GVS Properties, LLC *and* International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 15, Local Lodge 447. Case 29–CA–077359

August 27, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On December 27, 2012, Administrative Law Judge Kenneth W. Chu issued the attached decision.[1] The Respondent filed exceptions and a supporting brief.[2] The General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified and set forth in full below.[4]

In this case, we consider the proper application of the successorship doctrine in cases where a new employer is required, pursuant to a state or local worker retention statute, to retain its predecessor's employees for a specific period of time. Resolution of this issue involves deciding whether the appropriate time to determine successorship status in these circumstances is when the new employer assumes control over the business and hires the predecessor's employees pursuant to the retention statute, or after the mandatory retention period has ended.

The judge found that the appropriate time to determine successorship status in this situation is when the new employer assumes control over the predecessor's business and hires the predecessor's employees. He therefore found that the Respondent, which purchased several properties in New York City and was required to retain its predecessor's employees for at least 90 days under the city's Displaced Building Service Workers Protection Act (DBSWPA), was a *Burns* successor and that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the union that represented the predecessor's employees.[5] For the reasons explained below, we agree with the judge.

I. FACTS

The facts in this proceeding were largely stipulated and are not materially in dispute. On or about February 17, 2012, the Respondent purchased several real estate properties in New York City from Broadway Portfolio I LLC ("Broadway").[6] Prior to the sale, Broadway had subcontracted the daily service, maintenance, repair and upkeep of the properties to Vantage Building Services LLC ("Vantage").

Since at least May 1, 2010, the Union has represented the Vantage employees who performed services at the properties purchased by the Respondent.[7] The most recent collective-bargaining agreement between the Union and Vantage covering those employees was effective by its terms from May 1, 2010, to April 30, 2013.

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[1] The judge issued an erratum on February 14, 2013, correcting the notice of appearance.

[2] In his answering brief, the General Counsel contends that the Respondent's exceptions contain arguments and citations of authority in contravention of Rule 102.46(b)(1). We have accepted and considered the Respondent's exceptions here because the "number of pages of argument in the exceptions, when added to the pages in the brief, do not cause the brief to total more than 50 pages." *Hotel Del Coronado*, 344 NLRB 360, 360 (2005).

[3] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

Because the Respondent's motive is not at issue in this case, we do not rely on the judge's finding that the Respondent discharged employees "in a transparent effort to dilute the Union's majority and evade its successorship bargaining obligation."

[4] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010), and to conform to our standard remedial language. Further, we shall substitute a new notice to conform to the violations found and in accordance with our decisions in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and *Durham School Services*, 360 NLRB 694 (2014).

[5] See *NLRB v. Burns International Security Services*, 406 U.S. 272, 280–281 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). Under the successorship doctrine, a new employer that continues its predecessor's business in substantially unchanged form and hires employees of the predecessor as a majority of its work force is a successor with an obligation to bargain with the union that represented those employees when they were employed by the predecessor. We do not rely on the judge's characterization of the Board's successorship doctrine as holding that "when a business changes hands, the successor employer must take over and honor the collective-bargaining agreement negotiated by the predecessor." See *Burns*, 406 U.S. at 287–295 (holding that a successor employer is not bound by its predecessor's collective-bargaining agreement, and is ordinarily free to establish its own initial terms and conditions of employment).

[6] All dates are in 2012 unless otherwise specified.

[7] The unit consists of all full-time superintendents and porters (also known as maintenance technicians and maintenance assistants, respectively), excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined in the NLRA.

On February 17, 2012, the day of the purchase, the Respondent distributed to the unit employees a letter announcing that it would self-manage the properties, and the employees would no longer have jobs with Vantage. The letter stated that if the employees wished to continue working at the properties they should inform the Respondent's manager of operations. The letter also notified the employees that all of the terms and conditions of employment under Vantage were "revoked and nullified in their entirety"; the Respondent was setting new terms and conditions of employment; and their employment would be on a temporary and trial basis for 90 days, after which time the Respondent would determine its permanent staffing needs. Enclosed with the letter was a memorandum describing the new terms and conditions of employment.[8]

On February 18, the Respondent hired seven of the eight unit employees.[9] The parties stipulated that the Respondent hired the employees pursuant to the DBSWPA.

In relevant part, the DBSWPA states:

> b. (5) A successor employer shall retain for a ninety (90) day transition employment period at the affected building(s) those building service employee(s) of the terminated building service contractor (and its subcontractors), or other covered employer, employed at the building(s) covered by the terminated building service contract or owned or operated by the former covered employer.
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> (6) If at any time the successor employer determines that fewer building service employees are required to perform building services at the affected building(s) than had been performing such services under the former employer, the successor employer shall retain the predecessor building service employees by seniority within job classification; provided, that during such 90-day transition period, the successor employer shall maintain a preferential hiring list of those building service employees not retained at the building(s) who shall be given a right of first refusal to any jobs within their classifications that become available during that period.
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> (7) Except as provided in part (6) of this subsection, during such 90-day period, the successor contractor shall not discharge without cause an employee retained pursuant to this section.
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> (8) At the end of the 90-day transition period, the successor employer shall perform a written performance evaluation for each employee retained pursuant to this section. If the employee's performance during such 90-day period is satisfactory, the successor contractor shall offer the employee continued employment under the terms and conditions established by the successor employer or as required by law.

N.Y.C. Admin. Code § 22–505.

By letter dated March 7, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. By letter dated March 13, the Respondent refused. It asserted that the request was premature because it would not employ a substantial and representative complement of employees until after expiration of the 90-day transition period mandated by the DBSWPA, when it would determine whether the unit employees would be offered permanent employment.

On May 16 and 17, coinciding with the end of the 90-day transition period, the Respondent discharged three of the unit employees and hired four new employees.[10] As of May 17, therefore, the Respondent's work force consisted of four employees who had previously worked for Vantage and four employees who had not.

II. THE JUDGE'S DECISION

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union. The judge observed that under the Supreme Court's decisions in *Burns* and *Fall River*, a new employer that continues its predecessor's business in substantially unchanged form and hires employees of the predecessor as a majority of its work force is a successor, with an obligation to bargain with the union that represented those employees when they were employed by the predecessor. The judge noted that on February 18, the Respondent hired seven of its predecessor's eight unit employees to perform the same jobs under the same working conditions. The judge further noted that on March 7, the Union timely requested recognition and demanded bargaining with the Respondent.

The judge rejected the Respondent's defense that it was not a *Burns* successor because it did not choose to hire its predecessor's employees, but rather was compelled to do so by the DBSWPA.[11] The judge found that

[8] Those terms and conditions of employment significantly modified the wages, hours, and benefits set forth in the unexpired collective-bargaining agreement between Vantage and the Union. The changes are not alleged to be unlawful.

[9] The Respondent permanently laid off the eighth unit employee. The layoff is not alleged to be unlawful.

[10] The discharges are not alleged to be unlawful.

[11] See *Burns*, 406 U.S. at 287 ("The source of [the new employer's] duty to bargain with the union is not the collective-bargaining contract

the Respondent made "a conscious decision to retain the former workforce" when it decided to purchase and assume management of the properties with knowledge of the requirements of the DBSWPA. The judge rejected the Respondent's argument that the successorship determination could not be made until after expiration of the 90-day transition period, when it was required to offer continued employment only to those employees whose performance was satisfactory.

Ultimately, the judge found that the Respondent's bargaining obligation arose on March 7, when its work force was composed entirely of the predecessor's unit employees and the Union demanded to bargain.

III. DISCUSSION

We agree with the judge that the Respondent became a *Burns* successor with an obligation to recognize and bargain with the Union when it assumed control over the predecessor's business and hired the predecessor's employees. We find no merit in the arguments of the Respondent and our dissenting colleague that the successorship determination could not be made until after the DBSWPA-mandated retention period had ended. In support of this argument, the Respondent and our dissenting colleague rely heavily on selected language in *Fall River*, where the Court, referencing *Burns*, supra, observed that "the successor is under no obligation to hire the employees of its predecessor, subject, of course, to the restriction that it not discriminate against union employees in its hiring," and went on to state:

> [T]o a substantial extent the applicability of *Burns* rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated. This makes sense when one considers that the employer *intends* to take advantage of the trained work force of its predecessor.
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> 482 U.S. at 40–41 (emphasis in original; footnote and citations omitted).[12]

Like the judge in this case, we find that the Respondent made the "conscious" decision required by *Burns* and *Fall River* when it purchased the buildings and took over the predecessor's business with actual or constructive knowledge of the requirements of the DBSWPA.[13] We note that the Court in *Burns* and *Fall River* did not have before it the precise issue presented in this case: whether a successor bargaining obligation can be imposed on a new employer that hires its predecessor's employees pursuant to a worker retention statute. We see no indication in the Court's decisions, however, that it intended to deny collective-bargaining rights to employees in these circumstances.

In *Fall River*, the Court recognized that the Act's aim of preserving industrial peace is best served by ensuring continued representation as early as possible during a transition between employers. The Court observed that "a union is in a peculiarly vulnerable position" during the initial stages of an employer transition, because "[i]t has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it." 482 U.S. at 39. The Court therefore held that "during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor." Id.

The Court further explained that "[t]he position of the employees also supports the application of the presumptions [of majority support for an incumbent union] in the successorship situation," noting that:

> If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of

but the fact that it voluntarily took over a bargaining unit that was largely intact and that had been certified within the past year.").

[12] The dissent also cites *Paulsen ex rel. NLRB v. GVS Properties, LLC*, 904 F.Supp.2d 282, 292 (E.D.N.Y. 2012) (denying the Board's petition for 10(j) relief in this case, finding that the Respondent did not make a voluntary decision to hire its predecessor's employees because it was "legally precluded" from terminating them "except on narrow grounds."). The dissent correctly recognizes, however, that the opinion of a Federal district court judge in a 10(j) proceeding is not binding on the Board. *Electro-Voice, Inc.*, 320 NLRB 1094, 1094 fn. 2 (1996).

[13] The dissent argues that we have erroneously "conflate[d] the decision to purchase a business with the decision to compose its workforce." In our view, where, as here, the decision to purchase a business inevitably leads to a requirement that employees be retained for a certain period of time, those decisions are in effect one and the same. It is settled that a respondent is responsible for the reasonably foreseeable consequences of its actions. See, e.g., *Tile, Marble, Terrazzo Finishers, Local No. 31 (Standard Art, Marble and Tile Co.)*, 258 NLRB 1143, 1146 (1981); see generally *Radio Officers' Union v. NLRB*, 347 U.S. 17, 44–45 (1954). Here, the Respondent purchased properties subject to the DBSWPA and then voluntarily chose to manage those properties, a responsibility that the prior building owner contracted out to the predecessor employer, Vantage. It was certainly reasonably foreseeable that purchasing a building subject to the DBSWPA and then assuming responsibility for the management of the building would lead to a requirement that the predecessor's work force be retained. In these circumstances, we find that the Respondent's decision to take over the business of the predecessor and assume responsibility for the management of the buildings was tantamount to a decision to retain the predecessor's employees, at least for the period required by the DBSWPA.

> an enterprise's transformation. This feeling is not conducive to industrial peace.

482 U.S. at 39–40.

In short, the thrust of the Court's decision in *Fall River* is that stability in labor relations and the free flow of commerce during a transition between employers are best achieved by protecting existing bargaining rights. The position advanced by the Respondent and the dissent is sharply at odds with that rationale. Under their view, employees who are performing the same jobs under the same conditions after an employer transition would have their legitimate expectation of continued representation thwarted solely because the employer is subject to a state or local worker retention statute. We do not believe the Court intended such a result, which would deprive employees of their bargaining rights "during this unsettling transition period." Id. at 39.

The dissent contends that this denial of bargaining rights is necessary to avoid upsetting the careful balance struck by the Court in *Burns* and *Fall River* between "the interest of the successor in its freedom to structure its business and the interest of the employees in continued representation by the union." *Fall River*, 482 U.S. at 41. However, this argument confuses the impact of the worker retention statute with the impact of the bargaining obligation. It is the worker retention statute, not the imposition of a bargaining obligation that restricts the employer's right to make changes in the composition of the work force. Imposing a bargaining obligation in these circumstances merely implements the express mandates of Sections 8(a)(5) and 9(a) of the Act, without interfering in any way with the "rightful prerogative of owners independently to rearrange their businesses." 482 U.S. at 40.

We also find no merit in the argument of the Respondent and the dissent that the successorship determination should be delayed until after the mandatory retention period has run because of the possibility that the employer's chosen work force at that time will lack a majority complement of the predecessor's employees. The dissent argues, in this respect, that "[t]he short delay--here, a mere 90 days--would not unduly burden unions," and would avoid foisting the union on the employer's eventual work force. The dissent's approach, however, "fails to take into account the significant interest of employees in being represented as soon as possible," an interest which is "especially heightened" in a case like the present one "where many of the successor's employees, who were formerly represented by a union, find themselves after the employer transition in essentially the same enterprise, but without their bargaining representative." 482 U.S. at 49.

Consistent with this rationale, the Board has long held that the successorship determination is not affected by the temporary or probationary status of the predecessor's employees in the successor's work force, and it has found it inappropriate to defer successorship determinations until after the completion of employer-imposed probationary periods. See, e.g., *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 978, 1000 (2007) (affirming judge's finding that "[e]stablishment of a 90-day employee probationary period does not create doubt about the makeup of a work force sufficient to defer a work-force-continuity determination until after completion of the 90-day period"), enf. denied in part on other grounds, 570 F.3d 354 (D.C. Cir. 2009); *Sahara Las Vegas Corp*, 284 NLRB 337, 337 fn. 4, 343–344 (1987) (affirming judge's finding that 90-day probationary period had "no legally cognizable significance" on the successor's bargaining obligation), enfd. 886 F.2d 1320 (9th Cir. 1989); *The Clarion Hotel-Marin*, 279 NLRB 481, 490 (1986) (rejecting the employer's claim that successorship status could not be determined until the expiration of a probationary period), enfd. 822 F.2d 890 (9th Cir. 1987); *Denham Co*., 218 NLRB 30, 31–32 (1975) (rejecting argument that new employer could not accurately gauge the composition and extent of union representation in its ultimate work force until expiration of 30-day mandatory retention period; "even if these employees were truly considered . . . 'probationary' during the first 30 days, they were, nonetheless, 'employees' under the Act, for whom, we hold, Respondent had an obligation to bargain").

Significantly, in both *Clarion* and *Denham*, the employer was compelled to retain the predecessor's employees by the provisions of a contract of sale. In *Denham*, for instance, "[o]ne of the express conditions of takeover imposed by [the predecessor] was that Respondent retain [the predecessor's] employees for a minimum period of 30 days." *Denham*, supra, at 31. In finding that the respondent was a successor as of the date of the takeover, the Board attached no significance to fact that the respondent was compelled to retain the employees by the conditions imposed by the predecessor, rather than making the retention decision independently. The Board found continuity of the work force based solely on the fact that a sufficient number of predecessor employees had been retained by the successor. Id. at 31–32. In *Clarion*, the Board likewise found the respondent to be a successor notwithstanding that the retention of the prede-

cessor's employees was compelled by contract. *Clarion*, supra, at 489–490.[14]

We see no reason to depart from our precedent concerning probationary periods and compelled retention simply because the probationary period and the employee retention itself was required by a worker retention statute, rather than by the employer alone or by contract. The record establishes that the predecessor's employees all had a prospect of continued employment based on performance. Although the Respondent did not retain a sufficient number of its predecessor's employees to continue the Union's majority status, there is no reason to assume that that will generally be so. It is at least as likely that employers in this situation will choose to retain a substantial number of the predecessor's employees in order to take advantage of their knowledge and expertise, instead of hiring new and inexperienced employees. Accordingly, as with employer-imposed probationary periods, the temporary or probationary nature of employment during the mandatory retention period of worker retention statutes does not create doubt about the eventual makeup of the work force sufficient to outweigh "the significant interest of employees in being represented as soon as possible," *Fall River*, supra, at 49, or defeat the bargaining obligation long established by our cases under similar circumstances.

Our dissenting colleague claims that our decision will result in "a sea change in our nation's labor law" by "obliterat[ing] . . . the *Burns* right [to unilaterally set initial terms and conditions of employment], solely because a local retention ordinance is in place." See *Burns*, 406 U.S. at 294–295 ("Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."). The dissent contends that "[i]t is perfectly clear that employers governed by the DBSWPA and like statutes will have to retain all of their predecessor's employees," and it therefore predicts that "even if a local statute does not mandate retention of employees under the same terms and conditions of employment they enjoyed with the predecessor, a successor will have no opportunity to exercise the *Burns* right to set new terms."

The hypothetical posed by the dissent goes far beyond the scope of the instant case. We do not, as the dissent suggests, imply--much less hold--that all new employers subject to worker retention statutes are "perfectly clear" successors, and we are not "obliterat[ing]" the *Burns* right of successor employers to set their employees' initial terms. We note, moreover, that such a result would be inconsistent with the standard established by the Board in *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975). In *Spruce Up*, the Board held that a new employer that expressed a willingness to hire its predecessor's employees while at the same time announcing that it would pay a significantly reduced commission rate was not a "perfectly clear" successor within the meaning of *Burns*. 209 NLRB at 195. The Board reasoned that "[w]hen an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court," because of the possibility that many of the employees will reject employment under the new terms. Id. The Board therefore held that the "perfectly clear" exception of *Burns* and the consequent forfeiture of the right to set initial terms "should be restricted to circumstances in which 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 announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Id. (footnote omitted). See also *Canteen Co.*, 317 NLRB 1052, 1053–1054 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997) (clarifying that the initial bargaining obligation is triggered when a successor expresses an intent to retain the predecessor's employees without making it clear that employment will be conditioned on acceptance of new terms). Consistent with *Spruce Up*, therefore, employers subject to worker retention statutes can avoid "perfectly clear" successor status by announcing new terms and conditions of employment prior to or simultaneously with the expression of intent to retain their predecessors'

[14] Our dissenting colleague attempts to distinguish these cases on the basis that the employees' probationary status was imposed unilaterally by the successor or as a result of a sales agreement negotiated by the successor, whereas the Respondent in this case took no similar voluntary action, but rather was compelled to retain its predecessor's employees for a period of 90 days under the DBSWPA. As indicated above, however, we find that the Respondent made a conscious or voluntary choice to retain its predecessor's employees when it purchased the buildings and took over the predecessor's business with actual or constructive knowledge of the requirements of the DBSWPA. Clearly, the Respondent could have chosen either not to purchase the buildings or not to assume responsibility for managing the buildings. The Respondent could also have chosen to negotiate with the seller regarding the effects of the obligation to hire the predecessor's employees.

employees. Indeed, this is precisely what happened here when the Respondent simultaneously offered employment and announced new terms and conditions of employment.

Our dissenting colleague also expresses concern that our decision "could prove the death knell for local worker retention statutes" because of the possibility that courts could find the statutes preempted by the NLRA if the Board were to find that successorship obligations may arise before the expiration of the mandatory retention period. We do not share that concern.

Under the Supremacy Clause of the Constitution, state law is preempted when Congress has acted to occupy the field or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The Supreme Court has articulated two distinct doctrines addressing the preemptive effect of the Act. Under *Garmon* preemption, articulated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." Id. at 244. That is, states may not regulate conduct that is arguably protected or prohibited by the Act. Id. at 246. Under *Machinists* preemption, articulated in *Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), even conduct that is neither prohibited nor protected under the Act is exempt from state regulation if Congress intended that the conduct be unregulated and left to the "free play of economic forces." Id. at 140–141.

In *Washington Serv. Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995), cert. denied 516 U.S. 1145 (1996), the court considered and rejected a claim that the District of Columbia Displaced Workers Protection Act of 1994 (DWPA), a worker retention statute similar to the DPSWPA, was preempted by the NLRA.[15] The court found *Garmon* preemption inapplicable because the DPWA "raises no issue that the NLRB would have jurisdiction to decide under Sec. 7" and the DPWA does not encompass any matter "even arguably regulated by Sec. 8." 54 F.3d at 816. The court went on to find that the DWPA would not be preempted under *Machinists* even if the Board were to take the position that successorship can be found before the expiration of the mandatory retention period, as we find in this case. The court found that there would be no conflict between the retention statute and the Act because such a ruling "would presumably represent the Board's judgment that enforcing its successorship requirements in the context of DWPA hires would be congruent with the aims of the NLRA." Id. at 817. The court further stated:

> Moreover, even if the NLRB's application of its successorship doctrine to DPWA hires could somehow engender "conflict" between the local and federal Acts, . . . [w]e cannot imagine any . . . freedom implicitly left to employers by the NLRA that would be compromised were the NLRB to require employers to recognize the union of DPWA hires. Certainly the NLRA contains no implicit right of an employer to refuse to hire employees on the basis of union membership, or to refuse to recognize a union approved by the majority of its employees. . . . Application of the successorship doctrine under the DPWA therefore would not require the employer to do anything that it has a right under the NLRA to refuse.

Id.

The court rejected the argument, also raised here, that "the NLRA demonstrates Congress's desire that hiring decisions be left to the 'free play of economic forces.'" Id. The court stated that *Machinists* preempts only those local laws that "disturb the labor dispute resolution system established by the NLRA." Id. Citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754 (1985), the court observed that *Machinists* preemption does not apply to "employee protective legislation having nothing to do with rights to organize or bargain collectively." Id. at 818. Relying in part on the D.C. Circuit's decision in *Washington Serv. Contractors*, the U.S. District Court for the Eastern District of New York similarly determined that the DBSWPA, the ordinance at issue in this case, is not preempted by the NLRA. *Alcantara v. Allied Properties*, 334 F.Supp.2d 336 (E.D. N.Y. 2004) (DBSWPA not preempted by the NLRA, in part because the DBSWPA does not "regulate economic self-help activities."). Id. at 344–345.

Our dissenting colleague agrees with the dissent in *Washington Serv. Contractors* that local retention statutes would be preempted by the NLRA were the Board to decide, as we do today, that successorship obligations may arise before the expiration of the statutory mandatory retention period. Although we recognize that possibil-

[15] In *Washington Serv. Contractors*, the service contractors argued that the DWPA was preempted by the NLRA because (1) by requiring that the predecessor's employees be retained, the DWPA improperly attempts to mandate that employers become "successor" employers obliged to bargain with the union that represented their predecessor's employees, and this was an impermissible state incursion into the collective-bargaining process regulated by federal law, and (2) the DPWA improperly regulates contractors' rights to hire whomever they wish.

ity,[16] we do not view it as sufficient reason for us to carve out a special exception in our successorship jurisprudence. Our finding that *Burns* successorship obligations may arise before the expiration of a mandatory retention period is consistent with our case law under which *Burns* successorship is determined based on the nature of the successor's business and the composition of the successor's work force. As discussed above, we continue to view as immaterial the business or legal reasons that may underlie the successor's retention of the predecessor's employees, and the possibility that those employees may not survive a probationary period.[17]

For these reasons, we agree with the judge that the Respondent was a *Burns* successor and that it violated Section 8(a)(5) and (1) of the Act by its refusal, on and after March 7, to recognize and bargain with the Union.

ORDER

The National Labor Relations Board orders that the Respondent, GVS Properties, LLC, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 15, Local Lodge 447 (Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

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

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

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

> All full-time superintendents and porters (also known as maintenance technicians and maintenance assistants, respectively) and excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act, employed at the following addresses located in New York, New York: 601 West 139th Street (a/k/a 3421 Broadway); 614 West 157th Street; 600 West 161st Street (a/k/a 3851 Broadway); 559 West 164th Street; 701 West 175th Street; 700 West 176th Street; and 667 West 177th Street (a/k/a 4180 Broadway).

Within 14 days after service by the Region, post at all the New York, New York facilities, *to wit*: 601 West 139th Street (a/k/a 3421 Broadway); 614 West 157th Street; 600 West 161st Street (a/k/a 3851 Broadway); 559 West 164th Street; 701 West 175th Street; 700 West 176th Street; and 667 West 177th Street (a/k/a 4180 Broadway), copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 2012.

Within 21 days after service by the Region, file with the Regional Director of Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER JOHNSON, dissenting.

The issue before the Board in this case is one of first impression: whether an employer that is compelled to hire its predecessor's employees under a mandatory worker retention statute is a *Burns*[1] successor. My colleagues find that the Respondent is a *Burns* successor and impose a bargaining obligation on it. In so doing,

[16] See *Rhode Island Hospitality Assn. v. City of Providence*, 667 F.3d 17 (1st Cir. 2011); see also *California Grocer's Assn. v. City of Los Angeles*, 52 Cal.4th 177, 207–208 (2011), cert. denied 132 S.Ct. 1144 (2012); *Paulsen ex rel. NLRB v. GVS Properties, LLC*, supra.

[17] We deny the Respondent's request that we apply our holding prospectively only. Our decision does not amount to a change in the Board's successorship analysis. Even assuming arguendo that it does, the Respondent has failed to establish that our usual practice of applying our holding to the parties in the case in which it is announced would "work a manifest injustice." See *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993) (quotations omitted).

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

[1] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

they permit a municipal government to assume the Board's statutory responsibility to determine Federal successorship law under the Act, an unprecedented case of "reverse preemption." In my view, the only proper standard is to wait to apply the Board's successorship doctrine until after the statutorily mandated retention period has run. At that point, the Board would evaluate the voluntary decisions of the new employer, as the Supreme Court instructs. Doing so here, I find that the Respondent is not a *Burns* successor. Accordingly, I respectfully dissent.

I.

On or about February 17, 2012, the Respondent purchased several real estate properties that were covered by the New York City Displaced Building Service Workers Protection Act (DBSWPA), which required the Respondent, with limited exceptions, to retain its predecessor's employees for a period of 90 days. Based on operational needs, the Respondent initially hired seven of its predecessor's eight employees. At the end of the 90-day retention period, it terminated three of those employees and hired four outside employees, resulting in a work force lacking a majority complement from the predecessor employer.

In affirming the judge, my colleagues conclude that the Respondent was a *Burns* successor because it maintained a continuity of operations with its predecessor and had initially hired a majority of its predecessor's employees. In part, they reason that the Respondent made a conscious decision to purchase a business that was covered by the DBSWPA and, therefore, made a voluntary decision to retain its predecessor's work force.

II.

In reaching this conclusion, my colleagues ignore the balance of interests struck by the Supreme Court in *Burns* and its progeny. In those cases, the Court recognized that incumbent unions and the employees they represent are particularly vulnerable in successorship situations and that continuing the presumption of majority support through to the new employer can promote industrial peace. See *Fall River Dyeing v. NLRB*, 482 U.S. 27, 38–40 (1987). The Court wished to ensure, however, that employee free choice is not unduly impaired. The Court was also mindful of "the rightful prerogative of owners independently to rearrange their business." *Fall River Dyeing*, 482 U.S. at 40 (internal quotations omitted). After all, an "employer may be willing to take over a moribund business only if [it] can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision." *Burns*, 406 U.S. at 287–288; see also *John Wiley & Sons, Inc., v. Livingston*, 376 U.S. 543, 549 (1964). For instance, the Court emphasized that a new employer is under no obligation to hire the employees of its predecessor. *Fall River Dyeing*, 482 U.S. at 41; *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 264 (1974); *Burns*, 406 U.S. at 280 & fn. 5. Balancing these interests, the Supreme Court concluded:

> to a substantial extent the applicability of *Burns* rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated. This makes sense when one considers that the employer *intends* to take advantage of the trained work force of its predecessor.

Fall River Dyeing, 482 U.S. at 40–41 (emphasis in original).

The coercive nature of regulation, however, necessarily negates the voluntariness upon which the successorship doctrine is based. Compliance with the DBSWPA is not a voluntary choice—if an employer does not obey its commands, it faces monetary penalties and other enforcement mechanisms. Examining a local ordinance similar to the one at issue here, the First Circuit emphasized: "[T]he new employer has made no such 'conscious decision,' nor has the employer 'intend[ed] to take advantage' of the workforce. Rather, it will have been compelled to continue the employment of the former business's employees, subject to conditions, for three months." *Rhode Island Hospitality 'Assn. v. City of Providence*, 667 F.3d 17, 19 (1st Cir. 2011) (alteration in original); see also *Paulsen v. GVS Properties, LLC*, 904 F.Supp.2d 282, 290–292 (E.D.N.Y. 2012) (denying Section 10(j) injunctive relief in this case in part because the Respondent did not make a voluntary and conscious decision to hire a majority of its predecessor's employees). By forcing the Respondent to recognize and bargain with the Union based upon decisions it was coerced into making by the DBSWPA, the majority allows a local government to place its thumb on the scale in favor of incumbent unions, simply because they are incumbents, and thereby to upset the balance struck by the Supreme Court. No longer is "the rightful prerogative of owners independently to rearrange their business"--an interest the Court was "careful to safeguard"[2]--of any consequence.

Remarkably, the majority finds that an employer makes a voluntary decision to hire its predecessor's employees when it decides to purchase a business that is subject to a local worker retention statute , arguing that

[2] *Fall River Dyeing*, 482 U.S. at 40.

the former is "reasonably foreseeable" under these circumstances. Their conclusion erroneously conflates the decision to purchase a business with the decision to compose its work force. As the judge stated in his opinion denying the 10(j) petition in this case

> [T]he choice that *Burns* was focused on was not the voluntary decision to purchase a business or a piece of one, but the employer's voluntary decision to substantially assume its predecessor's employment force. That is the proper question because we are dealing with an issue of labor relations, not the myriad of other considerations that might drive an employer to enter into a transaction.[3]

Because of this error, the majority fails to recognize that an employer can make a voluntary choice as to the former decision, without making a voluntary choice as to the latter. Cf. *United Steelworkers of Am. v. St. Gabriel's Hosp.*, 871 F.Supp. 335, 341 (D. Minn. 1994) (rejecting the argument that an employer voluntarily assumes the collective-bargaining agreement of its predecessor by purchasing a business subject to a state statute forcing it to do so).

For support, my colleagues cite the Board's long-held position that successorship determinations are not affected by the temporary or probationary status of the predecessor's employees in the successor's work force. See *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 978, 1000 (2007), enf. denied in part on other grounds, 570 F.3d 354 (D.C. Cir. 2009); *Sahara Las Vegas Corp*, 284 NLRB 337, 337 fn. 4, 343–344 (1987), enfd. 886 F.2d 1320 (9th Cir. 1989); *The Clarion Hotel-Marin*, 279 NLRB 481, 490 (1986), enfd. 822 F.2d 890 (9th Cir. 1987); *Denham Co.*, 218 NLRB 30, 31–32 (1975). However, in each of the cases cited by the majority, the employees' status was either imposed unilaterally by the new employer or as a result of the sales agreement that was negotiated and entered into by the new employer. Here, however, the Respondent took no similar voluntary action. The DBSWPA *imposes a legal obligation* on the Respondent requiring it to retain its predecessor's employees for a period of 90 days, an obligation over which the Respondent had no say.

The majority's decision will have far reaching consequences. Ironically, it could prove the death knell for local worker retention statues. By allowing a local statute to control a matter of Federal labor law, the majority paves the way for these statutes to run headlong into the Supremacy Clause of the Constitution. Several courts have rejected challenges to these statutes on Federal preemption grounds, but they have entirely predicated their decisions on the assumption that the Board would not take the position it does here. See *Rhode Island Hospitality*, 667 F.3d at 29; *California Grocers Assn. v. City of Los Angeles*, 52 Cal. 4th 177, 205 (2011). Thus, the Board's decision today could needlessly undo the legitimate policy decisions of local governments.[4]

But even if this particular decision survives in the courts in the short run, the majority's willingness to allow these types of local statutes to influence the question of successorship will sharply curtail the rights of successor employers in the long run. Typically, a successor employer is free to set the initial terms and conditions on which it will offer employment to the workers of a predecessor. *Burns*, 406 U.S. at 294. In some extraordinary situations, however, it is perfectly clear that the new employer will retain all of the predecessor's employees, at which point the successor must consult with the incumbent union prior to fixing the initial terms and conditions. Id. at 294–295; see also *Fall River Dyeing*, 482 U.S. at 47 fn. 14; *Spruce Up*, 209 NLRB 194, 195 (1975), enfd. per curiam 529 F.2d 516 (4th Cir. 1975). It is perfectly clear that employers governed by the DBSWPA and like statutes will have to retain all of their predecessor's employees. Cf. *Canteen Co.*, 317 NLRB 1052, 1054 (1995) (employer deemed perfectly clear successor because it did not announce new wages until after it indicated it would hire most employees); *Springfield Transit Management*, 281 NLRB 72, 77–778 (1986). Therefore, even if a local statute does not mandate retention of employees under the same terms and conditions of employment they enjoyed with the predecessor, a successor will have no opportunity to exercise the *Burns* right to set new terms unless it does so prior to contracting to purchase the successor's business. Under the majority's rationale, then, the supposedly "extraordinary" *Spruce Up* exception will

[3] *Paulsen*, 904 F.Supp.2d at 292. While the opinion of a Federal district court judge in a Sec. 10(j) proceeding is not binding on the Board's subsequent determination of the merits of an unfair labor practice complaint, I note my complete agreement with Judge Cogan's analysis of the successor and preemption law issues presented in this case.

[4] I recognize that a panel majority of the D.C. Circuit observed that, even assuming the Board were to take the decision it does today, there would be no conflict between a local retention statute and the Act. See *Washington Serv. Contractors v. Dist. of Columbia*, 54 F.3d 811, 817 (D.C. Cir. 1995). In the context of that opinion, the observation was dictum. Further, for the reasons expressed in the dissenting opinion of Judge Sentelle in that case, id. at 818–820, I believe the majority was mistaken in its interpretation of Federal preemption law and Supreme Court precedent addressing successor employer obligations. Clearly, if a local government can control the decisions of the employer for purposes of successorship, decisions that are supposed to be voluntary under federal law of successorship as interpreted by the Supreme Court, then the notion of federal "supremacy" is turned on its head. The local tail will be wagging the Federal Supremacy Clause dog.

all but eliminate the general *Burns* right wherever a retention mandate applies, greatly limiting the ability of employers to restructure a predecessor's operations in a manner designed to make them profitable and to ensure the job security of those whom it chooses to employ.[5]

Thus, the majority's obliteration of the *Burns* right, solely because a local retention ordinance is in place, upsets a fundamental balance set by the Act and sets in motion "reverse pre-emption." Today's decision represents a sea change in our nation's labor law that neither Congress intended, nor the Supreme Court's precedent permits.

III.

Unlike my colleagues, I believe the Board should retain the balance struck by the Supreme Court in *Burns* and its progeny by analyzing the question of successorship after the mandatory worker retention period has run. Only once the retention period has elapsed is an employer finally able to make a free and conscious decision about the composition of its work force. The short delay—here, a mere 90 days—would not unduly burden unions. After all, the Board has long recognized that a decision regarding successorship need not be made on day one. Instead, the Board waits to pass judgment until a "substantial and representative complement" of workers is achieved. See *Fall River Dyeing*, 482 U.S. at 47. It is not uncommon for several months to pass before the employer reaches this level of employment. See, e.g., *Myers Custom Products*, 278 NLRB 636 (1986) (substantial and representative complement determined 60 days after the transfer of control).[6] This approach also safeguards the right of the new employer's chosen work force. If a majority of the employer's *consciously* chosen work force does not come from the predecessor,[7] they will not have a union foisted on them. Moreover, we would avoid the pitfalls of the majority's decision. The extraordinary perfectly clear successor exception would remain just that—an extraordinary exception. We would also protect the legitimate policy choices and goals of localities, which are to give covered employees a measure of transitional job security and a chance to prove themselves to the new employer. My approach harmonizes the *Burns* right with these underlying goals of the local statute, rather than subordinating one set of policies to the other.

Applying this analysis to the instant case, I find that the Respondent is not a *Burns* successor. After the mandatory retention period ran, the Respondent decided to replace a number of its predecessor's employees with outside workers. At that point, a majority of its employees had never worked for its predecessor and had never voted for representation by the Union. Imposing a bargaining obligation on the Respondent and its employees under these circumstances is a serious infringement on their rights and prerogatives.

Conclusion

My colleagues' decision today impermissibly gives state and local jurisdiction control of the determination of successor obligations under Federal law. By giving conclusive effect to state and local mandatory job retention laws, they actually threaten the abnegation of such laws under Federal preemption doctrine. They also deny to most, if not all, employers subject to those laws the rights which the Supreme Court has carefully articulated and protected in order to avoid discouraging the interest of employers in purchasing and saving failing businesses, thereby preventing job losses and the resultant adverse impact on our national economy. In my view, consistent with both the Board's statutory decisional mandate and the Supreme Court's well-defined balance of interests in successor situations, we are required to determine the Respondent's bargaining obligation at the point at which it was legally permitted to exercise its free choice as a successor employer. At that point, the Respondent opted

[5] Although the judge opines that the Respondent here is not a perfectly clear successor, the General Counsel does not allege that it is, as my colleagues acknowledge. Therefore, the judge's discussion on this point is nothing more than dicta.

My colleagues nonetheless share the judge's view, reasoning that employers subject to retention ordinances can avoid perfectly clear successor status by announcing new terms and conditions of employment prior to, or simultaneously with, the expression of intent to retain the predecessor's employees. At the same time, the majority emphasizes that "where, as here, the decision to purchase a business inevitably leads to a requirement that employees be retained for a certain period of time," the Respondent's decision to purchase and decision to compose its work force "are in effect one and the same." The only way for an employer to avoid being deemed a perfectly clear successor under this rationale would be for it to announce new terms of employment no later than the moment it agrees to acquire its predecessor's business. But it can hardly be claimed that a successor employer can make an informed decision about such matters at that point in time.

[6] My colleagues contend that I advocate "a special exception" to the successorship doctrine. That is not the case. I merely apply the doctrine as established by precedent—that the Board will apply the successorship doctrine once the employer makes a voluntary and conscious decision as to the nature of its operations and the composition of its workforce. The unique characteristics of worker retention ordinances, such as the DBSWPA, necessarily postpone the point at which the employer is able to make such decisions.

[7] See *Fall River Dyeing*, 482 U.S. at 50, approving as reasonable the Board's application of the substantial and representative complement" rule to determine whether a successor's bargaining obligation attaches because at that point in the succession "[t]he employer generally will know with tolerable certainty when all its job classifications have been filled or substantially filled, when it has hired a majority of *the employees it intends to hire*, and when it has begun normal production." (emphasis added)

not to employ a majority of its predecessor's employees. Accordingly, I would find that the Respondent is not a *Burns* successor and did not violate Section 8(a)(5) and (1) when it refused to bargain with the Union. I would dismiss the complaint.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with District Lodge 15, Local Lodge 447 of the International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive collective-bargaining representative of our employees in the bargaining unit.

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

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time superintendents and porters (also known as maintenance technicians and maintenance assistants, respectively) and excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act, employed at the following addresses located in New York, New York: 601 West 139th Street (a/k/a 3421 Broadway); 614 West 157th Street; 600 West 161st Street (a/k/a 3851 Broadway); 559 West 164th Street; 701 West 175th Street; 700 West 176th Street; and 667 West 177th Street (a/k/a 4180 Broadway).

GVS PROPERTIES, LLC

The Board's decision can be found at www.nlrb.gov/case/29-CA-077359 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Colleen P. Breslin, Esq. and *Genaira L. Tyce, Esq.*, for the Acting General Counsel.

Jonathan D. Farrell, Esq., of Mineola, New York, for the Respondent-Employer.

James M. Conigliaro, Jr., Esq., of Brooklyn, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried before me on August 14, 2012,[1] in Brooklyn, New York, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 29 of the National Labor Relations Board (NLRB) on May 31. The complaint, based upon a charge filed on March 23 by the International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 15, Local Lodge 447 (the Charging Party or Union), alleges that GVS Properties, LLC (the Respondent or Employer), has engaged in certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA or the Act) by failing and refusing to bargain collectively with the Union. The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.[2]

[1] All dates are in 2012 unless otherwise indicated.

[2] In a separate action, the Regional Director of Region 29 of the NLRB petitioned the United States District Court Eastern District of New York for a preliminary injunction under the Act Sec.10(j) against GVS Properties. *Paulsen v. GVS Props. LLC*, E.D.N.Y. 12-cv-4845 (November 13, 2012). By Memorandum Decision and Order issued by District Judge Cogan, the injunctive relief petition under §10(j) was denied and the case dimissed. Subsequently, the Respondent moved to dismiss this complaint consistent with Judge Cogan's decision which found that GVS was not a *Burns* successor and therefore not obligated to bargain collectively with the Union. The Acting General Counsel submitted an opposition to the dismissal motion on November 19. I find that the 10(j) action was taken independent of the complaint filed with the Board and the issue before the Board is very different from the injunctive relief sought in the federal court. The proceeding in the district court ". . . is merely ancillary and the decision in such proceeding is not res judicata upon the final hearing in a complaint case before the Board, because in an application for interlocutory and temporary

Issue

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act when it failed and refused to bargain collectively with the Union. The issue is whether an employer who is statutorily mandated to hire its predecessor's employees for at least 90 days under the New York City's Displaced Building Service Workers Protection Act (DBSWPA) is obligated to bargain with the recognized and exclusive bargaining representative of its predecessor's employees.

Posttrial briefs were timely filed by Respondent, Charging Party, and Acting General Counsel and have been carefully considered. On the entire record, including my observation of the demeanor of the witness, and after considering the briefs filed by the parties, I make the following

Findings of Fact

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent, a New York corporation, engaged in the ownership of real estate properties in Manhattan, New York, where it annually derived gross annual revenue in excess of $500,000 and receives at its New York facilities goods and supplies valued in excess of $5000 directly from enterprises located outside of New York State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent owns real estate properties throughout New York City. At all material times, the New York facilities at issue in this case consisted of 601 West 139th Street, 6104 West 157th Street, 600 West 161st Street, 559 West 164th Street, 701 West 175th Street, 700 West 176th Street, and 667 West 177th Street (hereinafter, the "New York facilities").

The New York facilities were previously managed by Vantage Building Services, LLC and had a collective-bargaining agreement with the Union (Jt. Exh. 2).[3] The previous owner, Broadway Portfolio I Owner, LLC, sold the New York facilities to Respondent GVS on or about February 17. Under Respondent, the New York facilities have been managed by Alma Realty Corp (Tr. 18). Since March 7, Respondent has refused to recognize the Union as the collective-bargaining representative.

B. Stipulated Facts

The complaint alleges that Respondent has failed to recognize and bargain with the Union as the exclusive bargaining representative since on or about March 7 (GC Exh. 1). As noted, the parties submitted a set of stipulated facts made part of the record (Jt. Exh. 1).

At all material times until on or about February 17, 2012, the facilities were managed by Vantage Building Services, LLC (hereinafter "Vantage"). During the times that Vantage managed the facilities, Vantage employed employees in a bargaining unit described as follows (Jt. Exh. 1, Stipulation par. 7):

> All full-time superintendents and porters (also known as maintenance, technicians and maintenance assistants, respectively) and excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined by the Act, employed at the Respondent's New York facilities.

During all times that Vantage managed these facilities, employees in the bargaining unit described above were responsible for the daily service, maintenance, repair, and upkeep of the New York facilities (Jt. Exh. 1, Stipulation par. 10). At all material times since at least May 1, 2010, until on or about February 17, 2012, the Union was the collective-bargaining representative of employees in the bargaining unit as described above for the purposes of collective bargaining with respect to pay, wages, hours of employment and other terms and conditions of employment, and was recognized as such representative by Vantage. Such recognition was embodied in a collective bargaining agreement effective from May 1, 2010, to April 30, 2013 (Jt. Exh. 1, Stipulation par. 11).

On or about February 17, Respondent purchased said facilities from Broadway Portfolio I Owner, LLC and on February 18, Vantage relinquished and Respondent assumed management of said facilities through Alma Realty Corp, a real estate management firm. When Respondent assumed Vantage's management operations, there were eight employees who worked in the unit. Respondent hired seven of the eight unit employees when it assumed Vantage's operations (Jt. Exh. 1, Stipulations pars. 12, 13). The names of the seven unit employees hired by Respondent are: Elvis Baez, Juan Castillo, Jose Cepeda, Harol Jimenez-Maderas, Carlos Manuel Laureano, Juan Rivera, and Roberto Sacaza Diaz.

At all material times since February 18 through on or about May 17, the employees hired by Respondent were responsible for the daily maintenance, repair, and upkeep of the New York facilities. At the time Respondent assumed Vantage's management operations on or about February 18, Respondent did not hire any additional employees within the unit (Jt. Exh. 1, Stipulations pars. 15 18). At all times since February 18, Respondent has owned the facilities described above and has exercised day-to-day supervision and control over all matters and decisions related to the terms and conditions of employment of the unit. From on or about February 18 through May 17, a majority of Respondent's workforce consisted of the employees

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relief under Sec. 10(j) or 10(l), the court does not undertake to pass upon the merits of the principle controversy." *DuBosie Chemicals Inc.*, 144 NLRB 56, 59 (1963). As a consequence, I find it has no bearing to the outcome of this trial. I am bound only to apply established Board precedent which the Supreme Court has not reversed, notwithstanding contrary decisions by the lower courts. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). I deny the Respondent's motion to dismiss and render this decision on the merits for the reasons set forth herein. *Detroit Newspaper Agency*, 330 NLRB 524, 525 (2000).

[3] For ease of reference, testimonial evidence cited here will be referred to as "Tr."(Transcript) followed by the page number(s). At trial, the parties jointly presented a stipulation of facts and referred to as "Joint Exhibit 1" (Jt. Exh. 1) and entered into the record upon due review. In addition, Respondent submitted a binder of documents that was made part of the record as Respondent Exhibit 1 (R. Exh.). References to the documents in R. Exh. 1 are indicated by page numbers. General Counsel's exhibits are identified as "GC Exh."

employed by Vantage as noted above (Jt. Exh. 1, Stipulations pars. 19, 21).

Respondent informed the seven unit employees named above, by separate letters all dated February 17 that they would no longer be employed by Vantage and that if they wished to continue working at the properties; they would be required to inform Nicholas Conway by February 27. At the time, Conway was employed by the Alma Realty Corp. and was the Operations Manager for Respondent's New York facilities (Tr. 18). The February 17 letters also informed the seven individuals that all terms and conditions related to their wages, hours, work rules, and working conditions under Vantage were revoked and nullified in their entirety. Respondent had unilaterally set forth new terms and conditions of potential employment for the seven individuals (R. Exh. 1 at 32–39). In pertinent part, the letter read:

> On or about February 18, 2012, GVS Properties, LLC will assume management of the properties located at (the New York facilities)…Accordingly, effective February 18, 2012, you will no longer be employed by your current employer—Vantage Building Services, LLC—to work at these property (ies).
>
> Should you wish to continue working at the property(ies), you must contact Nicholas Conway . . . If you do not contact Mr. Conway by February 27, 2012, GVS Properties will conclude you do not wish to be considered for work or employed by GVS Properties and we (GVS Properties) will act accordingly.
>
> Please realize all terms and conditions related to your wages, hours, work rules and working conditions with Vantage are revoked and nullified in their entirety. GVS Properties is therefore unilaterally and without review setting your initial terms and conditions of your (possible) employment with GVS Properties. To the extent any of your prior wages, hours, work rules and working conditions conflict with the wages, hours, work rules and working conditions established by GVS Properties, the wages, hours, work rules and working conditions by GVS Properties shall govern.[4]
>
> Employees of Vantage who have applied to GVS Properties for employment and provided GVS Properties all relevant paperwork will be hired on a temporary and trial basis in accordance with their prior seniority, within a specific job classification—as those terms are generally defined in labor relations—with Vantage. Any former employees of Vantage not hired by GVS Properties will remain on a preferential hiring list for such temporary positions for a period of ninety (90) days, commencing on or about February 18, 2012.

[4] The new wages and employee benefits substantially deviated from the collective bargaining agreement. For example, Respondent reduced wages for the superintendents from $15 per hour to $10 and for the Porters from $12 to $8 per hour. In addition vacation time, paid sick leave, and paid holidays were reduced and welfare benefits were eliminated (R. Exh. 1 at 50, 51).

Respondent hired the employees noted above pursuant to the New York City Displaced Building Service Workers Protection Act ("DBSWPA") (Jt. Exh. 1, Stipulations par. 17).

In relevant part, DBSWPA states:

> (b)(5) A successor employer shall retain for a ninety (90) day transition employment period at the affected building(s) those building service employee(s) of the terminated building service contractor (and its subcontractors), or other covered employer, employed at the building(s) covered by the terminated building service contract or owned or operated by their former covered employer.
>
> (b)(6) If at any time the successor employer determines that fewer building service employees are required to perform building services at the affected building(s) than had been performing such services under the former employer, the successor employer shall retain the predecessor building service employees by seniority within job classification; provided, that during the 90-day transition period, the successor employer shall maintain a preferential hiring list of those building service employees not retained at the building(s) who shall be given a right of first refusal to any jobs within their classifications that become available during that period.
>
> (b)(7) Except as provided in part (6) of this subsection, during such 90-day period, the successor contractor shall not discharge without cause an employee retained pursuant to this section.
>
> (b)(8) At the end of the 90-day transition period, the successor employer shall perform a written performance evaluation for each employee retained pursuant to this section. If the employee's performance during this 90-day period is satisfactory, the successor contractor shall offer the employee continued employment under the terms and conditions established by the successor employer or as required by law. NY Code §22–505 (Jt Exh 2).

Essentially, DBSWPA requires successor employers to retain building services employees (nonsupervisory workers) of the predecessor for a period of 90 days subject to termination for cause or a decision to operate with fewer employees. It also obligates the purchaser to perform a written performance evaluation for each retained employee after the 90 days is completed, and to offer continued employment to any employee who receives a satisfactory evaluation. DBSWPA does not require the new employer to retain the predecessor's wages, terms and conditions of employment. DBSWPA contains an opt-out provision exempting employers who are willing to become subject to a collective-bargaining agreement that contains provisions regarding the discharge or layoff of employees. The intent of DBSWPA is to provide job security to building employees in New York City by requiring successor building owners to offer employment to its predecessor's employees.

Conway testified he was responsible for overseeing the staff, dealing with tenant issues, and with the hiring and discharging of employees. He was ultimately responsible for either retaining or terminating the unit employees (Tr. 18, 19). Conway stated that he offered employment to seven of the eight employees who were terminated. He stated that the offer of em-

ployment was made because he was required to hire the predecessor's unit employees under DBSWPA (R. Exh. 32–45); (Tr. 25). He noted that one of the eight unit employees was not hired.[5] Conway stated that the eighth employee was not hired because he felt that the properties could be maintained with fewer employees. He testified that DBSWPA allows the successor employer to hire fewer employees based upon operational needs to perform building services (Tr. 29–33).

Conway said that the seven employees hired from the predecessor were considered permanent employees, subject to a 90 day evaluation period (R. Exh. 1 69–104). He specifically testified that "They were not probationary employees" (Tr. 35).

By letter dated March 7, the Union requested that Respondent recognize and bargain with it as the exclusive collective bargaining representative of the unit (R. Exh. 1 66). The General Counsel for the Union, James M. Conigliaro, states in his letter to Conway:

> I am writing to you regarding Vantage Building Services, LLC and your recent assumption of their management responsibilities. Specifically, the Union has been informed that you have sent correspondence to its members regarding changes to their terms and conditions of employment as set out in their collective bargaining agreement.
>
> As proscribed under federal labor laws and as a result of the existing collective bargaining agreement with Vantage, the Union demanded bargaining with your company (GVS Properties/Alma) regarding the terms and conditions of employment of its members.

By letter dated March 13, Respondent informed the Union that it did not recognize the Union as the collective bargaining representative of employees in the defined unit. Since March 7, Respondent has refused to recognize and bargain with the Union as the collective-bargaining representative of the unit (Jt. Exh. 1, Stipulations pars. 22, 23).

Subsequently, Respondent terminated three of the seven unit employees at the end of their 90 day evaluation period.[6] Respondent terminated Carlos Manuel Laureano and Elvis Baez on May 16 and Juan Rivera on May 17 (R. Exh. 105–111); (Tr. at 36–38). Respondent subsequently replaced the three terminated employees by hiring four new employees on May 17 (Jt. Exh. 1, Stipulations pars. 26, 27). Conway explained that he hired one additional employee because he felt that one building was understaffed (Tr. at 41–44).

Respondent has not engaged in collective bargaining with the Union after hiring the four new employees. Conway testified that none of the four new employees expressed any interest to him about joining the Union and that he was not aware if the Union had asked the new employees to complete dues authorization cards (Tr. at 48, 49).

[5] There are no pending charges and none have been alleged in this complaint that the nonhiring of the eighth Vantage employee by Respondent was a violation of the NLRA.

[6] There is no allegation in this complaint that the discharge of the three employees on May 16 and 17 was a violation of the NLRA.

Discussion and Analysis

A. 8(a)(5) and (1) Allegations

The Acting General Counsel, at Paragraphs 15 and 16 in the complaint, alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the defined unit. The Acting General Counsel states that Conigliaro requested on March 7 that Respondent bargain with the Union regarding the terms and conditions of employment of its members (the unit) (R. Exh. 1 at 66). The Respondent refused to recognize and bargain with the Union by letter dated March 13. It is not in dispute that the Union represented the unit employees of the predecessor. The Acting General Counsel has maintained that since March 7, the Respondent has failed and refused to recognized and bargain with the Union.

B. Respondent's Arguments

The Respondent does not deny that it refused to bargain as alleged. The Respondent argues that was required to hire the predecessor's unit employees under DBSWPA. The Respondent contends that under DBSWPA, it was ". . . legally prohibited from establishing its initial compliment (sic) of employees which would (or would not) establish whether the Respondent was a *Burns successor*. . ." (See, Respondent's answer to the complaint at GC Exh. 1). Respondent informed the Union in a letter dated March 13, that it did not recognize the Union as the collective-bargaining representative of the unit employees. In the letter, counsel for Respondent states:

> Please be further advised in accordance with the New York City Displaced Building Service Workers Protection Act ("DBSWPA") (§22–505 of the Administrative Code of the City of New York), GVS is currently evaluating the performance of the former employees of Vantage Building Service LLC (or its related entities). Upon the conclusion of ninety (90) day evaluation period, as mandated and set forth in DBSWPA, GVS will determine its staffing needs as well as decide who will be offered positions of employment. Accordingly, at this juncture it is unclear whether District 15, Local 447 International Association of Machinists and Aerospace Workers, AFL–CIO ("Local 15") is a *Burns Successor*…Said ninety (90) day evaluation period will conclude on or about May 17, 2012. Upon the conclusion of the ninety (90) evaluation period, and the offer of a more permanent position, GVS will determine if it has a bargaining obligation with Local 15 (R. Exh. 1 at 67, 68).

The Respondent does not dispute the fact that it had hired a majority of the predecessor's unit employees. The Respondent argues it was not a *Burns* successor. The Respondent contends that it was not a *Burns* successor when it hired a majority of the predecessor's unit employees ". . . because the hire of the said employees was required and mandated by DBSWPA and the Respondent would not have hired a substantial and compliment (sic) of employees until after March 13, 2012, i.e., some time

after the conclusion of the ninety (90) day DBSWPA period" (Jt. Exh. 1, Stipulation par. 24). The Respondent maintains that a *Burns* successorship results from the voluntary decision of a new employer to hire a majority of the predecessor's workforce and not from a mandate to hire the predecessor's majority workforce as required under DBSWPA.

As stipulated, upon the conclusion of the 90 day DBSWPA period, the Respondent terminated three employees on May 16, 17. Respondent then hired four new employees (Jt. Exh. 1, Stipulations 26, 27). As a result, the Respondent argues that there was no majority of the predecessor's unit employees after the 90 day period to require bargaining with the Union.

C. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union

In *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), a successor employer must bargain with the employee representative when it becomes clear that the successor has hired its full complement of employees and that the union represents a majority of those employees. The Board has held that when a business changes hands, the successor employer must take over and honor the collective-bargaining agreement negotiated by the predecessor. In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987), the Supreme Court clarified the *Burns* doctrine and held that an employer that purchases the assets of another is required to recognize and bargain with a union representing the predecessor's employees when (1) there is a substantial continuity of operations after the takeover and (2) if a majority of the new employer's workforce in an appropriate unit, consists of the predecessor's employees at a time when the successor has reached a substantial and representive complement. Under *Burns*, determining whether a new company is a successor "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Fall River Dyeing*, 482 U.S. at 43. Thus, a finding of successorship imposes an obligation on the Respondent to bargain with the union of its predecessor. Absent discrimination, even a successor is ordinarily free to set the initial terms on which it will hire the employees of a predecessor and "…is not bound by the substantive provisions of the predecessor's collective bargaining agreement." *Burns Int'l Sec. Servs., Inc.*, at 272, 294.

The rule of successorship imposes an obligation on the Respondent to bargain with the union of its predecessor. *Fall River Dyeing*, 482 U.S. at 36. "If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of 8(a)(5) is activated. This makes sense when one considers that the employer intends to take advantage of the training work force of its predecessor." Id. at 41–42.

I find that the Respondent violated Section 8(a)(5) and (1) of the Act when it failed to recognize and bargain when the Union demanded bargaining on March 7. As stipulated, and I find, that there were both continuity in the workforce and continuity of the business enterprise when Respondent purchased the New York facilities. The unit employees were performing the same jobs, tasks and duties in the same buildings prior to and after the purchase of the New York facilities.

With this background, it is abundantly clear that New York's DBSWPA was never intended or designed for a successor employer to circumvent or to avoid its obligation to bargain collectively with a recognized union. The DBSWPA was enacted due to the effects of ". . . September 11 and the deepening recession [which] have been devastating for low income New Yorkers." The findings also noted that "The volatility of the real estate industry coupled with new trends in the service economy are undermining stable employment relationships and creating a drain on an already overburdened social service system. At a time of great uncertainty, it is the policy of the City to promote stability in employment for building service workers, which will reduce the need for social services resulting from unemployment, and promote stability in the service industry." (See, DBSWPA *Historical Note* in R. Exh. 1.)

As such, DBSWPA was intended to protect building service employee job security and stability by requiring successor building owners to offer employment to its predecessor's employees for a 90 day probationary period and allows the employer to evaluate the employees after 90 day as to whether to retain or dismiss the employee. At the end of the 90 day transition period, the successor employer is required to perform a written performance evaluation for each employee and if satisfactory, the successor shall offer the employee continued employment under the terms and conditions established by the successor employer or as required by law. (See, DBSWPA Sections (5), (7), and (8) at R. Exh. 1.) Obviously, the fundamental underpinnings of both *Burns (*and its progeny) and DBSWPA were to maintain some degree of employment stability where there is a continuity in both the workforce and the business enterprise. As stated by the Court in *Fall River Dyeing*, where, as here, there is a substantial continuity between the predecessor's operations and a majority of its former employees, it is in the interest of the Act's policy to promote stability in collective bargaining relationships and preserving industrial peace by imposing bargaining obligations.

D. Respondent is a Burns Successor

I find that the Respondent is a *Burns* successor. It is not in dispute and the parties stipulated that there is "substantial continuity" between the enterprises to the extent that the business of both employers is essentially the same and the employees of the new company are doing the same jobs in the same working conditions. While this doctrine involves a multitude of factors, typically, the new employer must "hire a majority of its employees from the predecessor." *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 263 (1974). Here, on or about February 17, the Respondent hired seven of the eight predecessor's employees making up the unit. In addition, the parties stipulated and I find that the employees of the new company are doing the same jobs under the same working conditions. It is also not in dispute that the Union timely requested recognition and demanded bargaining with Respondent (Jt. Exh. 1, Stipulation par. 23*); Armco, Eastern Steel Div., Ashland Works*, 279 NLRB 1184 (1986).

Respondent argues that DBSWPA required it to hire the predecessor's unit employees and that it would not necessarily have hired a majority of the predecessor's employees, but for

the local municipal law (Tr. at 20–23). Basically, the Respondent argues that it did not make a voluntary and conscious decision to take advantage of its predecessor's trained workforce and therefore it was not a *Burns* successor. Respondent also apparently argues that any determination of a successorship obligation must be based on circumstances as they existed after the DBSWPA 90-day-probationary period. Respondent maintains that only three of predecessor's employees that were part of the unit remained after the 90-day period and with the hiring of four new employees, there were no longer a majority representative complement of employees from the predecessor for collective bargaining purposes.

The Acting General Counsel argues that Respondent made a conscious decision when it purchased the facilities with an understanding of the requirements of the local ordinance and when it retained some employees and terminated others.

In agreement with the Acting General Counsel, I reject Respondent's contentions. The Respondent did make a conscious decision to retain the former workforce. That conscious decision was made when the Respondent decided to purchase the facilities as an on-going enterprise with a trained workforce. It knew or should have known that the purchase was conditioned on the application of the DBSWPA. The Respondent also made a conscious decision when it hired seven of the eight former employees. Thus, the bargaining obligation under *Burns* attached on March 7 when the Union made its bargaining demand and at a time when Respondent employed 7 of the 8 employees represented by the Union. That was a full complement because even after the DBSWPA 90 day period ended, Respondent had the same number of employees. The Respondent initially laid-off one employee and discharged three at the end of the 90 day period in a transparent effort to dilute the Union's majority and evade its successorship bargaining obligation. But, immediately thereafter, it hired 4 new employees to bring the complement back up to where it was before the end of the DBSWPA period.

Board law clearly recognizes that, in similar circumstances, obligations under local law do not permit an employer to escape its successorship obligation.

For example, the Board in *Springfield Transit Management*, 281 NLRB 72 (1986), the Board affirmed the Administrative Law Judge's decision on the obligation of a new employer to recognize and bargain with the bargaining representative of the predecessor's employees mandated by a federal agreement with the new employer. In *Springfield Transit Management*, the federal Urban Mass Transportation Act (UMTA" provided federal grants to local municipal mass transit systems conditioned on protecting the rights of employees. As part of providing a grant, the Springfield Transit Management (STM) agreed and was required to hire all incumbent workers when it took over the management of the public bus service from the Pioneer Valley Transit Authority. The Administrative Law Judge found, and the Board affirmed that since STM was bound to hire all of the office clerical personnel pursuant to an UMTA agreement, ". . . the Respondent was bound to also recognize their collective bargaining representative and to negotiate terms and conditions of employment with the representative."[7] *Springfield Transit Management*, 281 NLRB at 78.[8]

The intent of DBSWPA is to ensure some normalcy of job security during a time of economic instability in the New York real estate industry. NLRA Section 8 (a)(1) and (5) was designed to ensure the free engagement of collective bargaining without interference, restraint, or coercion. Contrary to the Respondent's arguments, these two principles are not inapposite.[9] The illogical conclusion of Respondent's arguments would mean that the New York DBSWPA would preempt the NLRA by denying the rights of employees to collective bargaining who previously were represented but for the local ordinance. DBSWPA was never intended to circumvent the collective-bargaining rights of employees. It simply flies against logic to allow new employers to discharge employees with years of seniority after the 90 day probationary period and this would not serve or preserve stability in the building service industry as intended by DBSWPA.

The fact that a local ordinance has a compulsory retention policy does not alter the application of the successorship doctrine. The successorship doctrine serves the policies of the Act by preserving stability in the collective bargaining relationships and preserving industrial peace. The successorship doctrine is satisfied when two elements are met, to wit: (1) there is a substantial continuity of operations after the takeover and (2) if a majority of the new employer's workforce in an appropriate unit, consists of the predecessor's employees at a time when the successor has reached a substantial and representive complement. *Fall River Dyeing*, 482 U.S. 27, 43. Here, Respondent hired seven of the eight predecessor's employees. Conway testified that they were not probationary employees when hired on February 17. But even if they were probationary employees, the Board has previously determined that probationary employees enjoy the same under the Act's Section 7 rights as permanent employees. See, *Denham I*, 206 NLRB at 660 (1973).

It is clear that a self-serving probationary period imposed by the new employer on the majority of the predecessor's employees would not defeat an obligation to bargain.

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[7] While the employer may have made an independent decision to hire the predecessor's employees, the Administrative Law Judge correctly found that regardless, ". . . the obligation to offer jobs to (SSRC) employees was also a legal requirement set forth in undertakings by which STM was bound." *Springfield Transit Management*, 281 NLRB at 78.

[8] Respondent relied heavily on *M&M Parkside Towers, LLC*, 2007 WL 313429 (January 30, 2007), that a majority of the predecessor's employees could only be calculated after the 90 day probationary period had concluded when the former employees were made permanent by the new employer. However, *M&M Parkside Towers* was not adopted by the Board and has no administrative precedence herein. But to the extent that Respondent's arguments must be addressed, I find, and Conway testified, that the employees hired were permanent employees and not probationary.

[9] The Respondent has not argued, and it is not before me, that DBSWPA should be preempted by the NLRB Act. The preemption doctrine should not be lightly inferred even though the local ordinance requirements may suggest impingement on national labor relations' pre-emptive laws and regulations. See, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 21 (1987).

In *S & F Market Healthcare, LLC d/b/a as Windsor Convalescent Center of North Beach*, 351, NLRB 975 (2000), enf. denied in part on other grounds, 570 F.3d 354 (D.C. Cir. 2009), the employer purchased a skilled nursing home facility and retained approximately 75 percent of the predecessor's workforce as temporary employees. Each temporary employee was employed for a 90-day period in which time their performance was evaluated and offered permanent employment to those with satisfactory performance reviews. When the union demanded bargaining, the employer refused. The Board found that the obligation to bargain attached when *S & F* hired the temporary employees because "a work force continuity determination is not deferred until after the completion of a probationary period."

In *Sahara Las Vegas Corp.*, 284 NLRB 337 (1987), a casino was sold to the Sahara Las Vegas Corporation. Three days prior to the taking over of operations, Sahara informed the union president that the union would not be recognized until the casino was fully staffed, and that the employees were subjected to a 90-day probationary period. Sahara Las Vegas retained a majority of the predecessor's employees and refused to bargain with the union until after the 90 day period. The Board found Sahara Las Vegas was a *Burns* successor and obligated to bargain at the beginning of the 90 day period. The Board stated "the unilaterally imposed probationary period has no legally cognizable significance on the legal obligation of a successor employer to recognize and bargain with an exclusive employee representative." I strongly believe that to hold otherwise would embolden new employers after a takeover of operations to impose arbitrary probationary periods on the predecessor's employees to defeat the recognition and bargaining rights of unions. This would allow for the same conclusion in this instance where a compulsory local ordinance with an arbitrary 90-day probationary period would circumvent public policy and undermine the right of workers to designate a representative for collective bargaining under Section 1 of the Act.[10] Similarly, in *The Clarion Hotel-Marin*, 279 NLRB 481 (1986), the Board found that there was no basis to delay resolution of the majority question when the Respondent argued that its bargaining obligation should be delayed until the conclusion of a 90-day probation period.

I find that the new employer's bargaining obligation attached when the majority of Respondent's substantial and representative employee complement was composed of the predecessor's employees and when the Union had demanded to bargain on March 7. I find that under *Burns* and *Fall River*, supra, Respondent's bargaining obligation attached on March 7 when the majority of the Respondent's substantial and representative employees complement was composed of the predecessor's unit employees and when the Union made a clear and unequivocal demand to bargain.

I find that Respondent properly took action to set initial terms and conditions of employment which were different from those under the predecessor employer before incurring an obligation to recognize and bargain with the Union prior to March 7. As such, the GVS properly initiated unilateral terms and conditions of employment without committing an unfair labor practice. *NLRB v. Katz*, 369 U.S. 736 (1962).

But I also find that GVS was obligated to recognize and bargain with the Union after the demand to bargain was made by the Union on March 7 and violated Section 8(a)(1) and (5) of the Act when Respondent failed to recognize and refuse to bargain with the designated Union. As of March 7, GVS maintained (1) substantial continuity of its predecessor's operations; (2) had hired a substantial and representative complement of the predecessor's employees; and (3) the Union had made a demand to bargain. Even in circumstances, as here, where an employer has properly set initial terms, employers still have an ongoing obligation to bargain with a union over any subsequent changes to terms and conditions of employment. *301 Holdings, LLC*, 340 NLRB 366 (2003).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District 15, Local Lodge 447 of the International Association of Machinists and Aerospaceworkers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, Local 447 has been and is the exclusive representative of the building and maintenance employees employed by GVS Properties, LLC, for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. By refusing to recognize and bargain with the Union following the March 7, 2012, demand to bargain, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The recommended Order will require Respondent to cease and desist from bypassing the Union as the representative of all its full-time superintendents and porters (also known as maintenance technicians and maintenance assistants respectively) and excluding all other employees, clerical employees, managerial employees, guards, and supervisors as defined by the National Labor Relations Act employed at the following addresses in New York, New York: 601 West 139th Street; 6104 West 157th Street; 600 West 161st

[10] One may argue in the *S & F Market Healthcare* and *Sahara Las Vegas* cases that the new employers *chose to hire* the probationary employees and were not mandated to do so. But in this instance, a close reading of DBSWPA also allows for a degree of discretion to hire the predecessor's employees. GVS could have agreed and assumed the predecessor's collective-bargaining agreement [Section d] and decided to discharge and lay-off employees consistent with that agreement; GVS could have laid-off the predecessor's employees based upon operational needs [Sec. (b) (6)]; or GVS could have terminated employees for cause during the 90-day probationary period [Sec. (b) (7)].

Street; 559 West 164th Street; 701 West 175th Street; 700 West 176th Street; and 667 West 177th Street AND will require it to bargain collectively and in good faith with the Union as the exclusive representative of its employees.[11]

[Recommended Order omitted from publication.]

[11] The Charging party, as a remedy, requested that GVS rescind any changes to the employees' terms and conditions of employment implemented since March 7 and make whole any affected employees. However, the allegation that there may have been improper changes in the wages, terms, and conditions of employment after March 7 was not alleged in the complaint and no evidence substantiating this allegation was presented or litigated at the trial. Therefore, I find that it would be inappropriate to order this remedy. In any event, any such changes, if they were indeed implemented, may form the basis of additional charges that may be litigated in a subsequent proceeding.