

No. 16-60333

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**ADAMS AND ASSOCIATES, INC. AND MCCONNELL, JONES, LANIER
& MURPHY, LLP**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITIONS 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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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that oral argument would be of assistance to the Court.

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**ON PETITIONS FOR REVIEW AND CROSS-APPLICATION FOR
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THE NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petitions for review of Adams and Associates, Inc. (Adams) and McConnell, Jones, Lanier & Murphy, LLP (MJLM) and the cross-application for enforcement of the National Labor Relations Board (the Board) of a Board Order issued against Adams and MJLM on May 17, 2016,

reported at 363 NLRB No. 193. (RE 1-31).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 petitions for review and the cross-application are timely; the Act places no time limit on such filings. Venue is proper under Section 10(f) because MJLM transacts business in this circuit. 29 U.S.C. § 160(f).

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the unchallenged portion of its Order remedying the unlawful refusal to hire Taylor based on her union activity?

2. Whether substantial evidence supports the Board’s finding that Adams violated Section 8(a)(3) and (1) of the Act by refusing to hire five employees of its predecessor in an attempt to avoid a bargaining obligation?

¹ “RE” cites are to the Record Excerpts filed with Adams’ opening brief. “Tr.” refers to the hearing transcript. “GCX” and “RX” refer to hearing exhibits introduced by the General and the employers (Adams and MJLM), respectively. References preceding a semicolon are to the Board’s findings; cites following a semicolon are to supporting evidence. “Br.” cites are to Adams’ opening brief; “MJLM Br.” refers to MJLM’s opening brief.

3. Whether substantial evidence supports the Board's findings that Adams 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. Those findings turn on two subsidiary issues:

a. Whether the Board reasonably determined that Adams forfeited its right as a successor employer to set initial terms and conditions of employment by not announcing its intent to establish a new set of conditions prior to, or simultaneously with, its expressed intent to retain the predecessor's employees;

b. Alternatively, whether the Board reasonably determined that Adams' discriminatory hiring practices prevented it from setting initial terms.

4. Whether substantial evidence supports the Board's finding that Adams' refusal to allow Taylor access to the facility constituted bad-faith bargaining and violated Section 8(a)(5) and (1) of the Act.

5. Whether the Board's remedy for the unlawful transfer of bargaining unit work is within its discretion.

6. Whether substantial evidence supports the Board's finding that Adams and MJLM are joint employers.

STATEMENT OF THE CASE

Acting on unfair-labor-practice charges filed by the Sacramento Job Corps Federation of Teachers, AFT Local 4986, American Federation of Teachers (the Union), the Board's General Counsel issued an amended consolidated complaint alleging that Adams 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. The complaint also alleged that Adams and MJLM are joint employers and jointly and severally liable for remedying the alleged violations.

Following a hearing, an administrative law judge issued a decision and recommended order, finding that Adams had committed many of the alleged violations. First, the judge found that Adams violated Section 8(a)(3) and (1) of the Act by unlawfully refusing to hire predecessor employees as part of a union-avoidance scheme. Next, the judge found that Adams' discriminatory hiring created a bargaining obligation, and, therefore, the unilateral changes to mandatory terms and conditions of employment violated Section 8(a)(5) and (1) of the Act. In making this finding, the judge rejected the General Counsel's alternative theory that Adams incurred a bargaining obligation as a "perfectly clear" successor. The judge also rejected the contention that Adams had unlawfully refused to hire an employee because of union activity, reasoning that such a finding was unnecessary given the discriminatory refusal-to-hire determination. The judge further found

that Adams bargained in bad faith in violation of Section 8(a)(5) and (1) by banning a union representative from its facility. Finally, the judge determined that MJLM and Adams constitute joint employers. After considering exceptions to the judge’s decision filed by the parties, the Board issued a Decision and Order reversing the judge on two issues – incurring an obligation to bargain as a “perfectly clear” successor and refusing to hire an employee due to union activity. The Board affirmed, with minor changes, the remaining recommendations.

I. THE BOARD’S FINDINGS OF FACT

A. The Parties; Background

MJLM provides management, educational, and student services at Job Corps centers. The Job Corps program, administered by the United States Department of Labor (DOL), provides academic training toward a high school diploma and vocational training for economically disadvantaged young adults. Adams provides management and student services at Job Corps centers. Its CEO is Roy Adams. (RE12-13; GCX1uu,1vv, Tr.42.)

In February 2014, DOL awarded the service contract at the Sacramento Center (Center) to MJLM. MJLM hired Adams as its subcontractor to operate the Center. Before the award, Horizons Youth Services (Horizons) operated the Center under a DOL contract and had a collective-bargaining relationship with the Union. The bargaining unit included “[a]ll full-time Residential Advisors (RA),

Non-Residential Advisors, and Day Residential Advisors employed at the [Center].” Horizons employed 25 bargaining unit RAs, who oversee the students residing in the Center’s dormitories. The parties extended the most recent agreement, expiring on June 30, 2013, until March 9, 2014. (RE2,13; GCX1uu,1vv, 5,8, Tr.42, 55, 481.)

B. The Union Learns that Adams Will Take Over the Center’s Operations; Adams Meets with Incumbent RAs

On February 7, Horizons informed the Union that DOL had awarded MJLM the contract to operate the Center. On February 11, the Union notified MJLM that it was the exclusive collective-bargaining representative of the unit employees and requested information concerning the hiring process. On February 13, Adams responded to the Union, stating that it would be responsible for the hiring and employment of the Center’s RAs. (RE2; GCX17,18, Tr.486.)

Also on February 13, Adams Executive Director Jimmy Gagnon met with the Center’s RAs to announce the transition and discuss the hiring process. Gagnon, the transition lead, had overall hiring responsibility. He told employees that they had been “doing a really good job” and that Adams “didn’t want to rock the boat” and “wanted a smooth transition.” (RE2; Tr.54.) Genesther Taylor, identifying herself as the union president, asked about the availability of RA positions and what factors might prevent hiring an incumbent employee. Gagnon

responded that, “aside from disciplinary issues, he was 99 percent sure that [they] would all have a job.” (RE2; Tr.54.)

Gagnon announced that Adams was creating five new “residential coordinator” (RC) positions, which Horizons did not have. Gagnon explained that RCs share the same job duties as RAs, but also fill in for the dormitory supervisors and shift managers. Gagnon invited employees to review job descriptions and to apply for any two positions. Gagnon declined Taylor’s request for copies of the job descriptions. Employees had to return completed applications within 24 hours. (RE22-23; GCX4,5, Tr.53-57,533-38,542-43,624-28.)

C. Taylor Visits the Transition Office; the Union Demands Bargaining but Receives No Response

On February 14, Taylor visited the transition office to submit her employment application and again asked for copies of the job descriptions and posed questions concerning the transition. Gagnon again refused to provide copies and directed Taylor to Adams’ General Counsel Tiffinay Pagni. Taylor, “pursuing union activities” (RE16), also asked Adams’ Deputy Center Director Kelly McGillis for an employment application for a co-worker on medical leave. (RE2,5; Tr.57-61.)

That same day, the Union demanded that Adams recognize and bargain with it as the exclusive bargaining representative of the unit employees. Adams did not respond. (RE2; GCX19, Tr.491-92.)

D. Adams Begins the Hiring Process

Adams and MJLM conducted the hiring process in mid-February and early March. Adams made hiring decisions on an on-going basis throughout the transition period. (RE14; Tr.136.)

1. Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts

When hiring, Adams had to comply with Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts, 74 Fed. Reg. 6103 (Feb. 4, 2009) (Executive Order). The Executive Order requires a right of first refusal for displaced employees whereby successor contractors and subcontractors must offer employment to the predecessor contractor's "qualified" employees. 29 C.F.R § 9.1 (2013). A successor contractor must also base its decision regarding an employee's qualifications on written credible information provided by a knowledgeable source, such as the predecessor contractor, the local supervisor, the employee, or the contracting agency. 29 C.F.R. § 9.12(c)(4). The contractor must make a bona fide offer of employment to qualified applicants. 29 C.F.R. § 9.12(b). (RE14.)

2. Adams' RA Hiring System

To fill the Center's RA positions, Adams organized interviews with and spoke to Horizons managers about incumbent RAs. Adams and MJLM representatives interviewed applicants. At the end of each day, the interviewers

met with Adams' Human Resources Manager Valerie Weldon and Gagnon. While the interviewers made hiring recommendations, Gagnon made the final hiring decision. In doing so, he relied on an annotated employee list, disqualification forms, and interview evaluation forms. (RE14; GCX9,RX24, Tr.136,607,658,666-67,786-96,913.)

a. The "Horizons List"

During the transition period, Horizons did not provide personnel files, but assembled a list of current employees with job titles, hire dates, and seniority dates (Horizons List). As Adams' representatives spoke with Horizons supervisors about incumbent RAs, they annotated the Horizons List to include information from those conversations. (RE7,8; GCX13, Tr.788-89,795-96.)

On February 27, newly-hired manager Lee Bowman, a former Horizons supervisor, spoke with McGillis about incumbent applicants. Bowman annotated the Horizons List to recommend against hiring: Shannon Cousins-Kamara, Andre Lang, Macord Nguyen, Genesther Taylor, and Azaria Ting. McGillis added comments to the Horizons List based on her conversation with Bowman, including that Cousins-Kamara had an "integrity issue," Nguyen "sleeps and steals," Taylor "doesn't get much done," and Ting was "not good" at the job. (RE15; GCX13, Tr.332-27,344-45.)

b. Disqualification forms

Gagnon instructed McGillis to complete disqualification forms for any incumbent who received negative feedback from a Horizons supervisor during the transition. Immediately following her meeting with Bowman, McGillis completed disqualification forms for Cousins-Kamara, Lang, Nguyen, Taylor and Ting. Based on Bowman's notes and her discussion with Bowman, McGillis indicated on each employee's disqualification form that Adams "has reason to believe, based upon written credible information from a knowledgeable source, that this employee's job performance while working on the current contract has been unsuitable." (RE15; GCX26,RX9, Tr.799-801,965.)

c. Interview evaluation forms

All incumbent applicants were interviewed. Applicants were rated in nine categories on a scale of one to four, with one being excellent and four unsatisfactory. Interviewers completed an interview evaluation form containing the applicant's rating. (RE14-15; GCX10.)

E. Adams Hires a Majority of Incumbent Employees and Announces, for the First Time, Changes in Employment Terms

By March 1, Adams had hired nine of the fourteen members of the Horizons bargaining unit who applied for RA positions. Therefore, a majority of the RAs hired were former unit employees. Additionally, Adams hired former Horizons substitute RAs and one former Horizons custodian for the remaining RA positions.

Adams refused to hire Cousins-Kamara, Lang, Nguyen, Taylor, and Ting.

(RE3,16; GCX13,RX15,18,20,22,25.)

Prospective employees received offer letters that:

- specified wage rates (the same as the RAs' wage rate with Horizons);
- stated that employees were "eligible for all Company-sponsored benefits, as defined by our Human Resources Policies";
- established schedules (which for some incumbent RAs differed from their Horizons' schedule);
- provided that Adams "reserves the right to adjust work schedules as a business necessity and/or to meet program service needs"; and
- explained that employment was "at-will."

Employees signed employment agreements before beginning work, which provided that employment was at-will, that employees were subject to Adams' disciplinary policies and procedures, and that employment-related disputes must be resolved through mandatory arbitration. The offer letters and employment agreements articulated changes to unit employees' terms and conditions of employment. (RE2; GCX14, Tr.378-80,384-89.)

F. CEO Adams Reacts Negatively to the Hiring of a Majority of Predecessor Employees; Adams Begins Operations and Implements New Terms; Weldon Is Disciplined

Upon learning that Adams hired enough predecessor employees to incur a bargaining obligation, CEO Adams told Weldon, “[W]e screwed up. The Union was now involved and he was not happy.” (RE16; Tr.154.) In a March 4 email to hiring staff, CEO Adams wrote that, “[u]nfortunately, we hired the majority of the union members at Sacramento and we, therefore, must negotiate a Collective Bargaining Agreement and incur other associated union legal costs.” (RE16; GCX11(f).)

On March 11, Adams took over the Center with no discernible change in operation. Consistent with the offer letters and employment agreements, Adams unilaterally implemented changes in employees’ terms and conditions of employment, including:

- ceasing to give effect to the progressive discipline, just cause, and grievance provisions of the collective-bargaining agreement;
- implementing new disciplinary policies and procedures, at-will employment, and a mandatory arbitration policy for employment-related disputes;
- modifying the terms of the existing probationary period;
- eliminating existing health benefits; and

- changing some RAs' schedules from fixed shifts to rotating shifts.

Adams also assigned RA work to employees in the newly created RC position.

(RE3; GCX14.)

On March 22, CEO Adams drafted a memorandum for Pagni's and Weldon's personnel files again expressing dissatisfaction with the hiring team for not "achiev[ing] minimum performance at the Sacramento transition" because the priority of "avoid[ing] union recognition" was not fulfilled. (RE16; GCX11(j).) He concluded that the failure occurred "[d]espite repeated direction, guidelines, forms, discussion, HR staff experience, qualifications, 10 years of union avoidance responsibility, and, quite frankly, common sense." (RE16; GCX11(j).)

On March 27, Pagni asked Weldon to explain why RA positions were filled with incumbent RAs rather than with "Sub RAs," non-bargaining unit employees. (RE16; GCX11(i).) Pagni told Weldon that CEO Adams "raised this issue repeatedly." (RE16; GCX11(i).) On April 24, Weldon received a Final Written Warning, criticizing her failure to provide union-avoidance training. This written warning was the first Weldon had received after completing a transition. (RE16; GCX11(k).)

G. Adams Recognizes the Union, but Bars Taylor from the Center; the Parties Begin Bargaining; Adams Discharges Four Employees

On March 28, Adams recognized the Union. Before the first bargaining session on September 10, Adams refused Center access to

Taylor, the Union president and bargaining team member. Adams cited a policy that prohibited “[f]ormer staff and students, regardless of reason for separation, [from being] allowed on Center without the prior authorization of the Center Director or his/her designee.” The policy provided further that “[n]o group or individual . . . whose purpose can reasonably be expected to create controversy or disturbance among staff members of students, or who might interfere with their welfare or training, will be allowed on-Center.” (RE 20,25;GCX21,Tr.500-06.)

In April, Adams discharged Sheila Broadnax. It discharged Rolando Aspiras, Bienvenido Viloría, and Vincente Moran in September. Adams did not notify the Union of the discharges. (RE 25; Tr.501-04,1018.)

The Union renewed its request to bargain at the Center on September 10, October 14 and November 17. In December, Adams notified the Union that Taylor would be allowed on-site, and on January 9, 2015, the parties bargained at the Center. (RE25; Tr.500,506-10.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On May 17, 2016, the Board (Chairman Pearce and Members Hirozawa and McFerran) issued a Decision and Order affirming the judge’s rulings and conclusions and adopting the recommended order, as modified. The Board disagreed with the judge regarding two issues. First, the Board found that Adams

violated Section 8(a)(3) and (1) of the Act by refusing to hire Taylor, a former Horizons employee, because of her union activity. Second, the Board concluded that Adams was a “perfectly clear” successor because it did not announce a clear intent to establish new conditions of employment prior to, or simultaneous with, its expressed intent to retain Horizons employees. As a consequence of being a “perfectly clear” successor, the Board determined that Adams forfeited the right to make unilateral changes with respect to mandatory subjects of bargaining.

Alternatively, and in agreement with the judge, the Board determined that Adams had violated Section 8(a)(3) and (1) by refusing to hire five Horizons employees to avoid a bargaining obligation and likewise forfeited the right to make unilateral changes. Therefore, the Board found that Adams, being a “perfectly clear” successor or having engaged in discriminatory hiring practices, violated Section 8(a)(5) and (1) by:

- ceasing to give effect to the progressive disciplinary, just cause, and grievance provisions of the collective-bargaining agreement between Horizons and the Union;
- implementing new disciplinary policies and procedures, at-will employment, and a mandatory arbitration policy, which resulted in four unlawful discharges;
- modifying the terms of the probationary period for unit employees;

- eliminating health benefits;
- changing shifts schedules; and
- transferring bargaining unit work outside the unit.

The Board, in further agreement with the judge, found further that Adams violated Section 8(a)(5) and (1) by barring the union president's access to the Center for bargaining. Lastly, the Board agreed with the judge's recommended conclusion that Adams and MJLM constitute joint employers.

The Board Order requires Adams and MJLM 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. Affirmatively, the Order requires Adams and MJLM to offer reinstatement to the five Horizons employees who were discriminatorily not hired, to offer reinstatement to the four employees who were discharged, and to make all of the discriminatees whole. The Order further requires Adams and MJLM to, upon request by the Union, rescind the unilateral changes and restore the status quo ante until the parties reach an agreement or lawful impasse and to make whole the unit employees who sustained losses as a result of the unilateral changes. The Board's Order also directs Adams and MJLM to rescind the transfer of bargaining unit work, to recognize the Union as the exclusive collective-bargaining representative of the RCs, and to make RCs whole for any losses. The Order also directs Adams

and MJLM to allow the union president access to the Center for union and bargaining activity. Lastly, the Order requires Adams and MJLM to post a remedial notice. (RE 9-10.)

On July 29, 2016, the Board denied Adams' motion for reconsideration. The Board rejected Adams' challenge to record evidence supporting the discriminatory hiring scheme, affirmed the "perfectly clear" successor finding, and explained its rationale for the unlawful transfer-of-work remedy. (RE84-88.)

SUMMARY OF ARGUMENT

1. Adams has failed to contest the Board's finding that it refused to hire Taylor because of her union activity. The Board is thus entitled to a judgment summarily enforcing the portions of its Order based on that uncontested finding.

2. Substantial evidence supports the Board's finding that Adams had an obligation to bargain with the Union before setting the terms and conditions of employment. In this regard, the Board made alternative findings, either of which render Adams' subsequent unilateral changes unlawful. First, the Board found that Adams engaged in an unlawful union-avoidance hiring scheme. The credited record evidence demonstrates that Adams acted with an ill-motive and failed to show that it would have made the same decisions in the absence of union considerations. Having engaged in discriminatory hiring, Adams lost its right to unilaterally set the initial terms and conditions of employment.

Second, and alternatively, the Board found that Adams was a “perfectly clear” successor with an obligation to bargain with the Union before making changes in existing terms and conditions of employment. The Board’s finding is consistent with *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 294-95 (1972), in which the Supreme Court stated that in circumstances “in which it is perfectly clear that the new employer plans to retain all of the employees in the unit,” the successor employer must consult with the employees’ bargaining representative before fixing the initial terms and conditions of employment. The record amply supports the Board’s finding that Adams led Horizons employees to believe that it intended to retain them under substantially the same working conditions. Adams did not announce at any time prior to, or simultaneous with, its expressed intent to be a “perfectly clear” successor that terms and conditions of employment would change. Accordingly, the Board found under either theory that Adams violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union before implementing wholesale changes to employees’ terms and conditions of employment.

3. The Board also found that Adams engaged in bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act by refusing to allow the union president access to the Center for bargaining. The Board properly rejected as

unsupported Adams' reliance on a policy that prohibited access to former Adams employees and those who may disrupt operations.

4. The Board's Order properly remedies the unlawful transfer of bargaining unit work to non-unit employees. The undisputed record evidence shows that Adams transferred the RA work outside the unit without bargaining. Consistent with its broad remedial authority, the Board ordered Adams to bargain over the transfer and recognize the Union as the bargaining representative of the RCs.

5. Lastly, substantial evidence supports the Board's finding that Adams and MJLM are joint employers. The record establishes that the two entities coordinated wage rates, interviews, and hiring. It also shows that MJLM dictated the holiday schedule and reserved the right to terminate Adams' employees. Adams and MJLM simply point to other factors tending not to support a joint-employer finding, but those factors cannot overcome the weight of the evidence showing meaningful control over and participation in actions such as hiring, removing, and setting pay.

STANDARD OF REVIEW

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." *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1362 (7th Cir. 1997) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221,

236 (1963)). The Court’s “deference to the Board’s expertise extends to its findings of fact and application of law.” *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007). The Court will uphold the Board’s decision “if it is reasonable and supported by substantial evidence on the record considered as a whole.” *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003). The “substantial evidence” test requires the degree of evidence that could satisfy a reasonable factfinder. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998); *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). Therefore, under the substantial evidence standard, a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). As this Court has observed, “[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the . . . Board is not supported by substantial evidence.” *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978).

“In determining whether the Board’s factual findings are supported by the record, [the Court does] not make credibility determinations or reweigh the evidence.” *NLRB v. Allied Aviation Fueling*, 490 F.3d 374, 378 (5th Cir. 2007). The Board’s adoption of the administrative law judge’s credibility determinations

must be upheld absent a showing that they are unreasonable, self-contradictory, based upon inadequate reasons or no reason, or unjustified. *Dynasteel Corp. v. NLRB*, 476 F.3d 253, 257 (5th Cir. 2007).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCHALLENGED PORTION OF ITS ORDER REMEDYING THE UNLAWFUL REFUSAL TO HIRE TAYLOR BECAUSE OF HER UNION ACTIVITY

The Board found (RE18-19) that Adams violated Section 8(a)(3) and (1) of the Act by refusing to hire Taylor as part of its unlawful union-avoidance scheme (*see infra* pp. 22-38). The Board also found (RE5-7) that Adams unlawfully refused to hire Taylor because of her union activity. In its opening brief, Adams contests (Br. 30-45) only the former finding. Because Adams does not challenge the Board's independent finding that Adams did not hire Taylor because of her union activity, the Court should summarily enforce that portion of the Board's Order. *See NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 360 (5th Cir. 1978) (granting summary affirmance on uncontested violation); *see also* Fed. R. App. Proc. 28(a)(9)(A) (a party must raise all claims in its opening brief).²

² The Court should not excuse Adams' failure to challenge the independent violation based on union activity by relying on its challenge to Taylor's non-hire as part of the union-avoidance scheme. While the Court "liberally construe[s] briefs in determining issues presented for review," *Carmon v. Lubrizol Corp.*, 17 F.3d 791, 794 (5th Cir. 1994), Adams simply does not present for review the Board's

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT ADAMS VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO HIRE FIVE EMPLOYEES OF ITS PREDECESSOR IN AN ATTEMPT TO AVOID A BARGAINING OBLIGATION

A. Applicable Principles

Section 8(a)(3) of the Act prohibits discouragement of union membership “by discrimination in regard to hire.” 29 U.S.C. § 158(a)(3).³ This prohibition applies equally to the hiring decisions of an employer who takes over a business formerly operated by another employer. As described more fully below (p. 41), a successor employer incurs an obligation to recognize and bargain with a union when a majority of its employees, in a substantial and representative complement, were employed by the predecessor. Thus, an employer may not lawfully avoid, or attempt to avoid, a bargaining obligation by pursuing a hiring policy designed to keep predecessor employees in the minority. *See Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 262 & n.8 (1974); *NLRB v. Houston Dist. Servs., Inc.*, 573 F.2d 260, 263-64 (5th Cir. 1978). 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 recognizing and bargaining with a

finding that it violated Section 8(a)(3) by refusing to hire Taylor based on union activity.

³ A violation of Section 8(a)(3) creates a derivative violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Nat’l Fabricators, Inc. v. NLRB*, 903 F.2d 396, 398 n.1 (5th Cir. 1990).

union as a successor employer. *Houston Dist.*, 573 F.2d at 264; *see also Great Lakes Chem. Corp. v. NLRB*, 967 F.2d 624, 627-29 (D.C. Cir. 1992).

In most discrimination cases, the critical inquiry is whether union considerations motivated the employer's actions. 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 protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 186-87 (5th Cir. 1998). If an employer's reasons for its actions are pretextual – namely, the reason did not exist or was not relied upon – the employer has not met its burden, and the inquiry ends. *New Orleans Cold Storage & Warehouse Co. v. NLRB*, 201 F.3d 592, 600-01 (5th Cir. 2000).

Unlawful motivation can be inferred from circumstantial and direct evidence. *Thermon Heat*, 143 F.3d at 186. 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.” *United States 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 Adams violated Section 8(a)(3) and (1) of the Act by discriminating against union applicants when hiring the predecessor’s employees.

B. Adams Unlawfully Refused To Hire Five Horizons Employees

Substantial evidence supports the Board’s finding that Adams’ hiring decisions concerning Cousins-Kamara, Lang, Nguyen, Taylor, and Ting were unlawfully motivated. Adams, “from the beginning of the transition period,” demonstrated a “corporate intent to avoid successor status.” (RE16.) With respect to these five employees, Adams sanitized hiring records to omit references to the Union. It also altered and shredded interview forms to either strengthen or hide its reasons for not selecting the applicants. (RE16.) Adams also offered purely

pretextual reasons for its failure to hire the five employees and “sent back” officials with instructions to “strengthen the reasons for not hiring.” (RE16); *see also* pp. 33-38.

Adams’ corporate hiring plan included “staffing priorities specifically established to avoid hiring a majority of its work force from its predecessor.” (RE17.) The highest levels of the organization directed hiring personnel “to avoid hiring former unit employees in an effort to avoid an obligation to recognize the Union.” (RE17.) As the Board explained, “CEO Adams’ corporate goal was to avoid Union recognition,” (RE17), despite Horizons employees ultimately comprising a majority of Adams’ RAs. (RE15.) CEO Adams outwardly complained that his “team failed him.” (RE15.) He made his disappointment clear in the March 4 email to hiring committee members, stating that “unfortunately” Adams had hired a majority of union members. (RE 16; GCX11(f)). The next week, while de-briefing the hiring process, CEO Adams told Weldon that he was “very angry” and insisted that the hiring team had “screwed up” because the Union was now involved. (Tr. 154.)

CEO Adams continued to berate staff for their failure to avoid a bargaining obligation. In the March 22 memorandum for Pagni’s and Weldon’s personnel files, he explained that a “priority” during the transition was to avoid union recognition “within compliance guidelines,” and that the human resources

department had “grossly failed” to meet this expectation despite “10 years of union avoidance responsibility.” (RE16; GCX11(j).) Given the nature of the guidelines, which put the thumb on the scale in favor of hiring predecessor employees, the principal avenue to accomplish CEO Adams’ priority was to selectively refuse to hire incumbent employees.⁴

Adams’ calculated plan to selectively hire was on full display in its communications with and treatment of Weldon following the transition. Pagni’s March 27 email directed Weldon to explain how the pool of “ample incumbent [non-unit] Sub RA’s” was not used to hire, when “[t]hese incumbent employees could have been used to fill the RA positions without acknowledging the union.” (GCX11(i).) Pagni then reminded Weldon that CEO Adams “raised this issue *repeatedly*.” (GCX11(i) (emphasis added)). Weldon also received a final written warning – her first ever for transition efforts – which cited failure to provide union-

⁴ Adams did not present to the Board the claim (Br. 41 n.15) that Section 8(c) of the Act (29 U.S.C. § 158(c)) defeats an animus finding by privileging certain anti-union statements. The Court is therefore without jurisdiction to consider it: “No 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.” 29 U.S.C. 160(e); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (court lacks jurisdiction to consider issue not raised before Board). In any event, Section 8(c) does not affect the Board’s finding of animus based on CEO Adams’ anti-union statements. While that section protects certain statements from constituting independent violations of the Act, *see, e.g., Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 635-36 (5th Cir. 2003), it does not limit the use of those same statements as evidence of animus.

avoidance training. Thus, CEO Adams' response to a majority hire of Horizons employees, and Adams' efforts to hide its plan, provides ample evidence of unlawful motive. (RE17.)

1. The Board's animus finding does not rely on privileged evidence

Adams challenges the Board's animus finding by claiming that the Board relied on evidence subject to the attorney-client privilege. Specifically, Adams asserts (Br. 35-40) that the Board should have excluded certain General Counsel (GC) Exhibits and parts of Weldon's testimony as privileged attorney-client communications. Adams failed to meet its burden to demonstrate that the privilege applies to the documents and testimony.

Before addressing the merits of the argument, an explanation of how the privilege claim arose and a clarification as to which evidence remains at issue is required. At the unfair-labor-practice hearing, Adams invoked the attorney-client privilege in response to a subpoena request. After an in-camera review, the judge ordered the disclosure of most of the subpoenaed documents, drawing a distinction between communications regarding human resource matters and communications relating to legal advice. (Tr.31-40.) The documents were then admitted into evidence as GC Exhibits 11(a) through (l).⁵

⁵ Adams did not object to the admission of those exhibits. In response to the General Counsel's motion to admit the documents, Adams' counsel stated: "Well,

Before the Board, Adams excepted to the judge's disclosure of GC Exhibits 11(a)-11(b) and 11(d) -11(l) and certain testimony. The Board determined (RE1 n.5), without deciding whether the evidence was privileged, that the animus finding did not require reliance on GC Exhibits 11(d), (g), or (h) or Weldon's testimony about her hiring conversations with Gagnon.⁶ In finding animus, the Board did not rely on GC Exhibits 11(a), (b), or (c).⁷ Therefore, Adams only challenges GC Exhibits 11(f), (i), (j), (k), and (l).⁸ Adams also challenges the

11(a), I want to object on attorney/client privilege, but I'm going to say no objection. 11(b), no objection. 11(c), no objection. 11(d), no objection. 11(e), no objection. 11(f), no objection. 11(g), no objection. I don't -- and 11(h), I'm going to object that it lacks foundation. * * * 11(k), it's -- I object to it, it lacks foundation. * * * That's correct, (i) and (j) we do not object." (Tr.194-95.) In response to whether Adams' counsel objected to GC Exhibit 11(l), counsel responded: "No, Your Honor." (Tr.197.) Moreover, counsel subsequently withdrew his objection to GC Exhibits 11(h) and 11(k). (Tr.196-97.) Therefore, every document in GC Exhibit 11 was admitted into evidence without objection from Adams.

⁶ GC Exhibit 11(d) is an email from Pagni to Weldon, Gagnon, and MJLM partner Sharon Murphy providing hiring guidance in conformance with the Executive Order. GC Exhibits 11(g) and (h) are email threads between Pagni and Weldon concerning information gathered by Weldon to support the hiring decisions.

⁷ GC Exhibit 11(a) is an email from Pagni to Weldon and the Vice President of Operations, Susan Larson, with an attached notice to incumbent employees of their rights and a notice of disqualification from an offer of employment. GC Exhibit 11(b) is an email from Weldon to Pagni asking about wage rates for union hires. GC Exhibit 11(c) is a travel schedule for the transition team.

⁸ GC Exhibit 11(f) is CEO Adams' March 4 email. GC Exhibit 11(i) is Pagni's March 27 email to Weldon questioning the hiring process. GC Exhibit 11(j) is the March 22 memorandum from CEO Adams to Pagni documenting significant

Board's reliance on Weldon's testimony about a conversation she had with CEO Adams concerning his anger at failing to avoid union recognition.

Under well-established law, the attorney-client privilege applies:

“(1) Where legal advice of any kind is sought; (2) from a professional legal advisor in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal advisor; (8) except the protection be waived.” *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982) (quoting 8 J. Wigmore Evidence § 2292 at 554 (J. McNaughton rev. 1961)). The Court has observed that “what is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.” *El Paso Co.*, 682 F.2d at 538 (internal quotations omitted). The party asserting the privilege has the burden of proof. *See United States v. Powell*, 379 U.S. 48, 58 (1964). Additionally, the Court disapproves of invoking the privilege “as a blanket over an undifferentiated group of documents.” *El Paso Co.*, 682 F.2d at 539. The Court requires that the privilege “be specifically asserted with respect to particular documents.” *Id.*

performance concerns. GC Exhibit 11(k) is Weldon's final written warning. GC Exhibit 11(l) is an email from CEO Adams to Weldon regarding perceived transition failures.

Adams failed to sustain its burden of proof that the evidence constitutes privileged communication. At no point has Adams attempted to demonstrate that any challenged communication satisfies the standard for attorney-client privilege. Instead, Adams faults (Br. 39) the judge's distinction between communications involving human resource matters and communications involving legal advice.⁹ But Adams must do more than criticize the judge. It must specifically identify how the communications at issue involve the seeking of legal advice from a legal advisor. *See Patrick Cudahy, Inc.*, 288 NLRB 968, 971 n.13 (1988) (“It is *communication* between attorney and client related to the giving of legal advice that is privileged – not simply documents that pass between them.”) (Emphasis in original). Adams has not done so. Further, Adams' position that the communications must be privileged because they involve Weldon and Pagni, who are both attorneys but do not necessarily serve in that role at all times, contravenes this Court's precedent disapproving of treating documents as an undifferentiated group. *See El Paso Co.*, 682 F.2d at 539.

⁹ Treatises and precedent support that view. *See, e.g.*, Epstein, 1 Attorney-Client Privilege and the Work Product Doctrine 205-06 (5th ed. ABA 2001) (“A presumption has now arisen that an attorney employed in the legal department of a corporation is employed to provide legal advice but an attorney employed on the business or management side of a corporation is not.”); *Breneisen v. Motorola, Inc.*, No. 02-C-50509, 2003 WL 21530440, at *3 (N.D. Ill. July 3, 2003) (“There is a presumption that a lawyer in a legal department of the corporation is giving legal advice, and an opposite presumption for a lawyer who works on the business or management side.”).

Contrary to Adams' claim (Br. 40), the Board did not "effectively concede" that the judge admitted improper evidence. Rather, the Board found (RE1 n.5) that certain documents were unnecessary to the consideration of animus. As the Board explained (RE1 n.5), "other record evidence," such as the sanitization, alteration, and shredding of documents and the false reasons proffered for its decisions, demonstrates Adams' unlawful motive.

2. Adams' remaining arguments contesting motive lack merit

Adams further challenges the Board's unlawful motive finding as lacking evidentiary support and being based on "suspicion, conjecture, and theoretical" speculation. (Br. 33) This challenge fails. There is nothing theoretical about Adams' clearly expressed desire to hire non-unit employees ahead of incumbent RAs or Adams' repeated emphasis of that goal. Neither suspicion nor conjecture is needed to infer unlawful motivation from CEO Adams' "very angry" reaction at his staff "screw[ing] up" the union-avoidance plan.

Attempting to minimize the explicit discriminatory plans laid bare in the record, Adams asserts that the Board relied "primarily on the inference that [Adams'] hiring personnel were 'under orders to avoid hiring former unit employees to avoid an obligation to recognize the Union.'" (Br. 33, quoting RE17.) The Board relied on this reasonable inference *in addition to* the credited evidence discussed above. (*See* pp. 24-27.) Further, credited direct evidence of

specific orders to avoid certain hires, such as Pagni’s March 27 email to Weldon expressing CEO Adams’ desire to engage in a hiring process that sidestepped union recognition, flatly refutes Adams’ assertion that its CEO “never expressly or implicitly directed Pagni or Weldon to avoid hiring Horizons RAs.” (Br. 41.) Moreover, caselaw does not support Adams’ suggestion that the Board needed, in addition to the already “overwhelming evidence” of anti-union animus (RE17), to demonstrate that hiring personnel were “in fact ordered,” (Br. 34), to avoid hiring incumbent unit employees. The assertion ignores the axiomatic principle that animus can be inferred from circumstantial evidence. *See Thermon Heat*, 143 F.3d at 186; *NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 296 (5th Cir.1980) (Board’s findings will be upheld if based on plausible inferences drawn from the evidence).

Adams points to (Br. 34) testimony from Weldon, Gagnon, Pagni, and McGillis that they never received instructions to engage in union-avoidance hiring. The Court should decline Adams’ invitation to reweigh the evidence. *See Allied Aviation Fueling*, 490 F.3d at 378. Moreover, this undeniably self-interested testimony cannot outweigh the formidable documentary evidence supporting the Board’s finding that Adams implemented a union-avoidance plan from the outset.

Finally, Adams’ reliance (Br. 31-33) on *Brown & Root* is misplaced. In that case, the court explained that the Board’s finding that the employer unlawfully refused to hire incumbents to avoid a bargaining obligation was “crucial” to the

Board's independent finding that the employer threatened employees with reprisals for supporting the union in violation of Section 8(a)(1) of the Act. *Brown & Root*, 333 F.3d at 638. Once the Court reversed the latter, the former finding was "seriously undermined," because the Section 8(a)(1) violation was "a predicate upon which the Board built the illegal motive to taint [the employer's] applicant choices for hire." *Id.* at 637. Here, there is no similar underlying violation upon which the Board "built" an illegal motive for the refusal-to-hire violation. The substantial evidence to demonstrate unlawful motive in Adams' hiring decisions stands on its own.

C. The Board Properly Rejected Adams' Affirmative Defense

Ample evidence supports the Board's finding that Adams failed to show, as an affirmative defense, that it would have made the same hiring decisions even in the absence of union considerations. The Board found that Adams offered "patently pretextual" explanations and "struggled to provide meaningful rationale for disqualifying [the five incumbent non-hires]." (RE17.) Additionally, interview forms were "shredded," "altered" and "sanitized by deleting references to the Union." (RE17.) Against the backdrop of a CEO emphatically espousing a corporate goal of union avoidance and management officials shredding documents with such frequency as to make the activity "an ordinary day at the office" (RE19 n.22), Adams can hardly demonstrate that it would have made the same hiring

decisions absent union considerations. *See, e.g., Wright Line*, 251 NLRB at 1083-84 (where an employer’s “asserted justification is a sham . . . or circumstance advanced by the employer did not exist, or was not, in fact, relied upon . . . no legitimate business justification for the discipline exists”). Therefore, the Board reasonably found (RE18-20) that Adams failed to prove its affirmative defense.

1. Shannon Cousins-Kamara

Gagnon claimed that Adams did not hire Cousins-Kamara because Bowman reported “integrity issues.” (RX 20; GCX 13.) The Board properly found (RE18) that this proffered reason was pretextual and part of Adams’ scheme to avoid union recognition.

As the Board noted, McGillis interviewed Cousins-Kamara and admitted that she had “made a favorable impression.” (RE17.) McGillis also, however, admitted that, after speaking with Bowman, she shredded the first evaluation form and recreated an after-the-fact evaluation that recommended against hiring. (Tr.978.) Further, Gagnon, who made the ultimate hiring decision, never spoke to Bowman about the reported “integrity issues.” (RE18.) In light of Adams’ “trail of shredding and sanitation [that] cover[ed] original positive impressions of Cousins-Kamara and an intent to hire,” the Board properly determined that Adams’ “paper[ed] over” reasons for not hiring Cousins-Kumara are pretextual. (RE17-18.)

2. Andre Lang

Lang received an excellent overall evaluation from his interviewer, and Adams initially offered him a position, only to withdraw it later. Adams defended its withdrawal based on a date discrepancy that surfaced during Lang's background check. A date that Lang recorded regarding a former position did not match the dates of employment provided to the background checker. As the Board found, the background checker could not definitively ascertain the dates of employment from Lang's former employer, so the recorded dates "were not necessarily incorrect." (RE18.)

The Board properly deemed this defense pretextual, finding "there can be no doubt that his offer was withdrawn for specious reasons contrary to other applicants whose background checks showed similar disparities." (RE18.) Indeed, Adams' treatment of Lang stands in stark contrast to similarly situated applicants who Adams hired despite apparent date and position discrepancies.¹⁰ (RE18.) Unlike Lang, however, none of those applicants was a bargaining unit employee. The Board found (RE18) further evidence of pretext because Adams rescinded its offer despite Lang's perfect evaluation score rather than follow up with him once the discrepancy arose. According to Gagnon, Adams asked one applicant to provide documentation when the background checker could not independently

¹⁰ The hires included: Siegfried Coleman, Janelle Carroll, Anthony Davis, Amy Mathers, and Sharytta Scroggins. (GCX41(a)-(f), Tr.888-90.)

verify a degree. (Tr.888-90.) The Board determined that Adams' conduct "highlights the fact that prior Horizons employees were given extra scrutiny." (RE18.) Having determined that Adams implemented an inconsistent hiring practice based on union considerations, the Board properly rejected Adams' affirmative defense. *See, e.g., Marathon LeTourneau Co. v. NLRB*, 699 F.2d 248, 253 (5th Cir. 1983) ("We have often observed that the essence of discrimination in a [Section] 8(a)(3) violation consists of treating like cases differently.").

3. Macord Nguyen

Adams asserted that it did not hire Nguyen because he "[slept] on the job," as Bowman reported to McGillis, and because of an independent concern reported on Nguyen's interview evaluation form, not otherwise relayed by Bowman, about "data integrity issues." (RE18; GCX9.) The Board properly rejected this claim as pretext.

Gagnon, who interviewed Nguyen and decided not to hire him, could not explain what "data integrity issues" meant. (RE18; Tr.733-35.) As the Board found, however, those comments "obviously" referenced the Horizons List that Bowman annotated, and which included a union reference. (RE18.) Accordingly, the Board properly found that Adams "rejected Nguyen's 10 years of experience in favor of hiring inexperienced non-bargaining unit substitute RAs or a custodian in

order to avoid hiring a majority of its unit employees from the Horizons unit.”
(RE18.)

4. Genesther Taylor

Adams asserted that Taylor failed to complete assignments on her shift, had difficulty dealing with staff who are not RAs, and “was looking for reasons to complain.” (RE19; GCX27.) Substantial evidence supports the Board’s determination that those proffered reasons were pretextual.

Adams purportedly relied on the interview form and Bowman’s feedback on the Horizons List in deciding not to hire Taylor, but the Board found that evidence demonstrated pretext. McGillis, who “cover[ed] up original impressions,” admitted she altered Taylor’s interview scores, and her feedback was based, in part, on Taylor’s conduct as union president. (RE19 n.22.) Further, Bowman, who demonstrated a “pronounced lack of interest in providing truthful testimony,” had no recollection of the feedback she provided Adams. (RE19 n.24.)

Gagnon could not articulate how he developed the perception that Taylor did not complete assignments, dealt poorly with staff, and complained. (RE19.) He explicitly rejected his affidavit, wherein Gagnon stated that he relied heavily on McGillis’ interview notes and Bowman’s qualification assessment. (RE19.) Having disavowed those sources, Gagnon had no other support for Taylor’s non-hire.

5. Azaria Ting

According to Gagnon, Adams did not hire Ting because she was not good at doing RA tasks. Horizons management had also relayed accountability and attendance concerns. (RE19; RX25, Tr.830-31.) The Board properly found those concerns pretextual.

Ting's interviewer could not recall the interview. (Tr.901-02.) McGillis, who participated in hiring discussions, similarly lacked any recollection of Ting's qualifications. (Tr.940.) Gagnon simply testified that he did not rely on any of the interviewer's recommendations. The Board determined that, "in light of the corporate policy of successor avoidance," the proffered reasons for not hiring Ting "cannot be credited and are pretextual." (RE19, 20.)

* * *

Adams does not substantively address the substantial evidence supporting the Board's decision for each of the five employees. Rather, it trots out (Br. 42-44) the same defenses it offered to the Board without addressing the Board's rationale. For example, Adams does not explain Lang's disparate treatment concerning the date discrepancy. And his excellent interview score belies Adams' claim (Br. 43) that Bowman provided negative feedback regarding Lang's job performance. Likewise, Adams relies on (Br. 43-44) expressly discredited testimony with regard to Taylor and Cousin-Kamara. Once again, Adams asks the Court to perform a

function appropriately reserved to the Board – weighing evidence and assessing credibility. The Board urges the Court to reject this improper request. *See Allied Aviation Fueling*, 490 F.3d at 378.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT ADAMS 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

Adams does not contest that it maintained a continuity of operations and hired a majority of Horizons unit employees. As such, the Board properly found (RE20) that Adams is a successor employer. *See NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272, 279-81 (1972). Likewise, Adams does not contest that it implemented a host of unilateral changes. The issue, therefore, is whether the Board properly found that Adams had a duty to bargain with the Union before altering employment terms.

The Board, applying two alternative theories, determined that Adams’ unilateral changes to mandatory terms and conditions of employment violated Section 8(a)(5) and (1) of the Act. First, Adams, by failing to announce its intent to change employment terms prior to, or simultaneously with, its expressed intent to retain Horizons employees, became a “perfectly clear” successor with an obligation to bargain with the Union. Second, and alternatively, Adams’ unlawful refusal to hire Horizons employees in an effort to avoid union recognition vitiated

the right to set initial employment terms. If the Court agrees with either theory, then it must affirm the Board’s subsequent finding that Adams unlawfully implemented changes to terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act..¹¹ *See Jacob E. Decker & Sons*, 569 F.2d at 360; *Houston Dist. Servs.*, 573 F.2d at 263-64; *see also* Fed. R. App. Proc. 28(a)(9)(A).

The Board’s “findings on the successorship issue must be accorded a high degree of deference,” because the Board applies the general provisions of the Act in making those findings. *NLRB v. South Harlan Coal Co.*, 844 F.2d 380, 383 (6th Cir. 1988); *accord Pa. Transformer Tech. v. NLRB*, 254 F.3d 217, 223 (D.C. Cir. 2001). The Board’s rulings interpreting a successor’s bargaining obligations are entitled to judicial deference provided they are rational and consistent with the Act. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *Canteen*, 103 F.3d at 1361.

A. A “Perfectly Clear” Successor Must Consult with Employees’ Bargaining Representative before Establishing Terms and Conditions of Employment

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”

¹¹ Adams does, however, challenge the specific remedy for the unlawful transfer of work to the RCs. The Board addresses this challenge, *infra*, Section V, pp. 52-56.

29 U.S.C. § 158(a)(5).¹² Section 8(d) of the Act 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).

It is well settled under those provisions that, upon acquiring a business, a new employer is obligated to bargain with the union that represented its predecessor’s employees if the employer conducts essentially the same business as the former employer and a majority of the work force was formerly employed by the predecessor. *Fall River*, 482 U.S. at 41; *Burns*, 406 U.S. at 279-81; *NLRB v. Houston Bldg. Serv., Inc.*, 936 F.2d 178, 180 (5th Cir. 1991). The composition of the successor’s work force is a “triggering fact” in determining whether a bargaining obligation has attached, so the obligation is typically not established until the successor has hired “a substantial and representative complement.” *Fall River*, 482 U.S. at 46-52. As such, a successor employer is “ordinarily free to set initial terms on which it will hire the employees of a predecessor,” without bargaining with the incumbent union. *Burns*, 406 U.S. at 294 (emphasis added).

Nevertheless, the Supreme Court recognized that “there will be instances in which it is perfectly clear that the new employer plans to retain all of the

¹² A violation of Section 8(a)(5) creates a derivative violation of Section 8(a)(1). See *Metro. Edison*, 460 U.S. at 698 n.4; *Nat’l Fabricators*, 903 F.2d at 398 n.1.

employees in the unit.” *Burns*, 406 U.S. at 294-95; accord *Dunkin’ Int’l Sec. Inc. v. NLRB*, 320 Fed. App’x 276, 284 (5th Cir. 2009). In that circumstance, where the incumbent union’s eventual majority is certain, “it will be appropriate to have [the successor employer] initially consult with the [incumbent union] before he fixes terms.” *Burns*, 406 U.S. at 295. Accordingly, where an employer evinces a “perfectly clear” intention to retain the predecessor’s employees, it must consult with the union before altering extant terms and conditions of employment established by the predecessor. An employer’s failure to meet its obligation to recognize and bargain with the union before making changes therefore violates Section 8(a)(5) and (1) of the Act. *NLRB v. Houston Bldg. Servs., Inc.*, 128 F.3d 860, 864 n.6 (5th Cir. 1997) (*HBS II*); see also *W&M Props. of Conn. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008); *Canteen*, 103 F.3d at 1362.

In *Spruce-Up Corp.*, 209 NLRB 194, 195 (1974), *enforced mem.* 529 F.2d 516 (4th Cir. 1975), the Board interpreted the “perfectly clear” caveat in *Burns* as applying, not only where the new employer has “actively or, by tacit inference, misled employees into believing they would be retained without changes,” but also where it “has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.” Thus, under *Spruce-Up*, an employer that is “silent about its intent with regard to the existing terms and conditions of employment” is a “perfectly clear” successor if it “clearly

indicated it would be hiring the predecessor's employees" before announcing changes. *Canteen Corp.*, 317 NLRB 1052, 1053 (1995), *enforced*, 103 F.3d 1355 (7th Cir. 1997); *accord HBS II*, 128 F.3d at 864 n.6. The Board has consistently held that an employer that has made "perfectly clear" its plan to retain the predecessor's employees prior to the hiring process, without announcing changed terms of employment, may not later condition formal employment offers on changed terms without consulting the union. *See, e.g., Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664, 674-75 (D.C. Cir. 1978); *Fremont Ford*, 289 NLRB 1290, 1296-97 (1988). Further, an otherwise "perfectly clear" successor cannot escape liability for unilateral changes to employment terms by subsequently announcing new terms, even if that announcement precedes formal offers of employment. *See Int'l Ass'n of Machinists*, 595 F.2d at 675 n.49; *Canteen*, 317 NLRB at 1053-54. To avoid "perfectly clear" successor status, a new employer must clearly announce its intent to establish a new set of conditions *prior to, or simultaneously with*, its expression of intent to retain the predecessor's employees. *See, e.g., Elf Atochem N. Am., Inc.*, 339 NLRB 796, 807 (2003) (successor incurs "obligation to bargain over initial terms of employment when it displays an intent to employ the predecessor's employees without making it clear to those employees that their employment will be on terms different from those in place with the predecessor employer").

B. Adams Forfeited Its Right as a Successor Employer To Set Initial Terms and Conditions of Employment By Not Announcing Its Intent To Establish a New Set of Conditions Prior to, or Simultaneously With, Its Expressed Intent To Retain the Predecessor's Employees

The Board properly found that the facts “compel[led] a conclusion that [Adams] became a ‘perfectly clear’ successor on February 13,” (RE4), and thus from that date forward, it was not privileged to set initial terms without consulting the Union. As shown below, on that date, Adams told employees that they “would all have a job” and did not, simultaneous with that assurance, inform employees of new employment terms.

The totality of Adams’ conduct here demonstrates that it was “perfectly clear” that Adams planned to retain Horizons employees as its initial workforce. *See Burns*, 406 U.S. at 294-95. It is undisputed that, on February 13, Gagnon gathered the incumbent RAs to discuss hiring and told them that they had all been “doing a really good job” and that Adams “didn’t want to rock the boat” and “wanted a smooth transition.” (RE4; Tr.54-55.) It is also undisputed that Gagnon assured the incumbents that “aside from disciplinary issues, he was 99 percent sure that [they] would all have a job.” (RE4;Tr.54-55.) Gagnon knew that the Executive Order obligated Adams to offer a first right of refusal to eligible and qualified employees of Horizons. Under those circumstances, substantial evidence supports the Board’s finding that Adams made “perfectly clear” its intent to retain

the employees. *See Hilton's Environmental, Inc.*, 320 NLRB 437, 438 (1995) (new employer expressed an intent to retain incumbent employees when it solicited applications and assured employees that they would all be hired absent problems with information disclosed on their applications or in interviews); *Fremont Ford*, 289 NLRB at 1296-97 (new employer expressed an intent to retain incumbent employees when it indicated that it had few doubts about retaining most employees).

Adams' plan (Br. 47) to hire 15 RAs rather than "all" of Horizons RAs does not detract from the Board's finding. The Board, with judicial approval, has construed the word "all" in this context to mean "all or substantially all." *Int'l Ass'n of Machinists*, 595 F.2d at 673 & n.35; *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), *enforced*, 540 F.2d 841 (6th Cir. 1976). Therefore, "to become a 'perfectly clear' successor, a new employer need not retain *all* of the employees in the unit. Rather, the relevant inquiry is whether the successor intends to retain a sufficient number to continue the union's majority status." (RE4) (emphasis in original); *see also Spitzer Akron*, 219 NLRB at 22 (holding that the "perfectly clear" successor doctrine covers situations where a successor's plan includes fewer than all employees, "but still enough to make it evident that the union's majority status will continue").

Further, to avoid “perfectly clear” status, Adams needed to “clearly announce its intent to establish a new set of conditions,” (RE4), on or before the February 13 announcement. As the Board found, however, Adams did “not inform the employees that employment would be on new terms until the hiring process was nearly complete, when it distributed offer letters and employment agreements to successful applicants.” (RE4.) Gagnon, while inviting employees to apply, made no announcement that Adams would make any changes to the terms and conditions of employment. *See, e.g., Helnick Corp.*, 301 NLRB 128, 128 n.1 (1991) (obligation to bargain commenced when new employer informed employees that they could expect to be retained without mentioning changes in preexisting terms); *C.M.E., Inc.*, 225 NLRB 514, 514-15 (1976) (obligation to bargain commenced when new employer informed the union that it intended to rehire the predecessor’s employees without mentioning changes in preexisting terms, rather than on later dates when applications for employment were solicited or when the union and the new employer met to discuss contract revisions).

Thus, viewed from the employees’ perspective, employees reasonably believed after the February 13 meeting that their current positions would continue unchanged. *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 9 (2007) (assessing the effect of successor’s statements or conduct from the employees’ perspective by considering whether retained employees “view their job situations as essentially

unaltered”). Adams did not promptly apprise employees of impending changes, and employees had therefore “forgone the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force.” *Int’l Assn. of Machinists*, 595 F.2d at 674.

Adams wrongly claims that its proposed changes were “transparent” (Br. 47-48) and that it offered employees “more than sufficient notice.” (Br. 49.) According to Adams, its transparency was manifested at various times – before job offers, before and during interviews, in offer letters, before employment acceptance, and before employment commenced.¹³ Significantly, however, Adams cannot identify the date on which it notified employees of changes to terms and conditions of employment *prior to, or simultaneously with*, its expression of intent to retain Horizons employees. Adams also points to (Br. 46-47) its “comprehensive operational plan” that included a pre-determined staffing model and changes to wages, healthcare coverage, and other employment terms. Adams claims that it “did not keep [the] plans a secret from prospective employees,” (Br. 47), but it does not say when it told employees about the plan.

¹³ The record does not support certain of Adams’ disclosure claims. For instance, Adams asserts that it advised employees of health insurance plan changes, but when Gagnon was asked whether Adams spelled out benefits to employees, he responded simply: “Nope.” (Tr.685.) Adams also curiously likens (Br. 48) *asking* employees to provide pay stubs to *advising* employees of wage changes.

Given the facts surrounding Gagnon’s February 13 meeting with incumbent employees, Adams erroneously asserts that its obligation did not “become apparent until it decided to hire a majority of RAs.” (Br. 50.) To the contrary, the obligation arose on February 13, and Adams failed to notify employees of changes on or before that date. *See Int’l Ass’n of Machinists*, 595 F.2d at 675 n.49 (“[A] prospective employment relationship may be presumed when a successor has boldly declared an intention to retain incumbents but has not concurrently proposed substantially reduced benefits.”); *Canteen*, 317 NLRB at 1053-54 (announcement of significant changes to the terms and conditions of employment during interviews came too late to avoid a finding of “perfectly clear” successor).

In short, the Board relied on Adams’ undisputed promise that “99 percent” of the RAs would have jobs at the Center and the lack of evidence that Adams, prior to assuming operations, informed Horizons employees that they would be working under different terms. Under those circumstances, the Board properly found that Adams was a “perfectly clear” successor.

C. Adams’ Discriminatory Hiring Practices Prevented It from Setting Initial Terms

The Board also found that Adams “had a duty to bargain with the Union because it unlawfully refused to hire its predecessor’s employees.” (RE22.) A successor employer forfeits its right to set the initial terms and conditions of employment if it pursues a discriminatory hiring policy to avoid its successorship

bargaining obligations. *See Howard Johnson*, 417 U.S. at 262 n.8 (“[A] new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union.”). Therefore, 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. *See Houston Dist. Servs.*, 573 F.2d at 263-64 (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); *NLRB v. Foodway of El Paso*, 496 F.2d 117, 119 (5th Cir. 1974) (same); *Love’s Barbeque Rest.*, 245 NLRB 78, 81-82 (1979) (same), *enforced in relevant part sub. nom. Kallman 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 discrimination against the wrongdoer – the employer – to prevent it from benefiting from its unlawful conduct. *See NLRB v. Staten Island Hotel*, 101 F.3d 858, 862 (2d Cir. 1996); *United States Marine Corp.*, 944 F.2d 1305, 1321-22 (7th Cir. 1991); *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 above (pp. 22-38), Adams engaged in a union-avoidance scheme by implementing a discriminatory hiring system. The Board properly found that Adams’ unlawful refusal to hire the five incumbent RAs obligated it to “maintain the status quo by honoring the substantive terms as set forth in the expired collective-bargaining agreement with Horizons and to bargain with the Union about all changes to mandatory subjects of bargaining.” (RE22.)

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT ADAMS’ REFUSAL TO ALLOW TAYLOR ACCESS TO THE FACILITY CONSTITUTED BAD-FAITH BARGAINING AND VIOLATED SECTION 8(a)(5) AND (1)

As explained above (p. 42), Section 8(a)(5) of the Act requires employers to bargain with the collective-bargaining representative of their employees with respect to rates of pay, wages, hours of employment, or other terms or conditions of employment. 29 U.S.C. § 158(a)(5). “It is well established that each party to a collective-bargaining relationship has both the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party.” *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379 (1980), *enforced sub nom. Auto Workers v. NLRB*, 670 F.2d 663 (6th Cir. 1982). A ban on union representatives who are also former employees constitutes a refusal to bargain with the chosen representative and violates Section 8(a)(5) of the Act. *See, e.g.*,

Modern Mgmt. Servs., 361 NLRB No. 24, 2014 WL 4076358, at *2 (Aug. 18, 2014) (employer violated Section 8(a)(5) by denying a discharged employee access to the facility in her capacity as a union agent because her “prior employment [] provided no basis for the unilateral denial of access”), *enforced*, No. 14-1160, 2016 WL 3040484 (D.C. Cir. May 18, 2016); *Claremont Resort & Spa*, 344 NLRB 832, 834-35 (2005) (employer violated Section 8(a)(5) by refusing former employee access to its facility to perform union representative duties).

The Board found (RE25) that Adams engaged in bad-faith bargaining by barring union president and former Horizons employee Taylor from the Center for negotiations. Her presence was “of paramount importance to the Union,” and Adams’ refusal “misinterpret[ed]” the no-access rule. (RE25.) The rule applied to Adams’ “former staff,” and Taylor was not a former Adams employee. The rule also barred access to those “whose purpose can reasonably be expected to create controversy or disturbance among staff members or students, or who might interfere with their welfare or training.” (RE25.) But as the Board found, there was no evidence that Taylor might disturb or interfere with “the welfare or training of staff or students.” (RE25.)

Further, when the presence of a party’s representative “will create ill will and render good-faith negotiations impossible, the other party is justified in refusing to meet with that representative.” *Claremont Resort*, 344 NLRB at 835.

As the Board noted, however, “there is no evidence” that Taylor’s presence would generate ill-will or affect bargaining. (RE25.)

Adams one-sentence challenge (Br. 53) fails to address the Board’s specific findings that Taylor was not a former Adams employee and her presence posed no reasonable concern. Further, Adams offers no support for the proposition that the Board must show that the unlawful access prohibition “actually hindered bargaining.” (Br. 53.) Thus, the Board properly found that by banning Taylor, Adams refused to bargain in good faith.

V. THE BOARD’S REMEDY FOR THE UNLAWFUL TRANSFER OF BARGAINING UNIT WORK IS WITHIN ITS DISCRETION

Section 8(a)(5) of the Act requires that an employer bargain over changes in the terms and conditions of employment for unit employees. 29 U.S.C. § 158(a)(5). A decision to transfer unit work to nonunit personnel and the effects of that decision constitute mandatory subjects of bargaining. *See Hampton House*, 317 NLRB 1005, 1005 (1995).

Here, Adams does not dispute that it transferred work from the RAs to the employees in the new RC position without bargaining with the Union. Nor does it dispute that the RC duties are bargaining unit work. (RE22.) Assuming that the Court agrees that Adams was not privileged to set new terms and conditions of employment as discussed above (pp. 39-50), Adams was obligated to notify and bargain with the Union over the transfer of work. Its failure to do so violates

Section 8(a)(5) and (1). As a remedy, the Board ordered Adams to rescind the transfer of work, recognize the Union as the collective-bargaining representative of those occupying the RC position, and bargain over work transfer changes.

Section 10(c) of the Act (29 U.S.C. § 160(c)) directs the Board to order remedies for unfair labor practices, and the Board enjoys broad discretion in crafting appropriate remedies. *See, e.g., Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (Board’s authority to issue remedies is a “broad discretionary one, subject to limited judicial review”); *accord NLRB v. Int’l Ass’n of Bridge Structural & Ornamental Iron Workers*, 864 F.2d 1225, 1235 (5th Cir. 1989) (“The Board has broad discretion in its choice of remedies.”). The Court should not alter the Board’s remedial order unless it is a “patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *accord NLRB v. Delchamps, Inc.*, 653 F.2d 225, 228 (5th Cir. 1981).

Adams, citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), claims (Br. 51) that the Board’s Order is akin to a bargaining order requiring the Union to represent the RCs and that such an extraordinary remedy is unwarranted. Adams’ argument misunderstands the underlying violation and the Board’s Order – which is neither extraordinary nor a *Gissel* bargaining order. When “an employer has committed independent unfair labor practices which have made the holding of a

fair election unlikely,” the Board may issue a *Gissel* bargaining order that bypasses a secret-ballot election and directs the employer to immediately begin bargaining with the union. *Id.* at 610. Here, Adams did not engage in pre-election unfair labor practices, but unlawfully transferred unit work, and the Board ordered its traditional remedy for that violation. *See, e.g., Mt. Sinai Hosp.*, 331 NLRB 895 (2000) (ordering employer to rescind a new job reclassification, recognize the union as the exclusive representative of employees occupying the new position, and bargain with the union to remedy employer’s unlawful transfer of work to a new nonunit position), *enforced*, 8 Fed. App’x 111 (2d Cir. 2001).

Further, by placing the RCs in the unit, the Board has not “deprived” (Br. 52) those employees of their Section 7 right to select their collective-bargaining representative. The Board determined that the RC position entails “essentially the same work that RAs perform.” (RE23.) Given that the RA work is undeniably unit work, the Board properly placed the RCs, who are doing “essentially the same work,” in the unit. Moreover, as the Board noted, if Adams wants to challenge the Union’s majority status as the bargaining representative, it must wait until a “reasonable period of bargaining” is over. (RE88 n.12 (citing *UGL-UNICCO Serv. Co.*, 357 NLRB 801 (2011) (establishing “successor bar” whereby an incumbent union is entitled to “a reasonable period of bargaining,” during which an employer

may not unilaterally withdraw recognition “based on a claimed loss of majority support.”)).

Adams next contends that RCs are supervisors under Section 2(11) of the Act. 29 U.S.C. § 152(11). Adams bears the burden of showing supervisory status, *see, e.g., Dynasteel*, 476 F.3d at 258, but it provides no evidence or precedent to support its position. The Board found that the RCs are not supervisors under Section 2(11) of the Act because “there is no dispute that [they] have no authority to hire, transfer, suspend, layoff, discharge, recall, promote, reward or assign duties[, and [t]here is no evidence that they can meaningfully recommend such actions.” (RE23.) Adams does not contest those findings, but instead submits that RCs are supervisors because they “oversee the dorm area, regularly fill in for managers and supervisors, and manage staff on occasion.” (Br. 52.) The Board, rejecting this contention, reasoned that “[t]heir intermittent substitution for supervisors without any indicia of supervisory authority does not transform them into supervisors.” (RE23); *see, e.g., Masterform Tool Co.*, 327 NLRB 1071, 1071 (1999) (no finding of supervisory status when duties are performed sporadically).

VI. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT ADAMS AND MJLM ARE JOINT EMPLOYERS

The Board found that Adams and MJLM are joint employers. In doing so, the Board relied on (RE28) the co-determination of wages, MJLM’s control over scheduling and personnel matters, and its role in hiring. Further, Adams officials

reported to MJLM representatives, and the companies shared documents and procedures. As shown below, substantial evidence supports the Board’s finding, which is consistent with applicable precedent.

A. Applicable Principles

In assessing the joint-employer issue here, the Board invoked the test, approvingly cited by this Court, that “two separate entities may be joint employers of ‘a single workforce if they share or co-determine those matters governing the essential terms and conditions of employment.’” *Texas World Serv. Co. v. NLRB*, 928 F.2d 1426, 1432 (5th Cir. 1991) (quoting *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1123-24 (3d Cir. 1982), *enforcing Aldworth Co.*, 338 NLRB 137 (2000)). The existence of such a relationship “depends on the control which one employer exercises, or potentially exercises, over the labor relations policy of the other.” *N. Am. Soccer League v. NLRB*, 613 F.2d 1379, 1382 (5th Cir. 1980). The Board and courts have determined that meaningful control over or participation in such actions as hiring, controlling the number of employees, removing employees, inspecting and approving work, and setting pay and overtime evidences joint-employer status. *See, e.g., Ref-Chem Co. v. NLRB*, 418 F. 127, 129 (5th Cir. 1969); *Texas World Serv.*, 928 F.2d at 1432. The relevant time period for assessing joint-employer status is the period in which the unfair labor practices occurred. *See Texas World Serv.*, 928 F.2d at 1432; *Goodyear Tire & Rubber Co.*,

312 NLRB 674, 676 (1993). A determination of joint-employer status is “essentially a factual issue” decided on the totality of the circumstances and sustained if supported by substantial evidence. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964); *Texas World Serv.*, 928 F.2d at 1432.

B. MJLM’s Extensive Involvement in Adams’ Employment Matters Demonstrates Its Joint-Employer Status

Based upon several considerations, the Board found that MJLM and Adams were joint employers. The Board relied on (RE27 & n.42) the fact that the Adams and MJLM jointly developed the RA salary structure. Such control demonstrates joint-employer status. *See, e.g., Hamburg Indus., Inc.*, 193 NLRB 67, 67-68 (1971) (joint employer played indirect role in setting contractor wages). The Board also found that MJLM exercises control over scheduling and personnel matters. Under the subcontract agreement, “holidays shall be observed in accordance with MJLM prime contract.” (RE27.) The agreement, therefore, “is evidence of some control over hours.” (RE28.) *See Quantum Resources Corp.*, 305 NLRB 759, 760 (1991) (co-determination of holidays was relevant factor in joint-employer finding). The agreement also allows MJLM “to suspend and/or remove Adams’ staff from the Center if staff willfully violate Center rules, regulations and/or established policy standards.” (RE27.) This reserved discretion indicates joint-employer status. *See Dunkin’ Donuts, Mid-Atlantic Distrib. Ctr. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (influence over discipline and firing

decisions); *Whitewood Oriental Maint. Co.*, 292 NLRB 1159, 1161 (1989) (same), *enforced sub nom. Texas World Serv. Co. v. NLRB*, 928 F.2d 1426 (5th Cir. 1991).

The Board also found (RE28) that MJLM was involved in interviewing and making meaningful hiring recommendations. The assertion (Br. 55, MJLM Br. 11, 13) that MJLM played only a “minimal” role and that Gagnon had exclusive hiring responsibility ignores evidence of MJLM’s significant involvement. For instance, MJLM consultant Don Khajavi interviewed and recommended for hire two RAs. (Tr. 637-38,641.) MJLM partner Sharon Murphy interviewed an RA and discussed with Gagnon two Horizons’ applicants for positions at Adams. (RE27; Tr. 637-38,641.) Such control over hiring evidences joint-employer status. *See NLRB v. Western Temp. Servs., Inc.*, 821 F.2d 1258, 1266 (7th Cir. 1987) (influence over hiring); *Texas World Servs.*, 928 F.2d at 1433 (same). Further, “[e]ach evening,” Adams and MJLM reviewed which positions remained vacant and which were filled. (RE27.) The Board therefore properly found (RE27) that Adams and MJLM jointly determined which employees to hire.

Additionally, the Board relied on (RE28) interactions between McGillis, Adams’ highest ranking on-site representative, and Erica Evans, MJLM’s Center director. McGillis and Evans consulted on students, dormitories, career and social counseling, and Center policies, which “ensure[d] a coordinated operation.” (RE28.) Similarly, Weldon and MJLM Human Resources Director Joyce Barrett

shared an office during the transition and “consulted with each other on human resources matters.” (RE27.) MJLM and Adams also decided to “be under the same umbrella,” (D&O 27), meaning that Adams’ interview forms, standard operating procedures, and job descriptions were shared with and used by MJLM. (RE27); *see Texas World*, 928 F.2d at 1432 (provision of recordkeeping forms indicative of joint-employer status).

In finding MJLM and Adams jointly and severally liable for the unfair labor practices, the Board also observed that MJLM “does not contend that it neither knew, nor should have known, of Adams’ unlawful actions.” (RE1 n.7.) Nor does MJLM assert that it took “all measures within its power to resist those actions.” (RE1 n.7.) MJLM’s knowledge and inaction further support the Board’s joint-employer finding. *See Capitol EMI Music*, 311 NLRB 997, 1000 (1983) (joint employer seeking to escape liability for the other employer’s unlawfully motivated action has the burden to show that “it neither knew, nor should have known, of the reason for the other employer’s action or that, *if* it knew, it took all measures within its power to resist the unlawful action” (emphasis in original)), *enforced*, 23 F.3d 399 (4th Cir. 1994).

C. The Defenses to the Joint-Employer Finding Are Meritless

Adams and MJLM cannot escape joint-employer liability by relying on (Br. 54-56, MJLM Br. 10-11) differences in their scheduling, benefits, and application

processes.¹⁴ The Board considered these factors, but ultimately found that, “based on the record as a whole,” MLJM “shared or codetermined essential terms and conditions of employment of Adams’ employees.” (RE28.) As noted above, given that joint employer is a factual determination, the Court should defer to the Board’s findings and not reweigh the evidence. *See N. Am. Soccer*, 613 F.2d at 1381 (Board’s joint-employer finding must be affirmed if supported by substantial evidence on the record as a whole).

Contrary to Adams’ and MJLM’s arguments (Br. 55, MJLM Br. 12), the Board’s decision in *Hychem Constructors, Inc.*, 169 NLRB 274 (1968), does not undermine the Board’s finding. In *Hychem*, the putative joint employer could, pursuant to contract, approve the direct employer’s wage increases and overtime. *Id.* at 276. This process was “consistent with [the putative joint employer’s] right to police reimbursable expenses under its [] contract.” *Id.* Lacking other indicia of joint-employer status, the Board determined that the two entities were not joint employers. *Id.* Here, unlike the putative joint employer in *Hychem*, MJLM played an integral role in jointly setting the initial wages. It is not merely policing a contract; rather, it jointly determined employee wages. Further, unlike the lack of

¹⁴ Some of these claimed factors lack record support. For instance, contrary to MJLM’s assertion (MJLM Br. 10), MJLM’s and Adams’ standard operating procedures are identical, other than headers, footers, and titles referencing either MJLM or Adams.

other evidentiary support in *Hychem*, the Board made multiple factual findings in this case that firmly support the joint-employer finding.¹⁵

Adams and MJLM wrongly submit (Br. 57-58, MJLM Br. 16-19) that *Laerco Transportation*, 269 NLRB 324, 325 (1984), and *TLI, Inc.*, 271 NLRB 798 (1984), are “instructive” to the Board’s finding. In *Laerco*, the Board found that there was no joint-employer relationship because the putative joint employer engaged in only “extremely routine” supervision. 269 NLRB at 326. By contrast, MJLM’s influence during the transition period over core functions such as hiring, determining the holiday schedule, and setting wages are hardly “extremely routine.” In *TLI*, while the putative joint employer instructed drivers on deliveries, the drivers themselves selected assignments. 271 NLRB at 799. The putative joint employer did not have the authority to hire, fire, or discipline the direct employer’s employees, and its involvement in negotiations was limited inasmuch as it did not offer any proposals or insist on any reductions in the two sessions it attended. *Id.*

¹⁵ Reliance on (Br. 54-56, MJLM Br. 15) *AM Property Holding Corp.*, 350 NLRB 998 (2007), and *C.T. Taylor Co.*, 342 NLRB 997 (2004), is misplaced. In *AM Property*, the putative joint employer asked the direct employer to transfer an employee for temporary help filling a position. 350 NLRB at 1000. After a week, the putative joint employer hired a permanent employee to fill the vacancy, and the direct employer then transferred its employee to another position with the direct employer. *Id.* Nothing in *AM Property* detracts from the Board’s joint-employer finding here. Similarly, in *C.T. Taylor*, the putative joint employer occasionally requested the direct employer to remove a particular employee from a job, but had no authority to remove an employee. 342 NLRB at 998. Here, MJLM has the express authority to remove Adams’ employees.

Unlike the putative joint employer in *TLI*, MJLM was integrally involved in essential terms and conditions of employment.¹⁶

In sum, substantial evidence supports the Board's finding that Adams and MJLM are jointly and severally liable for all violations.

¹⁶ MJLM argues (MJLM Br. 19-27) that the Board invoked a new joint-employer test in this case. MJLM never presented this argument to the Board, and therefore the Court is without jurisdiction to hear it. *See Woelke*, 456 U.S. at 665. Notwithstanding the jurisdictional bar, MJLM's assertion is patently wrong. The Board did not invoke its new joint-employer test in this case, which it announced in *Browning-Ferris Industries*, 36 NLRB No. 186, 2015 WL 5047768 (Aug. 27, 2015). Rather, the Board followed its prior precedent. (RE28.)

CONCLUSION

The Board respectfully requests that the Court deny the petitions for review and enforce the Board's Order in full.

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December 2016

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FOR THE FIFTH CIRCUIT**

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MCCONNELL, JONES, LANIER &)	
MURPHY, LLP)	
)	
Petitioner/Cross-Respondent)	
)	No. 16-60333
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	20-CA-130613
)	20-CA-138046
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth 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 21st day of December, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 13,994 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

Dated at Washington, DC
this 21st day of December, 2016

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