

Nos. 17-1102, 17-1141

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

**PUBLI-INVERSIONES PUERTO RICO, INC.
D/B/A EL VOCERO DE PUERTO RICO
Petitioner/Cross-Respondent**

v.

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

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici:

1. Publi-Inversiones Puerto Rico, Inc. d/b/a El Vocero de Puerto Rico (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court.

2. The Board is the respondent and cross-petitioner before the Court; the Board’s General Counsel was a party before the Board.

3. Union De Periodistas, Artes Graficas Yramas Anexas, Local 33225 was the charging party before the Board.

B. Rulings Under Review:

This case is before the Court on the Company’s petition for review and the Board’s cross-application for enforcement of a Decision and Order issued by the Board on March 10, 2017, and reported at 365 NLRB No. 29.

C. Related Cases:

This case has not previously been before the Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

/s/ Linda Dreeben

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Dated at Washington, D.C.
this 22nd day of August 2017

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Publi-Inversiones Puerto Rico, Inc. d/b/a El Vocero de Puerto Rico (“the Company”) to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against the Company. In this unfair-labor-practice case, the Board found that the Company was a successor employer and violated the National Labor Relations Act by refusing to recognize and bargain with Union De Periodistas,

Artes Graficas Yramas Anexas, Local 33225 (“the Union”), and by failing to provide the Union with requested information. (JA 726 & n.1.)

The Board’s Decision and Order issued on March 10, 2017, and is reported at 365 NLRB No. 29, as corrected by 365 NLRB No. 65 (Apr. 25, 2017). (JA 726-39, 747-48.)¹ The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the Act, as amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final with respect to all parties.

The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement. *See* 29 U.S.C. § 160(e) and (f). The Company filed its petition for review on March 27, 2017. The Board filed its cross-application for enforcement on May 31, 2017. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

A successor employer has an obligation to bargain with the union representing its employees when there is substantial continuity between the

¹ In this brief, JA references are to joint appendix, and “Br.” refers to the opening brief filed by the Company. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

predecessor and successor enterprises, and a majority of the bargaining unit employees previously worked for the predecessor. Here, the Board found that the Company maintained substantial continuity by continuing its predecessor's operations in substantially unchanged form, and employed the requisite majority of bargaining-unit employees. Does substantial evidence support the Board's finding that the Company is a successor employer, and therefore violated Section 8(a)(5) and (1) of the Act by refusing to recognize, bargain with, and provide requested information to the Union?

RELEVANT STATUTORY ADDENDUM

The addendum attached to this brief contains all applicable statutes.

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company 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, bargain with, and provide information to the Union. (JA 200-10.) After a hearing, an administrative law judge found that the Company was a successor to predecessor Caribbean International News Corporation and had violated the Act as alleged. (JA 735-37.) On March 10, 2017, the Board issued its Decision and Order adopting the judge's findings. (JA 726 & n.1.) On April 25, the Board

corrected its Order and notice to employees. (JA 747-48.) Below are summaries of the Board's findings of fact and its conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Caribbean International News Corporation, the Publisher of *El Vocero*, Had a Collective-Bargaining Relationship with the Union, which Represented Unit Employees for Almost 40 Years

Caribbean International News Corporation published *El Vocero*, a daily general circulation newspaper, until November 2013. Caribbean's main offices, where its administrative and editorial work took place, were located in Puerta de Tierra, Puerto Rico. Its two presses were located, and thus the production of the newspaper occurred, at a facility in Puerto Nuevo. (JA 729 & n.2; JA 550.)

In addition to *El Vocero*, Caribbean published four magazines at no additional charge on topics ranging from society weddings and social events to surfing, automobiles, and housing mortgages. (JA 18-19.) Two of Caribbean's magazines were published digitally, while two were printed and inserted inside the newspaper. The printed magazines were on the same type of paper and were the same size as *El Vocero*. (JA 729; JA 18-19, 32-33.) Caribbean also operated a website and other social media sites for *El Vocero*. (JA 729; JA 118-19, 127-29, 177-78.)

The Union and Caribbean had a long-standing collective-bargaining relationship and were parties to a series of collective-bargaining agreements

covering editing, editorial (reporters, photographers, and artists), pressmen and press assistants, pre-press/dispatch, mechanic, classified, and promotion events employees. (JA 729-30, 733; JA 399-403, 535-36, 555-57.) Pressmen, assistant pressmen, mechanic, and dispatcher employees worked at the Puerto Nuevo facility to produce the newspaper. (JA 729; JA 17, 89.)

In addition, Caribbean contracted with other companies to provide “inserters,” who also worked at the Puerto Nuevo facility. Inserters placed sales flyers and Caribbean’s magazines inside the newspaper. (JA 729 & n.3; JA 17, 19, 33, 59, 77.) Inserters were not allowed to talk during work hours and had limited contact with Caribbean’s employees. (JA 729; JA 20, 68, 70, 71.) Inserters, who were not employees of Caribbean, were not included in the bargaining unit. (JA 730; JA 396-97.)

B. Caribbean Files for Bankruptcy; the Company Purchases *El Vocero*, Hires Employees, and Begins Operations

In September 2013, Caribbean filed for bankruptcy, and its machinery, fixtures, equipment, printing press, trade names, and logos were put up for sale. (JA 730; JA 410.) The Union initially objected to the sale notice but withdrew its objection when the notice was amended to include a statement that nothing in the sale order “shall be held to limit any independent obligation of the Buyer that potentially could arise after the closing pursuant to the National Labor Relations Act.” (JA 731; JA 425-26.) The Company purchased Caribbean’s property at the

public bankruptcy sale in November 2013. (JA 731; JA 552.) Caribbean ceased publishing *El Vocero* in November and transferred its assets to the Company. (JA 731.)

On November 25, 2013, Caribbean's supervisors gave employees a letter from the Company informing them of the sale and telling them to contact the Company to apply for employment. (JA 731; JA 435.) By December 15, 2013, the Company had hired 36 bargaining-unit employees, 24 of whom were formerly employed by Caribbean in the bargaining unit. (JA 735; JA 556-57.)

The Company also hired between 27 and 51 inserters. Instead of contracting with outside agencies for inserters as Caribbean did, the Company chose to employ them as regular, part-time workers. (JA 732; JA 557.) Inserters are part of the production department and work in the same building as press, pre-production, and dispatch employees. Inserters work primarily on the night shift, while press, pre-production, and dispatch employees work either day or night shift. (JA 732; JA 34, 165, 557.) Unlike employees in the historical bargaining unit, inserters do not receive health care benefits because they work part-time. Nor do they receive the same wage: inserters are paid \$7.25 per hour, while press, pre-production, and dispatch employees in the historical bargaining unit are paid between \$11.45 and \$24.04 per hour. (JA 732 & n.15; JA 446-59.) Otherwise, inserters have the same benefits as other company employees and operate under the same work rules. (JA

732; JA 557-58.) Inserters' work (putting advertisements inside the newspaper) does not require special skills or training. (JA 732; JA 531-32.) Inserters report directly to the inserts supervisor, while dispatch employees report to the dispatch supervisor, and press and pre-production employees report directly to Eligio Dekony, the production director, who also previously supervised press employees under Caribbean. (JA 732-33; JA 22, 59, 65, 520, 557.)

The Company began publishing *El Vocero* on December 1 in paper and digital formats. (JA 731; JA 551-52.) The Company's operations, including printing, dispatching, and inserting, take place at the Puerto Nuevo facility previously used by Caribbean. The Company's administrative and editorial departments worked out of the facility used by Caribbean until September 2015, when they were relocated to another facility. (JA 731; JA 551.)

The Company made several cosmetic changes to *El Vocero*: it redesigned the logo, changed the background color and font, added a slogan, reduced the size and number of pages, renamed sections of the paper, renamed its reporters "megareporters," and began using computer-to-plate printing instead of reproduction-of-negatives. (JA 731; JA 554.) It also purchased new desks and carpets, remodeled some offices, and replaced a photocopy machine. (JA 733; JA 121, 123.)

Just as Caribbean had done previously, the Company in 2015 began publishing several magazines in print and online, although it renamed them and published five instead of four. Two of the magazines are printed on glossy paper by an outside printer and sell for \$2.50 apiece; the others are provided free of charge, and some of them are published only in digital format. (JA 731; JA 143-46, 153, 536-40, 551, 563-633.)

C. The Company Refuses the Union's Demand for Recognition, Bargaining, and Information

On December 17, the Union sent the Company a letter requesting that it meet and bargain. In its letter, the Union also requested that the Company provide a list of all employees, including their names and classifications, and a flow chart showing their current positions. (JA 733; JA 535-36.)

After not receiving a response, the Union contacted the Company again on December 23 and repeated its requests for bargaining and information. (JA 733; JA 539-40.) The Company replied on December 30, responding that the Union's letters had been referred to legal counsel. The Company did not provide any information or agree to bargain. (JA 733; JA 542.)

The Union sent follow-up letters on January 17, 2014, and October 22, 2015. (JA 544, 546.) On October 30, the Company responded that it was not a successor to Caribbean and would not bargain with the Union. (JA 548.) The Company never provided any of the requested information. (JA 733; JA 558-59.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (then-Acting Chairman Miscimarra and Members Pearce and McFerran) found, in agreement with the judge, that there was substantial continuity between the two enterprises, and that by December 15, 2013, the Company employed a substantial and representative complement of employees in the historical bargaining unit, a majority of whom were former Caribbean bargaining-unit employees. (JA 726 & n.1.) In so finding, the Board agreed with the judge that the Company failed to show compelling circumstances to overcome the appropriateness of the historical bargaining unit, which excluded the inserters. Accordingly, the Board found, in further agreement with the judge, that the Company violated Section 8(a)(5) and (1) of the Act by failing to recognize, bargain with, and provide requested information to the Union. (JA 726 & n.1.)

The Board's March 10, 2017 Order requires the Company 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. (JA 727.) Affirmatively, the Board's Order directs the Company to bargain with the Union, on request, as the exclusive collective-bargaining representative of the bargaining-unit employees; furnish to the Union the information requested in December 2013; and post a remedial notice. (JA 727.)

Thereafter, the General Counsel filed a motion to correct the Board's conclusions of law and the notice to employees to clarify that inserters, whom the judge had found were not unit members, were excluded from the bargaining unit. (JA 740-72.) On April 25, the Board granted the motion, and issued an Order correcting its March 10 Order and notice to employees. (JA 747-48.)

SUMMARY OF THE ARGUMENT

Substantial evidence supports the Board's findings that the Company continued Caribbean's operations in substantially unchanged form, hired a bargaining-unit workforce consisting primarily of the predecessor's bargaining-unit employees, and refused the Union's demands for recognition, bargaining, and information. Applying the well-settled successorship doctrine set forth in *Fall River Dyeing and Finishing Corporation*² and *NLRB v. Burns International Security Services*,³ the Board reasonably determined that the Company was a successor employer and was therefore obligated to recognize, bargain with, and provide information to the Union that represented the predecessor's unit employees.

The Company would have this Court find that the cosmetic changes it made to the business sufficed to disrupt the continuity between its enterprise and that of

² 482 U.S. 27, 41 (1987).

³ 406 U.S. 272 (1972).

its predecessor. But the Court has never found that such minor changes thwart a finding of substantial continuity in the employing enterprise. Rather, the Board and the Court examine whether the successor has made “‘essential changes’ likely to affect employee attitudes about union representation.”⁴ None of the changes in operations made by the Company meet this test, and they do not come close to establishing a lack of continuity between its business and that of Caribbean.

Nor is there any substance to the Company’s attack on the Union’s majority status. Rather than show, as it is required to do, that the historical unit is “repugnant to Board policy,” that “compelling circumstances . . . overcome the significance of bargaining history,” that the unit “hamper[s] employees in fully exercising rights guaranteed by the Act,” or that the unit “no longer conform[s] reasonably well to other standards of appropriateness,”⁵ the Company merely argues that the inserters share a community of interest with other employees and therefore must be included in the historical bargaining unit. The Company confuses the analysis the Board uses in initial bargaining situations with the test utilized in successorship cases involving a historical bargaining unit. As the Board

⁴ *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 654 (D.C. Cir. 2003).

⁵ *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996) (citations omitted).

reasonably found, the Company simply failed to meet its burden of showing that the historical unit is no longer appropriate.

The Court should, therefore, reject the Company's myriad attempts to avoid its duty to bargain, and defer to the Board's finding of *Burns* successorship, which is rational and consistent with the Act and applicable precedent. Having provided no viable defense, the Company's petition for review should be denied and the Board's Order enforced.

Moreover, because the Company fails to challenge the Board's finding that it violated the Act by refusing to provide information to the Union, the Board is entitled to summary enforcement of that portion of its Order, so long as the Court upholds the Board's determination that the Company has a bargaining obligation.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY IS A SUCCESSOR EMPLOYER AND THEREFORE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE, BARGAIN WITH, AND PROVIDE REQUESTED INFORMATION TO THE UNION

A. Principles Establishing a Successor Employer's Obligation to Bargain; Standard of Review

Section 7 of the Act guarantees employees "the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

. . . .”⁶ The Act requires an employer “to bargain collectively with the representatives of his employees,” and a refusal to bargain violates Section 8(a)(5), and derivatively, Section 8(a)(1) of the Act.⁷

Unions that win a secret-ballot election and are certified by the Board as the unit employees’ collective-bargaining representative enjoy a rebuttable presumption of majority support.⁸ As the Supreme Court has explained, this presumption “promote[s] stability in collective-bargaining relationships, without impairing the free choice of employees” and in so doing, furthers the Act’s policy of promoting industrial peace.⁹

The presumption of continuing majority status is “particularly pertinent” in successorship situations because “during this unsettling transition period, the union needs the presumption[] of majority status to which it is entitled to safeguard its members’ rights and to develop a relationship with the successor.”¹⁰ Thus, under the doctrine of successorship, a change in the ownership of the employing

⁶ 29 U.S.C. § 157.

⁷ 29 U.S.C. § 158(a)(5) and (1); *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005).

⁸ *Fall River*, 482 U.S. at 38.

⁹ *Id.* (quoting *Terrell Machine Co.*, 173 NLRB 1480 (1969), *enforced*, 427 F.2d 1088 (4th Cir. 1970)).

¹⁰ *Id.* at 39.

enterprise does not by itself destroy the presumption of continuing majority status.¹¹ Instead, a new owner of a business enterprise is obligated to bargain with the incumbent union because “a mere change in ownership, without an essential change in working conditions, would not be likely to change *employee* attitudes toward representation.”¹² Under the Supreme Court’s decisions in *Fall River Dyeing and Finishing Corporation*¹³ and *NLRB v. Burns International Security Services*,¹⁴ the Board applies the presumption of majority support where there is a “substantial continuity” between the two enterprises, the incumbent union has demanded bargaining, and a majority of the employees in the unit were employed by the predecessor.¹⁵

In determining whether substantial continuity exists, “the Board keeps in mind the question whether ‘those employees who have been retained will understandably view their job situations as essentially unaltered.’”¹⁶ Once it is

¹¹ *Id.* at 37-38; *Trident Seafoods*, 101 F.3d at 118.

¹² *NLRB v. Fall River Dyeing & Finishing Corp.*, 775 F.2d 425, 428-29 (1st Cir. 1985) (emphasis in original) (quotation omitted), *affirmed*, 482 U.S. 27 (1987). *Accord Waterbury Hotel*, 314 F.3d at 655.

¹³ 482 U.S. at 41.

¹⁴ 406 U.S. at 279-81.

¹⁵ *Fall River*, 482 U.S. at 36-37, 43. *Accord Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1060 (D.C. Cir. 2009).

¹⁶ *Id.* at 43 (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973)).

established that the new employer is continuing the predecessor's operations in substantially unchanged form, the key consideration is whether a majority of the bargaining-unit employees formerly worked for the predecessor.¹⁷

To find that an employer is a successor under the Act, the Board engages in a highly fact-specific inquiry that examines the totality of the circumstances.¹⁸

Accordingly, the Board's findings regarding successorship are "conclusive" under Section 10(e) of the Act¹⁹ if they are supported by substantial evidence on the record as a whole.²⁰ A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it de novo."²¹

Here, the Board properly found that the Company is a successor employer because it continued the business enterprise substantially unchanged, and employed a cadre of bargaining-unit employees, a majority of whom were former Caribbean unit employees. Accordingly, as the Board further found, the

¹⁷ *Id.* at 46-52.

¹⁸ *Harter Tomato Prods. Co. v. NLRB*, 133 F.3d 934, 937 (D.C. Cir. 1998); *United Food & Commercial Workers v. NLRB*, 768 F.2d 1463, 1470 (D.C. Cir. 1985) ("*UFCW*").

¹⁹ 29 U.S.C. § 160(e).

²⁰ *Fall River*, 482 U.S. at 52.

²¹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999).

Company—having plainly refused the Union’s valid demands for recognition, bargaining, and information—violated the Act. As shown below, the Board’s findings are reasonable and supported by substantial evidence.

B. Overview of Contested and Uncontested Issues

In its opening brief, the Company does not dispute that it hired, by December 15, 2013, a substantial and representative complement of employees in the historical bargaining unit, a majority of whom were formerly employed by Caribbean. Instead, the Company argues (Br. 14-17) that the Board erred in finding substantial continuity in the employing enterprise, and that the historical bargaining unit is no longer appropriate because it excludes the inserters, whom it now employs directly. Were the inserters to be included in the unit, a majority of unit employees would not be former Caribbean unit employees, and the Company would be relieved of its bargaining obligation. The Board, however, reasonably found that the Company failed to meet its heavy burden of showing that the historical unit is no longer appropriate.

The Company declined to challenge other findings, both by failing to file exceptions before the Board and by failing to raise them in its opening brief. Specifically, the Company did not challenge before the Board, and does not contest here, the Board’s findings that the Union made an effective bargaining demand and that advertising salespersons and guards are properly excluded from the historical

unit. (JA 726 n.1.) Nor did the Company except below to the finding that its editors are properly included in the historical unit (JA 726 n.1), though it makes a perfunctory claim in its brief (Br. 48) that the editors are now supervisors and should be excluded from the unit. Such contentions, when merely mentioned in a brief without accompanying argument, are deemed waived.²² (*See* p. 24 below.)

In addition, the Company does not challenge in its opening brief the Board's finding that it violated the Act by refusing to provide information to the Union. Nor could it have done so, given its failure to adequately except to the judge's finding on that point before the Board. (JA 726 n.1.) As the Board found, the Company's "bare exception[]" was insufficient to preserve the issue before the Board. (JA 726 n.1.)²³

By failing to file exceptions to these findings, the Company is barred under Section 10(e) of the Act from raising them to the Court.²⁴ Furthermore, the Company may not raise in its reply brief any arguments that it waived in its

²² *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000).

²³ *See also Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 419 (D.C. Cir. 1996) (a "cursory exception" before the Board is "insufficient to preserve the issue for appeal").

²⁴ *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216 (D.C. Cir. 2002).

opening brief.²⁵ The Board therefore will be entitled to summary enforcement of those portions of its Order remedying the Company's violation of Section 8(a)(5) and (1) for refusing to provide requested information to the Union, if the Court upholds the Board's finding that the Company is a successor employer obligated to bargain with the Union. Below, we discuss only those issues that the Company has not waived.

C. Substantial Evidence Supports the Board's Finding that There Is Substantial Continuity between the Company and Its Predecessor

In determining whether substantial continuity exists in a given case, the Board examines the "totality of the circumstances," with an "emphasis on the employees' perspective."²⁶ In making this determination, the Board looks at the following factors: "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers."²⁷ As the Court has explained, the focus of the analysis "is not on the continuity of the business structure in general, but rather on the particular

²⁵ *Parsippany Hotel*, 99 F.3d at 418.

²⁶ *Fall River*, 482 U.S. at 43.

²⁷ *Id.*; *Dean Transp.*, 551 F.3d at 1060.

operations of the business as they affect the members of the relevant bargaining unit.”²⁸

There can be little doubt that substantial continuity exists between the enterprises operated by the Company and Caribbean. Caribbean ran a business that published *El Vocero*, a newspaper of general circulation. The Company publishes the same newspaper, at the same location, with the same equipment, using a similar production process. (JA 734.) The newspaper is still distributed free of charge to the same customers. (JA 734.) Just as Caribbean did, the Company maintains a website and social media presence for *El Vocero*. (JA 729, 734.) Although the Company reduced the number of administrative departments from 12 to 4, it retained several of Caribbean’s departments as sub-departments. As a result, the Board found that the Company’s departmental structure “is not that different” from Caribbean’s. (JA 735.)

Most importantly, from the perspective of employees in the historical bargaining unit, their jobs were unchanged. Record evidence—which the Company does not dispute in its brief—shows that on December 17, 2013, when the Union made its initial bargaining demand, unit employees performed the same work, using the same equipment, and in the same location, as they did for Caribbean. (JA 734; JA 21-22, 551.) While the parties stipulated that “[a]t some

²⁸ *UFCW*, 768 F.2d at 1470.

point since 2014,” the production process changed from reproduction-of-negatives printing to computer-to-plate printing, the Board found that the employees’ “job duties continued unchanged after the sale of [Caribbean’s] assets,” a conclusion that the Company does not challenge here. (JA 731 & n.11, 734; JA 21-22, 554.)

In addition, the Board found that the very short hiatus in operations between Caribbean’s departure and the Company’s arrival supports its finding of substantial continuity in the employing enterprise. Caribbean stopped operating sometime in November 2013, and the Company printed its first edition of *El Vocero* on December 1. (JA 735.) Courts, including this one, have found companies to be successors despite much longer operational lapses.²⁹ The extremely short hiatus here, especially given the absence of other factors suggesting a loss of continuity, supports the Board’s finding that the Company is a successor to Caribbean.³⁰

In light of the fundamental uniformity between the operations of Caribbean and the Company, the Company cannot escape a successorship finding by citing (Br. 11, 45-47) a litany of minor changes to the paper’s operation. Those

²⁹ *Fall River*, 482 U.S. at 45 (employer found to be successor despite 7-month hiatus in operations). *Accord Pa. Transformer Tech., Inc. v. NLRB*, 254 F.3d 217, 224 (D.C. Cir. 2001) (same, with 2-year hiatus); *UFCW*, 768 F.2d at 1472 (same, with 18-month hiatus); *Straight Creek Mining, Inc. v. NLRB*, 164 F.3d 292, 296 (6th Cir. 1998) (same, with 54-month hiatus); *Nephi Rubber Prod. Corp. v. NLRB*, 976 F.2d 1361, 1365 (10th Cir. 1992) (same, with 16-month hiatus).

³⁰ *See Fall River*, 482 U.S. at 45.

insignificant alterations do not overcome the Board's finding of continuity in the employing enterprise.

Specifically, in claiming that it did not substantially continue the business of its predecessor, the Company relies (Br. 11, 45-50) on differences that are mainly cosmetic. Thus, contrary to the Company, changing the font and background color of the newspaper and installing new carpet and a new photocopier are hardly the types of changes that would extinguish the continuity between two businesses engaged in the same endeavor. The Board reasonably rejected the Company's claims that these changes destroyed the continuity between the two enterprises, finding that they were "cosmetic in nature and wholly inadequate to show a change in the essential nature of the business." (JA 734.) Such superficial alterations, which affect neither "the essential nature of unit work, nor . . . the essential operations" of the successor, cannot destroy the continuity between two enterprises.³¹

The Company nevertheless argues (Br. 45-49) that these changes and others amount to "major" operational changes that disrupted the continuity between its enterprise and that of Caribbean. Thus, the Company asserts (Br. 46) that its operations are different because it publishes five magazines, two of which are

³¹ *UFCW*, 768 F.2d at 1474. *Accord NLRB v. Jarm Enters., Inc.*, 785 F.2d 195, 200 (7th Cir. 1986) (finding successor status where employer made "only basic cosmetic modifications of the physical and organizational structure").

printed on glossy paper and sell for \$2.50 apiece. The Company also claims that it “relocated its operations” and now operates “in a completely differently manner.” (Br. 47.) But publication of the magazines and the move of administrative and editorial offices did not occur until 2015—nearly two years after the Union made its December 17, 2013 bargaining demand, which triggered the Company’s duty to bargain. (JA 726, 734; JA 551, 554.) Those belated changes are therefore irrelevant to determining whether the Company had an obligation to bargain when the Union made its demand.³²

In any event, Caribbean also produced magazines on similar topics that were inserted into the newspaper. While two of the Company’s magazines are printed on glossy paper, the printing is done by an outside printer, and the difference in paper quality is a purely cosmetic matter. (JA 153.) Further, the Board found that the 2015 move to a new location encompassed only some employees; the dispatch and press employees remained at the same facility where they had previously worked for Caribbean. (JA 731; JA 554.)

The Company also errs in claiming (Br. 48) that changes to its organizational structure negated its obligation to bargain. While changes in administrative structure and management hierarchy “are, no doubt, important to the

³² See *Cencom of Missouri*, 282 NLRB 253, 254 n.2 (1986); *Hudson River Aggregates, Inc.*, 246 NLRB 192, 193 (1979), *enforced*, 639 F.2d 860 (2d Cir. 1981).

[Company] . . . they are far less important to the unit employees” who were “doing the same jobs in the same locations and under the same working conditions and mainly the same supervision as before the acquisition.”³³

Moreover, throughout its brief, the Company makes assertions regarding those changes that are simply unsupported by the facts as found by the Board. The Company claims, for example, that “employees’ interactions and labor swaps are commonplace.” (Br. 47-48.) But the administrative law judge declined to credit the Company’s witness, Production Director Eligio Dekony, finding his testimony that the inserters are in “constant communication” with press and dispatch employees to be “vague and unconvincing.” (JA 732.) The judge also reasonably discredited his “ambiguous” and “imprecise” testimony that inserters “help [press employees] with the machines.” (JA 732-33; JA 160.) She further noted that while Dekony testified that one inserter had become a press assistant, he “did not provide any more detail as to how this transfer occurred or when it occurred.” (JA 733.) The Company fails to meet its burden of showing that these credibility determinations, which the judge also based on Dekony’s unfavorable demeanor, “are hopelessly incredible, self-contradictory, or patently unsupportable.”³⁴

³³ *Ready Mix USA, Inc.*, 340 NLRB 946, 946 (2003).

³⁴ *Ozburn–Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (quoting *United Servs. Auto. Ass’n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004)).

Accordingly, the Court should reject the contentions that the Company bases on Dekony's discredited testimony.

Further, the Company does not undermine the Board's finding of substantial continuity by claiming (Br. 48) that, as a result of its management reorganization, the editors now directly supervise the "megareporters." In making this claim, the Company forgets that the administrative law judge reached the opposite conclusion. Editors, she determined, are statutory employees who are properly included in the bargaining unit. (JA 734.) Because the Company failed to file an exception to the judge's finding, it cannot challenge that finding now.³⁵ (JA 726 n.1.)

Finally, the Company asserts (Br. 45), without evidence, that it changed the duties and responsibilities of its reporters. Contrary to the Company's assertion, the parties' stipulation notes only that reporters' titles were changed to "megareporter." (JA 731; JA 554.) The Company placed no evidence before the Board of any changed duties and responsibilities, and the Board made no such finding. (JA 731.)

Despite its yeoman's attempt to catalog every possible difference between its business and that of Caribbean, the Company cannot overcome the Board's reasonable conclusion (JA 736) that, under the totality of circumstances, it

³⁵ *Lee Lumber*, 310 F.3d at 216.

maintained substantial continuity in the employing enterprise. Indeed, the Court has rejected similar arguments involving much more substantial changes. For example, the Court has affirmed the Board's findings of substantial continuity despite changes in "wages, benefits, training, customer base, managerial philosophy, and supplier contracts,"³⁶ "differences in size, facilities, work force, managerial philosophy, [and] customer base,"³⁷ and operational differences including changes to "supervision, work rules, policies, training programs, paperwork, and the method for assigning [work]."³⁸ These types of changes "[are] not 'essential changes' likely to affect employee attitudes about union representation" and will not, therefore, defeat a finding of successorship.³⁹

Perhaps the most instructive case is *UFCW*, where the Court held that the Board was *compelled* to find substantial continuity even though the new employer "purged most of the former upper management, made changes to the production process, attracted new customers and lost others, contracted with new suppliers, and down-sized its operation, using only a portion of the former facility."⁴⁰ If

³⁶ *Harter Tomato Prods. Co. v. NLRB*, 133 F.3d 934, 937 (D.C. Cir. 1998). See also *Cnty. Hosps. of Central Cal. v. NLRB*, 335 F.3d 1079, 1084 (D.C. Cir. 2003).

³⁷ *Pa. Transformer*, 254 F.3d at 223-24.

³⁸ *Dean Transp.*, 551 F.3d at 1061.

³⁹ *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 654 (D.C. Cir. 2003).

⁴⁰ *Pa. Transformer*, 254 F.3d at 224 n.2 (describing *UFCW*).

those changes did not suffice to defeat successorship in *UFCW*, where there was also an 18-month hiatus in operations and \$1.3 million in capital improvements,⁴¹ it can hardly be argued that the Company's more limited changes here required the Board to find a lack of continuity. That is especially so given the Court's teaching that an employer's reliance on a laundry list of differences (*see, e.g.*, Br. 11, 45-47) "is unresponsive to the question we face. We ask not whether [the employer's] view of the facts supports its version of what happened, but whether the Board's interpretation of the facts is reasonably defensible."⁴²

The Company errs in relying (Br. 42-44) on *NYP Acquisition Corporation*,⁴³ a distinguishable case, to support its mistaken claim that even minimal changes can defeat a finding of continuity in the employing enterprise. There, the Board found it unnecessary to pass on whether Acquisition, which operated the *New York Post* while it was in bankruptcy, was a successor employer.⁴⁴ As for Holdings, the entity that purchased the *Post* and took over from Acquisition, the Board found it was not a successor employer because it lawfully declined to hire a majority of its

⁴¹ *UFCW*, 768 F.2d at 1467, 1471-72.

⁴² *Pa. Transformer*, 254 F.3d at 224 n.2.

⁴³ *NYP Acquisition Corp.*, 332 NLRB 1041 (2000), *enfd. sub nom. Newspaper Guild of New York, Local No. 3 of Newspaper Guild, AFL-CIO v. NLRB*, 261 F.3d 291 (2d Cir. 2001).

⁴⁴ *Id.* at 1045 & n.14.

unit workforce from among the former *Post* employees.⁴⁵ The Board also found that the two entities were not alter egos.⁴⁶

NYP Acquisition, then, could not be more different from this case, which to begin with does not involve alter egos. Here, of course, the Board found the Company to be a successor because, unlike Holdings in *NYP Acquisition*, it did hire a majority of its bargaining-unit workforce from the historical bargaining unit employed by the predecessor. In addition, the Board found that the Company's "business is virtually indistinguishable" from that of its predecessor—an issue that the Board did not reach in *NYP Acquisition* with respect to either entity. (JA 734.) In these circumstances, *NYP Acquisition* does not in any way undermine the settled principle, relied on by the Board here (JA 734), that when employees are "in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace."⁴⁷ The Board's finding of continuity in the employing enterprise is supported by substantial evidence and should be upheld.

⁴⁵ *Id.* at 1046.

⁴⁶ *Id.* at 1044-45.

⁴⁷ *S. Power Co. v. NLRB*, 664 F.3d 946, 951 (D.C. Cir. 2012) (per curiam) (quoting *Fall River*, 482 U.S. at 39-40).

D. The Board Acted Within Its Broad Discretion in Finding that the Historical Bargaining Unit Constituted an Appropriate Unit

1. The Court rarely disturbs the Board's findings on unit appropriateness

Section 9(b) of the Act “vests in the Board authority to determine ‘the unit appropriate for the purposes of collective bargaining.’”⁴⁸ The Board’s bargaining-unit determinations “involve[] of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed.”⁴⁹ The Board has broad discretion in the selection of bargaining units, and it is well established that the Board “need only select *an* appropriate unit, not *the most* appropriate unit.”⁵⁰ The Company claims (Br. 33-40) that the historical bargaining unit is no longer appropriate, but the Court’s standard of review when considering that claim is “quite limited.”⁵¹

In the successorship context, where “the Board has long given substantial weight to prior bargaining history,” an acquired unit remains appropriate even if it

⁴⁸ *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996) (quoting 29 U.S.C. § 159(b)).

⁴⁹ *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)).

⁵⁰ *Serramonte Oldsmobile*, 86 F.3d at 237 (internal quotation marks omitted).

⁵¹ *Dean Transp.*, 551 F.3d at 1063.

is not the unit the Board itself would have chosen in the first instance.⁵² The Board has long held that “a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness.”⁵³ Indeed, as the Court has explained, “a group of employees with a significant history of representation by a particular union presumptively constitute an appropriate bargaining unit.”⁵⁴

2. The Company failed to meet its burden of showing that the historical unit is no longer appropriate

In assessing whether the bargaining unit of the predecessor employer remains appropriate in a successorship case, the Board applies a presumption, approved by the Court, that historical units constitute an appropriate bargaining unit.⁵⁵ The Board further “appropriately attache[s] significant weight” to bargaining history in assessing the unit’s appropriateness.⁵⁶ The party challenging a historical unit faces “a heavy evidentiary burden” to show that the unit is no

⁵² *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996).

⁵³ *Id.* (quoting *Indianapolis Mack Sales & Serv.*, 288 NLRB 1123, 1123 n. 5 (1988)).

⁵⁴ *Cnty. Hosps.*, 335 F.3d at 1085. *See also Dean Transp.*, 551 F.3d at 1064-65.

⁵⁵ *Cnty. Hosps.*, 335 F.3d at 1085. *See also Dean Transp.*, 551 F.3d at 1064-65.

⁵⁶ *S. Power Co. v. NLRB*, 664 F.3d 946, 951 (D.C. Cir. 2012).

longer appropriate.⁵⁷ To meet that burden, the Company would have to show that the historical unit recognized by Caribbean is “repugnant to Board policy,” that “compelling circumstances . . . overcome the significance of bargaining history,” that the unit “hamper[s] employees in fully exercising rights guaranteed by the Act,” or that the unit “no longer conform[s] reasonably well to other standards of appropriateness.”⁵⁸

The Company failed to meet this heavy burden. It argues (Br. 33-40) that the inserters, who were historically excluded from the unit, should now be included. But the Company fails to make any showing that the current unit is inappropriate, much less a showing that “compelling circumstances . . . overcome the significance of bargaining history.”⁵⁹

The Union represented a unit of Caribbean’s employees for almost 40 years. The historical bargaining unit, as reflected in the parties’ collective-bargaining agreement, did not include inserters because, to begin with, Caribbean did not directly employ them. (JA 732; JA 396-97.) In addition, inserters have always worked different hours, earned lower wages, and had different skills than employees in the historical unit. (JA 729; JA 35-36, 38, 59-60, 72-74.)

⁵⁷ *Trident Seafoods*, 101 F.3d at 118 (quoting *Banknote Corp. v. NLRB*, 84 F.3d 637, 647 (2d Cir. 1996)).

⁵⁸ *Id.* (citations omitted).

⁵⁹ *Id.*

Nothing in the record before the Board even suggests that the historical unit, without the addition of the inserters, is inappropriate. Both before the Board and the Court, the Company appears to argue (Br. 28-29) that its decision to hire the inserters directly should make them part of the unit. But the Board rejected this claim, finding “no evidence that the mere fact that [the Company] now employs the inserters as part-time employees has resulted in any change in the nature of the relationship between the employees in the historical unit and the inserters.” (JA 735.) Further, the Board found that “the evidence fails to demonstrate that the historical unit previously employed by [Caribbean] is no longer appropriate.” (JA 735.)

What the record does show is that the historical unit remains appropriate without the addition of the inserters. After all, inserters are paid far less than other employees—\$7.25 per hour, compared to between \$11.45 and \$24.04 per hour for other unit employees. (JA 735.) In addition, inserters only work part-time, unlike the press and dispatch employees in the historical unit, who work full-time. (JA 732.) Moreover, unlike employees in the historical unit, inserters primarily work on the night shift. (JA 732; JA 557.) They also have separate immediate supervision, because they report directly to the insert supervisor. By contrast, dispatch employees report to the dispatch supervisor, and press and pre-production employees report directly to Production Dekony, who also previously supervised

press employees under Caribbean. (JA 732-33; JA 22, 59, 65, 520, 557.) Other employees in the historical bargaining unit also have separate immediate supervision. (JA 519.)

Moreover, when they worked at Caribbean, inserters “had only passing contact” with employees in the historical bargaining unit, in part because they were not allowed to talk during work hours. (JA 735; JA 20, 68-72, 74.) The Company failed to provide any credible evidence showing that this situation changed when it assumed operation of the business. Although Dekony testified that the inserters are in “constant communication” with other employees, the judge, affirmed by the Board, rejected this testimony as “vague and unconvincing” because Dekony was unable to provide any details and his claims were ambiguous. (JA 732-33; JA 159.) The Company fails to show that the judge’s ruling, which she based in part on Dekony’s unfavorable demeanor, was “hopelessly incredible, self-contradictory, or patently unsupportable.”⁶⁰

Thus, on these facts, the Board found that the Company “did not produce any credible evidence that inserters . . . share a community of interest with the historically appropriate unit.” (JA 735.) In addition, the Company failed to meet its burden of showing that “compelling circumstances . . . overcome the

⁶⁰ *Ozburn–Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (quoting *United Servs. Auto. Ass’n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004)).

significance of bargaining history,”⁶¹ and that the historical unit is no longer appropriate. The Board, therefore, acted well within its broad discretion in determining that the historical unit remained appropriate without the addition of the inserters.

3. The Board did not abuse its discretion by granting the General Counsel’s motion to correct the Board’s Order

Under Section 10(d) of the Act, the Board may—until the record in a case is filed in court—“modify or set aside, in whole or in part, any finding or order made or issued by it.”⁶² The Board may make corrections or modifications to its Order *sua sponte* or in response to a motion filed by a party.⁶³ Whether the Board grants or denies such a motion is within its broad procedural discretion.⁶⁴ Moreover, as the Court has stated, the Board, “has broad discretion to define the contours of an appropriate bargaining unit.”⁶⁵

⁶¹ *Trident Seafoods*, 101 F.3d at 118.

⁶² 29 U.S.C. § 160(d).

⁶³ *Raven Gov’t Servs., Inc.*, 336 NLRB 991, 991 (2001), *enforced*, 315 F.3d 499 (5th Cir. 2002) (granting General Counsel’s motion to modify Board order to require that employees be made whole for losses using a different formula than the one specified in the original order); *U.S. Can Co.*, 305 NLRB 1127, 1127 n.2 (1992), *enforced*, 984 F.2d 864 (7th Cir. 1993) (finding merit in General Counsel’s exceptions and correcting the unit description in the administrative law judge’s conclusions of law to include certain employees).

⁶⁴ *U.S. Mosaic Tile Co. v. NLRB*, 935 F.2d 1249, 1254 (11th Cir. 1991).

⁶⁵ *Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008).

After the Board issued its March 10, 2017 Decision and Order affirming the administrative law judge's findings, the General Counsel filed a motion to correct the unit description in the Board's conclusions of law and notice to employees, to make clear that inserters are not included in the bargaining unit. (JA 740-42.) In its April 25 Order, the Board granted the General Counsel's motion, noting that "there was no credible evidence that the inserters shared a community of interest with the employees in the historical unit." (JA 747 n.2.) Accordingly, the Board corrected its conclusions of law and notice to employees to specifically exclude inserters, so that all parties would understand the scope of the bargaining unit.

The Company claims (Br. 35-38) that by granting the General Counsel's motion to correct, the Board unilaterally modified the now-expired collective-bargaining agreement between the Union and Caribbean. The Company also argues (Br. 35, 38) that the Board failed to provide a reasoned explanation for granting the motion. As we now show, the Board properly exercised its broad discretion by granting the motion and correcting its conclusions of law and notice to employees so that they accurately describe the unit over which the Company was required to bargain.

As an initial matter, and contrary to the Company's claims, the Board did not "improperly amend[]" the collective-bargaining agreement to exclude inserters. (Br. 38.) The Company misapprehends the Board's April 25 Order, which did not

make any change to the now-expired collective-bargaining agreement. Instead, the Board merely clarified its own March 10 Order to specifically state what the administrative law judge had found: inserters were never part of the historical unit, and the Company failed to show “compelling circumstances” demonstrating that the historical unit, without the inserters, had become inappropriate.⁶⁶ (*See* pp. 29-33 above.) (JA 748.)

Strangely, the crux of the Company’s argument (Br. 36) is that “all parties in this case are bound to the actual text of the [collective-bargaining agreement].” But all parties agree that the inserters were never part of the historical bargaining unit covered by that agreement. And surely the Company does not intend to signal its own willingness to abide by the terms of that expired agreement and to reinstate the more generous wages and benefits agreed to by Caribbean. (JA 731; JA 40-41, 43, 45.) In any event, under *Burns*, neither the Union nor the Company is bound by the terms of that contract.⁶⁷ Thus, the Company’s citations, intended to show that the Board cannot ignore the terms of an existing collective-bargaining agreement (Br. 36-37), are simply irrelevant in a *Burns* successor case.

⁶⁶ *See Trident Seafoods*, 101 F.3d at 118.

⁶⁷ *Burns*, 406 U.S. at 284 (“although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them”).

Even though the status of the inserters was the primary issue before the administrative law judge, the Company inexplicably claims (Br. 37) that no party raised the unit description as an issue at any point in the proceedings. The Company seems to have forgotten that the issue was raised repeatedly throughout the proceedings. Thus, in its answer to the General Counsel's complaint, which put forward a unit description excluding the inserters, the Company denied the unit description as drafted. The Company therefore can hardly claim that it misunderstood "the basis of the Board's complaint."⁶⁸ Moreover, at the hearing, both parties presented evidence about the inserters. (JA 19-20, 24, 32, 35-38, 47, 59-78, 89, 156-67.) Thereafter, the Board adopted the judge's finding that inserters had never been included in the historical unit, and that the unit remained appropriate without their inclusion. (JA 735.)

In addition, the Company took the opportunity to oppose the General Counsel's motion to correct the Order. (JA 743-46.) The Board rejected those arguments and decided to amend its conclusions of law and notice to employees to make clear what the judge had already found: that the inserters were never part of the historical bargaining unit and were not part of the successor unit over which the Company was obligated to bargain. (JA 747-48.)

⁶⁸ *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 350 (1938).

The Company further claims that the Board “refrained from providing the rationale behind its decision” (Br. 35), and faults the Board for not doing a “thorough community of interest analysis” (Br. 38). The Company’s argument erroneously assumes that the Board analyzes a historical unit in the same manner as a unit being certified for the first time. The Court has long rejected the Company’s argument, explaining that, in general, “a historical unit will be found appropriate” if it was recognized by the predecessor, “even if the unit would not be appropriate under Board standards if it were being organized for the first time.”⁶⁹ The Company cannot prevail by simply arguing that a combined unit including the inserters is an appropriate unit or that the inserters share a community of interest with the historical unit. Instead, as discussed above (pp. 29-33), it must show that the historical unit is “repugnant to Board policy,” that “compelling circumstances . . . overcome the significance of bargaining history,” that the unit “hamper[s] employees in fully exercising rights guaranteed by the Act,” or that the unit “no longer conform[s] reasonably well to other standards of appropriateness.”⁷⁰ The Company has not come close to making this showing.

In any event, the Board specifically found that “there was no credible evidence that the inserters shared a community of interest with the employees in

⁶⁹ *Trident Seafoods*, 101 F.3d at 118.

⁷⁰ *Id.*

the historical unit.” (JA 747 n.2.) The Board, in adopting the judge’s findings, had already determined that the inserters were not part of the historical bargaining unit, and that the Company had “not shown any compelling circumstances to overcome the appropriateness of the historical bargaining unit set forth in the collective-bargaining agreement between [Caribbean] and the Union.” (JA 735.) The Board, therefore, was fully justified in granting the General Counsel’s motion based on the parties’ evidence and arguments and on the judge’s finding that inserters were not part of the unit. By granting that motion, the Board merely affirmed what the Company already knew: the historical unit, without inserters, remained appropriate for collective bargaining.⁷¹ The Company has failed to show that the Board abused its discretion in any way.⁷²

⁷¹ *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 72 (D.C. Cir. 2015) (hospital not prejudiced by Board ruling on special appeal because it had opportunity to litigate its claims).

⁷² *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175 (D.C. 2000) (affirming Board’s summary disposition of unfair-labor-practice case where Board previously held representation hearing, and employer had the opportunity to present both documentary and testimonial evidence regarding the inclusion of seasonal workers in the bargaining unit). *Cf. San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1188 (D.C. Cir. 2012) (Board did not abuse its discretion by allowing General Counsel to amend complaint to allege that employer had again refused to bargain when the employer never denied its refusal to bargain and the amendment merely “reflect[ed] the undisputed facts at the time”).

E. The Company Failed To Demonstrate Bias on the Part of the Administrative Law Judge or the Board

Unable to counter the evidence that it publishes the same newspaper at the same location with the same equipment using a similar production process with mostly the same employees, and having failed to meet its burden of showing that the historical unit is no longer appropriate and that the Board abused its discretion by amending its own Order, the Company resorts (Br. 38-39, 48, 51-54) to contending that the administrative law judge and Board were biased against it.

A meritorious claim of bias must be based on an extrajudicial source, “result[ing] in an opinion on the merits on some basis other than what the judge learned from his participation in the case,”⁷³ or a “favorable or unfavorable predisposition . . . so extreme as to display clear inability to render fair judgment.”⁷⁴ The Court, however, will not find bias where a party’s “specific complaints are but disagreements with some of the [administrative law judge’s] rulings.”⁷⁵ The Company’s charges of bias here “are but disagreements” with the judge’s rulings. First, the Company complains (Br. 52-53) that the judge improperly credited a union witness and refused to credit its witness. Next, the

⁷³ *U-Haul Co. of Nevada v. NLRB*, 490 F.3d 957, 965 (D.C. Cir. 2007) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)).

⁷⁴ *Id.* at 965 (quoting *Liteky v. United States*, 510 U.S. 540, 551 (1994)).

⁷⁵ *Id.*

Company argues that the proceedings were “iniquitous and biased” (Br. 51) because the judge made “incorrect factual assertions” (Br. 54). Despite its colorful language, the Company has fallen far short of showing bias.

As an initial matter, as the Supreme Court has explained, even if the judge had discredited all of the Company’s witnesses (which she did not), the Company still would not have shown bias.⁷⁶ Further, “adverse rulings alone hardly demonstrate that the [administrative law judge] had a fixed opinion—a closed mind on the merits of the case.”⁷⁷

Thus, the Company cannot show bias on the part of the Board and the judge based on its unsubstantiated claim (Br. 52) that witness Olga Mendez Gonzalez, a sister of the Union’s secretary/treasurer, was biased and should not have been credited over Production Director Dekony. (JA 729 n.4.) Indeed, the Company could not even show that the judge erred in crediting her testimony, which concerned her duties as an inserter before the Company took over the business. (JA 729; JA 58-78.) As the judge reasonably found, her testimony “was not contradicted in any meaningful way by more credible testimony or evidence.” (JA

⁷⁶ See *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659-60 (1949). *Accord UAW v. NLRB*, 455 F.2d 1357, 1368 & n.12 (D.C. Cir. 1971).

⁷⁷ *Waterbury Hotel Mgmt. LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003) (quoting *Pharaon v. Bd. of Governors of the Fed. Reserve Sys.*, 135 F.3d 148, 155 (D.C. Cir. 1998)).

729 n.4.) In crediting her testimony, the judge also relied on her “steady and sure manner” of testifying. (JA 729 n.4.) That demeanor-based finding hardly provides a basis for disturbing the judge’s credibility ruling,⁷⁸ much less a basis for claiming bias.

Indeed, *So-White Freight Lines*,⁷⁹ cited by the Company (Br. 53 n.20) as support for its claim that the Board and the judge were biased, squarely undermines that assertion. According to the Company, in *So-White* the Board held that the testimony of a witness living with the sister of a charging party was “extremely suspicious,” but the case says no such thing. Rather, in *So-White* the Board affirmed the judge’s decision to credit that witness, thereby rejecting the employer’s claim that she lacked credibility because of her living arrangements.⁸⁰ As the Seventh Circuit aptly recognized in enforcing the Board’s order, bias is not established merely because an administrative law judge “credits one party’s witnesses over another’s.”⁸¹

⁷⁸ *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988) (Court will not overturn demeanor-based credibility determinations unless they are “inherently incredible”).

⁷⁹ 301 NLRB 223 (1991), *enforced*, 969 F.2d 401 (7th Cir. 1992).

⁸⁰ *Id.* at 229.

⁸¹ 969 F.2d at 408 n.7 (quotation omitted). *See also UAW*, 455 F.2d at 1368 n.12.

In addition to its futile credibility arguments, the Company claims (Br. 48) that the Board demonstrated bias through “incorrect factual assumptions.” In support of this assertion, the Company makes much of the administrative law judge’s finding of overlap between the two companies’ boards of directors. But the judge’s statement, while inaccurate, had no impact on her finding of substantial continuity between the Company and Caribbean. In deciding whether there is substantial continuity between two enterprises, as the Court has stated, the issue is not whether there has been a change in management but whether that change “effected any substantial transformation in the basic *operations*” of the new enterprise.⁸² If the “same work continued . . . at the same place, with the same or substantially similar procedures, processes, and machinery,” as the Board determined to be the case here, then the Court will affirm the Board’s finding of substantial continuity.⁸³ Accordingly, the factually incorrect but immaterial finding “in no way indicates that the trial judge was hostile to the [Company].”⁸⁴

In short, the Company’s “bias” arguments rehash claims made throughout its brief that the Board erred by finding the historical unit to be appropriate. The Company’s meager attacks on the Board’s credibility and factual findings fail to

⁸² *UFCW*, 768 F.2d at 1473 (emphasis in original).

⁸³ *Id.*

⁸⁴ *United States v. York*, 852 F.2d 221, 227 (7th Cir. 1988).

show that the Board's decision resulted from an "unfavorable predisposition . . . so extreme as to display clear inability to render fair judgment."⁸⁵ The Board's decision should, therefore, be upheld.

⁸⁵ *U-Haul*, 490 F.3d at 965.

CONCLUSION

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

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August 2017

STATUTORY ADDENDUM

**STATUTORY ADDENDUM
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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

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

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

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

* * *

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

Section 9(b) of the Act (29 U.S.C. § 159(b)) provides in relevant part:

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a

bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

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

findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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)	
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)	Nos. 17-1102, 17-1141
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	12-CA-120344
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 9,636 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 22nd day of August, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I 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
this 22nd day of August, 2017