

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 FOR
THE NATIONAL LABOR RELATIONS BOARD**

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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)	10-CA-136190
BOARD)	
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. R. 26 and Local Rule 26.1-1, the National Labor Relations Board, by its Acting Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

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Dated at Washington, D.C.
this 9th day of October 2019

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that oral argument will aid the Court in deciding the issues presented in this case.

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Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of 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.)¹

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. The Union has intervened in support of the Board.

¹ Consistent with Local Rule 28-5, the Board references the three-volume Appendix and the page number, with "A3 pp.1561-93" denoting Volume 3, pages 1561-93. "Br." refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

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?

STATEMENT OF THE CASE

This is primarily a successorship case involving the Company's duty to bargain with the Union after it took over operations of a skilled nursing home facility from its predecessor, Preferred Health Holdings, II, LLC (Preferred). A successor employer generally incurs an obligation to recognize and bargain with an incumbent union when, following the transition, there is a substantial continuity of

business operations and a majority of its employees, in a substantial and representative complement, are predecessor employees. While the successor must bargain with the union upon takeover, it is generally free to set initial terms and conditions of employment. The issues before the Court predominantly concern whether the Company employed a majority of the predecessor's employees, thereby incurring a bargaining obligation, and whether the Company engaged in discriminatory hiring practices to evade that obligation.

Before assuming operations, the Company created a new job classification called "helping hands," hired some but not all of the predecessor-employee applicants, and refused to respond to the Union's information request. After taking control, the Company refused to bargain with the Union and unilaterally changed terms and conditions of employment, which prompted the Union to file unfair-labor-practice charges. The Board's General Counsel issued an amended consolidated complaint alleging that the Company violated Sections 8(a)(5), (3), and (1) of the Act, 29 U.S.C. §§ 158(a) (5) (3), and (1), by committing numerous unfair labor practices before, during, and after the transition. The complaint also alleged that Ridgewood Health Care Center, Inc., and Ridgewood Health Services, Inc., are a single employer.

Following a hearing, an administrative law judge issued a decision and recommended order, finding that the Company had committed many of the alleged

violations. First, the judge found that Ridgewood Health Care Center, Inc., and Ridgewood Health Services, Inc., constituted a single employer. Next, the judge made several findings regarding the Company's successorship status and its bargaining obligation. The judge preliminarily found that the Company, having hired a majority of predecessor employees, was a successor employer with an obligation to bargain with the Union. In making this determination, the judge excluded the 19 "helping hands" employees from the unit. The judge further determined that because it was a successor employer, the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and provide the requested information.

The judge, applying two alternative rationales, next found that the Company had forfeited its right to set initial terms and conditions of employment. First, the judge found that the Company was a "perfectly clear" successor and had lost its right to set initial terms and conditions of employment because it had reassured predecessor employees that they would all be hired and failed to announce any new terms and condition of employment.² Alternatively, the judge found that the Company engaged in a pretextual hiring scheme designed to prevent the Union

² A successor waives its right to set initial terms and conditions of employment when it has actively or impliedly misled employees into believing they would all be retained without any changes to employment conditions or has failed to clearly announce an intention to set new conditions prior to inviting former employees to accept employment. *See Spruce Up Corp.*, 209 NLRB 194, 195 (1974).

from obtaining majority support by unlawfully creating the new “helping hands” job classification and by refusing to hire four predecessor employees. The judge determined that this conduct, which violated Section 8(a)(3) and (1) of the Act, caused the Company to forfeit its right to establish the initial terms and conditions of employment. Consequently, the judge found that the Company’s unilateral changes to mandatory terms and conditions of employment violated Section 8(a)(5) and (1) of the Act.

Finally, the judge found that the Company violated Section 8(a)(1) of the Act by unlawfully interrogating employees; by telling employees in August 2013, that the Company would not recognize the Union and would unilaterally set new conditions of employment despite being a successor employer that forfeited its right to make unilateral changes; and by threatening an employee with discharge based on her union support.³

After considering the parties’ exceptions to the judge’s decision, the Board issued a Decision and Order. The Board agreed with the judge’s conclusion that the Company was a successor employer with an obligation to bargain with the

³ The judge also found (A3 p.1591) that the Company violated Section 8(a)(5) and (1) of the Act by disciplining and discharging employees without notifying or bargaining with the Union. While the case was pending before the Board, the General Counsel requested withdrawal and remand of the complaint allegations underlying this violation, which the Board granted. (A3 p.1561 n.1.)

Union and that the Company had engaged in an unlawful discriminatory hiring scheme. The Board, however, departed from the judge’s reasoning in how it determined the Union’s majority status. Specifically, the Board found that, absent the Company’s unlawful discriminatory hiring scheme, the predecessor employees would have constituted a majority in the successor unit, even if the 19 “helping hands” were included in that calculation.

The Board also parted ways with the judge by not adopting the two bases for his recommended finding that the Company had forfeited the right to set initial terms and conditions of employment. First, the Board rejected the judge’s finding that the Company was a “perfectly clear” successor because it was not alleged in the complaint. (A3 p.1569 n.18.) Second, while the Board affirmed the judge’s conclusion that the Company violated Section 8(a)(3) and (1) by unlawfully engaging in union-avoidance hiring, the Board did not rely on the creation of the “helping hands” classification and, most significantly, held that the unlawful hiring did not cause the Company to forfeit its right to set the initial terms and conditions of employment.⁴ (A.3 pp.1565 n.11, 1565-70.) Accordingly, the Board did not

⁴ In making this determination, the Board overruled *Galloway School Lines*, 321 NLRB 1422 (1996), which had extended the remedial principle that an employer forfeits its right to set the initial terms and conditions of employment when, to avoid a bargaining obligation, it refuses to hire some, but not all or substantially all, of the predecessor employees. Here, the Board overturned *Galloway School* to the extent that it imposed this obligation on any successor employer that discriminates to *any* degree in hiring. The Board will continue to impose a

adopt the judge's findings that the Company violated Section 8(a)(5) and (1) by making unilateral changes, or that it violated Section 8(a)(1) by telling employees it would set the initial terms. (A3 p.1569 n.18.) Lastly, the Board also did not adopt the judge's finding that certain statements by company representatives in August 2013 violated Section 8(a)(1) because the complaint did not allege those statements to be unlawful. (A3 p.1564 n.8.)

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Parties

The Company owns and operates the Ridgewood Health Care Center, a skilled nursing home facility with 98 licensed beds in Jasper, Alabama. Beginning in 2002, the Company leased the Ridgewood facility to Preferred Health Holdings II, LLC (Preferred) as a nursing home. (A3 p.1582; A1 p.550.)

At all relevant times, the Union has represented approximately 141 employees at the Ridgewood facility in a unit including all full-time and part-time licensed practice nurses and nurses' aides. The most recent collective-bargaining agreement was effective from September 24, 2010, to September 24, 2016. (A3 1582; A2 pp.993,1001.)

bargaining obligation, but will no longer require the successor to bargain over initial terms. (A3 p.1569.) This finding is not before the Court because the Union did not seek review.

B. The Company Decides Not To Renew Preferred's Lease and Begins Transition Efforts To Take over Operations at the Ridgewood Facility

In 2012, the Company opted not to renew Preferred's lease upon termination in December 2013. In July 2013, after the Company and Preferred agreed to terminate the lease several months early, Preferred arranged for an all-employee meeting to introduce Joette Kelley Brown, majority owner of the Company. Minority owner, Alicia Stewart, was also present at the July meeting. Brown told employees that she anticipated the changeover to have little impact on employees and that wages and benefits would remain about the same. Brown also stated that she expected to retain "99.9 percent" of current employees and to honor the existing collective-bargaining agreement. (A3 p.1582; A1 pp.26,56,59-60,75-79,102-03,132-38,149-50,220-21,232,262-64,355,417-19, A.2 pp.990-96.)

On July 15, the Company notified the Union of the impending management transition. The Company also told the Union that it would reject the existing collective-bargaining agreement and that it had not decided which predecessor employees would be retained. (A3 pp.1582-83; A2 p.1020.)

On July 29, Preferred notified the Union and employees that, effective September 30, 2013, it would cease operations at the Ridgewood facility and that the Company would immediately begin operations. According to Preferred's

letter, the Company had not yet agreed to hire any Preferred employees. (A3 p.1583; A2 pp.1021-22.)

C. In August, Company Representatives Meet Again with Employees and Reassure Them that Little Will Change; the Union Files an Unfair-Labor-Practice Charge

In August 2013, company owners Brown and Stewart met again with Preferred's employees and reiterated the expectation to hire "99.9 percent" of the existing staff. Brown repeated that there would be minimal changes because the facility was working fine. In response to a specific employee's question about hiring Preferred employees, Brown told the group that employees who had been discharged from another skilled nursing facility owned by the Company, Ridgeview Health Care Center, would be eligible for hire at the Ridgewood facility and considered along with everyone else. Brown also voiced general opposition to the Union, saying that she saw no need for it and expected management and employees to resolve issues without a union. During the meeting, Brown also announced the creation of a new job classification called "helping hands," who would perform some of the same duties as certified nursing assistants but would not be certified. On August 19, 2013, the Union responded to this conduct by filing a charge against Preferred alleging contract repudiation and discriminatory layoffs. (A3 p.1583; A1 pp.59-60,67-68,262-63,273-74,343-45, A2 p.718.)

D. The Interview Process Starts; Interviewers Explain that the No-Rehire Policy at Ridgeview Does Not Disqualify Employees from Being Hired at Ridgewood

The Company posted notices at the Ridgewood facility instructing Preferred employees to schedule interviews by August 30. By the first week of September, Company representatives Brown, Stewart, Kara Holland, Administrator, and Vicky Burrell, Director of Nursing, had interviewed 65 Preferred employees. During the interviews, the representatives asked Preferred employees about their work at the Ridgewood facility and possible improvements. They also inquired about employee wages, benefits, paycheck deductions (including dues withholding), and union membership. (A3 p.1583; A1 pp.81,103-04,131-32,150-51,224-25,252,341,427-30,621, A2 pp.994,1023.)

One Preferred employee, Gina Eads, asked during her interview whether her prior discharge from Ridgeview (another facility operated by the Company) would disqualify her from employment at the Company's Ridgewood facility. Eads knew that Ridgeview had a general policy of not rehiring employees who were previously discharged from that facility and sought clarification on whether a prior discharge from Ridgeview would preclude her hire from Ridgewood now that the Company owned and operated both facilities. Interviewers Burrell and Holland assured Eads that she had nothing to worry about. No other employee raised the issue of the Company's rehire rules. And none of the interviewers asked any other

employee who had been discharged from Ridgeview about previous employment at that facility. (A3 p.1584; A1 pp.182-84,254-55,438-47,475-76,538,698-700, A2 p.914.)

E. The Company Makes Employment Offers to Preferred Employees and Begins Interviewing Outside Applicants; the Company Refuses the Union's Bargaining Request

Brown, after consulting with the other interviewers, made the final hiring decisions. On at least two employment decisions, including the non-hire of predecessor employee Vegas Wilson, Brown consulted with Sheila Cooper, who knew Brown from her work at another facility and who became Director of Nursing at Ridgewood shortly after the takeover. On September 11, Brown sent letters offering employment to 51 of the 65 Preferred applicants. Among the Preferred bargaining-unit employees who applied but were denied employment were Betty Davis, Connie Sickles, Wilson, and Eads. Davis, Sickles, and Eads had all previously worked at and been discharged from the Ridgeview facility. According to the letters, employment would be at-will and subject to terms and conditions set by the Company. After having concluded its hiring of Preferred employees, the Company began interviewing from among 111 non-predecessor applicants. (A3 pp.1583,1585; A1 pp.627,630,632-33,655-56,660-65,672-74,672,700-01, A2 pp.930-71,994,1039.)

In mid-September, the Union responded to the Company's July communications by requesting to bargain over employee layoffs, emphasizing that as a successor employer, the Company had an obligation to bargain with the Union. The Union also sought information concerning the Company's transition plan. On September 23, the Company denied any obligation to adhere to the existing collective-bargaining agreement and indicated a willingness to bargain and respond to the information request if, in fact, it became Preferred's successor. (A3 p.1585; A2 pp.1024-33.)

On September 25, the Union, once again, objected to the Company's position and renewed its demands for recognition and information. On September 30, the Company rejected the Union's position, stating that it was premature to decide successorship issues. (A3 p.1585; A2 pp.1034-39.)

F. The Company Takes Over the Facility and Refuses To Recognize and Bargain with the Union; Brown Tells Employees that There Is No Union and Threatens To Shutter the Facility if Employees Unionize; Cooper Threatens an Employee with Discharge for Supporting the Union

On October 1, the Company assumed operational control of the Ridgewood facility and implemented changes in the employees' terms and conditions of employment. Of the 101 employees who reported for work on October 1, 49 were Preferred employees and 52 had never worked for Preferred, including 19 employees who were hired into the new "helping hands" position. The October 1

staffing level of 101 employees was adequate and roughly consistent with levels both before the transition (88 employees in 2012) and after (103 employees in 2014). (A3 pp.1565 n.11, 1586; A1 pp.165-66,269-71,355-92,596, A2.994-95,1142-1247.)

On that same day, the Union again asserted that the Company was a successor, demanded bargaining, and resubmitted its information request. On October 7, the Company rejected the Union's position, claiming that it intended to hire "many more employees in the near future" and a majority of its existing workforce was not predecessor employees. (A3 p.1586; A2. pp.1043-45.)

On October 22, Brown sent a letter to all employees informing them of the Company's position on unions. According to Brown's letter, the facility was "operating without a union" and should remain that way because unions are "unnecessary." The letter also warned employees to be careful about signing union authorization cards. Several days later, Brown reinforced the sentiments of her October 22 letter in employee meetings where she informed employees that the Union was "neither recognized nor needed." She also stated that the facility might close if the Union ended up representing the Company's employees. (A3 pp.1586-87; A1 p.165, A2 pp.1046-47.)

In January 2014, Cooper, the Director of Nursing, "pulled" Caitlin Bolinger, a certified nurse assistant, into her office and said that she had heard that Bolinger

and other employees were talking about the Union and recruitment. Cooper then told Bolinger that if it was true, she would lose her job. (A2 p.1587; A1 p.108.)

In February, the Union amended its charge to include allegations that the Company refused to recognize and bargain with the Union, interrogated employees about their union membership, engaged in an unlawful hiring scheme, threatened employees with job loss, unlawfully refused to hire predecessor employees, and failed to provide requested information. (A2 pp.723-24.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On April 2, 2019, the Board (Chairman Ring and Members Kaplan and Emanuel; Member McFerran, dissenting in part) issued its Decision and Order, finding that the Company was a successor-employer that had a duty to recognize and bargain with the Union, but not one that had an obligation to bargain prior to setting the employees' initial terms and conditions of employment. (A3 pp.1561-93.) The Board therefore agreed with the administrative law judge that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by refusing to provide the requested information. (A3 p.1565 & n.12.) Further, the Board found, in agreement with the judge, that the Company violated Section 8(a)(1) of the Act by interrogating employees about their union membership, by notifying employees that they were no longer represented by the Union, and by threatening an employee with discharge for

supporting the Union. (A3 p.1561 n.2.) In finding the Company had an obligation to recognize and bargain with the Union, the Board agreed with the judge that the Company's refusal to hire four former Preferred employees violated Section 8(a)(3) and (1) of the Act, and that absent this discrimination, the Company would have hired enough predecessor employees for the Union to have the requisite majority. (A3 pp.1564-65.) In doing so, the Board found it unnecessary to determine whether Wilson should be included in the successorship calculation and, unlike the judge, found "no need" to decide whether the "helping hands" employees were part of the unit. (A3 pp.1565 n11.)

The Board found, however, that the Company did not have an obligation to bargain prior to setting the employees' initial terms and conditions of employment, rejecting both of the judge's rationales. (A3 p.1569 n.18.) Accordingly, the Board also reversed the judge's findings that the Company violated Section 8(a)(5) and (1) by making unilateral changes to the employees' existing terms and conditions of employment and violated Section 8(a)(1) by informing bargaining-unit employees in August 2013, that it would make unilateral changes to their working conditions. (A3 pp.1569 n.18, 1570.) Lastly, the Board reversed the judge's finding that the August 2013 statement that a union was unnecessary violated Section 8(a)(1) because that allegation was not contained in the complaint. (A3 p.1564 n.8.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and, 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. (A3 p.1571.) Affirmatively, the Board's Order requires the Company to offer full reinstatement to Davis, Eads, Sickles, and Vegas; make them whole; and remove any reference to the unlawful refusals to hire from their personnel files. (A3 p.1571.) The Board's Order also directs the Company, upon request, to bargain with the Union and to post a remedial notice. (A3 pp.1571-72.)

STANDARD OF REVIEW

The Court affords "considerable deference to the Board's expertise in applying the . . . Act to the labor controversies that come before it." *Visiting Nurse Health Sys., Inc. v. NLRB*, 108 F.3d 1358, 1360 (11th Cir. 1997). The Court will sustain the Board's factual findings if they are supported by "substantial evidence on the record considered as a whole." *Evans Servs., Inc. v. NLRB*, 810 F.2d 1089, 1092 (11th Cir. 1987) (quoting 29 U.S.C. § 160(e)); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91 (1951). Under that standard, the Court will not displace the Board's reasonable inferences from the evidence even if the Court might have reached a different conclusion had the matter been before it *de novo*. *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-29 (11th Cir. 1985). The same standard applies when the Board reaches a different conclusion from the

administrative law judge. *See NLRB v. Gimrock Constr., Inc.*, 247 F.3d 1307, 1311 (11th Cir. 2001) (To “differ with the [judge] on inferences and conclusions to be drawn from the facts is the Board’s prerogative.”).

SUMMARY OF ARGUMENT

1. The Board is entitled to summary enforcement of those portions of its Order remedying the uncontested violation that Director of Nursing Cooper’s threat to discharge an employee for her union support was unlawfully coercive under Section 8(a)(1) of the Act. The Company does not challenge the violation before the Court, and, as such, the Board is entitled to summary enforcement.

2. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees and telling them that the Union no longer represented them. Here, several high-level company representatives—the owner, the human resources director, and the facility administrator—directly asked employees if they were union members and indirectly fished for the same information by asking about dues withholding during pre-hire interviews. The Company never explained to employees the reason for its coercive inquiries; nor did the Company offer any explanation to the Board or the Court. Before the Court, the Company weakly asserts that the interrogations were not coercive, but does so by raising a newly minted argument that this Court may

not considered because it is jurisdictionally barred from review under Section 10(e) of the Act.

The Company does not independently challenge the Board's finding regarding Brown's coercive statement that the Union no longer represented the employees. Rather, the Company relies only on its claim that it was not a successor, so Brown's statement could not have been unlawful. Because substantial evidence supports the Board's successorship finding, the Board's finding that Brown's statement was unlawful is likewise proper.

3. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by unlawfully refusing to hire four employees to avoid the Union. The Board found that the four employees' union membership motivated the Company's refusal to hire them, citing the coercive pre-hire interrogations regarding their membership, Brown's October 2013 threat to close the facility if the employees unionized, and Cooper's January 2014 threat to discharge an employee for her union support. The Board found further that the Company failed to prove its affirmative defense that it would have made the same employment decisions in the absence of union considerations. Specifically, the Board rejected the Company's reliance on a no-rehire policy for its refusal to hire three Preferred applicants. Indeed, as the Board explained, the record evidence belies that claim because the Company had previously assured former Ridgewood

employees that they would be considered like everyone else, only to invoke the policy when the risk of hiring a majority of the predecessor's unionized workforce became clear. And the Board reasonably found unpersuasive the Company's vague proffered bases for not hiring a fourth otherwise qualified Preferred employee.

The Company's challenges to the Board's finding that the Company discriminatorily refused to hire those Preferred applicants provide no basis for the Court to disturb the Board's decision. First, the Court is jurisdictionally barred from considering many of the Company's varied claims because the Company never raised them to the Board in the first instance. Second, none of the properly raised attacks have merit and largely amount to the Company's continued disagreement with the Board's view of the facts and evidence, matters insufficient to surmount the substantial-evidence standard of review. These claims are generally ill-suited for judicial review, and particularly so where an employer's motivation is an issue.

4. Substantial evidence supports the Board's finding that the Company is a successor to Preferred with a bargaining obligation, and the Company violated Section 8(a)(5) and (1) of the Act by both failing to recognize and bargain with the Union and failing to furnish the Union with requested information. In determining that, but for the Company's unlawful motivation, it would have hired a majority of

Preferred employees, the Board reasonably fixed the operative date as of the takeover, October 1, 2013, and the size of the workforce at that time, 101 employees. Accordingly, substantial evidence supports the Board's successorship finding because, absent discrimination, a minimum of 52 Preferred employees would have been employed on October 1, constituting a clear majority. And having found the Company to be a successor employer with a bargaining obligation, the Company's failure to provide the Union with requested information is likewise unlawful. None of the Company's arguments against successorship has merit and, instead, the arguments reflect the Company's continued willingness to engage in a numbers game to defeat the Union's majority status and avoid a bargaining obligation.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THOSE PORTIONS OF ITS ORDER REMEDYING THE UNCONTESTED UNLAWFUL THREAT OF DISCHARGE BECAUSE OF UNION ACTIVITY

The Board found (A3 p.1571) that Director of Nursing Cooper's January 2014 threat to discharge employee Bolinger for union activity violated Section 8(a)(1) of the Act. Before the Court, the Company does not contest the violation and has therefore waived any challenge to it. *See United States v. Nealy*, 232 F.3d 825, 830-31 (11th Cir. 2000) (arguments not raised in opening brief are waived); *see also* Fed. R. App. Proc. 28(a)(9)(A) (brief must contain party's contentions

with citation to authorities and record); accord *Herring v. Sec’y, Dept. of Corrs.*, 397 F.3d 1338, 1342 (11th Cir. 2005) (arguments “raised for the first time in a reply brief are not properly before a reviewing court”). The Board is therefore entitled to summary enforcement of those portions of its Order remedying that uncontested violation. *NLRB v. Allied Med. Transp., Inc.*, 805 F.3d 1000, 1009 (11th Cir. 2015); *Purolator Armored*, 764 F.2d at 1427-28.

II. THE BOARD REASONABLY FOUND 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

A. Applicable Principles

Section 7 of the Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations [and] to bargain collectively through representatives of their own choosing” 29 U.S.C. § 157. Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of [their Section 7 rights].” 29 U.S.C. § 158(a)(1). An employer violates Section 8(a)(1) when its actions would reasonably tend to coerce employees in the exercise of protected Section 7 rights. *NLRB v. McClain of Ga., Inc.*, 138 F.3d 1418, 1421 (11th Cir. 1998); *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 415-16

(5th Cir.1981).⁵ The test for a Section 8(a)(1) violation is whether an employer's conduct has a reasonable tendency to coerce; actual coercion is unnecessary.

United Servs. Auto. Ass'n v. NLRB, 387 F.3d 908, 913 (D.C. Cir. 2004); *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

B. Substantial Evidence Supports the Board's Finding that the Company Coercively Interrogated Employees about Their Union Membership

Courts have recognized that, although “not per se illegal,” interrogations into union activities “present an ever-present danger of coercing employees in violation of their Section 7 rights.” *TRW-United*, 637 F.2d at 416; *see also Williams Enters., Inc. v. NLRB*, 956 F.2d 1226, 1240 (D.C. Cir. 1992); *M.J. Mech. Servs., Inc.*, 324 NLRB 812, 812-13 (1997), *enforced mem.* 172 F.3d 920 (D.C. Cir. 1998). The Board has repeatedly held that absent mitigating circumstances, it is generally unlawful for an employer to inquire about union membership in the context of a job interview. *See, e.g., Facchina Constr. Co.*, 343 NLRB 886, 886 (2004), *enforced mem.*, 180 F. App'x 178 (D.C. Cir. 2006); *C.P. Assocs., Inc.*, 336 NLRB 167, 175 (2001). Interrogating an applicant concerning union membership in a job interview setting carries the coercive implication that the applicant's job may

⁵ Decisions of the former Fifth Circuit issued prior to October 1, 1981, are binding precedent for this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

depend on the response. *Adco Elec., Inc.*, 307 NLRB 1113, 1117 (1992), *enforced*, 6 F.3d 1110 (5th Cir. 1993); *Active Transp.*, 296 NLRB 431, 431 n.3 (1989), *enforced mem.*, 924 F.2d 1057 (6th Cir. 1991).

Other relevant considerations include the rank of the official conducting the interrogation, whether the employer has a valid purpose for obtaining the information, and whether the employer has informed employees as to the reason for the questioning. *NLRB v. Gaylord Chem. Co.*, 824 F.3d 1318, 1333 (11th Cir. 2006) (quoting *TRW-United*, 637 F.2d at 416). Also relevant to the analysis is whether the questioning occurs against the backdrop of other violations or in a generally anti-union atmosphere. *NLRB v. Brookwood Furniture*, 701 F.2d 452, 462-63 (5th Cir. 1983); *Sturgis Newport Bus. Forms, Inc. v. NLRB*, 563 F.2d 1253, 1257 (5th Cir. 1977).

Here, the Board found that during hiring interviews of Preferred employees seeking employment, three high-level company officials—Brown, the owner; Warren, the human resources director; and Holland, the facility administrator—asked “*most Preferred employees . . . about their payroll deductions, which included deductions for union dues.*” (A3 p.1590, emphasis added); *see Gaylord*, 824 F.3d at 1333 (questioning was coercive in part because vice president was involved). The same three high-level officials engaged in even more invasive

interrogations by *directly* asking some applicants if they were union members.⁶

The Board also found that the Company never explained “why [its] agents need[ed] such information when interviewing employees who performed bargaining-unit work.” (A3 p.1590); *see Sturgis Newport*, 563 F.2d at 1256 (finding union support questions to be coercive, in part, because the employer neither showed a reason for questioning employees nor communicated a reason to employees).

It bears noting, too, that the Company’s determined effort to uncover the union sentiments of the predecessor workforce occurred in the context of Brown’s unlawful statement that employees were no longer represented by the Union and Brown’s widely disseminated opposition to the Union. *See, e.g., NLRB v. Brookwood Furniture*, 701 F.2d 452 at 462-63 (interrogation more coercive when coupled with other threats); *Sturgis Newport*, 563 F.2d at 1257 (“[Union] opposition is not proof of anti-union animus . . . [but] may be considered as background when determining whether conversations tend to be coercive.”). And the Board reasonably looked askance at the Company’s “suspect” conduct, given

⁶ The Company repeats the erroneous claim (Br. 32, 42) that the Company only interrogated four employees. The Board never made any such finding, and the Company ignores that the unlawful interrogation analysis includes those employees who were directly asked about their union membership *as well as* those employees whose union membership was discovered through payroll deduction inquiries.

one “would reasonably assume that a company assuming operations of a facility would already have a sense of the total payroll and benefits costs involved in running the business.” (A3 p.1590.)

The Company weakly contests (Br. 33) the Board’s finding by summarily asserting, without supporting argument, that the interrogation was not intimidating or threatening. The Company’s self-serving, naked assertion is insufficient to show that the Board’s finding is unsupported by substantial evidence. Moreover, before the Board, the Company never raised its newly minted claim (Br. 33-34) that the Board departed from precedent by recognizing a per se violation of Section 8(a)(1), which therefore is jurisdictionally barred from review.⁷ As Section 10(e) of the Act provides, “[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (court lacks jurisdiction to consider issue not raised before Board); *Purolator*, 764 F.2d at 1433 (same). In any event, as the above discussion makes clear, the Board did not apply some “per se” analysis, as the Company claims, but rather it considered the full context under which these interrogations occurred under well recognized factors.

⁷ The Company’s Exceptions Brief is not part of the official administrative record. The Board has therefore filed, simultaneously with this brief, a motion to lodge it with the Court.

In short, high-level company officials pried into the union affiliation of most of the Preferred job applicants through either a “circuitous approach” of asking about union-dues deductions or direct inquiries into whether they were members of the Union. And the officials did so without having a valid reason for obtaining the information, informing applicants as to the reason for the questioning, or offering applicants any assurances against reprisals. Further, the coercive interrogations happened in the context of an employer with an unequivocally anti-union stance. Under these circumstances, substantial evidence supports the Board’s finding that the Company unlawfully interrogated employees in violation of Section 8(a)(1).

C. Substantial Evidence Supports the Board’s Finding that the Company Unlawfully Told Employees that the Union No Longer Represented Them

As noted above, an employer violates Section 8(a)(1) when its actions would reasonably tend to coerce employees in the exercise of protected Section 7 rights. *See McClain*, 138 F.3d at 1421. Here, it is undisputed that Brown, the Company’s owner, sent a letter to all employees on October 22, informing them that the Union no longer represented them, notwithstanding the fact that the Company was found to be a successor employer with a bargaining obligation. The Board, with court approval, has long held that this conduct violates Section (8)(a)(1). *See, e.g., Beverly Health & Rehab. Servs., Inc.*, 325 NLRB 897, 902

(1998), *enforced*, 187 F.3d 769 (8th Cir. 1999); *Colonna's Shipyard*, 293 NLRB 136, 141 (1989), *enforced*, 900 F.2d 250 (4th Cir. 1990).

The Company's single-sentence "challenge" to the Section 8(a)(1) violation relating to Brown's statement does not comply with the Federal Rules of Appellate Procedure requiring a party's brief to contain its contentions with citation to authorities and record. *See* Fed. R. App. Proc. 28(a)(9)(A). Rather than address the merits of the violation, the Company summarily asserts (Br. 71) that if the Court finds that it is not a successor, then Brown's October 22 statement was lawful. For the reasons discussed below (pp.51-56), substantial evidence fully supports the Board's determination that the Company was a successor to Preferred. As such, and in the absence of any other challenge, the Court should uphold the Board's finding that the Company violated Section 8(a)(1).

III. 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

A. Applicable Principles

As noted, Section 7 of the Act guarantees employees the right "to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" 29 U.S.C. § 157. In turn, Section 8(a)(3) of the Act implements Section 7 by prohibiting employer "discrimination in regard to hire or tenure of employment or any term or

condition of employment to . . . discourage membership in any labor organization.”
29 U.S.C. § 158(a)(3).⁸ This prohibition applies equally to the hiring decisions of
an employer who takes over a business formerly operated by another employer.

A successor employer incurs an obligation to recognize and bargain with a
union when a majority of its employees, in a substantial and representative
complement, were employed by the predecessor. An employer may not lawfully
avoid, or attempt to avoid, a bargaining obligation by pursuing a hiring policy
designed to keep predecessor employees in the minority. *See Howard Johnson Co.*
v. Hotel Emps., 417 U.S. 249, 262 & n.8 (1974); *NLRB v. Houston Dist. Servs.*,
Inc., 573 F.2d 260, 263-64 (5th Cir. 1978). Accordingly, a new employer violates
Section 8(a)(3) and (1) of the Act if it refuses to hire the predecessor’s employees
because they are union members or to avoid an obligation to bargain with a union
as a successor employer. *Houston Dist.*, 573 F.2d at 264; *see also Great Lakes*
Chem. Corp. v. NLRB, 967 F.2d 624, 627-29 (D.C. Cir. 1992). In such
discrimination cases, the critical inquiry is whether anti-union animus unlawfully
motivated an employer’s failure to hire predecessor employees. In *NLRB v.*
Transportation Management Corp., 462 U.S. 393 (1983), the Supreme Court

⁸ A violation of Section 8(a)(3) creates a derivative violation of Section 8(a)(1),
which makes it unlawful for an employer to “interfere with, restrain, or coerce
employees” in the exercise of rights guaranteed in Section 7 of [the Act].” 29
U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

approved the Board's test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1088-89 (1980), *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Under that test, if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in an employer's decision to take adverse action, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that the adverse action would have been taken even in the absence of the protected activity. *Transp. Mgmt.*, 462 U.S. at 397, 401-03; *McClain*, 138 F.3d at 1424. An employer must establish its affirmative defense by a preponderance of the evidence. *NLRB v. S. Fla. Hotel & Motel Ass'n*, 751 F.2d 1571, 1579 (11th Cir. 1985).

Because direct evidence of union animus is often impossible to obtain, the Board may rely on circumstantial evidence. *McClain*, 138 F.3d at 1424; *Purolator Armored*, 764 F.2d at 1429. The Board, with this Court's approval, routinely has found that contemporaneous violations of Section 8(a)(1) serve as evidence of an employer's antiunion motivation. *See, e.g., NLRB v. Goya Foods*, 525 F.3d 1117, 1127 (11th Cir. 2008) (citing employer's "cumulative, serious and extensive" violations of Section 8(a)(1)); *McClain*, 138 F.3d at 1424-25 (citing employer's "numerous" Section 8(a)(1) violations). And the Court is "even more deferential

when reviewing the Board’s conclusions regarding discriminatory motive, because most evidence of motive is circumstantial.” *Goya Foods*, 525 F.3d at 1126 (internal quotation omitted). As shown below, the Board reasonably found that the Company violated Section 8(a)(3) and (1) of the Act by discriminating against union applicants when hiring Preferred employees.⁹

B. The Company Acted with an Unlawful Motive in Refusing To Hire Four Employees

1. Substantial evidence supports the Board’s finding of animus

As the Board explained (A3 p.1563), circumstantial evidence surrounding three key findings of the Company’s otherwise unlawful conduct support its finding that the Company acted with animus toward the Union in refusing to hire four Preferred employees as part of its union-avoidance scheme. First, the Board relied on the fact that the Company “coercively interrogat[ed] Preferred employee

⁹ The Company wrongly contends (Br. 35-36) that *Planned Building Services, Inc.*, 347 NLRB 670, 673 (2006), *overruled on other grounds*, *Pressroom Cleaners*, 361 NLRB 643 (2014), sets forth a four-factor test in successorship cases involving unlawful refusals to hire. To the extent the Company suggests that *Planned Building Services* modified the longstanding *Wright Line* analysis, the Company is incorrect. *See Planned Bldg.*, 347 NLRB at 673 (“Thus, to establish a violation of Section 8(a)(3) and (1) in cases where a refusal to hire is alleged in a successorship context, the General Counsel has the burden to prove that the employer failed to hire employees of its predecessor and was motivated by antiunion animus.”). To be sure, the four factors listed by the Company (Br. 35) are relevant to the overall analysis, but do not modify the *Wright Line* framework in this case. *See Planned Bldg.*, 347 NLRB at 673 (“We find that these factors remain relevant in establishing a refusal-to-hire violation in the successorship context.”).

applicants regarding their union membership during job interviews.” (A3 p.1563.)

The Company both directly asked employees about their union membership and adopted a “circuitous approach to eliciting the [same] information” by asking payroll deduction questions that any company assuming operations of a facility should reasonably already have known without asking employees during the hiring process. (A3 p.1590.) Second, the Board found that the Company also displayed animus when Brown, Company owner, held employee meetings and “threatened that she might close the facility if employees unionized.” (A3 p.1563.) And, third, the Company “clearly demonstrated animus again several months later when Cooper, Director of Nursing, threatened to fire [an employee] for recruiting her coworkers to support the Union.” (A3 p.1563.)

Notably, the Company did not except to the judge’s findings that Brown threatened to shutter the facility or that Cooper threatened to discharge an employee for her union support. (A3 p.1563: “The Company [does] not except to the judge’s findings that these latter two incidents occurred”; Exceptions Br.). Likewise, the Company does not dispute that its interviewers quizzed employees on payroll deductions (including union-dues withholding) and union membership. This largely uncontested series of coercive and threatening acts provides ample evidence to support the Board’s finding that anti-union animus motivated the Company.

To no avail, the Company attempts to challenge (Br. 37-39, 52) the substantiality of the Board’s evidence of animus by listing other considerations that it claims support a contrary finding—that it acted, in fact, without anti-union animus. As an initial matter, the Company’s argument ignores that “[i]t is not [the Court’s] function to reweigh the evidence or make credibility choices.” *Mead Corp. v. NLRB*, 697 F.2d 1013, 1021-22 (11th Cir. 1983). Moreover, in rejecting similar arguments, the Court has explained that often “the record contains evidence that could support findings of both a lawful and an unlawful motive,” but the Court’s “standard of review is limited, however, to determining whether the Board’s inference of unlawful motive is supported by substantial evidence—not whether it is possible to draw the opposite inference.” *McClain*, 138 F.3d at 1424-25; *NLRB v. Malta Constr. Co.*, 806 F.2d 1009, 1012 (11th Cir. 1986) (“As in many cases there is evidence of both a lawful and an unlawful motive.”).

In any event, the Company’s list of certain lawful acts does not compel a finding of lawful motivation. For example, that the Company interviewed Preferred employees first, hired many of them, told them that it wanted to hire 99.9 percent of them, and encouraged them to apply does not erase the series of threats and coercive activity that accompanied those activities. Nor does the fact that the Company hired several known union members defeat a finding that anti-union animus guided its *overall* hiring strategy—that is, to stop hiring Preferred

employees once it was clear they were approaching a majority. There is nothing inconsistent with the Board’s finding of anti-union animus and the existence of the Company’s highlighted conduct. The Company could have both acted pursuant to a union-avoidance hiring scheme *and* engaged in every activity it enumerates. Accordingly, the Board did not “brush[] this evidence aside with no articulate, cogent, and reliable analysis” or “ignore[] it entirely.” (Br. 39 (internal quotations omitted).) To the contrary, the Board determined that countervailing evidence of anti-union animus was more compelling.¹⁰

The Company relies (Br. 49-50) on inapposite cases to argue that the Board’s animus finding here was insufficient. None of the cases involves an employer’s overall hiring scheme to avoid union representation in a successorship situation; rather, they all involve individual discharges. Here, the evidence shows that the Company sought to avoid union representation, which, in turn, motivated its refusal to hire the four employees with “well-documented work histories” and “uneventful interviews.” Further, two of the cases, *Florida Steel Corp. v. NLRB*, 587 F.2d 735 (5th Cir. 1979), and *NLRB v. Birmingham Publishing Co.*, 262 F.2d 815 (5th Cir. 1977), predate *Wright Line*, the Board’s seminal case for analyzing

¹⁰ The Company relatedly argues (Br. 50-51) that the Court should deny enforcement if the Court disagrees with any one of the three bases for the Board’s animus finding. While the Board maintains that the entire animus finding is amply supported by substantial evidence, should the Court disagree, then remand, rather than denial of enforcement, would be proper.

discriminatory practices under the Act. And while *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483 (11th Cir. 1982), issued around the same time as *Wright Line*, the case predates the Supreme Court’s approval of *Wright Line*, and the Court expressly stated that it was not deciding whether that framework applied to the facts of that case. *Id.* at 491 n.4. Lastly, *BE & K Construction Co. v. NLRB*, 133 F32d 1372 (11th Cir. 1997), has no application to the facts of this case. There, the Court found no animus because the employer’s public pronouncements of general antiunion sentiment were “*lawful expressions* of its anti-union stance.” *Id.* at 1377 (emphasis added). Here, the record contains undisputed evidence of the Company’s *unlawful* anti-union conduct, namely, the coercive pre-hire interrogations and Cooper’s discharge threat. In short, the Company has not shown that, under the circumstances of this case, the Board’s animus finding is unsupported by substantial evidence.

2. The Company’s challenges to the Board’s reliance on the pre-hire interrogations are jurisdictionally barred and otherwise meritless

The Company argues (Br. 40) that the Board’s reliance on the interrogation to support animus improperly equated an unlawful-interrogation finding with a discriminatory-intent finding. The Company failed to raise this argument to the Board and, under Section 10(e) of the Act, the Court may not consider it. In any event, the Board’s reliance on the Company’s unlawful interrogation of Preferred

employees in finding anti-union animus was reasonable. Indeed, the Board has long considered the existence of other unfair labor practices, including Section 8(a)(1) violations that do not require intent, as evidence of animus. *See, e.g., The Fremont-Rideout Health Grp.*, 357 NLRB 1899, 1902 (2011) (employer’s animus demonstrated by other violations, including coercive interrogation); *Dico Tire, Inc.*, 330 NLRB 1252, 1260 (2000) (same); *Mashkin Freight Lines*, 272 NLRB 427, 436 (1984) (same). Given this longstanding precedent, the Company cannot credibly claim (Br. 41) that the Board’s reliance on an extant Section 8(a)(1) violation to support a finding of animus is a “leap” without any reasoned basis. Though the Board, as the Company maintains (Br. 40-41 & n.11), does not consider the speaker’s intent in determining whether an interrogation is coercive, this analytical principle is irrelevant when considering whether a coercive interrogation independently supports an anti-union animus for a refusal-to-hire allegation. In other words, the Board’s analysis of a Section 8(a)(1) violation is distinct from whether, having found a Section 8(a)(1) violation, the Board may properly rely on it to support a finding of ill motive.

The Company’s reliance (Br. 41) on *CBI Na-Con, Inc.*, 343 NLRB 792 (2004), is misplaced. In *CBI*, the Board reversed a finding of animus based on a coercive interrogation because the employer had demonstrated that its hiring system was neutral and lawful. Nothing in *CBI* supports the Company’s overly

broad claim that a coercive-conduct violation cannot support an anti-union animus finding.

Section 10(e) bars the Company's argument (Br. 41-42) that the Board's animus finding is infirm because the Board failed to identify the interrogators; the Company never raised that claim to the Board. In any event, the Company's argument ignores express findings that "employees were asked by Brown, Holland and/or Warren about their wages, benefits and paycheck deductions and/or whether they were members of the Union." (A3 p.1583.) The judge found further based on Brown's own testimony that "she consulted with the other [representatives] in making her hiring decisions," (A3 p.1583 n.23), and Warren and Holland both testified that they made recommendations to Brown based on their interviews. (A1 pp.627,630,632-33,655-56,660-65,672-74.) Under these circumstances, the Company cannot maintain that the Board's decision lacks an "articulate, cogent, and reliable analysis" showing [company] decisionmakers had anti-union hiring animus." (Br. 41.)¹¹

¹¹ Once again, the Company's claim (Br. 42) that it only asked four applicants about union affiliation is contrary to the credited record evidence. *See* p.25 n.6.

3. The Company's challenges to the Board's animus finding relating to Brown's threat to close the facility are jurisdictionally barred and otherwise meritless

The Company lodges a variety of unpersuasive claims concerning Brown's threat to shutter the facility if the employees unionized. First, the Company disputes (Br. 47) that Brown ever made the statement. As noted above (p.32), however, the administrative law judge found that Brown made the statement, and the Company never challenged that finding before the Board. Accordingly, Section 10(e) of the Act bars review of the issue.

Next, it is irrelevant (Br. 44) both that the complaint omitted Brown's statement and that the Board did not find Brown's statement to be an independent violation of the Act.¹² Neither consideration affects the explicit factual finding, which the Company did not contest, that Brown made the statement. And the Board has long recognized that conduct exhibiting animus but not independently alleged to violate the Act "may be used to shed light on the motive for, or the underlying character of, other conduct that is alleged to violate the Act." *Am. Packaging Corp.*, 311 NLRB 482, 482 n.1 (1993). Here, the Board properly relied on Brown's non-alleged statement, which involved "the most serious threat" of

¹² The Company also refers to an injunction petition that the Board's Regional Director filed in October 2014, which likewise did not include Brown's threat. The petition is irrelevant to the Board's decision in this case.

facility closure. *See Crown Bolt, Inc.*, 343 NLRB 776, 777 (2004) (recognizing the severity of closure threat).

The Company also argues that even if Brown said it, “[i]t was not unlawful for Brown to respond to the inquiry with a truthful answer.” (Br. 48.) But this argument assumes too much. First, the complaint did not allege, nor did the Board find, that Brown’s threat constituted an independent violation of the Act. Second, this claim rests on an unsupported assumption that Brown’s statement was truthful. Neither Brown nor the Company identified any objective facts to support the claim (Br. 48) that Brown was merely announcing a reasonable prediction based on economic realities. *See, e.g., Weather Tamer*, 676 F.2d at 488 (observing that such predictions “must be carefully phrased on the basis of objective fact” when analyzing whether a statement concerning closure was protected under Section 8(c), quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-19 (1969)). Accordingly, the Company cannot show that the Board erred by relying on Brown’s undisputed threat.

The Company also argues (Br. 47) that the Board’s animus finding “hinges” on the uncontested finding that Brown threatened to close the facility if the employees unionized; to the contrary, Brown’s threat constituted one of three sound bases for finding animus. And the Board’s finding with regard to Brown is not “a last-minute allegation dropped into the case without prior notice.” (Br. 48.)

The Company was first on notice of the alleged threat during the hearing and later when the judge expressly found that Brown “went so far as to at one point as to say that the facility would close if the Union was involved.” (A3 p.1590.) The Company’s failure to except to this express factual finding does not render it “last-minute.”

Finally, the Company misreads the Board’s decision in challenging (Br. 48) the factual underpinning of the Board’s finding that Brown made this statement. The Company claims that the judge credited two witnesses who never testified about Brown’s statement, but, in doing so, misunderstands the footnote, wherein the judge cites to the testimony of three different employees. Only one of the employees, Debra Thomas, testified—and the judge credited that testimony—that when she asked Brown about rumors that “if [they] had a union in there, they would shut the place down,” (A1 p.165), Brown responded that it was a “possibility.” (A3 p.1587 n.59.) The judge referenced the testimony of two other employees in the same footnote to support his finding concerning *other* statements made during the same meeting. (A3 p.1587 n.59.)

4. The Company’s challenges to the Board’s animus finding relating to Cooper’s discharge threat are jurisdictionally barred and otherwise meritless

With respect to Cooper’s threat to discharge an employee for her union support, the Company first claims (Br. 43-47) that the Board “retroactively

imputed” Cooper’s animus to the 2013 union-avoidance hiring scheme. As a threshold matter, the Company never raised this issue to the Board, and Section 10(e) of the Act therefore bars the Court from considering it. In any event, the Company’s claim is contrary to the undisputed facts.

The Company wrongly contends (Br. 45-46) that Cooper’s threat to discharge an employee for her union support “has no connection” to the unlawful union-avoidance hiring scheme because Cooper was not involved in any hiring decisions. As shown above (p.12), however, the undisputed record evidence establishes that Cooper consulted with Brown on at least two hiring decisions, one of which was Wilson’s. The judge found, the Board adopted, and the Company did not contest that Cooper “told Brown that [Wilson] had been terminated due to an altercation with a coworker,” (A3 p.1584), despite the absence of any documentation of such altercation in Wilson’s personnel file. Brown followed Cooper’s recommendation, and Wilson was not hired. Cooper also recommended against hiring another applicant, and her advice was followed. (A3 p.1584 n.38.) Under these circumstances, the Court must reject the Company’s attempts to downplay Cooper’s role. *See, e.g., Inova Health Sys. v. NLRB*, 795 F.3d 68, 83 (D.C. Cir. 2015) (emphasizing that those with knowledge and bias recommended discharge, and the decisionmaker relied on this advice); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998) (“[E]vidence of a

subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence.”). The Board properly found (A3 p.1587) that Cooper's January threat was simply a “resurfacing” of the Company's anti-union sentiment.

The two pre-*Wright Line* cases cited by the Company (Br. 44), which involve imputing knowledge of union activity, do not support its position. In *Delchamps, Inc. v. NLRB*, 585 F.2d 91, 94 (5th Cir. 1978), the Court refused to impute a low-level supervisor's knowledge of a discharged employee's union conduct to the decisionmaker, who undisputedly had no knowledge of that conduct. In *Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408, 412 (5th Cir. 1981), the Court reversed a finding of discriminatory discipline because the record contained undisputed evidence that the decisionmakers only learned about the union activities of the disciplined employees after the discipline issued. Neither of these cases bolsters the Company's contention that the Board wrongly imputed Cooper's animus to the decisionmaker. As the Board found, Cooper played a role in hiring, and Brown personally knew of the employees' union affiliation and made no secret of her distaste for that affiliation.

5. The timing of Brown's and Cooper's statements does not diminish the animus finding

The Company claims (Br. 45-46, 50) that Cooper's and Brown's threats came too late to support a finding of animus. Not so. As the Board noted,

“subsequent threats may, in certain circumstances, properly be deemed relevant in assessing whether a motivating factor in an employer’s prior decision not to hire employees was their union membership or support.” (A3 p.1563, citing cases.)

The Company fails (Br. 45-46) to distinguish the cases cited by the Board. For example, the employer’s conduct in *R.J. Corman Railroad Construction, LLC*, 349 NLRB 987, 1000 (2007), a refusal-to-hire case, and the Company’s conduct here are remarkably akin. There, the employer engaged in an unlawful interrogation during the interview stage and four weeks later threatened plant closure. *Id.* According to the judge, the subsequent threat evidenced “the depth of [the employer’s] animus . . . by the fact that it made other unlawful statements later that same month.” *Id.* Here, the Company also unlawfully interrogated employees during the interviews, and Brown also threatened a facility closure three weeks later. And the Company’s “antiunion sentiment resurfaced in January 2014, when Cooper threatened an employee with discharge for her union support.” (A3 p.1587); *see also K.W. Elec., Inc.*, (2004) (relying, in part, on unfair labor practices that occurred three and four weeks after employee discharge to find anti-union animus); *SCA Tissue N. Am., LLC v. NLRB*, 371 F.3d 983, 990 (7th Cir. 2004) (generally recognizing the propriety of the Board’s consideration of post-termination conduct and any anti-union animus inferences to be drawn therefrom).

The Company erroneously reasons (Br. 46) that these cases are inapposite because, in those cases, the same individual who undertook the adverse action subsequently made the unlawful statements. The Company neglects the fact that both Cooper and Brown were involved in the hiring process and both Cooper and Brown issued threats. For these reasons, the Company's attack on the case support for the Board's animus finding is unavailing.

C. The Board Reasonably Rejected the Company's Affirmative Defense

Ample evidence supports the Board's finding that the Company failed to show, as an affirmative defense, that it would have made the same hiring decisions even in the absence of its unlawful motive. With respect to the no-rehire policy, the Board found that the Company "manipulate[d] the hiring process" to avoid the Union, (A3 p.1564), and, with respect to Wilson's non-hire, the Company relied on the "flimsiest of rationales," (A3 p.1590). Given these findings, the Company can hardly show that that its purported justification was actually, in fact, relied upon. *See, e.g., Wright Line*, 251 NLRB at 1083-84 (where an employer's "asserted justification is a sham . . . or circumstance advanced by the employer did not exist, or was not, in fact, relied upon . . . no legitimate business justification for the discipline exists"). Therefore, the Board reasonably found that the Company failed to prove its affirmative defense.

1. No-rehire policy: Betty Davis, Gina Eads, and Connie Sickles

Before the Board, the Company proffered the same basis for its decisions not to hire Davis, Eads, and Sickles; namely, that the Company had “a policy precluding the employment of workers at Ridgewood who had previously been terminated from the separate Ridgeview facility (which Brown also owned and operated).” (A3 p.1564.) The Board rejected (A3 p.1564) this proffered justification as contrary to the record evidence.

To begin, Brown stated in employee meetings before the application and interview process had begun that Preferred employees who had been previously discharged from Ridgeview would be eligible for rehire at Ridgewood. The Board found that, when specifically asked about this scenario, “Brown responded that such employees would be considered along with everyone else.” (A3 p.1564.) The Company gains no ground in suggesting (Br. 56) that Brown made no assurance about the no-rehire policy or that her assurance that all employees would be considered equally even if they had been discharged from the Ridgeview facility was misunderstood. First, the Company did not raise either claim to the Board, so, like many of its arguments, Section 10(e) of the Act prohibits the Court from considering them. Even if the Court were to entertain it, however, the Company’s anemic challenge to the context of Brown’s statement is insufficient to undermine the substantial evidence supporting the Board’s rejection of the

affirmative defense. The Company could certainly have asked Brown during the hearing to explain what she meant during the all-employee meeting but did not.

The interviews conducted by the Company also support the Board's finding that the Company did not intend to rely on its no-rehire policy. As the Board found (A3 pp.1584, 1590), Eads asked during her interview about a prior discharge from Ridgeview and received assurances that she had no cause for concern. And the undisputed record evidence establishes that the other two non-hires, Davis and Sickles, were not asked about prior employment at Ridgeview and that the interviewers' notes lacked any reference to a no-rehire policy.

Moreover, the Board noted that it would be "illogical" for the Company to invest "the time and expense of interviewing this pool of applicants at Ridgewood" if it "intended to preclude their hire by applying the 'no-rehire' policy from Ridgeview." (A3 p.1564.) The Board found, and the Company does not contest, that Davis, Eads, and Sickles "had uneventful hiring interviews presenting no other obstacle to employment by [the Company]." (A3 p.1584.) Under these circumstances, the Board properly found that the Company failed to show that under its no-rehire policy, it would have refused to hire the employees.

The Company's challenges are meritless. First, the Court should dismiss, out of hand, the Company's baseless assertions that the Board's showing of unlawful motivation is "exceptionally weak," (Br. 54), that the Board failed to find

“a nefarious intent,” (Br. 59, 60), and that the Board failed to identify what “motivated Brown to reverse course,” (Br. 60). The Board found, as discussed above (pp.31-44), that union avoidance motivated the Company’s hiring and that its intent was to discriminate in its hiring scheme to achieve that goal, and in making this finding it relied on multiple instances of animus, most of which are uncontested.

Next, the Company demonstrates its misunderstanding of the Board’s decision by making the correct but irrelevant observation (Br. 54-55) that the Board did *not* find that the no-rehire policy was unlawful. While the Company may have had a neutral, lawful policy in place, the Board found that the Company did not show that it “actually intended to rely on [it].” (A3 p.1564 n.9.) Rather, the Board found (A3 p.1564) that the Company only decided to use the policy once it knew how many predecessor employees had applied and when it could “manipulate the hiring process” to ensure that it avoided hiring a majority of Preferred employees. Relatedly, the Company wrongly maintains (Br. 60) that the Board implicitly found that the Company initially lacked a no-rehire policy. The Board made no such finding. As noted above, the Board (A3 p.1564) found that the Company opted to use the policy as a pretext only after realizing that it risked hiring a majority of employees represented by the Union.

The Company claims (Br. 55-60) that the Board wrongly found that the Company had “reversed course” by first not intending to apply the no-rehire policy and then, upon discovering that the hiring figures signaled a union majority, deciding to apply it. The Board did not, contrary to the Company’s assertion, craft a “whole new theory—different from the [judge].” (Br. 55.) Like the Board, the judge rejected the Company’s affirmative defense because the Company “failed to rebut the inference that a no-rehire rule was subsequently applied as a discriminatory means by which to disqualify unit member applicants.” (A3 p.1590.) And even if the Company’s view of the Board’s decision is accurate and the Board parted ways from the judge’s rationale, the Company’s failure to file a motion for reconsideration with the Board prior to seeking review precludes the issue from the Court’s consideration. *See Woelke*, 456 U.S. at 665 (recognizing that there are instances where a motion for reconsideration is the first opportunity for a party to raise objections, and a party preserves those objections by filing a timely motion to reconsider); *see also* NLRB Rules and Regulations, 29 CFR § 102.48(d)(2) (motions for reconsideration “shall be filed within 28 days . . . after service of the Board’s decision and order”).

Next, the Company asserts a string of claims that all applicants were treated the same (Br. 56), that it applied the rule fairly (Br. 56-57), that it was a business judgment outside the Board’s review province to apply the no-rehire policy (Br.

57-58), and that the Board's analysis is replete with speculation (Br 59). Each of these claims simply asks the Court to reweigh the evidence by offering the same arguments rejected by the Board. The Board considered the Company's "strained explanation" and its "illogical" position and ultimately determined that the Company had failed to prove its affirmative defense. In doing so, the Board did not "substitut[e] its business judgment" for the Company's, (Br. 57-58); rather, the Board evaluated the Company's explanations and evidence and found them unpersuasive. In short, the evidence supports the inference that the Company decided to apply its policy only after it realized it faced a union majority. *See Purolator*, 764 F.2d at 1428-29 (the Court should not displace Board's reasonable inferences, even if the Court may have reached a different conclusion).

The Company engages in misdirection (Br. 60) by emphasizing that the no-rehire policy did not have the desired effect because its application eliminated four non-predecessor employees and only three predecessor employees. The number of non-hired, non-predecessor employees is wholly irrelevant. What matters to the Board's analysis is whether the policy had the intended effect of avoiding a union majority; in other words, whether application of the policy depressed union hiring sufficiently to avoid a bargaining obligation. In this regard, and irrespective of non-predecessor hires, the policy had the "desired effect" of ensuring that the Company did not ostensibly hire a majority of Preferred employees.

2. Vegas Wilson

The Board properly rejected (A3 p.1584) the Company's asserted justification that it did not hire Wilson because Cooper, who had worked with Wilson at another facility, informed Brown that Wilson's altercation with a coworker prompted her discharge from that facility. The Board determined that the Company's reason was based on "the flimsiest of rationales," (A3 p.1590), inasmuch as the incident was not recorded in Wilson's personnel file; Wilson was not asked about it during her interview nor later offered an opportunity to explain; there were no interview notes; Cooper did not testify; and Brown could offer "few specifics" as to Cooper's report. (A3 pp.1564, 1590.) In rejecting this defense, the Board (A3 p.1564 n.10) starkly contrasted Wilson and another non-hire with an outside complaint where the Company's evidence for that applicant was specific and corroborated, unlike the "nebulous evidence" concerning Wilson.

Here, the Company trots out precisely the same "defenses" it pressed before the Board. (*See* Exceptions Br. 44-45.) The Board considered and properly rejected the Company's arguments, determining instead that the reasonable inferences from the evidence supported a finding that it failed to prove its affirmative defense. And, once again, before the Court, the Company's position does not explain the difference between the superficial evidence for Wilson's non-hire and the specific, corroborated evidence for the non-hire of another applicant

with an outside complaint. Nor does the Company show why Brown’s incomplete recollection and second-hand knowledge are compelling, particularly in the absence of testimony—at the Company’s election—from Cooper. The Court must not disturb the Board’s finding even if it would have reached a different result had it considered the issue *de novo*. See *Purolator*, 764 F.2d at 1428-29.

IV. 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

Under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 279-81 (1972), and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987), a subsequent employer has an obligation to bargain with an incumbent union so long as the new employer is in fact a “successor” and the majority of its employees were employed by the predecessor. Failure to recognize and bargain with a union where there is such a bargaining obligation violates Section 8(a)(5) and (1) of the Act. Courts recognize the Board’s special expertise in assessing successorship and, based on that expertise, have accorded such findings a “high degree of deference.” *NLRB v. St. Mary’s Foundry Co.*, 860 F.2d 679, 681 (6th Cir. 1988); accord *Local 32B-32J SEIU v. NLRB*, 982 F.2d 845, 850-51 (2nd Cir. 1993); see also *Computer Sciences Corp. v. NLRB*, 677 F.2d 804, 808 (11th Cir.1982) (recognizing the Board’s expertise in successorship issues).

The test for determining whether an employer is a successor depends on two factors. First, whether there is a substantial continuity of business operations; and second, whether there is a continuity in the workforce (whether a majority of the employer’s substantial and representative complement of employees in an appropriate unit are former employees of the predecessor). Further, the Board will deem a new employer a successor with a bargaining obligation if the 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 anti-union animus.” (A3 p.1563 (citing *Downtown Hartford YMCA*, 349 NLRB 960, 984 (2007)).

A. The Company Would Have Hired a Majority of Preferred Employees But For Union Considerations

Here, the Board properly found that the Company was a successor to Preferred with a bargaining obligation. The Company did not contest the first successorship factor before the Board—that there was a “substantial continuity of business operations” after it assumed operations. (A3 p.1563.) Regarding majority status, the second factor, as shown above (pp.31-51), substantial evidence supports the Board’s finding that the Company would have hired four Preferred employees but for its discriminatory hiring scheme. The Board reasonably found that “because the [Company] completed [its] hiring of incumbent Preferred employees before hiring new, non-Preferred applicants, it follows that the

[Company] would have hired fewer non-Preferred applicants had they lawfully extended job offers to the four discriminates.” (A3 p.1565 n.11.)

On October 1, 2013, the Company employed 101 workers at the facility, 49 of whom were former Preferred employees. The Company did not dispute that its staffing at the time of the transition was adequate. The Board then found (A3 p.1565 n.11) that, absent the Company’s discrimination, “[t]he hiring of Davis, Eads, and Sickles would have increased the total number of former Preferred employees on October 1, from 49 to 52, while simultaneously reducing the total number of non-Preferred employees from 52 to 49.” (A3 p.1565 n.11 (citing *Jennifer Matthew Nursing & Rehab. Ctr.*, 332 NLRB 300, 307 n.9, 308 (2000).)¹³ Substantial evidence thus supports the Board’s finding of the Union’s majority status, and the Board properly determined that the Company is a successor to Preferred with an obligation to recognize and bargain with the Union. The Company therefore violated Section 8(a)(5) and (1) by refusing to do so.

The Board’s reliance on *Jennifer Matthew Nursing* was proper, contrary to the Company’s position (Br. 66). That case supports the fundamental principle

¹³ Given that a majority was established without having to examine the inclusion of Wilson, the Board did not need decide whether “Wilson should be excluded from the October 1 successorship calculation” because there was a question about her clearance to work as of October 1, due to an unresolved physical examination issue. (A3 p.1565 n.11.)

that when the Board analyzes majority status, it uses the employer's staffing level as of the takeover of operations unless the employer can demonstrate that a different number or date is necessary, *see, e.g., Myers Custom Prod.*, 278 NLRB 636, 637 (1987)), and then the Board adds in the unionized discriminatees (non-hires) and subtracts the same number of non-unionized hires. *See, e.g., Pacific Custom Materials*, 327 NLRB 75, 86 (1998) (in analyzing majority status, the Board uses fixed workforce number and includes the discriminatory non-hires and excludes equal number of other hires); *J.D. Landscaping Corp.*, 281 NLRB 9, 11 (1986) (same). Here, the Board found (A3 p.1565 n.11), and the Company does not challenge before the Court, that October 1, 2013, is the operative date for determining majority status. The Company's reference (Br. 65) to hiring in the six weeks after October 1, is therefore irrelevant, as is the Company's stray observation (Br. 38) about four additional offers of employment to predecessor employees. As shown, the Board examines the workforce on the date of transition, not during the pre-hire phase, and it considers only concrete events, not speculative hiring.

The Company, playing an inscrutable numbers game, challenges the Board's majority-status finding arguing that, even if it had hired Eads, Davis, and Sickles, it "would have just hired more people." (Br. 65.) It curiously claims further (Br. 66-67) that if it had hired the four Preferred employees at issue, it would have then

hired four more non-Preferred employees, leaving the predecessor employees as a minority (56 non-Preferred to 53 Preferred employees). This sliding-scale staffing level theory is baffling and finds no support in Board law. Setting aside what is arguably an acknowledgement that its goal was to avoid a majority of predecessor employees, the record establishes the falsity of the Company's claim. As the Board found (A3 p.1586 n.52), the facility was adequately staffed on October 1, 2013, with 101 employees. The Company's puzzling claim that its staffing level was fungible based on the number of predecessor-employee hires is contrary to the credited record evidence.

The Company continues its numbers game by claiming (Br. 66 n.15) that remand is necessary to determine Wilson's inclusion in the unit. For the reasons discussed, the credited record evidence does not show that it would have hired 52 non-Preferred applicants *and* 52 Preferred applicants, for a total of 104 employees. The appropriate, and unchallenged, staff number, as found by the Board, is 101 employees. Therefore, if the Company would have hired 52 Preferred applicants, but for its union-avoidance hiring scheme, it would only have hired 49 non-Preferred applicants. There is no tie-breaker issue, and remand is unnecessary.

The Company's remaining argument (Br. 67-71) that the "helping hands" employees should be included in the bargaining unit is not properly before the Court for two reasons. First, the Company should have filed a motion for

reconsideration with the Board if it disagreed with the Board's decision not to decide the issue. *See Woelke*, 456 U.S. at 665. Contrary to its claim (Br. 67), whether to include a position in a unit is a highly detailed factual, not legal, question, and is one that the Board should decide in the first instance assuming the issue is raised at the proper time, which here it was not.

Second, the Board's determination (A3 p.1565 n.11) that it need not decide whether the "helping hands" employees should be included in the unit is irrelevant to any issue before the Court. Irrespective of whether the "helping hands" are counted in the total number of employees, unionized predecessor employees comprise a majority of the new unit, and the Company has a bargaining obligation either way. The Company identifies *no error* in the Board's decision. It does not argue that the Board should have decided the issue or that it is aggrieved by the Board not having decided it. There is no basis for the Court to consider whether the "helping hands" employees should be part of the bargaining unit.

B. The Company Does Not Challenge the Merits of the Information Request Finding, Which the Court Should Uphold

After having found the Company to be a successor employer with a bargaining obligation, the Board determined (A3 p.1595 n.12) that the Company consequently violated Section 8(a)(5) and (1) by failing to provide information the Union requested that was relevant to its bargaining duty. The Company does not contest the merits of this finding, nor reasonably could it because it never

responded to the Union's information requests. The Company's one-sentence challenge to this violation (Br. 71) rests on its argument that it is not a successor employer, so it has no obligation to provide information. For the reasons outlined above (pp.51-56), substantial evidence supports the Board's successorship finding, and therefore, the Board properly found that the Company violated Section 8(a)(5) and (1) by refusing to provide the requested information.

CONCLUSION

The Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

s/ Elizabeth Heaney

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s/ Barbara A. Sheehy

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OCTOBER 2019

**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)	10-CA-136190
BOARD)	
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), the Board certifies that its motion contains 13,000 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
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Dated at Washington, DC
this 9th day of October 2019

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Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using 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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this 9th day of October 2019