

Nos. 16-3212, 16-3400

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

**1621 ROUTE 22 WEST OPERATING COMPANY, LLC, d/b/a
SOMERSET VALLEY REHABILITATION AND NURSING CENTER**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

1199 SEIU UNITED HEALTH CARE WORKERS EAST

Intervenor for Respondent

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of issues.....	2
Statement of related cases	3
Concise statement of the case	6
I. Procedural history	6
II. The Board’s findings of fact	7
A. Somerset’s Operations; the Union’s organizing campaign; Somerset’s unfair labor practices during and after the campaign.....	7
B. Floor nurse duties	9
C. The 2010 survey; the April 2011 injunction proceeding	10
D. Somerset eliminates the LPN classification and hires RNs to replace the LPNs	11
E. Discharges of Irene D’Ovidio and Maharanie Mangal	12
F. Somerset ignores the Union’s access request.....	13
III. The Board’s conclusions and order	14
Standard of review	16
Summary of argument.....	16
Argument.....	19

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
I. Substantial evidence supports the Board’s finding that Somerset violated Section 8(a)(3) and (1) by eliminating the LPN classification in retaliation for the LPNs’ union activity	19
A. Applicable principles.....	20
B. Somerset eliminated the LPN classification in retaliation for LPNs’ union activity and to avoid reinstating LPNs it had unlawfully discharged	22
1. Somerset knew of the LPNs’ union activities and its animus toward the Union is “beyond question”	23
2. Somerset failed to prove it would have eliminated the LPN classification absent the LPNs’ union activity.....	26
3. Somerset unlawfully discharged D’Ovidio and Mangal.....	30
II. Substantial evidence supports the Board’s finding that Somerset violated Section 8(a)(5) and (1) by altering the scope of the bargaining unit.....	31
A. Applicable principles.....	31
B. The Board properly found that Somerset altered the scope of the bargaining unit.....	33
C. Somerset’s defenses are inapplicable	34
D. The record does not support Somerset’s asserted defenses	38
III. Substantial evidence supports the Board’s finding that Somerset violated Section 8(a)(5) and (1) by denying the Union access to its facility	41
IV. The Board acted within its broad remedial discretion in ordering Somerset to restore the LPN classification and reinstate two affected LPNs	43
A. Applicable principles.....	44

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
B. The Board properly ordered Somerset to restore the LPN classification	44
V. The Board properly rejected Somerset’s challenges to the complaint’s validity	47
A. The Court lacks jurisdiction to consider the Company’s untimely challenge	48
B. General Counsel Griffin properly ratified the complaint.....	51
Conclusion	56

TABLE OF AUTHORITIES

Cases	Page(s)
<i>1621 Route 22 W. Operating Co. v. NLRB</i> , 825 F.3d 128 (2016)	5, 8-11, 19, 23, 24, 45, 48, 50, 51
<i>Advanced Disposal Servs. East v. NLRB</i> , 820 F.3d 592 (3d Cir. 2016)	52-55
<i>Aldworth Co.</i> , 338 NLRB 137 (2002), <i>enforced</i> , 363 F.3d 437 (D.C. Cir. 2004).....	31
<i>Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.</i> , 404 U.S. 157 (1971).....	35
<i>Alta Vista Regional Hosp.</i> , 357 NLRB 326 (2011)	41
<i>Atl. Limousine, Inc. v. NLRB</i> , 243 F.3d 711 (3d Cir. 2001)	16
<i>Beth Israel Hospital v. NLRB</i> , 437 U.S. 483 (1978).....	44
<i>Boise Cascade Corp. v. NLRB</i> , 860 F.2d 471 (D.C. Cir. 1988).....	32
<i>Brookwood Furniture</i> , 701 F.2d 452 (5th Cir. 1983)	22
<i>Caterpillar Inc. v. NLRB</i> , 803 F.3d 360 (7th Cir. 2015)	41
<i>CCE, Inc.</i> , 318 NLRB 977 (1995)	42
<i>Citizens Publ'g & Printing Co. v. NLRB</i> , 263 F.3d 224 (3d Cir. 2001)	16

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Clear Pine Mouldings, Inc. v. NLRB</i> , 632 F.2d 721 (9th Cir. 1980)	22
<i>Consumer Fin. Prot. Bureau v. Gordon</i> , 819 F.3d 1179 (9th Cir. 2016)	53
<i>Doolin Sec. Sav. Bank, FSB v. Office of Thrift Supervision</i> , 139 F.3d 203 (D.C. Cir. 1998).....	52
<i>Dorsey Trailers, Inc. v. NLRB</i> , 134 F.3d 125 (3d Cir. 1998)	37, 39
<i>Douds v. Int’l Longshoremen’s Assn.</i> , 241 F.2d 278 (2d Cir. 1957)	32
<i>Dubuque Packing Co.</i> , 303 NLRB 386 (1991)	37, 38
<i>FEC v. Legi-Tech, Inc.</i> , 75 F.3d 704 (D.C. Cir. 1996).....	52-53
<i>Fibreboard Paper Prods.v. NLRB</i> , 379 U.S. 203 (1964).....	38, 44, 45
<i>First National Maintenance v. NLRB</i> , 452 U.S. 666 (1981).....	37, 38
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979).....	16
<i>Furniture Rentors of America v. NLRB</i> , 36 F.3d 1240 (3d Cir. 1994)	37, 39
<i>Grane Health Care v. NLRB</i> , 712 F.3d 145 (3d Cir. 2013)	16

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Hanlon & Wilson Co. v. NLRB</i> , 738 F.2d 606 (3d Cir. 1984)	22
<i>Healthcare Employees Union Local 399 v. NLRB</i> , 463 F.3d 909 (9th Cir. 2006)	24
<i>Holyoke Water Power Co.</i> , 273 NLRB 1369 (1985), <i>enforced</i> , 778 F.2d 49 (1st Cir. 1985).....	41
<i>Holyoke Water Power Co. v. NLRB</i> , 778 F.2d 49 (1st Cir. 1985).....	41-42
<i>Hunter Douglas, Inc. v. NLRB</i> , 804 F.2d 808 (3d Cir. 1986)	25
<i>Idaho Statesman v. NLRB</i> , 836 F.2d 1396 (D.C. Cir. 1988).....	35, 36
<i>Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.</i> , 796 F.3d 111 (D.C. Cir. 2015).....	52, 53
<i>Intermet Stevensville</i> , 350 NLRB 1270 (2007)	21
<i>Kenrich Petrochemicals, Inc. v. NLRB</i> , 907 F.2d 400 (3d Cir. 1990)	44
<i>Lightner v. 1621 Route 22 W. Operating Co., LLC</i> , 2012 WL 1344731 (D.N.J. Apr. 16, 2012).....	11
<i>Lightner v. 1621 Route 22 West Operating Co., LLC</i> , 729 F.3d 235 (3d Cir. 2013)	11

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Limestone Apparel Corp.</i> , 255 NLRB 722 (1981), <i>enforced mem.</i> , 705 F.2d 799 (6th Cir. 1982)	21
<i>Marquez Bros. Enter., Inc. v. NLRB</i> , 650 Fed. App'x 25 (D.C. Cir. 2016).....	50
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	20, 32
<i>Mt. Sinai Hosp.</i> , 331 NLRB 895 (2000), <i>enforced</i> , 8 Fed. App'x 111 (2d Cir. 2001)	32
<i>New Surfside Nursing Home</i> , 330 NLRB 1146 (2000).....	42
<i>NLRB v. 1199, Nat. U. of Hosp. & Health Care Emp.</i> , 824 F.2d 318 (4th Cir. 1987)	40
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967).....	41
<i>NLRB v. Bay Shipbuilding Corp.</i> , 721 F.2d 187 (7th Cir. 1983)	36
<i>NLRB v. Noel Canning</i> , 134 S. Ct. 2550 (2014).....	4
<i>NLRB v. Omnitest Inspection Servs.</i> , 937 F.2d 112 (3d Cir. 1991)	21, 22
<i>NLRB v. Operating Engineers Local 542</i> , 532 F.2d 902 (3d Cir. 1976)	36

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. Thermon Heat Tracing Servs., Inc.</i> , 143 F.3d 181 (5th Cir. 1988)	20
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983).....	20, 21
<i>NLRB v. Wooster Div., Borg-Warner Corp.</i> , 356 U.S. 342 (1958).....	35
<i>Parkwood Developmental Ctr., Inc. v. NLRB</i> , 521 F.3d 404 (D.C. Cir. 2008).....	49
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941).....	45
<i>Quick v. NLRB</i> , 245 F.3d 231 (3d Cir. 2001)	16, 44
<i>Raymond F. Kravis Ctr. for the Performing Arts</i> , 351 NLRB 143 (2007), <i>enforced</i> , 550 F.3d 1183 (D.C. Cir. 2008).....	35
<i>Regal Cinemas, Inc.</i> , 334 NLRB 304, <i>enforced</i> , 334 F.3d 300 (D.C. Cir. 2003).....	38
<i>Shell Oil Co. & Oil, Chem. & Atomic Workers, Int'l Union</i> , 194 NLRB 988 (1972), <i>enforced sub nom.</i> , <i>OCAW v. NLRB</i> , 486 F.2d 1266 (D.C. Cir. 1973).....	32, 33
<i>St. John's Gen. Hosp. of Allegheny v. NLRB</i> , 825 F.2d 740 (3d Cir. 1987)	45

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>SW General, Inc. v. NLRB</i> , 796 F.3d 67 (D.C. Cir. 2015), <i>cert. granted</i> , 136 S. Ct. 2489 (June 20, 2016)	47, 50, 51
<i>Texas World Serv. Co. v. NLRB</i> , 928 F.2d 1426 (5th Cir. 1991)	22
<i>Travitz v. Northeast Dep't ILGWU Health & Welfare Fund</i> , 13 F.3d 704 (3d Cir. 1994)	30
<i>Torrington Industries</i> , 307 NLRB 809 (1992)	38
<i>U.S. v. Pelullo</i> , 399 F.3d 197 (3d Cir. 2005)	33
<i>United States v. Chem. Found., Inc.</i> , 272 U.S. 1 (1926).....	54-55
<i>United States v. Morgan</i> , 313 U.S. 409 (1941).....	55
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	16
<i>Van Dorn Machinery Co.</i> , 286 NLRB 1233 (1987), <i>enforced</i> , 881 F.2d 302 (6th Cir. 1989)	37
<i>Vincent Indus. Plastics, Inc. v. NLRB</i> , 209 F.3d 727 (D.C. Cir. 2000).....	22
<i>Wackenhut Corp.</i> , 345 NLRB 850 (2005)	32, 34
<i>Woelke & Romero Framing</i> , 456 U.S. 645 (1982).....	26, 48

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)	
<i>Wright Line</i> , 254 NLRB 1083 (1980), <i>enforced on other grounds</i> , 662 F.2d 899 (1st Cir. 1981).....	20-21, 46	
Statutes:		
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)		
Section 3(d) (29 U.S.C. § 153(d)).....	53, 54	
Section 7 (29 U.S.C. § 157)	15, 20, 32	
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	<i>passim</i>	
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	<i>passim</i>	
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	<i>passim</i>	
Section 8(d) (29 U.S.C. § 158(d)).....	35	
Section 10(a) (29 U.S.C. § 160(a))	2	
Section 10(c) (29 U.S.C. § 160(c))	44	
Section 10(e) (29 U.S.C. § 160(e))	2, 16, 26, 48, 50, 55	
Section 10(f) (29 U.S.C. § 160(f))	2	
Section 10(j) (29 U.S.C. § 160(j)).....	11, 26	
Federal Vacancies Reform Act (5 U.S.C. § 3345 et seq.)		7, 15, 18, 47-53
Section 3348(d) (5 U.S.C. § 3348(d)).....	51	
Section 3348(e) (5 U.S.C. § 3348(e))	51	
Regulations:		
29 CFR § 102.46(b)(2).....	49	

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of 1621 Route 22 West
Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing

Center (Somerset) for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order issued against Somerset on July 13, 2016, and reported at 364 NLRB No. 43. (JA 1-24.)¹ 1199 SEIU United Healthcare Workers East (the Union), which represents a unit of Somerset employees, has intervened on the Board’s behalf. The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act) (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce.

This Court has jurisdiction over this appeal because the Board’s Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Venue is proper under Section 10(f) because the unfair labor practices occurred in New Jersey. Somerset filed its petition for review on July 25, 2016. The Board filed its cross-application for enforcement on August 15, 2016. Both filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF ISSUES

1. Does substantial evidence support the Board’s finding that Somerset violated Section 8(a)(3) and (1) of the Act by eliminating its Licensed Practical Nurse (LPN) classification from the bargaining unit in retaliation for the LPNs’

¹ “JA” references are to the joint appendix. References preceding a semicolon are to the Board’s findings; those following are to supporting evidence.

union activity and discharging LPNs Irene D'Ovidio and Maharanie Mangal?

2. Does substantial evidence support the Board's finding that Somerset violated Section 8(a)(5) and (1) of the Act when it altered the scope of the bargaining unit without the Union's consent?

3. Does substantial evidence support the Board's finding that Somerset violated Section 8(a)(5) and (1) of the Act by denying the Union access to its facility?

4. Did the Board act within its broad remedial discretion in ordering Somerset to restore the LPN classification and reinstate two discharged LPNs?

5. Did the Board properly reject Somerset's challenges to the complaint's validity?

STATEMENT OF RELATED CASES

This appeal is the third unfair-labor practice proceeding to reach this Court that addresses issues relating to the Union's organization campaign at Somerset. The campaign culminated in a September 2, 2010 election, where certain of Somerset's employees, including LPNs, selected the Union as their collective-bargaining representative. On August 26, 2011, the Board certified the Union as the collective-bargaining representative.

1. *Somerset I*: On January 9, 2012, Somerset petitioned this Court for review of the Board's order rejecting its challenge to the Union's certification and

finding its refusal to bargain violated Section 8(a)(5) and (1) of the Act. *See 1621 Route 22 W. Operating Co. v. NLRB*, 3d Cir. Nos. 12-1031, 12-1505 (*Somerset I*).

On October 3, 2013, this Court placed *Somerset I* in abeyance pending its decision on the petition for rehearing in *NLRB v. New Vista Nursing Home & Rehabilitation*, 3d Cir. Nos. 11-3440, 12-1027 and 12-1936. *New Vista*, like *Somerset I*, presented the issue of whether Member Becker (a member of the Board panel that issued the decisions and orders under review in both *Somerset I* and *New Vista*) was properly appointed to the Board. The Board has twice requested that the Court lift the stay, explaining that Member Becker's appointment was valid in light of *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), and that the petitioner in *New Vista* had abandoned its challenge regarding Member Becker's appointment.² *Somerset I*, and its underlying challenge to the Union's certification, remains pending in this Court.

The pending challenge to the Union's certification in *Somerset I* affects which issues the Court can resolve in this case. Two unfair labor practices at issue here—the change in the unit scope and the refusal to allow the Union access to the nursing home—depend on the validity of the Union's certification. Specifically, the Board found that the unilateral elimination of the LPN classification was unlawful because it was done without the Union's consent. (JA 3-4.) Likewise,

² *See* Motion to Lift Order Putting Case in Abeyance, *Somerset I*, 3d Cir. Nos. 12-1031, 12-1505 (September 5, 2014); Letter, *Somerset I*, pp. 1-2 (October 6, 2014).

the Board found that Somerset's failure to allow the Union access to its facility prevented the Union from fulfilling its duties as the employees' bargaining representative. (JA 2 n.5.) Both violations hinge on whether the Union is the employees' lawful collective-bargaining representative, and the Court cannot rule on those issues until it decides the validity of the Union's certification, at issue in *Somerset I*. The Court can, however, reach the issue of whether Somerset's elimination of the LPN classification, and the related discharge of two LPNs, violates Section 8(a)(3) and (1) of the Act because the Union's certification does not affect that determination.

2. *Somerset II*: On June 6, 2016, this Court enforced a Board order finding that Somerset committed numerous unfair labor practices during the Union's campaign and after the election. *See 1621 Route 22 W. Operating Co. v. NLRB*, 825 F.3d 128 (2016) (*Somerset II*). This Court affirmed the Board's findings that, before the election, Somerset violated Section 8(a)(1) of the Act by repeatedly interrogating employees about their union support and by soliciting grievances and promising to fix them. *Id.* at 145-47. The Court also affirmed the Board's finding that following the election, Somerset unlawfully discharged four LPNs, all of whom the Court found Somerset "targeted because of their union support." *Id.* at 146. The Court concluded that the discharge of the four union supporters was

“unlawfully motivated” and violated Section 8(a)(3) and (1) of the Act. The Court enforced the Board’s order requiring their reinstatement. *Id.* at 146.

CONCISE STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

As noted, this case is the third unfair-labor-practice proceeding arising from the unionization campaign at Somerset. After the Union won the election, and following an investigation of unfair-labor-practice charges filed by the Union, the Board’s Acting General Counsel, Lafe Solomon, issued a consolidated complaint on April 26, 2012, alleging that Somerset 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.

After a hearing, an administrative law judge issued a decision and recommended order finding that Somerset had violated the Act as alleged. First, the judge found that Somerset’s unilateral elimination of the LPN classification and transfer of LPN work to non-unit registered nurses (RNs) constituted both an unlawful change in unit scope and an unlawful transfer of work, in violation of Section 8(a)(5) and (1) of the Act. (JA 13-16.) Next, the judge found that Somerset’s elimination of the LPN classification and the transfer of that work to non-unit employees was done in retaliation for the LPNs’ union activity and also violated Section 8(a)(3) and (1) of the Act. (JA 16-20.) The judge further found

that Somerset's discharge of the last two remaining LPNs, Irene D'Ovidio and Maharanie Mangal, was part of its unlawful elimination of the LPN classification and violated Section 8(a)(5), (3), and (1) of the Act. (JA 20.) Finally, the judge found that Somerset violated Section 8(a)(5) and (1) of the Act by denying the Union access to its facility. (JA 21.)

The Union filed exceptions to the judge's decision on February 25, 2013. The Acting General Counsel and Somerset each filed exceptions on March 5, 2013. Three years later, on March 10, 2016, Somerset filed a motion to dismiss the complaint on grounds that Solomon was improperly serving as Acting General Counsel under the Federal Vacancies Reform Act (FVRA) when the complaint issued. On March 31, 2016, General Counsel Richard F. Griffin issued a Notice of Ratification, ratifying the complaint's issuance and its continued prosecution. On July 13, 2016, the Board adopted and modified the judge's conclusions that Somerset's actions violated Section 8(a)(5), (3), and (1), as described below. The Board also denied Somerset's motion to dismiss. (JA 1-8.)

II. THE BOARD'S FINDINGS OF FACT

A. Somerset's Operations; the Union's Organizing Campaign; Somerset's Unfair Labor Practices During and After the Campaign

Somerset is a 32-room, 64-patient nursing and rehabilitation center in Bound Brook, NJ operated by Healthbridge Management, Inc. and Care One

Management, Inc. While Somerset provides 24-hour skilled nursing services for both sub-acute and long-term care patients, Somerset typically does not have more than five or six long-term patients at a time. (JA 2, 9; 374, 454-55.)

About June 2010, Somerset's Administrator Elizabeth Heedles, announced a reduction in nurses' hours and changes in schedules. Soon thereafter, LPNs Sheena Claudio and Shannon Napolitano contacted the Union, and the Union's organizing campaign commenced at Somerset—a campaign that Somerset vigorously opposed. (JA 10; *Somerset II*, 825 F.3d at 134.) In a September 2, 2010 election, a unit of employees that included LPNs, but not RNs, selected the Union as their collective-bargaining representative. (JA 9.)

The Board found that Somerset's actions during the anti-union campaign resulted in several unfair-labor-practice violations, and this Court affirmed those findings in *Somerset II*. 825 F.3d. at 144-48. Before the election, Somerset's managers, including Somerset Administrator Doreen Illis (who replaced Heedles), repeatedly interrogated employees about their union support and activities. (JA 10; 825 F.3d at 145.) Care One Regional Director Jason Hutchens and Illis also unlawfully solicited employees' grievances, promising to fix them. (JA 10; 825 F.3d at 146-47.) Somerset made good on its promises by eliminating the schedule changes "which had created employee unrest" and transferring Administrator Heedles, who had made those changes. 825 F.3d at 146.

In the weeks following the election, Somerset unlawfully discharged LPNs Claudio, Jillian Jacques, and Napolitano, along with staffing coordinator Valerie Wells, in retaliation for their union activity. Indeed, Napolitano, Jacques, and Napolitano were the three leading union advocates at Somerset. (JA 10 n.3.) Somerset’s reasons proffered for their discharges—a stricter enforcement of policies meant to improve patient care—were deemed “simply pretextual.” 825 F.3d at 146. In addition to the unlawful discharges, Somerset also dropped several per diem nurses following the election, and replaced them with nurses from another Care One or Healthbridge location whom Illis thought “‘would vote in [Somerset’s] favor in a new election’ if the results of the first election were overturned.” *Id.* at 137. Taken as a whole, these actions established that Somerset’s animus against its employees’ union activity was “beyond question.” *Id.* at 136.

B. Floor Nurse Duties

When the Union was selected as the collective-bargaining representative, Somerset employed 19 LPNs and 8 RNs. (JA 5 n.22; 815.) Both LPNs and RNs worked as floor nurses. (JA 511). Typically, Somerset assigned three floor nurses to each morning and evening shift, and two floor nurses worked the overnight shift. (JA 10; 145-47.) Each floor nurse was responsible for about 20 to 22 patients or residents each day. (JA 10; 149.) When working as floor nurses, both LPNs and

RNs performed the same duties such as distributing medication, performing assessments, and administering various treatments, including changing bandages, starting IV lines, and administering respiration such as nebulizers, BIPAP and CPAP machines, and inhalers. (JA 10; 150-56.) RNs' licenses allowed them to perform three specific duties that LPNs could not: administer an "IV push," develop a plan of care with interpretative as opposed to observational assessment, and make a pronouncement of death. (JA 10-11, 15; 225, 310.) There is no evidence showing how often, if ever, floor nurses performed those tasks. (JA 15.)

C. The 2010 Survey; the April 2011 Injunction Proceeding

In 2009, Somerset received a survey from the New Jersey Department of Health and Human Services (NJDHHS) (the 2009 Survey) noting deficiencies, including two involving harm to a patient. (JA 12 n.12.) In December 2010, Somerset received the results of a recertification survey (the 2010 Survey) from NJDHHS that noted 13 nursing-related deficiencies, none of which involved harm to a patient. (JA 12; 947-98.) In response to the 2010 Survey, Somerset held several meetings with nurses to discuss the results, but did not otherwise provide any increased training to address any nursing deficiencies identified. (JA 18; 999-1000.) No LPNs or RNS were disciplined as a result of the deficiencies identified in the 2010 Survey. (JA 12 n.13; 404-07.)

In April 2011, while the complaint in *Somerset II* was pending, the Board's Regional Director for Region 22 brought an injunction proceeding under Section 10(j) of the Act (29 U.S.C. § 160(j)), seeking reinstatement of the four unlawfully discharged employees. The District Court ordered reinstatement of two of the four employees in April 2012. *See Lightner v. 1621 Route 22 W. Operating Co., LLC*, No. 11-2007, 2012 WL 1344731, at *44 (D.N.J. Apr. 16, 2012).³

D. Somerset Eliminates the LPN Classification and Hires RNs to Replace the LPNs

In May 2011, 6 months after receiving the results of the 2010 Survey and about a month after the Board's Regional Director petitioned for an injunction requiring Somerset to reinstate the LPNs that it had discharged, Danette Manzi, executive vice president of Healthbridge Management, decided to eliminate the LPN classification entirely and use only RNs as floor nurses. She arrived at that conclusion after discussions with Care One Regional Director Hutchens, who apprised her of Administrator Illis' concerns regarding the surveys and the standard of care being provided. (JA 12.) Manzi directed that, as floor-nurse positions became available, they should be offered only to non-unit RNs. (JA 12; 159, 514.) Somerset did not notify the Union that it had eliminated the LPN

³ After the Board's underlying Order in *Somerset II* issued, this Court found the district court's temporary injunction moot, and remanded the case, instructing the district court to vacate its opinion and order. *Lightner v. 1621 Route 22 West Operating Co., LLC*, 729 F.3d 235, 237-38 (3d Cir. 2013).

classification until September 2011, when it raised the nonexistence of LPN positions as a defense to reinstating LPNs in the injunction proceeding. (JA 95-96.) Somerset also did not notify any of the bargaining unit members of that decision. (JA 12; 473-74.)

Soon after the decision was made to eliminate the LPN classification, Somerset started filling its floor nurse positions with RNs referred by an agency, and had its remaining LPNs train those nurses to perform floor nurse tasks. Some RNs from the agency had no nursing experience at all, and did not know how to perform basic tasks such as administering an IV. (JA 11; 159.) The experienced LPNs also showed the new RNs how to treat dialysis patients, pass medications, evacuate fluid from lungs, and dress wounds. (JA 11; 159-62.) As of the time of the unfair-labor-practice hearing in this case, none of the RNs who initially replaced LPNs in the summer of 2011 remained save one, who was currently suspended and had previously been disciplined 8 times for medication errors. (JA 11 n.7; 393-94.)

E. Discharges of Irene D'Ovidio and Maharanie Mangal

By July 2011, of the 19 LPNs who had been employed at Somerset just 3 months earlier, only Irene D'Ovidio and Maharanie Mangal remained. (JA 11.) D'Ovidio had worked at Somerset, where she specialized in wound care, since August 2002. (JA 11; 190-95.) On August 18, 2011, D'Ovidio arrived at work

and was called into Administrator Illis' office. Illis discharged D'Ovidio, explaining that Somerset was moving in a different direction and that D'Ovidio "wasn't part of the plan." (JA 11; 211.)

Mangal had also worked at Somerset since 2002. Sometime in August 2011, Director of Nursing Ruth Roper Brown told Mangal that Somerset was only hiring RNs. Later that month, new Administrator Kristina Grasso encouraged Mangal to enroll in an RN program if she wished to remain employed. When Grasso discovered that Mangal had not enrolled in such a program, she discharged Mangal on November 17. (JA 11; 128-35, 265-67.)

After Somerset eliminated its LPNs and terminated D'Ovidio, Dr. Edward Buch, a wound care specialist who referred patients to Somerset and worked closely with D'Ovidio, ceased his referrals. He expressed his dissatisfaction with the new RNs' lack of training and inability to properly care for his patients, and he ultimately ended his relationship with Somerset, citing deterioration of care. Since eliminating the LPN classification, Somerset's reputation in the community has suffered. (JA 11; 629-33.)

F. Somerset Ignores the Union's Access Request

On January 30, 2012, the Union's executive vice-president, Milly Silva, wrote to Grasso requesting access to bargaining unit members' work areas in order to observe work processes and working conditions, including health and safety

concerns. The Union sought access to conduct bargaining surveys in advance of collective-bargaining negotiations, and also to identify any possible health and safety issues, such as the unavailability of certain lifts that reduce back injuries among unit certified nursing assistants (CNAs). Some CNAs had also complained to the Union about inadequate time to perform all of their duties, and the Union wanted to observe their job assignments. Somerset ignored the Union's request for access. (JA 13; 96-101.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce, Member Miscimarra, and Member Hirozawa) adopted the judge's findings that the elimination of the LPN classification constituted unlawful retaliation for LPNs' union activity under Section 8(a)(3) and (1) of the Act. (JA 1, 3.) The Board majority (Chairman Pearce and Member Hirozawa) further found that the elimination of the LPN classification unlawfully modified the scope of the bargaining unit, and thus violated Section 8(a)(5) and (1) of the Act.⁴ (JA 2-3.) The Board found it unnecessary to pass on the judge's additional finding that the elimination of the

⁴ Member Miscimarra found it unnecessary to pass on the majority's finding that the elimination of the LPN classification violated Section 8(a)(5), in light of the finding that the elimination violated Section 8(a)(3).

LPN classification also constituted an unlawful work transfer.⁵ (JA 4 n.20.) The Board also unanimously affirmed the judge’s finding that D’Ovidio’s and Mangal’s discharges resulted from the unlawful elimination of the LPN classification, and thus violated Section 8(a)(5), (3), and (1) of the Act. (JA 3 n.12.) The Board also agreed with the judge that the denial of access violated Section 8(a)(5) and (1) of the Act. Finally, the Board rejected Somerset’s FVRA-based motion to dismiss the complaint, explaining that Somerset waived the issue by failing to timely raise the argument in its exceptions and, in any event, that the issue was moot due to Griffin’s ratification of the complaint. (JA 1-2, n.4.)

The Board ordered Somerset to cease and desist from violating the Act as it had done in this case and “in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.” (JA 4-6.) Affirmatively, the Board ordered Somerset to reinstate the LPN classification, to return to the LPNs any LPN work transferred to the RNs, to reinstate any affected LPNs, including D’Ovidio and Mangal, and to make them whole. In addition to posting a remedial notice, the Board further ordered Somerset to read the notice aloud to employees, and mail it to all bargaining unit employees employed at any time since May 1, 2011. (JA 5-7.)

⁵ Contrary to Somerset’s statement that “the Board affirmed the ALJ’s decision in its entirety” (Br. 19-20), the Board did *not* adopt the judge’s finding that Somerset unlawfully transferred unit work without bargaining with the Union.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence. *See* Section 10(e) of the Act, 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). "The Board's factual inferences are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it *de novo*." *See Universal Camera*, 340 U.S. at 488; *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). The Board's credibility determinations are entitled to "great deference" and must be affirmed unless they are shown to be "inherently incredible or patently unreasonable." *Atl. Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001); *Grane Health Care v. NLRB*, 712 F.3d 145, 149 (3d Cir. 2013) (citations and internal quotations omitted). The Board's legal conclusions must be upheld if based on a "reasonably defensible" construction of the Act. *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Somerset violated Section 8(a)(3) and (1) of the Act by eliminating the LPN classification, and as a result discharging two LPNs, because of the LPNs' union activity. Somerset indisputably knew of the LPNs' union activity. Its prior unfair labor practices,

found by the Board and affirmed by this Court, establish Somerset's animus toward that activity. Moreover, the timing of the decision—made weeks after the filing of a petition seeking reinstatement of unlawfully discharged LPNs—supports the Board's finding that Somerset took action in order to deplete the unit of its strongest union supporters and to avoid reinstating the discharged LPNs. The Board properly rejected Somerset's contention that it eliminated LPNs for patient-care reasons. No evidence links the LPNs to any patient-care deficiencies. The record also does not support Somerset's contention that it eliminated LPNs as part of a transition to an all-sub-acute model because no such transition occurred.

Substantial evidence further supports the Board's finding that Somerset's unilateral elimination of the LPN classification unlawfully altered the unit's scope in violation of Section 8(a)(5) of the Act. Somerset does not dispute that it unilaterally and systematically replaced LPNs with non-unit RNs until no LPNs remained in the unit—an action that seriously depleted unit size and strength. Instead of addressing the Board's unit-scope finding, Somerset raises defenses that are plainly inapplicable to unit-scope changes and instead apply to unilateral work transfers. Moreover, even if the asserted defenses were applicable, the Board properly found that Somerset failed to prove them. Somerset made no change in the scope and direction of its enterprise, and it failed to show that it eliminated the LPN classification to improve patient care.

Substantial evidence supports the Board's finding that Somerset further violated Section 8(a)(5) by ignoring the Union's request for access to its facility. The Union, whose need for access was particularly acute as a newly certified union, requested access to observe employees' working conditions and health and safety needs. Somerset ignored the request, offered no accommodation, and now falsely claims that the Union had alternative means of obtaining that information.

Somerset's objections to the Board's remedy requiring reinstatement of the LPN classification and the return of LPN work to LPNs lack merit. Such remedies are supported by longstanding Supreme Court precedent. Moreover, Somerset utterly failed to substantiate its claim that restoration of the LPN classification would cause patient care to suffer.

Finally, the Court lacks jurisdiction to consider Somerset's FVRA-based challenge to the complaint because Somerset failed to timely challenge the complaint's validity before the Board. Somerset offers no extraordinary circumstances to excuse its failure to do so. In any event, the issue of Solomon's designation is moot because, under this Court's precedent, General Counsel Griffin's ratification of the complaint is sufficient to correct any alleged defect, and Somerset has failed to rebut the presumption that Griffin properly discharged his duty by independently reviewing the complaint and the case before ratifying its issuance and continued prosecution.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT SOMERSET VIOLATED SECTION 8(a)(3) AND (1) BY ELIMINATING THE LPN CLASSIFICATION IN RETALIATION FOR THE LPNS’ UNION ACTIVITY

Somerset’s retaliation against its LPNs for leading the unionization drive did not end with the unlawful discharges of the leading union advocates in *Somerset II*. Rather, concerned that the pending injunction proceeding could result in an order to reinstate those nurses, and realizing that it needed to infuse the unit with non-Union supporters, Somerset simply eliminated the LPN classification, an action that “seriously depleted the size and strength of the bargaining unit.” (JA 5.) In doing so, Somerset discharged two highly experienced nurses. As shown below, substantial evidence supports the Board’s finding that Somerset acted not “to resolve patient-care problems that had plagued [it] for years,” but “in response to the LPNs’ union activity.”⁶ (JA 3.)

⁶ Contrary to Somerset’s suggestion (Br. 29-30), the Union’s certification as bargaining representative has no bearing on the allegation that Somerset eliminated the LPN classification and discharged D’Ovidio and Mangal in retaliation for the LPNs’ union activity. Violations of Section 8(a)(3) and (1) of the Act do not depend on a union’s certification. *See, e.g., Somerset II*, 825 F.3d at 145-46 (finding that Somerset unlawfully retaliated against four employees for their union activities while the Union’s certification was still pending). This Court, therefore, may reach this issue regardless of the outcome of *Somerset I*.

A. Applicable Principles

Section 7 of the Act guarantees employees the right “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of [those] rights.” 29 U.S.C. § 158(a)(1).

Section 8(a)(3) of the Act bans “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). An employer violates Section 8(a)(3) by “discharging employees because of their union activity.” *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 186 (5th Cir. 1988). Although the protections of Section 8(a)(3) and Section 8(a)(1) “are not coterminous, a violation of [the former] constitutes a derivative violation of [the latter].” *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Whether an employer’s adverse action violates the Act often requires determining the employer’s motive. 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, 254 NLRB 1083, 1088-89 (1980), *enforced on other grounds* 662 F.2d 899 (1st Cir. 1981). Under that test, if substantial evidence supports the Board’s finding that employees’ protected activity was a “motivating factor” in an employer’s decision to take adverse action, that 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 any protected activity. *See NLRB v. Omnitest Inspection Servs.*, 937 F.2d 112, 122 (3d Cir. 1991) (citing *Transp. Mgmt. Corp.*, 462 U.S. at 401-03). If the lawful reasons advanced by the employer for its actions are a pretext—that is, if the reasons either did not exist or were not in fact relied on—the employer’s burden has not been met, and the inquiry is logically at an end. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982).

Under *Wright Line*, the elements required to support a showing of unlawful motivation are “union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.” *Intermet Stevensville*, 350 NLRB 1270, 1274 (2007). Unlawful motive can be inferred from either direct or circumstantial evidence, which includes knowledge of employees’ union activity, hostility towards the union, the timing of the adverse action, the employer’s reasons (or lack thereof) for acting, and the treatment accorded

similarly-situated employees. *See Omnitest Inspection Servs.*, 937 F.2d at 122; *Hanlon & Wilson Co. v. NLRB*, 738 F.2d 606, 614 (3d Cir. 1984).

Courts are particularly “deferential when reviewing the Board’s conclusions regarding discriminatory motive.” *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000); *accord Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 726 (9th Cir. 1980) (determination of motive is “particularly within the purview of the Board”). “Once the Board has inferred an illegal motive for an employment decision, [a] court ‘may not lightly displace the Board’s factual finding of discriminatory intent.’” *Texas World Serv. Co. v. NLRB*, 928 F.2d 1426, 1435 (5th Cir. 1991), *quoting Brookwood Furniture*, 701 F.2d 452, 464 (5th Cir. 1983). Applying that analysis, the Board reasonably found that Somerset eliminated the LPN classification, and discharged two LPNs, because of the LPNs’ protected union activities.

B. Somerset Eliminated the LPN Classification in Retaliation for LPNs’ Union Activity and To Avoid Reinstating LPNs It Had Unlawfully Discharged

The Board properly found that Somerset eliminated the LPN position and transferred that work to non-unit RNs in retaliation for the LPNs’ union activity and to evade its responsibility to reinstate the unlawfully discharged LPNs. (JA 3, 16-20.) Substantial evidence supports the Board’s finding that Somerset harbored strong animus against the Union, and against the LPNs’ union activities in

particular. Although Somerset contends that patient-care considerations actually motivated the LPN elimination, the Board reasonably found that the record does not substantiate that claim. (JA 3.)

1. Somerset knew of the LPNs' union activities and its animus toward the Union is "beyond question"

The Board properly found that Somerset knew of the LPN's union activity. The Union filed the election petition in July 2010, nearly a year before the events of this case. As the Board found, since then, "significant litigation regarding the election, certification and [Somerset's] unfair labor practices has followed." (JA 16.) Moreover, this Court has already found that the Somerset discharged the LPNs who were the leading union advocates. *Somerset II*, 825 F.3d at 136. Given that evidence, the Board was on solid ground in finding that Somerset's "knowledge of the LPNs' union activities at the time their work was transferred and the classification eliminated is indisputable." (JA 16.)

Similarly, the Board reasonably found that Somerset's anti-union animus motivated its decision to eliminate the LPNs from the unit. The Board relied on Somerset's actions in *Somerset II*, which "evinced [Somerset's] animus toward . . . the union activities of the LPNs in particular." (JA 16.) Indeed, the discharges of the union supporters in *Somerset II* demonstrated Somerset's "wish to erode the Union's support to improve its chances of winning a rerun election." (JA 3.) As the Board explained, "removing the unit classification whose members had led the

organizing drive would go a long way towards accomplishing that goal.” (JA 3.) Somerset labels the Board’s conclusion that it took action to accomplish its goal of winning a rerun election as speculation. (Br. 39.) But that contention ignores this Court’s finding in *Somerset II* that Administrator Illis sought to pack the bargaining unit with employees who “‘would vote in [Somerset’s] favor in a new election’ if the results of the first election were overturned.” 825 F.3d at 137.

Moreover, Somerset’s numerous unfair labor practices in *Somerset II*, which included interrogations, solicitation of grievances, and discharges of active union supporters, renders Somerset’s animus “beyond question.” (JA 16.) Notably, Somerset committed many of those violations before the election. *See Healthcare Employees Union Local 399 v. NLRB*, 463 F.3d 909, 920 (9th Cir. 2006) (unfair labor practices “occurring between the filing of a petition for a representation election with the Board and the ensuing election . . . rais[e] a powerful inference of anti-union animus”).

The Board also noted that there was no significant turnover in Somerset’s management between the events in *Somerset II* and Somerset’s decision in May 2011 to eliminate the LPN classification—a decision that involved both Illis and Hutchens. (JA 12, 16.) Illis, who unlawfully remedied grievances, coercively interrogated employees, and discharged the four union supporters in *Somerset II*, remained administrator until August 2011. Hutchens, who unlawfully solicited

employee grievances, was Care One's regional director until November 2011. (JA 9.) The Board reasonably found that "the evidence is more than sufficient to demonstrate [Somerset's] animus against the employees' union activity, and the active participation by Hutchens and Illis in unlawful conduct designed to thwart it." (JA 16.)

The timing of Somerset's decision also "supports an inference that Somerset eliminated the LPN classification in response to the LPNs' union activity, rather than to resolve patient-care problems that had plagued [Somerset] for years." (JA 3.) In April 2011, the Board initiated injunction proceedings seeking reinstatement of the LPNs that Somerset had unlawfully discharged. "[J]ust 1 month after the General Counsel sought [the] injunction," Somerset decided to eliminate the LPN classification. (JA 3.) That timing "militates substantially in favor of a finding that [Somerset's] decision was unlawfully motivated." (JA 16-17.) *See Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 814 (3d Cir. 1986) (timing and departure from past practice indicates unlawful motive).

Somerset contends that the Board impermissibly relied only on timing in establishing that it eliminated the LPN classification in retaliation for LPNs' union activity. (Br. 39-40.) But that argument misreads the Board's decision. In addition to the suspicious timing, as discussed above, the Board relied on its previous court-enforced findings that Somerset had recently committed a series of

unfair labor practices, rendering its animus against the Union “beyond question.” (JA 3, 16-17.) Substantial evidence therefore strongly supports the Board’s finding that Somerset “transferred the work of the LPNs to the RNs in retaliation for the LPNs’ union activity, and in order to avoid reinstating them should the General Counsel obtain an order in the [Section] 10(j) proceeding requiring that it do so.” (JA 17.)⁷

2. Somerset failed to prove it would have eliminated the LPN classification absent the LPNs’ union activity

Somerset contends that it eliminated the LPN classification in order to improve the quality of the care it provided (Br. 40-41). The Board, however, found that “the evidence does not substantiate [Somerset’s] defense.” (JA 20.) Instead, the evidence shows that Somerset took action in response to the LPNs’ union activity, not patient-care problems. (JA 3.)

⁷ For the first time, Somerset contends (Br. 29-30) that the LPNs’ pre-election behavior at issue in *Somerset I* was not protected concerted activity, and if the Court finds the Union was improperly certified, then the Court must necessarily find that the elimination of the LPN classification (and the discharge of two LPNs) was lawful. Somerset did not raise to the Board the argument that LPNs did not engage in protected, concerted activity before the election. (JA 2026-37.) Therefore, this Court lacks jurisdiction to address it. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing*, 456 U.S. 645, 665 (1982) (stating Section 10(e) of the Act precludes court of appeals from reviewing claim not raised to the Board).

Somerset claims that it eliminated the LPN classification and transitioned to an all-RN model “to address patient care and nursing issues” and to “reposition the facility in the marketplace as an all-subacute facility.” (Br. 40-41.) The Board flatly rejected that claim, explaining that “[t]here is simply no evidence of any change in [Somerset’s] patient population, let alone the sort of dramatic change which would establish that it eliminated the LPN position and transferred the work outside the bargaining unit for legitimate, nondiscriminatory reasons.” (JA 17.) Before eliminating the LPN classification, Somerset had no more than a handful of long-term residents, and “the majority of the patients for which it provided care required sub-acute services.” (JA 14.) Indeed, it continued to advertise for long-term residents during Illis’ tenure, and, “as of May 2012, its website indicated that it provided long-term as well as sub-acute care.” (JA 17.) Thus, the lack of any discernible change to its patient population controverts Somerset’s contention that elimination of the LPNs was necessary to provide care to a more acute population.

The Board further properly found that Somerset did not show that the deficiencies identified in the 2009 and 2010 Surveys prompted it “to conclude that the acuity level of its patients was too intense for LPNs, as opposed to RNs, to provide adequate care.” (JA 17.) Manzi, who made the decision to eliminate the LPNs, admitted that she “never even inquired as to whether the RNs . . . were performing at a higher level overall” than the LPNs. (JA 19.) Illis further

acknowledged that, before the change, the supposed nursing problems Somerset experienced were with both RNs and LPNs. (JA 12.) Although RNs can perform some specific tasks that LPNs cannot perform, there is no record evidence tying those tasks to specific deficiencies in the Surveys, and no evidence evincing “why [Somerset] focused on the LPNs, as opposed to the RNs, as the ultimate source of the problem.” (JA 19.) It is also telling that Healthbridge Management and CareOne Management operated approximately 28 nursing home facilities, but, despite the asserted belief that RNs provide better sub-acute care, Somerset was the only facility to implement an all-RN unit. (JA 20.)

Indeed, the record indicates that, if anything, LPNs provided better patient care than the RNs. As the Board found, “some of the RNs [who] replaced the LPNs at [Somerset’s] facility, both those initially referred from an agency beginning in the spring of 2011 and those hired to replace the agency RNs as employees, had to be shown how to begin IVs, administer dialysis, perform pleural evacuation and tracheostomy suctioning, and perform wound care.” (JA 19.) Only one of the RNs initially employed to replace LPNs still worked for Somerset at the time of the hearing, and she had committed eight medication errors and was also “suspended and on a final warning for permitting a patient to leave the facility in order to smoke a cigarette[.]” (JA 19.) By contrast, D’Ovidio’s discharge led to

deteriorating wound care at Somerset, forcing Dr. Buch to stop referring patients there and end his relationship with Somerset. (JA 19.)

The timing also belies Somerset's contention (Br. 41) that the Surveys prompted the LPN elimination. As the Board found, Somerset had "patient-care problems that had plagued [it] for years." (JA 3.) Illis purportedly formed her opinion about the LPNs' inability to provide adequate care by August 2010, after she initially saw the 2009 Survey, but "for reasons unexplained by Manzi or any of [Somerset's] other witnesses, the determination to replace LPNs with RNs was not made for another 7 months." (JA 18.) Given the supposed severity of the issue, the Board correctly concluded that Somerset's "unexplained delay in addressing what it contends was the wholesale inadequacy of the LPNs as a classification militates against a finding that its asserted reason for replacing them with RNs was legitimate." (JA 18.) Indeed, the "sole training and education the LPNs received after the [2010 Survey] was a series of meetings Illis conducted with the nursing staff to discuss the agency's findings." (JA 18.) As the Board found, that minimal training undermines Somerset's contention that the 2010 Survey was so significant as to require massive changes in its nursing staff.

The record also does not substantiate Somerset's bare contention that the elimination of the LPNs "has had a positive impact upon patient care at Somerset." (Br. 41.) Somerset relies on the testimony of Administrator Grasso, whom the

Board explicitly discredited. (JA 20.) Further, Somerset offered no evidence that its 30-day readmission rate, as opposed to its general readmission rate, declined after May 2011. (JA 20.) Thus, the Board concluded that “the evidence is insufficient to substantiate [Somerset’s] claim that the effort to reduce hospital readmission rates, and admittedly evolving protocols, required the replacement of [its] LPNs with RNs[.]” (JA 15.) Instead, as described above, the credited evidence shows that Somerset’s reputation in the community declined after it eliminated the LPNs (JA 11), and the LPNs’ replacements did not know how to perform even basic nursing tasks. (JA 19.)

3. Somerset unlawfully discharged D’Ovidio and Mangal

The Board also found that Somerset’s “decision [to eliminate the LPN classification] resulted in the discharge of LPNs D’Ovidio and Mangal.” (JA 3, n.12.) Somerset does not challenge that finding in its brief, and has therefore waived its right to challenge it on appeal. *See Travitz v. Northeast Dep’t ILGWU Health & Welfare Fund*, 13 F.3d 704, 711 (3d Cir. 1994) (“When an issue is not pursued in the argument section of the brief, the appellant has abandoned and waived that issue on appeal.”)

In any event, the record amply supports the Board’s finding. As the Board stated, Somerset “provided no evidence to establish that Mangal and D’Ovidio were discharged for any reason other than their being LPNs, as opposed to RNs.”

(JA 20.) Should the Court enforce the Board’s finding that Somerset unlawfully eliminated the LPN classification, it should therefore also enforce the Board’s finding that Mangal and D’Ovidio were unlawfully discharged. *See, e.g., Aldworth Co.*, 338 NLRB 137, 144-45 (2002), *enforced* 363 F.3d 437 (D.C. Cir. 2004) (employer violated Section 8(a)(3) by discharging employees for violation of policy that was altered for retaliatory reasons).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT SOMERSET VIOLATED SECTION 8(a)(5) AND (1) BY ALTERING THE SCOPE OF THE BARGAINING UNIT

The Board found that Somerset unlawfully altered the scope of the bargaining unit when it unilaterally eliminated the unit’s LPN classification. (JA 3-4.) As in the underlying Board proceeding, Somerset fails to directly challenge that finding. (JA 4.) Instead, Somerset proceeds on the erroneous premise that the Board treated its action as a transfer of work, relying on various defenses applicable to management decisions about which parties have a duty to bargain. The Board, however, specifically did not address whether Somerset’s action was also a unilateral transfer of work. (JA 4 n.20.) As shown below, Somerset’s asserted defenses and the precedent on which it relies are inapplicable.

A. Applicable Principles

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives

of his employees.”⁸ An employer violates its duty to bargain in good faith if it alters the scope of a bargaining unit without union or Board consent. *See Shell Oil Co. & Oil, Chem. & Atomic Workers, Int’l Union*, 194 NLRB 988, 995 (1972), *enforced sub nom. OCAW v. NLRB*, 486 F.2d 1266, 1268 (D.C. Cir. 1973) (“[I]n the absence of an agreement, neither party may attempt or force upon the other an enlargement, alteration, or merger of an established unit.”) The elimination of a position from a bargaining unit—such as the elimination of the LPNs here—alters the scope of a unit, and an employer who undertakes such an action absent the union’s consent or Board action violates Section 8(a)(5) and (1) of the Act. *See Wackenhut Corp.*, 345 NLRB 850, 852-85 (2005); *Mt. Sinai Hosp.*, 331 NLRB 895 n.2 (2000), *enforced* 8 Fed. App’x 111 (2d Cir. 2001).

The reasons why an employer may not force a change in the bargaining unit are “as simple as they are fundamental.” *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 475 (D.C. Cir. 1988). Unless parties know the unit of bargaining, they “cannot bargain meaningfully about . . . conditions of employment.” *Id.* (citing *Douds v. Int’l Longshoremen’s Assn.*, 241 F.2d 278, 282 (2d Cir. 1957)). Thus, “the statutory interest in maintaining stability and certainty in bargaining

⁸ A violation of Section 8(a)(5) derivatively violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights (29 U.S.C. § 157). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

obligations requires adherence to that unit in bargaining.” *Shell Oil Co.*, 194 NLRB at 995 (1972).

B. The Board Properly Found That Somerset Altered the Scope of the Bargaining Unit

Substantial evidence supports the Board’s finding that the elimination of the LPN classification was a change in unit scope. Indeed, Somerset does not dispute that finding or even mention it in its brief. Because “an appellant’s failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal,” this Court should affirm the Board’s finding that Somerset’s decision to remove LPNs from the unit unlawfully altered the scope of the unit in violation of Section 8(a)(5) and (1) of the Act. *U.S. v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005).

In any event, Somerset does not contest that it unilaterally replaced LPNs with RNs when LPNs resigned or were discharged, until ultimately no LPNs remained in the unit. Somerset also does not challenge the Board’s finding that the LPN elimination “seriously depleted the size and strength of the bargaining unit.” (JA 5.) Nor could Somerset mount such as a challenge, because as the Board noted, the elimination of the LPNs ultimately reduced “about a quarter of the unit.” (JA 5 n. 22.) Somerset’s unilateral elimination of the LPN position unquestionably altered the unit’s scope.

The Board properly found this case analogous to *Wackenhut Corporation*, 345 NLRB at 852. (JA 3.) There, the Board found that the employer unlawfully altered the unit scope when, without the union’s consent, the employer eliminated the position of sergeant from the bargaining unit of security officers and transferred that work to non-unit lieutenants. Similarly, here, Somerset did not simply move work between positions in different units; instead, it “effectively . . . eliminated the LPN position that had performed the work at issue.” (JA 4 n.20.) Indeed, the RNs’ duties were similar enough to the duties the LPNs had performed that the experienced LPNs trained the RNs who would eventually replace them. (JA 11.) Following that training, “the RNs. . . proceeded to perform the same work that LPNS had performed as floor nurses.” (JA 11.) Thus, here, as in *Wackenhut*, the result is that non-unit employees are performing the same duties as the eliminated positions—security-guard work in *Wackenhut* and floor-nurse work here—but under different names.

C. Somerset’s Defenses Are Inapplicable

In defending the unilateral elimination of the LPN classification, Somerset ignores the Board’s finding that its action was an unlawful change in unit scope and instead defends its action as a lawful transfer of work—a characterization that the Board specifically did not address. (JA 4 n.20.) Rather than raise defenses specific to an allegation of unlawful alteration of unit scope, Somerset claims (Br.

30-37) that it had no duty to bargain over eliminating the LPN classification because its decision was attributable to a fundamental change in its business, did not concern labor costs, and was necessitated by economic exigency. Somerset's arguments, however, rest on the mistaken premise that the elimination of the LPN classification was a transfer of work, over which Somerset was required to bargain.

The Board properly rejected Somerset's defenses as "inapplicable" and "ill-suited" to the case at hand because they address the separate and distinct issue of whether certain management decisions are mandatory subjects of bargaining. (JA 4.) The Board distinguishes between mandatory and permissive subjects of bargaining. *See NLRB v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342, 349-50 (1958). Section 8(d) (29 U.S.C. § 158(d)) requires the parties to meet and bargain over employees' "wages, hours, and other terms and conditions of employment," which are mandatory bargaining subjects. *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971); *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400-01 (D.C. Cir. 1988). Absent an agreement, an employer may implement a proposal concerning a mandatory subject if the parties bargain to impasse. *Raymond F. Kravis Ctr. for the Performing Arts*, 351 NLRB 143, 144 (2007), *enforced* 550 F.3d 1183 (D.C. Cir. 2008). All other lawful subjects of bargaining are permissive, and a party may not insist to impasse on a permissive subject of bargaining. *Idaho Statesman*, 836 F.2d at 1400. The scope of an

existing bargaining unit is a permissive subject of bargaining. *See, e.g., NLRB v. Operating Engineers Local 542*, 532 F.2d 902, 907 (3d Cir. 1976). Indeed, “if it were a mandatory subject, an employer could use its bargaining power to restrict (or extend) the scope of union representation in derogation of employees’ guaranteed right to representatives of their own choosing.” *Idaho Statesman*, 836 F.2d at 1400-01; *see also NLRB v. Bay Shipbuilding Corp.*, 721 F.2d 187, 191 (7th Cir. 1983) (employers are not “free to alter the composition of the bargaining unit under the guise of a transfer of unit work.”)

Given the distinction between mandatory and permissive bargaining subjects, the Board “has never found an exception to an employer’s duty to refrain from unilaterally changing a scope of a unit—again, a permissive subject of bargaining—based on defenses recognized in cases dealing with mandatory bargaining subjects.” (JA 4.) Likewise, *Somerset* points to no court decision that has applied *Somerset*’s asserted defenses to allow an employer to unilaterally change the scope of a bargaining unit, and as it did before the Board, it “offers no rationale” for applying these defenses here. (JA 4.) In essence, *Somerset* seeks to “make sweeping changes to its’ employees’ representation not only without obtaining the Union’s consent, but without even notifying the Union in advance,” an attempt that the Board rightly rejected. (JA 4.)

The Board further recognized (JA 4) that, even assuming Somerset’s asserted defenses apply to unit-scope changes, none of the precedent on which Somerset relies (Br. 30-35) involves a situation where, as here, an employer transfers work from one group of its own employees to another group of its own employees *at the same location*. See *Dorsey Trailers, Inc. v. NLRB*, 134 F.3d 125 (3d Cir. 1998) (subcontract of unit work to a different employer at a different location); *Furniture Rentors of America v. NLRB*, 36 F.3d 1240 (3d Cir. 1994) (same); *Dubuque Packing Co.*, 303 NLRB 386 (1991) (relocation of work from one plant to another); *Van Dorn Machinery Co.*, 286 NLRB 1233 (1987) (unilateral change to paid lunch policy that did not involve any transfer of work), *enforced* 881 F.2d 302 (6th Cir. 1989). Rather, the genesis for each of these cases is *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), where the Court discussed various types of management decisions and whether they gave rise to a bargaining obligation. But as the Board found, “the entire line of Board and court cases [on which Somerset relies] . . . including *First National Maintenance and Dubuque Packing*, deal with transfers of work in which the employer moves the work to employees of a different employer or its own employees at a different location. A straightforward work reassignment . . . is not contemplated by these cases.” (JA 4 n.18.) The Board therefore properly rejected the applicability of those cases because here, unlike the cases cited above, Somerset’s employees “still

perform all the work that the employees in the eliminated LPN classification performed at the same location.” (JA 4.)

Thus, Somerset has failed to offer a valid and recognized defense to the Board’s actual finding that the elimination of the RN classification was an unlawful change in unit scope. Indeed, again proceeding on the erroneous premise that the Board found the elimination of LPNs from the unit constituted a transfer of work over which Somerset had to bargain, Somerset raises no challenge to the Board’s finding that its asserted defenses were inapplicable.⁹

D. The Record Does Not Support Somerset’s Asserted Defenses

The Board further properly found that “even if the defenses that Somerset claims were cognizable here,” they are not supported by the record and lack merit. (JA 4.) Somerset first claims that it eliminated the LPN classification as “part of a fundamental change in the nature, scope, and direction of its business.” (Br. 32.) Specifically, Somerset claims that the fundamental change was “to address the patient care and nursing issues” and to become an all-subacute facility. (Br. 32.)

⁹ Somerset’s argument (Br. 31, n.2) that the Board’s decision to apply the *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203 (1964)/*Torrington Industries*, 307 NLRB 809 (1992) line of cases (which apply when an employer makes a decision to subcontract bargaining unit work, *see Regal Cinemas, Inc.*, 334 NLRB 304, 312, *enforced*, 334 F.3d 300 (D.C. Cir. 2003)), in lieu of *First National Maintenance/Dubuque Packing* precedent (which applies when an employer undertakes a substantial change in its operations such as closure or relocation, *see id.*), misunderstands the Board’s decision (JA 4 n.18), which clearly stated that *neither* line of cases applied.

But even if fundamentally changing its operations excused a unit-scope violation, the Board, as discussed above (pp. 26-30), found that Somerset failed to prove that it made any such changes to its business because Somerset primarily served a sub-acute population both before and after it decided to eliminate the LPN classification.

Somerset also contends that, under this Court's decisions in *Dorsey Trailers*, 134 F.3d 125, and *Furniture Rentors*, 36 F.3d 1240, it could eliminate the LPN classification without bargaining with the Union because its decision did not turn on labor costs or any other issue that could be resolved by bargaining. (Br. 32-35.) But those cases are inapposite here. In both cases, this Court rejected the argument that labor costs motivated the employers' subcontract decisions, thereby giving rise to a duty to bargain over the matter. *Dorsey Trailers*, 134 F.3d at 131-32 (employer had no duty to bargain over subcontract decision "centered around the scope and direction of [the employer's] future viability"); *Furniture Rentors*, 36 F.3d at 1246 (court remanded for Board to determine whether employer had a duty to bargain over subcontract decision attributable to employees' theft of merchandise). As noted above, pp. 34-38, the Board did *not* find that the elimination of the classification was a decision subject to bargaining, rendering those two cases irrelevant.

Even if the cases applied, Somerset has failed to prove that its decision to subcontract was motivated by factors that bargaining could not address, such as its “need to upgrade the quality of its nursing staff” and “improve the quality of nursing care.” (Br. 33, 35.) For the reasons discussed above, pp. 27-29, the evidence does not support its claim that the RNs provided better care than the LPNs such that an all-RN unit ensured better quality of care. (JA 19.)

Finally, Somerset contends that compelling economic circumstances forced it to eliminate the LPN classification. (Br. 35-37.) It claims that if it “remained unable to handle the level of care the patients needed,” it could get more unfavorable surveys, higher hospital readmission rates, and a loss of referrals from hospitals, which would eventually cause it to lose money. (Br. 36.) Somerset offered “no substantive evidence to support this contention,” only “hypothetical speculation.” (JA 15.) Demonstrating compelling economic circumstances requires more evidence than the “bare assertion” that an employer will experience economic harm if it does not take unilateral action. *See NLRB v. 1199, Nat. U. of Hosp. & Health Care Emp.*, 824 F.2d 318, 322 (4th Cir. 1987) (nursing home failed to show that compelling economic circumstances motivated its layoffs where

only evidence was manager’s “bare” and unsupported assertion that Medicaid cuts forced the layoff).¹⁰

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT SOMERSET VIOLATED SECTION 8(a)(5) AND (1) BY DENYING THE UNION ACCESS TO ITS FACILITY

An employer’s duty to bargain under Section 8(a)(5) includes the duty to “provide information that is needed by the bargaining representative for the proper performance of its duties.” *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967). When a union requests access to an employer’s premises, the Board, with court approval, applies a balancing test that weighs the employer’s property rights against the union’s need for access. *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), *enforced* 778 F.2d 49 (1st Cir. 1985). When dealing with matters of bargaining unit members’ safety, a union’s “duty to attend to the safety of the employees whom it represents entitles it to insist on performing its own investigation of safety issues[.]” *Caterpillar Inc. v. NLRB*, 803 F.3d 360, 364 (7th Cir. 2015); *accord Holyoke Water Power Co. v. NLRB*, 778 F. 2d at 52 (“potential for disruption is not as great where, as here, the union already represents the

¹⁰ As discussed above, pp. 30-31, it is undisputed that the only reason for D’Ovidio’s and Mangal’s discharges were that the two nurses were LPNs and Somerset had eliminated the LPN classification. Therefore, should the Court find that the elimination of the classification violated Sec. 8(a)(5), their discharges also violated Sec. 8(a)(5). *See, e.g., Alta Vista Regional Hosp.*, 357 NLRB 326, 326-27 (2011) (finding that discharge of employee due to unlawful unilateral change violated Sec. 8(a)(5)).

employees, and seeks access only to study a possible threat to the health and safety of its members”). The employer bears the burden of establishing that its property rights predominate over the union’s right to reasonable access. *See, e.g., New Surfside Nursing Home*, 330 NLRB 1146, 1146 n.1, 1150 (2000). A union’s need for direct observation of work processes, working conditions, safety concerns, and other matters is “particularly acute” when, like here, the union is newly certified and bargaining for an initial contract. *CCE, Inc.*, 318 NLRB 977, 978-79 (1995).

Substantial evidence supports the Board’s finding that Somerset unlawfully denied—and in fact ignored—the Union’s request for access. (JA 2 n.5, 21.) After the Board certified the Union, Union Vice-President Milly Silva wrote to Somerset requesting access to the employees’ work areas in order “to observe work processes and working conditions, including health and safety conditions.” (JA 21.) The Board properly found (JA 21), and Somerset does not dispute, that the information sought—“direct interaction with the employees and observation of their work areas, working conditions, and work processes—was presumptively relevant to [the Union’s] responsibilities as a collective-bargaining representative.” Somerset did not respond by asserting any property interest or by offering any accommodation; it simply ignored the request. (JA 2 n.5.)

Somerset contends that it properly denied access because the Union had alternative means of gathering the information sought, but that claim is

unsupported. (Br. 37-38.) Contrary to Somerset’s contention (Br. 38), the Union’s Vice-President, Ricky Elliott, did not state that the Union could receive all of the information it needed from interviewing unit employees. Specifically, Elliott testified that only access to the facility would allow the Union to determine if CNAs had too much work to be able to adequately perform it all, given the “kind of residents [they] have” and the exact tasks they needed to perform for those residents. (JA 134.) As the Board found, Elliott’s testimony “made clear that simply discussing the employees’ terms and conditions of employment with them was not an adequate substitute for actually observing their workplace and work activities.” (JA 21.)

Moreover, access to the facility is particularly important where, as here, the union is bargaining for an initial contract. In that circumstance, “the union has no prior experience with the employer’s facility and practices, and the employees are relatively unlikely to have experience with collective bargaining negotiations.” (JA 21.) The Board therefore reasonably found that Somerset violated Section 8(a)(5) and (1) when it ignored the Union’s request for access to its facility.

IV. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ORDERING SOMERSET TO RESTORE THE LPN CLASSIFICATION AND REINSTATE TWO AFFECTED LPNS

The Board’s order to restore the LPN classification, reinstate D’Ovidio and Mangal, and return the LPN work to the LPNs was well within its broad remedial

discretion. Consistent with *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501-02 (1978), the Board executed its “delicate responsibility” of balancing Somerset’s patient-care interests with employees’ organizational rights. In light of Somerset’s failure to substantiate its claim that LPNs provided inferior patient care to RNs, the Board reasonably ordered its standard, conventional remedy of restoring the LPN classification and reinstating the affected LPNs.

A. Applicable Principles

Under Section 10(c) of the Act, the Board has broad authority to fashion remedies, including “reinstatement of employees.” 29 U.S.C. §160(c). The Board’s remedial authority is a “broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods.*, 379 U.S. at 216. This Court will only overturn the Board’s remedy if the Board abused its discretion. *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 405 (3d Cir. 1990) (en banc); *see also Quick v. NLRB*, 245 F.3d 231, 254 (3d Cir. 2001) (Board “draws on a fund of knowledge and expertise” in fashioning remedies and its choice must not be disturbed “unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act”) (internal quotation omitted).

B. The Board Properly Ordered Somerset to Restore the LPN Classification

The Board ordered Somerset to “restore the LPN classification and return to

the LPNs any LPN work transferred to RNs since May 2011.” (JA 6.) The Board further ordered Somerset to reinstate D’Ovidio and Mangal. (JA 6.) In *Somerset II*, this Court recognized that “reinstatement [has been] the conventional correction for discriminatory discharges” under the Act – one that this Court is “particularly hesitant to overturn.” 825 F.3d at 147 (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941)). Similarly, when an employer has made an unlawful unilateral change, such as Somerset’s change to the unit scope, “[t]he Board has the power to order the restoration of the status quo ante[.]” *St. John’s Gen. Hosp. of Allegheny v. NLRB*, 825 F.2d 740, 746 (3d Cir. 1987). The Board’s restoration remedy may include “reinstatement with back pay” when “the loss of employment stems directly from an unfair labor practice[.]” *Fibreboard*, 379 U.S. at 215-17.

Somerset contends that the Board’s reinstatement order requires it to provide substandard care, in contravention of federal law requiring it to provide care that will promote maintenance or enhancement of its residents’ quality of life. (Br. 25.) The record, however, does not support Somerset’s assertion that the evidence is “beyond dispute” that the LPNs could not provide competent care. (Br. 27.) The Board rejected that assertion (pp. 26-29) as unsupported and pretextual. There is no evidence in the record tying any of Somerset’s supposed nursing deficiencies to LPNs, as opposed to RNs. (JA 19.) As the Board found, before Manzi decided to

eliminate the LPN classification, she “never even inquired as to whether the RNs at Somerset Valley were performing at a higher level overall than had the LPNs.” (JA 19.) On the other hand, when Somerset eliminated its experienced LPNs in favor of inexperienced agency RNs, Dr. Buch stopped referring patients there and ended his relationship with Somerset, and Somerset’s reputation in the community suffered. (JA 11.) Moreover, of the RNs initially hired after the change, none remained by the time of the hearing, save for one nurse who was on a suspension after having been disciplined 8 times for medication errors. (JA 11 n.7.) Put simply, “the evidence . . . does not substantiate [Somerset’s] contention that RNs necessarily perform at a higher level . . . [or] that an all-RN model substantially improved the standard of care provided[.]” (JA 19.) The evidence therefore soundly contradicts Somerset’s claim that LPNs impose a danger to patient safety.

As this Court explained in rejecting Somerset’s previous attempt to avoid a reinstatement order following a discriminatory discharge, the Board’s analysis under the second stage of the *Wright Line* test “necessarily incorporate[s] the question of whether safety concerns should preclude reinstatement.” *Id.* In other words, if Somerset cannot prove that it would have eliminated the LPNs absent their union activity, which, as discussed above, pp. 26-30, it cannot, then it also cannot prove that LPNs should not be reinstated.

The Board's Order does not dictate how Somerset must provide patient care. (Br. 25-26.) The Board's Order requires Somerset to restore the LPN classification and reinstate any LPNs eliminated because of its change. (JA 6-7.) The Board does not require Somerset to cease using RNs entirely; indeed, Somerset always had at least one RN on duty during the day shift even when using LPNs as floor nurses. (JA 187.) The Board therefore has not required Somerset to do anything except what it had been doing for years—use a combination of LPNs and RNS as its floor nurses. The Board reasonably rejected Somerset's claim that LPNs could not provide proper patient care as pretext, and this Court should uphold the Board's finding.

V. THE BOARD PROPERLY REJECTED SOMERSET'S CHALLENGES TO THE COMPLAINT'S VALIDITY

Relying primarily on *SW General, Inc. v. NLRB*, 796 F.3d 67, 82 (D.C. Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (June 20, 2016), which found that Acting General Counsel Solomon was serving in violation of the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345 et seq. (the FVRA), between January 5, 2011, and November 4, 2013, Somerset argues that Solomon lacked authority to issue the complaint in this case.¹¹ Somerset also contends that General Counsel Griffin's ratification of the complaint is insufficient to cure any possible defect in the initial

¹¹ The Board disagrees with the D.C. Circuit's decision in *SW General*. Having granted the petition for certiorari, the Supreme Court heard argument in *SW General* on November 7, 2016.

complaint. As shown below, the Court lacks jurisdiction to consider the challenge to Solomon’s authority because Somerset failed to timely raise that challenge to the Board. In any event, under the Court’s precedent, even assuming Acting General Counsel Solomon’s designation was improper, the ratification by the Senate-confirmed General Counsel effectively cures any defect in the complaint and prosecution.

A. The Court Lacks Jurisdiction To Consider the Company’s Untimely Challenge

Section 10(e) of the Act, prevents the Court from considering Somerset’s challenge to the complaint’s validity because Somerset failed to raise its challenge timely to the Board. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc.*, 456 U.S. at 665 (stating Section 10(e) precludes court of appeals from reviewing claim not raised to the Board); *accord Somerset II*, 825 F.3d at 138 (“Our jurisdiction [. . .] is limited by the exhaustion requirement embedded in [Section 10(e)].”)

The Board properly found that Somerset waived any challenge to Solomon’s appointment by failing to timely raise its argument. (JA 1 n.4.) As the Board explained, Somerset “never raised any issue regarding the FVRA or the authority of the Acting General Counsel” until it filed the motion to dismiss in March 2016,

well after the case was already pending before the Board. (JA 1 n.4.) Notably, Somerset did not challenge Solomon’s authority in its March 5, 2013 exceptions to the administrative law judge’s decision. *See* 29 CFR § 102.46(b)(2) (stating that “[a]ny exceptions to a ruling, finding, conclusion or recommendation which is not specifically urged shall be deemed to have been waived.”). Nor did Somerset raise its objection in its answer to the complaint, during the subsequent hearing, or in its brief to the administrative law judge. Somerset thus failed to raise its challenge at every opportune moment, and the Board properly deemed it waived.

Contrary to Somerset’s claim, its belatedly filed motion to dismiss did not “adequately preserve[] the issue.” (Br. 46-47.) That motion came 3 years after it filed exceptions to the judge’s decision. The Board’s Rules and Regulations preclude parties from belatedly raising new issues that were not preserved for appeal through the filing of timely exceptions. *See* 29 CFR § 102.46(b)(2). As the Board noted, Somerset’s motion sought to overturn the judge’s decision “based on a newly raised argument.” (JA 1, n.4.) The Board therefore properly rejected the motion as “an untimely effort to file additional exceptions.” (JA 1, n.4.) *See Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008) (to preserve objections for appeal party must raise them in time and manner that Board requires).

This Court has recognized that Section 10(e)'s "exhaustion bar" applies to Somerset's statutory challenge to Solomon's authority to issue the complaint. *See Somerset II*, 825 F.3d at 139-43. In doing so, this Court noted its decision "was in accord" with *SW General*, "in which the D.C. Circuit expressed doubt that the argument then before it, if unpreserved, could be raised in court." *Id.* at 142, citing *S.W. General*, 796 F.3d at 83 ("[w]e address the FVRA objection in this case because the petitioner raised the issue in its exceptions to the ALJ decision," and "[w]e doubt that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or concluded—will enjoy the same success."). *See also Marquez Bros. Enter., Inc. v. NLRB*, 650 Fed. App'x 25, 27 (D.C. Cir. 2016) (finding that "typical NLRA exhaustion doctrine applies" to FVRA challenges to Solomon's service as Acting General Counsel).

The Court should reject, as it did in *Somerset II*, 825 F.3d at 140-42, Somerset's argument (Br. 48-49) that extraordinary circumstances warrant consideration of its challenge to the complaint. In *Somerset II*, this Court held that Somerset's FVRA-based challenge to the validity of the complaint, raised for the first time on appeal, did not fall within the ambit of the extraordinary circumstances exception to Section 10(e). 825 F.3d at 142. Somerset claims that this case differs from *Somerset II* and constitutes extraordinary circumstances because, unlike in *Somerset II*, it presented the Board with an opportunity to rule

on the FVRA issue by filing a motion to dismiss. For the reasons discussed above, that motion was untimely and improper, and Somerset failed to present the Board with any reason to excuse its untimeliness. Therefore, this case is materially indistinguishable from *Somerset II*. In both cases, Somerset failed to timely raise its FVRA argument in exceptions to the Board. This Court should therefore reject Somerset's contention that extraordinary circumstances excused its failure to timely raise the FVRA issue before the Board.

B. General Counsel Griffin Properly Ratified the Complaint

In any event, as the Board held (JA 1-2 n.4), General Counsel Griffin's ratification of the complaint and its continued prosecution moots any challenge to the authority of Acting General Counsel Solomon under the FVRA. As the D.C. Circuit recognized in *SW General*, the Board's General Counsel is one of several officers expressly exempted from the FVRA's "void-ab-initio" and "no-ratification" provisions. 796 F.3d at 79 (discussing 5 U.S.C. § 3348(e)).¹² The court therefore treated "the actions of an improperly serving Acting General Counsel [as] *voidable*, not void," indicating that any statutory defect in actions could be cured through ratification by a properly appointed General Counsel. *Id.*

¹² Although Section 3348(d) provides that "[a]n action taken by any person who is not acting [in compliance with the FVRA] shall have no force or effect" and "may not be ratified," 5 U.S.C. § 3348(d)(1)-(2), Section 3348(e) exempts "the General Counsel of the National Labor Relations Board" from the provisions of "this section." 5 U.S.C. § 3348(e).

(emphasis in original). Here, because General Counsel Griffin, who was sworn into office on November 4, 2013, and whose appointment is undisputedly valid, ratified the prior actions of Acting General Counsel Solomon, Somerset cannot show that the Court should void the complaint.

Agency ratification is a proper and accepted practice—one approved by this Court—as a remedy for actions taken by improperly appointed government officials. Indeed, this Court recently found that the Board’s ratification and reappointment of a regional director originally appointed during the absence of a Board quorum, and that regional director’s ratification of his own actions, were proper. *See Advanced Disposal Servs. East v. NLRB*, 820 F.3d 592, 602-05 (3d Cir. 2016). In doing so, this Court recognized that ratification is an equitable remedy that “has been applied flexibly” and “has often been adapted to deal with unique circumstances.” *Id.* at 602-03, citing *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117-20 (D.C. Cir. 2015) (discussing precedent for considering validity of decisions made after replacement of improperly appointed official); *Doolin Sec. Sav. Bank, FSB v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998) (upholding cease-and-desist order issued by validly appointed Director, which effectively ratified action of “acting director” who initiated case, even if acting director was illegally appointed); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996) (holding

that reconstituted FEC could properly ratify prior decisions made when unconstitutionally constituted). *See also Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1191-92 (9th Cir. 2016) (upholding ratification of prior decisions made by director, who served in violation of FVRA but was subsequently properly appointed).

On March 21, 2016, General Counsel Griffin issued a notice of ratification providing that, “[a]fter appropriate review and consultation with [] staff,” he “decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel’s broad and unreviewable discretion under Section 3(d) of the Act.” (JA 1-2 n.4.) By ratifying the issuance and continued prosecution of the complaint against Somerset, General Counsel Griffin eliminated any uncertainty as to whether a lawfully serving General Counsel would issue the complaint. *See Intercollegiate Board.*, 796 F.3d at 118-19 (“de novo review” by properly appointed members sufficiently cured taint caused by invalid members’ prior actions).

There is no merit to Somerset’s contention (Br. 50-51) that under this Court’s decision in *Advanced Disposal*, General Counsel Griffin’s ratification is ineffective because it does not show that he had “full knowledge of the decision to be ratified” or that he made “a detached and considered affirmation of the earlier

decision.”¹³ 820 F.3d at 602. To the contrary, *Advanced Disposal* fully supports the validity of the ratification. The ratification specifically provides that General Counsel Griffin reviewed the complaint and consulted with his staff. (JA 2, n.4.) It also details Griffin’s consideration of the case, explaining that he has “decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel’s broad and unreviewable discretion under Section 3(d) of the Act.” (JA 2, n.4.) Somerset presents no evidence even suggesting that he behaved other than as he stated in the ratification. *See Advanced Disposal*, 820 F.3d at 604 (finding that Board’s claim that it “specifically considered the relevant supporting material before reauthorizing selection” of Regional Director was sufficient to show knowledge of material facts and detached judgment). Somerset’s bald assertion that the ratification is a “rubberstamp” does not disprove these statements. *See id.* at 605 (presumption of regularity cannot be defeated by unsupported claim that ratification is a “rubberstamp”).

Moreover, Somerset’s contentions regarding the ratification’s alleged shortcomings fail to recognize that this and other courts apply a “presumption of regularity” under which they presume that public officials have properly discharged their official duties, absent “clear evidence to the contrary.” *United*

¹³ Somerset’s contention that the ratification fails because it “does not specify that [it] is nunc pro tunc” (Br. 51) is unsupported by any precedent requiring that a ratification contain such language.

States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926); accord *Advanced Disposal*, 820 F.3d at 605 (rejecting argument that a “blanket ratification” was invalid). Indeed, Somerset’s arguments disregard the Supreme Court’s instruction that federal courts should not probe the mental processes of agency decisionmakers; “[j]ust as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected.” *United States v. Morgan*, 313 U.S. 409, 422 (1941) (error to permit Secretary of Agriculture to be deposed regarding process by which he reached decision, including extent to which he studied record and consulted with subordinates). The burden is on Somerset “to produce doubt on the [Board’s] claim” that Griffin “properly ratified . . . earlier actions.” *Advanced Disposal*, 820 F.3d at 604. But Somerset has offered no facts, much less the sort of “clear evidence to the contrary,” *Chem. Found.*, 272 U.S. at 14-15, that would warrant disregarding General Counsel Griffin’s ratification or delving into the process underlying it.

In sum, Somerset has waived its challenge to the complaint’s validity, and, in any event, Griffin’s ratification is sufficient to cure any alleged defect. Therefore, this Court should reject Somerset’s attempt to circumvent both Section 10(e)’s exhaustion requirement and this Court’s precedent upholding agency ratifications of prior actions.

CONCLUSION

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

Respectfully submitted,

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January 2016

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

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REHABILITATION AND NURSING CENTER)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 16-3212, 16-3400
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	22-CA-069152
)	22-CA-074665
Respondent/Cross-Petitioner)	
)	
and)	
)	
1199 SEIU UNITED HEALTHCARE)	
WORKERS EAST)	
)	
Intervenor for Respondent)	

CERTIFICATE OF COMPLIANCE

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel David Casserly certifies that he is a member in good standing of the State Bar of Pennsylvania. He is not required to be a member of this Court’s bar, as he is representing the federal government in this case.

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,901 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board’s brief filed with

the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; 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.

s/Linda Dreeben
Linda Dreeben
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National Labor Relations Board
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(202) 273-2960

Dated at Washington, DC
this 27th day of January, 2017

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

1621 ROUTE 22 WEST OPERATING)	
COMPANY , LLC, d/b/a SOMERSET VALLEY)	
REHABILITATION AND NURSING CENTER)	
)	
Petitioner/Cross-Respondent)	
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1199 SEIU UNITED HEALTHCARE)	
WORKERS EAST)	
)	
Intervenor for Respondent)	

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third 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
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