

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MERIT HOUSE, LLC

and

Case 08-CA-099622

SERVICE EMPLOYEES INTERNATIONAL UNION,
DISTRICT 1199, WV/ KY/OH

Rudra Choudhury and Kyle Vuchak, Esqs.,
for the General Counsel.

Tybo Wilhelms and Carolyn Davis, Esqs.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Toledo, Ohio, on September 4, 2013. The Service Employees International Union, District 1199, WV/KY/OH (the Union) filed the charge on March 5, 2013, an amended charge was filed on May 30, 2013, and a second amended charge was filed on June 27, 2013.¹ The Acting General Counsel² issued the complaint on July 12, 2013.

The complaint alleges that the Respondent is a successor to West Toledo Management, Inc. d/b/a West Toledo Health Care and Rehabilitation Center (West Toledo). The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union as the collective-bargaining representative of its employees and failing to provide relevant requested information. The complaint also alleges that from approximately April 8 through 10, 2013, the Respondent, through Terry Johnson, interrogated its employees about their union sympathies in violation of Section 8(a)(1) of the Act.³ The Respondent's answer denies the material allegations of the complaint.

¹ All dates are in 2013 unless otherwise indicated.

² I have taken administrative notice of the fact that on October 29, 2013, the United States Senate confirmed President Obama's nomination of Richard F. Griffin Jr. to be the Board's General Counsel and that he was sworn in on November 4, 2013.

³ I have taken administrative notice of the fact that on October 22, 2013, the Regional Director filed a petition for an injunction under Section 10(j) of the Act regarding the allegations in the complaint in the United States District Court for the Northern District of Ohio, Western Division, in Case 3:13-cv-02345. That matter is presently pending before the court.

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

5

FINDINGS OF FACT

I. JURISDICTION

10

15

The Respondent, a limited liability corporation, with an office and a place of business located at 4645 Lewis Ave., Toledo, Ohio, has been, since March 1, 2013, engaged in the operation of a short-term rehabilitation and long-term nursing care facility. Based on projections since March 1, 2013, at which time the Respondent commenced operations, the Respondent will annually derive gross revenues in excess of \$100,000 and purchase and receive products, goods and materials in excess of \$5000 from points located outside the State of Ohio in conducting its operations. 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.

20

II. ALLEGED UNFAIR LABOR PRACTICES

Background

25

30

As noted above, since March 1, 2013, the Respondent has operated a short-term rehabilitation and long-term nursing care facility in Toledo, Ohio. John Stone is the owner and administrator of the Respondent. Prior to March 1, 2013, West Toledo operated a nursing home at the same location. From 1991 until 2005 employees at West Toledo were represented by HERE , Local 84. Since 2005, West Toledo and the Union were parties to successive collective-bargaining agreements, the most recent of which was effective by its terms from January 1, 2013, through December 31, 2014. According to the recognition clause of the most recent contract between West Toledo and the Union, the Union represented all full-time and part-time certified nursing assistants, nursing assistants, dietary employees, cooks, housekeeping employees, laundry assistants, and hospitality employees (Jt. Exh. 1). Since at least 2009, West Toledo did not employ any hospitality employees. There were approximately 30 employees in the unit.

35

Facts

40

Because of financial difficulties, West Toledo had been operating under a receivership supervised by the Court of Common Pleas of Lucas County, Ohio since 2009. During the summer of 2012, Stone became interested in purchasing the West Toledo facility and paid several visits to the facility. Stone testified that during these visits, he had occasion to speak with

⁴ In making my findings regarding the credibility of witnesses, I considered their demeanor, the content of their testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this regard, that “nothing is more common in all kinds of judicial decisions than to believe some and not all” of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007).

both unit employees and supervisors regarding the facility. In this connection, Stone testified that he spoke to Mary Pat Page, West Toledo's director of nursing, on a number of occasions. According to Stone, Page told him that "there was some disenchantment" among employees about the Union. Stone's testimony regarding his conversation with Page is uncontroverted and therefore I credit it.

Stone also testified that he spoke to West Toledo employee Nancy Wernert, about employee morale. According to Stone, during their conversation, Wernert talked about a strike that occurred at the facility a couple of years ago and stated that she felt the facility had not really recovered from it. Stone testified that Wernert said she was not a "big fan" of the Union going forward and that other employees felt the same way.

Wernert testified that while she spoke to Stone when he was visiting the facility, she never said anything to him about the Union. (Tr. 155-156.) At the time of the hearing, Wernert was a current employee of the Respondent and therefore her testimony is unlikely to be false. *Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003). In addition, Wernert's demeanor while testifying reflected certainty regarding her answers. On the other hand, Stone's testimony on this point appeared to be an effort to testify in a manner that strengthened the Respondent's case. Accordingly, I do not credit his testimony regarding his alleged conversation with Wernert.

On December 17, 2012, the State court judge supervising the receivership of West Toledo approved the receiver's application to sell the West Toledo facility (R. Exh. 2). On January 4, 2013, West Toledo and Stone entered into asset purchase and operation transfer agreements indicating that the Respondent would assume operations of the West Toledo facility on March 1, 2013. (GC Exh. 2.)

On February 11, 2013, West Toledo's human resources representative, Sharon Reynolds, held a meeting in order to inform employees about the transfer of the facility from West Toledo to the Respondent. Stone was present at the meeting. Union organizer, Kyle Huff, had been advised of the meeting by an employee and also attended. During this meeting Reynolds informed employees that the Respondent had purchased the nursing home and that effective on February 28, 2013, all of the employees would be terminated by West Toledo. During the meeting, Stone advised the West Toledo employees that they could apply for positions with the Respondent and that Respondent's representative, Terry Johnson,⁵ would conduct interviews of all the employees who applied.

According to Huff's credited testimony, during the meeting, Huff asked Stone whether he would honor the current collective-bargaining agreement that was in effect between West Toledo and the Union by signing a contract assumption agreement. Stone replied that he would take a look at it and think about it. When the meeting ended, Huff asked Stone for contact information and Stone gave Huff his business card with an address on it.

⁵ In May 2013, Terry Johnson married and took the last name Baer. Since her involvement in this case preceded that date and employees knew her by the name of Johnson, I will refer to her as Terry Johnson in this decision.

Stone testified that after the meeting with unit employees on February 11, 2013, Huff presented him with a letter dated February 12, 2013. In this letter, Huff requested that he and Stone “ schedule a date to negotiate over the sale of West Toledo Health Care.” The letter further indicated that because Stone would be taking over the operation of the facility on March 1, 2013, a meeting needed to be scheduled as soon as possible. (R. Exh. 3.)

To the extent they conflict, I credit Huff’s testimony regarding his conversations with Stone on February 11. Huff’s testimony was clear and straightforward and his demeanor reflected certainty. On the other hand Stone’s testimony was not convincing. In this regard, Huff’s February 12 letter was addressed to the same address that was listed on Stone’s business card. The credible evidence establishes that Huff first received that address on February 11. Based on the record as a whole, I find it implausible that Huff gave Stone a letter dated February 12 with that address on it. Accordingly, I do not credit Stone’s testimony on this point.

I find, however, that Stone did receive a letter from Huff dated February 12 shortly after that date. In this regard, the General Counsel does not dispute the authenticity of letter and it was in the possession of the Respondent at the time of the hearing. While there is no credible evidence as to how the Respondent received it, I draw the inference that it was mailed by the Union on February 12 and was received shortly thereafter by the Respondent.

From approximately February 13 to 24, Johnson conducted interviews of West Toledo employees who had an interest in working for the Respondent. Johnson had worked for Stone at a previous nursing home and was hired by Stone as a consultant to assist him in starting the Respondent’s operation. Johnson was given full authority by Stone to make the hiring decisions regarding the Respondent’s initial complement of employees. Johnson met with employees in a conference room at the West Toledo facility. After employees completed an application, Johnson spoke to each one of them individually. She asked each employee if they would make any changes at the facility and three to four applicants answered this question by saying that they did not want to have a union. Johnson testified that she reported these statements to Stone prior to March 1. Johnson also testified that during this period West Toledo’s director of nursing, Mary Pat Page told her that she did not think the employees wanted to have the Union there. Johnson also reported Page’s comments to Stone prior to March 1.

On February 23, the Respondent made its first formal offers of employment to West Toledo employees. West Toledo continued to operate the facility until midnight on February 28. At 12:01 a.m. on March 1, the Respondent began to operate the facility. The parties stipulated that the Respondent has continued to operate the business of West Toledo in basically unchanged form (Jt. Exh. 1). At the time it began operations, the Respondent employed 19 employees in unit job classifications, 17 of whom were previously employed by West Toledo. After March 1, the Respondent continued to hire employees. As of April 16, the Respondent employed 25 employees in unit job classifications, 17 of whom had previously been employed by West Toledo.

During the period of time that Johnson was interviewing employees, Huff received reports from union stewards at the West Toledo facility regarding the employees who were being interviewed by the Respondent. According to Huff’s uncontroverted testimony, on February 20 or 21, he called Stone and asked him for dates to meet and bargain with the Union and also asked

him for a list of employees that the Respondent had hired who were bargaining unit members at West Toledo. Stone replied that he would get back to Huff regarding his requests.

5 On February 26, Huff was at the West Toledo facility to speak with Reynolds in order to ensure that all employees were paid their earned vacation pay and wages when West Toledo ceased operations. While Huff was at the facility, he also met with Stone. Huff reminded Stone that earlier in February Stone had told him that he would look at an assumption agreement. Huff had such an agreement with him and handed it to Stone.⁶ Huff asked Stone if he was going to execute it. Stone replied that he would look at the agreement. Huff also asked Stone for a list of
10 employees that had been hired by the Respondent who had formerly been employed at West Toledo. Stone told Huff that he would get back to him regarding that request.

15 On February 28, Huff again visited the West Toledo facility. As of that date, based on reports he had received from unit employees, Huff believed that the majority of the employees that the Respondent had hired in unit classifications were West Toledo employees. While he was at the facility, Huff met with Johnson and requested from her a list of the West Toledo bargaining unit employees that had been hired by the Respondent. Johnson told Huff that she needed to consult with Stone before she could respond to his request.

20 Johnson testified that on March 1, the Respondent's first day of operation, she conducted two orientation sessions for the new employees; one was at 10 a.m. and the other was at approximately 2 p.m. All of the newly hired employees attended one of the sessions. Stone was present for parts of each meeting. According to Johnson, most of the meeting was devoted to properly filling out employee paperwork but that some employees asked whether they were still
25 going to have a union at the facility. Stone responded by saying that it was up to them, it was not up to him. Johnson also testified that in those sessions most employees indicated they were opposed to the Union. Johnson's testimony contained no further detail, however, on which employees made such statements or what they said.

30 Stone testified that at each of the meetings held on March 1 with unit employees, he was asked if they would have a union at the facility. Stone replied to this question at both meetings that whether there was a union or not was up to the employees. Stone did not testify that any employees made statements opposing the Union. Stone did testify, however, that he was present at that transition of the facility to the Respondent's control at 12:01 a.m. on March 1. According
35 to Stone, shortly afterwards unit employee Tyshanta Deloney told him that she and "lots" of other employees did not support the Union.

40 I credit the mutually corroborative testimony of Johnson and Stone that employees asked at both meetings on March 1 whether they would have a union at the facility and that Stone replied that it was up to them and not up to him. I do not credit Johnson's uncorroborated testimony that many employees indicated opposition to the Union at these meetings. If this had

⁶ The contract assumption agreement provides that the Respondent would be bound by the collective bargaining agreement between the Union and West Toledo. The agreement further provides, however, that "Nothing herein shall preclude the union from entering into lawful agreements modifying the terms of the existing collective bargaining agreement; however neither party shall be obligated to agree to such modifications during the term [of] this Agreement. (GC Exh. 6.)

occurred I would expect Stone to have also testified about it. The fact that he did not convinces me that Johnson's testimony on this point is not reliable. I do credit Stone's uncontroverted testimony, however, that on March 1 employee Deloney told him that she and "lots" of other employees did not support the Union.⁷

5

On March 4, 2013, the Union filed a petition for an election among the employees of the Respondent in Case 08-RC-099504.⁸ On March 5, the Union filed the unfair labor practice charge in the instant proceeding.

10

On approximately April 6 Stone asked Johnson to obtain statements from the unit employees regarding whether they wanted a union at the facility Stone testified that he made this request because of the unfair labor practice charge that had been filed. He indicated that in his view "it was time to ask the staff what it was that they wanted." (Tr. 211.)⁹ Pursuant to Stone's request, Johnson went around the facility and told employees, either individually or in small groups, that she needed to have them put in writing whether or not they wanted the Union. Johnson further instructed employees to turn in their written statements to her. Johnson also called some employees on the phone while they were working and gave them the same instructions. Johnson told employees that it did not matter to her one way or the other as to what their choice was. Johnson did not offer any explanation to employees as to why she was seeking this information.

15

20

Between April 8 and 10, 21 unit employees signed statements indicating that they did not want the Union to represent them. The employees gave the statements to Johnson who, in turn furnished them to Stone.

25

After not receiving any response to his request for bargaining or for information regarding the employees hired by the Respondent, on March 12, Huff sent a letter to the Respondent requesting that Stone meet with him in order "to bargain a collective bargaining agreement, covering the employees of Merit House." (GC Exh. 8.) On April 3, 2013, Huff sent a letter to the Respondent requesting that the Union be provided with a list of all former employees of West Toledo that were hired in the job classifications of STNA; housekeeping; laundry; and cook/dietary worker. (GC Exh. 9)

30

35

As of the date of the hearing, the Respondent had not responded to the Union's requests for recognition and bargaining nor had it provided the requested information.

⁷ Deloney testified on behalf of the General Counsel but was not asked about this conversation with Stone.

⁸ On March 25, the Regional Director approved the Union's withdrawal request regarding this petition.

⁹ Johnson testified that she believed the Respondent's counsel had asked her to obtain the statements because a petition had been filed "and the employees needed to say whether or not they wanted to be represented." (Tr. 177-178.) I do not credit Johnson's testimony. It is implausible given the fact that the petition had been withdrawn on March 25.

Analysis

Whether the Respondent is a Successor Employer that Violated Section 8 (a)(5) and (1) of the Act by Refusing to Recognize and Bargain with the Union

5

It is clear that when there is substantial continuity between the operations of a successor employer and predecessor employer and the successor hires as its employees a majority of the predecessor's represented employees, the successor is obligated to bargain with the incumbent union. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Spruce Up Corp.*, 209 NLRB 194 (1974). A successor's obligation to recognize a union which had represented the predecessor's employees attaches after the occurrence of two events: (1) a demand for recognition and bargaining by the union; and (2) the employment by the successor employer of a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor. *Hampton Lumber Mills-Washington*, 334 NLRB 195 (2001).

10

15

The Respondent does not dispute the fact that it is a successor employer within the meaning of *Fall River*, *Burns*, and *Spruce Up*. It contends, however, that the Union did not make a valid demand for recognition until March 12, 2013. The Respondent further contends that it was privileged to not extend recognition to the Union on the basis of *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998).

20

25

Allentown Mack involved a successor employer's refusal to bargain with the union based on a "good faith reasonable doubt" about the union's majority status. In *Allentown Mack*, the Supreme Court found that the evidence supported the employer's assertion of its good-faith doubt of majority support and therefore remanded the case with instructions to deny enforcement of the Board's order finding a violation of Section 8(a)(5) and (1).

30

35

40

In the instant case, it is clear that the Respondent is a successor to West Toledo. On March 1, the Respondent took over the operation of the facility involved from West Toledo and continued to operate it in unchanged form. There was no interruption in the operations of the facility as a result of the transfer from West Toledo to the Respondent. At the time it began operations on March 1, the Respondent employed 19 employees in the job classifications of STNA, cook/dietary aide, laundry and housekeeper. 17 of these employees had been previously employed by West Toledo in the same bargaining unit job classifications. As of April 16, the Respondent employed 25 employees in the classifications noted above, 17 of whom had been previously employed by West Toledo in bargaining unit classifications. Thus, it is clear that on March 1, the Respondent had a substantial and representative complement of employees. In this regard, on March 1 the Respondent employed approximately 75 percent of its full complement of employees in all of the unit job classifications. Accordingly, based on *Fall River*, *Burns*, and *Spruce Up*, I find that on March 1, the Respondent was a successor to West Toledo.

45

I now turn to the issue of the Union's bargaining demand. In the first instance, the credited and uncontroverted testimony of Huff establishes that on February 20 or 21, in a telephone conversation with Stone, Huff requested that Stone meet and bargain with the Union regarding a collective-bargaining agreement. I find Huff's conversation with Stone to be a valid bargaining demand.

In addition, on February 11, Huff asked Stone to sign the contract assumption agreement that would bind the Respondent to the collective-bargaining agreement between the Union and West Toledo. On February 26 Huff presented Stone with the contract assumption agreement and asked him to execute it. The Board has held that a demand that a successor employer honor the predecessor's collective-bargaining agreement is a valid demand for recognition because it subsumes a demand for recognition. *Metro Toyota*, 318 NLRB 168, 177 (1995); *Stanford Realty Associates*, 306 NLRB 1061, 1066 (1992); *Sterling Processing Corp.*, 291 NLRB 208, 217 (1988). In *Metro Toyota*, the Board noted this is particularly the case when the union indicates that is going to be flexible with regard to the terms of the existing contract. 318 NLRB at 177. In the instant case, the language of the contract assumption agreement that Huff tendered to Stone on February 26 indicates that nothing in the agreement precludes the Union from modifying the terms of the existing collective-bargaining agreement. On the basis of the foregoing, I find that Huff's February 11 and February 26 requests that Stone honor the existing collective-bargaining agreement between the Union constitute valid requests for recognition.

In *MSK Corp.*, 341 NLRB 43, 44 (2004), the Board held that:

[W]here a union demands recognition from a prospective successor employer before that successor has hired a substantial and representative complement of employees, the union's demand is deemed to be a continuing one and the successor's bargaining obligation matures once it hires a substantial and representative employee complement. See *Simon DeBartelo Group*, 325 NLRB 1154, 1156 (1998), *enfd.* 241 F.3d 207 (2d Cir. 2001).

Applying those principles to the instant case, I find that Huff's oral request to bargain made to Stone on February 20 or 21 and his February 11 and February 26 requests for recognition were continuing in nature and that the Respondent's bargaining obligation became effective when it began operations on March 1, 2013.¹⁰

As noted above, the Respondent contends that it was privileged not to extend recognition to the Union because it had a good-faith reasonable doubt of the Union's majority status under the Supreme Court's decision in *Allentown Mack*.

The Respondent also contends that the Union's filing a petition for an election on March 1, indicates that the Union itself believed that it had lost majority support among the employees and could only regain that support through an election. The Respondent contends that the filing of the petition also supports the Respondent's reasonable belief that the Union lacked majority support on March 1.

¹⁰ The General Counsel acknowledges in his brief that the Respondent did not have an obligation to bargain with the Union over its purchase of the facility from West Toledo, as the Union requested in its February 12 letter. The Respondent's purchase of the facility is subject to its entrepreneurial control and is not a bargainable matter. *Fibreboard Paper Co. v. NLRB*, 329 U.S. 203, 223-225 (1964). I agree with the General Counsel that the Respondent had no obligation to bargain with the Union regarding its purchase of the facility. The February 12 letter does, however, reflect the Union's continuing desire to represent the West Toledo employees as the operation of the facility was transferred to the Respondent.

The General Counsel claims that because of the “successor bar” doctrine as set forth in the Board’s decision in *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011), the Respondent cannot rely on *Allentown Mack* in defending its refusal to bargain, regardless of whether it claims its good-faith doubt arose before or after it began operations on March 1. (GC Br. at 11 and 13.)

5 The General Counsel further contends that the Respondent’s reliance on the good-faith doubt standard is incorrect because the Board’s decision in *Levitz Furniture of the Pacific*, 333 NLRB 717 (2001) requires that an employer must demonstrate actual loss of majority support.

10 I do not agree with the General Counsel that I should not consider evidence of employee disaffection regarding the Union that the Respondent became aware of prior to its beginning operations on March 1. In *UGL-UNICCO*, supra, there is no discussion of the applicability of *Allentown Mack* to the period of time before an employer would normally be obligated to acquiesce to a union’s bargaining request. Thus, I find that I must consider the Respondent’s claim that it had a good-faith reasonable doubt of the Union’s majority status when it began
15 operations on March 1

I also do not agree that the Board’s decision in *Levitz Furniture*, supra, precludes the Respondent from raising its *Allentown Mack* defense in this case. In *Levitz*, the Board held that an employer may unilaterally withdraw recognition from an incumbent union only when the
20 union has actually lost the support of a majority of the bargaining unit employees. The instant case does not involve an incumbent union with a long-standing relationship with an employer, as was the case in *Levitz Furniture*. In the instant case, as in *Allentown Mack*, the issue is whether the Respondent has an initial obligation to bargain with the Union by virtue of its status as a
25 successor employer.

I do agree with the General Counsel’s argument that the successor bar doctrine precludes the consideration of evidence reflecting employee disaffection with the Union on or after March 1 for reasons which I will explain in detail later in this decision.

30 I first address the Respondent’s claim that as of the date when it initially began operations on March 1, there was evidence establishing good-faith doubt of the Union’s majority status within the meaning of *Allentown Mack*. In *Nova Plumbing, Inc.*, 336 NLRB 633, 636 (2001), the Board summarized the evidence that the Supreme Court relied on in *Allentown Mack* in finding that the employer established a good-faith doubt of majority support as follows:

35 (1) a statement by the union steward to the respondent’s managers that the union lacked majority support; (2) a concession by the union that reliable information showed that 7 of the 32 unit employees did not support the union; (3) a statement by an employee that “he was not being represented for the \$35 he was paying,” and (4) a statement by employee Bloch to a manager that the entire night shift did not want the union. In *Allentown Mack*, the Court gave particular weight
40 to the union steward’s statement that the union lacked support since he was “not hostile to the union and was in a good position to assess antiunion sentiment.”*Id.* at 371.

In the instant case, prior to the Respondent’s commencement of operations on March 1, Stone had been told by Page, West Toledo’s director of nursing in the summer of 2012, that
45 “there was some disenchantment” among employees regarding the Union. In addition, while Johnson was conducting interviews in February 2013, three or four West Toledo employees who had applied for positions at the Respondent told her that they did not want to have a union. Page

also told Johnson that she did not think the employees wanted to have a union at the facility. Johnson reported all of these statements to Stone prior to March 1.

5 The only direct evidence of employee disaffection is Johnson's testimony that three or four employees told her that they did not want a union at the facility.¹¹ I note, however, that Johnson did not testify regarding the names of the three or four employees who made such statements. Thus, it cannot be determined that these employees were actually among the 17 former West Toledo employees that the Respondent had hired by March 1.

10 The evidence emanating from Page is indirect¹² in that she told Johnson of her belief that she did not think that employees wanted to have a union at the facility and told Stone that there was "some disenchantment" with the union. The statements made by Page to Johnson failed to identify the number and names of employees who allegedly were opposed to continued union representation. There is, in fact, no record evidence to establish the basis for Page's opinion in this regard. In addition, Page's statement to Stone that there was some disenchantment with the Union is of little value to the Respondent's defense. There is no indication as to how many employees possessed this sentiment toward the Union. Moreover, in my view, merely because an employee is disenchanted with a union does not establish that he or she no longer desires union representation.

20 On the basis of the foregoing, I find that both the direct and indirect evidence arguably showing employee opposition to continued union representation is entitled to little weight. I find therefore that the Respondent has failed to demonstrate that it had a good-faith doubt as to the Union's majority status when the Respondent's bargaining obligation came into fruition on March 1. See *MSK*, supra at 46-48.

30 The fact that the Union filed a petition for an election on March 1, does not serve as a basis for the Respondent to have had a good-faith doubt of the Union's majority status as of that date. The Board has long held that even after a union has been voluntarily recognized by an employer it may file an election petition in order to receive the benefits of a Board certification, such as the irrebuttable presumption of majority status for 1 year following the certification. *General Box Co.*, 82 NLRB 678 (1949). In the circumstances of this case, the Union's filing of the petition does not in any way detract from the presumption of continued majority support that it possessed on March 1.

35 In addition, the statements that employee Deloney made to Stone on March 1 that she and "lots" of other employees did not support the union does not serve as a basis for the Respondent's refusal to recognize and bargain with the Union. Importantly, Deloney's statement is vague in that she gave no indication as to the number of employees she was referring to by the use of the term "lots." I also find that the statements opposing the Union signed by employees

¹¹ In *MSK Corp.*, 341 supra at 45 (2004) the Board indicated that direct evidence of employee opposition to union representation consists of statements made by employees directly to management officials regarding their sentiment toward the union.

¹² In *MSK Corp.*, supra at 47 the Board indicated that indirect evidence of employee opposition to union representation consists of statements by an employee that other employees oppose the union or statements by supervisors that employees oppose the union.

from April 8 to April 10 do not privilege the Respondent from recognizing and bargaining with the Union.

5 In so finding, I rely on the Board's decision in *Hampton Lumber Mills-Washington*,
 supra. In that case, as here, the successor employer unlawfully refused to recognize and bargain
 with the union on November 30, 1999. The Board found that a petition received on December 8,
 1999, did not excuse the employer's unlawful refusal to bargain. In its decision the Board relied
 on its decision in *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 176-178 (1996), affd.
 10 in pertinent part and remanded on other grounds 117F.3d 1454 (D.C. Cir. 1997), which
 reaffirmed the Board's "practice of presuming that, when an employer unlawfully fails or refuses
 to recognize and bargain with the incumbent union, any employee disaffection from the union
 that arises during the course of that failure or refusal results from the earlier unlawful conduct."
 Applying that policy, the Board found in *Hampton Lumber Mills-Washington*, that the petition
 was presumptively tainted by the employer's November 30 unfair labor practice. *Id.* at 196.

15 Since the Respondent had an obligation to recognize and bargain with the Union on
 March 1, 2013, it cannot rely on evidence received on that date or thereafter in refusing to
 recognize and bargain with the Union on the basis of the Board's successor bar doctrine. In
UGL-UNICCO, supra, the Board returned to the successor bar doctrine set forth in *St. Elizabeth*
 20 *Manor, Inc.*, 329 NLRB 341 (1999). Under the successor bar doctrine, a union is entitled to
 reasonable period of time during which no question concerning representation that challenges its
 majority status may be raised through a petition for an election filed by employees, by the
 employer or by a rival union. In addition, during this period an employer may not unilaterally
 withdraw recognition from a union based on the claimed loss of majority support. *UGL-*
 25 *UNICCO*, supra, slip op. at 8. See also *Hampton Lumber Mills-Washington*, supra at 196.

In reestablishing the successor bar doctrine in *UGL-UNICCO*, supra, slip op. at 3, the
 Board noted the following observation by the Supreme Court set forth in *Fall River*:

30 [A]fter being hired by new company following a layoff from the old, employees
 initially will be concerned primarily with maintaining their new jobs. In fact, they
 might be inclined to shun support for their former union, especially if they believe
 that such support will jeopardize their jobs with the successor or if they are
 inclined to blame the union for their layoff and problems associated with it.
 35 Without the presumptions of majority support and with a wide variety of
 corporate transformations possible, an employer could use a successor enterprise
 as a way of getting rid of a labor contract and exploiting the employees' hesitant
 attitudes toward the union to eliminate its continuing presence. [*Id.* at 40.]

40 Applying the successor bar doctrine to the instant case, once the Respondent's obligation
 to recognize and bargain with the Union matured on March 1, the Union was entitled to a
 reasonable period of time of bargaining without challenge to its majority status. Of course, the
 Respondent has refused to recognize and bargain with the Union entirely and consequently no
 bargaining has occurred at all between the parties. Under these circumstances, the Respondent
 45 cannot be permitted to rely on the vague statements made to Stone by Deloney on March 1 or
 the written expressions of employee disaffection from the union during the period of April 8 to
 10 as a basis for its refusal to recognize and bargain with the Union. On the basis of the

made phone calls to employees while they were at work. Johnson further instructed employees to turn in their written statements to her. Johnson told employees that it did not matter to her one way or the other as to what their choice was but she did not offer any explanation to employees as to why she was seeking this information. Between April 8 and 10, 21 unit employees signed statements indicating they did not want the Union to represent them. The employees gave the statements to Johnson who, in turn furnished them to Stone.

In *Strucknes Construction Co.*, 165 NLRB 1062 (1967), the Board held that, absent unusual circumstances, the polling of employees by an employer regarding their support of a union is violative of Section 8 (a)(1) unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of the union's claim of majority status; (2) this purpose is communicated to the employees; (3) assurances against reprisal are given; (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

The Board has indicated that the failure to comply with even one of the criteria set forth in *Strucknes* is sufficient to establish a violation of Section 8(a)(1). *American National Insurance Co.*, 281 NLRB 713 fn. 3 (1986). In the instant case, the Respondent failed to meet any of the *Strucknes* requirements. The Respondent did not tell employees what the purpose of the poll was and therefore did not comply with the second requirement. The Respondent did not give assurances against reprisals and therefore did not comply with the third requirement. All of the 21 employees who responded to Johnson's instruction to indicate in writing whether they supported the union signed their declaration. Thus, the poll was not conducted by secret ballot and did not meet the fourth requirement. As noted above, I found that the Respondent engaged in unfair labor practices on March 1, 2013, by refusing to recognize and bargain with the union and by failing to provide requested information. Accordingly, the Respondent did not comply with the fifth requirement.

With respect to the first requirement, while the purpose of the poll may have been to determine the truth of the Union's claim of majority status, the poll was conducted during a period of time when the Union's majority status could not validly be challenged. As noted above in *UGL-UNICCO*, supra, pursuant to the successor bar doctrine, a union is entitled to a reasonable period of time of bargaining during which no questions concerning its majority status may be raised. In situations where the successor employer recognizes the union, a reasonable period is a minimum of 6 months measured from the date of the first bargaining meeting. *Id.*, slip op. at 9. In the instant case, since the Respondent unlawfully refused to recognize and bargain with the Union there has, of course, been no bargaining between the parties. Accordingly, the Respondent was not privileged to poll its employees during the period from April 8 to 10 to determine whether the Union maintained majority support.

On the basis of the foregoing, I find that the Respondent violated Section 8(a)(1) of the act by polling its employees to determine the Union's majority support.

I next consider whether the Respondent's conduct in telling employees they needed to express in writing whether they supported the Union also constituted unlawful interrogation. In *Scheid Electric*, 355 NLRB 160 (2010) the Board noted that in determining whether questions asked of an employee violate Section 8(a)(1) it considers:

[W]hether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act. *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1166, 1178 fn. 20 (1984), enfd sub. nom. *HERE Local 11 v. NLRB*, 760F.2d 1006, (9th Cir. 1985). Among the factors that may be considered in making such an analysis is the identity of the questioner, the place, and method of interrogation, the background of the questioning and the nature of the information sought and whether the employee is an open union supporter. [Id. at 160.]

Applying those factors to the instant case, I find that Johnson's instructions to employees to indicate in writing whether they supported the Union constituted an unlawful interrogation in violation of Section 8(a)(1) of the Act. Johnson was the Respondent's representative who interviewed the employees and made all of the hiring decisions at the Respondent and thus possessed substantial authority. Pursuant to instructions from the Respondent's owner, Johnson systematically directed all of the employees to disclose in writing whether they supported the Union and she did so in the context of the Respondent engaging in other unfair labor practices. It is clear that under these circumstances Johnson's questioning of employees regarding their support of the Union restrained and coerced them in the exercise of their rights guaranteed by the Act.

CONCLUSIONS OF LAW

1. Since March 1, 2013, the Union has been the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time certified nursing assistants, cooks, dietary aides, housekeepers and laundry employees employed by the Respondent at its facility located at 4645 Lewis Ave., Toledo, Ohio, but excluding all registered nurses and licensed practical nurses, office clerical employees, receptionists, professional employees, guards and supervisors as defined by the Act.

2. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by:

(a) refusing to recognize and bargain with the Union since March 1, 2013;

(b) refusing to provide the Union with a list of employees that the Respondent had hired in unit job classifications who had previously been employed by West Toledo.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by polling and interrogating employees about their support for the Union in a manner constituting interference, restraint, and coercion of Section 7 rights.

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

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.

Since the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, I shall order the Respondent to recognize and, on request, bargain with the Union as the collective-bargaining representative of the unit employees and, if an understanding is reached, embody the understanding in a signed agreement.

Since the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with relevant information requested by the Union, I shall order it to provide the requested information to the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondent, Merit House, LLC, Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively in good faith with Service Employees International Union, District 1199, WV/KY/OH (the Union) as the exclusive collective-Bargaining representative for the unit employees in the following appropriate unit:

All full-time and regular part-time certified nursing assistants, cooks, dietary aides, housekeepers and laundry employees employed by the Respondent at its facility located at 4645 Lewis Ave., Toledo, Ohio, but excluding all registered nurses and licensed practical nurses, office clerical employees, receptionists, professional employees, guards and supervisors as defined by the Act.

(b) Failing to bargain in good faith with the Union by refusing to furnish the Union with relevant information it had requested.

(c) Polling and interrogating employees about their support for the Union in a manner constituting interference, restraint, and coercion of Section 7 rights.

(d) 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.

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

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

10 All full-time and regular part-time certified nursing assistants, cooks, dietary aides, housekeepers and laundry employees employed by the Respondent at its facility located at 4645 Lewis Ave., Toledo, Ohio, but excluding all registered nurses and licensed practical nurses, office clerical employees, receptionists, professional employees, guards and supervisors as defined by the Act.

15 (b) Furnish to the Union the information it had requested regarding a list of employees that the Respondent had hired in unit classifications who had previously been employed by West Toledo.

20 (c) Within 14 days after service by the Region, post at its facility in Toledo, Ohio, copies of the attached notice marked "Appendix."¹⁵ 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, the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2013.

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

Dated, Washington, D.C., January 6, 2014

40

Mark Carissimi
Administrative Law Judge

15 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."

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 recognize and bargain in good faith with the Service Employees International Union, District 1199, WV/KY/OH (the Union) as the collective-bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time certified nursing assistants, cooks, dietary aides, housekeepers and laundry employees employed by the Respondent at its facility located at 4645 Lewis Ave., Toledo, OH but excluding all registered nurses and licensed practical nurses, office clerical employees, receptionists, professional employees, guards and supervisors as defined by the Act.

WE WILL NOT refuse to provide the Union with information that it requested regarding a list of employees who we hired in unit classifications who had previously worked for West Toledo.

WE WILL NOT poll and interrogate you about your support for the Union in a manner constituting interference, restraint, and coercion of your Section 7 rights.

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

WE WILL recognize and bargain with the Union as the collective-bargaining representative of the unit employees and, if an understanding is reached, embody that understanding in a signed agreement.

WE WILL provide the Union with information it had requested regarding a list of employees who we hired in unit classifications that had previously worked for West Toledo.

MERIT HOUSE, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1240 East 9th Street, Room 1695, Cleveland, OH 44199-2086

(216) 522-3715, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (216) 522-3740.