

Oral Argument Not Yet Scheduled

**No. 16-60715**

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

**CREATIVE VISION RESOURCES, LLC**  
**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**  
**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **STATEMENT REGARDING ORAL ARGUMENT**

The National Labor Relations Board submits that this case involves the application of well-established legal principles to findings of fact supported by substantial evidence and by reasoned credibility determinations, and that the case may accordingly be decided without oral argument. However, if the Court believes that oral argument would be of assistance or if it grants Creative's request for oral argument, the Board respectfully requests the opportunity to participate.

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**UNITED STATES COURT OF APPEALS  
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**No. 16-60715**

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**CREATIVE VISION RESOURCES, LLC  
Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD  
Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**INTRODUCTION**

This case is before the Court on the petition of Creative Vision Resources, LLC to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against Creative. The Board’s Decision and Order issued on August 26, 2016, and is reported at 364 NLRB No. 91. (ROA.3128-56.)<sup>1</sup>

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<sup>1</sup> In this brief, ROA references are to the record on appeal filed with the Court. “Br.” refers to the opening brief filed by Creative, and “ABr.” refers to the amicus brief filed in support of Creative by the Chamber of Commerce.

In that Order, the Board found that Creative, as a “perfectly clear” successor, violated the National Labor Relations Act, 29 U.S.C. § 160(a), by failing and refusing to recognize and bargain with Local 100, United Labor Unions (“the Union”), and by announcing and implementing unilateral changes to unit employees’ existing terms and conditions of employment. (ROA.3134.)

Before the Court, Creative no longer disputes that it is the successor to the employees’ prior employer, Berry III, and must bargain with the Union. Creative does, however, contest the Board’s finding that it is a “perfectly clear” successor and was not permitted to unilaterally change employment terms. Under Board law, an “ordinary” successor must bargain with the employees’ union but may set the initial terms and conditions of employment. In contrast, a successor that has made it “perfectly clear” to the employees that they would be retained under the predecessor employer’s terms and conditions of employment must maintain those terms until reaching agreement (or impasse) with the union.

### **STATEMENT OF JURISDICTION**

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the Act, which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final under Section 10(e) and (f) of the

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References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Act, 29 U.S.C. § 160(e) and (f). The Court has jurisdiction under Section 10(e) and (f) of the Act because the unfair labor practices occurred in New Orleans, Louisiana.

Creative filed its petition for review on October 25, 2016, and the Board filed its cross-application for enforcement on December 5, 2016. Both Creative's petition and the Board's cross-application are timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Does substantial evidence support the Board's findings that Creative, as an undisputed successor employer, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain in good faith with the Union, and by unilaterally changing existing terms and conditions of employment after Creative had made "perfectly clear" its intention to retain the predecessor's employees?
2. Does the Court have jurisdiction to hear Creative's challenge to the complaint's validity?

### **STATEMENT OF THE CASE**

Acting on an unfair-labor-practice charge filed by the Union, the Board's Acting General Counsel Lafe Solomon issued a complaint alleging that Creative violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing and refusing to recognize and bargain with the Union, and by announcing

and implementing unilateral changes to unit employees' existing terms and conditions of employment. (ROA.824-25.) After a hearing, an administrative law judge found that Creative was a legal successor to employer Berry III. The judge found that, as a legal successor to Berry III, Creative violated the Act by failing to recognize and bargain in good faith with the Union. (ROA.3142, 3152-53.) The administrative law judge recommended that the unilateral change allegations be dismissed because he found that the General Counsel failed to establish that Creative was a "perfectly clear" successor to Berry III. (ROA.3153.)

After the administrative law judge issued his decision, the case was transferred to the Board. In February 2013, the Acting General Counsel filed exceptions to the judge's decision with the Board; Creative filed cross-exceptions. Three years later, on April 18, 2016, Creative filed a motion for leave to file another exception, arguing that the complaint should be dismissed because Acting General Counsel Solomon was improperly serving under the Federal Vacancies Reform Act ("FVRA") when the complaint issued. (ROA.3113-20.) On April 26, the Board denied the filing as untimely. (ROA.3121.) On April 27, General Counsel Richard F. Griffin issued a Notice of Ratification, ratifying the complaint's issuance and its continued prosecution. (ROA.3122-25.)

On August 26, 2016, the Board adopted the judge's finding, to which there was no exception, that Creative was a successor to Berry III and violated the Act

by failing to bargain with the Union. (ROA.3128 & n.1.) The Board further found, contrary to the judge, that Creative was also a “perfectly clear” successor to Berry III and violated the Act by failing to provide the Union with notice and an opportunity to bargain before imposing initial terms and conditions of employment. (ROA.3128.) Below are summaries of the Board’s findings of fact and the Board’s conclusions and order.

## **I. THE BOARD’S FINDINGS OF FACT**

### **A. Alvin Richard III Starts a New Company To Supply “Hoppers” to his Family’s Garbage Disposal Business**

Since 2007, the Union has represented a unit of “hoppers”—workers who ride on the back of garbage trucks and empty trash cans into the trucks—employed by Berry III.<sup>2</sup> (ROA.3128; ROA.2146.) Berry III supplied hoppers to work on garbage trucks operated by Richard’s Disposal, a waste disposal company in New Orleans. (ROA.3128, 3142; ROA.174, 178.) Berry III classified the hoppers as independent contractors; it paid the hoppers a flat daily rate of \$103 and did not deduct state or federal taxes or social security. (ROA.3128; ROA.95, 118, 532-33.) Six days a week, the hoppers gathered at Richard’s Disposal by 4:00 a.m.

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<sup>2</sup> Berry operated several companies—M & B Services, Milton Berry, and Berry Services, Inc.—which are referred to collectively in the Board’s Decision and Order as “Berry III.” The parties stipulated that these businesses constitute a single entity and single employer. (ROA.3128, 3142; ROA.181.)

Berry III supervisor Karen Jackson then assigned two hoppers to each Richard's Disposal garbage truck. (ROA.3129 n.5, 3145; ROA.95, 313, 429, 533.)

In 2010, Alvin Richard III, the vice president of Richard's Disposal, established his own company—Creative—to provide hoppers to Richard's Disposal instead of Berry III. (ROA.3128; ROA.424, 862-65.) Richard was motivated at least in part by his concern that Berry III misclassified the hoppers as independent contractors. (ROA.3128, 3146-47; ROA.458.) In preparation for the transition, Richard asked a Richard's Disposal employee to create applications, employee handbooks, and safety manuals for Creative's employees. (ROA.3128; ROA.459, 492.)

In May 2011, Richard began distributing employment applications and W-4 tax withholding forms to Berry III employees. (ROA.3128; ROA.459.) By soliciting applications from the Berry III hoppers, Richards was agreeing to hire them because all that the Berry III hoppers needed to do to obtain employment with Creative was to turn in the completed application. (ROA.3129 & n.5, 3133 n.14, 3144-45; ROA.437-38.) Richard personally gave applications and forms to about 20 Berry III employees. (ROA.3128; ROA.460.) To those employees, Richard explained that, unlike Berry III, Creative would not pay them a daily rate. (ROA.3128; ROA.460.) Instead, Creative would pay \$11 per hour, plus overtime, and would deduct taxes and Social Security from their paychecks. (ROA.3128;

ROA.460.) Around May 19, Richard also asked Berry III employee Eldridge Flagge to distribute applications and tax forms, and Flagge subsequently distributed them to about 50 Berry III employees. (ROA.3128; ROA.104.) Because Richard did not tell Flagge about the planned changes to pay, Flagge did not tell any of the employees to whom he gave applications that their terms and conditions of employment would change. (ROA.3128, 3149; ROA.98, 103-04, 301.) Richard did not seek applications from any other source. (ROA.3131; ROA.364-88, 430, 437-38, 2301-44.)

At the end of May, the Union's state director, Rosa Hines, received two phone calls from hoppers who said they had heard that a new company was taking over for Berry III and that their wages would drop to \$11 per hour. The hoppers had not been told this by Creative or Richard and had only heard rumors. (ROA.3132, 3148; ROA.187, 253-55.)

**B. Richard's Disposal Cancelled its Agreement with Berry III, and Creative Employed Berry III's Hoppers**

Richard planned to start supplying hoppers to Richard's Disposal on May 20, but he did not have enough completed applications from Berry III's hoppers. Because not every hopper worked every day, Richard needed 70 completed applications to begin work. (ROA.3129 n.5; ROA.467.) By June 1, Richard had received 70 completed applications from Berry III hoppers, which was enough to assign hoppers to the Richard's Disposal garage trucks. The same day, he

cancelled the Richard's Disposal agreement with Berry III. (ROA.3129, 3145; ROA.437-38, 2077.)

The next day, June 2, Creative began supplying hoppers to Richard's Disposal. (ROA.3129, 3145; ROA.349, 423.) That morning, when the hoppers showed up to work at 4:00 a.m., former Berry III supervisor Karen Jackson, who had also been retained by Creative, held a meeting. In the meeting, Jackson told the gathered employees about Creative's planned changes to their terms and conditions of employment: Creative would pay \$11 per hour for a guaranteed eight-hour day, plus overtime; provide four paid holidays annually; and deduct taxes from the hoppers' paychecks. (ROA.3145, 3150; ROA.303-04, 314, 447-48, 543-46.) Some hoppers left rather than accept the new terms and conditions of employment. (ROA.3129, 3151; ROA.466, 485.) Jackson then assigned 44 hoppers (two per truck) to the available Richard's Disposal garbage trucks. (ROA.3129; ROA.2353.)

**C. Creative Refused to Bargain with the Union and Unilaterally Implemented Initial Terms and Conditions of Employment Without Bargaining**

On June 3, a hopper called Union State Director Hines and told her that Jackson informed the hoppers about the takeover by Creative and the reduction in wages. (ROA.206, 256.) On June 4, Creative distributed an employee handbook and safety manual to the hoppers; under Berry III, the hoppers had not had either

manual. (ROA.3129, 3148; ROA.304-07.) That same day, Hines went to Richard's Disposal to meet with the hoppers, who gave her a copy of the new employee handbook and safety manual. (ROA.3129; ROA.206-07, 256.)

On June 6, Hines delivered a letter to Creative requesting bargaining. (ROA.3129, 3152; ROA.208.) Creative did not reply and, on June 17, the Union filed unfair-labor-practice charges. (ROA.3129, 3152; ROA.209.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Pearce and Member Hirozawa, Member Miscimarra dissenting in part) found that Creative violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union and by announcing and implementing unilateral changes in the unit employees' existing terms and conditions of employment on and after June 2, 2011, including promulgating new work rules and changing the manner in which employees are paid. (ROA.3128.)

The Board's Order requires Creative to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (ROA.3135.) Affirmatively, the Board's Order directs Creative to recognize the Union and, on request, to bargain in good faith with the Union as the exclusive collective-bargaining representative of the hoppers; notify

and, on request, bargain with the Union before implementing any changes in the unit employees' wages, hours, or other terms and conditions of employment; on request of the Union, rescind any changes in the terms and conditions of employment that were unilaterally implemented on or after June 2, 2011, except for the changes implemented with respect to required payroll deductions; make the unit employees whole for any losses sustained; and post a notice. (ROA.3135-36.)

### **SUMMARY OF THE ARGUMENT**

Creative does not contest that it is a successor employer to Berry III and that it has a duty to bargain with the Union representing its hoppers. The Board is therefore entitled to a judgment summarily enforcing the portions of its Order based on these uncontested findings.

Creative does, however, challenge the Board's finding that it is a "perfectly clear" successor with an obligation to bargain with the Union before making changes in existing terms and conditions of employment. The Board's finding is consistent with *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 294-95 (1972), in which the Supreme Court stated that where "it is perfectly clear that the new employer plans to retain all of the employees in the unit," the successor employer must consult with the employees' bargaining representative before fixing the initial terms and conditions of employment, and with the Board's subsequent decision in *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enforced*

*mem.* 529 F.2d 516 (4th Cir. 1975). Because Creative did not clearly announce, prior to or simultaneously with its expressed intention to hire the hoppers, that it was changing their terms and conditions of employment, Creative violated Section 8(a)(5) and (1) of the Act by failing to consult with the Union before unilaterally changing those terms.

The record amply supports the Board's finding that Creative failed to announce the new terms at the time it expressed its intention to hire the hoppers. Richard and Flagge distributed applications to Berry III employees, but only Richard told the 20 employees to whom he gave applications that he planned to change their terms and conditions of employment. Flagge did not tell the 50 employees he spoke to because he did not know.

Not only did Creative fail to announce the changes before it decided to hire the Berry III hoppers, it waited until the hoppers showed up for their first day of work before it announced and simultaneously made the changes. Creative's failure to bargain with the Union over these initial changes to terms and conditions of employment violates Section 8(a)(5) and (1) of the Act.

Finally, the Court lacks jurisdiction to consider Creative's FVRA-based challenge to the complaint because Creative failed to timely challenge the complaint's validity before the Board. Creative offers no extraordinary circumstances to excuse its failure to do so and does not challenge the Board's

finding that its argument was untimely. In any event, the issue of Solomon’s designation as Acting General Counsel is moot because General Counsel Griffin’s ratification of the complaint is sufficient to correct any alleged defect. Creative has failed to challenge the ratification.

## **ARGUMENT**

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT CREATIVE WAS A SUCCESSOR EMPLOYER THAT VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION AND BY UNILATERALLY CHANGING TERMS AND CONDITIONS OF EMPLOYMENT**

#### **A. Successorship Principles and Standard of Review**

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees . . . .” 29 U.S.C. § 158(a)(5).<sup>3</sup> Section 8(d) of the Act defines the duty to bargain collectively as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .” 29 U.S.C. § 158(d).

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<sup>3</sup> A violation of Section 8(a)(5) creates a derivative violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Sara Lee Bakery Grp., Inc. v. NLRB*, 514 F.3d 422, 427 n.3 (5th Cir. 2008).

It is well settled under those provisions that, upon acquiring a business, a new employer is obligated to bargain with the union that represented its predecessor's employees if the employer conducts essentially the same business as the former employer and a majority of the work force was formerly employed by the predecessor. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 279-81 (1972); *NLRB v. Houston Bldg. Serv., Inc.*, 936 F.2d 178, 180 (5th Cir. 1991). As such, a successor employer is “ordinarily free to set initial terms on which it will hire the employees of a predecessor,” without bargaining with the incumbent union. *Burns*, 406 U.S. at 294 (emphasis added).

Nevertheless, the Supreme Court recognized that “there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit.”<sup>4</sup> *Burns*, 406 U.S. at 294-95; accord *Coastal Int'l Sec., Inc. v. NLRB*, 320 F. App'x 276, 284 (5th Cir. 2009) (per curiam). In that circumstance, where the incumbent union's eventual majority is certain, “it will be appropriate to have [the successor employer] initially consult with the [incumbent union] before he fixes terms.” *Burns*, 406 U.S. at 295. Accordingly, where an employer, through its statements or conduct, has made “perfectly clear”

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<sup>4</sup> The Board, with judicial approval, has construed the word “all” in this context to mean “all or substantially all.” *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664, 673 & n.35 (D.C. Cir. 1978).

its intention to retain the predecessor's employees, it must consult with the union before altering extant terms and conditions of employment established by the predecessor. *See Coastal*, 320 F. App'x at 284-85. The *Burns* caveat, though characterized as dicta by Creative (Br. 22), has been applied for decades by the courts of appeals, including this one, to find that a "perfectly clear" successor's failure to meet its obligation to recognize and bargain with the union before making changes violates Section 8(a)(5) and (1) of the Act. *See e.g., NLRB v. Houston Bldg. Servs., Inc.*, 128 F.3d 860, 864 n.6 (5th Cir. 1997) (per curiam); *W&M Props. of Conn. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008); *Dupont Dow Elastomers, LLC v. NLRB*, 296 F.3d 495, 506 (6th Cir. 2002); *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1364 (7th Cir. 1997); *Banknote Corp. of Am. v. NLRB*, 84 F.3d 637, 642-43 (2d Cir. 1996); *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674, 679 (9th Cir. 1980).

In *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enforced mem.* 529 F.2d 516 (4th Cir. 1975), the Board interpreted the "perfectly clear" caveat in *Burns*. The Board will find an employer to be a perfectly clear successor where the new employer has "actively or, by tacit inference, misled employees into believing they would be retained without changes," or where it "has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up*, 209 NLRB at 195. Thus, under

*Spruce Up*, an employer that is “silent about its intent with regard to the existing terms and conditions of employment” is a “perfectly clear” successor if it “clearly indicated it would be hiring the predecessor’s employees” before announcing changes. *Canteen Corp.*, 317 NLRB 1052, 1053 (1995), *enforced*, 103 F.3d 1355 (7th Cir. 1997); *accord Houston Building*, 128 F.3d at 864 n.6. Applying those principles, the Board has consistently held that where an employer, through its statements or conduct, has made “perfectly clear” its plan to retain the predecessor’s employees without announcing changed terms of employment, it may not later condition formal employment offers on changed terms without consulting the union. *See, e.g., Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664, 674-75 (D.C. Cir. 1978); *Fremont Ford*, 289 NLRB 1290, 1296-97 (1988).

Further, an otherwise “perfectly clear” successor cannot escape liability for unilateral changes to employment terms by subsequently announcing new terms, even if that announcement precedes formal offers of employment. *See Int’l Ass’n of Machinists*, 595 F.2d at 675 n.49; *Canteen*, 317 NLRB at 1053-54. To avoid “perfectly clear” successor status, a new employer must clearly announce its intent to establish a new set of conditions *prior to, or simultaneously with*, its expression of intent to retain the predecessor’s employees, so that employees “are not lulled into a false sense of security.” *Int’l Ass’n of Machinists*, 595 F.2d at 674. *See also*

*Elf Atochem N. Am., Inc.*, 339 NLRB 796, 807 (2003) (successor incurs “obligation to bargain over initial terms of employment when it displays an intent to employ the predecessor’s employees without making it clear to those employees that their employment will be on terms different from those in place with the predecessor employer”). In other words, “prompt notice” of any new terms is required so that employees have “sufficient time to rearrange their affairs” should the employees decide to leave rather than accepting the new terms. *Int’l Ass’n of Machinists*, 595 F.2d at 675 n.49.

The Board’s “findings on the successorship issue must be accorded a high degree of deference,” because the Board applies the general provisions of the Act in making those findings. *NLRB v. South Harlan Coal Co.*, 844 F.2d 380, 383 (6th Cir. 1988); accord *Pa. Transformer Tech. v. NLRB*, 254 F.3d 217, 223 (D.C. Cir. 2001). “Balancing competing interests to effectuate national labor policy, particularly in the successorship context, is a delicate responsibility committed primarily to the Board.” *Int’l Ass’n of Machinists*, 595 F.2d at 673 n.41.

Therefore, the Board’s rulings interpreting a successor’s bargaining obligations are entitled to judicial deference provided they are rational and consistent with the Act. *Fall River*, 482 U.S. at 42; *Canteen*, 103 F.3d at 1361.

The Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v.*

*NLRB*, 340 U.S. 474, 488 (1951); *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). This Court has stated that successorship findings are “‘primarily factual in nature’” and therefore are reviewed for substantial evidence. *Houston Bldg.*, 936 F.2d at 180 (quoting *Fall River*, 482 U.S. at 43). Under the substantial-evidence test, a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it de novo.” *Universal Camera*, 340 U.S. at 488; accord *NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 378 (5th Cir. 2007) (court does not reweigh evidence in determining whether factual findings are supported by substantial evidence). As this Court observed, “[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the . . . Board is not supported by substantial evidence.” *Merchants Truck Line, Inc. v. NLRB*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978). The Court’s “deference extends to [its] review of both the Board’s findings of fact and its application of law.” *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003); *Tellepsen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 559 (5th Cir. 2003) (court “defers to the legal conclusions of the Board if reasonably grounded in the law and not inconsistent with the Act”). Further, the Court “must sustain the Board’s application of its legal interpretations to the facts of the particular case

when supported by substantial evidence based upon the record considered as a whole.” *Tellepsen*, 320 F.3d at 559.

Finally, “[i]n determining whether the Board’s factual findings are supported by the record, [the Court does] not make credibility determinations or reweigh the evidence.” *Allied Aviation*, 490 F.3d at 378. The Board’s adoption of the administrative law judge’s credibility determinations must be upheld absent a showing that they are unreasonable, self-contradictory, based upon inadequate reasons or no reason, or unjustified. *Dynasteel Corp. v. NLRB*, 476 F.3d 253, 257 (5th Cir. 2007).

**B. Creative Failed to Announce New Terms and Conditions of Employment Prior to, or Simultaneously With, Its Expressed Intent To Retain the Berry III Hoppers and, Therefore, Forfeited Its Right to Change Those Terms and Conditions Without First Bargaining with the Union**

Creative admits (Br. 10-11) that it is a successor employer under *Burns* and *Fall River* and that it therefore has a continuing obligation to bargain with the Union before implementing changes in conditions of employment. Thus, Creative did not challenge before the Board, nor does it challenge here, the finding that it violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union after June 2. Accordingly, the Board is entitled to summary enforcement of the portion of its Order requiring Creative to recognize and, on

request, bargain with the Union. *See NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 360 (5th Cir. 1978) (granting summary affirmance on uncontested violation).

The essence of the dispute therefore is whether Creative was privileged, upon assuming operations on June 2, to condition employment on terms that were not announced prior to or simultaneous with Creative’s expression of intent to hire the Berry III hoppers. As we show below, Creative, as a “perfectly clear” *Burns* successor, was not privileged to unilaterally set initial terms without bargaining with the Union.

The determination of “perfectly clear” successor status and the concomitant duty to bargain about initial terms and conditions of employment under which the predecessor’s employees are offered employment rests in the hands of, and is determined by, the actions of the successor itself. Substantial evidence supports the Board’s finding that Creative’s conduct demonstrated that it was “perfectly clear” that Creative planned to retain Berry III’s hoppers as its initial workforce. *See Burns*, 406 U.S. at 294-95.

As an initial matter, Creative expressed its intent to retain the Berry III hoppers from mid-May to June 1, 2011, when Richard and Flagge distributed applications to the hoppers. (ROA.3130-31.) The Board found—and Creative does not dispute the evidence the Board relied on—that by asking Berry III hoppers to fill out job applications, Creative was offering them employment.

(ROA.3133 n.14; ROA.437-38.) Creative did not interview the hoppers or condition employment on requirements such as background checks. (ROA.3144; ROA.437.) *See S & F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 356 (2009) (finding employer to be ordinary *Burns* successor because employment offers were temporary and were conditioned on interviews and “passing a pre-employment physical, drug test and acceptable reference and background checks”). Rather, as Richard himself testified, he intended to offer employment to everyone who returned a completed application. (ROA.3133 n.14; ROA.437-38.) Here, as the Board explained, “the judge’s own factual findings establish that [Creative] expressed an intent to retain the predecessor’s employees between mid-May and June 1.” (ROA.3130-31.) There was “‘no doubt’ that [Creative] intended to retain the Berry III hoppers as its new work force and that ‘filling out the application and tax forms was a formality.’” (ROA.3131, 3144; ROA.437.)

The record amply demonstrates that the Berry III employees would necessarily make up Creative’s workforce because it had no other applicants. The Board found that between mid-May and June 1, the day Richard cancelled the agreement with Berry III, Creative “made no efforts to hire hoppers from other sources.” (ROA.3131, 3133.) Both Richard and Flagge distributed applications “to the hoppers” who worked for Berry III. (ROA.103-04, 430, 460.) Moreover, as supervisor Karen Jackson testified—and Creative’s payroll records

corroborate—the only hoppers who worked for Creative on June 2 had previously worked for Berry III. (ROA.364-88, 2301-44.)

Further, Creative had no incentive to seek other applicants. Richard “already knew about the quality of the hoppers’ work . . . [and h]is dissatisfaction was not with the hoppers themselves, but rather with Berry III’s lax management practices.” (ROA.3146.) Training new employees “would have been a major undertaking.” (ROA.3147.) Thus, the Board concluded, “it is hardly surprising that [Creative] would decide to use the same individuals who already were hopping on the trucks every morning.” (ROA.3147.) *See Canteen*, 103 F.3d at 1363 (upholding Board’s determination that employer was perfectly clear successor where it “neglected to take serious steps to recruit from other sources”).

Although Creative had agreed to hire all of the Berry III hoppers who applied, it failed to announce previously or even simultaneously that it was changing the hoppers’ employment terms. Richard solicited applications from only 20 hoppers and told only those 20 of his planned changes to their wages and other terms and conditions of employment. The administrative law judge credited the uncontradicted testimony of Flagge that he did not inform any of the 50 hoppers to whom he distributed applications of the new terms of employment. (ROA.3132, 3149; ROA.103-04.) Flagge’s testimony was further corroborated by hopper Booker Sanders, who testified that Flagge gave him an application but did

not tell him about any changes to the employment terms. (ROA.3149; ROA.301.)

Based on that testimony, the Board found “no evidence that the hoppers who got their application forms from Flagge rather than Richard [] received the same information.” (ROA.3149.)

Accordingly, the Board weighed all the evidence and reasonably determined that Creative “failed to give notice of different initial terms to 50 of the approximately 70 Berry III hoppers from whom it solicited applications on or before June 1.” (ROA.3132.) Creative’s actions, therefore, did not indicate to employees that their initial terms and conditions of employment would be different from those under Berry III. It was not until June 2—after Creative had decided to hire all the Berry III hoppers who applied—that supervisor Jackson informed the 70 assembled hoppers of the new terms. As the Board found, “Jackson’s announcement of new terms on June 2 came too late to remove [Creative] from the ‘perfectly clear’ exception.” (ROA.3132.) *See Spruce Up*, 209 NLRB at 195 (successor must “clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment”). Therefore, Creative violated the Act by unilaterally implementing new terms and conditions of employment without first bargaining with the Union.

**C. Creative’s Arguments Challenging the Board’s Perfectly Clear Successor Determination Fail**

In challenging the Board’s decision that it is a perfectly clear successor under *Burns* and *Spruce Up*, Creative makes a variety of factual arguments, contrary to the record evidence, that it informed the hoppers of the new terms and conditions before hiring them. Then it asserts legal arguments that it had no duty to bargain until 1) it had hired a substantial and representative complement of employees on June 2 and 2) the Union first made a bargaining demand. As we now demonstrate, Creative’s arguments are unsupported by the record or successorship law.

**1. Creative did not “clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment,” as required by *Spruce Up***

Creative disputes the Board’s finding that it did not “concurrently reveal[] to a majority of the incumbent employees that different terms [would] be instituted” when it agreed to hire the Berry III hoppers. Creative challenges these findings by claiming (Br. 43-47) that it did, in fact, announce new terms prior to commencing operations and hiring employees; it asserts, first, that it did not intend to hire all Berry III applicants and, second, that employees had reason to know that their employment terms would change. As we now show, Creative’s factual arguments are unsupported by the record.

First, Creative advances meritless arguments to counter the Board’s finding that by offering job applications and W-4 forms to Berry III’s hoppers it intended to hire all who submitted them. (ROA.3131-32.) Before the Board, Creative did not challenge the administrative law judge’s finding that it intended to hire the hoppers to whom it gave applications and W-4 forms. (ROA.3131 n.12.) And, as the Board found, “[t]ypically, a job applicant does not fill out a W-4 form until hired, so inclusion of the tax form with the application suggests that [Creative] had little doubt about whom it would hire.” (ROA.3131.) Though Creative does not dispute the supporting evidence—including Richard’s own testimony about his hiring plan (ROA.437-38)—it now claims (Br. 42) that the Board’s finding “obliterates the basic tenets of contract law of offer and acceptance.” That claim ignores prior Board and court law on this issue finding employers to be “perfectly clear” successors where circumstances—even aside from a traditional hiring process or formal offer and acceptance of employment—showed that they expected to draw their workforce from the predecessor’s employees. *See Canteen*, 103 F.3d at 1362-63 (rejecting employer’s claim that it only intended to hire those applicants who accepted its terms; finding that employer’s expectation of retaining all was so strong that it did not recruit externally until applicants turned down work); *C.M.E.*, 225 NLRB 514, 514-15 (1976) (new employer informed the union that it intended to rehire the predecessor’s employees and then solicited and

collected applications). Moreover, the Board’s finding was based on the facts of this case—specifically, that Richard intended to hire all the hoppers who applied—and has no broader implications for contract law as Creative suggests.

Second, Creative attacks the Board’s finding that it failed to announce the new employment terms prior to or simultaneously with its intent to retain the Berry III hoppers. To challenge that finding, Creative (Br. 36) and Amicus (ABr. 13-14) rely on Creative’s provision of W-4s as evidence that the hoppers knew they would be subject to new terms and conditions of employment.<sup>5</sup> Although Creative claims that employees should have known of some of the imminent changes because it distributed tax forms along with job applications, substantial evidence supports the

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<sup>5</sup> Amicus also goes further (ABr. 13), claiming that Board law requires a finding that the successor actually misled employees, not simply a failure to inform them of new terms. But because Creative never makes this argument on its own behalf, the Court should decline to consider it. *See Garcia-Melendez v. Ashcroft*, 351 F.3d 657, 663 n.2 (5th Cir. 2003) (“amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal”). In any event, Amicus’s restricted reading of *Spruce Up* is directly contrary to that decision, which provides for perfectly clear successorship in two situations: where the new employer has “actively or, by tacit inference, misled employees into believing they would be retained without changes,” or where it “has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.” *Spruce Up*, 209 NLRB at 195. *See also Int’l Ass’n of Machinists*, 595 F.2d at 674-75 (explaining that even employees who are not “affirmatively led to believe that existing terms will be continued,” can be harmed by a successor’s failure to “apprise[] [employees] promptly of impending reductions in wages or benefits”).

Board’s finding that the tax forms were simply not “sufficiently clear that a reasonable employee in like circumstances would understand that continued employment [was] conditioned on acceptance of materially different terms from those in place under [Berry III].” (ROA.3131 n.12.)

Employers must *clearly* inform employees about changed terms and conditions of employment and not treat the information as puzzle pieces for employees to put together. *See Dupont Dow*, 296 F.3d at 503 (employer’s statement of new terms must be “sufficiently clear and definite to overcome the impression carefully created by the [employer] that the terms and conditions would remain the same”). Indeed, contrary to Creative’s claim (Br. 38) that all employees understood the import of the W-4 forms, some hopppers wrote “exempt” on the W-4s, demonstrating that they did not understand that Creative would be deducting taxes from their pay. (ROA.3132 n.12; ROA.1763, 1782, 1788, 1797, 1801, 1818, 1852, 1858, 1873, 1887, 1919, 2185, 2189, 2197, 2224, 2234, 2249, 2257, 2378.) Therefore, the Board reasonably concluded that Creative’s distribution of tax forms without explanation was “too ambiguous” to meet the requirement under *Spruce Up* that successors must clearly announce their intent to establish new employment conditions. (ROA.3131 n.12.) *See Spruce Up*, 209 NLRB at 195; *Elf Atochem N. Am., Inc.*, 339 NLRB 796, 808 (2003) (employer’s

statement “was not specific enough to clearly inform employees of the nature of the changes which [successor] intended to institute in the future”).

Nor is Creative’s cause helped by its suggestion (Br. 45), and that of Amicus (ABr. 13-14), that the hoppers had received the requisite notice of the changed employment terms via word of mouth. As the Board explained, “[g]ossip, conjecture, and unsubstantiated rumors cannot take the place of the clear announcement of intent to establish a new set of conditions required by *Spruce Up*.” (ROA.3132.) How many hoppers heard the rumors remains a mystery: the Board agreed with the administrative law judge that “the record affords no way of quantifying how many of the hoppers had learned about the \$11 per hour wage rate or the other terms and conditions of employment before they reported for work . . . on June 2.” (ROA.3132, 3149.)

Creative is also incorrect when it argues (Br. 32-33) that the Board reversed the administrative law judge’s factual and credibility findings regarding “credited evidence of the word-of-mouth communication” between employees and failed to show extraordinary circumstances to justify that reversal.<sup>6</sup> The Board did not

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<sup>6</sup> Creative argues (Br. 32-34) that the Board must show “extraordinary circumstances” in order to reverse an administrative law judge’s factual and credibility findings. Creative’s argument confuses the standard of review of Board decisions by appellate courts with the standard used by the Board to review administrative law judge decisions. *See Standard Dry Wall Prod., Inc.*, 91 NLRB 544, 544-45 (1950) (stating that the Board, not the administrative law judge, has

reverse the judge’s factual or credibility findings as Creative claims (Br. 32-33); rather, it drew different inferences and legal conclusions from them. *See Texas World Serv. Co. v. NLRB*, 928 F.2d 1426, 1431 (5th Cir. 1991) (noting that “court cannot reverse the Board’s decision when the Board and the ALJ merely draw different inferences from established facts”) (citation omitted). *Accord NLRB v. Allied Med. Transp., Inc.*, 805 F.3d 1000, 1009 (11th Cir. 2015) (noting that “the Board can draw a different inference from the facts without disturbing the administrative law judge’s credibility determinations”) (citation omitted). Specifically, the Board adopted the judge’s credibility findings that while Richard informed about 20 hoppers of the new terms of employment, Flagge did not inform the remaining 50 hoppers. (ROA.3128, 3132.) The Board then drew a different legal conclusion than the administrative law judge, finding that “Richard’s announcement of new terms to approximately 20 Berry III hoppers did not negate the inference of probable continuity of employment of the remaining 50 Berry III hopper applicants, who lacked knowledge that their wages and benefits would be reduced.” (ROA.3133.)

Creative next attempts to argue that all the hoppers knew of the new terms by suggesting (Br. 46) that it hired only 44 hoppers, who formed a “small, cohesive

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“the power and responsibility of determining the facts, as revealed by the preponderance of the evidence”).

workforce . . . [and] hang out, talking in the morning.” Creative’s claim is belied by the facts. On its first day of operations, Creative assigned 44 hoppers to the available garbage trucks, but it hired 70 hoppers before beginning operations because not every hopper works every day. (ROA.3129 n.5; ROA.467.) In any event, this small unit argument is simply a variant of its reliance on word-of-mouth notice. Again, Creative cannot rely on rumor and gossip to carry its burden of informing the Berry III hoppers *prior to, or simultaneously with*, its expression of intent to retain them. *See Dupont Dow*, 296 F.3d at 503 (requiring employer’s statement of new terms to be “sufficiently clear and definite to overcome the impression carefully created by the Company that the terms and conditions would remain the same”); *Rosdev Hosp., Secaucus, LP & La Plaza, Secaucus, LLC*, 349 NLRB 202, 207 (2007) (noting that “to the extent an employer’s pretakeover announcement contains ambiguities regarding the terms and conditions of employment offered to employees, such ambiguities will be resolved against the employer”).

Creative has failed to demonstrate that substantial evidence does not support the Board’s findings that it intended to retain all Berry III hoppers who applied and that it failed to provide the requisite clear notice of new employment terms.

**2. Creative’s legal arguments fail because they rest on principles inapplicable to these facts and to perfectly clear successors**

As described above, the Board found that Creative violated the Act by announcing new employment terms on June 2—after it had unconditionally agreed to hire the Berry III’s hoppers. Given those facts, Creative advances two legal challenges to contend that it had no duty to bargain until either June 2 or June 6. First, Creative claims that under the Supreme Court’s decision in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), it did not hire a “substantial and representative complement” of employees until June 2 and therefore it had no prior bargaining obligation. Second, Creative argues that it had no obligation to bargain until June 6, when the Union first made a bargaining demand. Creative’s claims are not supported, as it suggests, by *Fall River*, and are instead based on a misunderstanding of successorship case law. Moreover, as shown above, the Board found that Creative had an obligation to bargain by June 1—the date it had 70 completed applications, a number sufficient to begin operations. (ROA.3133.)

**a. The Board’s “substantial and representative complement” rule does not apply to perfectly clear successors**

In *Fall River*, the Court upheld the Board’s “substantial and representative complement rule” for determining when a successor has a bargaining obligation in situations where the successor “gradually builds its operations and hires employees.”<sup>7</sup> 482 U.S. at 47. But as the Board explained (ROA.3133), that rule does not apply in cases such as this one where the employer has been found to be a perfectly clear successor. Instead, the rule “developed in a very different context” and “addressed the question when the bargaining obligation is triggered in circumstances where there has been a hiatus between the closing and reopening of an enterprise and/or a successor gradually builds up its work force over a period of time.” (ROA.3133.) In other situations, such as that in *Burns*, the Court “did not have to consider the question *when* the successor’s obligation to bargain arose,” because the “‘triggering’ fact for the bargaining obligation was th[e] composition of the successor’s work force.” *Fall River*, 482 U.S. at 47 (emphasis in original).

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<sup>7</sup> In *Fall River*, the predecessor closed its doors in late summer, the successor began operations in September, and the union demanded bargaining in October. Not until January did the successor reach its goal of hiring one full shift of workers. The Court agreed with the Board that the successor had a duty to bargain with the union in January when it had hired a substantial and representative complement of employees. 482 U.S. at 52.

Moreover, the Board concluded that “nothing in the language or the reasoning of *Fall River* supports the extension of these criteria to the ‘perfectly clear’ successor context.” (ROA.3133-34.) To do so “would eviscerate the ‘perfectly clear’ exception, which is intended to promote bargaining *before* the successor hires the predecessor’s employee and fixes initial terms, in circumstances where the successor intends to retain as its work force a majority of the predecessor’s employees.” (ROA.3134 (emphasis in original).)

Creative attempts to provide support for its claim that it did not hire a substantial and representative complement until June 2 by asserting (Br. 6-7 n.4, 11, 31 n.11) that it was unable to start business as planned on May 20 and, therefore, had to solicit employees from sources other than Berry III hoppers. But the Court lacks jurisdiction to consider this claim because Creative failed to make this argument to the Board at the correct time under the Board’s procedures. *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. v. NLRB*, 456 U.S. 645, 665-66 (1982) (stating that Section 10(e) precludes court of appeals from reviewing claim not raised to the Board). *See also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[s]imple fairness” requires that courts should not overturn agency decisions “unless the

administrative body not only has erred but has erred against objection made at the time appropriate under its practice”).

Specifically, Creative failed to raise in its cross-exceptions that it sought applications from other sources, despite the judge’s finding to the contrary. Instead, it raised that issue for the first time in its answering brief to the General Counsel’s exceptions. The Board therefore rejected it as procedurally foreclosed.<sup>8</sup> (ROA.3131 n.11.) *See* 29 C.F.R § 102.46(b)(2) (“Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.”); *Manno Elec., Inc.*, 321 NLRB 278, 283 n.10 (1996) (refusing to hear employer’s claim, which was raised for the first time in an answering brief), *enforced*, 127 F.3d 34 (5th Cir. 1997) (unpublished) (per curiam). As to Creative’s claim (Br. 7 n.4) that it should “not be required to except to every fact” in an administrative law judge’s decision, whether Creative hired applicants from outside sources was not an inconsequential fact in the judge’s decision. Creative needed to except to that factual finding because it goes

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<sup>8</sup> Because it failed to file a motion for reconsideration of the Board’s decision, Creative may not now challenge the Board’s finding that it was procedurally foreclosed from raising the issue of external hiring for the first time in its answering brief. *See Woelke*, 456 U.S. at 665-66; *NLRB v. U.S. Postal Serv.*, 477 F.3d 263, 270 n.1 (5th Cir. 2007) (failure to file motion for reconsideration barred Court’s consideration).

to the issue of whether Creative intended to retain all of Berry III's employees, which is pivotal in the successorship analysis. (ROA.3146-47.)

*Massey Energy Co.*, 358 NLRB 1643 (2012), and *NLRB v. WTVJ, Inc.*, 268 F.2d 346 (5th Cir. 1959), cases cited by Creative (Br. 7 n.4) to argue that it preserved the issue, do not support its claim. Nothing in either decision suggests that raising an issue in an answering brief without filing an exception as required by the Board's rules is sufficient to preserve an issue for appellate review. Rather, both cases stand for the unremarkable proposition that the Board, in the absence of exceptions, "is free to use its own reasoning" and may find violations "for different reasons and on different *theories* from those of administrative law judges or the General Counsel." *Massey Energy*, 358 NLRB at 1652 (emphasis in original).<sup>9</sup> *See also WTVJ*, 268 F.2d at 348.

In any event, Creative offers no record evidence to contradict the Board's factual finding that all its hiring efforts involved the Berry III hoppers. Indeed, Creative's only assertion (Br. 6) that it hired from outside sources—its claim that Flagge's son was an outside applicant—is unsupported in the record. Payroll records amply demonstrate that Flagge's son worked for Berry III before he was

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<sup>9</sup> *Massey Energy* was issued by a Board panel composed of Members Hayes, Griffin, and Block. On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including the appointments of Members Griffin and Block.

hired by Creative. (ROA.868, 870, 873, 2932.) Thus, Creative's claim (Br. 6-7) of a delay in start-up due to a need for external recruiting is simply incorrect. As the Board stated, the "transition from Berry III to [Creative] would be an abrupt shift, and Richard had to be sure he had enough hoppers lined up to staff all of the trucks in advance," which is why the start of operations was delayed from May 20 to June 2. (ROA.3131.) The record shows that those employees came solely from Berry III, not elsewhere, just as Creative planned and expected. It therefore had no uncertainty about whether the Union would retain its majority status.

Creative further argues (Br. 26-27) that it did not hire the hoppers until the workforce assembled on June 2 and therefore it could not have been sure that a majority of Berry III employees would accept employment. This, of course, ignores that Creative, via Richard's hiring plan, intended to hire any Berry III applicant and that it sought no outside applicants. There could have been no doubt that the Berry III hoppers would comprise Creative's workforce; indeed, Creative waited to start operations until it had 70 Berry III applications. Creative can hardly claim now that it did not know whether the majority of its employees would be former Berry III hoppers.

Creative relies (Br. 26-27) on *Emerald Maintenance, Inc.*, 188 NLRB 876, 877 (1971), *enforced in part*, 464 F.2d 698 (5th Cir. 1972), to support its claim. But in *Emerald*, the Court found that "it was not clear that a majority of Emerald

employees were union members until after the work force assembled.” *Emerald*, 464 F.2d at 701. Here, by contrast, Creative knew that all the hoppers who assembled on June 2 were former bargaining unit members—because those were the only persons to whom it distributed applications. Moreover, the Court did not apply the Board’s *Spruce Up* decision in *Emerald* because it had not yet been decided.

**b. Creative was obligated to bargain as a perfectly clear successor regardless of an affirmative bargaining demand**

Creative next claims (Br. 14-19) that it was not obligated to bargain until June 6, when the Union demanded bargaining. Specifically, Creative claims that because it commenced operations on June 2, and the Union did not request bargaining until June 6, it was free to impose its own initial terms and conditions of employment. But nowhere in *Fall River* does the Supreme Court impose an affirmative bargaining demand requirement in the perfectly clear successor context.

As the Second Circuit explained in *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 645 (2d Cir. 1996), *Fall River* applies “[w]here a successor rebuilds an operation over a period of time or where there is a hiatus between the closing and reopening of an enterprise.” In those cases, “there may be considerable doubt as to whether a union that enjoyed the support of a majority of a predecessor’s

bargaining unit continues to do so under the successor's operation.” *Id.* But in this case, Creative “could easily discern its obligation to presume that the representatives of [Berry III’s] employees continued to enjoy majority status.” *Id.* at 645-46. Here, there was no start-up period,<sup>10</sup> and Creative intended to hire all of Berry III’s employees, did not solicit outside hires, and did not inform most (50 of 70) employees of changed terms and conditions of employment either prior to or simultaneously with its expression of the intent to hire. In *Banknote*, the court rejected the employer’s “formalistic approach where the requirement of a demand would have supplied it with no additional certainty regarding this obligation.” *Id.* at 646. Applying the same principles, the Board properly rejected Creative’s defense as there is no need for the Union to make a separate bargaining demand because “[t]he ‘perfectly clear’ exception applies only in circumstances where the continuity of the existing work force and the union’s majority status in the new work force are reasonably certain.” (ROA.3134 n.15.)

In support of its argument that *Fall River* requires that the Union first demand bargaining before any obligation to bargain could attach, Creative relies

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<sup>10</sup> As the Board found, once Creative accumulated 70 completed applications from Berry III employees on June 1, Richard cancelled the agreement with Berry III, and Creative began operations the next day, June 2. (ROA.3129 & n.5, 3145.)

on a series of cases that do not involve the perfectly clear exception under *Burns*.<sup>11</sup>

Rather, as described below, they are ordinary *Burns* successor cases:

- *NLRB v. Houston Bldg. Serv., Inc.*, 936 F.2d 178 (1991) (finding company to be ordinary successor under *Burns* with no analysis of the perfectly clear exception);
- *Prof'l Janitorial Serv. of Houston, Inc.*, 353 NLRB 595 (2008) (same)<sup>12</sup>;
- *Aircraft Magnesium, A Div. of Grico Corp.*, 265 NLRB 1344 (1982) (same), *enforced*, 730 F.2d 767 (9th Cir. 1984) (table);
- *Erica, Inc.*, 344 NLRB 799 (2005) (same), *enforced*, 200 F. App'x . 344 (5th Cir. 2006) (unpublished);
- *Bengal Paving Co.*, 245 NLRB 1271 (1979) (finding, on factual grounds, that successor had no obligation to bargain with the union where the General Counsel failed to establish that a majority of employees in the bargaining unit were former employees of the predecessor company).

Creative's citation (Br. 17) to *Peters v. NLRB*, 153 F.3d 289 (6th Cir. 1998), is also unavailing, principally for the reasons set forth by the Sixth Circuit in *Dupont Dow Elastomers, LLC v. NLRB*, 296 F.3d 495, 503-06 (6th Cir. 2002). In *Peters*, the court found that the successor employer was not a perfectly clear

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<sup>11</sup> Similarly, none of the cases cited by Amicus (A Br. 11-12) in support of its claim that the Union must first demand bargaining involve perfectly clear successors.

<sup>12</sup> At the time the Board order issued, the Board lacked a quorum of three members. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 686-88 (2010) (holding that two-member quorum of a three-member panel delegated all of the Board's powers could not continue to exercise that delegated authority after the third Board member's appointment expired).

successor because he affirmatively announced new terms “before or immediately after commencing operations.” *Peters*, 153 F.3d at 298. But in *Dupont Dow*, the Court disavowed any reading of *Peters* that would allow an employer to “have it both ways” by luring employees to accept employment while reserving the ability to set initial terms and conditions “by simply announcing the changes post-hire, but before or immediately after commencing operations.” *Dupont Dow*, 296 F.3d at 506 (internal quotation omitted). Such an interpretation, according to the court, could not be reconciled with the Supreme Court’s *Burns* decision or the Sixth Circuit’s own prior decision in *Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841 (1976). *Id.*

Nor does *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 11 (2007), support Creative’s assertion (Br. 18) that the Union must demand bargaining before its duty to bargain commences. Indeed, Creative misstates the facts of that case. In *Cadillac*, the union’s demand to bargain came *after* the employer’s changes to terms and conditions. *Cadillac*, 349 NLRB at 7-8, 10 n.31 (employer stopped making contributions to union benefits funds on July 16; the Union demanded bargaining in a phone call in late July). Nevertheless, the Board found Cadillac to be a perfectly clear successor and ordered it to make employees whole for its failure to make benefit fund payments. *Cadillac*, 349 NLRB at 13. The same holds true in other cases; perfectly clear successors’ bargaining obligations

preclude changes to initial employment terms even without prior bargaining demands. *See Spitzer Akron*, 540 F.2d at 843, 845 (bargaining obligation commenced prior to start of operations where employer hired predecessor employees without announcing changes to terms and conditions of employment; union demanded bargaining after start of operations and imposition of new terms); *C.M.E.*, 225 NLRB at 514-15 (bargaining obligation commenced on date employer made it “‘perfectly clear’ that it planned to retain all or substantially all of the employees in the unit” rather than the date more than two months later when the union demanded bargaining). Thus, contrary to Creative’s claims, the Board and courts of appeals do not require a union to first demand bargaining in the perfectly clear successor context. Instead, the Union is “entitled to an irrebuttable presumption of majority support for a reasonable period of bargaining,” and Creative violated the Act by failing to bargain before unilaterally changing the hoppers’ terms and conditions of employment. (ROA.3128, 3134 n.15.)

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In sum, not only did Creative fail to inform most Berry III hoppers that it planned to change their terms and conditions of employment before or when indicating it would hire them, it waited until the hoppers reported for work to announce those changes. As the D.C. Circuit has cautioned, “unconditional retention announcements engender expectations, oftentimes critical to employees,

that prevailing employment arrangements will remain essentially unaltered. . . .

[U]nless [employees] are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force.” *Int’l Ass’n of Machinists*, 595 F.2d at 674-75.

Creative’s failure to clearly announce new terms and conditions of employment led the hoppers to believe that their terms and conditions would be the same. By announcing new terms without first bargaining with the Union, Creative violated the Act.

## **II. THE COURT HAS NO JURISDICTION TO HEAR CREATIVE’S CHALLENGE 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. (“FVRA”), Creative argues that Solomon did not have authority to issue the complaint in this case.<sup>13</sup> As shown below, the Court lacks jurisdiction to consider the challenge to Solomon’s authority because Creative failed to timely raise that challenge to the Board. In any event, even

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<sup>13</sup> 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.

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 Creative's Untimely Challenge**

Section 10(e) of the Act prevents the Court from considering Creative's challenge to the complaint's validity because Creative failed to timely raise its challenge to the Board. *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *accord Hallmark Phoenix 3, L.L.C. v. NLRB*, 820 F.3d 696, 709 (5th Cir. 2016), *H. B. Zachry Co. v. NLRB*, 377 F.2d 670, 671 (5th Cir. 1967) (per curiam).

Before the Board, Creative failed to timely raise any challenge to Solomon's appointment. Notably, Creative did not challenge Solomon's authority in its February 2013 exceptions to the administrative law judge's decision. Although Creative attempted to raise the issue in a motion to file an exception out of time in April 2016 (ROA.3113-20), more than three years after the case began pending before the Board, the Board denied Creative's motion as out of time (ROA.3121). Creative asserts no extraordinary circumstances to excuse its failure to have timely raised the issue before the Board. Nor does it argue that the Board improperly

denied its motion to file the exception out of time.<sup>14</sup> In those circumstances, the Court lacks jurisdiction to hear its challenge to Solomon. 29 U.S.C. § 160(e). *See United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”).

In any event, although the stated basis for Creative’s motion to file the exception out of time was the D.C. Circuit’s August 7, 2015 decision in *SW General* (ROA.3116), Creative did not file its motion until eight months later (ROA.3113). Moreover, FVRA-based challenges to Solomon were raised in Board cases even before exceptions in this case were filed in February 2013; thus, Creative had every reason to know of the issue. The Board itself first responded to a challenge to Solomon’s designation as Acting General Counsel in a decision published in March 2012, and other FVRA-based challenges continued over the next few years. *See Ctr. for Soc. Change, Inc.*, 358 NLRB 161, 161 (2012); *see also Sub-Acute Rehab. Ctr. at Kearny, LLC*, 359 NLRB No. 77, 2013 WL 989751 at \*1 n.1; *Benjamin H. Realty Corp.*, 361 NLRB No. 103, 2014 WL 6068930 at \*1.

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<sup>14</sup> Having failed to assert extraordinary circumstances or to challenge the Board’s denial of its motion, Creative has waived any such claims and may not raise them in its reply brief. *United States v. Brown*, 305 F.3d 304, 308 n.4 (5th Cir. 2002); 29 U.S.C. § 160(e).

Further, courts have recognized that Section 10(e)'s "exhaustion bar" applies to Creative's statutory challenge to Solomon's authority to issue the complaint. *See SW 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 1621 Route 22 W. Operating Co., LLC v. NLRB*, 825 F.3d 128, 139-43 (3d Cir. 2016) (finding that court lacked jurisdiction to consider employer's FVRA objection because it did not demonstrate extraordinary circumstances to excuse its failure to first raise the issue to the Board); *Marquez Bros. Enter., Inc. v. NLRB*, 650 F. 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). This Court, therefore, lacks jurisdiction to consider Creative's FVRA argument.

**B. General Counsel Griffin Properly Ratified the Complaint**

In any event, Creative's argument (Br. 47-50) that the complaint should be dismissed pursuant to *SW General* overlooks a critical distinction between *SW General* and this case: here, General Counsel Griffin ratified the original complaint and its continued prosecution. Under *SW General*, this crucial difference dictates an entirely different result and moots any argument that the

complaint should be dismissed. Moreover, although Creative noted the ratification in its opening brief (Br. 48), it has waived any challenge to the ratification. *See Brown*, 305 F.3d at 308 n.4.

In any event, 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 78-79 & n.7 (discussing 5 U.S.C. § 3348(e)).<sup>15</sup> 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.* (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, Creative cannot show that the Court should void the complaint.

Agency ratification is a proper and accepted practice, approved by the courts as a remedy for actions taken by improperly appointed government officials or bodies. *See, e.g., See Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179,

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<sup>15</sup> 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).

1191-92 (9th Cir. 2016) (upholding ratification of prior decisions made by director, who served in violation of FVRA but was subsequently properly appointed); *Advanced Disposal Servs. East v. NLRB*, 820 F.3d 592, 602-05 (3d Cir. 2016) (recognizing that ratification is an equitable remedy that “has been applied flexibly” and “has often been adapted to deal with unique circumstances”); *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).

On April 27, 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.” (ROA.3124.) By ratifying the issuance and continued prosecution of the complaint against Creative, General Counsel

Griffin eliminated any uncertainty as to whether a lawfully serving General Counsel would issue the complaint. *See Intercollegiate*, 796 F.3d at 118-19 (“de novo review” by properly appointed members sufficiently cured taint caused by invalid members’ prior actions). General Counsel Griffin’s ratification is consistent with the presumption of regularity afforded to public officials in the exercise of their official duties. *See United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *accord 10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 725 n.79 (5th Cir. 2013).

In sum, Creative’s unsupported claims challenging Acting General Counsel Solomon’s authority fail to account for General Counsel Griffin’s subsequent ratification of the complaint and subsequent prosecution.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enforce the Board's Order in full and deny Creative's petition for review.

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February 2017

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

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|--------------------------------|---|----------------|
| CREATIVE VISION RESOURCES, LLC | ) |                |
|                                | ) |                |
| Petitioner/Cross-Respondent    | ) |                |
|                                | ) | No. 16-60715   |
| v.                             | ) |                |
|                                | ) | Board Case No. |
| NATIONAL LABOR RELATIONS BOARD | ) | 15-CA-020067   |
|                                | ) |                |
| Respondent/Cross-Petitioner    | ) |                |

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 11,001 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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

**UNITED STATES COURT OF APPEALS  
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|                                | ) |                |
| Respondent/Cross-Petitioner    | ) |                |

**CERTIFICATE OF SERVICE**

I hereby certify that on February 27, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further 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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