No. 19-11615 & 19-12209

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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

Petitioners & Cross Respondents,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent & Cross-Petitioner.

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

REPLY/RESPONSE BRIEF OF PETITIONERS & CROSS RESPONDENTS

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PETITIONERS AND CROSS-RESPONDENTS' CERTIFICATE OF INTERESTED PERSONS

Counsel of record for Petitioners and Cross-Respondents Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc. certify that the following persons have an interest in the outcome of this appeal. Petitioners and Cross-Respondents make these representations for the Judges of this Court to evaluate possible disqualification or recusal:

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Ridgewood Health Care Center, et al. v. NLRB

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No. 19-11615 & 19-12209

Ridgewood Health Care Center, et al. v. NLRB

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Petitioners & Cross-Respondents certify that their parent corporation is Kelley Health Holdings, Inc., and Kelley Health Holdings, Inc. is not a publicly-held corporation.

s/ Ronald W. Flowers, Jr.
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I. SUMMARY OF THE ARGUMENT

The Board[1] held, among other things, that Ridgewood was Preferred's successor and had violated the Act by refusing to recognize and bargain with the Union. The Board reached that conclusion by holding Ridgewood had discriminatorily refused to hire four employees, which resulted in former members of the Preferred bargaining unit falling short of composing a majority of the bargaining unit at Ridgewood. The Board also held that Ridgewood had violated the Act on other, ancillary issues—interrogation of applicants about their Union membership, telling employees the Union no longer represented them,

[1] This brief carries forward the same shortened names from the Petitioners'–Cross-Respondents' principal brief. Thus, Ridgewood Health Center, Inc. is "Ridgewood Center"; Ridgewood Health Services, Inc. is "Ridgewood Services"; and when no distinction between the two is necessary, they are collectively "Ridgewood." Preferred Health Holdings II, LLC is "Preferred"; and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union is "the Union." The National Labor Relations Board is "the Board," and the Administrative Law Judge is the "ALJ." The National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, is "the Act."

As before, citations to the administrative record take the form "R. <page number>." The brief cites to the supplement to the administrative record lodged on November 14, 2019 as "Supp. R. <page number>." The brief cites to Ridgewood's principal brief as Petitioner's Brief, to the Board's principal brief as Respondent's Brief, and to the Union's brief as Intervenor's Brief.

and threatening an employee. The Court should reject the Board's conclusions, grant the petition for review, and refuse to enforce the Board's order.

Most of the Board's decision hinges on demonstrating that Ridgewood's decisions not to hire Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson were the result of anti-union animus. That analysis fails both steps of the *Wright Line* analysis.

Ridgewood's decisions not to hire Davis, Eads, and Sickles resulted from a neutral policy to hire no one who was ineligible for rehire at the Ridgeview facility, which shared common ownership. Contrary to the Board and Union's contentions, which question Ridgewood's business judgment and raise justifications absent from the Board's decision, there is no evidence Ridgewood reversed course and implemented the no-rehire policy to avoid a Union majority. Further, the policy disqualified more non-Preferred applicants than Preferred applicants. Ridgewood has shown it would not have offered employment to Davis, Eads, and Sickles regardless of any supposed anti-union hiring animus.

So too for Wilson. Ridgewood declined to hire her when it learned of her involvement in an altercation with a coworker at another facility.

The efforts to discredit that legitimate reason again resort to attacks on Ridgewood's business judgment and an attempt to contrast Ridgewood's treatment of Wilson with its similar treatment of another former-Preferred applicant. There is no evidence casting doubt on the decision-maker's good-faith belief that hiring Wilson would be a bad idea. Further, there is no evidence that refutes Ridgewood's other stated reason for not hiring Wilson—she failed her physical. So Ridgewood has also shown it would not have offered employment to Wilson regardless of any supposed anti-union hiring animus.

In any event, the Court should reject the Board's finding of anti-union animus, which would cause the discriminatory hiring claims to fail the first step of the *Wright Line* analysis. The Board ignored substantial evidence that Ridgewood harbored no anti-union hiring animus—including favoring former-Preferred employees in the hiring process and having offered enough of those employees positions for them to have been a majority of the bargaining unit when Ridgewood began operations. Instead it inferred animus from a supposed interrogation that the Board, contrary to precedent, concluded was *per se* unlawful. It also relied on two after-the-fact statements to infer animus. One was a statement by a

decision-maker that was truthful and never found unlawful. The other was by a non-decision-maker who had no connection to Ridgewood's decision to implement the no-rehire policy. Both statements were too remote in time to allow the Board to infer animus. As a result, there is no substantial evidence to support the Board's unreasonable animus finding, which is unsupported by articulate, cogent, and reliable analysis.

Moreover, even if the Court embraced the Board's unsupportable findings on discriminatory hiring, it should still reject the Board's successorship analysis. Ridgewood disqualified seven applicants based on its no-rehire policy, four of whom were non-Preferred applicants. That means, without the policy, Ridgewood would have employed 108 people on October 1, 2013: 52 former-Preferred applicants and 56 non-Preferred applicants—still not a majority. To avoid that reality, the Board disregards the four non-Union members the policy disqualified and concocts a one-in-one-out theory that allows it to add Union members to the bargaining unit and subtract non-Union members. But that theory has no evidentiary basis. All the evidence shows that: (1) Ridgewood was hiring all eligible and qualified applicants; (2) 101 employees was not a ceiling; and (3) Ridgewood desired and would have hired a larger staff.

Finally, the Court should reject the Board's conclusion that Ridgewood unlawfully interrogated applicants about their Union affiliation. Asking applicants about their union affiliation is not *per se* illegal. And unlawful interrogation requires the Board to find coercion, which it did not find here. The Board and Union cannot escape the consequences of the lack of a finding of coercion by relying on new reasoning and analysis that is absent from the Board's decision.

For all of these reasons, and those stated in Ridgewood's principal brief, the Court should grant the petition for review and refuse to enforce the Board's order.

II. ARGUMENT

A. Ridgewood did not unlawfully interrogate those applying for employment.

The Board states that it "found" that Ridgewood had unlawfully interrogated applicants "about their wages, benefits and paycheck deductions." (Resp't's Br. 37.) In doing so, it cites to the ALJ's opinion, not its own opinion. (*See id.* (citing R. 1593).) And the Board did not adopt the ALJ's factual findings or the legal conclusions it drew from those findings. (R. 1567.) Not even the Union contends the Board adopted all of the ALJ's findings here. (*See* Intervenor's Br. 12.)

The Board admits, consistent with binding precedent, that the "interrogation" it alleges is not *per se* illegal. (Resp't's Br. 23, 26.) Instead, unlawful interrogation requires a finding of coercion. *See TRW, Inc. v. NLRB*, 654 F.2d 307, 314 (5th Cir. Unit A 1981); *see also Rossmore House*, 269 NLRB 1176, 1177 (1984), *aff'd sub nom. Hotel Emps., Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Here there was no such finding. The Board does not (and cannot) identify where either it or the ALJ found coercion. And no witness testified they thought the questions were coercive or intimidating. (R. 35–36, 55, 70, 87, 90–91, 109–11, 138, 149, 157, 159, 177–178, 194, 207–08, 230–31, 246–47, 346–47.)

The best that can be said for the Board's position is that there was no finding on coercion at all—no finding either way. The ALJ purely assumed unlawful interrogation because he thought it was reasonable to assume Ridgewood already knew the answers to questions about payroll deductions and because Ridgewood had asked some applicants if they were Union members. (R. 1596.) As for the Board itself, the only facts it discussed and found relevant were that "[s]everal of the Preferred employees who applied were asked during their interviews whether they were Union members." (R. 1568.) The Board never analyzed, considered, or adopted the ALJ's finding related to questions about "wages, benefits, and paycheck deductions." (*Compare* R. 1589, *with* R. 1568.) In any event, the cursory one sentence discussion is woefully inadequate under the critical analysis required by *NLRB v. Gaylord Chem. Co.*, 824 F.3d 1318, 1333 (11th Cir. 2006). (*See* Resp't's Br. 24.)

The Board does not (and cannot) explain the absence of a coercion finding, particularly where the conversations were non-intimidating and non-threatening and lacked any anti-union sentiment. (*See* R. 35–36, 55, 70, 87, 90–91, 109–11, 138, 149, 157, 159, 177–178, 194, 207–08, 230–31, 246–47, 346–47.) The Board's conclusion, without discussion or analysis,

that simply asking four applicants if they were in the Union is unlawful—that asking applicants about union affiliation is *per se* illegal—is contrary to its own precedent "without reasoned justification" and contrary to binding precedent. *See TRW*, 654 F.2d at 314; *Rossmore House*, 269 NLRB at 1177; *see also Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 446 (D.C. Cir. 2004); 5 U.S.C. § 706(2)(A).

The Board cannot escape the consequences of the lack of a coercion finding by relying on factors and a false narrative that it apparently now believes it should have considered. (Resp't's Br. 24 (citing *Gaylord Chem.*, 824 F.3d at 1333); *accord* Intervenor's Br. 13–14 (referencing eight factors that it contends should have been considered and analyzed).) Neither the Board nor the ALJ considered the factors the Board now argues matter or even noted them as relevant. Thus, the Board's new argument creates a curious contrast between the factors and theories the Board now argues matter and the absence of any discussion or analysis of them in the Board or ALJ's decisions. More importantly, as the Supreme Court long ago made clear, it is not the role of the courts of appeals to rewrite the Board's decisions for them, and it would be improper to enforce the Board's order on the basis of new reasoning. *See*

SEC v. Chenery Corp., 332 U.S. 194, 197 (1947) (If the grounds for the administrative decision "are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."); *accord NLRB v. Clark*, 468 F.2d 459, 467 (5th Cir. 1972) ("It is well settled that the reasons actually advanced by an administrative agency are the only reasons properly considered by a court in determining the legality of the agency's action.").

Finally, the Board makes an argument that not even the Union makes—that Ridgewood failed to raise its argument that the interrogation was lawful to the Board and that § 10(e) of the Act, therefore, jurisdictionally bars this Court from considering it. (Resp't's Br. 26; *see also* Intervenor's Br. 12–14.) Ridgewood, however, specifically stated in its exceptions: "Respondents except to the ALJ's finding that they violated § 8(a)(1) of the Act through unlawful interrogation of employees." (Supp. R. 18.)

Regardless, the law does not require the rigidity the Board claims. "[T]here is a difference between raising new issues and making new arguments on appeal. If an issue is 'properly presented, a party can make

any argument in support of that [issue]; parties are not limited to the precise arguments they made below.'" *In re Home Depot Inc.*, 931 F.3d 1065, 1086 (11th. Cir. 2019) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)); *accord Sec'y, U.S. Dep't of Labor v. Preston*, 873 F.3d 877, 883 n.5 (11th Cir. 2017) ("Offering a new argument or case citation in support of a position advanced in the district court is permissible—and often advisable.")).

In *Home Depot*, the defendant made one argument in the district court (there should not be a multiplier to class counsel's lodestar) and a different one in this Court (the multiplier was incorrectly calculated), but this Court held that the "contradictory" arguments raised no new issue. *See Home Depot*, 931 F.3d at 1086. Here, Ridgewood excepted to the ALJ's finding that the alleged interrogation was unlawful, even relying on an on-point case for its supposedly "new argument." (Supp. R. 18, 38 n.96 (citing *Oil Capital Sheet Metal*, 349 NLRB 1348, 1355 (2007).) Thus, Ridgewood has raised no new "objection that has not been urged before the Board." 29 U.S.C. § 160(e). The most that can be said is that

Ridgewood has offered additional argument in support of an issue that it raised before the Board.[2]

B. The Board failed to show that Ridgewood discriminated against applicants because of anti-union animus.

For a company with supposed anti-union animus, Ridgewood certainly went out of its way to try to hire the former-Preferred employees who were in the bargaining unit. The Board does not dispute that Ridgewood:

- Encouraged Preferred employees to apply on multiple occasions;
- Told Preferred employees that it wanted to hire 99.9% of them;
- Gave Preferred employees hiring preference by interviewing them first; and
- Hired them in a much greater percentage than it did non-Preferred—non-Union—applicants (80% to 50%).

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[2] Moreover, because the Board's decision contradicts binding precedent in this Circuit, had Ridgewood failed to disclose the contradictory and controlling law, the Board and Union would have been obligated to do so themselves. *See* Model Rules of Prof'l Responsibility r. 3.3(a)(2) (Am. Bar Ass'n 2016).

(Resp't's Br. 33.) The Board does not dispute that Ridgewood hired all known union members. (*Id.*) The Board also does not dispute that Ridgewood offered employment to four former-Preferred employees who either declined the offer or never showed up for work (*Id.* at 54.) Thus, the Board tacitly concedes that Ridgewood offered employment to enough former-Preferred bargaining-unit employees for those employees to have been a majority of Ridgewood's bargaining unit when Ridgewood began operations on October 1, 2013.

The Board, instead, contends "[t]he Company could have both acted pursuant to a union-avoidance hiring scheme and engaged in every activity it enumerates" and Ridgewood is simply asking the Court to reweigh evidence. (Resp't's Br. 34.) Not so. The substantial-evidence standard may be deferential, but it is not judicial abdication. Here, the Board ignored the substantial evidence that detracted from its finding that Ridgewood's hiring decisions were driven by a desire to avoid a Union majority, and it relied on evidence that is irrelevant to its convoluted "reversed course" theory of animus. The result is a finding that is unreasonable given the evidence and that is unsupported by

articulable, cogent, and reliable analysis. *See Northpoint Health Servs., Inc. v. NLRB*, 961 F.2d 1547, 1550, 1554 (11th Cir. 1992).

Moreover, the Board fails to distinguish controlling precedent that supports rejection of the Board's animus theories. *See Fla. Steel Corp. v. NLRB*, 587 F.2d 735, 742, 744 (5th Cir. 1979) (holding general anti-union attitude is not enough); *NLRB v. Birmingham Publ'g Co.*, 262 F.2d 2, 8 (5th Cir. 1977) (same); *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 492 (5th Cir. 1979) (same). Although the Board correctly notes that these cases predate *Wright Line,* 251 NLRB 1083 (1980), *enf'd,* 662 F.2d 899 (1st Cir. 1981), it fails to explain why that matters and what *Wright Line* changed that affects the continued validity of those decisions. (Resp't's Br. 34.)

Finally, the Board attempts to distinguish *BE & K Constr. Co. v. NLRB,* 133 F.3d 1372 (11th Cir. 1997), on the basis that the expression of anti-union animus was lawful in that case but, here, the Board found "unlawful anti-union conduct, namely, the coercive pre-hire interrogations and Cooper's discharge threat." (Resp't's Br. 35.) But the Board is also relying on Brown's statement that the facility possibly could close, (*see id.* at 38–40), a statement that has never been found unlawful,

and it fails to explain how, consistent with Circuit law, it can rely on Brown's statement to show unlawful hiring animus. (Resp't's Br. 35.)

1. The interrogation finding does not establish unlawful hiring animus.

As to its finding that the supposed interrogation of applicants supports a finding of anti-union animus, even the Board seems to struggle to make sense of the decision. The *Wright Line* analysis requires anti-union animus by or imputable to a decision-maker. *Cf. Delchamps, Inc. v. NLRB*, 585 F.2d 91, 94–95 (5th Cir. 1978) ("[T]he Board must show that the particular supervisor responsible for the firing must know about the discharged employee's union activities."). The Board never explains how it extrapolated decision-maker animus based on a supposed interrogation when:

- For interrogation, the speaker's intent is irrelevant;
- The Board never identified the persons who supposedly interrogated the applicants, and the ALJ's unadopted identification is vague; and
- No one testified the questions were coercive, threatening, or accompanied by expressions of anti-union animus.

See CBI Na-Con, Inc., 343 NLRB 792, 793 & n.9 (2004); *Am. Freightways Co.*, 124 NLRB 146, 147 (1959); *see also* (R. 35–36, 55, 70, 87, 90–91, 109–11, 138, 149, 157, 159, 177–178, 194, 207–08, 230–31, 246–47, 346–47, 1567, 1589.)

Rather than explain, the Board makes an argument that is, at best, illogical and, at worst, indecipherable:

> 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.

(Resp't's Br. 36.) As best as Ridgewood can discern, that argument recognizes that an interrogation finding is "distinct" from an anti-union animus finding, which supports Ridgewood's position and contradicts the Board's conclusion that one equals the other. Charitably, the argument may be that although interrogation requires no intent, the Board could nonetheless infer intentional anti-union animus, but that is not what the Board did. And allowing an inference of animus from a no-intent violation (one that was not even a violation) would be to contrary to the facts of the

case, the Board's decision, and Board precedent holding that unlawful interrogation is insufficient to show discriminatory motivation in hiring. *See CBI Na-Con*, 343 NLRB at 793 & n.9.

The Board attempts to avoid that conundrum by arguing that Ridgewood reads *CBI Na-Con* too broadly. (Resp't's Br. 36–37.) The Court can, and should, reject that argument. In *CBI Na-Con*, the Board held the unlawful interrogation finding did not establish anti-union hiring animus—did not "undermine" the lawful hiring process. *CBI Na-Con*, 343 NLRB at 793 & n.9. The Board went on to say, "even if we were to find that Kinchen's comments manifested union animus on the Respondent's part,"—a clear indication it previously held the unlawful interrogation did not manifest union animus—it would still "not prove disparate treatment of union applicants in the hiring system." *Id.* at 793. Thus, Ridgewood's reading of *CBI Na-Con* is correct, and the Board has not justified its departure from that precedent in this case.

Although the Board cites other decisions, many do not mention, let alone analyze, whether an interrogation finding equates to union animus. Moreover, the decisions the Board relies on are distinct for other reasons. Both *Fremont-Rideout Health Grp.*, 357 NLRB 1899, 1902

(2011), and *Mashkin Freight Lines*, 272 NLRB 427, 427 (1984), dealt with other conduct displaying union animus (a threat about participating in a strike and surveillance regarding attending a union meeting, respectively) that occurred concurrent to the interrogations, which made an inference of animus clear. The decision in *Dico Tire, Inc.*, 330 NLRB 1252, 1260 (2000), found animus based on widespread and unspecified "other violations found in this decision." So none of those decisions should guide this Court here.

Lastly, the Board again claims Ridgewood's arguments are barred by § 10(e). (Resp't's Br. 35–36.) The Board is wrong. In its brief in support of its exceptions, Ridgewood specifically stated "[a]lthough the ALJ cites that 'some employees were simply asked if they were members of the union,' the evidence of such alleged questions is not sufficient for animus" and that "the ALJ's findings are insufficient to establish anti-union animus." (Supp. R. 37; *see also* Supp. R. 17.) So Ridgewood raised nothing new here, and, regardless, Ridgewood can raise different and additional arguments. *See Home Depot Inc.*, 931 F.3d at 1086; *Preston*, 873 F.3d at 883 n.5.

2. Brown's statement about potential closure of the facility does not show unlawful hiring animus.

At the threshold, the Board makes a narrow § 10(e) argument—Ridgewood did not deny Brown made the challenged statement. Although this does not affect Ridgewood's other substantive challenges, Ridgewood took exception to the "ALJ's reliance on . . . statements allegedly made by Ms. Brown months after the hiring decisions and after RHS commenced operating the facility" to display anti-union animus. (Supp. R. 17.) Ridgewood's reference to a statement "allegedly" made reflects its disagreement with the ALJ's conclusions, which is sufficient.

The Board's desire to avoid discussion of Brown's statement makes sense because the evidence the ALJ and Board relied on is self-contradictory. The Board recognizes that two of the three witnesses the ALJ relied upon to show Brown made a threat never said Brown made a threat. The Board argues, however, the ALJ cites those persons as "support [for] his finding concerning other statements made during the same meeting." (Resp't's Br. 40). The cites, however, are directed to one sentence dealing exclusively with the "shut down" comment and the ALJ does not reference in the sentenceto any "other statements" to which

those cites were referring. (R. 1593 & n.59.) So, the testimony the ALJ relied on is self-contradictory.

More fundamental, the Board correctly concedes that Brown's statement has never been found to be unlawful. (Resp't's Br. 38–39.) The Board also recognizes that binding precedent establishes that lawful expressions of a company's anti-union stance cannot be used to show anti-union hiring animus. (Resp't's Br. 35 (citing *BE & K Constr.*, 133 F3d at 1377)). The Board never explains how, consistent with *BE & K*, it can use Brown's never-found-unlawful statement to show animus.

Instead, the Board relies on a single decision—one of its own—as establishing that conduct not found to violate the Act can "shed light" on motive. *Am. Packaging Corp.*, 311 NLRB 482, 482 n.1 (1993). *American Packaging*, however, predates and is inconsistent with this Court's decision in *BE & K*. To the extent the Board still takes a position contrary to *BE & K*,[3] the Board is operating "outside the law" by using the wrong

[3] Both the Fifth Circuit and at least one ALJ have noted the Board's position may remain in conflict with *BE & K*. *See Brown & Root, Inc.* v. *NLRB*, 333 F.3d 628, 639 (5th Cir. 2003); *Fleming Cos.*, No. 26-CA-17899, 1998 WL 1985249 (N.L.R.B. Sept. 18, 1998) (noting the Board's continued reliance on anti-union statements not found to be lawful as evidence of hiring animus and specifically stating the Board's position conflicts with Circuit law, including *BE & K*, 133 F.3d at 1375–76), *aff'd as modified*

legal standard. *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979) ("For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law. Such an order will not be enforced."), *abrogated on other grounds by* 29 C.F.R. § 103.30(a)(5) (1989).

The Board admits that "the complaint did not allege, nor did the Board find, that Brown's threat constituted an independent violation of the Act," but it belatedly analyzes whether the statement was a violation of the Act, arguing Brown's statement was based on "unsupported assumption[s]." (Resp't's Br. 39; *accord* Intervenor's Br. 20 (arguing why statement was an "unlawful threat").) This analysis comes far too late and is jurisdictionally barred. *See* 29 U.S.C. § 160(e). Similarly, this Court is not tasked to weigh the facts when neither the ALJ nor the Board did so. *See Chenery*, 332 U.S. at 197; *Clark*, 468 F.2d at 467.

Regardless, the Board's argument that Brown's mention of the possibility of the closing rests on "unsupported assumptions" is incorrect. The previous nursing home had closed due to financial pressures. (R. 420-

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sub nom. In re Fleming Cos., 336 NLRB 192 (2001), *enf'd in part & denied in part sub nom. Fleming Cos. v. NLRB,* 349 F.3d 968 (7th Cir. 2003).

422). Witnesses testified about the facility's precarious financial situation. (R. 509-510, 639). Brown testified about the financial pressures. (R. 426-427). Thus, Ridgewood's argument is not based on "unsupported assumptions."

3. Cooper's statement months after the fact cannot establish unlawful hiring animus.

Once again, the Board argues that Ridgewood did not raise an argument to the Board, this time that a finding of animus based on non-decision-maker Cooper's post-hac statement was improperly imputed to Brown, and that the argument is barred under § 10(e). And, once again, the Board is wrong. Ridgewood specifically argued in its exceptions: "Sheila Cooper, who allegedly made a threat to Caitlyn Bollinger, was not involved in the interviews or hiring decisions of the former-Preferred employees. The alleged threat by a non-decision-maker who was not employed at the time, months after the transition cannot demonstrate animus during the hiring process." (Supp. R. 36.)

Next, the Board argues Cooper had a "connection" to the alleged hiring scheme because she gave input about a Preferred applicant and non-Preferred Applicant (neither were hired). (Resp't's Br. 41–42.) This argument is a good old red herring.

The Board's theory is that Brown "reversed course" and implemented a no-rehire rule to manipulate the number of former Preferred employees hired, but Cooper's challenged statement has no relation to the no-rehire rule. There is no evidence that anyone consulted Cooper about the no-rehire rule—she was not a Ridgewood or Ridgeview employee at the time—and there is no evidence she provided any input on the rule. Cooper's input into two applicants had nothing to do with the no-rehire rule.

Thus, as Ridgewood explained in its principal brief, the Board has, without adequate explanation, retroactively imputed the mindset of a non-decision-maker to Brown's alleged decision to "reverse course" and implement the no-rehire rule. (*See* Pet'r's Br. 43–47.) More, the non-decision-maker gave no input about the rule and was not even a Ridgewood employee when Ridgewood implemented the rule. (*See id.*) What the Board has done makes no sense.

The only remaining matter is the decision involving Wilson. The Board argues that animus can be inferred when "those with knowledge and bias recommended discharge." (Resp't's Br. 41 (citing *Inova Health Sys. v. NLRB*, 795 F.3d 68, 83 (D.C. Cir. 2015).) There is, however, no

evidence Cooper, had "knowledge" of Wilson's union membership, or even that Cooper knew Wilson worked at Preferred. *See Pioneer Nat. Gas Co. v. NLRB*, 662 F.2d 408, 412 (5th Cir. Unit A Nov. 30, 1981) (reversing a finding of discriminatory discipline because the decision-makers learned about the union activities after the discipline issued).

The Board attempts to fix that problem by blurring the lines between what Cooper knew and what Brown knew. It argues: "Cooper played a role in hiring, and Brown personally knew of the employees' union affiliation." (Resp't's Br. 42.) The Board offers no justification for imputing Brown's knowledge to Cooper. Further, Cooper also gave input that led to a non-Preferred applicant not being hired, (R. 677–78) and treating Preferred and non-Preferred applicants the same does not suggest animus. *Cf. NLRB v. Winona Textile Mills*, 160 F.2d 201, 208 (8th Cir. 1947) ("The disproportionate treatment of union and non-union employees may be persuasive evidence of discrimination in violation of Sec. 8(3). But this section does not impose an obligation to favor union employees over others." (citations omitted)).

4. The statements the Board relies on are too remote in time to support hiring animus.

Curiously, the Board devotes a separate section of its brief to arguing that Cooper's and Brown's after-the-fact statements (if they happened at all) were not too late to support a finding of animus. (*See* Resp't's Br. 42–44.) Those statements occurred over three months and multiple weeks, respectively, after Ridgewood began operations on October 1, 2013, and even further from when Ridgewood decided to implement the no-rehire policy and when it made hiring decisions. Continuing to rely on cases permeated with unlawful conduct and egregious acts and with misconduct that occurred close in time to the challenged action, the Board argued that in "certain circumstances" after the fact statements can support animus. (Resp't's Br. 43.)

The Board primarily relies on *R.J. Corman Railroad Construction, LLC*, 349 NLRB 987, 1000 (2007), which it calls "remarkably akin." (Resp't's Br. 43.) But, as Ridgewood explained in its principal brief, *R.J. Corman* is not akin at all. (*See* Pet'r's Br. 45–46.) And the only thing remarkable is that *R.J. Corman* is the closest case the Board could find.

In *R.J. Corman*, the company told a covert union applicant that it was hiring, but fifteen people who showed up in union gear the next day

were told the company was not hiring and were not hired, even though the company continued to hire. 349 NLRB at 987–88. The decision-maker then, that very day, immediately asked one person if he was in the union and told him the company would not stand for "union bullshit" and threatened to "close the doors" before the operation went union. *Id.* at 988. No more than a few weeks later, at a meeting with twenty to thirty employees, the same decision-maker threatened plant closure and loss of benefits—their transportation to and from Kentucky, their meal and lodging expenses, and their uniforms—if the operations went union. *See id.* So the decision-maker's same-day comments, which he reinforced a few weeks later, may have occurred after the fact, but they were substantially closer in time than the statements here, and the decision stated that their closeness in time was significant. *See id.* at 989 ("Significantly, these violations closely followed the union members' attempted application for employment, and they were clearly based on the Union's attempt to organize the Respondent's employees at Bedford

Park."). Thus, *R.J. Corman* is not "akin" to the case here, where all of the comments occurred long after the fact.[4]

5. There is not substantial evidence to show anti-union hiring animus.

As explained in Ridgewood's principal brief, the Court should reverse, or at the very least remand, if the Court concludes that substantial evidence fails to support any of the three grounds on which the Board based its animus finding. (*See* Pet'r's Br. 50–53.). In response, the Board agrees in part. The Board argues if the Court does not uphold the "entire animus finding," then "remand, rather than denial of enforcement, would be proper." (Resp't's Br. 34 n.10.) Thus, if the Court does not uphold the entire animus justification, both Ridgewood and the Board agree enforcement is improper.[5]

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[4] For the reasons already stated in its principal brief, the decisions in *K.W. Electric, Inc.*, 342 NLRB 1231, 1231 (2004), and *SCA Tissue North America, LLC v. NLRB*, 371 F.3d 983, 987 (7th Cir. 2004), also involved conduct that was close in time to the challenged decision. *See* (Pet'r's Br. 45–46); *see also SCA Tissue N. Am., LLC*, 338 NLRB 1130, 1133 (2003).

[5] To the extent the Board seeks to rely on any other supposed violations of § 8(a)(1) as evidence of animus—*e.g.*, the letter to employees stating that the Union no longer represented them or the Union's information request—any such reliance would be circular. The Board would be arguing that Ridgewood was motivated by anti-union hiring animus based on actions that are only violations if Ridgewood's failure to

C. Regardless of any supposed anti-union hiring animus, Ridgewood would have made the same hiring decisions.

1. Ridgewood did not implement the no-rehire rule to avoid hiring Preferred's unionized employees, and it would have made the same decision regarding Davis, Eads, and Sickles.

The general thrust of the Board's argument is that Brown supposedly told employees that the no-rehire policy would not apply but then implemented the policy to manipulate the hiring process to avoid a workforce comprised of a majority of Preferred bargaining unit employees. The Court should reject that argument, conclude the no-rehire rule was neutral, and conclude that Ridgewood would have made the same decision not to hire Betty Davis, Gina Eads, and Connie Sickles regardless of any supposed anti-union hiring animus.

To begin, the Board argues: "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." (Resp't's Br. 45.) But that statement is

hire Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson was discriminatory. But those actions are only discriminatory if the Board can show that Ridgewood's hiring decision was motivated by anti-union hiring animus.

false. There was no testimony about statements at multiple "meetings," and Brown never told ineligible employees they would be eligible for hire. Instead, one witness testified that, in one meeting, she asked if people fired from Ridgeview would be considered for employment at Ridgewood. (R. 73–74.) Brown purportedly said that they would have to apply and would be considered "just like everyone else." (R. 73–74, 1568, 1570.)

As Ridgewood explained in its principal brief, the witness's question did not call on Brown to fully explain Ridgeview's no-rehire policy and its application at Ridgewood, and her response to the statement was true.[6] (*See* Pet'r's Br. 56–57.) The Board dismisses that explanation an "anemic challenge," but it offers little more than questions about Brown's business judgment in place of reasoning why that challenge is not virile and ferrous. (Resp't's Br. 45–46; Intervenor's Br. 21.)

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[6] The Board argues yet again that § 10(e) prohibits the Court from considering Ridgewood's argument. (Resp't's Br. 45.) Again, that is wrong. Ridgewood argued in its exceptions: "Contrary to the ALJ's finding, no one testified that Brown said the no-rehire rule would not apply. That she did not disavow the rule supports her intent to apply the rule to RHS, but, at the same time, to allow everyone to apply." and it cited to the relevant testimony and portion of the ALJ's order. (Supp. R. 42 & n.105.)

Indeed, much of the Board's arguments are based on its apparent belief that Brown should have better explained herself. Yet, a less-than perfect explanation does not make her statement false or indicate that Ridgewood reversed course. Moreover, the Board's simple disagreement with Brown's business judgment—how to respond to a difficult question after being put on the spot in a room full of employees she was trying to convince to apply to her new company—is an insufficient basis to discredit Ridgewood's no-rehire policy as a ruse to conceal anti-union hiring animus. *See Mueller Brass Co. v. NLRB*, 544 F.2d 815, 819 (5th Cir. 1977); *Davison-Paxon v. NLRB*, 462 F.2d 364, 371 (5th Cir. 1972); *Sam's Club*, 349 NLRB 1007, 1009 n.10 (2007). The Board's disagreement with how Ridgewood should have allocated its resources to improve efficiency during the interview process is in the same vein—an attack on Ridgewood's business judgment. (Resp't's Br. 57–58.)

In addition, the Board refers in its brief to an interview it neither mentioned nor considered in its decision, in which an applicant testified that non-decision-makers Kara Holland and Vicki Burrell, in response to a question from the applicant, said they were not aware of the no-rehire policy. (Resp't's Br. 26, 61; *accord* Intervenor's Br. 22; *see also* R. 188,

1590 (ALJ decision).) The Board did not find this discussion mattered when it issued its decision, and neither should the Court. Presumably the Board knew those statements by non-decision-makers had no relevance. That leaves the Board's argument for a reversal of course entirely reliant on Brown's statement that former-Ridgeview employees would be considered like "everyone else."[7] (R. 73–74.)

As in the Board's decision, the Board and the Union cite no evidence in their briefs: (1) that Ridgewood "reversed course" between the alleged July statement and the September hiring; (2) as to what would have prompted any such reversal; or (3) that Ridgewood believed the no-rehire rule would disqualify more former-Preferred employees than other applicants. Instead, they both respond by contending that, because the Board found animus, it could assume everything else: "the Board found … union avoidance motivated [Ridgewood's] hiring and that its intent

[7] From a practical perspective, no reasonable business in Ridgewood's position, needing Preferred to continue operations for months after the meeting at issue, would have told Preferred employees they had no chance to be retained when the facility changed hands in October. To do so would have guaranteed that those employees would look for other employment, and the loss of those employees could have threatened the on-going operations and patient care during the transition period.

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." (Resp't's Br. 47; *accord* Intervenor's Br. 23.) This circular, *ipse dixit* argument, is not substantial evidence, let alone persuasive or reasoned.

Moreover, the Board admits that its reversed course theory resulted in more non-Preferred applicants being disqualified. GC claims this is "wholly irrelevant" because the no-rehire rule had the "intended effect of avoiding a union majority." (Resp't's Br. 49.) This argument is difficult to understand as the no-rehire rule actually had the opposite effect. Instead of "avoiding a union majority," it caused Ridgewood to hire fewer non-Preferred applicants. (*See* Part II.D.1., *infra*.)

2. Ridgewood would have made the same decision regarding Wilson.

The Board fails even to address two of the meritless bases for the decision that Ridgewood discriminated against Wilson: the altercation was not in Preferred's personnel documents (the incident did not happen at Preferred)[8] and Wilson was not questioned about it in her interview

[8] The Board focused on the absence of information in Preferred's files, but the ALJ focused on the absence of information in Ridgeview's

(Ridgewood did know of the incident until after Wilson's interview). (R. 542–43, 1570.)

Instead, the Board contends Ridgewood has not explained the "difference" between failing to ask Wilson about her past misconduct in her interview and evidence another applicant was asked about her past misconduct in her interview. (Resp't's Br. 50–51.) But what "specific, corroborated" evidence the Board refers to is unclear. Brown's testimony about the other applicant was brief and inconsequential, but at its heart showed Brown used similar judgment for both the other applicant and Wilson—she did not want to hire an applicant with past work issues. (R. 453–54, 466, 538–39.) Specifically, Brown relied on a complaint by a high school friend that the other applicant had been rude to a family member who was under Preferred's care. (R. 453–54) Brown could not recall how she received the information ("notice or a phone call") or who was present when she received it. (R. 453–54.) And, even though Ridgewood knew

files. (R. 1390, 1570.) Although Ridgewood discussed the lack of information in Ridgeview's files in its principal brief, the reasoning is the same. Because the incident did not happen at Preferred, there is no reason it would be in Wilson's Preferred file.

about the incident when it interviewed the other applicant, no one asked her about it in her interview. (R. 453, 538–39.)

Given those circumstances, there is no "specific, corroborated" evidence that differs from Wilson's circumstances. Indeed, if it was lawful not to hire the other applicant based on a second-hand account of rude behavior without asking her about it in her interview—one that was known at the time of the interview—then it is certainly lawful not to hire Wilson based on a report of more serious behavior—a workplace altercation—that Ridgewood lacked an opportunity to ask about during her interview. So, far from condemning Ridgewood's refusal to hire Wilson, Ridgewood's decision not to hire the other applicant is fully consistent with Ridgewood's refusal to hire Wilson. Regardless, the other applicant was also a Preferred applicant, (R. 59–60), and treating members of the same protected class differently does not suggest animus or discrimination. *See Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1030 (5th Cir. 1980); *see also Mann v. Frank*, 7 F.3d 1365, 1370 (8th Cir. 1993).

The Board's argument that Brown had only second-hand knowledge of Wilson's misconduct also proves nothing. (Resp't's Br. 51) Employers

regularly rely on second-hand knowledge, such as an application or a reference, and Brown also relied on second-hand knowledge to disqualify the applicant accused of being rude. The Board's opinion that Brown should have gotten first-hand information instead of relying on Cooper is yet another attempt to substitute the Board's business judgment for Ridgewood's.

Finally, the Board question's Brown's "incomplete recollection." (Resp't's Br. 51.) Lack of perfect recall does not show Brown lacked a good-faith belief that hiring Wilson would be a bad idea given Wilson's altercation with a coworker at another facility, and Brown's good-faith belief is enough. *See Hawaiian Dredging Constr. Co. v. NLRB*, 857 F.3d 877, 885 (D.C. Cir. 2017) ("Under *Wright Line*, evidence of a good faith belief suffices to establish a defense, even if the belief is erroneous."). Moreover, Brown twice testified that Cooper had told her that Wilson had been part of an altercation with another employee at another nursing home, and that is why Wilson was not hired. (R. 484, 542–43.) There is no evidence, let alone substantial evidence, Brown lacked a good faith belief that Wilson had engaged in conduct that justified refusing to hire her.

In any event, the altercation between Wilson and a co-worker at another facility—not Preferred or Ridgeview—is not the only reason Ridgewood offered for its decision not to employ Wilson on October 1, 2013. It is undisputed that Wilson had also failed her physical examination. (R. 584–85, 1259, 1571 n.11.) That failure is another legitimate, nondiscriminatory basis for Ridgewood's decision not to employ her, and the neither the Board nor the Union have shown that Ridgewood would have allowed Wilson to work after failing her physical but-for anti-Union animus.

D. Ridgewood is not a successor to Preferred.

1. Under any analysis, former members of the Preferred bargaining unit would have never been a majority of Ridgewood's workforce.

Regardless of whether the no-rehire rule was lawful, a majority of Ridgewood's employees still would not have been former Preferred bargaining-unit members, which means Ridgewood still would not have been a successor employer. (*See* Pet'r's Br. 64–67.) The Board somehow finds "baffling" and "puzzling Ridgewood's common-sense analysis that the no-rehire rule disqualified seven applicants—three former-Preferred employees (Davis, Eads, and Sickles) and four non-Preferred employees—which means the no-rehire rule cannot have prevented a

Union majority. (Resp't's Br. 55.) But what finds no evidentiary support is the Board's baffling and puzzling one-in-one-out assumption—that if Ridgewood had hired Davis, Eads, and Sickles it would necessarily not have hired three eligible and qualified non-Preferred applicants that were part of Ridgewood's workforce on October 1, 2013.

The Board claims that Ridgewood's "puzzling claim" that, absent the no-rehire rule it would have started operations with 108[9] instead of 101 employees "is contrary to the credited record evidence." (Resp't's Br. 55; *see* Pet'r's Br. 66–67.) But the Board never identifies what record evidence Ridgewood's common-sense analysis contradicts. The actual record evidence is that Ridgewood was not rejecting qualified applicants but, instead, hired through October 1 and continued to hire after that, including hiring twenty-two applicants in the following six weeks. (R. 177, 509–11, 513, 639, 1000.)

What is more, Ridgewood offered more than 101 applicants employment. In fact, it offered employment to four former-Preferred

[9] Ridgewood reaches the number 108 by adding the 101 employees it hired, the three former-Preferred employees disqualified under the no-rehire rule, and the four non-Preferred employees disqualified under the no-rehire rule.

employees who either declined offers of employment or just did not show up for work.[10] (R. 89, 241, 1000.) This demonstrates that the Board's one-in-one-out theory is wrong. If that theory were correct and 101 employees were a ceiling, then Ridgewood would have had to be prepared to rescind up to four employment offers had all 105 applicants accepted employment and shown up for work. There is simply no evidence of that. Instead, all the evidence demonstrates that Ridgewood would have hired all eligible and qualified applicants.

Although the Board repeatedly refers to the facility being "adequately staffed on October 1," (Resp't's Br. 55), that is a fundamentally different issue than whether the record evidence supports the Board's one-in-one-out theory, which requires a conclusion that Ridgewood would have rejected eligible and qualified applicants because it had hired someone else. There is no evidence to support that conclusion. Again, to the contrary, the evidence is that Ridgewood was

[10] Had those four accepted their offers of employment, Ridgewood would have begun operations on October 1, 2013, with a 53-52 majority of former members of the Preferred bargaining unit. This further demonstrates that Ridgewood never manipulated the hiring process to ensure a non-Union majority as has been argued. (*See* Part II.C.1., *supra*.)

seeking and hiring eligible applicants at all relevant times, and Ridgewood was not rejecting anyone who was qualified and eligible before October 1. (R. 98, 116, 170, 177, 430-32, 509–11, 513, 589, 599, 639, 1000.)

Lacking evidence, the Board misstates its own precedents, claiming it is a "fundamental principle" that "the Board adds in the unionized discriminatees (non-hires) and subtracts the same number of non-unionized hires." (Resp't's Br. 53–54 (citing *Pac. Custom Materials, Inc.*, 327 NLRB 75, 86 (1998); *J.D. Landscaping Corp.*, 281 NLRB 9, 11 (1986)).) But the cases on which the Board relies arose from different circumstances than those present here.

In *Pacific Custom Materials*, the predecessor had thirty-two bargaining unit employees, and it was undisputed the successor sought to hire thirty-two employees. *See* 327 NLRB at 78, 81. A document even listed thirty-two needed hires. *See id.* at 79. The decision never discussed some broad one-in-one-out rule. And, unlike here, the employer never argued it would have hired all qualified applicants. Instead, it argued the opposite—that it hired only the most qualified applicants to get to thirty-two. *See id.* at 80, 85. Moreover, unlike here, adding the discriminatees (ten) and union members already hired (thirteen) created a majority of

union members in the bargaining unit under any calculation. *See id.* at 84–85.

In *J.D. Landscaping*, the successor company instructed a recruiter to hire "25 good men," and the company was undoubtedly a successor because it hired twenty former union member employees and six outside hires. 281 NLRB at 10. The ALJ concluded some former union applicants were discriminated against, which had nothing to do with a one-in-one-out successor theory. *See id.* at 10–11.

Thus, neither *Pacific Custom Materials* nor *J.D. Landscaping* support application of a one-in-one-out rule as a matter of law, and the evidence fails to supports applying such a rule in this case. And under any analysis, former-Preferred bargaining-unit members were never, and would never have been, a majority of Ridgewood's workforce.[11] So Ridgewood is not Preferred's successor.

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[11] As stated in Ridgewood's principal brief, if the Court were to conclude that Ridgewood would have hired Davis, Eads, and Sickles but-for anti-union hiring animus, but it does not include the four non-Preferred employees in the calculation of majority status, the result would be a 52-52 tied with Wilson as the tiebreaker. (*See* Pet'r's Br. 66 n.15.) In that instance, the Court will need to decide whether Wilson's hiring claim survives the second step of the *Wright Line* analysis—whether Ridgewood would have refused her employment anyway based on her altercation with a coworker at another facility. If the Court

2. Helping Hands are part of the bargaining unit.

The Board claims Ridgewood's argument that the "Helping Hands" employees are in the bargaining unit is not properly before the Court because Ridgewood should have filed a motion for reconsideration. (Resp't's Br. 55–56.) Ridgewood filed exceptions on the issue, and the Board declined to consider it. (Supp. R. 7, 10, 20–26; R. 1571 n.11.) There was no requirement for Ridgewood to ask the Board again to consider an issue the Board had just expressly declined to consider.

Finally, the Helping Hands analysis is not, "a highly detailed factual" question, as made clear in Ridgewood's brief. (Resp't's Br. 56.) It is a simple, straightforward application of undisputed facts to clear law and remand is unnecessary. (*See* Pet'r's Br. 67–71.)

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concludes Wilson's claim survives *Wright Line* on that basis, it should remand to the Board for a decision on whether Wilson's failure of her physical excludes her from the successorship analysis. (*See id.*)

III. CONCLUSION

For these reasons, and those stated in Ridgewood's principal brief, the Court should grant Ridgewood's petition for review and deny the Board's application for enforcement.

Respectfully submitted,

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No. 19-11615 & 19-12209

Ridgewood Health Care Center, et al. v. NLRB

CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in 14-point Century Schoolbook, which is a proportionally spaced font that includes serifs.

This brief complies the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2)(A)(i) because it contains 8,107 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 32-4.

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Dated: November 22, 2019

No. 19-11615 & 19-12209

Ridgewood Health Care Center, et al. v. NLRB

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2019, a copy of the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system, which will serve it on the following CM/ECF participants. If a party served does not participate in the CM/ECF system, I have served them by FedEx.

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