

Nos. 15-1305, 15-1350

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

GVS PROPERTIES, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, DISTRICT LODGE 15, LOCAL LODGE 447**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

(a) *Parties and Amici*: The Board is respondent/cross-petitioner before the Court; its General Counsel was a party before the Board (Board Case No. 29-CA-77359). The International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 15, Local Lodge 447 was the charging party before the Board. GVS Properties, LLC (“the Company”), petitioner/cross-respondent before the Court, was respondent before the Board.

(b) *Rulings Under Review*: This case is before the Court on a petition filed by the Company for review of an order issued by the Board on August 27, 2015, and reported at 362 NLRB No. 194. The Board seeks enforcement of that order against the Company.

(c) *Related Cases*: This case has not been before this or any other court. Board counsel are unaware of any related cases either pending or about to be presented to this or any other court.

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of the issue presented	3
Relevant statutory provisions.....	3
Statement of the case.....	3
I. The Board’s findings of fact.....	4
A. The Company purchases from Broadway certain facilities managed by Vantage, whose employees selected the Union as their collective-bargaining representative	4
B. When the Company purchases Broadway’s buildings, it simultaneously assumes Vantage’s management of the facilities, and hires a workforce consisting entirely of Vantage’s employees, pursuant to a local worker retention law.....	5
C. The Union demands recognition and bargaining, but the Company refuses; after the 90-day period, the Company terminates three unit employees and hires four new ones	8
II. The Board’s conclusions and order.....	8
Summary of argument.....	9
Standard of review	11
Argument.....	12

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
The Board reasonably found that the appropriate time to determine successorship status was when the Company assumed control of the predecessor’s operations and hired its employees, and therefore, that the Company violated the Act by refusing to recognize and bargain with the Union at that time.....	12
A. A successor employer that acquires a business in substantially unchanged form and hires a majority of its workforce from the predecessor must recognize and bargain with the union that represents the predecessor’s employees.....	13
B. The Board reasonably determined that the Company’s bargaining obligation attached when it assumed control of its predecessor’s operations and hired a workforce consisting of the predecessor’s employees.....	16
1. The Company chose to retain its predecessor’s employees and was, therefore, a <i>Burns</i> successor	17
2. The Board reasonably declined to defer its successorship determination until after the 90-day retention period ended	20
C. The Company’s remaining contentions lack merit	27
Conclusion	33

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alcantara v. Allied Properties, LLC</i> , 334 F.Supp.2d 336 (E.D.N.Y. 2004)	29
<i>Bd. of Regents of the Univ. of Wash. v. EPA</i> , 86 F.3d 1214 (D.C. Cir. 1996).....	27
<i>California Grocers Association v. NLRB</i> , 52 Cal.4th 177 (2011)	31
<i>Canteen Corp. v. NLRB</i> , 103 F.3d 1355 (7th Cir. 1997), <i>enforcing</i> 317 NLRB 1052 (1995)	11,14
<i>Chelsea Indus., Inc. v. NLRB</i> , 285 F.3d 1073 (D.C. Cir. 2002).....	31
<i>Chevron U.S.A., Inc. v. Natural Res. Def. Council</i> , 467 U.S. 837 (1984).....	12
<i>Coronet Foods, Inc. v. NLRB</i> , 981 F.2d 1284 (D.C. Cir. 1993).....	4,30
<i>Denham Co.</i> , 218 NLRB 30 (1975)	21,24
<i>DuBosie Chemicals, Inc.</i> , 144 NLRB 56 (1963)	30
<i>Fall River Dyeing & Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987).....	12,14,15,17,20,23,25,26
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979).....	12

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Local 926, Int'l Union of Operating Engineers v. Jones</i> , 460 U.S. 669 (1983).....	11
<i>Machinists Lodge 76 v. Wisconsin Employment Relations Commission</i> , 427 U.S. 132 (1976).....	28,29
<i>M&M Parkside Towers, LLC</i> , 2007 WL 313429 (NLRB Div. of Judges, Jan. 30, 2007)	31
<i>NLRB v. Burns International Security Services, Inc.</i> , 406 U.S. 272 (1972).....	4,8,10,11,12,13,15,16,17,20,21,25
<i>NLRB v. Erie Resistor Corp.</i> , 373 U.S. 221 (1963).....	11
<i>NLRB v. Kentucky May Coal Co.</i> , 89 F.3d 1235 (6th Cir. 1996)	30
<i>NLRB v. Q-1 Motor Express, Inc.</i> , 25 F.3d 473 (7th Cir. 1994)	30
<i>NLRB v. South Harlan Coal, Inc.</i> , 844 F.2d 380 (6th Cir. 1988)	11
<i>Pa. Transformer Tech., Inc. v. NLRB</i> , 254 F.3d 217 (D.C. Cir. 2001).....	11,13,25
<i>Paulsen v. GVS Properties, LLC</i> , 904 F.Supp.2d 282 (E.D.N.Y. 2012).....	4,30
<i>Prime Serv., Inc. v. NLRB</i> , 266 F.3d 1233 (D.C. Cir. 2001).....	14

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Radio Officers' Union of Comm. Telegraphers Union v. NLRB</i> , 347 U.S. 17 (1954).....	19
<i>Rhode Island Hosp. Ass'n v. NLRB</i> , 667 F.3d 17 (1st Cir. 2001).....	30,31
<i>Sahara Las Vegas Corp.</i> , 284 NLRB 3374 (1987), <i>enforced mem.</i> , 886 F.2d 1320 (9th Cir. 1989)	21,22,23
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959).....	27
<i>S&F Market Healthcare, LLC v. NLRB</i> , 570 F.3d 354 (D.C. Cir. 2009)	21
<i>S. Nuclear Operating Co. v. NLRB</i> , 524 F.3d 1350 (D.C. Cir. 2008).....	14
<i>Springfield Transit Management, Inc.</i> , 281 NLRB 72 (1986)	25
<i>Spruce Up Corp.</i> , 209 NLRB 194 (1974), <i>enforced mem.</i> , 529 F.2d 516 (4th Cir. 1975)	15,26
<i>The Clarion Hotel-Marin</i> , 279 NLRB 481 (1986), <i>enforced</i> , 822 F.2d 890 (9th Cir. 1987)	21
<i>Tile, Marble, Terrazzo Finishers, Local No. 31</i> , 258 NLRB 1143 (1981)	19

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>U.S. v. Jernigan</i> , 341 F.3d 1273 (11th Cir. 2003)	27
<i>Washington Serv. Contractors Coalition v. D.C.</i> , 54 F.3d 811 (D.C. Cir. 1995).....	11,27,28,29
<i>Windsor Convalescent Ctr. of North Long Beach</i> , 351 NLRB 975 (2007)	21,22,23,24

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	9,14,24
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3,4,9,13,14,32
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3,4,9,8,14,32
Section 8(d) (29 U.S.C. § 158(d)).....	13
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2
Section 10(f) (29 U.S.C. § 160(f))	2
Section 10(j) (29 U.S.C. § 160(j)).....	4,30

Rules:

Fed. R. App. P. 28(a)(9)(A)	27
D.C. Cir. R. 28(a).....	27

GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
Board	National Labor Relations Board
Broadway	Broadway Portfolio I LLC
Company	GVS Properties, LLC
DBSWPA	New York City Displaced Building Service Workers Protection Act
Union	International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 15, Local Lodge 447
Vantage	Vantage Building Services LLC

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of GVS Properties, LLC (“the Company”) to review, and cross-application of the National Labor Relations Board

(“the Board”) to enforce, a Board Order issued against the Company on August 27, 2015 and reported at 362 NLRB No. 194. (A64-82)¹ The Board found that the Company, as a successor employer, unlawfully refused to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 15, Local Lodge 447 (“the Union”), after continuing the operations of the predecessor employer and hiring a workforce consisting entirely of the predecessor’s employees. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151 et seq., 160(a)) (“the Act” or “the NLRA”). The Board’s Order is final with respect to all parties.

The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review and cross-applications for enforcement may be filed in this Court. The Company’s September 2, 2015 petition for review and the Board’s October 14, 2015 cross-application for enforcement are timely, as the Act places no time limit on such filings. The Union was the charging party below and has intervened on the Board’s side here.

¹ References in this proof brief are as follows: “A” references are to the deferred appendix. “Br.” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUE PRESENTED

It is undisputed that the Company, upon taking over the predecessor's operations, hired a workforce consisting entirely of the predecessor's employees pursuant to a New York City worker retention law requiring new employers to retain those workers for 90 days. At the outset of the 90-day period, the Company refused the incumbent union's request for recognition and bargaining. The issue, therefore, is whether the Board reasonably found that the appropriate time to determine successorship status was when the Company assumed control of the predecessor's business and hired its employees, rather than at the end of the retention period. If so, it follows that the Company violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union.

RELEVANT STATUTORY PROVISIONS

Relevant provisions are contained in an addendum at the end of this brief.

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by the Union (A 134), the Board's General Counsel issued a complaint alleging that the Company, as a successor employer, violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to recognize and bargain with the incumbent union as the employees' collective-bargaining representative. (A 138-143.) Following a short hearing with a largely stipulated record, an administrative law judge issued a

decision and recommended Order finding that the Company violated Section 8(a)(5) and (1) as alleged. (A 74-82.) Specifically, the judge found that under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972) (“*Burns*”), the Company was a successor whose bargaining obligation attached when it assumed control of the predecessor’s business and hired a workforce consisting entirely of the predecessor’s employees. He therefore found that the Company’s refusal of the Union’s contemporaneous request for recognition and bargaining was unlawful.²

On August 27, 2015, after considering the Company’s exceptions and the parties’ briefs, the Board issued a Decision and Order, affirming the judge’s conclusions for the reasons the Board explained in its Decision. (A 64-82.)

I. THE BOARD’S FINDINGS OF FACT

A. The Company Purchases from Broadway Certain Facilities Managed by Vantage, Whose Employees Selected the Union as Their Collective-Bargaining Representative

The Company owns and manages residential and commercial buildings throughout New York City, including the Washington Heights facilities at issue

² On November 13, 2012, before the administrative law judge issued his decision, a district court judge in a proceeding under Section 10(j) of the Act, 29 U.S.C. § 160(j), denied the General Counsel’s petition for interim injunctive relief, finding in part that the Company was not a successor employer with a duty to bargain with the Union. *See Paulsen v. GVS Props., LLC*, 904 F.Supp.2d 282, 292-93 (E.D.N.Y. 2012). Such a decision is not binding on the Board. *See Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284, 1287-88 (D.C. Cir. 1993), and cases cited at pp. 30-31.

here. (A 64, 75; 93.) It bought those facilities from Broadway Portfolio I (“Broadway”), which had subcontracted daily service, maintenance, repair, and upkeep to Vantage Building Services, LLC (“Vantage”). (A 64, 75; 94.)

In early 2010, Vantage’s maintenance employees, including those who worked at Broadway’s properties, elected the Union as their collective-bargaining representative. The bargaining unit consisted of all full-time superintendents and porters at the Company’s New York facilities. (A 64-65, 75; 94.) Shortly thereafter, the parties entered into a collective-bargaining agreement, effective between May 1, 2010, and April 30, 2013. (A 65, 75; 93-95.)

B. When the Company Purchases Broadway’s Buildings, It Simultaneously Assumes Vantage’s Management of the Facilities, and Hires a Workforce Consisting Entirely of Vantage’s Employees, Pursuant to a Local Worker Retention Law

The Company purchased the Washington Heights properties from Broadway on February 17, 2012. (A 64, 76; 95.) The same day, the Company distributed a letter to Vantage’s unit employees, announcing that they would no longer have jobs with Vantage because the Company was going to manage the properties itself. In the letter, the Company stated that if the employees wished to continue working at the properties, they should inform the Company’s operations manager, Nicholas Conway. The letter also notified the employees that their employment would be on a “temporary and trial basis” for 90 days, after which the Company would determine its permanent staffing needs. Accompanying the letter was a memo

containing the new terms and conditions of employment for potential hires. The letter further stated that all of their terms and conditions of employment under Vantage were “revoked and nullified in their entirety,” that the Company was setting new terms and conditions. (A 65, 76; 95, 167-186, 233.)

On February 18, the Company assumed Vantage’s management operations, and hired seven of the eight unit employees who had worked for Vantage, pursuant to New York City’s Displaced Building Service Workers Protection Act (“DBSWPA”). It permanently laid off the eighth employee, and did not hire any additional employees. (A 65 & n.9, 76; 95, 243-244.) The seven employees hired by the Company continued to perform daily maintenance, repair, and upkeep of the facilities, as they had done previously while employed by Vantage. (A 65, 76; 95-96.)

The DBSWPA aims to provide job security to building employees in New York City by requiring successor building owners to offer employment to its predecessors’ employees.³ (A 77; 100) It requires a successor employer to retain its predecessor’s nonsupervisory employees for 90 days, subject to termination for

³ The DBSWPA defines “successor employer” as one that:

“(i) has been awarded a building service contract to provide, in whole or in part, building services that are substantially similar to those provided under a service contract that has recently been terminated, or (ii) has purchased or acquired control of a property in which building service employees were employed.” N.Y.C. Admin Code § 22-505 (a)(8).

cause or a decision to operate with fewer employees. The DBSWPA states, in relevant part:

(b)(5) A successor employer shall retain for a 90 day transition employment period at the affected building 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.

(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 services employees by seniority within job classification.

(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.

(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.

According to Conway, who oversaw the staff, handled tenant issues, and made all hiring and discharge decisions, the workers that the Company retained were “not probationary employees.” (A 77; 250.)

C. The Union Demands Recognition and Bargaining, but the Company Refuses; After the 90-Day Period, the Company Terminates Three Unit Employees and Hires Four New Ones

On March 7, 2012, the Union sent a letter to the Company, requesting that the Company recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. In a March 13 letter, the Company refused to bargain. It asserted that the Union's request was premature because it would not employ a substantial and representative complement of workers until after the mandatory 90-day transition period expired, at which time it would determine whether to offer the unit employees permanent jobs. (A 65, 77; 96, 187)

On May 16 and 17, when the 90-day transition period ended, the Company discharged three unit employees and hired four new workers. (A 65, 77; 96, 190-196, 251-253.) At that point, the Company's workforce consisted of four employees who had previously worked for Vantage and four who had not. Since that time, the Company has not recognized or bargained with the Union. (A 65, 77; 96, 263-64.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Member Hirozawa; Member Johnson dissenting) found that the Company was a successor employer under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972) ("*Burns*"), and that it violated Section 8(a)(5) and (1) of the Act (29 U.S.C.

§ 158(a)(5) and (1)) by refusing to recognize and bargain with the Union when it assumed control of the predecessor's operations and hired a majority of its workforce from the predecessor. (A 64-82.)

The Board's Order requires the Company to cease and desist from engaging in the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 (29 U.S.C. § 157). (A 70.) Affirmatively, the Board's Order requires the Company, upon request, to bargain with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. It also requires the Company to post a remedial notice. (A 70.)

SUMMARY OF ARGUMENT

The Board reasonably found that the Company, as a successor employer, unlawfully refused to recognize and bargain with the Union. It is undisputed that the Company continued its predecessor's operations in substantially unchanged form, hired a workforce consisting entirely of the predecessor's employees at the start of the 90-day retention period specified by the DBSWPA, and refused the Union's demand for recognition and bargaining. Applying its traditional successorship doctrine, the Board therefore determined that the Company was a *Burns* successor whose duty to bargain arose when it assumed control of the predecessor's operations and hired a substantial and representative complement of

its workforce from the predecessor on February 18, 2012. In doing so, the Board reasonably declined to defer its successorship determination until after the 90-day period expired. The Board's analysis should be affirmed because it constitutes a reasonably defensible interpretation of the Act, furthers the Act's policies, and comports with Board and court precedent.

The Company erroneously argues that it was not a *Burns* successor because it did not make a conscious and voluntary decision to hire the predecessor's employees, but was required to do so by the DBSWPA. As the Board explained, the Company's claim ignores that its decision to purchase and manage properties it knew were subject to the DBSWPA was entirely voluntary. The Company also insists that the Board should have determined the Company's successor status after the 90-day retention period ended, and accuses the Board of deviating from precedent, but it is the Company that ignores the applicable law. The Board, with judicial approval, has consistently found that a bargaining obligation attaches once a new employer assumes control of a business and hires a majority of its workforce from the predecessor, even in cases involving compelled retention and probationary periods. Indeed, it is well established that the successorship determination is unaffected by the temporary or probationary status of the predecessor's employees, and, here, the Company admitted that the employees were not probationary, further undermining its argument.

Therefore, the Court should reject the Company's myriad attempts to use the DBSWPA as an end-run around its duty to bargain, and defer to the Board's finding of *Burns* successorship, which is rational and consistent with the Act and applicable precedent. Having provided no viable defense, the Company's petition for review should be denied and the Board's Order enforced.

STANDARD OF REVIEW

The Board is "the body to whom Congress has entrusted the evolution of federal labor policy." *Washington Serv. Contractors Coalition v. D.C.*, 54 F.3d 811, 817 (D.C. Cir. 1995) (citing *Local 926, Int'l Union of Operating Engineers v. Jones*, 460 U.S. 669, 681 (1983)). Reviewing courts "recognize that, in 'applying the general provisions of the Act to the complexities of industrial life,' . . . the Board brings to its task an expertise that deserves . . . [judicial] deference." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); accord *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1364 (7th Cir. 1997). Accordingly, the Board's findings as to successorship are given significant deference. *Pa. Transformer Tech., Inc. v. NLRB*, 254 F.3d 217, 223 (D.C. Cir. 2001); accord *NLRB v. South Harlan Coal, Inc.*, 844 F.2d 380, 383 (6th Cir. 1988).

The Board's rulings interpreting a successor's bargaining obligations are entitled to judicial deference if they are rational and consistent with the Act. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("*Fall River*");

see generally Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 & n.11 (1984) (if statute is silent or ambiguous on an issue, court must defer to administrative agency's permissible construction, even if court would have construed statute differently). Where, as here, the facts underlying successor status are not in dispute and the only issue concerns when the Company's bargaining obligation arose, the Board's construction of the Act must be accepted by a reviewing court if it is "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979).

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE APPROPRIATE TIME TO DETERMINE SUCCESSORSHIP STATUS WAS WHEN THE COMPANY ASSUMED CONTROL OF THE PREDECESSOR'S OPERATIONS AND HIRED ITS EMPLOYEES, AND THEREFORE, THAT THE COMPANY VIOLATED THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION AT THAT TIME

It is undisputed (Br. 27-28, 34) that the Company purchased buildings from Broadway, assumed Vantage's management of the facilities, and hired all of its employees from Vantage pursuant to the DBSWPA, a local worker retention statute. (A 64-65; 95-96.) As the Board found on those largely stipulated facts (A 64, 66-69), the Company was a *Burns* successor that made a conscious decision to purchase the buildings and to assume the predecessor's operations. As the Board further found, the Company's obligation to bargain with the incumbent union was triggered when it purchased the facilities, assumed control over the operations, and

hired Vantage's employees, even though the hiring was pursuant to the DBSWPA. (A 64-65.) The Company primarily challenges the Board's findings by insisting (Br. 34-35, 42-43, 50-51) that a successor's bargaining obligation should not be activated until after the DBSWPA's mandatory-retention period ends. As shown below, the Company's challenge falls flat.

A. A Successor Employer that Acquires a Business in Substantially Unchanged Form and Hires a Majority of Its Workforce from the Predecessor Must Recognize and Bargain with the Union that Represents the Predecessor's Employees

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" 29 U.S.C. § 158(a)(5). Section 8(d) of the Act (29 U.S.C. § 158(d)) defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees 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). 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. *Burns*, 406 U.S. at 287-88; *Pa. Transformer Tech., Inc. v. NLRB*, 254

F.3d 217, 223 (D.C. Cir. 2001). A successor employer that refuses to do so violates Section 8(a)(5) and (1) of the Act.⁴

A successor employer is one that “makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor.” *Fall River*, 482 U.S. at 41; *accord Canteen Corp.*, 103 F.3d at 1361 (“When substantial continuity of operations and of workforce are found, the duty to bargain with the union is triggered.”), *enforcing* 317 NLRB 1052 (1995). Thus, upon acquiring a business, a new employer is obligated to bargain with the union that represents the predecessor’s employees if it continues its predecessor’s business in substantially unchanged form, and hires a majority of its employees from the predecessor. *Fall River*, 482 U.S. at 41; *accord Prime Serv., Inc. v. NLRB*, 266 F.3d 1233, 1239 (D.C. Cir. 2001). The imposition of a bargaining obligation follows from the new employer’s intention “to take advantage of the trained workforce of its predecessor,” which the incumbent union represents. *Fall*

⁴ An employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1) of the Act, which makes it unlawful to “interfere with, restrain, or coerce employees in the exercise” of their rights under Section 7 of the Act. 29 U.S.C. §§ 157, 158(a)(1). *See S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 n.6 (D.C. Cir. 2008).

River, 482 U.S. at 41. At that stage, once the incumbent union has demanded recognition and bargaining, the successor is obligated to do so. *Id.* at 52-53.⁵

The Supreme Court has recognized that the goal of the Board's successorship doctrine is to encourage stability in collective-bargaining relationships without impairing employees' free choice and, in turn, to further industrial peace. *Fall River*, 482 U.S. at 38-39. Indeed, "[i]f the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest." *Id.* at 43-44. As the Court explained, "during a transition between employers, a union is in a peculiarly vulnerable position," because it "is uncertain about the new employer's plans[]" and must "also must protect whatever rights still exist for its members." *Id.* Thus, "during this unsettling transition period, the union needs the presumption[] of

⁵ A successor employer is "ordinarily free to set initial terms on which it will hire the employees of a predecessor," *Burns*, 406 U.S. at 294, as the Company did here. (A 64 n.5, 68-69) By contrast, where "it is perfectly clear that the new employer plans to retain all of the employees in the unit," the successor must bargain before altering the employment terms set by the predecessor. *Id.* at 294-95. However, the "perfectly clear" exception, which does not arise here, is restricted to circumstances where the new employer has "actively or, by tacit inference, misled employees into believing they would all be retained without change[s]," or "has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enforced mem.*, 529 F.2d 516 (4th Cir. 1975).

majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor." *Id.*

B. The Board Reasonably Determined that the Company's Bargaining Obligation Attached When It Assumed Control of Its Predecessor's Operations and Hired a Workforce Consisting of the Predecessor's Employees

Applying the foregoing principles, the Board reasonably found that the Company became a *Burns* successor on February 18, when it indisputably assumed control of Broadway's business in essentially unchanged form and hired a workforce consisting entirely of the subcontractor Vantage's employees, even though the Company made its hiring decisions pursuant to the DBSWPA. Accordingly, the Board also found that the Company's duty to bargain was activated when the Union demanded bargaining on March 7. In so ruling, the Board rejected the Company's claim (Br. 34-35, 40-43) that it was not a *Burns* successor because it did not voluntarily hire the predecessor's employees but was compelled to do so by the DBSWPA. The Board likewise dismissed the Company's related assertion (Br. 42-49) that the appropriate time to determine successorship status is after the 90-day retention period expires. As shown below, settled legal principles support the Board's findings.

1. The Company chose to retain its predecessor's employees and was, therefore, a *Burns* successor

First, the Board reasonably found that the Company “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.” (A 66, quoting *Fall River*, 482 U.S. at 41.) See *Burns*, 406 U.S. at 287 (“The source of [an employer’s] duty to bargain with the union is . . . that it voluntarily took over a bargaining unit that was largely intact”).

Considering the purpose of the successorship doctrine as articulated in *Burns* and *Fall River* (see above pp. 14-16), the Board reasonably concluded that the Supreme Court never intended that employees’ “legitimate expectation of continued representation” should be thwarted by an employer’s compliance with a state or local worker retention statute, as it “would deprive employees of their bargaining rights ‘during this unsettling period.’” (A 67, quoting *Fall River*, 482 U.S. at 39). As the Board acknowledged, although the precise issue here—“whether a successor bargaining obligation can be imposed on a new employer that hires its predecessor’s employees pursuant to a worker retention statute”—was not before the Supreme Court in *Burns* or *Fall River*, there is “no indication . . . that it intended to deny collective-bargaining rights to employees in these circumstances.” (A 66.) Indeed, as the Board noted, “the thrust of . . . *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.” (A 67.) The Company’s attempt to shirk its bargaining obligation by hiding behind the DBSWPA does not achieve those ends. Therefore, the Board reasonably found the Company’s position to be “sharply at odds with that rationale.” (A 67.)

Moreover, in contending (Br. 42) that it is not a *Burns* successor because it was “compelled” by the DBSWPA to retain the predecessor’s employees, the Company plainly neglects the stipulated facts and uncontroverted record evidence. As the Board observed (A 66 n.13), the Company purchased Broadway’s buildings knowing that they were subject to the DBSWPA, and voluntarily assumed Vantage’s management operations in those buildings. Indeed, Operations Manager Conway admitted that “it’s [his] job to be aware of” the DBSWPA and that, of the approximately 50 properties that the Company has purchased since 2007, about half were subject to the law. (A 234-236.) As the Board found (A 68 n.14), armed with that knowledge, the Company clearly could have chosen not to purchase the DBSWPA-affected buildings or to assume responsibility for managing them. The Company also could have sought to negotiate with Broadway regarding the effects

of its obligation to hire Vantage's employees.⁶ (*Id.*) In fact, the predecessors, Broadway and Vantage, split ownership and management of the buildings; by contrast, the Company consciously and voluntarily decided to assume both responsibilities. (A 64; 93-94.) As the Supreme Court noted in *Fall River*, "to a substantial extent the applicability of *Burns* rests in the hands of the successor." 482 U.S. at 40. Therefore, the Company's freely made decision to structure the transaction as it did supports the Board's finding that it was a *Burns* successor under the circumstances of this case.

The Company misses the mark in complaining (Br. 44) that the Board's analysis conflates the "entrepreneurial" decision to assume control over a property with the "operational" decision to take advantage of the incumbent employees' skills. As an initial matter, its claim presumes that those two decisions are mutually exclusive, but the facts show otherwise. Moreover, it is well established that a respondent "is responsible for the reasonably foreseeable consequences of its conduct." *Tile, Marble, Terrazzo Finishers, Local No. 31*, 258 NLRB 1143, 1146 (1981); accord *Radio Officers' Union of Comm. Telegraphers Union v. NLRB*, 347 U.S. 17, 45 (1954) ("a man is held to intend the foreseeable consequences of his

⁶ The Company overlooks that the DBSWPA "allows for a degree of discretion to hire the predecessor's employees," as the judge noted (A 80 n.10). For example, under Section (b)(6) of the DBSWPA, the Company could have laid off Vantage employees by seniority, depending on operational needs. Similarly, under Section (b)(7), the Company could have terminated employees for cause during the 90-day transition period, and it did. (A 65; 95, 243-244.)

conduct”). As the Board aptly noted, given the Company’s conscious choice to both purchase and manage DBSWPA-affected buildings, “[i]t 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.” (A 66 n.13.)

Indeed, as the Company acknowledges (Br. 41), a key to *Burns* successorship is that the employer “intends to take advantage of the trained workforce.” *Fall River*, 482 U.S. at 41. Here, the Company purchased Broadway’s buildings and, the next day, took over Vantage’s management of those buildings, with Vantage’s trained workforce. In these circumstances, the Board reasonably concluded that “the [Company’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 90-day transition period. (A 66 n.13.)

2. The Board reasonably declined to defer its successorship determination until after the 90-day retention period ended

The Board’s determination (A 67) of the appropriate time to evaluate the Company’s bargaining obligation—upon assuming control of the predecessor’s operations and hiring a majority of its employees from the predecessor—is consistent with Board and court precedent, as well as the statutory policies underlying the successorship doctrine. Thus, the Board’s conclusion that the

Company was a *Burns* successor whose bargaining obligation attached upon hiring the predecessor's employees, even if it did so pursuant to the DBSWPA, is rational and consistent with the Act.

As discussed (pp. 14-16), the Supreme Court has recognized that employees have a “significant interest in being represented as soon as possible, an interest which is ‘especially heightened’ [here] ‘where many of the successor’s employees . . . find themselves after the employer transition in essentially the same enterprise, but without their bargaining representative.’” (A 67, quoting *Fall River*, 482 U.S. at 49.) Consistent with this recognition, the Board, with court approval, has held that the temporary or probationary status of the predecessor’s employees does not affect the successorship determination or necessitate delaying a successor’s bargaining obligation until after the probationary period ends. (A 67.) *See, e.g., Windsor Convalescent Ctr. of North Long Beach*, 351 NLRB 975, 978, 1000 (2007), *enforcement denied in part on other grounds sub nom. S&F Market Healthcare, LLC v. NLRB*, 570 F.3d 354 (D.C. Cir. 2009); *Sahara Las Vegas Corp.*, 284 NLRB 337, 337 n.4, 342-44 (1987), *enforced mem.*, 886 F.2d 1320 (9th Cir. 1989); *The Clarion Hotel-Marin*, 279 NLRB 481, 490 (1986), *enforced*, 822 F.2d 890 (9th Cir. 1987); *Denham Co.*, 218 NLRB 30, 31-32 (1975).

For instance, in *Windsor Convalescent Center*, the Board found that the employer became a *Burns* successor when it took over the predecessor’s nursing

facility and hired a workforce consisting mainly of the predecessor's employees, who were subject to evaluation after 90 days. 351 NLRB at 975, 978. The Board rejected the employer's argument that its bargaining obligation should not have attached until after the 90-day period ended because it had hired the predecessor's employees on a "temporary" basis. *Id.* at 978. In so ruling, the Board disagreed with the employer labeling the employees "temporary," as they "all had a reasonable prospect of continuing employment based solely on [the employer's] assessment of their work performance" after the probationary period. *Id.* at 1000. Therefore, the Board concluded that the establishment of a 90-day probationary period was insufficient to defer the successorship determination. *Id.*

Similarly, in *Sahara Las Vegas*, the employer stipulated that it had the attributes of a successor employer, but argued that the 90-day probationary period that it established for the casino employees "left doubt about the actual makeup of its work force until the probationary period was completed." 284 NLRB at 342. Rejecting the employer's argument, the Board affirmed the judge's finding that "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." *Id.* at 343.

The Company's efforts (Br. 53 n.9) to distinguish *Windsor Convalescent Center* and *Sahara Las Vegas* are unavailing. That the successor employers

themselves established the 90-day probationary periods in those cases does not undercut the Board's determination here. As the Board recognized, although the employers in those cases did not ultimately "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." (A 68.) Indeed, it is "at least as likely that employers in this situation will choose to retain a substantial number of the predecessor's employees to take advantage of their knowledge and expertise," which leads to a bargaining obligation. (A 68.) *See Fall River*, 482 U.S. at 41.

Like the employers in *Windsor Convalescent Center* and *Sahara Las Vegas*, the Company had options. For example, as explained (above at pp. 18-19), it could have negotiated with Broadway regarding the effects of hiring Vantage's employees. Or it could have chosen not to retain a majority of Vantage's employees under Sections (b)(6) and (7) of the DBSWPA, which allow a successor to lay off the predecessor's employees based on operational needs or to terminate them for cause during the 90-day period. (A 65 & 80 n.10.)

Recognizing those possibilities, the Board reasonably concluded that the temporary or probationary nature of employment "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.'" (A 68, quoting *Fall River*, 482 U.S. at 39.) Nor does it "defeat the bargaining obligation long

established” by Board law. (A 68.) *Accord Windsor Convalescent Ctr.*, 351 NLRB at 1000 (“Establishment 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.”).

Moreover, the Board has consistently proceeded with the successorship determination irrespective of whether the new employer was required by contract or statute to hire the predecessor’s employees. Thus, in *Denham Co.*, where “[o]ne of the express conditions of takeover imposed by [the predecessor] was that [the successor] retain [its] employees for a minimum period of 30 days,” the Board found that the new employer was a successor as of the date of the takeover based on the composition of the successor’s workforce. 218 NLRB 30, 31 (1975). The Board reasoned that, even assuming those employees were truly considered “probationary” during the first 30 days, they were still “employees” under the Act, entitled to the full panoply of Section 7 rights. The Board therefore rejected the successor’s claim that it “could not accurately gauge the composition and extent of union representation in its ultimate work force until the 30-day period expired.” *Id.* at 31-32. Likewise, in *The Clarion Hotel-Marin*, the Board found the respondent to be a successor where its entire workforce consisted of the

predecessor's employees because it had agreed in the sale documents to offer them employment. 279 NLRB 481, 490 (1986).⁷

The Court should reject the Company's speculation (Br. 50-51) that the Board's analysis would essentially render all employers *Burns* successors "even in the absence of substantial continuity in operations." This hyperbole ignores that the Company was not forced to purchase Broadway's buildings and take over Vantage's management operations, but rather, made a voluntary decision to do so, aware of the applicability of the DBSWPA. (See above pp. 16-20.) Moreover, the Company forgets that a new employer becomes a successor only if there is also "substantial continuity" in operations. *Fall River*, 482 U.S. at 43; accord *Pa. Transformer Tech.*, 254 F.3d at 222. Indeed, the Board's determination of *Burns* successorship here rested on the stipulated evidence establishing a substantial continuity in the enterprises when the Company assumed control of the business in essentially unchanged form.

Furthermore, the Company's view of the successorship doctrine would contravene the statutory goal of ensuring industrial stability through employees'

⁷ *Springfield Transit Management, Inc.*, 281 NLRB 72 (1986), also supports the Board's analysis. There, the Board found that the respondent became a successor when it took over the predecessor's operations and hired a workforce consisting almost entirely of the predecessor's clerical personnel, as required by the local transit statute. *Id.* at 78. Contrary to the Company's claim (Br. 52-53), that determination did not hinge on the Board's further finding that the new employer was also a "perfectly clear" successor bound to apply the preexisting terms and conditions of employment. *Id.*

continued representation despite a change in employers. The longstanding Board principle of determining successorship when the new employer has assumed control over the predecessor's operations and hired its employees "remove[s] any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees." *Fall River*, 482 U.S. at 38. Adopting the Company's position would allow new employers to avoid bargaining with the incumbent union and to thwart employees' legitimate expectation of continued representation.

The Company also misses the mark by noting (Br. 52-53) that it was not a "perfectly clear" successor, and was therefore free to set employees' initial terms of employment. *See Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enforced mem.*, 529 F.2d 516 (4th Cir. 1975), and discussion at p. 15 n.5 (explaining the "perfectly clear" exception). As the Board explained, employers subject to worker retention statutes can avoid "perfectly clear" successor status by announcing new terms and conditions of employment before or simultaneously with expressing their intent to retain the predecessors' employees, which is "precisely what happened here." (A 68-69.) Thus, the Board's decision does not force all new employers who hire employees under worker retention statutes to become "perfectly clear" successors, contrary to the Company's claim (Br. 50-51).

In short, the Board reasonably found that the Company made a conscious decision to retain the predecessor's workforce, and that, as a *Burns* successor, its bargaining obligation arose when it took over the predecessor's operations and hired a majority of its workforce from Vantage.

C. The Company's Remaining Contentions Lack Merit

The Company contends (Br. 32-33, 36-37, 41-42) that the Board's analysis contradicts and misinterprets settled law on successorship obligations, but it is the Company that ignores pertinent cases and relies on distinguishable and inapplicable authorities. To begin, the Company claims in passing (Br. 34, 50-51) that the NLRA preempts the DBSWPA, but it offers no analysis to support its position, nor does it explain the relevance of that summary assertion. Even assuming that its passing references are sufficient to preserve the argument for appellate review, which is not the case,⁸ the Board reasonably found, consistent with this Court's reasoning in *Washington Service Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995), that the NLRA does not

⁸ See *Bd. of Regents of the Univ. of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (merely referring to argument in opening brief is insufficient to preserve it); *U.S. v. Jernigan*, 341 F.3d 1273, 1283 n. 8 (11th Cir. 2003) (party must make more than "passing references" to issues to preserve them for review); see also Fed. R. App. P. 28(a)(9)(A) (opening brief must state party's "contentions and the reasons for them"); D.C. Cir. R. 28(a) (parties' briefs must contain "items required by FRAP 28").

preempt the DBSWPA under either the Board's *Garmon* or *Machinists* doctrines,⁹ and therefore, that no conflict exists between the two laws. (A 69.)

As the Board observed (A 69), and the Company overlooks, in *Washington Service Contractors Coalition*, this Court squarely rejected a claim that a similar worker retention law was preempted by the NLRA. *Id.* at 816-17. The Court found *Garmon* preemption was inapplicable because the statute "raise[d] no issue that the NLRB would have jurisdiction to decide under [Section] 7" and did not cover any matter "even arguably regulated by [Section] 8." *Id.* at 816. The Court also concluded that *Machinists* preemption would not apply, even if the Board had determined (as it did here) that the employer became a successor before the retention period expired, because such a finding would not "invoke 'conflict' between the [worker retention law] and the NLRA." *Id.* at 817.

As the Court further explained, because the NLRA "contains no implicit right of an employer to refuse to hire employees on the basis of union membership,

⁹ Under *Garmon* preemption, "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by [Section] 7 of the National Labor Relations Act, or constitute an unfair labor practice under [Section] 8, due regard for the federal enactment requires that state jurisdiction must yield." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). Thus, states may not regulate conduct that is arguably protected or prohibited by the Act. *Id.* at 246. On the other hand, under *Machinists* preemption, even conduct that is neither prohibited nor protected under the Act is exempt from state regulation if Congress intended that the conduct be left to the "free play of economic forces." *Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140-41 (1976).

or to refuse to recognize” a majority union, “[a]pplication of the successorship doctrine under the [worker retention law] . . . would not require the employer to do anything that it has a right under the NLRA to refuse.” *Id.* Finding the statute was “employee protective legislation having nothing to do with rights to organize or bargain collectively,” the Court concluded that “[t]he NLRA does not preempt such legislation.” *Id.* Nor, as the Board reasonably found (A 69), does the NLRA preempt the DBSWPA here.

Indeed, citing *Washington Service Contractors Coalition*, 54 F.3d at 816-17, the District Court for the Eastern District of New York determined that the DBSWPA—the very law at issue here—was not preempted by the NLRA because it “operates completely independently of collective bargaining,” “does not conflict with or inhibit the bargaining or dispute resolution process established by the NLRA,” and “does not regulate economic self-help activities.” *Alcantara v. Allied Properties, LLC*, 334 F.Supp.2d 336, 344-45 (E.D.N.Y. 2004). Therefore, under *Washington Service Contractors Coalition*, which the *Alcantara* court relied upon in analyzing the statute at issue here, the Court should likewise find the Act does not preempt the DBSWPA.

The Company further errs in relying on *Paulsen ex rel. NLRB v. GVS Props., LLC*, 904 F.Supp.2d 282 (E.D.N.Y. 2012), a ruling that preceded the administrative law judge’s recommended decision and the Board’s Decision and

Order. As the Company appears to acknowledge (Br. 3), district court rulings in cases seeking preliminary injunctive relief under Section 10(j) of the Act, 29 U.S.C. § 160(j), do not preclude the Board or a reviewing court from making contrary findings in subsequent proceedings. *See Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284, 1287-88 (D.C. Cir. 1993); *NLRB v. Kentucky May Coal Co.*, 89 F.3d 1235, 1239-40 (6th Cir. 1996); *DuBosie Chemicals, Inc.*, 144 NLRB 56, 59 (1963). Indeed, as the Seventh Circuit recognized in *NLRB v. Q-1 Motor Express, Inc.*, “[i]f the eventual outcome [of the Board’s proceedings] turns out to be different from what was predicted [by the district court], . . . it is obviously the prediction, not the outcome, that must be rejected.” 25 F.3d 473, 477 n.3 (7th Cir. 1994). After all, district court rulings in Section 10(j) cases “often must be made in the face of uncertainty about how the Board will eventually resolve the unfair labor practice issues.” *Coronet Foods*, 981 F.2d at 1287-88. Moreover, because the Act “anticipates court review, not preview, of the Board’s first instance decisions,” the “district court finding in a [S]ection 10(j) auxiliary proceeding would [not] later bind the [Board] when ruling, definitively, on the unfair labor practice charge and the remedy appropriate thereto.” *Id.*

Finally, in maintaining that successorship status can only be determined after the probationary period ends, the Company erroneously relies (Br. 14, 35, 45-46) on *M&M Parkside Towers, LLC*, 2007 WL 313429 (NLRB Div. of Judges, Jan. 30,

2007), a case where an administrative law judge merely made a recommended ruling that was never adopted by the Board and therefore has no precedential value. *See Rhode Island Hosp. Ass'n v. NLRB*, 667 F.3d 17, 30 (1st Cir. 2001) (acknowledging that judge's unreviewed opinion does not bind the Board).¹⁰ In any event, the Company is not aided by the language it quotes (Br. 46), where the judge opined that employees become "permanent" on "the date that offers of employment are actually made." *M&M Parkside Towers, LLC*, 2007 WL 313429 (NLRB Div. of Judges, Jan. 30, 2007). Here, the Company made job offers on the day it purchased Broadway's buildings, and admittedly did not consider the workers to be probationary. (A 77; 250.) The Company also misses the mark in asserting (Br. 35, 45-46) that in *M&M Parkside Towers*, the General Counsel espoused a position that differed from the Board's finding here. It is settled that the Board is not bound by an argument or theory that the General Counsel has advanced before it. *See Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (recognizing difference between the Board as an adjudicatory body and the General Counsel as a litigating party before the Board).

¹⁰ Though the Company suggests otherwise (Br. 23-24, 46-47), *Rhode Island Hospitality Association*, 667 F.3d at 30-31, and *California Grocers Association v. NLRB*, 52 Cal.4th 177, 204 (2011), most certainly did not adopt the judge's recommended ruling. On the contrary, both courts recognized that the Board had not yet ruled on whether successorship obligations attach at the outset or conclusion of a worker retention period mandated by law. Indeed, in *Rhode Island Hospitality Association*, 667 F.3d at 30-31, the First Circuit specifically noted the possibility that the Board could rule as it did here.

In sum, the Board's determination that the Company had an obligation to bargain with the Union when it took over the predecessor's business and hired a majority of its employees from Vantage, even though it hired them under the DBSWPA, comports with precedent and represents a reasonably defensible construction of the Act.¹¹ Accordingly, the Court should defer to the Board's analysis, and affirm its finding that the Company was a successor employer that violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

¹¹ Because the Board's decision "does not amount to a change in the Board's successorship analysis" (A 70 n.17), and is consistent with its precedent (see above pp. 21-31), there is no basis for the Company's claim (Br. 53-55) that the Board should have applied its holding only prospectively.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

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June 2016

ADDENDUM OF STATUTES AND RULES

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 7. [29 U.S.C. § 157]

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. [29 U.S.C. § 158]

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

....

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession

....

Sec. 10 [29 U.S.C. § 160]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

. . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in such 2112 of title 28, United States Code. Upon the filing of such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in

question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Relevant provisions of the Federal Rules of Appellate Procedure are as follows:

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

.....

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)

.....

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

GVS PROPERTIES, LLC)	
)	
Petitioner/Cross-Respondent)	Nos. 15-1305
)	15-1350
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	29-CA-077359
)	
and)	
)	
INTERNATIONAL ASSOCIATION)	
MACHINISTS AND AEROSPACE WORKERS,)	
AFL-CIO, DISTRICT LODGE 15, LOCAL)	
LODGE 447)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,581 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
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Dated at Washington, DC
this 1st day of June, 2016

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INTERNATIONAL ASSOCIATION)	
MACHINISTS AND AEROSPACE WORKERS,)	
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LODGE 447)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2016 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are a registered user 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 1st day of June, 2016