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)

CHARGING PARTY USW'S REPLY BRIEF IN SUPPORT OF CROSS EXCEPTIONS TO THE ALJ's DECISION

Pursuant to Section 102.46(h) of the National Labor Relations Board's Rules and Regulations, the Charging Party USW respectfully submits the following Reply Brief in support of its exceptions to the Administrative Law Judge's Decision. The credited evidence clearly established that Respondents engaged in a hiring scheme aimed at avoiding (albeit unsuccessfully) their obligation to recognize and bargain with the USW. Because this unlawfule union avoidance scheme tainted the entire process, the ALJ erred in accepting Respondents' subjective, uncorroborated and conflicting reasons for refusing to retain Mr. Borden, Ms. Kimbrell and Mr. Waldrop.

ARGUMENT

A. Contrary to Respondents' argument, the record clearly establishes that Union avoidance motivated the Respondents' hiring and staffing decisions.

The Respondents do not dispute the well settled principle that, in the successorship context, hiring and staffing decisions motivated by a desire to avoid recognizing an incumbent Union violate Section 8(a)(3) of the Act. *See Karl Kallmann d/b/a Love's Barbeque*, 245 NLRB

78 (1979); *CNN America*, 361 NLRB No. 47, n. 36 (2014). The Respondents' argument that the General Counsel failed to establish that hiring and staffing decisions were motivated by union animus or an unlawful hiring scheme lack merit. The record is replete with evidence that the Respondents sought to avoid the Union **after** they had invited the USW to bargain over the terms of a new collective bargaining agreement and told employees that "99.9 percent" would be retained.[1] It is evident that Respondents retracted this initial recognition and then adopted a scheme (albeit unsuccessful) to avoid recognizing the Union.[2] Because the Respondents faced an October 1 date to reassume operation of the nursing home, the implementation of the scheme was admittedly "chaotic."[3]

Moreover, the Respondents faced the problem of retaining a sufficient number of incumbent employees in order to continue operating the nursing home without an interruption in care.[4] Once the Respondents informed the State of Alabama that they would assume control of operating their nursing home, the Respondents were under a legal obligation to ensure that patients received continuous and adequate care.[5] In other words, shutting down operations for a period of time was not an option. To control for this problem and still avoid recognizing the

[1] *See*, JEX 4 (July 15 Letter from Respondents' Counsel). Several employees recall that at the first meeting with Ms. Brown, she reassured them that 99.9 percent would be hired. (Tr. Eaton 75, 77; McPherson 102, Wilbert, 132, McClain, 137; Puckett, 261)

[2] The scheme was ultimately unsuccessful because the ALJ correctly determined that the historical bargaining unit was an appropriate unit from which to measure majority status. The ALJ correctly determined that "helping hands" did not have to be included in the analysis because this was not a position that existed in the historical unit. The Respondents reliance on *John P. Scripps Newspaper Corp. d/b/a The Sun*, 329 NLRB 854, 859 (1999) for the argument that "helping hands" must be included in the unit is misplaced because that decision (as argued in the USW's Answering Brief, p. 27) involved a different issue then the one presented in this case. Moreover, the rationale supporting the decision in *The Sun* (i.e. preservation of the historical unit) counsels **against** applying the framework articulated in that case to determine whether the USW retained majority status.

[3] The "chaotic" process is difficult to square with the fact that Respondents' owner Ms. Joette Brown knew more than one year prior to October 1, 2013 that she would be assuming operation of the nursing home. The Respondents also anticipated hiring 99.9 percent of the incumbent employees prior to having a change of heart about recognizing the Union. Indeed, had the Respondents hired 99.9 percent of the incumbent employees, then there would have been no way to avoid recognizing the Union. The chaos that ensured is best explained by the Respondents' decision to avoid the Union.

[4] As used herein, the term "incumbent employees" means the employees working at the Respondents' nursing home when it was operated by Preferred.

[5] *See*, Charging Party Ex. 6 (T. 556-557)

Union, the Respondents decided to implement a two-step hiring process: the Respondents first required Preferred employees (i.e. incumbent employees) to accept employment by September 16, 2013 and then turned to hiring external candidates. Contrary to Respondents' argument, this process did not benefit incumbent employees but rather allowed the Respondents to know how many external hires were needed to avoid recognizing the Union.

In addition to the manner that Respondents conducted the hiring and staffing process, other evidence supports the conclusion that Respondents' hiring and staffing decisions were motivated by Union animus (i.e. a desire to avoid the Union). First, the Respondents do not credibly dispute that Ms. Brown told employees in June or July of 2013 that "99.9" percent would be retained. This representation coincided with the July 15 letter offering to bargain with the USW over the terms and conditions of employment. At some point after the July 15 letter, Respondents decided to avoid the Union and then engaged in a chaotically arranged hiring process. The lack of planning indicates that Respondents planned of hiring 99.9 percent of the incumbent employees. Because the Respondents intended to keep the existing work force, the hiring process did not require subjecting these employees to treatment as new employees. Thus, the ensuing "chaos" in late August 2013 indicates that there was a drastic change in plans; a change from dealing with the USW to avoiding recognition altogether.

Once the Respondents decided to avoid the Union, hiring 99.9 percent of the incumbent employees (indeed even 99.9 percent of those that applied) was no longer an option. Hiring 99.9 percent of the 65 Preferred employees (i.e. the incumbent employees that applied) would have ensured the Union's majority status because even under the Respondents' inflated numbers, a full employee complement is less than 99 percent of 65. As Ms. Brown acknowledged, staffing levels are determined by average patient census and the number of licensed beds. As noted in

the USW's brief supporting cross-exceptions, the number of licensed beds and the historical average monthly patient census have resulted in a historical staffing average of approximately 88 unit employees. (*See*, USW's Brief Supporting Cross Exceptions, p. 10 n. 6)

Second, 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 October 1 (Tr. at 43, 148, 162)[6], (ii) that at Ridgeview (the 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)[7] (iv) that the facility worked well without too many employees belonging to the Union (Tr. at 75-76)[8], 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). 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).[9]

Third, contrary to the Respondents' claim, Mr. Borden was not the only employee who

[6] 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 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.")

[7] 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.")

[8] 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.")

[9] 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).

testified that he was asked about his union membership. 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 her interview whether she was in the union. (Tr. at 102). Such inquiry into union membership makes sense given Ms. Brown's experience with a union at Ridgeview that had only nine members and her ability to do operate that facility as if that Union did not exist.

Fourth, the Respondents' letter to employees dated October 22, 2013 was a pre-emptive effort to keep the union out and thus supports a finding of anti-union animus. (ALJD 11-12) Because the statements that the facility was operating non-union and that a union was unnecessary at the facility occurred while the Respondents were still allegedly engaged in hiring, there should be no question that the statements are evidence that anti-union animus motivated the Respondents' hiring and staffing decisions.[10]

Finally, the apparent "after the fact" use of a "no-rehire" rule borrowed from the Ridgeview facility supports the inference that the Respondents hiring and staffing decisions were motivated by anti-union animus. 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 conflicted with Ms. Brown's stated goal of hiring qualified candidates. (Tr. at 426)

Additionally, 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. Ms. Eads testified that she was told during the interview that she had nothing to worry about regarding her

[10] According to the Respondents, they continued hiring until November 14, 2013 and even rehired Mr. Waldrop (a formerly represented employee) on October 16, 2013.

prior employment at Ridgeview. (Tr. at 181) Ms. Eads also testified that Ms. Holland (one of the interviewers) told her that she was not aware of a no-rehire policy being applied at Ridgewood. (Tr. 181)[11] 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) Consistent with Ms. Eads testimony about the interview process, she was scheduled for a physical and actually passed the physical. According to the Respondents, only employees that were conditionally offered employment were scheduled for a physical. The Respondents, however, reversed course and decided to rescind the offer of employment in late September 2013.[12] This about face strongly supports an inference that the "no-rehire" rule was applied "after the fact" to justify excluding at least five (5) former Preferred employees.

The Respondents contention that they applied the same criteria to external candidates lacks an evidentiary basis. (*See*, Respondents' Answering Brief, p. 10) 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)

[11] Given that Ms. Holland 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.

[12] Testimony also 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 waived. It is not credible that Respondents would encourage employees who had no chance of retaining employment at RHCC to apply for a job. It was only after then Respondents realized the need to screen out more employees that the "no-rehire" rule was used to avoid recognizing the Union.

B. Contrary to the Respondents' argument, the hiring and inclusion of "helping hands" in the unit for purposes of determining majority status and other staffing decisions support an inference of animus.

CNN America, Inc., 316 NLRB No. 47 (2014) supports the proposition that a hiring scheme that inflates the unit in order to avoid recognizing an incumbent Union demonstrates discriminatory animus. The evidence and testimony demonstrate that the Respondents inflated staffing numbers with the "helping hands" classification. The Respondents had 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 had 22 helping hands on the payroll. (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, reflected on the two week period of September 28 and October 11, 2014. (CPEX 12) However, immediately following this two week period, there were only 12 helping hands on the schedule. (CPEX 13) In three of the monthly 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 an inference that this classification was used to inflate staffing levels.

Second, the inference that "helping hands" were used to inflate staffing numbers in order to avoid the Union is supported by the fact that the average number of employees in the historical unit positions **after** October 1, 2013 (i.e. post-transition) mirrors the average number of

employees in these positions **prior** to October 1, 2013. The record established that the facility can be adequately staffed with eighty-two (82) to eight-eight (88) unit employees. The work schedules identified as C.P. Exhibits 1-4 showed that as few as eighty-two (82) employees working in the historic bargaining unit positions was sufficient to adequately staff the nursing home. The total average number of employees in historical bargaining unit positions at the facility during the year prior to the take-over was eighty-eight (88). (*See*, Charging Party USW's Post Hearing Brief, Appendix A) Ms. Collette (Director of Nursing for Preferred and the only person qualified as an expert) testified that (i) the staffing levels indicated on Preferred's work schedules were adequate staffing under Alabama law for a facility with 98 licensed beds and an average patient census of eighty-five (85) percent; (ii) that the inspector for the State of Alabama reviewed the schedules and (iii) the State of Alabama never cited Preferred for inadequate staffing. (T. 373, 378, 389-91, 398-399)

Because staffing requirements are driven by the number of licensed beds and average monthly patient census, it is not surprising to find that Respondents' average staffing levels in the historical unit positions mirrors the average staffing levels reflected on the pre-October 1, 2013 schedules.[13] Based on the schedules provided by the Respondents, the average staffing level in the historical unit positions was 88 employees during the period of August 2014 through January 2015. (*See*, Charging Party USW's Post Hearing Brief, Appendix B)[14] Thus, given that

[13] CPX 9 shows that in the period between October 1, 2013 and October 1, 2014, the average monthly patient census was approximately 86 percent. Ms. Collette testified that prior to October 1, 2013, the average monthly patient census was approximately 85 percent. (T. 356)

[14] **CPEX 10** shows that for the period of August 3 to August 16, 2014 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)). **CPEX 11** shows for the period of August 17 to August 30, 2014that the Respondents operated the facility with **84** employees in the historical unit positions**. CPEX 12** shows for the period of September 28 to October 11, 2014. 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 that for period of October 12 to October 25, 2014 the Respondents operated the facility with **89** employees in the historical unit positions. **CPEX 14** shows for the period of December 7 to December 20 that Respondents operated the facility with **88** employees in the historical

under Alabama law the Respondents could adequately staff the facility with only the historical bargaining unit positions, the addition of a new classification was unnecessary and used to inflate staffing numbers.

This conclusion is further buttressed by the fact that Alabama law 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*, Charging Party USW's Post Hearing Brief, p. 21, n. 12). 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." *Id*. These requirements explain why Respondents' witness Ms. Sue Leigh Warren stated unequivocally that **"Helping hands cannot do the work of a certified nursing assistant."** (Tr. at 691)(emphasis added)[15] The Respondents' treatment of this position as a "nurse aide" for purposes of determining whether a majority of former unit employees occupied the unit positions as of October 1, 2013 demonstrates a union avoidance motive. The desire to avoid recognizing the Union can be the only explanation for why the Respondents treated the "helping hands" classification a "nurse aide", knowing that in Alabama any person desiring to work as a "Nurse Aide" must be certified.

In addition to inflating the "unit positions" with helping hands, the Respondents offered several positions to Ridgeview employees.[16] Ms. Holland's testimony showed that Ridgeview

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unit positions (i.e. 98 minus 10 helping hands). **CPEX 15** shows for the period of December 2, 2014 to January 3, 2015, the Respondents operated the nursing home with **86** employees in historical unit positions. **CPEX 16** shows for the period of January 18 to January 31, 2015that Respondents operated the facility with **84** employees working in the historical unit positions.

[15] The argument that a helping hand is a "nurse aide" as the term is used in the contract clearly conflicts with how the term is defined under Alabama law. Pursuant to Article 33 of the contract (which provides that "in the event any provision of this Agreement is held to be in conflict with or violation of any State and Federal statue or Court decision, such statue or Court decision shall govern and prevail. . . .",) the definition used by the State of Alabama would control interpretation of the term as it appears in the contract and thus exclude helping hands from the scope of the unit. (JEX 3, p. 19)

[16] Five (5) of the nineteen (19) employees in the "helping hands" classification as of October 1, 2013 actually

employees were allowed to take positions at RHCC while **simultaneously** keeping a position at Ridgeview. Filling positions with current and active Ridgeview employees (whom the Respondents evidently believed would not support the union) clearly supports an inference that unlawful Union avoidance motivated the Respondents' hiring and staffing decisions.

Finally, and perhaps most importantly, the Respondents' claim that it had hired one-hundred and twenty-three (123) employees as of November 14, 2013 **proves** that during this time period the Respondents sought to inflate unit staffing levels in order to avoid recognizing the Union. Historically, the facility has never operated with such an inflated number of unit employees. Furthermore, the Respondents' own contemporaneous schedules show that they operate and have operated the facility with substantially less employees (even if one includes "helping hands"). The only explanation for the claim that they had hired 123 employees in November 2013 was to support their contention that the Union lacked a majority and thus avoid recognition.

CONCLUSION

The substantial evidence that Respondents conducted its hiring and staffing decision with the singular motive of avoiding the Union support the USW's contention that the ALJ erred when he accepted the Respondents' subjective, uncorroborated and conflicting reasons for not hiring Mr. Borden, Ms. Kimbrell and Mr. Waldrop.

Respectfully submitted,

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

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worked at Ms. Brown's non-union facility Ridgeview. (JEX 21, p. 2) According to Ms. Holland, the following employees that Respondents listed as employed at RHCC in one of the historical unit positions also remained employed at Ridgeview: Ashley Davis, Deb Davis, Ciera Howze, Destiny Meadows, Crystal Vanscoyk and Rita Wright. (Tr. at 637-644)

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2015, I served a true and correct copy of the foregoing via email and U.S mail on the following persons:

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