

No. 17-

IN THE
Supreme Court of the United States

CREATIVE VISION RESOURCES, L.L.C.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On first blush, the question appears simple – when may a successor employer set its own initial terms and conditions of employment or have to accept the terms of the predecessor employer. But decades have passed since this Court addressed the important business and public subject of mergers, acquisitions, and contract assumptions involving a successor employer, which hoped to settle the question. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1942); *Fall River Dyeing and Finishing Corporation v. NLRB*, 482 U.S. 27 (1987). This lengthy time period has bred confusion, conflict, precedent defiance, misinterpretation, and forum shopping amongst the federal appellate courts and within the NLRB.

The question presented is:

Whether a bargaining demand is required in both the “ordinary” successor context and the “perfectly clear” successor context? Or whether, as the Fifth Circuit held, in “perfectly clear” successor cases, “the composition of the successor’s work force” alone is the “‘triggering’ fact for the bargaining obligation” and no union bargaining demand is required.

PARTIES TO THE PROCEEDING

Petitioner Creative Vision Resources, L.L.C. was respondent before the National Labor Relations Board and petitioner/cross-respondent in the Fifth Circuit. Respondent National Labor Relations Board was respondent/cross-petitioner in the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENT

Creative Vision Resources, L.L.C. is a limited liability corporation established under the laws of the State of Louisiana. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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Petitioner Creative Vision Resources L.L.C. (Creative Vision) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals on February 14, 2018 is reported at 882 F.3d 510, and reproduced at Pet.App. 1a-37a. The decision and order of the National Labor Relations Board is reported at 364 N.L.R.B. No. 91, N.L.R.B., and is reproduced at Pet.App. 75a-127a. The decision by the administrative law judge is unreported, but is available at 2013 WL 75068, and is reproduced at Pet.App. 128a-194a.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2018. A petition for rehearing en banc was denied on March 19, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The case involves a minority owned labor contractor, Creative Vision Resources, L.L.C., with a unit of 42 to 44 employees. Creative Vision went into business to rectify the illegal operations of the predecessor employer, Berry III, who misclassified its employees and failed to properly pay them, including not deducting federal and state taxes, social security or child support payments. This petition asks whether a union bargaining demand is necessary to trigger a successor employer's bargaining obligation,

whether in both the ordinary successor and “perfectly clear” successor contexts.

This Court’s successorship doctrine establishes that when a successor employer takes over assets or a business of a predecessor employer, the successor employer may establish its own initial terms of employment. In *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), this Court set forth a narrow exception to the general “ordinary” successor rule, termed a “perfectly clear” successor. For a successor employer falling under the narrow “perfectly clear” successor exception, the successor must first bargain with the predecessor’s union before setting its initial terms. But as clarified by this Court in *Fall River Dyeing and Finishing Corporation v. NLRB*, “[t]he successor’s duty to bargain at the ‘substantial and representative complement’ date is triggered only when the union has made a bargaining demand.” 482 U.S. 27, 52.

Fall River Dyeing not only clarified but also echoed this Court’s directive in *Burns* that the obligation to bargain with the union only triggered “when the union requested” the successor to bargain. 406 U.S. at 294. Therefore, a union bargaining demand is a fundamental element of this Court’s successorship doctrine jurisprudence and a prerequisite to pinpointing the moment when a successor may have to recognize and bargain with a union, whether as an ordinary successor or as a “perfectly clear” successor.

Consistent with the fundamental fairness principles announced and applied in *Fall River Dyeing*, a majority of circuit courts condition a successor employer’s obligation

to bargain on (1) a substantial and representative complement of employees, a majority of whom were employed by the predecessor; and (2) the existence of an outstanding demand by the union for recognition or bargaining. *See Nephi Rubber Prods. Corp. v. NLRB*, 976 F.2d 1361, 1365 n. 6 (10th Cir. 1992); *Williams Enters., Inc. v. NLRB*, 956 F.2d 1226, 1232 (D.C. Cir. 1992); *Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1286-87 (6th Cir. 1989); *Aircraft Magnesium, A Division of Grico Corp.*, 730 F.2d 767 (9th Cir. 1984), *enf'g*, 265 NLRB 1344, 1345 (1982).

But the Fifth Circuit abandoned this Court's firmly announced bargaining demand requirement in the "perfectly clear" successor context and joined the outlying Second Circuit, holding that in "perfectly clear" successor situations, the "composition of the successor's work force" *alone* is the "triggering" fact for imposing the bargaining obligation. Pet.App. 71a-72a.

Certiorari is warranted to resolve the ongoing circuit conflict over whether it is permissible to strip the union demand requirement out of the calculus, when determining whether the "perfectly clear" successor exception applies and bars the unilateral setting of new employment terms and conditions.

The Fifth Circuit's decision is seriously out of step with this Court's guidance, the majority of circuit decisions, and even its own precedent. By departing from this Court's clear guidance, the panel below created a deep conflict between it and several other circuits, which correctly

and collectively rejected similar efforts to undermine the fundamental requirement of a union demand to trigger a successor's bargaining obligation.

Even the procedural path of the case to this petition highlights the palpable deep conflict. The Administrative Law Judge found Creative Vision did not have to first negotiate with the union representing the predecessor's employees and thus Creative Vision legally set its initial terms and conditions of employment. On appeal to the NLRB by the agency's General Counsel, the NLRB reversed in a 2 to 1 split decision. On appeal to the Fifth Circuit, the panel affirmed the NLRB in a decision which it later withdrew following a petition for en banc review. The panel issued a new decision, again affirming the NLRB and denying the petition.

The practical consequences of the Fifth Circuit's failure to adhere to this Court's precedents are substantial as other courts will be encouraged to further erode the fairness protections afforded successor employers, whether "ordinary" or "perfectly clear." This Court's review is essential to hold fast the safeguards and clear guidance of *Burns* and *Fall River Dyeing*.

A. The Triggering of a Perfectly Clear Successor's Bargaining Obligation Requires a Union's Bargaining Demand

A successor employer is ordinarily free to set initial terms of employment when hiring its predecessor's employees. *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). Under *Burns*, a successor need not accept either its predecessor's collective-

bargaining agreement or its employment terms and conditions. Similarly, a successor has no obligation to bargain with the union representing its predecessor's employees before it sets its own initial employment terms and conditions. This Court in *Burns*, explicitly rejected the Board's then-rule that a successor must in all circumstances bargain with an incumbent union before instituting employment terms differing from the predecessor's collective bargaining contract.

In dictum, *Burns* identified a "narrow" exception to the broader general successor rule. Under this narrow exception, a "perfectly clear" successor must bargain with the union when "it is perfectly clear that the new employer plans to retain all of the employees in the unit" and "the union requested it to do so." *Burns, supra*, 406 U.S. at 294-95. Only when both prongs are met must a successor bargain with the union over terms and may not set its own.

The articulated requirement of a union demand in *Fall River Dyeing* followed the Court's seminal successorship analysis in *Burns*, in which it held a successor obligated to bargain with the union about wages and other terms and conditions of employment "when the union requested to do so." *Burns, supra*, 406 U.S. at 294. With no bargaining demand by the union present in *Burns*, the "perfectly clear" narrow exception to the general rule could not apply. Thus, two necessary events combine to trigger both an ordinary and a perfectly clear successor employer's obligation to bargain with the union: (1) the successor's employment of a "substantial and representative complement" of the predecessor's employees; and (2) the union's bargaining demand. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 52 (1987). As the Court explained in *Fall River Dyeing*,

Once the employer has concluded that it has reached the appropriate complement, then, in order to determine whether its duty to bargain will be triggered, it has only to see whether the union already has made a demand for bargaining.

Fall River Dyeing, supra, 482 U.S. at 52-53. Like *Burns*, *Fall River Dyeing* began operations and hiring under its new initial terms before receiving the union bargaining demand.

Instead of following this Court's precedent in *Burns* and *Fall River Dyeing* and a majority of the circuits requiring an initial bargaining demand, the Fifth Circuit strayed far afield in *Creative Vision Resources*, aligning itself with the Second Circuit and its 1996 decision, *Banknote Corp. of America v. NLRB*, 84 F.3d 637 (2d Cir.1996). In so doing, the Fifth Circuit exacerbated a clear split within the circuit courts on this issue.

Standing directly contrary to the Fifth and Second Circuits, four federal courts of appeal have addressed this issue with all applying *Fall River Dyeing* to require (1) a substantial and representative complement of employees, a majority of whom were employed by the predecessor; and (2) the existence of an outstanding demand by the union for recognition or bargaining. *See Nephi Rubber Prods. Corp. v. NLRB*, 976 F.2d 1361, 1365 n. 6 (10th Cir. 1992); *Williams Enters., Inc. v. NLRB*, 956 F.2d 1226, 1232 (D.C. Cir. 1992); *Briggs Plumingware, Inc. v. NLRB*, 877 F.2d 1282, 1286-87 (6th Cir. 1989); *Aircraft Magnesium, A Division of Grico Corp.*, 730 F.2d 767 (9th Cir. 1984), *enf'g*, 265 NLRB 1344, 1345 (1982).

The Fifth Circuit's *Creative Vision* decision not only departed from the majority of circuits but it also departed from existing Fifth Circuit precedent requiring a union bargaining demand to trigger a successor's bargaining obligation. *See NLRB v. Houston Bldg. Serv., Inc.*, 936 F.2d 178, 180 (5th Cir. 1991) (Where successor employer immediately hired all of predecessor's employees and the union had made bargaining demand, the obligation to bargain arises because "a majority of the successor's employees had been employed by its predecessor, assuming that the union has made a bargaining demand.")

B. The Administrative Law Judge's Decision and the National Labor Relations Board

Richard's Disposal contracts with the City of New Orleans, private business, and industry for trash collection. Berry III, the predecessor employer of Creative Vision, had a labor contract with Richard's Disposal to provide hoppers. Creative Vision Resources L.L.C. (Creative Vision) is a labor supply company, created to supply general labor to the business community, including hoppers to Richard's Disposal, Inc. Hoppers ride on the back of garbage trucks, transferring garbage from containers to garbage trucks.

Alvin Richard III (Richard) created Creative Vision Resources to employ the hoppers provided to Richard's Disposal and to correct the employment irregularities and misclassification mistakes with the hoppers' employment relationship with Berry III. Ultimately, Richard's Disposal cancelled its contract with Berry III and instead contracted with Creative Vision for its hoppers.

The National Labor Relations Board (NLRB or Board) is an independent agency charged with the administration of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* Its General Counsel is appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(d). The General Counsel has “final authority” *** in respect of” the issuance of complaints alleging that an individual has committed an unfair labor practice. *Ibid*; see 29 U.S.C. § 160(b).

1. On June 17, 2011, Local 100, United Labor Unions (the “Union”) filed an unfair labor practice charge with the Board against Creative Vision. The Board alleged that Creative Vision, a successor employer, violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing to recognize the union as the representative of a predecessor’s bargaining unit employees (Berry III). The Board alleged that Creative Vision unilaterally set initial terms without first bargaining with the union.

After an investigation, the Regional Director for Region 15 of the NLRB, (Region 15), issued a complaint against Creative Vision on March 30, 2012. Following a hearing in August and September 2012, Administrative Law Judge (ALJ) Keltner W. Locke issued a decision on January 7, 2013.

The ALJ found Creative Vision was an ordinary successor to the predecessor company, Berry III. Specifically, the ALJ found that on June 2, 2011, Creative Vision became an ordinary *Burns* successor to Berry III, as this was the date it began operations and hired a representative complement of employees. Pet.App. 174a-175a. As an ordinary successor, it had an obligation

to recognize and bargain with the union but is also had the right to unilaterally set its own initial terms of employment. Pet.App. 190a. It was not until June 6, 2011 that the Union sent Creative Vision a bargaining demand

Region 15 filed an exception to the ALJ's decision with the NLRB that Creative Vision had the right to set initial terms and conditions of employment. Creative Vision also filed an exception to the ALJ's ruling on the credibility of a witness. On April 18, 2016, Creative Vision filed another exception based upon the recent decision of the U.S. Court of Appeals, District of Columbia Circuit, *SW General Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), cert. granted, 136 S.Ct. 2489 (2016). The exception was based on the alleged violation of the Federal Vacancies Report Act (FVRA) by the NLRB's former Acting General Counsel serving without authorization. Thus, the complaint issued was invalid.

On April 26, 2016, the NLRB's Office of the Executive Secretary stated that the exception was untimely and would not be forwarded to the NLRB for consideration. The next day, April 27, 2016, the NLRB's General Counsel filed a Notice of Ratification, ratifying the alleged unauthorized complaint.

On August 26, 2016, by a bare majority of two to one, the NLRB upheld the ALJ's decision that Creative Vision, as a successor employer, had to recognize and bargain with the union. Pet.App. 75a-127a.

2. The NLRB, however, reversed the ALJ's finding that Creative Vision was an ordinary successor with the right to unilaterally set its initial terms. The NLRB failed to acknowledge this Court's precedent in *Burns*, holding

that a union bargaining demand is required when applying the “perfectly clear” successor exception. In reversing, the NLRB found Creative Vision to have back pay liability.

The dissent agreed with the ALJ’s findings of fact and decision that Creative Vision was an ordinary successor with the right to set its initial terms of employment. Pet. App. 105a-124a.

C. The Fifth Circuit Split With a Majority of Courts and Fifth Circuit Precedent Requiring a Union Bargaining Demand to Trigger a Successor’s Bargaining Obligation

On October 25, 2016, Creative Vision filed a petition for review of the NLRB’s decision with the Fifth Circuit Court of Appeals and the NLRB filed a cross application for enforcement of its decision.

On September 25, 2017, the panel enforced the NLRB’s decision. On November 7, 2017, Creative Vision filed a petition for rehearing en banc. On November 22, 2017 the court ordered the NLRB to respond to the petition. It did on December 18, 2017. On February 14, 2018, the court withdrew its September 17, 2017 decision and substituted a new decision, again enforcing the NLRB’s decision.

The Fifth Circuit held that a union bargaining demand is not required to trigger a successor employer’s bargaining obligation when the “perfectly clear” exception applied. In joining in the reasoning and rationale in the Second Circuit’s *Banknote Corp.* decision, the Fifth Circuit limited *Fall River’s* bargaining demand requirement only to the ordinary successor context. Pet.App. 34a-35a.

As a consequence, the panel held that the cornerstone bargaining demand requirement had no application to determining the trigger date of a “perfectly clear” successor’s obligation to bargain with the union. The panel took the collective holdings of *Burns* and *Fall River* and turned them on their heads. Citing *Banknote Corp.*, the Fifth Circuit stripped out the bargaining demand requirement as “superfluous” because it concluded that a “perfectly clear” successor should “easily discern” that the union will presumptively retain its status as the bargaining representative of the employees. Pet.App. 35a. In so doing, the Fifth Circuit eliminated one of the only two requirements necessary to trigger a successor’s obligation to bargain with a union.

REASONS FOR GRANTING THE PETITION

This case presents the Court the opportunity to resolve the split of authority over whether a successor employer – either ordinary or “perfectly clear” – must first face a union bargaining demand before a duty to bargain with the union is triggered. By removing the requirement of a bargaining demand for a successor employer falling within the narrow “perfectly clear” exception, the Fifth Circuit abandoned the long-understood guidance of this Court in *Burns* and *Fall River Dyeing*.

This Court could not have been more clear when it conditioned both an ordinary and a “perfectly clear” successor employer’s obligation to bargain with the union on satisfying both prongs: (1) the successor’s employment of a “substantial and representative complement” of the predecessor’s employees; and (2) the union’s bargaining demand. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 52 (1987).

This case presents the perfect vehicle for addressing the question presented. It arises out of federal court; the question was directly addressed by both the circuit court and the NLRB, and there is no dispute in the factual record that when Creative Vision unilaterally set its initial terms, there was no bargaining demand asserted. And finally, the decision below presents a solid departure from established Supreme Court precedent, a direct split with a majority of circuit decisions, and an abandoning of directly on point Fifth Circuit authority.

Review and reversal of the decision below is warranted to preserve the integrity of this Court's precedents, to ensure that the requirements of the ongoing, common transactions of mergers, acquisitions, and contract assumptions are understood and followed by the stakeholders – both large and small, to ensure nationwide uniformity on a question of fundamental importance to the regular commercial transactions that are critical to the national economy.

A Clear Conflict Exists Between the Six Circuit Courts That Have Determined Whether a Union Bargaining Demand is Required to Trigger a Successor's Bargaining Obligation

In *NLRB v. Burns*, this Court overturned a line of NLRB decisions, requiring a successor employer be bound to accept the terms of a predecessor employer's collective bargaining agreement. 409 U.S. 272. This Court held that a successor employer may ordinarily set its own initial terms without bargaining with the incumbent union:

Although Burns had an obligation to bargain with the union concerning wage and other conditions of employment when the union requested it to do so, this case is not like a § 8(a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative.

Burns, 409 U.S. at 294.

This Court recognized the difficulty in understanding how a successor employer could be said to have “unilaterally” changed any preexisting term or condition of employment without bargaining “when it had no previous relationship whatsoever to the bargaining unit.” *Id.* While the terms under which Burns hired its employees may have differed from the predecessor’s CBA, “it does not follow that Burns changed its terms and conditions of employment when it specified the initial basis on which the employees were hired” when it began operations. *Burns*, 409 U.S. at 294. Within this context, this Court in *Burns* articulated in dicta an exception to the ordinary successor rule:

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees’ bargaining unit before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has

a duty to bargain with the union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by s 9(a) of the Act, 29 U.S.C. s 159(a). Here, for example, Burns' obligation to bargain with the union did not mature until it had selected its force of guards late in June.

Burns, 409 U.S. at 294-295.

Following *Burns*, the Supreme Court issued another seminal decision in *Fall River*, 482 U.S. 27. In *Fall River*, this Court noted that in *Burns*, the “triggering fact” for a successor’s bargaining obligation was the composition of the successor’s work force. *Id.* at 46. The Court determined the “substantial and representative complement” rule “fix[es] the moment” to determine the composition of the successor’s workforce. *Id.* at 47. “If, at this particular moment, a majority of the successor’s employees had been employed by the predecessor, then the successor has an obligation to bargain ...” *Id.* The employer generally will know with tolerable certainty when all its job classifications have been filled or substantially filled, when it has hired a majority of the employees it intends to hire, and when it has begun normal production.” *Id.* at 50. This Court then held the “successor’s duty to bargain at the substantial and representative complement is triggered only when the union has made a bargaining demand.” *Id.* at 52. This Court found this requirement placed a minimal burden upon the successor to simply check, once it reached its substantial and representative complement, to determine whether there was a union bargaining demand. *Fall River*, 482 U.S. at 52-53.

Contrary to the Fifth Circuit’s application in *Creative Vision*, this Court in *Burns* and *Fall River Dyeing*, never limited the requirement of a union bargaining demand to its successorship doctrine to the ordinary successor scenario. It did not require the bargaining demand for only the ordinary successor and not for the narrow exception of the “perfectly clear” successor. In fact, both *Burns* and *Fall River Dyeing* were ordinary successors because of the absence of a bargaining demand at the time they implemented their initial terms and conditions.

Likewise, the NLRB similarly applied the two-pronged *Fall River Dyeing* requirements in the “perfectly clear” exception context so a union bargaining demand was required to trigger a bargaining obligation. *Cadillac Asphalt Paving Co.*, 349 NLRB 6 (2007). In *Cadillac*, the NLRB specifically held:

Having found that LLC is a successor to Paving, we must determine when LLC’s bargaining obligation with the Teamsters matured. LLC’s bargaining obligation matured when two conditions were met: (1) LLC had hired a substantial and representative complement of employees, a majority of whom had been Teamsters unit employees; and (2) the Teamsters made an effective demand for recognition.

Cadillac Asphalt, 349 NLRB at 9.

In *Cadillac*, the NLRB correctly followed this Court’s precedent finding that an announcement of new terms *after* a union bargaining demand meets the “perfectly

clear” exception. *Cadillac*, 349 NLRB at 9; *Fall River*, 482 U.S. at 52.

Almost all courts of appeal applying *Fall River Dyeing* unequivocally hold that the concurrence of two circumstances is required to trigger a bargaining obligation by a successor: (1) the hiring of a substantial and representative complement of employees, a majority of whom were employed by the predecessor; and (2) the existence of an outstanding demand by the union for recognition or bargaining. See *Nephi Rubber Prods. Corp. v. NLRB*, 976 F.2d 1361, 1365 n. 6 (10th Cir. 1992) (determination of whether successor employer has duty to bargain requires analysis of whether successor has hired substantial and representative complement of employees at time of union’s bargaining demand); *Williams Enters., Inc. v. NLRB*, 956 F.2d 1226, 1232 (D.C. Cir. 1992) (“The presumption of majority support that creates a successor’s duty to bargain arises ... only when ... the new employer has hired a ‘substantial and representative complement’ of its workforce and a majority of that workforce is composed of predecessor employees; and the incumbent union has, at some time, issued a valid bargaining demand to the new employer.”), decision supplemented by 312 N.L.R.B. 937, 1993 WL 402910 (1993), enf’d, 50 F.3d 1280 (4th Cir. 1995); *Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1286-87 (6th Cir. 1989) (“The concurrence of two events is necessary to obligate the successor employer to bargain with the union: the successor’s employment of a ‘substantial and representative complement’ of the predecessor’s employees and the union’s demand for recognition.”) *Aircraft Magnesium, A Division of Grico Corp.*, 730 F.2d 767 (9th Cir. 1984), enf’g, 265 NLRB 1344, 1345 (1982) (“... well settled that the significant time

frame for determining what percentage of a purchaser's employees were former employees of a predecessor is when a demand for bargaining has been made and a representative complement of an employer's work force is on the job."). See also, an earlier decision of the D.C. Circuit, predating *Fall River* which ruled, "But absent a bargaining demand by the union, the successor can simply institute the terms on which the employees were hired as the beginning terms of employment, as was the situation in *Burns*." *Ass'n of Machinists & Aerospace Workers, AFL-CIO v. NLRB*, 595 F.2d 664, 675, fn. 52 (D.C. Cir. 1978).

Even the Fifth Circuit's precedent in *NLRB v. Houston Bldg. Serv., Inc.*, 936 F.2d 178, 180 (5th Cir. 1991), held that when an employer immediately hired all of its predecessor's employees and the union had made a bargaining demand, the successor's obligation to bargain arose because "a majority of the successor's employees had been employed by its predecessor, assuming that the union has made a bargaining demand."

Prior to the Fifth Circuit's decision in *Creative Vision*, the lone outlier in the constellation of successor cases was the Second Circuit's *Banknote* decision, in which the Second Circuit significantly deviated from the bulk of authority on the issue and held that the bargaining demand was not a requirement in every type of *Burns* successorship case for the exception to apply. *Banknote*, 84 F.3d at 645-646. The Second Circuit declined to apply the two-pronged *Fall River* rule. And until *Creative Vision*, its holding and reasoning rightfully stood alone, unaccepted by any other circuit.

Even the NLRB in its decision and in its brief neglected to follow its jurisprudence that a bargaining demand *is required* for the exception to apply. *See Capital Steel & Iron Co.*, 299 NLRB 484, 486; *Fremont Ford Sales, Inc.*, 289 NLRB 1290, 1295 (1988); *Royal Midtown Chrysler Plymouth, Inc.*, 296 NLRB 1039, 1040 (1989). As the Board stated in *Royal Midtown Chrysler Plymouth*:

Successorship does not automatically carry with it the obligation to bargain with the union that represented the predecessor’s employees. Nor does the fact that the union represents a majority of the successor’s employees in an appropriate unit operate alone to invoke the bargaining obligation; and this is so even when the successor has attained a “substantial and representative complement” of employees. The bargaining obligation – albeit potentially present when successorship and representative complement are established – *must be triggered by a demand for recognition or bargaining.*

296 NLRB at 140. If the NLRB had simply followed its established precedent built on the foundation of *Burns* and *Fall River Dyeing* when resolving the issue in *Creative Vision*, no review would have been necessary.

B. Never Before Has a Court Held that the Cancellation or Expiration of a Predecessor’s Contract, the Day Before a Successor Assumes the Contract, Triggers a Successor Employer’s Bargaining Obligation

Neither this Court nor any other federal appellate court, before the Fifth Circuit’s decision in *Creative*

Vision, has held that the cancellation or expiration of a predecessor's contract, the day before a successor hires a majority of the predecessor's employees and commences operations, triggers a successor's bargaining obligation.

Rather, this Court has always tied a successor's obligation to bargain to the trigger event of satisfaction of two requirements: the hiring of a majority of a predecessor's employees and a union bargaining demand. And as *Burns* illustrates, this Court held *Burns*' bargaining obligation triggered on July 9, when the union made its bargaining demand. This Court did not hold that the bargaining obligation triggered on June 30, the day Wackenhut's contract cancelled and the day before *Burns* hired Wackenhut's employees and commenced operations on July 1.

The NLRB and Fifth Circuit, for the first time in successorship jurisprudence, held that the date of the cancellation or expiration of a predecessor's contract, to which a successor is succeeding, triggers a successor's bargaining obligation -- even without the successor having hired any of the predecessor's employees and without a bargaining demand from the union representing those employees. Both held at the date of contract cancellation the intent of a successor like *Creative Vision* is "perfectly clear" because it "plans to retain" the employees in the unit. So, *Creative Vision* had a duty to bargain with the union on the day before it knew whether it could successfully hire *Berry III*'s hoppers and without any notification from the union of a bargaining demand. Stated differently, the last day that *Creative Vision* was an ordinary successor with the right to set its initial terms was the day before the contract was cancelled.

This is solidly in error, as employer intent has only been determinative when a union bargaining demand already exists and is coupled with the hiring of a substantial and representative complement, as set forth in *Burns* and *Fall River Dyeing*. Ignoring these two keystones established by this Court's successorship doctrine, the Fifth Circuit has added another keystone -- the date of the predecessor's contract expiration, which by itself can now trigger a successor's bargaining obligation.

But this unauthorized addition strikes at the heart of this Court's precedent and revises this Court's successorship doctrine with a heavy hand, by injecting an independent "intent" test to the doctrine, which supplants the two requirements set by this Court. In doing this, the Fifth Circuit and the NLRB diminish the recognized right of a successor to set its initial terms and elevate the narrow "perfectly clear" exception to greater stature than the "ordinary" successor rule.

C. The Fifth Circuit's Holding that a Successor Who Announces its New Initial Terms on the Day it begins Operations is Too Late and is Thus a "Perfectly Clear" Successor, Conflicts Directly With this Court's Decision in *Burns*

The panel held that Creative's June 2 announcement of its terms was untimely because it occurred *the same day* the hoppers were hired and operations commenced, subjecting Creative to the "perfectly clear" exception. *Creative*, 2017 WL 4290829 at *8.

This holding conflicts directly with *Burns*. In *Burns*, the predecessor, Wackenhut, had a contract through June

30, 1967. On July 1, Burns took over the contract, hired all the Wackenhut employees, and both announced and set its new terms of employment. *Id.* at 284. The Court found Burns was an “ordinary” successor and timely set its initial terms even though they were announced on the same day as the hiring and beginning of operations. *Id.* at 294-295.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

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June 11, 2018

APPENDIX

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**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT, FILED FEBRUARY 14, 2018**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60715

CREATIVE VISION RESOURCES, L.L.C.,

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner

February 14, 2018, Filed

On Petitions for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board.

Before KING, PRADO, and SOUTHWICK, Circuit
Judges.

KING, Circuit Judge:

The opinion previously issued in this case is withdrawn,
and the following opinion is substituted therefor:

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Creative Vision Resources, L.L.C., succeeded another company as the staffing provider for garbage trucks in New Orleans. It set its own initial terms and conditions of employment instead of bargaining with the incumbent union. The union filed an unfair-labor-practice charge against Creative, alleging violations under Section 8(a) of the National Labor Relations Act. The administrative law judge concluded, among other things, that Creative was not a “perfectly clear” successor and accordingly was within its right to set initial terms and conditions. The National Labor Relations Board reversed. Creative petitions this court for review, while the Board seeks enforcement of its order. We deny Creative’s petition and grant the Board’s petition to enforce.

I. FACTUAL AND PROCEDURAL BACKGROUND¹

Richard’s Disposal is a trash-collection company in the greater New Orleans area. Since 2007, Local 100, United Labor Unions has represented the “hoppers” who ride on the back of Richard’s Disposal’s garbage trucks and pick up trash cans. Until early June 2011, the hoppers were employed by a labor-supply company called Berry III.

Dissatisfied with Berry III’s management practices, Richard’s Disposal’s vice president, Alvin Richard III, decided to form Creative Vision Resources, L.L.C. (“Creative”), to become the new hopper supplier. These unsatisfactory practices, according to the Board’s

1. We draw most of our discussion of the history of the dispute from the decisions of the Board and the administrative law judge. *See Creative Vision Res., LLC*, 364 N.L.R.B. No. 91 (2016).

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decision, included Berry III's "treatment of the hoppers as independent contractors," which meant "Berry III paid the hoppers a flat rate of \$103 per day with no overtime, and made no deductions for taxes or social security."

To prepare for the transition from Berry III to Creative, which was scheduled to take place on May 20, 2011, Richard prepared an employee handbook and safety manual. He also put together employment applications, which, along with federal and state tax forms, were to be distributed to current Berry III hoppers. Richard then personally distributed these applications along with tax forms to about 20 hoppers. He informed them that joining Creative would mean changes in the terms and conditions of their employment, including \$11-per-hour pay with overtime and the deduction of taxes and social security from their paychecks.

Richard also asked a Berry III hopper named Eldridge Flagge to help him pass out applications. Flagge passed out approximately 50 applications and tax forms between mid-May and June 1. Richard testified that he told Flagge of the new terms and conditions; Flagge denied he was told and testified he did not tell the hoppers of the changes in the prospective terms of employment.

Regardless, some of the hoppers learned of the changed terms. One hopper, Anthony Taylor, testified that the hoppers knew of the new pay rate before June 2 because "we all congregate out there in the morning. We been knowing that." A Union official also testified that at least one hopper asked her about the \$11-per-hour pay

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rate. When she asked who told them about the pay cut, “they said they just hear it. They had not heard from any authorized personnel.”

Relevant here, Creative’s employee-selection process was not rigorous. Once Berry III hoppers filled out the application and tax forms, they were hired. Creative did not interview candidates, review qualifications, or check references. Rather, Richard acknowledged that he (and thus Creative) intended to offer a job to any Berry III hopper who applied.

No transition occurred on May 20 because Creative had not received enough applications to fully staff its operations. By June 1, though, Creative had about 70 completed applications from the Berry III hoppers. At this point, Richard’s Disposal cancelled its contract with Berry III. Creative was to start as the new hopper supplier the next day. As the Board found, Creative directly told the hoppers about the new terms on the morning of June 2:

At approximately 4 a.m., the hoppers assembled in the yard as usual, to await assignment to a truck. They were met by former Berry III supervisor, Karen Jackson, whom Richard had hired on June 1. Jackson informed all of the hoppers present that “[t]oday is the day you start working under Creative Vision.” Jackson then explained to them the terms under which they would be working, including, among other things, the \$11-per-hour pay rate, the deduction of Federal and State taxes, and a number of new

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employment standards and safety rules. Some of the hoppers refused to work upon learning of the new terms. A sufficient number of hoppers remained, however, to staff the trucks. Thus, on its first day of operations, [Creative] supplied 44 hoppers to Richard's Disposal, all of whom were formerly employed by Berry III.

Two days later, on June 4, Creative distributed an employee handbook setting out new rules and employment standards. Then, on June 6, after learning that Creative had replaced Berry III and retained the incumbent employees, the Union hand delivered a letter to Creative demanding that it recognize the Union as the hoppers' exclusive representative for collective-bargaining purposes. Creative did not reply.

Shortly thereafter, the Union filed an unfair-labor-practice charge against Creative. Acting on behalf of the Board's Acting General Counsel, a Board Regional Director investigated and issued a complaint in March 2012. The dispute proceeded to a two-day trial, after which the administrative law judge ("ALJ") concluded that Creative violated subsections 8(a)(1) and (5) of the National Labor Relations Act (the "Act") by refusing to recognize the Union. He also concluded that Creative was not a perfectly clear successor because it "did not fail to communicate candidly with the hoppers" about its intent to set initial terms. As such, Creative did not violate the Act by setting initial terms.

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In making this determination, the ALJ relied on the fact that Richard communicated the initial terms of employment to approximately 20 hoppers in May and that a rumor spread among the hoppers that Creative would be paying \$11 per hour. The ALJ also heavily relied on Creative's June 2 announcement of initial terms to the hoppers who were assembled for work and were awaiting assignment.

The Board disagreed with the ALJ in part. It upheld the ALJ's finding that Creative was a successor and therefore violated subsections 8(a)(1) and (5) by refusing to recognize and bargain with the Union. It also concluded that Creative was a perfectly clear successor and had violated the Act by unilaterally imposing initial terms and conditions of employment. In its analysis, the Board looked only to Creative's communications on or before June 1, concluding the June 2 announcement was untimely. The Board concluded that Creative's pre-June 2 communications—Richard's communication of new terms to 20 hoppers, the rumors that reached an unknown number of hoppers, and the inclusion of tax forms with the applications—were insufficient. The Board concluded that the limited notice from these communications “did not negate the inference of probable continuity of employment of the remaining 50 Berry III hopper applicants, who lacked knowledge that their wages and benefits would be reduced.”

One Board member dissented. He concluded that the hoppers were not formally hired until June 2, when they boarded the trucks, so he would have “examine[d] what

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[Creative] communicated to the hoppers *on or before June 2.*” To him, then, the 4:00 a.m. June 2 meeting was enough to give notice of new terms of employment. Even if it were not, though, the tax forms attached to the applications were sufficient in his view because the hoppers did not pay income taxes when employed by Berry III. Finally, Creative’s bargaining obligation was not triggered, and it could therefore unilaterally set new terms of employment, until June 6, the date the Union made its bargaining demand.

Creative now petitions this court for review, while the Board seeks to have its order enforced. Creative does not contest the Board’s holding that Creative violated subsections 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union. “[W]hen an employer does not challenge a finding of the Board, the unchallenged issue is waived on appeal, entitling the Board to summary enforcement.” *Sara Lee Bakery Grp. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008). Thus, the Board is entitled to summary enforcement of the uncontested parts of its order.

II. DISCUSSION

Creative makes three main arguments, two of which relate to the applicability of the perfectly clear successor doctrine. Creative first argues the Board erred by concluding Creative was a perfectly clear successor and thus could not set initial terms and conditions of employment without bargaining with the Union. Creative next argues that it did not violate its bargaining obligation

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because at the time Creative unilaterally set terms, the Union had not sent a bargaining demand. Finally, it argues that the complaint against it, issued on behalf of the Board's former Acting General Counsel, was invalid.

We review the Board's "legal conclusions de novo and its 'factual findings under a substantial evidence standard.'" *Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 207 (5th Cir. 2014) (quoting *Sara Lee Bakery*, 514 F.3d at 428). "Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. It is more than a mere scintilla, and less than a preponderance." *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656 (5th Cir. 2012) (emphasis removed). "We may not reweigh the evidence, try the case de novo, or substitute our judgment for that of the Board, 'even if the evidence preponderates against the [Board's] decision.'" *Id.* (quoting *Brown v. Apfel*, 192 F.3d 492, 496 (5th Cir. 1999)). This does not mean our review is *pro forma* (i.e., it is not merely a "rubber stamp"). *NLRB v. Arkema, Inc.*, 710 F.3d 308, 314 (5th Cir. 2013). We must find the supportive evidence to be substantial. *Id.* at 314-15. On the law, the Board's "interpretation of the NLRA will be upheld 'so long as it is rational and consistent with the Act.'" *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 349 (5th Cir. 2013) (quoting *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991)).

a. "Perfectly Clear" Successor

We begin our analysis of whether Creative was a perfectly clear successor with the relevant statutory

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language. Section 8(a) of the Act provides that “[i]t shall be an unfair labor practice for an employer . . . to interfere with” or “restrain” protected union and organization rights or “to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(1), (5). The employees’ representative is determined by a “majority of the employees” in the appropriate bargaining unit. *Id.* § 159(a). Under the Act, when an employer qualifies as a “successor” to another, it is “bound to recognize and bargain with the union” that represented its predecessor’s employees. *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272, 284, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972).

That bargaining obligation, though, does not mean every successor must abide by its predecessor’s terms and conditions of employment. The Supreme Court in *Burns* rejected a Board rule requiring just that, instead holding that “a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor.” *Id.* at 294. No obligation to bargain before setting initial terms arises in most situations because it will normally not be evident whether the union will retain majority status until after the successor has hired a full complement of employees. *Id.* at 295. Further, the Court expressed concern that “[s]addling” a successor “employer with the terms and conditions of employment contained in the old collective-bargaining contract may make [beneficial] changes impossible and may discourage and inhibit the transfer of capital.” *Id.* at 288. The Board’s rejected rule would have been inconsistent with “[t]he congressional policy manifest in the Act,” which “is to enable parties to

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negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.” *Id.*

The *Burns* Court also identified a narrow exception to that rule, which applies when “it is perfectly clear that the new employer plans to retain all of the employees in the [bargaining] unit and in which it will be appropriate to have [it] initially consult with the employees’ bargaining representative before [it] fixes terms.” *Id.* at 294-95. Thus, two types of successors emerged from *Burns*: an “ordinary” successor, who is “free to set initial terms on which it will hire the employees of a predecessor,” and a “perfectly clear” successor, who must bargain with the employees’ union before changing terms to which its predecessor had agreed. *See id.*

Shortly after *Burns*, the Board decided *Spruce Up*, where it tried to set boundaries for the perfectly clear exception. *See Spruce Up Corp.*, 209 N.L.R.B. 194, 195 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975). In *Spruce Up*, the Board focused not only on whether the successor intended to retain its predecessor’s employees, but also on whether the incumbent employees would accept the successor’s offer of employment. *See id.* Critical to whether the incumbent employees would accept, and thus allow the union to retain majority status, are the successor’s terms of employment. *Id.* As the Board explained:

When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the

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previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer “plans to retain all of the employees in the unit,” as that phrase was intended by the Supreme Court.

Id. The Board cautioned that a broader reading of *Burns*, which focused only on whether the successor intended to retain the employees, would cause successors “to refrain from commenting favorably at all upon employment prospects of old employees” so as to retain their “right to unilaterally set initial terms, a right to which the Supreme Court attache[d] great importance in *Burns*.” *Id.* Instead, under *Spruce Up*’s test, what a new employer must avoid is misleading employees or otherwise failing to provide notice of changing employment terms:

[T]he caveat in *Burns* . . . should be restricted to circumstances in which the new employer has either actively, or by tacit inference, misled employees into believing they would all be retained without changes in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Id. (footnote omitted).

We have summarized the holdings of *Burns* and *Spruce Up* as follows: While “a successor employer is

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ordinarily free to set initial terms on which it will hire its predecessor's employees, when a successor evinces a 'perfectly clear' intention to retain the predecessor's employees, it must consult with their bargaining representative before fixing its own terms." *Adams & Assocs., Inc. v. NLRB*, 871 F.3d 358, 2017 WL 4079063, at *8 (5th Cir. Sept 15, 2017). A successor set on retaining its predecessor's employees may dispel this "perfectly clear" intention by giving employees "prior notice of its intention" to institute its own initial terms or by "hold[ing] itself" as if it will not adhere to the terms of the previous collective-bargaining agreement ("CBA"). *NLRB v. Hous. Bldg. Servs., Inc.*, 128 F.3d 860, 864 n.6 (5th Cir. 1997) (per curiam).

Creative does not dispute that it is a successor, so we focus on whether it was a "perfectly clear" one. The key question here is whether Creative provided sufficient and timely notice of its intent to change the hoppers' terms and conditions of employment, thereby clarifying that it was an ordinary rather than perfectly clear successor.

The Board held that Creative was a perfectly clear successor. To the Board, June 1 rather than June 2 was the date by which Creative had to give notice of its intent to offer employment on different terms, so Creative's June 2 announcement was irrelevant. As to the pre-June 2 communications, the Board concluded: (1) Richard did not tell Flagge about the new terms of employment and therefore Flagge did not tell those terms to the 50 Berry III hoppers he gave applications to; (2) Richard's communication of new terms to approximately 20 Berry

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III hoppers and the subsequent word-of-mouth spread of those new terms were insufficient to put a majority of Creative’s hoppers on notice; and (3) inclusion of tax forms “without explanation, let alone an express announcement that taxes would be withheld from the hoppers’ pay, was too ambiguous” for “a reasonable employee in like circumstances [to] understand that continued employment [was] conditioned on acceptance of materially different terms.” *Creative Vision Res., LLC*, 364 N.L.R.B. No. 91, slip op. at 4-6 & n.12 (2016).

Creative disputes each of these conclusions. It argues that its June 2 announcement of new terms was timely because the announcement preceded the formal hiring of Berry III’s hoppers. Creative also argues that its pre-June 2 communications with the hoppers were sufficient to put them on notice. First, the Board erred by improperly substituting its credibility determinations for the ALJ’s over whether Richard told Flagge of the new terms of employment. Second, the Board erred by rejecting the credited evidence of the word-of-mouth communications between the hoppers. Finally, Creative argues that the Board’s conclusion about the ambiguity of the tax forms “demeans the hoppers,” as any American worker would realize that a tax form indicating that the employer will deduct taxes means the employer intends to do just that.

We consider each of these arguments in turn.

*Appendix A***i. The June 2 Announcement**

The Board's conclusion that Creative's June 2 announcement was untimely is well founded. To reach this conclusion, the Board summarized its past decisions as holding that a successor employer may unilaterally set initial terms of employment if it "clearly announce[s] its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees." *Id.* at 3. But after the successor expresses its intent to retain the predecessor's employees, an announcement of new terms, "even if made before formal offers of employment are extended or the successor commences operations, will not vitiate the bargaining obligation." *Id.* The Board's justification for this prior-or-simultaneous-announcement requirement is as follows:

[A] new employer that expresses an intent to retain the predecessor's work force without concurrently revealing to a majority of the incumbent employees that different terms will be instituted, improperly benefits from the likelihood that those employees, lacking knowledge that terms and conditions will change, will choose to stay in the positions they held with the predecessor, rather than seeking employment elsewhere.

Id. at 6. After stating the legal standard it would apply, the Board found that Creative expressed an intent to retain Berry III's employees between mid-May and June 1.

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This court has briefly spoken twice about the timing of an announcement of new terms and its effect on notice. We recently observed in *Adams & Associates* that a communication of new employment terms through offer letters and employment agreements was untimely because the communication occurred after the successor evinced an intent to retain its predecessor's employees. *Adams & Assocs.*, 871 F.3d 358, 2017 WL 4079063, at *8. In *Houston Building Services*, we opined that a successor may not set its own initial terms if it fails to give “prior notice of its intention” and it “holds itself as if it will adhere to the terms of the previous CBA.” *Hous. Bldg. Servs.*, 128 F.3d at 864 n.6. We turn to our sister circuits for further guidance.

The D.C. Circuit explicated the rationale for prior or simultaneous announcement of new terms in *International Ass'n of Machinists & Aerospace Workers, AFL-CIO v. NLRB*, 595 F.2d 664, 193 U.S. App. D.C. 279 (D.C. Cir. 1978). There, the D.C. Circuit approved of *Spruce Up*'s qualification of *Burns*'s perfectly clear exception. *Id.* at 674. Recall that the *Spruce Up* Board held that it is not “perfectly clear” that a successor “plans to retain all” the predecessor's employees when it also plans to impose new terms on those employees. *Spruce Up*, 209 N.L.R.B. at 195. The successor can reasonably anticipate that some incumbents will balk at and decline the new terms. *See id.* This qualification, while sensible, generates an additional problem, one the D.C. Circuit identified:

[I]n the Board's view . . . the successor . . . may endeavor to conceal, or at least postpone

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publicity on, reemployment objectives in order to avoid the onus of bargaining during the usually difficult period of takeover, and the incumbent employees may thereby be deprived of early appraisal of their retention prospects.

Int'l Ass'n of Machinists, 595 F.2d at 675. To provide an “important measure of protection” against this possibility, the Board adopted and the D.C. Circuit approved a prior-or-simultaneous-announcement requirement. *Id.* at 674. Such a requirement ensures that incumbent employees will not be “lulled into a false sense of security” by a successor’s announcement that it intends to retain the incumbents. *Id.* at 675; *see also S & F Mkt. St. Healthcare LLC v. NLRB*, 570 F.3d 354, 359, 386 U.S. App. D.C. 444 (D.C. Cir. 2009) (“[A]t bottom the ‘perfectly clear’ exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work.”). The D.C. Circuit went on to note that even when a subsequent announcement of new terms occurs before actual hiring, incumbent employees may “lack . . . sufficient time to rearrange their affairs.” *Int'l Ass'n of Machinists*, 595 F.2d at 675 n.49. In those situations, they may “be forced to continue in the jobs they held under the successor employer, notwithstanding notice of diminished terms.” *Id.*

The Seventh Circuit has found this reasoning persuasive. In *Canteen Corp.*, it approved the Board’s rejection of the view “that the obligation to bargain only arose when the employer had failed to announce the initial employment terms prior to, or simultaneously with, the

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extension of unconditional job offers to the predecessor employees.” *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1360, 1364-65 (7th Cir. 1997). Similarly, the Sixth Circuit, in *DuPont Dow*, held that the announcement of new terms before operations commenced but after formal offers were made and accepted came too late. *See DuPont Dow Elastomers, L.L.C. v. NLRB*, 296 F.3d 495, 506 (6th Cir. 2002).

We are persuaded by the Board’s and D.C. Circuit’s reasoning of the wisdom of the prior-or-simultaneous-announcement requirement. We apply it here and find, after careful examination of the record and the Board’s inferences drawn therefrom, that substantial evidence supports the Board’s conclusion that Creative evinced a “perfectly clear” intention to retain the Berry III hoppers by June 1. Thus, Creative’s announcement of new terms on June 2 was untimely.

The record reflects that the shift from Berry III to Creative would be abrupt, so Creative needed to ensure it had hoppers lined up in advance. Creative distributed 70 applications to Berry III hoppers and made no efforts to hire hoppers from other sources.² Creative had no reason

2. Creative argues that it sought applicants from sources other than Berry III’s hoppers. It did not, however, file an exception to the ALJ’s finding to the contrary, and therefore the Board found that Creative was procedurally foreclosed from raising the issue. Under the circumstances, we will not consider this question. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because

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to do so. Richard knew the quality of the hoppers' work, and his dissatisfaction was not with the hoppers but with Berry III's management. Further, finding and training new hoppers would have been a major undertaking, delaying what was supposed to be a rapid transition. Richard did not interview any applicants or perform reference checks on them, and he testified that he was agreeing to hire Berry III hoppers who submitted applications. The distributed applications also contained W-4s—a tax form that is, as the Board noted, typically filled out after an employee is hired. From these facts, the Board inferred that the hiring process was a formality and that Creative sought to hire the Berry III hoppers en masse. And that is just what happened. On June 1, when Creative had enough Berry III applicants, Richard cancelled Berry III's contract with Richard's Disposal. All 44 hoppers Creative employed on the first day of operations were previously employed by Berry III. A reasonable mind could accept such evidence and inferences as sufficient to support the conclusion that by June 1, Creative had evinced a "perfectly clear" intent to retain the Berry III hoppers.

Creative defends using June 2 as the cutoff date, arguing that its whole hiring process was "in flux" up until June 2 when the hoppers hopped on the trucks. It was only at that point that the hoppers were formally hired and it became "perfectly clear" how many would accept Creative's new terms. Creative relies on *Emerald*

of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665, 102 S. Ct. 2071, 72 L. Ed. 2d 398 (1982) (stating that § 160(e) precludes a court of appeals from reviewing claims not raised to the Board).

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Maintenance, Inc. v. NLRB, 464 F.2d 698 (5th Cir. 1972), to argue that the delay caused by insufficient hopper applications and uncertainty over how many hoppers would accept the new terms indicates that the Union’s majority status was not clear “until after the work force had been assembled” on June 2. *See id.* at 701. There, Emerald required the incumbent employees to reapply for their jobs and refused to recognize the union’s referral slips. *Id.* at 700. This refusal contravened its predecessor’s CBA, which required the predecessor to fill all its positions with union members. *Id.* Emerald built up its workforce after commencing operations and hired a significant number of non-incumbents. *Id.* This court found that Emerald was not a perfectly clear successor because “it was not clear that a majority of Emerald employees were union members until after the work force had been assembled.” *Id.* at 701.

Emerald differs in key ways from this case. Unlike Creative’s application process, Emerald’s was not *pro forma*—it hired a significant number of non-incumbents and refused to hire union members simply because they were union. Emerald indicated from the outset that it intended to set its own terms by refusing to follow the terms of the CBA during the application process. Emerald built its workforce after it commenced operations and did so gradually (unlike Creative), making it less evident that the incumbent union’s majority status would continue. Finally, the procedural posture of *Emerald* informs our understanding of it. There, we considered the case without owing deference to a Board finding of perfectly clear successorship. (Remember that *Burns* was decided

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in the interim between the Board's decision in *Emerald* and ours. *Id.* at 699-700.) Here, by contrast, the Board has found that Creative is a perfectly clear successor, and we do not review de novo but for substantial evidence.

Admittedly, Creative did not expressly announce that it intended to retain the hoppers. Its conduct, however, spoke volumes. We agree with the Board, that in limited circumstances, a successor's plan to retain the incumbents will be perfectly clear from its actions and not its words. *See Cadillac Asphalt Paving Co.*, 349 N.L.R.B. 6, 10-11 (2007). That was the case in *Cadillac Asphalt*, where, similarly to here, all the incumbents received applications (with attached W-4s), which were purely for recordkeeping purposes. *See id.* There as well, the successor made no effort to hire non-incumbents. *See id.* at 10. The successor did announce that it was entering into a joint venture with the predecessor. *See id.* at 7, 10-11. But it did not announce that it planned to retain the incumbents. *See id.* Rather, the *Cadillac Asphalt* Board found that the successor's "perfectly clear" intent to retain the incumbents was evinced by its *pro forma* and closed application process. *See id.* at 10-11.

Finally, we note that the facts of this case make it unnecessary for us to consider whether there are some situations where a subsequent announcement of new terms before formal hiring or commencement of operations will be timely. In this case, the June 2 announcement clearly was untimely. The announcement occurred the same day the hoppers were formally hired and Creative's operations commenced. This same-day announcement gave the

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hoppers insufficient time to rearrange their personal affairs.

ii. Pre-June 2 Communications

Having concluded that Creative's June 2 announcement of new terms was untimely, we turn now to whether Creative gave notice of its intent to establish new terms on or before June 1. In analyzing this issue, we consider the cumulative effect of three pre-June 2 communications from Creative to the hoppers: (1) Richard's alleged communication to Flagge about the new terms of employment; (2) Richard's communication of the new terms to about 20 hoppers and the subsequent word-of-mouth exchanges among the hoppers; and (3) the inclusion of tax withholding forms with the job applications. We conclude that all three combined did not provide a majority of Creative's hoppers with sufficient notice of the new terms.

We turn first to Richard's alleged conversations with Flagge. Recall that Flagge, a hopper, spoke to Richard and passed out about 50 applications to other hoppers. There is a dispute about what Richard told Flagge. Richard claimed he told Flagge about the new terms. Flagge denied this. The Board ultimately sided with Flagge, concluding that "Richard did not inform Flagge of the new terms and conditions of employment and, consequently, Flagge did not inform any of the hoppers to whom he gave applications that their terms and conditions would change under [Creative]." *Creative*, 2016 NLRB LEXIS 637 at*4.

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Creative argues that the Board erred by siding with Flagge. In Creative's view, the ALJ credited Richard as "a sincere and meticulous witness," and thus necessarily credited Richard's testimony that he told Flagge the new terms. By reaching the opposite credibility finding than the ALJ, who actually saw the witnesses, the Board's credibility choice was unsupported by substantial evidence.

In making this argument, Creative mischaracterizes the ALJ's and Board's findings. The Board could not have erred in dismissing the ALJ's credibility determination over what Richard told Flagge because the ALJ did not make a credibility determination over what Richard told Flagge. While ALJ "credibility determinations are binding except in rare instances," *Adams & Assocs.*, 871 F.3d 358, 2017 WL 4079063, at *8, no relevant ALJ credibility determination was made here. In order to see why, a detailed review of the ALJ's decision is necessary.

The ALJ began his analysis of Richard's testimony by stating that Richard said that he told Flagge about the new terms. The ALJ then noted that "Flagge's testimony squarely contradicts Richard . . . on this point." *Creative*, 2016 NLRB LEXIS 637 at *85 (ALJ op.). Flagge said that Richard did not tell him anything about the new terms. The ALJ then moved to a separate issue in Richard's testimony regarding how he had passed out applications to about 20 other hopppers and told them about the new terms. Regarding this testimony, the ALJ noted that the hopppers did not corroborate Richard's testimony. But the ALJ also noted that other factors made Richard appear

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credible, such as Richard's appearance as a meticulous witness. Thus, the ALJ was confronted with whether to credit Richard's testimony about two different purported communications: (1) what Richard told Flagge, and (2) what Richard told the 20 hoppers.

Given this context, the ALJ's finding becomes clear. The ALJ credited Richard's testimony only with respect to what he told the 20 hoppers, not with respect to what he told Flagge. Specifically, the ALJ's credibility finding on this point was the following:

This finding, that hoppers working for Berry III learned some information about [Creative] from Jackson, does not contradict Richard['s] . . . testimony that he informed hoppers about [Creative's] initial terms of employment. Although Richard['s] . . . testimony is uncorroborated, *it is also uncontradicted*. Moreover, it is consistent with the fact that at least some hoppers knew about the contemplated \$11-per-hour wage rate.

Further, as discussed above, Richard . . . appeared to be a sincere and meticulous witness. For these reasons, I credit his testimony that he told some of the hoppers—those to whom he gave employment application forms—that [Creative] would be paying an \$11-per-hour wage, would guarantee 8 hours of employment per day, would pay overtime for hours worked in excess of 40 per week, and

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would withhold taxes from their paychecks. Based on Richard[‘s] . . . credited testimony, I also find that he told these hoppers that [Creative] guaranteed four holidays.

2016 NLRB LEXIS 637 at *94.

As the emphasized portion highlights, the ALJ’s credibility finding relates only to Richard’s testimony that he told the 20 hoppers about the new terms. How could the ALJ credit Richard’s testimony about his communications with Flagge as “uncontradicted” when the ALJ explicitly described that testimony earlier as being “squarely contradict[ed]?” Instead, the ALJ’s finding should be read to mean what it says: the ALJ credited Richard’s uncorroborated and uncontradicted testimony about what he told the 20 hoppers, not the contradicted testimony about what he told Flagge.

And this reading makes sense. This is not a case where the ALJ implicitly but necessarily resolved a credibility dispute. In the ALJ’s eyes, Richard telling 20 hoppers about the new terms was sufficient (among other circumstances, including the June 2 communications) to evade the perfectly clear exception. The ALJ therefore had no reason to decide whether Richard or Flagge was being truthful with respect to their conversation because the ALJ’s conclusion did not hinge on that determination. Finally, we note that the Board’s reading of the ALJ’s decision appears to match our own. The Board never stated that it was dismissing an ALJ credibility determination. In fact, with regard to the ALJ’s credibility findings, the

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Board expressly stated that it found no basis for reversing the findings. 2016 NLRB LEXIS 637 at *2 n.1.

We are left with a situation in which the ALJ did not make a credibility finding for this dispute and the Board found that “Richard did not inform Flagge of the new terms and conditions of employment.” 2016 NLRB LEXIS 637 at *4. Under these circumstances—where (1) the ALJ did not resolve the factual dispute raised by the conflicting testimony (Richard’s and Flagge’s competing versions of their conversation); (2) there is a clear Board finding (Richard did not tell Flagge about the new terms); and (3) the ALJ credited both witnesses with respect to other conversations (Richard’s uncontradicted testimony about what he told the 20 hoppers, and Flagge’s uncontradicted testimony about what he did not tell the other hoppers)—we will not disturb the Board’s finding under the substantial evidence standard of review.

But even if the ALJ made a credibility determination that the Board overrode, the credibility choice is ultimately irrelevant. Both the ALJ and the Board agree that Flagge never communicated the new terms to the hoppers. Because Flagge never passed along Richard’s message, no additional employees were put on notice of the new terms. *See Adams & Assocs.*, 871 F.3d 358, 2017 WL 4079063, at *8 n.6 (observing that the notice inquiry “is conducted from the employees’ perspective” (citing *Fall River Dyeing & Furnishing Corp. v. NLRB*, 482 U.S. 27, 43-44, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987); *NLRB v. Hous. Bldg. Serv., Inc.*, 936 F.2d 178, 180 n.1 (5th Cir. 1991))).

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We next consider Richard’s communication of new terms to about 20 hoppers (plus the subsequent informal word-of-mouth exchanges between the hoppers). These communications were insufficient to put a majority of Creative’s workforce on notice of the new terms. Although the *Burns* Court and *Spruce Up* Board spoke in terms of a plan “to retain all of the employees in the unit,” the Board and lower courts have subsequently recognized that the relevant inquiry is whether the successor planned to retain enough of the predecessor’s employees so that the union’s majority status will continue.³ Such a rule is sensible, and the Board’s reasoning shows why. Here, the Board reasoned that allowing a successor to communicate its new terms to a minority of its incumbent employees would invite abuse. A new employer “would be encouraged to announce changes in preexisting terms only to a select few incumbent employees, while allowing the majority of

3. See *Galloway Sch. Lines*, 321 N.L.R.B. 1422, 1427 (1996) (“To summarize, the duty to bargain may not arise when initial employment terms are set because it may not be evident at that time that the union’s majority status in the old work force will continue in the new one. However, in other situations, it may be apparent from the new employer’s hiring plan that the union’s majority status will continue, and then the new employer is required to bargain over initial terms.”); see also *DuPont Dow*, 296 F.3d at 500-01 (“But where it is ‘perfectly clear’ that the new employer intends to retain the unionized employees of its predecessor as a *majority* of its own work force under essentially the same terms as their former employment, the new employer becomes a ‘perfectly clear successor’ and must bargain with the union.” (emphasis added)); *Canteen Corp.*, 103 F.3d at 1361-62 (“The Court thus established that a successor would be required to bargain with the union before setting its initial terms of hiring when it was clear that it intended to hire a *majority* of the predecessor’s workforce.” (emphasis added)).

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employees to be lulled by its silence into not seeking other work.” *Creative*, 2016 NLRB LEXIS 637 at *21. Like the Board, we conclude that such a result would be at odds with *Burns* and *Spruce Up*.

The word-of-mouth spread of the new terms to some hoppers does not change this result. Both the ALJ and the Board found that “the record affords no way of quantifying how many of the hoppers had learned about the \$11 per hour wage rate or the other terms and conditions of employment before they reported for work . . . on June 2.” *Id.* Neither witness who testified that the hoppers knew of the new pay rate before June 2 said how many hoppers were privy.⁴ It was reasonable for the Board to conclude

4. The ALJ, relying on the testimony of one hopper, Kumasi Nicholas, also found that *Creative* notified some other hoppers about the new terms in advance of the June 2 meeting. The Board found that Nicholas’s testimony did not support a finding that the hoppers were told of the new terms in advance. On direct examination, Nicholas was asked, “[W]hat happened on the very first day that [*Creative*] began operations[?]” Nicholas responded, “Well, they told us ahead of time—Mrs. Jackson told us ahead of time, you know, might be switching over to another little company where—you know, a pay rate, and she just let us know ahead of time, and then that’s when, you know, they started off.” An effort to clarify whether Nicholas learned about the pay rate before the June 2 meeting produced the response, “I’m not sure. It’s been about a year. . . . I know she told me that, but I’m not sure.” *Creative*, 2016 NLRB LEXIS 637 at *19 n.13.

We will not disturb the Board’s conclusion. We acknowledge that when “the Board disagrees with the ALJ’s findings, this court examines the findings of the Board more critically than it would have done had the Board agreed with the ALJ.” *Tex. World Serv. Co., Inc. v. NLRB*, 928 F.2d 1426, 1430 (5th Cir. 1991). “But this court still sustains the Board’s findings if the record taken as a whole

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that a majority of the incumbent hoppers were not put on notice through Richard's communication of new terms to about 20 hoppers and subsequent word of mouth.

The Board also found that, from the hoppers' perspective, the new pay rate was unsubstantiated rumor or gossip and therefore could not constitute a clear announcement of the new terms. Taylor, the hopper who testified that he learned about the new pay rate before June 2, could not identify his source of information. The Union official, who received a call from hoppers claiming they heard Creative would pay only \$11 per hour, said the hoppers could not confirm where their information came from. We will not disturb the Board's reasonable conclusion that, as rumor and gossip with no clear source, the new terms were not clearly announced. Such a conclusion makes sense given that the purpose of a clear announcement is to give incumbent employees an opportunity to reshape their personal affairs. It is reasonable to conclude that an employee would not reshape his or her personal affairs (i.e., begin searching for new work) because he or she overhears uncorroborated rumors.

contains substantial evidence to support those findings." *Id.* at 1431. "Provided substantial evidence exists, this court cannot reverse the Board's decision when the Board and the ALJ merely draw different inferences from established facts." *Id.* Here, the Board merely drew a different inference (that Nicholas learned of the new terms at the June 2 meeting) from facts the ALJ and Board shared. Based on the ambiguity of Nicholas's response and the uncertainty with which he delivered it, we find that substantial evidence supports the Board's finding.

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Turning lastly to the tax withholding forms, we conclude that the Board's decision, finding these forms insufficient to put the hoppers on notice, is supported by substantial evidence. Certainly, the tax forms conspicuously note that their purpose is to allow an employer to withhold taxes and social security. Creative argues that such a withholding would fundamentally change the hoppers' terms of employment, as (so the argument goes) it would convert them from independent contractors to employees. Creative further argues that with this information, the hoppers should have deduced that the forms signaled a change in their terms of employment.

While Creative's argument is reasonable, the Board's finding is even more so. The Board concluded that the inclusion of the tax forms was too ambiguous to constitute sufficient notice. In doing so, the Board pointed out that it was unclear whether the hoppers filled out tax forms for Berry III. Had they previously done so, Creative's inclusion of tax forms would not clearly signal a change in employment terms. Further, the Board observed that no evidence existed that the hoppers considered themselves independent contractors rather than employees. Absent knowledge of their alleged original status as independent contractors, the hoppers would be unable to deduce that a tax withholding would change that status. Finally, a number of hoppers wrote that they were exempt from paying taxes on the forms, indicating that the tax forms did not signal to the hoppers that a change in tax collection practices was imminent. Indeed, none of the hoppers testified that they understood that Creative planned to deduct taxes from their pay before

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the June 2 announcement. Given both the ambiguity of the announcement and the multistep deductions required for an employee to identify the change in employment terms, we determine that the Board's conclusion that the tax forms did not put the hoppers on notice is supported by substantial evidence. *See Rosdev Hosp., Secaucus, LP & La Plaza, Secaucus, LLC*, 349 N.L.R.B. 202, 207 (2007) (ALJ op.) (“[T]o the extent an employer’s pretakeover announcement contains ambiguities regarding the terms and conditions of employment offered to employees, such ambiguities will be resolved against the employer.”).

The two cases Creative cites to support its argument that the inclusion of tax forms was sufficient notice—*S & F Market* and *Ridgewell’s*—in fact demonstrate the reasonableness of the Board’s position. Both present situations in which the notice at issue explicitly stated the new terms. No multistep deductions were required on the part of the employees. In *S & F Market*, the new employer included a cover letter with each job application that promised “significant operational changes,” identified various pre-employment checks and tests to be passed, and required the applicant to affirm his or her understanding that the employment offered would be temporary and at will. *S & F Mkt.*, 570 F.3d at 356. The panel concluded that “the employees *had every indication*—from S & F’s job applications, interviews, and letters offering employment—that S & F intended to institute new terms of employment.” *Id.* at 360 (emphasis added). Similarly, in *Ridgewell’s*, the new employer announced to the union during a meeting that it would change the workers’ statuses from employees to independent contractors. *Ridgewell’s*

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Inc., 334 N.L.R.B. 37, 37 (2001). The announcement “clearly signaled that the [new employer’s] initial terms and conditions of employment would differ.” *Id.*

To be clear, a new employer need not produce an itemized list of changes to employment terms. But the inclusion of tax forms in this case falls well short of the simple and direct announcements in *S & F Market* (via a cover letter with the job application) and *Ridgewell’s* (during a meeting with the union).

We acknowledge that this case does not present facts indicating that Creative endeavored to create an impression that it would keep Berry III’s terms. This case is therefore slightly dissimilar from *DuPont Dow* and *Elf Atochem*, two opinions the Board cites to support its decision. In *DuPont Dow*, a single sentence in a memorandum distributed to the employees stated that the new employer would set initial terms. *DuPont Dow*, 296 F.3d at 503. This single sentence was not “sufficiently clear and definite to overcome the impression carefully created by the Company that the terms and conditions would remain the same.” *Id.* Similarly, in *Elf Atochem*, the new employer told the employees it would offer “comparable” terms and conditions and then reneged. *Elf Atochem N. Am., Inc.*, 339 N.L.R.B. 796, 808 (2003).

But while the case before us is distinguishable from *DuPont Dow* and *Elf Atochem*, the distinction is not dispositive. The *Spruce Up* Board did not limit the perfectly clear exception to situations where employees are actively misled. Rather, the Board warned that employees

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could be misled merely through “tacit inference.” *Spruce Up*, 209 N.L.R.B. at 195. Indeed, even when employees “are not affirmatively led to believe that existing terms will be continued,” the expression of intent to retain the incumbents can, by itself, “engender expectations,” causing employees to “forego the reshaping of personal affairs.” *Int’l Ass’n of Machinists*, 595 F.2d at 674.

b. Necessity of a Bargaining Demand

Creative’s next argument is that it did not violate its bargaining obligation because at the time Creative unilaterally set terms, the Union had not sent a bargaining demand. It relies on *Fall River Dyeing & Furnishing Corp v. NLRB*, to argue that all successors are free to set initial terms before the union demands bargaining. Creative’s duty to bargain was therefore not triggered until the Union’s demand on June 6, four days after Creative announced its initial terms.

We find this argument meritless. As the Board pointed out, *Fall River*’s demand rule “developed in a very different context,” namely the ordinary successor context. *Creative*, 2016 NLRB LEXIS 637 at *25. The Board concluded that nothing in the language or the reasoning of *Fall River* supports the demand rule’s extension to the perfectly clear successor context. A full digression into *Fall River* and cases interpreting it shows why.

In *Fall River*, the Supreme Court addressed when an ordinary successor’s obligation to bargain with an incumbent union attaches. *See Fall River*, 482

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U.S. at 30. The successor in that case restarted its predecessor's operations following a seven month hiatus and gradually built its workforce. *Id.* at 32-33, 45. As a result of this gradual buildup, the percentage of the successor's workforce composed of its predecessor's employees fluctuated. *See id.* at 47. Due to this ongoing fluctuation, the Court was tasked with setting the proper moment to check to see if the majority of the successor's workforce was composed of its predecessor's employees. *See id.* To set this moment, the Court adopted the "substantial and representative complement" rule. *Id.* A successor's bargaining obligation is triggered when it hires a "substantial and representative complement" of its workforce, a majority of which had previously been employed by its predecessor. *Id.* But a bargaining obligation only triggers at this moment if the union has made a bargaining demand. *Id.* at 52. The Court reasoned that the combination of the "substantial and representative complement" rule as well as the demand rule would avoid placing "an unreasonable burden" on the employer to determine when its bargaining obligation attaches. *See id.* at 50. "Once the employer has concluded that it has reached the appropriate complement, then, in order to determine whether its duty to bargain will be triggered, it has only to see whether the union already has made a demand for bargaining." *Id.* at 52-53.

Importantly, however, the *Fall River* Court suggested that in some situations the composition of the employer's workforce alone may trigger a duty to bargain. The *Fall River* Court observed that the "'triggering' fact for the bargaining obligation" in *Burns* was the "composition of

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the successor’s work force.” *Id.* at 46. The Court noted that in *Burns* the predecessor’s “contract expired on June 30 and [the successor] began its services with a majority of [the predecessor’s] guards on July 1.” *Id.* at 47; *see Burns*, 406 U.S. at 275. There was no “start-up period by the new employer while it gradually buil[t] its operations and hire[d] employees.” *Fall River*, 482 U.S. at 47.

No case Creative cites has extended the demand requirement that *Fall River* established for ordinary successors to perfectly clear successors.⁵ Tellingly, not all courts even extend the demand requirement to all ordinary successor cases. The Second Circuit in *Banknote Corp.*, limited the demand rule to factual circumstances analogous to *Fall River*—i.e., where there is a “gradual or staggered hiring” or “a significant hiatus in operations.” *Banknote Corp. of Am. v. NLRB*, 84 F.3d 637, 646 (2d Cir. 1996). In those cases, a bargaining demand has an important function as there “may be considerable doubt as to whether a union that enjoyed the support of a majority of a predecessor’s bargaining unit continues to do so under the successor’s operation.” *Id.* at 645. But when

5. *Cadillac Asphalt*, the one case Creative cites as applying the demand rule in the perfectly-clear-successor context, actually supports the contention that a perfectly clear successor’s obligation to bargain over initial terms may arise before a union demand. In *Cadillac Asphalt*, the union’s demand came after Cadillac changed its terms and conditions. *See Cadillac Asphalt*, 349 N.L.R.B. at 7-8. Cadillac stopped contributing to its employee’s union benefit fund on July 16. *Id.* at 7. The union’s response came two days later, on July 18. *Id.* Nevertheless, the Board held that Cadillac was a perfectly clear successor and ordered it to make employees whole for its failure to make benefit fund payments starting on July 16. *Id.* at 13.

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the successor engages in “a rapid transition period with the immediate hiring of a full employee complement,” the rationale for the demand rule dissipates. *Id.* at 646. In those cases, the successor will be able to “easily discern its obligation to presume that the [union] continued to enjoy majority status.” *Id.* at 645-46.

While this court has indicated that a union bargaining demand is required to trigger a bargaining obligation in the ordinary successor context, *see Hous. Bldg. Serv.*, 936 F.2d at 180, we find *Banknote*'s reasoning persuasive for the perfectly clear successor context. Self-evident as it may be, the perfectly clear exception only applies when it is “perfectly clear” that the union’s majority status will survive the transition from predecessor to successor. *See Burns*, 406 U.S. at 294-95. Accordingly, sending a bargaining demand to a perfectly clear successor would be superfluous because the new employer would be able to “easily discern” from the outset that the union will presumptively retain its majority status during the transition. *See Banknote Corp.*, 84 F.3d at 645-46. We therefore decline to require a union bargaining demand to trigger a perfectly clear successor’s duty not to unilaterally set initial terms of employment. In perfectly clear successor cases, the “composition of the successor’s work force” alone is the “‘triggering’ fact for the bargaining obligation.” *See Fall River*, 482 U.S. at 46.

c. Validity of the Complaint

Finally, Creative argues the Board’s complaint was void because it was issued on behalf of Acting General

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Counsel Lafe Solomon, who at the time was serving in violation of the Federal Vacancies Reform Act (“FVRA”). The Board contends we lack jurisdiction to hear this argument because Creative was untimely in making it. Even if we have jurisdiction, the Board contends that the later General Counsel ratified the complaint, effectively curing any defect.

“[T]he FVRA prevents a person who has been nominated for a vacant PAS [Presidential nomination and Senate confirmation] office from performing the duties of that office in an acting capacity.” *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 938, 197 L. Ed. 2d 263 (2017). Solomon’s nomination was pending in the Senate from January 2011 to January 2013. *Id.* at 937. During that time, Solomon was serving as Acting General Counsel. *See id.* The FVRA prohibited him from doing so. *Id.* at 944. The complaint in this case was filed in March 2012 while Solomon was serving as Acting General Counsel in violation of the FVRA. Creative thus argues that the complaint was void and “may not be ratified.” *See SW Gen., Inc. v. NLRB*, 796 F.3d 67, 71, 78, 418 U.S. App. D.C. 67 (D.C. Cir. 2015), *aff’d*, 137 S. Ct. 929, 197 L. Ed. 2d 263 (2017).⁶

6. Creative’s argument relies on the general rule that actions taken in violation of the FVRA are void *ab initio*. The FVRA, however, expressly exempts “the General Counsel of the National Labor Relations Board” from this rule. 5 U.S.C. § 3348(e)(1). The D.C. Circuit has left open whether the actions of an improperly serving Acting General Counsel are voidable or instead “wholly insulate[d] . . . even in the event of an FVRA violation.” *SW Gen.*, 796 F.3d at 79. We express no view on that question.

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The Board responds by arguing the NLRA precludes our consideration of this issue. It relies on Section 10(e), which provides: “No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). Creative did not challenge Solomon’s authority when it filed its exceptions to the ALJ’s decision in February 2013. Creative did not object until April 2016, and the Board concluded the objection was untimely. *See* 29 C.F.R. § 102.2(d)(1); *see also id.* § 102.46(f). Creative does not now argue that its exceptions were timely or that it has shown extraordinary circumstances. *See Indep. Elec. Contractors of Hous., Inc. v. NLRB*, 720 F.3d 543, 550-52 (5th Cir. 2013). Such arguments are forfeited. *See SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 784 (5th Cir. 2017). We have held untimely objections to be waived under Section 10(e). *See Hallmark Phx. 3, L.L.C. v. NLRB*, 820 F.3d 696, 712-13 (5th Cir. 2016). Because Creative did not timely object to Solomon’s authority to file the complaint, our review of any such argument is barred. *See* 29 U.S.C. § 160(e); *Hallmark*, 820 F.3d at 713.

III. CONCLUSION

For the foregoing reasons, we deny Creative’s petition and grant enforcement of the Board’s order.

**APPENDIX B — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT, FILED SEPTEMBER 25, 2017**

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

No. 16-60715

CREATIVE VISION RESOURCES, L.L.C.,

Petitioner Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner.

September 25, 2017, Filed

On Petition for Review and Cross-Application
for Enforcement of an Order of the National
Labor Relations Board.

Before KING, PRADO, and SOUTHWICK, Circuit
Judges.

KING, Circuit Judge:

Creative Vision Resources, L.L.C., succeeded another company as the staffing provider for garbage trucks in New Orleans. It set its own initial terms and conditions of employment instead of bargaining with the incumbent union. The union filed an unfair-labor-practice charge

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against Creative, alleging violations under Section 8(a) of the National Labor Relations Act. The administrative law judge concluded, among other things, that Creative was not a “perfectly clear” successor and accordingly was within its right to set initial terms and conditions. The National Labor Relations Board reversed. Creative petitions this court for review, while the Board seeks enforcement of its order. We deny Creative’s petition and grant the Board’s petition to enforce.

I. FACTUAL AND PROCEDURAL BACKGROUND¹

Richard’s Disposal is a trash-collection company in the greater New Orleans area. Since 2007, Local 100, United Labor Unions has represented the “hoppers” who ride on the back of Richard’s Disposal’s garbage trucks and pick up trash cans. Until early June 2011, the hoppers were employed by a labor-supply company called Berry III.

Dissatisfied with Berry III’s management practices, Richard’s Disposal’s vice president, Alvin Richard III, decided to form Creative Vision Resources, L.L.C. (“Creative”), to become the new hopper supplier. These unsatisfactory practices, according to the Board’s decision, included Berry III’s “treatment of the hoppers as independent contractors,” which meant “Berry III paid the hoppers a flat rate of \$103 per day with no overtime, and made no deductions for taxes or social security.”

1. We draw most of our discussion of the history of the dispute from the decisions of the Board and the administrative law judge. *See Creative Vision Res., LLC*, 364 N.L.R.B. No. 91 (2016).

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To prepare for the transition from Berry III to Creative, which was scheduled to take place on May 20, 2011, Richard prepared an employee handbook and safety manual. He also put together employment applications, which, along with federal and state tax forms, were to be distributed to current Berry III hoppers. Richard then personally distributed these applications along with tax forms to about 20 hoppers. He informed them that joining Creative would mean changes in the terms and conditions of their employment, including \$11-per-hour pay with overtime and the deduction of taxes and social security from their paychecks.

Richard also asked a Berry III hopper named Eldridge Flagge to help him pass out applications. Flagge passed out approximately 50 applications and tax forms between mid-May and June 1. Richard testified that he told Flagge of the new terms and conditions; Flagge denied he was told and testified he did not tell the hoppers of the changes in the prospective terms of employment.

Regardless, some of the hoppers learned of the changed terms. One hopper, Anthony Taylor, testified that the hoppers knew of the new pay rate before June 2 because “we all congregate out there in the morning. We been knowing that.” A Union official also testified that at least one hopper asked her about the \$11-per-hour pay rate. When she asked who told them about the pay cut, “they said they just hear it. They had not heard from any authorized personnel.”

Relevant here, Creative’s employee-selection process was not rigorous. Once Berry III hoppers filled out the

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application and tax forms, they were hired. Creative did not interview candidates, review qualifications, or check references. Rather, Richard acknowledged that he (and thus Creative) intended to offer a job to any Berry III hopper who applied.

No transition occurred on May 20 because Creative had not received enough applications to fully staff its operations. By June 1, though, Creative had about 70 completed applications from the Berry III hoppers. At this point, Richard's Disposal cancelled its contract with Berry III. Creative was to start as the new hopper supplier the next day. As the Board found, Creative directly told the hoppers about the new terms on the morning of June 2:

At approximately 4 a.m., the hoppers assembled in the yard as usual, to await assignment to a truck. They were met by former Berry III supervisor, Karen Jackson, whom Richard had hired on June 1. Jackson informed all of the hoppers present that "[t]oday is the day you start working under Creative Vision." Jackson then explained to them the terms under which they would be working, including, among other things, the \$11-per-hour pay rate, the deduction of Federal and State taxes, and a number of new employment standards and safety rules. Some of the hoppers refused to work upon learning of the new terms. A sufficient number of hoppers remained, however, to staff the trucks. Thus, on its first day of operations, [Creative] supplied 44 hoppers to Richard's Disposal, all of whom were formerly employed by Berry III.

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Two days later, on June 4, Creative distributed an employee handbook setting out new rules and employment standards. Then, on June 6, after learning that Creative had replaced Berry III and retained the incumbent employees, the Union hand delivered a letter to Creative demanding that it recognize the Union as the hoppers' exclusive representative for collective-bargaining purposes. Creative did not reply.

Shortly thereafter, the Union filed an unfair-labor-practice charge against Creative. Acting on behalf of the Board's Acting General Counsel, a Board Regional Director investigated and issued a complaint in March 2012. The dispute proceeded to a two-day trial, after which the administrative law judge ("ALJ") concluded that Creative violated subsections 8(a)(1) and (5) of the National Labor Relations Act (the "Act") by refusing to recognize the Union. He also concluded that Creative was not a perfectly clear successor because it "did not fail to communicate candidly with the hoppers" about its intent to set initial terms. As such, Creative did not violate the Act by setting initial terms.

In making this determination, the ALJ relied on the fact that Richard communicated the initial terms of employment to approximately 20 hoppers in May and that a rumor spread among the hoppers that Creative would be paying \$11 per hour. The ALJ also heavily relied on Creative's June 2 announcement of initial terms to the hoppers who were assembled for work and were awaiting assignment.

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The Board disagreed with the ALJ in part. It upheld the ALJ's finding that Creative was a successor and therefore violated subsections 8(a)(1) and (5) by refusing to recognize and bargain with the Union. It also concluded that Creative was a perfectly clear successor and had violated the Act by unilaterally imposing initial terms and conditions of employment. In its analysis, the Board looked only to Creative's communications on or before June 1, concluding the June 2 announcement was untimely. The Board concluded that Creative's pre-June 2 communications—Richard's communication of new terms to 20 hoppers, the rumors that reached an unknown number of hoppers, and the inclusion of tax forms with the applications—were insufficient. The Board concluded that the limited notice from these communications “did not negate the inference of probable continuity of employment of the remaining 50 Berry III hopper applicants, who lacked knowledge that their wages and benefits would be reduced.”

One Board member dissented. He concluded that the hoppers were not formally hired until June 2, when they boarded the trucks, so he would have “examine[d] what [Creative] communicated to the hoppers *on or before June 2.*” To him, then, the 4:00 a.m. June 2 meeting was enough to give notice of new terms of employment. Even if it were not, though, the tax forms attached to the applications were sufficient in his view because the hoppers did not pay income taxes when employed by Berry III. Finally, Creative's bargaining obligation was not triggered, and it could therefore unilaterally set new terms of employment, until June 6, the date the Union made its bargaining demand.

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Creative now petitions this court for review, while the Board seeks to have its order enforced. Creative does not contest the Board’s holding that Creative violated subsections 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union. “[W]hen an employer does not challenge a finding of the Board, the unchallenged issue is waived on appeal, entitling the Board to summary enforcement.” *Sara Lee Bakery Grp. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008). Thus, the Board is entitled to summary enforcement of the uncontested parts of its order.

II. DISCUSSION

Creative makes three main arguments, two of which relate to the applicability of the perfectly clear successor doctrine. Creative first argues the Board erred by concluding Creative was a perfectly clear successor and thus could not set initial terms and conditions of employment without bargaining with the Union. Creative next argues that it did not violate its bargaining obligation because at the time Creative unilaterally set terms, the Union had not sent a bargaining demand. Finally, it argues that the complaint against it, issued on behalf of the Board’s former Acting General Counsel, was invalid.

We review the Board’s “legal conclusions *de novo* and its ‘factual findings under a substantial evidence standard.’” *Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 207 (5th Cir. 2014) (quoting *Sara Lee Bakery*, 514 F.3d at 428). “Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as

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adequate to support a conclusion. It is more than a mere scintilla, and less than a preponderance.” *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656 (5th Cir. 2012) (emphasis removed). “We may not reweigh the evidence, try the case *de novo*, or substitute our judgment for that of the Board, ‘even if the evidence preponderates against the [Board’s] decision.” *Id.* (quoting *Brown v. Apfel*, 192 F.3d 492, 496 (5th Cir. 1999)). This does not mean our review is *pro forma* (i.e., it is not merely a “rubber stamp”). *NLRB v. Arkema, Inc.*, 710 F.3d 308, 314 (5th Cir. 2013). We must find the supportive evidence to be substantial. *Id.* at 314-15. On the law, the Board’s “interpretation of the NLRA will be upheld ‘so long as it is rational and consistent with the Act.” *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 349 (5th Cir. 2013) (quoting *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991)).

a. “Perfectly Clear” Successor

We begin our analysis of whether Creative was a perfectly clear successor with the relevant statutory language. Section 8(a) of the Act provides that “[i]t shall be an unfair labor practice for an employer . . . to interfere with” or “restrain” protected union and organization rights or “to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(1), (5). The employees’ representative is determined by a “majority of the employees” in the appropriate bargaining unit. *Id.* § 159(a). Under the Act, when an employer qualifies as a “successor” to another, it is “bound to recognize and bargain with the union” that represented its predecessor’s employees. *NLRB v. Burns Int’l Sec.*

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Servs., Inc., 406 U.S. 272, 284, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972).

That bargaining obligation, though, does not mean every successor must abide by its predecessor's terms and conditions of employment. The Supreme Court in *Burns* rejected a Board rule requiring just that, instead holding that "a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor." *Id.* at 294. No obligation to bargain before setting initial terms arises in most situations because it will normally not be evident whether the union will retain majority status until after the successor has hired a full complement of employees. *Id.* at 295. Further, the Court expressed concern that "[s]addling" a successor "employer with the terms and conditions of employment contained in the old collective-bargaining contract may make [beneficial] changes impossible and may discourage and inhibit the transfer of capital." *Id.* at 288. The Board's rejected rule would have been inconsistent with "[t]he congressional policy manifest in the Act," which "is to enable parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities." *Id.*

The *Burns* Court also identified a narrow exception to that rule, which applies when "it is perfectly clear that the new employer plans to retain all of the employees in the [bargaining] unit and in which it will be appropriate to have [it] initially consult with the employees' bargaining representative before [it] fixes terms." *Id.* at 294-95. Thus, two types of successors emerged from *Burns*: an

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“ordinary” successor, who is “free to set initial terms on which it will hire the employees of a predecessor,” and a “perfectly clear” successor, who must bargain with the employees’ union before changing terms to which its predecessor had agreed. *See id.*

Shortly after *Burns*, the Board decided *Spruce Up*, where it tried to set boundaries for the perfectly clear exception. *See Spruce Up Corp.*, 209 N.L.R.B. 194, 195 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975). In *Spruce Up*, the Board focused not only on whether the successor intended to retain its predecessor’s employees, but also on whether the incumbent employees would accept the successor’s offer of employment. *See id.* Critical to whether the incumbent employees would accept, and thus allow the union to retain majority status, are the successor’s terms of employment. *Id.* As the Board explained:

When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer “plans to retain all of the employees in the unit,” as that phrase was intended by the Supreme Court.

Id. The Board cautioned that a broader reading of *Burns*, which focused only on whether the successor intended to retain the employees, would cause successors “to refrain from commenting favorably at all upon employment prospects of old employees” so as to retain their “right to

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unilaterally set initial terms, a right to which the Supreme Court attache[d] great importance in *Burns*.” *Id.* Instead, under *Spruce Up*’s test, what a new employer must avoid is misleading employees or otherwise failing to provide notice of changing employment terms:

[T]he caveat in *Burns* . . . should be restricted to circumstances in which the new employer has either actively, or by tacit inference, misled employees into believing they would all be retained without changes in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Id. (footnote omitted).

We have summarized the holdings of *Burns* and *Spruce Up* as follows: While “a successor employer is ordinarily free to set initial terms on which it will hire its predecessor’s employees, when a successor evinces a ‘perfectly clear’ intention to retain the predecessor’s employees, it must consult with their bargaining representative before fixing its own terms.” *Adams & Assocs., Inc. v. NLRB*, No. 16-60333, 871 F.3d 358, 2017 U.S. App. LEXIS 17917, 2017 WL 4079063, at *8 (5th Cir. Sept 15, 2017). A successor set on retaining its predecessor’s employees may dispel this “perfectly clear” intention by giving employees “prior notice of its intention” to institute its own initial terms or by “hold[ing]

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itself” as if it will not adhere to the terms of the previous collective-bargaining agreement (“CBA”). *NLRB v. Hous. Bldg. Servs., Inc.*, 128 F.3d 860, 864 n.6 (5th Cir. 1997) (*per curiam*).

Creative does not dispute that it is a successor, so we focus on whether it was a “perfectly clear” one. The key question here is whether Creative provided sufficient and timely notice of its intent to change the hoppers’ terms and conditions of employment, thereby clarifying that it was an ordinary rather than perfectly clear successor.

The Board held that Creative was a perfectly clear successor. To the Board, June 1 rather than June 2 was the date by which Creative had to give notice of its intent to offer employment on different terms, so Creative’s June 2 announcement was irrelevant. As to the pre-June 2 communications, the Board concluded: (1) Richard did not tell Flagge about the new terms of employment and therefore Flagge did not tell those terms to the 50 Berry III hoppers he gave applications to; (2) Richard’s communication of new terms to approximately 20 Berry III hoppers and the subsequent word-of-mouth spread of those new terms were insufficient to put a majority of Creative’s hoppers on notice; and (3) inclusion of tax forms “without explanation, let alone an express announcement that taxes would be withheld from the hoppers’ pay, was too ambiguous” for “a reasonable employee in like circumstances [to] understand that continued employment [was] conditioned on acceptance of materially different terms.” *Creative Vision Res., LLC*, 364 N.L.R.B. No. 91, 2016 NLRB LEXIS 637, at *17 & n.12 (2016).

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Creative disputes each of these conclusions. It argues that its June 2 announcement of new terms was timely because the announcement preceded the formal hiring of Berry III's hoppers. Creative also argues that its pre-June 2 communications with the hoppers were sufficient to put them on notice. First, the Board erred by improperly substituting its credibility determinations for the ALJ's over whether Richard told Flagge of the new terms of employment. Second, the Board erred by rejecting the credited evidence of the word-of-mouth communications between the hoppers. Finally, Creative argues that the Board's conclusion about the ambiguity of the tax forms "demeans the hoppers," as any American worker would realize that a tax form indicating that the employer will deduct taxes means the employer intends to do just that.

We consider each of these arguments in turn.

i. The June 2 Announcement

The Board's conclusion that Creative's June 2 announcement was untimely is well founded. To reach this conclusion, the Board summarized its past decisions as holding that a successor employer may unilaterally set initial terms of employment if it "clearly announce[s] its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees." 2016 NLRB LEXIS 637 at *13. But after the successor expresses its intent to retain the predecessor's employees, an announcement of new terms, "even if made before formal offers of employment are extended or the successor commences operations, will

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not vitiate the bargaining obligation.” *Id.* The Board’s justification for this prior-or-simultaneous-announcement requirement is as follows:

[A] new employer that expresses an intent to retain the predecessor’s work force without concurrently revealing to a majority of the incumbent employees that different terms will be instituted, improperly benefits from the likelihood that those employees, lacking knowledge that terms and conditions will change, will choose to stay in the positions they held with the predecessor, rather than seeking employment elsewhere.

2016 NLRB LEXIS 637 at *22. After stating the legal standard it would apply, the Board found that Creative expressed an intent to retain Berry III’s employees between mid-May and June 1.

This court has briefly spoken twice about the timing of an announcement of new terms and its effect on notice. We recently observed in *Adams & Associates* that a communication of new employment terms through offer letters and employment agreements was untimely because the communication occurred after the successor evinced an intent to retain its predecessor’s employees. *Adams & Assocs.*, 2017 U.S. App. LEXIS 17917, 2017 WL 4078063, at *8. In *Houston Building Services*, we opined that a successor may not set its own initial terms if it fails to give “prior notice of its intention” and it “holds itself as if it will adhere to the terms of the previous CBA.” *Hous.*

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Bldg. Servs., 128 F.3d at 864 n.6. We turn to our sister circuits for further guidance.

The D.C. Circuit explicated the rationale for prior or simultaneous announcement of new terms in *International Ass'n of Machinists & Aerospace Workers, AFL-CIO v. NLRB*, 595 F.2d 664, 193 U.S. App. D.C. 279 (D.C. Cir. 1978). There, the D.C. Circuit approved of *Spruce Up's* qualification of *Burns's* perfectly clear exception. *Id.* at 674. Recall that the *Spruce Up* Board held that it is not “perfectly clear” that a successor “plans to retain all” the predecessor’s employees when it also plans to impose new terms on those employees. *Spruce Up*, 209 N.L.R.B. at 195. The successor can reasonably anticipate that some incumbents will balk at and decline the new terms. *See id.* This qualification, while sensible, generates an additional problem, one the D.C. Circuit identified:

[I]n the Board’s view . . . the successor . . . may endeavor to conceal, or at least postpone publicity on, reemployment objectives in order to avoid the onus of bargaining during the usually difficult period of takeover, and the incumbent employees may thereby be deprived of early appraisal of their retention prospects.

Int’l Ass’n of Machinists, 595 F.2d at 675. To provide an “important measure of protection” against this possibility, the Board adopted and the D.C. Circuit approved a prior-or-simultaneous-announcement requirement. *Id.* at 674. Such a requirement ensures that incumbent employees will not be “lulled into a false sense of security” by a successor’s

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announcement that it intends to retain the incumbents. *Id.* at 675; *see also S & F Mkt. St. Healthcare LLC v. NLRB*, 570 F.3d 354, 359, 386 U.S. App. D.C. 444 (D.C. Cir. 2009) (“[A]t bottom the ‘perfectly clear’ exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work.”). The D.C. Circuit went on to note that even when a subsequent announcement of new terms occurs before actual hiring, incumbent employees may “lack . . . sufficient time to rearrange their affairs.” *Int’l Ass’n of Machinists*, 595 F.2d at 675 n.49. In those situations, they may “be forced to continue in the jobs they held under the successor employer, notwithstanding notice of diminished terms.” *Id.*

The Seventh Circuit has found this reasoning persuasive. In *Canteen Corp.*, it approved the Board’s rejection of the view “that the obligation to bargain only arose when the employer had failed to announce the initial employment terms prior to, or simultaneously with, the extension of unconditional job offers to the predecessor employees.” *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1360, 1364-65 (7th Cir. 1997). Similarly, the Sixth Circuit, in *DuPont Dow*, held that the announcement of new terms before operations commenced but after formal offers were made and accepted came too late. *See DuPont Dow Elastomers, L.L.C. v. NLRB*, 296 F.3d 495, 506 (6th Cir. 2002).

We are persuaded by the Board’s and D.C. Circuit’s reasoning of the wisdom of the prior-or-simultaneous-announcement requirement. We apply it here and find,

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after careful examination of the record and the Board's inferences drawn therefrom, that substantial evidence supports the Board's conclusion that Creative expressed an intent to retain the Berry III hoppers by June 1. Thus, Creative's announcement of new terms on June 2 was untimely.

The record reflects that the shift from Berry III to Creative would be abrupt, so Creative needed to ensure it had hoppers lined up in advance. Creative distributed 70 applications to Berry III hoppers and made no efforts to hire hoppers from other sources.² Creative had no reason to do so. Richard knew the quality of the hoppers' work, and his dissatisfaction was not with the hoppers but with Berry III's management. Further, finding and training new hoppers would have been a major undertaking, delaying what was supposed to be a rapid transition. Richard did not interview any applicants or perform reference checks on them, and he testified that he was agreeing to hire Berry III hoppers who submitted applications. The distributed applications also contained W-4s—a tax form that is, as

2. Creative argues that it sought applicants from sources other than Berry III's hoppers. It did not, however, file an exception to the ALJ's finding to the contrary, and therefore the Board found that Creative was procedurally foreclosed from raising the issue. Under the circumstances, we will not consider this question. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665, 102 S. Ct. 2071, 72 L. Ed. 2d 398 (1982) (stating that § 160(e) precludes a court of appeals from reviewing claims not raised to the Board).

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the Board noted, typically filled out after an employee is hired. From these facts, the Board inferred that the hiring process was a formality and that Creative sought to hire the Berry III hoppers en masse. And that is just what happened. On June 1, when Creative had enough Berry III applicants, Richard cancelled Berry III's contract with Richard's Disposal. All 44 hoppers Creative employed on the first day of operations were previously employed by Berry III. A reasonable mind could accept such evidence and inferences as sufficient to support the conclusion that by June 1, Creative had expressed an intent to retain the Berry III hoppers.

Creative argues that its whole hiring process was "in flux" up until June 2 when the hoppers hopped on the trucks. It was only at that point that the hoppers were formally hired and it became "perfectly clear" how many would accept Creative's new terms. Creative relies on *Emerald Maintenance, Inc. v. NLRB*, 464 F.2d 698 (5th Cir. 1972), to argue that the delay caused by insufficient hopper applications and uncertainty over how many hoppers would accept the new terms indicates that the Union's majority status was not clear "until after the work force had been assembled" on June 2. *See id.* at 701. There, Emerald required the incumbent employees to reapply for their jobs and refused to recognize the union's referral slips. *Id.* at 700. This refusal contravened its predecessor's CBA, which required the predecessor to fill all its positions with union members. *Id.* Emerald built up its workforce after commencing operations and hired a significant number of non-incumbents. *Id.* This court found that Emerald was not a perfectly clear successor because

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“it was not clear that a majority of Emerald employees were union members until after the work force had been assembled.” *Id.* at 701.

Emerald differs in key ways from this case. Unlike Creative’s application process, Emerald’s was not *pro forma*—it hired a significant number of non-incumbents and refused to hire union members simply because they were union. Emerald indicated from the outset that it intended to set its own terms by refusing to follow the terms of the CBA during the application process. Emerald built its workforce after it commenced operations and did so gradually (unlike Creative), making it less evident that the incumbent union’s majority status would continue. Finally, the procedural posture of *Emerald* informs our understanding of it. There, we considered the case without owing deference to a Board finding of perfectly clear successorship. (Remember that *Burns* was decided in the interim between the Board’s decision in *Emerald* and ours. *Id.* at 699-700.) Here, by contrast, the Board has found that Creative is a perfectly clear successor, and we do not review *de novo* but for substantial evidence.

Creative is also wrong to assume that an expression of intent to retain the incumbent workforce is limited to express announcements or formal hiring. *Canteen Corp.* is particularly instructive in this regard. There, the Seventh Circuit refused to disturb the Board’s determination that, based on the “totality of Canteen’s conduct,” Canteen formed an intent, “albeit unannounced,” to retain its predecessor’s employees. *Canteen Corp.*, 103 F.3d at 1363. This was in spite of the fact that Canteen “never

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announced an intention to employ the predecessor’s employees” and never “state[d] that they would be hired under the predecessor’s terms and conditions.” *Id.* at 1362. Reviewing the totality of Canteen’s conduct, the Board and the court found particularly relevant that Canteen “neglected to take serious steps to recruit from other sources.” *Id.* at 1363. Here, we similarly find substantial evidence to support the Board’s finding that, based on the totality of Creative’s conduct (and in particular its failure to take serious steps to recruit outside of Berry III’s workforce), Creative intended to retain Berry III’s hoppers by June 1.

Finally, we note that the facts of this case make it unnecessary for us to consider whether there are some situations where a subsequent announcement of new terms before formal hiring or commencement of operations will be timely.³ In this case, the June 2 announcement clearly was untimely. The announcement occurred the same day the hoppers were formally hired and Creative’s operations

3. The Second Circuit indicated as much in *Nazareth Regional High School v. NLRB* when it read *Spruce Up* as:

limited to those situations where employees are led at the outset by the successor-employer to believe that they will have continuity of employment on pre-existing terms and as not applying where the new employer dispels any such impression prior to or simultaneously with its offer to employ the predecessor’s work force.

549 F.2d 873, 881 (2d Cir. 1977) (quoting *Bhd. of Ry. Clerks v. REA Express, Inc.*, 523 F.2d 164, 171 (2d Cir. 1975)).

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commenced. This same-day announcement gave the hoppers insufficient time to rearrange their personal affairs.

ii. Pre-June 2 Communications

Having concluded that Creative's June 2 announcement of new terms was untimely, we turn now to whether Creative gave notice of its intent to establish new terms on or before June 1. In analyzing this issue, we consider the cumulative effect of three pre-June 2 communications from Creative to the hoppers: (1) Richard's alleged communication to Flagge about the new terms of employment; (2) Richard's communication of the new terms to about 20 hoppers and the subsequent word-of-mouth exchanges among the hoppers; and (3) the inclusion of tax withholding forms with the job applications. We conclude that all three combined did not provide a majority of Creative's hoppers with sufficient notice of the new terms.

We turn first to Richard's alleged conversations with Flagge. Recall that Flagge, a hopper, spoke to Richard and passed out about 50 applications to other hoppers. There is a dispute about what Richard told Flagge. Richard claimed he told Flagge about the new terms. Flagge denied this. The Board ultimately sided with Flagge, concluding that "Richard did not inform Flagge of the new terms and conditions of employment and, consequently, Flagge did not inform any of the hoppers to whom he gave applications that their terms and conditions would change under [Creative]." *Creative*, 2016 NLRB LEXIS 637 at *5.

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Creative argues that the Board erred by siding with Flagge. In Creative's view, the ALJ credited Richard as "a sincere and meticulous witness," and thus necessarily credited Richard's testimony that he told Flagge the new terms. By reaching the opposite credibility finding than the ALJ, who actually saw the witnesses, the Board's credibility choice was unsupported by substantial evidence.

In making this argument, Creative mischaracterizes the ALJ's and Board's findings. The Board could not have erred in dismissing the ALJ's credibility determination over what Richard told Flagge because the ALJ did not make a credibility determination over what Richard told Flagge. While ALJ "credibility determinations are binding except in rare instances," *Adams & Assocs.*, 2017 U.S. App. LEXIS 17917, 2017 WL 4079063, at *8, no relevant ALJ credibility determination was made here. In order to see why, a detailed review of the ALJ's decision is necessary.

The ALJ began his analysis of Richard's testimony by stating that Richard said that he told Flagge about the new terms. The ALJ then noted that "Flagge's testimony squarely contradicts Richard . . . on this point." *Creative*, 2016 NLRB LEXIS 637 at *85 (ALJ op.). Flagge said that Richard did not tell him anything about the new terms. The ALJ then moved to a separate issue in Richard's testimony regarding how he had passed out applications to about 20 other hoppers and told them about the new terms. Regarding this testimony, the ALJ noted that the hoppers did not corroborate Richard's testimony. But the

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ALJ also noted that other factors made Richard appear credible, such as Richard's appearance as a meticulous witness. Thus, the ALJ was confronted with whether to credit Richard's testimony about two different purported communications: (1) what Richard told Flagge, and (2) what Richard told the 20 hoppers.

Given this context, the ALJ's finding becomes clear. The ALJ credited Richard's testimony only with respect to what he told the 20 hoppers, not with respect to what he told Flagge. Specifically, the ALJ's credibility finding on this point was the following:

This finding, that hoppers working for Berry III learned some information about [Creative] from Jackson, does not contradict Richard[s] . . . testimony that he informed hoppers about [Creative's] initial terms of employment. Although Richard[s] . . . testimony is uncorroborated, *it is also uncontradicted*. Moreover, it is consistent with the fact that at least some hoppers knew about the contemplated \$11-per-hour wage rate.

Further, as discussed above, Richard . . . appeared to be a sincere and meticulous witness. For these reasons, I credit his testimony that he told some of the hoppers—those to whom he gave employment application forms—that [Creative] would be paying an \$11-per-hour wage, would guarantee 8 hours of employment per day, would pay overtime for hours worked in

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excess of 40 per week, and would withhold taxes from their paychecks. Based on Richard[s] . . . credited testimony, I also find that he told these hoppers that [Creative] guaranteed four holidays.

2016 NLRB LEXIS 637 at *94.

As the emphasized portion highlights, the ALJ's credibility finding relates only to Richard's testimony that he told the 20 hoppers about the new terms. How could the ALJ credit Richard's testimony about his communications with Flagge as "uncontradicted" when the ALJ explicitly described that testimony earlier as being "squarely contradict[ed]?" Instead, the ALJ's finding should be read to mean what it says: the ALJ credited Richard's uncorroborated and uncontradicted testimony about what he told the 20 hoppers, not the contradicted testimony about what he told Flagge.

And this reading makes sense. This is not a case where the ALJ implicitly but necessarily resolved a credibility dispute. In the ALJ's eyes, Richard telling 20 hoppers about the new terms was sufficient (among other circumstances, including the June 2 communications) to evade the perfectly clear exception. The ALJ therefore had no reason to decide whether Richard or Flagge was being truthful with respect to their conversation because the ALJ's conclusion did not hinge on that determination. Finally, we note that the Board's reading of the ALJ's decision appears to match our own. The Board never stated that it was dismissing an ALJ credibility determination.

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In fact, with regard to the ALJ's credibility findings, the Board expressly stated that it found no basis for reversing the findings. 2016 NLRB LEXIS 637 at *5 n.1.

We are left with a situation in which the ALJ did not make a credibility finding for this dispute and the Board found that “Richard did not inform Flagge of the new terms and conditions of employment.” 2016 NLRB LEXIS 637 at *5. Under these circumstances—where (1) the ALJ did not resolve the factual dispute raised by the conflicting testimony (Richard's and Flagge's competing versions of their conversation); (2) there is a clear Board finding (Richard did not tell Flagge about the new terms); and (3) the ALJ credited both witnesses with respect to other conversations (Richard's uncontradicted testimony about what he told the 20 hoppers, and Flagge's uncontradicted testimony about what he did not tell the other hoppers)—we will not disturb the Board's finding under the substantial evidence standard of review.

But even if the ALJ made a credibility determination that the Board overrode, the credibility choice is ultimately irrelevant. Both the ALJ and the Board agree that Flagge never communicated the new terms to the hoppers. Because Flagge never passed along Richard's message, no additional employees were put on notice of the new terms. *See Adams & Assocs.*, 2017 U.S. App. LEXIS 17917, 2017 WL 4079063, at *8 n.6 (observing that the notice inquiry “is conducted from the employees' perspective” (citing *Fall River Dyeing & Furnishing Corp v. NLRB*, 482 U.S. 27, 43-44, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987); *NLRB v. Hous. Bldg. Serv., Inc.*, 936 F.2d 178, 180 n.1 (5th Cir. 1991))).

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We next consider Richard’s communication of new terms to about 20 hoppers (plus the subsequent informal word-of-mouth exchanges between the hoppers). These communications were insufficient to put a majority of Creative’s workforce on notice of the new terms. Although the *Burns* Court and *Spruce Up* Board spoke in terms of a plan “to retain all of the employees in the unit,” the Board and lower courts have subsequently recognized that the relevant inquiry is whether the successor planned to retain enough of the predecessor’s employees so that the union’s majority status will continue.⁴ Such a rule is sensible, and the Board’s reasoning shows why. Here, the Board reasoned that allowing a successor to communicate its new terms to a minority of its incumbent employees would invite abuse. A new employer “would be encouraged

4. See *Galloway Sch. Lines*, 321 N.L.R.B. 1422, 1427 (1996) (“To summarize, the duty to bargain may not arise when initial employment terms are set because it may not be evident at that time that the union’s majority status in the old work force will continue in the new one. However, in other situations, it may be apparent from the new employer’s hiring plan that the union’s majority status will continue, and then the new employer is required to bargain over initial terms.”); see also *DuPont Dow*, 296 F.3d at 500-01 (“But where it is ‘perfectly clear’ that the new employer intends to retain the unionized employees of its predecessor as a *majority* of its own work force under essentially the same terms as their former employment, the new employer becomes a ‘perfectly clear successor’ and must bargain with the union.” (emphasis added)); *Canteen Corp.*, 103 F.3d at 1361-62 (“The Court thus established that a successor would be required to bargain with the union before setting its initial terms of hiring when it was clear that it intended to hire a *majority* of the predecessor’s workforce.” (emphasis added)).

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to announce changes in preexisting terms only to a select few incumbent employees, while allowing the majority of employees to be lulled by its silence into not seeking other work.” *Creative*, 2016 NLRB LEXIS 637 at *21. Like the Board, we conclude that such a result would be at odds with *Burns* and *Spruce Up*

The word-of-mouth spread of the new terms to some hoppers does not change this result. Both the ALJ and the Board found that “the record affords no way of quantifying how many of the hoppers had learned about the \$11 per hour wage rate or the other terms and conditions of employment before they reported for work . . . on June 2.” *Id.* Neither witness who testified that the hoppers knew of the new pay rate before June 2 said how many hoppers were privy.⁵ It was reasonable for the Board to conclude

5. The ALJ, relying on the testimony of one hopper, Kumasi Nicholas, also found that Creative notified some other hoppers about the new terms in advance of the June 2 meeting. The Board found that Nicholas’s testimony did not support a finding that the hoppers were told of the new terms in advance. On direct examination, Nicholas was asked, “[W]hat happened on the very first day that [Creative] began operations[?]” Nicholas responded, “Well, they told us ahead of time—Mrs. Jackson told us ahead of time, you know, might be switching over to another little company where—you know, a pay rate, and she just let us know ahead of time, and then that’s when, you know, they started off.” An effort to clarify whether Nicholas learned about the pay rate before the June 2 meeting produced the response, “I’m not sure. It’s been about a year. . . . I know she told me that, but I’m not sure.” *Creative*, 2016 NLRB LEXIS 637 at *19 n.13.

We will not disturb the Board’s conclusion. We acknowledge that when “the Board disagrees with the ALJ’s findings, this court

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that a majority of the incumbent hoppers were not put on notice through Richard's communication of new terms to about 20 hoppers and subsequent word of mouth.

The Board also found that, from the hoppers' perspective, the new pay rate was unsubstantiated rumor or gossip and therefore could not constitute a clear announcement of the new terms. Taylor, the hopper who testified that he learned about the new pay rate before June 2, could not identify his source of information. The Union official, who received a call from hoppers claiming they heard Creative would pay only \$11 per hour, said the hoppers could not confirm where their information came from. We will not disturb the Board's reasonable conclusion that, as rumor and gossip with no clear source, the new terms were not clearly announced. Such a conclusion makes sense given that the purpose of a clear announcement is to give incumbent employees an opportunity to reshape their personal affairs. It is reasonable to conclude that an employee would not reshape his or her personal affairs

examines the findings of the Board more critically than it would have done had the Board agreed with the ALJ." *Tex. World Serv. Co., Inc. v. NLRB*, 928 F.2d 1426, 1430 (5th Cir. 1991). "But this court still sustains the Board's findings if the record taken as a whole contains substantial evidence to support those findings." *Id.* at 1431. "Provided substantial evidence exists, this court cannot reverse the Board's decision when the Board and the ALJ merely draw different inferences from established facts." *Id.* Here, the Board merely drew a different inference (that Nicholas learned of the new terms at the June 2 meeting) from facts the ALJ and Board shared. Based on the ambiguity of Nicholas's response and the uncertainty with which he delivered it, we find that substantial evidence supports the Board's finding.

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(i.e., begin searching for new work) because he or she overhears uncorroborated rumors.

Turning lastly to the tax withholding forms, we conclude that the Board's decision, finding these forms insufficient to put the hoppers on notice, is supported by substantial evidence. Certainly, the tax forms conspicuously note that their purpose is to allow an employer to withhold taxes and social security. Creative argues that such a withholding would fundamentally change the hoppers' terms of employment, as (so the argument goes) it would convert them from independent contractors to employees. Creative further argues that with this information, the hoppers should have deduced that the forms signaled a change in their terms of employment.

While Creative's argument is reasonable, the Board's finding is even more so. The Board concluded that the inclusion of the tax forms was too ambiguous to constitute sufficient notice. In doing so, the Board pointed out that it was unclear whether the hoppers filled out tax forms for Berry III. Had they previously done so, Creative's inclusion of tax forms would not clearly signal a change in employment terms. Further, the Board observed that no evidence existed that the hoppers considered themselves independent contractors rather than employees. Absent knowledge of their alleged original status as independent contractors, the hoppers would be unable to deduce that a tax withholding would change that status. Finally, a number of hoppers wrote that they were exempt from paying taxes on the forms, indicating that the tax forms did not signal to the hoppers that a

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change in tax collection practices was imminent. Indeed, none of the hoppers testified that they understood that Creative planned to deduct taxes from their pay before the June 2 announcement. Given both the ambiguity of the announcement and the multistep deductions required for an employee to identify the change in employment terms, we determine that the Board's conclusion that the tax forms did not put the hoppers on notice is supported by substantial evidence. *See Rosdev Hosp., Secaucus, LP & La Plaza, Secaucus, LLC*, 349 N.L.R.B. 202, 207 (2007) (ALJ op.) (“[T]o the extent an employer’s pretakeover announcement contains ambiguities regarding the terms and conditions of employment offered to employees, such ambiguities will be resolved against the employer.”).

The two cases Creative cites to support its argument that the inclusion of tax forms was sufficient notice—*S & F Market* and *Ridgewell’s*—in fact demonstrate the reasonableness of the Board’s position. Both present situations in which the notice at issue explicitly stated the new terms. No multistep deductions were required on the part of the employees. In *S & F Market*, the new employer included a cover letter with each job application that promised “significant operational changes,” identified various pre-employment checks and tests to be passed, and required the applicant to affirm his or her understanding that the employment offered would be temporary and at will. *S & F Mkt.*, 570 F.3d at 356. The panel concluded that “the employees *had every indication*—from S & F’s job applications, interviews, and letters offering employment—that S & F intended to institute new terms of employment.” *Id.* at

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360 (emphasis added). Similarly, in *Ridgewell's*, the new employer announced to the union during a meeting that it would change the workers' statuses from employees to independent contractors. *Ridgewell's Inc.*, 334 N.L.R.B. 37, 37 (2001). The announcement "clearly signaled that the [new employer's] initial terms and conditions of employment would differ." *Id.*

To be clear, a new employer need not produce an itemized list of changes to employment terms. But the inclusion of tax forms in this case falls well short of the simple and direct announcements in *S & F Market* (via a cover letter with the job application) and *Ridgewell's* (during a meeting with the union).

We acknowledge that this case does not present facts indicating that Creative endeavored to create an impression that it would keep Berry III's terms. This case is therefore slightly dissimilar from *DuPont Dow* and *Elf Atochem*, two opinions the Board cites to support its decision. In *DuPont Dow*, a single sentence in a memorandum distributed to the employees stated that the new employer would set initial terms. *DuPont Dow*, 296 F.3d at 503. This single sentence was not "sufficiently clear and definite to overcome the impression carefully created by the Company that the terms and conditions would remain the same." *Id.* Similarly, in *Elf Atochem*, the new employer told the employees it would offer "comparable" terms and conditions and then reneged. *Elf Atochem N. Am., Inc.*, 339 N.L.R.B. 796, 808 (2003).

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But while the case before us is distinguishable from *DuPont Dow* and *Elf Atochem*, the distinction is not dispositive. The *Spruce Up* Board did not limit the perfectly clear exception to situations where employees are actively misled. Rather, the Board warned that employees could be misled merely through “tacit inference.” *Spruce Up*, 209 N.L.R.B. at 195. Indeed, even when employees “are not affirmatively led to believe that existing terms will be continued,” the expression of intent to retain the incumbents can, by itself, “engender expectations,” causing employees to “forego the reshaping of personal affairs.” *Int’l Ass’n of Machinists*, 595 F.2d at 674.

b. Necessity of a Bargaining Demand

Creative’s next argument is that it did not violate its bargaining obligation because at the time Creative unilaterally set terms, the Union had not sent a bargaining demand. It relies on *Fall River Dyeing & Furnishing Corp v. NLRB*, to argue that all successors are free to set initial terms before the union demands bargaining. Creative’s duty to bargain was therefore not triggered until the Union’s demand on June 6, four days after Creative announced its initial terms.

We find this argument meritless. As the Board pointed out, *Fall River*’s demand rule “developed in a very different context,” namely the ordinary successor context. *Creative*, 2016 NLRB LEXIS 637 at *25. The Board concluded that nothing in the language or the reasoning of *Fall River* supports the demand rule’s extension to the perfectly clear successor context. A full digression into

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Fall River and cases interpreting it shows why.

In *Fall River*, the Supreme Court addressed when an ordinary successor's obligation to bargain with an incumbent union attaches. *See Fall River*, 482 U.S. at 30. The successor in that case restarted its predecessor's operations following a seven month hiatus and gradually built its workforce. *Id.* at 32-33, 45. As a result of this gradual buildup, the percentage of the successor's workforce composed of its predecessor's employees fluctuated. *See id.* at 47. Due to this ongoing fluctuation, the Court was tasked with setting the proper moment to check to see if the majority of the successor's workforce was composed of its predecessor's employees. *See id.* To set this moment, the Court adopted the "substantial and representative complement" rule. *Id.* A successor's bargaining obligation is triggered when it hires a "substantial and representative complement" of its workforce, a majority of which had previously been employed by its predecessor. *Id.* But a bargaining obligation only triggers at this moment if the union has made a bargaining demand. *Id.* at 52. The Court reasoned that the combination of the "substantial and representative complement" rule as well as the demand rule would avoid placing "an unreasonable burden" on the employer to determine when its bargaining obligation attaches. *See id.* at 50. "Once the employer has concluded that it has reached the appropriate complement, then, in order to determine whether its duty to bargain will be triggered, it has only to see whether the union already has made a demand for bargaining." *Id.* at 52-53.

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Importantly, however, the *Fall River* Court suggested that in some situations the composition of the employer's workforce alone may trigger a duty to bargain. The *Fall River* Court observed that the "'triggering' fact for the bargaining obligation" in *Burns* was the "composition of the successor's work force." *Id.* at 46. The Court noted that in *Burns* the predecessor's "contract expired on June 30 and [the successor] began its services with a majority of [the predecessor's] guards on July 1." *Id.* at 47; *see Burns*, 406 U.S. at 275. There was no "start-up period by the new employer while it gradually buil[t] its operations and hire[d] employees." *Fall River*, 482 U.S. at 47.

No case Creative cites has extended the demand requirement that *Fall River* established for ordinary successors to perfectly clear successors.⁶ Tellingly, not all courts even extend the demand requirement to all ordinary successor cases. The Second Circuit in *Banknote Corp.*, limited the demand rule to factual circumstances analogous to *Fall River*—i.e., where there is a "gradual or staggered hiring" or "a significant hiatus in operations." *Banknote Corp. of Am. v. NLRB*, 84 F.3d 637, 646 (2d

6. *Cadillac Asphalt*, the one case Creative cites as applying the demand rule in the perfectly-clear-successor context, actually supports the contention that a perfectly clear successor's obligation to bargain over initial terms may arise before a union demand. In *Cadillac Asphalt*, the union's demand came after Cadillac changed its terms and conditions. *See Cadillac Asphalt Paving Co.*, 349 N.L.R.B. 6, 7-8 (2007). Cadillac stopped contributing to its employee's union benefit fund on July 16. *Id.* at 7. The union's response came two days later, on July 18. *Id.* Nevertheless, the Board held that Cadillac was a perfectly clear successor and ordered it to make employees whole for its failure to make benefit fund payments starting on July 16. *Id.* at 13.

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Cir. 1996). In those cases, a bargaining demand has an important function as there “may be considerable doubt as to whether a union that enjoyed the support of a majority of a predecessor’s bargaining unit continues to do so under the successor’s operation.” *Id.* at 645. But when the successor engages in “a rapid transition period with the immediate hiring of a full employee complement,” the rationale for the demand rule dissipates. *Id.* at 646. In those cases, the successor will be able to “easily discern its obligation to presume that the [union] continued to enjoy majority status.” *Id.* at 645-46.

While this court has indicated that a union bargaining demand is required to trigger a bargaining obligation in the ordinary successor context, *see Hous. Bldg. Serv.*, 936 F.2d at 180, we find *Banknote*’s reasoning persuasive for the perfectly clear successor context. Self-evident as it may be, the perfectly clear exception only applies when it is “perfectly clear” that the union’s majority status will survive the transition from predecessor to successor. *See Burns*, 406 U.S. at 294-95. Accordingly, sending a bargaining demand to a perfectly clear successor would be superfluous because the new employer would be able to “easily discern” from the outset that the union will presumptively retain its majority status during the transition. *See Banknote Corp.*, 84 F.3d at 645-46. We therefore decline to require a union bargaining demand to trigger a perfectly clear successor’s duty not to unilaterally set initial terms of employment. In perfectly clear successor cases, the “composition of the successor’s work force” alone is the “triggering” fact for the bargaining obligation.” *See Fall River*, 482 U.S. at 46.

*Appendix B***c. Validity of the Complaint**

Finally, Creative argues the Board’s complaint was void because it was issued on behalf of Acting General Counsel Lafe Solomon, who at the time was serving in violation of the Federal Vacancies Reform Act (“FVRA”). The Board contends we lack jurisdiction to hear this argument because Creative was untimely in making it. Even if we have jurisdiction, the Board contends that the later General Counsel ratified the complaint, effectively curing any defect.

“[T]he FVRA prevents a person who has been nominated for a vacant PAS [Presidential nomination and Senate confirmation] office from performing the duties of that office in an acting capacity.” *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 938, 197 L. Ed. 2d 263 (2017). Solomon’s nomination was pending in the Senate from January 2011 to January 2013. *Id.* at 937. During that time, Solomon was serving as Acting General Counsel. *See id.* The FVRA prohibited him from doing so. *Id.* at 944. The complaint in this case was filed in March 2012 while Solomon was serving as Acting General Counsel in violation of the FVRA. Creative thus argues that the complaint was void and “may not be ratified.” *See SW Gen., Inc. v. NLRB*, 796 F.3d 67, 71, 78, 418 U.S. App. D.C. 67 (D.C. Cir. 2015), *aff’d*, 137 S. Ct. 929, 197 L. Ed. 2d 263 (2017).⁷

7. Creative’s argument relies on the general rule that actions taken in violation of the FVRA are void *ab initio*. The FVRA, however, expressly exempts “the General Counsel of the National Labor Relations Board” from this rule. 5 U.S.C. § 3348(e)(1). The D.C. Circuit has left open whether the actions of an improperly

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The Board responds by arguing the NLRA precludes our consideration of this issue. It relies on Section 10(e), which provides: “No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). Creative did not challenge Solomon’s authority when it filed its exceptions to the ALJ’s decision in February 2013. Creative did not object until April 2016, and the Board concluded the objection was untimely. *See* 29 C.F.R. § 102.2(d)(1); *see also id.* § 102.46(f). Creative does not now argue that its exceptions were timely or that it has shown extraordinary circumstances. *See Indep. Elec. Contractors of Hous., Inc. v. NLRB*, 720 F.3d 543, 550-52 (5th Cir. 2013). Such arguments are forfeited. *See SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 784 (5th Cir. 2017). We have held untimely objections to be waived under Section 10(e). *See Hallmark Phx. 3, L.L.C. v. NLRB*, 820 F.3d 696, 712-13 (5th Cir. 2016). Because Creative did not timely object to Solomon’s authority to file the complaint, our review of any such argument is barred. *See* 29 U.S.C. § 160(e); *Hallmark*, 820 F.3d at 713.

III. CONCLUSION

For the foregoing reasons, we deny Creative’s petition and grant enforcement of the Board’s order.

serving Acting General Counsel are voidable or instead “wholly insulate[d] . . . even in the event of an FVRA violation.” *SW Gen.*, 796 F.3d at 79. We express no view on that question.

**APPENDIX C — DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

NATIONAL LABOR RELATIONS BOARD

CREATIVE VISION RESOURCES, LLC
AND LOCAL 100, UNITED LABOR UNIONS

Case 15-CA-020067

August 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS
MISCIMARRA AND HIROZAWA

On January 7, 2013, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,¹

1. There are no exceptions to the judge's finding that the Respondent did not violate Sec. 8(a)(5) and (1) by unilaterally changing the way unit employees are assigned to trucks. Accordingly, we affirm the judge's dismissal of that allegation.

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and conclusions only to the extent consistent with this Decision and Order, to amend his remedy, and to adopt the recommended Order as modified and set forth in full below.²

We adopt the judge’s findings, as to which there are no exceptions, that Creative Vision Resources, LLC (the Respondent), was a legal successor to single employer M & B Services, Milton Berry, and Berry Services, Inc. (Berry III or the predecessor) , and that it violated Section 8(a) (5) and (1) of the Act by failing to recognize and bargain in good faith with the incumbent employees’ bargaining representative, Local 100, United Labor Unions (the Union). For the reasons set forth below, however, we also find, contrary to the judge, that the Respondent was a “perfectly clear” successor and that it violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with notice or an opportunity to bargain before imposing initial terms and conditions of employment for the unit employees.

The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

2. We shall substitute a new Order and notice to conform to the violations found and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014), and *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

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I. Facts

Richard's Disposal is a waste disposal company operating in the greater New Orleans, Louisiana area. Since 2007, the Union has represented a unit of employees, called hoppers, who ride on the back of the garbage trucks operated by Richard's Disposal and empty garbage cans into the trucks.³ Prior to June 1, 2011, the hoppers were employed by Berry III, a labor supply company.

In 2010, Alvin Richard III (Richard), the vice president of Richard's Disposal and the son of its owner, decided to form the Respondent as a new labor supply company to provide hoppers to Richard's Disposal. The decision was prompted by concerns about Berry III's lax management practices, including, among other things, its treatment of the hoppers as independent contractors. The record shows in this respect that Berry III paid the hoppers a flat rate of \$ 103 per day with no overtime, and made no deductions for taxes or social security.

The transition from Berry III to the Respondent was scheduled to take place on May 20, 2011.⁴ In anticipation,

3. The most recent collective-bargaining agreement between the Union and Berry III was effective by its terms from September 1, 2007 through August 31, 2010.

The bargaining unit originally included Berry III-employed hoppers who worked on garbage trucks both for Richard's Disposal and for Metro Disposal, another waste disposal company. At some point in time, Berry III lost its contract with Metro Disposal and ceased providing hoppers to that company.

4. All dates are in 2011, unless otherwise stated.

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Richard had an employee handbook and safety manual prepared in May. He also prepared applications for employment, which, along with Federal and State tax withholding forms, were to be distributed to current Berry III hoppers. Richard distributed applications to approximately 20 Berry III hoppers, and informed them of certain changes in their terms and conditions of employment, including that the Respondent would pay \$ 11 per hour with overtime, and that it would deduct taxes and social security from their paychecks. Richard also asked Berry III hopper Eldridge Flagge to assist him in passing out applications. Between mid-May and June 1, Flagge passed out approximately 50 applications. Richard did not inform Flagge of the new terms and conditions of employment and, consequently, Flagge did not inform any of the hoppers to whom he gave applications that their terms and conditions would change under the Respondent.

Berry III hoppers who wished to retain their jobs after the transition were merely required to complete an application and a W-4 tax form. As found by the judge, “filling out the application . . . was a formality, albeit a required one.” The Respondent did not interview candidates for its hopper positions, review their qualifications, or check their references.⁵ Indeed, Richard

5. Richard testified that by soliciting applications from the Berry III hoppers, he was agreeing to hire them “if [he] needed them.” The record establishes that the Respondent “needed” all 70 of the Berry III hoppers from whom it solicited applications. Richard’s Disposal operates 6 days per week and sends out 20-22 trucks per day, with 2 hoppers on each truck. Because all of the hoppers do not show up for work every day, the Respondent employs more than

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acknowledged that, by submitting applications, Berry III hoppers were agreeing to work for the Respondent and the Respondent was agreeing to hire them.

The transition did not occur on May 20, as initially planned, because the Respondent had not obtained sufficient applications from Berry III hoppers to fully staff the trucks. However, by June 1, the Respondent had approximately 70 completed applications from Berry III hoppers. On that date, Richard cancelled Berry III's agreement with Richard's Disposal.

Beginning on June 2, the Respondent began supplying hoppers to Richard's Disposal. At approximately 4 a.m., the hoppers assembled in the yard as usual, to await assignment to a truck. They were met by former Berry III supervisor, Karen Jackson, whom Richard had hired on June 1. Jackson informed all of the hoppers present that "[t]oday is the day you start working under Creative Vision." Jackson then explained to them the terms under which they would be working, including, among other things, the \$ 11-per-hour pay rate, the deduction of Federal and State taxes, and a number of new employment standards and safety rules. Some of the hoppers refused to work upon learning of the new terms. A sufficient number of hoppers remained, however, to staff the trucks. Thus, on its first day of operations, the Respondent supplied 44 hoppers to Richard's Disposal, all of whom were formerly employed by Berry III.

the minimum number of hoppers (40-44) required to fully staff the trucks on a particular day. The Respondent's weekly payroll usually includes between 62 and 67 hoppers and, during in its first 6 months of operation, the Respondent employed over 100 hoppers.

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On June 4, the Respondent distributed an employee handbook and safety manual to the hoppers, which set out a number of new rules and employment standards.

On June 6, after learning that the Respondent had replaced Berry III and retained the incumbent employees, the Union's State Director, Rosa Hines, hand delivered a letter to the Respondent demanding that it recognize the Union as the hoppers' exclusive representative for collective-bargaining purposes. The Respondent did not reply.

II. Discussion

In *NLRB v. Burns International Security Services*, 406 U.S. 272, 281-295, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972), the Supreme Court held that a successor employer is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally. The Court explained that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident whether the union will retain majority status in the new work force until after the successor has hired a full complement of employees. *Id.* at 295. The Court recognized, however, that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Id.* at 294-295.

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The Board in *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), addressed the “perfectly clear” exception, and found it was “restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.” (Footnote omitted.) Acknowledging that “the precise meaning and application of the Court’s caveat is not easy to discern,” the Board reasoned that “[w]hen an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer ‘plans to retain all of the employees in the unit,’ as that phrase was intended by the Supreme Court,” because of the possibility that many of the employees will reject employment under the new terms, and therefore the union’s majority status will not continue in the new work force. *Id.*⁶

6. Although the Court in *Burns*, and the Board in *Spruce Up*, spoke in terms of a plan to retain *all* of the employees in the unit, the Board has subsequently clarified that the relevant inquiry is whether the successor plans to retain a sufficient number of the predecessor’s employees so that the union’s majority status will continue. See *Galloway School Lines*, 321 NLRB 1422, 1426-1427 (1996); *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040, 97 S. Ct. 739, 50 L. Ed. 2d 752 (1977).

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In subsequent cases, the Board has clarified that the perfectly clear exception is not limited to situations where the successor fails to announce initial employment terms before it formally invites the predecessor’s employees to accept employment. Rather, a new employer has an obligation to bargain over initial terms when it displays an intent to employ the predecessor’s employees without making it clear that their employment will be on different terms from those in place with the predecessor. *Canteen Co.*, 317 NLRB 1052, 1053-1054 (1995), *enfd.* 103 F.3d 1355 (7th Cir. 1997).⁷ Thus, in applying the “perfectly clear” exception of *Burns*, the Board scrutinizes not only the successor’s plans regarding the retention of the predecessor’s employees but also the timing and clarity of the successor’s expressed intentions concerning existing terms and conditions of employment.

Here, the judge found that “[t]he record leaves no doubt that the Respondent[] . . . intended to employ the hoppers working in the Berry III bargaining unit, and made no efforts to hire hoppers from other sources.” As set forth in Richard’s testimony, cited by the judge, Richard agreed

7. In *Canteen*, the Board found that a successor “effectively and clearly communicated . . . its plan to retain the predecessor employees” by expressing to the union its desire to have the employees serve a probationary period without mentioning any changes in employment conditions. Therefore, it became a perfectly clear successor at that point, and “was not entitled to unilaterally implement new wage rates” the next day, during employment interviews. *Id.*, citing *Fremont Ford*, 289 NLRB 1290, 1296-1297 (1988); *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), *enf. denied* in relevant part sub nom. *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977).

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to hire the Berry III hoppers who submitted applications. Notwithstanding this clear intent, the judge found that the Respondent was not a “perfectly clear” successor within the meaning of *Spruce Up*, because it “did not fail to communicate candidly with the hoppers” about its intent to set its own initial terms. In so finding, the judge relied on the fact that, between mid-May and June 1, Richard “communicated at least some information” about initial terms “to at least some of the hoppers.” Additionally, the judge cited evidence that an unknown number of hoppers heard a rumor while they were still employed by Berry III that the Respondent would be paying \$ 11 per hour. Finally, the judge placed heavy reliance on Jackson’s June 2 announcement of initial terms and conditions of employment to the hoppers who had assembled for work and were awaiting assignments. Accordingly, the judge concluded that “before it began operations, hoppers in the Berry III bargaining unit were aware that Respondent intended to make a number of significant changes.” He therefore found that the Respondent was a regular *Burns* successor that lawfully exercised its prerogative to set initial terms and conditions of employment that differed from those established by the predecessor.⁸ We disagree, for the reasons that follow.

8. The judge also dismissed the complaint allegation that, even assuming the Respondent was a regular *Burns* successor, it violated Sec. 8(a)(5) and (1) by unilaterally implementing new work rules through the employee handbook and safety manual, after the bargaining obligation attached. The General Counsel has excepted. In light of our finding below that the Respondent was a “perfectly clear” successor, we find it unnecessary to pass on the General Counsel’s alternate theory.

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As described above, by submitting applications, the Berry III hoppers were agreeing to work for the Respondent, and the Respondent was agreeing to hire them. The judge’s reliance on Jackson’s June 2 announcement that the hoppers were now working for the Respondent and under new terms and conditions of employment—made after the hoppers reported to work and were awaiting their truck assignments for the day—ignored Board decisions clarifying that, to preserve its authority to set initial terms and conditions of employment unilaterally, a successor must clearly announce its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor’s employees.⁹ The Board has consistently held, moreover, that a subsequent announcement of new terms, even if made before formal offers of employment are extended or the successor commences operations, will not vitiate

9. See, e.g., *Elf Atochem North America, Inc.*, 339 NLRB 796, 807 (2003) (successor incurs “obligation to bargain over initial terms of employment when it displays an intent to employ the predecessor’s employees without making it clear to those employees that their employment will be on terms different from those in place with the predecessor employer”); *Canteen*, 317 NLRB at 1053-1054; *Helnick Corp.*, 301 NLRB 128, 128 fn. 1 (1991) (obligation to bargain over initial terms commenced when new employer informed employees that they could expect to be retained without mentioning changes in preexisting terms); *C.M.E., Inc.*, 225 NLRB 514, 514-515 (1976) (obligation to bargain over initial terms commenced when new employer informed the union that it intended to retain the predecessor’s employees without mentioning changes in preexisting terms, rather than on later dates when applications for employment were solicited or when the union and the new employer met to discuss contract revisions).

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the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employees without making it clear that their employment is conditioned on the acceptance of new terms.¹⁰

10. See, e.g., *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 5–7 (2016) (“the bargaining obligation attaches when a successor expresses an intent to retain the predecessor’s employees without making it clear that employment will be conditioned on acceptance of new terms”; the subsequent announcement of new terms will not justify a refusal to bargain); *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 3–4 (2016) (“The Board has consistently held . . . that a subsequent announcement of new terms, even if made before formal offers of employment are extended, or before the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor’s employees without making it clear that their employment is conditioned on the acceptance of new terms.”); *DuPont Dow Elastomers, LLC*, 332 NLRB 1071, 1074 (2000) (“The Board has consistently found that an announcement of new terms will not justify a refusal to bargain if . . . the employer has earlier expressed an intent to retain its predecessor’s employees without indicating that employment is conditioned on acceptance of new terms.”), *enfd.* 296 F.3d 495 (6th Cir. 2002); *Canteen*, 317 NLRB at 1053–1054; *Starco Farmers Market*, 237 NLRB 373, 373 (1978) (“[W]here the new employer’s offer of different terms was simultaneous with the expression of intent to retain the predecessor’s employees, the Board has found no duty to bargain over initial employment terms. However, where the offer of different terms was subsequent to the expression of intent to retain the predecessor’s employees, the Board has regarded the expression of intent as controlling and has found that the new employer was obligated to bargain with union before fixing initial terms.” (internal citations omitted)); *Roman Catholic Diocese of Brooklyn*, 222 NLRB at 1055 (obligation to bargain over initial terms commenced when the chairman of the

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new employer's board of trustees expressed an intent to retain the predecessor's employees without mentioning any changes in preexisting terms; obligation was not vitiated when promise to rehire was later disavowed and employees were specifically informed—before formal offers of employment were extended and operations began—that employment would be on new terms and that the new employer “has no intention of being bound by the terms and conditions of employment which prevailed” under the predecessor).

The dissent argues that the Board's case law holding that a new employer must announce its intent to establish new terms prior to or simultaneously with its expression of intent to retain the predecessor's employees to avoid “perfectly clear” successor status should not control in the “unique facts” of this case. Specifically, the dissent asserts that because the Respondent's hiring process “remained in a state of flux right up to the moment on June 2 when the hoppers accepted employment by boarding the garbage trucks to begin work,” the “chronological endpoint” for determining whether the Respondent was a perfectly clear successor “was June 2, its first day of operations.” This argument fundamentally misconstrues the “perfectly clear” exception. In *Burns*, the Supreme Court recognized that there will be instances in which it will perfectly clear *before* the hiring process is complete that the successor intends to hire the predecessor's employees as a majority of its initial workforce. In those circumstances, the Court stated that “it will be appropriate to have [the successor] initially consult with the employees' bargaining representative before he fixes terms.” 406 U.S. 294–295. The Court contrasted that situation with the more common situation where “it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit” *Id.* Although the Board in *Spruce Up* held that “[w]hen an employer

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In the present case, the judge’s own factual findings establish that the Respondent expressed an intent to retain the predecessor’s employees between mid-May and June 1. Examining the events culminating with the June 1 cancellation of Berry III’s agreement to provide hoppers to Richard’s Disposal, the judge found that it was “perfectly clear,” using those words in their ordinary sense, that the Respondent intended to retain the Berry III hoppers as its new work force and continue operations largely unchanged. The judge emphasized that the transition from Berry III to the Respondent would be an abrupt shift, and Richard had to be sure he had enough hoppers lined up to staff all of the trucks in advance. The judge additionally emphasized that the Respondent “made no efforts to hire hoppers from other sources,”¹¹ and he opined:

who has not yet commenced operations announces new terms . . . we do not think it can fairly be said that the new employer ‘plans to retain all of the employees in the unit,’” (209 NLRB at 195), the Board has consistently required that the announcement of new terms be made prior to or simultaneously with the expression of intent to retain. And it is irrelevant if, as is often the case, the hiring process is incomplete or “in a state of flux” at that point. See cases cited above and in footnote 9.

11. The Respondent contends in its answering brief that it sought applicants from sources other than the predecessor’s employees. However, the Respondent did not except to the judge’s contrary finding. It is therefore procedurally foreclosed from raising the issue for consideration by the Board in its answering brief. See *Richmond District Neighborhood Center*, 361 NLRB No. 74, slip op. at 1, fn. 1 (2014), citing *White Electrical Construction Co.*, 345 NLRB 1095, 1096 (2005) and *Bohemian Club*, 351 NLRB 1065, 1067 fn. 6 (2007); see also the Board’s Rules and Regulations

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If the Respondent had not intended to hire the members of the bargaining unit, en masse, Richard [] or someone working for him would have interviewed applicants, examined qualifications, and checked references. Instead, the Respondent chose merely to distribute applications, with W-4 forms attached, to the hoppers in the Berry III bargaining unit. Typically, a job applicant does not fill out a W-4 form until hired, so inclusion of the tax form with the application suggests that the Respondent had little doubt about whom it would hire.

Relying on these facts, and Richard's own testimony that he was agreeing to hire Berry III hoppers who submitted applications, the judge found that there was "no doubt" that the Respondent intended to retain the Berry III hoppers as its new work force and that "filling out the application and tax forms was a formality."¹² See

Sec. 102.46(b)(2) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.").

12. The Respondent and our dissenting colleague do not challenge the judge's finding that, by distributing job applications and W-4 forms to the Berry III hoppers, the Respondent was offering to hire them. However, they contend that the Respondent's inclusion of the W-4 forms with the job applications also signaled a fundamental change in the hoppers' terms and conditions of employment, namely, that if they accepted employment, they would cease being independent contractors with no taxes withheld. They argue, therefore, that the Respondent timely informed the

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hoppers that employment was being offered on different terms. We disagree. As discussed above, to avoid “perfectly clear” successor status, a new employer must “clearly announce its intent to establish a new set of conditions” prior to or simultaneously with its expression of intent to retain the predecessor’s employees. 209 NLRB at 195; *Canteen*, 317 NLRB at 1053–1054. Although the announcement need not be made in any particular form, it must be sufficiently clear that a reasonable employee in like circumstances would understand that continued employment is conditioned on acceptance of materially different terms from those in place under the predecessor. The inclusion of W-4 forms with job applications, without explanation, let alone an express announcement that taxes would be withheld from the hoppers’ pay, was too ambiguous to meet this standard. The record does not disclose whether the hoppers received W-4 forms when they applied to work for Berry III. Further, although the term “independent contractor” has been used in these proceedings to describe the hoppers’ employment status under Berry III, there is no evidence that the hoppers considered themselves to be “independent contractors” rather than “employees” of Berry III in a bargaining unit represented by the Union. Furthermore, a number of hoppers wrote on their W-4 forms that they were exempt from paying taxes, suggesting that they did not understand that taxes would be withheld from their pay if they accepted employment with the Respondent, let alone that their terms and conditions of employment would be changed. Indeed, none of the hoppers testified that they understood that the Respondent planned to deduct taxes from their pay before Jackson’s announcement on June 2.

The cases cited by our dissenting colleague are distinguishable. In *Ridgewell’s, Inc.*, 334 NLRB 37 (2001), enfd. 38 Fed.Appx. 29 (D.C. Cir. 2002), the new employer, during one of its first contacts with the union and before the hiring process or operations began, expressly informed the union that it would utilize the predecessor’s employees only on an independent contractor basis. The Board found that the announcement was both “timely” and “substantive,

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Cadillac Asphalt Paving Co., 349 NLRB 6, 11 (2007) (finding that “by offering job applications and W-4 forms to [the predecessor’s] employees . . . [the successor] invited the employees to accept employment”). Based on this compelling evidence, we find that Jackson’s announcement of new terms on June 2 came too late to remove the Respondent from the “perfectly clear” exception.

Nor do we find that the word-of-mouth communication among the hoppers about the Respondent’s new pay rate was legally sufficient notice to the hoppers or the Union of the Respondent’s intent to establish new terms and conditions of employment. The judge found, and we agree, that “the record affords no way of quantifying how many of the hoppers had learned about the \$ 11 per hour wage rate or the other terms and conditions of employment before they reported for work . . . on June 2.” Only one hopper, Anthony Taylor, testified that he learned about

putting the union on notice that a new set of employment conditions would be in effect.” *Id.* at 37. Similarly, in *S & F Market Street Healthcare, LLC v. NLRB*, 570 F.3d 354, 360–361 (D.C. Cir. 2009), denying enf. to *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975 (2007), the court found that by expressly informing the predecessor’s employees that any employment would be “at will,” the successor signaled a significant and material change from employment under the “just cause” provision of the collective-bargaining agreement between the predecessor and incumbent union. Here, in contrast, the Respondent did not expressly inform the Union or the hoppers that the hoppers would be treated as employees rather than as independent contractors. And it did not inform the majority of the hoppers that they would have taxes withheld from their pay until after the bargaining obligation had already attached.

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the new pay rate before June 2. However, he was not able to identify the source of the information, other than to state: “we all congregate out there in the morning. We been knowing that.” In addition, Union director Hines testified that, in May, several hoppers told her that they heard a new company was taking over for Berry III, and at least one hopper told her that he heard the new company would be paying \$ 11 an hour. Hines questioned the hoppers, but “no hopper . . . could confirm where he got it from” or “say that anyone in authority of their . . . new employer to be, had stated that [their pay] would be \$ 11 an hour.” From the perspective of the employees and the Union, then, the information about the Respondent’s new pay rate was unsubstantiated rumor or gossip until it was confirmed by Jackson on June 2. Gossip, conjecture, and unsubstantiated rumors cannot take the place of the clear announcement of intent to establish a new set of conditions required by Spruce Up.¹³

13. The judge found that Jackson notified some of the hoppers “in advance, while they were still working for Berry III,” about the Respondent’s initial terms and conditions of employment. In so finding, the judge relied on the testimony of hopper Kumasi Nicholas. However, the judge misconstrued Nicholas’ testimony. Nicholas testified that he could not recall when Jackson told him about the initial terms. Asked on direct examination, “what happened on the very first day that [the Respondent] began operations,” Nicholas testified, “Well, they told us ahead of time—Mrs. Jackson told us ahead of time, you know, might be switching over to another little company where—you know, a pay rate, and she just let us know ahead of time, and then that’s when, you know, they started off.” An effort to clarify whether Nicholas learned about the pay rate during Jackson’s meeting with the hoppers on the morning of June 2 brought the response, “I’m not sure. It’s been

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Similarly, we find Richard's communications of new terms to approximately 20 Berry III hoppers between mid-May and June 1 did not remove the Respondent from the "perfectly clear" exception. The judge found that Richard "told some of the hoppers --those to whom he gave employment application forms--" of the planned changes in terms and conditions of employment. Richard testified that he distributed applications to only 20 hoppers. The only other person who distributed applications was Flagge, and the credited testimony establishes that Flagge did not inform any of the hoppers to whom he gave applications of the Respondent's new terms. Accordingly, the record clearly establishes that the Respondent failed to give notice of different initial terms to 50 of the approximately 70 Berry III hoppers from whom it solicited applications on or before June 1.

To hold that a successor can avoid the obligation to bargain over initial terms in these circumstances would invite abuse. A new employer, wishing to take advantage of the skill and experience of the incumbent employees while avoiding the bargaining obligation of

about a year. . . . I know she told me that, but I'm not sure." Even assuming, moreover, that Jackson discussed the Respondent's pay rate with the hoppers before June 2, the record does not support a finding that she did so as an agent of the Respondent. Richard hired Jackson on June 1 (after she put the hoppers on the trucks), and she began working for the Respondent on June 2. There is no evidence that Richard, or anyone else in a position of authority with the Respondent, informed Jackson of the hoppers' initial terms and conditions of employment or authorized Jackson to speak on the Respondent's behalf before she was hired.

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a “perfectly clear” successor, would be encouraged to announce changes in preexisting terms to only a select few incumbent employees, while allowing the majority of the employees to be lulled by its silence into not seeking other work. Such a result would be at odds with the clear import of the Supreme Court’s decision in *Burns* and the Board’s decision in *Spruce Up*. See *S & F Market Street Healthcare*, 570 F.3d at 359 (holding that, “at bottom the ‘perfectly clear’ exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it . . . lulled into not looking for other work”); *International Assn. of Machinists and Aerospace Workers, AFL-CIO v. NLRB*, 595 F.2d 664, 674-675, 193 U.S. App. D.C. 279 (D.C. Cir. 1978) (approving the Board’s imposition of an initial bargaining obligation on the basis that “unconditional retention-announcements engender expectations, oftentimes critical to employees, that prevailing employment arrangements will remain essentially unaltered [U]nless [the predecessor’s employees] are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force.”), cert denied, 439 U.S. 1070, 99 S. Ct. 839, 59 L. Ed. 2d 36 (1979).

Thus, a new employer that expresses an intent to retain the predecessor’s work force without concurrently revealing to a majority of the incumbent employees that different terms will be instituted, improperly benefits from the likelihood that those employees, lacking knowledge that terms and conditions will change, will choose to stay

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in the positions they held with the predecessor, rather than seeking employment elsewhere.

As the Board has observed, “[t]he Spruce Up test focuses on gauging the probability that employees of the predecessor will accept employment with the successor. “ Road & Rail Services, Inc., 348 NLRB 1160, 1162 (2006) (citing *Spruce Up*; Machinists, 595 F.2d at 673 fn. 45 (observing that in applying the *Spruce Up* test “the relevant factor is the degree of likelihood that incumbents will work for the successor”). The Board explained in *Spruce Up*:

When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer “plans to retain all of the employees in the unit,” as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts. . . . Since that is so, it is surely not “perfectly clear” to either the employer or to us that he can “plan to retain all of the employees in the unit” under such a set of facts. 209 NLRB at 195.

The Board theorized that a successor’s plan to hire at least the majority of its employees from the work force of

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its predecessor is not likely enough to succeed when its offer of employment is coupled with an announcement of reduced wages and benefits, and in such circumstances no duty to bargain over initial terms and conditions of employment would arise. Applying that rationale here, Richard's announcement of new terms to approximately 20 Berry III hoppers did not negate the inference of probable continuity of employment of the remaining 50 Berry III hopper applicants, who lacked knowledge that their wages and benefits would be reduced. The Respondent's plan to hire at least a majority of its employees from the ranks of the Berry III hoppers was therefore reasonably certain to succeed. Moreover, by June 1, it was clear that the Respondent's plan had indeed succeeded.¹⁴ The Respondent was therefore obligated as of that date to consult with the Union before imposing initial terms.

The Respondent, joined by our dissenting colleague, contends that, even assuming it was "perfectly clear" that the Respondent planned to retain the Berry III hoppers on June 1, the bargaining obligation was not triggered until the Union demanded bargaining on June 6 and, therefore, the Respondent lawfully established initial terms and condition of employment on June 2. We find no merit in that argument.

14. As the judge found, by turning in their applications and tax forms to the Respondent, the Berry III hoppers were agreeing to work for the Respondent and the Respondent was agreeing to hire them. On June 1, the Respondent had approximately 70 completed applications from Berry III hoppers, a number sufficient to fully staff the trucks operated by Richard's Disposal; Richard therefore cancelled the contract with Berry III on that date

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The rule invoked by the Respondent and our dissenting colleague --that a bargaining obligation is triggered only when the union has made a bargaining demand--developed in a very different context. In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987), the Supreme Court addressed the question when the bargaining obligation is triggered in circumstances where there has been a hiatus between the closing and reopening of an enterprise and/or a successor gradually builds up its work force over a period of time. The Court held that, in those circumstances, the successor's duty to bargain is not triggered until (1) the successor is engaged in normal operations with a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor, and (2) the union has demanded recognition or bargaining. *Id.* at 51-52. However, nothing in the language or the reasoning of *Fall River* supports the extension of these criteria to the "perfectly clear" successor context. Indeed, application of these criteria would eviscerate the "perfectly clear" exception, which is intended to promote bargaining *before* the successor hires the predecessor's employees and fixes initial terms, in circumstances where the successor intends to retain as its work force a majority of the predecessor's employees.

The Respondent and our dissenting colleague have cited no case in which the Board or courts have applied the *Fall River* criteria in the "perfectly clear" successor context. To the contrary, in *Cadillac Asphalt*, 349 NLRB at 9-11, cited by the Respondent in its answering brief, the Board discussed the two-prong rule of *Fall River*

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but ultimately found that the new employer's obligation as a "perfectly clear" successor to bargain over initial terms arose before the union demanded bargaining. See also C.M.E., 225 NLRB at 514-515, where the Board reversed the administrative law judge's finding that the successor's obligation to bargain commenced on the date the union demanded recognition, and found, instead, that the obligation commenced on the earlier date when the successor made it "perfectly clear" that it planned to retain all or substantially all of the predecessor's employees. Cadillac Asphalt and C.M.E. are consistent with a long line of cases where the Board, without addressing *Fall River*, found that a "perfectly clear" successor's obligation to bargain over initial terms commenced before the predecessor's employees were formally hired and normal operations began and/or before the union demanded recognition and bargaining. Nexeo Solutions, LLC, 364 NLRB No. 44, slip op. at 5-9 (finding that obligation to bargain over initial terms commenced before successor hired employees and before union demanded bargaining); Adams, 363 NLRB No. 193, slip op. at 4-5 (same); Canteen, 317 NLRB at 1052-1054 (same); Level, a Div. of Worcester Mfg., Inc., 306 NLRB 218, 218, 220 (1992) (same). See also Elf Atochem North America, Inc., 339 NLRB at 796 (finding that obligation to bargain over initial terms commenced before successor hired employees); DuPont Dow, 332 NLRB at 1075 (same); Helnick Corp, 301 NLRB at 128 fn. 1 (1991) (same); Spitzer Akron, 219 NLRB at 23 (finding that obligation to bargain commenced before union demanded bargaining).¹⁵

15. The dissent contends that dispensing with the *Fall River* criteria in the "perfectly clear" successor context is impractical

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In sum, we find that the Respondent is a “perfectly clear” successor and that it violated Section 8(a)(5) and (1) of the Act by announcing and implementing unilateral

because: there is no certainty that the union will even seek to represent the predecessor’s employees in the new work force; the employer may already have a work force represented by a different union; it is possible that none of the predecessor’s employees will accept employment with the new employer; and there may be no evidence that the predecessor’s union is supported by the predecessor’s employees. At the root of these concerns is an elemental misunderstanding of the “perfectly clear” successor doctrine. The “perfectly clear” exception applies only in circumstances where the continuity of the existing work force and the union’s majority status in the new work force are reasonably certain. See *Burns*, 406 U.S. at 294–295 (recognizing that “there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees’ bargaining representative before he fixes terms”); *DuPont Dow*, 332 NLRB at 1073 (interpreting *Spruce Up* as requiring “both a manifestation of intent on the part of the employer to retain all or substantially all of its predecessor’s employees and also a substantial likelihood that those offered employment will accept it”). Moreover, under current law, when a business changes hands and the new employer is a successor, the union is entitled to an irrebuttable presumption of majority support for a reasonable period of bargaining, preventing any challenge to the union’s status, whether by the employer’s unilateral withdrawal of recognition or by an election petition. *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011). Accordingly, a successor (whether a regular *Burns* successor or a “perfectly clear” successor) must recognize and bargain with the union that represented its predecessor’s employees for a reasonable period of time—even if it has affirmative evidence that the union is no longer supported by the predecessor’s employees.

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changes in the unit employees' terms and conditions of employment on and after June 2, 2011.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 3 and 4:

“3. Beginning June 2, 2011, and continuing to date, the Respondent has failed and refused to recognize and bargain with Local 100, United Labor Unions, as the exclusive collective-bargaining representative of its employees in the appropriate unit described in paragraph 2, above, and thereby has violated Section 8(a)(5) and (1) of the Act.”

“4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by announcing and implementing unilateral changes in the unit employees' existing terms and conditions of employment on and after June 2, 2011, including promulgating new work rules and changing the manner in which employees are paid. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.”

AMENDED REMEDY

We amend the judge's proposed remedy to address the additional violations that we have found. Having found that the Respondent is a perfectly clear successor and that it violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union prior to changing existing terms

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and conditions of employment for the unit employees, we shall require the Respondent, on request of the Union, to retroactively restore the terms and conditions of employment established by its predecessor and to rescind the unilateral changes it has made, except for the payroll deductions required by Federal, State, or local law.¹⁶ The Respondent shall also be required to make employees whole for any loss of wages or other benefits they suffered as a result of the Respondent's unilateral changes in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), except for the changes in the unit employees' net pay resulting from the payroll deductions required by Federal, State, or local law.

Finally, the Respondent shall be required to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

16. The Order shall not be construed as requiring or authorizing the Respondent to rescind any improvements in the unit employees' terms and conditions of employment unless requested to do so by the Union.

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ORDER

The National Labor Relations Board orders that the Respondent, Creative Vision Resources, LLC, New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Unilaterally changing the terms and conditions of employment of its unit employees without providing the Union with notice and an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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All full-time and part-time hoppers employed by Creative Vision Resources, LLC, who work on trucks in the collection of garbage and trash in the Greater New Orleans, Louisiana area, excluding all other employees, guards and supervisors as defined in the Act.

(b) Before implementing any changes in the bargaining unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

(c) On request of the Union, rescind any changes in the terms and conditions of employment for the unit employees that were unilaterally implemented on and after June 2, 2011, except for the changes implemented with respect to payroll deductions required by Federal, State and local law.

(d) Make the unit employees whole, with interest, for any losses sustained as a result of the unilateral changes in terms and conditions of employment in the manner set forth in the remedy section of this decision.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

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(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its New Orleans, Louisiana, facility copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has

17. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C. August 26, 2016

/s/
Mark Gatson Pearce, Chairman

/s/
Kent Y. Hirozawa, Member

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MEMBER MISCIMARRA, dissenting in part.

In this case, the judge found that, under *NLRB v. Burns International Security Services*, 406 U.S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972) (*Burns*),¹ the Respondent was a legal successor to the unionized predecessor employer, Berry III,² and violated Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA or Act) by failing to recognize and bargain in good faith with unit employees' incumbent bargaining representative, Local 100, United Labor Unions (the Union), on and after June 6, 2011, the date the Union demanded recognition and bargaining. There are no exceptions to these findings.

1. Under *Burns* and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987), a legal successor --i.e., an employer that acquires and continues (in substantially unchanged form) the business of a unionized predecessor, and hires as a majority of its work force (or of a segment of its work force constituting an appropriate bargaining unit) the predecessor's union-represented employees--must, upon receiving a demand for recognition or bargaining, recognize and bargain with the unit employees' incumbent bargaining representative. However, the successor is not bound by the terms of the predecessor's labor contract and has the right to set its own different initial terms and conditions of employment. As the Supreme Court stated in *Fall River Dyeing*, the Court in *Burns* "was careful to safeguard the rightful prerogative of owners independently to rearrange their businesses" (internal quotations omitted). 482 U.S. at 40.

2. As more fully explained in the judge's decision, Respondent's predecessor, Berry III, was a labor contractor in the business of furnishing individuals called "hoppers" to trash collection companies in the New Orleans area, including a company called Richard's Disposal. Richard's Disposal is owned by Alvin Richard, Jr. The owner and president of the Respondent is Alvin Richard III (Richard III). "Hoppers" ride on the rear of garbage trucks and load garbage from trash containers into the truck.

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The principal issue on exceptions arises from the judge's finding that, contrary to the General Counsel's further allegation, the Respondent was *not* a "perfectly clear" successor to Berry III, and therefore did not violate Section 8(a)(5) of the Act when it set initial terms and conditions of employment for unit employees without bargaining with the Union.³ My colleagues reverse the judge's dismissal of this allegation and find that the Respondent was a "perfectly clear" successor. Applying the standard set forth in *Spruce Up*, *supra*, I would find, in agreement with the judge and contrary to my colleagues, that the facts establish that the Respondent was not a "perfectly clear" successor.⁴

3. The general rule, stated above in fn. 1, is that a successor employer has the right to set its own different initial terms and conditions of employment. However, the Court in *Burns* recognized a limited exception to this right in situations where "it is *perfectly clear* that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294-295. "The 'perfectly clear' exception is and must remain a narrow one because it conflicts with 'congressional policy manifest in the Act . . . to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.'" *S&F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 359, 386 U.S. App. D.C. 444 (D.C. Cir. 2009) (quoting *Burns*, 406 U.S. at 288). The Board interpreted the "perfectly clear" exception in *Spruce Up Corp.*, 209 NLRB 194 (1974), *enfd. mem.* 529 F.2d 516 (4th Cir. 1975). See fn. 4, below.

4. In *Spruce Up*, the Board interpreted the limited "perfectly clear" exception to the general rule of *Burns* to be "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all

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The key point of my disagreement with my colleagues concerns whether, as stated in *Spruce Up*, *supra*, the Respondent “failed to clearly announce its intent to establish a new set of conditions prior to inviting former

be retained without change in their wages, hours, or conditions of employment, “ or “where the new employer has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. “ 209 NLRB at 195; accord *Ridgewell’s, Inc.*, 334 NLRB 37 (2001), *enfd.* 38 Fed. Appx. 29 (D.C. Cir. 2002). And the Board in *Spruce Up* made clear that by “prior to,” it meant “prior to or simultaneously with”: “When an employer who has not yet commenced operations announces new terms *prior to or simultaneously with* his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer ‘plans to retain all of the employees in the unit,’ as that phrase was intended by the Supreme Court.” 209 NLRB at 195 (emphasis added). Significantly, *Spruce Up* does not mandate that an employer announce its intent to establish new employment terms in any particular form to any specific number or percentage of its predecessor’s unit employees. All that is required is a communication that “portend[s] employment under different terms and conditions.” *Ridgewell’s*, 334 NLRB at 37; see *S&F Market Street Healthcare*, 570 F.3d at 359 (“[A]t bottom the ‘perfectly clear’ exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work.”).

Only the second part of the *Spruce Up* gloss on *Burns’* “perfectly clear” exception--i.e., whether the Respondent timely notified the hoppers of its intention to set new terms and conditions of employment --is at issue here. The judge found that the credited evidence would not support a finding that the Respondent had misled employees, either actively or by tacit inference, to believe that they would all be retained without any changes in their terms and conditions of employment. My colleagues do not disagree with this finding.

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employees to accept employment. “ My colleagues find that the Respondent failed to timely announce its intent to establish new employment terms. In this regard, I believe that my colleagues have erred by applying “perfectly clear” successor law in an excessively rigid and formalistic manner that does not do justice to the unique facts of this case, especially the nature of the Respondent’s hiring process. In concluding, contrary to my colleagues, that the Respondent did *not* fail to announce, at the appropriate time, its intent to establish new terms and conditions of employment, I emphasize the following points.

As the judge’s detailed recitation of the facts shows, Richard III decided to form the Respondent as a new labor supply company to replace Berry III as the provider of hoppers to Richard’s Disposal. Richard III was, as the judge stated, “displeased with the laxity of Berry III and determined to run his company differently, in compliance with the law and with greater attention to workplace safety.” Among other things, Richard III wanted to correct what he perceived to be Berry III’s erroneous treatment of hoppers as independent contractors instead of employees, reflected in part by the fact that Berry III did not deduct income taxes from the hoppers’ pay. To carry out the transition from Berry III to the Respondent without an interruption in trash-collection services, the Respondent had to ensure that it had a sufficient number of hoppers available to supply to Richard’s Disposal to staff the latter’s garbage trucks the day after Richard’s Disposal terminated its labor-supply contract with Berry III. How the Respondent’s hiring process unfolded is vital to determining whether the Respondent was a “perfectly clear” successor.

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The Respondent's hiring process began on or about May 19, 2011,⁵ but remained in a state of flux right up to the moment on June 2 when the hoppers accepted employment by boarding the garbage trucks to begin work.⁶ Thus, in determining whether the Respondent fulfilled its obligation under *Spruce Up* to clearly announce to the hoppers its intention to set new terms and conditions of employment prior to or simultaneously with inviting them to accept employment, we must examine what the Respondent communicated to the hoppers *on or before June 2*.

As to that critical issue, the judge found that (1) prior to June 2, Richard III told a number of hoppers (but apparently not more than 20) about the Respondent's

5. All dates are 2011.

6. Although Richard's Disposal cancelled its contract with Berry III on June 1, I believe that the chronological endpoint for determining whether the Respondent, under *Spruce Up*, timely communicated its intention to set initial terms and conditions of employment was June 2, its first day of operations. As the judge described, Richard III testified that throughout the application process, he was hiring hoppers to work for him *if he needed them*. Thus, the Respondent would not know precisely which hoppers it needed until they showed up on June 2. Indeed, the record reflects that the Respondent was still handing out applications on that day. Moreover, on the morning of June 2, after the Respondent announced its employment terms to the hoppers gathered in the yard, some of them chose to accept employment on the offered terms by climbing onto a truck, and others decided not to accept employment on those terms and left the yard. Thus, hiring was an ongoing process that continued right up to June 2, when the Respondent spelled out in detail the terms on which it was offering employment.

[110a-113a]

Pages 110-113 are Intentionally Omitted.

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new terms and conditions of employment; (2) starting in May, the Respondent began distributing applications to Berry III hoppers with W-4 tax withholding forms attached; and (3) shortly before 4 a.m. on the morning of June 2, before work started and before hoppers boarded the trucks, the Respondent, through its supervisor, Karen Jackson, communicated to *all* the hoppers gathered in the yard its new terms and conditions of employment, which the hoppers were free to accept or refuse. Forty-four hoppers accepted those terms and boarded the trucks, which the judge found was a representative complement of the predecessor's hoppers. Accordingly, based on the credited evidence, I would find, in agreement with the judge, that the Respondent provided timely notice to the hoppers of its intention to set new terms and conditions of employment.¹

1. My colleagues cite several cases in support of their view that Jackson's June 2 announcement of initial terms and conditions came too late to prevent the attachment of "perfectly clear" successor status. I will not belabor my discussion by distinguishing those cases individually. Suffice it to say that none of them presents the unusual facts presented here, which demonstrate that the Respondent fulfilled its obligation under *Spruce Up* to clearly announce to employees its intention to set new terms and conditions of employment at the appropriate time in the circumstances of this case, namely, before inviting them to accept employment on June 2. Moreover, as explained more fully in the text, prior to June 2 the Respondent distributed a job application to each hopper with a W-4 tax withholding form attached, which was independently sufficient to "portend employment under different terms and conditions," *Ridgewell's*, 334 NLRB at 37, because the tax withholding forms placed the hoppers on notice that they would no longer be paid as independent contractors with no income tax withheld as they had been with predecessor Berry III. And in any event, by June 2, the

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Even assuming for the sake of argument that Jackson's June 2 announcement of new initial employment terms came too late to remove the Respondent from the "perfectly clear" exception, the Respondent's earlier actions clearly portended employment under different terms and conditions than those of Berry III and were

Respondent had clearly informed hoppers of the new terms and conditions of employment: prior to June 2, Richard III had informed approximately 20 hoppers about the new terms and conditions, and on June 2, Jackson told all the assembled hoppers about the new terms and conditions of employment.

I am concerned that my colleagues have failed to fully recognize that, as the D.C. Circuit emphasized in *S&F Market Street Healthcare*, the "perfectly clear" exception "is and must remain a narrow one because it conflicts with 'congressional policy manifest in the Act . . . to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.'" 570 F.3d at 359 (quoting *Burns*, 406 U.S. at 288). As I stated recently in another case dealing with the "perfectly clear" exception, "the policies at issue here . . . should make the Board reluctant to find 'perfectly clear' successorship." *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 18 fn. 8 (2016) (Member Miscimarra, dissenting in part). "Perfectly clear" successor law is not a legal trap, and it does not require any particular form of communication. In short, I believe my colleagues take an excessively formalistic approach that does not adequately account for the reality that the Respondent's hiring process was in flux right up to the morning of June 2. As of June 1, Richard III believed he had a large enough pool of applicants for Richard's Disposal to cancel its contract with Berry III. But he did not know which of the hoppers from that pool would show up the next day. On the morning of June 2, Jackson announced in detail the new terms and conditions to the hoppers who showed up. Those who accepted were hired on the spot.

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thus independently sufficient to render the “perfectly clear” exception inapplicable. As the judge described in his recitation of the facts (but did not discuss in his legal analysis under *Spruce Up*), the Respondent attached a tax withholding form to the job application it provided to each of the hoppers. The inclusion of these tax forms is especially compelling evidence of the Respondent’s intention to set new terms of employment different from its predecessor’s. As mentioned above, one of Richard III’s primary goals in establishing the Respondent was to correct what he saw as Berry III’s allegedly lax management practices, including improperly treating hoppers as independent contractors with no taxes withheld from their pay. Among other things, Richard III was determined to treat hoppers as employees. Importantly, the tax withholding form provided to hoppers along with the application was the sort that an *employee* (as opposed to an independent contractor) receives. The tax forms thus signaled a fundamental change in hoppers’ terms and conditions of employment, namely, that if they accepted employment by the Respondent, they would cease being independent contractors paid by the day with no taxes withheld and would become employees from whose paychecks taxes would be withheld. And because the hoppers received these withholding forms with their applications--and signed (and in virtually every case also dated) the withholding forms--it reasonably follows that they were on notice that the Respondent was offering employment on new and different terms.

The instant case is therefore similar to *Ridgewell’s*, 334 NLRB at 37. In *Ridgewell’s*, the employer, prior to

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hiring or commencing operations, announced that it would hire the predecessor's catering employees as independent contractors. The Board found that the employer was not a "perfectly clear" successor because its announcement of a shift to independent contractor status for the former employees "portended employment under different terms and conditions" and thus clearly signaled that Ridgewell's terms and conditions of employment would differ from its predecessor's. *Id.* at 37-38. Similarly, the inclusion of the tax forms with the job applications in the instant case portended an equally fundamental change in hoppers' terms and conditions: treatment as employees with income taxes withheld from their pay, as opposed to independent contractors with no income taxes withheld. See also *S&F Market Street Healthcare*, 570 F.3d at 354 ("perfectly clear" exception inapplicable where successor informed applicants that employment would be "at will," where under predecessor, unit employees employed for 90 days or more could be discharged only for cause; all that is required is "a portent of employment under different terms and conditions").

I am not persuaded by my colleagues' contrary position. First, they minimize the fact that, as described above, the inclusion of tax withholding forms with the applications portended to the hoppers that the Respondent was offering them employment under different terms and conditions.¹ This act alone, however, was independently

1. In arguing that the hoppers would not have been on notice that employment was being offered on "significantly different terms" based on the inclusion of tax withholding forms with the job applications, the majority states that the "record does not disclose

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whether the hoppers received W-4 forms when they applied to work for Berry III.” But the majority acknowledges that “[t]he record shows . . . that Berry III paid the hoppers a flat rate of \$ 103 per day with no overtime, *and made no deductions for taxes* or social security” (emphasis added). Since the record establishes that Berry III did not deduct income taxes from the hoppers’ pay, it is reasonable to infer that Berry III did not require hoppers to fill out a useless W-4 form, the sole purpose of which is to enable the employer to withhold the correct amount of income tax. The inclusion of W-4 forms by Richard III clearly indicated a change in employment terms.

Further seeking to minimize the significance of the W-4s attached to the applications, my colleagues assert that some hoppers may not have considered themselves to be “independent contractors” under Berry III or “underst[ood]” that taxes would be withheld. The issue, however, is not what the hoppers believed or understood, but what the Respondent communicated to the hoppers prior to or simultaneously with inviting them to accept employment. The inclusion with job applications of W-4 forms--which state, on their face, that they refer to tax withholding--signaled a fundamental change in hoppers’ employment status from not having any money withheld from their pay to having money withheld. My colleagues speculate that because “a number” of hoppers wrote on their forms that they were exempt from paying taxes, this suggests “that they did not understand that taxes would be withheld from their pay if they accepted employment with the Respondent” Of course, many hoppers apparently understood this perfectly well, since a number of them filled out the forms in full. However, the issue again is not what the hoppers understood, but what the Respondent communicated to them; and the tax withholding forms attached to each application conveyed that hoppers would be accepting employment with the Respondent on terms that differed from Berry III’s terms. Finally, my colleagues attempt to distinguish *Ridgewell’s* and *S&F Market Street Healthcare* by arguing that, unlike the successors in those cases, the Respondent did not “expressly” notify the

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sufficient to remove the Respondent from the “perfectly clear” exception to the general rule of *Burns*. See S&F Market Street Healthcare, 570 F.3d at 360 (“a portent of employment under different terms and conditions” suffices to make “perfectly clear” exception inapplicable); Ridgewell’s, 334 NLRB at 37 (same). Further, the Respondent did announce to *all*hoppers --not just the approximately 20 hoppers Richard III spoke to when he gave them their applications--the changed terms and conditions on which it was offering employment on the morning of June 2. After that detailed announcement, some of the hoppers accepted employment on the offered terms by climbing on a truck, and others rejected employment on the offered terms by leaving the yard. With that announcement, the “perfectly clear” exception, already

hoppers that they would be treated as employees rather than independent contractors. I believe the inclusion of W-4 forms with the job applications constituted sufficient notice in this regard. Moreover, Supervisor Jackson reiterated the point when she addressed the hoppers on the morning of June 2. My colleagues also distinguish these cases on the basis that the Respondent “did not inform the majority of the hoppers that they would have taxes withheld from their pay until after the bargaining obligation had already attached.” However, the Respondent attached a W-4 form to each job application distributed to the hoppers, and the record shows that the first sentence in the instructions at the top of the W-4 form states: “Complete Form W-4 so that your employer can withhold the correct federal income tax from your pay.” (The state tax withholding form has corresponding language.) I also reject the unspoken premise of the majority’s statement, which is that the bargaining obligation had already attached before Jackson addressed the hoppers on June 2. As explained in the text, I find to the contrary.

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inapplicable by virtue of the distributed tax withholding forms, was rendered doubly inapplicable. See *S&F Market Street Healthcare*, 570 F.3d at 360 (“[T]he ‘perfectly clear’ exception applies only to cases in which the successor employer has led the predecessor’s employees to believe their employment status would continue unchanged after accepting employment with the successor. “).²

2. Any lack of precision in the record about who received notice and when is a failure of proof by the General Counsel, whose burden it was to establish that the Respondent violated Sec. 8(a)(5) of the Act by setting initial employment terms without bargaining with the Union, a violation that depends on proving the Respondent was a “perfectly clear” successor. Necessarily, therefore, the General Counsel has the burden of proving that the Respondent was a “perfectly clear” successor by showing that it “*failed* to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.” *Spruce Up*, 209 NLRB at 195 (emphasis added). Thus, it was for the General Counsel to prove that the Respondent *failed* to announce new employment terms to a sufficient number of hoppers, not on the Respondent to prove it did.

My colleagues say that to “hold that a successor can avoid the obligation to bargain over initial terms in these circumstances would invite abuse” because this would signal that successors could avoid “perfectly clear” status by informing “only a select few” of the predecessor’s employees that different terms will be instituted. There is no basis for their stated concern. Here, the facts establish that the Respondent informed all the hoppers that it was offering employment on different terms. Prior to June 2, Richard III informed some 20 hoppers about the new terms, and on June 2, Supervisor Jackson told *all* the hoppers about the new terms. And in any event, the inclusion of tax forms with job applications given to all the hoppers “portend[ed] employment under different terms and conditions.” *Ridgewell’s*, 334 NLRB at 37.

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As a final matter, the record establishes that the Union did not make any demand for recognition or bargaining until June 6, which makes June 6 the earliest point in time when the Respondent could be deemed a “successor” for purposes of Section 8(a)(5). I believe this independently precludes a finding that the Respondent was a “perfectly clear” successor on or before June 2, when the Respondent commenced operations after indicating, as explained above, that there would be different employment terms.

It is well established that, in successorship cases, the successor employer’s obligation to recognize and bargain with the union commences only if and when two conditions are met: (1) the union demands recognition or bargaining, and (2) the successor is engaged in normal operations with a “substantial and representative complement” of employees, a majority of whom were employed by the predecessor.³ I respectfully disagree with my colleagues’ position that they can dispense with these requirements. For good reasons, the Board and the courts have created well-established successorship principles that identify the precise point in time when a legal successor may be required to recognize and bargain with the union. For example, in *Fall River Dyeing*, *supra*, the Supreme Court indicated--consistent with longstanding Board and court cases--that a successor employer’s obligation to recognize and bargain with the union does not attach “until the *moment* when the employer attains the ‘substantial and representative complement, ““ which is measured

3. *St. Elizabeth Manor*, 329 NLRB 341, 344 fn. 8 (1999) (citing *Royal Midtown Chrysler Plymouth*, 296 NLRB 1039, 1040 (1989)).

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at the time the employer has received a “demand” from the union. 482 U.S. at 52 (emphasis added); cf. *Voith Industrial Services, Inc.*, 363 NLRB No. 116, slip op. at 18-19 (2016) (Member Miscimarra, concurring in part and dissenting in part).⁴ Most importantly, if one dispenses with the requirement of a demand for bargaining before a new employer can be deemed either a conventional or “perfectly clear” successor, the Board would impose bargaining obligations on the new employer even though (i) the employer has received no demand for recognition or bargaining from *any* union, and there is no certainty that the predecessor’s union will even seek to represent employees who are hired or retained by the employer; (ii) the employer--for legitimate, nondiscriminatory reasons--may already have a work force represented by a *different* union, which may preclude lawful recognition of and bargaining with the predecessor’s union; (iii) it is possible that the predecessor’s employees, even though offered employment, will not accept employment with the new employer; and (iv) there may be no evidence that the predecessor’s union is supported by any employees

4. In line with numerous Board and court cases, the Supreme Court in *Fall River Dyeing* held that if the union makes a premature demand for bargaining, the employer at that time has no duty to recognize and bargain with the union. In these circumstances, however, the Board and the courts have created a “continuing demand” rule, under which “a premature demand that has been rejected by the employer . . . remains in force.” 482 U.S. at 52. Thus, as stated in the text, provided that the other prerequisites to successor status have been satisfied, the employer must recognize and bargain with the union if and when (1) it has received the union’s demand for recognition or bargaining, and (2) the successor is engaged in normal operations with a “substantial and representative complement” of employees, a majority of whom were employed by the predecessor. *Id.*

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who work for the new employer. Moreover, when the employer does subsequently receive a bargaining demand from the predecessor's union, it may be that *none* of the predecessor's employees will have accepted offers of employment extended by the new employer. In these circumstances, under successorship case law that dates back decades, the new employer cannot be considered a legal "successor," and the new employer would *violate* the Act if it recognized and bargained with the predecessor's union.⁵

5. Sec. 9(a) provides for union recognition and bargaining only if the union is supported by a "majority of the employees" in an appropriate unit. Under Sec. 8(a)(2) of the Act, an employer commits an unfair labor practice if it recognizes and bargains with a union that does not have majority employee support. Although the Board and the courts have held that the "majority" requirement may be satisfied in successorship cases if there is sufficient evidence of business continuity and the existence of a work force majority at the time the union has demanded recognition and bargaining (provided that the employer at such time has a "substantial and representative complement" of employees), the Act makes clear that the only basis upon which bargaining can be considered appropriate is evidence sufficient to establish that the new employer is a legal "successor" --again, that (1) the predecessor's union has demanded recognition or bargaining, and (2) the successor is engaged in normal operations with a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor.

Decades of case law establish that the prerequisites of successor status are not evaluated in the abstract. Rather, this evaluation is made only when the union demands recognition or bargaining (or later if the union made such a demand before the employer had a substantial and representative complement of employees). My colleagues cite cases to the contrary in the context of "perfectly clear" successorship. In none of these cases did the

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In sum, for the reasons stated above, I would find that the Respondent was not a “perfectly clear” successor under *Spruce Up*, and it did not violate the Act by unilaterally setting initial terms and conditions of employment. Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 26, 2016

/s/
Philip A. Miscimarra, Member

Board squarely address (or discuss in depth) the issue of whether a union must demand bargaining before “perfectly clear” successor status attaches. And insofar as these cases could be interpreted as indicating that a bargaining obligation could attach without a demand for bargaining, I reject their reasoning.

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APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Local 100, United Labor Unions (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT unilaterally change your terms and conditions of employment without negotiating in good faith with the Union to agreement or to impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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WE WILL recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and part-time hoppers employed by Creative Vision Resources, LLC, who work on trucks in the collection of garbage and trash in the Greater New Orleans, Louisiana area, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of your employment, notify, and on request, bargain with the Union as the exclusive collective-bargaining representative of our unit employees.

WE WILL, on request of the Union, rescind the changes in the terms and conditions of employment for the unit employees that we unilaterally implemented on and after June 2, 2011, except for the changes we implemented with respect to payroll deductions required by Federal, State, or local law.

WE WILL make our unit employees whole for any losses they sustained due to the unlawfully imposed changes, except for the changes in net pay resulting from payroll deductions required by Federal, State, or local law, with interest.

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WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

CREATIVE VISION RESOURCES

The Board's decision can be found at www.nlr.gov/case/15-CA-020067 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Respondent, a successor, violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the Union which was the exclusive representative of the predecessor's bargaining unit employees. However, Respondent did not violate the Act in other ways alleged in the complaint.

Procedural History

This case began on June 17, 2011, when Local 100, United Labor Unions (the Charging Party or the Union) filed the initial unfair labor practice charge against Creative Vision Resources, LLC (the Respondent). It amended this charge on November 9, 2011.

After an investigation, the Regional Director for Region 15 of the National Labor Relations Board issued a complaint against the Respondent on March 30, 2012. In doing so, she acted for and on behalf of the Board's Acting General Counsel (the General Counsel or the government). The Respondent filed a timely answer.

On May 23 and July 17, 2012, the Regional Director amended the complaint. Respondent filed timely answers to these amendments.

On August 15, 2012, a hearing opened before me in New Orleans, Louisiana. On that day, on August 16 and 17

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and September 29, 2012, the parties presented evidence. After the hearing closed, counsel filed posthearing briefs.

Admitted Allegations

In its answer and by stipulation during the hearing, the Respondent admitted certain of the allegations raised in the complaint. Specifically, the Respondent has admitted the allegations raised in complaint paragraphs 1(a), 1(b), 2(a)--2(i), 3(a)--3(c), and 6. Based on these admissions, I find that the government has proven the allegations raised in these paragraphs.

Thus, I find that the unfair labor practice charge and amended charge were filed and served as alleged.

The Respondent has not admitted the allegations, raised in complaint subparagraphs 2(j) and 2(k), regarding the nature of its business operations. It also has not admitted the allegation, raised in complaint paragraph 4, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. However, it has admitted allegations sufficient to establish that it is such an employer.

Specifically, the Respondent has admitted that, based on a projection of its operations since about June 2, 2011, when it began business, it will annually provide services valued in excess of \$ 50,000 to Richard's Disposal, Inc. The Respondent also has admitted that Richard's Disposal is an enterprise within the State of Louisiana which annually purchases and receives at its New Orleans, Louisiana

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facility, directly from outside the State of Louisiana, goods valued in excess of \$ 50,000. Based on these admissions, I conclude that the Respondent is subject to the Board's jurisdiction and meets the Board's standards for the assertion of jurisdiction. Further, I conclude that at all material times, the Respondent has been an employer engaged in commerce within the meaning of within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent has admitted, and I find, that the following individuals are its supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Alvin Richard III, owner and president; Karen Jackson, administrator.

Status of the Parties

In May 2010, Alvin Richard III (Richard III) incorporated the Respondent to be a labor contractor providing workers to Richard's Disposal, a company operated by his father, Alvin Richard Jr. (Richard Jr.). At the time of incorporation, another entity, referred to here as Berry III, was performing this function, and continued to do so until June 2, 2011.

Richard III is the owner and president of the Respondent, and also is a vice president of Richard's Disposal. However, the complaint does not allege that Richard's Disposal and the Respondent are a single entity and the record would not establish such an identity. For purposes of this case, the two businesses are distinct and separate, notwithstanding Richard III's service in the management of both companies.

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The employees furnished to Richard's Disposal by the Respondent (and previously by Berry III) are classified as "hoppers." As stated in the Respondent's posthearing brief, "Hoppers ride on the rear of the garbage trucks and load the garbage from trash containers into the truck."

Although the Respondent provides the same service that Berry III had performed furnishing hoppers to work on another company's garbage trucks at one point Berry III had more customers. At that time, Berry III furnished hoppers not only to Richard's Disposal but also to Metro Disposal, another trash collection company in the New Orleans area.

Before proceeding further, to avoid confusion, it should be noted that the entity referred to here as Berry III did business under the following names at various times: M&B Services, Berry Services, Inc., Milton Berry, and a second corporation also called Berry Services, Inc. At hearing, the parties stipulated that these businesses were a single entity and single employer. For simplicity, the complaint calls this entity Berry III, as I do here.

Berry III was furnishing hoppers to Richard's Disposal on May 8, 2007, when the Board conducted a representation election. On May 18, 2007, based on the results of that election, the Board certified that Local 100, Service Employees International Union was the exclusive representative, within the meaning of Section 9(a) of the Act, of the following appropriate unit of employees:

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Included: All full-time and part-time hoppers employed by the Employer who work as hoppers on trucks operated either by Metro Disposal, Inc. and/or Richard's Disposal, Inc. in the collection of garbage and trash in the Greater New Orleans area.

Excluded: All other employees, guards and supervisors as defined in the Act.

The certification identified the employer as "M&B Services," the name which the entity, here called "Berry III," was using at the time. Berry III's various name changes did not affect its continuing duty to recognize and bargain with the certified union.

In October 2009, Local 100 severed its affiliation with the Service Employees International Union and began operating under the name "Local 100, United Labor Unions." Upon this disaffiliation, bargaining unit employees who had been members of Local 100, Service Employees International Union automatically became members of Local 100, United Labor Unions. They did not have to pay an initiation or transfer fee or complete any applications.

The constitution of Local 100, United Labor Unions did not change significantly from that of Local 100, Service Employees International Union. Local 100 continued under essentially the same leadership before and after the disaffiliation. Of the 10 individuals who were board members of Local 100, Service Employees International

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Union, 9 became board members of Local 100, United Labor Unions.

The disaffiliation did not affect the collective-bargaining agreements, which Local 100, United Labor Unions assumed and honored. It continued to represent employees in the bargaining unit described above as well as employees of other employers which had been parties to collective-bargaining agreements with Local 100, Service Employees International Union, and it has engaged in negotiations on behalf of such employees. Based on these facts, I conclude that Local 100, United Labor Unions is an organization in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Therefore, I conclude that it is a labor organization within the meaning of Section 2(5) of the Act.

Complaint subparagraph 8(f) alleges that Local 100, United Labor Unions is the successor to Local 100, Service Employees International Union, and succeeded to the bargaining rights of Local 100, Service Employees International Union with respect to the bargaining unit described above. The Respondent denies such successorship.

The Respondent's brief acknowledges the October 2009 disaffiliation but denies that there was continuity of representation. The Respondent characterizes Local 100, United Labor Unions as "not international in nature" and operating in only three States. The Respondent further states:

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The SEIU has another local in the New Orleans metropolitan area, SEIU Local 21, and it was operating when the ULU [United Labor Unions] began operations. Tr. 725-26. Judicial notice can be taken under Federal Rule of Evidence 201 that the SEIU is a larger, more influential and more economically successful union than the ULU. This may be gleaned from the unions' respective websites, U. S. Department of Labor filings by the unions, and news articles and reports.

Respondent's argument is not persuasive. Even assuming, solely for the sake of argument, that Local 100, United Labor Unions is smaller and less influential than the Service Employees International Union, the relevance of such a comparison escapes me. For example, historians might well regard Andrew Johnson as a less influential president than Abraham Lincoln, and Johnson certainly was shorter. However, under the law, he was indeed Lincoln's successor. Relative political skill and physical size were not cognizable factors. Likewise, here I will stick to the criteria the Board has enunciated in its precedents.

The Respondent also points out that the hoppers represented by the SEIU did not have an opportunity to vote on whether they wished to disaffiliate from the SEIU and be represented by the ULU and argues that this absence of a vote is material and should be considered. In making this argument, the Respondent seeks to distinguish Raymond F. Kravis Center for the Performing Arts, 351 NLRB 143 (2007), which stands in the way.

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Therein, the Board held that an employer is not relieved of its bargaining obligation merely because a merger or affiliation is accomplished without due process safeguards. In arguing that the same principle should not be applied to disaffiliation, the Respondent's brief states:

The action of a union disaffiliating from another union is unique from a union merger or affiliation. With a merger or affiliation, unions typically decide to come together to augment their economic strength and power. This, by its very nature benefits the union membership that is merged. In contrast, a disaffiliation typically involves a new union formed by leaving a larger or more substantial one. That is what happened in the case at hand. In disaffiliations, there is not the likelihood, as in mergers, that the represented employees will be economically better off or better represented. In the case of disaffiliations, there is a greater need for the represented employees to be protected. That is why a due process election in which the affected employees vote is necessary.

However, the Board's rationale in *Raymond F. Kravis Center for the Performing Arts* did not depend on the likelihood that employees would retain or gain bargaining power. Rather, this decision rested on the Board's understanding of *NLRB v. Financial Institution Employees of America Local 1182 (Seattle- First)*, 475 U.S. 192, 106 S. Ct. 1007, 89 L. Ed. 2d 151 (1986). In that case, the Supreme Court held that the Board cannot discontinue

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a certified union's recognition without determining that its affiliation with another union raised a question of representation and, if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit. The Board held that the lack of a membership vote concerning union affiliation was insufficient to raise a question concerning representation, that is, to make it "unclear whether a majority of employees continue to support the reorganized union."

Following this logic, the appropriate inquiry here is not whether the change seems to increase or decrease a union's bargaining power. Rather, in weighing the Respondent's attempt to distinguish *Raymond F. Kravis Center for the Performing Arts*, the pivotal issue is whether the lack of a membership vote for disaffiliation is sufficient to raise a question concerning representation. Notwithstanding the Respondent's argument, I cannot conclude that a vote to disaffiliate is all that different from a vote to affiliate or merge. Where, as here, the local union leadership remains in place and continues to deal with an employer as before, very little has changed, particularly from the employees' point of view. In the present case, at least, no change has altered the local union's identity so much that it would raise a question concerning representation.

Indeed, the disaffiliation here appears little different from that in *Miron & Sons, Inc.*, 358 NLRB 647 (2012). There, the Board adopted the judge's finding that there was a substantial continuity of representation and, accordingly, that the employer had a continuing duty to recognize the union as the exclusive bargaining

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representative. The Respondent argues that in *Miron*, “the employer never challenged the union’s status under the continuity of representation requirement. It is not an issue in the case.” However, even were I to regard *Miron* merely as illustrative, it supports the conclusion I draw from the reasoning in *Raymond F. Kravis Center for the Performing Arts*. There, the Board stated:

In determining whether there is a lack of continuity of representation after a merger or affiliation, the Board considers whether the merger or affiliation resulted in a change that is “sufficiently dramatic” to alter the union’s identity. *May Department Stores*, 289 NLRB 661, 665 (1988), *enfd.* 897 F.2d 221 (7th Cir. 1990). This may occur where “the changes are so great that a new organization comes into being--one that should be required to establish its status as a bargaining representative through the same means that any labor organization is required to use in the first instance.” *Western Commercial Transport, Inc.*, 288 NLRB 214, 217 (1988).

351 NLRB at 147. Applying this same principle to the present case, involving a disaffiliation rather than a merger or affiliation, and considering the totality of the circumstances, I conclude that there is a continuity of representation. The employer here called “Berry III” had a duty to recognize and bargain with Local 100, Service Employees International Union before the disaffiliation, and after the disaffiliation, it had a duty to recognize and bargain with Local 100, United Labor Unions, which it did.

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If the Respondent is a successor to Berry III--an issue to be discussed and decided below--and if the bargaining unit remains in existence, then the Respondent now has the same duty to recognize and bargain with Local 100, United Labor Unions. However, the Respondent argues that the bargaining unit has changed in a manner which makes the present unit inappropriate. Respondent's brief states as follows:

The SEIU and Berry III entered into a collective bargaining agreement on September 1, 2007. GCX-27. Article 1, Recognition, recognizes a unit of hoppers working on trucks operated by Richard's Disposal and Metro Disposal.

At some time after Berry III and the SEIU entered their agreement, Berry III lost its contract to supply hoppers to Metro to another company--FastTrack. Tr. 151. The union has never filed a disclaimer of interest of representation of the hoppers at Metro Disposal. Tr. 252-53.

In the instant case, the unit used to establish successorship was only the hoppers working on trucks operated by Richard's Disposal. Hoppers working at both Richard's and Metro were not counted to determine whether [the Respondent] hired a majority of employees in the Berry III's and SEIU unit.

With respect to the last sentence quoted above, it may be noted that in determining successorship the Board

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looks to whether a majority of the putative *successor's* bargaining unit employees had worked for the predecessor. That question, whether a majority of the hoppers hired by the Respondent had worked in the Berry III bargaining unit, will be addressed below. Here, I focus on whether Berry III's loss of the Metro Disposal contract affected the appropriateness of the bargaining unit. It is not unusual for the size of a bargaining unit to shrink when an employer loses an existing customer, just as it is not unusual for a bargaining unit to grow when an employer gains a new customer. Typically, such fluctuations do not affect either the appropriateness of the bargaining unit or the employer's duty to recognize and bargain with its exclusive representative. (An exception involves the permanent shrinking of a bargaining unit all the way down to one person, but that exception is not applicable here.)

Berry III's loss of the Metro Disposal contract did not reduce the bargaining unit to a single employee or otherwise render it inappropriate. It continued in existence at least until June 2, 2011, when the Respondent began its business operations.

Moreover, successorship may be found even when the bargaining unit of the putative successor differs in some respects from that of the predecessor. In *Specialty Hospital of Washington-Hadley, LLC*, 357 NLRB 814 (2011), the Board stated:

Bronx Health Plan, 326 NLRB 810 (1998), *enfd.*
203 F.3d 51, 340 U.S. App. D.C. 181 (D.C. Cir.
1999), is illustrative of the extent the unit may

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be altered without eliminating successorship obligations. There, the predecessor employed workers in hundreds of job classifications in the recognized unit. The successor hired a tiny fraction (.05 percent) of the predecessor's bargaining unit employees (16 out of 3500), who were scattered among those many job classifications. The union sought to bargain over the 16 employees in a clerical unit. The Board found successorship because, among other things, all of the successor's unit employees had been employees of the predecessor. In short, in *Bronx Health Plan*, the successor's unit no longer contained the vast preponderance of the predecessor's bargaining unit job classifications and employee complement. But, as there was continuity both in the nature of the enterprise and the work force (within the contracted unit), successorship principles resulted in a duty to bargain.

....

The Supreme Court has instructed that the question of substantial continuity must be considered from the employees' perspective. Viewed from that perspective, it makes no difference whether the successor acquired only a part of the unit or the union disclaimed interest in a part of the unit. In either case, there is no reason to believe that employees' views on union representation have changed. Put another

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way, a diminution of unit scope or unit inclusion, by itself, is insufficient to meaningfully affect the way that unit employees perceive their jobs or significantly affect employee attitudes concerning union representation.

357 NLRB 814, 814-815 (footnote omitted).

The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate. “Compelling circumstances” are required to overcome the significance of bargaining history. *Cadillac Asphalt Paving Co.*, 349 NLRB 6 (2007). Here, the Respondent has not shown such compelling circumstances. Accordingly, I reject the Respondent’s inappropriate unit argument.

Was Respondent A Successor?

The Respondent denies the allegation that it is a successor to Berry III. However, the Acting General Counsel argues that the facts meet the standards for successorship regardless of whether they are examined using the analytical framework of *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987), or that of *NLRB v. Burns International Security Services*, 406 U.S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972). The facts satisfy both tests.

As stated above, Alvin Richard Jr. owns Richard’s Disposal, providing trash collection services in the New Orleans area, and his son, Richard III, is the chief

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operating officer of that company. It had contracted with Berry III to provide the hoppers who ride at the back of the garbage trucks and load the trash into the trucks. However, problems arose and Richard III testified he “saw it as an opportunity to start a business for myself.”

Richard III decided to form a company which would replace Berry III as the supplier of the hoppers. To that end, he incorporated the Respondent in May 2010, but this company did not begin operations right away.

With assistance from an employee of Richard’s Disposal, Richard III prepared employment application forms. A Berry III employee, Eldridge Flagge, passed out the applications to others employed by Berry III in the hoppers’ bargaining unit. Each application included the tax forms which an employee typically completes on being hired. The record indicates that Richard III gave Flagge the forms sometime around May 19, 2011. Flagge distributed the applications soon after he received them. However, the record indicates that Flagge played little role in collecting the completed applications. Rather, after filling out an application, a hopper would give it directly to personnel working for Richard’s Disposal.

For reasons discussed later in this decision, I credit Richard III’s testimony that he, too, provided application forms to some of the hoppers employed by Berry III. The record reveals an obvious motivation for doing so: The change from Berry III to the Respondent was not something which would be phased in gradually. Rather, it would be an abrupt shift from one to the other. Therefore,

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Richard III needed to be sure he had enough hoppers lined up to staff all the trash trucks before the Respondent replaced Berry III. Moreover, it was not Richard III's policy to place any hopper on a truck until that person had submitted an application form, including the tax forms attached to it.

Richard III did not interview any applicants for employment. I infer that he presumed that all the hoppers working for Berry III were qualified, or else they would not be doing the work already. Therefore, filling out the application and tax forms was a formality, albeit a required one. Richard III testified, in part, as follows:

Q. [I]sn't it also true at the time you started--isn't it also true at the time you started passing out the applications or gave Mr. Flagge the applications for him to pass out, it was your plan to start providing hoppers to Richard's Disposal on May 20, 2011?

A. Yes.

Q Okay. But you didn't start that day, because you didn't have enough applications returned to you. Correct?

A. Yes.

Q. Okay. So I'm assuming on June 1, you had enough applications.

A. Yes.

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Q. Isn't it also true that by the hoppers turning in their applications, they were agreeing to work for Creative Vision, and you were agreeing to hire them if they wanted to work?

A. If I needed them, yes, sir.

By June 1, 2011, the Respondent had the applications of enough hoppers to staff the trash trucks, and on that date Richard's Disposal canceled its agreement with Berry III. The next day, the Respondent began providing to Richard's Disposal the same hoppers who had been doing the same work but receiving their pay from Berry III. From the hoppers' point of view, little had changed. They still reported for work at the same place, Richard's Disposal, and still rode on Richard's Disposal's trucks.

Moreover, their direct supervisor had not changed. Karen Jackson had been employed as a supervisor by Berry III, where she assigned each hopper to work on a specific truck. She continued to do the same thing.

A little before 4 a.m. on June 2, 2011, when the hoppers arrived at the Richard's Disposal facility to work, Jackson conducted a meeting to inform them that they were working for Creative Vision. In the words of one hopper, Shawn Lewis, "Ms. Jackson called a little brief meeting before any trucks drove out of the yard, and told us, 'Today is the day you start working under Creative Vision.'" Jackson also told the hoppers that they would be paid \$ 11 per hour, would receive overtime, and that the Respondent would guarantee each hopper 8 hours of work per day.

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On this first day, 44 hoppers worked for the Respondent. This number was sufficient to staff the trucks operated by Richard's Disposal. Specifically, Richard III testified that Richard's Disposal typically sends out 20 to 22 trucks per day and each truck has two hoppers. Thus, from 40 to 44 hoppers would be sufficient for Richard's Disposal to operate in the usual manner. Accordingly, although the record suggests that on some later days the Respondent provided, and Richard's Disposal used, more than 44 hoppers, I conclude that the 44 hoppers employed on June 2, 2011, constituted a representative complement of employees.

Under *NLRB v. Burns International Security Services*, above, at least half of the employees in the representative compliment must have worked for the putative predecessor. Here, all 44 of the hoppers who worked for the Respondent on June 2, 2011, had been bargaining unit employees at Berry III. Clearly, Respondent is a *Burns* successor. Further, I conclude that the Respondent is also a successor under *Fall River Dyeing Corp. v. NLRB*, above.

In *Fall River Dyeing Corp.*, the Supreme Court articulated a "substantial continuity" test, which the Board applied in *Van Lear Equipment*, 336 NLRB 1059 (2001). The Board noted that the Supreme Court had identified the following factors as relevant:

[W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in

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the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers.

336 NLRB at 1063. The answer to each of these questions is “yes.” The business of the Respondent is the same as that of Berry III, providing employees to work as hoppers on trucks operated by Richard’s Disposal. The working conditions remained the same and the employees worked under the supervision of the same person, Karen Jackson. The production process remained unchanged. At one point, Berry III provided hoppers for two disposal services, Metro Disposal as well as Richard’s Disposal, whereas it appears that the Respondent only provides hoppers to Richard’s Disposal. Nonetheless, the Respondent has “basically the same body of customers” as Berry III.

These factors are assessed from the perspective of the employees, that is, “whether ‘those employees who have been retained will . . . view their job situations as essentially unaltered.’” *Id.*, quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184, 94 S. Ct. 414, 38 L. Ed. 2d 388 (1973). From the perspective of the employees who appeared for work on June 2, 2011, nothing had changed. They would not have known that they were working for a different employer if their supervisor, Karen Jackson, had not told them.

One hopper, Booker T. Sanders, who testified as a witness for the Respondent, stated that he recalled a

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meeting at which Jackson “said Creative Vision was taking over, and she they’re paying \$ 11 an hour, and they’re taking out taxes and Social Security.” The Respondent also called to the witness stand another hopper, Harold Jefferson, who testified that Jackson “got all the hoppers, and she explained to us that, you know, Creative Vision was open, and we no longer worked for Berry.” If Jackson had not called a meeting of the hoppers on June 2, 2011, and informed them that they were now working for the Respondent, they would not have known until they received their paychecks.

In sum, the evidence clearly establishes the “substantial continuity” required by the *Fall River Dyeing Corp.* test, as well as successor under *NLRB v. Burns International Security Services*, above. I so find.

Is Respondent A “Perfectly Clear” *Burns* Successor?

In general, a *Burns* successor has a duty to recognize and bargain with the exclusive representative of the predecessor’s employees but it remains free to set the initial terms and conditions of employment. However, there is an exception. In *Burns*, the Supreme Court stated that although a successor employer “is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees’ bargaining representative before he fixes terms.” 406 U.S. at 294.

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The Board has held that this “perfectly clear” exception to the general rule that a successor employer is free to set initial terms, while restrictive, should apply “to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. “ *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enfd. mem.* 529 F.2d 516 (4th Cir. 1975); see also *Grenada Stamping & Assembly, Inc.*, 351 NLRB 1152 (2007); *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 10 (2006).

The present record would not support any finding that the Respondent had misled employees, either actively or by tacit inference, to believe they would all be retained without any changes in the wages, hours, or conditions of employment. Rather, whether the Respondent is a “perfectly clear” *Burns* successor turns on whether it “failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. “

For example, in *Cadillac Asphalt Paving Co.*, above, the successor employer did not conduct job interviews and no evidence indicated that it sought applicants from any source other than the predecessor’s work force. At a meeting with the predecessor’s employees, the successor invited them to fill out job applications and W-4 forms

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but did not tell them it intended to set initial terms and conditions of employment. In these circumstances, the Board found that the hiring employer was a “perfectly clear” *Burns* successor.

The facts in the present case are rather similar to those in *Cadillac Asphalt Paving Co.* but certainly not identical. As described above, Richard III distributed application forms, with attached W-4 tax forms, to hoppers while they were employed by Berry III and he also enlisted the help of Eldridge Flagge, one of the hoppers in the Berry III bargaining unit. The record does not indicate that the Respondent sought employees from any other source.

To this extent, the facts here resemble those in *Cadillac Asphalt Paving Co.* However the credited evidence establishes that Richard III communicated at least some information about the contemplated wages and working conditions to at least some of the hoppers while they were still employed by Berry III. The question thus is whether the Respondent conveyed enough information to enough hoppers.

To preserve its authority to establish initial terms and conditions of employment, a successor must “clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. “ *Spruce Up Corp.*, above, 209 NLRB at 195. What constitutes such a clear announcement? The information must be sufficient to allow the predecessor’s employees to make an informed choice about whether to go to work for the Respondent.

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In *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975 (2007), a successor sent a letter to the predecessor's employees offering them temporary employment. The letter stated that they were not eligible for certain benefits, and adding, "Other terms and conditions of your employment will be set forth in Windsor's personnel policies and its employee handbook."

Although the quoted statement seems to convey the successor's intent to establish a new set of working conditions, the Board held that it was insufficient to allow the predecessor's employees an informed choice concerning whether to accept the successor's employment offer or turn it down. The Board held that a general statement that new terms will subsequently be set is not sufficient to fulfill the Respondent's *Spruce Up* obligation to announce new terms prior to or simultaneous with the takeover.

In other words, applying the Board's *Spruce Up* standard faithfully requires digging deeper than might at first appear necessary from a narrow and literal reading of the test. A message sufficient to convey the successor's intention to establish new terms and conditions of employment may still lack enough detail to afford the predecessor's employees an informed choice. If so, the "perfectly clear" label sticks.

Thus, the doctrine has evolved since 1972, when the Supreme Court noted that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit, and in which

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it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Burns, above, 406 U.S. at 294-295. Under the doctrine, as it has now ripened and matured, a successor employer's failure to provide sufficient information to the predecessor's employees proves that it is perfectly clear the successor intended to retain all the unit employees.

Therefore, it is important to distinguish between the ordinary meaning of the words "perfectly clear" and the import of this phrase as a term of art. When used in the everyday sense, the words "perfectly clear" take the analysis in a different direction. The record makes it perfectly clear that the Respondent intended to retain the employees in the bargaining unit, but this conclusion does not rest on the amount of communication between the Respondent and the hoppers.

If the Respondent had not intended to retain the employees in the Berry III bargaining unit, it would have been a remarkable coincidence that on the first day of the Respondent's operations all 44 hoppers had been employed by Berry III. Of course, it was not a coincidence. The record does not indicate that the Respondent sought to hire hoppers from any other source.

If the Respondent had not intended to hire the members of the bargaining unit, en masse, Richard III or someone working for him would have interviewed applicants, examined qualifications, and checked references. Instead, the Respondent chose merely to distribute applications, with W-4 forms attached, to the

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hoppers in the Berry III bargaining unit. Typically, a job applicant does not fill out a W-4 form until hired, so inclusion of the tax form with the application suggests that the Respondent had little doubt about whom it would hire.

Richard III already knew about the quality of the hoppers' work because they performed that work for Richard's Disposal, a company he managed. His dissatisfaction was not with the hoppers themselves, but rather with Berry III's lax management practices, which included treating the hoppers as independent contractors rather than employees, failing to deduct taxes, and neglecting to follow such usual employment practices as issuing handbooks and implementing dress standards.

Moreover, the hoppers in the Berry III bargaining unit already were familiar with how Richard's Disposal operated. If the Respondent had decided to recruit through the State unemployment office or through "help wanted" advertisements, the process of selecting and training those chosen would have been a major undertaking. So it is hardly surprising that the Respondent would decide to use the same individuals who already were hopping on the trucks every morning.

The record leaves no doubt that the Respondent's owner, Richard III, intended to employ the hoppers working in the Berry III bargaining unit, and made no efforts to hire hoppers from other sources. Using the words "perfectly clear" in their everyday sense, that intent is perfectly clear. Is such an intention "perfectly clear" when that phrase is a term of art? To answer that question, I return to the issue

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of what the Respondent communicated to the hoppers while they still worked for Berry III. On this point, witnesses delivered conflicting testimony.

Richard III testified that he gave job application forms to some of the hoppers who were working for Berry III, and that when he did so he described to them the terms and conditions of employment which would be instituted by the Respondent, stating, for example, that hoppers would earn \$ 11 per hour. This testimony invites scrutiny because, although both the Respondent and the General Counsel called a number of hoppers to the witness stand, none testified that Richard III gave him a job application.

However, Richard III was not the only possible conduit of information from the Respondent to the hoppers. Both Richard III and hopper Eldridge Flagge testified that Richard III gave Flagge application forms which Flagge then distributed to other hoppers. According to Richard III, he gave Flagge a stack of about 15 to 20 applications and Flagge later requested more.

Although it is undisputed that Richard III gave Flagge application forms, their testimony conflicts regarding what Richard III told Flagge. Richard III's testimony, if credited, would establish that he informed Flagge of the initial terms and conditions of employment which he intended to implement when the Respondent began operations:

Q. What did you tell Mr. Flagge, if anything about what the wages, benefits, and--would be?

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A. \$ 11 an hour, eight hours guaranteed a day, overtime if they made it, and holidays--the four standard holidays.

Q. Did you mention anything about taxes being withheld?

A. Yes.

However, Flagge's testimony squarely contradicts Richard III on this point:

Q. And during that conversation, did Alvin Richard III say anything about pay to you?

A. No.

Q. Did he tell you anything about holiday pay during that conversation?

A. No.

Q. Did he say anything about new work rules?

A. No.

Q. During that conversation, did he say anything about an employee handbook?

A. No.

Q. Did he say anything about a safety manual?

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A. No.

Before addressing this conflict in the testimony, I note that even if Richard III told Flagge about the contemplated terms and conditions of employment Flagge did not convey such information to other hoppers employed by Berry III. I credit Flagge's uncontradicted testimony that he told the other hoppers "they might have a job when they fill the application out, but they needed to have Social Security, ID to bring up in there, and I told them to bring it to Clayton, where he could make a copy of it."

Richard III's testimony, if credited, establishes that the hoppers had another source of information apart from Flagge, namely, Richard III himself. He testified that, in addition to providing Flagge application forms to distribute, he also gave out such forms to other employees in the Berry III bargaining unit:

Q. Now, did you distribute applications during this time?

A. Yes.

Q. And how many applications would you say you might have distributed during this time period?

A. Maybe 20.

Q. What did you say to the hoppers as you gave them applications?

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A. They had to know about their wages, \$ 11 an hour, 40-hour guaranteed--excuse me. Guaranteed eight, 40 hours, the overtime after the 40 hours, and I was going to have to do the taxes.

Q. Did you say holidays, too? I'm sorry. I didn't.

A. Yes. There's four guaranteed holidays in our business.

Richard III testified that he began distributing these applications sometime in May 2011. However, he could not name any individual, except Flagge and a hopper named Terry Hills, to whom he had given an application. Richard III also testified that he received completed applications from hoppers working for Berry III but, again, could not name any person who gave him one.

Richard III's inability to identify the hoppers to whom he had given and from whom he had received application forms does raise questions about the reliability of his testimony. However, in evaluating this testimony, I cannot simply assume that Richard III was so familiar with the hoppers that he knew all of them by sight and could associate faces with names. He was not their immediate supervisor and the hoppers spent almost all their work time away from the facility.

Eight hoppers testified at the hearing, six of them called by the Respondent. However, none of these witnesses testified that Richard III had informed him of the initial terms and conditions of employment before

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June 2, 2011. Indeed, none of the hoppers testified that he had received such information from any source before June 2, 2011.

This absence of corroboration, as well as Richard III's inability to name specific individuals to whom he had given applications, raises some doubt about the reliability of his testimony. However, other considerations weigh in favor of crediting it.

From Richard III's testimony and that of other witnesses, I infer that he was not very happy with the way Berry III operated. Berry III treated the hoppers as independent contractors even though they clearly had the attributes of employees--for example, they were required to work at specific times and in a specific way--and did not withhold taxes from their pay. Berry III also did not provide employees with either an employee handbook or a safety manual, and it ignored an unfair labor practice complaint, resulting in a default judgment. See *M&B Services, Inc.*, 355 NLRB No. 136 (2010) (not reported in Board volumes).

Richard III testified that there had been problems with Berry III, a factor in his decision to start his own company. Although his demeanor as a witness was low key, I infer that he was displeased with the laxity of Berry III and determined to run his company differently, in compliance with the law and with greater attention to workplace safety.

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Thus, he instituted work rules requiring hoppers to put on vests, which I assume were similar to safety vests worn by highway construction workers, before they could get on the trucks. Richard III also established a dress code. It required hoppers to wear shirts and belts at all times and to wear their pants pulled up rather than hanging low on the waist.

This impression of Richard III being meticulous, a stickler for detail, is consistent with a portion of his testimony which otherwise puzzled me. According to Alvin Richard Jr., who owns Richard's Disposal, his son, Richard III, is vice president and manager of that company. The son, however, was not so confident he held the second title. On cross-examination, he testified, in part, as follows:

Q. Okay. Were you the vice president of Richard's Disposal on June 1, 2011?

A. I'm a COO. If that's a vice president, I don't know.

The General Counsel then showed Richard III a letter bearing his signature and the title "vice president." This exchange followed:

Q. And at the bottom it says, vice president. So does that refresh your recollection as to whether or not you're the vice president or not?

A. No.

Q. It doesn't?

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A. I said I signed it. What my title was at the time I don't remember.

Richard III's demeanor was not belligerent or hostile and I believe he was trying to give answers which were both accurate and precise. His reluctance to agree that he was vice president, even after seeing a letter referring to him by that title, did not advance his interest in any obvious way. If he had been trying to conceal his management position with Richard's Disposal, he would not have referred to himself as "COO," chief operating officer. In view of his willingness to acknowledge that title, his hesitation about the title of vice president is difficult to understand except as a reflection of scrupulousness in attention to detail.

The easier course, when confronted with a letter he signed which referred to him as "vice president," would have been simply to admit that "vice president" was his title. Instead, he testified that he did not remember what his title had been at the time of the letter, an answer he could not have expected to help his credibility. Thus, Richard III impressed me as being a meticulous witness even when his answers foreseeably might be contrary to his interest.

Moreover, even though no hopper testified that Richard III told him about the initial terms and conditions, the record does establish that some hoppers had heard that the Respondent would be paying \$ 11 per hour. For example, a union official, Rosa Hines, reported that at least one hopper employed by Berry III had called

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the Union to ask about the \$ 11-per-hour figure. Hines testified:

What I received is a call, saying they heard a couple hoppers --I'm not sure of their names-- and they heard that their wages was dropped to \$ 11, and I questioned on that did the management or did this new company tell you that, and they said they just hear it. They had not heard from any authorized personnel.

The Respondent argues that the existence of this rumor--that hoppers hired by the Respondent would make \$ 11 per hour--supports an inference that the Respondent did, in fact, announce this pay rate to the hoppers while they were still working for Berry III. Thus, the Respondent's brief asks: "How else could hoppers communicate to Hines the pay rate of \$ 11/hour at [Creative Vision Resources] unless they learned it from Richard, from Flagge, or from other hoppers who learned it from Richard and/or Flagge?"

The testimony of Anthony Taylor confirms that a number of hoppers learned about the \$ 11-per-hour wage rate while they were still working at Berry III. This same testimony illustrates the difficulty of tracking down the elusive source of this information:

Q. Now, you mentioned \$ 11 an hour. What, if any, conversations were the hoppers having before this meeting about the \$ 11 an hour?

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A. We all congregate in the morning out there. They been knowing about the \$ 11 an hour.

Q. So the hoppers before this meeting in May knew about the \$ 11 an hour?

A. Sure, man. The application was passed out before. I think Flagge was passing out those applications.

Q. Did Flagge know about the \$ 11?

A. I told you, we all congregate out there in the morning. We been knowing that.

The testimony of Kumasi Nicholas, who worked in the Berry III bargaining unit, provides further evidence that hoppers knew about the Respondent's initial terms and conditions of employment before the Respondent began operations:

Q. Before you began work for Creative Vision, did you know you were going to make \$ 11 an hour?

A. Yes, sir.

Q. Did you know you were going to be guaranteed eight hours a day?

A. Yes, sir.

Q. Did you know you were going to get overtime?

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A. Yes, sir.

Q. Did you know you were going to get four holidays?

A. Yes, sir.

However, Nicholas' testimony does not indicate that he received this information from Richard III. Rather, he learned about the Respondent's contemplated terms and conditions of employment from Karen Jackson, who then was working for Berry III: "Well, they told us ahead of time--Ms. Jackson told us ahead of time, you know, might be switching over to another little company where--you know, a pay rate, and she just let us know ahead of time, and then that's when, you know, they started off."

Jackson did not testify that she informed the hoppers in advance, while they still worked for Berry III, about Respondent's replacing Berry III as the contractor providing hoppers to Richard's Disposal. Indeed, she stated in a pretrial affidavit, "I don't know who told the hoppers about [Respondent] CVR taking over. I was employed by Mr. Berry until June 3. The hoppers' first day was June 2. I don't know who did my job on June 2."

Jackson admitted in a subsequent affidavit, and acknowledged on the witness stand, that she erred in stating that her first day working for the Respondent was June 3 rather than June 2. For reasons discussed below, I have significant reservations about the reliability of her testimony. Therefore, crediting Nicholas, I find that Jackson, who was the hoppers' supervisor at Berry III, did

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inform them about some of the Respondent's contemplated initial terms and conditions of employment, including that \$ 11 per hour wage rate.

This finding, that hoppers working for Berry III learned some information about the Respondent from Jackson, does not contradict Richard III's testimony that he informed hoppers about the Respondent's initial terms of employment. Although Richard III's testimony is uncorroborated, it is also uncontradicted. Moreover, it is consistent with the fact that at least some hoppers knew about the contemplated \$ 11-per-hour wage rate.

Further, as discussed above, Richard III appeared to be a sincere and meticulous witness. For these reasons, I credit his testimony that he told some of the hoppers --those to whom he gave employment application forms--that the Respondent would be paying an \$ 11-per-hour wage, would guarantee 8 hours of employment per day, would pay overtime for hours worked in excess of 40 per week, and would withhold taxes from their paychecks. Based on Richard III's credited testimony, I also find that he told these hoppers that the Respondent guaranteed four holidays.

The record does not establish exactly how many hoppers heard Richard III make these statements about the initial terms and conditions of the Respondent. At most, Richard III likely distributed applications to less than half the hoppers in the Berry III bargaining unit.

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There is no evidence that the hoppers who got their application forms from Flagge rather than Richard III received the same information. I credit Flagge's uncontradicted testimony that he did not tell them. This testimony is consistent with that of hopper Booker Sanders, who received a job application form from Flagge but no information about the Respondent's initial terms and conditions of employment. Sanders did not learn that the Respondent would be paying \$ 11 per hour until he attended a meeting called by Supervisor Karen Jackson on the day the Respondent began operations.

The record affords no way of quantifying how many of the hoppers had learned about the \$ 11-per-hour wage rate or the other terms of employment by the time they reported for work, as usual, at the Richard's Disposal facility on June 2, 2011. There, again as usual, they encountered Karen Jackson, who had been Berry III's supervisor responsible for deciding which hoppers would work on which trucks. Jackson's job with Berry III had required her to be at the facility every workday around 3:30 a.m., to take the roll and make sure each truck was adequately staffed. She had held that position through June 1, 2011, when she resigned from Berry III and accepted an offer to do the same job for the Respondent. Early on June 2, sometime between 3:30 and 4 a.m., Jackson called a meeting of the hoppers, announced that they no longer were working for Berry III, and told them the new terms and conditions of employment.

Before describing that meeting, I will address how much weight should be given to Jackson's testimony. Two problems raise concerns about her credibility.

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The first problem concerns conflicting statements Jackson made in pretrial affidavits about the date she began working for the Respondent. In the earlier pretrial affidavit, Jackson gave June 3, 2011, as the date she started working. If so, that would indicate that she was not present on the Respondent's first day of operations, June 2, and could not then have conducted a meeting with hoppers.

However, Jackson provided a second pretrial affidavit which corrected the date. In that second affidavit, Jackson stated that she had mistakenly believed that June 3, 2011, had been a Thursday. After someone showed her a calendar, she realized that her first day of work for the Respondent actually had been June 2, 2011.

Further, there is also a separate and more serious problem. Late in the hearing, Jackson resumed the witness stand and then admitted altering the dates on the copies of some employment applications which the Respondent furnished to the Board during the investigation of the charge. These applications had been dated June 8, 2011, presumably by the applicants submitting them, but Jackson had covered up that date with a correction fluid and typed June 2, 2011, in its place.

One of the altered documents was the employment application of a hopper, Damian Pichon, which originally bore the date June 8, 2011. Jackson admitted using a correction fluid such as Wite Out to cover up this date and substituting June 2, 2011. During cross-examination by the General Counsel, Jackson testified, in part, as follows:

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Q. Ms. Jackson, why did you do that?

A Well, as I was copying information, I just happened to look at it and see that one page had one date, and I just changed it on the front. I just changed it to try to make everything coincide, since he worked the first day. It was stupid. I didn't think it through when I did it. I just did it.

Q. Did anyone tell you to make those changes?

A. No.

Both Jackson's conduct and her explanation, which I do not find wholly persuasive, raise doubts about the reliability of her testimony. Nonetheless, based on the entire record, I believe it is highly likely that Jackson did begin work for the Respondent on June 2, 2011, and did conduct a meeting with the hoppers on that date, rather than at some later time.

Moreover, this misconduct does not compel a conclusion that every bit of Jackson's testimony should be rejected. Whatever might have been the motive for her changing the dates on the application forms, I do not believe it caused her to give an incorrect starting date in her affidavit. Rather, considering all the circumstances, it seems likely that Jackson made an innocent mistake when she stated, in her earlier affidavit, that she began work for the Respondent on June 3, 2011.

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Moreover, a number of hoppers testified that Jackson was present at the Richard's Disposal facility on June 2, 2011. For example, hoppers Kumasi Nicholas, Anthony Taylor, and Jason Bertrand testified that they saw Jackson at the facility on the first day of the Respondent's operations. Hopper Eldridge Flagge also was present at the facility on June 2, 2011, and saw Jackson there.

Hopper Harold Jefferson testified as follows concerning the meeting Jackson conducted on June 2, 2011:

Q. When you began work on the very first day of Creative Vision, can you tell us what happened on that very first day?

A. Well, we went--she held a meeting one morning

.....

Q. Who is that, when you say, "she"?

A. Ms. Jackson.

Q. Ms. Jackson held a meeting?

A. Yes. She got all the hoppers, and she explained to us that, you know, Creative Vision was open, and we no longer worked for Berry, and we'll receive two checks, one from Berry and one from Creative Vision, and, you know, basically that was it.

Q. Did she tell you what you were going to get paid?

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A. Yes. She said--she explained to us how we was going to get paid, and, you know, what day the time goes in and, you know, stuff like that.

Q. How much did she tell you you were going to get paid?

A. She said we was going to be started off with \$ 11 an hour, and we was going to--you know, everything over 48 hours is 16.50 an hour, you know, and--

Q. So you get overtime is what she was telling you.

A. Right. And they was--they started taking taxes out, you know. They was going to start taking taxes out.

Q. Did she mention holidays to you?

A. No. She didn't mention nothing about holidays.

Q. Was safety discussed?

A. Yes. They discussed safety.

Q. Who gave you your application, if you recall, to work for Creative Vision?

A. Ms. Jackson.

In sum, a number of witnesses confirm that Jackson was present at the Richard's Disposal facility and met with

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the hoppers on the day the Respondent began operations. Of course, some of the witnesses remembered the meeting in greater detail than others. However, all of the testimony paints a consistent picture and generally corroborates the following testimony, given by Jackson, describing what she told the hoppers at this meeting:

It was approximately about 3:40, because everybody doesn't get there for 3:30, so I waited to let some of them get there, you know, so I could meet with them. Well, they had a good bit of them that were there. So I met with them. I explained to them that it was a new company taking over that was not Berry Services anymore. It was going to be called Creative Vision. They were going to be making \$ 11 an hour, guaranteed eight hours, time and a half being paid to them for overtime. That's hours worked over 40 hours. I also told them that taxes would be taken out of their money. They would not receive 1099s like they did with Mr. Berry, that they would receive W-2 forms. I also discussed safety issues with them.

Q. What kind of safety issues?

A. They had to have on a vest to get on a truck. They had to wear their pants pulled up. They couldn't wear their pants, because that's the fashion now where they're wearing their pants hanging down. But we don't want that. We want them to be dressed properly. They needed to have on a shirt and a belt at all times.

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Q. What, if anything, was mentioned about holidays?

A. Yes. I told them they had four holidays. They had to work 180 days to receive the pay for the holidays.

Q. About how long would you say that meeting lasted?

A. Maybe 20, 25 minutes at the most.

Q. Did it go past 4:00 p.m.--or 4:00 a.m.? Excuse me.

A. Yes.

In at least one respect, Jackson's testimony goes beyond that of the hoppers who described the June 2, 2011 meeting. Jackson testified that some of the hoppers were so unhappy about the announced terms and conditions of employment that they walked away:

Q. Now, when the meeting was over, were there some hoppers who weren't satisfied with the terms and conditions that--the wages, the terms and conditions that had been announced by you?

A. Yes.

Q. What did they do?

A. They left the yard. They started discussing it and then they left the yard. I'm not working with

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this bullshit; people try to--I'm sorry, but that was--that is what was said. Okay. This is what I heard them saying. I can't pinpoint who it was, because there was a lot of people out there, and it is dark out there in the mornings. So they left the yard. Some of them just didn't--some people did refuse to work.

Based on the evidence discussed above, I find that the Respondent's owner, Richard III, determined the initial terms and conditions of employment before the Respondent began operations. Indeed, I infer that one reason Richard III established the Respondent was to correct problems in the terms and conditions of employment under which the Berry III hoppers worked.

Although Berry III employed the hoppers, it assigned them to work on Richard's Disposal's trucks. As chief operating officer of Richard's Disposal, Richard III thus was aware of the irregularities in the way the hoppers were treated but had no direct way to address the matter so long as the hoppers worked for someone else. However, the problems were serious and some, such as Berry III's treating the hoppers as independent contractors and failing to pay overtime, appear to have violated Federal law.

By creating the Respondent and hiring the hoppers, Richard III was able to put an end to the unlawful way they had been treated, but achieving this goal necessarily involved setting new terms and conditions of employment. Credited evidence reflects that the Respondent decided to pay the hoppers an hourly rate, with overtime,

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and communicated this intention well before it began operations. Similarly, the record establishes that the Respondent decided to withhold taxes from the hoppers' paychecks, and communicated this intention while the hoppers were still employed by Berry III.

In sum, the record establishes that it was "perfectly clear" (using these words in the everyday sense) that the Respondent was going to hire the predecessors employees and continue operations largely unchanged. However, the Respondent did not fail to communicate candidly with the hoppers who would become its employees and thus did not fall within the definition of "perfectly clear" successor which the Board set forth in *Spruce Up Corp.*, above.

The reason for this apparent difference is that the Board, exercising caution, did not "push the envelope" but instead articulated a narrower standard than the Supreme Court's language arguably might support. "We concede that the precise meaning and application of the Court's caveat is not easy to discern," the Board wrote, "But any interpretation contrary to that which we are adopting here would be subject to abuse, and would, we believe, encourage employer action contrary to the purposes of this Act and lead to results which we feel sure the Court did not intend to flow from its decision in *Burns*." *Spruce Up Corp.*, 209 NLRB at 195.

On occasion, some Board members have expressed the viewpoint that the *Spruce Up* standard not only is more restrictive than required by the Supreme Court's language but is also, in their opinion, too restrictive.

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See, e.g., *Canteen Co.*, 317 NLRB 1052, 1054-1055 (1995) (Chairman Gould, concurring). However, the *Spruce Up* standard remains Board law and I apply it here.

In *Spruce Up*, after explaining its reasoning, the Board stated:

We believe the caveat in *Burns*, therefore, *should be restricted* to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. [Id. At 195 (footnote omitted, emphasis added.)]

Here, the credited evidence does not suggest that the Respondent, either actively or tacitly, tried to mislead employees into believing they would all be retained without change in their wages, hours, or conditions of employment. To the contrary, the record establishes that before it began operations, hoppers in the Berry III bargaining unit were aware that Respondent intended to make a number of significant changes.

Moreover, before 4 a.m. on the very first day of the Respondent's operations, and before hoppers got on the trucks, the Respondent's supervisor, Jackson, described

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the changes to them in detail. As a result, some of the workers decided not to accept employment and left.

In these circumstances, I conclude that the Respondent's conduct does not meet the test for "perfectly clear" successor which the Board established in *Spruce Up*. Therefore, I further conclude that the Respondent did not violate the Act by setting its initial terms and conditions of employment.

Refusal to Bargain Allegations

Complaint paragraph 9(a) alleges that from about October 2009 until about June 2, 2011, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the unit employed by M&B Services, Inc. The Respondent has denied this allegation.

As discussed above, the record establishes that on May 18, 2007, the Board certified Local 100, Service Employees International Union, as the exclusive representative of a unit of hoppers employed by M&B Services. The entity referred to herein as "Berry III" was doing business as M&B Services at the time of this certification and I conclude that until June 2, 2011, it had a duty to recognize and bargain with Local 100, Service Employees International and, after Local 100 disaffiliated from the Service Employees International Union, with Local 100.

Also, for the reasons discussed above, I have concluded that Local 100, the full name of which is Local 100, United

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Labor Unions, is the successor to Local 100, Service Employees International Union. Accordingly, I conclude that the government has proven the allegations raised by complaint paragraph 9(b).

Complaint paragraph 9(b) alleges that at all times since about June 2, 2011, based on Section 9(a) of the Act, the Union (Local 100, United Labor Unions), has been the exclusive collective-bargaining representative of the Respondent's employees in the unit. The Respondent has denied this allegation.

For the reasons discussed above, I have concluded that the Respondent became a *Burns* successor to Berry III on June 2, 2011, the date on which it began operations and on which it hired a representative complement of employees. The Union became the Section 9(a) exclusive representative on that date.

Complaint paragraph 10(a) alleges that about June 6, 2011, the Union, by letter, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the bargaining unit. Although the Respondent's answer denied this allegation, the evidence is clear and uncontroverted that the Union did send to the Respondent a June 6, 2011 letter requesting bargaining. Indeed, the Respondent's posthearing brief stated that "the union's state director, Rosa Hines, visited [the Respondent] on Monday, June 6, and delivered a letter demanding recognition and bargaining. " Therefore, I conclude that the government has proven the allegations raised in complaint paragraph 10(a).

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Complaint paragraph 10(b) alleges that since about June 6, 2011, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit. The Respondent's answer denied this allegation.

The record establishes that the Union did not receive a reply to the June 6, 2011 request to bargain. On June 17, the Union filed the unfair labor practice charge which began these proceedings.

The Respondent did not meet with the Union until February 14, 2012, when the Union's state director, Rosa Hines, and another union representative conferred with the Respondent's attorney, Clyde H. Jacob III. After their initial meeting on Valentine's Day, representatives of the Union and the Respondent met about four more times. Hines credibly testified that the last such meeting was in late May or early June 2012:

Q. Have you scheduled any other meetings?

A. No. We're still--we're waiting back--Mr. Jacob said that he would talk his client and get back, so we're still waiting for him to get back to us.

Hines also testified, credibly and without contradiction, that the Union and the Respondent had not reached any agreements.

Based on Hines' testimony, which I credit, I find that between June 6, 2011, and about February 14, 2012,

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the Respondent failed and refused to bargain with the Union. It appears that as of February 14, 2012, when the Respondent's attorney met with the union representatives, that the Respondent has given the Union at least de facto recognition. It may be noted, however, that the Respondent's answer to the complaint, dated April 12, 2012, denied the allegation in complaint paragraph 9(b) that at all times since June 2, 2011, based on Section 9(a) of the Act, the Union has been the exclusive representative of the hoppers.

The complaint does not allege "surface bargaining," that is, going through the motions of negotiating but with an intent not to reach agreement, and the General Counsel has not argued such a theory. Additionally, the government did not seek to elicit the sort of detailed testimony about the negotiating process which is needed to prove "surface bargaining" allegations.

It appears clear that the alleged violations of Section 8(a)(5) do not concern what happened at the bargaining table but rather the Respondent's tardiness in even coming to the table. A successor employer's obligation to recognize the union attaches after the occurrence of two events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the successor employer of a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor. *University Medical Center*, 335 NLRB 1318 (2001). Accordingly, the Respondent's obligation to recognize and bargain with the Union began on June 6, 2011, when it received the Union's letter demanding such recognition and bargaining.

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Section 8(d) of the Act states that to “bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees *to meet at reasonable times* and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising there under, and the execution of a written contract incorporating any agreement reached if requested by either party.” 29 U.S.C. § 158(d) (emphasis added). An unwillingness to meet at reasonable times breaches the duty to bargain in good faith.

In *Gitano Group, Inc.*, 308 NLRB 1172 fn. 2 (1992), a union requested bargaining in August but the employer did not schedule a meeting until late December. The employer did not offer evidence of any particularly unusual or emergency condition which would justify the delay. The Board found that the employer had violated the Act. Here, the Respondent delayed for twice as long as the employer in *Gitano Group, Inc.* and the record neither suggests nor supports a finding of any particularly unusual or emergency circumstance which might justify such a delay.

The Respondent certainly had sufficient opportunity to present evidence to explain the cause of the delay and to argue, if appropriate, that there were mitigating circumstances. Not only did the complaint allege a violative refusal to recognize and bargain, but the General Counsel clearly put the Respondent on notice that its delay in recognizing and bargaining with the Union was an issue in this case. Indeed, counsel for the General Counsel began his opening argument with the observation that “ignoring

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a responsibility won't make it go away, and the longer one ignores it, the worse the situation becomes." The General Counsel then stated:

On June 6, 2011, the Hoppers union, Local 100, requested to bargain with the Respondent. Since that time, Respondent has failed and refused to recognize and bargain in good faith with the union, a plain violation of Section 8(a)(5) of the Act. Respondent knows it has this duty; yet it continues to ignore it.

Nonetheless, neither the Respondent's opening argument nor its posthearing brief focused on the approximately 8-month delay between the June 6, 2011 demand for recognition and bargaining and the first meeting, on February 14, 2012. If the Respondent believed there were legitimate reasons to justify the delay, it has not broadcast them from the rooftops.

The record leaves little room to doubt that the Respondent is, indeed, a successor to Berry III and, therefore, has become heir to Berry III's duty to recognize the Union and bargain with it. Considering that all the employees initially hired by the Respondent had worked in the Berry III bargaining unit, that they continued their same work from the same location and under the same supervision, and that there was no gap between the end of their employment with Berry and their hire by the Respondent, the conclusion becomes inescapable that the Respondent has a successorship obligation under both the *Burns* and *Fall River Dyeing* analytical frameworks. Reaching that conclusion does not take 8 months.

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Therefore, I conclude that the Respondent delayed unreasonably in replying to the Union's bargaining request and in meeting with the Union's representatives. It thereby breached its duty to bargain in good faith, as described in Section 8(d) of the Act, and violated Section 8(a)(5).

Even though the Respondent met with union representatives on February 14, 2012, it still has not clearly and unequivocally recognized the Union's status as the hoppers' exclusive representative. Indeed, its answer to the complaint denied such status. Moreover, it has taken the position, elaborated in its posthearing brief, that the Union is not the successor to the originally certified labor organization, Local 100, Service Employees International Union. Similarly, it continues to challenge the appropriateness of the bargaining unit.

Therefore, I conclude that, notwithstanding the five meetings at which the Respondent discussed with the Union the hoppers' terms and conditions of employment, it still has not recognized the Union as their Section 9(a) representative and, therefore, continues to violate Section 8(a)(5) and (1) of the Act.

Alleged Unilateral Changes

Complaint paragraph 11(a) alleges that about June 2, 2011, the Respondent changed the manner in which it pays its employees. As amended at hearing, complaint paragraph 11(b) alleges that about July 13, 2011, the Respondent changed the manner in which employees are

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selected for work. Complaint paragraph 11(c) alleges that about June 11, 2011, the Respondent promulgated new work rules in the form of an employee handbook.

The Respondent's answer denies all these allegations. Additionally, the answer raises, as an affirmative defense, that "Any unilateral change was either required by law or legally de minimis in nature."

In making these allegations, the General Counsel assumes that the evidence proves the Respondent to be a "perfectly clear" *Burns* successor, and therefore without the right to establish unilaterally its initial terms and conditions of employment. As discussed above, a "perfectly clear" *Burns* successor is an exception to the general rule that a successor employer may set its initial terms and conditions of employment without bargaining with the union.

However, for the reasons discussed above, I have concluded that the Respondent was not a "perfectly clear" *Burns* successor. Accordingly, it had no duty to bargain with the Union before establishing the initial wages and working conditions and did not violate the Act by doing so unilaterally.

Because I conclude that the Respondent did not violate the Act by establishing initial wages and working conditions, it is not necessary to reach the Respondent's "affirmative defense." However, I understand that the Respondent is raising it to argue that it could not continue the predecessors' practice of treating the employees as if

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they were independent contractors, that is, by paying them by the day without regard to the Fair Labor Standards Act and by failing to withhold taxes as required by the Internal Revenue Code. These arguments, I believe, clearly are nonfrivolous and would merit consideration had I concluded that the Respondent was a “perfectly clear” *Burns* successor. However, in view of my conclusion to the contrary, I need not and do not consider the Respondent’s affirmative defense.

The unilateral change alleged in complaint paragraph 11(a) concerned the Respondent paying employees at \$ 11 per hour, with taxes withheld. Because the Respondent was a successor, and not a “perfectly clear” *Burns* successor, it lawfully established such initial terms of employment.

The unilateral change alleged in complaint paragraph 11(c) concerns work rules promulgated in an employee handbook. Although the complaint alleges that the Respondent issued this handbook about June 11, 2011, the credited evidence establishes that many employees received their handbooks on June 4, 2011. However, I do not believe that the lawfulness of these new rules depends either on the exact date when the handbook was printed or the date when an employee received the handbook.

The rules took effect when the Respondent began its operations, not when the handbook was printed or distributed. The issue of whether an employee had notice of a rule--and, if so, when--is distinct from the issue of when the rule came into existence. Because I find that

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the Respondent promulgated these rules as part of the initial terms and conditions of employment it established at startup, I conclude that it had no duty to bargain with the Union and that it did not violate the Act.

The allegations in complaint paragraph 11(b) raise different issues. Originally, paragraph 11(b) of the complaint alleged that *about June 9, 2011*, the Respondent changed the manner in which employees were selected for work. At hearing, the General Counsel moved to amend the complaint to change the date to July 13, 2011. Over the Respondent's objection, I granted the amendment. In opening argument, the General Counsel described the allegation as follows:

Lastly, under Berry, hoppers were regularly assigned to the same truck and had never been replaced by new employees for training. You will hear Respondent during July 2011, well after it had succeeded Berry, removed hoppers from their regular trucks and then replaced them with new employees, employees still in training. Respondent ignored its legal obligation to bargain with the union, and in doing so, further worsened the situation.

The General Counsel's posthearing brief shed further light on the scope and gravamen of the allegations. It stated, in part:

[I]n July 2011, Respondent, through Supervisor Karen Jackson, began replacing experienced

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hoppers on trucks with inexperienced hoppers. While working for Berry III, Jackson always assigned experienced hoppers to trucks before inexperienced hoppers for safety reasons. However, Jackson changed this policy in July 2011, when she replaced hopper Eldridge Flagge with a rotation of three new and completely inexperienced hoppers. Jackson did the same with experienced hopper Booker Sanders. Flagge and Sanders continued to show up for work, but Jackson eventually simply stopped assigning them to work for Respondent, favoring the inexperienced hoppers over the veteran hoppers.

(Exhibit and transcript citations omitted.)

The General Counsel's argument, as set forth above, depends on the assumption that the Respondent is a "perfectly clear" *Burns* successor and therefore obligated to bargain with the Union before changing the terms and conditions of employment which the predecessor had established. However, I have concluded that the Respondent was not such a "perfectly clear" successor and thus had the right to establish its own initial terms and conditions of employment without having first to bargain with the Union.

If the Respondent is not a "perfectly clear" *Burns* successor, then it doesn't matter whether Jackson's action changed one of the predecessor's terms or conditions of employment. Rather, the relevant question

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concerns whether her action changed a policy that the *Respondent* adopted when it lawfully set the initial terms and conditions of employment. A departure from the Respondent's initial terms and conditions of employment might trigger a bargaining obligation, but that would be the case only if the change affected some term or condition which was a mandatory subject of collective bargaining, and only if the change were material, substantial, and significant. See, e.g., *Ead Motors Eastern Air Devices*, 346 NLRB 1060 (2006).

The General Counsel's post-hearing brief argues that Jackson made a change in the "method used to assign hoppers" and that this change was unlawful even if the Respondent were not shown to be a "perfectly clear" *Burns* successor. This argument appears to be premised on the assumption that at the time Jackson supposedly made the change, in July 2011, the Respondent already had in place a policy or practice concerning the assignment of hoppers to trucks, and that Jackson changed it. Thus, the General Counsel's brief states:

In either scenario [whether "perfectly clear" *Burns* successor or not] Respondent unilaterally changed the method used to assign hoppers to trucks without first providing the Union with notice and an opportunity to bargain regarding the change of a mandatory subject of bargaining, and therefore, violated Section 8(a)(5) of the Act.

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Thus, argument assumes that there was an existing policy or practice--an established "method used to assign hoppers to trucks" --and that Jackson changed it. Proving that there was, in fact, such a method or practice is a necessary antecedent to proving that the Respondent changed it, and the General Counsel bears the burden of proof.

Indeed, to establish a violation, the government must prove a number of elements. It must show (1) the existence of a particular term or condition associated with the workers' current employment by the Respondent, (2) that this term or condition of employment concerns a mandatory subject of collective bargaining, (3) that the Respondent changed it, (4) that the change was material, substantial, and significant, and (5) that the Respondent made the change without affording the employees' exclusive representative notice and a meaningful opportunity to bargain.

The government has not carried its burden of proving that there was an extant practice or "method used to assign hoppers to trucks." The General Counsel elicited testimony from Jackson to the effect that when she worked for Berry III she chose to assign to the trucks experienced hoppers rather than inexperienced. However, because the Respondent is not a "perfectly clear" *Burns* successor and was not bound to retain the Berry III practices, Jackson's testimony about her work for Berry III is largely irrelevant.

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Jackson may well have continued to prefer experienced hoppers over inexperienced, but I do not consider such a personal preference to be the same thing as an established practice. Rather, it seems likely that her opinion that experienced hoppers are safer was simply one factor she took into account in exercising her independent judgment as a supervisor.

In this regard, the complaint alleges that Jackson is a supervisor of the Respondent within the meaning of Section 2(11) of the Act. That subparagraph of the Act limits the definition of supervisor to those individuals who use independent judgment when they exercised authority on behalf of the employer. See 29 U.S.C. § 152(11). The government's allegation that Jackson meets the statutory definition of supervisor necessarily includes the allegation that Jackson must use independent judgment in performing her supervisory duties, and the Respondent has admitted it.

Jackson's supervisory duties include deciding which hoppers to assign to which trucks, decisions based not on one but a number of different factors, one of them being the relative experience or inexperience of the workers available for assignment. Jackson's testimony makes clear that when she was making such decisions as a supervisor for Berry III she took into account the relative experience of the hoppers available for assignment.

It would not be surprising if Jackson's belief that less experience hoppers are more likely to have accidents continues to influence how she exercises her independent

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judgment as a supervisor for the Respondent. However, even should she decide to give this factor less weight, or no weight at all, it does not change the “method used to assign hoppers to trucks. “ That method is to have the supervisor make the decisions, as need arises, using independent judgment.

Certainly, it is possible to imagine situations in which an employer promulgates a list of criteria to be used by the supervisor in making such choices or, going even further, assigns each criterion a specific weight. The present record does not suggest that the Respondent did so.

The government has not pointed to any document amounting to a statement of the Respondent’s policy on how hoppers should be assigned to trucks. Likewise, the record does not suggest that Jackson, Richard III, or any other person speaking for the Respondent announced such a policy.

Compared to Berry III, the Respondent has demonstrated far more inclination to set policy, to memorialize such policies in employee manuals, and, more generally, to do things “by the book.” Nonetheless, the General Counsel has not offered any document which reflects either the terms of a policy about assigning hoppers to trucks, or even the existence of such a policy.

Of course, a practice can come into existence and become established without any formal statement of policy. However, the present record does not persuade me that such a practice existed.

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Moreover, this unilateral change allegation rests largely on Jackson's testimony. The General Counsel has argued forcefully that Jackson is not a credible witness but rather someone willing to alter the dates on documents submitted during a government investigation. Additionally, she initially erred concerning the date on which she began work for the Respondent.

Further, considering her testimony as a whole leads me to suspect it was affected by a desire to place the Respondent, and herself, in a favorable light. Thus, it is difficult to evaluate how much of her professed concern about hopper safety reflected her actual practice as a supervisor and how much was exaggeration for the sake of appearance.

Other witnesses have corroborated some portions of Jackson's testimony, such as that pertaining to what she told the hoppers during the meeting on June 2, 2011, and, in view of that corroboration, I have credited those portions. However, Jackson's testimony about mental processes when assigning hoppers for Berry III stands by itself and I have little confidence in it.

For these reasons, I conclude that credible evidence does not establish that the Respondent had an established practice regarding how hoppers were to be assigned to trucks. Because the government has not proven the existence of such a practice, it also cannot prove there was a change in it.

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In sum, with respect to the allegations raised in complaint paragraph 11(b), I find that the government has not carried its burden of proof. With respect to the other unilateral change allegations, I conclude that the Respondent, not being a “perfectly clear” *Burns* successor, acted lawfully in establishing the initial terms and conditions of employment unilaterally. Therefore, I recommend that the Board dismiss these allegations.

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REMEDY

Beginning June 6, 2011, and continuing to the present, the Respondent's refusal to recognize and bargain with the Union has placed it in violation of Section 8(a)(5) and (1) of the Act. To remedy these violations, I recommend that the Board order the Respondent to recognize and bargain with the Union without further delay and, additionally, to post the "Notice to Employees" attached to this decision as Appendix.

CONCLUSIONS OF LAW

1. The Respondent, Creative Vision Resources, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 100, United Labor Unions is a labor organization within the meaning of Section 2(5) of the Act and the exclusive representative, within the meaning of Section 9(a) of the Act, of the following employees who constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and part-time hoppers employed by Creative Vision Resources, LLC, who work on trucks in the collection of garbage and trash in the Greater New Orleans, Louisiana area, excluding all other employees, guards and supervisors as defined in the Act.

3. Beginning June 6, 2011, and continuing to date, the Respondent has failed and refused to recognize Local 100, United Labor Unions, as the exclusive representative of its

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4. The Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ¹

ORDER

The Respondent, Creative Vision Resources, LLC, New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 100, United Labor Unions, as the exclusive representative of all full-time and part-time hoppers it employs in the New Orleans, Louisiana area.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective

1. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes. employees in the appropriate unit described in paragraph 2, above, and thereby has violated and is violating Section 8(a)(5) and (1) of the Act.

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bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Grant immediate and full recognition to Local 100, United Labor Unions, as the exclusive representative of its full-time and part-time hoppers and bargain with that labor organization in good faith.

(b) Within 14 days after service by the Region, post at its facilities in New Orleans, Louisiana, copies of the attached notice marked "Appendix." ² Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such

2. If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. January 7, 2013

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**APPENDIX D — DENIAL OF REHEARING OF
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT, FILED MARCH 19, 2018**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60715

CREATIVE VISION RESOURCES, L.L.C.,

Petitioner Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner.

Appeals from the United States District Court for the
National Labor Relations Board

ON PETITION FOR REHEARING *EN BANC*

(Opinion 10/16/2017, 5 Cir., _____ F.3d _____)

Before Circuit Judges KING, PRADO, and SOUTHWICK.

PER CURIAM:

- Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the

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panel nor judge in regular active service of the court having requested that the court be polled on Rehearing *En Banc* (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

- Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE