
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

JAG HEALTHCARE, INC., d/b/a GALION POINTE, LLC

Respondent/Cross-Petitioner

ON APPLICATION FOR ENFORCEMENT AND
CROSS-PETITION FOR REVIEW OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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Nos. 15-1563 and 15-1607

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v.

JAG HEALTHCARE, INC., d/b/a GALION POINTE, LLC

Respondent/Cross-Petitioner

**ON APPLICATION FOR ENFORCEMENT AND
CROSS-PETITION FOR REVIEW OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT REGARDING ORAL ARGUMENT

Although this case involves the application of settled principles of law to well-supported factual findings, the Court may find oral argument to be helpful in clarifying the issues in dispute. The National Labor Relations Board (“the Board”) believes that 15 minutes per side would be sufficient for the parties to present their views.

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce, and the cross-petition of JAG Healthcare, Inc., d/b/a Galion Pointe, LLC (“JAG”) to review, a Board Decision and Order issued against JAG on December 15, 2014, and reported at 361 NLRB No. 135. (A. 1892-95.)¹ The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151 et seq., 160(a)), which empowers the Board to prevent unfair labor practices. The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act. (29 U.S.C. §160(e) and (f).) The Court has jurisdiction under the same Section of the Act. The Board’s application and JAG’s cross-petition were timely because the Act places no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board’s findings that JAG violated Section 8(a)(1) of the Act by telling employees that there would be no union at the Galion Pointe facility, by orally issuing or maintaining an unlawful no-solicitation/no-distribution policy, and by disciplining employee Natalie Archer for talking about the Union.

¹ “A” references are to the Joint Appendix. “SA” references are to the Supplemental Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's findings that JAG violated Section 8(a)(3) and (1) of the Act by refusing to hire 21 predecessor employees in an attempt to avoid an obligation to recognize and bargain with the Union.

3. Whether substantial evidence supports the Board's finding that JAG violated Section 8(a)(3) and (1) of the Act by discharging employees Archer, Traci Atkins, and Diana Nolen.

4. Whether substantial evidence supports the Board's findings that JAG was a successor employer that violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by unilaterally changing terms and conditions of employment. These findings in turn depend on:

a. Whether substantial evidence supports the Board's finding that JAG hired a majority of its bargaining unit employees from the predecessor when it began operating Galion Pointe on July 1 and was therefore a successor employer with an obligation to recognize and bargain with the Union.

b. Whether the Board reasonably found that JAG forfeited its rights as a successor employer to set initial terms by telling employees that it would be a nonunion business.

c. Alternatively, whether the Board properly found that JAG's discriminatory hiring practices prevented it from setting initial terms.

5. Whether the Court lacks jurisdiction to consider JAG's argument that it is not the entity liable for the unfair labor practices found by the Board.

STATEMENT OF THE CASE

Acting on charges filed by the Service Employees International Union, District 1199, WV/KY/OH ("the Union"), the Board's Acting General Counsel issued a complaint alleging that JAG violated Section 8(a)(5), (3), and (1) of the Act (29 U.S.C. §158(a)(5), (3), and (1)) by committing numerous unfair labor practices. (A. 1869; 1740-62.) Following a hearing, an administrative law judge found merit to most of the unfair labor practice allegations. (A. 1869-91.) On March 28, 2013, the Board (Chairman Pearce and Members Griffin and Block) issued its Decision and Order, affirming the judge's unfair labor practice rulings, findings, and conclusions, as modified. (A. 1865-67.) JAG petitioned for review of that order, and the Board cross-applied for enforcement. (6th Cir. Nos. 13-2054, 13-1448.)

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including the appointment of Members Griffin and Block. On September 24, 2014, the

Court granted the Board's motion to remand the case. On December 15, 2014, a properly constituted Board panel issued the Decision and Order now before the Court, which found that JAG committed the violations set forth in its earlier decision. (A. 1892-95.)

I. THE BOARD'S FINDINGS OF FACT

A. Background; JAG's Operations; on June 29, 2010, JAG Signs an Agreement To Begin Operating Village Care Nursing Home under the Name Galion Pointe and Employees Learn of the Change in Operations

In mid-2008, 925 Wagner Operating, LLC, d/b/a Village Care Center ("Village Care") entered into a lease with Cardinal Nursing Homes ("Cardinal") to operate a skilled nursing facility in Galion, Ohio, until June 30, 2010, which it called Village Care. (A. 1870; 1075, 1445-52.) The Union represented a unit of 37 Village Care employees, including nurses' aides, housekeepers, dietary aides and cooks, laundry employees, activity aides, environmental aides, and helpers. The parties' collective-bargaining agreement was effective from April 1, 2009, to April 30, 2012. (A. 1870; 48-49, 98, 1896-1922, 2238-73.)

In late 2009 or early 2010, JAG, a management company that operates skilled nursing homes, learned that Cardinal was looking for a new entity to lease the Village Care facility. JAG also learned that a union represented a unit of employees at the facility. (A. 1869-70; 127, 1452, 1454-55, 1509-10, 1568.)

On February 26, 2010, James Griffiths, the owner, president, and CEO of JAG, accompanied by other JAG administrators, visited Village Care. That day, JAG entered into a Nonbinding Letter of Intent to lease the Village Care facility from Cardinal. (A. 1870; 127, 131-32, 142, 255, 1099–1100, 1520, 1598-99, 2094-2100.) On May 3, JAG CFO David Cooley filed articles of organization with the State of Ohio for Galion Pointe, LLC (“Galion Pointe”). (A. 1870; 2029-33.) On May 14, Cardinal filed a Change of Operator Notice with the State of Ohio to provide notice that Galion Pointe would begin operating the Village Care facility on July 1. (A. 1870; 1492–1493, 1601, 1930-31.)

On June 29, Griffiths and Cardinal signed a lease for the Village Care facility. (A. 1870-71; 128-30, 1106, 1550-51, 1932-47.) That same day, Village Care and Galion Pointe signed an Operations Transfer Agreement stating, among other things, that Village Care would terminate its employees as of 11:59 p.m. on June 30, 2010. (A. 1871; 1495–96, 1948-72.) Then, later that day, Village Care’s Director of Nursing (“DON”) Amanda Ronk posted a notice at the facility advising employees that Village Care was sold, and inviting employees to come to a meeting at 4:00 p.m. on June 30 to meet the new owners. (A. 1871; 510, 689, 777, 824–825.)

B. On June 30, the Union asks Griffiths if JAG Will Recognize the Union; JAG tells the Union and Village Care Employees that Galion Pointe Will Operate Nonunion; JAG Sets New Terms and Conditions of Employment and Tells Employees that No Union Officials Are Allowed on the Property

On June 30, dietary employee and Union Delegate Julie Barnhart and Union Organizer Dawn Courtright encountered Griffiths at Village Care. (A. 1873; 46, 56-58, 607-09, 652-53.) Griffiths identified himself as the “[P]resident and CEO of JAG.” (A. 1608.) Courtright asked Griffiths if he would recognize the Union. (A. 1873; 58-59, 94, 610, 1608.) Griffiths replied, “no”; none of his facilities have unions, and Galion Pointe would also operate nonunion. (A. 1874; 59, 146, 610.)

At 4:00 p.m., Griffiths met with Village Care employees. Griffiths introduced himself as the new owner of the facility. He informed employees that Galion Pointe would operate as a nonunion facility, and that none of JAG’s other nursing homes had unions. (A. 1874-75; 146-47, 153-55, 343, 391, 616-17, 660, 709-10, 721-22, 741, 779, 830-31, 862, 883, 900-01, 910, 1015, 1614-18, 2310.) Griffiths acknowledged that employees could determine in the future whether they wanted union representation, but asserted that union representation was not necessary. (A. 1875; 153, 781, 833, 883, 900, 913-15, 1617-18, 1671, 2309-10.)

Consistent with the operations transfer agreement, Griffiths stated that Village Care would terminate their employment that day at 11:59 p.m. He distributed job applications for employment with JAG, and JAG handbooks that set

forth JAG's rules and policies. He instructed Village Care employees to submit applications, but set no deadline. (A. 1874; 147-48, 150-52, 187, 345-346, 619, 623, 692, 722, 782-83, 831-32, 897-99, 1015-16, 1614-15, 1973-2028, 2310, 2374-431.) Griffiths further advised Village Care employees that the terms and conditions of employment with Galion Pointe would differ from those at Village Care, including: (1) employees would no longer receive pay shift differentials (higher wages) for working night or weekend shifts; (2) employees would not keep time off accrued with Village Care; (3) employees would not be permitted to smoke on the premises, or leave the premises during lunch; and (4) employees would have to wear a uniform. (A. 1874; 148-152, 154-55, 177-78, 229, 393-95, 466-69, 624-27, 693-95, 779-81, 783-84, 833-35, 862-63, 897-99, 1316, 2310-11.)

Finally, Griffiths explained that JAG has a no-solicitation policy. (A. 1874-75; 617, 660, 1014-15.) He asked the nursing staff to call the police for assistance with removing any union representatives who came to the facility on or after July 1. (A. 1875; 639, 642, 662-63, 722, 835-36, 861-62, 1015.)

C. JAG, Relying on a List Identifying Village Care's Unit Members, Hires 15 of Them to Work for JAG

On June 30, JAG administrators went to Village Care to prepare for the takeover of operations on July 1. JAG's Corporate Director of Nursing Services Miriam Walters took the lead for hiring decisions for the clinical department,

which included Village Care's bargaining unit positions. She met with Village Care Human Resources/Payroll Manager Connie Knight. Knight provided Walters with access to employee personnel files, but Walters did not have time to review them. (A. 1871; 243, 257-59, 263, 267-69, 283, 1309.) Knight also provided Walters with a roster of employees, on which Knight wrote each employee's job title and whether the employee was a bargaining unit member. (A. 1871, 1872 and n.13; 262, 330, 470, 475-76, 1107-15, 1118, 2183-2208.) During the hiring process, Walters used that list to keep track of how many of those employees JAG was identifying for hire. (A. 1873; 305-09, 2035.) Walters did not ask Knight about employees' job performance, or ask who JAG should hire. (A. 1871-72; 267, 1319, 1408.)

Walters also met with Village Care DON Ronk. Ronk provided one or two word comments about the 37 unit employees, but she did so solely from memory and without reviewing personnel files. Walters "relied heavily" on Ronk's comments, but Walters did not ask Ronk for specific recommendations or opinions about whom JAG should hire. (A. 1872 and n.13; 262-64, 514, 517, 525-26, 1117-18, 2338-73.)

Throughout the day, Walters consulted with Griffiths, who made the final hiring decisions. (A. 1871; 262, 265-67.) JAG posted a notice around 10:30 p.m.,

setting forth that it had hired 15 employees from Village Care's bargaining unit.

(A. 1875; 98, 233, 347-48, 399-400, 417-19, 522, 1155, 2116-17.)

D. On July 1, JAG Begins Operating Galion Pointe in Essentially Unchanged Form; a Majority of the Employees in Bargaining Unit Positions Are Comprised of Former Village Care Bargaining Unit Employees

At midnight on July 1, JAG began operating the nursing home under the name Galion Pointe. (A. 1875; 133, 143, 182-83.) All 35 nursing home residents at the facility on June 30 remained at the facility on July 1. (A. 1875; 143, 2308.) As noted, JAG hired 15 employees from the 37-member Village Care bargaining unit.

On July 2, JAG hired another former Village Care bargaining unit member, who became the 16th employee to fill a unit position. (A. 1876, 1879; 1286, 2039, 2145-48.) To further supplement staffing at Galion Pointe, JAG assigned employees from its other nursing homes (mostly on a temporary basis). (A. 1876; 166-68, 269-70, 310-34, 354, 402, 1214-15, 1281, 1507-08, 1593-94, 1631-32.) Specifically, on July 1, JAG used eight employees from other facilities it operated to fill bargaining unit positions. Between July 2 and July 5, JAG used four additional employees from other JAG facilities to fill bargaining unit positions. (A. 1876 and n.26; 310-14, 1214-25, 2210.)

JAG also hired all of Village Care's managers and supervisors to fill similar positions at Galion Pointe. (A. 1875; 1235, 1630, 2116-17.) Starting on July 1,

some of these supervisors and other staff performed bargaining unit work, including seven JAG supervisors and three other nonbargaining unit employees. (A. 1876; 271, 353, 402–03, 869, 884, 1203–08, 1224, 1392–94, 1673, 2038-41, 2210-11.)

E. On July 2, the Union Holds a Press Conference and JAG Disciplines Natalie Archer for Expressing Union Support; on July 6, the Union Asks JAG To Bargain and Files an Election Petition

On July 2, the Union held a press conference across the street from the Galion Pointe facility to protest JAG’s failure to hire many former Village Care bargaining unit employees. (A. 1876; 69–70, 106–07.) At least seven former Village Care bargaining unit employees attended the conference. During the conference, State Tested Nurse’s Aide (“STNA”) Natalie Archer, a former Village Care employee and union member hired by JAG to work at Galion Pointe, remarked to another employee that she would rather be outside with her friends and the Union than inside the Galion Pointe facility. (A. 1876, 1877; 535-36, 541-42, 1928.)

After the press conference, DON Ronk called Archer to her office and asked if she made the prounion statement. After Archer confirmed making the statement, Ronk asked Archer if she wanted to remain at Galion Pointe. (A. 1877; 536-39, 1717-19.) Ronk then counseled Archer for having a “negative attitude and negative body language while on duty.” (A. 1877; 538, 2042.) On July 5, Ronk

made written notes that Archer was making “negative comments” to staff and on social media about Galion Pointe, but she did not speak to Archer about those comments. (A. 1877; 2042.) Also after the conference, Supervisor Al Claypool called former Village Care unit employee Mary Siegenthal to inform her that DON Ronk and other administrators had watched the press conference from inside the nursing home, and noted the former Village Care unit employees who attended. (A. 1876 and nn.28-29; 842, 1928.)

On July 6, Union Organizer Courtright sent Griffiths a letter asking him to bargain with and recognize the Union at Galion Pointe. (A. 1876; 70–71, 97, 168; 1923.) That same day, Frank Hornick, the Union’s Ohio Healthcare Division Director, filed a petition for an election with the Board. (A. 1876; 98–99, 104, 108-10, 1924.) In a letter addressed to JAG about the petition, Hornick stated that JAG should refrain from changing working conditions. (A. 1876; 98-99, 109, 1925.) JAG did not respond to either letter. (A. 1876; 100.)

F. On July 12, JAG Discharges Archer and Diana Nolen; on July 13, JAG Discharges Traci Atkins

1. Archer

On July 8, Archer attended a mandatory staff meeting. After the meeting, Archer notified Galion Point administrators that she was unable to work her assigned shift that evening because her son was ill. (A. 1878; 1714, 2105.) The absentee report confirmed that Archer’s absence was due to her son’s illness. (A.

1878; 2105.) On July 12, Ronk notified Archer that she was terminated. Ronk did not provide a reason. (A. 1878; 1720-21, 2038, 2168.) Ronk never documented any actual problems regarding whether Archer's attitude affected patient care. (A. 1887.)

2. Nolen

JAG hired Diana Nolen, a union member who had worked as an STNA at Village Care, to work at Galion Pointe. (A. 1878; 1012, 1928, 2035.) On July 12 Nolen, who was off duty, received a phone call that DON Ronk wanted to meet with her at 1:00 p.m. that day. (A. 1878; 1021–22.) When Nolen arrived at the nursing home, she reported to Ronk's office, where Ronk and Human Resources/Payroll Manager Connie Knight were present. Nolen began the conversation by asking if she was being fired. Ronk answered, "yes." (A. 1878; 1023.)

Ronk explained that a nursing home resident had overheard Nolen and STNA Archer speaking in the hallway about the Union. Ronk added that the nursing home resident had been scared by the conversation and had called his/her family, who in turn had called the nursing home. (A. 1878; 1023-24, 1034-35, 2040.) Ronk declined to tell Nolen which resident made the complaint, and Nolen left the nursing home. (A. 1878; 1024.)

Nolen later telephoned Ronk, who confirmed that Nolen was fired because a resident became scared after overhearing her and another STNA talking about the Union. (A. 1878; 1024-25.) Ronk did not follow internal procedures for investigating resident complaints, which required filing various reports with the State of Ohio. Other than relying on the resident's complaint, Ronk did not investigate the matter further before discharging Nolen. (A. 1878 n.37; 1074, 1265, 1725.)

3. Atkins

Traci Atkins, a union member who worked as a dietary aide at Village Care, applied for the same position at Galion Pointe on June 30, but was not selected for hire on July 1. (A. 1877; 718, 722–25, 1926, 2212.) On approximately July 6, Dietary Manager Valerie McKelvey called Atkins and asked if she wanted to work at Galion Pointe full-time starting July 19. (A. 1877; 744.) Atkins replied that she needed to give notice at her other job (at McDonald's), but accepted McKelvey's offer. Atkins and McKelvey also agreed that Atkins would work at Galion Pointe on a fill-in basis until July 19. Consistent with that agreement, Atkins worked a fill-in shift at Galion Pointe on July 7, and was scheduled to work another fill-in shift on July 14. (A. 1877; 725, 727, 744-45.) Atkins also ordered a uniform, had her picture taken for a new identification badge, and submitted a second

application for employment (dated July 6) because McKelvey misplaced the application that Atkins submitted on June 30. (A. 1877; 725–29, 2217.)

On July 13, McKelvey called Atkins and told her that Griffiths “had changed his mind about letting [her] come back.” (A. 1877; 726-27, 745.) McKelvey stated that there was a “long story” behind Griffiths’ decision “that she could not discuss,” but noted that Atkins might be called back “after things calmed down” with the transition. (A. 1877; 726–27, 745.)

G. Between July 1 and September 30, JAG Hires 28 Employees Who Did Not Work at Village Care To Fill Former Unit Positions; JAG Only Hires 2 Former Unit Employees, Including Atkins, Who It Subsequently Discharged

Of the remaining 22 unit employees who had worked for Village Care, at least 16 filed applications with JAG for employment at Galion Pointe. Specifically, between July 1 and July 27, at least 9 former STNA’s, 3 dietary employees, and 2 housekeeping and laundry employees filed applications with JAG. Later, 2 former Village Care STNAs filed applications, one on September 7, and the other at an undetermined time. (A. 1879; 699, 710, 768, 792-94, 807-10, 839-41, 846-47, 853, 870-71, 923, 2374-433.) The applications stated, “JAG Healthcare Application for Employment.” (A. 1879; 2374-433.) As noted, JAG hired 2 former Village Care bargaining unit members, an STNA on July 2, and dietary employee Atkins on July 7, whom it fired on July 13.

Between July and September, JAG hired 28 new employees to work in former Village Care bargaining unit positions who had no connection to Village Care. Those hires resulted from turnover, the needs of nursing home residents, and JAG returning employees assigned to Galion Pointe when it began operating back to their original facilities. Specifically, JAG hired 17 STNA's, 8 dietary employees, 2 housekeeping and laundry employees, and 1 hospital aide. (A. 1879 and n.40, 1880 and n.41; 1621-23, 2038-41.)

On August 27, JAG's Corporate Director of Nursing Walters wrote remarks about certain employees at Galion Pointe, including "[K.S.], good, union is stupid," and [M.] "good-said union was falling apart before we took over." (A. 1880; 298-301, 2034.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Members Hirozowa and Schiffer) issued its Decision and Order, incorporating by reference the Board's 2013 Decision and Order. (A. 1892-95.) The Board found, in agreement with the administrative law judge, that JAG violated Section 8(a)(1) of the Act by telling employees that there would be no union at the Galion Pointe facility, by orally issuing or maintaining an unlawful no-solicitation/no-distribution policy, and by disciplining employee Natalie Archer for talking about the Union. (A. 1893.) The Board also found, in agreement with the judge, that JAG violated Section 8(a)(3) and (1) of the Act by

refusing to hire 21 former Village Care employees, and by discharging employees Archer, Nolen, and Atkins. (A. 1893.)

Finally, the Board found, in agreement with the judge, that JAG violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, and by unilaterally changing terms and conditions of employment. (A. 1892-93.) Specifically, the Board found that JAG continued the predecessor's business essentially unchanged "and then hired a majority of its bargaining unit employees from the predecessor employer," thereby obligating JAG to recognize and bargain with the Union. (A. 1865, 1881-84.) In determining that JAG's unilateral changes were unlawful, the Board relied on two alternative findings. First, the Board found that "[u]nder the present circumstances" – telling employees that Galion Pointe would be nonunion and then hiring a majority of its bargaining unit employees from the predecessor – JAG forfeited its right to set initial terms. In the alternative, the Board found that JAG's discriminatory hiring practices independently made unlawful its setting of initial terms. (A. 1865, 1881-84.)

The Board's Order requires JAG to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A. 1893.)

Affirmatively, the Order requires JAG to offer employment to 21 former Village Care employees, to offer reinstatement to Archer, Nolen, and Atkins, and to make

all of the discriminatees whole. The Order further requires JAG to recognize and bargain with the Union and to rescind unilateral changes. (A. 1893.) Finally, the Order requires JAG to post a remedial notice. (A. 1893.)

SUMMARY OF ARGUMENT

1. JAG violated Section 8(a)(1) of the Act in several instances, because its statements and conduct, viewed from a reasonable employee's standpoint, would have a tendency to coerce employees' exercise of their Section 7 rights.

The Board reasonably found coercive JAG CEO Griffiths' statement to employees, prior to making hiring decisions, that it would operate nonunion. The Board, with this Court's approval, has found similar statements unlawful because it causes a reasonable employee to conclude that a successor employer, such as JAG, intends to discriminate when hiring, and that the employee should refrain from union activity. Because the statement was unlawfully coercive, it is not, as JAG contends, protected speech under Section 8(c) of the Act.

Similarly, the Board reasonably found that JAG unlawfully coerced employees by orally issuing an overbroad work policy when it asked employees to call the police to enforce JAG's no-solicitation policy against union organizers. Particularly in light of JAG's statement that Galion Pointe would operate nonunion, a reasonable employee would conclude not only that the Union was

unwelcome, but also that other lawful union activity during nonwork time in nonwork areas was equally unwanted.

Likewise, the Board reasonably found that JAG unlawfully applied its oral policy to discipline employee Archer after she expressed solidarity with the Union. JAG has shown no extraordinary basis to reverse the Board's discrediting of JAG's asserted reason for the discipline.

2. Substantial evidence supports the Board's finding that JAG violated Section 8(a)(3) of the Act by discriminatorily refusing to hire 21 predecessor employees in an attempt to avoid having to recognize and bargain with the Union as a successor employer. Thus, under settled precedent, a new employer acts unlawfully when it refuses to hire a predecessor's employees because they are union members, or to avoid having to recognize and bargain with a union. Here, JAG's hiring practices, such as hiring 28 employees without offering an interview or a position to the numerous predecessor employees demonstrates its unlawful motivation. The Board properly rejected, as dependent on discredited evidence, JAG's affirmative defenses that it would have refused to hire the employees even absent its animus. JAG has waived any challenge to that finding by not raising it to the Court.

3. JAG violated Section 8(a)(3) and (1) of the Act by discharging employees Archer, Nolen, and Atkins. JAG's reasons for discharging Archer and Nolen were

pretextual, and it relied on a discredited claim that Atkins rejected its offer of employment. JAG has waived its credibility-based argument that it would have discharged the employees even absent their union status.

4. JAG violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union, and by unilaterally changing terms and conditions of employment. The Board found, based on settled principles, that JAG operated in substantially the same form as the predecessor, that as of July 1, a majority of JAG's employees in a substantial and representative complement were the predecessor's employees, that the Union had an outstanding bargaining request, and that therefore JAG was a successor employer. JAG thus forfeited its right to set initial terms by stating that it would operate nonunion and its unilateral changes were unlawful. In the alternative, the Board reasonably found that JAG lost that right because of its discriminatory hiring practices.

5. The Court lacks jurisdiction to consider JAG's argument that it is not the entity liable for the unfair labor practices. JAG did not raise that argument to the Board, and its litigating conduct contradicts its belated claim.

STANDARD OF REVIEW

The Court must uphold the Board’s factual findings if they are supported by substantial evidence, even if the reviewing court could justifiably make different findings if it considered the matter de novo. 29 U.S.C. § 160 (e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 225 (6th Cir. 2000). “The Board’s application of the law to the facts is also reviewed under the substantial evidence standard, and the Board’s reasonable inferences may not be displaced on review.” *Indiana Cal-Pro, 23 Inc. v. NLRB*, 863 F.2d 1292, 1297 (6th Cir. 1988). “Deference to the Board’s factual findings is particularly appropriate where the record is fraught with conflicting testimony and essential credibility determinations have been made.” *Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008) (quotation marks and citation omitted); accord *Gen. Fabrications Corp.*, 222 F.3d at 225. In such cases, this Court’s review is “severely limit[ed],” and the Board’s credibility determinations should be affirmed “unless they have no rational basis.” *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 967 (6th Cir. 2003); see also *Tel Data Corp. v. NLRB*, 90 F.3d 1195, 1199 (6th Cir. 1996) (credibility determinations should be affirmed “unless they are inherently unreasonable” or “self-contradictory”).

ARGUMENT

Throughout its brief, JAG relies on several arguments that it did not raise to the Board, rendering this Court without jurisdiction to consider those claims. Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” *See also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (stating that Section 10(e) bars courts from considering issues not raised before the Board); *Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008) (court will not consider an issue not raised in exceptions to the Board); *Lee v. NLRB*, 325 F.3d 749, 752 (6th Cir. 2003) (same).

A party’s exceptions to an administrative law judge’s decision must “set forth specifically the questions of procedure, fact, law, or policy,” objected to, “designate by precise citation of page the portions of the record relied on,” and “concisely state the grounds for the exception.” 29 C.F.R. § 102.46(b)(1). This Court has discussed the “specificity required for a claim to escape the bar imposed by § 10(e)” by explaining that the exception must be “that which will apprise the Board of an intention to bring up the question.” *Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 689 (6th Cir. 2006). Similarly, if an objecting party files a supporting brief, the brief must contain “argument, presenting clearly the points of fact and

law relied on,” “with specific page reference to the record and the legal or other material relied on.” 29 C.F.R. § 102.46(c)(3). *See Nova S.E. Univ. v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015). As we will show below, many of JAG’s arguments were either not raised to the Board or not raised with the specificity necessary to preserve the issue on appeal.

JAG also fails to raise several arguments on appeal that it raised to the Board and has therefore waived those contentions. An argument in a brief to the court must contain the party’s contentions and the reasons for them, with citations to relevant authorities and to the record. *See Fed. R. App. P. 28(a)(8)(A)*. A party’s failure to address Board findings constitutes abandonment of the right to object. *Hyatt Corp. v. NLRB*, 939 F.2d 361, 368 (6th Cir. 1991). Moreover, “issues adverted to in a perfunctory manner unaccompanied by some effort of developed augmentation, are deemed waived.” *Conley*, 520 F. 3d at 638; *see also United States v. Noble*, 762 F.3d 509, 528 (6th Cir. 2014) (party forfeits right to challenge trial court’s finding by failing to raise issue in opening brief); *Wright v. Holbrook*, 794 F.2d 1152, 1156 (6th Cir. 1986) (argument raised for the first time in reply brief will not be considered by the court).

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT JAG VIOLATED SECTION 8(a)(1) OF THE ACT BY TELLING EMPLOYEES THAT THERE WOULD BE NO UNION AT THE GALION POINTE FACILITY, BY ORALLY ISSUING OR MAINTAINING AN UNLAWFUL NO-SOLICITATION/NO-DISTRIBUTION POLICY, AND BY DISCIPLINING EMPLOYEE ARCHER FOR TALKING ABOUT THE UNION

A. An Employer Violates Section 8(a)(1) of the Act by Coercing Its Employees and Interfering With the Exercise of Their Statutory Right To Engage in Union Activity

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees” in the exercise of their rights under Section 7 of the Act. 29 U.S.C. §158(a)(1). Section 7, in turn, guarantees employees “the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities” 29 U.S.C. §157. The test for a Section 8(a)(1) violation is whether “the employer’s statements from the employees’ point of view [has] a reasonable tendency to coerce”; actual coercion is not necessary. *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659 (6th Cir. 2005). In assessing the coercive impact of an employer's statements, the Court “defers to the [Board’s] judgment and expertise.” *Id.* at 660 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)).

B. Substantial Evidence Supports the Board’s Findings that JAG Unlawfully Coerced Village Care Employees by Stating That Galion Pointe Would Not Have a Union

Substantial evidence supports the Board’s finding (A. 1865, 1882, 1892-93) that JAG violated Section 8(a)(1) of the Act by telling Village Care employees that Galion Pointe would operate as a nonunion facility. The unlawful statement came from JAG’s Owner, President, and CEO Griffiths, who told Village Care employees on June 30 that they could apply for employment at Galion Pointe, but that the facility would open the next day without union representation. Griffiths’ statement, as the Board held in a similar case, “blatantly coerces employees . . . and constitutes a facially unlawful condition of employment.” *Advanced Stretchforming Int’l, Inc.*, 323 NLRB 529, 530-31 (1997) (successor employer unlawfully told predecessor’s employees that they could apply for employment but that there would be no union), *enforced*, 208 F.3d 801 (9th Cir.), *amended and superseded on reh’g*, 233 F.3d 1176 (9th Cir. 2000).

The statement by a successor employer to the predecessor’s employees that it will operate without a union is coercive because of the principles that underlie successorship. As set forth below (pp. 48-50), a successor incurs an obligation to recognize and bargain with a union when a majority of its employees, in a substantial and representative complement, were formerly employed by the predecessor. Because of this principle, the Board has explained, with this Court’s

approval, a successor employer does not know whether it will have an obligation to recognize and bargain with a union until “it has hired its workforce.” *Kessel Food Markets Inc.*, 287 NLRB 426, 429 (1987), *enforced*, 868 F.2d 881 (6th Cir. 1989). And “[w]hen an employer tells applicants” that it “will be nonunion before it hires its employees, the employer indicates to the applicants that [it] intends to discriminate against the [predecessor’s] employees to ensure its nonunion status.” *Id.* at 429. In addition, “[a]t this unsettling time of transition, . . . ‘a union is in a peculiarly vulnerable position’ and employees ‘might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor.’” *Advanced Stretchforming*, 323 NLRB at 530 (*quoting Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987)); *accord Williams Enter., Inc. v. NLRB*, 956 F.2d 1226, 1235 (D.C. Cir. 1992) (a successor’s statement that it will operate nonunion “indicates to employees that ‘any conduct by them which is not consistent with that cause may jeopardize their employment possibilities or security.’” (*quoting Williams Enter., Inc.*, 312 NLRB 937, 940 (1993))).

In these circumstances, settled case law, as shown above, fully warranted the Board to find that Griffiths’ statement violated Section 8(a)(1) of the Act. *See also Kessel*, 287 NLRB at 427, 429 (successor unlawfully told predecessor’s employees that it would operate nonunion); *Williams*, 956 F.2d at 1234 (finding unlawful

successor's statement to prospective employees that it "intend[ed] to operate . . . nonunion"); *JLL Restaurant, Inc.*, 347 NLRB 192, 193, 204 (2006) (successor unlawfully told predecessor's employees that "it intended to reopen . . . as a nonunion business entity"), *enforced*, 325 F. App'x 577 (9th Cir. 2009); *Eldorado, Inc.*, 335 NLRB 952, 953 (2001) (successor unlawfully told predecessor's employees "that the new business was starting out as a nonunion company and that 'if you guys want a union, it's up to you. Why you would want one, I don't know.'")

JAG's claim (Br. 26-29) that Griffiths' statement was protected speech under Section 8(c) of the Act is misplaced. Section 8(c) authorizes "the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). Section 8(c) therefore does not protect coercive speech. Here, as shown above Griffiths' statement was unprotected coercive speech because it indicated to Village Care employees that JAG intended to discriminate against them when hiring, and sent a message to employees that union activity could affect their employment with JAG. Accordingly, as the D.C. Circuit has explained in a similar situation, although "[o]rdinarily, an employer's statement that it will not have a union at its plant does not violate [S]ection 8(a)(1) . . . [a] successor employer's statement that it will not

have a union at its plant . . . does violate Section 8(a)(1).” *Williams*, 956 F.2d at 1234. Moreover, because Griffiths’ statement standing alone violated Section 8(a)(1), JAG’s argument (Br. 28-29) that it did not also engage in other unlawful conduct, such as threatening regressive bargaining, is immaterial.

Contrary to JAG’s contention (Br. 29), the Board also reasonably found (A. 1882) that “Griffiths’ remarks remained coercive even though Griffiths acknowledged that JAG [] employees could later choose to unionize.” As the Board explained, “[r]egardless of that acknowledgement, Griffiths’ remarks still notified Village Care employees that JAG . . . intended to discriminate against them because of their status as union members when it made its June 30 hiring decision[s].” (A. 1882.) In these circumstances, “[a] successor employer need not necessarily say that it intends to remain nonunion ‘at all costs’ to send the coercive message to potential employees.” *Williams*, 956 F.2d at 1235. For the same reasons, JAG’s assertion that it recognized the Union prior to this Court proceeding (Br. 29) has no bearing on the Board finding Griffiths’ statement unlawful. *See C&B Flooring Ass’n*, 349 NLRB 692, 697 (2007) (employer acted on statement that it would be nonunion by refusing to recognize and bargain with the union). Moreover, JAG’s claim (Br. 27) that its statement was not an assertion of futility ignores strong evidence to the contrary. As the Board noted (A. 1882), consistent with JAG telling Village Care employees and the Union that JAG would operate

Galion Pointe nonunion, JAG followed through on its promise by refusing the Union's request to bargain, not once but twice, on both June 30, before it had hired any employees, and again on July 6.

Finally, the Court has no jurisdiction to consider JAG's additional argument (Br. 30-32) that Griffiths' statement was not coercive because it was based (Br. 31) on "objectively verifiable facts indicating that it was unlikely [JAG] would hire a majority of the Village Care bargaining unit." That argument, however, differs from JAG's contentions to the Board. Specifically, before the Board, JAG argued that Griffiths' statement was lawful because it was "nothing more tha[n] declarations of fact (as of that date: no other JAG . . . facility employed workers represented by a union; and there was no contract between the [U]nion and [JAG])." (A. 1771.) Thus, JAG did not contend to the Board, as it argues now to the Court, that Griffiths' statement was lawful because it was based on "objective" evidence that JAG's actual planned hiring would not require JAG to recognize the Union under successorship principles. Because JAG failed to raise this argument before the Board, the Court lacks jurisdiction under Section 10(e) of the Act to consider it. (*See* pp. 22-23.)

In any event, JAG's "objectively verifiable facts" (Br. 31) consists of his "insider knowledge" (Br. 32) regarding Village Care's financial condition and JAG's prior practice of using employees from other JAG facilities to assist in the

transition. Notably, however, JAG cites no evidence for its assertion that Griffiths based his statement on “objective” knowledge that JAG’s actual hiring, not completed until well after he spoke to Village Care’s employees, would not require it to bargain with the Union under settled successor principles. Indeed, as the Board explained, Griffith’s refusal to recognize the Union on June 30 “is particularly telling, because he unequivocally told [the Union] that he would not recognize the Union . . . even though JAG . . . had not yet made its initial hiring decisions.” (A. 1882.) Thus, Griffith’s statement was not based on any verifiable fact, other than JAG’s predetermined course to remain nonunion.

In these circumstances, and contrary to JAG’s argument (Br. 32), this case bears no comparison to *P.S. Elliott Services, Inc.*, 300 NLRB. 1161, 1162 and n.3 (1990), where the Board held that an employer’s statement to potential employees that it was “a nonunion company” did not violate Section 8(a)(1) of the Act. In that case, the new employer knew when it absorbed 7 of the predecessor’s 8 employees into its workforce of approximately 175 employees, that it would never reach successor status. Therefore, the Board found that the employer had an “objective basis” on which it could base its statement that it would remain nonunion. *Id.* at 1162; *see also Williams*, 956 F.2d at 1235 (distinguishing *P.S. Elliot*). No such objective evidence exists here.

C. Substantial Evidence Supports the Board’s Finding that JAG Unlawfully Coerced Employees by Orally Issuing an Overbroad Work Policy and by Applying that Policy To Discipline Employee Archer

An employer violates Section 8(a)(1) of the Act where it prohibits its own employees from engaging in protected union organizing activities at the workplace during nonworking time and in nonworking areas, unless the employer can show that it needs to prohibit the activity to maintain production or discipline. *Republic Aviation*, 324 U.S. 793, 803-04 (1945); *NLRB v. Daylin, Inc.*, 496 F.2d 484, 486-88 (6th Cir. 1974). In addition, although an employer may prevent employees from talking about a union when they are actively working, an employer violates Section 8(a)(1) when it permits employees to discuss various subjects unrelated to work, but not issues related to a union. *Jensen Enter.*, 339 NLRB 877, 878 (2003).

The rationale behind protecting employees’ interest in discussing self-organization amongst themselves at the workplace is twofold. First, “organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.” *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). Second, the jobsite is “uniquely appropriate” for the exchange of employees’ views regarding union representation (*Republic Aviation*, 324 U.S. at 803 n.6), as it “is the one place where [employees] . . . traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their

status as employees” (*Eastex Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (quoting *Gale Prods.*, 142 NLRB 1246, 1249 (1963)); see also *NLRB v. Inter-Disciplinary Advantage, Inc.*, 312 F. App’x 737, 744 (6th Cir. 2008) (“[T]he right of employees to self-organize and bargain collectively . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.”) (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978))).

Accordingly, an employer violates Section 8(a)(1) of the Act by maintaining a work policy that “would reasonably tend to chill employees in the exercise of their Section 7 rights.” *NLRB v. Ne. Land Serv., Ltd.*, 645 F.3d 475, 481 (1st Cir. 2011) (quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)). And a workplace rule or policy that either explicitly restricts Section 7 activity, or that employees would “reasonably construe” as doing so, is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). It does not matter whether the employer has applied or enforced the policy – mere maintenance constitutes an unfair labor practice. *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (D.C. Cir. 2007). Here, the Board reasonably found that JAG’s policy, as explained by Griffiths, was unlawful because employees would reasonably construe it as prohibiting Section 7 activity.

1. JAG unlawfully prohibited union discussion and solicitation

As discussed (p. 8), JAG maintained a written no-solicitation policy, which as the Board noted, “would arguably be lawful had it merely stood alone as written in the handbook.” (A. 1885.) Griffiths, however, when describing the policy to employees, “did not limit himself to reciting the written terms of the no-solicitation policy.” (A. 1885.) Instead, Griffiths referenced the no-solicitation policy and then “explicitly” encouraged staff to call the police for assistance with enforcing JAG’s written no-solicitation rule against union organizers. (A. 1866.)

Employees would reasonably interpret Griffiths’ statement as restricting union activity. When determining whether there is a Section 8(a)(1) violation, the Board considers “all surrounding circumstances.” *Thill, Inc.*, 298 NLRB 669, 677 (1990). Here, the context within which Griffiths made his statement supports the Board’s finding. Griffiths’ statement not only came on the heels of his referencing JAG’s written no-solicitation policy, but after he stated that JAG would operate non-union. By identifying the Union as the desired target of JAG’s written no-solicitation policy, and stating that the facility would operate non-union, “a reasonable employee” would conclude that the Union “was not welcome at the nursing home in any shape or form, including union talk, union solicitation, or distribution of union literature by employees during nonwork time in nonwork

areas.” (A. 1866.) In these circumstances, the Board was fully warranted to find that Griffiths’ statement violated Section 8(a)(1) of the Act. (A. 1865, 1886.)

JAG contends (Br. 34-36) that Griffiths’ reference to calling the police against union organizers was not coercive because JAG intended to prohibit all solicitation. But JAG’s *claimed* intentions are irrelevant and do not lessen the coercive effect of its actual stated intention to seek police assistance to remove union organizers from its property. JAG also argues that its policy was lawful because the Board failed to show that JAG actually discriminated against any such organizers. Whether JAG actually applied its policy against the Union has no relevance. Rather, the relevant inquiry depends on whether a statement has a tendency to coerce, and not whether actual coercion occurred. *See NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 539 (6th Cir. 2000) (work rule unlawful even absent evidence of enforcement).

JAG also argues (Br. 34) that the Board’s findings are contrary to settled law that an employer is not required to permit non-employee union organizers onto its property. That argument misconstrues the Board’s finding. The Board’s decision does not implicate an employer’s rights regarding access of non-employee union organizers. Rather, the Board simply found that, in context, Griffiths’ comments, which singled out the Union’s presence as a reason for calling the police, suggested a broader limitation on employees’ union activity that encompassed

activity occurring “on nonwork time in nonwork areas” and therefore had a tendency to coerce employees. (A. 1886.)

Finally, JAG never raised to the Board its argument (Br. 34-35) that Griffiths’ statement was not unlawful because he made it before JAG began operating the facility on July 1. As shown above, pp. 22-23, the Court has no jurisdiction to consider the argument. In any event, Griffiths’ comment would have a tendency to coerce employees from the moment stated because he said it in conjunction with inviting Village Care employees to submit employment applications to JAG. Accordingly, Village Care employees received an unmistakable message that they should refrain from union activity beginning with JAG’s hiring process on June 30.

2. JAG unlawfully applied its oral policy to discipline Archer

The Board further reasonably found that JAG unlawfully applied its oral no-solicitation/no-distribution policy, and thus violated Section 8(a)(1) of the Act, when it disciplined Archer for remarking that she would rather be outside with the Union (at its press conference) than inside the nursing home. As the Board explained, “JAG’s action was fully consistent with Griffiths’ desire to bar the Union (and union talk) from the workplace, and had a reasonable tendency to interfere with, restrain, or coerce Archer in the exercise of her Section 7 rights.” (A. 1886.)

Before the Court, JAG disputes (Br. 36-39) that it disciplined Archer for her pro-union comments. Instead, JAG argues that it disciplined her for other reasons, including (Br. 37) a bad attitude that “distracted from her duty of care to patients.” This argument fails primarily because the Board discredited JAG’s claim that Archer’s comments affected patient care. As the Board found, JAG’s concern was “specula[tion],” and further undermined by its failure to “document any actual problems with patient care that arose as a result of Archer’s . . . comment in support of the Union.” (A. 1887.) JAG has not shown or indeed, even argued, that these credibility findings are irrational and not worth the “considerable weight” that the Court accords such findings. *See Local Union No. 948, Int’l Bhd. of Elec. Workers, (IBEW), AFL-CIO v. NLRB*, 697 F.2d 113, 117-18 (6th Cir. 1982). Moreover, given that JAG never told Archer that she was disciplined because her comments were affecting patient care, a reasonable employee would deem the discipline, given so close in time to Archer’s expression of union solidarity, to be coercive. Finally, JAG’s characterization (Br. 37) of Archer’s discipline as “mild” does not lessen the coercive effect.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT JAG VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCRIMINATORILY REFUSING TO HIRE 21 VILLAGE CARE EMPLOYEES IN AN ATTEMPT TO AVOID AN OBLIGATION TO RECOGNIZE AND BARGAIN WITH THE UNION AS A SUCCESSOR EMPLOYER

A. Applicable Principles

Section 8(a)(3) of the Act specifically prohibits discouragement of union membership by discrimination in regard to hire” 29 U.S.C. § 158(a)(3). A refusal to hire applicants because of their union affiliation or activity violates this prohibition. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941). Those principles also apply to the hiring decisions of an employer who takes over a business formerly operated by another employer. Thus, an employer may not lawfully avoid its bargaining obligation by pursuing a hiring policy that is designed to keep its predecessor’s employees in the minority. *See Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 262 & n.8 (1974); *Kentucky Gen., Inc. v. NLRB*, 177 F.3d 430, 436 (6th Cir. 1999).

Establishing such a violation does not require a showing that the new employer failed to hire any of the predecessor’s employees, or that it singled out those not hired because of their union support. It is sufficient that, if the employer had hired the discriminatees, the total number of the predecessor’s employees hired would have triggered a bargaining obligation, and that the failure to hire was designed to avoid that result. *See Great Lakes Chem Corp. v. NLRB*, 967 F.2d 624,

627-29 (D.C Cir. 1992). Accordingly, a new employer violates Section 8(a)(3) and (1) of the Act if it refuses to hire the predecessor's employees because they are union members, or to avoid having to recognize and bargain with a union as a successor employer.² *Id. See Am. Press, Inc. v. NLRB*, 833 F.2d 621, 624-25 (6th Cir. 1987); *see also NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 804-05 (1st Cir. 1995); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1315-16 (7th Cir. 1991) (*en banc*); *Kallmann v. NLRB*, 640 F.2d 1094, 1097, 1100-02 (9th Cir. 1981).

In most discrimination cases, the critical inquiry is whether the employer's actions were motivated by union animus. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board test for determining motivation in unlawful discrimination cases first articulated in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981); *cert denied*, 455 U.S. 989 (1982).

Under that test, if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in an employer's decision to take adverse action against the employee, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the adverse action even in the absence of

² A violation of Section 8(a)(3) creates a derivative violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426, 430-31 (6th Cir. 1997).

protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *NLRB v. A&T Mfg. Co.*, 783 F.2d 148, 149 (6th Cir. 1984). If the lawful reasons advanced by the employer for its actions are a pretext – that is, if the reason either did not exist or was not in fact relied upon – the employer has not met its burden, and the inquiry is logically at an end. *Limestone Apparel Corp.*, 255 NLRB 722, *enforced mem.*, 705 F.2d 799 (6th Cir. 1982).

Unlawful motivation in hiring decisions can be inferred from circumstantial as well as direct evidence. *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 873 (6th Cir. 1995). Factors that support a finding that a new employer discriminatorily refused to hire employees of the predecessor include: “evidence of union animus, lack of a convincing rationale for refusal to hire the predecessor’s employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor’s employees from being hired as a majority of the new owner’s overall work force to avoid the Board’s successorship doctrine.” *U.S. Marine Corp.*, 293 NLRB 669, 671 (1989), *enforced*, 944 F.2d 1305 (7th Cir. 1991) (*en banc*); *accord Planned Bldg. Servs.*, 347 NLRB 670, 673 (2006).

As shown below, the Board properly found that JAG violated Section 8(a)(3) and (1) of the Act by discriminating against union applicants when hiring

the predecessor's employees.

B. JAG Unlawfully Refused To Hire 21 Predecessor Employees

Substantial evidence supports the Board's finding (A. 1884) that union animus was a motivating factor in JAG's refusal to hire 21 former Village Care employees who were bargaining unit members. Notably, JAG's other unfair labor practices – provide ample support for the Board to find JAG's hiring practices unlawfully motivated – namely, telling Village Care employees that Galion Pointe would operate nonunion, linking its no-solicitation policy to the Union, and warning employee Archer for expressing solidarity with those who attended a union press conference. (*See* pp. 35-36.). Indeed, Griffiths' statement to employees that JAG intended to operate nonunion, “effectively told Village Care employees that JAG . . . intended to discriminate against them to ensure its nonunion status.” (A. 1884.) JAG's overall conduct “reinforced the point that the Union was not welcome at the nursing home.” (A. 1884.)

As the Board further explained (A. 1884), other evidence also supports its reasonable inference that JAG's hiring was unlawfully motivated. For example, Griffith confirmed JAG would remain nonunion when he told Courtright that he would not recognize and bargain with the Union. (*See* p. 7.) In addition, JAG, consistent with Griffiths' comments, tracked the total number of Village Care bargaining unit members selected for hire. (*See* p. 9.)

Then, after JAG began operating the facility, it monitored the Union's July 2 press conference and noted which former Village Care unit employees had attended. In addition, that same day JAG issued a warning to Archer after she expressed solidarity with those who attended the conference. Thereafter, in late August, JAG wrote notes "that described certain employees as 'good' because of their remarks suggesting that they did not support the Union." (A. 1884.) Finally, the Board reasonably inferred unlawful motivation (A. 1884) from JAG's failure to hire or even interview numerous former Village Care unit employees between July 1 and September 30, despite hiring a total of 28 employees with no connection to Village Care to fill unit positions during that timeframe. *See U.S. Marine*, 293 NLRB at 671 (finding that employer discriminatorily refused to hire predecessor's employees based, in part, on successor hiring numerous new employees without contacting predecessor's employees).

JAG's (Br. 45-47) contention that the Board erred in finding its hiring practices discriminatorily motivated lacks evidentiary and precedential support. First, JAG argues (Br. 45) that Griffiths' statement that Galion Pointe would operate nonunion was not coercive and did not demonstrate unlawful motivation. As shown above, Griffiths' statement was coercive under well-settled law. Next, JAG (Br. 45-46) disputes the Board's inference that it tracked the number of former unit members hired in an attempt to avoid a successor bargaining

obligation. Instead, JAG claims that it tracked the number of union members hired solely to ensure compliance with any legal requirements to recognize and bargain with the Union, and to respond to any demand by the Union for bargaining. The Board's inference, however, is hardly unreasonable given that JAG never responded to the Union's initial demands for bargaining, and that prior to completing hiring, it had already made abundantly clear that it would not recognize the Union. Indeed, standing alone, Griffiths' statement that JAG would not recognize the Union permits a reasonable inference that JAG tracked hires to ensure that it would not incur any bargaining obligation. In addition, as shown, JAG's subsequent unfair labor practices, its notations about employees' union sympathies and its hiring practices after June 30, support the Board's finding that JAG tracked the hiring of former unit members for discriminatory reasons.

Finally, JAG claims (Br. 45-46) that it had insufficient time to "engage" or "plan[]" a discriminatory hiring scheme. JAG never raised this claim to the Board. Therefore, the Court lacks jurisdiction under Section 10(e) of the Act to consider it. (*See* pp. 22-23.)

C. JAG Has Failed To Show that Its Failure To Hire Was Not Motivated by Animus

The Board further reasonably found that JAG did not demonstrate that it would not have hired the 21 former Village Care employees even in the absence of its unlawful motivation and that instead, JAG's hiring decisions were made "with

the aim of reaching a targeted total number of hires from the Village Care bargaining unit.” (A. 1884.) Before the Board, JAG raised various explanations for its failure to hire, including that it did not have enough bargaining unit positions to hire the discriminatees, that the discriminatees had various deficiencies making them unsuitable hires, or that they did not submit job applications. The Board properly rejected those assertions as contrary to the credited evidence. (A. 1873 n. 16, 1874, 1879 n.40, 1880 and n.42, 1884 and n.52, 1885.)

Before the Court, JAG does not resurrect the affirmative defenses rejected by the Board. Indeed, JAG proffers no argument that it would not have hired the discriminatees even in the absence of animus. JAG also provides no reason, let alone any extraordinary reason, to reverse the Board’s credibility determinations. As discussed (*see* p. 23), by failing to contest these findings on appeal, JAG has waived any argument that it failed to hire the discriminatees for reasons other than their union support. Therefore, JAG has left unchallenged the Board’s finding that “but for the discrimination, JAG . . . would have filled its available bargaining unit positions with former Village Care employees.” (A. 1884.)

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT JAG VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEES ARCHER, NOLEN, AND ATKINS

The Board reasonably found that JAG unlawfully discharged employees Archer, Nolen, and Atkins. The *Wright Line* analysis of motivation, described above (pp. 37-39) applies. Factors that support a finding that an employee's discharge was unlawfully motivated include knowledge of union activities, hostility toward union activities as revealed by the commission of other unfair labor practices, the timing of the adverse action, and the pretextual nature of the employer's justification. *See Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 689 (6th Cir. 2006); *Gen. Fabrications*, 222 F.3d at 225-26.

A. Substantial Evidence Demonstrates that Union Animus Motivated JAG's Discharge of Archer, Nolen, and Atkins

As the Board found, JAG's "union animus is established both by evidence specific to each discharged employee and also by evidence of other violations of the Act, including its coercive statements and its efforts to avoid incurring a bargaining obligation by engaging in hiring discrimination against the predecessor's employees." (A. 1865.) Thus, undisputed evidence establishes that JAG was aware of Archer's, Nolen's, and Atkins' status given that it had a roster of Village Care's unionized employees. (A. 1887-88.) The timing of all three discharges further evidences animus because the discharges occurred within a week after the Union filed a petition for an election. (A. 1887-88.) *See Active*

Transp., 296 NLRB 431, 431-32 (1989) (finding unlawful motive where shortly after organizing drive began employer fired employees with past union association), *enforced mem.*, 924 F.2d 1057 (6th Cir. 1991); *NLRB v. Health Care Logistics*, 784 F.2d 232, 237 (6th Cir. 1986) (timing shows unlawful motive where employee was fired after informing other employees that a union representative would come to the facility).

With respect to Archer specifically, JAG disciplined her for having a negative attitude shortly after she expressed solidarity with the Union. (A. 1887.) See *Children's Studio Sch. Pub. Charter Sch.*, 343 NLRB 801, 805 (2004) (employer's comments that an employee does not have the "right spirit" or has a "bad attitude" are veiled references to the employee's protected activities and circumstantial evidence of animus). Further, the Board properly determined that JAG's reasons for discharging Archer were pretextual and demonstrated animus. For example, at the hearing JAG claimed that Archer's absence from work on July 8 was suspicious because she did not seem ill, and that this absence was a factor in her discharge. But, JAG does not dispute that it offered a false reason for questioning Archer's absence from work that day and that Archer's absence was due to her son's illness, as noted in Archer's absentee report. (A. 1878 and n.34, 1887.)

Substantial evidence similarly supports the Board's finding that Nolen's discharge was discriminatorily motivated. When JAG discharged Nolen, Ronk accused Nolen of speaking with Archer about the Union. (A. 1887.) Further, JAG's asserted reason for the discharge – a complaint of resident abuse – was pretextual because JAG failed to investigate the claim or follow required reporting procedures regarding an alleged complaint of resident abuse. (A. 1878 n.37, 1887.) *See Whirlpool Corp v. NLRB*, 92 F. App'x 224, 229 (6th Cir. 2004) (employer's failure to investigate and follow established procedure in response to alleged employee misconduct supports Board's finding that employee unlawfully discharged employee); *ITT Auto. v. NLRB*, 188 F.3d 375, 388 (6th Cir. 1999) (same).

Likewise, strong evidence supports the Board's finding that animus was a motivating factor in Atkins' discharge. A manager, when discharging Atkins, informed her that she might be rehired once things "calmed down," implying that once JAG ensured that the Union was gone, Atkins could return. (A. 1888.)

In sum, the Board had ample basis to find that JAG's discharges of the three employees were unlawfully motivated.

B. JAG Has Waived Its Primarily Credibility-Based Argument that It Would Have Discharged the Three Employees Absent Their Union Status

The Board (A. 1878-79 nn.34, 37-40) also reasonably found that JAG failed to carry its affirmative defense of establishing that it would have discharged any of the three employees even absent their union activity. Before the Board, JAG proffered several reasons for the discharges, claiming Archer's poor attitude led to poor patient care, that Nolen's alleged abuse of a resident warranted her discharge, and that Atkins voluntarily quit her job. The Board, noting that JAG contested the findings "solely on disagreement with the judge's credibility resolutions" which the Board "adopted in full," rejected JAG's proffered reasons for discharge. (A. 1865.) JAG raises no such credibility-based arguments on appeal, and therefore waives any challenge to the Board's adoption of the judge's credibility determinations. (*See* p. 23.)

In light of the Board's uncontested credibility findings, whether JAG (Br. 47) "put forth significant evidence of the legitimate business reason[s]" to the judge for discharging them has no relevance because the Board discredited that evidence. Moreover, JAG's conclusory assertions of legitimate reasons for the discharges (Br. 47), in which it repeats in a few lines defenses rejected by the Board, without substantively addressing the Board's detailed contrary findings,

provides a further basis for finding that JAG has waived any challenge to the Board's rejection of its affirmative defenses.³ (*See* p. 23.)

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT JAG WAS A SUCCESSOR EMPLOYER THAT VIOLATED SECTION 8(A)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION AND BY UNILATERALLY CHANGING TERMS AND CONDITIONS OF EMPLOYMENT

A. Applicable Principles

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representative of [it's] employees” 29 U.S.C. § 158(a)(5). In turn, Section 8(d) of the Act defines the “duty to bargain collectively” as “the performance of the mutual obligation of the employer and [the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d); *see Beverly Health & Rehab. Serv., Inc. v. NLRB*, 297 F.3d 466, 479 (6th Cir. 2002).

When a new employer acquires a unionized business it must recognize and bargain with the union representing the predecessor's employees if the new employer is a “successor employer” to the predecessor. *NLRB v. Burns Int'l Sec.*

³ To the extent JAG references any specifics in the facts section of its brief, a reference devoid of any developed argument does not constitute a properly raised challenge. *See U.S. v. Lanier*, 285 F. App'x 239, 241-42 (6th Cir. 2002) (party waives issue referenced in fact section of brief but not developed in argument).

Servs., 406 U.S. 272, 287-88 (1972).⁴ The new employer becomes a *Burns* successor when it conducts essentially the same business as the former employer, and it employs a “substantial and representative complement” of the predecessor’s work force. *Fall River Dyeing*, 482 U.S. at 41; *Burns*, 406 U.S. at 278-81; *Briggs Plumbingware v. NLRB*, 877 F. 2d 1282, 1287 (6th Cir.1989). Factors considered in determining whether the new business enterprise has continuity include: (1) whether the business of the two entities remains unchanged; (2) whether the employees perform the same job functions under the same conditions and supervision; and (3) whether the production process and customers remain the same. *See Fall River*, 482 U.S. at 43; *Straight Creek Mining, Inc. v. NLRB*, 164 F.3d 292, 295 (6th Cir. 1988).

If these conditions are met, a union’s demand to bargain triggers the successor’s bargaining obligation. *Fall River*, 482 U.S. at 46; *Briggs*, 877 F.2d at 1287. The bargaining obligation arises because “a mere change in ownership, without an essential change in working conditions, would not be likely to change employee attitudes toward representation.” *Straight Creek Mining*, 164 F.3d at 295 (quotation marks and citation omitted). In addition, the successor’s bargaining obligation support the Act’s overarching aim of stability in bargaining

⁴ A violation of Section 8(a)(5) creates a derivative violation of Section 8(a)(1). *See NLRB v. Centra, Inc.*, 954 F.2d 366, 367 n.1 (6th Cir. 1992).

relationships and industrial peace. *Fall River*, 482 U.S. at 36-41; *accord NLRB v. Aquabrom, Div. of Labor Lakes Chem. Corp.*, 855 F.2d 1174, 1179 (6th Cir. 1988), *amended and supplemented*, 862 F.2d 100 (6th Cir. 1988).

B. Substantial Evidence Supports the Board’s Finding that JAG Is a Successor Employer with the Obligation To Recognize and Bargain with the Union

The Board reasonably found (A. 1881) that JAG was a successor employer to Village Care when it began operating the nursing home on July 1 under the name Galion Pointe and that it had an obligation to bargain with the Union “that was triggered” on that date. (A. 1883.) Thus, JAG’s failure to recognize and bargain with the Union when requested to do so violated Section 8(a)(5) and (1) of the Act.

JAG does not dispute that it operated in substantially the same form as the predecessor Village Care. As the Board explained (A. 1881), JAG operated the same business, a nursing home, with the same patients, and with Village Care’s supervisory staff. In addition, it hired those supervisors, as well as other employees, to perform the same jobs as when Village Care was the employer. (A. 1881.) In these circumstances, the business continued essentially unchanged. *See Fall River*, 482 U.S. at 43.

The Board also reasonably found (A. 1883) that JAG met the other criteria for establishing successor status – that is, as of July 1, a majority of its employees,

in a substantial and representative complement, were formerly employed by Village Care. *See Fall River*, 482 U.S. at 46-47. Thus, as of that date, 15 of the 23 employees JAG hired to work in bargaining unit positions had worked in those positions at Village Care, with the remaining 8 employees who filled bargaining unit positions temporarily relocating to Galion Pointe from other JAG facilities. *See Horizon Hotel*, 49 F.3d at 806 (successor had bargaining obligation where 14 of 24 employees in unit positions were former union employees of the predecessor); *Van Lear Equip., Inc.*, 336 NLRB 1059, 1063 (2001) (successor had bargaining obligation where its 26 bus drivers constituted a substantial and representative unit complement and where 19 of those drivers had worked in unit positions for the predecessor); *Jennifer Matthew Nursing & Rehab. Ctr.*, 322 NLRB 332 NLRB 300, 306 (2000) (employer required to recognize union when it incorrectly believed that its bargaining obligation did not attach unless it hired at least 51percent of the predecessor's entire staff).

The Board properly found, and JAG does not contest, that July 1 served as the appropriate date to determine whether JAG had hired a substantial and representative complement of employees. Indeed, as the Board explained, starting July 1, JAG “had an obligation to care for the 35 nursing home residents who were already at the facility and . . . it had to maintain staffing levels that would satisfy the State of Ohio’s regulations.” (A. 1883). *See Jennifer Matthew Nursing &*

Rehab. Ctr., 332 NLRB at 307 (successor employer began full operation when it started operating nursing home because it had represented to the State of New York that it would have sufficient staffing to provide proper care once it assumed operation).

The Board also reasonably found (A. 1883) that the Union made a valid bargaining demand on June 30, when Union Representative Courtright asked Griffiths whether he would recognize the Union. As the Board explained, “[i]f [a] union asks the successor employer to bargain before the successor has hired a substantial representative complement of its workforce, the union’s premature request remains in force until the moment that the successor attains the substantial and representative complement.” (A. 1883 n.46, *citing Fall River*, 482 U.S. at 52). Moreover, the Union again requested bargaining on July 6. JAG’s repeated refusals to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act.

JAG argues (Br. 42) that it has no bargaining obligation because former Village Care unit employees compromised less than 50 percent of equivalent unit positions in JAG’s workforce. Specifically, JAG (Br. 42) does not dispute that it hired 15 former Village Care unit employees to fill unit positions at Galion Pointe. Instead, JAG claims (Br. 42, 50) that those 15 employees constituted less than half of the employees in bargaining unit positions because JAG assigned 16 other

employees to Galion Pointe as of July 1 to fill those positions, meaning that the predecessor employees numbered only 15 out of approximately 31 unit employees. But the Board rejected that argument for reasons that JAG does not now contest. As the Board explained (A. 1883 n.47), it declined to count 7 supervisors serving in unit positions as employees because although they performed some bargaining unit work, the bargaining unit excluded supervisors. In addition, the Board also declined to count 3 other employees who served in positions not contained in the bargaining unit. (A. 1883 n.47.) Because JAG takes no issue with the Board's reasoning, those findings stand unrefuted. Moreover, JAG does not dispute that the Board made an "arguably a generous decision in [JAG's] . . . favor," by counting the 8 transfer employees as part of the bargaining unit despite the fact that "half of those [8] employees held positions at their home facilities that were supervisory in nature or otherwise would not be classified as bargaining unit positions." (A. 1883 n.47.)

JAG's reliance on other JAG employees sent to work at Galion Pointe after July 1 (Br. 43) has no merit. In the first place, JAG does not identify these employees, or show that these JAG employees performed unit work. Moreover, JAG (Br. 42) misses the point with its argument that "depending on the day examined," Village Care employees "compromised . . . at most 50 [percent]" of the workforce. As discussed (pp. 50-52), the Board reasonably found that July 1 was

the triggering date for determined that JAG had a substantial representative compliment of employees. Therefore, any JAG employees subsequently assigned to Galion Pointe after July 1 has no bearing on determining JAG's bargaining obligation. Thus, JAG has failed to establish that the Board erred by finding that as of July 1 a majority of its employees hired into unit positions had previously worked for Village Care.

C. JAG Lost Its Rights To Set Initial Terms By Telling Employees that It would Operate Nonunion

The Board properly found that Griffith's statement to employees, the day before operations commenced, that Galion Point would be a nonunion facility forfeited JAG's right to set initial terms and conditions of employment.

Ordinarily, a successor employer is not bound by the substantive terms of the predecessor's collective-bargaining agreement and it can set initial terms and conditions of employment. *Burns*, 406 U.S. at 284. However, a new employer that attempts to withhold or subvert the successorship rights of employees forfeits the right to set initial terms. *State Distrib. Co.*, 282 NLRB 1048, 1049 (1987.)

"The fundamental premise of the forfeiture doctrine is that it would be contrary to statutory policy to 'confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor because it has unlawfully blocked the process by which the obligations and rights are incurred.'" *Advanced Stretchforming*, 323 NLRB at 530-31 (*quoting State Distrib. Co.*, 282 NLRB at 1049). In other words,

“the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employees’ bargaining representative and enter into good-faith negotiations with that union about those terms and conditions.” *Id.* at 530.

When a successor employer informs its employees that there will be no union at the company, it “blocks the process by which *Burns* rights are incurred” and therefore loses its rights to set initial terms and conditions of employment. *Advanced Stretchforming*, 323 NLRB at 530-31; *see also C&B Flooring Assoc., LLC.*, 349 NLRB 692, 697 (1997). As the Board has explained, a statement to employees that there will be no union at the successor employer’s facility not only “blatantly coerces employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing,” but it also “constitutes a facially unlawful condition of employment.” *Advanced Stretchforming*, 323 NLRB at 530. Indeed, “nothing in *Burns* suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine other legitimate terms and conditions of employment.” *Id.*

Here, JAG first announced that Galion Pointe would be nonunion and then on July 1 a majority of JAG’s workforce in unit positions was comprised of the predecessor’s unit employees. In those circumstances, the Board properly found that JAG “did not conduct itself like a lawful *Burns* successor.” *Id.* Thus, the

Board reasonably determined that JAG's coercive statement caused it to lose its right to unilaterally set initial terms. As such, the Board also properly found that JAG violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by unilaterally changing the employees' terms and conditions of employment. *See Advanced Stretchforming*, 323 NLRB at 530-31 (successor loses right to set initial terms by claiming business will be nonunion and thereafter hiring a majority of predecessor's employees); *Concrete Co.*, 336 NLRB 1311, 1311 (2001) (successor lost privilege to set initial terms by telling predecessor employees "there's no [u]nion; the [u]nion's gone").

D. JAG Lost Its Privilege To Set Initial Terms by Engaging in Discriminatory Hiring Practices

The Board also found that JAG's "discriminatory hiring practices independently made unlawful its unilateral setting of initial terms." (A. 1865.) Where an employer has pursued a discriminatory hiring policy to avoid its successorship bargaining obligations, it is axiomatic that the employer "cannot escape its bargaining obligation on the ground that the union does not represent a majority of its employees." *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998). Thus a new employer that discriminates in hiring the predecessor's employees violates Section 8(a)(5) and (1) of the Act by setting initial terms and refusing to recognize and bargain with the predecessor's union. *Horizons Hotel*, 49 F.3d at 806; *Am. Press*, 833 F.2d at 624-26; *U.S. Marine*, 944

F.2d at 1323; *Love's Barbeque Rest. No. 62*, 245 NLRB 78, 81-82 (1979), *enforced in relevant part sub. nom. Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

Indeed, where, as here, an employer engages in discriminatory hiring practices, those practices make it impossible to determine whether it would have hired all of the former employees in the absence of such discrimination.

Accordingly, the Board properly resolves the doubt created by the employer's discrimination against the wrongdoer – the employer – to prevent the employer from benefiting from its unlawful conduct. *See NLRB v. Staten Island Hotel*, 101 F.3d 858, 862 (2d Cir. 1996); *U.S. Marine Corp.*, 944 F.2d at 1321-22; *see generally, Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) (“elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrongdoing has created”).

As shown (pp. 50-52), JAG “limited its hiring of former Village Care bargaining unit employees to ensure that JAG . . . would be nonunion.” (A. 1884.) Therefore, the Board reasonably found, on this alternative basis, that JAG “as a result of its discriminatory hiring practices . . . lost its right to unilaterally set initial terms and conditions on July 1 without first giving notice to and bargaining with the Union,” and by refusing recognize and bargain with the Union from June 30 onward. (A. 1885.) *See Am. Press*, 833 F.2d at 624-26 (employer who unlawfully refused to hire predecessor's employees also acted unlawfully by refusing to

recognize and bargain with the union and by unilaterally changing terms and conditions of employment); *U.S. Marine*, 944 F.3d at 1319-23 (same); *Love's Barbeque Rest.*, 245 NLRB at 81-82 (same).

V. THE COURT IS WITHOUT JURISDICTION TO CONSIDER JAG'S ARGUMENT THAT IT IS NOT THE ENTITY LIABLE FOR THE UNFAIR LABOR PRACTICES

JAG argues (Br. 48-50, 52) that the Board failed to identify a basis to name JAG as the party liable for the unfair labor practices found by the Board. Contrary to that contention (Br. 48-50, 52), JAG did not raise this argument to the Board, and its belated injection of this issue on appeal renders the Court with no jurisdiction to consider it. (*See* pp. 22-23.)

Here, JAG's exceptions to the administrative law judge's recommended order (A. 1763-76) did not place the Board on notice of its intent to raise its argument that the judge erred by naming "[t]he Respondent, JAG Healthcare, Inc., d/b/a Galion Pointe, LLC" as the liable party. (A. 1889.) Rather, JAG's sole exception to the judge's proposed remedy and order contested only the factual findings upon which the judge relied to find unfair labor practices; JAG did not except on the additional ground that it was not a liable party. (A. 1775.) JAG did except to the judge's finding (A. 1871) that it "operates" nursing home facilities, arguing only that it does not "own[] or control" any nursing home. (A. 1763.) However, it offered no argument to the Board that the absence of an actual

ownership interest in the nursing home precluded the judge from holding it liable for the unfair labor practices.⁵ Because JAG filed no exception that the judge improperly found it a liable entity, the Court has no jurisdiction to consider JAG's argument raised for the first time on appeal. (*See* pp. 22-23.)

In any event, while JAG suggests (Br. 48-50, 52) that Galion Pointe either shares liability or has sole liability, its conduct during the unfair labor practice proceeding does not hint at its current theory. Rather, JAG has consistently demonstrated that it presumed the validity of the Board's decision to name JAG as the Respondent liable for the unfair labor practice violations. Thus, none of the position papers filed by JAG in response to the Union's charges asserted that JAG was improperly named as the charged party. (A. 2221-2308.) Moreover, JAG's answer to the complaint raised 18 affirmative defenses, none of which asserted that JAG was improperly named as a Respondent and therefore not liable for the unfair labor practices alleged in the complaint. (SA 2670-78.) Instead, JAG's answer to the complaint admitted that "on or about June 29, 2010 it executed an Operations Transfer Agreement with . . . Village Care . . . , which transferred operational control of the nursing facility formerly operated by Village Care to Respondent [JAG], effective July 1, 2010." (A. 1747, 1752, SA 2671 par. 3.) JAG's answer

⁵ Notably, the Board did not find that JAG owned the Galion Pointe facility. Rather, the Board found that JAG served as a management company, with another company owning the facility itself. (A. 1870 and n.6, 1871 n.8.)

also admitted that “JAG terminated its employees Diana Nolen and Natalie Archer,” but simply denied acting unlawfully. (A. 1755, SA 2673 par. 17.)

Thereafter in its post-hearing brief to the judge, JAG did not raise any issues regarding whether it was correctly named the Respondent. Instead, consistent with its answer to the complaint, JAG simply disputed that its statements and conduct constituted unfair labor practices. For instance, JAG acknowledged that on June 30, JAG informed employees “that it would begin operating the facility as Galion Pointe” on July 1, and that on that date it “commenc[ed] operation of Galion Pointe.” (Brief to ALJ pp. 8, 14.). JAG also referenced “JAG’s hiring at Galion Pointe,” and “JAG’s hiring decisions.” (Brief to ALJ pp. 13-14.) Further undermining JAG’s new contention are the undisputed facts that applications to work at Galion Pointe listed JAG as the employer, and Village Care employees received JAG handbooks. Moreover, Griffiths admittedly acted as JAG’s President and CEO when he stated that he would not recognize the Union. (A. 1608.)

Thus, while JAG faults the Board for not pursuing liability against Galion Pointe, JAG’s own conduct during the proceedings confirmed the Board’s characterization of Galion Pointe as simply JAG’s operating name. (A. 1870 n.7.) In light of JAG’s acknowledgment that it had “operational control” of the facility renamed Galion Pointe, that it exercised that control to hire employees to work at

Galion Pointe, and to terminate two of “its” employees named as discriminatees, it has no basis to now claim that the Board erred by naming JAG a Respondent and liable entity.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying JAG's petition for review and enforcing the Board's Order in full.

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National Labor Relations Board

May 2016

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POINTE, LLC	* 08-CA-039112
	* 08-CA-039133
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,868 words of proportionally-spaced, 14-point type and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 26th day of May, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 26th day of May, 2016