

20-1522(L)

20-1973(XAP)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

305 WEST END HOLDING, LLC, d/b/a 305 WEST END AVENUE OPERATING, LLC, ULTIMATE CARE MANAGEMENT ASSISTED LIVING MANAGEMENT, LLC, A DIVISION OF THE ENGEL BURMAN GROUP, d/b/a ULTIMATE CARE MANAGEMENT, LLC,

Petitioners-Cross-Respondents,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

**REVISED BRIEF AND SPECIAL APPENDIX
FOR PETITIONERS-CROSS-RESPONDENTS**

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JURISDICTIONAL STATEMENT

This matter was initiated by the filing of Unfair Labor Practice charges with the National Labor Relations Board by Local 2013 of the United Food & Commercial Workers against 305 West End Avenue Operating, LLC (previously incorrectly identified as West End Holding, LLC). The Board subsequently issued a Complaint against Petitioner 305 West End pursuant to 29 U.S.C. § 160(b). An Administrative Law Judge conducted a hearing and on February 7, 2019, issued an opinion in which he ordered relief against both 305 West End and Ultimate Care Assisted Living Management, LLC (previously incorrectly identified as a division of The Engel Burman Group). 305 West End and Ultimate Care subsequently filed exceptions to the ALJ's decision. The Board issued a final order pursuant to 29 U.S.C. § 160(c) on April 29, 2020, in which it granted relief against both Petitioners/ Cross-Respondents. This Court has jurisdiction of this case pursuant to 29 U.S.C. § 160(f). The underlying Petition for Review was timely filed on May 8, 2020.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Board properly held that the “substantial and representative complement” of employees at the property (previously called The Esplanade) was reached on December 5, 2016, even though the hiring of a significant part of that complement included the probationary maintenance employees that 305 West End was required to hire pursuant to a local ordinance.

2. Whether 305 West End and/or Ultimate Care is a successor employer despite the fact that a majority of its employees, following the replacement of the probationary maintenance workers it was compelled to hire, were not employees who had previously worked at the Esplanade.

3. Whether the Union in this case was a members-only union and therefore is not entitled to any presumption of majority status, nor should employees who were not members of the Union be counted in determining successorship.

4. Whether 305 West End and Ultimate Care are joint employers under the standard appropriately applied to this case.

5. Whether the operation of the property at 305 West End is substantially the same as it was when it was managed by 305 West End’s predecessors, even though it was previously senior residential living and under 305 West End it is licensed assisted living, which entails substantial differences that break continuity between the two businesses.

6. Whether 305 West End and/or Ultimate Care is obligated to rehire or otherwise make Trinidad Hardy whole even though she received severance pay and signed a total release of claims.

STATEMENT OF THE CASE

1. Nature of the Case and Relevant Procedural History.

The property located at 305 West End Avenue in New York City was run for many years as The Esplanade, an independent senior living residence. A-91. It was not licensed by the New York Department of Health and provided no medical services of the kind required for an assisted living residence. A-182-183, A-211, A-228-229; A-395-396. It was simply a residence where elderly people could live. A-395-396. An unlicensed community is not responsible for the residents' well-being and does not have to comply with any Department of Health standards or regulations. *Id.* By contrast, the regulations governing assisted living buildings require all staff to be trained on how to recognize potential medical issues with the residents. A-394-395, A-414-415. Housekeepers, for example, must be trained to look for warning signs of illness, and kitchen staff must check lists of approved foods before serving food to a resident. *See, e.g.,* A-396-397, A-417-418, A-421.

The 2015 collective bargaining agreement between Local 2013 and the Esplanade (through its payroll company, County Agency) included a “wall-to-wall” unit definition like the 348S collective bargaining agreement, but it is undisputed, for example, that the Union did not represent recreation employees (those who engaged in recreational activities with the residents). *Compare* A-2429; A-2555;

A-2437 (dues check-off provision); and A-909 with A-312, A-317-318, A-340, A-670-673, A-769, A-785, A-824, A-826.

In addition, other hourly employees whom the Union supposedly represented had never paid dues or participated in the Union under Local 348S's stewardship, and they continued not to pay dues or consider themselves members of the Union after the change to Local 2013. *Compare* A-247-249, A-615, A-622-625, A-638, A-745, A-748, A-798-799, A816-817; A-2497-2540 with A-312, A-336. The Union made no attempt to enforce the union security clause. A-624-625, A-745, A-799, A-805-806, A-873, A-877. The Union did not bill dues or health insurance premiums for employees who were identified by Esplanade's Executive Director, Marcy Levitt, as non-Union, and the Esplanade payroll records for 2016 show likewise. *See* A-246-250, A-265-266, A-622, A-734, A-752; A-2497-2540; A-2168-2190.¹

¹ The Administrative Law Judge chose not to credit Levitt's testimony that she decided the raises for non-Union employees, even though her testimony was supported by some of the employees, basing his credibility determination entirely on the 2016 payroll, in which the raises for Union employees matched the ones for those who were not in the Union. ALJ Opinion at 19. Ms. Levitt had been the Executive Director at Esplanade for nearly 20 years, however, and awarded different raises every year; the only year for which payroll information was available was 2016, just before the sale to 305 West End. It would hardly be surprising that she might sometimes choose to match the raises established by the CBA, but that question was never asked, because the admissibility of the payroll information was still being debated when Ms. Levitt testified.

Contrary to law and to the CBA's unit definition, Deannie Duncanson, the Food Services Director who managed a staff of 30 in the kitchen, paid Union dues and recruited for the Union, and two other kitchen managers were also members of the Union. *See* R-67 at Union.6.5.18-0005, -0012, -0013; A-147-160, A-164, A-170, A-239-244, A-252-253, A-255-256, A-258-260, A-263-264, A-569-570, A-572-573, A-597, A-625-628, A-682-684, A-749-751, A-787-788, A-795-798, A-802, A-808, A-814, A-827-828, A-1222 at p. 2; A-2621; *compare* A-2843-2852 at ¶ 13.

In sum, Local 348S and then Local 2013 acted like "members only" unions instead of the exclusive bargaining representatives of all of the non-supervisory employees at the Esplanade.

In 2016, Petitioner 305 West End was created to purchase the property and transform it into a licensed assisted living residence. Shortly before the purchase, executives from Petitioner Ultimate Care inspected the Esplanade property, discovering an appalling lack of cleanliness, including bedbugs, mouse droppings and roaches in the kitchen, and numerous other health code violations. A-408-410, A-433-434, A-519-520, A-568-569, A-602-603, A-647-648, A-679-680, A-710-711, A-766.

The Esplanade employees were alerted to the upcoming sale by meetings and by notices announcing the sale and two job interviewing fairs. A-93-94, A-139,

A-512-514; A-1145-1148. 305 West End wanted to be able to hire some of the existing Esplanade staff if possible, since they were more familiar with the residents and the building than the incoming managers. But experience at the property was not as important as factors like good attitude, ability to adapt to new, more stringent requirements, and the ability to communicate. A-406, A-411-413, A-415-416, A-420-421, A-468, A-517-519, A-573-575, A-598, A-643, A-646, A-649, A-1013-1015.

Given the appalling and filthy conditions at the Esplanade, 305 West End did not want to rehire Esplanade's janitors, porters, handymen/ maintenance engineers, and housekeepers, all of whom fall within the definition of "building service workers" in New York City Administrative Code § 22-505(a) (the Displaced Building Services Workers Protection Act or "DBSWPA").² However, the DBSWPA required that all such employees be retained for at least 90 days after the sale of the property. Thus, 305 West End was forced to retain at least fifteen employees pursuant to the ordinance, and attempted to retrain them to 305 West End's higher standards. A-526-529, A-708-709; A-2482-2485. A-2702-2704.

² "The term 'building service' means work performed in connection with the care or maintenance of an existing building and includes, but is not limited to, work performed by a watchman, guard, security officer, fire safety director, doorman, building cleaner, porter, handyman, janitor, gardener, groundskeeper, stationary fireman, elevator operator and starter, window cleaner, and superintendent." NYC Admin. Code § 22-505(a).

305 West End closed on the property on December 5, 2016, and immediately began to implement its own standards, which were considerably higher than those of the Esplanade, in preparation for becoming a licensed assisted living facility. A-220, A-229-230, A-234-235. Extensive renovations were made throughout the building, and staff received extensive training regarding the new standards to be observed and upheld. A-101, A-120, A-145, A-220, A-229-233, A-260-261, A-263, A-266-267, A-423-425, A-435-440, A-442-443, A-451-454, A-460-461, A-463, A-657, A-715, A-757-758, A-804; A-2442-2449. The Department of Health agreed to license the facility floor-by-floor for assisted living, with the seventh floor certified as of April of 2018, and other floors certified when completed. A-231-234, A-434-435, A-461.

Once the required 90 days of employment for BSW employees had expired, 305 West End's management began the process of evaluating their performance to determine whether they should be retained. A-720-721, A-948-951. (A few had stopped coming to work and needed to be replaced earlier. A-709, A-733-737.) Most of the housekeepers did not meet the heightened standards demanded by 305 West End, but some of the maintenance personnel did. As a consequence, most of the housekeepers retained due to the New York City ordinance were discharged, while most of the maintenance workers were retained. A-2450-2479. Respondent 305 posted for the positions that were open, and it took a few weeks to hire replacements.

A-724-725, A-736-737, A-949-950, A-954-955. Many of the housekeepers were replaced, but not all, because 305 West End used a more efficient staffing model. A-529-531, A-534, A-708-709, A-711, A-715-716, A-948-949. But once the housekeeping staff transitioned from the BSW employees to workers selected by 305 West End, housekeeping was no longer a topic of concern. Tr. 999-1000.

Severance Offers. Esplanade invited the Union to engage in “effects bargaining” after the sale of the property, but the Union refused. Faced with the Union’s lack of cooperation, Esplanade offered severance payments in February 2017 to those County Agency employees who were not hired by 305 West End. Among these was Trinidad Hardy, who received a severance payment of \$14,130.58 in exchange for her signature on a document entitled, “Acknowledgment and Release,” which released “all claims, whether known or unknown” under any and all potentially applicable employment statutes, including the National Labor Relations Act, with respect to Esplanade and its “successors and assigns”. *See* A-2570-2572, A-1229-1235, A-1249-1254; A-155, A-193.

2. **Relevant Procedural History**

When 305 West End took over the building, Local 2013 of the United Food & Commercial Workers (“the Union”) filed Unfair Labor Practice charges against 305 West End, ultimately resulting in the issuance of a Complaint against Petitioner

305 West End by National Labor Relations Board Region 2 pursuant to 29 U.S.C. § 160(b).

A hearing was held, and Administrative Law Judge Benjamin W. Green issued an opinion on February 7, 2019, finding that 305 West End and Ultimate Care Assisted Living Management, LLC (hereinafter “Ultimate Care”)³ were joint employers and successors and ordered them to bargain with Local 2013. He also found that 305 West End was required to make Trinidad Hardy whole for its failure to hire her. ALJ decision (*see* A-2897-2940). (Different relief was also ordered against The Esplanade and its payroll company, County Agency, Inc. They are not parties to this Petition for Review.)

Exceptions were taken to the ALJ’s decision, and the Board issued its final order pursuant to 29 U.S.C. § 160(c) on April 29, 2020. It granted relief against both 305 West End and Ultimate Care. 369 NLRB No. 62 (2020). The underlying Petition for Review was timely filed on May 8, 2020.

³ Ultimate Care Management is an entity that manages assisted living properties for The Engel Burman Group. It will eventually become the manager of the 305 West End once it is a fully licensed assisted living property. A-220-221. The Counsel for the General Counsel stated its intention to add Ultimate Care as a respondent, alleging it was a joint employer, during the course of the trial. A-833-836. The ALJ allowed the amendment. *Id.* at A-853-854.

SUMMARY OF THE ARGUMENT

A. This Union is Not Entitled to a Presumption of Majority Status.

As a members-only Union, Local 2013 was not entitled to any presumption of majority status. *See Sarnow Candy Co., Inc.*, 306 NLRB 213 (1992) and other cases cited *infra*. The ALJ refused to consider, and the Board completely ignored, definitive evidence – including the Union’s own records – establishing 1) the Union’s routine failure to collect dues from many of the employees, and 2) un rebutted evidence that the Union’s shop steward was well aware that these employees were not members of the Union. A Union whose goal is to promote the interests only of its members over those of the employees it is supposed to represent, or claims after the fact to represent, is not permitted a presumption of majority status. *Sarnow, et. al, supra*. Moreover, employees should not be forced to accept the representation of a union they did not choose and do not support, as this flies in the face of the employees’ rights under Section 7 of the National Labor Relations Act to choose to be represented for purposes of collective bargaining or “refrain” from such representation.

B. The Board Inappropriately Designated December 5, 2016, as the Date a “Substantial and Representative Complement” of 305 West End’s Workforce Was Reached.

305 West End took over the property on December 5, 2016. It hired a number of employees from its predecessor, but given the appalling lack of cleanliness and

poor maintenance of the property, which was established at the hearing by overwhelming and undisputed evidence, 305 West End did not wish to hire Esplanade's housekeeping and maintenance staff. However, 305 West End's hands were tied by New York City's DBSWPA, which required the Respondent to hire and retain all of these Building Service Workers for at least 90 days. Consequently, these employees were not hired "voluntarily," as must necessarily be the case for a new employer to be deemed a successor under *NLRB v. Burns Int'l Security Svcs., Inc.*, 406 U.S. 272 (1972). Most of these BSWs were discharged following the 90-day period mandated by the ordinance, with some separating somewhat earlier. Most were replaced by April 20, 2017, though staffing needs did not require them to be replaced one-for-one.

The Board in this case nevertheless chose December 5, 2016, the date of 305 West End's takeover of the property, as the date a "substantial and representative complement" was reached and concluded that 305 West End was a *Burns* successor based on mistaken calculations of the number of employees hired. This decision ignored the effect of the DBSWPA by relying on the assertion that a majority of the *other* employees hired by 305 West End as of December 5 were former Esplanade employees. The cleaning and maintenance staff are key components of any workforce, and cannot simply be subtracted from the substantial and representative complement of workers. It also ignores the requirement of *Burns* that a successor

employer must *voluntarily* choose the majority of its workforce from its predecessor. The undisputed evidence at the hearing established that 305 West End did *not* want to hire the Esplanade’s cleaning staff, even if it was willing to hire some of the other former Esplanade employees. A successor is obligated to bargain only when “the new employer makes a *conscious decision* to maintain generally the same business ... *and intends to take advantage of the trained work force of its predecessor.*” *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987) (emphasis added). The Board’s decision is inimical both to business reality and to binding Supreme Court precedent. Even the Board’s own Counsel for the General Counsel acknowledged in its Exceptions brief to the decision of the ALJ that 305 West End should not be considered a successor because it did not reach its substantial and representative complement until after it was allowed to discharge the cleaning staff it was forced to hire because of the DBSWPA.

C. The Board Erred in Determining That 305 West End Continued Substantially the Same Business as the Esplanade.

Esplanade’s business consisted of operating a building that merely provided a location for senior citizens to live. In contrast, 305 West End’s business is a high-end assisted living residence, licensed by the New York Department of Health, with legal responsibility for the health and well-being of its residents. The Board also erred in finding that 305 West End and Ultimate Care Management are joint

employers. The record reveals no evidence that that Ultimate Care “shares or codetermines” with 305 West End the terms and conditions of the 305 West End’s employees, or that Ultimate Care “possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.” The General Counsel has the burden of proof on this matter and failed to discharge that burden.

D. The Board Erred in Holding That 305 West End is Obligated to Offer Reinstatement and Back Pay to Union Steward Trinidad Hardy.

The Board found that 305 West End’s failure to hire former union steward Trinidad Hardy was a violation of 29 U.S.C. 158(a)(3). The Board ordered her to be made whole, even though she had received a \$14,130.58 severance payment in exchange for her execution of an “Acknowledgment and Release,” in which she had released “all claims, whether known or unknown” under any and all potentially applicable employment statutes, including the National Labor Relations Act, with respect to Esplanade and its “successors and assigns.” In doing so, the Board relied on a case, *Kelly Services Inc.*, 368 NLRB No. 130 (2019), which dealt with arbitration agreements required by the employer of its employees, rather than an agreement voluntarily signed by a former employee in exchange for substantial consideration. The Board also used a strained and unlikely interpretation of the Acknowledgment and Release to conclude that it was intended only to shield a *Burns*

successor from the effect of unlawful practices by its predecessor. A plain reading of the document shows that Hardy voluntarily waived her claims to the remedy the Board is attempting to enforce here.

ARGUMENT

A. The Board's Decision is Inconsistent With Established Law and Does Not Take Account of All Relevant Evidence.

The Court must determine whether the Board's determination is supported by substantial evidence and is in accordance with law. *Cibao Meat Prods., Inc. v. N.L.R.B.*, 547 F.3d 336, 339 (2d Cir. 2008). Substantial evidence means more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Salmon Run Shopping Ctr. LLC v. N.L.R.B.*, 534 F.3d 108, 113 (2d Cir. 2008); *SDBC Holdings, Inc. v. N.L.R.B.*, 711 F.3d 281, 288 (2d Cir. 2013). While the Court is not to substitute its judgment for that of the agency, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. The consistency of an agency's position is a factor in assessing the weight that position is due. An agency explanation will not be afforded deference unless the agency has considered all relevant issues and factors. *Long Island Head Start Child Dev. Servs. v. N.L.R.B.*, 460 F.3d 254, 257-258 (2d Cir. 2006).

As discussed further below, the Board ignored important evidence establishing that the Charging Party operated as a members-only Union, and is therefore not entitled to a presumption of majority status. Moreover, the Board's holding that the "substantial and representative complement" required by Burns was

reached on December 5, 2016, by ignoring the fact that the entire cleaning staff was retained only due to the operation of the local ordinance was contrary to established Supreme Court law and sets an unsupportable precedent. Its conclusion also relied on incorrect calculation of the number of union-represented employees that were hired by 305 West End, in part because it included the recreation employees that the Union disavowed at the hearing in this case.

B. *The Board's Failure to Consider the Evidence That the Union Was "Members Only" is Reversible Error, and the Order to Bargain with This Members-Only Union Must be Vacated.*

Bizarrely, the Board ***totally ignored*** the first Exception submitted by Petitioners, to wit, the fact that the charging party Union operated as a “members only” union. The Board did not address that exception at all, even though it was argued at length in the Petitioners’ Exceptions to the ALJ’s decision. An administrative agency “must examine the relevant data” in making a decision. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Long Island Head Start, supra*, 460 F.3d at 257-258. An agency decision will be considered arbitrary and capricious if the agency has “entirely failed to consider an important aspect of the problem.” *Motor Vehicle Mfrs., id.* That is precisely what the Board did here.

The collective bargaining agreement between the Esplanade and the Union identifies a wall-to-wall unit. The overwhelming evidence demonstrates, however,

that neither Esplanade nor the Union ever treated the unit as defined in the contract; instead, both parties treated the Union as a “members only” Union.

1. The Union **Intentionally** Declined to Represent the Recreation Employees.

As noted, the Board completely ignored the evidence that Local 2013 operated as a “members only” union. The ALJ likewise gave the evidence short shrift. The Union acknowledged at the hearing that it did not represent the recreation employees despite the description of a wall-to-wall unit in the collective bargaining agreements. *See, e.g.*, A-670-673 (CGC: “We’ve already had the union define the relevant unit, which the recreation department is not in, and it was never claimed that they’d been in. ... ALJ: The point is it’s undisputed.”); A-785 (ALJ: “It’s virtually stipulated...”); A-824 (Counsel for the Union: “[A]lbeit we don’t have stipulation that recreation assistants were not in – was not part of the unit, the fact of the matter is it’s not a controverted item.”).

The ALJ drew the unsupportable conclusion that the Union did not “know” about the recreation employees from the testimony of Eugene Hickey, Local 2013’s Director of Collective Bargaining, who “testified that he did not know recreation employees were employed at the facility and, therefore, never considered them to be included in the bargaining unit.” ALJ Opinion at p. 4. This conclusion ignored other contradictory evidence, including Mr. Hickey’s direct examination, where he said

that the Union did not represent recreation employees and in which he described an encounter with a recreation employee pending the sale to 305 West End. He recalled telling this employee “that the recognition that [the Union] had did not cover the recreation folks and that there was nothing we could do for her.” A-317-318.

It was not until Mr. Hickey’s cross-examination, two months later, that he suddenly said he never knew the recreation employees existed. A-929-932. This reversal in testimony is hardly credible, and certainly should not form the primary basis for a unit determination. *See, e.g., Don Chavas, LLC*, 361 NLRB 101, 118 n.13 (2014) (emphasis added) (“[H]e claimed he was in the factory infrequently but ***changed his testimony*** to note that daily he overheard conversation between Soto and Figueroa because he was often in the factory. This type of contradictory testimony weighs negatively on the overall credibility of his testimony.”); *Jordan Valley Coop. Creamery*, 111 NLRB 920, 927 (1955) (“Lyons was an untrustworthy witness, as the record reveals. On direct examination he said that all he could recall of the conversation was that Welsh told him he was not going back to work unless he was given a raise and that there was ‘something wrong with the labor relations there’ On cross-examination he finally admitted that there was considerable discussion about the men forming a union at the plant. On redirect examination he at first admitted and then denied immediately having reported Welsh’s visit to management. His shifting and contradictory testimony deprives it of credibility.”);

Glen Raven Silk Mills, Inc., 101 NLRB 239, 247 (1952) (disbelieving witness whose testimony about a supposed list of deficiencies in an employee's work was contradicted between direct and cross-examination).

Notably, when the ALJ asked Mr. Hickey if he took any action after “learning” about the recreation employees, he said he did not. A-932. Mr. Hickey also testified that Ms. Ida Baldoquin was the Union representative who worked with Esplanade to determine who was and who was not in the Union. Ms. Baldoquin, however, never claimed *not to know* that there were recreation workers at the Esplanade. She testified simply that the Union did not represent recreation employees: “[A]s per the contract, I ... never had to represent the recreational workers because, from what I was told, they were more so like the beauty salon and, like the people did activities and whatnot, and they weren't part of the contract.” A-A-336, A-901. There were purportedly “regular visitations” by Union representatives to the Esplanade. A-849. Ms. Baldoquin's testimony contradicts the ALJ's inference that because Mr. Hickey claimed he did not “know” about the recreation employees, then the Union did not “know.” Even if Mr. Hickey did not personally know, the evidence makes it plain that others with the Union, including Ms. Baldoquin and shop steward Trinidad Hardy, clearly did know. The Union was aware that recreation employees were employed at the Esplanade and intentionally declined to represent them.

2. The Shop Steward Knew That Many Other Employees Were Not in the Union.

Evidence ignored by the ALJ and the Board also undisputedly demonstrates that long-time shop steward Trinidad Hardy knew that many other employees in various job classifications, not just recreation employees, were not members of the Union; several of them testified at the hearing that she tried to recruit them to the Union, and also that she made no effort, when they declined, to enforce the Union security clause. *See* A-624-625 (“[S]he had asked me did I want to join the union, and I told her I had no interest in being in the union because I felt like it was just too much money for the money that I was making. ... Q: At any time, Ms. Grant, did Ms. Hardy or anyone else from the union tell you you couldn’t work there unless you paid dues to the union? A No. She never said that.”), A-745⁴, A-799⁵, A-805-

⁴“Q: [W]ere you covered by the union contract? ... A: Not to my knowledge, no, sir. ...

Q: And did you have discussions with anyone, including Ms. Hardy, about whether you were covered by the contract?

A: Not about whether I was covered or not, but whether I wanted to be a part of it or join it.

Q: How many conversations?

A: Several.

Q: [D]escribe to the Judge the nature of those conversations.

A: She just – I guess she was just trying to coax me, to get me to join the union.

Q: And what was your response?

A: No.”

⁵“Q: During the time you were working at Esplanade in the dining room, were you in the union?

A: No. I was never part of the union. ...

806, A-873, A-877. The shop steward's knowledge that many employees were not members of the Union is imputed to the Union. *Goski Trucking Corp.*, 325 NLRB 1032, 1034 (1998) ("While the testimony indicates that McFall may not have known about Go's existence prior to 1994, inasmuch as Simmons was the shop steward, his knowledge is imputed to the Union."); *Local 17, United Bhd. of Carpenters & Joiners of Am.*, 318 NLRB 196, 196 (1995) (shop stewards were acting as union's agents in interactions with employer); *United Bhd. of Carpenters & Joiners of Am., Local 296*, 305 NLRB 822, 831 (1991) (same).

3. The Union's Own Records Demonstrate Its Acquiescence in the Fact That Many "Unit" Employees Were Not Union Members.

The Union's records show that it did not send invoices for dues to County Agency in 2016 for all of the employees that would have been included in a wall-to-wall unit. Similarly, County Agency's payroll records for 2016 reflect that dues were not deducted from the paychecks of many of these same employees who would have been included in a wall-to-wall unit. A-247-249; A-2498-2544; A-1405-2167.

Q: Did anyone ask you to join the union?

A: Yeah, I was given paper twice or maybe three times, but after that, I didn't sign – I didn't sign up. ...

Q: And who was the person or persons who would present you with the membership papers or union papers?

A: From the union -- it would be Trinidad, who was our union delegate, I think they called her at the time.

Q: Trinidad Hardy?

A: Yes."

The ALJ and the Board inexplicably ignored the crucial evidence of the Union's own records. The ALJ noted that the payroll records show that dues were not deducted from the paychecks of all employees, but failed to draw any inference from that fact. ALJ Opinion at 6. Likewise, the ALJ acknowledged that many employees did not obtain Union health insurance, but attributed it solely to the cost for family plans. ALJ Opinion at p. 5 and n.12. The Union did not bill the Esplanade either for health insurance or for dues *only for the employees who were not members of the Union*. A-2498-2544. The obvious conclusion, supported by employee testimony, is that if employees did not want to purchase Union health insurance, they did not need to join the Union.

4. The Union Intentionally Represented Statutory Supervisors.

Finally, as shown in the evidence cited in the Statement of the Case, there were statutory supervisors who were dues-paying members of the Union, though both the Board and the ALJ ignored this plain and undisputed fact. By including supervisors in the unit, the Union failed to comply with its legal obligations under the terms of the CBA and the basic tenets of labor law. The unit definition, though wall-to-wall, excluded “executives, supervisors, and guards as defined in the Labor Management Relations Act as amended ...” A-2427-2441 at p. 1; A-2555-2569 at p. 1; *see also* A-869-871.

The evidence thus shows that employees who should have been represented by the Union were not (the recreation employees and miscellaneous others), and employees who should not have been represented by the Union were (at least two supervisors). The ALJ declined to consider any of this evidence beyond the Union's acquiescence to the exclusion of recreation employees; the Board ignored it completely. This Union knowingly acquiesced in its predecessor's failure to properly represent the unit as defined in the CBA. This was a "members only" Union that chose to represent only a portion of the employees that would otherwise have been encompassed by the CBA. The remaining employees – including both recreation employees and the others who did not pay dues, many of whom flatly testified that they were not in the Union – cannot be counted in the bargaining unit and a bargaining order cannot be entered in this case.

5. A Members Only Union is Not Entitled to a Presumption of Majority Status.

The evidence here overwhelmingly establishes that Local 2013 was a members-only union not entitled to majority status. In *Arthur Sarnow Candy Co., Inc.*, 306 NLRB 213 (1992), likewise, the evidence of the union's own records was considered highly significant in proving the union's members-only operation:

Based on the Union's records, showing the names of the employees that the Union billed for dues, pension, and welfare contributions, and comparing them to the Employer's payroll records over a similar period of time, it is concluded that the 1986-1989 collective-bargaining

agreement was applied *only* to employees who were listed as being employed by Sarnow. ***Moreover, these records show that from 1987 (and perhaps even earlier) the collective-bargaining agreement was being applied only to those employees of Sarnow who were members of the Union.***

306 NLRB at 215 (some emphasis added). The Board in *Sarnow* also rejected the union's argument that it had never agreed to have the contract applied only to union members, because it plainly had the ability to enforce the contract and chose not to do so:

While it is argued that the Union never agreed to have its contract applied only to union members[, and] that its failure to enforce the agreement fully was merely the result of inattention or carelessness, I note that ***the Union has had a shop steward at the premises and there was no evidence that the Employer attempted to hide the existence of the contract from other employees.*** Nor is there any evidence that the Employer refused to meet with the Union, or that it made any efforts to impede the Union from talking with or having access to its employees.

Id. (emphasis added). The Board in *Sarnow* therefore concluded that the presumption of the Union's majority status had been rebutted, and that no bargaining order could issue:

While it is true that the 1986-1989 collective-bargaining agreement (which was executed by the Respondent) describes a bargaining unit with sufficient clarity, it seems to me that the facts show that ***in practice, the parties have applied the contract at variance with the unit description.*** ... On balance, I am inclined to find that pursuant to the practice of the parties over at least 3 or more years, the collective-bargaining relationship has been limited to a members only situation.

... In view of the above, it is concluded that the presumption of continuing majority status cannot be applied to the facts of the present case. Further, as it is concluded that there does not exist an appropriate bargaining unit within the meaning of Section 9(a) of the Act, *it therefore follows that a bargaining order cannot be granted pursuant to Section 8(a)(5) of the Act.*

Id. at 216-217 (emphasis added).

The Board in *In Re Makins Hats, Ltd.*, 332 NLRB 19 (2000), noted that frequent visits from a Union representative and the presence of a shop steward in the work area precluded a conclusion that the Union did not acquiesce in the application of the CBA to its members only:

Respondent consistently applied the contracts only to employees known to it as members of the Union, and did not pay contractual benefits or otherwise apply the contracts to unit employees whom it believed did not belong to the Union. [The ALJ] further found, based on testimony of both Akins and the Union's district director, Sandra Bermejo, that Bermejo had visited the Respondent's shop on a frequent and regular basis since 1983 and that one of the employees served as a union steward during much of that time. All the unit employees worked in a large open room and were visible to anyone who entered. Crediting Akins over Bermejo, the judge found that Bermejo knew of the presence of unit employees to whom the contract was not being applied and acquiesced in that arrangement. ... It is clear from the evidence summarized in the fact statement above, that the Respondent at all relevant times applied the contract terms on a members-only basis and that the Union must reasonably have been aware of this fact. The Board will not issue a bargaining order under those circumstances.

332 NLRB at 19-20.

In *Don Mendenhall*, 194 NLRB 1109 (1972), the Board acknowledged that the union and non-union employees' wage rates were the same, but concluded that the CBA was effectively a members-only contract because the non-union employees received no other benefits of union membership:

Mendenhall paid the union wage scale to both union and nonunion employees but paid health and welfare benefits only for those employees who were members of the Union. There is nothing in the record that shows that the Union attempted to enforce the union-security clause in the contract with respect to the nonunion employees or that it afforded them any representation as the collective-bargaining agent. ... It is evident from these facts that, although recognized ostensibly as the exclusive bargaining agent for all of the Respondent's employees engaged in the installation of ceramic tile, the Union in fact represented only those who were its members. ***With the exception of the hourly rate, the nonunion employees in the unit received none of the benefits of the contract, and the record is devoid of any evidence that the Union concerned itself with their hours or working conditions in any respect.*** ... We conclude that, in the context of events, the Respondent's actions cannot be held violative of Section 8(a)(5). That section, by reference to Section 9(a), requires as a predicate for any finding of violation that the employee representative has been designated or selected as the exclusive representative of the employees. It has been settled since the early days of the Act that members-only recognition does not satisfy statutory norms.

194 NLRB at 1109-1110 (emphasis added). The fact that the 2016 payroll records at Esplanade showed that union and non-union employees received the same raises that year is therefore not dispositive of whether the Union operated as members-only, contrary to the ALJ's reliance upon that evidence. The records also show that

the non-union employees did not pay dues and did not receive health insurance from the Union, as in *Don Mendenhall*.

The Union here knew and acquiesced in the fact that the contract was not being applied to numerous employees who were facially included in the contractual bargaining unit. “[W]hile a union is not required to aggressively police its contracts in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or unit and then rely on its ignorance of events to argue that it was not on notice of an employer’s unilateral changes. ... The [employees] who were not covered by the contract worked in the open and were known to unit employees.” *The Cobalt Grp., LLC*, No. 2-CA-30455, 1999 WL 33452915 (Feb. 23, 1999). Trinidad Hardy was the shop steward at Esplanade for at least five years before 305 West End purchased the property, and unrebutted evidence from the employees established that she often tried to recruit employees who were not members of the Union. Her knowledge that many employees were not members of the Union, and the Union’s failure to make any attempt to enforce the union-security clause, fatally undermines the Board’s conclusion that the Union was entitled to a presumption of majority status when 305 West End purchased the Esplanade property.

“[T]he Courts have recognized the right of a successor to question a union’s continuing majority status and to withdraw recognition if it can show that the union had in fact lost its majority status at the time of the refusal to bargain or that the

refusal to bargain was grounded on a good-faith doubt based on objective factors that the union continued to command majority support.” *The Cobalt Grp., id.*, citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 n.8 (1987).

An element of the General Counsel’s prima facie case whenever it is alleged that an employer has violated Section 8(a)(5) of the Act is proof of the Union’s majority status. Don Mendenhall, Inc., 194 NLRB 1109, 1110 (1972). Ordinarily, the General Counsel satisfies this element by relying upon Board certification or the existence of a collective-bargaining agreement to raise a presumption of majority status, which may be either rebuttable or irrebuttable depending on the timing of the alleged refusal to bargain. Here the only evidence of majority status is the collective-bargaining agreement in effect at the time of the change in ownership. ***It is clear from the evidence recited above that this collective-bargaining agreement was not applied to all employees in the bargaining unit it purported to cover. It was, in essence, a “members-only” contract. Such contracts do not support a presumption of majority support. Arthur Sarnow Candy Co.***, 306 NLRB 213 (1992). ***Moreover, the Board does not issue bargaining orders in “members-only” units. Goski Trucking Corp.***, 325 NLRB No. 192 (June 30, 1998); ***Mathews-Carlson Body Works, Inc.***, 325 NLRB No. 114 (April 16, 1998); *Don Mendenhall, Inc., supra*.

The Cobalt Group, id. (emphasis added). Numerous cases have likewise held that bargaining orders cannot be issued with respect to members-only units:

The evidence relating to the practice under the agreements further makes it clear that the parties did not intend them to be effective collective-bargaining contracts, but instead merely regarded them as arrangements under which Respondent agreed to check off dues, health and welfare, and pension payments for union members only. The acquiescence of the Unions in Respondent’s failure both to enforce the union-security provisions of the agreements and to pay health and

welfare contributions for all employees (as ostensibly provided by the “contracts”), makes it clear that the parties did not believe that they were in true collective-bargaining relationships. Since the alleged agreements are not such as would give rise to a presumption of majority status, we find that the General Counsel has failed to sustain his burden of proof and therefore that the complaint should be dismissed.

Ace-Doran Hauling & Rigging Co., 171 NLRB 645, 646 (1968); *see also Rogan Bros. Sanitation Inc.*, 362 NLRB 547, 581 (2015) (“[A]lthough Local 813 and Rogan Brothers intended to enter into a valid collective bargaining agreement, the evidence also shows that over many years, the Union acquiesced in the fact that the contract was applied only to those employees who happened to join Local 813. ... As I have concluded that the collective bargaining agreement between Rogan Brothers and Local 813 cannot be enforced by way of Section 8(a)(5) of the Act, it therefore follows that R&S cannot be liable under Section 8(a)(5) for any refusal to bargain allegations ...”); *Mfg. Woodworkers Ass’n*, 194 NLRB 1122, 1123 (1972) (“Although the Painters’ contracts have, since at least 1962, contained specific provisions calling for exclusive recognition and coverage, the record discloses that these contracts have never been so applied. Rather, based on the apparent understanding of the parties and their actions, it seems clear that Painters has been treated as the bargaining representative only of its own members in a variable group of association shops employing such members. ... Under these circumstances, we cannot find that the Respondent association was obligated to continue to recognize

the Painters as the exclusive bargaining representative either for all wood finishers, as provided in previous contracts, or for an alleged unit of wood finishers comprising association shops in which members of the Painters are employed.”); *Bender Ship Repair Co., Inc.*, 188 NLRB 615, 616 (1971) (refusing to enforce bargaining order where General Counsel failed to prove majority status: “[I]t is evident from the practice under this and earlier contracts that the parties had no intention of entering into a real collective-bargaining relationship. Instead, for many years, the Union was willing to exact little in the way of contract enforcement and the Respondents were satisfied to reap the financial benefit of lower costs.”); *Moeller Bros. Body Shop, Inc.*, 306 NLRB 191, 193 (1992) (affirming finding that union lacked majority status: “We conclude that the Union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the Respondent’s contractual noncompliance. ... this is a case where the Union, if it had exercised reasonable diligence, would clearly have been alerted much earlier to the misconduct.”); *Glenlynn, Inc.*, 204 NLRB 299, 302-303 (1973) (union not a majority representative where it made no attempt to police provisions of agreement, including union security clause and contributions to health and welfare fund).

“[Section 8(a)(5)], by reference to Section 9(a), requires as a predicate for any finding of violation that the employee representative has been designated or selected

as the exclusive representative of the employees. It has been settled since the early days of the Act that members-only recognition does not satisfy statutory norms.” *Don Mendenhall, supra*, 194 NLRB at 1109-1110. Because the Union here was not the exclusive representative of the Esplanade employees, Petitioners did not violate Section 8(a)(5) by refusing to bargain with the Union, and the Board’s bargaining order should be vacated.

C. *The Board’s Conclusion That 305 West End Had Its Substantial and Representative Complement of Workers as of December 5, 2016, Contradicts Fundamental Supreme Court Authority and Sets Unacceptable Precedent.*

1. *The New York City Ordinance Removed Respondent’s Choice in Hiring Housekeeping and Maintenance Staff.*

The DBSWPA, New York City Administrative Code § 22-505(a), requires employers who have taken over a property within the City to retain for at least 90 days employees called “Building Service Workers”, those workers who do jobs connected with “the care or maintenance of an existing building”. The ordinance requires the successor employer to retain such employees for at least “a ninety (90) day transition employment period.” *Id.* Only then can the successor evaluate each such employee on his or her merits to assess whether to retain or discharge the employee:

(8) At the end of the 90-day transition period, the successor employer shall perform a written performance evaluation for each employee retained pursuant to this section. If the employee’s performance during

such 90-day period is satisfactory, the successor contractor shall offer the employee continued employment under the terms and conditions established by the successor employer or as required by law.

Id.

The mandatory nature of the ordinance bears directly on the issue of *Burns* successorship. *Burns* states that the source of any duty to bargain with the predecessor's union representative is the "voluntary" choice of the successor to take over "a bargaining unit that was largely intact." *Burns, supra*, 406 U.S. at 287. "The Supreme Court has made it clear that *Burns* successorship is based on an employer's *voluntary* choice to hire more than fifty percent of its workforce from its predecessor's workforce." *Paulsen v. GVS Properties, LLC*, 904 F. Supp.2d 282, 290 (E.D.N.Y. 2012) (emphasis added).

The Supreme Court has directed that the assessment of whether a majority of the new workforce comprises the predecessor's employees must be made when a "substantial and representative complement" of the new employer's staffing has been reached. *Fall River Dyeing, supra*, 482 U.S. at 47; *Indianapolis Mack Sales*, 272 NLRB 690, 694 (1984), *enf'd denied*, 802 F.2d 280 (7th 1986). But this test in turn depends on whether the employer has *voluntarily* staffed its operation to full or nearly-full operation. "[I]n the collective bargaining context, a successor is only obligated to bargain when 'the new employer makes a conscious decision to maintain generally the same business *and to hire a majority of its employees from*

the predecessor ... [and indeed] ***intends to take advantage of the trained work force of its predecessor***.” *Resilient Floor Covering Pension Tr. Fund Bd. of Trustees v. Michael’s Floor Covering, Inc.*, 801 F.3d 1079, 1092 (9th Cir. 2015) (some emphasis in original), citing *Fall River Dyeing*, 482 U.S. at 41 (some emphasis added) (“[T]o a substantial extent the applicability of *Burns* rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated. ***This makes sense when one considers that the employer intends to take advantage of the trained work force of its predecessor.***”). “The employer generally will know with tolerable certainty when all its job classifications have been filled or substantially filled, when it has hired a majority of the employees it ***intends*** to hire, and when it has begun normal production.” *Fall River Dyeing, id.*, 482 U.S. at 50 (emphasis added).

The court in *Paulsen v. GVS Properties, supra*, therefore found that the DBSWPA precluded a finding of *Burns* successorship upon hiring: “By limiting an employer’s ability to discharge employees solely to cases of cause or redundancy, the Displaced Workers Act deprives the employer of making the voluntary decision that *Burns* requires in order to deem an employer to be a successor.” 904 F. Supp.2d at 290. “Reading the Supreme Court cases on successorship alongside the language of the Displaced Workers Act, it is clear that a new employer cannot be deemed a

Burns successor at the beginning of the 90-day period because it lacks the ability to choose whether to hire its predecessor’s employees at that point.” *Id.* at 290-291. “[S]ince ultimately, GVS did not hire a majority of its employees from its predecessor, the Court determines that GVS was not a *Burns* successor. GVS, therefore, had no obligation to recognize or bargain with the Union.” *Id.* at 292.

305 West End likewise did not ultimately hire a majority of its employees from its predecessor. The evidence was undisputed that 305 West End’s Regional Director of Housekeeping recommended against hiring the BSW workers but that the DBSWPA left no choice. A-708; A-2482-2485. Moreover, most of them were not successfully retrained and therefore had to be discharged after the 90 days had passed. A-708-709. 305 West End did not voluntarily retain them, and the key test of *Burns* successorship was not met. In acknowledgment of this reality, the Counsel for the General Counsel – the prosecutorial arm of the Board itself – acknowledged in its Exceptions brief that the Petitioners should not be considered successor employers under *Burns*:

...the appropriate time for measuring a putative successor’s workforce in the context of a workforce preservation statute is not until a reasonable time after the expiration of the mandatory retention period. This will allow the putative successor an opportunity to evaluate the predecessor’s employees and make an informed decision as to the composition of its workforce. Applying this standard, the Board should conclude here that the Respondents were not successor employers and therefore did not violate Section 8(a)(5) of the Act.

[We must file our proposed Supplemental Appendix and cite here to the CGC's Exceptions brief.]⁶

The Board avoided the inexorable logic of its own General Counsel's conclusion by ignoring the BSW workers entirely. It simply wrote them out of the equation and concluded that, since the remaining staff comprised a majority from the Esplanade, the housekeeping and maintenance staff need not be considered. The Board's decision is faulty precedent and undermines the requirement expressed in *Fall River Dyeing* that the successor's **voluntarily-chosen** staff must comprise a majority of its predecessor's staff. It is astonishing that the Board proposes to judge the employer's intent with respect to its hiring of staff while ignoring a substantial portion of it. Far from trying to "take advantage of the trained workforce of its predecessor," *cf. Fall River Dyeing, supra*, 305 West End was appalled by the condition of the property, and none of Esplanade's housekeepers and maintenance employees would have been hired without the operation of the DBSWPA. *See* A-2484-2485; A-529-530, A-708. The effect of the Board's decision would be to skew

⁶ The CGC was urging the Board to officially reverse *GVS Properties, LLC*, 362 NLRB 1771 (2015), which has been vacated, but upon which the ALJ relied. In *GVS Properties*, the Board had held an employer makes the "conscious" decision required by *Burns* and *Fall River Dyeing* when it purchases buildings and takes over a predecessor's business "with actual or constructive knowledge" of the requirements of the DBSWPA. As discussed above, the Board avoided the CGC's request by simply subtracting the BSW workers from its analysis, an absurd response to the problem.

the percentages in every takeover case in which a local ordinance like the DBSWPA has effect – so that employers like 305 West End who hire *part* of the workforce from its predecessor will suddenly be considered to have hired a *majority* from its predecessor regardless of its actual intent. This result is a blatant violation of *Burns* and *Fall River Dyeing*, as the dissent pointed out in the since-vacated *GVS Properties*, 362 NLRB 1771 (2015):

The Court in *Fall River Dyeing* was mindful of “the rightful prerogative of owners independently to rearrange their business.” *Fall River Dyeing*, 482 U.S. at 40 (internal quotations omitted). After all, an “employer may be willing to take over a moribund business only if [it] can make changes in corporate structure, *composition of the labor force*, work location, task assignment, and nature of supervision.” *Burns*, 406 U.S. at 287-288; *see also John Wiley & Sons, Inc., v. Livingston*, 376 U.S. 543, 549 (1964).

GVS Properties, 362 NLRB at 1778 (2015), *vacated*, *GVS Properties, LLC*, No. 29-CA-077359, 2017 WL 1462124 (DCNET Apr. 20, 2017) (emphasis added).

The present case is an excellent example of an employer referenced in *Burns* that wanted to take over a moribund business in order to make changes in, among other things, the composition of the labor force. There was an abundance of testimony as to the degraded condition of the property at the time of the sale and the Respondent’s intent to make the property an elite assisted-living residence. The Respondent wanted to hire employees, particularly housekeeping employees, who would be willing to work according to the much higher standards it would be

implementing in order to bring the property up to the standards its market niche demands. The DBSWPA, however, removed the Respondent's choice of how to staff the building housekeeping and maintenance departments for at least 90 days.

As the dissent in *GVS Properties* argued, the majority in that since-vacated opinion was effectively trying to influence not just labor relations, but business decisions, which is beyond its purview:

By forcing the Respondent to recognize and bargain with the Union based upon decisions it was coerced into making by the DBSWPA, the majority allows a local government to place its thumb on the scale in favor of incumbent unions, simply because they are incumbents, and thereby to upset the balance struck by the Supreme Court. No longer is “the rightful prerogative of owners independently to rearrange their business” – an interest the Court was “careful to safeguard” – of any consequence.

362 NLRB at 1778 (dissent).

The Board erred in looking to December 2016 as the time when the “substantial and representative complement” was reached. That time could not arrive until after the effect of the DBSWPA had expired. Moreover, the Board's calculations in footnote 5 of its decision are plainly wrong. The Board ignored the fact that the employee complement hired in December included employees whom the Union intentionally chose not to represent, even the recreation employees that the Union *acknowledged at the hearing it did not represent*. These employees should not be included in counting employees in the Esplanade bargaining unit.

Thus, even excluding the BSW employees from the calculations – which, as noted above, is an improper way to gauge the intent of the employer as required in *Burns* and *Fall River Dyeing* – the number of former Esplanade employees in the total complement of bargaining unit employees (excluding the recreation employees that the Union disavowed) was never higher than 49%, less than a majority. If the employees who did not pay dues to this members-only Union are also excluded, the percentages even more dramatically disprove successorship.⁷

In keeping with the Counsel for the General Counsel’s acknowledgment in its Exceptions brief that “the appropriate time for measuring a putative successor’s workforce in the context of a workforce preservation statute is not until a reasonable time after the expiration of the mandatory retention period”, the undisputed testimony of Faraz Kayani and the payroll records summarized in A-2702-2704 and A-2705-2708 demonstrate that a substantial and representative complement at 305 West End was not reached until April 20, 2017. As Kayani testified, the process of

⁷ The Board apparently misinterpreted payroll exhibits A-2643-2700 and A-1182-1218, because they show week-to-week payments, not employment status. Thus, for example, some employees are not listed for the week of December 8 who had been long-time employees of the Esplanade and were in fact hired by 305 West End (for example, Jessie Franklin. Compare A-824 with A-1182-1218 at 305/ESP0001193-1194). If one looks only at the payroll record from A-1182-1218 or A-2643-2700 without looking at the entire exhibit, the employee roster on December 8 seems to total 44 non-management employees, but as noted, the roster fails to include Jessie Franklin, and there are other ambiguities as well. In short, the ALJ’s and the Board’s calculations of the employees hired when 305 West End took over the building are wrong.

evaluating and discharging the housekeepers who did not make the grade began just after the 90-day period expired. It took time, however, for the process to be completed: for management to meet with the employees to affect their terminations, to post the positions that were now available, to receive applications, and to interview and hire the applicants. *See, e.g.*, A-720-722 (Walsh) (evaluations were done when employees were at work, and not all were at work at the same time; the intent was to give them all a fair chance to be retrained; he met with them all the time as he tried to train them); A-724-725 (the open positions were then posted and applicants interviewed); A-949-951, A-954, A-994-995 (Kayani) (“[I]t’s operationally impossible for me to have all the ... BSWs hired from Esplanade to 305 West End to have a 90-day review tailored, done, and executed,” precisely on the 90th day, so some received their evaluations within the next month or six weeks). There were several housekeepers hired within the two weeks prior to April 20 to replace some that had been kept on due to the ordinance and then discharged after the probationary period. A-967-968 (four or five housekeepers were hired in April).

The purpose of the ordinance is to provide BSW employees with a fair chance to earn employment with the successor. *See* <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2515189&GUID=996EDB08-31D8-45B9-9531-E1E1C7C7B21C>. Employers that are sincerely giving their probationary employees a chance to settle in do not rush to judgment on the

90th day of the period mandated by the ordinance. Nothing would appear more artificial and more deliberately intended to avoid the effect of both *Burns* and the DBSWPA than an employer terminating each BSW employee holdover on exactly the 91st day of employment. As the CGC acknowledged, the evidence here shows that the Respondent in good faith gave the employees the opportunity to earn their jobs, evaluated them at arm's-length, and made the decisions to discharge and replace the way the Respondent or any other normal employer would do in the ordinary course of business.

The proper date to consider the question of successorship was therefore not reached until April 20, 2017, by which time only 24 of the 52 full-time and part-time non-recreation employees were former Esplanade employees, not a majority, thus precluding any finding of *Burns* successorship even apart from the fact that the Union was operated as a “members only” unit or disputes about whether the new operation was sufficiently similar to the old to be considered a successor (discussed further below). Of the 56 non-management employees who were employed by 305 West End as of April 20, 2017, 4 were recreation assistants, whom the Union has officially disavowed, leaving 52. Only 24 of those are former Esplanade employees, thus *not* a majority. Of those, 8 did not pay Union dues and did not consider themselves part of the Union, which would leave only 16, demonstrating even

further that the Union did not represent a majority as of April 20, 2017, the date the substantial and representative complement was actually reached.

The employer is the best judge of when the substantial and representative complement has been reached. In cases which reject the employer's estimation of when the substantial and representative complement has been reached, there has often been some unusual element that has affected the numbers – *see, e.g., Hoffman ex rel. N.L.R.B. v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 367 (2d Cir. 2001) (employee roster proffered by employer reflected an increase in anticipation of the coming high season); *Hoffman v. Parksite Grp.*, 596 F. Supp. 2d 416, 422 (D. Conn. 2009) (employer acquired only two more employees within the seven months after taking over predecessor's operation). In the present case, however, the undisputed evidence shows that the BSW employees were retained only because of the New York City ordinance; that they were officially evaluated shortly after the required 90 days had passed, also as required by the ordinance; that most were discharged; and that many of them were then replaced over the next few weeks, up to and including April 20, 2017, when a full complement of employees was reached (pending licensure as an assisted living residence by the Department of Health).

D. Ultimate Care Management is Not a Joint Employer With 305 West End, Because the Interviewers Who Were Employed by Ultimate Care Relinquished Their Responsibilities as Soon as the Property Was Up and Running.

Although the managers who were involved in interviewing and hiring employees at the property *prior* to its purchase by 305 West End were employed by Ultimate Care, the latter entity's involvement after the purchase was limited to transitioning the property to its current management. Only one manager employed by Ultimate Care Assisted Living Management ever had an office at 305 West End: Regional General Manager, Faraz Kayani. The other Ultimate Care managers were never assigned to or had offices at the property. A-535, A-221, A-224, A-604. It is undisputed that every other employee at the property is employed by 305 West End Operating, LLC.

There has been enormous confusion regarding the proper standard to apply to an issue of joint employer status, much of which is discussed in the Board's announcement of its new Final Rule on joint employer status issued on February 26, 2020. *See* 85 Federal Register 11234 (Feb. 26, 2020).⁸ The most recent statement regarding determinations of joint employer status by a federal Circuit Court came in

⁸ Although the Board has issued a new final rule regarding joint employer status, "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018). In that case, the Court affirmed that the governing framework for the joint-employer inquiry is whether both employers “exert significant control over the same employees” in that they “share or co-determine those matters governing the essential terms and conditions of employment.” 911 F.3d at 1209. This analysis can take account of (i) an employer’s authorized but unexercised forms of control, and (ii) an employer’s indirect control over essential terms and conditions of the employees’ employment. *Id.*

No evidence in this case suggests that there is a common-law employment relationship between Ultimate Care and 305 West End’s employees, that Ultimate Care “shares or codetermines” with 305 West End the terms and conditions of the 305 West End’s employees, or that Ultimate Care “possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.” The sole evidence in the record regarding Ultimate Care Assisted Living Management is that Regional Manager Faraz Kayani and the persons who considered applications for employment at 305 West End and for a short time helped to train the employees are employed by that entity.

Contrary to the Board’s conclusion that Ultimate’s regional managers “maintain authority over the facility after the sale,” ALJ Opinion at p. 18, absolutely no evidence in the record supports any inference that Ultimate Care had any role in

determining the terms and conditions of the employees' employment since 305 West End's purchase of the property in December 2016. *See* A-221 ("Ultimate Care comes as needed. So in the beginning, they ... would be there more. And now we're running, so we don't need as much. They just visit ... on their schedule."); A-224 ("Regional people do not work at the facility. They come in as needed for meetings, for events."); Tr. 522-523 ("[I]n the beginning, [I] spent considerable amount of time there each week. As the – now a year or so later, as the operation is being run by ... our management team there, I'm going there maybe once every month, month and a half, give or take."); A-535-536 ("I'm not in the building that often."); A-604, A-608 (Brian White oversees 16 facilities, including 305 West End, and the employees report not to him but to the sites' executive directors); A-702-703 (Clement Walsh likewise oversees 16 facilities).

The General Counsel bears the burden of proof on the subject of alleged joint employer status. *See, e.g., McDonalds USA, LLC*, 363 NLRB No. 92, n.3 (Jan. 8, 2016) (General Counsel bears the burden of proof with respect to the joint employer issue overall); *Union Carbide Bldg. Co.*, 269 NLRB 144, 149 n.4 (1984) (if the General Counsel failed to prove joint employer status, it would also fail to prove adequate service on the putative joint employer). The Board impermissibly failed to hold the General Counsel to his burden, stating, "Although the record is not entirely clear on the point, it *stands to reason* that Respondent Ultimate managers

responsible for hiring employees also set the terms and conditions of their employment.” A-2897-2940 p. 18 (emphasis added). This inference is not only contradicted by the unrebutted evidence, it is also an absolutely inadequate ground on which to conclude that Ultimate was a joint employer with 305 West End. An absence of record evidence should not be a point in favor of the General Counsel, but instead should *preclude* a finding of joint employer status because the General Counsel has failed to discharge its burden of proof. There is *no evidence in the record* that the Ultimate managers who were involved in hiring – which was done before Respondent 305 actually took over the property – set the terms and conditions of the employees’ employment. Indeed, that conclusion contradicts the undisputed evidence that only Regional Manager Faraz Kayani maintains ultimate authority over the employees. *See* A-2897-2940 at 23; A-137, A-405-406, A-446. The undisputed testimony is that the regional managers who did the hiring came in to help train the employees, and by the time of the hearing, were no longer making more frequent visits to the site than their normal regional responsibilities require.

All of the other employees who testified, including those who testified for the GC, stated that they were employed by 305 West End, not by Ultimate Care. *See, e.g.,* A-89, A-207. Moreover, the General Counsel acknowledged in his questions that communications regarding hiring came from 305 West End. *See, e.g.,* A-97.

The employees who were interviewed to work at 305 understood that those interviewing them were employed by 305 West End. *See, e.g.*, A-95.

The documentation of the hiring process, which was entered into evidence by the General Counsel, all showed that the hiring entity was 305 West End Operating. *See, e.g.*, A-1145-1150. The hiring paperwork also reflects that 305 West End Operating is the employer. *See* GC-16. This is in contrast to the testimony indicating that the employees at the former Esplanade regarded County Agency and Esplanade as intertwined (*see, e.g.*, A-202-203, A-211-215).

The Board erred when it concluded that Ultimate Care is a joint employer with 305 West End.

E. The Operation of the Property at 305 West End is Not Substantially the Same as When It Was Managed by Respondents Esplanade Partners and County Agency, Inc., in Part Because It Has Changed From Senior Residential Living to Licensed Assisted Living.

The current operation is substantially different from the Esplanade, 305 West End's predecessor at the property. The Esplanade was merely a location in which senior citizens could choose to live. From its inception, the operation at 305 West End has been developed as a high-end assisted living residence, licensed by the New York Department of Health and subject to numerous specific legal requirements, such as the provision of medical assistance, the ability to identify, report, and potentially resolve residents' medical problems, and complying with numerous other

specific requirements imposed by the Department of Health for the benefit of the residents. Unlike the Esplanade, 305 West End takes legal responsibility for the health and well-being of the residents:

[The New York State Department of Health] actually, during the annual survey, will come in and pick four to six employees and interview them about what they know and how they operate and, you know – so it is important that the employees are really able to understand that we’re not just coming in eight hours a day or less and just guarding the front desk or just throwing a piece of meat on a plate and giving it to a 90-year-old. We have to understand that every resident that passes the front desk, we need to recall whether yesterday this 90-year-old was wearing the same blouse or not. Because if she was, we need to let our case manager know, because she could be going through a change health-wise, mental and physical, where she’s becoming forgetful. ... [T]he inability to [] change your clothes could actually mean she might not be able to take her medication on time – or [is] not taking it at all.

A-414-415.

In *Smegal v. Gateway Foods of Minneapolis, Inc.*, 819 F.2d 191 (8th Cir. 1987), the Circuit Court concluded that the defendant was not a successor employer where it purchased what amounted to a subcontract of the predecessor’s operation, never hired a majority of its employees from the predecessor, reorganized the operation, and provided a somewhat different service: large-scale food wholesaler versus retail grocery business. The court described a seven-factor test to determine whether the new company was a successor: “1) substantial continuity of the same business operations, 2) use of the same plant, 3) continuity of the work force,

4) similarity of jobs and working conditions, 5) similarity of supervisory personnel, 6) similarity in machinery, equipment, and production methods, and 7) similarity of products or services.” In analyzing these factors, the court concluded, among other things:

[W]hile the occupations of National employees remained the same, the transition to large scale wholesaling, and the new organizational structure of Gateway necessarily changed the nature of their jobs and working conditions. The mix of the employees included changes of supervisory personnel as well. On the whole, the weight of these factors suggests that Gateway is not a successor employer.

819 F.2d at 194.⁹

Testimony from the employees themselves, including employees who testified for the General Counsel, confirm that the operation is run much differently under 305 West End than it was under Esplanade. *See, e.g.*, A-120 (“Right now,

⁹ *See also Kessel Food Markets, Inc. v. N.L.R.B.*, 868 F.2d 881 (6th Cir. 1989) (affirming Board’s conclusion that the employer was not a successor because various facts established that the employer would not have hired the predecessor’s entire work force: it used a larger work force comprising more part-time employees, had different operating methods for the purposes of enhanced customer service, and in any event, many of the predecessor’s employees did not apply); *Reynolds v. RehabCare Grp. E. Inc.*, 590 F. Supp. 2d 1107, 1112-1113 (S.D. Iowa 2008), *aff’d*, 591 F.3d 1030 (8th Cir. 2010) (using the *Smegal* test to conclude that the defendant, a new vendor of physical therapy services at the subject location, was not a successor of the previous vendor, plaintiff’s employer, for purposes of the plaintiff’s USERRA lawsuit); *Trustees of Roofers Local No. 96 Fringe Benefit Funds v. Duluth Architectural Metals*, 2005 WL 1593039, at *2 (D. Minn. July 1, 2005) (using a similar test to conclude that defendant was not liable for a predecessor’s unpaid contributions to plaintiff union’s ERISA plan where the only relationship between the two operations was that the defendant purchased the predecessor’s equipment).

the building is totally being renovated, so there's a lot of – a lot of changes that are going on, and I'm sure there's going to be a lot more changes coming on. ... We were running it, the Esplanade, one way, and I guess they want us to run it another way.”). Faraz Kayani, the Regional Manager, testified extensively about the changes that were being made both in the physical plant and the level of customer service in order to render the property both license-worthy for assisted living and top-tier in its market. A-405-418.

The Board erred when it held that the current 305 West End operation is sufficiently similar to the Esplanade to be considered a successor.

F. Trinidad Hardy Voluntarily Signed a Release in Exchange for Severance Pay and the Petitioners Should Not be Required to Offer Her Instatement and Back Pay

The ALJ found that the decision not to hire Trinidad Hardy was based on anti-Union animus and ordered Respondent to offer reinstatement to her and to pay her back pay. A-2897-2940 at p. 32. The Board upheld this finding, discounting the effect of Ms. Hardy's voluntary waiver of claims against Esplanade and its successors in exchange for \$14,130.58.

The release Hardy signed states as follows, in relevant part:

I, Trinidad Hardy, hereby acknowledge my receipt of payment in the amount of \$14,130.58 and release County Agency Inc. and Esplanade Venture Partnership ***and their respective affiliates, successors, and assigns***, from all claims, whether known or unknown, arising from or

in connection with the following: ...o) *The National Labor Relations Act*. ...

Nothing in this Release shall be construed so as to prohibit me from filing a charge with, or participating in any investigation or proceeding conducted by a local, state, or federal agency, including but not limited to the EEOC. ***This Release shall, however, prohibit me from recovering any individual relief, compensation, or damages in any such charge, complaint or claim filed by anyone.***

See A2570-2622, p. 7 of 53 (emphasis added). Ms. Hardy signed the release on February 10, 2017. *Id.* The release plainly is supported by consideration, applies to decisions under the Act, applies to the successors and assigns of the Esplanade,¹⁰ and prohibits her from recovering any individual relief or compensation as a consequence of any charge or complaint, no matter who files it.

The Board discounted Hardy's voluntary waiver by relying on *Kelly Services Inc.*, 368 NLRB No. 130 (2019), a case which dealt with arbitration agreements ***required*** by the employer of its employees, rather than an agreement voluntarily signed by a former employee in exchange for substantial consideration. The Board's

¹⁰ "Successors and assigns" is a traditional formula referencing entities that have received property by some legal method of conveyance, such as sale, transfer, or inheritance. See, e.g., Black's Law Dictionary (5th ed. 1979) ("Assigns – Assignees; those to whom property is, will, or may be assigned"; "Successor in interest – One who follows another in ownership or control of property."); see also generally *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 12 (1945) ("The formula that includes successors and assigns, among others, is one probably borrowed from the jargon of conveyancing."). 305 West End is a legal successor of Esplanade Partners because it purchased the property from Esplanade; it is not a successor as defined in *Burns*.

decision also ignores the impact of *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which emphatically held that the National Labor Relations Act does not supersede employees' ability to waive their rights to class arbitration of claims against their employers.

The Board also used a strained and unlikely interpretation of the Acknowledgment and Release to conclude that it was intended only to shield a *Burns* successor from the effect of unlawful practices by its predecessor. The language of the waiver is clear. Its intent is to allow the former employee to recover specified severance pay in exchange for a complete waiver of monetary relief from either the Esplanade or its successors, but nevertheless permits the employee to file or assist in making an administrative charge against the employer. Therefore, no derogation of Hardy's right to seek assistance from the Board occurred.

The Board erred in holding that the Petitioners are obligated to offer reinstatement and back pay to Trinidad Hardy.

CONCLUSION

For all of the foregoing reasons, Petitioners 305 West End respectfully request that the Court reverse the decision of the Board, find that the Petitioners are neither joint employers nor *Burns* successors to the Esplanade and County Agency, reverse the Board's bargaining order against the Petitioners, and find that Trinidad Hardy is barred from obtaining reinstatement or back pay. For the same reasons, Petitioners request that Board's Cross Application for Enforcement be denied.

Respectfully submitted this 10th of March, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petitioners'/Cross-Respondents' Brief in Support of its Petition for Review complies with Fed. Rule of App. Proc. 32(a)(7)(b), containing 12, 718 words, excluding the cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, certificates of counsel, signature block and proof of service.

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SPECIAL APPENDIX

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NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

County Agency Inc. and Esplanade Partners Ltd. d/b/a Esplanade Venture Partnership d/b/a The Esplanade Hotel and 305 West End Holding, LLC d/b/a 305 West End Avenue Operating, LLC and Ultimate Care Management Assisted Living Management, LLC, A Division of The Engel Burman Group, d/b/a Ultimate Care Management, LLC, and United Food & Commercial Workers Union, Local 2013. Cases 02–CA–188405, 02–CA–189863, and 02–CA–195031

April 29, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On February 7, 2019, Administrative Law Judge Benjamin W. Green issued the attached decision. Respondents 305 West End Holding, LLC d/b/a 305 West End Avenue Operating, LLC (305 West End) and Ultimate Care Management Assisted Living Management, LLC, a division of the Engel Burman Group, d/b/a Ultimate Care Management, LLC (Ultimate) filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs. The General Counsel filed

exceptions and a supporting brief, and the Charging Party and Respondents 305 West End and Ultimate filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge’s rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.³

1. We agree with the judge’s conclusion that the New York Displaced Building Service Workers Protection Act (DBSWPA) did not relevantly affect the composition of the successor Respondents’ work force on December 5, 2016, the date the successor Respondents began operating the Esplanade Hotel with a substantial and representative complement. As noted above, the credited record evidence establishes that the successor Respondents voluntarily chose to hire predecessor employees, including those covered by the DBSWPA, as a majority of their initial complement. Moreover, because the DBSWPA covers only building service employees,⁴ and many of the predecessor employees hired by the successor Respondents were not building service employees (and therefore their hiring by the Respondent was indisputably voluntary), predecessor employees not covered by the DBSWPA would have constituted a majority of the successor Respondents’ initial complement all by themselves.⁵ For both of these independent reasons, we find

¹ No party excepts to the judge’s conclusion that Respondents County Agency and Esplanade (the predecessor Respondents), as joint employers, violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information it requested on October 27, 2016.

² Respondents 305 West End and Ultimate (the successor Respondents) have implicitly excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf’d. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We specifically affirm the judge’s determination to credit the testimony of Ultimate Executive Director Faraz Kayani that the successor Respondents intended to retain as many employees of the predecessor Respondents as possible—including those covered by the New York Displaced Building Service Workers Protection Act (DBSWPA), N.Y.C. Admin. Code § 22-505—because those employees would require less training, and it would be costly and time consuming to replace them. Kayani’s testimony in this regard was clear and apparently spontaneous. Moreover, because it tended to support a finding that the successor Respondents had breached a duty to recognize and bargain with the predecessor employees’ collective-bargaining representative, Kayani’s testimony was contrary to his employer’s interest and, therefore, adverse to his own pecuniary interest. The Board has long considered such testimony to be particularly reliable. See, e.g., *Flexsteel Industries*, 316 NLRB 745, 745 (1995) (citing cases), aff’d. mem. 83 F.3d 419 (5th Cir. 1996). Furthermore, Kayani’s testimony was corroborated by Ultimate Regional Food Service Director Paul Senken, who credibly testified that

the successor Respondents instructed hiring officers to hire as many predecessor employees as possible in order to take advantage of their familiarity with the Esplanade Hotel facility, the residents, and the operation. Finally, Ultimate Vice President Brian White credibly testified that the successor Respondents hired certain janitorial and maintenance employees, who were covered by the DBSWPA, because they fit the successor Respondents’ needs, further corroborating Kayani’s version of events and supporting the judge’s finding, which we adopt, that the successor Respondents voluntarily chose to hire employees of the predecessor Respondents as a majority of their initial complement.

³ We shall modify the judge’s recommended Order to conform to the Board’s standard remedial language and substitute new notices to conform to the Order as modified. Because the predecessor Respondents are no longer operating the facility involved in this proceeding, we shall order them to mail a copy of the attached notice marked “Appendix A” to the Union and to the last known addresses of their former unit employees at that facility in order to inform them of the outcome of this proceeding.

The successor Respondents did not except to the judge’s recommended affirmative bargaining order, so we find it unnecessary to provide a justification for that remedy. See *Arbah Hotel Corp. d/b/a Meadowlands View Hotel*, 368 NLRB No. 119, slip op. at 1 fn. 2 (2019), and cases cited therein.

⁴ The definition of “building service employee” in the DBSWPA is lengthy and detailed, but in substance, a building service employee is a nonsupervisory employee, earning \$35 an hour or less, engaged in the care or maintenance of an existing building. See N.Y.C. Admin. Code § 22-505(a).

⁵ On December 5, 2016, the successor Respondents hired 40 employees, 36 of whom had previously been employed by the predecessor

that the record before us does not present the question of whether, as the General Counsel argues, a departure from the successorship principles set forth in *Burns* and *Fall River Dyeing* would be warranted where a worker retention law *does* interfere with an employer's ability to make a voluntary and conscious decision as to the composition of its work force.⁶ Because the successor Respondents "made a conscious decision to maintain generally the same business and to hire a majority of [their] employees from [their predecessors]"—indeed, *intended* to take advantage of their predecessors' trained work force—we affirm the judge's conclusion that the successor Respondents must bargain with the Charging Party Union as the representative of the predecessor Respondents' employees. *Fall River Dyeing*, 42 U.S. at 40–41.⁷

2. The judge's recommended Order requires the successor Respondents to make predecessor employee Trinidad Hardy whole for their unlawful refusal to hire her because of her protected union activity. The successor Respondents contend on exception that a release agreement Hardy signed with the predecessor Respondents prevents the Board from ordering its standard make-whole remedies. The release provides, in relevant part:

Nothing in this Release shall be construed so as to prohibit me from filing a charge with, or participating in any investigation or proceeding conducted by a local, state, or federal agency *This Release shall, however, prohibit me from recovering any individual relief, compensation, or damages in any such charge, complaint, or claim filed by anyone.*

(Emphasis added.) We reject the successor Respondents' contention for two independent reasons.

First, the Board is not bound by private agreements like the one Hardy signed. As we recently explained, an agreement that purports to prohibit an employee from obtaining Board-ordered remedies implies "a reciprocal limitation on the Board's exercise of its power to award those remedies." *Kelly Services Inc.*, 368 NLRB No. 130, slip op. at 4 (2019), and such a limitation must be denied effect. Board-ordered remedies serve a public purpose, as the courts have recognized,⁸ and the Board does not give effect to private agreements that purport to limit the exercise of its remedial powers in the public interest. *Kelly Services*, above. Moreover, "the Board's remedial powers are an aspect of its broader power to prevent unfair labor practices, and Congress has provided that this broader power

Respondents. Four new employees were hired between December 5 and December 8: Jose Cabrera, Elsie DelVillar, Taylor Vardi, and Deandra Williams. However, where, as here, an employer commences normal operations with a substantial and representative complement of employees, "the relevant measuring day to determine if the [c]ompany employed a majority of union members is the initial date it began operating." *Ford Motor Co.*, 367 NLRB No. 8, slip op. at 13 (2018) (quoting *Vermont Foundry*, 292 NLRB 1003, 1009 (1989)); see also *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 46–47 (1987); *NLRB v. Burns Security Services*, 406 U.S. 272, 278–281 (1972). Here, the relevant date is December 5, 2016. We reject the successor Respondents' suggestion that the record does not support the judge's calculations regarding the composition of the successor Respondents' initial complement. The judge relied on a roster of 305 West End employees that was produced by the successor Respondents pursuant to the General Counsel's subpoena, authenticated by Ultimate Regional Director Kayani, and introduced into evidence without objection. The judge also relied upon 305 West End payroll records that were introduced by both the General Counsel and by the Respondents and were identical in relevant part. Taken together, these records establish, as the judge found, that 305 West End hired 40 employees in unit classifications on December 5, and four additional employees by December 8. Esplanade payroll records for 2016 and layoff notices provided to Esplanade employees prior to the transfer of ownership corroborate each other as to the final composition of the predecessor work force and clearly establish that 36 of the 40 employees hired by 305 West End on December 5 previously worked for County Agency/Esplanade. The successor Respondents claim, variously, that they would not have hired 7, 11, or 15 predecessor employees absent the DBSWPA. In other words, the successor Respondents claim that without the DBSWPA, they could have hired as many as 15 new building service employees. Again, the evidence shows that the successor Respondents *freely chose* to hire predecessor employees, including predecessor building service employees. But even if the successor Respondents had hired 15 new building service employees instead of an

equal number of predecessor employees on December 5, predecessor employees would still have constituted a 21-employee majority of the initial complement of 40 employees. In other words, on the appropriate date to assess whether the Union possessed majority status, the record shows that the successor Respondents would have hired predecessor employees as a majority of their work force—even if they had not been constrained by the DBSWPA and had opted to replace every single DBSWPA-covered predecessor employee with a new employee. Thus, while we agree with the judge that the record establishes the Respondents voluntarily opted to hire DBSWPA-covered employees, even if we accepted their contentions that they would not have, this would not alter the finding that the Union possessed majority status on December 5.

⁶ We would consider addressing this question in a future appropriate case.

⁷ In so affirming, we neither rely upon nor endorse that portion of the judge's analysis relating to *GVS Properties, LLC*, 362 NLRB 1771 (2015), order vacated April 20, 2017, a decision in which we did not participate, the continued precedential viability of which is rendered doubtful by the Board's 2017 vacatur Order.

⁸ See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941) ("Making . . . workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces."); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965) ("The back pay remedy has the twofold purpose of reimbursing employees for actual losses suffered as a result of a discriminatory discharge and of furthering the public interest in deterring such discharges."); see also *Oil, Chemical and Atomic Workers International Union v. NLRB*, 806 F.2d 269, 272 (D.C. Cir. 1986) ("[T]he Board, having filed an unfair labor practice complaint, proceeds in vindication of the public interest, *not* in vindication of private rights."); *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957) ("It is well established that the Board's power to prevent unfair labor practices is exclusive, and . . . its function is to be performed in the public interest and not in vindication of private rights.") (citing cases), enf. 251 F.2d 639 (6th Cir. 1958).

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‘shall not be affected by any other means of adjustment or prevention that has been or may be established by *agreement*, law, or otherwise.’” *Id.*, slip op. at 5 (quoting Section 10(a) of the Act) (emphasis in *Kelly Services*). Because the clear language of the Act and well-settled precedent preclude private limitation of the Board’s authority to remedy violations of the Act in the public interest, we find that Hardy’s release is ineffective to bar our remedial order.

Second, we find that Hardy’s release agreement with the *predecessor* Respondents cannot, in any case, reasonably be read to encompass the *successor* Respondents’ liability for their own independent violation of the Act. The agreement provides that Hardy releases “County Agency, Inc. and Esplanade Venture Partnership and their respective affiliates, successors and assigns” from claims arising from, inter alia, “the relationship of the parties, the termination of my employment or any action or omissions of Esplanade Venture Partnership or County Agency, Inc.” The clear intent of the agreement is to release the predecessor Respondents from claims arising from and relating to Hardy’s employment by them. The agreement by its terms also releases, among others, the predecessor Respondents’ “successors,” but this clearly aims to shield potential successors from liability under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), for unfair labor practices committed by the predecessor Respondents.⁹ We see no basis, either in the language of the agreement or in law, for construing the release to shield the successor Respondents from liability for *their own* unlawful conduct. Accordingly, for this independent reason also, we find that the release does not affect the remedial obligation of the successor Respondents to make Hardy whole for their unlawful refusal to hire her.¹⁰

ORDER

The National Labor Relations Board orders that

A. Respondents County Agency Inc. and Esplanade Partners Ltd. d/b/a Esplanade Venture Partnership d/b/a The Esplanade Hotel, New York, New York, joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with United Food & Commercial Workers Union, Local 2013 by failing and refusing to furnish it with requested information that is

relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of the Respondents’ unit employees.

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

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

(a) Furnish to the Union in a timely manner the information requested by the Union on October 27, 2016.

(b) Within 14 days after service by the Region, duplicate and mail, at their own expense and after being signed by the Respondents’ authorized representative, copies of the attached notice marked “Appendix A”¹¹ to the Union and to all unit employees who were employed by the Respondents at any time since October 27, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that each Respondent has taken to comply.

B. Respondents 305 West End Holding, LLC d/b/a 305 West End Avenue Operating, LLC and Ultimate Care Management Assisted Living Management, LLC, a division of the Engel Burman Group, d/b/a Ultimate Care Management, LLC, New York, New York, joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Food & Commercial Workers Union, Local 2013 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Refusing to hire employees because of their protected union activity.

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

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

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

⁹ In *Golden State Bottling*, the Supreme Court upheld the Board’s ruling that a purchaser who acquires a business with knowledge of the seller’s unremedied unfair labor practices may be held jointly and severally liable to remedy those violations.

¹⁰ Member Emanuel agrees that a make-whole remedy is appropriate for Hardy, but based only on the second reason set forth in this decision—that the release agreement cannot reasonably be read to encompass

the successors’ own conduct. He would not pass on whether the release should be denied effect because it limits the Board’s remedial authority.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Mailed by Order of the National Labor Relations Board” shall read “Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

All full-time and part-time employees, excluding executives, supervisors and guards as defined in the Labor Management Relations Act as amended. Full-time employees are employees employed on a steady basis. Part-time employees are call in employees and work as needed.

(b) Within 14 days from the date of this Order, offer Trinidad Hardy instatement to the job she held as an employee of Respondents County Agency/Esplanade or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Trinidad Hardy whole for any loss of earnings and other benefits suffered as a result of the unlawful refusal to hire her, in the manner set forth in the remedy section of the decision.

(d) Compensate Trinidad Hardy for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(e) Within 14 days from the date of this Order, remove from their files any reference to the unlawful failure to hire Trinidad Hardy, and within 3 days thereafter, notify Hardy in writing that this has been done and that the failure to hire her will not be used against her in any way.

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

(g) Within 14 days after service by the Region, post at their New York, New York facility copies of the attached notice marked "Appendix B."¹² Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily

communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since December 5, 2016.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification by a responsible official on a form provided by the Region attesting to the steps that each Respondent has taken to comply.

Dated, Washington, D.C. April 29, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

COUNTY AGENCY INC. AND ESPLANADE PARTNERS LTD. D/B/A ESPLANADE VENTURE
PARTNERSHIP D/B/A THE ESPLANADE HOTEL

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WE WILL NOT refuse to bargain collectively with United Food & Commercial Workers Union, Local 2013 by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its function as your collective-bargaining representative.

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

WE WILL furnish to the Union in a timely manner the information requested by the Union on October 27, 2016.

COUNTY AGENCY INC. AND ESPLANADE
PARTNERS LTD. D/B/A ESPLANADE VENTURE
PARTNERSHIP D/B/A THE ESPLANADE HOTEL,
JOINT EMPLOYERS

The Board's decision can be found at www.nlr.gov/case/02-CA-188405 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX B

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Food & Commercial Workers Union, Local 2013 as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT refuse to hire you because of your protected union activity.

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

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

All full-time and part-time employees, excluding executives, supervisors and guards as defined in the Labor Management Relations Act as amended. Full-time employees are employees employed on a steady basis. Part-time employees are call in employees and work as needed.

WE WILL, within 14 days from the date of the Board's Order, offer Trinidad Hardy instatement to the job she held as an employee of County Agency/Esplana de or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Trinidad Hardy whole for any loss of earnings and other benefits resulting from our unlawful refusal to hire her, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Trinidad Hardy for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Trinidad Hardy, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful refusal to hire her will not be used against her in any way.

305 WEST END HOLDING, LLC D/B/A 305 WEST
END AVENUE OPERATING, LLC AND ULTIMATE
CARE MANAGEMENT ASSISTED LIVING
MANAGEMENT, LLC, A DIVISION OF THE ENGEL

BURMAN GROUP, D/B/A ULTIMATE CARE
MANAGEMENT, LLC, JOINT EMPLOYERS

The Board's decision can be found at www.nlr.gov/case/02-CA-188405 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Zachary E. Herlands, Esq. and Jacob Frisch, Esq., for the General Counsel.

Paul Wagner, Esq., Arch Stokes, Esq., and Anne-Marie Mizel, Esq. (Stokes Wagner), for the Respondents.

Robert F. O'Brien, Esq. and W. Daniel Freehan, Esq. (O'Brien, Belland & Bushinsky), for the Charging Party.

DECISION

BENJAMIN W. GREEN, Administrative Law Judge. This case was tried before me in New York, New York, on March 19, 20, April 4, 18, 19, May 30, and 31, 2018. The General Counsel contends that Respondents County Agency, Inc. (County) and Esplanade Partners Ltd. d/b/a Esplanade Venture Partnership d/b/a The Esplanade Hotel (Esplanade), as joint employers,¹ violated Section 8(a)(5) and (1) of the Act by failing to furnish requested information regarding the sale of their facility² to the United Food & Commercial Workers Union, Local 2013 (Union). The General Counsel also contends that Respondent 305 West End Holding, LLC d/b/a 305 West End Avenue Operating, LLC (West End) and Respondent Ultimate Care Management Assisted Living Management, LLC, a Division of the Engel Burman Group d/b/a Ultimate Care Management, LLC (Ultimate),

¹ References herein to "Respondents Esplanade" include Respondent County, while references to "Respondent Esplanade" do not.

² The facility at issue is the Esplanade Hotel, a residential building located at 305 West End Avenue, New York, New York 10023.

³ References herein to "Respondents West End" include Respondent Ultimate, while references to "Respondent West End" do not.

⁴ The complaint originally plead a refusal-to-hire 16 employees, but the General Counsel has withdrawn, with my approval, the allegation pertaining to Harpal Sudeshkumar.

⁵ Toward the end of the trial, the General Counsel moved to include Respondent Ultimate as a joint employer of Respondent West End. I granted this motion and an amendment to the complaint was entered into evidence. Respondent Ultimate did not file an answer to the amended complaint, but Respondent West End did and denied it was a joint employer with Respondent Ultimate.

⁶ References herein to Scharf refer to Alexander, not Solomon.

as joint employers³ and the successor of Respondents Esplanade, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the incumbent Union as the representative of the predecessor's unit employees. Finally, the General Counsel contends that Respondents West End violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire 15 of the predecessor's employees.⁴

The Respondents, except Respondent Ultimate, filed answers to the complaint denying the substantive allegations.⁵ Respondent Esplanade admits in its answer that it owned and operated an assisted living facility located at 305 West End Avenue, New York, New York. In its posthearing brief, Respondent West End states that the "property was owned by the Scharf family, and was operated for a long time by Solomon Scharf, and thereafter by his son Alexander, known as 'Ali.'"⁶ (R. Br. p. 5) Respondent County Agency admits in its answer that it is in the business of providing professional employer organizational services, including the provision of personnel, payroll, and other human resources functions to customers. In its posthearing brief, Respondent West End states that Respondent County was "a company under contract with (Respondent) Esplanade to supply workers." (R. Br. p. 5)

As discussed below, I find that Respondents Esplanade, as joint employers, violated the Act by failing to provide the Union with requested information. I also find that Respondents West End, as joint employers and successors of Respondents Esplanade, unlawfully refused to bargain with the Union as the representative of the predecessor's unit employees. Lastly, among the merit allegations, I find that Respondents West End unlawfully refused to hire Union shop steward Trinidad Hardy because of her union position and/or activity. However, I do not find, and herein dismiss, the allegation that Respondents West End violated the Act by refusing to hire 14 other employees in a failed attempt to avoid successorship.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs filed by the General Counsel, the Union, and Respondent West End,⁷ I make these

FINDINGS OF FACT⁸

I. LABOR ORGANIZATION STATUS AND JURISDICTION

In their answers to the complaint, Respondents Esplanade and

⁷ Until March 23, 2018 (day 3 of the trial), the law firm of Stokes Wagner represented Respondent Esplanade and Respondent West End. Respondent County did not appear at the trial. On March 23, 2018, Stokes Wagner indicated that it might not be able to continue representing Respondent Esplanade because of a potential conflict caused by a pending criminal indictment of Scharf. The next day, Stokes Wagner withdrew as Respondent Esplanade's counsel and continued only as counsel for Respondent West End. Respondent Esplanade did not appear during the remainder of the trial through independent counsel or otherwise. Respondent West End was the only respondent that filed a posthearing brief.

⁸ My factual findings are based upon a review and consideration of the entire record of this case. Testimony contrary to my findings has been discredited. Credibility findings need not be all-or-nothing propositions and, indeed, it is common in judicial proceedings to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, 335 NLRB 622

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Respondent West End denied sufficient knowledge to admit or deny the status of the Union as a labor organization within the meaning of Section 2(5) of the Act. The Union negotiated and was party to a collective-bargaining agreement covering a unit of employees employed at the Esplanade Hotel until that facility was sold on December 5, 2016.⁹ The Union filed at least one grievance under the contract (which settled) and requested the information at issue in this case. The Union also contacted Respondent West End in an attempt to have that company assume the collective-bargaining agreement or at least bargain with the Union as the representative of the unit. Accordingly, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. See *Image Systems*, 285 NLRB 370, 374 (1987).

None of the Respondents deny commerce information or employer status as plead in the complaint as a basis for jurisdiction. At all material times, the Respondents have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES¹⁰

The Operation of the Esplanade Hotel Prior to the Sale on December 5

Respondent Esplanade owned and operated the Esplanade Hotel as a senior independent living residence which provided certain nonmedical services. Those services included three meals a day (in the dining room or delivered to the resident's apartment); front desk concierge services such as greeting people entering the building, announcing visitors,

handling mail, answering phones, and fielding complaints; housekeeping with towel, linen, and paper replacement; activities and entertainment (e.g., singers, poetry, bingo, exercise classes); and a beauty parlor.

Respondent Esplanade was owned by the Scharf family. Marcy Levitt was the executive director and Eli Singer was the controller. Additional managers and supervisors included recreation director Leslie Brown, housekeeping director Alexander Francisca, maintenance engineering director Dzevat Bivic, customer service director Albert Etienne, and marketing director Ruth O'Connell.

The Union represented a unit of employees who were employed at the Esplanade Hotel and the most recent collective-bargaining agreement was effective February 1, 2015, to January

31, 2018. The Union entered into this contract with "County Agency Inc., located at 129 South Eighth Street, Brooklyn, NY 11211, for the employees employed at The Esplanade Hotel located at 305 West End Avenue, New York, New York 10023, hereinafter referred to as the 'Employer'." (R. Exh. 1) Levitt testified that "we all worked for (Respondent) County." (Tr. 202) The contract was signed by Scharf as "partner" under a line identifying him as a representative of "County Agency Esplanade."

The recognition provision of the contract describes the unit as follows (R. Exh. 1):

[A]ll of its full-time and part-time employees, with respect to wages, hours and conditions of employment, excluding executives, supervisors and guards as defined in the Labor Management Relations Act as amended, and agrees to deal collectively only with this Union for and on behalf of such employees. Full-time employees are employees employed on a steady basis. Part-time employees who are call in employees and work as needed.

Although the contract describes a wall-to-wall unit, Union director of collective-bargaining Eugene Hickey testified that he did not know recreation employees were employed at the facility and, therefore, never considered them to be included in the bargaining unit.¹¹

The collective-bargaining agreement was a comprehensive contract. The contract included a union security clause requiring Union membership in good standing as a condition of employment. The contract also included provisions that dictated the terms and conditions of employment of unit employees, including wages, leave, health benefits, layoffs, discharges, suspensions, and subcontracting. Further, the contract included the following provision in Article 31 regarding successors and assigns (R. Exh. 1.):

Section 1. This agreement shall be binding upon the parties hereto, their successors, administrators, executors, and assigns and shall survive a change of name, of location or place of business or re-organization. In the event the entire operation or any part thereof is sold, leased, transferred or taken over by the sale, transfer, lease, assignment, receivership or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this agreement for the life thereof. It is understood by this Section that the parties hereto shall not use any leasing device to a third party to evade this agreement. The Employer shall give notice to the existence of this agreement to any purchaser, transferee, assignee or lessee of the operation

(2001). A credibility determination may rely on a variety of factors, including the context of the testimony, the witness's demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003).

⁹ All dates refer to 2016, unless stated otherwise.

¹⁰ The General Counsel, in its brief, refers to the failure of Respondent West End to produce certain subpoenaed documents and failure to produce other subpoenaed documents in a timely manner at the start of the hearing. However, the General Counsel has not asked for inferences or

the suppression of evidence that, in my opinion, would be dispositive of any of my findings herein. More concerning to me is Respondent West End's apparent failure to provide the General Counsel with a privilege log after representing at trial that it would. However, the General Counsel never submitted a motion regarding this issue and has not asked for a specific remedy. Accordingly, I do not address the matter further herein.

¹¹ Throughout the trial, Respondent West End's counsel took the position, in agreement with the Union, that recreation employees at the Esplanade Hotel were not historically included in the unit. In its brief, Respondent West End confirmed that "recreation employees . . . were not represented by the Union . . .". R. Br. p. 7. I find the unit, excluding recreation employees, to be appropriate.

of this agreement or any part thereof. Such notice shall be in writing with a copy to the Union not later than thirty (30) days prior to sale.

Section 2. The Employer shall not have the right to assign this agreement or in any other manner to transfer the rights and obligations thereof to any other party, unless and until the purchaser, transferee, assignee or lessee shall first have assumed and accepted, in writing, all the terms and conditions of this agreement. Employees working under this agreement shall at all times be entitled, acting through the Union as their representative, to hold the Employer directly responsible for the full performance of all terms and conditions of this agreement.

The contract was negotiated by Scharf and Singer on behalf of the employer. The union negotiators were Hickey, Hardy (a front desk concierge employee), and union representative Idania Baldoquin.

In August 2015, the parties settled a grievance pertaining to the paid leave of unit employees under articles 4-6 of the collective-bargaining agreement. An internal email from Singer regarding this settlement stated, in part, that the “settlement offered herein [by the Union] is agreeable to the Esplanade and County Agency.” (GC Exh. 42.) Singer’s email identified him as the controller of “Esplanade Senior Residences.”

The contract, in Article 7, provided for all non-probationary employees to receive wage increases of \$0.40 per hour on February 1, 2015 and February 1, 2016, and a \$0.50 per-hour wage increase on February 1, 2017. Article 3 of the contract provided for premium pay for overtime and hours worked on holidays. Respondent County’s 2016 payroll records reflect that unit employees received pay increases and premium pay consistent with the contract.

The contract also provided, in Article 11, for employees to receive health benefits through a union welfare fund. Under Article 11, employees paid nothing toward single coverage, but 100 percent (above the cost of single coverage) for a family or plus one plan.¹² Accordingly, as one might expect, prior to the sale, payroll records for the vast majority of Esplanade Hotel employees show no deductions for medical benefits.

The General Counsel called employee witnesses who testified that they understood their employer to be Respondent Esplanade (not Respondent County) and Respondent County to be the payroll company that issued paychecks. Front desk employee Dawn Capelli testified that she has been employed at the Esplanade Hotel since 2014 and understood the facility to be owned by the Scharf family. During Capelli’s employment, she never met anyone she understood to be employed by Respondent County. Server Michelle Bellemy testified that she has been employed at the Esplanade Hotel for five years and only understood Respondent County to be the payroll company that prepared employee paychecks. Deannie “Joy” Duncanson¹³ testified that she was employed at the facility from 1994 to December 4, 2016 and only

knew Respondent County as the name on the paychecks. Like Capelli, neither Bellemy nor Duncanson met anyone they understood to be employed by Respondent County.

According to Levitt, certain employees were considered “union” while other employees in the same classifications were not. Levitt claimed that Singer kept a list of the employees who were not represented by the Union. No such list was entered into evidence and Singer did not testify. However, Levitt identified 10 employees she thought were not represented by the Union. Levitt also testified that she exercised discretion in giving such nonunion employees annual wage increases, which were inconsistent with and, in fact, higher than the contractual wage increases received by unit employees. However, as noted above, 2016 payroll records reflect that all employees received wage increases consistent with the contract.

In support of the proposition that some unit employees were “nonunion,” Respondent West End notes that certain employees did not have union dues deducted from their paychecks (as reflected in the payroll records).

Duncanson testified that she was one of three “leads” in the kitchen (along with Mike Whyte and Terrell Brannon). Certain employees testified that they understood Duncanson to be the kitchen manager or supervisor. Bannon, in his resume, described himself as a supervisor. Levitt testified that Duncanson was the director of food service and Whyte/Bannon were supervisors. However, when asked whether Whyte reported to Duncanson, Levitt said they “worked in conjunction with each other.” (Tr. 232.) According to Levitt, Duncanson hired employees, directed them to do tasks, and worked with her (Levitt) to create menus for residents’ meals. Levitt testified that Duncanson, like other department heads, had authority to discipline employees (but could not recall an instance when she did so). Levitt also testified that Duncanson’s resume, which was submitted to Respondents West End, was generally accurate in its description of her duties. Duncanson’s resume described her experience at the Esplanade Hotel as follows (GC 21):

Esplanade Luxury Senior Residences, New York, NY January 2000-Present Director of Food Services

- Manage a staff of thirty and the general operations of the kitchen including shift schedules and billing.
- Create a premium service experience for seniors.
- Responsible for the creating and executing four-cycle balanced menus.
- Manage kitchen inventory including the ordering of groceries, produce, meats, and fish that meet Kosher standards.

Esplanade Luxury Senior Residences, New York, NY April 1998—December 1999 Dining Room/Kitchen Supervisor

- Recorded senior attendance at every meal.
- Created schedules for servers, cooks, and utility.

¹² Respondent West End called and questioned employees Norman Campbell, William Londea, and Charlene Grant regarding their health benefits. Campbell testified that he received health care coverage through Respondent Esplanade. Londea testified he was offered coverage, but declined it because he was covered under a separate plan. Grant

testified she never applied for health coverage. Thus, the employees did not effectively testify that they were denied health benefits under the contract. Further, the employees would not necessarily know whether their employer made welfare contributions on their behalf.

¹³ As discussed below, Duncanson’s job title is disputed.

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- Ordered inventory including bread, ice cream, milk, and other beverages.

Esplanade Luxury Senior Residences, New York, NY October 1994-March 1998 Server

- Served seniors by taking food orders while clearing and resetting dining room when appropriate.

Duncanson claimed that she identified herself on her resume as the director of food services because “that’s the position I was hoping to get with the new company.” (Tr. 140.) Duncanson denied she hired/fired employees or directed employees to do tasks. However, Campbell, a server/assistant chef, credibly testified that he was interviewed by Duncanson, merely introduced to Levitt the same day, and later notified by Duncanson that he was hired.

Duncanson denied she scheduled employees or ordered inventory. According to Duncanson, Whyte did the scheduling and Whyte/Brannon did the ordering. Duncanson testified that she was only a lead to the extent she created menus with Levitt and “managed kitchen inventory.” Otherwise, Duncanson claimed she spent her time cooking, waiting tables, and washing dishes.

When owned by the Scharf family, the Esplanade Hotel was not a licensed assisted living facility regulated by the New York Department of Health (NY DOH). Medical personnel were not employed at the facility and medical care was not administered to the residents.

The Sale of the Facility and the Hiring Process

In about June, Scharf told Hickey the facility was going to be sold. Hickey notified union counsel. On June 17, Union counsel emailed Scharf a proposal for a modified collective-bargaining agreement which identified “Northwind Group” as a successor employer. The Union proposal provided for the successor to recognize the Union as the bargaining representative of unit employees and abide by the terms of the contract. Union representatives later met with Scharf, Ran Eliasaf (identified by Hickey as the prospective buyer), and their attorney to discuss the proposed contract modification. The parties subsequently corresponded regarding the matter, but never signed an agreement for the buyer to recognize the Union and/or assume the contract. The sale was ultimately scheduled to close and take effect on December 5.

In about October, Respondent Ultimate designated regional executive director Faraz Kayani as the manager who would lead the operational transition during the sale.

In October, flyers were distributed at the facility which notified employees that they could interview for jobs with the new owner on October 27. Hardy notified Hickey of the flyers.

On October 26, Hickey visited the Esplanade Hotel. While there, Hickey held a meeting with about 30–35 unit employees and advised them to apply for employment with the buyer. A nonunit recreation employee attended the meeting and asked Hickey how recreation aides could “get in the Union.” Hickey told the employee that recreation was not covered by the collective-bargaining agreement. According to Hickey, he was unaware, until October 26, that Respondents Esplanade employed recreation employees. Hickey did not consider whether the recreation employees might be covered by the wall-to-wall unit description in the contract.

On October 27, union counsel emailed Scharf a letter requesting the following information (GC Exh. 9):

1. The identity of any purchaser or prospective purchaser including corporate name and contact information;
2. A copy of any purchase and sale documents including, but not limited to, Letters of Intent, Sales Agreements, Asset Purchase Agreements or Acquisition Agreements between any purchaser or prospective purchaser and Esplanade;
3. Any communications between Esplanade and any purchaser or prospective purchaser relating to the existing Collective Bargaining Agreement with Local 2013;
4. Any other documents which refer or relate to the sale of Esplanade’s business assets or plans to convey such assets to 305 LLC or any other entity; and
5. Any communications or documents referring or relating to Esplanade’s compliance with Article 31 the Parties’ Collective Bargaining Agreement.

Union counsel explained in this letter that the Union was aware of the pending sale of Respondent Esplanade to Respondent West End and needed the information to monitor compliance with the collective-bargaining agreement, particularly Article 31 regarding successors and assigns.

On October 27, Union counsel also sent a letter to prospective buyers Eliasaf and Jan Burman, which stated as follows (GC Exh. 10):

As you are aware, UFCW Local 2013 is the certified Collective Bargaining representative of employees working for the Esplanade Hotel (“Esplanade”) and is party to a Collective Bargaining Agreement (“CBA”) with that Company. We have been advised that 305 West End Avenue Operating LLC (“305 LLC”) is acquiring the Esplanade and intends to operate the facility. We are in receipt of a notice which states that 305 LLC is interviewing for positions at the Esplanade. Please be advised that Local 2013 anticipates and expects that 305 LLC will assume the existing CBA and retain all bargaining unit employees in their current positions. All current employees want to continue their employment at the Esplanade. Be advised that we will take all necessary actions to ensure the rights of our members to their current positions.

On October 27, Respondents West End conducted interviews of Esplanade Hotel employees who applied for continued employment. Baldoquin went to the facility that day. While at the facility, Baldoquin approached a man who seemed to be in charge and asked whether he was “aware that this is [a] union shop?” The man answered, “to his knowledge, this wasn’t going to be a union shop and that they had to reapply.” (Tr. 327–329.) Baldoquin did not attempt to determine this man’s name and was not asked, at trial, to describe his appearance.

In addition to the interviews conducted on October 27, on November 18, Respondents West End held a job fair at a Marriot hotel which was attended by employee applicants who were, for whatever reason, not interviewed on October 27 and other applicants who were not previously employed at the Esplanade Hotel. Although outside applicants were interviewed, Kayani testified that Respondents West End wanted to retain as many Esplanade Hotel employees as possible because current employees would

require less training and it would be costly and time consuming to replace them.

Erik Anderson, Respondent Ultimate's vice president of human resources, helped organize and coordinate the interview process. However, he only interviewed a few applicants himself when the primary interviewers were occupied. The interviews were largely conducted by regional managers of Respondent Ultimate, including Kayani; Susan Murphy, regional director of dining services (front of the house dining as opposed to the kitchen); Paul Senken, regional director of food and beverage services; Randy Tremble, vice president of food and beverage services; Clement Walsh, regional director of housekeeping; Brian White, vice president of environmental services; and Richard Youngberg, regional director of operations. Applicants were generally interviewed by the manager who would be responsible for the department in which the applicant was seeking a job. However, Kayani interviewed applicants for all departments. Levitt was not involved in the hiring of employees. Some applicants were interviewed more than once, and some were interviewed by more than one manager at a time.

The interviews generally lasted anywhere from 5 to 15 minutes. However, Murphy testified that she spent more time than that with the applicants.

According to Anderson, interviewers looked for applicants with "inner qualities" or "core values," which would allow the company to provide excellent customer service and succeed in a "relationship business." (Tr. 504.) Thus, Respondents West End wanted employees with an engaging personality and attitude, good work ethic, and a commitment to team work. Anderson testified that an applicant's skills and technical abilities were valued but noted that such skills/abilities could be taught. Anderson believed inner qualities and core values were more difficult to teach and a priority in selecting employees. Moreover, Anderson testified that a significant percentage of the staff of the Esplanade Hotel were unskilled employees (e.g., porters and housekeepers) who could be trained.

Tremble largely echoed Anderson's testimony to the extent he believed personality and attitude were most important for "front of the house" staff who are easily trained and have regular interaction with residents. However, according to Tremble, "back of the house" employees, such as cooks, who do not have as much contact with residents and are more skilled, need to demonstrate experience and skill before being hired. Similarly, White testified that maintenance engineers need to come with prior knowledge, skills, and experience.

Respondents West End was not given access by Respondents Esplanade to employee personnel files. Tremble noted that interviewers do not normally have access to personnel files when hiring employees in situations that do not involve the sale of a business. Tremble further testified that employees were being interviewed "without prejudice." Senken testified that he did not believe personnel files would be especially helpful as documents contained therein largely reflect the subjective opinions of supervisors.

Upon cross-examination by Union Counsel, Anderson testified that he did not know whether the interviewers checked references of newly hired employees who had not previously worked at the Esplanade Hotel. Anderson testified that, ideally

in a normal situation, it is good practice to check the references of applicants if time allows. Anderson asserted, however, that references are rarely reliable, and this was not a normal situation. Other than Anderson, none of the managers who conducted interviews were examined about whether they checked applicant references.

According to Anderson, interviewers had no prior experience conducting interviews in a union environment. Therefore, he included the following directive among instructions to interviewers in advance of the interviews (R. Exh. 24):

- All interviewing must be done without ANY regard whatsoever to any individuals' union or non-union status.
- There must be no discussion in any manner of "union" topics.

Respondent Ultimate's human resource department provided the interview team with "Applicant Evaluation" forms. These applicant evaluations contained a rating matrix with a list of categories for job qualifications, and boxes next to each category to be checked with a rating of poor, fair, average, good, or excellent. Interviewers testified that they only used the applicant evaluations as a tool to the extent it was useful and did not necessarily complete the form for every applicant. Tremble testified that it was typical to hire applicants with ratings of "average" because "average is decent." (Tr. 573.)

Kayani testified that he did not need approval from anyone to hire an applicant as he was the person who was ultimately responsible for hiring decisions. If Kayani "decided to hire someone, there was no other discussion." (Tr. 434.) Kayani further testified that other interviewers were also high ranking regional managers who largely had authority to hire employees without approval. By contrast, Anderson testified that the interviewers made hiring decisions which were reviewed by Respondent Ultimate vice president of operations Maryellen McKeon. However, Anderson admitted that all the recommendations of the interview team were approved by McKeon.

The New York Displaced Building Service Workers Protection Act (DBSWPA), N.Y.C. Admin. Code § 22-505, requires covered employers to retain certain "building service employees" (BSE) following the sale of a business. This city ordinance identifies BSEs as, excluding supervisors, those who earn less than \$35 per hour and are engaged in the care or maintenance of a building. DBSWPA limits the ability of an employer to sever BSEs as follows:

2. Upon termination of a building service contract, any covered employer or the successor building service contractor, whichever person intends to furnish substantially similar building services to those that were provided under the terminated building service contract, shall retain those building service employees employed at the buildings covered by the terminated contract for a 90-day transition employment period.
3. If at any time the covered employer or successor building service contractor, whichever person intends to furnish substantially similar building services to those that were provided under the terminated building service contract, determines that fewer building service employees are required to perform

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building services at the affected buildings than had been performing such services by the former building service contractor, the covered employer or the successor building service contractor shall retain the building service employees by seniority within job classification; provided, that during the 90-day transition period, the covered employer or successor building service contractor shall maintain a preferential hiring list of those building service employees not retained at the buildings who shall be given a right of first refusal to any jobs within their classifications that become available during that period.

4. Except as provided in paragraph 3 of this subdivision, during the 90-day transition period, the covered employer or successor building service contractor, whichever person intends to furnish substantially similar building services to those that were provided under the terminated building service contract, shall not discharge without cause a building service employee retained pursuant to this section.

5. At the end of the 90-day transition period, the covered employer or successor building service contractor, whichever person intends to furnish substantially similar building services to those that were provided under the terminated building service contract, shall perform a written performance evaluation for each building service employee retained pursuant to this section. If such employee's performance during such 90-day transition period is satisfactory, the covered employer or successor building service contractor shall offer such employee continued employment under the terms and conditions established by the covered employer or successor building service contractor.

Respondents West End interpreted this ordinance to require

the retention for 90 days of certain BSEs employed at the Esplanade Hotel, including housekeepers, porters, laundry assistants, and maintenance engineers. Walsh testified that he was responsible for hiring the housekeepers and porters. According to Walsh, in December, he made determinations whether to hire housekeepers and porters even though they had to be retained until March 5, 2017, as a matter of law. Walsh claimed he did not know until after the interview process was over that BSEs had to be retained for 90 days. However, Kayani testified that BSEs were identified before December 5, and no determination was made in December whether to retain them beyond the mandatory 90-day period. Rather, according to Kayani, BSEs were given the same training and opportunity for continued employment as other employees and, like other employees, Respondents West End preferred to retain them if possible instead of replacing them.

Respondents West End has identified 15 predecessor employees who were retained in what it understood to be BSE classifications (7 housekeepers, 3 porters, 1 laundry assistant, 4 maintenance assistants).

On December 2, McKeon sent an email to Respondent West End owner Steven Krieger with an attachment purporting to list the names of 29 former employees who were not being hired. Of those employees, 18 employees (16 kitchen and 2 front desk) were identified as non-BSEs and 11 employees (7 housekeeping and 4 porters) were identified as BSEs. McKeon was not called to testify at trial.

The following alleged discriminatees were not hired by Respondents West End:¹⁴

Last Name	First Name	Department	Job Title¹⁵
Brannon	Terrel	Kitchen	
Cabness	Anthony	Kitchen	Waitstaff Server
Colon	Augustina	Kitchen	Waitstaff Server
Dalmage	Davian	Kitchen	Waitstaff Server
Dejesus	Dora Y.	Kitchen	
Duncanson	Deannie	Kitchen	
Hardy	Trinidad	Front Desk	Front Desk Concierge
James	Lisa	Kitchen	Waitstaff Server
Jerome	Henry	Kitchen	Waitstaff Server
Joseph	Lynda	Kitchen	
Mullen	Virginia	Front Desk	Front Desk Concierge
Roberts	Kimeyetta	Kitchen	
Smith	Astley	Kitchen	Waitstaff Server
Terrier	Laurent	Kitchen	Chef
Weber	Denis	Kitchen	Waitstaff Server

¹⁴ Of these employees, Cabness and Roberts were not among the employees identified in McKeon's December 2 email as employees who would not be hired.

¹⁵ The record does not clearly indicate the job title of certain alleged discriminatees, including Brannon (whose title is disputed).

Certain employees of Respondents Esplanade who were not hired by Respondents West End, including Hardy, signed releases in exchange for monetary compensation. These agreements indicate that the employee “release(s) County Agency, Inc. and Esplanade Venture Partnership and their respective affiliates, successors and assigns, from all claims, whether known or unknown, arising from or in connection with the . . . National Labor Relations Act; . . .” The release agreements further state:

Nothing in this Release shall be construed so as to prohibit me from filing a charge with or participating in any investigation or proceeding conducted by a local, state, or federal agency, including but not limited to the EEOC. This Release shall, however, prohibit me from recovering any individual relief, compensation, or damages in any such charge, complaint, or claim filed by anyone.

Youngberg interviewed front desk concierge employees, including Hardy. According to Youngberg, Hardy “came in with a look of anger and disgust that we were even going through this process. Just a body language, angry face.” (Tr. 756.) Youngberg testified that Hardy was not hired “because we are a business of attitude, customer service, professionalism, and if my loved one was moving into one of our communities, I would truly want someone that would greet me in a professional, positive attitude.” (Tr. 757.) However, Youngberg completed an applicant evaluation that graded Hardy as “excellent” (the highest grade) in the categories of “guest service & hospitality personality” and “enthusiasm.”¹⁶ Youngberg admitted that these categories would encompass customer service, and a rating of “excellent” in those categories would not normally be consistent with someone who showed “anger and disgust” during the interview. Youngberg offered no explanation for this discrepancy between his testimony and the applicant evaluation he completed for Hardy.

Tremble interviewed Duncanson and decided not to hire her. According to Tremble, he did not hire her because she was in charge of an area that appeared to be in particularly poor condition. Tremble also noted that Duncanson did not have experience with formal dining.¹⁷ Tremble testified that Duncanson said during the interview she could do things other than manage but did not indicate she would accept a lower position than the one she currently held.

Other than Hardy and Duncanson, the alleged discriminatees largely received ratings on their applicant evaluations of “average” or worse (to the extent an applicant evaluation was completed and entered into evidence). Only three of the alleged discriminatees (Brannon, Terrier, and Dejus) received ratings of “good” in any category. Brannon received ratings of “good” in

¹⁶ Youngberg graded Hardy as “good” in all other categories except flexibility (which was rated “average”). Youngberg did not explain why Hardy was only rated “average” in flexibility.

¹⁷ Like Hardy, Duncanson was rated “excellent” in the categories of “guest service & hospitality personality” and “enthusiasm,” and “good” in all other categories except “flexibility” (which was rated “average”).

¹⁸ This count includes predecessor employees hired on December 5 and new employees hired no later than December 8 (the first pay day). (GC Exh. 32) Respondent West End asserted in its brief that 46

the categories of “appearance/presentation” and “communication skills,” but “poor” in “enthusiasm” and “fair” in “team building.” His overall assessment was “fair.” Terrier received a rating of “good” in “guest service & hospitality personality,” but was not graded in any other category. Dora Dejesus received a rating of good in “enthusiasm,” but “poor” in “team building” and “initiative.” Her overall rating was “fair.”

Server Barbarba Nichols, a server of Respondents Esplanade who was hired by Respondents West End, received ratings of “average” in all categories.

Among the new employees who were hired even though they did not previously work at the Esplanade Hotel, three were referenced in the General Counsel’s brief in connection with an argument of disparate treatment: Cook Jose Cabrera, server Deandra Williams, and utility aide/dishwasher Augustine Batista. On his applicant evaluation, Cabrera received ratings of “good” in six categories. Two additional categories were checked “average,” but with an arrow pointing toward the box for “good.” One category, “appearance/presentation,” was clearly checked “average.” Williams received ratings of “good” in seven categories, and “average” in two categories (“initiative” and “time management”). Batista received ratings of “average” in five categories, and “fair” in one category (“communication skills”). Batista was not rated in three categories.

Respondents West End believed the Esplanade Hotel had been overstaffed at the front desk and in the food and beverage department (i.e., the kitchen and waitstaff). Respondents West End maintained the engineering staff in full as, according to White, the existing staff fit the needs of the new employer.

The interviewers generally testified that they understood the old Esplanade Hotel staff to include union and nonunion employees but claimed that hiring decisions were not made on the basis of union affiliation. Respondent Ultimate does not manage other unionized facilities.

Post-Sale

Respondent Ultimate took over the management of the facility following the sale. Initially, Respondent Ultimate’s regional managers maintained a near daily presence at the facility to train employees and bring the new operation up to desired standards. Although these managers stopped coming as often once the operation stabilized, they maintained responsibility for the facility and continued to visit on a less frequent basis. Among their responsibilities, regional managers were involved in disciplinary and discharge determinations.

The General Counsel asserts that Respondents West End initially hired 44 employees in unit classifications and, of those, 36 were former employees of the predecessor. My count reflected the same results.¹⁸ Respondents West End also hired five nonunit

non-supervisory/nonrecreation positions (i.e., unit classifications) were initially filled. This number seems to include Mike Whyte (listed on GC Exh. 32 as hired and terminated December 5) and Tyler Bogen (listed on GC Exh. 32 as hired July 12). However, GC Exh. 32 is some sort of chart and does not appear to be actual payroll records. Whyte does not appear on the payroll as having worked for Respondents West End and Bogen does not appear on the payroll until January 2017. (GC 18.) Thus, I have not included Whyte or Bogen among the initial complement. Attached to this decision is a list of personnel hired by Respondents West

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recreation employees who were previously employed by the predecessor.

Respondents West End identified 15 predecessor employees it hired as individuals, whom it believed, were not dues paying members of the Union. Those 15 employees included the five nonunit recreational employees.¹⁹

Scharf, Levitt, and Singer maintained a presence at the facility after the sale. Levitt was initially retained as the executive director without an adjustment in salary but was later transferred to the position of director of resident relations. Scharf has maintained an office at the facility, but it is not clear what type of work he has done after the sale. Singer continued as controller until about April 2017, when he separated.

According to Levitt, residents of the building were not affected by the sale and "there was a complete continuity of services." (Tr. 207.) Residents continued to receive three meals a day, housekeeping services, laundry services, concierge services, recreation, and entertainment. Levitt also testified that she was unaware of any change in employees' job duties.

On December 20, Kayani sent the following email to managers/supervisors, including Tremble, Murphy, Walsh, Levitt, O'Connell, and Brown (GC Exh. 34):

Please make sure ANY and ALL new hires go through me including those that will go into the kitchen/dining. This means that I meet them, even if it is for 5-minutes. I also would like their new hire packet completed given to me, hand delivered OR if I am NOT in the Community; scanned over to Maria and myself

including Eli. And this should be done BEFORE they start not after. (original packet left for me to collect. I will review and FedEx over to Bohemia).

Same goes for termination - If someone resigns that is a different story, but if someone will be terminated, I MUST be notified immediately and it must be done in my presence. After the termination the respective Department head MUST complete a West End Termination Form and hand deliver it to me or SCAN if over to Maria, Eli and myself. (original one to be given to me when I am in the building and I will get that to Bohemia).

I understand we have a lot going on but at the same time, inconsistencies in these areas can and will lead to potential

End with references to employees' positions, hire dates, separation dates, and BSE status (according to Respondent West End).

¹⁹ Throughout the trial, the General Counsel and Union objected to the introduction of evidence regarding dues paid by employees and/or their status as Union members. I largely sustained these objections to the extent Respondents West End was not merely attempting to establish its awareness and understanding of the same. The General Counsel has not contended that Respondents West End discriminated against employees on the basis of their respective Union membership. Rather, the General Counsel alleges that Respondents West End failed to hire predecessor employees to avoid successorship.

²⁰ Although the record contains testimony regarding NY DOH licensing requirements for the medical care of residents in assisted living facilities, Respondent West End did not specifically cite to state law or

payroll errors that we do not want. Therefore, I want everyone to take this very seriously.

It was the intent of Respondents West End to operate the Esplanade Hotel as a high end assisted living facility with appropriate certification from the NY DOH and high-level services/amenities. Levitt testified that an assisted living facility has certified home-health attendants and a round-the-clock nursing staff who keep medical records for each resident and monitor their medication. Kayani testified that an assisted living facility needs to monitor health care providers entering the building by having them sign in/out and ensuring, through a background check, that they are properly licensed. According to Kayani, an assisted living facility must also monitor and comply with the dietary restrictions of residents while an independent living facility does not. Kayani further testified that, in an assisted living facility, even nonmedical employees need to be aware of and ready to report potential medical problems of residents. As an example, Kayani said a porter should report blood in the toilet after seeing a resident exit the bathroom. According to Levitt, the primary difference between an assisted and independent living facility is that the former provides medical services and the latter does not.²⁰ As of the trial, Respondents West End had not begun providing medical services to residents or medical training to staff members.

Several managers of Respondents West End testified that the condition of the Esplanade Hotel prior to the sale was deplorable, particularly the kitchen, dining room, and employee lounge. Anderson testified that the administrative records were also extremely disorganized. The General Counsel did not attempt to rebut this characterization of the facility.

As of the trial, Respondents West End were in the process of renovating the building and applying for a license from the NY DOH to operate as an assisted living facility. Renovations were scheduled to occur in two phases with phase 1 being renovations from the basement to the seventh floor and phase 2 being renovations from the eighth floor to the roof. These renovations started in the basement in about the spring of 2017. Kayani estimated that Phase 1 is about 35-40 percent done and would be finished in about 5 or 6 months. Phase 2 was expected to begin in January 2019 and, according to Kayani, the entire process could take 2 years.

Kayani represented that he expected the NY DOH to grant the facility a license on a rolling floor-by-floor basis as renovations progressed. Kayani testified (on April 4, 2018) that construction

regulations regarding the same. I take administrative notice that the NY DOH website, under "Adult Care Facilities/Assisted Living," states that "Adult Care Facilities (ACF) provide long-term, non-medical residential services to adults who are substantially unable to live independently due to physical, mental, or other limitations associated with age or other factors. Residents must not require the continual medical or nursing services provided in acute care hospitals, in-patient psychiatric facilities, skilled nursing homes, or other health related facilities, as Adult Care Facilities are not licensed to provide for such nursing or medical care." https://www.health.ny.gov/facilities/adult_care/. Legal information regarding what assisted living facilities can and cannot do may be found in the New York public health law and applicable rules and regulations. NY Pub Health L § 4651*2; 10 CRR-NY 1001.

on the seventh floor is complete and he hoped to receive a license for assisted living on that floor within the month. However, the record closed on May 31, 2018 and contains no evidence that the facility has been licensed in whole or in part for assisted living.

The record is largely silent with regard to the size and composition of the medical staff Respondents West End intends to employ once the facility is licensed for assisted living. Kayani testified that a registered nurse (RN) has been retained with the hope that the facility would be licensed for assisted living on the seventh floor by the end of April 2018. This RN would not actually start work until the facility received a license to operate on at least one floor. The record contains no evidence that the RN has started working.

Respondents West End presented evidence of changes it has or plans to implement following the sale. Front desk employees were provided with uniforms and reduced in number from a maximum of three per shift to a maximum of two per shift. The waitstaff employed on each shift was reduced as well. Managers described the kitchen and dining area as filthy, unorganized, and cluttered, with expired food, broken appliances, missing ceiling tiles, and missing lights. Accordingly, these areas have been cleaned, restocked, and fixed.

Kayani testified that all employees, including BSEs, were reevaluated by about April 20, 2017. However, there was no formal process for preparing written reviews during an initial probationary period. Rather, according to Kayani, written evaluations were only prepared for employees who were terminated during the probationary period. The remaining employees received standard annual evaluations at some point during the year.

Respondents West End did not, on March 5, 2017, 90 days after the sale, discharge the nine BSEs who remained after being identified in the attachment to McKeon's December 2 email as employees who would not be hired.²¹ As of March 6, 2017, Respondents West End employed 55 employees in unit classifications. Of those employees, 31 were still incumbent employees who worked at the Esplanade Hotel prior to the sale.

Seven BSEs were terminated on March 23 or 24, 2017. Two of the BSEs allegedly designated for termination on the December 2 list were, nonetheless, retained indefinitely. Kayani testified that these two BSE porters were retained because they, like other employees who were not discharged, demonstrated competence during the first 90 days of their employment. Walsh testified that BSEs who were terminated had problems with attendance and taking direction. Respondents West End replaced all of the BSEs who separated (either by resignation or termination). By my count, once the last BSEs were terminated, new employees outnumbered predecessor employees 26 to 24.²²

ANALYSIS AND CONCLUSIONS

I. JOINT EMPLOYERS

Respondents Esplanade

The General Counsel contends that Respondent Esplanade and Respondent County are joint employers. I agree.

Under the current standard, "(t)he Board may find that two or more statutory employers are joint employers of the same statutory employees if they 'share or codetermine those matters governing the essential terms and conditions of employment.'" *Browning-Ferris Indus. of California, Inc.*, 362 NLRB 1599 (2015) quoting *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982). "(T)he question is whether one statutory employer 'possesse(s) sufficient control over the work of the employees to qualify as a joint employer with' another employer." *Id.* quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

It is uncontested that Respondent Esplanade was owned and operated by the Scharf family. Scharf and Singer negotiated the most recent collective-bargaining agreement, which was a comprehensive contract that governed unit employees' terms and conditions of employment. Scharf signed the contract as a representative of "County Agency Esplanade." Shortly thereafter, in settling a grievance regarding paid leave, Singer indicated that the Union's offer was "agreeable to the Esplanade and County Agency." Thus, Scharf and Singer appeared to be acting on behalf of two employers, Respondent Esplanade and Respondent County. As Respondent County admits that it employed unit employees and the record demonstrates that Respondent Esplanade codetermined the essential terms and conditions of employment of those employees, I find that Respondents Esplanade are joint employers.

Levitt's conclusory testimony that "we all worked for (Respondent) County" was neither credible nor convincing. Rank-and-file employees were called by both sides to testify and none indicated they understood anyone at the Esplanade Hotel to be employed by Respondent County. Rather, employees testified that they understood the employer to be the Esplanade Hotel as owned by the Scharf family.

Respondents West End

The General Counsel contends that Respondent West End and Respondent Ultimate are joint employers. Once again, I agree.

Respondent Ultimate's regional managers hired the initial complement of employees, and continued to visit and maintain authority over the facility after the sale. Thus, regional managers have remained involved in employee discipline. On December 20, Kayani sent an email to managers (including regional managers Tremble, Murphy, and Walsh) indicating that he (Kayani) must approve any subsequent hires and terminations. Although the record is not entirely clear on the point, it stands to reason that Respondent Ultimate managers responsible for hiring employees also set the terms and conditions of their employment. Certainly, no evidence was introduced to the contrary. Accordingly, I find that Respondents West End codetermined the essential terms and conditions of employment of unit employees and are joint employers.

²¹ Two of these BSEs apparently resigned during the retention period.

²² The General Counsel asserted that the complement was still 32 to 27 employees in favor of predecessor employees as of March 30, 2017. This count appears to be based on names in the payroll records for the

payday, March 30, 2017. However, GC Exhibit 32 indicates that BSEs were discharged on March 23 and 24, 2017. It seems that these employees were paid on May 30, 2017, even though they were no longer employed as of that date.

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II. SUCCESSOR ANALYSIS

Respondents West End as a Successor of
Respondents Esplanade

The General Counsel contends that Respondents West End is a successor of Respondents Esplanade. I agree.

A successor employer has a duty to recognize and bargain with an incumbent union when, after assuming the business of a predecessor, it maintains a continuity of the enterprise and a continuity of the work force with the presumption of majority support in an appropriate unit. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). Respondent West End contests the continuity of the enterprise, the continuity of the work force, and the appropriateness of the unit. In contesting the unit, Respondent West End contends that Respondents Esplanade and the Union maintained a members-only arrangement whereby only dues paying Union members received wages and benefits pursuant to the contract.

Unit

The Board has held that an incumbent union will not retain a presumption of majority support within a unit if the unit lacked clarity or the parties administered their contract on a members-only basis. *Arthur Sarnow Candy Co., Inc.*, 306 NLRB 213 (1992); *Brower's Moving & Storage*, 297 NLRB 207, 208 (1989); *Ace-Doran Hauling & Rigging Co.*, 171 NLRB 645 (1968). In *Brower's Moving & Storage*, 297 NLRB at 208, the Board stated as follows:

[I]t is well established in Board law that an incumbent union generally enjoys a presumption of continued majority status during the term of a collective-bargaining agreement. In *Ace-Doran Hauling & Rigging Co.*, supra, the Board found a narrow exception to that general rule when two factors undermined the validity of the contract and the presumption of majority status. First, the Board found that the unit was not defined with sufficient clarity "to warrant a finding that the contracts are ones to which a presumption of majority status can attach." (Id. at 645.) Second, the Board found that both parties' practice under the agreements showed that the parties did not intend them to be effective collective-bargaining agreements, but merely arrangements to check off dues and to procure benefits for union members only. (Id. at 646.) Similarly, in *Bender Ship Repair Co.*, (188 NLRB 615, 615 (1971)), the Board found a "patent ambiguity" in the contractual unit definition and that the union acquiesced in the application of the contract to only a few favored employees. (Id. at 616)

Here, Levitt testified that she gave higher raises than the contract required to employees who were considered nonunion. However, Levitt was not a credible witness and I do not rely on her testimony in the absence of documents to substantiate her

²³ Respondent West End did not indicate that it attempted, with subpoena power, to obtain records from Respondent County as would establish that employees received pay and/or benefits inconsistent with the contract.

²⁴ If Respondent West End's theory were adopted, nonmember employees who do not pay union dues or financial core fees in right-to-work

claim that the contract was not applied to certain employees. The best evidence would be payroll records and other documents showing the receipt of wages and benefits by employees. See *Electronic Data Systems International Corp.*, 278 NLRB 125 (1986). Contrary to Levitt's self-serving testimony, the 2016 payroll records show that employees received wage increases of \$0.40 per hour and premium pay consistent with the contract.²³

At most, Respondent West End has arguably demonstrated that the Union did not enforce the union security clause with respect to certain employees who were not paying dues. I make no factual finding in this regard as, even if true, it is not controlling of the legal issue. The Union's alleged failure to demand the discharge of employees pursuant to the union security clause does not mean those employees were denied representation or that the presumption of their support for the Union should not apply. As noted above, the credible evidence indicates that employees were covered by the collective-bargaining agreement and paid accordingly. In fact, the employees' receipt of contractual pay without incurring the cost of bargaining would arguably make the Union more attractive rather than less. See *Pacific Coast Supply, LLC*, 360 NLRB 538, 545 fn.11 (2014), citing *Terrell Machine Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir. 1970)) (ALJ observes that, in *Terrell*, the court did not find employee nonmembership in right-to-work state suggestive of employees' disaffection from the union as employees could be content with benefits of representation without paying for them).²⁴ Regardless, the law provides for a presumption regarding the union support of incumbent unit employees and does not turn on or require a hearing as to their subjective feelings.

It is admittedly puzzling that the Union was not aware that recreation employees were employed at the Esplanade Hotel and failed to take the position, once it found out, that recreation employees must be included in the wall-to-wall unit. However, the contractual unit was specifically described and the Union's failure to seek the inclusion of five previously unknown recreation employees did not render the unit description ambiguous.

Based upon the foregoing, I will not apply the "narrow exception" referenced in *Ace-Doran Hauling & Rigging Co.* to find that the Union lacks majority support because the unit lacked clarity or the predecessor's contract was administered on a members-only basis.

Continuity of the Enterprise

In determining the continuity of the enterprise between predecessor and successor operations, the Board considers the following factors among the totality of the circumstances: "(1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products, and basically has the same body of customers."²⁵ *Always East Transportation, Inc.*, 365 NLRB No.

states would not be counted toward an incumbent union's support in a successor analysis. The Board has not adopted such an approach to continuity. See, e.g., *Empire Janitorial Sales & Service, LLC*, 364 NLRB No. 138 (2016).

²⁵ The Supreme Court has observed that succession rests largely "in the hands of the successor" in that it must make "a conscious decision to

71 (2017) citing *Fall River Dyeing*, 482 U.S. at 43. These factors are analyzed from the perspective of unit employees and whether they “understandably view their job situations as essentially unaltered.” Id. quoting *Golden State Bottling Co.*, 414 U.S. 168, 184 (1973). Accordingly, “the essence of successorship . . . is not premised on an identical re-creation of the predecessor’s customers and business . . .” *A.J. Myers & Sons, Inc.*, 362 NLRB 365, 371.

Here, Respondents West End did not significantly alter the operation following the sale. According to Levitt, the existing residents experienced a “complete continuity of services,” and the evidence does not indicate that the cleaning and ongoing renovation of the building had the effect of significantly changing the nature of the business. Respondents West End determined that the facility was somewhat overstaffed and reduced the number of certain employees on certain shifts, but did not change the tasks those employees performed or their working conditions. The record also indicates that Levitt, Scharf, Singer, and at least some supervisors, were retained by Respondents West End. Although certain managers and supervisors did change, the operation was not impacted in such a significant way as to undermine, from the perspective of unit employees, a continuity of the enterprise. See e.g., *Empire Janitorial Sales & Service, LLC*, 364 NLRB No. 138 (2016).

Respondents West End contend that certain changes were planned and would take effect once the Esplanade Hotel transitioned to an assisted living facility. However, Respondents West End acquired the property on December 5 and had not received a license, in whole or in part, up to and through the litigation of this matter, 16 months later. I do not rely on Kayani’s self-serving testimony that at least one floor was going to be licensed by the end of the month since the trial continued for another two months without evidence of the same. The record indicates that Respondents West End has done no training of employees with regard to the provision of medical services and the record does not contain significant evidence as to how specific unit positions would change once the facility is licensed for assisted living.²⁶

The limited evidence Respondent West End presented regarding future changes to its operation are not of a type that, even if already implemented and described in greater detail, would defeat a finding of successorship. In *Morton Development Corp.*, 299 NLRB 649 (1990), the Board rejected an employer’s contention that it had no obligation to bargain with an incumbent union after closing for over 4 months in order to convert its intermediate care facility for the intellectually disabled to a skilled nursing home.²⁷ In so doing, the Board found the new operation “sufficiently similar to its old business” to sustain a continuity of its bargaining obligation even though it changed its mission and customers, made some physical changes to the facility, sold/purchased certain equipment, and increased its medical services. Id. See also *Empire Janitorial Sales & Service, LLC*, 364 NLRB No.

maintain generally the business” and “take advantage of the trained work force of its predecessor.” *Fall River Dyeing*, 482 U.S. at 41.

²⁶ Although Respondents West End has retained one RN, the RN has not begun working and cannot be included in a non-professional unit without choosing the same in a self-determination election. The law is also unclear as to the type of medical services an assisted living facility may provide.

138 (2016). The Board, in *Morton Development*, 299 NLRB at 651, noted in part, as follows:

[T]here were minor changes in the way the service and maintenance employees performed their jobs. Cooks and dietary aides now prepare more specialized foods and trays for the elderly residents; the housekeeping aides work around medical equipment and may work around residents who cannot be moved; and the laundry aides actually launder washables rather than showing residents how to perform laundry duties. Employees who were formerly living unit aides became nurses aides and have increased nursing responsibilities. Nevertheless, they, along with activities aides, basically *652 remain responsible for assisting residents in their daily routine. The current residents are, however, more frail and less mobile than the former residents and can spend only a small part of their time in programmed activities. Maintenance employees now encounter fewer problems with equipment and furniture that has been damaged by residents. Nonetheless, upon the Respondent’s re-opening, as the judge originally observed, cooks still cooked, maintenance persons still repaired, and aides still aided residents.

Respondents West End does not purport to be planning more extensive changes to the operation than the changes implemented in *Morton*, and I find that Respondents West End maintained a continuity of the enterprise with its predecessor.

Continuity of the Work Force

A successor will be found to have maintained a continuity of the predecessor’s work force and will be presumed to have majority support among unit employees if, upon hiring a “substantial and representative complement” or “full complement” of employees, a majority were employed by the predecessor in an appropriate unit. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). This is because Board policy presumes the employees of a unionized employer will continue to support the union after a new employer takes over, and generally requires the successor employer to recognize the union if a majority of its work force were employed by the predecessor in an appropriate unit. *Fall River Dyeing*, 427 U.S. at 40; *Labor Plus, LLC*, 366 NLRB No. 109 (2018). The Supreme Court explained in *Fall River Dyeing*, 482 U.S. at 39–40, the importance of presumptions in the context of successorship as follows:

The rationale behind the presumptions is particularly pertinent in the successorship situation and so it is understandable that the Court in *Burns* referred to them. During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer’s plans, and cannot be sure if or when the new employer must bargain

²⁷ *Morton Development* was not a successor case in that the putative successor was the same corporate entity as the predecessor. The Board “recognized, however, the usefulness of the factors applied in making successorship determinations” and relied on Board successor cases in conducting a continuity analysis. 299 NLRB at 650.

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with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members under the collective-bargaining agreement with the predecessor employer. Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.

The position of the employees also supports the application of the presumptions in the successorship situation. If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it. Without the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence.

In deciding when the prospective successor has hired a full complement of employees, the Board considers whether the job classifications designated for the operation were filled or substantially filled, whether the operation was in normal or substantially normal production, the size of the complement on that date, the time expected to elapse before a substantially larger complement would be at work, and the relative certainty of the employer's expected expansion. *Fall River Dyeing*, 482 U.S. at 49; *Labor Plus, LLC*, 366 NLRB No. 109 (2018).

I find that Respondents West End was a successor as of the date of the sale, December 5. Respondents West End provided "a complete continuity of services," as described by Levitt, to the same residents when it assumed control of the Esplanade Hotel. Levitt also admitted that she was unaware of any change in employees' job duties. Employees offered credible and undisputed testimony that they continued to perform the same work and provided the same services before and after the sale. Respondent West End's assertion that certain employees should be included in the complement but not counted toward the Union's majority, because they were not dues paying Union members, has no legal support and misconstrues the concept of a presumption.

Nevertheless, Respondent West End contends it could not have hired a substantial and representative complement of

employees until the DBSWPA 90-day period for retaining BSEs expired. This defense fails for a number of reasons.

First, Respondents West End did not actually reduce its staff by discharging some or all of the BSEs after the required 90-day retention period. All of the BSEs who were discharged were replaced. Since the BSEs were replaced, the complement of employees was unaffected by their ultimate severance and was full as of December 5. By December 5, Respondents West End had filled desired classifications and was operating at normal production without any disruption of residential services.

Second, Respondent West End's math is unconvincing. McKeon's December 2 email identified 11 BSEs who were, allegedly, not going to be hired. However, two of those BSEs were retained indefinitely following the 90-day retention period. Thus, at most, only nine BSEs (not 11) could arguably be excluded from the count. In its brief, Respondent West End asserts, illogically, that none of the 15 BSEs should be counted toward the Union's majority support even though six (including four not mentioned in the December 2 email) were retained indefinitely (and all were unit employees employed by the predecessor). Those six predecessor BSEs, at the very least, would be counted toward the Union's support.

Even if I were to accept as fact that Respondents West End made a presale decision not to hire 11 BSEs (which, as discussed below, I do not) and assume nine new employees would have been hired in place of those who were not ultimately retained, the amended count would be 27 predecessor employees to 17 new employees—a clear union majority. The record contains no evidence that the complement was, in any other way, as of December 5, arguably distorted by local law. The normal turnover of non-BSEs while certain BSEs were in the process of being replaced has nothing to do with the DBSWPA, and Respondents West End has no basis for opportunistically reaping the benefits of the same to deny unit employees their bargaining representative.²⁸

Third, as mentioned above, the factual assertion underlying Respondent West End's defense is unsubstantiated by the credible evidence. Respondent West End asserts in its brief that "the record is undisputed that none of the housekeeping staff would have been hired if Respondent had not been obligated to hire them under the [DBSWPA]." (R. Br. p. 24.) This is incorrect as the factual assertion was flatly disavowed by its own witness, Kayani. Kayani testified that no determinations were made to discharge BSEs in advance of the sale and Respondents West End preferred to retain them indefinitely (like all other former employees of the predecessor). I do not rely on McKeon's December 2 email, which is hearsay, to reach a finding to the contrary. Likewise, I do not rely on the testimony of Anderson or Walsh. Kayani credibly testified that he had the final say with regard to hiring the predecessor's employees. On December 20, Kayani sent an email cautioning his managerial team to consult

²⁸ Respondent West End is on even more dubious factual and legal grounds in asserting that five recreation employees should be counted toward the complement but not counted toward the Union's majority support. Throughout the trial, and in its brief, Respondent West End's counsel represented that recreation employees were not unit employees. It is, therefore, nonsensical to suggest that the five recreation employees

should be counted toward the unit complement. Further, for the reasons described above, if recreation employees were included in the complement, as predecessor employees, they would be counted toward the Union's majority support. However, even if I were to include the recreation employees in the unit complement and not count them as presumed union supporters, the Union would still enjoy a majority of 27 to 22.

with him in advance of any terminations. Since Kayani had authority over the hiring and retention of BSEs and had no plans not to hire them in advance of the sale (or even discharge them after 90 days), I reject the contention that Respondents West End would not have hired certain BSEs but for the DBSWPA.

Last, but not least, in a case directly on point, the Board rejected the argument “that the successorship determination could not be made until after the DBSWPA-mandated retention period has ended.” *GVS Properties, LLC*, 362 NLRB 1771 (2015).²⁹ The Board, in *GVS Properties*, observed that it “has long held that the successorship determination is not affected by the temporary or probationary status of the predecessor’s employees in the successor’s work force, and it has found it inappropriate to defer successorship determinations until after the completion of employer-imposed probationary periods.” *Id.* The Board further noted that this was so even where the retention of the predecessor’s employees was required for a period of time as a provision of the contract of sale. *Id.*

Based on the foregoing, I find that, as of December 5, Respondents West End was a successor of Respondents Esplanade.

III. SECTION 8(A)(5) AND (1)—REFUSAL TO RECOGNIZE/BARGAIN AND FURNISH INFORMATION

1. Refusal to Recognize and Bargain with the Union

Respondent West End has denied an obligation to bargain with the Union on the grounds that (1) Respondent Ultimate was not a joint employer with Respondent West and (2) they are not, collectively, the successor of Respondents Esplanade. As discussed above, I have found that Respondent West End and Respondent Ultimate are joint employers and, collectively, a successor of Respondents Esplanade. Accordingly, I find that Respondents West End violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the bargaining representative of unit employees.

2. Refusal to Furnish Information to the Union

The General Counsel contends that Respondents Esplanade violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with information related to the sale of the facility. Respondents Esplanade did not appear at trial or file briefs in defense of this allegation. I agree that Respondents Esplanade violated the Act as alleged.

I have already determined, above, that Respondents Esplanade are joint employers and, as such, are both under an obligation to produce requested information that is relevant and necessary for the Union to perform its function as the bargaining representative of unit employees. *Branch International Services, Inc.*, 313 NLRB 1293, 1296 (1994).

The Union requested the identity of prospective purchasers of the business with contact information, a copy of any purchase documents, communication between Respondents Esplanade and purchasers as relate to the collective-bargaining agreement, and any other documents which refer or relate to the sale. This is

not information that is presumptively relevant as it does not pertain to the terms and conditions of employment of unit employees. Rather, the burden of establishing relevance is on the requesting party. However, the Board has adopted a liberal discovery-type standard for information requests and the burden of showing relevance is not exceptionally heavy. *Columbia College Chicago*, 363 NLRB No. 154 (2016); *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994); *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983).

As noted in the successor section, the sale of a business is a particularly vulnerable time for employees and their bargaining representative. Accordingly, the “Board has . . . held that where the union bargaining representative has received information that the employer may be subcontracting unit work or has or may be transferring its business to another, the union is entitled, on appropriate request, to information bearing on that issue, so that the union may properly represent the unit employees.” *Washington Star Co.*, 273 NLRB 391, 396 (1984), citing *Westwood Import Co.*, 251 NLRB 1213 (1980), and *Air Express International Corp.*, 245 NLRB 478 (1979).

Here, the Union justified its information request as being necessary to monitor and enforce the contract, particularly Article 31 on successors and assigns. The information is arguably relevant to this end as it would allow the Union to identify prospective buyers, determine whether the sale agreement provides for assumption of the collective-bargaining agreement, and determine whether Respondents Esplanade notified the purchaser of the collective-bargaining agreement (as required by art/ 31). An employer might assert that the requested information is overly broad and contains confidential information. However, “[i]t is well established that an employer may not simply refuse to comply with an ambiguous or overbroad information request but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information.” *Columbia College Chicago*, 363 NLRB No. 154 (2016) quoting *National Steel Corp.*, 335 NLRB 747, 748 (2001). Further, the party asserting a confidentiality claim has the burden of proving it and proposing an accommodation such as redactions. *Washington Gas Light Co.*, 273 NLRB 116 (1984); *United States Postal Service*, 364 NLRB No. 27 (2016). Respondents Esplanade did not contend that the Union’s information request was overbroad or encompassed confidential information.

Based on the foregoing, I find that Respondents Esplanade violated Section 8(a)(5) and (1) of the Act by refusing to furnish information requested by the Union on October 27.

IV. SECTION 8(A)(3) AND (1)—REFUSAL TO HIRE

The General Counsel contends that Respondents West End refused to hire 15 of the predecessor’s employees in violation of 8(a)(3) of the Act. I find, herein, that Respondents West End unlawfully refused to hire Steward Hardy, but will dismiss the

²⁹ Although Respondent West End relies heavily upon an ancillary proceeding in which a district court denied the Board’s petition for 10(j) relief, *Paulsen ex rel. NLRB v. GVS Properties, LLC*, 904 F.Supp.2d 282, 292 (E.D.N.Y)(2012), the Board in *GVS Properties* expressly rejected the precedential value of that decision as it “is not binding on the Board.”

362 NLRB 1771fn. 12. Further, although the Board’s decision in *GVS Properties* was ultimately “vacated as moot” by order of the United States Court of Appeals for the District of Columbia, the circuit did not reach or address the merits of the case and, regardless, its decisions are no more controlling as precedent than those of the district court.

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remainder of the refusal-to-hire allegations.

In successor situations, the Board does not apply the *FES*, 331 NLRB 9 (2000), refusal-to-hire analyses to the extent it requires proof that the employer was actually hiring at the time of the alleged unlawful conduct and the applicant had relevant experience or training for the position. *Planned Building Services*, 347 NLRB 670 (2006). Rather, it is presumed that the successor is hiring positions previously filled by predecessor employees and that the predecessor employees are qualified to continue in those positions. *Id.* Accordingly, consistent with *Wright Line*, 251 NLRB 1083 (1980), 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.” *Id.* The Board has held that such proof includes the following:

[S]ubstantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor’s employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor’s employees from being hired as a majority of the new owner’s overall work force to avoid the Board’s successorship doctrine.

Id. at 673 citing *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989), *enfd en banc* 944 F.2d 1305 (7th Cir. 1991), *cert. denied* 503 U.S. 936 (1992). Once the General Counsel has shown that the employer failed to hire employees of its predecessor and was motivated by antiunion animus, the burden shifts to the employer to prove it would not have hired the predecessor’s employees even in the absence of its unlawful motive. *Id.* at 674.

The parties have presented specific arguments with regarding to employees Hardy and Duncanson, and I will address them before moving on to an analysis of the alleged discriminatees as a group.

Trinidad Hardy

Respondents West End was admittedly aware that Hardy was the shop steward. Further, through Scharf, Singer, and Levitt, who were retained by Respondents West End following the sale, Respondents West End would have known that Hardy was one of the negotiators who represented the Union in negotiations for the most recent collective-bargaining agreement.

Evidence of union animus consists largely of a discrepancy between the favorable applicant evaluation Hardy received from Youngberg and Youngberg’s inexplicable testimony to the contrary. Youngberg testified that Hardy “came in with a look of anger and disgust that we were even going through this process. Just a body language, angry face.” However, Youngberg graded Hardy “excellent” in categories of “guest service & hospitality

personality” and “enthusiasm.” Youngberg admitted that such ratings would not normally be given to an employee who looked angry and disgusted. I do not find Youngberg credible. Rather, I find his explanation for the refusal to hire Hardy blatantly pre-textual.

The decision not to hire Hardy is particularly surprising since Respondents West End admitted a preference for hiring applicants who presented well in attitude, personality, and enthusiasm. Although perhaps somewhat a comparison of apples and oranges, it is noteworthy that Respondents West End hired several servers even though they had consistently “average” ratings in multiple categories, including the categories of personality and enthusiasm. Tremble testified that an applicant’s personality was particularly important for front of the house servers because they have significant interaction with residents. One would expect it to be equally important for a front desk concierge employee, such as Hardy, to display an engaging personality as she too had significant interaction with residents. Accordingly, it is telling of Respondents West End’s discriminatory intent that waitstaff were hired with “average” ratings for personality and enthusiasm while Hardy was not hired with ratings of “excellent.”

In my opinion, the flagrant pretext of the stated reason for Respondents West End’s refusal to hire Hardy and a degree of disparate treatment is sufficient to establish a prima facie case.³⁰ See *Grane Healthcare Co.*, 357 NLRB 1412 (2011). There is pretext and then there is *pretext*. This is not a case in which something was odd or a little difficult to understand about an employer’s explanation for alleged unlawful conduct. Rather, Youngberg’s rational directly and irreconcilably conflicts with his own applicant evaluation. Youngberg, on the stand, was presented with the discrepancy and could not begin to articulate an explanation.

Since the stated reason for Respondents West End’s refusal to hire Hardy is pure pretext, I need not do a mixed-motive analysis to determine whether Hardy would have been hired regardless of her union position and activity. *Parkview Lounge, LLC*, 366 NLRB No. 71 (Apr. 26, 2018); *Master Mining*, 274 NLRB 1213, 1214 (1985). Accordingly, I find that Respondents West End violated Section 8(a)(3) and (1) of the Act by refusing to hire Hardy because of her union position and/or activity.

Although Hardy signed an agreement releasing Respondents Esplanade from certain damages resulting from a charge filed with a federal agency, Respondents West End was not a party to that agreement. If Respondents West End want to assert a release of damages on the grounds that it is a successor or assign of Respondents Esplanade, it may do so in a compliance proceeding.

Deannie Duncanson

The General Counsel contends that Respondents West End refused to hire Duncanson, along with the other alleged discriminatees, in an attempt to avoid successorship. Respondents West

³⁰ I do not rely, in considering alleged antiunion animus on the part of Respondents West End, on the statement of an unnamed individual to Baldoquin, on October 27, that, “to his knowledge, this wasn’t going to be a union shop and that [employees] had to reapply.” Baldoquin did not attempt to determine the individual’s name and was not asked to describe his appearance at trial. Accordingly, I am not inclined to find the anonymous individual an agent of Respondents West End. Further, I do not

find the statement overly indicative of animus. Technically, the new employer was not a union shop until and unless the predecessor employees applied and were hired in sufficient number to find successorship. Lastly, Respondent Ultimate managers were not familiar with “union shops” and the individual’s comment that employees “had to reapply” suggests, perhaps, a misunderstanding as to what a union shop signifies.

End defended against the allegation as it pertains to Duncanson on the grounds that she was a supervisor within the meaning of Section 2(11) and not covered by the Act. The General Counsel contends that Duncanson was a unit employee who acted largely as a cook and server. However, Duncanson's alleged supervisory status with Respondents Esplanade is not germane to the issue whether Respondents West End violated the Act by refusing to hire her. Respondents West End could refuse to hire an applicant into a 2(11) position on the basis of that person's union activity. The issue is not whether Duncanson held a unit position with Respondents Esplanade, but whether Respondent West End unlawfully refused to hire her into a unit position. I find that it did not.

Duncanson admittedly stated in her resume that she was the director of food service at the Esplanade Hotel and applied for the same position with Respondents West End. Respondents West End was entitled to reject her application for that nonunit position even if it did so on the basis of her union activity.

I do not find that Respondents West End should have known to consider Duncanson for hire as a unit employee (e.g., server or cook). Whether she actually held the position of lead, supervisor, manager, or director of food service, there is little question that Duncanson was either the person or one of the people in charge of the kitchen. She told Tremble during the interview she could do things other than manage but did not say she would take a lesser position than the one she claimed to hold previously and the one she was applying to retain. Duncanson's resume did not indicate she had performed unit work (i.e., serving food) since 1998. Under these circumstances, I do not find the evidence sufficient to show that Respondents West End acted unreasonably or unlawfully in its refusal to consider her for a unit position. See *Diamond Detective Agency, Inc.*, 339 NLRB 443 (2003) (employer acted lawfully in refusing to hire employee into former position he was applying for and not considering him for employment in other positions that were available).

The General Counsel contends that Respondents West End's unlawful intent to bar Duncanson from a unit position can be gleaned from Tremble's testimony that he did not hire Duncanson because she oversaw an operation in poor condition and received a favorable applicant evaluation. According to the General Counsel, Tremble's testimony was pretextual because Respondents West End hired Levitt even though she was the executive director of a poorly run facility. However, Respondent West End presented uncontested evidence that the kitchen and dining area were in particularly egregious condition and the two other "kitchen leads" (as identified by Duncanson) were not hired either. Further, although Duncanson received above-average ratings on her applicant evaluation, the employment decision was based on the condition of her department as opposed to her interview. Accordingly, I do not find Tremble's rationale for refusing to hire Duncanson, on its merits, to be pretextual or indicative of a discriminatory intent.

Based upon the foregoing, I do not find that the General

Counsel established a prima facie case that Respondents West End unlawfully refused to hire Duncanson.

3. Alleged Discriminatees other than Hardy

The General Counsel contends that Respondents West End refused to hire alleged discriminatees other than Hardy in a doomed attempt to avoid successorship. I disagree and will dismiss these refusal-to-hire allegations.

As noted above, Respondents West End hired a super majority of the predecessor's employees on December 5. The General Counsel asserts in a conclusory manner that Respondents West End attempted to avoid hiring a majority of the predecessor employees, but miscalculated the total number of employees in the bargaining unit. The General Counsel has offered no explanation or theory as to whom Respondents West End mistakenly believed was in/out of the unit and how it would have affected the count. The General Counsel has not, for example, claimed that Respondents West End mistakenly believed that 10 predecessor employees in unit classifications would not be counted toward the Union's majority support because they were not dues paying members of the Union (a position Respondent West End actually took in connection with the successor analysis). Considering such a possibility, for the sake of argument, and including those employees in the complement but not counting them as union supporters, the Union would still have majority support by a count of 26 to 18. If Respondents West End also believed the predecessor's five nonunit recreation employees would be included in the count (perhaps upon the belief that recreational employees must be included in any appropriate unit) and excluded as employees who were not dues paying members of the Union, predecessor employees would still outnumber new employees by a count of 26 to 23. Accordingly, it does not follow that Respondent mistakenly believed it would avoid successorship by hiring "nonunion" employees instead of the alleged discriminatees.³¹

Admittedly, Respondent West End has taken the position in this proceeding that it did not hire a full complement of unit employees until after certain BSEs were replaced (by April 20, 2017) or at least separated (March 23 or 24, 2017). Thus, it is conceivable that Respondents West End set out to orchestrate a discriminatory plan whereby it sought to avoid succession by refusing to hire the alleged discriminatees, waiting over 90 days for the DBSWPA retention period to expire, and terminating enough BSEs to eliminate the Union's majority support (and thereby defeat a finding of successorship). Since Respondent West End actually raised this hail-mary defense against successorship, I am inclined to address the possibility that its hiring process was strategically designed in support of it. However, in my opinion, the General Counsel has a greater evidentiary hill to climb than in the more typical case where an employer actually refuses to hire a majority of the predecessor's employees and can reasonably expect to avoid succession on that basis.

It is also noteworthy that Respondents West End did not immediately terminate any of the BSEs as soon as it was legally

³¹ As noted in the fact section, the General Counsel has not argued that Respondents West End discriminated against employees (other than Hardy) on the basis of an understanding that some were union members and others were not. Rather, the General Counsel has contended that

Respondents West End violated Sec. 8(a)(3) and (1) of the Act by attempting (unsuccessfully) to avoid hiring enough predecessor employees to be found a successor.

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entitled to do so on March 5, 2017 (90 days after the sale). BSEs were retained through March 22, 2017. One would expect an employer intent on defeating successorship by firing BSEs to do so as quickly as possible. Further, the General Counsel has not alleged or attempted to prove that any of the BSEs were unlawfully terminated. The fact that Respondents West End did not rush to terminate BSEs, perhaps unlawfully, suggests it was not seeking to avoid successorship by extralegal means (and makes the evidentiary hill in favor of a violation even steeper).

As discussed above, I have found that Respondents West End refused to hire Hardy because she was known to be the union steward and participated in contract negotiations. Respondents West End's treatment of Hardy does suggest that it preferred to avoid hiring proactive union supporters and would prefer to avoid dealing with the Union as a bargaining representative of unit employees. The remainder of the General Counsel's arguments in favor of a violation are far less compelling.

The General Counsel contends that the failure of interviewers to complete an applicant review form for each applicant warrants an inference of discrimination. I do not find it particularly suspicious that interviewers used the form as convenient during a day when they were interviewing and hiring a great many applicants. The interviewers were not required by upper management or human resources to use the form for each employee. Rather, the form was used in a discretionary manner for guidance. Further, the evidence does not indicate that the forms went strategically missing for certain employees, such as the alleged discriminatees. The record does not contain applicant evaluations for some of the alleged discriminatees, but does contain applicant evaluations for other alleged discriminatees, including Hardy. If Respondents West End were inclined to artificially lower the rankings or "misplace" the evaluations of alleged discriminatees, we probably would not be in possession of a stellar applicant evaluation for, of all applicants, the known steward. Although the General Counsel is correct that interviewers were not entirely consistent in rigorously using the applicant evaluation form for every applicant, Respondents West End's failure to do so was not the type of inconsistency which necessarily suggested a discriminatory intent.

Likewise, I do not find it overly suspicious that (1) the interviews only lasted 5 to 15 minutes, (2) interviewers did not have access to employee personnel files, and/or (3) employee references were not rigorously checked. It is perhaps somewhat surprising that interviewers did not spend more time with each applicant given that Respondents West End considered attitude and personality the most important qualification for certain positions (as opposed to, for example, years of service with the company). However, some applicants were interviewed more than once and applicants were interviewed in large numbers. Respondents West End was also aware that in-house applicants were sufficiently qualified to maintain employment with the predecessor. I do not think it self-evident that longer interviews were necessarily warranted or practical under the circumstances. With regard to personnel files, interviewers testified that Respondents Esplanade did not give them access to those documents. Tremble noted that interviewers do not normally have access to personnel files when hiring employees and employees were being interviewed "without prejudice." Senken did not consider the

absence of personnel files to be a particularly significant disadvantage as such documents tend to be subjective. I am not shocked that Respondents West End failed to make a greater effort to obtain and pore through personnel files of employees who were currently working at the Esplanade Hotel and had not been discharged. I am equally unimpressed, as evidence of animus, by Anderson's testimony that he was unaware whether the interviewers checked the references of newly hired employees who never worked at the Esplanade Hotel. Managers who conducted the interviews were called by Respondent West End to testify and were not asked whether they contacted references. Anderson explained that ideally in a typical hiring situation where time allows, it is good practice to check references even though such references are rarely reliable. However, Anderson also testified that this was not a typical situation.

The General Counsel did not specifically assert how these discrepancies in the hiring process actually work into its theory of the case. It could be argued that the corners Respondents West End cut in hiring employees suggest it would have retained all Respondents Esplanade's employees if it were not for a strategy of union avoidance. However, it is at least equally plausible that Respondents West End were pressed to implement a new operation, hire a large number of employees, and already knew that most employees successfully maintained employment at the Esplanade Hotel without being fired. I can understand an employer wanting to conduct a fairly brief interview of employees to ensure they were not hiring someone who presented particularly poorly, without scouring personnel records or having in depth discussions about each employee with their former managers and supervisors. It is somewhat suspicious that Respondents West End hired new employees without conducting extensive interviews of those applicants or (perhaps) checking their references, but this evidence was not aggressively pursued and, even if true, would be far from a smoking gun under the circumstances.

The General Counsel asserts that alleged discriminatees who received average ratings on their applicant evaluations should have been hired over new applicants, and Respondent's West End's failure to offer more specific reasons for its decision not to hire the alleged discriminatees to do so implies animus. Tremble testified that it was typical for Respondents West End to hire applicants with ratings of "average" and (excluding Hardy and Duncanson) alleged discriminatees received certain category rankings of "average" or, in limited circumstances, "good." Further, Kayani testified that Respondents West End preferred to keep predecessor employees if possible because it was less time consuming and costly than replacing them. Thus, to the extent employees were equivalent and received ratings of "average," we would expect incumbent employees to be hired over new employees.

The problem with the General Counsel's argument in this regard is that it relies on comparisons between employees who were both employed by the predecessor and/or employees who were not equivalent. The General Counsel notes that predecessor employee Nichols was hired with "average" ratings while alleged discriminatee Terrier was not hired with a rating of "good"

in the category of “guest service & hospitality personality.”³² However, Nichols and Terrier were both former employees of the predecessor and selecting one over the other would not adversely impact Respondents West End with regard to successorship. Further, Nichols was a server while Terrier was a cook, and their applicant evaluations appear to have been completed by two different people (with different handwriting). Thus, applicants Nichols and Terrier were not in direct competition with each other and two different interviewers could have had two different concepts of the ratings.

The General Counsel noted in its brief that new employee Jose Cabrera, a cook (like Terrier), was hired even though he received ratings of “average” in certain categories. However, Cabrera, like Terrier, received a rating of “good” in the category of “guest service & hospitality personality.” More importantly, Cabrera received a rating of “good” in seven other categories in which Terrier was not rated. Thus, Cabrera received what appears to be a better applicant evaluation than Terrier.

Of the new employees, other than Cabrera, the General Counsel identified server Williams and utility/dishwasher Batista as applicants who should not have been hired over predecessor employees. I do not agree. Williams received rankings of good in the important categories of “guest service & hospitality personality” and “enthusiasm,” as well seven other categories. As such, her applicant evaluation was significantly better than each of the alleged discriminatees who held the position of server. Batista was a utility aide/dishwasher, and the evidence does not indicate she was hired over any alleged discriminatee who held the same position. In this case, the General Counsel’s arguments regarding disparate treatment fail because they are based on false equivalencies.

It is true that Respondent West End did not have managers testify to the specific reasons why each alleged discriminatee was not hired and the record does not contain applicant evaluations for each one. I would have liked to hear such testimony and we are, therefore, left with something of a vacuum that might be filled with an inference of animus. However, unlike the General Counsel, as discussed above, I find the applicant evaluations to be largely consistent with a legal hiring process, and these interviews were conducted in mass over a year before the trial. Meanwhile, the General Counsel did not call any of the alleged discriminatees to contest or otherwise cast doubt upon the ratings contained in their applicant evaluations. I do not find Respondents West End’s failure to offer more specific reasons for its decision not to hire the alleged discriminatees, among other evidence presented by the General Counsel, sufficient to support a prima facie case.

The General Counsel relies heavily on *Lemay Caring Ctr.*, 280 NLRB 60 (1986), but that case is distinguishable. First and foremost, the employer in *Lemay Caring* actually hired a minority of the predecessor’s employees. Second, the employer in *Lemay Caring* made certain unlawful 8(a)(1) statements that were far more telling of its goal to avoid successorship than any evidence presented here by the General Counsel. Third, the

record in *Lemay Caring* contained evidence that employees were actually told they were not hired because of a manager’s “gut feelings” and other criteria that were particularly nebulous.

Ultimately, although a refusal-to-hire violation was established with regard to Hardy, this and other marginal evidence of animus does not go far enough to extend that violation to the other allege discriminatees. I will not call it entirely far-fetched to believe that Respondents West End expected to avoid successorship by refusing to hire the alleged discriminatees and then discharging enough BSEs to undermine the Union’s majority (since Respondents West End made this argument with regard to succession). However, the General Counsel did not actually articulate this theory and inferring such a motive is more difficult to accept than an inference of the unlawful motive at issue in more typical refusal-to-hire cases, such as *Lemay Caring*. In my opinion, this case involves a heightened evidentiary burden, which the General Counsel has failed to satisfy.

Accordingly, based upon the foregoing, I do not find that Respondents West End violated Section 8(a)(3) and (1) of the Act by failing to hire alleged discriminatees other than Hardy. I will, therefore, dismiss those allegations.

REMEDY

Having found that Respondents Esplanade and Respondents West End have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The remedies of reinstatement and backpay are appropriate for discriminatory refusals-to-hire, and I will order Respondents West End to provide those remedies with regard to Hardy. *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000).

Backpay for the unlawful refusal-to-hire Hardy shall be calculated in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as required in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondents West End shall compensate Hardy, who was unlawfully denied employment, for search-for-work and interim employment expenses regardless of whether those expenses exceed her earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra., compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), backpay computations shall compensate Hardy for any adverse tax consequences of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondents West End shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 2 a report allocating backpay to the appropriate calendar year. The Regional Director will then

³² Terrier’s applicant evaluation was only partially complete. He received a rating of “good” for “guest service & hospitality personality,” but no ratings for other categories.

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assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondents West End will be ordered to recognize and bargain with the Union as the bargaining representative of unit employees.

Respondents Esplanade will be ordered to promptly provide the information requested by the Union on October 27.

Respondents West End will be ordered to post the notice attached hereto as "Appendix A" and Respondents Esplanade will be ordered to post the notice attached hereto as "Appendix B."

CONCLUSIONS OF LAW

1. Respondents West End and Respondents Esplanade are employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

2. United Food & Commercial Workers Union, Local 2013, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents West End violated Section 8(a)(3) and (1) of the Act by refusing to hire Union shop steward Trinidad Hardy because of her union position and/or activity.

4. The following unit is appropriate for purposes of collective bargaining:

[A]ll of its full-time and part-time employees, with respect to wages, hours and conditions of employment, excluding executives, supervisors and guards as defined in the Labor Management Relations Act as amended, and agrees to deal collectively only with this Union for and on behalf of such employees. Full-time employees are employees employed on a steady basis. Part-time employees who are call in employees and work as needed.

5. Respondents West End Violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the bargaining representative of unit employees.

6. Respondents Esplanade violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information it requested on October 27, 2016.

7. The violations found are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has not otherwise violated the Act.

ORDER³³

1. The Respondents shall CEASE AND DESIST from engaging in the following conduct:

A. Respondents West End, a joint employer, consisting of 305 West End Holding, LLC d/b/a 305 West End Avenue Operating, LLC, New York and Ultimate Care Management Assisted Living Management, LLC, a Division of the Engel Burman Group d/b/a Ultimate Care Management, LLC, of Bohemia, New York, their offers, agents, successors, and assigns, shall cease and desist from

(1) Refusing to hire employees because of their union position and/or activity.

(2) Failing and refusing to recognize and bargain in good-faith with the United Food & Commercial Workers Union, Local 2013 (Union), as the exclusive bargaining representative of employees in the following bargaining unit:

(A)ll of its full-time and part-time employees, with respect to wages, hours and conditions of employment, excluding executives, supervisors and guards as defined in the Labor Management Relations Act as amended, and agrees to deal collectively only with this Union for and on behalf of such employees. Full-time employees are employees employed on a steady basis. Part-time employees who are call in employees and work as needed.

(3) 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.

B. Respondents Esplanade, a joint employer, consisting of County Agency, Inc. of Brooklyn, New York, and Esplanade Partners Ltd. d/b/a Esplanade Venture Partnership d/b/a The Esplanade Hotel of New York, New York, their offers, agents, successors, and assigns, shall cease and desist from

(1) Failing or refusing to provide information to the Union that is relevant and necessary to perform its duties as the exclusive collective-bargaining representative of Unit employees employed at the New York, New York facility involved in these proceedings.

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

2. The Respondents shall take the following AFFIRMATIVE ACTION necessary to effectuate the policies of the Act.

A. Respondents West End shall

1. Recognize and bargain in good-faith with the Union as the exclusive collective-bargaining representative of Unit employees.

2. Within 14 days from the date of this Order, offer Trinidad Hardy reinstatement to the position for which she applied, or, if such a position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

3. Make Hardy whole for any loss of wages or benefits suffered as a result of the unlawful refusal to hire her in the manner set forth in the remedy section of this decision.

4. Compensate Hardy for search-for-work and interim employment expenses following Respondents West End's refusal to hire her regardless of whether those expenses exceed her interim earnings.

5. Compensate Hardy for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

6. Within 14 days from the date of this Order, remove from

³³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

its files any reference to its unlawful refusal to hire Hardy, and within 3 days thereafter, notify Hardy in writing that this has been done and that the refusal to hire her will not be used against her in any way.

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

8. Within 14 days after service by the Region, post at its facility in New York, New York, the facility involved in these proceedings, copies of the attached notice marked "Appendix A."³⁴ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondents West End's authorized representative, shall be posted by Respondents West End and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondents West End customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondents West End to ensure that the notices are not altered, defaced, or covered by any other material. If Respondents West End has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondents West End at any time since December 5, 2016.

9. Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Respondents Esplanade shall

(a) Promptly provide to the Union with information it requested on October 27, 2016.

(b) Within 14 days after service by the Region, post at its facility in New York, New York, the facility involved in these proceedings, copies of the attached notice marked "Appendix B."³⁵ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondents Esplanade's authorized representative, shall be posted Respondents Esplanade and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondents Esplanade customarily communicates with its employees by such means. Reasonable steps shall be taken by

³⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondents Esplanade to ensure that the notices are not altered, defaced, or covered by any other material. If Respondents Esplanade has gone out of business, closed or sold the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents Esplanade at any time since October 27, 2016.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges that the Respondent unlawfully refused-to-hire employees other than Hardy, or other allegations not specifically found herein.

Dated at Washington, DC. February 7, 2019

APPENDIX A

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire you or otherwise discriminate against you because you hold a union position or engage in union activities.

WE WILL NOT fail and refuse to recognize and bargain with the United Food & Commercial Workers Union, Local 2013 (Union) as the representative for purposes of collective-bargaining of employees in the following bargaining unit:

All of its full-time and part-time employees, with respect to wages, hours and conditions of employment, excluding executives, supervisors and guards as defined in the Labor Management Relations Act as amended, and agrees to deal collectively only with this Union for and on behalf of such employees. Full-time employees are employees employed on a steady basis. Part-time employees who are call in employees and work as needed.

³⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

COUNTY AGENCY INC. AND ESPLANADE PARTNERS LTD. D/B/A ESPLANADE VENTURE
PARTNERSHIP D/B/A THE ESPLANADE HOTEL

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain in good-faith with the Union as the exclusive bargaining representative of employees in the bargaining unit.

WE WILL, within 14 days from the date of this Order, offer reinstatement to Trinidad Hardy for the job she applied for, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Hardy whole for any loss of earnings and other benefits resulting from our refusal to hire her, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Hardy for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Hardy, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the refusal-to-hire will not be used against her in any way.

305 WEST END HOLDING, LLC D/B/A 305 WEST END AVENUE OPERATING, LLC AND ULTIMATE CARE MANAGEMENT ASSISTED LIVING MANAGEMENT, LLC, A DIVISION OF THE ENGEL BURMAN GROUP D/B/A ULTIMATE CARE MANAGEMENT, LLC

The Administrative Law Judge's decision can be found at www.nlr.gov/case/2-CA-188405 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX B
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide information to the United Food and Commercial Workers Union, Local 342, AFL-CIO (Union), that is relevant and necessary to perform its duties as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All of its full-time and part-time employees, with respect to wages, hours and conditions of employment, excluding executives, supervisors and guards as defined in the Labor Management Relations Act as amended, and agrees to deal collectively only with this Union for and on behalf of such employees. Full-time employees are employees employed on a steady basis. Part-time employees who are call in employees and work as needed.

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

WE WILL promptly provide to the Union with information it requested on October 27, 2016.

COUNTY AGENCY, INC. AND ESPLANADE PARTNERS LTD. D/B/A ESPLANADE VENTURE PARTNERSHIP D/B/A THE ESPLANADE HOTEL

The Administrative Law Judge's decision can be found at www.nlr.gov/case/2-CA-188405 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



LIST OF PERSONNEL

Predecessor Employees
 New Employees
 Predecessor Supervisor
 New Supervisor
 Predecessor Recreation Employee

P
 N
 SP
 SN
 RP

Initial Complement	Status	BSE	Hired	Seperated
Aguino, Manuel	P		12/5/2016	
Alexander, Francisca	SN		12/5/2016	
Anselmo, Fernando	P	BSE	1/5/2016	
Baez, Melanie	SN		4/6/2017	
Batista Rodriguez, Agustin B	N		12/5/2016	
Battick, James W	P	BSE	12/5/2016	
Bellamy, Michelle	P		12/5/2016	
Bicic, Dzevat	SN		12/5/2016	
Blocker, Otto	P		12/5/2016	12/12/2016
Bradford, Ida	P		12/5/2016	
Breaker, Michael	P		12/5/2016	
Brennan, Annis	RP		12/5/2016	
Brown, Leslie E	SP		12/5/2016	
Burnham, Lorraine A	P		12/5/2016	
Cabrera, Jose	N		12/6/2016	12/7/2016
Caplan, Shelley	SP		12/20/2016	
Cappelli, Dawn	P		12/5/2016	
Campbell, Norman	P		12/5/2016	
Celisca, Berne	SP		11/30/2016	
Conway, Kelsey A	N		12/5/2016	12/11/2016
De La Cruz, Milda	P	BSE	12/5/2016	3/1/2017
DelVillar, Elsie	N		12/8/2016	
Embry, Nicole	RP		12/5/2016	4/11/2017
Eposito, Felicetta Pia	P	BSE	12/5/2016	3/24/2017
Etienne, Albert	SP		12/5/2016	
Fajar, Miguelina	P	BSE	12/5/2016	3/23/2017
Fantalina, Rimma	P	BSE	12/5/2016	3/23/2017
Fernandez, Carlos	P	BSE	12/5/2016	
Fernandez, Clara	RP		12/5/2016	
Figueroa, Don Frank	P	BSE	12/5/2016	3/24/2017
Franklin, Jess	RP		12/5/2016	
Garcia, Danitza	P		12/5/2016	

COUNTY AGENCY INC. AND ESPLANADE PARTNERS LTD. D/B/A ESPLANADE VENTURE
PARTNERSHIP D/B/A THE ESPLANADE HOTEL

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Gomez, Danilda A	P	BSE	12/5/2016	3/23/2017
Grant, Charlene Benymon	P		12/5/2016	
Harpal, Sudeshkumar	P	BSE	12/5/2016	
Harrison, Stephen	P		12/5/2016	
Johnson, James	P	BSE	12/5/2016	3/23/207
Keller, Almedia	RP		12/5/2016	
Knight, Gregory	P		12/5/2016	
Korzep, Stanislaw	P	BSE	12/5/2016	
Leon-Heras, Claudio	P		12/5/2016	
Levin, Michael	N		12/5/2016	12/15/2016
Lind, Jonathan E	N		12/5/2016	12/28/2016
Loach, Carlis R	P		12/5/2016	
Londea, William E	P		12/5/2016	
Martinez, Flor	P		12/5/2016	
Nartowicz, Helena	P		12/5/2016	12/15/2018
Nicholls, Barbara	P		12/5/2016	
Oconnell, Ruth	SP		12/5/2016	
Peters, Hayden R	P		12/5/2016	
Rivera, Carmelo	P		12/5/2016	
Rodriguez, Cynthia	P		12/5/2016	
Rybicka, Sylwia	P	BSE	12/5/2016	1/24/2017
Salwen, Marcy	SP		12/5/2016	
Singer, Edwin	SP		12/5/2016	
Supliguicha, Maria	P	BSE	12/5/2016	3/23/2017
Vadi, Taylor	N		12/8/2016	
Valle, Lazaro	P	BSE	12/5/2016	1/16/2017
Williams, Deandra	N		12/7/2016	4/4/2016

New Hires Retained After March 24, 2017

Adolphe Desrosiers, Marie	N		1/18/2017	
Bogen, Tyler	N			
Blackwood, Kevin	N		1/5/2017	
Clarke, Vivienne C	N		3/16/20167	
Currey, Salaambia N	N		12/28/20116	
Dessources, Lenz	N		1/4/2017	
Durand, Fritz	N		3/1/2017	
Francillon, Kettia	N		2/24/2017	4/6/2017
Joachim Desrosiers, Sabrina	N		3/1/2017	
Joseph, Jean R	N		1/4/2017	
Leveque Philogene, Claudicie	N		3/1/2017	
Loggins, Robert E	N		2/24/2017	

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DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Maxwell, Clarence A	N	2/24/2017
Merced, Raymond L	N	3/22/2017
Nooks, Georgia S	N	2/12/2017
Pagan, Mercedes	N	12/19/2016
Ramos, Omar	N	3/1/2017
Rivera, Ismael	N	1/16/2017
Rosario, Natash	N	12/15/2017
Simmons, Gregory S	N	1/5/2017
Thomas, Stephanie N	N	1/12/2016
Walters, Tasha	N	12/28/2016

New Hires not Retained until March 24, 2017

Frost, Norman C	N	12/28/2016	2/3/2017
Gonzalez, Julio R	N	12/12/2016	12/25/2016
Marie, Javier	N	2/15/2017	2/17/2017
Perry, Shatasia	N	12/21/2016	1/26/2017
Serrano, Sean M	N	12/15/2016	2/5/2017
Tavira Martinez, Marco A	N	12/12/2016	12/14/2017
Viruet, Carmenlydia M	N	12/12/2016	2/3/2017

December 5, 2016

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March 6, 2017

New Hires Severed		4
New Hires		20
Predecessor Employees Severed	5	
Total	<hr/> 31	<hr/> 24

March 25, 2017

New Hires Severed		
New Hires		2
Predecessor Employees Severed	7	
Total	<hr/> 24	<hr/> 26