

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION ONE/SUBREGION 34

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FARERI ASSOCIATES, LP, GREENWICH)		
PARK, GREENWICH PREMIER SERVICES)		
CORP., and BRENWOOD HOSPITALITY,)	NLRB CASE Nos.	01-CA-188158
LLC, A SINGLE EMPLOYER)		01-CA-190046
)		01-CA-191779
-and-)		01-CA-214016
)		
SERVICE EMPLOYEES INTERNATIONAL)		
UNION LOCAL 32BJ)		
_____)		

**BRIEF IN SUPPORT OF EXCEPTIONS
FILED BY FARERI ASSOCIATES, LP, GREENWICH PARK, GREENWICH
PREMIER SERVICES CORP. AND BRENWOOD HOSPITALITY,
LLC, A SINGLE EMPLOYER**

Ryan A. O'Donnell, Esq.
Siegel, O'Connor, O'Donnell & Beck, P.C.
150 Trumbull Street – 5th Floor
Hartford, CT 06103
Attorneys for Fareri Associates, LP,
Greenwich Premier Services Corp., and
Brenwood Hospitality, LLC, A Single
Employer

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-and-

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 32BJ

Case Nos. 01-CA-188158
 01-CA-190046
 01-CA-191779
 01-CA-214016

I. STATEMENT OF THE CASE

Fareri Associates, LP, Greenwich Park, LLC, Greenwich Premier Services Corp., and Brenwood Hospitality, LLC's, (hereinafter referred to as "Fareri") submits this brief in support of its Exceptions to the Decision ("JD") of Administrative Law Judge David I. Goldman ("ALJ") issued on May 13, 2019 in the matter of Service Employees International Local 32BJ ("Union"), Cases 01-CA-188158, 01-CA-190046, 01-CA-191779, and 01-CA-214016, reported at JD-41-19.

This case involves Respondent's acquisition of an office park in Greenwich, Connecticut. Upon making said purchase, Respondent, for a number of economically motivated reasons, chose not to hire the 21 incumbent cleaners, all of which were represented by the Union. The ALJ improperly found that the Respondent:

Beginning on or about November 5, 2016, unlawfully discriminated by refusing to consider for hire or hire the following former employees of AffinEco because they were

represented by the Union, in violation of Section 8(a)(3) and (1) of the Act: Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, Rosa Vasquez, Regina Cruz, Miguel Gonzalez, Segundo Zuniga, Ana Elicea, Mayra Maurad, Rosalia Bravo-Affon, Indiana Pena, and Irma Arango. (JD 64: 5–11)

These 21 employees constituted all of the former AffinEco employees who were employed at the time of Respondent’s purchase of the office park.

Additionally, the ALJ improperly found “The Respondent since on or about November 5, 2016, by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the above described unit, violated Section 8(a)(5) and (1) of the Act.” (JD 64: 25–27) Furthermore, the ALJ also improperly found the Respondent, “since on or about November 5, 2016, by unilaterally setting initial terms and conditions of employment for unit employees without first giving notice to and offering to bargain with the Union about those initial terms and conditions, violated Section 8(a)(5) and (1) of the Act.” (JD 64: 29–32)

II. STATEMENT OF THE ISSUES

1. Did the Respondent, beginning on or about November 5, 2016, unlawfully discriminate by refusing to consider for hire or hire the following former employees of AffinEco because they were represented by the Union, in violation of Section 8(a)(3) and (1) of the Act: Favian Brito, Marcia Cordero, Elidel Garfias, Ivette Huguet, Joel Jacome, Marcela Jaramillo, David Narvaez, Sonia Osorio, Lucia Perez, Yolanda Revilla, Silvia Rios, Nestor Trivino, Rosa Vasquez, Regina Cruz, Miguel Gonzalez, Segundo Zuniga, Ana Elicea, Mayra Maurad, Rosalia Bravo-Affon, Indiana Pena, and Irma Arango? (JD 64: 5–11)

2. Did the Respondent since on or about November 5, 2016, by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of

the above described unit, violate Section 8(a)(5) and (1) of the Act? (JD 64: 25–27)

3. Did Respondent, since on or about November 5, 2016, by unilaterally setting initial terms and conditions of employment for unit employees without first giving notice to and offering to bargain with the Union about those initial terms and conditions, violate Section 8(a)(5) and (1) of the Act? (JD 64: 29–32)?

The answer to each question is “no.” The ALJ erroneously answered all three questions in the affirmative.

III. STATEMENT OF THE FACTS

Greenwich Office Park (“GOP,” the “property,” “premises,” or “office park”) is a campus of nine (9) commercial office buildings located in Greenwich, Connecticut. Respondent, Greenwich Park, LLC (“GPLLC”) is a real estate company that owns buildings one through six and leases buildings eight and nine. (Tr. 496) Greenwich Premier Services Corp. (“GPS”) is the managing agent at GOP. (Tr. 434) In that capacity, it oversees the day-to-day operations at the property and is responsible for collecting rent from the tenants. (Tr. 83) It does not participate in the hiring, firing, direction, or discipline of the janitorial cleaners at GOP. (Tr. 83)

From 2006 until 2016, United Services was the vendor with which the managing agent contracted to clean the office park. (Tr. 219)

The building cleaners employed by United Services at the premises were represented by Local 32BJ which had negotiated a collective bargaining agreement on their behalf governing wages, hours and other terms and conditions of employment. (GC 3; Tr. 220) At that time, United Services employed approximately 21 employees at GOP. (GC 4; Tr. 103)

John Fareri became interested in acquiring GOP in late 2015 or early 2016. (Tr. 1169) He

subsequently entered into purchase and lease agreements for the GOP property in the first half of 2016. (Tr. 1170)

After the agreements had been executed, there followed a “due diligence” period. (Tr. 84, 464, 1172). One of the purposes of this period was to analyze the cost structure of the existing operation, including the prices charged by vendors, to determine if the property was, in fact, worth acquiring. (Tr. 464, 554, 975). The financial aspect of this analysis was largely conducted by Christopher Sheskier, GPS’s Chief Financial Officer. (Tr. 417, 464–467).

As part of his analysis, Mr. Sheskier evaluated various costs, including the janitorial costs charged to the previous owner by United Services. (Tr. 554–556, 1175) He compiled a chart comparing the costs charged by United Services to costs paid for comparable janitorial services by Fareri in other properties in the same area. (Tr. 556, 1048–1054, 1060, R 12) Based upon the cost-per-square-foot, Mr. Sheskier determined that United Services’ charges were 60 percent to 100 percent higher than the costs for similar services at Respondent’s other comparable properties. (Tr. 558) In fact, United Services was charging 60 percent more than Fareri was paying to clean a building across the street from GOP. (Tr. 557)

Respondent always intended that GOP would be cleaned by a third-party janitorial vendor. (Tr. 467). To that end, Respondents considered proposals from A&A Maintenance Services, Inc., Harvard Maintenance, Inc. and Ken-Cal—all unionized companies. (Tr. 518, 990, 1175). All of these bids were rejected on the basis of cost. (Tr. 520, 992, 1176). A bid was also received from Soriano, a company which was not unionized, which was also rejected. (Tr. 87, 1009).

United Services submitted a proposal and was also considered. (GC 24, Tr. 994, 1177). Based on his experience in the industry, Mr. Sheskier knew it would be inefficient and expensive for United Services to staff the job with full-time employees. (Tr. 86, 1063). Indeed, when Mr.

Sheskier analyzed this bid and found that the prices it contained were almost double those paid by Respondents' other buildings for similar services. (Tr. 1187). Despite this, United Services was "in the running" right up until the date of closing. (Tr. 245) Telephone calls and meetings were held with United Services' principal Paul Senecal so that Respondents could gain an understanding of why the proposed prices were so high. (Tr. 1181–1185) Various methods of reducing costs, such as reducing the scope of services and reducing the size of the staff, were discussed but didn't work out. (Tr. 1063, 1182–1185)

In fact, United Services' prices were scheduled to actually increase because of a contractual commitment to the Union to "convert" several part-time cleaners to full-time status. (Tr. 234–235, 1215–1217) This would entail payment of full-time benefits for these workers which were considerably more expensive than part-time benefits. (Tr. 276) This cost increase would then be passed to United Services' putative customer—GPS. (Tr. 1185–1186)

The due diligence period dragged out for various reasons and the closing on the property was repeatedly delayed. (Tr. 1171). The chief obstacle was that Fareri was having difficulty securing financing to pay for the purchase. (Tr. 1254). Finally, in November 2016, time was about to run out. (Tr. 1171, 1254–1256). If Mr. Fareri failed to close, the deal would fall through and he would lose his down payment. At this time, no third-party janitorial contractor had been selected. (Tr. 467, 514).

The closing ultimately took place on November 4, 2016. (Tr. 466). Out of sheer necessity, it was decided that Respondents would take the cleaning function "in-house" using Brenwood Hospitality ("BH") as the cleaning contractor. (Tr. 448, 973) This was always intended as a temporary expedient and the search for a cleaning contractor continued. (Tr. 466, 514, 1188) Raul Hernandez, the J House's Director of Housekeeping, who oversaw cleaning and maintenance

operations at the hotel. (Tr. 688, 1174, 1188) Mr. Fareri decided to temporarily use BH as the janitorial contractor at GOP. (Tr. 448, 973) BH, in turn, used Mr. Hernandez to manage the cleaning at GOP as well as the cleaning at J House. (Tr. 448, 691–696, 738–788)

Mr. Hernandez went over to GOP that same day and met with Ms. Pia, who was the Property Manager at that time. (Tr. 707) At that time, Mr. Hernandez had not yet hired anyone. (Tr. 710) Nevertheless, he found eight (8) people to work that night. (Tr. 711, 735) Half of these people were personal acquaintances of his; he got the other half by “word of mouth.” (Tr. 712) He made the decision to pay the cleaners \$10.00 per hour. (Tr. 713)

Because there was an urgent need to start cleaning GOP immediately, many of the normal hiring formalities went by the wayside. (Tr. 527) There were not employment applications, I-9’s or any of the customary “on-boarding” documents available. (Tr. 711, 743–744, 1099) Payroll had not yet been set up and several of the cleaners were not paid that first week. (Tr. 546, 563)

Cleaning operations at GOP commenced that Saturday night, November 5, 2016. (Tr. 735) These operations were very basic: There were no keys to allow access to all areas that needed to be cleaned. (Tr. 736) There were no established cleaning routines to follow. (Tr. 736, 874) Only four (4) of the buildings were cleaned that night. (Tr. 737, 1102, 1147)

At approximately 6:00 p.m. on November 7, a group of 10 to 15 of the cleaners who had formerly worked at the property for United Services appeared in the lobby of building two. (Tr. 1107) These former employees announced they were seeking employment. (Tr. 853, 1107) However, these individuals were not instantly hired because Mr. Hernandez was overwhelmed and confused by the “chaotic” situation. In the following few days, eight former AffinEco employees were hired by Respondent.

BH continued to serve as the janitorial contractor until June 30, 2017. Because this had

always been intended to be a temporary measure, the search for a new janitorial vendor continued. (Tr. 514, 1188, 1192, 1230) A bid was received from a company named Integrated Building Management (“IBM”) in December 2016. (Tr. 521, 1193; R 11, GC 38) The price quoted was approximately \$1 per square foot—a figure in line with what the Respondents were paying for similar services in their other buildings. As such, IBM’s bid was accepted. (Tr. 1194, 1239–1240) IBM took over the work effective July 1, 2017. (Tr. 1195; GC 38)

IV. ARGUMENT

A. The ALJ erred in his determination that General Counsel demonstrated Respondent failed to hire employees of its predecessor and was motivated by antiunion animus

(Exceptions 1, 2, 3, 7, 8, 10, 11, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28)

As the ALJ notes in his decision, the Supreme Court-approved analysis in cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Planned Building Services*, 347 NLRB 670 (2006), the Board held that “*Wright Line* provides the appropriate framework for deciding whether a successor employer violated Section 8(a)(3) by refusing to hire predecessor employees.” In *Downtown Hartford YMCA*, 349 NLRB 960, 960 (2007), the Board explained:

To establish a violation of Section 8(a)(3) under *Wright Line* where a refusal to hire is alleged in the successorship context, the General Counsel has the burden of showing that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. Once the General Counsel has made this showing, the burden shifts to the employer to demonstrate that it would not have hired the predecessor's employees even in the absence of its unlawful motive. (citation to *Planned Building Services*, *supra*, omitted].)

In the instant scenario, Respondent takes exception to the ALJ’s findings regarding whether

General Counsel met its initial *Wright Line* burden. First, both the ALJ and the General Counsel are able to only demonstrate that 13 of the 21 former AffinEco employees were not hired by Respondent. (JD 25: N. 36) Eight former AffinEco employees were hired by Respondent, a critical factor the ALJ dismisses by alleging Respondent’s hiring of these eight employees was “delayed” and therefore, “discriminatory.” (JD 51: 15–16) The ALJ offers no citation or analysis in support of his conclusion Respondent “were found to have discriminatorily delayed hiring.” (JD 51:15–16) While the ALJ repeats this finding on two separate occasions—that there was a discriminatory “delay” in hiring eight employees—no analysis is offered as to how this conclusion was reached, or as to what evidence was relied upon.

Likewise, the General Counsel’s brief is, over the course of its 186 pages, bereft of any mention of “delayed” hiring. Of course, given the General Counsel’s reliance on *Galloway School Lines*, 321 NLRB 1422, 1422–1423 (1996), there would have been no need to explain away the fact that eight former AffinEco employees were hired by Respondent. In its brief, the General Counsel cites *Galloway School Lines*, supra, 321 NLRB at 1427 in support of its interpretation that *N. L. R. B. v. Burns Intern. Sec. Services, Inc.*, 406 U.S. 272 (1972) “Precludes an employer from setting initial terms and conditions of employment even when it discriminates against some—but not all—predecessor employees in order to avoid a bargaining obligation.” However, in between the filing of the General Counsel’s brief and the ALJ’s decision, the holding in *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110, changed the standard relied upon by the General Counsel. No longer could the “some—but not all” standard be used to evaluate Respondent’s hiring practice. In his decision, the ALJ ignores the General Counsel’s reliance on *Galloway* and, instead, injects his own analysis of *Ridgewood* into the General Counsel’s argument. Such analysis that clings to the notion the hiring of these employees was

“discriminatorily delayed” which, conveniently, shifts the case’s reliance on *Galloway* to reliance on the new standard articulated in *Ridgewood*.

This position is logically inconsistent, however, with other areas of the Decision. Specifically, the ALJ determined Respondent and its representatives were indeed in possession of a “seniority” list that contained the names of the former AffinEco employees. (JD 8: 28–30) Yet, the ALJ also discounts the hiring of these eight employees by noting these employees hid their union affiliation. (JD 22: 5–7) Either the Respondent had this alleged list, and hired union members anyway or it did not have the list, and therefore, could not have based its alleged discrimination off said list. If Respondent had the list, as the ALJ believes, then it absolutely knew it was hiring former union employees—to suggest otherwise strains the bounds of credulity.

Furthermore, although Respondent did not immediately hire every possible former employee the instant it took ownership of GOP, the ALJ determined “even the former AffinEco employees who were hired were the victims of hiring discrimination until hired.” (JD 44: 26–27) There was well-documented confusion and chaos following Respondent’s acquisition of GOP. (Tr. 365) Despite this chaos, eight employees were hired a few days—not weeks, and certainly not months—following Respondent’s acquisition of the company. Tr. 768–771, 859) The ALJ’s decision—without citation or analysis—creates a new standard whereby employers who acquire a company and do not instantly hire any and all former union affiliated employees have violated the Act. In turn, such a standard would provide no leeway or flexibility for the new employer to find its operational footing, so to speak. Instead, it demands instantaneous acquiesce to the unbridled interests of labor, with little to no regard for the myriad of operational challenges and difficulties that may arise—and, in the instant case, did arise—in

the first few days of a new enterprise.

There is no evidence—cited or otherwise—that supports the General Counsel’s contention, or the ALJ’s finding, that Respondent failed to hire all the employees of its predecessor, or that such hirings were “delayed.” As such, General Counsel failed to meet its *Wright Line* burden, and the ALJ erred in finding to the contrary.

B. The ALJ erred in his determination that Respondent failed to meet its Wright Line Burden by proving a compelling, substantial demonstration that it would not have hired the predecessor's employees even in the absence of its allegedly unlawful motive.

(Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13,14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28)

Assuming, *arguendo*, the General Counsel met its initial *Wright Line* burden, the burden shifts to the Respondent to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive. Respondent acknowledges it cannot meet its burden merely by showing that it had a legitimate reason for its actions; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). Contrary to the ALJ’s decision, Respondent demonstrated a legitimate business reason for its actions—actions it would have taken regardless of the protected conduct.

The ALJ’s flippant dismissal of Fareri’s chief argument submitted in support of its *Wright Line* burden ignores the considerable evidence in support of Fareri’s argument that price considerations, as well as a number of other economic and operational factors, were at the heart

of its decision not to renew the AffinEco contract.

In an argument that echoes many of the concerns noted by the U.S. Supreme Court in the *Burns* decision, Respondent detailed how its actions were driven by the need to reduce costs in a newly acquired property. The successful acquisition and revitalization of the property in question—the Greenwich Office Park—depended (indeed, still depends) on Respondent’s ability to meet its target operating costs. Whether the employees against whom Respondent allegedly discriminated were union is irrelevant: Respondent’s business model required the hiring of part-time employees at certain wage and benefit levels. As such, any employee unwilling or unable to meet these requirements would not have been hired by Respondent to work at the Office Park, regardless of union affiliation or protected activity.

Respondent’s decision not to hire 13 former AffinEco employees was based solely on legitimate business reasons. While not identical, many of the same core legal and economic concepts addressed in *Burns* resurface in the instant fact pattern. As the Court noted in *Burns*, a potential employer may be:

Willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.

Burns, 406 U.S. at 288.

The instant matter finds Fareri seeking to purchase the Greenwich Office Park (“GOP”), a similarly “moribund” business. Fareri owns a number of profitable commercial buildings and recognized an opportunity to revitalize the GOP. However, such revitalization was predicated on the Fareri’s ability to reduce costs at the GOP; without the freedom to change the pricing and operational structure of the struggling enterprise, Fareri would have had no interest in the GOP,

let alone its employees.

In the GOP, Fareri saw an opportunity. By approximately May 2016, a conditional contract had been signed, and a deposit was placed on the property in June 2016. Following this deposit, Fareri embarked on a “due diligence” period where it evaluated the purchase, which remained “conditional.” As it already owned a number of profitable commercial buildings, Fareri understood what actions needed to be taken—especially with regard to operating costs—to make GOP a worthwhile investment. First and foremost, Fareri knew it had to cut costs. Toward that end, Fareri used this “due diligence” period to solicit bids from a variety of potential custodial and janitorial vendors—some unionized, others non-unionized. One such vendor was AffinEco, the company that, prior to Fareri’s purchase of GOP, was contracted to clean the office park.

As it so happened, Fareri was already engaged in negotiations with AffinEco over the possible serving of another Fareri property 500 West Putnam. (T 288, 14) Kelly Pia, a Fareri project coordinator who was involved in the West Putnam negotiations, broached the topic of Fareri’s possible acquisition of GOP with Paul Senecal, AffinEco’s managing partner. (Tr. 228, 11-12) As Senecal testified, eventually, the conversation “over the course of time discussing 500 West Putnam¹, we started to talk about Greenwich Office Park.” (Tr. 288, 19–20). Fareri knew AffinEco’s employees were unionized, and yet, it proactively sought a bid from AffinEco. If Fareri was interested in avoiding a union, or held some sort of animus toward unions, soliciting a custodial bid from a unionized vendor is certainly an unusual approach.

Not only did Fareri initiate the discussion about AffinEco servicing GOP, but it also continued to pursue a bid from AffinEco. At this juncture in the discussion between Fareri and

¹Respondent eventually hired Ken-Cal Maintenance to service its West Putnam property with part-time, unionized employees. (Tr. 979)

AffinEco, if Fareri did not want to engage a unionized vendor for GOP, or even if wanted to avoid the specific union at issue, it would have terminated discussions. Instead, Fareri sought additional information on a number of topics, such as staffing levels and the extent and cost of services provided. (GC 22–GC 29). These initial conversations—between Fareri and a vendor with a unionized work force—were so promising Pia invited Senecal to submit a bid to services at the property on a going-forward basis. (Tr. 231; GC 24) Fareri quite obviously had no issue with using a vendor with an organized work force; in fact, several vendors at Fareri’s other properties were already organized. (Tr. 979) If a discriminatory plan was in place from the very “beginning” as alleged by the ALJ, there is no logical explanation for Fareri’s continued solicitation of bids from organized vendors—including, but not even limited to, AffinEco. Faced with this obvious logical inconsistency, the ALJ substitutes repetition and snark for an actual explanation. Clearly, the only plan in place was one designed to reduce cost, and transform GOP into a profitable enterprise worthy of Fareri’s considerable capital investment.

On August 26, Senecal, in response to her request for additional information, sent Ms. Pia a proposal to continue performing the cleaning work at GOP once Fareri’s purchase was complete. Consistent with concerns over cost, Fareri’s CFO Chris Sheskier created an internal document comparing the “cost of the bid received from AffinEco to the cost the Fareri companies paid for cleaning in other buildings they managed or owned.” (JD 8:24–26.)

As summer turned into fall, the negotiations between Fareri and AffinEco appeared, by all accounts, serious enough that senior management, including John Fareri, became directly involved in the process. (Tr. 255) In fact, the first genuine issue between the parties arose in October when, weeks after submitting its bid to service GOP post-sale, Senecal called Fareri and Pia to explain that, due to an agreement with the Union, AffinEco was required to incrementally

convert to the use of more full-time cleaning employees at GOP (and fewer part-time). (Tr. 260–261) Senecal told them that the conversion had been delayed through agreement with the Union for some years, but was going to be unavoidable. While currently 14 employees worked full time, more would have to be converted to full-time in the near future. (Tr. 261)

As Senecal testified, he knew there was nothing in the information Fareri collected during its “due diligence” that would “indicate that the pricing was going to go up in other steps...” (Tr. 234) Senecal was aware of Fareri’s sensitivity to any potential price increases; he, after all, had a number of conversations with Fareri’s representatives, and obviously had a sense of their fiscal expectations and projections for the GOP purchase. Indeed, Senecal informed Fareri that as a result of this “conversion” process, the original pricing provided with the AffinEco bid was no longer accurate.

This last minute audible by Senecal threw the process into chaos. As Sheskier testified, the company wanted the cleaning done on four hour shifts, with everyone finished by 10 p.m. (Tr. 1062) This reliance on part-time employees reflected “the general norm...in pretty much every one of our buildings.” (Tr. 1262) The ability to replicate this “norm” in the GOP building was critical to Fareri’s decision to invest in the property. Consider the impact this late revelation had on the pricing structure: the cost per square foot that AffinEco proposed to charge was double what Fareri Companies were paying for the cleaning in other comparable properties. Specifically, AffinEco proposed to charge \$2.12 per square foot as opposed to the more common \$1.02 per square foot. (Tr. 1180) This price structure would amount to annual cost increases of at least \$280,000. To find out—especially in the latter stages of an acquisition—that one’s costs could now annually increase by over a quarter of a million dollars would frustrate any sensible employer.

As the ALJ's decision makes clear, Mr. Fareri was vocal in his frustration over this unexpected change in pricing information. Indeed, based in this new information, Mr. Fareri informed Senecal "that's going to make it very difficult for us to do business together." (Tr. 236) Senecal responded that he "understood that" and, again, wanted to provide Fareri the opportunity to reduce costs in other areas." Senecal testified Mr. Fareri was "not happy" and "frustrated"—and who can blame him? (Tr. 236) To interpret such frustration—or any subsequent attempts to remediate this potential cost increase—as "anti-union animus" is to ignore the economic realities that drive an entrepreneur's decisions regarding investment and acquisition.

In response to Fareri's concerns, Senecal noted he wanted to give Fareri "an opportunity to go back to the seller [of the GOP building] and get the appropriate adjustment, in a cost that you may or may not be aware will be a go forward cost." (Tr. 235) Again, Senecal did not testify that Fareri was upset about the presence of a union. By the time Senecal informed Fareri of the change in pricing, Fareri was already well-aware of United Services' relation with the union. There is simply no way to explain Fareri's continued interest in United Services—as evidenced by its ongoing discussions with Senecal—if it was concerned about the presence of a union.

Despite these sudden changes in proposed pricing, Fareri continued to work with United Services to try and determine a way to lower costs. If Fareri was looking for an excuse to avoid a Union, it's difficult to imagine a better scenario. And yet, discussions between the two organizations continued. Specifically, once it was established the higher costs would, from a labor perspective, be unavoidable, "Mr. Sheskier converted the conversation to...what are other ways we can reduce costs...we discussed some cost reduction conversations about reducing scope. That we could get reductions from the Union if we scope reductions." (Tr. 243, 17–22). Here, again, the conversation centered around ways to work with the Union; for instance, the

parties discussed how:

If we are vacuuming five nights a week and we reduce the vacuuming to once a week, there's less work that's done. If we can demonstrate to the Union there is less work, we can go ask for an appropriate reduction in labor, to compensate for less work...we discussed cost savings. And it's a conversation that we have with many people. Scope reductions are a way to reduce costs in a union environment.

(Tr. 243–244)

The need to reduce costs to make the acquisition of GOP profitable is the reality at the heart of Fareri's discussion with United Services.

On October 24, the parties met yet again to try and address this new pricing information. While the ALJ cites comments made by Fareri during this meeting as evidence of anti-union animus and hiring discrimination (JD 42:7), his direct quote of the conversation is curiously inaccurate. The transcript records Mr. Senecal's testimony about the October 24 meeting as follows (emphasis added):

Senecal: We were talking about the status of the building. *I don't remember the -- it's not my nature to take notes after a meeting or record conversations, so this is all coming from memory. Can't remember how the question was asked,* but we answered the question that we were stuck with the Union. We had no choice but to implement the full time conversions. They were agreed. You know, there are agreed -- these were agreed upon in our collective bargaining agreement.

GC: Do you know why you answered that you were stuck with the Union?

Senecal: Why do we have to do this? Why are we stuck with this? Why does this have to be union? Some words like that. But what sticks in my mind is that we said *that we were stuck with this*. We had to do it. We had no choice.

(Tr. 241)

In his decision, however, the ALJ alleges Senecal’s testimony stated the following: “Sheskier and/or John Fareri responded, ‘Are we stuck with the Union. Are we stuck with the Union?’” (JD 9: 18–21) The word “stuck” came from Senecal and the GC; at no point was it established that this was actually the language used by Respondent.

While the two accounts vary only slightly, with regard to the ALJ’s determination of discrimination, this slight variation matters a great deal. Inquiring as to whether their company was “stuck with this”—stuck with the part-time to full-time conversation clause—is reasonable and legal, especially in light of the fact of Fareri’s well-documented need to reduce costs. Furthermore, Senecal adds several important qualifiers during this section of his testimony. While the rest of his testimony is delivered with confidence and relative certainty, here he falters, noting “That’s what I—to the best I can recall, that’s what they said.”(Tr. 242) Furthermore, Senecal admits he wasn’t even sure Mr. Fareri was the speaker; it could have been “either Mr. Fareri or...Mr. Sheskier”(Tr. 242) Its curious, to say the least, that Senecal’s testimony is notable imprecise at the moment when General Counsel tries to connect the negotiations between Fareri and United Services to some kind of anti-union animus. And rather than verifying Senecal’s comments in this key moment in the Fareri-AffinEco negotiations, the ALJ remembers a version of events suited to a narrative that seems, at least in this instance, predisposed to interpreting

Fareri's actions as discriminatory.

Were Fareri so incensed about the Union, it stands to reason there would have been some degree of discussion over how to avoid the Union.² Or, more likely, the parties would simply have broken off negotiations. Instead, Fareri continued to try to negotiate with AffinEco up until November 3, 2016. (Tr. 245) While it's true Fareri did not directly contact the Union regarding the possible use of Union employees at GOP, the company believed its months of negotiation with Senecal was indistinguishable from direct discussions with the Local 32BJ. After all, Senecal repeatedly made representations to Fareri as to what terms and conditions the unionized employees could and could not accept. Given that Senecal continued to negotiate with Fareri certainly gives the appearance Senecal had the ability to make concessions as to price and other terms and conditions of employment. Respondent certainly believed this to be the case, as it continued to negotiate with Senecal up to a few days prior to closing on GOP.

Respondent would not have hired the predecessor's employees even in the absence of its allegedly unlawful motive. If the alleged discriminatees in question had—while still

²The ALJ notes that around this time Fareri contacted a “union avoidance” law firm, as though this piece of information were somehow indicative of animus. Indeed, the ALJ allowed evidence of this contact to be entered on the record as evidence of animus. Not only is this characterization simply wrong on its face—there is nothing “illegal” about union avoidance per se—its embrace by an ALJ moves toward a dangerous restriction on employer's right to speech, i.e. that merely consulting with a law firm about union avoidance is somehow punishable under the law. Furthermore, any management labor attorneys who represent employers in Representation cases and/or who advise employers to pay its employees competitive wages, provide competitive benefits, and to treat employees with respect would also be—somehow—signaling animus.

Likewise, the ALJ allowed GC exhibit 55 (“union avoidance” law firm website print out) to be entered into the record as evidence of animus. In doing so, the ALJ explained: “I think it goes to weight. I would agree with you that that's you're not going to win a case with a firm. But they are showing that the firm they talked to, one of the many things it specializes in is union avoidance. The allegations of the complaint, generally put, alleged union avoidance so I'm going to allow it.” (Tr. 1363–1366)

demanding full-time hours, wages, and benefits—applied for employment at the GOP, they would have, without question, been rejected. As the ALJ notes, several former AffinEco employees applied for a position with Respondent and, while doing so, failed to disclose either their union affiliation or their former employment with AffinEco. The ALJ believes these employees—the same employees whose names were on a seniority list allegedly used by Respondent—managed to trick the employer into hiring them by lying on their applications. There is, however, a far more plausible explanation for the fact Respondent hired these eight “undercover” union employees: They agreed to work within Respondent’s fiscal model critical.

In discussing his finding that Respondent failed to meet its Wright Line burden, the ALJ notes that “AffinEco employees provided everything that the Respondent needed, and the Respondent had no workforce to clean.” (JD 42: 32) Likewise, the ALJ also determined that “The fact that the Respondent did not look to the experienced, out-of-work, but unionized AffinEco employees on November 5 is by itself some evidence of discriminatory motive.” (JD 42: 32–33) In both instances, however, the ALJ’s argument demonstrates a fundamental disconnect between the decision’s logic and the cold economic reality facing the Respondent. The Company did not purchase Greenwich Office Park so it could expand its operations into the custodial business; rather, it purchased this real estate because it had experience in making a profit on properties where other investors could not. Simply hiring every former AffinEco employee at the rate sought by Local 32BJ might have yielded a smoother transition for tenants of the building. However, such an approach would have, over the long term, been disastrous. As noted above, hiring employees at the rate sought by Local 32BJ would have cost Respondent, at a minimum, an additional \$280,000. So, while the ALJ is correct that Respondent could have quelled some of the initial chaos of the ownership transfer by plugging in the former AffinEco

employees, the increase cost would have made Respondent’s investment—the transfer of capital envisioned by *Burns*—pointless. However, since Respondent only learned about the mandatory “conversion” from Senecal after it made a deposit on the property, withdrawing from the deal was not an option.

When the Respondent first solicited bids for a janitorial vendor, it did not discriminate with regard to union status—it was only interested in meeting its necessary pricing targets. Similarly, when it was seeking to hire employees, it did, in fact, hire union members who agreed to employment terms consistent with those pricing targets. On the other hand, Respondent did not hire the 13 union employees who applied via letter because the Union’s employment terms were incompatible with pricing targets. During the months and weeks leading up to Respondent’s purchase of the office park, Senecal repeatedly and emphatically told Respondent that Union employees would not accept terms and conditions consistent with its economic models. The term “union” became, from Respondent’s perspective, nothing more than shorthand for “applicants we can’t afford to hire.” When employees were willing to work within the necessary economic parameters, they were hired—union or otherwise.

C. Respondent did not have an obligation to recognize and bargain with the Union and, as such, did not violate Section 8(a)(5) and (1) of the Act.

(Exceptions: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28)

Respondent did not engage in discriminatory conduct toward former AffinEco employees. Consequently, the Union lacks the necessary majority status to trigger either recognition or a bargaining obligation under the Act.

In his decision, the ALJ cites to the Board's recent Ridgewood holding, noting:

It is well established that when a new employer would have hired a majority of its unit employees from the predecessor's unionized work force but for the new employer's discrimination based on antiunion animus, the Board will deem the new employer a successor with an obligation to recognize and bargain with the union that represented the predecessor's unit employees.

Ridgewood Health Care Center, Inc., 367 NLRB No. 110, slip op. at 3 (2019)

Absent such discrimination, the new employer is only obligated to recognize a “successor 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.”

Burns Security Services, 406 U.S. at 281–295. However, the *Burns Security Services* Court recognized that “there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit 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.

With regard to the instant scenario, the ALJ found “Respondent unlawfully refused to ever hire 13 of the former AffinEco. Combined with the eight former employees who it has been found to have discriminatorily delayed hiring, the predecessor's employees would have easily constituted a majority, even of the full complement of 33 or 34. Accordingly, the Union retained its presumption of majority support and the duty to bargain remained intact” As discussed extensively in the previous section of this brief, Respondent maintains it has satisfied its *Wright Line* obligations and, consequently, cannot be found to have unlawfully refused to ever hire 13 of the former AffinEco employees. Assuming, *arguendo*, Respondent did unlawfully refuse to hire

13 of the former AffinEco employees, this number does not establish the requisite majority as 34 total employees were hired. The ALJ acknowledges this fact and, as such, shoehorns into his analysis eight additional former AffinEco employees, the hiring of whom was “delayed.” As noted earlier in this brief, no additional information is provided as to what constitutes “delayed” hiring. While much of the ALJ’s decision features extensive recitation of the facts and extensive legal analysis, no such effort is made to explain the finding that the eight former AffinEco employees who were hired were also victims of discrimination, despite being hired only a few days after Respondent purchased Greenwich Office Park.

Therefore, Respondent maintains it did not have an obligation to recognize and bargain with the Union and, as such, did not violate Section 8(a)(5) and (1) of the Act.

D. Respondent was entitled to unilaterally set initial terms and conditions of employment for unit employees without first giving notice to and offering to bargain with the Union about those initial terms and conditions, and, as such, did not violate Section 8(a)(5) and (1) of the Act.

(Exceptions: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28)

It is well-established that “A statutory successor is ordinarily free to set initial terms and conditions of employment.” *Burns Security Services*, 406 U.S. at 284.” However, in his decision, the ALJ determined:

The Respondent has been found to have discriminated in hiring against every one of the predecessor's employees. Furthermore, it hired a significantly larger complement of employees (but not twice as many) as were employed by the predecessor. Thus, in this

case there is a likelihood—not mere “uncertainty”—that absent discrimination, the successor would have hired every one of the predecessor's unit employees. The Respondent has no evidence to overcome the resolution against it of any uncertainty as to this question of what it would have done absent its unlawful discrimination. Accordingly, as recently reaffirmed in *Ridgewood Health Care Center*, supra, the *Loves' Barbeque* remedy of requiring the Respondent to bargain with the union before setting initial terms and conditions of employment is applicable.

The ALJ's decision, to use one of his own phrases, appears to conduct his analysis “without reference to the reality staring back at [him] from the record.” As discussed extensively throughout this brief, Respondent maintains it has satisfied its burden under the *Wright Line* framework, and has proven it would indeed have not hired the former AffinEco employees absent its unlawful discrimination. Indeed, the only question is, had Respondent known it would be able to meet its pricing target for the Greenwich Office Park prior to making its initial investment, would it even have pursued the property? The answer is almost certainly no—a result that would have triggered the scenario envisioned in *Burns*, were the flow of capital is frustrated by arcane and overzealous law.

E. The ALJ's Recommendations

(Exceptions: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28)

Based on the arguments presented in Section IV A–E above, Respondent takes exceptions to the ALJ's recommendations as noted in the exception list (Exceptions 23 and 24). Such recommendations are dependent on the ALJ's arguments as discussed in the forgoing brief.

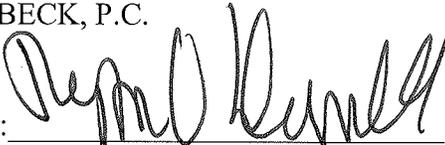
Given the exceptions raised it has raised to these arguments, Respondent believes the ALJ's recommendations are likewise insufficient.

CONCLUSION

The facts and law do not support a finding that Respondent be required to recognize the Union, and/or be denied the opportunity to set the initial terms and conditions of employment.

DATED: July 12, 2019

SIEGEL, O'CONNOR, O'DONNELL
& BECK, P.C.

By: 
Ryan A. O'Donnell Esq.

Siegel, O'Connor, O'Donnell & Beck,
P.C.
150 Trumbull Street – 5th Floor
Hartford, CT 06103
Attorneys for Fareri Associates, LP,
Greenwich Premier Services Corp., and
Brenwood Hospitality, LLC, A Single
Employer

CERTIFICATE OF SERVICE

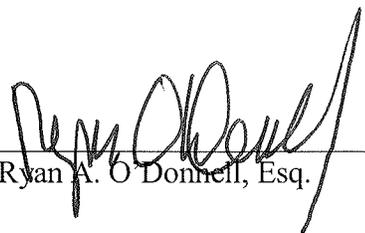
I hereby certify that on this date the foregoing Brief in Support of Exceptions filed by Fareri Associates, LP, Greenwich Park, Greenwich Premier Services Corp. and Brenwood Hospitality, LLC, a single employer in the above-captioned matter, which is e-filed with the Board, was served electronically upon the persons below:

Paul J. Murphy
Acting Regional Director
National Labor Relations Board
Acting Regional Director: Region 1
10 Causeway Street
Room 601
Boston, MA 02222-1001
Paul.murphy@nlrb.gov

Rick Concepcion, Esq
National Labor Relations Board
450 Main Street
Hartford, CT 06517
Rick.concepcion@nlrb.gov

Jessica Drangel Ochs, Esq.
1350 Broadway
Suite 501
New York, NY 10018
jochs@seiu32bj.org

DATED: July 12, 2019



Ryan A. O'Donnell, Esq.