. 56, 607–608, 652–653.) When Courtright arrived, she walked into the nursing home, located Barnhart, and then walked outside of the building with Barnhart to the “smoke hut,” a small building behind the nursing home that employees used for smoking breaks. (Tr. 57, 91, 609, 1312.)

Upon seeing Courtright arrive, Knight notified Griffiths and told him that Courtright was not allowed to be at the facility.¹⁹ Knight also showed Griffiths where Courtright and Barnhart were speaking (in front of the smoke hut). (Tr. 1312–1313, 1410–1411.) A while later, Griffiths approached Courtright and Barnhart in front of the smoke hut. (Tr. 93, 609.) After establishing that Griffiths was the new owner, Courtright asked Griffiths if he was going to recognize the Union. (Tr. 58–59, 94, 610, 1608.) Griffiths answered, “no,” stating that none of his facilities are union, and the Village Care facility would not be union either. (Tr. 59, 146, 610, 1608.) Griffiths testified that he also asked Courtright to leave because she did not give proper notice of her visit, and because he did not think it was appropriate for her to attend the staff meeting. (Tr. 1609–1610, 1634–1635.)

Shortly after the exchange with Griffiths, Courtright and Barnhart entered the nursing home and went to the living room to wait for the meet-the-new-owners meeting to begin. (Tr. 60, 611–612.) Before the meeting started, however, Village Care Administrator Paul Andrella approached Courtright and asked her to come to his office. Courtright agreed. Once they (Courtright, Andrella, Barnhart, and Ronk) were in Andrella’s office, Andrella told Courtright that he was asked to tell her that she must leave the facility because she did not give 24 hours’ notice before her visit, as required by the collective-

October 18, 2010 position statement (GC Exh. PST 2, p. 3). JAG Healthcare created both of those documents well after it made its June 30 hiring decisions, and the documents include information from employee personnel files that Walters admitted she had limited, if any, time to review on June 30. (See GC Exh. 22 (referencing events that Walters listed as occurring as late as July 18, 2010); GC Exh. PST 2, p. 3.; see also sec. II,(B),(2), *supra* (discussing Walters’ limited review of employee personnel files).)

In addition, I do not find that the personnel/disciplinary records that JAG Healthcare entered into evidence (see R. Exh. 21) played a meaningful role in JAG Healthcare’s June 30 hiring decisions. Walters admitted that she had a limited time frame on June 30 to review employee personnel files that, as JAG Healthcare admitted, were in disarray. Walters therefore had to rely heavily on Ronk’s verbal assessment of the staff, and the notes that Walters made during the hiring process reflect that fact. (See sec. II,(B),(2), *supra*; GC Exh. 20; R. Exh. 18.)

¹⁹ Knight believed that Courtright did not give proper notice to the facility administrator before her visit, and also believed that Courtright was only allowed to visit the employee breakroom. (Tr. 1312.)

bargaining agreement.²⁰ (Tr. 60–61, 612–613, 655–656; see also GC Exh. 2, art. 32.) Courtright responded that Andrella did not give her 30 days' notice that the nursing home was sold. (Tr. 61, 614, 656; see also GC Exh. 2, art. 8.) Andrella warned Courtright that if she did not leave, he would call the police and have her arrested. (Tr. 614, 656.) Courtright accordingly got up to leave the facility, and instructed Barnhart to take detailed notes at the meeting and telephone her afterwards.²¹ (Tr. 63, 614, 656–657.)

C. The June 30 Meet-The-New-Owners Meeting

At 4 p.m., Griffiths held a meet-the-new-owners meeting in the Village Care facility living room for employees who were able to attend. Griffiths described his experience in the nursing home management and operation field, and explained that at midnight on July 1, JAG Healthcare would take over as the new management company for the nursing home. Over the course of the 1-hour meeting, Griffiths spoke on a variety of topics, including employee jobs, new terms and conditions of employment, and the Union.

1. Job status of Village Care employees

Consistent with the operations transfer agreement, Griffiths told Village Care employees that Village Care would terminate their employment that same day (June 30) at 11:59 p.m. Regarding employment with Galion Pointe (the new operating name of the facility as of July 1), Griffiths distributed job applications to employees at the meeting, and instructed them to turn the applications in for review as soon as possible. Griffiths did not set a firm deadline for submitting applications.²² (Tr. 152, 187, 345–346, 619, 782, 831; R. Exh. 4, p. 2.)

²⁰ I find that Griffiths was the one who asked Andrella to tell Courtright to leave. Indeed, Griffiths testified that he asked Courtright to leave directly after meeting her near the smoke hut. (Tr. 1609–1610, 1634–1635.)

²¹ Courtright did return to the nursing home later in the evening at the direction of her union team leader. When Andrella asked why she returned, Courtright asserted that she was present to represent the union members. Andrella reiterated that Courtright was not invited to the staff meeting or allowed in the building, and Courtright asked Andrella if he was denying members their right to union representation. Andrella responded by asking Courtright to go to the smoke hut, where he would send union members after the staff meeting concluded. Courtright complied, and returned home after speaking to union members who stopped by the smoke hut after the meeting. (Tr. 63–65, 631.)

²² The Acting General Counsel did not prove that Griffiths promised that he would hire all Village Care employees to work at Galion Pointe. While some witnesses testified that Griffiths told employees at the June 30 meeting that their jobs were safe (see Tr. 618, 628, 630; R. Exh. 4, p. 2 (Barnhart); Tr. 722 (Atkins); Tr. 897, 911 (Bishop); and Tr. 1014 (Diana Nolen)), several other witnesses, including some of the discriminatees, testified that Griffiths did not promise employees that they would be hired at Galion Pointe. (See Tr. 153, 1616 (Griffiths); Tr. 413 (Claypool); Tr. 692, 695, 697 (Peterman); Tr. 783, 804, 810 (Teeter); and Tr. 862–863, 880–882 (Haney).) Since the conflicting testimony on this point was equally credible, I find that the Acting General Counsel did not prove by a preponderance of the evidence that Griffiths promised to hire all Village Care employees. See *Central National Gotesman*, 303 NLRB 143, 145 (1991) (finding that General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the

2. New terms and conditions of employment

Griffiths also advised employees at the meeting that the terms and conditions of employment with Galion Pointe would be different than those that were in effect with Village Care. By way of example, Griffiths identified the following new policies that would apply to employees at Galion Pointe:

- Employees would no longer be allowed to smoke on the premises (including the smoke hut);
- Galion Pointe would not pay shift differentials (higher wages) to employees who worked on the night or weekend shifts;
- Employees would not be permitted to leave the premises during lunch time or break time;
- Galion Pointe would provide employees with a free lunch during their shift;
- Employees would not retain any paid time off that they accrued with Village Care; and
- Employees would be required to wear color-coded scrubs (with the color corresponding to the employee's department) that would need to be purchased from Galion Pointe.

(Tr. 148–152, 154–155, 177–178, 229, 393, 623–627, 693–695, 780–781, 783–784, 833–835, 860–861, 897–899, 1316, 1614–1615, 1670; R. Exh. 4.) Griffiths also gave each employee at the meeting a copy of the JAG Healthcare associate handbook, which described the Company's policies, procedures, work rules, programs, and benefits. (See GC Exh. 14, p. 4.) The handbook stated the following work rule about solicitation and distribution:

No Solicitation/Distribution

During work time, each associate is to be occupied with his or her assigned responsibilities. Engaging in the distribution of literature during work time or in working areas or soliciting support of other associates for any group, cause or product on work time is prohibited.

Non-associates are prohibited from soliciting or distributing any written or printed materials of any kind for any purpose on Company premises at any time. In addition, it is not permissible to post on the premises or remove from the premises any signs, notices, or printed material. Company bulletin boards are to be used exclusively for materials that have been reviewed and approved for posting by management.

allegation); *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (same), questioned on other grounds, *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

I also note that I have not given weight to testimony indicating that earlier on June 30 (before Griffiths met with employees) Ronk and Claypool assured employees that their jobs were safe. (See Tr. 828–829, 965–966, 976–977.) The Acting General Counsel did not establish that either Ronk or Claypool was authorized to speak on behalf of JAG Healthcare on June 30 in any capacity, much less on the question of whether employees would be hired by JAG Healthcare/Galion Pointe on July 1.

Associates of course are free to discuss anything they wish during breaks or meal periods, providing that all associates involved in the discussion are also on break or meal period. Distribution of literature or materials by associates in non-work related areas, on non-work time is also permissible. However, using any Company equipment or property to do so is not allowed and may be cause for disciplinary action.

(GC Exh. 14, pp. 25–26.)

3. Remarks about the Union

Regarding the Union, Griffiths advised employees that none of JAG Healthcare's other nursing homes were unionized (Tr. 154, 343, 391, 617, 660, 692, 709–710, 722, 741, 830, 901, 1618), and stated that as of July 1, Galion Pointe would not be a union facility either. (Tr. 627, 692, 722, 830, 901, 910–911, 1015; R. Exh. 4, p. 2.) Griffiths acknowledged that employees could still decide in the future if they wanted to be represented by a union, but asserted that he did not believe that union representation was necessary because employees did not need someone else to communicate with him if they had a problem.²³ (Tr. 153, 692, 781, 833, 862, 883, 900, 913–915, 1617–1618, 1671; R. Exh. 4, pp. 1–2.)

Finally, Griffiths noted that JAG Healthcare has a non-soliciting policy. (Tr. 617, 660, 1014–1015, 1620; GC Exh. 14, pp. 25–26.) Griffiths accordingly asked the nursing staff to call the police for assistance with removing any union organizers who came to the facility on or after July 1.²⁴ (Tr. 639, 642, 662, 722, 836, 861, 1015.)

D. JAG Healthcare Begins Notifying Employees about Hiring Decisions

At approximately 7:30 p.m. on June 30, JAG Healthcare finished reviewing Village Care's employees and asked Village Care Administrator Paul Andrella to begin notifying certain employees that they would not be hired to work at Galion Pointe. (Tr. 195, 233–234, 264.) Andrella accordingly spoke

²³ Griffiths denied telling employees that “there would not be a union at Galion Pointe, period” (see Tr. 1619), but the facts that I have found here are consistent with that narrow denial. Through his remarks, Griffiths essentially told employees (as he told Union Organizer Courtright earlier that afternoon, see sec. II,(B),(4), supra) that regarding union representation, employees were starting from scratch as of July 1 (i.e., without a collective-bargaining representative), but could nonetheless choose to unionize in the future if they wished.

In that connection, I also note that I have not credited Diana Nolen's testimony that Griffiths explicitly said that employees were not allowed to talk about the Union. (Tr. 1015.) Nolen's testimony on that specific point was not corroborated by any of the other witnesses who testified about Griffiths' remarks during the June 30 meeting.

²⁴ I have not credited Griffiths' equivocal denial that he gave this instruction. When asked by counsel if he made “any sort of remark regarding the Union [and] somebody being arrested,” Griffiths initially responded, “No,” but then stated that “[t]here was some sort of discussion on solicitation, I remember, during the meeting, and there—there was exchange in between that.” (Tr. 1619.) The facts that I have found above (concerning union representatives being excluded from the facility) are fully consistent with Griffiths' statement that he had an exchange with employees about solicitation, and are also fully consistent with Griffiths' efforts on June 30 to remove Courtright from the facility.

with several, but not all, employees to deliver the news that they would not be hired. (Tr. 223, 234, 419, 698, 757–758, 902, 921, 947–948.) Courtright received news of the adverse hiring decisions that same evening. (Tr. 66.)²⁵

E. July 1—The First Day the Nursing Home Operates as Galion Pointe

At midnight on July 1, the nursing home officially began operating under the name Galion Pointe. (Tr. 133, 143, 182.) All 35 nursing home residents that were at the facility on June 30 remained at the facility on July 1. (GC Exh. PST 2, Exh. C.) At approximately 10:30 p.m. on June 30, JAG Healthcare posted a notice near the employee time clock to announce the names of the former Village Care employees that it hired to work at Galion Pointe, effective July 1. (Tr. 233, 347–348, 399–400, 417–419, 522; GC Exh. 37 (list of employees hired by JAG Healthcare that was posted by the employee time clock on June 30/July 1).) As indicated on the notice, JAG Healthcare hired 15 employees from the 37-member Village Care bargaining unit, one more employee than JAG Healthcare admitted that it could have gotten by with to meet the State of Ohio's minimum staffing requirements. (Tr. 98, 1155; GC Exh. 37.) JAG Healthcare also hired all of Village Care's supervisors to fill similar positions at Galion Pointe. (Tr. 1630; see also GC Exh. 37) Several former Village Care employees who were not contacted on June 30 (by Andrella or another JAG Healthcare representative) reported to work their customary morning shifts, only to learn that JAG Healthcare did not hire them to work at Galion Pointe. (Tr. 599–601, 723–724, 865–866, 967.)

To supplement its staffing at the nursing home, and also to assist former Village Care employees as they adjusted to JAG Healthcare's philosophy and leaner staffing assignments, JAG Healthcare assigned several employees from other nursing homes to work at Galion Pointe (mostly on a temporary basis). (Tr. 166–168, 239, 269–270, 310–314, 354, 402, 1204–1205, 1281, 1507–1508, 1593–1594.) As part of that group of temporary assignments, JAG Healthcare brought in eight employees from other facilities to fill bargaining unit positions on July 1, and brought in four additional employees from other facilities to fill bargaining unit positions between July 2–5.²⁶ (GC Exh.

²⁵ At some point, Village Care prepared a written Notice of Termination/Transition that notified employees that their employment with Village Care was terminated as of 12:01 a.m. on June 30. (GC Exh. 18.) The evidentiary record does not show that Village Care or JAG Healthcare posted or distributed the written notice at any point before July 9, the day that Village Care final checks were available. (Tr. 235–237.)

²⁶ The following eight JAG Healthcare employees were assigned to Galion Pointe from other facilities on July 1 and temporarily filled bargaining unit positions: employees A.C., A.D., T.H., R.H., Ca. K., A.P., C.S., and M.W. (GC Exh. 57; see also Tr. 1214–1225.) Half of those eight employees held supervisory or nonbargaining unit positions at their home facilities (employees A.D., R.H., A.P., and C.S.). (GC Exh. 57.) The following four additional JAG Healthcare employees were assigned to bargaining unit positions at Galion Pointe with start dates from July 2–5: employees K.A., D.C., S.E., and P.S.. Employee S.E. was only assigned to Galion Pointe for 1 day (July 2). (GC Exh. 57.)

57.) During the July 2–5 timeframe, JAG Healthcare employed 16 members from the former Village Care bargaining unit, since it hired former Village Care employee B.H. on July 2. (GC Exh. 23.)

JAG Healthcare also asked its other staff (including supervisors) to perform bargaining unit work starting on July 1. Specifically, seven JAG Healthcare supervisors (Paul Andrella, Al Claypool, Connie Knight, Valerie McKelvey, Amanda Ronk, Doug Walters, and Miriam Walters) and three other nonbargaining unit employees (Rhonda Davey (LPN), Trula Fortney (administrative assistant), and Jayna Hetrick/Hopkins (marketing, admissions, and respiratory therapist) who were already assigned to Galion Pointe in some capacity performed some bargaining unit work starting on July 1.²⁷ (Tr. 271, 353, 402–403, 869, 884, 1203–1208, 1224, 1392–1394, 1673; GC Exhs. 23, 57.)

F. The Union Responds to JAG Healthcare's Hiring Decisions

1. The Union's press conference

On July 2, the Union held a press conference across the street from the Galion Pointe facility to protest JAG Healthcare's decision not to hire several former Village Care bargaining unit employees. (Tr. 69–70, 106–107.) A number of former Village Care employees attended the press conference, including: Julie Barnhart, Sharon Brady, Vicky Ely, Brenda Peterman, Mary Siegenthal, Martha Swiger, and Delena Teeter. (Tr. 106, 637–638, 789–790, 804, 841, 922–923, 969–970.)

The Union's press conference attracted the attention of Galion Pointe personnel who were on duty at the time. Indeed, after the press conference, Claypool called former employee Mary Siegenthal to tell her²⁸ that Ronk, Trula Fortney, and Director of Activities Cathy Shuster watched the press conference from inside the nursing home, and made a note of which former employees they saw at the conference.²⁹ (Tr. 842.) In

To the extent that Walters and Knight identified other employees who were assigned to other facilities but performed work at Galion Pointe, I have not given weight to that testimony because Walters and Knight did not establish with sufficient clarity that those additional employees were assigned to the Galion Pointe bargaining unit and/or did not establish the dates that the additional employees worked. (See Tr. 1214–1225, 1386–1394.)

²⁷ The parties disagree about whether Davey and Fortney were supervisors at Galion Pointe. I have not ruled on that dispute since the outcome does not affect my analysis.

²⁸ Claypool was motivated to warn Siegenthal in part because they shared a social relationship. (Tr. 852.)

²⁹ JAG Healthcare called Fortney and Ronk to testify in its case. Both Fortney and Ronk admitted that they observed the press conference from a nursing home window and commented about which former employees attended, though they suggested that they were merely making casual remarks. (Tr. 1685–1686, 1711–1712.) Fortney and Ronk denied being asked by JAG Healthcare to keep tabs on which former employees were at the press conference. (Tr. 1686, 1712.) Fortney also denied monitoring the attendees at the press conference. (Tr. 1686.)

I have credited Claypool's admission (as outlined in Siegenthal's testimony). Fortney and Ronk essentially corroborated the facts under-

addition, STNA Natalie Archer remarked that she would rather be outside with her friends and the Union than inside the Galion Pointe facility. (Tr. 536; GC Exh. 28(a).)

2. The Union asks JAG Healthcare to bargain, and files a petition for an election

On July 6, Courtright sent Griffiths a letter asking him to bargain with and recognize the Union at Galion Pointe. (Tr. 70–71, 97, 168; GC Exh. 4.) Specifically, Courtright asserted:

At this time the Union has bec[o]me aware that you have kept more than 51% of the bargaining unit work force so therefore by law you are require[d] to bargain[] and recognize the Union. The Union is demanding dates to negotiate over the aforementioned issue. Below is a list of dates that the Union is available to negotiate.

(GC Exh. 4.)

Also on July 6, SEIU Ohio Healthcare Division Director Frank Hornick filed a petition for certification of representative with the Board. (Tr. 98–99, 108–110; GC Exh. 6.) In a letter to JAG Healthcare about the petition, Hornick stated that “[i]t is imperative that you cease and desist any and all changes in working conditions, direct bargaining with the employees, and abstain from any current or future harassment or intimidation, as it is in violation of Federal Labor Law.” (Tr. 109; GC Exh. 7.) There is no evidence that JAG Healthcare contacted the Union to respond to either of the Union's July 6 letters.

G. Natalie Archer, Tracy Atkins, and Diana Nolen are Discharged

1. Traci Atkins' discharge

Traci Atkins worked as a dietary aide at Village Care, and applied for the same position at Galion Pointe on June 30. (Tr. 718, 722–723; GC Exh. 62(a).) Atkins, who was a member of the Union, was not among the employees that JAG Healthcare selected for hire on July 1. (Tr. 724; GC Exhs. 10(c), 37.)

On July 6, Dietary Manager Valerie McKelvey called Atkins and asked if she was interested in working at Galion Pointe full time. (Tr. 724–725; see also Tr. 725, 744 (McKelvey stated that Griffiths was “going to allow her to have somebody come back”).) Atkins responded that she would have to give notice at her other job (at McDonald's), but accepted McKelvey's offer to begin working at Galion Pointe on a full-time basis starting on July 19. Atkins and McKelvey also agreed that Atkins would work at Galion Pointe on a fill-in basis between July 6 and 19, and consistent with that agreement, Atkins worked a fill-in shift at Galion Pointe on July 7, and was scheduled to work another fill-in shift on July 14. (Tr. 725.) Atkins also ordered new scrubs that would meet Galion Pointe's color-coded uniform requirements, had her picture taken for a new identification badge, and submitted a second

lying Claypool's warning. In addition, Ronk's denial carries little weight because it relates to a tangential issue (whether some other JAG Healthcare official instructed her to monitor former employees at the press conference) and does not rebut the central issue that Ronk, who played a pivotal role in JAG Healthcare's hiring decisions at Galion Pointe in the summer of 2010, was keeping track of which former employees were at the union press conference.

application for employment (dated July 6) because McKelvey misplaced the application that Atkins submitted on June 30. (Tr. 725–726, 729; GC Exh. 62(d).)

On July 13, McKelvey called Atkins and told her that Griffiths had changed his mind about letting Atkins come back. McKelvey stated that there was a long story behind Griffiths's decision that she could not discuss with Atkins, but noted that Atkins might be called back after things calmed down with the transition process.³⁰ (Tr. 726–727, 745.)

2. Natalie Archer's discharge

Natalie Archer worked as an STNA at Village Care, was a member of the Union, and was one of the former Village Care employees that JAG Healthcare hired on July 1 to work at Galion Pointe. (Tr. 535; GC Exh. 10(c); R. Exh. 21(a) (application dated July 1).) JAG Healthcare hired Archer notwithstanding Ronk's report to Walters that Archer was a "playa" who was part of a clique of nurse aides that gossiped and bullied other employees. (Tr. 1125–1126, 1246; R. Exh. 18 at p. 10.)

As noted above, on July 2 (the day that the Union held its press conference across the street from the nursing home),³¹ Archer remarked to another employee that she would rather be outside with her friends and the Union than inside the Galion Pointe facility. (Tr. 536; GC Exh. 28(a).) Later that same day, Ronk called Archer to her office and asked her if she made the statement in question. When Archer confirmed that she did make the statement, Ronk asked Archer if she would like to remain at Galion Pointe. (Tr. 538–539.) Ronk also counseled Archer for having a "negative attitude and negative body language while on duty." (Tr. 538; GC Exh. 28(a).) Ronk record-

³⁰ Although Griffiths testified at trial after having the opportunity to hear Atkins' testimony, the Respondent did not ask Griffiths to refute any aspect of Atkins' testimony. Nor did the Respondent call McKelvey as a witness. (I note that McKelvey was no longer employed by JAG Healthcare at the time of trial.)

The Respondent did present testimony from Walters and Knight that Atkins "quit" on or about July 9 because she did not want to leave her job at McDonald's or accept JAG Healthcare's offer to work at another facility (Marion Pointe). (Tr. 1186–1187, 1323–1324, 1350.) I do not find that testimony to be reliable. First, the Respondent did not offer any documentation to corroborate Knight and Walters' testimony that JAG Healthcare wanted Atkins to work at Marion Pointe. Second, neither Knight nor Walters offered a reliable foundation for their testimony about Atkins' availability to work at Galion Pointe on a full-time basis. Indeed, Knight admitted that her testimony about Atkins' alleged job constraints was based on hearsay information from a conversation that Knight said she had with McKelvey. (See Tr. 1421—I did not credit Knight's subsequent assertion that she spoke to Atkins at McDonald's, where Atkins told Knight that the Galion Pointe job did not work for her.) No foundation at all was offered for Walters' claims about Atkins' job constraints in July. (See Tr. 334 (Walters' deposition testimony, in which she stated she did not know who Atkins was).) Because of these deficiencies, I have not credited Knight and Walters' testimony about Atkins' brief employment at Galion Pointe.

³¹ Although Ronk's notes state that the incident and counseling occurred on July 1, the testimony in the record establishes that Archer made her statement and was counseled on July 2, the same day as the Union's press conference. (Tr. 538, 1717.)

ed the following description of the July 2 counseling session with Archer in her notes:

[Archer] states . . . that she would rather [be] out there (outside with past employees and the Union) than be in here (Galion Pointe). [I] encouraged Natalie to improve her attitude as it is not appropriate in this working environment. Natalie continued to have negative language with [me] and negative body language (rolling eyes, shaking head). Again I encouraged Natalie not to make negative comments in front of residents which causes them increased anxiety. Natalie walked out of [my] office.

(GC Exh. 28(a); see also Tr. 1717–1719, 1727 (during trial, Ronk asserted that Archer's comment was a problem because it was a distraction from her duty to care for the nursing home residents).)³²

On July 5, Ronk made additional notes about Archer, stating that "Natalie [is] continuing to make negative comments to staff about being employed by Galion Pointe. She is also on 'Facebook' using inappropriate language about employees that remain at Galion Pointe." (GC Exh. 28(a).) There is no evidence that Ronk spoke to Archer in connection with Ronk's July 5 note, and the record does not contain information about the nature of Archer's alleged comments to other employees or her postings on Facebook.

On July 8, Archer attended a mandatory staff meeting. During the meeting, Ronk observed that Archer had a bad attitude, as indicated by the fact that Archer was "rolling her eyes and talking to coworkers and snickering about what was being said."³³ (GC Exh. 28(b).) At some point after the meeting, Archer notified Galion Pointe administrators that she would not be able to work her assigned shift that evening because her son was ill. (Tr. 1714; GC Exh. 35(e); see also GC Exh. 28(b).)³⁴

On or about July 12, Ronk called Archer into her office and advised her that she was being terminated. (Tr. 1720 (noting that Knight and Davey were also present); GC Exh. 54, p. 3.))

³² I do not credit Ronk's trial testimony that after the meeting in Ronk's office, Archer left the nursing home in the middle of her shift, without having anyone relieve her of her duties. (See Tr. 1719.) Ronk did not document Archer's alleged early departure anywhere in her notes or in Archer's personnel file, and there is no evidence that Galion Pointe disciplined Archer for an early departure on July 2. (See GC Exh. 28(a); R. Exh. 21(a).)

³³ Walters also testified that she observed Archer's poor attitude during the July 8 staff meeting. (Tr. 1161–1162.) I have given little weight to Walters' testimony on this point because Walters stated in her pretrial deposition that she did not know who Archer was. (Tr. 333–334.) My factual findings about the meeting are therefore based on Ronk's observations, which (as far as the staff meeting is concerned) were not rebutted or discredited during the trial.

³⁴ During her testimony, Ronk stated that when Archer called off her shift, Archer claimed that she herself was sick. Ronk questioned the validity of Archer's absence, asserting that Archer "didn't seem to be sick at the [staff] meeting" held earlier in the day. (Tr. 1714.) I have not credited that portion of Ronk's testimony because it is not consistent with Archer's absentee report (which cites Archer's son's illness as the reason for Archer's absence) or Ronk's July 8 notes about Archer's absence (which merely state that Archer called off work for her shift). (See GC Exhs. 28(b), 35(e).)

According to Ronk, Archer responded by leaving her office without further comment. (Tr. 1720–1721; see also Tr. 1347; but see Tr. 1024 (on July 12, Diana Nolen saw Archer emerge from Ronk’s office in tears).) Galion Pointe relied on Ronk’s notes about the events of July 2, 5, and 8 as its bases for terminating Archer. (GC Exh. 54, pp. 3–5; see also Tr. 456–458 (Knight sent Ronk’s notes to the Ohio Department of Unemployment).)

3. Diana Nolen’s discharge

Diana Nolen worked as an STNA at Village Care, was a member of the Union, and also was one of the former Village Care employees that JAG Healthcare hired on July 1 to work at Galion Pointe. (Tr. 1012; GC Exh. 10(c); R. Exh. 20(k) (application dated June 30).) According to Ronk (Nolen’s supervisor), Nolen performed well as an STNA when Village Care operated the nursing home, but Nolen’s attitude deteriorated once Galion Pointe took over operations. (Tr. 1722–1723.)

On July 12, Trula Fortney called Nolen (who was off duty) and told her that Ronk wanted to meet with her at 1 p.m. that day. (Tr. 1021–1022.) When Nolen arrived at the nursing home, she reported to Ronk’s office, where Ronk and Knight were waiting.³⁵ Nolen began the conversation by asking up front if she was being fired, and Ronk answered, “[Y]es.” (Tr. 1023.) Ronk then explained that Nolen was being fired because a nursing home resident overheard Nolen and another STNA speaking in the hallway about the Union. Ronk added that the nursing home resident was scared by the conversation and called his/her family, who in turn called the nursing home.³⁶ (Tr. 1024, 1034.) Nolen asked Ronk to tell her which resident made the complaint, but Ronk declined. Nolen then left the facility.³⁷ (Tr. 1024.)

³⁵ Ronk testified that Rhonda Davey was also present, while Nolen testified that Fortney (and not Davey) was also present. (Compare Tr. 1724 with Tr. 1023.) This conflict in testimony is not material to my analysis because neither Davey nor Fortney testified about the meeting.

³⁶ Nolen believed that Archer was the STNA in question, but denied speaking with Archer about the Union. (Tr. 1034–1036; see also Tr. 1024 (after her meeting with Ronk on July 12, Nolen saw Archer enter Ronk’s office, and then leave in tears 10–15 minutes later).)

³⁷ At trial, Ronk reported a significantly different version of Galion Pointe’s rationale for terminating Nolen. According to Ronk, Galion Pointe terminated Nolen based on a complaint from a nursing home resident. Ronk’s notes dated July 9 state:

[A nursing home resident called Ronk] down to his room [and] complained of STNA Diana Nolen [“slamming” things around his room and “demanding” that he turn on his side. When he told her that he was in pain, [Nolen stated] “no you’re not.” [The nursing home resident] states that Diana has “a bad attitude” and that she “doesn’t belong in this job.” [I] assured [the resident] that if he is in pain to let the nurse know, and that his pain is whatever he says it is.

(GC Exh. 25(d).) Ronk testified that after interviewing the resident, she spoke with the nursing home administrator (Andrella) and they decided to terminate Nolen. (Tr. 1723.)

I have not credited Ronk’s account of the rationale for Nolen’s discharge for several reasons. First, Ronk’s testimony that she and Andrella jointly decided to terminate Nolen was undermined by the fact that Andrella testified in his pretrial deposition that he did not know who Nolen was, or that she had been terminated. (Tr. 240–241, 1723.) Second, Ronk admitted that she did not follow Galion Pointe’s internal

Still in disbelief, Nolen called the facility from her car and spoke to Ronk to confirm that she had been fired. Ronk reiterated that Nolen was fired because a nursing home resident became scared after overhearing Nolen and another STNA talking about the Union.³⁸ (Tr. 1025.)

H. Hiring at Galion Pointe—July Through September 2010

1. Several former Village Care employees apply for jobs at Galion Pointe

In the weeks after Galion Pointe began operating the nursing home, several former Village Care employees who were not hired on July 1 submitted applications for employment for bargaining unit positions. As indicated in the following table, most of the employees submitted applications by mid-July:

Employee Name & Job Title	JAG Healthcare Application Date
Martha Bishop—STNA	July 12 (R. Exh. 20(d).)

procedures for investigating resident complaints. Normally, a complaint of resident abuse at Galion Pointe is investigated by the nursing home social worker or by the nursing home administrator. (Tr. 534.) Ronk admitted, however, that she did not know if any such investigation was completed (beyond her own interview of the resident), and further admitted that she believed and relied on the nursing home resident’s complaint without investigating the matter further. (Tr. 534–535.) Third, there is no evidence that Galion Pointe complied with the State of Ohio’s reporting requirements for complaints of nursing home resident abuse, such as immediately filing an initial report about the complaint and incident, and then filing a final report within 5 days. (Tr. 1074.) And fourth, despite the serious nature of the alleged complaint of resident abuse, both Ronk and Knight indicated that Ronk said little, if anything, about the complaint of resident abuse during Nolen’s termination meeting (Davey and Fortney did not testify about what was said in Nolen’s discharge meeting). Specifically, Ronk testified that upon learning that she was terminated, Nolen smiled, said thank you, and walked out her office without asking about the reason for the termination. (Tr. 1725.) Knight also testified that Nolen was happy to be terminated, but when asked about the reasons that were provided to Nolen for her termination, Knight only commented that reasons “were offered,” without describing the nature of those reasons. (Tr. 1365.) All of those deficiencies raise significant questions about the credibility of the purported complaint of resident abuse, and about the credibility of Ronk’s testimony that the complaint was the basis for Nolen’s discharge.

Finally, I note that I did not credit Walters’ testimony about Nolen’s discharge because Walters’ testimony was based on hearsay information that she obtained from Ronk. (Tr. 1162.) I also did not credit Walters’ trial testimony about Nolen’s attitude, because in her pretrial deposition, Walters stated that she did not know who Nolen was, or whether Nolen had been employed at Galion Pointe. (Tr. 332–333, 1130.)

³⁸ I do not find that Nolen’s credibility was harmed by the fact that she started a new job at Galion Community Hospital on July 12, the same day that she was fired from her position at Galion Pointe. (Tr. 1030.) Although JAG Healthcare argued that Nolen’s decision to start another job was evidence that Nolen engaged in misconduct at Galion Pointe (and was looking for a way out of her position there), that argument is purely speculative. (See R. Posttrial Br. at 31.) I observed Nolen’s demeanor when she was cross-examined about this issue, and I credit Nolen’s explanation that she had to find another job because she has two children. (Tr. 1030.)

Employee Name & Job Title	JAG Healthcare Application Date
Jolene Dennis—STNA	July 9 (R. Exh. 20(f).)
Ceileata Dotson—STNA	No application in the record
Vicky Ely—STNA	July 1 (Tr. 923.)
B.H.—STNA	Application is undated (GC Exh. 47.)
Kathleen Mcle—STNA	July 9 (R. Exh. 20(j).)
Sandra Ohler—STNA	July 19 (R. Exh. 20(m).)
Brenda Peterman—STNA	July 6 (R. Exh. 20(n).)
Brandi Riley—STNA	No application in the record
Bobbie Stephens—STNA	July 9 (R. Exh. 20(r).)
Cassandra Storer—STNA	July 25 (R. Exh. 20(s).)
Martha Swiger—STNA	July 9 (R. Exh. 20(t).)
Delena Teeter—STNA	September 7 (Tr. 809; R. Exh. 20(c).)
Judy Watts—STNA	No application in the record
Jackie Zent—STNA	No application in the record
Traci Atkins—Dietary	July 6 (R. Exh. 20(b).)
Julianne Barnhart—Dietary	July 6 (R. Exh. 20(c).)
Wanda Haney—Dietary	July 1 (Tr. 870–871.)
Shirley Sedmak—Dietary	No application in the record
Sharon Brady—Housekeeping & Laundry	July 15 (R. Exh. 20(e).)
Sandra Nolen—Housekeeping & Laundry	Did not file an application (Tr. 1059.)
Mary Siegenthal—Housekeeping & Laundry	Filed application on or about July 6. Did not file another application after informed on or about July 9 that the original copy was lost. ³⁹ (Tr. 839, 853.)

JAG Healthcare hired only two applicants from this list of former Village Care employees that were part of the bargaining unit: employee B.H. (hired on July 2); and Traci Atkins (hired on July 7, but discharged on or about July 13). (GC Exh. 23; see also sec. II,(G),(1), supra.)

2. JAG Healthcare hires new employees to fill multiple bargaining unit positions

In the months of July, August, and September 2010, JAG Healthcare hired several new employees (i.e., employees who were not former Village Care employees) to work at Galion Pointe, including 17 employees who were hired as STNAs, 8 employees who were hired to do bargaining unit work in the dietary department, 2 housekeeping/laundry employees, and 1 hospitality aide.⁴⁰ The new round of hiring was driven by the

³⁹ There were no written guidelines at Galion Pointe for receiving and retaining job applications. (Tr. 594.) Generally, applicants could give their paperwork to Knight or Andrella, but applicants also turned in paperwork to various department heads. In the initial time period after Galion Pointe began operating the nursing home, Knight stored job applications that she received in a pile under her desk. (Tr. 1411–1413.)

⁴⁰ I note that contrary to JAG Healthcare’s assertion in its August 20, 2010 position statement that it did not hire the discriminatees because no positions were available, JAG Healthcare was forced to hire a high number of new employees at Galion Pointe in part because many of its employees resigned or were discharged in the same time period (July to September). (See GC Exh. 23; compare GC Exh. PST 1, p. 6.) High employee turnover rates are common at nursing homes. Griffiths described Galion Pointe’s turnover rate as “below 50 percent,” which he

needs of the nursing home residents, JAG Healthcare’s decisions to discharge some of the employees that it hired on July 1, and the fact that many of the JAG Healthcare employees who were assigned to Galion Pointe to help with the initial transition period were ready to return to their original facilities. (Tr. 1621–1623; GC Exh. 23.) As indicated in the following table, most of JAG Healthcare’s hiring decisions occurred in or after mid-July:

Date Range	Number of New STNAs Hired	Number of New Dietary Department Ees Hired	Number of New House-keeping & Laundry Ees Hired	Number of Other New Bargaining Unit Ees Hired
July 1–10, 2010	2	2	0	0
July 11–20, 2010	7	3	2	0
July 21–31, 2010	4	0	0	0
August 1–31, 2010	1	1	0	1 (hospitality aide)
September 1–30, 2010	3	2	0	0
Total (July–September)	17	8	2	1

(GC Exhs. 23, 57.)⁴¹

Ronk, as the director of nursing, took the lead on most of the hiring, but she did consult with Walters occasionally. (Tr. 273, 1225.) Ronk kept track of the action that she took on each application by writing on the first page of the application packet “Received,” “Reviewed” and “Interviewed,” with an accompanying date, when the relevant step in the process was completed. (See, e.g., Tr. 565–566; GC Exh. 29.) Ronk interviewed certain applicants for bargaining unit positions in July, but did not select any former Village Care employees for interviews. (Compare GC Exhs. 29(p), (cc) (applicants who were new to the facility and were interviewed) with GC Exhs. 30(a), (e), (bb) (applicants who were former Village Care employees and were not interviewed).)

characterized as low when compared to the national average of nearly 100 percent per year. (Tr. 1622–1623.)

⁴¹ As previously noted, JAG Healthcare did hire two former Village Care employees for bargaining unit positions after July 1: Traci Atkins and employee B.H.. (See sec. II,(H),(1), supra.) Atkins and employee B.H. are not included in the data referenced in this section because I have restricted the data to employees who were new to the facility.

I also note that the table above only includes applicants who accepted positions at Galion Pointe. Ronk offered at least one bargaining unit position (STNA) to a new applicant who ultimately did not accept employment at the facility. (Tr. 568–569; GC Exh. 29(t).)

I. Walters' August 27 Notes About Employees

In a set of handwritten notes bearing the date August 27, Walters wrote the following remarks about certain employees at Galion Pointe:

[K.S.], good, union is stupid
 [S.R.], good
 [Ka.], 2nd shift, good
 [M.], good—said union was falling apart before we took over

(Tr. 298–301, 303; GC Exh. 19.) Walter acknowledged that the only “M.” employed at Galion Pointe was STNA M.S. (Tr. 301; see also sec. II.(B).(2) (employee K.S. was also an STNA).)

J. Wanda Haney's October 4 Interview

On or about October 4, Walters contacted Haney and asked her to come to the facility to interview for a position in the dietary department because employee M.D. recommended Haney for the position. (Tr. 872, 1137–1138.) At that point, JAG Healthcare did not have an application on file for Haney. (Tr. 870–872, 1138.) Haney agreed, and met with Walters for an interview, during which Haney noted that she was seeking a wage of \$10/hour. (Tr. 874, 1140.) Haney did not receive a job offer to work at Galion Pointe.⁴² (Tr. 874.)

⁴² I have not credited Haney's testimony that Walters asked her during the interview if she would have any problems being “outside” the Union (to which Haney responded that she would not have a problem with that). (Tr. 873–874.) Walters denied making that statement (Tr. 1144), and since her denial was equally credible as Haney's testimony on that point, the Acting General Counsel did not meet its burden of proving that Walters in fact made the statement. See *Central National Gottesman*, 303 NLRB at 145 (finding that General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB at 591–592 (same), questioned on other grounds, *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

On the other hand, I did not find Walters credible when she testified about why she did not offer Haney a position in the dietary department after the October interview, primarily because significant portions of Walters' testimony on that issue were inconsistent with other evidence in the record. For example, Walters testified that Haney was “unkempt,” had fingers that were “stained yellow,” and “smelled like the bottom of a dirty ashtray” at her interview, but Haney's 2004–2005 performance evaluation (the only one entered into the record) states that Haney met expectations in all areas related to hygiene and sanitary regulations, and there is no evidence that Haney's personal hygiene ever posed a problem when she worked for Village Care. (Tr. 1138; R. Exh. 21(i).) Similarly, Walters testified that Haney's salary demand of \$10/hour was too high when compared to other employees in the dietary department, but the record shows that JAG Healthcare paid two dietary department employees (M.D. and M.M.) over \$11/hour, and paid another dietary employee (C.W.) \$9.50/hour. (Tr. 1140, 1142; GC Exh. 23.) Because of those inconsistencies (among others), I did not find Walters' testimony to be reliable about the reasons for Haney's nonselection.

Discussion and Analysis

A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

In this case, many of the relevant facts were established by business records that are not disputed. Witness credibility, however, was pivotal in certain areas, and in particular was relevant to the events of June 30 (when JAG Healthcare made its initial hiring decisions and met with Village Care employees) and to the facts related to JAG Healthcare's decisions to discharge Traci Atkins, Natalie Archer, and Diana Nolen. I have outlined my credibility findings in the findings of fact above and in the analysis below. However, as a general matter, I found that portions of Amanda Ronk's and Miriam Walters' testimony lacked credibility because each of them provided testimony that at times was evasive, implausible or contradicted by JAG Healthcare documentation. Unless otherwise noted, I generally credited the testimony of the other witnesses that the parties presented because the testimony was presented in a forthright manner and was corroborated by other evidence.

B. When Did JAG Healthcare Assume Control of the Nursing Home?

In litigating this case against JAG Healthcare, the Acting General Counsel offered alternative theories of liability on certain issues because it was not certain about when JAG Healthcare began operating and exercising authority over the nursing home. For example, the Acting General Counsel argued that JAG Healthcare unlawfully terminated, or alternatively refused to hire, 21 Village Care employees on or about June 30. (See GC Exh. 1(k), pars. 14(b)–(e).) Similarly, the Acting General Counsel argued that JAG Healthcare unlawfully withdrew recognition from, or alternatively refused to recognize and bargain with, the Union on or about June 30. (See GC Exh. 1(k), pars. 15(c)–(d).)

Now that the trial has been completed, the evidentiary record makes it clear that JAG Healthcare did not begin operating the nursing home until July 1. The operations transfer agreement between Village Care and Galion Pointe/JAG Healthcare is explicit on that point, and to the extent that JAG Healthcare CEO James Griffiths spoke to employees on June 30, he did so

only as a JAG Healthcare representative in preparation for the transfer of operations that would occur at 12 a.m. on July 1. (See Findings of Fact (FOF), sec. II,(A),(5).)

My finding that JAG Healthcare took control of the nursing home on July 1 resolves the question of which of the Acting General Counsel's alternative theories are viable. JAG Healthcare did not terminate the 21 discriminatees in question on June 30 (as alleged in pars. 14(b)–(c) of the complaint)—instead, Village Care terminated the 21 discriminatees,⁴³ and JAG Healthcare did not select them for hire on or after July 1. Similarly, JAG Healthcare did not withdraw recognition from the Union on June 30 (as alleged in par. 15(c) of the complaint)—instead, JAG Healthcare did not recognize or bargain with the Union once JAG Healthcare began operating the nursing home on July 1. (See FOF, sec. II,(B)–(C), (F).) Accordingly, I recommend that paragraphs 14(c) and 15(c) of the complaint be dismissed. I will address the remaining allegations in paragraphs 14 and 15 of the complaint in my analysis below.

C. Is JAG Healthcare a Successor Employer to Village Care?

To determine whether a new employer is the successor employer to the previous employer, the Board considers the totality of the circumstances to evaluate whether there is a substantial continuity between the two companies. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). Specifically, the Board considers the following factors:

whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Id.; see also *C & B Flooring Associates, LLC*, 349 NLRB 692, 696 (2007). In conducting the analysis, the Board keeps in mind the question whether those employees who have been retained will understandably view their job situations as essentially unaltered. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. at 43.

Applying that standard to JAG Healthcare, I find that JAG Healthcare is a successor employer to Village Care. When JAG Healthcare took over operations from Village Care on July 1, it continued to operate the facility as a nursing home. There was

⁴³ To be sure, Village Care was hardly efficient in notifying employees of their terminations on June 30. At most, Village Care employees learned that they would be terminated on June 30 when Griffiths told employees that fact at the June 30 meet-the-new-owners meeting (conducted with Village Care Administrator Paul Andrella's tacit approval), and to a lesser extent when Andrella (in the role of the current Village Care administrator and the new Galion Pointe administrator) told certain Village Care employees on June 30 that they would not be hired to work at Galion Pointe. (See FOF, sec. II,(C)–(D).) The shortcomings in Village Care's efforts to notify its employees on June 30 that they were terminated, however, do not trump the explicit language in the operations transfer agreement, which explicitly stated that Village Care would terminate its employees at 11:59 p.m. on June 30. (See FOF, sec. II,(A),(5).)

no break in service to the existing nursing home residents, and when JAG Healthcare hired its employees and supervisors, it hired them to perform the same jobs that they held when Village Care was their employer. Although JAG Healthcare did set its own initial terms and conditions of employment and implement its philosophy that all employees should respond to patient needs when possible (i.e., regardless of their specific job description), members of the bargaining unit continued to provide the same core set of services that they provided when Village Care operated the nursing home. As a result, the employees that JAG Healthcare retained reasonably would have viewed their jobs as essentially unaltered. See *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063–1064 (2001) (finding substantial continuity between the predecessor and successor because although the successor provided different pay rates and benefits than the predecessor, the employee bus drivers were performing the same work that they performed for the predecessor).⁴⁴

D. Did JAG Healthcare Engage in Conduct That Affected its Rights as a Successor Employer?

Ordinarily, a successor employer is free to set the initial terms and conditions of employment under which it will hire the employees of a predecessor. In addition, the successor employer is not bound by the substantive provisions of the predecessor's collective-bargaining agreement with the union, and is also not obligated to hire the predecessor's employees, as long as it does not discriminate against union employees when making its hiring decisions. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. at 40 (citing *NLRB v. Burns Security Services*, 406 U.S. at 280 fn. 5, 284, 294).

In this case, however, the Acting General Counsel alleges that JAG Healthcare engaged in conduct that altered its rights as a successor employer and, ultimately, violated the Act. I have addressed each of those allegations below.

⁴⁴ I do not find that JAG Healthcare was a “perfectly clear” successor. When it is “perfectly clear” that a successor employer will retain the predecessor's employees under their prior working conditions, the successor must first consult with the employees' bargaining representative before setting initial terms and conditions of employment. *NLRB v. Burns Security Services*, 406 U.S. at 294–295. The “perfectly clear” successor exception only applies, however, when the successor employer has either actively or by tacit inference misled employees into believing they would be retained without change in their wages, hours, or conditions of employment, or when the successor employer failed to clearly announce its plan to establish new terms and conditions prior to inviting the predecessor's employees to accept employment. *Garden Grove Hospital & Medical Center*, 357 NLRB No. 63, slip op. at 4 (2011).

The criteria for the perfectly clear successor exception have not been met in this case, particularly given the undisputed evidence that on June 30, JAG Healthcare expressly told Village Care employees about several areas where JAG Healthcare would offer different terms and conditions of employment than Village Care. See *Spruce Up Corp.*, 209 NLRB 194, 195 (1974) (perfectly clear successor exception does not apply where the successor clearly announces its intent to establish a new set of conditions before inviting former employees to accept employment), *enfd.* 529 F.2d 516 (4th Cir. 1975); see also FOF, sec. II,(C),(2).

1. Did JAG Healthcare unlawfully tell former Village Care employees that there would be no Union at Galion Pointe?

The Acting General Counsel alleges that JAG Healthcare told employees that there would be no union serving as their collective-bargaining representative when it assumed control of the nursing home on July 1. (GC Exh. 1(k), par. 11.) As the Board has explained, “[w]hen an employer tells applicants that it will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against the [predecessor’s] employees to ensure its nonunion status.” *Kessel Food Markets*, 287 NLRB 426, 429 (1987), *enfd.* 868 F.2d 881 (6th Cir. 1989), *cert. denied* 493 U.S. 820 (1989). Such statements violate Section 8(a)(1) of the Act because they are coercive. *Id.* In addition, a successor employer that informs applicants that there will be no union at the company loses its right under *Burns* to set initial terms and conditions of employment. *C & B Flooring Associates, LLC*, 349 NLRB at 697 (citing *Advanced Stretchforming International*, 323 NLRB 529, 530 (1997), *enfd.* in pertinent part 233 F.3d 1176 (9th Cir. 2000)).

On June 30, the day before JAG Healthcare began operating the nursing home, JAG Healthcare CEO James Griffiths met with Village Care employees and told them that starting on July 1, there would be no union at the facility. Since Griffiths made that statement before JAG Healthcare made its June 30 hiring decisions, Griffiths indicated to the employees that JAG Healthcare intended to discriminate against them to ensure that the nursing home would be nonunion (just as the Board described in *Kessel Food Markets*). Griffiths’ remarks remained coercive even though Griffiths acknowledged that JAG Healthcare employees could later choose to unionize. Regardless of that acknowledgment, Griffiths’ remarks still notified Village Care employees that JAG Healthcare intended to discriminate against them because of their status as union members when it made its June 30 hiring decisions. (See FOF, sec. II,(C),(3).)

I note that Griffiths followed through with his promise that Galion Pointe would be nonunion as of July 1 by refusing to recognize and bargain with the Union despite Courtright’s verbal request on June 30 and her written request on July 6. (See FOF, sec. II,(B),(4), (F),(2).) Griffith’s refusal to recognize the Union on June 30 is particularly telling, because he unequivocally told Courtright that JAG Healthcare would not recognize the Union on June 30 even though JAG Healthcare had not yet made its initial hiring decisions. See *C & B Flooring Associates, LLC*, 349 NLRB at 697 (noting that not only did the employer tell employees that they would be hired without union representation, but also the employer acted on its promise by repeatedly refusing to bargain with the union); (see also FOF, sec. II,(B),(4)–(5) (Courtright asked Griffiths to recognize the Union before Griffiths met with employees at 4 p.m. on June 30), (D) (JAG Healthcare completed its June 30 hiring decisions at 7:30 p.m.).

Based on the foregoing analysis, I find that JAG Healthcare violated Section 8(a)(1) of the Act when Griffiths told Village Care bargaining unit employees on June 30 that there would be

no union serving as their collective-bargaining representative when JAG Healthcare took control of nursing home operations at Galion Pointe on July 1. (GC Exh. 1(k), par. 11.) Since, as a result of that violation, JAG Healthcare lost its right to unilaterally set the initial terms and conditions of employment,⁴⁵ I also find that JAG Healthcare violated Section 8(a)(5) and (1) of the Act by unilaterally changing employees’ terms and conditions of employment on July 1 without first giving notice to and bargaining with the Union (GC Exh. 1(k), par. 16) and by generally refusing to recognize and bargain with the Union since June 30 (GC Exh. 1(k), par. 15(d)).

2. Did JAG Healthcare hire enough unionized employees to create an obligation to recognize and bargain with the Union at Galion Pointe?

As an alternative theory for its allegation that JAG Healthcare has unlawfully refused to recognize and bargain with the Union since June 30 (see GC Exh. 1(k), par. 15(d)), the Acting General Counsel alleges that JAG Healthcare made hiring decisions that obligated it to bargain with the Union. (See GC Posttrial Br. at 44–46.)

The Board has held, consistent with Supreme Court precedent, that a successor employer inherits the collective-bargaining obligation of its predecessor if a majority of the successor’s employees in an appropriate bargaining unit were employed by the predecessor, and if there exists substantial continuity between the enterprises. *Specialty Hospital of Washington–Hadley, LLC*, 357 NLRB 814, 815 (2011); *Van Lear Equipment, Inc.*, 336 NLRB at 1063. As noted above, I have found that there is a substantial continuity between Village Care and JAG Healthcare/Galion Pointe. (See Discussion and Analysis, sec. C.) There is also no dispute that the bargaining unit at issue in this case is an appropriate bargaining unit. I therefore turn to the question of whether a majority of the employees in JAG Healthcare’s bargaining unit were employed by Village Care.

The triggering fact for when a successor employer becomes obligated to bargain is when a majority of employees in the successor employer’s bargaining unit were employed by the predecessor (and therefore are represented by the union). *Fall River Dyeing Corp. v. NLRB*, 482 U.S. at 46. In some instances, the successor’s obligation to bargain begins immediately, because the successor immediately begins providing a full range of operations and a majority of the employees in the successor’s bargaining unit are represented by the union. By contrast, when a successor employer gradually builds its operations and hires employees during an initial startup period, the Board does not evaluate whether the successor has an obligation to bargain until the successor has hired a substantial and representative complement of its work force.⁴⁶ *Id.* at 46–47. To

⁴⁵ There is no dispute that JAG Healthcare unilaterally set initial terms and conditions of employment that went into effect on July 1. The new terms and conditions of employment included (among other things) unilateral changes to employee wages and hours, both of which are mandatory subjects for collective bargaining. (See FOF, sec. II,(C),(2).)

⁴⁶ If the union asks the successor employer to bargain before the successor has hired a substantial representative complement of its work

decide whether a substantial and representative complement exists in a particular employer transition, the Board considers: whether the job classifications designated for the operation were filled or substantially filled; whether the operation was in normal or substantially normal production; and the size of the complement on that date and the time expected to elapse before a substantially larger complement would be at work, as well as the relative certainty of the employer's expected expansion. *Id.* at 48–49.

The evidentiary record here shows that JAG Healthcare began providing a full range of operations at Galion Pointe on July 1, as soon as it assumed control of the facility. JAG Healthcare essentially had no choice but to immediately begin full operations on July 1 because it had an obligation to care for the 35 nursing home residents who were already at the facility, and because it had to maintain staffing levels that would satisfy the State of Ohio's regulations. (See FOF, sec. II,(E).) See also *Jennifer Matthew Nursing & Rehabilitation Center*, 332 NLRB 300, 307 (2000) (finding that the successor employer was in full production the moment that it took control of the nursing home, in part because the successor represented to the State of New York that it would have sufficient staffing to provide adequate nursing care to the patients once the successor assumed control of the facility). July 1 is therefore the relevant date to determine whether JAG Healthcare was obligated to bargain with the Union.

On July 1, JAG Healthcare employed 23 members in the bargaining unit, 15 of which were former Village Care employees (the other 8 were employees who were assigned to Galion Pointe from other JAG Healthcare facilities).⁴⁷ (See FOF, sec. II,(E).) Since a majority of the employees in JAG Healthcare's bargaining unit on July 1 were former Village Care employees and thus represented by the Union, I find that JAG Healthcare had an obligation to bargain with the Union that was triggered on July 1.⁴⁸ And, since JAG Healthcare refused to recognize

force, the union's premature request remains in force until the moment that the successor attains the substantial and representative complement. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. at 52.

⁴⁷ I have not counted the seven JAG Healthcare supervisors that performed some bargaining unit work in my analysis, because the collective-bargaining agreement explicitly states that the bargaining unit does not include managers or supervisors. (See FOF, sec. II,(A), (E).) I also have not counted Rhonda Davey, Trula Fortney, or Jayna Hetrick/Hopkins in my analysis because the bargaining unit does not include nurses (Davey), clerical workers (Fortney), or professionals (Hetrick/Hopkins). In any event, the result would not change if I added Davey, Fortney and/or Hetrick/Hopkins to the bargaining unit, because former Village Care bargaining unit employees would still be in the majority. I also note that my decision to count the eight transfer employees as part of the bargaining unit is arguably a generous decision in JAG Healthcare's favor, given that half of those eight employees held positions at their home facilities that were supervisory in nature or otherwise would not be classified as bargaining unit positions. (*Id.*)

⁴⁸ I am not persuaded by JAG Healthcare's argument that the Acting General Counsel did not present sufficient evidence to prove that the former Village Care employees in the bargaining unit were represented by the Union. Specifically, JAG Healthcare argued that the Acting General Counsel failed to present evidence that the former Village Care employees that it hired worked enough hours to qualify as full-time or part-time employees, a prerequisite for being part of the bargaining

and bargain with the Union despite the Union's requests on June 30 and July 6, I find that JAG Healthcare violated Section 8(a)(5) and (1) of the Act. (GC Exh. 1(k), par. 15(d).) (See FOF, sec. II,(B),(4), (F),(2) (June 30 and July 6 requests that JAG Healthcare recognize and bargain with the Union).)

3. Did JAG Healthcare unlawfully discriminate against former Village Care bargaining unit employees when making hiring decisions?

Next, the Acting General Counsel alleges that since June 30, JAG Healthcare has violated Section 8(a)(3) and (1) of the Act by refusing to hire former Village Care bargaining unit employees because they were members of the Union and because JAG Healthcare sought to avoid having union members comprise a majority of its bargaining unit. (GC Exh. 1(k), pars. 14(d)–(e).)

To establish a violation of Section 8(a)(3) and (1) in a case such as this one where a refusal to hire is alleged in a successorship context, the General Counsel has the burden of proving that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. The following factors are among those that would establish that a new owner violated Section 8(a)(3) by refusing to hire the employees of the predecessor:

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

Planned Building Services, 347 NLRB 670, 673 (2006). Once the General Counsel has shown that the employer failed to hire employees of its predecessor and was motivated by antiunion animus, the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive. In establishing its defense, the employer is free to show, for example, that it did not hire particular employees because they were not qualified for the available jobs, and that it would not have hired them for that reason even in the absence of the unlawful considerations. Similarly, the employer is free to show that it had fewer unit jobs than there were unit employees of the predecessor. *Planned Building Services*, 347 NLRB at 674.

The Acting General Counsel established a prima facie case that JAG Healthcare discriminated against former Village Care employees by not hiring them because they were members of the Union. There is substantial evidence of union animus, starting with Griffiths' June 30 remarks to Courtright and Barnhart

unit. (R. Posttrial Br. at 14, 18; see also FOF, sec. II,(A).) In my view, however, JAG Healthcare conceded that 37 former Village Care employees were part of the bargaining unit (including the 15 bargaining unit members that JAG Healthcare hired on July 1) when Knight identified those employees as union members on the employee roster that Walters used when making her hiring decisions on June 30. (See FOF, sec. II,(B),(2).) JAG Healthcare is bound by that admission.

and to employees at the meet-the-new owners meeting that the Union would not be representing employees at the nursing home once JAG Healthcare took over operations on July 1. Griffiths reinforced the point that the Union was not welcome at the nursing home by linking JAG Healthcare's no-solicitation policy specifically to the Union, and encouraging staff to call the police for assistance in excluding union organizers from the property. (See FOF, sec. II,(B),(4), (C),(2)-(3).) As noted above, since Griffiths made those statements before JAG Healthcare completed its hiring on June 30, Griffiths effectively told Village Care employees that JAG Healthcare intended to discriminate against them to ensure its nonunion status. *Kessel Food Markets*, 287 NLRB at 429. Consistent with Griffiths' remarks, when making hiring decisions on June 30, Walters used an employee roster that identified which employees were union members, and Walters also kept track of the total number of Village Care bargaining unit members that she selected for hire. (See FOF, sec. II,(B),(2)-(3).)

The evidentiary record also establishes that JAG Healthcare's union animus continued after June 30. For example, when the Union held its press conference on July 2, Ronk (who took the lead on hiring decisions at the nursing home after July 1) monitored the conference and noted which former Village Care employees were present at the conference. That same day, Ronk also wrote up Natalie Archer for saying that she would rather be outside with the Union (at the press conference) than inside the nursing home. (See FOF, sec. II,(F),(1), (G),(2).) In addition, on or about August 27, Walters made notes that described certain employees as "good" because they made remarks that suggested that they did not support the Union. (See FOF, sec. II,(I).) And, despite hiring 17 STNAs, 8 dietary employees, 2 housekeepers, and 1 hospitality aide between July and September 2010, JAG Healthcare did not select former Village Care employees for any of those positions.⁴⁹ See *U.S. Marine Corp.*, 293 NLRB 669, 671 (1989) (animus demonstrated in part by the fact that the successor employer did not contact any of the predecessor's employees when it hired additional employees, despite the fact that the predecessor's employees had qualifications that were comparable to employees the successor hired previously), *enfd.* 944 F.2d 1305 (7th Cir. 1991), *cert. denied* 503 U.S. 936 (1992); (see also FOF, sec. II,(E).)

JAG Healthcare did not demonstrate that it would not have hired the discriminatees even in the absence of the unlawful considerations. I do not credit JAG Healthcare's assertion that there were not enough bargaining unit positions at Galion Pointe to hire additional employees who had worked for Village Care. Indeed, JAG Healthcare's own hiring data undermines that argument, because high turnover at the nursing home led JAG Healthcare to fill 28 bargaining unit positions between July 1 and September 30. (See FOF, sec. II,(H),(2).) I also do not credit JAG Healthcare's assertion that it did not hire the discriminatees because of assorted shortcomings noted in

their personnel files, because the evidentiary record shows that neither Walters nor Ronk relied on Village Care's personnel files when they made their hiring decisions. Instead, the record shows that Walters relied on Ronk's subjective impressions to eliminate employees from consideration, with the aim of reaching a targeted total number of hires from the Village Care bargaining unit. (See FOF, sec. II,(B),(2)-(3), (E).) And finally, I do not find that JAG Healthcare demonstrated that Wanda Haney was not qualified for a position in the dietary department (see R. Posttrial Br. at 24-26), because Walters' testimony about the reasons for Haney's nonselection in October was not reliable. (See FOF, sec. II,(J).) Accordingly, I find that JAG Healthcare did not rebut the Acting General Counsel's prima facie case of discrimination, and I find that but for the discrimination, JAG Healthcare would have filled its available bargaining unit positions with former Village Care employees.⁵⁰

Because of the strong evidence that JAG Healthcare limited its hiring of former Village Care bargaining unit employees to ensure that JAG Healthcare would be nonunion, I find that JAG Healthcare discriminated against 21 former Village Care employees in violation of Section 8(a)(3) and (1) of the Act.⁵¹ (GC Exh. 1(k), pars. 14(d)-(e).)

I also find that as a result of its discriminatory hiring practices, JAG Healthcare lost its right to unilaterally set the initial terms and conditions of employment. JAG Healthcare therefore violated Section 8(a)(5) and (1) of the Act when it set ini-

⁵⁰ As the Board has explained, "[a]lthough it cannot be said with certainty whether the successor would have retained all of the predecessor employees if it had not engaged in discrimination, the Board resolves the uncertainty against the wrongdoer and finds that, but for the discriminatory motive, the successor employer would have employed the predecessor employees in its unit positions." *Planned Building Services*, 347 NLRB at 674 (citing *Love's Barbecue Restaurant No. 62*, 245 NLRB 78, 82 (1979), *enfd.* in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981)).

⁵¹ The Board has recognized that, in some instances, predecessor employees who do not apply for a position with the successor employer (nonapplicants) do not qualify as discriminatees. See *Kessel Food Markets*, 287 NLRB at 431 (holding that the nonapplicants in the case were not discriminatees because the evidence did not show that the employer discouraged the nonapplicants from applying, that the employer structured its hiring process to prevent the nonapplicants from applying, or that the employer declined to hire any of the predecessor's employees for unlawful reasons); see also *Planned Building Services*, 347 NLRB at 716-717 (nonapplicants counted as discriminatees because the employer's actions made it clear that it would have been futile for the employees to apply for jobs with the successor employer).

Here, although JAG Healthcare asked former Village Care employees to submit applications, the record is clear that JAG Healthcare did not always require applications as a firm prerequisite to being considered for and offered a position. Instead, in some instances, JAG Healthcare selected individuals for hire, and then allowed the individuals to submit their application paperwork days or weeks after they were hired. (See FOF, sec. II,(B),(3); see also FOF, sec. II,(J) (JAG Healthcare interviewed Haney for a position in the dietary department even though it did not have an application for her on file).) In light of those practices, I find that the nonapplicants in this case do qualify as discriminatees, because their failure to submit an application did not disqualify them from being considered for employment at the nursing home.

⁴⁹ JAG Healthcare did hire former Village Care employee B.H. for an STNA position on July 2. JAG Healthcare also hired Traci Atkins on July 6 for a position in the dietary department, but told her that the position was no longer available on July 13.

tial terms and conditions on July 1 without first giving notice to and bargaining with the Union (GC Exh. 1(k), par. 16) and when it generally refused to recognize and bargain with the Union from June 30 onward (GC Exh. 1(k), par. 15(d)).⁵² See *Planned Building Services*, 347 NLRB at 674 (citing *Love's Barbecue Restaurant No. 62*, 245 NLRB at 82).

E. Did JAG Healthcare's No-Solicitation Rule Violate the Act?

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities. See *Relco Locomotives, Inc.*, 358 NLRB 298, 309 (2012) (collecting cases, and noting that the employer's subjective motive for its action is irrelevant).

The Board has articulated the following standard that specifically applies when it is alleged that an employer's work rule violates Section 8(a)(1):

If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

NLS Group, 352 NLRB 744, 745 (2008) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004)), adopted in 355 NLRB 1154 (2010), *enfd.* 645 F.3d 475 (1st Cir. 2011). As with all alleged 8(a)(1) violations, the judge's task is to "determine how a reasonable employee would interpret the action or statement of her employer . . . , and such a determination appropriately takes account of the surrounding circumstances." *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011); see also *Alta Bates Summit Medical Center*, 357 NLRB 259, 285 (2011) (noting that with regard to health care institutions, re-

⁵² At first glance, one might think that there is some tension between my finding that JAG Healthcare hired enough Village Care bargaining unit members to create an obligation to bargain with the Union, and my finding that JAG Healthcare discriminated against Village Care bargaining unit members when it made its hiring decisions. (See Discussion and Analysis, sec. D.(2)-(3).) The tension is resolved, however, when one remembers that a successor employer can commit both types of violations (discriminatory hiring, coupled with hiring enough union members to create an obligation to bargain) if it miscalculates the number of union members that it would take to create a bargaining obligation in the successor's bargaining unit. See, e.g., *Jennifer Matthew Nursing & Rehabilitation Center*, 332 NLRB at 306 (employer incorrectly asserted that a bargaining obligation would not attach unless it hired 51 percent or more of the predecessor's entire staff).

strictions on solicitation during nonworking time and in nonworking areas are presumptively unlawful, unless the institution proves that the prohibited solicitations and distributions may adversely affect patients).

JAG Healthcare's no-solicitation policy is set forth in its employee handbook, and states as follows:

No Solicitation/Distribution

During work time, each associate is to be occupied with his or her assigned responsibilities. Engaging in the distribution of literature during work time or in working areas or soliciting support of other associates for any group, cause or product on work time is prohibited.

Non-associates are prohibited from soliciting or distributing any written or printed materials of any kind for any purpose on Company premises at any time. In addition, it is not permissible to post on the premises or remove from the premises any signs, notices, or printed material. Company bulletin boards are to be used exclusively for materials that have been reviewed and approved for posting by management.

Associates of course are free to discuss anything they wish during breaks or meal periods, providing that all associates involved in the discussion are also on break or meal period. Distribution of literature or materials by associates in non-work related areas, on non-work time is also permissible. However, using any Company equipment or property to do so is not allowed and may be cause for disciplinary action.

(See FOF, sec. II.(C).(2).)

JAG Healthcare's written no-solicitation rule does not explicitly restrict Section 7 activity, and would arguably be lawful had it merely stood alone as written in the handbook. For example, the final paragraph of the written policy recognizes the right of employees to speak about the union and distribute literature during nonwork time in nonwork areas. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945) (an employer may not bar employees from distributing union literature in nonworking areas of its property during nonworking time unless the employer can justify its rule as necessary to maintain discipline and production); *New York New York Hotel & Casino*, 356 NLRB 907, 913 (2011) (same), *enfd.* 676 F.3d 193 (D.C. Cir. 2012). Similarly, the second paragraph of the written policy is consistent with case law establishing that employers generally cannot be compelled to allow nonemployees (including union representatives) who are strangers to their property to distribute union literature on the employer's property. See *Babcock & Wilcox v. NLRB*, 351 U.S. 106, 113 (1956).

Griffiths, however, did not limit himself to reciting the written terms of the no-solicitation policy when he spoke to employees on June 30. Instead, Griffiths referenced the no-solicitation policy and then explicitly encouraged staff to call the police for assistance with enforcing the no-solicitation rule against union organizers. (See FOF, sec. II.(C).(3).) By singling out the Union as a desired target of JAG Healthcare's no-solicitation policy, Griffiths made statements that would lead a reasonable employee to construe the no-solicitation rule as prohibiting Section 7 activity, because a reasonable employee would conclude based on Griffiths remarks that the Union was

not welcome at the nursing home in any shape or form, including union talk, union solicitation, or distribution of union literature by employees during nonwork time in nonwork areas. Cf. *SNE Enterprises*, 347 NLRB 472, 473 (2006) (“It is well settled that an employer violates Section 8(a)(1) by selectively enforcing an otherwise valid no-solicitation rule against union solicitors only.”), enfd. 257 Fed. Appx. 642 (4th Cir. 2007). I therefore find that on June 30, JAG Healthcare violated Section 8(a)(1) of the Act by verbally issuing and maintaining a rule that prohibited employees from discussing unions, and by verbally issuing and maintaining an unlawful no solicitation/no distribution policy.⁵³ (GC Exh. 1(k), par. 12.)

I also find that Ronk unlawfully applied JAG Healthcare’s no-solicitation rule to Archer on July 2 when Ronk wrote up Archer for remarking that she would rather be outside with the Union (at its press conference) than inside the nursing home. (See FOF, sec. II,(G),(2).) Ronk’s action was fully consistent with Griffiths’ desire to bar the Union (and union talk) from the workplace, and had a reasonable tendency to interfere with, restrain, or coerce Archer in the exercise of her Section 7 rights. Through Ronk’s actions on July 2, JAG Healthcare coercively enforced the verbally issued rule prohibiting discussion about unions against Archer, and thus violated Section 8(a)(1) of the Act. (GC Exh. 1(k), par. 13(a).) I recommend that the alternative allegation in paragraph 13(b) of the complaint (that Ronk issued a new work rule) be dismissed.

F. Did JAG Healthcare Violate the Act when it Discharged Archer, Atkins and Nolen?

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer’s decision was the employee’s union or other protected activity. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003). The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); see also *Relco Locomotives, Inc.*, 358 NLRB 298, 311 (2012) (observing that “[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation”).

If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee’s union or protected activity. *Consolidated Bus Transit, Inc.*, 350 NLRB at 1066; *Pro-Spec Painting*, 339 NLRB at 949; *Bally’s Atlantic City*, 355 NLRB

1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the respondent’s rebuttal burden is substantial), enfd. 646 F.3d 929 (D.C. Cir. 2011). The General Counsel may offer proof that the employer’s reasons for the personnel decision were false or pretextual. *Pro-Spec Painting*, 339 NLRB at 949 (noting that where an employer’s reasons are false, it can be inferred that the real motive is one that the employer desires to conceal—an unlawful motive—at least where the surrounding facts tend to reinforce that inference) (citation omitted). However, a respondent’s defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Park N’ Fly, Inc.*, 349 NLRB at 145 (citations omitted).

The *Wright Line* standard does not apply where there is no dispute that the employer took action against the employee because the employee engaged in activity that is protected under the Act. In such a single-motive case, the only issue is whether the employee’s conduct lost the protection of the Act because the conduct crossed over the line separating protected and unprotected activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003). Specifically, when an employee is disciplined or discharged for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Aluminum Co. of America*, 338 NLRB 20 (2002). In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. *Stanford Hotel*, 344 NLRB 558, 558 (2005) (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)).

1. Natalie Archer’s discharge

The Acting General Counsel alleges that JAG Healthcare unlawfully discriminated against Natalie Archer by discharging her on or about July 12 because she was a union member, because JAG Healthcare suspected that she engaged in union activities, and because JAG Healthcare wished to discourage other employees from engaging in similar activities. (GC Exh. 1(k), par. 17.)

I find that the Acting General Counsel made an initial showing of discrimination. There is no dispute that Archer was a member of the Union. It is also undisputed that JAG Healthcare was aware that Archer engaged in union activities, because Knight identified Archer as a union member on the employee roster that she gave to Walters on June 30, and Ronk confronted Archer on July 2 for making a remark in support of the Union and the press conference that it held that same day. The Acting General Counsel also presented ample evidence of animus, including the fact that Ronk wrote up Archer on July 2 for having a negative attitude because Archer remarked that she would rather be at the union press conference than in the nursing home; continued to fault Archer for having a negative attitude on July 5 and 8; offered a false reason for questioning Archer’s absence from work on July 8 (Ronk asserted that

⁵³ I do not find that JAG Healthcare’s written no-solicitation rule was overbroad or unlawful, as alleged in par. 12 of the complaint.

Archer did not seem ill on the day that she was absent, but Archer was in fact absent because her son was ill); and discharged Archer within a week of the Union's request for an election. (See FOF, sec. II,(B),(2), (G),(2); Discussion and Analysis, sec. D,(3) (describing additional conduct by Griffiths, Walters, and Ronk that demonstrate animus).) See also *Relco Locomotives, Inc.*, 358 NLRB 298, 311 (2012) (evidence of suspicious timing, false reasons given in defense, and failure to adequately investigate alleged misconduct all support an inference of animus and discriminatory motivation); *Children's Studio School Public Charter School*, 343 NLRB 801, 805 (2004) (explaining that an employer's comments that an employee does not have the right spirit, has a bad attitude, and is argumentative and uncooperative can be veiled references to the employee's protected activities, and thus circumstantial evidence of animus) (collecting cases).

Turning to JAG Healthcare's affirmative defense, JAG Healthcare asserts that it discharged Archer because her poor attitude led to a decline in her willingness to care for patients. (See R. Posttrial Br. at 26–28.) I find that JAG Healthcare failed to prove this affirmative defense. As a preliminary matter, none of the records that relate to Archer's discharge state that JAG Healthcare discharged Archer because of poor patient care. To the contrary, when JAG Healthcare provided information about Archer's discharge to the State of Ohio, it cited Ronk's notes, which at most outline a generalized concern about Archer's attitude about working at Galion Pointe. The only time that Ronk expressed concern that Archer's attitude could affect patient care was on July 2, when Ronk speculated that Archer's comment that she would rather be outside with the Union than in the nursing home could cause the patients anxiety. Ronk did not document any actual problems with patient care that arose as a result of Archer's July 2 comment in support of the Union, nor did she document any other instances where Archer's attitude affected her care for patients.⁵⁴ (See FOF, sec. II,(G),(2).) Given the lack of any evidence that Archer's care for patients deteriorated, and the lack of any evidence that Ronk relied on such a concern when she discharged Archer, I find that JAG Healthcare's affirmative defense lacks merit.⁵⁵

Viewing the record as a whole, including the Acting General Counsel's strong initial showing of discrimination and JAG Healthcare failure to prove its affirmative defense, I find that the Acting General Counsel met its burden of proving that JAG

⁵⁴ For example, although Ronk testified that Archer left work in the middle of her shift on July 2, she did not document that alleged incident. As previously noted, I did not find Ronk's testimony about that alleged misconduct to be credible.

⁵⁵ JAG Healthcare pointed out in its brief that Archer did not testify at trial. (R. Posttrial Br. at 28.) As I have found, however, the parties presented other evidence that established the facts underlying Archer's discharge. (See FOF, sec. II,(G),(2).) I am not persuaded by JAG Healthcare's argument that it was deprived of the opportunity to defend itself regarding Archer's discharge because Archer did not appear at trial for questioning pursuant to JAG Healthcare's subpoena. While it is true that Archer did not appear, JAG Healthcare did not request that its subpoena to Archer be enforced, and thus essentially waived the issue.

Healthcare violated Section 8(a)(3) and (1) of the Act when it discharged Archer on July 12. (See GC Exh. 1(k), par. 17.)

2. Diana Nolen's discharge

The Acting General Counsel alleges that JAG Healthcare unlawfully discriminated against Diana Nolen by discharging her on or about July 12 because she was a union member, because JAG Healthcare suspected that she engaged in union activities, and because JAG Healthcare wished to discourage other employees from engaging in similar activities.. (GC Exh. 1(k), par. 17.)

As with Archer, I find that the Acting General Counsel made an initial showing of discrimination regarding Diana Nolen's discharge. Nolen was a member of the Union, and JAG Healthcare was aware that Nolen engaged in union activities, because Knight identified Nolen as a union member on the employee roster that she gave to Walters on June 30. In addition, Ronk was under the mistaken impression that Nolen engaged in union activities on July 2 by speaking with Archer on July 2 about the union press conference. The Acting General Counsel also satisfied the animus requirement, as indicated by evidence that Ronk: accused Nolen of speaking with Archer about the Union; discharged Nolen within a week of the Union's request for an election; and predicated Nolen's discharge on an alleged complaint of resident abuse that JAG Healthcare did not properly investigate or report to the State of Ohio. (See FOF, sec. II,(B),(2), (G),(3); Discussion and Analysis, sec. D,(3) (describing additional evidence of animus).) See also *Relco Locomotives, Inc.*, 358 NLRB 298, 311 (evidence of suspicious timing, false reasons given in defense, and failure to adequately investigate alleged misconduct support an inference of animus and discriminatory motivation).

As its affirmative defense, JAG Healthcare asserts that it terminated Nolen because of a nursing home resident's complaint that Nolen disregarded his statement that he was in pain. (R. Posttrial Br. at 29–31.) JAG Healthcare failed to establish this affirmative defense. In describing the issues that arise when a resident complains of abuse, JAG Healthcare emphasized that such complaints must be handled seriously, and require an internal investigation (by the nursing home administrator or social worker), an immediate report to the State of Ohio, and a final report to the State of Ohio within 5 days of the incident. JAG Healthcare, however, did not complete any of those steps in handling the alleged complaint against Nolen—instead, Ronk testified that she interviewed the nursing home resident herself, and then terminated Nolen based on that interview alone. (See FOF, sec. II,(G),(3).) JAG's failure to investigate or report the alleged complaint of resident abuse against Nolen seriously undermines the credibility of Ronk's testimony (and JAG Healthcare's affirmative defense) that JAG Healthcare discharged Nolen because of the resident complaint, and for that reason I reject JAG Healthcare's affirmative defense.

Viewing the record as a whole, including the Acting General Counsel's strong initial showing of discrimination and JAG Healthcare failure to prove its affirmative defense, I find that the Acting General Counsel met its burden of proving that JAG Healthcare violated Section 8(a)(3) and (1) of the Act when it discharged Nolen on July 12. (See GC Exh. 1(k), par. 17.)

3. Traci Atkins' discharge

Last, the Acting General Counsel alleges that JAG Healthcare unlawfully discriminated against Traci Atkins by discharging her on or about July 13 because she was a union member, and because JAG Healthcare wished to discourage other employees from engaging in similar activities.. (GC Exh. 1(k), par. 18.)

The Acting General Counsel made an initial showing of discrimination regarding Traci Atkins' discharge. Atkins was a member of the Union, and JAG Healthcare was aware that Atkins engaged in union activities, because Knight identified Atkins as a union member on the employee roster that she gave to Walters on June 30. The Acting General Counsel also satisfied the animus requirement, as indicated by evidence that McKelvey discharged Atkins within a week of the Union's request for an election; and noted at the time of Atkins' discharge that she might be able to rehire Atkins once things "calmed down" with the nursing home transition. (See FOF, sec. II,(B),(2), (G),(1); Discussion and Analysis, sec. D,(3) (describing additional evidence of animus).) See also *Relco Locomotives, Inc.*, 358 NLRB 298, 311 (evidence of suspicious timing and false reasons given in defense support an inference of animus and discriminatory motivation).

For its affirmative defense, JAG Healthcare asserted that Atkins quit voluntarily because JAG Healthcare could not accommodate her work schedule at McDonald's (Atkins' other job). (R. Posttrial Br. at 28–29.) Atkins, however, certainly did not act in a manner that would suggest that she decided not to return to Galion Pointe—to the contrary, Atkins submitted new paperwork, purchased a new set of scrubs that would meet JAG Healthcare's requirements, and reported for her July 7 fill-in shift as scheduled. Even if we put that issue aside, JAG Healthcare's affirmative defense fails because JAG Healthcare did not present credible evidence to support its theory that Atkins quit voluntarily. JAG Healthcare did not call McKelvey as a witness to rebut Atkins' testimony. Further, although Griffiths testified on two different occasions at trial, JAG Healthcare did not ask him any questions to rebut the statements that Atkins attributed to him (as relayed to Atkins by McKelvey). Instead, JAG Healthcare relied on Knight and Walters to establish its defense, even though those two witnesses could only offer unreliable hearsay testimony to support the theory that Atkins quit her job at Galion Pointe voluntarily in July. (See FOF, sec. II,(G),(1).) In light of Atkins' credible testimony about her preparations to return to Galion Pointe, and JAG Healthcare's failure to present credible evidence to support its claim that Atkins quit voluntarily, I reject JAG Healthcare's affirmative defense and I find that the Acting General Counsel met its burden of proving that JAG violated Section 8(a)(3) and (1) of the Act when it discharged Atkins on July 13. (See GC Exh. 1(k), par. 18.)

CONCLUSIONS OF LAW

1. By refusing to recognize and bargain with the Union as the collective-bargaining representative of the bargaining unit from June 30, 2010, onward, JAG Healthcare violated Section 8(a)(5) and (1) of the Act.

2. By telling Village Care bargaining unit employees on or about June 30, 2010, that there would be no union serving as their collective-bargaining representative once JAG Healthcare took control of nursing home operations on July 1, 2010, JAG Healthcare violated Section 8(a)(1) of the Act.

3. By unilaterally changing bargaining unit employees' terms and conditions of employment on or about July 1, 2010, without first giving the Union notice and an opportunity to bargain, JAG Healthcare violated Section 8(a)(5) and (1) of the Act.

4. By refusing to hire 21 former Village Care employees⁵⁶ from July 1, 2010, onward because they were represented by the Union and to avoid an obligation to recognize and bargain with the Union, JAG Healthcare violated Section 8(a)(3) and (1) of the Act.

5. By verbally issuing and maintaining a work rule that prohibited employees from discussing unions, and by verbally issuing and maintaining an unlawful no-solicitation/no-distribution policy on or about June 30, 2010, JAG Healthcare violated Section 8(a)(1) of the Act.

6. By coercively enforcing the rule prohibiting discussion about unions against Natalie Archer on or about July 2, 2010, JAG Healthcare violated Section 8(a)(1) of the Act.

7. By discharging Natalie Archer and Diana Nolen for discriminatory reasons on or about July 12, 2010, JAG Healthcare violated Section 8(a)(3) and (1) of the Act.

8. By discharging Traci Atkins for discriminatory reasons on or about July 13, 2010, JAG Healthcare violated Section 8(a)(3) and (1) of the Act.

9. By committing the unfair labor practices stated in Conclusions of Laws 1–8 above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

10. I recommend that the allegations in paragraphs 13(b), 14(c), and 15(c) of the complaint be dismissed.

REMEDY

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

The Respondent, having discriminatorily discharged employees Natalie Archer, Traci Atkins, and Diana Nolen, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

⁵⁶ The 21 employees affected by this violation are: Traci Atkins, Martha Bair (Swiger), Julie Barnhart, Martha Bishop, Sharon Brady, Jolene Dennis, Ceileata Dotson, Vicky Ely, Wanda Haney, Kathleen McLe, Sandra Nolen, Sandra Ohler, Brenda Peterman, Brandi Riley, Shirley Sedmak, Mary Siegenthal, Bobbie Stephens, Cassandra Storer, Delena Teeter, Judy Watts, and Jackie Zent. (See GC Exh. 1(k), par. 14(b).)

In addition, the Respondent, having violated Section 8(a)(3) by unlawfully refusing to hire 21 former Village Care employees, must offer reinstatement to the 21 discriminatees who were not hired and also make those discriminatees whole for their losses (using Village Care's terms and conditions of employment). The make-whole remedy extends from the date of the successor's unlawful refusal to bargain until the successor, consistent with the Board's order, reaches a new agreement with the union or bargains to a lawful impasse. *Planned Building Services*, 347 NLRB at 674–675 (citing *State Distributing Co.*, 282 NLRB 1048, 1048 (1987)). Backpay for the 21 discriminatees who were not hired shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

To remedy the 8(a)(5) violation that the Respondent committed by unilaterally implementing initial terms and conditions of employment without first giving notice to and bargaining with the Union, the Respondent must: (1) at the Union's request, restore the terms and conditions of employment established by Village Care, rescinding the unilateral changes made by JAG Healthcare; (2) recognize and bargain with the Union; and (3) make employees that JAG Healthcare did hire whole for their losses (again, using Village Care's terms and conditions of employment). The make-whole remedy extends from the date of the successor's unlawful refusal to bargain until the successor, consistent with the Board's order, reaches a new agreement with the union or bargains to a lawful impasse.⁵⁷ *Planned*

⁵⁷ For both the 8(a)(3) refusal to hire violation and the 8(a)(5) unilateral implementation of initial terms and conditions violation, the Respondent retains the right to present evidence in a compliance proceeding to show that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement, and to establish either the date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated, or the

Building Services, 347 NLRB at 674–675. Backpay for this violation shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). This includes reimbursing unit employees for any expenses resulting from Respondents' unlawful changes to their contractual benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *affd.* 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons* and *Kentucky River Medical Center*, *supra*. I further recommend that the Respondent be ordered to make all contributions to any benefit funds established by the Union's collective-bargaining agreement with Village Care, and which contributions the Respondent would have made but for the unlawful unilateral changes, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).⁵⁸

[Recommended Order omitted from publication.]

date on which it would have bargained to good-faith impasse and implemented its own monetary proposals. If the Respondent carries its burden of proof on these points, the measure of the Respondent's make-whole obligation may be adjusted accordingly. *Planned Building Services*, 347 NLRB at 676.

⁵⁸ I decline the Acting General Counsel's request that, as part of the remedy, I require the Respondent to reimburse the discriminatees for the amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination. I also decline the Acting General Counsel's request that I require the Respondent to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. These remedies would constitute changes in Board law, and thus the Acting General Counsel should present its requests to the Board directly. See *New Link, Ltd.*, 358 NLRB No. 26, slip op. at 4 fn. 2 (2012) (not reported in bound volume).