No. 19-11615

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RIDGEWOOD HEALTH CARE CENTER, INC. AND
RIDGEWOOD HEALTH SERVICES, INC.

Petitioner / Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent / Cross-Petitioner

and

UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

Intervenor

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

BRIEF OF INTERVENOR USW

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RIDGEWOOD HEALTH CARE CENTER, INC. and RIDGEWOOD HEALTH SERVICES, INC.	)	
Petitioners/Cross-Respondents	)	No. 19-11615
v.	)	Board Case Nos.
	)	10-CA-113669
NATIONAL LABOR RELATIONS BOARD	)	10-CA-136190
Respondent/Cross-Petitioner	)	
and	)	
UNITED STEEL, PAPER & FORESTRY RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC	)	
Intervenor	)	

Certificate of Interested Persons

Pursuant to Fed. R. App. P. 26 and Local Rule 26.1-1, the Intervenor, by and through its counsel of record, hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Burr & Forman, LLP, Counsel for Petitioners
2. Doyle, John D, Regional Director, Region 10, for the NLRB
3. Emmanuel, William J., Member of the NLRB
4. Flowers, Jr., Ronald W., Counsel for Petitioners
5. Habenstreit, David, Acting Deputy Associate General Counsel for NLRB

6. Hattaway, Ashley, Counsel for Petitioners

7. Heaney, Elizabeth, Attorney for the NLRB

8. Kaplan, Marvin E., Member of the NLRB

9. McFerran, Lauren, Member of the NLRB

10. National Labor Relations Board, Respondent

11. Quinn, Connor, Weaver, Davies & Rouco, LLP, Counsel for Intervenor

12. Resnick, Anthony, Counsel for Charging Party

13. Ridgewood Health Care Center, Inc., Petitioner

14. Ridgewood Health Services, Inc., Petitioner

15. Ring, John F., Chairman of the NLRB

16. Robb, Peter B. General Counsel for the NLRB

17. Rosas, Michael, Administrative Law Judge

18. Rouco, Richard, Counsel for Intervenor

19. Scully, Matthew T., Counsel for Petitioners

20. Sheehy, Barbara, Attorney for NLRB

21. Stock, Alice B., Deputy General Counsel for the NLRB

22. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Intervenor

23. Wheeler, Keren, Counsel for Charging Party

24. Williams, Jeffrey D., Attorney for the NLRB

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Ridgewood Health Care Center, Inc., and Ridgewood Health Services, Inc. (the Company) for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order issued against the Company finding that it unlawfully refused to hire former predecessor employees, coerced and threatened employees, and refused to recognize and bargain with the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC (the Union). The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a) (the Act).

The Board's Decision and Order issued on April 2, 2019, and is reported at 367 NLRB No. 110. (A3 pp.1561-93.) The Court has jurisdiction over this proceeding because the Board's Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The petition and application were timely; the Act provides no time limits for such filings. Venue is proper under Section 10(f) because the Company transacts business in this Circuit.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of those portions of its Order remedying the uncontested unlawful threat of discharge because of union activity?
2. Did the Board reasonably find that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees and by telling them that they were no longer represented by the Union?
3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire four employees of its predecessor to avoid a bargaining obligation?
4. Whether substantial evidence supports the Board's findings that the Company was a successor employer that violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by refusing to provide requested information?

FINDINGS OF FACT

The Union adopts in full the findings of fact as discussed by the National Labor Relations Board ("the Board") in its brief at Section I, "The Board's Findings of Fact."

ARGUMENT

I. The Decision of the Administrative Law Judge

The ALJ found that Respondents, as a single employer, were successors to the previous operator under *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972) and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), because there was a substantial continuity between the two entities, and a substantial and representative complement of the Respondents workforce consisted of formerly represented employees.

The ALJ decided that October 1, 2013 was the appropriate date for determining majority status because (1) the historical unit consisted of approximately 82 to 88 employees; (2) all the bargaining unit positions had been filled; (3) for most months after October 1, 2013, the Respondents operated with less than 101 employees including helping hands and have averaged eighty-eight employees in the historical unit position (i.e. the unit without helping hands) and (4) Alabama law requires the nursing home to be adequately staffed at all times.

The ALJ found that there was substantial continuity of operations between the predecessor and successor employers. The ALJ further found that the formerly represented employees constituted a majority of employees hired into an appropriate bargaining unit position. The ALJ relied for this finding

primarily on his determination that the 19 employees hired into the newly created "helping hands" classification were not in the historical bargaining unit, because helping hands have never been included in the historical unit, the position is not equivalent to nursing aides because it does not require certification, and helping hands only performed a small subset of the duties performed by certified nursing aides. The ALJ therefore excluded employees in the "helping hands" classification from the representative complement in assessing the percentage of predecessor employees hired by the successor.

Because the new operator, RHS, had substantial continuity with its predecessor and hired a majority of its predecessor's employees, the ALJ found that it was a successor employer under *Burns*. Further, the ALJ concluded that RHS was a "perfectly clear" successor to Preferred, pursuant to *Spruce Up Corp.*, 209 NLRB 194, 195 (1974). The ALJ based this determination on statements by Joette Brown and the successor employer's attorney, James Smith, that 99.9 percent of employees would be rehired, that the successor would be obligated to recognize the Union and honor the existing collective bargaining agreement, and that the collective bargaining relationship with the Union would continue, all of which misled employees into believing that their terms and conditions of employment would continue under the new operator.

Finally, the ALJ concluded that RHS deliberately engaged in a discriminatory hiring scheme in order to avoid its statutory obligation to bargain with the USW. The ALJ based this finding on evidence that RHS had willfully manipulated the application, hiring and re-hiring process prior to the October 1 takeover so that employees previously employed by the predecessor employer would not form a majority of its workforce. The ALJ analyzed the business justifications proffered by the successor employer for its failure to hire eleven of the predecessor's employees, and found that with respect to four of these, the justification was pretextual.

II. The Decision of the National Labor Relations Board

The Board affirmed the ALJ's holding that RHS is a successor to *Preferred*, the previous operator, and therefore obligated to recognize and bargain with the USW. The Board based its decision on its findings that (1) there was indisputably "substantial continuity" of operations after the Company took over the nursing home; and (2) that employees of the predecessor employer would have maintained majority status in the workforce but for the Company's discriminatory hiring scheme, and in particular, its discriminatory refusal to hire four former Preferred employees: Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson. (A3 at p. 1567). The Board agreed with the ALJ that the failures to hire each of these four

applicants constituted independent violations of Section 8(a)(3) of the Act, and ordered the appropriate remedy.

The Board declined to rule whether or not the creation of the new "helping hands" classification was evidence of anti-union animus, and declined to decide whether the "helping hands" employees are appropriately included in the representative complement of the workforce for the purpose of determining majority status under *Fall River Dyeing*. The Board found it unnecessary to determine the status of the helping hands classification because regardless of their inclusion in the unit, the Company qualified as a successor employer. (A3 p. 1570, fn. 8).

The Board went on to hold that despite the Company's successor status, the Company was not obligated to bargain with the Union prior to setting initial terms and conditions of employment upon taking over operation of the nursing home. (A3 p. 1571). Holding for the first time that the Supreme Court's *Burns* decision prohibits the long-established remedy in cases, like this one, where the successor engages in a discriminatory hiring scheme, the Board overturned *Galloway School Lines*, 321 NLRB 1422 (1996). (A3 p. 1572). Had the Board not reached out to overturn precedent here, the remedy prescribed in *Love's Barbeque Rest.*, 245 NLRB 78, 82 (1979), enf'd in part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), would have required the Company to restore the predecessor's

terms and conditions of employment. (A3 p. 1582, Member McFerran, dissenting in part).

III. The Board's finding that Petitioner engaged in a discriminatory hiring scheme in order to avoid a successor bargaining obligation is supported by substantial evidence.

In this case, the Board affirmed the ALJ's finding that Ridgewood Health Services was a successor employer to Preferred Health Services, the previous operator. The Supreme Court in *Fall River Dyeing* set forth the factors for ascertaining whether a new employer is a successor to the previous employer. In making this determination, the Board must consider:

> whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27, 43 (1987). When a successor "refuses to hire predecessor employees because of anti-union animus, the Board presumes that but for such discrimination, the successor would have hired a majority of incumbent employees." *N.L.R.B. v. CNN America*, 865 F.3d 740, 752 (D.C. Cir. 2017).

It is well settled that an employer violates Section 8(a)(3) of the Act if it adopts a hiring scheme with the motive of avoiding an incumbent union. The NLRB and the courts have consistently found that where an employer engages in a

discriminatory hiring scheme, and where the union-represented employees would have achieved majority status but for that scheme, the employer will be found to be a *Burns* successor. *See N.L.R.B. v. CNN America*, 865 F.3d 740, 756 (D.C. Cir. 2017) (affirming Board holding that "major motive" in hiring decisions was successor employer's "desire to operate its Washington and New York bureaus without a union" and that decision to manipulate composition of workforce was "part of an overall plan motivated by antiunion animus"); *Waterbury Hotel Mgmt. v. N.L.R.B.*, 314 F.3d 645, 652 (D.C. Cir. 2003) (affirming Board's conclusion that successor employer "was determined not to hire enough incumbent employees to trigger a bargaining obligation" and made hiring process decisions based on the unlawful motive "to avoid hiring incumbent, union employees"); *Emerald Green Building Services*, 364 NLRB No. 109 (2016) (discriminatory scheme established where successor planned to hire not more than 49% of predecessor's employees "in order to keep their number under a majority" and "absent such discrimination, the complements at each location would have been composed of more than 51 percent of the predecessor's employees."); *Karl Kallmann d/b/a Love's Barbeque*, 245 NLRB 78 (1979) (Respondent's unlawful scheme to evade hiring predecessor employees included advertisements for positions in local newspapers and interviewing applicants at local motel); *Pace Industries*, 320 NLRB 661 (1996)

(High standards of preemployment screening applied to exclude former employees from employment so as to avoid recognizing union).

In such cases, the evidence that the employer made its hiring decisions with the deliberate aim of avoiding its obligation to bargain with the union will frequently support a finding that the employer's hiring decisions were motivated by anti-union animus. The evidence that such a scheme is underway supports a *prima facie* case under *Wright Line* that the motivation for failing to hire certain employees as part of the scheme was motivated by anti-union animus. A hiring scheme may consist of the discriminatory refusal to hire any employees of the predecessor, or by the discriminatory failure to hire any number of these employees in order to suppress their total number. Such a scheme may be shown by the statements of employer representatives. *Waterbury Hotel Mgmt. v. N.L.R.B.*, 314 F.3d 645 (D.C. Cir. 2003). A scheme may also be evidenced by the pretextual nature of the employer's reasons for refusing to hire employees of the predecessor. *N.L.R.B. v. CNN America*, 865 F.3d 740 (D.C. Cir. 2017).

Here, the Board specifically found that the Company engaged in an unlawful hiring scheme in order to avoid its labor law obligations as a successor employer, and made individual unlawful discriminatory hiring decisions as part of that scheme:

> To the extent that former Preferred employees constituted less than a majority of the bargaining unit on October 1 (49 of 101 employees), this was

> the result of the Respondents' discriminatory refusal to hire four predecessor employee applicants in order to suppress the number of former Preferred employees below a majority of those hired.

(A3 at p. 1569). The Board found that, in addition to the direct evidence of anti-union animus (discussed below), there was "ample" circumstantial evidence that the hiring decisions were made with a discriminatory motive as part of an overall scheme to avoid the Union. *Id.* Here, the Board specifically found that "[t]o the extent that former Preferred employees constituted less than a majority of the bargaining unit on October 1 (49 of 101 employees), this was the result of the Respondents' discriminatory refusal to hire four predecessor employee applicants *in order to suppress* the number of former Preferred employees below a majority of those hired." *Id.* The Board found that to enact its plan, the Company decided to "manipulate the hiring process to ensure that a majority of newly hired employees within the unit were not former Preferred employees in order to avoid their bargaining obligation." (A3 at p. 1570).

The Board properly inferred that the timing of the hiring process, including a two-step process for job offers, demonstrated a discriminatory motive. The Company decided to implement a two-step hiring process: it first required Preferred employees (i.e. incumbent employees) to accept employment by September 16, 2013 and then turned to hiring external candidates. This process did

not benefit incumbent employees but rather allowed the Respondents to know how many external hires were needed to avoid recognizing the Union.

The Board affirmed the ALJ's finding that RHS sent offers of employment to the former employees first, and requested a quick turnaround for their responses. Only after that time did RHS send offers to outside hires. The findings by the ALJ and the Board on the nature of this scheme make clear that the Company sought to avoid the Union after they had invited the USW to bargain over the terms of a new collective bargaining agreement and told employees that "99.9 percent" would be retained. It is evident that Respondents retracted this initial recognition and then adopted a scheme (albeit unsuccessful) to avoid recognizing the Union. Because the Respondents faced an October 1 date to reassume operation of the nursing home, the implementation of the scheme was admittedly "chaotic."

The Company further demonstrated its intent to rid itself of its legal bargaining obligation prior to the October 1 takeover, during the period when the Company hatched its discriminatory hiring plan. The Board agreed with the ALJ's finding of fact that during meetings with employees, Joette Brown stated that she did not see a need for a union; that at Ridgeview (the facility she owned and operated) employees came directly to her with problems that she tried to settle; and that as of August 2013, there was no union representing employees at the facility. The Board declined to find that these statements independently constituted an

unfair labor practice, and did not rely on the statement as evidence of animus as to the hiring decisions. (A3, p. 1570). Nevertheless, Brown's statements stand as record evidence of the Company's intent at the time that they were made. That intent was to operate without a union representing its employees. *See Elastic Stop Nut. v. N.L.R.B.*, 921 F.2d 1275, 1281 (D.C. Cir. 1990) (finding discriminatory hiring scheme where employer "kept its hiring of Union members to an absolute minimum to avoid dealing with the Union" and stated that the Company "would not recognize the Union or any prior collective bargaining agreements."). In addition, the job offers sent to former Preferred employees were "at will" offers of employment, demonstrating the Company's intent to operate without a union.

IV. The holding that Petitioner unlawfully interrogated applicants for employment is based on substantial evidence.

The Board affirmed the ALJ's factual finding that "several of the Preferred employees who applied were asked during their interviews whether they were Union members." (A3 p. 1568). Specifically, the Board upheld the ALJ's finding that the evidence showed that the Company's representatives coercively interrogated applicants during the hiring process. (A3 p. 1569).

The Company does not dispute the Board's factual findings, arguing only that interrogations into union support and membership by employer representatives are non-coercive. The Company argues that the questioning of an applicant during the interview process is not "intimidating or threatening,"

but fails to refer to the standard applied by this court in determining the coercive nature of an interrogation, which considers the following factors:

> (1) the history of the employer's attitude toward its employees; (2) the nature of the information sought; (3) the rank of the official of the employer in the employer's hierarchy; (4) the place and manner of the conversation; (5) the truthfulness of the employees' reply; (6) whether the employer has a valid purpose in obtaining information concerning the union; (7) whether this valid purpose, if existent, is communicated to the employees; and (8) whether the employer assures the employees that no reprisals will be taken if they support the union.

Nat'l Labor Relations Bd. v. Gaylord Chem. Co., 824 F.3d 1318, 1333 (11th Cir. 2016).

It is incorrect that "calculated probing of union sympathies" does not violate Section 8(a)(1). *See President Riverboat Casinos of Missouri*, 329 NLRB 77, 78 (1999). Where questioning by a supervisor has "no legitimate purpose" and questions are "designed to determine [the employee's] involvement in protected activities," the interrogation is presumed to have a coercive effect. *Hunter Douglas*, 277 NLRB 1179, 1181 (1985), *enfd*. 804 F.2d 808 (3d Cir. 1986). The standard for unlawful interrogation has long recognized that "an employee is entitled to keep from his employer his views" on union representation. *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, n. 7 (5th Cir. 1980).

The Board did not hold that such questioning is "*per se*" illegal. Rather, the Board, in affirming the ALJ's findings, relied on the fact that employees were questioned as to their union membership by high ranking officials including the Company's owner, without any purpose, and under circumstances where their future employment hung in the balance. (A3 p. 1569; 1589; 1596). *See Sturgis Newport Bus. Forms, Inc. v. N. L. R. B.*, 563 F.2d 1252, 1256 (5th Cir. 1977) (employer had "no reason" for interrogating employees; did not communicate any reasons to employees, and made no effort to assure employees with whom they talked that there would be no reprisals).

V. The Board correctly applied *Wright Line* to find that Petitioner made discriminatory hiring decisions.

A. The Board's findings of anti-union animus are based on substantial evidence.

The Company maintains that the Board erred in applying the Board's *Wright Line* discrimination analysis. *Wright Line*, 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Company further argues that the Board committed legal error in failing to apply its *Planned Building Services*, 347 NLRB 670 (2006). The Company incorrectly states the legal standard, because *Planned Building Services* does not create a new discrimination analysis. Like this case, *Planned Building Services* involved the application of *Wright Line* to a discriminatory hiring

scheme in the successorship context. However, *Planned Building Services* did not articulate a new standard or create additional hurdles to proving discrimination. *Planned Building. Services*, 347 NLRB 670 (2006) ("the appropriate analysis is that set forth in *Wright Line*).

The Board's decision straightforwardly applied the *Wright Line* standard, which requires an initial showing that that the "employer's actions were the result of its animus toward union or protected activity." *Id.* At 672. The Board agreed with the ALJ that the record contained "ample circumstantial evidence" that the hiring decisions were motivated by anti-union animus, and additionally pointed to specific instances where Company representatives "clearly demonstrated animus." (A3 p. 1569). The Board's finding that the refusals to hire Davis, Sickles, Eads and Wilson were motivated by anti-union animus is "a question of fact," and therefore binding on this court where supported by substantial evidence. *N.L.R.B. v. McClain of Georgia*, 138 F.3d 1418, 1424 (11th Cir. 1998). This court has long held that "the task of determining motive is particularly within the purview of the Board." *Purolator Armored, Inc. v. N.L.R.B.*, 764 F.2d 1423, 1428–29 (11th Cir. 1985). In determining motive, the Board "may rely upon direct and circumstantial evidence to infer anti-union motive." *Mclain of Georgia*, 138 F.3d 1418, 1424. Evidence of discriminatory motive may include

> an employer's expressed hostility toward unionization coupled with knowledge of ongoing union activity, other unfair labor practices committed by the employer contemporaneous with the adverse action, the timing of the adverse action in relation to union activity, the employer's reliance on pretextual reasons to justify the adverse action, disparate treatment of employees based on union affiliation, and an employer's deviation from past practice.

Id.

The Company attempts to argue that the evidence of its discriminatory motivation is undercut by its course of conduct. In disputing the Board's finding of animus, the Company primarily asks that this court re-weigh the Board's assessment of the facts, and overrule the Board's "rejection" of the Company's view of the evidence. (Pet. Br. at 39). That is not the applicable standard, particularly where the Board is making a motive determination. *See Purolator Armored*, 764 F.2d at 1429. Moreover, the Board's finding of animus is not contradicted by the evidence put forward by the Company. The fact that the Company did not entirely exclude the predecessor's workforce from applying or from employment is not at all inconsistent with the finding of animus.

Hiring a limited number of the predecessor's employees does not foreclose a finding that the Company violated the Act. *See Daufuskie Island Club & Resort*, 328 NLRB 415 (1999) (putative successor employer that purposely hired only 48.5% of the predecessor employees violated the Act).

This is particularly true where, as here, the Board found that Company manipulated the composition of the workforce "in order to suppress the number of former Preferred employees below a majority of those hired." (A3, p. 1569). The Company's assertion that it could not have had discriminatory motive with respect to the four discriminates is belied by the larger context of its unlawful scheme. *See, e.g.*, *N.L.R.B. v. CNN America*, 865 F.3d 740, 757 (D.C. Cir. 2017) (rejecting successor's argument that "it could not have discriminated against union members because it hired a majority of the [predecessor] employees who had worked at each bureau" and concluding that where the record "contained evidence of animus but the employer hired a majority of union members, 'the more reasonable inference is that the Employer's discriminatory design ultimately failed, not that it wasn't tried'") (citing *Great Lakes Chem. Corp. v. N.L.R.B.*, 967 F.2d 624, 628 (D.C. Cir. 1992)).

Here, the hiring of predecessor employees as part of the workforce was unavoidable. The Company faced the problem of retaining a sufficient number of incumbent employees in order to continue operating the nursing home without an interruption in care. Once the Respondents informed the State of Alabama that they would assume control of operating their nursing home, the Company was under a legal obligation to ensure that patients received

continuous and adequate care. Shutting down operations for a period of time was not an option, and this necessitated the hiring of Preferred employees. (A3, p. 1588).

In finding anti-union animus, the Board reasonably relied on evidence that Company representatives unlawfully interrogated applicants for employment as to their union membership. (A3 at p. 1569). The Company now argues that a finding of unlawful interrogation cannot serve as evidence of anti-union animus, because the Board may look at the effect of interrogation on an applicant and find it to be coercive regardless of the interrogator's intent.[1] *See Planned Bldg. Services*, 347 NLRB 670, 677 (2006) (applicant would reasonably believe that his employment was contingent on answers to interrogation). The Company here ignores the Board's overarching conclusion that its hiring process was calculated to manipulate successorship law and avoid the Union. In this context, the questioning of employees supports a "bottom-line conclusion that anti-union animus pervaded [the] hiring process." *Nat'l Labor Relations Bd. v. CNN America*, 865 F.3d 740, 756 (D.C. Cir. 2017). The Board may reasonably infer that where the Company was without justification seeking to unlawfully probe applicants' union sympathies during the hiring interviews, it acted with anti-union animus with respect to its hiring

[1] The Union adopts the NLRB's position that under Section 10(e) of the NLRA, the court is jurisdictionally barred from considering this argument.

decisions—even if the specific employees who were interrogated did not become the targets of the discriminatory hiring scheme. *McClain of Georgia*, 38 F.3d 1418, 1424 (11th Cir. 1998) ("Board may rely upon direct and circumstantial evidence to infer anti-union motive"). Finally, it is appropriate for the Board to consider evidence of anti-union animus in determining that the refusals to hire were the product of discriminatory motive, as such acts "demonstrate that [an employer] was staunchly opposed to unionization of its employees and was willing to commit a variety of unlawful acts to defeat the Union." *Purolator*, 764 F.2d 1423, 1429.

The Board further supported its finding of anti-union animus with the fact that owner Joette Brown, a few weeks after the ownership transition, "threatened that she might close the facility if employees unionized." (A3, p. 1569). The Company argues primarily that the Board's holding is based on insufficient evidence, and asks the Court to re-weigh the ALJ's and Board's view of the "underlying factual basis." (Pet.'s Brief at 48).[2] Because substantial evidence supports the Board's finding of fact, it may not be disturbed. The Board affirmed the ALJ's view of the evidence and credibility determinations based on credible testimony by employee Debra Thomas. (A3, p. 1593). It is well-established that "credibility resolutions are peculiarly within

[2] The Union adopts the NLRB's position that under Section 10(e) of the NLRA, the court is jurisdictionally barred from considering this argument.

the province of the ALJ and the Board and are entitled to deference unless inherently unreasonable or self-contradictory." *N.L.R.B. v. United Sanitation Serv.*, 737 F.2d 936, 938 (11th Cir. 1984).

Moreover, Brown's statement, while not separately alleged, meets the definition of an unlawful threat of plant closure, and therefore serves as particularly clear and powerful evidence of anti-union animus. Brown's statement that the re-establishment of union representation meant a possibility that she would close down the facility was made without any basis in objective fact, showing employees that the decision would be in the owner's hands and based on her antipathy toward dealing with unions. This statement is a threat under *N.L.R.B. v. Gissel Packing Co.*, which requires that any prediction of plant closure "be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." 395 U.S. 575, 618 (1968). Under established Board law, it is "no defense" that an employer has phrased a "prediction of plant closure as a possibility rather than a certainty." *Daikichi Corp.*, 335 NLRB 622, 624 (2001) (noting that "in *Gissel* itself, the employer's unlawful statements were to the effect that the union would probably strike and that a strike 'could lead to the closing of the plant.').

B. The Board's finding that the Petitioner's justifications for four refusals to hire were pretextual is supported by substantial evidence.

The Company challenges the Board's holding that its asserted justification for refusing to hire Eads, Sickles and Davis was pretextual. The Board held that the evidence in the record showed that "when specifically asked whether current Ridgewood employees who had previously been discharged from Ridgeview, a separate facility also owned and operated by Brown for the prior five years, would be eligible for hire at Ridgewood, Brown responded that those employees would be considered along with everyone else." (A3, p. 1570). The Company now inappropriately asks this court to re-weigh the evidence with respect to this conclusion.

Substantial evidence supports the finding that when asked whether current Ridgewood employees who had been previously terminated from Ridgeview, another facility operated by Brown, would be eligible for re-hire, "Brown responded that those employees would be considered along with everyone else." The Company maintains to this court that Brown did not say what she plainly said—that a termination from the Ridgeview facility was not a bar to being hired in the transition process. In urging this court to overturn the Board's reasonable inference, the Company grossly misapprehends the standard of review. The Board's view of Brown's statement and its meaning is due substantial deference, as

it is a "plausible inference from the evidence." *Weather Tamer, Inc. v. N.L.R.B.*, 676 F.2d 483, 487 (11th Cir. 1982).

The Board further found that the interview process demonstrated that there was not a "no rehire" rule in place at the time of the interviews. "Brown and RHS interviewers, when asked, indicated that a previous discharge from Ridgeview would not be grounds for disqualification." (A3 p. 1596). Substantial evidence supports the Board's inference that the "no-rehire" rule was a pretext used to limit the number of Preferred employees. The Preferred employees who were ruled out because of the no-rehire rule at Ridgeview were not asked about their employment at Ridgewood nor about the circumstances of their departure at Ridgeview. Applying Ridgeview's "no rehire" designation to Ridgewood employees without inquiring about their work performance at Ridgewood conflicted with Ms. Brown's stated goal of hiring qualified candidates.

Specifically, the ALJ found that Gina Eads asked during her interview whether the Ridgeview no-rehire rule would disqualify her from employment after the takeover, the interviewers "assured her that she had nothing to worry about and reflected that in their notes ("learned from the past, would like a chance.")." The other applicants ostensibly barred by the "no-rehire" rule were

never asked about a discharge from Ridgeview or informed about the policy and its effects. (A3 p. 1590).

It is plausible, and based in more than "mere suspicion," for the Board to infer from this accumulation of evidence that it was only after the Company realized the need to screen out more incumbent employees to reach its numerical goal that the "no-rehire" rule was used to avoid recognizing the Union. *Purolator Armored*, 764 F.2d 1423, 1428–29. The Board properly found that "Brown's post-interview decision to reverse course and apply Ridgeview's "no-rehire" policy to Ridgewood after all supports an inference of discriminatory hiring." (A3 p. 1570). The Board inferred the motivation for the Company's change in policy from evidence showing that the Company "had received fewer applications than expected from former Preferred employees, presenting the Respondents with an opportunity to manipulate the hiring process to ensure that a majority of newly hired employees within the unit were not former Preferred employees in order to avoid their bargaining obligation." *Id.* As an inference arising from circumstantial evidence as to an employer's discriminatory motivation, this analysis is "for the Board" should remain undisturbed by the court. *N.L.R.B. v. United Sanitation Serv.*, 737 F.2d 936, 939 (11th Cir. 1984).

Substantial evidence supports the Board's inference that the "no-rehire" rule was a pretext used to limit the number of Preferred employees. The Preferred employees who were ruled out because of the no-rehire rule at Ridgeview were not asked about their employment at Ridgewood nor about the circumstances of their departure at Ridgeview. Applying Ridgeview's "no rehire" designation to Ridgewood employees without inquiring about their work performance at Ridgewood conflicted with Ms. Brown's stated goal of hiring qualified candidates.

The Board also made reasonable inferences in finding that the Company failed to justify its refusal to hire Vegas Wilson. The Company's brief to this court does nothing to strengthen its flimsy justifications for this decision. Because the evidence shows that the failure to hire Wilson was based on an unlawful intent to avoid a successor bargaining obligation, and no neutral justification has been presented for the decision, the Board's finding of discrimination must be upheld.

Nevertheless, the Company repeatedly mischaracterizes the Board's finding that its justifications were pretextual as the substitution of the Board's business judgment for the Company's reasoned decision-making. A finding of pretext, however, is well within the Board's purview. The Board found here that the totality of the evidence contradicts the Company's assertion of a

legitimate business justification—not that the Company used poor judgment or that it would not, under non-discriminatory circumstances, have the right to apply a rule barring re-hire after termination. Nothing in the Board's decision constitutes a criticism of the Company's "business judgment." *See Nat'l Labor Relations Bd. v. CNN America*, 865 F.3d 740, 759 (D.C. Cir. 2017) (Board reasonably found that successor's asserted neutral justifications for failing to hire applicants were pretextual).

VI. Conclusion

The Board's finding that Ridgewood is a successor to Preferred is based on the substantial evidence that but for its discriminatory manipulation of the hiring process, it would have met the *Fall River Dyeing* criteria for successorship. This court should therefore uphold the finding that the Petitioner is under a successor bargaining obligation, and order it to recognize and bargain with the Union. Pursuant to this bargaining obligation, the court should order the Company to provide the Union with all information requested in the course of the Union's representational duties. Additionally, this court should uphold the Board's findings with respect to the discriminatory refusals to hire Eads, Sickles, Davis, and Wilson, and order the Petitioner to comply with the Board's order to make those employees whole.

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Petitioners/Cross-Respondents	)	No. 19-11615
v.	)	Board Case Nos.
	)	10-CA-113669
NATIONAL LABOR RELATIONS BOARD	)	10-CA-136190
Respondent/Cross-Petitioner	)	
and	)	
UNITED STEEL, PAPER & FORESTRY RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), Intervenor certifies that the foregoing brief contains 5,504 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2019, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit via the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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