

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

RIDGEWOOD HEALTH CARE CENTER, INC.
AND RIDGEWOOD HEALTH SERVICES, INC.
A SINGLE EMPLOYER

And

Case 10-CA-113669

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION (USW)

And

RIDGEWOOD HEALTH SERVICES, INC.

And

Case 10-CA-136190

CHARGING PARTY'S USW'S BRIEF ANSWERING RESPONDENT'S
EXCEPTIONS TO THE ALJ DECISION

Richard Rouco
Counsel for the USW

OF COUNSEL:
Quinn Connor Weaver
Davies & Rouco
Two 20th Street North, Ste. 930
Birmingham, AL 35203
205-870-9989

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CHARGING PARTY'S ANSWERING BRIEF

Pursuant to Section 102.46(d) of the National Labor Relations Board's Rules and Regulations, the Charging Party USW respectfully submits the following brief answering the Respondent's exceptions to the Administrative Law Judge's Decision.

STATEMENT OF THE CASE

Ridgewood Health Care Center, Inc. (hereinafter RHCC) is skilled nursing home facility in Jasper, Alabama, which is licensed/certified to operate with ninety-eight (98) beds. (Tr. at 546)¹ In January, 2008, Ms. Brown purchased RHCC and a sister nursing home named

¹As Ms. Brown testified, Alabama strictly controls the number of beds a nursing can operate with under its certificate of need process. (Tr. at 547) This fact is very important to understanding this case because the number of licensed beds sets a practical limit on staffing needs. Though the facility is licensed for 98, Ms. Brown testified that "for the employee amounts", RHCC only has ninety-seven (97) beds. (Tr. at 546) In other words, the staffing requirements are not based on the licensed number but on the number of beds actually in service. The testimony also established that patient census plays a critical role in determining staffing levels. The historical monthly patient census was approximately eighty-six (86) percent (*See*, Charging Party Exhibit No. 9 and Tr. at 356) Based on the number of beds and the historical patient census, Ms. Collett (the former Director of Nursing) testified that the

Ridgeview Health Care Center, Inc. and its operating entity Ridgeview Health Services, Inc. (Tr. at 405) Prior to Ms. Brown acquiring RHCC, it was owned by her father and his partner Mr. Caldwell. (Tr. at 598) In fact, both Ridgeview Health Care Center and RHCC (i.e. the two facilities Ms. Brown purchased in January 2008) were owned and operated by Ms. Brown's father and his partner. (Tr. at 598)

Ms. Brown had a falling out with Mr. Walker (the person operating her RHCC nursing home) when he requested a reduction in rent payments. (Tr. at 540) Ms. Brown refused to reduce rent payments and, as a result, Brown and Walker arbitrated their dispute. (Tr. at 542) Shortly after the arbitration had concluded in June 2012, Ms. Brown and Mr. Walker decided not to renew the lease. (i.e. the lease allowing Walker to operate RHCC)² (Tr. at 543) It was at this point in time (July or August of 2012) that Ms. Brown decided to unify operation and ownership of RHCC. (Tr. at 543) The twin decisions of terminating the lease and assuming operation of RHCC occurred more than one year prior to the actual transition in October 2013.³

Though the decision to non-renew the lease occurred in July or August of 2012, Ms. Brown and Mr. Walker first met with employees to announce the decision in June or July of 2013. (Tr. at 549) At the first meeting with employees, Ms. Brown stated that 99.9 percent of employees would retain their positions at RHCC. (Tr. at 75, 77, 102, 132, 137 and 261) Ms. Brown also reassured employees that things seem to be working well at Ridgewood and that nothing was going to change about insurance, pay, wages, contracts and the name of the facility. (Tr. at 55, 75, 101, 218-219)

facility was adequately staffed prior to the October 1, 2013 transition. (Tr. at 390-391)

² The lease that allowed Walker to operate Ms. Brown's nursing home was set to expire by its own terms in December, 2013.

³ This is an important fact because it demonstrates that the ensuing chaotic hiring process resulted when Ms. Brown decided to rid herself of the Union in August 2013. Prior to this decision, the plan was to retain 99.9 percent of the employees.

On July 15, 2013, the USW received a letter from Respondents' lawyer Mr. James Smith. (J. Ex. 4) Mr. Smith indicated that the collective bargaining agreement was unacceptable but that his client wanted to negotiate a "mutually acceptable Agreement" with the USW. *Id.*

When word spread that the Respondents rejected the contract, Ms. Cynthia Dudley confirmed that employees were upset. (Tr. at 311) Ms. Brown testified that in late July or August 2013, she held another set of meetings with employees and staff to reassure employees because "there were crazy things being said and talked about." (Tr. at 418)⁴ Again, Ms. Brown, along with her sister Alicia and Reverend Wallace, reassured employees that 99.9 percent would be hired in this August meeting. (Tr. at 260- 261, 354)

According to Ms. Audrie Borden, Ms. Brown observed that employees at RHCC were "all close-knit, very family oriented. And why fix something that's not broke." (Tr. at 341). Rev. David Wallace was also reassuring employees that things were going to stay the same and that they were going to try to honor the contract. (Tr. at 341)⁵ Ms. Brown reiterated this assurance by telling employees at these August meeting that employees had a job and that things would basically stay the same. (Tr. at 77)

During these meetings in August (shortly before the hiring process began), Ms. Brown acknowledged that she was still evaluating everything and when asked whether she told employees whether there would be any changes, she testified "there again, I mean, I think everything was still under evaluation. And so I didn't know at that time what the outcome would be." (Tr. at 419)

⁴ Though Ms. Brown had a difficult time recalling any dates, we know from other testimony that the second meeting more likely than not occurred in late July or early August. Ms. Brown testified that she visited with a friend's father in the nursing home during the time that she held meetings with employees. (Tr. at 570). Her friend Ms. Stacy Alley testified that her father was at RHCC from mid-July until his death on August 30, 2013. (Tr. at 611).

⁵ According to Borden, Rev. Wallace attended the meetings with Department heads with Ms. Brown and her sister. (Tr. 342) He was allowed to speak at the meeting and also run some of the meetings with other staff. *Id.*

The application and interview process began on August 13, 2013 and concluded on or about August 30, 2013. (Tr. 421:9-12; *see*, Joint Ex. 10 p. 2, “A notice was posting in the facility which explained to employees how to apply for employment with Ridgewood Health Services, Inc. and told them that to apply they must call to schedule an appointment with Ridgewood Health Services, Inc. by August 30.”) No employees working at RHCC prior to the October 1 transition applied after August 30, 2013. (Tr. at 422)⁶

Ms. Brown testified that she “**hired 51**” of the sixty-five (65) Preferred employees that applied and that Joint Exhibit 12 was the form letter sent to the hired employees. (Tr. at 429) Significantly, Joint Exhibit 12 is dated September 11, 2013 and sets a return date of September 16, 2013. Thus, as of September 11, 2013, Respondent had decided to hire 51 former Preferred employees and, as the testimony demonstrates, 51 had accepted employment by September 16, 2013 (the deadline set forth in the letter) and only two did not report to work on October 1, 2013.

The applications of outside employees establish that they started applying after the first week of September 2013. (*See*, RX-22 Harrington application dated 9-12-13; RX-24, Padgett application dated 9-18-13; RX. 26, Pittman, application dated 9-9-13; RX-28, Campbell Application dated 9-18-13; RX-30, Greenwade Application dated 9-9-11; RX-32, Wood Application dated 9-27-13; RX-33, Sanford Application dated 9-24-13; RX-34, Thomas Application dated 9-30-13; Rx-35, Tatum Application dated 10-1-13; RX-36, Taylor Application dated 9-26-13) This confirms that Preferred employees were hired first before outside employees were considered for employment. Such a procedure allowed the Respondents to determine how many non-incumbent employees were needed to defeat majority status.

On September 10, 2013, the USW sent a letter to Ms. Brown’s lawyer requesting that

⁶ Mr. Marcus Waldrop is one exception. Though he applied prior to August 30, he asked to reschedule his physical but the request was denied. After October 1, 2013, the Respondents allowed Mr. Waldrop to apply for employment and take a physical.

Respondents accept the terms of the contract and accepting the invitation expressed in the July 15 letter to bargain over the terms and conditions of a new contract. (JEX 8, p. 2). The September 10, 2013 letter also states that Ridgewood Health Services as the operating company had an obligation to recognize and bargain with the Union. *Id.*

On September 13, 2013, the USW sent Mr. James Smith (Brown's counsel) and Ms. Shifflett (Preferred's Administrator) a letter requesting, among other things, information about the transition. (JEX 9) On September 23, 2013, Ms. Brown's new counsel Ashley Hattaway rejected the Union's request to bargain as premature and also rejected the requested information. (JEX 10). On September 25, 2013, the USW responded to Ms. Hattaway's September 25 letter again requesting that Respondents and Ms. Brown bargain with the Union over a new agreement. (JEX 11) Though the Union reiterated its belief that RHCC was bound by the collective bargaining agreement, the Union also observed that many represented employees had already received and accepted offers of continued employment at the facility. (JEX. 11, p. 2) As a result of the hiring of Preferred employees in order to keep the facility operating as a nursing home on the date of the transition, the USW claimed that a substantial and representative complement had been retained and that represented employees constituted a majority. (JEC. 11, p. 2)

The Respondents assumed operation of RHCC on October 1, 2013. The Respondents refused to meet and bargain with the USW after October 1, 2013. The USW filed an initial charge on August 19, 2013 and subsequently amended this charge on September 19, 2013 and February 5, 2013. (GC EX (1(a), 1(c)) A Complaint was issued based on the amended charges.

RESPONSE TO EXCEPTIONS

1. Respondents' exception 1 lacks merit because the Administrative Law Judge (ALJ) correctly found that the relationship had deteriorated and that Ms. Brown decided not to renew the lease because the "relationship changed" after an arbitration over lease payments and she had "hard feelings" toward Mr. Walker. (Tr. at 412).

2. Respondents' exception 2 lacks merit because the ALJ correctly found that Respondents were successors under *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), because a substantial and representative complement of the Respondents workforce consisted of formerly represented employees. A substantial and representative complement consists of the number of employees needed to adequately staff the facility under Alabama law. The record established that the facility is adequately staffed with eighty-two (82) to eight-eight (88) unit employees.⁷ First, the ALJ correctly found that an appropriate historical unit exists without inclusion of the helping hands position and this historical unit consisted of approximately eighty-two (82) employees and that formerly represented employees held a majority of these positions on October 1, 2013. Second, as an alternative basis for finding majority status, the record established that by September 16, 2013, more than fifty-one (51) employees working at the facility in bargaining unit positions accepted continued employment and continued to work through the transition in the same positions. Because the Respondents have not excepted to the single employer findings, the Board should conclude the RHCC had hired a majority of formerly represented employees as of September 16, 2013.

⁷ The work schedules identified as C.P. Exhibits 1-4 establish that eighty-two (82) employees working in the historic bargaining unit positions constitutes a substantial and representative complement. As the Appendix A to this brief demonstrates eighty-eight (88) employees was the total average number of bargaining unit employees used at the facility during the year prior to the take-over. Ms. Collette (Director of Nursing for Preferred) testified that the staffing levels indicated on the predecessor's work schedules was adequate staffing under Alabama law for a facility with 98 licensed beds. (Tr. at 390-391)

3. Respondents exception 3 lacks merit because the ALJ correctly found that October 1, 2013 is an appropriate date for determining majority status because (1) the historical unit consisted of approximately 82 to 88 employees, (2) all the unit positions had been filled (i.e. LPNs, CNAs, Dietary, House Keeping, Laundry and Maintenance); (3) for most months after October 1, 2013, the Respondents have operated with less than 101 employees including helping hands (CPEX 10-16) and have averaged eighty-eight employees in the historical unit position (i.e. the unit without helping hands) and (4) Alabama law requires the nursing home to be adequately staffed at all times. (Tr. at 602)

4. As noted in response to Exception No. 2, the ALJ correctly found that the formerly represented employees constituted a majority of employees hired into an appropriate bargaining unit positions. Respondents incorrectly characterize Joint Stipulation of Fact ¶ 37 which as stating that they hired 101 employees to perform bargaining unit work. Additionally, Respondents incorrectly imply that they had 123 employees working at the same time. Joint Exhibit 21 page 6 shows does not show that 123 employees worked at the facility in 2013. Additionally, Charging Party Exhibits 10-16 demonstrate that the Respondents operated the facility with far fewer than 123 employees even if helping hands are included.⁸

⁸ CPEX 10 shows a total of 95 employees on the schedule for the period of August 3 to August 16, 2014. Of the 95 employees, two employees were not scheduled for any days during the two week period reflected on the schedule and 9 employees were helping hands. Thus, Respondents operated with 84 employees actually scheduled to work in the historical unit positions (i.e. 95 minus 11 employees (helping hands and two not scheduled to work)) and a total of 93 employees including helping hands. CPEX 11 shows a total of 101 employees on the schedule for the period of August 17 to August 30, 2014. Of the 101 employees, two appeared on the schedule but were not assigned any work days and 14 were classified as helping hands. Four of the helping hands did not perform any work but instead attended courses. Thus, the facility operated with a total of 94 employees including 10 helping hands who were assigned to work. If the 10 helping hands are excluded, the Respondents operated the facility with 84 employees in the historical unit positions. CPEX 12 shows 105 employees on the schedule for the period of September 28 to October 11, 2014. Of the 105 employees, one employee is not assigned any work days and 16 employees are helping hands. Of the 16 helping hands, four did not perform work on most days. Thus, the facility operated with 100 employees including helping hands. If helping hands are excluded, the facility operated with 88 employees assigned to work in historical bargaining unit positions. (e.g. 100 minus 12 helping hands assigned to work) CPEX 13 shows 101 employees on the schedule of the period of October 12 to October 25, 2014. Of the 101 employees, 12 are helping hands. Thus, the Respondents operated the facility with 89 employees in the historical unit positions.

5. Respondents' exception 5 lacks merit because the ALJ correctly found that helping hands should not have been included in the unit analysis because helping hands have never been included in the historical unit (Tr. at 390), helping hands are not certified thus they cannot be considered nursing aides as the term is used in the unit description (Tr. at 391, 690) and helping hands only performed a small subset of the duties performed by certified nursing aides.⁹

6. Respondents' exception 6 lacks merit because Respondents incorrectly assert that helping hands are covered by the unit descriptions because it is undisputed that this classification did not exist in the historical bargaining. (Tr. at 390) Respondents cannot unilaterally change the scope of the unit description in the collective bargaining agreement. Respondents also cannot interpret an agreement that they claim did not apply to them in a self-serving manner. Respondents work schedules separately identifies the helping hand position and does not list these employees so classified under any of the historical unit positions. Finally, helping hands only performed a very small subset of the job duties formerly performed by certified nursing aides.

7. Respondents' exception 7 lacks merit because Respondents incorrectly assert that

CPEX 14 shows 100 employees on the schedule for the period of December 7 to December 20. Of the 100 employees on the schedule 2 were not scheduled to work any days during the period and 10 were helping hands. Thus, the Respondents operated the facility with only 98 employees actually scheduled to work and with only 88 employees in the historical unit positions (i.e. 98 minus 10 helping hands). CPEX 15 shows 96 employees on the schedule for the period of December 2, 2014 to January 3, 2015. Of the 96 employees, one employee was not scheduled to work any days during this period and 9 employees were helping hands. Thus, the Respondents operated the facility with 95 employees including helping hands and 86 employees in historical unit positions. CPEX 16 shows 95 employees on the schedule for the period of January 18 to January 31, 2015. Of the 95 employees, 2 were not scheduled to work any days during this period and 9 were helping hands. Thus, the Respondents operated the facility with 93 employees and with 84 employees working in the historical unit positions.⁹ Respondents' witness Ms. Sue Leigh Warren put the matter most succinctly: "**Helping hands cannot do the work of a certified nursing assistant.**" (Tr. at 691) Ms. Warren's testimony accurately reflects State law. In Alabama, any individual who desires to work as a nurse aide in an Alabama nursing home must first be listed in good standing on the Alabama Nurse Aide Registry, including RN's and LPN's. An individual must successfully complete a State-approved Nurse Aide Training and Competency Evaluation Program and pass both the written and skills tests to be listed on the Nurse Aide Registry. (See, Alabama Department of Public Health's website, <https://ph.state.al.us/NurseAideRegistry/%28S%28awtj5hzwv1cknz45wehaqs45%29%29/FAQ.aspx>)

each of the accretion factors support including the helping hands position in the unit description contained in the collective bargaining agreement.

8. Respondents' exception 8 lacks merit because Respondents are incorrect in asserting the helping hands work under the same supervisors and management as CNAs. CNA's are part of the nursing staff and helping hands would not considered in the nursing department because they are not certified. (Tr. at 390-391) Additionally, helping hands are not currently scheduled to work the 11 p.m. to 7 a.m. shift, whereas all other nursing department positions (i.e. LPNs and CNAs) work all three shifts. (CPEX 14-16)

9. Respondents' exception 9 lacks merit because Respondents incorrectly assert that helping hands fill in for CNAs. The undisputed testimony is that helping hands cannot perform the duties of a CNA because they are not certified by the State of Alabama and thus cannot fill in for a CNA. (Tr. at 272, 391)

10. Respondents' exception 10 lacks merit because the ALJ correctly found that the Respondents reliance on *Texaco Port Arthur* and *Wiedemann* is misplaced because the burden of proofs in these cases differed from the burden of proof in a accretion analysis.

11. Respondents' exception 11 lacks merit because the ALJ did not substitute his own judgment regarding Ms. Brown's decision to use helping hands. Respondents can use helping hands (assuming the State of Alabama would approve how they are used) but that doesn't mean these positions should be included in unit analysis for purposes of determining whether a majority of the positions in an appropriate unit are held by formerly represented employees.

12. Respondents' exception 12 lacks merit because the ALJ correctly noted that the number of helping hands declined substantially from the number hired on October 1, 2013 and through November 14, 2013. For example, the Respondent hired 19 helping hands at minimum

wage as of October 1, 2013. (JEX 21, p. 1-3; Tr. at 586 (minimum wage job)) As of November 14, 2013, the Respondents hired 22 helping hands. (JEX 21, p. 4-6) Charging Party Exhibits 10-16, however, show that the number of “helping hands” has substantially declined since November 2013. Based on CPEX 10-16, the average monthly number of helping hands employed during the period between August 3, 2014 and January 31, 2015 is eleven (11). During this period, the highest number was 16 helping hands during the two week period of September 28 and October 11, 2014. (CPEX 12) However, immediately following this period there were only 12 helping hands on the schedule. (CPEX 13) In three of the sampled schedules produced by Respondent, there were only 9 helping hands on the schedule. (CPEX 10, 15 & 16) The difference between 19 helping hands employed on October 1, 2013 and the average of 11 helping hands on the 2014 and 2015 schedules reflected in CPEX 10-16 represents a substantial decline and supports that ALJ’s finding in footnote 19. Moreover, the decline cannot be attributed to the helping hands becoming CNAs. CPEX 1-4 show that from June 2012 to September 2013, on average 46 CNAs worked at the facility during any given month. Since the transition on October 1, 2013, the schedules provided by the Respondents for 2014 and the first month of 2015, show that the average monthly CNA head count is 36. (CPEX 10-16)

13. Respondents’ exception 13 lacks merit because the ALJ correctly inferred that the first meeting Ms. Brown had with employees happened prior to the July 15, 2013 letter because Ms. Brown testified that she met with employees in June or July of 2013. (Tr. at 549) Additionally, Ms. Brown testified that she visited the facility again in early August 2013 because employees were saying crazy things. (Tr. at 418) The reasonable inference is that first visit occurred prior to July 15, 2013 and that the second visit occurred a three or four weeks later after the employees learned of the July 15, 2013 letter.

14. Respondents' exception 14 lacks merit because the ALJ correctly credited the testimony of numerous employees who stated that Ms. Brown and Reverend David Wallace told them at the first meeting that there would be minimal changes and that things would remain basically the same. (See, Tr. at 55, 75, 77, 101, 218, 219, 341)

15. Respondents' exception 15 lacks merit because the ALJ correctly credited the testimony of Ms. Collette and Ms. Uptain that Ms. Brown stated she would have to "honor the contract" at the first meeting. (Tr. 230:18-21; 353:3-5) This is consistent with Ms. Brown's own testimony that she believed she had to recognize the Union (Tr. at 415). Ms. Collette did not apply for the Director of Nursing position because she retired due to health reasons. (Tr. at 354) Additionally, Ms. McPherson testified that Ms. Brown said during pre-transition meetings with employees that RHCC would continue to follow the contract.¹⁰

16. Respondents' exception 16 lacks merit because the ALJ correctly found that Ms. Brown told employees that things were working fine and that things would basically stay the same because Ms. Brown had vague and fuzzy recollections about what was said at the meetings and she did not deny that she told employees that 99.9 percent would be retained. The Respondents fail to point to Ms. Brown's testimony denying these statements. Additionally, witnesses testified that Reverend David Wallace also told employees that things would basically stay the same. (Tr. at 341) Finally, Mr. Walker was at the meetings with Ms. Brown and Ms. Borden credibly testified that he was telling employees at the meeting in the presence of Ms. Brown that things would stay the same. (Tr. 341) The Respondents did not produce Mr. Wallace to rebut the statement attributed to him.

17. Respondents' exception 17 lacks merit because the ALJ correctly found that

¹⁰ Ms. McPherson recalls that an employee asked about following the union contract and that the response was if it broke don't fix it. (Tr. at 103)

Respondents drastically changed their position on recognizing and collectively bargaining with the USW. The July 15, 2013 letter from Respondents' counsel to the USW states that the Respondents wanted to meet with the USW to bargain over a "mutually acceptable Agreement." (JEX 4) After a change in counsel, Respondents' new counsel on September 23, 2013 misconstrued the July 15 letter and stated that Ms. Brown only agreed to bargain with the USW should her company be considered a successor. There is nothing in the July 15, 2013 letter that qualifies the willingness to meet and bargain over the terms of new contract. Indeed, the July 15 letter closes with the following: "Please contact me at your earliest convenience so we may begin the bargaining process." (JEX 4)

18. Respondents' exception 18 lacks merit because the ALJ correctly concluded that Respondents' hiring process was a suspect and part of a scheme to avoid disrupting operations while Respondents figured out a way to circumvent potential obligations under the CBA. First, Respondents' July 15 letter upset employees because it was inconsistent with what they had been led to believe. (Tr. at 311) Ms. Brown, Mr. Walker, Ms. Alicia Stewart (Ms. Brown's sister) and Reverend Wallace all had to meet with employees in early August to settle them down. (Tr. at 418) At these meetings, they made the same reassurances about things not changing in a significant way. Second, the "chaotic hiring" process is hard to explain given that Ms. Brown and Mr. Walker had known for over a year that Brown would resume operation of her nursing home; unless, of course, it was hastily designed in order to screen out as many employees as possible. Third, Ms. Brown continued to tell employees through the interview process in late August and early September 2013 that nothing had been decided on what changes if any would occur and that it was still under evaluation. (Tr. at 426, 427)¹¹ Finally, contrary to Respondents

¹¹ Ms. Brown testified that during the interview process they "we were still trying to evaluate what the employees had and trying to make decisions on what we were going to be able to do." (Tr. at 426-427)

argument, the number of Preferred employees who applied created a huge problem for the Respondents plan to avoid the Union. If Respondents had hired 99.9 percent of the 65 employees that applied, then the former employees would certainly have comprised a majority. Given that staffing requirements are driven by the number of beds and average patient census, the Respondents needed at most 88 employees in the unit positions. This fact is borne out by the Respondents' actual practice of having between 84 to 88 employees in the unit positions and supported by the pre-transition numbers that showed an average monthly head count of 88 employees in the unit positions. Thus, the Respondents had to find a way to deny a substantial portion of the 65 employees who applied continued employment at RHCC in order to avoid recognizing the Union.

19. Respondents' exception 19 lacks merit because the ALJ correctly found that Respondent never announced that it would change the terms and conditions of employment. As noted above, Ms. Brown testified that even during the interview process, the Respondent had not decided what terms if any would change. Indeed, they were still trying to figure out what the employees had. (Tr. at 426, 427)¹² Respondents' reliance on the offer letter's statement that employees are "at will" is wholly inadequate to overcome the testimony of Ms. Brown and employees witnesses that Respondents had not made any decisions about changes to the terms and conditions of employment and were still evaluating. Indeed, the language Respondents' rely upon in the offer letters is boiler plate language. Moreover, Respondents' reliance on the July 15 letter also misunderstands the nature of the claim; simply because Respondents' did not want to assume the contract does not mean that it communicated and set the new terms and conditions of employment. Had the Respondents kept their promise to bargain with the Union, the terms and

¹² During the August meetings, Ms. Brown testified that Respondents had made no decision about any changes: "there again, I mean, I think everything was still under evaluation. And so I didn't know at that time what the outcome would be." (Tr. at 419:5-8)

conditions would have remained the same until a new agreement or impasse was reached.

20. Respondents' exception 20 lacks merit because the ALJ correctly concluded that RHS was perfectly clear successor.

21. Respondents' exception 21 lacks merit because the Respondents were aware that the General Counsel was arguing that they were perfectly clear successors. The General Counsel's opening statement referenced the perfectly clear theory in addition to the traditional *Burns* successorship. (Tr. at 19) Additionally, the seventh affirmative defense raised in Respondents' answer to the complaint alleges that RHS informed employees that their employment would be under different terms and conditions of employment; such an allegation demonstrates that Respondents were aware that the "perfectly clear successor" doctrine was at issue in the case because if *Burns* successorship was the only issue, there would be no need to reference that employees were notified prior to accepting employment that the terms and conditions were different.

22. Respondents' exception 22 lacks merit because the ALJ correctly found that Ms. Kimbrell testified that employees terminated from Ridgeview would be considered along with everyone else. Ms. Kimbrell testified that Ms. Brown stated that these employees "would have to go through the application process" and "that they would consider rehire just like everybody else." (Tr. at 67)

23. Respondents' exception number 23 the ALJ's finding lacks merits. The evidence established that (i) Ms. Brown told employees that she did not see a need for a union during the meetings with employees prior to the transition (Tr. at 43, 148, 162)¹³, (ii) that at Ridgeview (the

¹³ Baker Tr. at 42-43 (During meeting in July or August of 2013 Ms. Brown was asked about the Union and "She talked about, you know, taking over, and she mentioned that she didn't think that there should be – that there was any need for a union, that things could be settled without a union."); Davidson Ramos Tr. at 148 (When asked about the Union during pre-transition meetings, Ms. Brown "said that they really didn't see no need for it because over

facility she owned and operated) employees came directly to her with problems that she tried to settle (Tr. at 25, 31, 247), (iii) that at Ridgeview they had nine members in their union and that they were such a “close knit” family over there and that if they had a problem they worked it out amongst themselves (Tr. at 159)¹⁴ (iv) that the facility worked well without too many employees belonging to the Union (Tr. at 75-76)¹⁵, and (v) that Ms. Brown further stated during these meetings that as of now (i.e. August 2013) there was no union (Tr. at 25).

24. The Respondents’ exception 24 lacks merit because the record clearly established that employees were told to apply and arrange for an interview prior August 30, 2013. (Tr. at 421) The purpose for this requirement was to get a handle on how many employees she would retain working at her nursing home. (Tr. at 421) Ms. Brown also had a vague recollection of whether the process was extended for an extra week and that would only have covered the interviews and not the deadline for calling and scheduling an interview. (Tr. at 422 “I think we extended the process for a week. I don’t remember the dates”) Respondents concede that with the exception of Mr. Waldrop (who actually applied during the initial time frame in August 2013), no incumbent employee applied after August 30.¹⁶

25. Respondents’ exception 25 lacks merits because Ms. Eaton testified that she was asked during an interview whether she was in the Union (Tr. at 80) and also asked about whether she deducted union dues. (Tr. at 83). Ms. McPherson also testified that she was asked during

here they don't have -- they're not filing grievances over there [Ridgeview] because they work so well together.” (brackets added based on questioning that clarified reference to over there as meaning Ridgeview.); Thomas Tr. at 162 (Ms. Brown stated during pre-transition meetings that “she didn’t see any reason for a union.”)

¹⁴ Thomas Tr. at 159 (Testifying that during the pre-transition meetings the issue of the union came up and Ms. Brown stated “that they had a union over there at Ridgeview with nine members, and they were such a close-knit family over there, that if they had a problem, they worked it out amongst themselves.”)

¹⁵ Eaton Tr. at 76 (During pre-transition meetings with employees, an employee asked about the union and Ms. Brown stated “that at Ridgeview, they had a union and there were only around 8 people, 8 to 12 people in their union, and they didn't really need it for anything, that their facility worked well without a lot of participants in the union.”)

¹⁶ Mr. Waldrop was not offered employment until after October 1, 2013 and that occurred because the new director of nursing (Shiela Cooper) encouraged Mr. Waldrop to reapply.

her interview whether she was in the union. (Tr. at 102). Respondents did not need to ask Tidwell and Dudley whether they were in the Union because they already knew the answer. (Tr. at 427) Thus, contrary to Respondent's claim, Mr. Borden was not the only employee who testified about being asked whether he or she was in the union.

26. Respondents' exception 26 lacks merit because the evidence clearly supports the inference that Preferred employees (i.e. incumbent employees working at RHCC) were required to respond to offers of employment by September 16, 2013. (JEX 12) Additionally, according to Ms. Brown she wanted to know how many incumbent employees would be retained prior to hiring external candidates. (Tr. at 421) The applications of all external candidates were submitted in September 2013 after the vetting of incumbent employees. *See, supra.*

27. Respondents' exception 27 lacks merits because Ms. Eads testified that she was told during the interview that she had nothing to worry about regarding her prior employment at Ridgeview. (Tr. at 181) Ms. Eads also testified that Holland told her that she was not aware of a no-rehire policy being applied at Ridgewood. (Tr. 181) Ms. Holland confirmed that during the interview process she was not aware of a no-rehire policy and that she only became aware of the policy on October 1, 2013. (Tr. at 631, 633) Finally, the interview notes only confirm Ms. Eads testimony that she raised a concern regarding her former employment at Ridgeview. The notes further confirm Ms. Eads testimony that she was not really asked anything about her employment history because the two interviewers had worked with her for so many years. (Tr. at 181)

28. Respondents' exception 28 lacks merit because the ALJ's opinions are based on the record, exhibits and his observations of the witnesses. The ALJ's opinions are relevant to his conclusion that the Respondents engaged in a discriminatory hiring scheme in violation of the

Section 8(a)(3) of the Act.

29. Respondents' exception 29 lacks merits because it does not identify the alleged mischaracterization of testimony. The record testimony established and the Respondents do not dispute that Respondents kept no records or notes regarding the alleged report by Ms. Cooper that Ms. Vegas had been involved in an altercation and that Respondents did not question Ms. Vegas about this allegation.

30. Respondents' exception 30 lacks merits because it completely ignores the credited testimony of Ms. Collett and Charging Party exhibits 1 through 4. Both Ms. Collett and Ms. Dudley testified that Charging Party Exhibits 1 through 4 were the work schedules for unit positions covering the period from July 2012 to August/September 2013. (Tr. at 355, 364 (authenticating the schedules)) Additionally, the testimony of Ms. Collett and Ms. Dudley established that the organization of the nursing home (i.e. number of halls and beds in each hall), the work hours for each shift and the total number of beds remained the same both before and after the transition. (Tr. at Dudley 292-299, Collett 374-380) Finally, Ms. Collett (the only witness qualified as an expert on nursing home staffing requirements) testified that RHCC was adequately staffed in the months preceding the transition on October 1, 2013, that the schedules identified as Charging Party Exhibits 1 through 4 showed all the staffing need to operate the facility within Alabama's requirements and that the State of Alabama never cited RHCC for inadequate staffing and that schedules were reviewed by the State of Alabama. (Tr. at 373, 378, 389 and 398-399)¹⁷

31. Respondents' exception 31 lacks merit because it does not take issue with the ALJ's decision to credit Ms. Collett's testimony that the facility was adequately staffed, as

¹⁷ Respondents did take exception to the ALJ's ruling that Ms. Collett was qualified as an expert to give opinions about staffing levels at RHCC. (Tr. at 373)

demonstrated above. Additionally, the record citation (i.e. T 584-585) does not support the claim regarding Ms. Brown's testimony. These pages make no reference to adequate staffing of the facility. Finally, the ALJ correctly noted that though some employees testified about working overtime, this testimony was vague and not supported with any documentation. The only documents concerning staffing levels prior to October 1, 2013 are Charging Party Exhibits 1 through 4. Additionally, the Respondents own work schedules (as demonstrated in response to exception 4, fn. 8 *supra*) confirm that the facility is adequately staffed with approximately 84 to 88 employees in the unit positions. This is precisely the average head count for the one year period preceding October 1, 2013 and reflected in Charging Party Exhibits 1-4. This fact is unsurprising given that the facility only operated with 98 beds and that the average monthly patient census was approximately 86 percent (i.e. on average the nursing home had 84 patients in the facility each month (98 x .86)) (CPEX 9; Collett Tr. at 356)

32. Respondents' exception 32 lacks merit because the record evidence clearly supports the inference that Respondents hired an excessive number of helping hands on October 1, 2013 to inflate the number of employees in the bargaining unit. First, the Respondents had 19 employees in the "helping hands" classification on October 1, 2013 and then increased that number to 22 by November 14, 2014. (JEX 21) Approximately one year later, the Respondents only had on average 11 employees working in the "helping hands" classification. (CPEX 10-16) Second, the five (5) of the nineteen (19) employees in the "helping hands" classification as of October 1, 2013 actually worked at Ms. Brown's non-union facility Ridgeview. (JEX 21, p. 2) Finally, as Ms. Holland's testimony showed several Ridgeview employees (not only helping hands) were allowed to take positions at RHCC while keeping a position at Ridgeview. According to Ms. Holland, the following employees that Respondents listed as employed at

RHCC also remained employed at Ridgeview: Ashley Davis, Deb Davis, Ciera Howze, Destiny Meadows, Crystal Vanscoyk and Rita Wright. (Tr. at 637-644) This pattern of filling in staffing needs with employees from Ridgeview (where testimony showed the employees did not support the union) when incumbent employees were available to fill these positions clearly supports an inference that the employer was inflating the unit to avoid recognizing the union.¹⁸

33. Respondents' exception 33 lacks merit because the evidence established that RHS displayed animus during its hiring process. The ALJ relied on statements and conduct that occurred prior to the hiring decisions, including questioning of employees about union membership and statements during meetings that there was no need for a union. (*See, supra*, Response to exceptions 23 and 25). The ALJ also inferred animus regarding hiring decisions from the Respondents' drastic change in position regarding recognition and willingness to bargain with the Union that occurred prior to October 1, 2013. (*See, supra*, Response to exception 17). The ALJ also properly inferred animus in RHS's hiring decisions from the inflation of the unit with the "helping hands" classification and could have inferred animus from RHS's use of employees who were still employed at Ridgeview and hiring of employees with no experience to fill unit positions. (*See, supra*, Response to exception 32 and note 18) The testimony also established that during a meeting in October, 2013, Ms. Brown stated that it was a possibility that the nursing home could close down if the union came in. (Tr. at 164)

34. The Respondents' exception 34 does not cite any record evidence to support the exception. The ALJ appropriately relied on *CNN America, Inc.*, 316 NLRB No. 47 (2014) for the proposition that a hiring scheme that inflates the unit in order to avoid recognizing an incumbent Union demonstrates discriminatory animus.

¹⁸ Indeed two employees (Ashly Dickerson and Jacob Norris) with no prior working experience were hired as CNAs on or about October 1, 2013. (JEX 21 p. 1, see column D)

35. The Respondents' exception 35 lacks merit because the ALJ correctly distinguished *Raytheon v. Hernandez*, 540 U.S. 44 (2003)(a case dealing with ADA and Title VII pretext analysis). The *Raytheon* case involved a single employer's use of its own clearly stated no-rehire policy to bar employees from reapplying for employment at the same location that they were dismissed from. In this case, the Respondents rely on the alleged "no-rehire" rule used at Ridgeview (a separate employer and company) to bar employees from continuing employment at Ridgewood (RHCC). Indeed, Respondents used the "no rehire" rule (a rule that Ms. Holland, Ridgeview's facility administrator, stated she was not aware of during the interviews of incumbent employees) to deny Ms. Davis continued employment even though she had worked at RHCC for ten years without incident.

36. Respondents' exception 36 lacks merit because the ALJ did not mischaracterize the testimony. The ALJ correctly interpreted the undisputed testimony that Ms. Brown and RHS interviewers told employees that the "no-rehire" rule would not disqualify an employee from consideration. As noted above, Ms. Holland was not even aware that such a rule was being applied to Preferred employees even though she was tasked with interviewing employees. Respondents' claim that employees could go through the application process and be considered for employment even though they would not be hired because of the "no-rehire" rule is properly rejected as meritless. Indeed, the suggestion that employees should go through a hollow exercise where the outcome is predetermined strongly supports an inference that the rule was applied in a discriminatory manner and with the intent of avoiding the Union.

37. Respondents exception 37 does not cite the record to support its factual contention. The inference that the "no-rehire" rule was advanced as a pretextual "after the fact" reason for limiting the number of unit employees retained at RHCC is more than adequate. First,

the evidence established that Ms. Holland (the Ridgeview Administrator) was not aware of the no-rehire rule when conducting interviews. (Tr. at 633) Second, according to the Respondents, employees scheduled for a physical were conditionally offered employment. Ms. Eads was called back to take a physical and then actually passed a physical. (Tr. at 182-183) She then received a letter dated September 28 telling her that she was not offered employment but given no explanation. (Tr. at 183) It was only later that Ms. Eads learned that even though she was conditionally offered employment the offer was retracted because of the “no-rehire” rule. Such inconsistent conduct supports the inference that application of the “no rehire” was discriminatory. Third, Respondents applied the “no rehire” rule to exclude Ms. Davis even though she had worked at RHCC for 10 years without incident. The Respondents conceded that they took no steps to inquire from Ms. Davis’s supervisors at RHCC whether she had been a good employee over the previous ten years.

38. Respondents’ exception 38 lacks merit because the ALJ correctly held that Respondents violated Section 8(a)(5) by refusing to recognize the USW as the bargaining representative and refused to bargain with the USW.

39. Respondents’ exception 39 lacks merit because the ALJ correctly held that Respondents violated Sections 8(a)(1) and 8(a)(5) of the Act by unilaterally setting the terms and conditions of employment without bargaining with the USW.

40. Respondents’ exception 40 lacks merit because the ALJ correctly held that the Respondents violated Section 8(a)(1) and Section 8(a)(3) of the Act when they refused to hire four unit employees because Respondents wanted to reduce the number of unit employees retained.

41. Respondents’ exception 41 lacks merit because the ALJ correctly held that the

Respondent violated Section 8(a)(1) of the Act through unlawful interrogation and statements to Preferred employees that the Respondents would not recognize the USW.

ARGUMENT

I. Respondents are a *Burns* Successor.

The evidence established that Respondents are a *Burns* successor because (1) they actually hired 51 employees in mid-September in substantially all the unit positions and 51 employees constituted a substantial and representative complement of the unit; and (2) the helping hand classification should not have been added for the purposes of determining whether former Preferred employees constituted a majority of the unit.

A. Former Preferred employees constituted a majority of employees hired to perform unit positions.

The Respondents did not take exception to the ALJ's finding that RHCC and Ridgewood Health Services (RHS) are a single employer. (ALJD 14:1-5) The Respondents also did not take exception to the ALJ's finding that Ms. Brown formed RHS in July 2013 solely for the purpose of operating RHCC and that Ms. Brown had continuously owned RHCC from 2008 through October 2013. (ALJD 13:30-39) As owner of the nursing home, RHCC had to ensure that the facility was adequately staffed to meet the needs of resident/patients. Thus, in mid-September 2013, RHCC and RHS began hiring/retaining employees who already worked at the facility. In other words, the employees who accepted employment by September 16, 2013 would simply continue reporting to work at RHCC as they had in the past.

Though the Charging Party acknowledges that majority status is generally measured on the initial date of operation (ALJD 15:1-10), this case presents a unique fact pattern because one of the entities involved (RHCC) never experienced a change of ownership.¹⁹ Since RHCC and

¹⁹ The alleged violation is that the Respondents failed to recognize and bargain with the USW. The Complaint

RHS constitute a single employer, it is appropriate to measure majority status on the date the employees of a former “sub-contractor” (i.e. Preferred) accepted the offer to remain employed with the owner of the facility (i.e. RHCC), who has decided to terminate the subcontracting relationship and assume control over operation of the facility.

As the USW noted in its September 25, 2013 letter, Preferred employees had reported that they were required to accept employment with Respondents prior to October 1, 2013. (JEX. 11, p. 2) Indeed, the offer letter sent to Preferred employees who had applied with the Respondents required that employees (desiring to accept employment) return the letter to Ms. Sue Leigh Warren in person by September 16, 2013. (JEX 12) Ms. Brown also confirmed that that she had hired 51 Preferred employees prior to October 1, 2013. (Tr. at 429:3-16)

The evidence established that the incumbent Preferred employees were offered employment prior to external candidates.²⁰ At least 49 of the 51 formerly represented employees offered employment elected to continue employment in their bargaining unit positions.²¹ Moreover, the 49 employees that accepted employment by September 16, 2013 were distributed in each of the unit classifications with the exception of maintenance. Joint Exhibit 21 shows that the number of Preferred employees who accepted employment with Respondents in the following classifications: 8 employees working in the Dietary classification (including the food supervisor), 5

alleges that Respondents had a duty (based on successorship theory) to recognize and bargain with the USW. Because there is no change in the alleged violation but only an alternative theory supporting the finding of an Section 8(a)(5) violation, the Board can affirm on any alternative theory it deems appropriate. “It is well settled that even where the General Counsel has not excepted to an administrative law judge’s analysis, the Board ‘is not compelled to act as a mere rubber stamp’ but rather is ‘free to use its own reasoning.’ *Massey Energy Co.*, 358 NLRB No. 159 (Sept. 28, 2012)

²⁰ As noted above in the “Statement of the Case” section, the applications of external candidates are dated at the earliest on September 9, 2013. The finding that Respondents offered employment to the incumbent employees first is consistent with Ms. Brown’s explanation that she wanted to know how many Preferred employees would be retained before searching for external candidates. Respondents cannot retract this position without discrediting their defense to this case.

²¹ The testimony established the Ms. Eaton was offered continued employment as a CNA and that Ms. Uptain was offered a maintenance position. (Tr. at Eaton 82 and Uptain 233) With Eaton and Uptain added to the list of former employees who accepted employment (see JEX 21, p. 1-2), there were 51 offers of employment.

employees working in the Housekeeping classification, 4 employees working in Laundry classification, 9 employees working in the LPN classification, and 23 employees working in the CNA classification.

The obligation to recognize the Union attached on September 16, 2013 because the Respondents had hired a substantial and representative complement of its work force and former Preferred employees constituted a majority of the employees hired as of that date. There is no doubt that 49 employees constituted a “substantial” portion of the Respondent’s work force because it exceeded thirty (30) percent of the eventual employee complement (i.e. non-supervisory employees). *See, Yellowstone International Mailing*, 332 NLRB 386 (2000) (observing that “In general, the Board finds an existing complement to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the job classifications.”) The record evidence demonstrates that the Respondents head count (even if we included the disputed helping hands classification) has never reached 147 employees such that the 49 former employees who accepted employment constituted less than 30 percent of the eventual employee complement. Historically, the facility had been staffed with approximately 88 unit positions, a number confirmed by the Respondents current staffing in these historical unit positions (i.e. LPNs, CNAs, Housekeeping, Dietary, Laundry and Maintenance but excluding “helping hands” classification).²²

²² Respondents argument that they kept hiring employees after October 1, 2013 ignores that successorship analysis focuses on the substantial and representative complement and not on the full complement. Moreover, Respondents own schedules belie the argument that 123 employees constituted the full complement. First, JEX 21 does not show that 123 employees were ever employed at the same time at RHCC. Second, CPEX 10-16 establish that the Respondents operated on average with a total of 96 employees scheduled to work (i.e. including the disputed helping hands classification). (*See*, note 8 *supra*, CPEX 10 shows a total of 93 employees scheduled to work; CPEX 11 shows a total of 94 employees scheduled to work; CPEX 12 shows a total of 100 employees scheduled to work; CPEX 13 shows a total of 101 employees scheduled to work; CPEX 14 shows a total of 98 employees scheduled to work; CPEX 15 shows a total of 95 employees scheduled to work and CPEX shows a total of 93 employees scheduled to work) The average figure was obtained by simply adding the total number of employees scheduled to work on all the schedules and dividing by the number of schedules (i.e. 7).

B. The ALJ properly determined that Board law did not require that the “helping hands” classification be added to the unit for purposes of determining majority status. Rather, the historic unit positions constitute an appropriate unit for determining majority status.

The Respondents contend that the ALJ erred when he did not include the helping hands classification for purposes of deciding whether the Respondents were obligated to recognize and bargain with the USW. This argument hinges on the Respondents’ self-serving interpretation of language in the unit description contained in a contract they refuse to honor. The unit description at issue provides the following:

Pursuant to the certification of representative issued by the National Labor Relations Board on April 26, 1976, in Case No. 10-RC-10625, the Company agrees to recognize the Union as the exclusive representative of all full time and regular part-time employees employed at Respondent’s facility, including LPN’s, nurse aides, housekeeping employees, dietary employees, laundry employees, maintenance employees and the food supervisor (it is understood that in the event any of the preceding job titles change, they will remain in the bargaining unit) but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Respondents emphasize the clause that comes after a listing of the covered classifications that states “it is understood that in the event any of the preceding job titles are changed they will remain in the bargaining unit.” According to Respondents, “the collective bargaining agreement anticipates that job titles may change and prospectively holds that employees with changed titles performing the work will remain in the unit.” There is no record evidence supporting that the parties to the Agreement adopted this interpretations. Indeed, a plain reading of this clause simply prevents that employer from changing job titles of an existing classification and then claiming that the positions fall outside the unit. This is not the situation present in this case. Instead, the Respondents want to use this language to justify adding an entirely new classification which did not historically exist at RHCC prior to October 1, 2013. Such an

addition would require the parties to the CBA to reach an agreement about the duties and pay of the new classification before it is added. Indeed, the very same Article that Respondents rely upon provides that “Changes in this Agreement, whether by additions, waivers, deletions, amendments or modifications must be by mutual agreement in writing.” (JEX 3, p. 3 Article I, ¶ 2)

Respondents next argue that (i) the unit description makes no distinction between certified and non-certified nurse aide positions and (ii) that Respondents made the business decision to employ “helping hands” as “nurse aides.” Respondents even assert that both “helping hands” and CNAs perform the work of “nurse aides”. It is surprising that Respondents take a position contrary to Alabama law and the testimony of their witness Ms. SueLeigh Warren.

Alabama law clearly provides that “an individual who desires to work as a **Nurse Aide in an Alabama Nursing Home** must first be listed in good standing on the Alabama Nurse Aide Registry, include RNs and LPNs.” (See, Attachment A)(emphasis added)²³ To be listed on the Nurse Aide Registry, “an individual must complete a State-approved Nurse Aide Training and Competency Evaluation Program and pass both the written and skills tests.” These requirements explain why Respondents’ witness Ms. SueLeigh Warren stated unequivocally that “**Helping hands cannot do the work of a certified nursing assistant.**” (Tr. at 691)(emphasis added) There is no dispute that the helping hands are not nurse aides under Alabama law.

The Respondents suggestion that the meaning of “nurse aide” as used in the contract differs from the use of the term under Alabama law has no basis in fact or the record. Such an interpretation conflicts with purpose and intent of Article 33 of the contract. Article 33 provides, in relevant part, that “in the

²³ Though the ALJ did not discuss the Alabama requirements for a “nurse aide”, the USW post hearing brief cited to the website and information reflected on Attachment A. (See, Charging Party USW’s Post Hearing Brief, p. 21, n. 12).

event any provision of this Agreement is held to be in conflict with or violation of any State and Federal statute or Court decision, such statute or Court decision shall govern and prevail. . . .” (JEX 3, p. 19) Respondents’ interpretation of the unit description such that helping hands perform “nurse aide” work in their facility clearly conflicts with Alabama law and would not survive a challenge.

Respondents’ argument that the ALJ adopted the wrong analysis depends on their claim that “helping hands” are “nurse aides” under the CBA’s unit description. Working from this assumption, the Respondents contend that the appropriate analysis should be governed by the framework the Board set forth in *John P. Scripps Newspaper Corp. d/b/a The Sun*, 329 NLRB 854, 859 (1999). The Respondents contend that refusing to add the “helping hands” classification to the unit described in the CBA for purposes of deciding whether the former employees obtained majority status is inconsistent with the presumption in *The Sun* that new employees performing similar work are presumed to be included in the unit.

Respondents’ use of the framework articulated in *The Sun* runs contrary to reasons that motivated the Board to adopt a new standard for evaluation of unit clarification petitions. The issue in the *The Sun* involved the transfer of work out of the unit because of technological changes that (most importantly) the Union contested as undermining their representative status. Protecting what the parties historically agreed to as the appropriate unit motivated the Board’s decision in *The Sun*. Indeed, the Board made the following observation about why it decided to change the standards used in unit clarification cases:

Importantly, the scope of this bargaining unit is not one we have imposed on the parties. Rather, it is one that they voluntarily agreed to and have incorporated in successive collective-bargaining agreements. To ignore it would undermine the integrity of both the bargaining process itself and the existing bargaining unit. Once a bargaining unit has been established, the statutory goal of “encouraging the practice and procedure of collective bargaining” (sec. 1 of the Act) requires adherence to that unit, absent mutual agreement by the parties to change it. “Adherence to a bargaining unit, once it is fixed, is central to Congress’ purpose of stabilizing labor-management relations in interstate commerce.” *Id.* at 860.

The irony in this case is that Respondents advocate the use of a standard designed to protect the Union’s representative status and the parties’ agreements about the historical unit. Instead of transferring

work out of unit in order to undermine the Union's representative status such as the case in *The Sun*, the Respondents in this case want to add a new job classification to the unit for purposes of avoiding the Union, even though, it is undisputed that the "helping hands" classification had never existed at RHCC prior to October 1, 2013.

Another reason for rejecting the Respondents argument that *The Sun* provides the appropriate framework is that position at issue in this case is not defined by the duties or worked performed. Rather, the "nurse aide" position requires that the employee holding the position be certified and licensed to work as a nurse aide in Alabama. It bears repeating that in Alabama, an individual may not work as a Nurse Aide unless he or she has satisfied the certification requirements. Thus, the unit description is based on licensing and certification requirements and not on job duties.

The certification requirement explains Ms. Warren's clear testimony that "helping hands" cannot perform the duties of a CNA. It also explains why "helping hands" have a separate work schedule than CNAs and are not listed in the same rotation with CNAs. (See, CPEXs 10-16) Finally, if "helping hands" were interchangeable with CNAs then one would expect to find many more "helping hands" on the employee roster than CNAs for the simple reason that "helping hands" are paid minimum wage and substantially less than CNAs. However, since the initial "inflation" of the unit with helping hands in October and November of 2014, the monthly number of "helping hands" has averaged 11, while the monthly average number of CNAs is 36.

The Respondents finally argue that the ALJ erred in application of the accretion analysis. This argument is simply incorrect. First, as an initial matter, the ALJ's finding that "helping hands" should not be included for purposes of determining majority status does not depend on application of an accretion analysis. The principle that the Board does not disturb a historical unit description that the parties have agreed to and used is sufficient to support the decision not to add the "helping hands" classification in the sucesorship analysis. *Banknote Corp. v. NLRB*, 84 F.3d 637, 647 (2d Cir.1996)("The Board places a heavy evidentiary burden on a party attempting to show that historical units are no

longer appropriate.”) In *Avanti Health System LLC*, 357 NLRB No. 129, slip op. at 5 (2011), the Board rejected Respondents argument that six individuals should be included in the historical RN unit because has the predecessor employed these individuals they would have been included in the unit. Thus, the Board agreed that the historical bargaining unit was the appropriate unit to use for determining whether the Union obtained majority status even though an appropriate unit could have included more employees.

Second, assuming that an accretion analysis is appropriate, the ALJ correctly concluded that Board law did not compel the inclusion of the “helping hands” classification in the unit. (ALJD 15:35-45) Though the accretion test involves a balancing of several factors, one factor in this case dictates that adding the “helping hands” to the unit as “nurse aides” is not compelled. Alabama law does not allow an uncertified individual to work as a nurse aide in an Alabama nursing home. The positions of CNA and “helping hands” are clearly not interchangeable and treating them as such violates Alabama law. Additionally, the skills and functions are not sufficiently similar. CNAs acquire their skills through a combination of class work and practice. More importantly, CNAs must demonstrate that they have the skills to work as a nurse aide in Alabama by passing both a State approved written and skills test. (*See*, Attachment A) No such requirements apply to the “helping hands” classification.

In summary, the ALJ correctly concluded that Respondents are a *Burns* successor. This conclusion is supported by the alternative theory that Respondents (as single employers) hired 49 employees prior by September 16, 2013 and that 49 employees constitutes a substantial and representative complement of the eventual unit. Second, the ALJ correctly concluded that the “helping hands” classification should not be added to the historical bargaining unit when deciding whether represented employees constituted a majority of a substantial and

representative complement of the Employer's work force. There is no dispute that Respondents retained a majority of Preferred employees in the historical unit positions (i.e. LPNs, CNAs, Dietary, Laundry, Housekeeping and Maintenance).

II. The Respondents are a "Perfectly Clear" Successor.

The Respondents misconstrue the standard governing the "perfectly clear" successor doctrine. Though a *Burns* successor can set the new terms and conditions of employment, it must actually do so. Simply stating that employer rejects the existing collective bargaining agreement (without setting forth the new terms) is not sufficient.

A. The Respondents are a "Perfectly Clear" Successor because (1) Respondents announced the intention to hire 99.9 percent of the employees and (2) Respondents did not adequately and timely inform employees or the Union about the new terms and conditions.

The Respondents rely on *Banknote Corp. of America*, 315 NLRB 1041, 1042 (1994) *enfd.* 87 F. 3d 637 (2nd Cir. 1996) for the proposition that they effectively availed themselves of the privilege to set the new terms and conditions of employment because (1) the July 15, 2013 letter clearly repudiated the collective bargaining agreement; (2) the Respondents' statement that they would retain 99.9 percent of all employees (a statement that they have not disavowed) occurred on or after the Jul 15 letter, (3) the Respondents clearly communicated that they were still evaluating everything and that nothing had been decided about the new terms and conditions and (4) the offer letters state that employment is "at will".

First, though the July 15 letter stated that the Respondents rejected the collective bargaining agreement, the letter says nothing about any new terms and conditions of employment. In fact, the letter invites the Union to **bargain over the new terms and conditions**. Inviting the Union to bargain over the new terms and conditions of employment is a far cry from availing oneself of the right to announce the new terms and conditions of

employment.

Second, the Respondents argue that no evidence supports the conclusion that Respondents announced their intention to retain 99.9 percent of the unit employees prior to the July 15 meeting. Respondents, however, conflate two meetings that occurred during the summery of 2013. According to Ms. Brown, the first meeting occurred in “June or July” of 2013. (Tr. at 549) It was at the first meeting with employees that Ms. Brown first stated that 99.9 percent of employees would retain their positions at RHCC. (Tr. at 75, 77, 102, 132, 137 and 261) Because Ms. Brown acknowledge that the meeting occurred in “June or July”, there is a factual basis for inferring that the meeting occurred prior to the July 15 letter being received by the Union.

Third, Respondents argue that they sufficiently communicated that changes may occur and that under *Banknote* such that they cannot be deemed a “perfectly clear” successor. In *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), the Board limited the “perfectly clear” language in *Burns* to circumstances where “the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours or conditions of employment, or at least to circumstances where the new employer, . . . has failed to clearly announced its intent to establish a new set of conditions prior to inviting former employees to accept employment.” (ellipsis added) The Board has interpreted this language as not requiring the employer to expressly promise to keep all terms and conditions the same. For example in *301 Holdings, LLC*, 340 NLRB 366, 368-370 (2003), the new apartment building owner told his two carryover employees that their schedules would change, but said nothing about any other terms or conditions changing. The failure to mention any other conditions resulted in a finding that the employer was a “perfectly clear” successor.

In *World Evangelism, Inc.*, 248 NLRB 909, 917 (1980) the new owner was found to be a “perfectly clear” successor even though he initially stated in writing that the contract would be terminated with the takeover. However, five maintenance employees threatened to quit unless the new owner assumed the prior contract, so the new owner told the Union to put together a proposal but then tried to set new terms.

In *Fremont Ford*, 289 NLRB 1290, 1296-1297 (1988) the Board found that the Respondent failed to clearly announce a new set of conditions prior to inviting former employees to accept employment. In so finding the Board noted that the respondent “embarked on a misinformation campaign” that was designed to confuse employees.

Though Respondents claim that the statements about the possibility of changes to the terms and conditions of employment insulate them from a “perfectly clear” status, these statements can equally be viewed as an effort by the Respondents to string along employees. The ALJ correctly determined that during this critical period involving the transition, the Respondents sent two messages: (1) early on in the process Respondents invited the Union to bargain over the new terms and (2) Respondents the continued to delay announcing the new terms and conditions through the hiring process and did not announce the new terms and conditions until after employees reported to work on October 1, 2013. The Respondents needed enough employees to accept positions so as to operate the facility without interruption but at the same time sought to avoid the Union through a discriminatory hiring scheme.

Finally, the only actual term that the Respondents can plausibly point to that it announced in advance of October 1, 2013 is the “employment at will” condition contained in the offer letters. This change, however, is insufficient to defeat a finding that the Respondents are a “perfectly clear” successor. As the Board noted in *301 Holdings, LLC*, 340 NLRB 366, 368-370

(2003), announcing one change is insufficient to avoid the bargaining obligation as to the remaining terms and conditions of employment.

B. Respondents argument that the Board should reject the ALJ’s “perfectly clear” successor finding because the General Counsel failed to plead this theory before trial lacks merit.

The Amended Complaint alleges a Section 8(a)(5) violation arising from the Respondents unilateral change to the terms and conditions of employment without bargaining with the Union. Paragraphs 12, 20 and 21 clearly allege that the Respondents had an obligation to bargain with the USW before implementing changes to the terms and conditions of employment. Indeed, paragraph 12 specifically references the changes announced on October 1, 2013. The Respondents’ Seventh Affirmative defense alleges that they had the right to set the new terms and conditions of employment. Because the Amended Complaint clearly alleges a violation arising from the Respondents refusal to recognize and bargain with the USW, the General Counsel did not have to specifically plead the “perfectly clear” successorship theory in order for the Board and the ALJ to consider this theory. The Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful *conduct* was alleged in the complaint. *Massey Energy Co.*, 358 NLRB No. 159 (Sept. 28, 2012)

III. Respondents engaged in a discriminatory hiring scheme designed to avoid the Union.

The Respondents argue that the ALJ inappropriately inferred animus at the time of the transition and that the ALJ failed to apply the correct standard regarding a showing that the Respondents hiring decision were motivated by animus. These arguments lack merit and are belied by the record evidence.

A. The evidence established that the Respondents expressed animus during the transition period.

The ALJ correctly inferred that Respondents acted with anti-union animus during the transition period. First, Respondents claim that it was willing to work with the Union belies its actual conduct. Though Respondents initially agreed to meet and bargain with the USW over the new terms and condition of employment, they abruptly changed course during the hiring process. During the meetings in August 2013 with employees, Ms. Brown repeatedly told employees that she saw no need for a union and that at her other facility employees and management worked things out amongst themselves without the need for the Union. (*See, supra*, Response to Exception 23) Statements by a successor during the hiring process that there is no need for a union or that that facility will operate non-union are coercive. *See, Advanced Stretchforming International, Inc.*, 323 NLRB 529, 530 (1997).²⁴ Moreover, coercive statements are not protected speech under Section 8(c) of the Act. *See Scripps Memorial Hospital Encinatas*, 347 NLRB 52 (2006)

Second, the Respondents argue that the statements attributed to Ms. Brown in October 2013 after the transition occurred are protected speech. Again, the statement that if the Union came there is possibility the nursing home would close is clearly coercive and unprotected under Section 8(c). *See, In re Daikichi Corp.*, 335 NLRB 622, 624, (2001)(observing that a prediction of a closure that is not carefully crafted and based on objective factors was coercive). The fact that the statement occurred after October 1, 2013 does not mean that it fails to shed light on the Respondents' motivation while making hiring decisions. *See*, 334 NLRB 810, 818 (2001)(post

²⁴ The law is well-settled that conduct that exhibits animus but that is not independently alleged to violate the Act may be used to shed light on the motive for, or the underlying character of, other conduct that is alleged to violate the Act. *American Packaging Corp.*, 311 NLRB 482, fn. 1 (1993). *See also Meritor Automotive, Inc.*, 328 NLRB 813 (1999).

decision statements of anti-union animus can establish that decision was motivated by anti-union animus)

Third, the Respondents argue that the statements attributed to Ms. Shiela Cooper in January 2014 cannot demonstrate anti-union animus because Ms. Cooper was not involved in the hiring process. The record evidence contradicts this assertion. Ms. Cooper was the person consulted regarding Ms. Vegas Wilson. It was Ms. Cooper's input that resulted in the decision not to hire Ms. Wilson. Additionally, Ms. Cooper was the person responsible for hiring Ms. Waldrop after the October 1, 2013 deadline. Finally, given Ms. Cooper's position as the facility administrator, her anti-union animus can clearly be attributed to the Respondents.

Finally, the Respondents argue that ALJ incorrectly inferred animus for the hiring of "helping hands". An unlawful refusal to hire may be shown by 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. *CNN America*, 361 NLRB No. 47, n. 36 (2014); *Planned Bldg.*, 347 NLRB at 673 (quoting *U.S. Marine*, 293 NLRB at 670).

The Board's opinion in *CNN America*, 361 NLRB No. 47 n. 36 (2014) provides excellent guidance on how to treat the Respondents' refusal recognize the Union on the basis of an inflated unit. In *CNN America*, majority offered an in-depth analysis of why CNN violated the Act when it refused to recognize the Union because it insisted on ignoring the historical bargaining unit as the appropriate benchmark in order to effectuate its plan to avoid recognizing the Union:

The *U.S. Marine* case is particularly instructive here and rebuts our dissenting colleague's suggestion that an unlawful motive to avoid a successor bargaining obligation cannot be shown where a successor ultimately hires a majority of the predecessor's employees. The respondent successor in that case falsely projected that the number of employees that would comprise its full work force would be twice the size of the predecessor's bargaining unit. Based on this "false full-

complement projection,” the respondent rehired a majority of the predecessor's employees but stopped at the point that they would become a majority of its enlarged “fabricat[ed]” bargaining unit. The Board found (293 NLRB at 671) that the respondent's failure to rehire remaining employees of the predecessor “was a necessary and integral part of the Respondents' attempt to avoid an obligation to recognize and bargain with the Union” and violated Sec. 8(a)(3) and (1).

Here, as in *U.S. Marine*, CNN's hiring process was motivated by the intention to avoid its successor bargaining obligation. Although CNN did not falsely project a bargaining unit larger than the historical TVS bargaining unit, it erroneously contended, contrary to the judge's finding and substantial precedent, *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996), and *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994), enfd. 84 F.3d 637, 647 (2d Cir. 1996), that the only appropriate unit was a much larger one that consisted of the TVS employees and its own production employees. Based on this erroneous projection, CNN conducted its hiring process in the same discriminatory manner as in *U.S. Marine* to ensure that the number of TVS employees that it hired would not constitute a majority of the larger unit that it believed appropriate. In doing so, the number of TVS employees that it hired constituted a majority of the historical TVS bargaining unit that remained appropriate after CNN took over operations from TVS. However, by refusing to hire additional TVS employees to avoid a successor bargaining obligation, based on its erroneous position regarding the size of the appropriate unit, CNN violated Sec. 8(a)(3) and (1). *Id.*

In this case, the evidence supports the conclusion that Respondents included “helping hands” as part of its unit analysis in an effort to effectuate its discriminatory hiring scheme and avoid recognizing the Union. As noted above, the Respondents hired employees in two stages: they first interviewed the Preferred employees to determine how many they would retain and then considered external candidates knowing how many they needed to hire in order to avoid the Union. The evidence shows that Respondents hired 19 “helping hands” on October 1, 2013 and that in the subsequent year, the number was substantially lower. (*See, supra*, Response to Exception 32). Moreover, given that the number of CNAs remained constant during the same period, the Respondents explanation that the initial group of “helping hands” became CNAs lacks merit. Additionally, the evidence established that Respondents used employees at Ridgeview facility as a means of inflating the number of unit employees; the Ridgeview employees were counted in the Ridgewood unit even though they also worked at Ridgeview.

Finally, of the 101 employees that the Respondents used to determine majority status, two of these employees were supervisors. The record established that Jack Tidwell was hired as the maintenance supervisor, yet his name is included in the list of 101 employees used to determine majority status. (JEX 21, p. 2; Tr. at 643). The testimony also established that Ms. Rita Wright was hired as the dietary manager, yet her name is also included in the list used to determine majority status. (JEX 21 p. 2; Tr. at 644) Though the unit description covers the “food supervisor” position, another employee named Josephine Richards was hired to fill that position. (JEX 21, p. 2). The inclusion of these two employees further supports the inference that the Respondents acted in a manner that inflated the number of employees hired in order to avoid recognizing the Union.

B. The evidence clearly established that the Respondents’ hiring decisions were motivated with the intent to avoid the Union.

Respondents’ argument that the ALJ required them to prove that the hiring decisions were not motivated by animus lacks merit. The ALJ correctly inferred animus from the Respondents conduct and statements and then correctly discredited the Respondents defense that they would have taken the same action absent the anti-union animus.

There is ample evidence supporting the inference that the Respondents’ hiring decisions were motivated by a desire to avoid the Union. First, the Respondents about face regarding its stated intention of hiring 99.9 percent of the Preferred employees supports an inference of animus. Had Ms. Brown hired 99.9 percent of Preferred’s bargaining unit, there would be no question that the Union retained its majority status. In fact, hiring 99.9 percent of the 65 Preferred employees would have also ensured the Union’s majority status because even under the Respondent’s inflated numbers, a full employee complement is substantially less than one-hundred and twenty-eight employees (e.g. as Ms. Collette testified she was told that 99.9 percent

meant that one or two employees would likely fail a drug test (Tr. 354:2-6))

Second, and related to this first point, the admitted “chaos” is inexplicable and an unconvincing cover given that Ms. Brown knew she would take over operation of the facility as early as July or August of 2012. Indeed, prior to August 2013, the plan had been to hire 99.9 percent of Preferred employees and thus there was no need to plan for “processing” all these employees. Respondents knew, however, that to avoid the Union, a majority of its employee complement could not be former Preferred employees. Accordingly, the Respondents adopted a rushed process that (1) required all Preferred employees to set an appointment within a limited window (i.e. August 13 to August 30) and (2) to accept employment by September 16, 2013. Respondents’ evidently believed that by rushing the process and having acceptance of employment by September 16, it would have time to hire a sufficient number of external candidates and/or Ridgeview employees so that Preferred employees did not constitute a majority.

Finally, the Respondents’ decision and application of Ridgeview’s “no re-hire” designation to Preferred employees seeking employment at a different facility was simply inexplicable and inconsistent. The Preferred employees who were ruled out because of the no-rehire rule at Ridgeview were not asked about their employment at Ridgewood nor about the circumstances of their departure at Ridgeview. (Tr. at 535) Applying Ridgeview’s “no rehire” designation to Ridgewood employees without inquiring about their work performance at Ridgewood conflicts with Ms. Brown’s stated goal of hiring qualified candidates. (Tr. at 426)

The evidence regarding Ms. Gina Eads further supports the inference that the “no-rehire” rule was a pretext used to limit the number of Preferred employees. The Respondents allege that employees scheduled for a physical had been conditionally offered employment. Ms. Eads was

scheduled for a physical and actually passed the physical. However, the Respondents reversed course and decided rescind the offer in late September 2013. The reason she was likely scheduled for a physical is that her interviewers were not aware of the “no rehire” rule. Given that Ms. Holland (one of Ms. Eads interviewers) was slated to become the administrator at Ridgeview, this lack of knowledge strongly suggests that the “no-rehire” rule was used after the fact to justify not hiring Preferred employees that but for their status as represented employees would have been hired.

Third, the testimony established that Respondents told Preferred employees who left Ridgeview with a “no-rehire” designation that they could apply and would be considered the same as everybody else applying. Respondents argued that this testimony only shows that they were told they would be considered. However, this is sufficient to establish that the “no-rehire” rule was initially waived. The argument that Respondents would encourage employees who had no chance of retaining employment at RHCC to apply for a job does little to counter the conclusion that the rule was applied as a pretext to avoid recognizing the Union because Preferred employees constituted a majority.

Finally, the Respondents contention that they applied the “no-rehire” rule to non-Preferred employees seeking employment at RHCC lacks merit. With respect to the examples of external employees rejected because of the Ridgeview “no-rehire” designation, there is a lack of documentary evidence that these employees were excluded for the proffered reason. For example, though Respondents testified that Debra Pittman was denied employment because she was not eligible for rehire, there is no separation document demonstrating this fact. Indeed, Ms. Pittman did not even write down on her application that she had worked at Ridgeview. (See, REX 26)

Similarly, Ms. Warren testified that three other external applicants were allegedly refused employment because they were Ridgeview no-rehires. These employees are Ms. Sanford, Mr. Thomas and Ms. Tatum. Again, there is no documentation establishing that these employees had separated from employment with Ridgeview and were not eligible for re-hire. Indeed, on Mr. Thomas's application there is notation verifying his employment at Ridgeview but nothing indicating that he was ineligible for rehire. (See, Rx-34, p. 3) Given that there is no supporting documentation and no explanation for the absence of such documentation, Ms. Warren's testimony should be discredited.

IV. CONCLUSION

The record evidence demonstrates that the Respondents unlawfully refused to recognize the USW as the bargaining representative of Respondents employees and that it engaged in a discriminatory hiring scheme in an effort to avoid recognizing the USW. Accordingly, the USW respectfully requests that the Board reject all of the Respondents' exceptions.

Respectfully submitted,

/s/Richard P. Rouco
Richard Rouco
Counsel for USW

OF COUNSEL:
Quinn Connor Weaver
Davies & Rouco
Two 20th Street North, Ste. 930
Birmingham, AL 35203
205-870-9989

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2015, I filed a true and correct copy of the foregoing via email and U.S mail, which will notify and serve the following:

Jeffrey Williams
National Labor Relations Board
Region 10
233 Peachtree Street, NE
1000 Harris Tower
Atlanta, Georgia 30303
Telephone: (404) 331-2899
Fax: (404) 331-2858
E-mail: jeffrey.williams@nrlb.gov

Ashley Hattaway
Ronald Flowers
BURR & FORMAN LLP
420 North 20th Street
Wells Fargo Tower, Suite 3400
Birmingham, Alabama 35203
Telephone: 205-251-3000 Facsimile: 205-458-5100
ahattawa@burr.com
rflowers@burr.com

/s/Richard P. Rouco
Richard P. Rouco