United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 31, 2017

TO: Kathy Drew King, Regional Director
Region 29

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Fresenius Medical Center and
New York State Nurses Association
Cases 29-CA-186891, 29-CB-188219,
29-CA-193831

524-3350-9400
524-5084-3300
524-6740-5000
530-4075
530-4090-7500
530-6067-4000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(5) of the Act by refusing to recognize the Union or apply the existing terms and conditions of employment to its DeGraw facility, whether the Employer violated Section 8(a)(3) by failing to recall or transfer unit employees to the DeGraw facility, and whether the Union violated Section 8(b)(1)(A), (2), or (3) by bargaining in bad faith and seeking to impose itself as the exclusive bargaining representative of the employees at the DeGraw facility.

We conclude initially that the Employer's operations at its DeGraw facility are covered by the scope of the established bargaining unit, and that the Employer has therefore violated Section 8(a)(5) by withdrawing recognition from the Union with respect to that facility and by unilaterally changing the terms and conditions of employment for unit employees. The scope of the established bargaining unit is defined by the performance of registered professional nursing duties in connection with the existing operations of the Employer's "ABC" facilities, regardless of the ultimate location of those operations. The DeGraw facility constitutes a continuation of those existing operations, rather than a "new" facility or an expansion of the Employer's operations, and thus covered employees at the DeGraw facility are part of the established unit.

We further conclude that the Employer has violated Section 8(a)(3) by failing to recall or transfer unit employees to the DeGraw facility. We find that the Employer's change in position and its deliberate decision not to ultimately recall or transfer experienced unit nurses to vacancies at the DeGraw facility was motivated, at least in part, by a desire to undermine the majority status of the Union at the new facility in order to withdraw recognition from the Union. The Employer has failed to rebut such finding of a discriminatory motive, and indeed the Employer's explanations for its

decision not to recall or transfer unit employees, despite its previous plans to do so, are pretextual and further reinforce our finding of a violation.

Finally, and as a result of our findings above, we conclude that the Union did not violate Section 8(b)(1)(A), (2), or (3) when it lawfully attempted to enforce the established scope of the bargaining unit and to contest the Employer's unlawful withdrawal of recognition at the DeGraw facility. The Region should therefore issue complaint regarding the aforementioned violations by the Employer, absent settlement, and dismiss the remaining charges against the Union.

FACTS

Fresenius Medical Center, d/b/a New York Dialysis Services, Inc. ("the Employer") operates dialysis facilities in Brooklyn, New York, and throughout New York State. The New York State Nurses Association ("the Union") represents the registered professional nurses working at several of the Employer's facilities. The Union represents employees at the Employer's facilities in four separate bargaining units, including what is known as the "ABC" unit. As of 2014, the "ABC" unit covered the operations of four Brooklyn dialysis facilities in geographic proximity: the Atlantic Hemodialysis Center ("AHC"), the Atlantic Peritoneal and Home Dialysis Training Center ("APD"), the Brooklyn Kidney Center ("BKC"), and Atlantic Hemodialysis at Cobble Hill ("Cobble Hill"). At that time, the "ABC" unit included approximately 34 nurses, including 17 nurses at the AHC facility and 10 nurses at the BKC facility. The Employer's operations across the four "ABC" facilities had a capacity of 55 dialysis chairs, including 28 chairs at the AHC facility and 22 chairs at the BKC facility.

The dialysis operations of what is now the "ABC" unit were previously controlled by a single predecessor employer, the Long Island College Hospital ("LICH"), or its intermediaries, and the Union has represented employees performing registered professional nursing duties in connection with the "ABC" operations for decades. From 1999 to 2003, the Union was party to at least two successive collective-bargaining agreements with a group of medical doctors controlling the provision of dialysis services at LICH under the name of AFMSM/CASPI. Those agreements contained a scope provision stating, in relevant part:

> This agreement covers all of the employees in the bargaining unit consisting of all full-time, regular part-time and per diem registered professional nurses and persons authorized by permit to practice as registered professional nurses including staff nurses, assistant nursing care coordinators, utilization review coordinators and community health coordinators. . . .
>
> It is agreed that this contract shall apply and continue in full force and effect at any location to which the Employer may move. It is further

> agreed that this contract shall apply to any new or additional facilities of the Employer and under its principal direction and control within the five (5) boroughs of New York City, Nassau, Suffolk and Westchester counties.

The Union has bargained directly with the Employer for over a decade, and the Union and the Employer were party to a 2003-2006 collective-bargaining agreement containing a scope provision substantially similar to the language in the predecessor contracts with AFMSM/CASPI. The 2003-2006 scope provision stated, in part:

> This agreement covers all of the employees in the bargaining unit consisting of all full-time, regular part-time, temporary and per diem registered professional nurses and persons authorized by permit to practice as registered professional nurses including staff nurses, assistant nursing care coordinators, assistant head nurses and all others employed to perform registered professional nursing duties. Non-bargaining unit personnel shall not routinely perform clinical nursing duties normally performed by members of the bargaining unit. . . .
>
> It is agreed that this contract shall apply and continue in full force and effect at any location to which the Employer may move. It is further agreed that this contract shall apply to any new or additional facilities of the Employer and under its principal direction and control within the five (5) boroughs of New York City, Nassau, Suffolk and Westchester counties.

Between 2006 and 2007, the Union and the Employer negotiated new collective-bargaining agreements for all four units represented by the Union, and at the Employer's request each separate unit maintained its own individual contract. In November 2006, the Employer included a note in its bargaining proposal regarding the existing scope provision, which stated: "Delete applicability of agreement to new operations established by employer (as opposed to relocation) for all CBAs." Over the following year, the parties negotiated over the precise wording of the "new or additional facilities" clause and modified the geographic limitation to instead include a limitation to new or additional facilities "under the same facility operating certificate." The Union's lead negotiator at the time states that the Employer did not object to the separate clause governing the relocation of existing operations.

As early as 2013, the Employer began planning the closures of the AHC and BKC facilities in order to transfer their operations to a new facility to be opened at 595 DeGraw Street ("the DeGraw facility"). The Employer filed an initial application with the New York State Department of Health in which the Employer explained that it

would merely be moving the existing operations to the DeGraw facility.[1] The DeGraw facility was designed to have a 50-chair capacity to replace the 50 dialysis chairs at the AHC and BKC facilities.

In May 2014, the Employer informed the Union that the AHC facility would be shutting down operations due to the closure of the larger healthcare facility where it was located, and that unit employees from the AHC facility would be transferred to the DeGraw facility once it opened. The Employer and the Union jointly contacted affected employees to inform them of their eligibility for temporary placement or a layoff until the opening of the DeGraw facility. In June 2014, the Employer and the Union negotiated a written closure agreement for the AHC facility. The closure agreement provided for the creation of new evening-shift positions at other facilities, including outside the "ABC" unit, which were "intended to be temporary" pending the opening of the DeGraw facility. The agreement also provided for voluntary layoffs in which employees would receive severance payments and would retain contractual recall rights for up to 12 months.

On June 30, 2014, the parties' most recent collective-bargaining agreement expired. It had included a recognition provision in which the Employer, on behalf of the "ABC" facilities, recognized the Union "as the exclusive collective bargaining representative of every employee covered by this agreement." The unit scope provisions of the agreement were consistent with the previous agreement, stating, in relevant part:

> This agreement covers all regular full-time, regular part-time, per diem and temporary employees licensed or otherwise lawfully entitled to practice as registered professional nurses, including staff nurses, assistant head nurses, assistant nursing care coordinators, and/or nurse-in-charge, employed by the Employer to perform registered professional nursing duties. . . .

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[1] The Employer initially filed a "limited review" application. The application process involves filing a certificate of need with the New York State Department of Health. There are three levels of review. "Full review" is required for actions such as establishing a new healthcare facility or requesting a change of ownership, and it entails a public hearing process and approval by an administrative body. "Administrative review" is required for actions such as relocating extension clinics with the addition of services, and it does not involve public hearings or approval by the designated administrative body. "Limited review" is required for actions such as minor alterations or the relocation of extension clinics without the addition of services, and it also does not involve public hearing or formal administrative approval.

> Non-bargaining unit persons shall not routinely perform clinical duties normally performed by members of the bargaining unit. . . .
>
> It is agreed that this Agreement shall apply and continue in full force and effect at any other location(s) to which the Employer may move the existing operations of the subject dialysis facilities, and it is further agreed that the Agreement shall apply to any new or additional facilities of the employer under the same facility operating certificate.

Article 4 of the agreement had included definitions for "regular full-time," "regular part-time," "per diem" and "temporary" employee status based on hours worked.

Shortly after the contract expired, the Employer and the Union commenced negotiations for a successor contract. In July, counsel for the Employer informed the Union that the Employer planned to eventually close the Cobble Hill facility and to transfer its operations to the DeGraw facility. The eventual closure of the Cobble Hill facility was also reflected in the terms of the AHC closure agreement.[2] During a September 2014 bargaining session, the Employer's lead negotiator at the time explained that a proposal to eliminate the "new or additional facility" clause in the expired contract "did not apply to the DeGraw facility as [the Employer] planned to move and relocate the ABC facilities into DeGraw." In November 2014, the Employer reiterated that it planned to staff the DeGraw facility with Union-represented employees covered by the "ABC" contract.

At a December 2014 bargaining session, according to the Employer's (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) the Employer's (b)(6), (b)(7)(C) clarified to the Union that the Employer "was not expanding with the opening of DeGraw, but, rather, it was planning to move existing facilities and operations from the ABC facilities to DeGraw." In the same month, the Employer's (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) similarly informed the Union of the Employer's intentions to relocate the 50 dialysis chairs at the AHC and BKC facilities to the 50-chair DeGraw facility. The Employer continued to reiterate that its "goal was to combine the ABC facilities . . . at the DeGraw facility" in bargaining sessions through at least September 2015. Later in December, the Employer and the Union telephoned every nurse covered by the expired "ABC" contract based on seniority date, including those recently laidoff from the AHC facility in June, and solicited their choice of shift at the DeGraw facility. The "DeGraw Clinic Call Order" showed that most of the nurses contacted had accrued decades of seniority working as nurses at the "ABC" facilities. The record of those calls suggests that (b)(6), (b)(7)(C) laidoff nurses indicated that they were not interested

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[2] As of 2017, the Employer has since revised its plans and states that it intends to keep open the Cobble Hill facility and a small operation at the APD facility.

in returning, (b)(6), (b)(7 nurses placed in evening shifts outside the "ABC" unit indicated a desire to stay in those positions, and at least 22 of the remaining nurses confirmed their desire to either help open the DeGraw facility or be transferred there when the BKC and Cobble Hill facilities closed.

Due to the termination of its lease, the Employer closed the BKC facility in July 2015. As a result, 11 employees were laidoff and several others were transferred to temporary placements at other facilities—the last bargaining-unit employees were laidoff in mid-August 2015. The Employer and the Union negotiated another written closure agreement, which provided for the creation of one evening-shift "floater" position at other facilities, as well as for layoff procedures. Under the terms of the agreement, the BKC employees would retain contractual recall rights to the Cobble Hill facility or the soon-to-be-opened DeGraw facility for up to 12 months. At the time, the Employer's (b)(6), (b)(7)(C) estimated that the DeGraw facility would be open by November 2015. Employees at BKC were laidoff based on seniority between July and mid-August 2015. Several months later, in November 2015, the opening of DeGraw remained delayed and the Employer laidoff two full-time nurses at the APD facility. In discussions with the Union, the Employer maintained that the APD work would also eventually be relocated to the DeGraw facility.

Throughout this period, the Employer and the Union continued bargaining over a successor collective-bargaining agreement for the "ABC" unit. In early 2016, the Employer began asserting that it was necessary to drastically cut employee health and pension benefits when the DeGraw facility opened. Around the same time, according to the Employer's lead negotiator at the time, the Union indicated that maintaining the existing health and pension benefits was one of its priorities or "absolutes." In March 2016, the Employer put forward a bargaining proposal that did not specifically refer to DeGraw, but which included a proposed modification of the existing scope provision such that if the Employer moved its existing operations to another location, the contract would "be modified to include the provision of health (including, medical, dental, vision, life and disability) and retirement benefits pursuant to the Employer's existing health and retirement plans for non-bargaining unit employees, in lieu of the NYSNA Benefits Fund and NYSNA Pension Plan benefits." The Union objected that such modification would result in a substantial loss of benefits for employees transferred to the DeGraw facility once it opened. According to the Employer's (b)(6), (b)(7)(C), who was present, the Employer made no response to the Union's objections regarding DeGraw during the bargaining session.

The following month, April 2016, the Employer put forward a revised two-option bargaining proposal. The first option substantially maintained the employees' existing benefits, but proposed, in relevant part, to alter the scope provision to remove the reference to "new or additional facilities," and also included the following note:

> Note: In the event that the Company opens the DeGraw facility, it will not involve a move of any existing operations nor open under the same facility operating certificate of an existing or former dialysis facility . . . so the terms of the collective bargaining agreements of the existing and former dialysis facilities shall not apply at the DeGraw facility.

The Employer's bargaining proposal stated that if the Union did not agree to the complete "package" of proposals set forth in the first option, then the Employer would revert to its position as set forth in the second option. The second option made no reference to the scope provision or to DeGraw, but included substantial cuts in employee benefits. During the April 25 bargaining session, the Employer also told the Union for the first time that DeGraw would be opening as a "new facility" and that "DeGraw would no longer involve a move of any of the existing ABC operations so the terms of the NYSNA contracts would not apply at DeGraw." The Union interpreted this two-option proposal as offering it the choice of either maintaining benefits but agreeing that DeGraw was outside the unit, or keeping DeGraw in the unit but agreeing to cuts in benefits.

In late May 2016, the Employer contacted the New York State Department of Health and requested to reclassify its licensing application from a relocation of existing facilities to the creation of a new "extension" facility. The Employer was instructed to undertake a different form of lower-level review, "administrative review" rather than "limited review," which included filing a two-page certificate of need and several other documents, but which did not involve the more thorough agency review required for new healthcare facilities.

In a letter to the Employer dated June 3, 2016, the Union objected to the Employer's assertions that the DeGraw facility would no longer be part of the bargaining unit, noting that such assertion "was inconsistent with our bargaining history and with our long-held understanding." In a responsive letter dated June 16, 2016, counsel for the Employer acknowledged that, "[w]hen negotiations commenced in May 2014, as well as for a time thereafter, NYDS initially expressed an intention to recognize NYSNA as the bargaining representative of the DeGraw RN employees since it was then NYDS' expectation to open DeGraw as a clinic to which it would transfer its patients and staff from [AHC, APD, and BKC], all of which operations it had intended to shut down." The Employer then claimed, however, that "circumstances have *drastically changed* in the past two years regarding the opening of the DeGraw facility" (emphasis in original). In particular, the Employer cited the fact that the opening had been delayed for two years, that no AHC or BKC patients were expected to be transferred, and that no remaining AHC or BKC equipment would be transferred. Based on those factors, the Employer stated that DeGraw was a "new facility, unrelated to any current or former ABC facility." The Employer also stated in the letter that it would be an unfair labor practice for it to recognize the Union at DeGraw.

The Employer began hiring for vacancies at the DeGraw facility in October 2016 through open job postings. The Employer did not specifically advertise such postings at the remaining Union-represented facilities. The DeGraw facility opened on October 31, 2016, and as of early 2017 it employed four unrepresented employees performing registered professional nursing duties. The facility has a 50-chair capacity, as initially planned, and the Employer intends to gradually increase operations over time. Meanwhile, the Cobble Hill and APD facilities have remained open with a staff of at least six nurses represented by the Union.

ACTION

We conclude initially that the DeGraw facility remains part of the established bargaining unit, and that the Employer has therefore violated Section 8(a)(5) by withdrawing recognition from the Union with respect to that facility, and by unilaterally changing the terms and conditions of employment for unit employees.[3] We further conclude that the Employer's decision not to ultimately recall or transfer unit employees to the DeGraw facility, as it had previously planned to do, was motivated in whole or in part by a discriminatory desire to withdraw recognition from the Union. Thus, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) and (3). Finally, we conclude that the charges against the Union should be dismissed, absent withdrawal, insofar as the Union was lawfully attempting to enforce the scope of the established bargaining unit and to contest the Employer's unlawful withdrawal of recognition.

A. The Employer Violated Section 8(a)(5) by Withdrawing Recognition and Unilaterally Changing Employees' Terms and Conditions of Employment

It is well established that the "fundamental purpose" of the Act is to "foster and maintain stability in bargaining relationships."[4] Once a bargaining unit has been

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[3] We find it unnecessary to determine whether the Employer separately violated Section 8(a)(5) by presenting regressive bargaining proposals in mid-2016, because the remedy for such a violation would be duplicative in light of the Section 8(a)(5) violations discussed in this memorandum.

[4] *Midland Electrical Contracting Corp.*, 365 NLRB No. 87, slip op. at 2 (June 6, 2017); *see Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38-39 (1987) ("The overriding policy of the NLRA is to promote 'industrial peace' . . . [by permitting] unions to develop stable bargaining relationships with employers . . . ."); *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949) ("To achieve stability of labor

established, "the statutory goal of 'encouraging the practice and procedure of collective bargaining' requires adherence to that unit, absent mutual agreement by the parties to change it."[5] This is particularly true where the definition of the bargaining unit "is one that [the parties] voluntarily agreed to and have incorporated in successive collective-bargaining agreements,"[6] and regardless of whether the unit scope was previously certified by the Board.[7] As a result, an employer violates Section 8(a)(5) and (1) by refusing to recognize a union as the exclusive bargaining representative of employees in an established unit, and by unilaterally changing unit employees' terms and conditions of employment.[8]

In the context of an unfair-labor-practice proceeding, the Board has the responsibility to determine the scope of the bargaining unit insofar as necessary to evaluate whether the employer has, in fact, violated the Act.[9] Where a bargaining unit is defined by the work performed, rather than by job classifications at a specific location, "it is necessarily that scope which is central to the Board's analysis."[10] As set

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relations was the primary objective of Congress in enacting the National Labor Relations Act.").

[5] *The Sun*, 329 NLRB 854, 860 (1999) (quoting 29 U.S.C. § 151); *see id.* (quoting *NLRB v. United Technologies Corp.*, 884 F.2d 1569, 1572 (2d Cir. 1989)); *see also Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 474-75 (D.C. Cir. 1988).

[6] *The Sun*, 329 NLRB at 860.

[7] *Ready Mix USA, Inc.*, 340 NLRB 946, 947 & n.10 (2003).

[8] *Golden State Warriors*, 334 NLRB 651, 652-54 (2001), *enforced*, 50 F. App'x 3 (D.C. Cir. 2002); *Westinghouse Electric Corp.*, 238 NLRB 763, 764 (1978) (finding that employer violated Act by refusing to bargain with union at single plant that was part of established multiplant unit), *enforced mem.*, 618 F.2d 102 (4th Cir. 1980); *cf. The Idaho Statesman*, 281 NLRB 272, 276 & n.8 (1986), *enforced*, 836 F.2d 1396 (D.C. Cir. 1988).

[9] *E.g.*, *Bay Shipbuilding Corp.*, 263 NLRB 1133 (1982) (finding that the employer, "having chosen to resolve the matter by itself, rather than by filing a 'UC' petition, is now in a position where it has violated the Act if it took an erroneous view"), *enforced*, 721 F.2d 187, 191 (7th Cir. 1983); *see The Sun*, 329 NLRB at 859.

[10] *The Sun*, 329 NLRB at 857; *cf. Archer Daniels Midland Co.*, 333 NLRB 673, 673 n.2, 675 (2001) (contrasting units defined by the work performed with units "described by employees in . . . general job classifications . . . who work at a specific location or address"). We note that the framework established by the Board in *The*

out below, the relevant contract language and the parties' bargaining history firmly establish that the scope of the unit in the current case includes those employees performing registered professional nursing duties as part of the Employer's multi-facility "ABC" operations. In addition, the DeGraw facility remains part of the original "ABC" operations and the employees performing registered professional nursing duties at that facility remain in the established bargaining unit. Finally, the Employer's attempt to characterize the DeGraw facility as outside the bargaining unit is unavailing.

1. The bargaining unit includes all employees performing registered professional nursing duties in connection with the Employer's multi-facility "ABC" operations

Here, we find that the scope of the established bargaining unit is defined as including all employees performing registered professional nursing duties in connection with the work of the former "ABC" facilities, regardless of the actual location of that work. We begin with the scope and recognition provisions of the parties' most recently expired contract, the latter of which states that the Employer, on behalf of the "ABC" facilities, recognizes the Union "as the exclusive bargaining representative of every employee covered by this agreement." In turn, the scope provision states that the agreement covers all employees "employed by the Employer to perform registered professional nursing duties."[11] The scope provision further states that the agreement shall apply "at any other location(s) to which the Employer may move the existing operations of the subject dialysis facilities." The plain language of the expired collective-bargaining agreement therefore defines the scope of the bargaining unit as including any employee hired to perform nursing duties at the former "ABC" facilities or "any other location(s)" to which the existing operations of those facilities are moved.

Sun, to determine whether non-unit employees who have been assigned unit work should be included in a bargaining unit that is defined by the type of work performed, is not at issue here. This case involves the Employer's decision to move existing jobs to a different facility, not its creation of new job classifications and the assignment of work to those employees. 329 NLRB at 857, 859. *See Tarmac America, Inc.*, 342 NLRB 1049, 1050 n.5 (2004).

[11] The references in the scope provision to "regular full-time, regular part-time, per diem and temporary employees" are not job classifications, but contractual terms defined in article 4 of the parties' agreement. Likewise, the reference to such employees as "including" certain job titles is, at most, a nonexhaustive list of job classifications that does not affect the overall definition of the unit's scope.

Thus, prior to the Employer's decision to close several facilities and move the work to the planned DeGraw facility, the scope of the multi-facility unit was defined by the performance of "registered professional nursing duties" in connection with a specific subset of the Employer's business. The Employer operates numerous healthcare and dialysis facilities in the New York City area, and the "ABC" unit is one of four distinct bargaining units involving nurses represented by the Union. The separateness of the bargaining unit at issue in this case is a vestige of a time when the dialysis operations at the several "ABC" facilities were controlled by a common predecessor employer—historically, the Long Island College Hospital ("LICH") or an intermediary employer. The Employer subsequently succeeded LICH and its intermediaries in operating the former LICH facilities, and has bargained directly with the Union as exclusive representative of the "ABC" unit since at least 2004.

In making our determination as to the scope of the bargaining unit, we do not need to rely solely on the terms of the most recent collective-bargaining agreement. To the contrary, those terms are consistent with several decades of consistent bargaining history, both with the Employer and the predecessor employers operating the former "ABC" facilities in their various incarnations. For example, the 1998-2000 collective-bargaining agreement between the Union and AFMSM/CASPI (a group of medical doctors controlling the provision of dialysis services at LICH) included a scope provision covering all employees authorized to practice as registered professional nurses. Thus, the employees performing nursing duties at all of the former LICH operations remained a single bargaining unit. The scope provision in the 1998-2000 agreement also contained a clause clarifying that the contract "shall apply and continue in full force and effect at any location to which the Employer may move," as well as a separate "new or additional facilities" clause not at issue in this case for the reasons discussed below. The 2000-2003 collective-bargaining agreement with AFMSM/CASPI included identical language in relevant part. When the Employer took over direct control of the operations of the four former LICH facilities, the Employer and the Union negotiated a 2003-2006 collective-bargaining agreement for the "ABC Sites" that maintained the same historical language in the scope provision.

Between 2006 and 2007, the parties negotiated new collective-bargaining agreements for all four units represented by the Union, and at the Employer's request each separate unit maintained its own individual contract. In November 2006, the Employer included a note in its bargaining proposal regarding the scope provision, which stated: "Delete applicability of agreement to new operations established by employer (as opposed to relocation) for all CBAs." Over the following year, the parties subsequently negotiated over the precise wording of the "new or additional facilities" clause and its limitation to facilities "under the same facility operating certificate." However, as confirmed by the Union's lead negotiator at the time, at no point did the Employer contest the wording of the separate clause governing the relocation of "existing operations" to other locations, which reflected the contractual language going back to at least 1998.

Moreover, our determination of the scope of the relevant bargaining unit is supported by the more recent bargaining history between the Employer and the Union, up through the Employer's sudden change in position in mid-2016 and its assertion that the DeGraw facility would no longer be part of the unit. During numerous bargaining sessions over a period of two years, from mid-2014 through mid-2016, both parties acknowledged that employees would remain in the established bargaining unit after the operations of the AHC and BKC facilities were consolidated and moved to a different location. In sum, we find that the relevant bargaining unit is properly defined as covering all employees hired to perform registered professional nursing duties in connection with the existing operations of the "ABC" facilities, regardless of any subsequent move of those operations to different locations.

2. The DeGraw facility remains part of the multi-facility "ABC" operations and the employees performing registered professional nursing duties there are in the established bargaining unit

We further find that the DeGraw facility constitutes a continuation of the existing operations of the former "ABC" facilities, rather than a new or additional facility, and that all employees hired to perform registered professional nursing duties at the DeGraw facility are thus part of the established bargaining unit. The overwhelming balance of the evidence demonstrates that for a period of years, beginning in 2013 if not earlier, the express intention of the Employer was to open the DeGraw facility in order to move the existing operations of the "ABC" facilities. According to the Employer, it began constructing the DeGraw facility in order to "move and consolidate its operations from the AHC, BKC, and [APD facilities] (and potentially its operations at [Cobble Hill])." Likewise, according to the Employer's (b)(6), (b)(7)(C) the DeGraw facility "was designed to be an efficiently operating dialysis clinic with 50 chairs . . . to replace the 50 chairs NYDS has cumulatively at AHC (28 chairs) and BKC (22 chairs)." The (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) was heavily involved in the project of "building and opening DeGraw to relocate AHC and BKC."

Such intention was also the premise of the parties' bargaining over the issue from the start. For example, during a September 2014 bargaining session, the Employer's (b)(6), (b)(7)(C) explained that a proposal to eliminate the "new or additional facility" clause in the expired contract "did not apply to the DeGraw facility as [the Employer] planned to move and relocate the ABC facilities into DeGraw." Also according to the Employer's (b)(6), (b)(7)(C) at a December 2014 bargaining session the Employer's (b)(6), (b)(7)(C) larified to the Union that the Employer "was not expanding with the opening of DeGraw, but, rather, it was planning to move existing facilities and operations from the ABC facilities to DeGraw." In December 2014, the Employer's (b)(6), (b)(7)(C) similarly informed the Union of the Employer's intentions to relocate the 50 dialysis chairs at the AHC and

BKC facilities to the 50-chair DeGraw facility. The Employer continued to reiterate that its "goal was to combine the ABC facilities . . . at the DeGraw facility" in bargaining sessions through at least September 2015. When the Union raised the issue of the DeGraw facility during bargaining sessions as late as February and March 2016, the Employer made no claim that its operations there would constitute a "new" facility. Setting aside certain unforeseen delays in opening DeGraw and the replacement of laidoff employees, in the end the Employer has simply moved existing work from the "ABC" facilities to the DeGraw facility, as it had planned to do all along. As a consequence, the Employer has violated Section 8(a)(5) and (1) by withdrawing recognition from the Union with respect to the employees performing that work, and by unilaterally changing their terms and conditions of employment.

In reaching the above conclusion, we note that this case does not involve a unit "relocation" within the meaning of Board case law. Here, the existing work has not left the historically established bargaining unit, which is a multi-facility unit defined by the work performed, and thus the Board's "relocation" lines of cases are inapposite. In *Westwood Import Co.* and *Harte & Co.*, the Board held that when an entire unit relocates to a new facility, a collective-bargaining agreement in effect at the old facility will continue to apply and to create an irrebutable presumption of majority status "if the operations at the new facility are substantially the same as those at the old and if transferees from the old plant constitute a substantial percentage—approximately 40 percent or more—of the new plant employee complement."[12] However, such analysis is unnecessary where the parties' historical bargaining relationship or the scope of the bargaining unit already contemplates the movement of existing work to a new location.[13] Moreover, the *Westwood* and *Harte* line of cases

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[12] *Harte & Co.*, 278 NLRB 947, 948 (1986); *see Westwood Import Co.*, 251 NLRB 1213, 1214 (1980), *enforced*, 681 F.2d 664 (9th Cir. 1982).

[13] *See Fairlawn Care Center*, 233 NLRB 1025, 1025-26 (1977) (finding that employer was obligated to bargain with union and apply terms of contract at relocated facility where parties had agreed that contract would apply to relocation, and finding alternative inquiry into majority-status of union unnecessary), *enforced mem.*, 692 F.2d 764 (9th Cir. 1982); *see also Tarmac America*, 342 NLRB at 1050 (finding that employee performing bargaining unit work at new location set up by employer was included in definition of existing unit scope and thus accretion or new-job-classification analyses were unnecessary); *Mining Specialists, Inc.*, 314 NLRB 268, 269 (1999)(finding that the parties' collective-bargaining agreement continued to apply at a relocated facility based on the terms of the agreement); *Nave, Inc.*, 306 NLRB 926, 926 n.3, 931 (1992) (finding that work relocated to separate location remained within scope of single bargaining unit and employer thus violated the Act by withdrawing recognition and signing contract with a different union).

is equally inapplicable here insofar as the Employer has only moved one portion of the established bargaining unit, while maintaining continuous operations at the Cobble Hill and APD facilities.[14] In short, the bargaining unit itself has not been geographically relocated, and instead the Employer has merely shifted the location of certain work within the contours of the established definition of the unit's scope.

Similarly inapposite is *Gitano Group, Inc.* and its progeny, in which the Board held that when an established bargaining unit at a single facility is severed by the partial relocation of work to a new facility, the Board will apply a rebuttable presumption that the new facility is separate from the established unit.[15] If such presumption is not rebutted, the employer is not obligated to recognize the union at the new facility absent a showing that a majority of employees at the new facility are transferees.[16] The *Gitano* line of cases turns on the Board's presumption that single facility units are appropriate, and therefore that "[a] new facility is a separate appropriate unit," even if such facility constitutes a partial relocation or spinoff of work from an existing unit at another facility.[17] In other words, *Gitano* and its progeny are inapplicable where "there has been no creation of a [presumptive] second

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[14] *Rock Bottom Stores*, 312 NLRB 400, 402 (1993) (noting that the *Westwood* and *Harte* analysis applies where an employer "relocates an entire bargaining unit to a new facility"), *enforced*, 51 F.3d 366 (2d Cir. 1995); *see United Steelworkers of America, Local 7912*, 338 NLRB 29, 29 n.1 (2002). To inquire into the percentage of unit employees at the DeGraw facility alone would effectively rewrite the definition of the scope of the existing unit. Thus, even assuming that a *Westwood* and *Harte* "relocation" analysis was proper here and that the transfer of the former AHC and BKC operations to the DeGraw facility warranted a reassessment of the established unit's appropriateness, we note that the Union has at all relevant times represented a majority of employees in the bargaining unit as a whole. The Cobble Hill and APD facilities have remained in operation with at least six bargaining unit nurses employed at those locations. When the DeGraw facility commenced operations following the temporary cessation of the former AHC and BKC operations, the Employer employed only four unrepresented nurses. *See J.R. Simplot Co.*, 311 NLRB 572, 588 (1993) (measuring "substantial percentage" of workforce from the date that the relocation process has been substantially concluded), *enforced*, 33 F.3d 58 (9th Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995).

[15] *Gitano Group, Inc.*, 308 NLRB 1172, 1175-76 (1992).

[16] *Id.*

[17] *U.S. Tsubaki, Inc.*, 331 NLRB 327, 327 n.3 (2000).

bargaining unit."[18] In the present case, no work has been relocated outside of the existing unit, as defined by the parties, and the existing unit has not been fractured by the movement of work to the DeGraw facility. As previously discussed, the scope of the unit includes all employees performing registered professional nursing duties in connection with the operations of the former "ABC" facilities, regardless of the location of those operations. Moreover, the unit is already established as a multi-facility unit covering employees working in different locations. In both respects, the *Gitano* presumption that a geographically-isolated "spinoff" group of employees should constitute a separate appropriate unit is inappropriate. To apply such a presumption here, where there has been no change in definition or relocation of work *outside* of the established bargaining unit, and where unit employees already work in multiple locations, would instead merely undermine the stability of the bargaining relationship and subvert the policies of the Act.[19]

Finally, and contrary to the arguments raised by the Employer, we note that this case does not involve a so-called "*Kroger* clause."[20] Even assuming, for the sake of argument, that the second clause of the relevant sentence in the scope provision of the parties' expired contract—". . . and it is further agreed that the Agreement shall apply to any new or additional facilities of the employer under the same facility operating certificate"—would implicate the Board's after-acquired stores doctrine, such clause is not at issue here. The DeGraw facility is not a "new or additional" facility expanding the Employer's operations, but is instead a consolidation of the "existing operations" of the former ABC facilities within the meaning of the first clause of the relevant sentence—and, more significantly, within the meaning of the parties' bargaining history and the scope of the established bargaining unit. Employees performing

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[18] *Rock Bottom Stores,* 312 NLRB at 402; *see Penn Enterprises, Inc.*, Case 17-CA-071010, Advice Memorandum dated April 30, 2012, at 2 (characterizing *Gitano* as being applicable to "cases involving a transaction that fractures a bargaining unit into two facilities"); *cf. Armco Steel Co.*, 312 NLRB 257, 259 (1993) (discussing applicability of *Gitano* to unit-clarification cases, and noting that the purpose of the *Gitano* presumption is to determine whether relocated employees should nonetheless "remain a part of the unit from which they came," or should constitute a different appropriate unit at the new facility).

[19] Moreover, the Board's *Gitano* framework establishes a *rebuttable* presumption that a new location will constitute a separate appropriate unit. 308 NLRB at 1175. Even assuming that the *Gitano* framework was appropriate here, such presumption has effectively been rebutted by the parties' bargaining history and the established scope of the unit. *See also* note 14, *supra*, and cases cited.

[20] *See Kroger Co.*, 219 NLRB 388, 389 (1975).

registered professional nursing duties at the DeGraw facility are already part of the established unit, and no new or additional work has been created.

For the foregoing reasons, we conclude that these alternate legal theories are not applicable. Rather, the employees performing registered professional nursing duties at the DeGraw facility are already covered by the established bargaining unit, and the Employer has therefore violated Section 8(a)(5) and (1) by withdrawing recognition from the Union and by unilaterally changing employees' terms and conditions of employment.

3. The Employer's attempt to characterize the DeGraw facility as outside the bargaining unit is unavailing

In contrast to this extensive history regarding the status of the DeGraw facility as a continuation of the existing operations, the Employer's subsequent attempts in mid-2016 to reclassify DeGraw as a "new" facility are uniformly unavailing. First, we note that the unforeseen delay in the opening of the DeGraw facility did not change the scope of the established unit or relieve the Employer of its statutory bargaining obligations. It is clear that when the Employer closed the AHC and BKC facilities it marked a temporary cessation of business rather than a decision to permanently shut down. The AHC and BKC facilities closed due to issues with the operative leases, rather than business considerations, and the Employer was already engaged in the construction of the DeGraw facility where the existing work would be moved and consolidated. Moreover, the Cobble Hill and APD facilities remained open and thus the Union continued to represent employees in the established bargaining unit. Concurrently, the Employer and the Union were engaged in bargaining over a successor contract for the "ABC" unit as a whole. On these facts, a one to two year cessation of portions of the Employer's business did not transform the DeGraw facility, when it finally opened, into a "new" facility as opposed to a continuation of the existing operations.[21]

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[21] *Cf., e.g.*, *Golden State Warriors*, 334 NLRB at 653 (finding that one-year hiatus in operations did not disrupt continuity of business or employer's obligation to bargain with union); *Rockwood Energy & Mineral Corp.*, 299 NLRB 1136, 1139 & n.11 (1990) (finding that five-year suspension of production did not relieve employer of its bargaining obligation, where union remained active in bargaining over work covered by unit, where at least one unit employee remained continuously employed, and where there was an expectation of work eventually resuming), *enforced*, 942 F.2d 169 (3d Cir. 1991); *Coastal Cargo Co.*, 286 NLRB 200, 203-04 (1987) (finding continuation of existing business where employer ceased operations for one year before reopening in new corporate form).

Second, the mere fact that the Employer ultimately modified its licensing application to the New York State Department of Health is not controlling. The applicable state statutes that regulate the provision of dialysis services serve an entirely different purpose than the Act, which has the overriding purpose of ensuring the stability of collective-bargaining relationships. Thus, even assuming that the DeGraw facility was properly reclassified as "adding" dialysis services rather than relocating existing dialysis services for state regulatory purposes, the Employer was nonetheless continuing its existing business for purposes of federal labor law. Moreover, we note that the Employer itself affirmatively requested to reclassify the DeGraw facility—*after* making the decision to exclude the DeGraw facility from the bargaining unit and informing the Union that it would not be covered—and that it ultimately submitted a revised application that remained a form of lesser review. The Employer submitted a two-page certificate of need for a new "extension" location, and did not undergo the more extensive level of agency review reserved for the opening of new healthcare facilities.[22]

Finally, we find it largely immaterial that the DeGraw facility ultimately opened with new physical equipment and new patients. With respect to the equipment, the Employer does not suggest that its dialysis operations or the actual work performed have significantly changed, or that the job duties of the nurses working at the DeGraw facility are materially different from the nurses at the former "ABC" facilities.[23] Likewise, the identity of the specific patients who utilize the new facility does not determine whether it is a continuation of the same operations as the

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[22] We also note, insofar as the parties' expired collective-bargaining agreement illuminates the scope of the bargaining unit, that the "new or additional facilities" clause was tied to the Employer's operating certificate, but the movement of "existing operations" clause was not. Here, the Employer has plainly moved its existing operations from the AHC and BKC facilities to the DeGraw facility.

[23] *Cf. International Paper Co.*, 150 NLRB 1252, 1259 (1965) ("The new equipment at the north plant does not change the unit any more than new equipment replacing the equipment at the south plant would have changed it."). We also note that it appears that the Employer's intention was to open the DeGraw facility with new physical equipment from the outset, or at least well before it began claiming that DeGraw would be a "new" facility. When the AHC and BKC facilities closed in 2014 and 2015, the Employer's existing equipment was disposed of within 30 days, and yet during bargaining the Employer continued to assure the Union that the DeGraw facility would merely be a consolidation of the existing operations.

previous locations.[24] That is particularly true here, where the Employer itself admits that the turnover of dialysis patients is relatively frequent in the normal course of business. Such factors do not negate the strong evidence—including the Employer's own express admissions—that the DeGraw facility was designed and intended to be a continuation of the work performed at the former "ABC" facilities. The Employer had an operational capacity of 50 chairs at the closed AHC and BKC facilities, and the DeGraw facility has an identical 50-chair capacity to provide the exact same services to patients.

Based on such evidence, and given the Employer's failure to articulate a difference in the work performed at the DeGraw facility from the work performed at the closed AHC and BKC facilities, we conclude that the operations at the DeGraw facility are a continuation of the existing operations of the former "ABC" facilities and are thus within the scope of the established bargaining unit. Thus, by withdrawing recognition from the Union at the DeGraw facility and by unilaterally changing the terms and conditions of employment for bargaining-unit employees, the Employer has violated Section 8(a)(5) of the Act.[25]

B. The Employer Violated Section 8(a)(3) by Discriminatorily Refusing to Transfer or Recall Union-Represented Employees

The evidence in this case further indicates that the Employer independently violated the Act by failing to recall or transfer unit employees to the DeGraw facility as a result of their Union-represented status. In determining whether an employer's failure to recall employees constitutes a violation of the Act, the Board applies its

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[24] *See Coastal Cargo*, 286 NLRB at 203 (finding that employer had not commenced a new operation after temporarily ceasing business before reopening with a new sole customer).

[25] In the alternative, we conclude that, even assuming that the DeGraw facility is found to be outside the established bargaining unit, the Employer has violated Section 8(a)(5) by unilaterally transferring bargaining-unit work outside of the unit. *See, e.g.*, *Connecticut Color, Inc.*, 288 NLRB 699, 699 (1988). Although the parties bargained over the closure of the AHC and BKC facilities, they did so on the premise that the DeGraw facility would remain part of the unit. The Employer cannot circumvent the Union by subsequently changing its position and asserting that the relocated work is now at a "new" facility outside the unit, without first bargaining with the Union over what would then be transformed into a permanent transfer of bargaining-unit work. Here, no such bargaining occurred and the Employer presented its unilateral decision as a *fait accompli*. Thus, the Employer violated the Act even under its own claim—which we reject for the reasons discussed above—that the DeGraw facility is outside the established unit.

traditional *Wright Line* framework.[26] First, the General Counsel must show, by a preponderance of the evidence, that the employees' protected status was a motivating factor in the employer's adverse employment decision. The employer's discriminatory motive may be established by, among other things, the timing of the adverse action, the presence of other unfair labor practices, and the employer's reliance on pretextual reasons for the adverse action.[27] Once this initial showing has been made, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct.[28] An employer cannot carry its burden merely by showing that it had a legitimate reason for taking the action in question; it must affirmatively show that the action would have taken place even absent the employees' protected status.[29] The decision not to recall employees may exhibit an unlawful discriminatory motive even if the initial layoff of such employees was entirely legitimate.[30] The Board applies the same analysis in evaluating an employer's failure to transfer employees.[31]

Here, we find that a preponderance of the evidence demonstrates that the Employer's decision not to transfer or recall bargaining-unit nurses to the vacant positions at the DeGraw facility was motivated by their Union-represented status and by a desire to withdraw recognition from the Union at that facility. The evidence uniformly indicates that, beginning with the Employer's first plans to construct the DeGraw facility, its intention was to eventually transfer existing unit employees when the new facility opened. This was the Employer's consistent intention for several years, and the basis for its bargaining with the Union. Thus, for example, when the AHC and BKC facilities closed in 2014 and 2015 and employees were laidoff, the parties negotiated written closure agreements that memorialized limited recall rights to the DeGraw facility on the basis of seniority. The Employer also

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[26] *E.g.*, *Amptech, Inc.*, 342 NLRB 1131, 1133-34 (2004) (citing *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)), *enforced*, 165 F. App'x 435 (6th Cir. 2006).

[27] *See, e.g.*, *Lucky Cab Co.*, 360 NLRB 271, 273-74 (2014).

[28] *See id.*

[29] *See North Carolina Prisoner Legal Services*, 351 NLRB 464, 467-69 & n.17 (2007).

[30] *Daikichi Sushi*, 335 NLRB 622, 625 (2001), *enforced*, 56 F. App'x 516 (D.C. Cir. 2003); *Grinnell Corp.*, 320 NLRB 817, 831 (1996).

[31] *E.g.*, *Cave Springs Theatre*, 287 NLRB 4, 11 & n.27 (1987); *Raymond Engineering, Inc.*, 286 NLRB 1210, 1210-11 (1987).

transferred numerous employees to positions that were expressly intended to be "temporary" pending the opening of the DeGraw facility. At the same time, the parties were bargaining over a contract that would cover the DeGraw facility and the Employer was acknowledging that it would be part of the existing bargaining unit.

In light of the foregoing context, we first find that the timing and apparent impetus for the Employer's sudden change in position supports an inference of a discriminatory motive. After nearly two years of bargaining over a successor contract—during which both parties acknowledged that the contract would apply to the DeGraw facility and that unit employees would be transferred—in early 2016 the Employer began asserting that it was necessary to drastically cut employee health and pension benefits when the DeGraw facility opened. Around the same time in early 2016, according to the Employer's lead negotiator at the time, the Union indicated that maintaining the existing health and pension benefits was one of its priorities or "absolutes." In March 2016, the Employer made a bargaining proposal that included a clause modifying the existing scope provision such that when work was moved to a different location, the employees that were moved would receive the same health and pension benefits as non-union employees. Unsurprisingly, the Union strongly objected that such proposal would drastically cut benefits for the employees soon-to-be relocated to the DeGraw facility.

Several weeks later, the Employer provided a two-option bargaining proposal, one part of which included a "note" stating for the first time that the DeGraw facility would "not involve a move of any existing operations" and would be outside the bargaining unit. Such claim was a drastic reversal from the Employer's consistent course of conduct over a period of nearly two years, during which time the Employer expressly intended to open the DeGraw facility as a continuation of the former AHC and BKC facilities and to staff the DeGraw facility by recalling or transferring unit nurses. In a June 2016 letter to the Union reiterating that the DeGraw facility would now be a "new" location due to changed circumstances, the Employer identified no factors that had changed from March 2016 to April 2016. To the contrary, it appears that the only significant change from one bargaining session to the next was the Employer's bargaining dispute with the Union and the latter's insistence on retaining existing levels of benefits. Indeed, despite its own position only several weeks earlier, in its letter to the Union the Employer even threatened that it would be an unfair labor practice for it to recognize the Union at the DeGraw facility. On these facts, we find that the timing of the Employer's formalistic reclassification of DeGraw as a "new" facility supports an inference of a discriminatory motive.[32] Our finding is

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[32] *KAG-West, LLC*, 362 NLRB No. 121, slip op. at 2 & n.5 (June 16, 2015) (noting that discriminatory motive can be inferred from indirect evidence including timing alone). Alongside the timing of the Employer's decision, we note that an inference of animus

further supported by the fact that the Employer relied on its *own* decision not to transfer or recall former AHC and BKC employees to the DeGraw facility as one of its primary justifications for asserting that DeGraw would no longer be part of the unit.[33]

Moreover, it is well established that a finding of discriminatory motive may be predicated on an employer's pretextual explanation for its adverse personnel action.[34] Here, the Employer's asserted justifications for failing to recall or transfer bargaining-unit employees to the DeGraw facility all constitute pretext, thus further reinforcing our finding of a violation. For the reasons discussed previously in connection with the Section 8(a)(5) violation, we have already found unavailing the Employer's claim that the DeGraw facility somehow became a "new" facility rather than a continuation of the existing operations of the closed "ABC" facilities. Indeed, we find that the Employer has offered a pretextual justification for its decision to reclassify DeGraw as a "new" facility that would not be staffed by former unit employees. In its June 2016 letter to the Union and in subsequent position statements, the Employer relied on allegedly "changed" circumstances that were already present well before the Employer's first attempt to exclude the DeGraw facility from the unit. The opening of the facility had already been delayed nearly two years in March 2016, when the Employer proposed keeping it in the unit but cutting relocated employees' benefits. Similarly, the Employer had already disposed of its old

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is supported by the Employer's concurrent Section 8(a)(5) violations. *See Circle City Asphalt, LLC*, 330 NLRB 282, 285 (1999) (finding that employer's premature termination of agreement and efforts to disassociate itself from the union and become a non-union employer were evidence of animus establishing a discriminatory failure to recall a union supporter); *see also Overnite Transp. Co.*, 335 NLRB 372, 375 (2001).

[33] An inference of animus is also supported by the Employer's failure to advertise DeGraw job openings at the remaining Union-represented facilities, and is potentially supported by the Employer's decision in late May 2016 to contact the New York State Department of Health in order to voluntarily reclassify its application for the opening of the DeGraw facility as a new extension facility. As to the latter, we lack sufficient information to determine whether the Employer's request to reclassify the DeGraw facility as a new extension location was legitimate. We note, however, that despite the Employer's assertions, it is unclear that mere patient turnover would require such a reclassification. We also note that the Employer first stated that the DeGraw facility would be a new location several weeks prior to any communications with the New York State Department of Health regarding a revised application.

[34] *Auto Nation, Inc.*, 360 NLRB 1298, 1303 & n.13 (2014), *enforced*, 801 F.3d 767 (7th Cir. 2015); *Lucky Cab*, 360 NLRB at 274; *Loudon Steel, Inc.*, 340 NLRB 307, 312 (2003).

equipment from the AHC and BKC facilities, and patients had already begun receiving services at other locations. We find that the Employer's newfound reliance on such factors, only weeks later, to be pretextual.

The Employer also relies on the fact that the employees' recall rights in the AHC and BKC closure agreements expired before the ultimate opening of the DeGraw facility, stating that, since "no NYSNA bargaining unit members had recall rights to DeGraw when it opened, there can be no credible argument NYDS had an unlawful motive in not recalling laid off NYSNA employees." However, the mere fact that the employees no longer possessed contractual recall rights does not constitute an explanation for the Employer's deliberate failure to recall them, nor does it preclude a finding of discriminatory motive.[35] As noted above, we find that the Employer violated Section 8(a)(3) not because it was contravening any contractual obligations, but because its ultimate decision not to recall or transfer the affected employees was motivated, at least in part, by a desire to undermine the status of the Union at the DeGraw facility.[36]

As reflected in the December 2014 "DeGraw Clinic Call Order" provided by the Union, the majority of the nurses who were laidoff or placed in temporary positions had decades of experience working for the Employer and its predecessors at the former "ABC" facilities, and the Employer has identified no reason to doubt their status as highly qualified employees that would be desirable to staff the new DeGraw facility. Indeed, the Employer had already planned, for a period of years, to transfer or recall those same nurses to assist with opening the DeGraw facility—the Employer and the Union had even solicited specific shift preferences in December 2014. Although there was ultimately an extended delay before the facility opened, there is no evidence or claim that the Employer had reason to believe that the laidoff or transferred nurses would no longer be interested in returning. To the contrary, many

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[35] *Lana Blackwell Trucking, LLC*, 342 NLRB 1059, 1059 n.1, 1061 (2004) ("Although the employees may not have had any contractual rights to be recalled, the question remains whether the Respondent's decision not to recall [them] was discriminatory and motivated by an antiunion purpose . . . .).

[36] We also note that the DeGraw facility ultimately began hiring only several months after some of the affected employees' recall rights expired. The last BKC employees' contractual recall rights expired in approximately mid-August 2016, and the Employer began hiring for the DeGraw facility as early as October 2016. Simply because the Employer was not contractually *obligated* to recall the employees at that point does not explain why, after the passage of only several additional weeks, it did not in fact recall those experienced employees.

of the nurses remained in less desirable "temporary" positions to which they had transferred with the expectation of eventually moving to DeGraw.

Moreover, when the AHC and BKC closure agreements were negotiated, both the Employer and the Union fully expected the DeGraw facility to open well before the expiration of the 12-month contractual recall rights. When circumstances changed due to unforeseen delays, the Employer affirmatively decided to change its plans in order to not recall or transfer the former AHC and BKC nurses, and its opportunistic reliance on the fact that the contractual recall rights had expired by that point does not offer a substantive justification for that decision. In addition, we note that the Employer first began asserting that the DeGraw facility would not be part of the unit, and that none of the staff from the former "ABC" facilities would be transferred or recalled, *before* the last contractual recall rights had actually expired.

In sum, we find that the Employer's reliance on the employees' lack of contractual recall rights is not a legitimate explanation for its deliberate decision not to transfer or recall qualified employees to the DeGraw facility—as it had planned to do for several years, as it was easily capable of doing, and as it only decided not to do after its bargaining dispute with the Union and its apparent desire to remove the DeGraw facility from the bargaining unit in order to drastically cut employee benefits.[37] Although the Employer's ultimate goal may have been cost savings, rather than an ideological hostility toward the Union, an employer may not accomplish such goals by discriminating against Union-represented employees in lieu of bargaining to impasse, as required by the Act. As such, we find that the Employer has violated Section 8(a)(3) by discriminatorily failing to transfer or recall unit nurses.[38]

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[37] The Employer's only other explanation for its failure to recall or transfer unit nurses to the DeGraw facility is that it was following its "standard" hiring procedure. However, we find that this explanation is again pretextual. Nothing required the Employer to follow such procedure, because in fact for a period of several years it planned to staff the DeGraw facility *without* using an open hiring procedure.

[38] We further note that such finding of a violation provides a separate independent basis for the Section 8(a)(5) violation discussed previously. Even assuming that the DeGraw facility is outside the established bargaining unit, "but for" the Employer's discriminatory refusal to transfer or recall Union-represented nurses, the DeGraw facility would have been staffed by a majority of transferee employees performing work relocated from the closed AHC and BKC facilities. *See, e.g.*, *Gitano Group*, 308 NLRB at 1175 n.20, 1176.

C. The Union Did Not Violate Section 8(b)(1)(A), (2), or (3) by Attempting to Enforce the Scope of the Established Bargaining Unit

Finally, we conclude that the Union has not violated Section 8(b)(1)(A), (2), or (3) of the Act and that the unfair-labor-practice charges against the Union should be dismissed. For the reasons discussed above, we find that the DeGraw facility is, in fact, part of the established bargaining unit represented by the Union. As such, the Union did not violate the Act by attempting to enforce its rights and to engage in bargaining on behalf of the employees at the DeGraw facility.

/s/
J.L.S.

H:ADV.29-CA-186891.Response.Fresenius (b)(6), (b)(7)(C)