

Nos. 17-934, 17-1149

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HEALTHBRIDGE MANAGEMENT, LLC, et al.

Petitioners/Cross-Respondents

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

FINAL FORM BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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**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**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of HealthBridge Management, LLC (“HealthBridge”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order reported at 365 NLRB No. 37 and issued on February 22, 2017, against:

HealthBridge; 107 Osborne Street Operating Co. II, LLC d/b/a Danbury Health Care Center (“Danbury”); 710 Long Ridge Road Operating Co. II, LLC d/b/a Long

Ridge of Stamford (“Long Ridge”); 240 Church Street Operating Co. II, LLC d/b/a Newington Health Care Center (“Newington”); 1 Burr Road Operating Co. II, LLC d/b/a Westport Health Care Center (“Westport”); 245 Orange Avenue Operating Co. II, LLC d/b/a West River Health Care Center (“West River”); and 341 Jordan Lane Operating Co. II, LLC d/b/a Wethersfield Health Care Center (“Wethersfield”). The Board had jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, as the underlying unfair labor practices occurred in Connecticut. 29 U.S.C. § 160(e), (f). The petition and application are timely, as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the portions of its Order remedying its uncontested findings that HealthBridge, Danbury, Long Ridge, and Wethersfield violated Section 8(a)(5) and (1) of the Act by modifying contractual layoff notice and benefit eligibility provisions.

2. Whether substantial evidence supports the Board’s finding that HealthBridge, Long Ridge, Newington, and Westport violated Section 8(a)(5) and

(1) of the Act by eliminating employees' contractual seniority and reducing their wages and benefits.

3. Whether substantial evidence supports the Board's finding that HealthBridge and Westport violated Section 8(a)(5) and (1) of the Act by failing to reemploy employees Daye and Harrison, and Section 8(a)(1) by threatening to call the police in response to employees' protected activity.

4. Whether substantial evidence supports the Board's finding that HealthBridge and all six health care centers violated Section 8(a)(5) and (1) of the Act by unilaterally changing the established policy for calculating overtime and the established eligibility standard for premium pay on holidays.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Background; the 2004-2011 Collective-Bargaining Agreements

HealthBridge is a centralized management company that jointly operates and is an undisputed joint employer with six Connecticut skilled-nursing health care centers—Danbury, Newington, Long Ridge, West River, Westport, and Wethersfield (collectively with HealthBridge, and in whole or in part, “the Companies”)—each of which is individually incorporated as a separate entity.

(JA6; JA683.)¹ New England Health Care Employees Union, District 1199, SEIU (“the Union”), has represented bargaining units of service and maintenance employees at the centers, including the housekeeping and laundry employees, since the early 1990s. (JA7; JA98.)

The Union and the individual centers were parties to identical collective-bargaining agreements that were effective from December 31, 2004, to March 16, 2011. (JA7; JA338-620.) Article 9 of the parties’ agreements covered employees’ seniority, which in turn determined employees’ seniority-based wages and benefits. (JA7-8; JA346-48.) Article 9(B) listed five scenarios in which an employee’s accrued seniority would be lost:

- a. voluntary resignation or retirement;
- b. discharge for just cause;
- c. failure to return to work upon expiration of an authorized leave of absence . . . ;
- d. failure to return to work within ten (10) calendar days after . . . recall from layoff . . . ;
- e. layoff in excess of recall rights, which shall be equivalent to the Employee’s seniority as of the date of layoff, or two years whichever is less.

¹ “JA” references are to the Joint Deferred Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to the Companies’ opening brief to the Court.

(JA7 & n.8; JA346.) Article 9(D) specified that no “layoff or reduction of staff shall be implemented” without giving the Union 45-days’ notice, while Article 9(D) and (E) established seniority-based recall rights from layoffs. (JA7; JA347-48.) Article 9(F) prohibited any subcontracting of bargaining-unit work unless the subcontractor agreed to retain the existing employees and to preserve “all their rights, including seniority, under this Agreement.” (JA7 & n.7; JA348.) The parties’ agreements also contained an article binding “any purchaser, transferee, lessee, assigns, receiver or trustee” to accept the terms of the agreements. (JA7 n.7, 45; JA367.)

Elsewhere in the parties’ collective-bargaining agreements, Article 15(B) governed holiday premium pay and stated that “[i]n the event an Employee is required to work on any of [certain listed holidays], she/he shall be paid at the rate of one and one-half times her/his regular rate of pay for all hours worked on such holiday, and shall in addition” receive paid time off or additional compensation. (JA15; JA99-100, 353.) Article 14 governed overtime and stated that the normal work week for full-time employees “shall be forty (40) hours consisting of eight (8) hours each day including a paid lunch period of one-half (1/2) hour,” and that employees who “work in excess of eight (8) hours per day shall receive one and one-half (1 1/2) times their regular straight time hourly rate for hours actually worked in excess of (8) hours per day.” (JA16; JA351.)

B. The Companies Enter into “Supervisor-Only” Subcontracts

In January 2006, HealthBridge and the six health care centers entered into “supervisor-only” service agreements with a third-party subcontractor, Healthcare Services Group, Inc. (“HSG”), under which HSG was responsible for the day-to-day supervision of employees and for furnishing certain supplies. (JA7; JA660-72, 686.) HSG provided on-site account managers to supervise the operations, but the bargaining-unit employees remained on the Companies’ payroll. (JA7; JA102-03, 660-72.) Under the agreements, HSG received a monthly “management and supply fee” and was directed to keep labor costs within a set number of budgeted hours. (JA660-72.)

C. Long Ridge, Newington, and Westport Convert to “Full-Service” Subcontracts and Transfer the Housekeeping and Laundry Employees to HSG’s Payroll

On February 15, 2009, HealthBridge and three of the health care centers, Long Ridge, Newington, and Westport, converted their subcontracting agreements with HSG to “full-service” agreements. (JA7; JA673-81.) As a result, HSG assumed responsibility for all managerial and payroll services for the housekeeping and laundry operations. (JA7; JA235-36, 673-81.) The parties amended their subcontracting agreements to increase the monthly rate billed by HSG and to reflect that HSG was responsible for “[a]ll staffing and payroll responsibilities,” including “salary,” “taxes/insurance,” and “fringe benefits.” (JA660-81.)

Consistent with the collective-bargaining agreements between the Companies and the Union, the Companies directed HSG to retain the entire existing workforce and to maintain all existing terms and conditions of employment under the contracts. (JA7; JA279, 286-87, 336-37, 686.)

The Companies had sent a letter to the Union ten days earlier stating that they intended to enter into subcontracts with HSG for the housekeeping and laundry departments, and that HSG would be “assuming the day to day operations (including staffing)” of those departments. (JA7, 46; JA621, 639, 641.) The Companies’ letter affirmed that HSG would “retain the employees and recognize all their rights, including seniority, under the [collective-bargaining agreements].” (JA7, 46; JA621, 639, 641.) The following day, HSG sent a letter to the Union as notification that “the Housekeeping and Laundry employees at [the Companies’ facilities] will be transferred to the payroll of [HSG].” (JA46; JA622, 640, 642.) HSG also affirmed that it would “transfer all employees to our payroll with their seniority dates, accrued benefits, and job status intact,” that it agreed to all terms and conditions of the existing collective-bargaining agreements, and that “[t]his change will have no impact on the employees’ wages or benefits.” (JA7, 46-47; JA622, 640, 642.)

The 48 housekeeping and laundry employees were told at work that they were being transferred to HSG’s payroll. (JA7; JA103, 149-50, 162-644, 191, 200,

296.) None of the employees was informed that he or she was being terminated or laid-off by the Companies. (JA7, 73; JA103, 163-64, 306-07.) HSG subsequently required employees to sign various forms—including tax withholding, employment verification, and benefits-related forms—but the employees did not fill out HSG job applications, they were not interviewed for employment by HSG, and they underwent no reference or background checks. (JA7, 47; JA253-56, 279-80, 303-04, 309.)

D. The Housekeeping and Laundry Employees Continue to Work Under the Terms of the Collective-Bargaining Agreements

Throughout the period of full-service subcontracting, the employees continued to work under the terms of the collective-bargaining agreements without interruption. (JA8; JA157, 165, 286-87, 305, 326, 336, 686.) The employees continued to perform the same work at the same facilities in the same manner as before. (JA7; JA104, 164.) The same HSG managers continued to supervise the employees as they had during the period of “supervisory-only” subcontracting. (JA7-8; JA104, 149, 163.) Employees experienced virtually no changes in their daily work other than receiving their paychecks from HSG and clocking-in on separate HSG-installed time clocks. (JA8; JA189-90, 200, 281-83, 310.) HSG attempted to fix other minor changes by reimbursing employees for small differences in co-pays based on the equivalent health-insurance carrier utilized by

HSG, and by offering to look into obtaining a direct-deposit option for employees' paychecks. (JA49; JA237, 288-90, 310.)

During the period of full-service subcontracting, the Union filed numerous grievances directly with the Companies that involved employees working for HSG. (JA8.) For example, on February 25, 2009, the Union filed a grievance with Westport on behalf of housekeeping employee Franz Petion, who was formally on HSG's payroll, in support of his earlier bid to transfer to a position in the dietary department. (JA7, 49; JA221-22, 627.) The grievance was handled by the Companies with no involvement by HSG, and the Companies' human resources director eventually granted the grievance on the basis of Petion's accrued seniority. (JA7, 49; JA221-32, 627-33.) Before completing the transfer, the Westport administrator initially told Petion that his wages would be reduced to \$12.80 per hour, but she was overruled by the Companies' human resources director. (JA7, 49; JA233-34.)

Similarly, in April 2009, the Union filed a grievance with Long Ridge on behalf of Claudette Parks-Hill, who was paid by both Long Ridge and HSG as a per diem employee in the nursing and housekeeping departments. (JA7, 49-50; JA196-98, 208-15.) The Union successfully demonstrated to the Long Ridge administrator that, after losing her guaranteed part-time hours with HSG due to a layoff, Parks-Hill was contractually entitled to bump into a full-time position in

nursing based on her combined seniority with both Long Ridge and HSG. (JA7, 50, 74; JA196-98, 200-02, 204-07, 216-17.) In July 2009, the Union filed a grievance with Newington on behalf of Michael Cockburn, a housekeeping employee on HSG's payroll who was seeking a transfer to the maintenance department. (JA7, 51; JA105-07, 292, 623.) That grievance was denied by Newington on the grounds that Cockburn's pre-subcontracting start date with Newington had been two days later than the employee who received the position, and thus he held less contractual seniority. (JA7, 51; JA623.) The Union filed several additional grievances on behalf of the housekeeping and laundry employees that were either delivered to or raised with the Companies' administrators, including a grievance regarding HSG's failure to pay a laundry employee that the Long Ridge administrator accepted and promised to "look into." (JA51, 73; JA166-69, 184-88, 191-95, 203, 634.)

The Companies intended the full-service subcontracting arrangements to be temporary from their inception, and as early as the spring of 2009 the Companies were contemplating transferring the housekeeping and laundry employees back to the Companies' own payroll. (JA9, 11, 74.) On numerous occasions HSG managers stated that the bargaining-unit employees would be transferred back to the Companies' payroll. (JA8.) In the spring of 2009, the HSG account manager for the Newington facility began periodically telling a laundry employee that the

bargaining-unit employees would eventually be “going back” to Newington’s payroll. (JA8, 54; JA108-09, 120-24.) Likewise, in early 2010, the HSG district manager for the Long Ridge facility told a housekeeping employee that the employees might be returning to the Long Ridge payroll. (JA8; JA170-71.) The HSG district manager for the Westport facility made a similar statement to a union organizer in April 2010, before calling the organizer back a few days later and clarifying that the transfer back to the Westport payroll was only a possibility, adding that he “shouldn’t have said that.” (JA8 & n.11; JA248-49.)

E. Long Ridge, Newington, and Westport “Rehire” the Employees as New Probationary Hires and Eliminate Their Accrued Contractual Seniority; Westport Fails to Reemploy Employees Daye and Harrison, and Threatens to Call the Police in Response to Employee Complaints

On May 17, 2010, the full-service agreements between HSG and HealthBridge at the Long Ridge, Newington, and Westport facilities were converted back to “supervisor-only” agreements. (JA8; JA672, 686-87.) After arriving for work that morning as scheduled, employees at those facilities were met by HSG managers who handed out letters of termination on behalf of HSG. (JA8, 54; JA172.) The letters stated that as of 12:01 a.m. on May 17, the employees would “no longer be employed” by HSG. (JA8, 54; JA624-25, 635.) The letters given to employees at the Newington facility included an additional sentence stating: “Payroll services [will] not be provided for Newington Health Care

Center.” (JA54; JA624.) The employees were then told that they would need to reapply for their former jobs, and were directed to meetings with representatives of the Companies. (JA8, 54; JA138, 273, 335, 686.)

In the meetings with the Companies’ representatives, employees were informed that they would have to fill out new job applications, that they would be interviewed and subjected to background checks and drug testing, and that if hired they would be classified as “new hires” with no seniority at a starting salary rate of \$12.80 per hour. (JA8, 54; JA110, 126-27, 139, 173-74.) The starting salary rate would be a substantial pay reduction for nearly all of the bargaining-unit employees, and more senior employees had been making as much as \$19.14 per hour. (JA8, 54; JA112, 139, 181.) Many other contractual benefits, such as job security and health insurance coverage, would also be affected by the proposed elimination of the employees’ accrued seniority. (JA8 & n.12, 55; JA112, 157, 181-83.)

During the meeting at the Westport facility, employees reacted to the Companies’ announcement by voicing complaints that it was unfair and by stating that they were going to contact the Union prior to filling out the job applications. (JA8; JA126-28, 139.) In response, the Companies’ administrator for Westport told employees that if they were not going to fill out the forms then they needed to leave the premises and that she would call the police if they did not. (JA8; JA126-

28, 139-41, 144-45, 146-47.) The Westport employees then went outside to contact the Union. (JA8; JA128, 145.) Employees at the other facilities also expressed strong objections to the Companies' ultimatum that they reapply for their jobs as new hires, although across all three facilities most of the employees eventually decided to fill out the job applications. (JA8 & n.13, 54; JA111, 151, 156, 173-78.) Some employees specified in writing that they were doing so "under protest." (JA54; JA176-78, 219.)

All but one of the 48 bargaining-unit employees filled out the job applications provided by the Companies, and 45 of the 47 employees who did so were "rehired" on May 17 or May 18. (JA8, 55; JA250, 626, 636-38, 687.) Employees Newton Daye and Myrna Harrison filled out job applications at the Westport facility but were not reemployed. (JA8, 55-56; JA129-34, 141, 687.) The Companies have never provided an explanation for the refusal to reemploy Daye and Harrison, who had worked at the Westport facility for 13 years and 22 years, respectively. (JA8, 55-56; JA125, 132, 137, 141-43.) The job interviews conducted by the Companies were either non-existent or perfunctory—for example, one laundry employee with 16-years' experience at the Long Ridge facility was asked whether he knew how to work the laundry machine and dryer, and was then informed that he was hired. (JA8, 54; JA152-53, 177-80, 218-19.) Most of the employees were directed to return to work the same day that they were

interviewed and “rehired,” and from the employees’ perspective there was again virtually no change in the day-to-day work. (JA8; JA112-13, 152-53, 156, 274-75.)

After being “rehired” to the Companies’ payroll, the employees were in fact treated as new hires with no seniority, and as a result they experienced a dramatic reduction in wages and other contractual benefits. (JA16, 60; JA114-16, 157, 181-83.) Management officials at the health care centers were not told the reason for the cessation of the full-service arrangements by upper management, and instead they were merely told that the Companies would be taking the payroll back. (JA9, 55, 73; JA302, 320-22, 327-28.)

F. All Six Health Care Centers Unilaterally Change the Eligibility Standard for Holiday Premium Pay and the Policy for Calculating Overtime

In addition to the events described above, in late 2009 and early 2010 all six of the individual health care centers began discontinuing their practice of paying part-time and per diem employees time-and-one-half for hours worked on holidays. (JA62; JA199, 687.) Prior to those dates, the health care centers had consistently paid all employees time-and-one-half for hours worked on certain holidays, regardless of whether the employees held full-time, part-time, or per diem status. (JA9, 63; JA99-101.)

At various times in 2010, all six health care centers also ceased their practice of including half-hour paid lunch periods as time worked when calculating employees' daily overtime. (JA9, 65; JA117, 687-88.) If employees certified that they had received an uninterrupted half-hour lunch break, that time was no longer counted in an employee's total work time for purposes of calculating his or her overtime. (JA9, 65-66; JA154-55.)

G. Long Ridge Implements Layoffs without Providing 45-Days' Notice, and Delays Responding to a Union Information Request

In February 2010, Long Ridge informed the Union that it was considering laying off certified nursing assistants, and asked for the Union's permission to waive the contractual provision requiring 45-days' notice prior to any layoff, which the Union refused to do. (JA60; JA238-41.) Nonetheless, Long Ridge began laying off employees within a few days of the Union's refusal. (JA60; JA241-44.) The Union objected and, on March 2, delivered a letter to Long Ridge requesting information regarding the ongoing layoffs. (JA60-61; JA244-45, 643.) The Union did not receive certain requested information until July 2010. (JA62; JA246-47.)

H. Danbury and Wethersfield Modify the Eligibility Standard for Various Contractual Benefits

In mid-2010, Danbury and Wethersfield began implementing a new policy under which various benefits would only be available to employees formally hired

or “on the books” for positions guaranteed to work more than 20 hours per week, regardless of employees’ actual number of hours worked. (JA68; JA160-61, 688.) Previously, any employee who regularly worked more than 20 hours per week had been entitled to such benefits pursuant to the terms of the parties’ collective-bargaining agreements. (JA68; JA158-60.)

II. THE BOARD’S CONCLUSIONS AND ORDER

The Board (Members Pearce and McFerran; then-Acting Chairman Miscimarra,² concurring in part and dissenting in part) found that HealthBridge and the individual centers engaged in numerous unfair labor practices. (JA16-17.) First, the Board found that HealthBridge, Long Ridge, Newington, and Westport violated Section 8(a)(5) and (1) of the Act by modifying the terms of their collective-bargaining agreements without the Union’s consent by eliminating employees’ contractual seniority and reducing their wages and benefits. (JA16.) Second, the Board found that HealthBridge and Westport violated Section 8(a)(1) by threatening to call the police in response to employees’ protected concerted or union activity, and Section 8(a)(5) and (1) by failing to reemploy employees Daye and Harrison. (JA16-17.) Third, the Board found that HealthBridge and Long Ridge violated Section 8(a)(5) and (1) by laying-off employees without providing the contractual 45-days’ notice, and by failing to supply timely and complete

² Then-Acting Chairman Miscimarra was designated Chairman on April 24, 2017.

information requested by the Union. (JA17.) Fourth, the Board found that HealthBridge, Danbury, and Wethersfield violated Section 8(a)(5) and (1) by implementing a new eligibility standard for various contractual benefits. (JA17.) Finally, the Board found that HealthBridge, Danbury, Long Ridge, Newington, West River, Westport, and Wethersfield all violated Section 8(a)(5) and (1) by unilaterally changing employment terms by discontinuing established past practices regarding premium pay on holidays and the calculation of overtime. (JA17.)

The Board's Order requires HealthBridge and the individual centers to cease and desist from the unfair labor practices found, and from, in any like or related manner, restraining or coercing employees in the exercise of their statutory rights. (JA17-26.) Affirmatively, the Board's Order requires HealthBridge and the relevant centers to: offer Daye and Harrison reinstatement; rescind the unlawful modifications to the collective-bargaining agreements, restore the pre-modification terms, and continue in effect the terms of those agreements; rescind the unlawful unilateral changes to established practices, restore the pre-change employment terms, and, before implementing such changes, offer to bargain with the Union; make all affected employees whole for any loss of earnings and other benefits as a result of the unlawful conduct described; post remedial notices at the relevant facilities; and hold meetings at which the relevant notices are read to employees by

a responsible management official or by a Board agent in a management official's presence. (JA17-26.)

STANDARD OF REVIEW

The Court's review of Board orders is "quite limited," and the Court will enforce the Board's order where "its legal conclusions are reasonably based, and its factual findings are supported by substantial evidence on the record as a whole."³ The Court will not overturn the Board's findings of fact unless "no rational trier of fact could reach the conclusions drawn by the Board."⁴ Legal conclusions based on the Board's expertise are entitled to "considerable deference," and the Court affords the Board "a degree of legal leeway."⁵ The Court does not defer to the Board's interpretations of contracts.⁶

SUMMARY OF ARGUMENT

The primary issue in this case is whether HealthBridge and three of its jointly-operated health care centers violated the Act when, after the cessation of a temporary subcontract covering the housekeeping and laundry departments, the

³ *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

⁴ *NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1310 (2d Cir. 1990).

⁵ *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001).

⁶ *Local Union 36, Int'l Bhd. of Elec. Workers v. NLRB*, 706 F.3d 73, 83 & n.5 (2d Cir. 2013).

Companies formalistically reclassified their workforce as “new” hires in order to eliminate employees’ accrued contractual seniority and seniority-based benefits. As a result of the Companies’ unlawful modifications of their collective-bargaining agreements, senior employees with decades of accrued seniority were reclassified as new probationary hires overnight while suffering a pay cut of more than 30% and losing their health insurance and many other contractual benefits.

The Board found an unfair labor practice based on three independent legal theories, each of which independently supports enforcement of the Board’s Order. First, the Board agreed with the reasoning of Acting Chairman Miscimarra, concurring in relevant part, to find that the Companies’ attempt to utilize short-term operational changes to evade their statutory bargaining obligations was unlawful—a theory that the Companies largely ignore in their brief to the Court. The employees experienced virtually no changes in their day-to-day work during the brief period of subcontracting—which the Companies intended to be temporary from the start—and the Companies’ businesses underwent no substantive changes. Indeed, the Board reasonably inferred that the Companies acted with the deliberate purpose of eliminating employees’ seniority-based benefits, in direct contravention of the terms of the parties’ collective-bargaining agreements.

In addition, the Board further found that the statutory employment relationship between the Companies and the employees never ceased during the

temporary subcontracting period, thus providing an independent basis for finding that the Companies acted unlawfully by reclassifying their employees as “new” hires and eliminating contractually-guaranteed benefits. The Board found that the temporary subcontracting arrangement and the cessation of that arrangement were little more than administrative payroll transfers, and that, consistent with common-law principles, the Companies remained in an employment relationship with the temporarily-subcontracted employees for purposes of the Act.

The Board also found, as another independent basis for finding a violation, that the Companies were joint employers of the subcontracted employees with HSG. Throughout the brief 2009-2010 subcontracting period, the Companies mandated that HSG comply with the specific terms of the collective-bargaining agreements between the Companies and the Union, thereby dictating all of the employees’ essential terms and conditions of employment for the entire duration of the subcontract.

The portions of the Board’s Order remedying additional unfair labor practices committed by HealthBridge and the six health care centers during the same time period are also entitled to enforcement. The Companies do not contest two of these violations, involving modifications to contractual layoff notice and benefit eligibility provisions, and the Board is therefore entitled to summary enforcement of those portions of its Order. Two additional violations, involving

the failure to reemploy two employees and an unlawful coercive threat, follow directly from the primary violation described above, and should be enforced on the same grounds. Finally, the Board found that all of the Companies violated the Act by unilaterally changing established practices governing premium pay on holidays and the calculation of overtime without first bargaining with the Union. The Companies' arguments in response to these latter unilateral-change violations are both jurisdictionally barred and legally mistaken, and thus the Board is entitled to enforcement of those portions of its Order as well.

ARGUMENT

I. The Board Is Entitled to Summary Enforcement of the Portions of Its Order Remediating Its Uncontested Findings that HealthBridge, Danbury, Long Ridge, and Wethersfield Violated Section 8(a)(5) and (1) by Modifying Contractual Layoff Notice and Benefit Eligibility Provisions

The Board found that HealthBridge and Long Ridge violated Section 8(a)(5) and (1) of the Act by laying-off certified nursing assistants without providing the contractual 45-days' notice, and by failing to supply timely and complete information requested by the Union. The Board separately found that HealthBridge, Danbury, and Wethersfield violated Section 8(a)(5) and (1) by modifying their collective-bargaining agreements with the Union through the implementation of a new eligibility standard for various contractual benefits. The Companies do not challenge those findings (Br.12 & n.4), which are supported by

substantial evidence and established precedent.⁷ As a result, the Board is entitled to summary enforcement of the portions of its Order remedying those uncontested violations.⁸

II. Substantial Evidence Supports the Board’s Finding that HealthBridge, Long Ridge, Newington, and Westport Violated Section 8(a)(5) and (1) by Eliminating Employees’ Contractual Seniority and Reducing Their Wages and Benefits

A. Employers Violate the Act by Modifying the Provisions of a Collective-Bargaining Agreement During Its Term

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to “refuse to bargain collectively” with the union representing its employees.⁹ As such, an employer may not make unilateral changes to subjects affecting terms and conditions of employment without first notifying the union and bargaining to impasse.¹⁰ During the term of a collective-bargaining agreement, Section 8(d) imposes an additional requirement by mandating that “no party to such contract

⁷ See, e.g., *Woodland Clinic*, 331 NLRB 735, 736-37 (2000); *Oak Cliff-Goldman Baking Co.*, 207 NLRB 1063, 1063-64 (1973), *enforced mem.*, 505 F.2d 1302 (5th Cir. 1974).

⁸ *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 n.2 (2d Cir. 2009).

⁹ 29 U.S.C. § 158(a)(5).

¹⁰ *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

shall terminate or modify such contract” absent the other party’s consent.¹¹ An employer therefore violates Section 8(a)(5) and (1) by implementing a midterm modification of a contractual provision affecting employees’ terms and conditions of employment, unless the employer’s actions had a “sound arguable basis” in the contract and were not motivated by animus or bad faith.¹²

B. The Companies Unlawfully Eliminated Employees’ Accrued Contractual Seniority by Relying On a Short-Term Subcontract

The Board relied on three independent rationales in finding that the Companies violated the Act in May 2010 by treating employees as new probationary hires and eliminating their accrued contractual seniority. (JA10.) The Companies largely ignore one of these independent rationales, which like the other two is sufficient to support enforcement of the Board’s Order, and accordingly it will be discussed first before addressing the rationales that are contested in greater depth. Although the Board found that the Companies

¹¹ 29 U.S.C. § 158(d); *Milwaukee Spring Div.*, 268 NLRB 601, 602 (1984), *enforced sub nom. United Auto. Workers v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

¹² *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005) (discussing distinction between midterm-contract-modification violations and unilateral-change violations, and the differing remedies and legal standards for each), *enforced sub nom. Bath Marine Draftsmen’s Ass’n v. NLRB*, 475 F.3d 14 (1st Cir. 2007). Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with” or “restrain” employees’ statutory rights. 29 U.S.C. § 158(a)(1). A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1). *Allied Chem. Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6. (1971).

remained employers of the housekeeping and laundry employees during the temporary subcontracting period—both because the Companies never terminated the employment relationship, and because they constituted joint employers with HSG—the Board majority also agreed with Acting Chairman Miscimarra’s rationale for finding a violation. (JA10.) Thus, even assuming “there was no employment relationship between [the Companies] and the housekeeping employees . . . during the period that they were employed by HSG,” the Companies’ subsequent actions “were unlawful under Board precedent refusing to permit employers to use short-term operational changes to defeat their collective-bargaining obligations.” (JA10, 12-13 & n.32.)

1. Employers Violate the Act by Utilizing Short-Term Operational Changes to Circumvent Their Statutory Bargaining Obligations

The “overriding policy” of the Act is to ensure industrial peace by promoting the stability of collective-bargaining relationships.¹³ The Board and the courts have consistently found that employers are prohibited from refusing to bargain with a union or from repudiating the provisions of a collective-bargaining agreement, notwithstanding various changes or temporary lapses in the employer’s

¹³ *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987); accord *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-86 (1996).

operations.¹⁴ For example, an employer may not escape its obligations under a collective-bargaining agreement “through a sham transaction or technical change in operations,” such as the formation of an alter ego entity.¹⁵ Similarly, an employer may not circumvent its bargaining obligations by taking advantage of a temporary shutdown or hiatus in operations.¹⁶ The same reasoning applies where an employer temporarily subcontracts certain work before resuming operations and rehiring its employees.¹⁷ In summary, it is a “well established” principle of Board

¹⁴ See, e.g., *NLRB v. Rock Bottom Stores, Inc.*, 51 F.3d 366, 370-72 (2d Cir. 1995) (discussing rule that relocation of employer’s operations does not nullify existing collective-bargaining relationship or relieve employer of concurrent obligations).

¹⁵ *Lihli Fashions Corp. v. NLRB*, 80 F.3d 743, 748-49 (2d Cir. 1996); e.g., *NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 117-19 (2d Cir. 2001) (affirming that employer violated the Act by firing employees, rehiring them without regard to seniority, and transferring them to payroll of alter ego corporation).

¹⁶ See *NLRB v. Rockwood Energy & Mineral Corp.*, 942 F.2d 169, 175 (3d Cir. 1991) (affirming finding that post-hiatus employer was continuation of pre-hiatus employer following five-year suspension of mining operations, and requiring employer to recognize former employees’ seniority-based recall rights); *El Torito-La Fiesta Rests., Inc.*, 295 NLRB 493, 496-96 (1989) (requiring employer to apply terms of existing contract following 14-month shutdown), *enforced*, 929 F.2d 490, 493-96 (9th Cir. 1991).

¹⁷ *NLRB v. F&A Food Sales, Inc.*, 202 F.3d 1258, 1261-62 (10th Cir. 2000) (requiring employer to bargain with union and apply terms of existing contract after resuming operations following 16-month subcontract); see *Golden State Warriors*, 334 NLRB 651, 653-54 (2001) (finding unlawful changes to established recall rights where employer resumed operations after relocating to different arena for one season and temporarily subcontracting vending services), *enforced mem.*, 50 F. App’x 3 (D.C. Cir. 2002).

law that an employer may not cite temporary operational changes in order to “extinguish collectively bargained rights or obligations.” (JA13.)

2. The Companies’ Reliance on the Temporary Subcontract with HSG to Eliminate Employees’ Accrued Contractual Seniority and Seniority-Based Benefits Was Unlawful

The Board found that the present case was an unusually straightforward example of an employer attempting to impermissibly circumvent its bargaining obligations by relying on short-term operational changes. (JA12-13 & n.32.) Among the Board’s considerations, although not necessary to its finding of a violation, was its observation that there was “no apparent purpose” for the Companies’ decision to temporarily subcontract the employees and then rehire them with their seniority eliminated *other than* to extinguish the employees’ seniority-based entitlements. (JA13.) The Companies have never offered a business-related justification or any other explanation for their actions. Indeed, despite the fact that the Companies’ original reason for eliminating the employees’ contractual seniority was a critical issue during the lengthy hearing in this case, the Companies failed to call a single witness from HealthBridge or any of the centers to testify about it. As a result, the Board drew an adverse inference against the Companies—which the Companies do not contest—finding that their actions had

the deliberate purpose of circumventing the employees' collectively-bargained rights. (JA11, 13.)¹⁸

Furthermore, here “*the same employers . . . were in place before the February 2009 subcontracting and after the May 2010 resumption of housekeeping operations.*” (JA13 n.32 (emphasis in original).) The present case is thus an even more compelling example of an unfair labor practice than those cases in which the Board and this Court have found that alter ego corporations evaded their bargaining obligations.¹⁹ Indeed, not only did the exact same employers temporarily cease and then resume operations without changing their corporate forms, but those employers “were bound by the same [collective-bargaining agreements] before, during and after the subcontracting period,” and in fact “the [2009-2010] subcontracting occurred completely within the term of the 2004-2011 [collective-bargaining agreements].” (JA13 n.32.)

In addition, there was substantial continuity in the Companies' operations. The identity of the workforce before, during, and after the relatively brief subcontracting period remained virtually unchanged. (JA13 n.32.) At all times,

¹⁸ See *NLRB v. Dorn's Transp. Co.*, 405 F.2d 706, 713 (2d Cir. 1969) (affirming that Board could properly draw adverse inference from respondent's failure to call critical witness).

¹⁹ E.g., *G&T Terminal Packaging*, 246 F.3d at 118-19; *Goodman Piping Prods., Inc. v. NLRB*, 741 F.2d 10, 11-12 (2d Cir. 1984) (affirming that alter ego which resumed work of defunct corporation was bound by terms of existing contract).

the exact same work was continuously performed at the same centers for the benefit of the Companies, and there were no substantive changes to the Companies' businesses. (JA13 n.32.)

The Board also found that from the start the Companies intended the subcontracting arrangement to be temporary, and as early as the spring of 2009—within the first few months after the subcontracting began—employees were told that they would eventually be transferred back to the Companies' payroll. (JA8-9, 11, 13 & nn.32-33.) As in *F&A Food Sales*, where the Tenth Circuit enforced the Board's finding that an employer remained bound by an existing collective-bargaining agreement after a 16-month period of temporary subcontracting, the Companies here "simply returned to [their] status as original employer[s] after a short hiatus."²⁰

Given that the Companies remained bound by the existing collective-bargaining agreements, they were no more privileged to unilaterally extinguish employees' accrued seniority than an employer would be if it attempted to do so by terminating an employee and rehiring him or her later in the same day.²¹ Indeed, the Companies' actions were directly contrary to the parties' collective-bargaining

²⁰ 202 F.3d at 1262.

²¹ See *G&T Terminal Packaging*, 246 F.3d at 112, 117 (affirming that employer violated the Act by terminating employees covered by contractual seniority clause and rehiring some of them two days later without regard to seniority).

agreements. Article 9(B) of the parties' agreements delineates only five scenarios in which an employee's seniority may be lost: "(a) voluntary resignation or retirement; (b) discharge for just cause; (c) failure to return to work upon expiration of an authorized leave of absence . . .; (d) failure to return to work within ten (10) calendar days after . . . recall from layoff . . .; [and] (e) layoff in excess of recall rights" (JA346, 394, 487.) None of these contractual scenarios encompasses the Companies' decision to rehire employees after a temporary subcontracting period—during which the employees continued to perform the exact same work on the Companies' premises without interruption—and the Companies have failed to make any argument to the contrary. (JA7 n.8.)

Moreover, Article 9(F) expressly provides that in the event of "subcontracting," the employees will *retain* "all their rights, including seniority, under this Agreement." (JA348, 396, 489.) The fact that the employees retained their HealthBridge seniority during the 15-month period when they were subcontracted with HSG is also confirmed by the Companies' own contemporaneous actions. For example, grievances filed with the Companies on behalf of subcontracted employees Petion, Parks-Hill, and Cockburn were all resolved on the basis of those employees' continuing seniority with the HealthBridge facilities. (JA11.) In addition to a specific provision governing subcontracting, the parties' agreements also contain a broad provision binding any

successor, “transferee,” or “assign” of the bargaining-unit operations. (JA367, 414, 507.) As the Board found, it is “inconceivable” that the parties intended to provide less protection to employees who continued to perform the same work at the facilities without interruption than the contractual protections provided for in the context of layoffs, subcontracting, or a successorship situation. (JA12.)

As a result, and based on a careful review of the parties’ collective-bargaining agreements, the Board found that there was no “sound arguable basis” for interpreting the agreements to permit the Companies to rehire their workforce as new probationary employees with no seniority. (JA11-12 & n.26.) Thus, in agreement with Acting Chairman Miscimarra’s concurrence, the Board reasonably concluded that the above facts, “in their totality, support the finding of a [Section 8(a)(5)] violation here.” (JA12-13 n.32.)

In their brief to the Court, the Companies largely ignore this independent basis for the Board’s finding of a violation, despite the fact that the Board majority expressly affirmed Acting Chairman Miscimarra’s “alternative rationale” in all critical respects. (JA10, 12-13.) The Companies’ bare claim that “nothing in the [collective-bargaining agreements] forbade” the decision to classify the rehired workforce as new probationary employees and to strip them of their seniority-based benefits (Br.47) is patently unreasonable. The parties’ contracts *do* forbid the Companies’ actions: the parties bargained over a seniority provision that limits

the elimination of employees' accrued seniority to five enumerated scenarios, none of which is implicated here.²² Furthermore, the parties bargained over a specific clause in the seniority provision which clarifies that employees retain their accrued seniority in the event of the Companies subcontracting work, and an additional provision requiring any "transferee" or "assign" to preserve the bargaining-unit employees' contractual rights.

Even assuming that the Companies' had attempted to identify a provision in the contracts to support their actions—which they have failed to do in their brief to the Court²³—the contracts must be interpreted in a manner that reflects the intentions of the parties and avoids absurd results.²⁴ It "defies logic and common sense" to conclude that the Union intended to permit the Companies to eliminate decades of accrued seniority by simply transferring employees to a subcontractor and then rehiring them as "new" employees. (JA11-12.) Under the Companies'

²² See *Doe v. Bin Laden*, 663 F.3d 64, 70 (2d Cir. 2011) (discussing, in context of statutory interpretation, the "ancient maxim *expressio unius est exclusio alterius* (mention of one impliedly excludes others)"); *Cornell Univ. v. Local 2300, United Auto. Workers*, 942 F.2d 138, 140 (2d Cir. 1991) (applying same interpretive canon in context of collective-bargaining agreement).

²³ See *NLRB v. Star Color Plate Serv.*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988) (holding that arguments not raised in party's opening brief are deemed waived).

²⁴ Cf. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 104 (2d Cir. 2006) (noting that "cardinal principle" for interpretation of all contracts is that the intentions of the parties should control and "absurd results should be avoided"); *Hosp. San Carlos Borromeo*, 355 NLRB 153, 153 (2010) (finding no sound arguable basis in contract where interpretation was facially "implausible").

apparent interpretation of the contracts, the Companies could have accomplished the same result by means of two paper transactions in the course of a single day. Given that the Companies have failed to demonstrate a sound arguable basis in the contracts for the decision to eliminate the rehired employees' contractual seniority, the Companies have violated Section 8(a)(5) and (1) by unlawfully modifying the terms of the parties' contracts—regardless of whether the employment relationship was effectively terminated during the temporary subcontracting period.

C. The Companies Never Terminated the Employment Relationship for Purposes of the Act, and Thus They Acted Unlawfully by Eliminating Employees' Accrued Contractual Seniority

Based on many of the same considerations discussed above, the Board further found that, for purposes of the Act, the Companies remained employers of the housekeeping and laundry employees during the temporary subcontracting period. (JA12-13.) Given the “unusual” facts at issue, the Board reasonably found that the introduction of HSG as an additional employer after February 15, 2009, did not terminate the Companies' employment relationship with the bargaining-unit employees. (JA10.) Such finding provides a separate basis for the Board's conclusion that the Companies' decision to reclassify the employees as “newly hired probationers with no seniority rights” constituted an unlawful midterm modification in violation of Section 8(a)(5) and (1) of the Act. (JA13.)

1. An Entity May Remain the Employer of Employees Working for a Second Common-Law Master

The task of determining the existence of an employment relationship for purposes of the Act is one that “has been assigned primarily to the agency created by Congress to administer the Act,” and reviewing courts must defer to the Board’s findings as long as they are “reasonably defensible.”²⁵ In determining whether a statutory employment relationship exists, the Board may look to the common law of agency.²⁶ Under the common law, an agency relationship—here, employer and employee—results from “a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.”²⁷ As such, an agency relationship depends on the “manifest conduct” of the parties rather than the parties’ subjective intentions regarding the status of their relationship.²⁸ Once

²⁵ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984); *accord NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90, 94 (1995) (holding that Board findings based on reasonable applications of common law of agency are entitled to considerable deference).

²⁶ *See Town & Country Elec.*, 516 U.S. at 92-95 (affirming Board’s determination that paid union organizers remain common-law servants and thus statutory “employees” with respect to employing companies).

²⁷ Restatement (Second) of Agency § 15 (1958); *see id.* § 1(1).

²⁸ *Interocean Shipping Co. v. Nat’l Shipping & Trading Corp.*, 523 F.2d 527, 537 (2d Cir. 1975); *see also* Restatement (Second) of Agency § 15, cmt. a (noting that an agency relationship exists where “the person acting believes reasonably, from conduct for which the other is responsible, that he is authorized so to act”).

formed, an agency relationship therefore continues until it is “terminated by one or both parties.” (JA10 & n.20.)

Furthermore, as the Supreme Court has observed, it is a “hornbook rule” that an employee “*may be the servant of two masters . . . at one time as to one act*, if the service to one does not involve *abandonment* of the service to the other.”²⁹

Likewise, a servant “directed or permitted by his master to perform services for another may become the servant of such other,” but there is an “inference that the actor remains in the general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer.”³⁰

In other words, there is “no inference that because the general employer has permitted a division of control, he has surrendered it.”³¹ Thus, an employer may remain the common-law master of a servant working for a second master, and based on similar considerations such employer may remain the servant’s “employer” for purposes of the Act.

²⁹ *Town & Country Elec.*, 516 U.S. at 94-95 (emphases in original) (quoting Restatement (Second) of Agency § 226).

³⁰ Restatement (Second) of Agency § 227 & cmt. b; *see, e.g., Williams v. Pennsylvania R.R. Co.*, 313 F.2d 203, 209 (2d Cir. 1963).

³¹ Restatement (Second) of Agency § 227 cmt. b.

2. The Companies Remained Employers of the Housekeeping and Laundry Employees Despite the Temporary Payroll Transfer

It is undisputed that the Companies were the sole employers and common-law masters of the housekeeping and laundry employees prior to the February 15, 2009 full-service subcontracts, and subsequent to their May 17, 2010 end. Substantial evidence supports the Board's reasonable finding that, consistent with common-law agency principles, the employment relationship between the Companies and their employees for purposes of the Act was not terminated during the temporary subcontracting period despite the formal transfer of the employees to HSG's payroll. (JA10-13.)

Foremost among the Board's considerations was its finding that, from the very start, the Companies contemplated that the full-service subcontracting period would be a temporary payroll transfer rather than a permanent termination of their employment relationship with the employees. (JA11, 13.) The Board's finding was based, in part, on an uncontested adverse inference drawn against the Companies for their failure to call even a single company official to testify at the unfair-labor-practice hearing. (JA9, 11.) Meanwhile, the credited testimony of several employees revealed that HSG managers told employees as early as the spring of 2009 that they would eventually be returning to the Companies' payroll.

The Board further emphasized that there was no evidence the Companies took any contemporaneous steps to terminate their employment relationship with the bargaining-unit employees. (JA11.) Employees continued to perform the same work without interruption, and they were never informed that they had been terminated or laid-off by the Companies. They did not apply for employment with HSG, nor were they interviewed. Instead, employees were merely told that there had been a payroll transfer and that HSG would be taking over and would begin issuing their paychecks. Notably, this is in direct contrast to the events of May 2010, when employees were provided with unambiguous written and oral confirmation that they were being terminated by HSG. Moreover, the Companies failed to provide the contractually-required advance notice in February 2009 that would indicate that they viewed the employees as being laid-off. (JA11 n.24.) Under the common law, there is an inference that a servant working under a second master for the benefit of an original master remains the latter's servant "[i]n the absence of evidence to the contrary,"³² and none of the Companies' conduct in this case served to rebut that inference.

The Board's finding that the Companies did not terminate the employees is also supported by two letters sent to the Union in early February 2009 announcing

³² Restatement (Second) of Agency § 227 & cmt. b; *cf. Interocean Shipping*, 523 F.2d at 537 (holding that "manifest conduct" controls, and finding common-law agency relationship despite one party's subjective belief that such relationship did not exist).

the changes. (JA7, 11.) A letter from the Companies simply stated that they intended to enter into a subcontract with HSG regarding the housekeeping and laundry departments, and that HSG would be “assuming day to day operations (including staffing) of these departments” while retaining the employees and recognizing all of their contractual rights (JA621.) In turn, a letter from HSG the following day affirmed that the employees were being “transferred to the payroll of [HSG],” and that there would be “no impact” on employees’ seniority, wages, and benefits, or any other terms of the collective-bargaining agreements. (JA622.) Neither the Union nor the individual employees received any further communications indicating that the Companies were attempting to permanently sever their employment relationship with the employees—many of whom had been employed by the centers or predecessor entities for decades—or that the employees were in fact terminated.

As the Board noted, its finding that the employees remained employees of the Companies is also consistent with the proposition that the employees entered into secondary employment relationships with HSG. (JA11 n.21.) The employees were informed that they were being added to HSG’s payroll and that they were required to sign various forms as a result, including tax withholding, employment verification, and benefits-related forms, but there is no evidence that employees were ever told that they had ceased being the Companies’ employees as well. The

employees would have had reason to conclude that, at most, they had become employees of HSG *in addition to* being employees of the Companies—a conclusion consistent with the common-law principle that an employee may act as the servant of two masters at the same time. For example, in *Williams v. Pennsylvania Railroad* this Court applied common-law principles to find that a crane operator remained an employee of his general employer despite the fact that he was being paid by and was acting under the direction of a third-party stevedoring company at the time of a tortious accident.³³ According to the Court, the fact that the crane operator was party to an independent employment relationship with the stevedoring company “does not require a conclusion that [he] had ceased to be [the general employer’s] servant,” but instead may simply mean that he “had become the [stevedoring company’s] servant too.”³⁴

Finally, the Board observed that the Companies continued to act as employers of the bargaining-unit employees during the period of full-service subcontracting with HSG. (JA11.) For example, the Companies continued to permit housekeeping and laundry employees to exercise their contractual rights to transfer into other departments based on their accrued HealthBridge seniority. The Companies received grievances relating to such transfers, handled them without

³³ 313 F.2d at 205-06.

³⁴ *Id.* at 209.

consulting HSG, and resolved them based on employees' seniority as measured from their start date with the Companies. The handling of such grievances demonstrates that the employees continued to be part of the larger facility-wide bargaining units, that the employees retained their contractual seniority with the Companies, and that "those employees had seniority rights applicable not only to *their respective* housekeeping department but to *the other departments in their facility*," which were outside the control of HSG. (JA11 (emphases in original).)

Based on the Board's reasonable finding that the Companies never ceased to be the bargaining-unit employees' "employers" for purposes of the Act, the Companies' violation of Section 8(a)(5) and (1) is readily apparent. The parties' collective-bargaining agreements permitted the Companies to subcontract the housekeeping and laundry operations, but insofar as the subcontracted workers remained the Companies' employees the agreements clearly did not permit the Companies to unilaterally reclassify employees as newly-hired probationers or to unilaterally extinguish decades of accrued seniority. The Companies do not argue otherwise. Thus, the Companies' actions constituted unlawful midterm modifications of the employees' collectively-bargained rights under the contracts.

3. The Companies' Arguments Are Unavailing

The arguments that the Companies do make are unpersuasive. The Companies are incorrect to allege that there is "no legal basis" for the Board's

finding (Br.38-39), or that it is contradicted by Board precedent (Br.39-41). It is well established that the Board may properly consider the common law of agency, and specifically the Restatement (Second) of Agency, when evaluating the existence of an employment relationship for the purposes of the Act,³⁵ and as such the Board was not grasping for “legal straws” (Br.38) in citing the Restatement. Relying on similar Restatement sections, both the Supreme Court and this Court have recognized that an employee may remain the servant of one employer while performing work for a second employer.³⁶ Contrary to the Companies’ claim that the Restatement “only addresses how the servant becomes an agent of the ‘other master’” (Br.38), the Board’s analysis is consistent with the common-law principle that a master-servant relationship continues until either party manifests an objective intent to terminate it.³⁷ Moreover, the Board’s finding of a continuing employment relationship in this case is supported by the policy judgments

³⁵ See *Town & Country Elec.*, 516 U.S. at 94-95 (citing Restatement for purposes of determining statutory employment relationship); cf. *Hilton Int’l Co. v. NLRB*, 690 F.2d 318, 320-21 (2d Cir. 1982) (citing Restatement for purposes of distinguishing statutory “employees” from “independent contractors”).

³⁶ *Town & Country Elec.*, 516 U.S. at 94-95; *Williams*, 313 F.2d at 209.

³⁷ See *Interocean Shipping*, 523 F.2d at 537; Restatement (Second) of Agency § 118 (“Authority terminates if the principal or the agent manifests to the other dissent to its continuance.”); see also *id.* § 38 (“Authority exists only for the period in which, from the manifestations of the principal and the happening of events of which the agent has notice, the agent reasonably believes that the principal desires him to act.”).

underlying the Act, which favor the stability of collective-bargaining relationships.³⁸

Contrary to the arguments made by the Companies (Br.39-41), the Board's decision in *District 1199E, Health Care Employees*³⁹ is inapposite. That case did not involve the question of whether the original employer terminated its common-law master-servant relationship with the subcontracted employees, but instead involved the union's unlawful refusal to bargain with the subcontractor unless it accepted the terms of the predecessor contract.⁴⁰ In any event, the parties' manifest conduct there made clear that the original master-servant relationship was being terminated. The original employer sought to permanently subcontract its operations, the parties met and discussed the issue while the subcontractor identified itself as a successor employer, the subcontractor refused to accept the terms of the predecessor contract, and the employees received definitive notice—including new uniforms—indicating that they no longer worked for the original

³⁸ See *supra* pp. 24-25 & nn.13-17; *cf. Sure-Tan*, 467 U.S. at 891-92 (recognizing that the breadth of employment relationships encompassed by the Act is “striking” and that Congress intended broad application of the Act’s “avowed purpose of encouraging and protecting the collective-bargaining process”).

³⁹ 238 NLRB 9 (1978), *remanded*, 613 F.2d 1102 (D.C. Cir. 1979).

⁴⁰ *Id.* at 15.

employer.⁴¹ As the Board observed in the present case, “[e]very case in which we determine whether an employment relationship exists or continues is fact-specific,” and the Board’s finding here was based on “all the circumstances” of this somewhat unusual case. (JA13.)

The Companies’ substantive objections to the Board’s finding are also unavailing. Tellingly, the *only* evidence that the Companies can muster to demonstrate that they effectively terminated the employment relationship is the brief February 2009 letter (Br.36-37), sent to the Union and not the employees, stating that HSG would be “assuming the day to day operations (including staffing)” while retaining the employees. Yet, not only was this letter followed the next day by a letter from HSG to the Union expressly describing the subcontract as a payroll transfer, but the ambiguous language of the Companies’ letter is not inconsistent with the evidence supporting the Board’s finding that the employees had no reason to think that the Companies had unceremoniously terminated them.

The Companies misunderstand (Br.41-44) the Board’s partial reliance on the numerous grievances filed on behalf of HSG employees—including the Cockburn grievance, which the Companies entirely ignore. The Companies’ unilateral handling of those grievances demonstrates not only that they continued to treat employees on HSG’s payroll as members of facility-wide bargaining units covered

⁴¹ *Id.* at 12-13, 15.

by the collective-bargaining agreements, but also that the Companies continued to recognize the employees' accrued seniority with both the Companies and HSG in determining whether to permit those employees to bump non-HSG employees in other departments. As such, it is beside the point that Petion had originally applied for a transfer prior to HSG taking over, or that Parks-Hill remained a per diem employee on the payrolls of both HSG and Long Ridge. If anything, the Companies' further suggestions (Br.41-43) that alleged *former* employees still enjoyed contractual rights vis-à-vis the Companies, and that transferred employees were being "rehired" with their seniority intact, would only tend to support the conclusion that the elimination of accrued seniority in May 2010 was unlawful.

D. The Companies Remained Joint Employers with HSG, and Thus They Acted Unlawfully by Eliminating Employees' Accrued Contractual Seniority

The Board also found, as "an entirely separate basis for finding that the employment relationship between [the Companies] and the housekeeping employees never ceased for purposes of Section 8(a)(5)," that the Companies and HSG constituted joint employers during the temporary subcontracting period. (JA13.) The Board's finding is once again supported by substantial evidence.

1. An Entity May Constitute a Joint Employer If It Exercises Immediate Control over Employees' Terms and Conditions of Employment

Two separate entities may constitute joint employers of a single workforce if they “share or codetermine” those matters governing the employees’ terms and conditions of employment.⁴² Under the standard applied by the Board in this case, and consistent with this Court’s precedent, the “essential element” of any joint-employer determination is whether the putative joint employer exercised direct and immediate control over employment matters.⁴³ In evaluating whether such control was present, the Board and this Court have considered a variety of factors.⁴⁴ The question of whether an entity possessed sufficient indicia of control as to constitute a joint employer is ultimately a “factual issue,” and the Board’s determinations are

⁴² *Laerco Transp. & Warehouse*, 269 NLRB 324, 325 (1984); *accord NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982).

⁴³ *Clinton’s Ditch Coop. Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985) (stating that the “essential element” of joint-employer status is “sufficient evidence of immediate control over the employees”); *Airborne Freight Co.*, 338 NLRB 597, 597 n.1 (2002) (“The essential element in this analysis is whether a putative joint employer’s control over employment matters is direct and immediate.”); *accord AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995).

⁴⁴ *NLRB v. Solid Waste Servs., Inc.*, 38 F.3d 93, 94 (2d Cir. 1994) (“Relevant factors include commonality of hiring, firing, discipline, pay, insurance, records, and supervision.”); *Clinton’s Ditch*, 778 F.2d at 138-40; *Laerco Transp.*, 269 NLRB at 325 (noting relevance of matters “such as hiring, firing, discipline, supervision, and direction”).

conclusive if supported by substantial evidence on the record as a whole.⁴⁵

Although the Board has revised its standard for determining joint-employer status and overruled inconsistent prior decisions,⁴⁶ the Board found it unnecessary to reach the question of whether the revised standard was retroactively applicable here, and the Board instead applied the “direct and immediate” control standard described above. (JA13 & n.35.)

2. The Companies Dictated Virtually All of the Employees’ Terms and Conditions of Employment for the Duration of the Temporary Subcontract

The record fully supports the Board’s reasonable finding that the Companies and HSG constituted joint employers of the housekeeping and laundry employees. As the Board found, the Companies exercised direct and immediate control over virtually all of the HSG employees’ terms and conditions of employment by imposing an “explicit mandate” on HSG to retain the entire workforce and to adopt specific terms of employment. (JA14.) By requiring HSG to mirror the terms of the Companies’ collective-bargaining agreements with the Union, the Companies

⁴⁵ *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964); *SEIU, Local 32BJ v. NLRB*, 647 F.3d 435, 445 (2d Cir. 2011); *Int’l House v. NLRB*, 676 F.2d 906, 912 (2d Cir. 1982).

⁴⁶ *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186, 2015 WL 5047768 (Aug. 27, 2015) (representation proceeding; adopting revised standard), *affirmed*, 363 NLRB No. 95, 2016 WL 146995 (Jan. 12, 2016) (unfair-labor-practice proceeding), *petition for review filed*, No. 16-1028 (D.C. Cir. oral argument held Mar. 9, 2017).

thereby dictated the hiring of employees, their tenure and job security, their wages and benefits, just-cause protections for discipline or discharge, and all of the other myriad terms of employment that were followed by HSG.⁴⁷ The Companies did not merely dictate initial terms of employment that HSG was free to change, but instead imposed continuing terms that HSG was required to adhere to for the duration of the temporary subcontracting period. (JA14.)

In addition, the Board found that the Companies continued to exert significant control over the employees' terms and conditions of employment by including them within the broader pool of Long Ridge, Newington, and Westport employees for purposes of bidding into non-housekeeping departments that were not subcontracted. (JA14.) The Companies handled grievances filed on behalf of HSG employees with no input from HSG, and the Companies unilaterally decided whether to permit employees to cease working in the housekeeping department and to transfer, with their seniority and contractual rights intact, to other departments solely under the Companies' control. An employee's ability to transfer between departments is an important term of employment, particularly in the present case

⁴⁷ See *G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1530-31 (7th Cir. 1989) (affirming joint-employer status where employer exercised "significant control" over employees by requiring subcontractor to comply with terms of contractual addendum negotiated by employer and by dictating hiring of subcontractor's entire initial workforce).

where employees who did not transfer prior to May 2010 ultimately suffered dramatic reductions in wages and benefits.⁴⁸

While not central to the Board’s analysis, the Board also noted that the subcontracting arrangements between the Companies and HSG were essentially “cost-plus” arrangements under which the Companies agreed to reimburse HSG for labor costs and other expenditures at a “preset monthly rate.” (JA14.) Thus, in addition to the Companies’ role in dictating all of the essential employment terms, the rate of reimbursement set by the Companies under the cost-plus arrangement further limited HSG’s flexibility to determine its own employment practices. The Board has found similar arrangements—where a general employer effectively limits staffing and payroll decisions by setting the monthly labor costs for which the subcontractor is reimbursed—to be indicative of joint-employer status.⁴⁹

⁴⁸ *E.g.*, *Panther Coal Co.*, 128 NLRB 409, 410-11 (1960) (finding joint-employer status where putative joint employer retained ability to transfer employees between job sites and thereby control tenure and working conditions).

⁴⁹ *Cf.* *D&F Indus., Inc.*, 339 NLRB 618, 628 & n.12, 640 (2003) (finding joint-employer status where joint employer established employees’ rates of pay and provided funds from which they were paid by subcontractor); *Whitewood Maint. Co.*, 292 NLRB 1159, 1162 & n.11 (1989) (finding joint-employer status where subcontractor’s workload and staffing decisions depended on amount of monthly payments from joint employer), *enforced sub nom. Texas World Serv. Co. v. NLRB*, 928 F.2d 1426 (5th Cir. 1991).

Finally, the Board appropriately found that the Companies' lack of day-to-day supervision of the employees' work did not preclude a finding of joint-employer status and was entitled to less weight than normal under the circumstances of this case. (JA14-15.) As the Board explained, the exact same HSG supervisors continued to supervise employees before, during, and after the temporary subcontracting period, including at times when the Companies were the undisputed sole employers. (JA15.) There was never any actual change in supervision, and when the same individuals continued to supervise the employees during the temporary subcontracting period, they did so while governed by the same contractual terms as before and after. On these facts, the Board reasonably found that the Companies' direct role in controlling virtually all of the HSG employees' terms of employment outweighed the lack of direct supervision. (JA14-15.) In sum, the record amply supports the Board's finding that the Companies and HSG were joint employers.

3. The Companies' Attempts to Undermine the Board's Joint-Employer Finding Are Unavailing

The Companies raise several arguments in an effort to undermine the Board's joint-employer finding and to allege that it is inconsistent with the Board's or this Court's precedent. As explained below, none of the Companies' arguments has merit.

As an initial matter, the Companies are wrong to claim (Br.20-35) that the legal standard applied by the Board in this case is somehow inconsistent with the Court's precedent. Both the Court and the Board look to whether there was "immediate control" over employees.⁵⁰ In contrast, the Companies improperly conflate the Court's "immediate control" standard with a single *subfactor* in the Court's analysis: the putative joint employer's direct supervision of employees. (Br.30-32.) However, this Court's precedent forecloses the proposition that the "essential element" of joint-employer status is continuing supervision, rather than immediate control over terms and conditions of employment.⁵¹ The Court's statement in an older case that it would not find joint-employer status absent sufficient evidence that the putative joint employer "actually supervised *or exercised control over*" employees is not to the contrary.⁵²

⁵⁰ *Clinton's Ditch*, 778 F.2d at 138; *Airborne Freight*, 338 NLRB at 597 n.1. As a result, it is unnecessary to reach the validity of the Court's statement in *AT&T* that the Board's joint-employer findings are subject to some form of de novo review when the "wrong legal standards are applied." 67 F.3d at 451. *But see Town & Country Elec.*, 516 U.S. at 89-90 (holding that Board interpretations regarding employment relationships under the Act are entitled to considerable deference).

⁵¹ *E.g.*, *SEIU, Local 32BJ*, 647 F.3d at 442-43 (listing direct supervision as one of several relevant factors); *see also AT&T*, 67 F.3d at 451 (cautioning against elevating "a single factor" to determinative status); *Clinton's Ditch*, 778 F.2d at 138, 140 (finding that single supervision-related factor was "not determinative").

⁵² *Int'l House*, 676 F.2d at 915 (emphasis added).

Likewise, the Companies incorrectly imply (Br.32) that the Board erred by not expressly reciting the five factors listed by the Court in several prior cases. As the Court made clear in *Clinton's Ditch*, the essential element of the joint-employer inquiry is whether there is “sufficient evidence of immediate control over the employees,” and the Court declined to “select among [specific competing] approaches or devise an alternative test.”⁵³ Although the Court has listed the same five factors in several cases, it has never held that a finding of joint-employer status turns entirely on those five factors alone, or that the Board is required to recite a five-factor test.⁵⁴

In any event, the Board did take into consideration all of the relevant factors identified by the Court's precedent. The Companies misconstrue the Board's reasoning by suggesting (Br.25-26) that the Board relied on a “single factor” in making its joint-employer finding. Although the Companies' extensive exercise of control may have been motivated by their collectively-bargained contractual obligations, the Companies nonetheless exercised immediate control over virtually all facets of the HSG employees' terms of employment. Thus, for example, the

⁵³ 778 F.2d at 138.

⁵⁴ See *Clinton's Ditch*, 778 F.2d at 139-40 (finding “no other case presenting the exact combination of factors as those before us” and addressing non-enumerated factors that could also have relevance); *accord Arculeo v. On-Site Sales & Mktg., LLC*, 425 F.3d 193, 202 (2d Cir. 2005) (“At least in the NLRB context, we have identified a variety of factors . . . which *can* bear on whether an entity, which is not the formal employer, may be considered a joint employer.” (emphasis added)).

Board implicitly relied on the fact that, by mandating the continuation of all terms of employment contained in the collective-bargaining agreements, the Companies: dictated the initial hiring for HSG's entire workforce; restricted HSG's ability to fire or discipline employees by imposing a just-cause standard and other contractual protections; established the wages, benefits, and levels of health insurance for HSG's entire workforce; and continued to play some role in receiving grievances while, as described above, treating HSG employees as part of facility-wide bargaining-units and permitting them to bump non-HSG employees in other departments. (JA14.)

The Companies are also wrong to suggest (Br.22-24) that the degree of control they exercised was somehow diminished by the fact that they were acting in accordance with the subcontracting provision in their collective-bargaining agreements. The Companies themselves negotiated those agreements and, in February 2009, the Companies affirmatively imposed certain requirements on HSG regarding the subcontracted employees' terms of employment that continued in effect for the duration of the subcontract. To discount such control would permit joint employers to circumvent the Act by codifying every term of employment in a written instrument in advance, and then shifting all liability under federal labor law to a third-party subcontractor with no authority other than the day-to-day supervision of employees.

Moreover, the Companies misrepresent the facts by suggesting that they imposed “minimum” requirements and that HSG was “free to pay higher wages” if it so desired. (Br.23.) The Companies cite no record evidence to support that assertion, and, in fact, the Companies exercised continuing control by mandating compliance with the specific terms they set for the duration of the subcontracting period. (JA14.) As the Board emphasized, an employer does not automatically remain in a joint-employment relationship “whenever it subcontracts the unit’s work to another employer and requires adherence to preexisting terms and conditions of employment.” (JA15 n.41.) The Board found joint-employer status under the unique circumstances of this case, where the Companies only temporarily subcontracted their operations to HSG, while at all times mandating that HSG retain the workforce and adopt detailed terms of employment, and while continuing to treat the employees as part of larger facility-wide units.

The Court’s decision in *Clinton’s Ditch* is not to the contrary, and that case is immediately distinguishable in another key respect. The unfair labor practice for which the Board found joint-employer liability there was a refusal to bargain that occurred in October 1980, more than four years after the subcontractor hired the employees, and nearly two years after the subcontractor and the union negotiated their *own* successor collective-bargaining agreement without the original

employer.⁵⁵ By October 1980, the subcontractor had long since determined its own employment terms through independent bargaining, and any previous control by the original employer had been extinguished. Indeed, the Court stated that its considerations may have been different “[i]f the instant dispute had arisen under the 1975-78 collective bargaining agreement.”⁵⁶ According to the Court, if the union had intended “to extend the employer-employee relationship . . . it should have tried to bring [the original employer] to the bargaining table *in 1978*”⁵⁷—an implicit acknowledgment that a joint-employer relationship may have continued for more than a year after the subcontractor assumed contractual terms established by the original employer. The Court’s discussion of control over hiring (Br.25) must be read in light of the same facts. After the 1975-1978 contract expired, the subcontractor had theoretically been free to replace its entire workforce, and thus by 1980 the original employer’s lack of a continuing role in hiring or firing had become significant. In contrast, here, the Companies mandated that HSG retain the existing workforce for the entire period of joint-employer status.

The facts of *AT&T* are also readily distinguishable. There, the Board had found that AT&T was a joint employer due to its role in negotiating wage rates for

⁵⁵ *Id.* at 133-36.

⁵⁶ *Id.* at 140.

⁵⁷ *Id.* (emphasis added).

subcontracted cleaners.⁵⁸ On review, the Court found the Board's findings unsupported by the evidence. The Court found that a union official had informally met with an AT&T official once and discussed a general wage reduction, but AT&T ultimately did not determine the wage rates agreed to by the union and the subcontractor.⁵⁹ The Court reiterated that, in the absence of any actual control over employees' employment terms, mere "participation" in the collective-bargaining process is insufficient to establish joint-employer status.⁶⁰ Nothing in *AT&T* is inconsistent with the Board's decision here, where the Board found that the Companies exercised direct and immediate control over virtually all of the HSG employees' essential terms and conditions of employment, not that the Companies merely "participated" in "collective bargaining between [the subcontractor] and the union."⁶¹

Likewise, the present case is not "closely analogous" (Br.29) to the Board's finding in *Summit Express*.⁶² In that case, which primarily involved an inquiry into alter-ego status, the Board found that a subcontracting agreement between the

⁵⁸ *Exec. Cleaning Servs.*, 315 NLRB 227, 235-36 (1994), *enforcement denied in relevant part sub nom. AT&T*, 67 F.3d 446.

⁵⁹ *AT&T*, 67 F.3d at 448-51.

⁶⁰ *Id.* at 451.

⁶¹ *Id.*

⁶² 350 NLRB 592 (2007).

putative joint employer and the subcontractor was not sufficient to demonstrate actual control over employment matters.⁶³ The agreement in *Summit Express* essentially only gave the putative joint employer the authority to determine minimum job qualifications and performance standards.⁶⁴ The Board found that, although in practice the subcontractor had voluntarily decided to “simply continue” predecessor wage rates that had previously been set by the putative joint employer, such voluntary continuity alone did not establish control.⁶⁵ Critically, unlike in the present case, the putative joint employer there did not *require* the subcontractor to adopt specific terms, and did not otherwise dictate hiring or other employment matters affecting the subcontractor’s employees.

Finally, the Companies unpersuasively attempt (Br.29-30 n.11) to discount the Board’s consideration of the cost-plus arrangements with HSG and the Board’s passing citation to *CNN America*.⁶⁶ Although the D.C. Circuit did not affirm the Board’s joint-employer finding in *CNN America*, it was solely because the Board failed to apply or reconcile extant precedent requiring a showing of “direct and

⁶³ *Id.* at 592 n.3, 595-96, 617-18.

⁶⁴ *Id.* at 595-96, 615 & n.28.

⁶⁵ *Id.* at 596, 617-18.

⁶⁶ 361 NLRB No. 47, 2014 WL 4545618 (Sept. 15, 2014), *enforcement denied in part and remanded in part*, 865 F.3d 740 (D.C. Cir. 2017).

immediate” control⁶⁷—precedent which the Board expressly cited and applied here. The court noted that nothing precluded the Board, on remand, from applying the correct standard and concluding that it was met,⁶⁸ and the court did not address the Board’s partial reliance on the cost-plus consideration. To the contrary, D.C. Circuit precedent confirms that the existence of a cost-plus arrangement *is* an appropriate consideration in finding joint-employer status.⁶⁹

The fact that this Court found a very different “cost-plus” arrangement to be non-probative of joint-employer status in *International House* is not dispositive. There, the subcontractor would submit a projected budget, which, once approved, would later be underwritten by the general employer.⁷⁰ The general employer further agreed to cover any labor costs in excess of the projected budget, provided that the subcontractor was able to justify the excess.⁷¹ On those facts, the Court found that the general employer’s authority to merely “review incurred costs” did

⁶⁷ 865 F.3d at 750-51.

⁶⁸ *Id.* at 748-49 & n.2, 751.

⁶⁹ *See Dunkin’ Donuts Mid-Atl. Distribution Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (enforcing Board’s joint-employer finding where, among other things, employer controlled wage and benefit rates “by specifying, in the parties’ ‘cost-plus’ lease agreement, the rates it would reimburse” subcontractor).

⁷⁰ *Dining & Kitchen Admin.*, 257 NLRB 325, 327 (1981), *enforcement denied sub nom. Int’l House*, 676 F.2d 906.

⁷¹ *Id.*

not provide any actual control over the employees' terms of employment.⁷² In contrast, here, the Companies reimbursed HSG at a preset monthly rate which left no flexibility or autonomy on the part of HSG, and which placed a set limit on labor costs and other expenditures for the work involved.

In summary, the Board properly found that the Companies and HSG constituted joint employers during the temporary subcontracting period. As a result, the Companies violated Section 8(a)(5) and (1) by eliminating employees' contractual seniority and treating them as new probationary hires.

III. Substantial Evidence Supports the Board's Findings that HealthBridge and Westport Violated Section 8(a)(5) and (1) by Failing to Reemploy Employees Daye and Harrison, and Section 8(a)(1) by Threatening to Call the Police in Response to Employees' Protected Activity

In addition to the Companies' unlawful actions in eliminating employees' contractual seniority, the Board found that HealthBridge and Westport further violated the Act in May 2010 when they decided—without explanation—not to reemploy longtime employees Newton Daye and Myrna Harrison, and when a Westport manager threatened to call the police in response to employees voicing complaints and stating they wanted to contact the Union about the Companies' actions. The Board found that failing to reemploy Daye and Harrison without regard to their seniority or other contractual rights was the result of the Companies' midterm modifications, and that threatening to call the police was an impermissible

⁷² *Int'l House*, 676 F.2d at 914.

attempt to coerce employees into accepting those modifications. (JA9 n.15, 13.)

The Companies concede that if the Court enforces the Board's primary finding that the Companies acted unlawfully by modifying the terms of the collective-bargaining agreements, then the Board is entitled to enforcement of these additional unfair-labor-practice findings as well. (Br.48-49 nn.20-21.)

However, even absent the "additional" basis for finding a violation described above, the Board found that the Companies' threat to call the police independently violated the Act. (JA9 & n.15.) An employer's statements violate Section 8(a)(1) if they have a "reasonable tendency" to coerce employees, such as threats to call the police in response to protected activity.⁷³ Here, substantial evidence supports the Board's finding that, in response to a group of employees concertedly protesting the Companies' actions and stating that they would contact the Union, the Westport administrator threatened to call the police. The Companies' only counterargument is their claim that the administrator threatened to call the police before the employees engaged in any protected activity (Br.48-49), but the Companies are mistaken. As the Board and the administrative law judge both found (JA8-9, 77-78), unrebutted testimony confirms that the Westport administrator made the coercive statements *after* employees voiced complaints and proposed contacting the Union (JA139-41, JA144-47; *see* JA126-28). The

⁷³ *See N.Y. Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 410 (2d Cir. 1998); *Roadway Package Sys., Inc.*, 302 NLRB 961, 961 (1991).

Companies cite no record evidence in support of their contrary position, and instead rely solely on an ambiguous quotation from the administrative law judge's decision (JA56) that was later clarified by the judge's and the Board's express findings of fact (JA8-9, 77-78).

IV. Substantial Evidence Supports the Board's Findings that HealthBridge and All Six Health Care Centers Violated Section 8(a)(5) and (1) by Unilaterally Changing the Established Policy for Calculating Overtime and the Established Eligibility Standard for Premium Pay on Holidays

A. Employers Violate the Act by Unilaterally Changing an Established Past Practice without Bargaining to Impasse

As set forth previously (*supra* p. 22), an employer violates Section 8(a)(5) and (1) of the Act by making unilateral changes to union-represented employees' terms and conditions of employment without first bargaining to impasse.⁷⁴ A union may consciously waive its statutory right to bargain, but a heavy burden rests with the employer to show that such waiver was "clear and unmistakable."⁷⁵ An employer's unlawful unilateral change to an established past practice is a distinct violation under Section 8(a)(5), with different remedies than an employer's unlawful midterm contract modification as prohibited by Section 8(d).⁷⁶

⁷⁴ 29 U.S.C. § 158(a)(5); *Katz*, 369 U.S. at 743.

⁷⁵ *Local Union 36, Elec. Workers*, 706 F.3d at 81-84 (discussing this Court's "two-step framework" for evaluating Board's clear and unmistakable waiver standard); *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 810-15 (2007).

⁷⁶ *Bath Iron Works*, 345 NLRB at 501-03.

B. The Companies Changed Established Holiday Premium Pay and Overtime Practices without Bargaining, and the Union Did Not Clearly and Unmistakably Waive Its Right to Bargain

It is undisputed that, prior to late 2009 and early 2010, there were two established practices at all six health care centers that were subsequently changed: first, the practice of paying time-and-one-half holiday premium pay to all employees, including part-time and per diem employees, for hours worked on certain holidays; and second, the practice of counting employees' paid half-hour lunch break when calculating daily overtime in excess of eight hours. It is also undisputed that the Companies unilaterally modified both of these practices without first notifying or offering to bargain with the Union.

As the Board found, the Union did not clearly and unmistakably waive its right to bargain over either unilateral change. (JA15-16.) With respect to holiday premium pay, Article 15(B) of the parties' contracts merely refers to "an Employee" who works on a holiday, without qualification. (JA353, 400, 445, 493, 543, 588.) Although there is a reference to employees who work 20 hours or more per week in Article 15(A), that provision governs a separate benefit involving paid time off for holidays. With respect to overtime, the reference in Article 14 to "hours actually worked in excess of eight (8) hours" follows a clause defining the "normal work week" as consisting of "eight (8) hours each day including a paid lunch period of one-half (1/2) hour." (JA351, 444, 492, 542, 586; *see also* JA399.)

There is no clear, unambiguous support in the contracts for the decision to cease the established past practice of including paid lunch breaks when calculating total hours worked for overtime.

The Companies do not argue that the Union clearly and unmistakably waived its right to bargain over the established past practices at issue. They instead argue that the Board erred by failing to apply the less rigorous “sound arguable basis” standard. (Br.50-55.) However, the Companies’ argument is jurisdictionally barred. Under Section 10(e) of the Act, “[n]o objection that has not been urged before the Board . . . shall be considered by the court,” absent “extraordinary circumstances” not present or claimed here.⁷⁷ Apparently realizing this jurisdictional bar, the Companies state (Br.50, 54) that they argued before the Board that their actions were authorized by the collective-bargaining agreements. But that is a different argument turning on the facts or on contract interpretation. The Companies never argued that the appropriate legal analysis was the “sound arguable basis” standard rather than the “clear and unmistakable waiver” standard applied by the administrative law judge.

In any event, the Companies’ argument is plainly incorrect. The Board found that the Companies violated Section 8(a)(5) and (1) by unilaterally changing

⁷⁷ 29 U.S.C. § 160(e); *NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 435 (2d Cir. 2001) (finding issue barred where employer failed to raise issue or file motion for reconsideration regarding Board’s alleged mistake of law).

established past practices without first bargaining to impasse, and the Board tailored its remedy accordingly. (JA15-26.) The Board did not find that the Companies unlawfully modified the contracts pursuant to Section 8(d). As the Board has explained, “[t]he ‘unilateral change’ case and ‘contract modification’ case are fundamentally different in terms of principle, possible defenses, and remedy.”⁷⁸ Regardless of whether an employer defends its unilateral changes to established practices by arguing that the changes were authorized by a contractual provision, the appropriate standard remains clear and unmistakable waiver.⁷⁹ Such waiver did not occur here, where the Companies’ contractual arguments have little to no support in the actual language of the contracts, and where any theoretical ambiguities are clarified by the parties’ consistent past practices.

⁷⁸ *Bath Iron Works*, 345 NLRB at 501; *cf. Crest Litho, Inc.*, 308 NLRB 108, 110-11 & n.11 (1992) (applying less stringent “sound arguable basis” standard in case involving alleged midterm contract modification rather than a refusal to bargain).

⁷⁹ *Local Union 36, Elec. Workers*, 706 F.3d at 81-84; *Provena St. Joseph*, 350 NLRB at 810-15.

CONCLUSION

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

Respectfully submitted,

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February 2018

