No. 11-72498

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

A&C HEALTHCARE SERVICES, INC.

Respondent

and

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTCHARE WORKERS-WEST

Intervenor

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce its Decision and Order issued against A&C Healthcare Services, Inc. ("the Company"). The Board's Decision and Order

issued on February 25, 2011, and is reported at 356 NLRB No. 100. (E.R. 1.)[1] The Board's Order is final under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Board filed its application for enforcement on August 25, 2011. The Board's filing is timely because the Act imposes no time limit on such proceedings. Service Employees International Union, United Healthcare Workers-West ("the Union") was the charging party before the Board and has intervened.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a) ("the Act")), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices occurred in California.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company, as a successor employer, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, and changing unit employees' wages, hours, and other terms and conditions of employment without bargaining with the Union.

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[1] "E.R." references are to the Excerpts of Record filed by the Company. "S.E.R." references are to the Board's Supplemental Excerpts of Record. "Br." refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

RELEVANT STATUTES

Relevant statutory provisions are contained in an addendum at the end of this brief.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint against the Company. The complaint alleged that the Company, as a "perfectly clear" successor employer, violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to recognize and bargain with the Union, and unilaterally implementing changes in unit employees' existing terms and conditions of employment. (E.R. 3.) The complaint also alleged that the Company violated Section 8(a)(5) and (1) by subsequently withdrawing recognition from the Union. (E.R. 3.)

Following a hearing, an administrative law judge issued a recommended decision, in which he found that, assuming arguendo that the Company was not a "perfectly clear" successor when the Company took over operations from the predecessor on August 8, 2007, the Company was nonetheless a successor under *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272 (1972) ("*Burns*"). As a *Burns* successor, the Company was free to set initial terms and conditions of employment, but obligated to recognize and bargain with the Union before unilaterally implementing new terms on November 8, 2007, because its bargaining

obligation attached between September 14, 2007 and prior to November 8, 2007. (E.R. 3-8.) The judge found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union as the unit employees' bargaining representative until January 3, 2008, well after the bargaining obligation attached, and by unilaterally changing employees' wages, hours, and other terms and conditions of employment on and after November 8, 2007, without bargaining with the Union.[2] (E.R. 3-8.)

The Company filed exceptions to the judge's decision; the General Counsel filed limited exceptions. (E.R. 2.) On June 8, 2009, the two sitting members of the Board, Chairman Liebman and Member Schaumber, issued a Decision and Order affirming the judge's finding that the Company violated Section 8(a)(5) and (1), as described above, and modifying his recommended remedial order. (E.R. 2.)

On June 17, 2010, the Supreme Court held in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) ("*New Process*"), that the two-member Board did not have authority to issue decisions when there were no other sitting Board members.

Thereafter, on February 25, 2011, a three-member panel of the Board (Chairman Liebman and Members Pearce and Hayes) granted the Acting General

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[2] The judge dismissed the separate allegation that the Company unlawfully withdrew recognition from the Union on January 30, 2008, when it walked away from bargaining and returned the next day. (E.R. 6-7.) That matter is not before the Court.

Counsel's motion to review the previously-issued case and issued the Decision and Order that is currently before the Court. (E.R. 1.) In its Decision and Order, the Board affirmed the administrative law judge's rulings, findings, and conclusions, and adopted his recommended order to the extent and for the reasons stated in its June 8, 2009 Decision and Order, which the Board incorporated by reference. (E.R. 1.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; Pleasant Care Corporation Operates a Nursing Home at Which the Union Represents a Unit of Employees; the Company Purchases the Nursing Home in July 2007

For several years, Pleasant Care Corporation ("Pleasant Care") owned and operated Emmanuel Convalescent Hospital of Millbrae ("the facility"), which is a residential nursing home located in Millbrae, California. (E.R. 4; E.R. 20 ¶ 1.) Since 1995, the Union has represented a bargaining unit of approximately 85 employees at the facility, including licensed vocational nurses, certified nursing assistants, housekeeping staff, and dietary aides. The most recent collective-bargaining agreement between the Union and Pleasant Care was effective from October 1, 2006 to June 15, 2008. (E.R. 4; S.E.R. 6.)

Pleasant Care filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code in March 2007. (E.R. 3; E.R. 37.) The Company, which owned

and operated another nursing home in California, purchased the facility from Pleasant Care in a bankruptcy auction in July 2007. (E.R. 3; E.R. 20 ¶ 2.) In a subsequently-issued order, the United States Bankruptcy Court for the Central District of California (Los Angeles Division) approved the transfer of Pleasant Care's assets—including the assignment of the facility lease and related assets—to the Company, effective on the date that the Company obtained an operating license from the California Department of Health. (E.R. 3; E.R. 24-35.) According to the terms of the sale, the Company would operate the facility under an interim management agreement until it received its operating license. Upon receipt of its operating license, the Company would become, under the terms of the sale, the legal owner and operator of the facility. (E.R. 3; E.R. 27-28.) There was no indication that the Company would not be able to obtain an operating license. (E.R. 4.)

On July 26, pursuant to the Bankruptcy Court's order, Pleasant Care and the Company voluntarily negotiated and executed an Operations Transfer Agreement ("OTA") to provide for the Company's interim operation of the facility pending the issuance of the Company's operating license. (E.R. 36-65 & n.10.) A provision of the OTA stated that the Company was to offer probationary employment to all of Pleasant Care's employees at the facility. (E.R. 3; E.R. 40.)

B. The Company Assumes Operations of the Facility on August 8, and Continues To Provide Residential Nursing Care to Patients in Essentially Unchanged Form, and with the Same Complement of Employees; on September 14, the Union Requests that the Company Recognize and Bargain with It

On August 8, the Company took interim control of the facility under Pleasant Care's operating license, and continued to provide residential nursing care services to patients at the facility in essentially unchanged form from Pleasant Care's operations. (E.R. 3-4; E.R. 20 ¶ 5.)

When it took over operations, the Company utilized the same complement of employees who had been employed at Pleasant Care's facility. Thus, on August 8, the Company's principals personally informed all former Pleasant Care employees that the Company was immediately hiring them on a 90-day probationary basis. (E.R. 3-4; E.R. 20 ¶ 4.) These nonsupervisory employees were told that they would continue to receive their regular pay, but not their health or other benefits, thus effectively modifying employees' terms and conditions of employment as they existed in the extant collective-bargaining agreement between Pleasant Care and the Union. (E.R. 4; E.R. 20 ¶ 4.)

On September 14, the Union requested that the Company recognize and bargain with it, as the collective-bargaining representative of the unit employees. (E.R. 4; S.E.R. 6.) The Company did not respond to the Union's request until December. (E.R. 4; E.R. 21 ¶8.)

C. Prior to November 8, the Company's Complement of Employees is Firmly in Place; on November 8, the Company Unilaterally Implements Numerous Terms and Conditions of Employment, Including New Wages, Holidays, and Benefits; in December, the Company Refuses to Recognize the Union and Notifies the Union that It Will Recognize and Meet With It Only if Certain Conditions are Met

During the employees' 90-day probationary period, the Company did not hire any additional employees. No employees voluntarily left the Company's employ. (E.R. 6.) On November 8, at the conclusion of the employees' probationary period, the Company informed all but 6 of the 85 nonsupervisory/managerial employees who previously had been employed by Pleasant Care that they had passed their probationary period and had become permanent employees. (E.R. 20 ¶ 6.)

That same day, the Company announced new terms and conditions of employment covering wages, holidays, health insurance, overtime, sick leave, and no-call/no-show policy for all employees. (E.R. 20-21 ¶ 7.)

By letter dated December 3, the Company stated that it would recognize and bargain with the Union only after certain conditions were met, including the Company's employing a majority of employees who were previously unit employees under Pleasant Care. (E.R. 4; E.R. 21 ¶ 8.) Subject to these conditions being met, the Company agreed to bargain with the Union on January 3, 2008. (*Id.*)

D. The Company Recognizes the Union as Unit Employees' Bargaining Representative on January 3; on January 15, the Company Makes Further Unilateral Changes to Unit Employees' Terms and Conditions of Employment

On January 3, following issuance of the operating license, the Company recognized the Union as the exclusive collective-bargaining representative of the unit employees. (E.R. 4; E.R. 21 ¶ 9.)

On January 15, the Union and the Company met for their initial bargaining session. On or about that same date, the Company issued an Employee Handbook to its employees, in which it announced numerous new unilaterally-imposed changes in employees' wages, hours, and other terms and conditions of employment that were different from, or in addition to, those announced on November 8. Specifically, the Employee Handbook set out wage rates and bonuses for unit employees, and gave the Company the right to unilaterally revise wages, hours, and other terms and conditions of employment. It classified unit employees as at-will employees and established disciplinary procedures, a dress code, attendance rules, evaluation procedures, hours of work, overtime policies, and leave procedures. It also announced meal and rest periods for unit employees. Finally, the Handbook set out requirements for physical examinations and other health requirements; an anti-harassment policy; and accommodations for disabled employees. (E.R. 4; E.R. 22-23 ¶ 24.)

The Union and the Company held three more bargaining sessions, but failed to reach an agreement. During the January 30 bargaining session, the Company withdrew recognition from the Union, but rescinded this withdrawal the next day. The Company never stated that it was declaring an impasse or implementing a last, best, and final offer. (E.R. 4; S.E.R. 2.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Members Pearce and Hayes), in agreement with the administrative law judge, found that the Company was a *Burns* successor employer to Pleasant Care, and violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally changing employees' terms and conditions of employment after its bargaining obligation attached, between September 14 and prior to November 8. (E.R. 1-2.)

The Board's Order requires the Company to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act (29 U.S.C. § 157). (E.R. 1-2, 7.) Affirmatively, the Board's Order requires the Company to, on request of the Union, rescind any departures from terms or conditions of employment that, absent the Company's unilateral conduct, would have existed for employees on November 8, 2007; bargain collectively with the Union as the exclusive representative of unit

employees with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if agreement is reached, embody such agreement in a signed document; and post a remedial notice. (E.R. 2, 7.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company, as a *Burns* successor to Pleasant Care, unlawfully refused to recognize the Union, and unlawfully changed unit employees' wages, hours, and other terms and conditions of employment on and after November 8, 2007, without bargaining with the Union.

As a *Burns* successor, an employer is obligated to bargain with a union representing a unit of the predecessor's employees if it continues the predecessor's enterprise in substantially unchanged form and employs, as a majority of its work force, the predecessor's employees. Substantial evidence supports the Board's finding that the Company easily met the criteria and was a *Burns* successor. First, it is undisputed that the Company continued to operate Pleasant Care's nursing home without change upon taking over operations in August 2007. Second, the Company operated the facility with the same complement of employees employed by the predecessor and represented by the Union. The Company does not dispute that, upon acquiring Pleasant Care's nursing home, it employed all of Pleasant Care's employees on a probationary basis. The Board reasonably found that the Company's bargaining obligation attached between September 14, 2007—when

the Union requested recognition and bargaining—and prior to November 8, 2007—when the Company made substantial unilateral changes to employees' working conditions. During that timeframe, the evidence establishes that the Company had hired a "substantial and representative complement" of its employees, all of whom had worked for the predecessor employer. Prior to November 8, the Company's work force was not in any state of flux and was in no way indeterminate. That the employees were probationary is irrelevant to the analysis. Therefore, the Company was obligated to bargain with the Union as a *Burns* successor before implementing any new terms and conditions of employment.

Instead, on November 8, the Company unilaterally implemented changes in employees' wages, hours, and other terms and conditions of employment. Again on January 15, it made further unilateral changes that elaborated upon, or were in addition to, the previous changes. By failing to bargain with the Union over these matters, and failing to recognize the Union until January, the Company violated Section 8(a)(5) and (1) of the Act.

The Company erroneously argues that the Board found that it was a "perfectly clear" successor on August 8, 2007, prevented from setting initial employment rules when it took over operations from Pleasant Care. To the contrary, the Board plainly stated that it was assuming, for the sake of argument,

that the Company *was not* a perfectly clear successor. Its remedial order is consistent with this finding.

Finally, there is no merit to the Company's contention that the Board's remedy requiring it to rescind any departures from terms and conditions of employment that, absent the Company's unilateral conduct, would have existed for employees on November 8, is "unclear." The Company did not present this argument to the Board, and it is therefore precluded from advancing it, for the first time, in its opening brief. In any event, the Board's remedy is quite clear. It merely seeks to restore the status quo to that which would have existed when the Company's obligation to bargain with the Union attached and orders the Company to bargain with the Union about employees' terms and conditions of employment.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY WAS A SUCCESSOR EMPLOYER, AND THEREFORE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING UNIT EMPLOYEES' TERMS AND CONDITIONS OF EMPLOYMENT

A. Applicable Principles and Standard of Review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ."[3] Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

When a new employer acquires a unionized business, it must recognize and bargain with the union representing the predecessor's employees if the new employer is a "successor employer" to the predecessor. *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 287-88 (1972); *accord Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 627 (9th Cir. 1983); *Kallman v. NLRB*, 640 F.2d 1094, 1100 (9th Cir. 1981). A successor employer is one who "makes a conscious decision to maintain

[3] A violation of Section 8(a)(5) of the Act results in a derivative violation of Section 8(a)(1). *See Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

generally the same business and to hire a majority of its employees from the predecessor . . . ." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987). The imposition of an obligation to bargain follows from the new employer's intention "to take advantage of the trained work force of its predecessor." *Id.*

It is settled that, under the doctrine of successorship, a change in the ownership of an employing enterprise does not, by itself, destroy the presumption of continuing majority status for employees' collective-bargaining representative. *Fall River*, 482 U.S. at 37-38 (1987). Upon acquiring a business, a new employer becomes a successor obligated to bargain in good faith with the established collective-bargaining representative of its predecessor's employees if the employer conducts essentially the same business as the former employer, and a majority of the work force, in an appropriate bargaining unit, are former employees of the predecessor. *Fall River*, 482 U.S. at 27, 41-43, 52; *accord Burns*, 406 U.S. at 278-81; *Premium Foods, Inc*., 709 F.2d at 627.

The goal of the Board's successorship doctrine is to encourage stability in collective-bargaining relationships, without impairing the free choice of employees. *Fall River*, 482 U.S. at 38. That policy, in turn, supports the Act's overarching aim of maintaining industrial peace. *Id.* As the Supreme Court observed in *Fall River*, "[i]f the employees find themselves in essentially the same

jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest." *Fall River*, 482 U.S. at 43-44.

In determining whether a new employer is a "successor employer" for bargaining purposes, the Board first focuses on whether there is substantial continuity between the enterprises of the predecessor and the new employer. In reaching this determination, the Board looks at the totality of the circumstances, "with an emphasis on the employees' perspective." *Fall River*, 482 U.S. at 43. As the Supreme Court has stated, if the new employer is continuing the predecessor's business in substantially unchanged form, "those employees who have been retained will understandably view their job situations as essentially unaltered" and their attitudes toward union representation likely will have remained unchanged. *Id.*

In determining whether the new employer is continuing the predecessor's business in substantially unchanged form, the Board and courts consider a variety of factors, including whether the business of both employers is essentially the same, whether the employees of the new employer are performing the same work under the same conditions and supervisors, and whether the new employer has the same production process, the same products, and generally the same customers. *See Fall River*, 482 U.S. at 43; *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 463

(9th Cir. 1985); *Pa. Transformer Tech. Inc. v. NLRB*, 254 F.3d 217, 222 (D.C. Cir. 2001).

Once it is established that the new employer is continuing the predecessor's operations in substantially unchanged form, the next consideration is whether a majority of its employees formerly worked for the predecessor. *Fall River*, 482 U.S. at 46-52; *accord Kallman v. NLRB*, 640 F.2d 1094, 1100 (9th Cir. 1981). Because the composition of the successor's work force is a "triggering fact" in determining whether and when it is obligated to bargain with the union, the bargaining obligation is established only when the successor has hired "a substantial and representative complement" of its work force. *Fall River*, 482 U.S. at 46-52. Accordingly, except in instances "in which it is perfectly clear that the new employer plans to retain all of the employees in the unit[,]" a successor employer is "ordinarily free to set *initial* terms on which it will hire the employees of a predecessor, without bargaining with the incumbent union." *Burns*, 406 U.S. 294-95 (emphasis supplied). If an employer is a *Burns* successor, its duty to recognize and bargain with the union arises when a majority of a substantial representative complement of its work force was formerly employed by the predecessor. *Fall River*, 482 U.S. at 27, 41.

The determination of whether an employer is a successor is "primarily factual in nature," and is based on the totality of the circumstances. *Fall River*,

482 U.S. at 43; *Jeffries Lithograph Co.*, 752 F.2d at 464. Accordingly, the Board's factual findings are "conclusive" if they are supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)). Further, the Board's reasonable inferences are also entitled to "special deference." *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1464 (9th Cir. 1997) (citation omitted).

Reviewing courts "recognize that, in 'applying the general provisions of the Act to the complexities of industrial life,' . . . the Board brings to its task an expertise that deserves . . . [judicial] deference." *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963). Courts will therefore defer to the Board's conclusion under the Act "so long as it is reasonable and not precluded by Supreme Court precedent." *NLRB v. Advanced Stretchforming, Inc*., 233 F.3d 1176, 1180 (9th Cir. 2000) (citation omitted). Thus, a reviewing court may not displace the Board's choice between conflicting views, even if it could justifiably have made a different choice *de novo*. *See Universal Camera Corp. v. NLRB*, 340 U.S. 374, 488 (1951).

B. Substantial Evidence Supports the Board's Finding that the Company Was a *Burns* Successor, and Its Failure to Bargain with the Union Before Unilaterally Implementing Terms and Conditions of Employment in November and January Violated Section 8(a)(5) and (1)

Substantial evidence supports the Board's finding (E.R. 1, 2, 7, 8) that the Company, as a successor employer under *Burns*, unlawfully failed to recognize and

bargain with the Union, and unlawfully implemented wages, hours, and other terms and conditions of employment on and after November 8, 2007, at a time when it was obligated to recognize and bargain with the union representing the predecessor's employees. *See Burns*, 405 U.S. at 279-81; *Fall River*, 482 U.S. at 42-46. Moreover, even after the Company belatedly recognized the Union on January 3, 2008, it continued to make additional unilateral changes to unit employees' terms and conditions of employment.

To begin, the Board found, based on the stipulated facts, that the Company met the first criterion for successor status, namely, that it continued Pleasant Care's business in substantially unchanged form. As the Company stipulated (E.R. 20 ¶ 5), and the Board explained (E.R. 4), the Company took over operations of the facility from Pleasant Care on August 8, 2007, and, from that point on, provided residential nursing home services to patients in essentially unchanged form. *See Fall River*, 482 U.S. at 43; *Pa. Transformer Tech, Inc. v. NLRB*, 254 F.3d 217, 222 (D.C. Cir. 2001). In its opening brief, the Company does not contest the Board's finding that it continued Pleasant Care's business in essentially unchanged form, thereby waiving any challenge it may have had. *See, e.g., NLRB v. Ed Chandler Ford*, 718 F.2d 892, 894 (9th Cir. 1983) (party's failure to brief issue results in its waiving it).

Next, the Board reasonably found (E.R. 6) that the Company met the other criterion for successor status—that is, a majority of its employees, in a substantial and representative complement, were formerly employed by Pleasant Care. *See Fall River*, 482 U.S. at 46-47; *Premium Foods, Inc. v. NLRB*, 709 F.2d at 629; *Sullivan Indus. v. NLRB*, 957 F.2d 890, 895 (D.C. Cir. 1992).

As this Court has pointed out, "'the point at which a successor employer has hired a sufficient complement of workers for determining the employer's bargaining obligation will vary from case to case.'" *NLRB v. Jeffries Lithograph Company*, 752 F.2d 459, 464 (quoting *NLRB v. Hudson River Aggregates, Inc.*, 639 F.2d 865, 870 (2d Cir. 1981)). In determining whether a substantial and representative complement of employees is in place, several factors may be considered, such as whether the successor took over a fully operational business and continued it without any hiatus; whether the job classifications designated for the operation were filled or substantially filled and whether the operation was in normal or substantially normal production; the size of the employee complement on the date in question; and the relative certainty of any plans for expansion. *Fall River*, 482 U.S. at 49; *accord Premium Foods, Inc.*, 799 F.2d at 629. The Board does not give controlling weight to any single factor and "cannot rely on simple mathematical formulae to help it resolve successorship questions." *Jeffries Lithograph Company*, 752 F.2d at 464 (and cases cited).

Importantly, in analyzing if an employer is a *Burns* successor, the determination about substantial and representative complement is not deferred until completion of a probationary period. *Sahara Las Vegas Corp.*, 284 NLRB 337, 337 n.4, 1342-44 (1987), *enforced*, 886 F.2d 1320 (9th Cir. 1989) (table); *accord Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 978, 1000 (2007), *enforcement denied as to other matters, S&F Market Street Healthcare v. NLRB*, 570 F.3d 354 (D.C. Cir. 2009). *See also NLRB v. Marin Operating, Inc.*, 822 F.2d 890, 895 (9th Cir. 1987) (rejecting employer's argument that a successorship determination should be deferred until after completion of 90-day probationary period).

Here, the Board found that the Company's bargaining obligation attached at some point between September 14—when the Union requested recognition and bargaining—and prior to November 8—the date of the Company's unilateral implementation of additional terms and conditions of employment. (E.R. 6.) As the Board stated, by that point, the Company's "permanent employee complement and the Union's majority status" were established. (E.R. 6.)

The Board's choice for establishing the point at which the Company's bargaining obligation attached was reasonable in the circumstances here and amply supported by the record. (E.R. 6.) The stipulated facts establish that, during that period, the Company's substantial and representative complement of employees

was firmly in place. Simply put, the Company chose to utilize the same complement of employees employed by Pleasant Care to operate the enterprise in essentially unchanged form, and without any interruption to patient services. (E.R. 6; ER 20 ¶ ¶ 4-6.) There was no evidence that the employee complement was ever in any state of flux or indeterminate. Indeed, "not one employee voluntarily left" the Company's employ during the probationary period. (E.R. 6.) Nor did the Company hire any new employees before its unilateral changes on November 8 or expand the organization or the enterprise. (E.R. 6.) Nor did it have any intention of discharging a majority, or even a substantial number of, the former employees and replacing them at the end of the probationary period. (E.R. 6.) In fact, the stability of the workforce is underscored by the fact that following the probationary period, the Company retained *all but 6* of its 85 employees, a 93-percent retention rate. (E.R. 6.)

In light of the workforce's stability between September 14 and November 8, the Board reasonably concluded (E.R. 6) that a substantial and representative complement of employees coalesced during that time. And, contrary to the Company (Br. 14-16), the employees' status as probationers during that period "had little if anything to do with employment levels," *NLRB v. Marin Operating, Inc.*, 822 F.3d 890, 895 (9th Cir. 1987) (internal quotations omitted), as Board law clearly holds that a substantial and representative complement of employees may

be fixed regardless of the employees' probationary status. *See* p. 21, *supra* (citing cases).

Because the Company's bargaining obligation attached between September 14 and a point prior to November 8, the Company, as a successor, was obligated to recognize and bargain with the Union over the terms and conditions of employment. (E.R. 6.) Instead, on November 8, the Company unilaterally implemented changes in employees' wages, as well as health insurance, overtime, sick leave, and no-call/no-show policy benefits and other terms and conditions of employment. These terms and conditions of employment were different from the terms and conditions of employment the Company implemented on August 8, 2007 when it first took over the operation of the facility. On that date, the Company lawfully established initial terms and conditions of employment for the former Pleasant Care employees, announcing they would continue to receive their regular pay but that they would not receive health or other benefits. [4] By November 8, the Union had requested bargaining and the Company had hired a substantial and representative complement. However, the Company failed to recognize the Union; it did not officially recognize the Union or agree to start bargaining until January 3, 2008. (E.R. 4.)

[4] This announcement changed the existing benefits contained in the collective-bargaining agreement between Pleasant Care and the Union. As a *Burns* successor, the Company did not have to adhere to the terms of the existing collective bargaining agreement.

Moreover, the Company admits (Br. 15) that, by January 3, 2008, it had an obligation to bargain with the Union. The Company also admits (Br. 4) that it issued an Employee Handbook on January 15, 2008, in which it "elaborated on and [set forth] additional terms and conditions of employment." The Company made these changes on January 15 without bargaining to an impasse with the Union or as part of a last, best, and final offer. Accordingly, the Board is entitled to summary affirmance of its finding that the Company's changes to employees' terms and conditions of employment on January 15 were unlawful. *See, e.g., NLRB v. Nevis Indus. Inc.*, 647 F.2d 905, 908 (9th Cir. 1981); *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006).

C. The Company's Contentions Are Without Merit

On review, the Company essentially raises three challenges to the Board's Order. First, the Company claims that the workforce was not "permanent" until the end of the probationary period and therefore the November 8 unilaterally implemented terms and conditions of employment were not unlawful. Second, the Company erroneously claims that the Board determined it was a "perfectly clear" successor bound to follow the collective bargaining agreement between the Union and the predecessor employer. Finally, the Company argues that the Board's

Order is unclear. The Company's arguments are not supported in either fact or law.[5]

The Company claims (Br. 14-18) that it did not have a "permanent" workforce in place until November 8 when the probationary period expired and therefore the wages, hours, benefits and other terms and conditions of employment announced that day are best characterized as "initial" terms and conditions of employment. The Company is wrong. First, the Company admittedly (Br. 4) set initial terms and conditions of employment on August 8 when it hired all the predecessor's employees on a probationary basis. Next, the Company's efforts to attach labels such as "permanent employees" and "probationary employees" are not determinative of its bargaining obligation. *See* pp. 14-18, 21 (citing cases).

Indeed, notwithstanding the probationary status of the employees, there was no evidence that the work force was in any state of flux or indeterminacy prior to November 8. There is no evidence demonstrating that the Company intended to lay off segments of the unit or expressed dissatisfaction with particular parts of the organization or sought to change or enlarge the operation. (E.R. 6.) Instead, at the

[5] Before the Board, the Company argued that it was not a successor because it acquired the facility in a bankruptcy auction, and it had no obligation to recognize the Union until it received its operating license from the State. The Company failed to raise any such arguments in its brief to the Court, thereby waiving them. *See, e.g., NLRB v. Ed Chandler Ford*, 718 F.2d 892, 894 (9th Cir. 1983). *See also* Fed. R. App. P. 28(a)(9)(A).

conclusion of the probationary period, the Company hired 93 percent of the former employees. In short, although the Company claims that the Board was not justified in concluding that it had no intention of modifying the work force, it cannot overcome the Board's reasonable inferences that the Company "clearly knew" prior to November 8 the number of employees it would be utilizing.

Second, the Company argues at length (Br. 6-14) that it was not a "perfectly clear" successor on August 8, when it took over operations at the facility, or on November 8, when employees' probationary period ended.[6] The Company's arguments on this point are irrelevant. Simply put, the Board did not find that the Company was a "perfectly clear" successor. Instead, the Board assumed for the sake of argument that the Company was *not* a "perfectly clear" successor, and analyzed the Company's legal obligation as a *Burns* successor, empowered to set initial terms and conditions of employment, and not bound by the preexisting collective bargaining agreement between the Union and Pleasant Care. (E.R. 6.)

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[6] Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor without bargaining with the incumbent union, "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit." *Burns*, 406 U.S. at 294-95. In such circumstances, where the incumbent union's eventual majority cannot be doubted, "it will be appropriate to have [the successor employer] initially consult with the [incumbent union] before he fixes terms." *Id.* at 295. *See, e.g.*, *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674, 678-79 (9th Cir. 1980).

Moreover, the Board's Order clearly does not remedy a "perfectly clear" successor finding. The Order requires the Company to rescind, upon the Union's request, any terms and conditions of employment that would have existed for employees on November 8, 2007, not those in effect on August 8, 2007, when the Company began operating the facility. Nor does the remedy require the Company to adopt the terms of the collective bargaining agreement entered into by the Union and Pleasant Care. As such, the Company's discussion (Br. 6-13) of caselaw relating to "perfectly clear" successor principles is irrelevant.[7]

As a final matter, the Company argues (Br. 20) that a portion of the Board's order is "uncertain" because it cannot "ascertain" the "terms and conditions that are to be implemented." The Board's Order is quite clear. It requires the Company to, on request of the Union, rescind any departures from terms and conditions of employment that, absent the Company's unilateral conduct, would have existed for employees on November 8, 2007, and to bargain with the Union over terms and conditions of employment. (E.R. 2.)

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[7] For the same reasons, the Company's repeated reliance on *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975 (2007), *enforcement denied in part sub nom., S&F Market Street Healthcare v. NLRB*, 570 F.3d 354 (D.C. Cir. 2009), is unavailing. In that case, the Company admitted that it was a *Burns* successor and the parties litigated whether it was a perfectly clear successor. The Court found that the Board had erred, as a factual matter, in determining that the Company did not announce that it would be hiring employees on different terms and conditions of employment. *S&F Market Street Healthcare*, 570 F.3d at 450.

To the extent that the Company had a genuine inability to understand the extent of its obligations under the remedial order, including its duty to bargain with the Union, it could have raised this question in its exceptions to the Board or in a motion for reconsideration to the Board. However, in its exceptions, the Company did not argue that this provision in the Order—or any other provision, for that matter—was "uncertain." Instead, the Company only excepted generally to the Order. (S.E.R. 22-23.) Under Section 10(e) of the Act (29 U.S.C. § 160(e)), a generalized exception of that sort is an insufficient basis for preserving an argument like the Company now advances before the Court.[8] *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 497 (D.C. Cir. 1996) (stating that a general exception "is far too broad to preserve a particular issue for appeal," and noting that a "categorical denial does not place the Board on notice that its particular choice of remedy is under attack"). *Accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126-27 (9th Cir. 2011). Likewise, after the Board modified the judge's recommended remedial order (E.R. 2 & n.1), the Company did not file a

[8] The Company's exceptions state, in relevant part, as follows: "ORDER: in its entirety." (S.E.R. 22-23.) In support of its exception, the Company merely states that it "takes exception" to the judge's conclusions of law and recommendations, the remedy, and the Order "to the extent they incorporate terms and conditions to which [the Company] has taken exception in [its other exceptions]." (S.E.R. 23.) It does not present any specific argument, let alone an argument as to why any provision of the remedial order is "uncertain."

motion for reconsideration with the Board, in which it could have raised any concerns about the remedy. *See, e.g., Legacy Health Sys.*, 662 F.3d at 1127. In sum, the Company did not raise any arguments with respect to requirements of the Board's Order at the appropriate time. *See ILGWU v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

In any event, contrary to the Company's claim (Br. 20-21), the Board's remedy requiring the Company to rescind, on the Union's request, any unilateral departures from the terms and conditions of employment that would have existed for employees on November 8, 2007, is not uncertain. The remedy aims to restore the status quo that would have existed on and after November 8, but for the Company's unlawful unilateral changes made that day and January 15, 2008. (E.R. 2, 6.) Although the Company was privileged to set initial terms and conditions of employment on August 8, it did so by offering only regular wages without any benefits. The Company did not indicate to employees that it would be making any other changes to their terms and conditions of employment. Subsequently, when the Company reached its substantial and representative complement of employees between September 14 and prior to November 8, its bargaining obligation, as a *Burns* successor, attached. It was therefore required to bargain over any changes to employees' terms and conditions of employment beginning at that point. Specifically, it was not privileged to make the unilateral

changes it made on November 8, 2007 and January 15, 2008. Those and any other unilateral changes it made during that time, at the Union's request, must be rescinded. [9]

Absent the remedy described above, the Company would be allowed to profit from its unlawful conduct, because its unlawful unilateral changes would stand, undisturbed, as the baseline from which bargaining between the parties would occur. The Board's Order makes clear that the Company must rescind those unlawful unilateral changes.

STATEMENT OF RELATED CASES

Board counsel are not aware of any related cases pending in this Circuit.

[9] There is also no merit to the Company's suggestion (Br. 20) that, in deferring the question of the Company's health care obligations to the compliance stage of the proceeding, the Board was "implicitly recogniz[ing] the uncertainty of the remedy." Again, the Company never raised this argument to the Board, and it is not properly before the Court. *See* pp. 28-29. In any event, as the Board observed (E.R. 7 n.14), the discrete matter of the Company's healthcare obligations may be governed by the OTA and may be deemed an initial term and condition not subject to the Company's bargaining obligation. In light of the unique factors affecting this particular matter, the Board reasonably deferred the question of whether the Company had a bargaining obligation with respect to the new healthcare plan until the compliance stage of the proceedings. *Id.* The Board's decision to defer this distinct matter to the compliance stage in no way suggests that the remedies for the unfair labor practices are uncertain.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board

April 2012

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	
v.	)	Case No. 11-72498
	)	
A & C HEALTHCARE SERVICES, INC.	)	
	)	
Respondent	)	
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST	)	
	)	
Intetvenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,983 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben
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Dated at Washington, DC
this 9th day of April 2012

9th Circuit Case Number(s) 11-72498

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STATUTORY ADDENDUM TABLE OF CONTENTS

STATUTORY ADDENDUM

Section 7 (29 U.S.C. §157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Section 8(a)(1) and (5) (29 U.S.C. §158(a)(1) and (5)):

It shall be an unfair labor practice for an employer--
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Section 8(d) (29 U.S.C. § 158(d)):

[Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Section 10(a) (29 U.S.C. §160(a)):

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice...affecting commerce....

Section 10(e) (29 U.S.C. §160(e)):

The Board shall have the power to petition any court of appeals of the United States...wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order....No objection that has not been urged before the Board...shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive....