**FINAL BRIEF** **ORAL ARGUMENT NOT YET SCHEDULED**

# Nos. 07-1439, 07-1502

**UNITED STATES COURT of APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**S&F MARKET STREET HEALTHCARE LLC d/b/a WINDSOR CONVALESCENT CENTER OF NORTH LONG BEACH**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| S&F MARKET STREET HEALTHCARE LLC d/b/a WINDSOR CONVALESCENT CENTER OF NORTH LONG BEACH | * | |
| Petitioner/Cross-Respondent | * | |
| v. | * | Nos. 07-1439, 07-1502 |
| NATIONAL LABOR RELATIONS BOARD | * | |
| Respondent/Cross-Petitioner | * | |

THE BOARD'S CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

(A) Parties and Amici: S&F Market Street Healthcare LLC d/b/a Windsor Convalescent Center of North Long Beach, petitioner/cross-respondent herein, was a respondent in the case before the Board. The Board is the respondent/cross-petitioner herein, and the Board's General Counsel was a party in the case before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of the Board's Decision and Order in Case Nos. 21-CA-36422, 21-CA-36645, and 21-CA-36650, issued on September 30, 2007, and reported at 351 NLRB No. 44.

(C) Related Cases: This case has not previously been before this Court.

Board counsel are unaware of any related cases currently pending before, or about to be presented before, this Court or any other court.

/s/ Linda Dreeben
Linda Dreeben
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1099 14th Street, NW
Washington, DC 20570

Dated at Washington, DC
this 9th day of June, 2008

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UNITED STATES COURT OF APPEALS
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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## STATEMENT OF JURISDICTION

This case is before the Court on the petition of S&F Market Street Healthcare LLC d/b/a Windsor Convalescent Center of North Long Beach ("Windsor") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, an order of the Board finding that Windsor violated Section 8(a)(1), (3) and (5) of the National Labor

Relations Act ("the Act"), as amended (29 U.S.C. §§ 151, 158(a)(1), (3) and (5)). The Board's Decision and Order, issued on September 30, 2007 and reported at 351 NLRB No. 44 (A 1670-1703),[1] is a final order with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)).

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to remedy unfair labor practices. Windsor filed its petition for review on October 30, 2007. The Board filed its cross-application for enforcement on December 7, 2007. Both filings were timely, as the Act places no time limitation on such filings. This Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows a party aggrieved by a final order of the Board to file a petition for review in this Court.

## STATEMENT OF THE ISSUES PRESENTED

1. Whether this Court should summarily enforce the Board's uncontested findings that Windsor violated Section 8(a)(3) and (1) of the Act by refusing to hire four union stewards and suspending and terminating certain employees because of their protected, concerted, and/or union

[1] "A" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

activities and violated Section 8(a)(1) of the Act by informing employees that there was no union at the facility or that its facility was nonunion.

2. Whether substantial evidence supports the Board's findings that Windsor, as an undisputed successor employer, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain in good faith with the Union, and by unilaterally changing existing terms and conditions of employment after Windsor had made "perfectly clear" its intention to retain Candlewood's employees.

## RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

## STATEMENT OF THE CASE

Acting on charges filed by the Service Employees International Union, Local 434B ("the Union"), the Board's General Counsel issued a complaint alleging that Windsor violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing, as a successor employer, to bargain with the Union and by unilaterally changing terms and conditions of employment for employees represented by the Union. (A 1129-1139.) The complaint further alleged that Windsor violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to hire four union

stewards and suspending and terminating certain employees for their protected or concerted activity. Finally, the complaint alleged that Windsor violated Section 8(a)(1) of the Act ((29 U.S.C. § 158(a)(1)) by informing employees that there was no union at its facility or that its facility was nonunion. Following a hearing, an administrative law judge found Windsor violated Section 8(a)(5) and (1) by refusing, as a successor employer, to bargain with the Union, Section 8(a)(3) and (1) by suspending and terminating certain employees, and Section 8(a)(1) by making the nonunion statements. (A 1696, 1698-99, 1701.) The judge dismissed the other allegations. (A 1696-97.)

After Windsor and the General Counsel filed timely exceptions, the Board (Members Liebman, Schaumber, and Kirsanow) issued its Decision and Order, affirming the judge's unfair labor practice rulings, findings, and conclusions as to the violations found by the judge. (A 1670.) The Board further found, reversing the judge's dismissals, that Windsor violated Section 8(a)(5) and (1) by unilaterally changing existing terms and conditions of employment and violated Section 8(a)(3) and (1) by refusing to hire certain union stewards. (A 1670.)

# STATEMENT OF FACTS

## I. THE BOARD'S FINDINGS OF FACT

### A. Windsor Purchases Candlewood Care Center; Windsor Decides to Hire Candlewood Employees on a Temporary Basis; Windsor Collects Applications From and Conducts Interviews with Candlewood Employees

Windsor operates skilled nursing facilities in southern California. (A 1670; 434-37.) In the spring of 2004, Windsor purchased Candlewood Care Center ("Candlewood") in North Long Beach from Covenant Care Orange, Inc. (A 1670; 876, 1399.) Covenant Care and the Union were signatories to two collective-bargaining agreements covering certain employees at Candlewood. (A 1671; 1152-1205.) The "Base Unit" consists of nurses' aides, certified nursing assistants ("CNAs"), restorative aides, orderlies, dietary employees, activity assistants and housekeeping employees. (A 1671; 1155.) The "LVN Unit" consists of licensed vocational nurses. (A 1671; 1181.)

When Windsor representatives toured the facility before assuming operations, Kathleen Leonard, director of human resources for Windsor, recommended a complete overhaul of the facility and replacement of all the staff. (A 1672, 1689; 889.) Based on immediate staffing needs, Windsor decided to offer some current staff "temporary employment" for up to 90

days with a review period during that time and the opportunity for "regular" employment at the end of that period. (A 1672, 1689; 900.)

Carol Spencer, Windsor's director of staff development, looked at Candlewood's personnel files to compile a list of employees that Windsor would not hire. (A 1672; 677-81, 901, 1300, 1546.) Spencer's list is in alphabetical order except for the names Debra Smith, Sharie Hailey, and Annie Moss at the end. (A 1672; 1548-59.) Spencer also compiled a second list based on the assessments of Candlewood's administrator Carmen Hernandez. (A 1672; 681-82, 1553.) Spencer's second list has heavy black dots adjacent to the names Davenport, Haley,[2] Smith, and Moss, with an additional notation of "steward" next to Moss' name. (A 1672; 1553.) Each of those individuals was a union steward at Candlewood. (A 1672; 52, 105, 125, 289.)

During May 2004, at a Candlewood staff meeting announcing that the facility had been sold, Covenant Care representative Dava Ashley introduced Leonard to the Candlewood staff. Leonard spoke about Windsor and its other facilities. (A 1676; 881.) Ashley fielded questions from employees about what would happen when Windsor took over the facility.

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[2] "Haley" is a misspelling referring to employee Sharie Hailey. (A 1671 n.8.)

(A 1676; 207, 881-83.) Neither Leonard nor Ashley announced any specific changes that Candlewood employees could anticipate following Windsor's assumption of operations at the facility. (A 1676; 207, 881-83.)

In mid-June, Windsor provided employment applications to Candlewood staff. (A 1672; 58, 150, 275, 340, 664, 904, 1333.) At the end of June, Leonard, Spencer, and Carren Chastek, Windsor's regional director of clinical services, interviewed all Candlewood employees who had submitted applications, including those on Spencer's lists. (A 1672; 559, 904.) In the interviews, the Windsor representatives told Candlewood employees that any employment offers would be temporary for up to 90 days. (A 1690; 728, 798, 900.) When employees asked what was meant by "temporary," Leonard told them Windsor would look at their work and assess them within the 90 day period. (A 1690; 900.)

### B. Windsor Assumes Operation of the Facility; Windsor Makes Hiring Decisions and Employees Begin Work; Windsor Mails and Distributes Offer Letters

Windsor assumed operations at the facility on July 1, 2004, renaming it Windsor Convalescent Center of North Long Beach. (A 1671; 949.) Windsor began operations with 120 employees, over 75 percent of whom were former Candlewood employees. (A 1672; 1307-23.) Windsor hired about half of the employees identified on the problem lists compiled

by Spencer. (A 1672; 911.) Windsor did not hire four union stewards: Colter, Hailey, Moss, and Debra Smith. (A 1671; 49, 117-18, 140, 304.) Three other Candlewood union stewards were hired. (A 1671; 195, 197, 254, 257, 319, 322.) As of July 1, ten to twelve employees were non-Candlewood recruits, whom Windsor considered "probationary" or "regular" employees. (A 1672; 952.)

Windsor mailed, and in some cases also hand-delivered at the facility on July 1, written offers to those Candlewood employees whom it employed beginning July 1. (A 1672; 932.) The letters, dated June 30, begin with "Congratulations!" and indicate that "temporary employment" is being offered for "up to 90 days." (A 1672; 1558-1662.) The letter has a typewritten underlined space where each employee's hourly compensation rate was written in by Leonard. (A 1689; 930, 1558-1662.) The wage rates for all employees were the same as paid by Candlewood and Leonard included them in the letter to clarify for employees that Windsor was going to honor their hourly wages. (A 1671; 932.) The letter states that, as a "temporary employee," an individual is not eligible for company benefits and that "[o]ther terms and conditions of your employment will be set forth in Windsor's personnel policies and its employee handbook." (A 1672;

1557.) The letter had a space at the bottom for each employee to sign and date it. (A 1676; 1557.)

### C. The Union Seeks Recognition; Windsor Holds a Staff Barbeque; Union Representatives Come to the Facility to Meet with Employees; Leonard Tells Them that the Facility is Not Union

Union Representative William Hirst sent Windsor two letters, dated June 29 and July 1, apprising Windsor of the Union's representational status and requesting a meeting. (A 1673; 18-19, 1329-31.) By letter dated July 7, Windsor declined to meet with the Union, stating that the Union's claim could only be determined once the facility had reached a "representative complement of regular employees." (A 1673; 1332.)

On July 1, Windsor hosted a staff barbeque in the facility's courtyard during the lunch hour. (A 1673; 941.) Union President Tyrone Freeman and Hirst attempted to visit employees on the patio during the barbeque. Leonard asked the union representatives to leave and then, in the presence of employees, stated that there was "no union in the facility," the facility was "not a union building," and that the Union "was not welcome there." (A 1673; 26-27, 418, 942.) When Freeman and Hirst refused to leave, Leonard called the police. (A 1673; 27, 944.) They left before the police arrived. (A 1673; 29, 943.)

### D. Windsor Renovates the Facility and Takes Down the Union Bulletin Board; Windsor Distributes Employee Handbooks; Windsor Retains Candlewood Employees for Regular Employment

Following the takeover of operations on July 1, Windsor spent approximately $450,000 to $500,000 on renovations to the facility and the purchase of new equipment such as mattresses. (A 1674, 1691; 486.) Among the renovations was repainting of the employee lounge and the hallway where the Union's bulletin board was hanging. (A 1674; 887.) Windsor took down the bulletin board and, after the walls were repainted, posted anti-union fliers in the space. (A 1674, 1692; 229, 887, 1039-40.)

At a July 9 staff meeting, Windsor distributed handbooks to temporary employees; probationary employees were given a handbook in their employment packet. (A 1672-73; 951.) The handbook distributed to the temporary employees listed only legally mandated benefits such as workers compensation and unemployment insurance. (A 1673, 1691; 948, 1338-40.) Those given to probationary employees listed additional benefits that employees would receive after completing their 90-day probationary period. (A 1673; 948, 952, 1367-69.)

In the 90 days following July 1, the "temporary" and "probationary/ regular" employees enjoyed the same terms and conditions of employment during the first 90-day period. (A 1672; 953.) Windsor decided to retain

some temporary employees from Candlewood based on their work performance, how they handled their jobs, attendance, and skill level. (A 1674, 1691; 976, 1052.) Windsor highlighted those employment offers at staff meetings and in newsletters. (A 1674; 979, 1551.) Temporary employees who were selected for regular employment did not serve a probationary period and became permanent employees upon completion of 90 days' employment. (A 1673, 1695; 953.)

E. Employee Williams States She Was Threatened; Williams Identifies Employees Who Asked Her to Attend a Union Meeting and those Employees are Suspended; Three Suspended Employees are Named on a Termination List; All Suspended Employees are Reinstated and the Three Named Employees are Terminated Three Days Later

On July 7, Spencer found employee Shronda Williams cowering in an empty patient room. (A 1673; 742-43.) Williams told Spencer that she was frightened because some employees were threatening her and pressuring her to do something that she did not want to do. (A 1673; 744.) At Leonard's request, after the incident was reported to her by Spencer, Williams prepared a written statement saying that Tara Smith, Davenport, and some other people (identified verbally as including Nereida Jimenez and Nana Williams) had asked her to go to a union meeting that day. (A 1673; 393, 744-45, 955-57.) Leonard did not speak directly to Williams, who insisted that she just wanted to go home. (A 1673; 956.) That day, Leonard called

the named employees into her office and suspended them all pending an investigation for harassing a coworker. (A 1673; 165-66, 223, 332, 957-59.) Leonard refused to tell the employees who had made the accusation or to give any other details. (A 1673; 165, 332, 959.)

By memorandum dated July 9, Leonard notified Chastek that 14 employees would be replaced by the end of the month. (A 1693; 562, 1550.) The list included Davenport, Jimenez, and Williams, all of whom were still on suspension. (A 1693; 1550.)

After she later interviewed Williams, Leonard determined that there had been no wrongdoing and, approximately 2 weeks after suspending the employees, on July 20, reinstated all of the suspended employees with pay. (A 1673; 168, 226.) Three days later, on July 23, Leonard notified Davenport, Jimenez, and Williams that Windsor no longer needed their services. (A 1673; 169, 235, 326-27, 964.)

F. Union Steward Matos is Terminated; Leonard Tells Employees the Facility is Not Union; Employee Smith is Terminated for Arguing Over an Assignment

Also on July 23, Windsor terminated union steward Gladys Matos for, according to Windsor, a confrontation with administrator Hernandez over a change in her work schedule. (A 1673; 265-66, 972-74.) On that same day, at a staff meeting with about 40 employees, Leonard stated that the facility is

"not a union building," that the employees "were not union," and that, like other Windsor facilities, the facility was "union-free." (A 1673; 162, 330, 403.)

Windsor discharged employee Tara Smith, a CNA, on August 10. (A 1673, 1700; 356, 966.) Smith returned to work on Monday, August 9, with a doctor's note after missing two days of work over the weekend due to illness. (A 1673, 1700; 360, 372-89, 966, 969, 1303-04.) On that day, Smith argued with her supervisors regarding her work assignment when she was assigned to Station 2, rather than her usual Station 1A work area. (A 1673, 1693; 364-65.) A few weeks after Smith was discharged, her supervisor gave a verbal warning to a CNA for arguing over her assignment, threatening to clock out, and reassigning herself. (A 1673, 1700; 1305.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Liebman, Schaumber, and Kirsanow) found, in agreement with the administrative law judge, that Windsor violated Section 8(a)(3) and (1) of the Act by suspending and terminating certain employees for their protected, concerted and/or union activities. (A 1670.) The Board also agreed with the judge that Windsor violated Section 8(a)(1) of the Act by informing employees that there was no union at its facility or that its facility was nonunion. (A 1670.) The Board

further found, reversing the judge's dismissal, that Windsor violated Section 8(a)(3) and (1) of the Act by refusing to hire four union stewards. (A 1670.)

The Board further agreed with the judge that as a successor to Candlewood, the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the representative of its base unit employees and LVNs. (A 1670.) The Board found, contrary to the judge, that Windsor was a "perfectly clear" successor and therefore violated Section 8(a)(5) and (1) of the Act by unilaterally changing existing terms and conditions of employment. (A 1670.)

The Board's Order requires Windsor to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's Order directs Windsor to recognize and, on request, bargain with the Union and rescind any departures from terms and conditions of employment that existed on July 1, 2004, retroactively restoring preexisting terms of employment. (A 1684-85.) The Order further requires Windsor to make whole the unit employees for losses caused by Windsor's failure to apply the preexisting terms and conditions, subject to Windsor demonstrating that, had it lawfully bargained

with the Union, it would have, at some identifiable time, lawfully imposed less favorable terms. (A 1685.)

The Order directs Windsor to offer jobs to the four union stewards it refused to hire and to reinstate the five employees who were unlawfully terminated. (A 1685.) The Order also requires Windsor to make whole those union stewards and employees for any loss of earnings and to remove from those employee files any reference to its unlawful actions. (A 1685.) Finally, the Board's Order directs Windsor to provide payroll records to the Board, and to post a remedial notice. (A 1685.)

## SUMMARY OF ARGUMENT

Windsor has failed to contest the Board's findings that it committed numerous unfair labor practices during its first month of operations at the former Candlewood facility. These unlawful acts include refusing to hire union stewards, suspending and terminating employees for their protected, concerted, and/or union activity, and informing employees that there was no union at its facility. The Board is entitled to a judgment summarily enforcing the portions of its Order based on these uncontested findings.

Furthermore, Windsor does not contest that it is a successor employer to Candlewood and that it has a duty to bargain with the Union representing

employees at the facility. Thus, summary enforcement of the Board's Order requiring Windsor to bargain with the Union is also warranted.

Windsor however, challenges the Board's finding that it is a "perfectly clear" successor with an obligation to bargain with the Union before making changes in existing terms and conditions of employment. The Board's finding is consistent with *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 294-295 (1972), in which the Supreme Court stated that in circumstances "in which it is perfectly clear that the new employer plans to retain all of the employees in the unit," the successor employer must consult with the employees' bargaining representative before fixing the initial terms and conditions of employment.

The record amply supports the Board's finding that Windsor led Candlewood's employees to believe that it intended to retain them under substantially the same working conditions. Windsor collected applications from Candlewood employees and interviewed each applicant. During the interviews, Windsor told employees that they would be temporary employees for 90 days and their work would be reviewed during that time. Windsor did not announce during interviews, or at any time prior to its July 1 takeover of the facility, that terms and conditions of employment would change.

Not only did Windsor fail to announce changes before it indicated that the Candlewood employees would be hired, the employees were already on the job when the changes were announced and simultaneously made. Indeed, the employees had been working for nine days before the handbooks outlining Windsor's policies and procedures were distributed. The Union's bulletin board was taken down after Windsor assumed operation of the facility. Windsor's failure to bargain with that Union over these initial changes to terms and conditions of employment constitutes a violation of Section 8(a)(5) and (1) of the Act.

# ARGUMENT

## I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT WINDSOR VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO HIRE FOUR UNION STEWARDS AND SUSPENDING AND TERMINATING CERTAIN EMPLOYEES FOR THEIR PROTECTED, CONCERTED, AND/OR UNION ACTIVITY AND VIOLATED SECTION 8(a)(1) BY INFORMING EMPLOYEES THERE WAS NO UNION AT THE FACILITY OR THE FACILITY WAS NONUNION.

Windsor does not contest that it refused to hire four union stewards, suspended and terminated four employees for their protected activity, terminated a union steward, and told employees more than once that its facility was not union. Specifically, Windsor does not contest (Br 2) the Board's finding that it violated Section 8(a)(3) and (1) of the Act by refusing to hire Edna Colter, Debra Smith, Sharie Hailey, and Annie Moss, all of whom were union stewards at Candlewood. (A 1680.) Nor does Windsor contest the Board's finding that it violated Section 8(a)(3) and (1) of the Act by suspending Tracy Davenport, Nana Williams, Nereida Jimenez, and Tara Smith pending investigation for harassing a coworker after they allegedly asked that coworker to attend an offsite union meeting, nor does Windsor contest its subsequent unlawful termination of those same employees. (A 1678.) Windsor further does not contest its unlawful termination of union steward Gladys Matos. (A 1678.) Finally, Windsor does not contest that it

violated Section 8(a)(1) of the Act when Kathleen Leonard told union representatives, in front of unit employees at a barbeque, that there was "no union in the facility" and the facility was "not a union building" and later told a group of about 40 unit employees at a staff meeting that the facility was "not a union building." (A 1672.)

Under well-settled law, Windsor's failure to contest these findings constitutes a waiver of any defense and warrants summary enforcement of the Board's Order with respect to these violations. *Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 808 (D.C. Cir. 2007) ("it is [this Court's] longstanding rule that '[t]he Board is entitled to summary enforcement of the uncontested portions of its order[s]'" (quoting *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006)).

## II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT WINDSOR, AS AN UNDISPUTED SUCCESSOR EMPLOYER, VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN IN GOOD FAITH WITH THE UNION, AND BY UNILATERALLY CHANGING EXISTING TERMS AND CONDITIONS OF EMPLOYMENT AFTER WINDSOR HAD MADE "PERFECTLY CLEAR" ITS INTENTION TO RETAIN CANDLEWOOD'S EMPLOYEES

### A. Successorship 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 . . . ." Section 8(d) of the Act (29 U.S.C. § 158(d)) defines the duty to bargain collectively 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 . . . ."

It is well settled under those provisions that, upon acquiring a business, a new employer is obligated to bargain with the union that represented its predecessor's employees if the employer conducts essentially the same business as the former employer, and a majority of the work force was formerly employed by the predecessor. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987) ("*Fall River*"); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 279-281 (1972) ("*Burns*"); *Cmty. Hosps. of Cent. California v. NLRB*, 335 F.3d 1079, 1083 (D.C. Cir. 2003). Because the composition of the successor's work force is a "triggering fact" in determining whether it is obligated to bargain with the union, the bargaining obligation is typically not established until the successor has hired "a substantial and representative complement." *Fall River*, 482 U.S. at 46-52. Accordingly, 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. at 294 (emphasis supplied).

Nevertheless, the Supreme Court recognized that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit."[3] *Burns*, 406 U.S. at 294-295. In that circumstance, 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. Accordingly, where an employer, through its statements or conduct, has made "perfectly clear" its intention to retain the predecessor's employees, it must consult with the union before altering the existing employment terms established by its predecessor. An employer's failure to meet its obligation to recognize and bargain with the union before making changes therefore violates Section 8(a)(5) and (1) of the Act. *W&M Props. of Connecticut v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008); *DuPont Dow Elastomers v. NLRB*, 296 F.3d 495, 501 (6th Cir. 2002); *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1362 (7th Cir. 1997). *See also NLRB v. Katz*, 369 U.S. 736 (1962) (employer's unilateral change in conditions of employment, without notice to or bargaining with the established collective-bargaining representative of its employees, violates Section 8(a)(5)).

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[3] The Board, with judicial approval, has construed the word "all" in this context to mean "all or substantially all." *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664, 673 & n.35 (D.C. Cir. 1978).

In *Spruce-Up Corp.*, 209 NLRB 194, 195 (1974), *enforced mem.* 529 F.2d 516 (4th Cir. 1975) ("*Spruce-Up*"), the Board interpreted the *Burns* "perfectly clear" caveat as applying, not only where the new employer has "actively or, by tacit inference, misled employees into believing they would be retained without changes," but also "to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Thus, under *Spruce-Up*, an employer that is "silent about its intent with regard to the existing terms and conditions of employment" is a "perfectly clear" successor if it "clearly indicated it would be hiring the predecessor's employees" before announcing changes. *Canteen Corp*., 317 NLRB 1052, 1053 (1995), *enforced*, 103 F.3d 1355 (7th Cir. 1997). Applying those principles, the Board has consistently held that where an employer, through its statements or conduct has, prior to beginning the hiring process, made "perfectly clear" its plan to retain the predecessor's employees, without announcing changed terms of employment, it may not later condition its formal offers of employment on changed employment terms without consultation with the union. *Int'l Ass'n of Machinists*, 595 F.2d at 674-75; *Fremont Ford*, 289 NLRB 1290, 1296-1297 (1988).

"[T]he Board's findings on the successorship issue must be accorded a high degree of deference." *NLRB v. South Harlan Coal Co.*, 844 F.2d 380, 383 (6th Cir. 1988); *accord Pa. Transformer Tech. v. NLRB*, 254 F.3d 217, 223 (D.C. Cir. 2001). 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." *Canteen*, 103 F.3d at 1364 (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)). See also *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-844 & n.11 (1984) (if statute is silent or ambiguous with respect to an issue, court must defer to administrative agency's permissible construction, even if court would have construed statute differently). The Board's rulings interpreting a successor's bargaining obligations are, accordingly, entitled to judicial deference provided they are rational and consistent with the Act. *Fall River*, 482 U.S. at 42; *Canteen*, 103 F.3d at 1361.

This Court's review of the Board's factual conclusions is "highly deferential." *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998). Under Section 10(e) of the Act, the Board's factual findings are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). A reviewing court may not "displace the

Board's choice between two fairly conflicting views" of the evidence, regardless of whether the Court might rule differently were it to consider the matter *de novo*. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord Elastic Stop Nut Div. of Harvard Indus. v. NLRB*, 921 F.2d 1275, 1279 (D.C. Cir. 1990). In other words, this Court does not ask whether a petitioner's "view of the facts supports its version of what happened, but rather whether the Board's interpretation of the facts is reasonably defensible." *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). Accordingly, this Court has limited its review of Board decisions to whether they are supported by substantial evidence, or whether the Board "acted arbitrarily or otherwise erred in applying established law to the facts at issue." *W&M Props.*, 514 F.3d at 1346 (internal quotation marks omitted).

### B. Windsor Was a "Perfectly Clear" Successor with an Obligation To Bargain with the Union Before Making Changes in Existing Terms and Conditions of Employment

Windsor admits (Br 2) that it is a successor employer under *Burns* and *Fall River* and that it therefore has a continuing obligation to bargain with the Union before implementing changes in conditions of employment once a

substantial and representative complement of employees was in place.[4] Windsor does not challenge the Board's finding that it violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union after July 1. (A 1670.) The Board is thus entitled to summary enforcement of the portion of its Order requiring Windsor to recognize and, on request, bargain with the Union. (A 1684-85.) *See Flying Food Group*, 471 F.3d at 181.

The essence of the dispute therefore is whether Windsor was privileged, upon assuming operations on July 1, to condition employment on terms that were not announced prior to or simultaneous with Windsor's takeover of the Candlewood facility. As we show below, Windsor, as a "perfectly clear" *Burns* successor, was not privileged to unilaterally set initial terms without consulting with the Union. For, as the Board found, by its conduct, Windsor "'failed to clearly announce its intent to establish a new set of conditions prior to inviting former [Candlewood] employees to accept employment.'" (A 1675-76 (quoting *Spruce Up*, 209 NLRB at 195).)

The determination of "perfectly clear" successor status and the concomitant duty to bargain about initial terms and conditions of

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[4] Windsor does not challenge before the Court the appropriateness of the bargaining units nor does it challenge the continuing representational status of the Union.

employment under which the predecessor's employees are offered employment rests in the hands of, and is determined by the actions of the successor itself. The totality of Windsor's conduct demonstrated that it was "perfectly clear" that Windsor planned to retain Candlewood's employees as its initial workforce. *See Burns*, 406 U.S. at 294-95. There is no dispute (Br 13-14) that, on July 1, the day Windsor took over operations, both bargaining units were "overwhelmingly composed of former Candlewood employees who had been represented by the Union." (A 1673.)[5] Windsor interviewed all Candlewood applicants and hired all but 17 out of over 120 Candlewood employees.[6] (A 1689; 559, 904, 1307-23.)

Furthermore, Windsor's actions did not indicate to employees that their initial terms and conditions of employment would be different from those under Candlewood. The Board concluded in *Spruce Up* that where an employer who intends to hire predecessor employees under its "own initial

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[5] Windsor points out (Br 14) that as of October 1, less than a majority of its workforce was comprised of former Candlewood employees, of whom at most 40 were now employed by Windsor. To the extent that Windsor may be wishing to take issue with the operative date for determining its perfectly clear successor status, it is precluded from making any argument on this point by not addressing it directly in its opening brief. *See New York Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007).

[6] The record does not indicate how many of those 17 employees even chose to apply to Windsor.

terms . . . whether or not he would in fact retain the [predecessor employees] would depend upon their willingness to accept those terms." 209 NLRB at 195. Thus, if Windsor had announced inconsistent or substitute terms it could not be "perfectly" confident of hiring "all of the employees in the unit . . . ." *Burns*, 406 U.S. at 294-95. However, the announcement of such changes carries with it a simultaneous risk: the "genuine possibility that those employees will reject the offer of employment under those announced terms." (A 1677.) *See IAM*, 595 F.2d at 672; *DuPont Dow*, 296 F.3d at 503 ("[i]f the new employer offers lesser or inconsistent terms and ignores the union, it runs the risk of losing the experienced work force").

Simply, "there is no evidence that [Windsor], prior to the takeover, informed Candlewood employees that those who were retained would be working under different core terms and conditions of employment." (A 1676-77.)[7] Such a conclusion is substantiated by Windsor's delivery of employment applications to all Candlewood staff and subsequent interviews

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[7] The Board's standard has always dealt with "core" terms and conditions such as wages. *See, e.g.*, *Canteen Corp.*, 103 F.3d at 1358 (wages); *Monterey Hosp.*, 334 NLRB 1019, 1019 (2001) (same); *DuPont Dow Elastomers*, 332 NLRB 1071, 1072-73 (2001) (severance program, overtime pay policy, and seniority), *enforced*, 296 F.3d 495 (6th Cir. 2002). Windsor's argument (Br 26) that use of the word "core" somehow announces a new standard is based on an exaggerated and unavailing view of the term "core."

of all staff members who applied for jobs with Windsor. For example, the June 8 cover sheet accompanying the Windsor employment application "conspicuously lacked any mention of intended changes to employees' terms and conditions of employment." (A 1676.) As the Board found, "employees consistently testified that no changes to terms and conditions of employment were discussed with them during interviews, other than the imposition of a 'review' period." (A 1674 n.20.) Indeed, none of the Windsor representatives testified that they told employees, in interviews or at any time prior to the takeover, that terms and conditions would change.[8] (A 1676.)

Windsor's reliance (Br 10, 29) on its statement on the application form that Windsor "can change benefits, policies and conditions at any time" is misplaced. "A general statement that new terms will subsequently be set is not sufficient to fulfill [Windsor's] *Spruce Up* obligation to announce new terms prior to or simultaneous with the takeover." (A 1677.) In the absence

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[8] As the Board noted, a number of employees testified that they were affirmatively told, in staff meetings or in response to specific questions about what to expect from the takeover, that "nothing was going to change" and "we did not have to worry." (A 1676 & n.29; 133-34, 207, 297-98.) Employee Jimenez' uncontroverted testimony was that administrator Carmen Hernandez told her regarding wages that "everybody would stay at their same amount until the yearly evaluations." (A 1676 n.29; 172.) In fact, wages did stay the same for Candlewood employees. (A 1671; 932.)

of announced plans to change employment terms, this general statement on the application is insufficient to provide the necessary information to employees about planned changes prior to inviting them to accept employment.

Windsor repeatedly asserts (Br 11-12, 37-39) that its intention was to hire the Candlewood employees on only a temporary basis and that it told employees this in their interviews and offer letters.[9] Contrary to its assertion, Windsor's description of its temporary employment for those employees was not for a set period of time (they were simply told they could be reviewed for "up to" 90 days) or for work on a specific project. Rather, Windsor subjected employees to "what amounted to a probationary period." (A 1675.) As the Board concluded (A 1674 n.20), "[m]erely telling employees that their work would be reviewed does not constitute a clear announcement of changes to terms and conditions of employment."

Not only did Windsor fail to announce changes before indicating it would hire Candlewood employees, the employees were already on the job with Windsor when the changes were announced. Nine days after the

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[9] As the Board found (A 1676), the evidence does not indicate that the letters were actually received by the employees prior to July 1. Windsor did not introduce into evidence any letters signed and dated by employees. (A 1676; 1015.)

workforce started, Windsor passed out employee handbooks setting forth new terms and conditions of employment. (A 1672-73; 951.) Thus, the former Candlewood employees were deprived of the opportunity to make an informed choice about accepting employment with Windsor because the terms were not clearly announced prior to the commencement of operations. As such, Windsor is precluded from unilaterally imposing new terms on those employees over a week after the employees had begun their employment. (A 1678.) *IAM*, 595 F.2d at 674-75; *Spruce Up*, 209 NLRB at 194.[10] As this Court has stated, even if the Candlewood employees were "not affirmatively led to believe that existing terms w[ould] be continued, unless they [were] apprised promptly of impending reductions in wages or benefits, they may well have forego[ne] the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions w[ould] be comparable to those in force." *IAM*, 595 F.2d at 674-75.

Windsor's reliance on cases where the employer announced its intent to make changes to specific terms or conditions of employment prior to assuming operations is misplaced. A statement that Windsor "could" do

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[10] Although the Company refers (Br 23) to *Spruce Up* as the Board's "gloss" on *Burns*, but the Board's reasoning in *Spruce Up* has been accepted by this Court. *IAM*, 595 F.2d at 672-73.

something at some unknown future point, is not tantamount to the statements on which Windsor relies (Br 29) in *Planned Bldg. Svcs.*, 318 NLRB 1049 (1995) and *Ridgewell's*, 334 NLRB 37 (2001). In *Planned Building*, the employer told employees before assuming operations that "benefits would not be the same." 318 NLRB at 1049. In *Ridgewell's*, the employer told the union before finalizing its contract for the catering work in question—well before assuming operations—that former employees would be utilized on an independent contractor basis (putting them outside the definition of "employee" in the Act) if they performed work for the successor. 334 NLRB at 37. In contrast, Candlewood employees were simply told that they would serve what amounted to a probationary period if they came to work for Windsor.

Windsor argues (Br 27-28) that the Candlewood employees had an actual change in employment status because the application form indicated that anyone hired would be terminable "at will" whereas the collective-bargaining agreement with Candlewood has a "just cause" discharge provision. As the Board found (A 1676), such a statement does not, as did the statement in *Ridgewell's*, "signal[] an intent to divest the predecessor's employees of 'employee' status altogether."

"In sum, [Windsor] forfeited the right to set initial terms under *Spruce Up* because it failed, prior to inviting former Candlewood employees to accept employment on or after July 1, to clearly announce its intent to establish new terms." (A 1678.) Thus, Windsor violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) when it implemented the employee handbooks and discontinued use of the union bulletin board.

The Board does not dispute that Windsor was dissatisfied with the physical plant and some of the staff when it first inspected the Candlewood facility.[11] However, despite Windsor's protestations that it fully intended to replace all the Candlewood staff, its actions did not convey this intent to the employees. Indeed, its actions were directly to the contrary. There were no announced changes to the employees' terms and conditions of employment, such as changes in wages rates, benefit packages, or employee status. As Windsor points out (Br 10), the application cover sheet made clear that only applicants meeting Windsor's "operational needs" would be hired. Based on this statement, almost all of Candlewood applicants met those operational needs because over 75 percent of them were hired.

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[11] Windsor refers (Br 6) to the Candlewood staff as "substandard" based on its description of conditions at the facility prior to assuming operations. As the judge noted (A 1694), the actual condition of the facility in spring 2004 likely "lies somewhere between the parties' polarized views."

If it had announced changes to terms and conditions of employment before the Candlewood employees had accepted employment, Windsor ran the risk of those employees turning down the jobs, leaving Windsor with the burden of having inadequate numbers of staff to care for its residents resulting in a delayed takeover of the facility and an inability to fill more resident beds for income. Despite any reservations it may initially have had, Windsor apparently needed the Candlewood employees to keep its revenue stream going. Its failure to announce any changes in conditions of employment netted an almost complete success in retaining the former Candlewood employees.

A successor employer "may explore all options with respect to the composition of its workforce. However, when it determines that it will retain the workforce of its predecessor, it cannot ignore the union those employees have chosen when it comes time to determine the conditions of employment." *Canteen*, 103 F.3d at 1364-65. There is no dispute that as of July 1, when Windsor was responsible for the facility, the majority of employees that it chose to have working under its authority were from Candlewood. Windsor needed these employees, hired these employees, and had a duty to bargain with their union.

Throughout its brief, Windsor rails that it should not be deprived of its right to set initial terms and conditions of employment. The simple answer is that Windsor was not deprived of this right. Windsor could have unilaterally established any initial terms and conditions of employment that it specifically announced *prior* to or simultaneous with the hiring of its workforce. It chose not to. Instead Windsor chose to wait over a full week after it had taken over operations and had a full complement of staff working at the facility, the majority of which were former Candlewood employees. In these circumstances, Windsor's own actions created its "perfectly clear" successor status.

Thus, for example, Windsor argues (Br 34) that passing out of the handbooks and taking down the bulletin board after taking over the facility were not unlawful unilateral changes because it had decided to makes those changes prior to commencing operations. However, Windsor did not announce these changes prior to its takeover and then merely implement them afterward. *See Monterey Newspapers*, 334 NLRB 1019, 1019 (2001) (employer lawfully set new wage rates prior to acquisition by making offers of employment to applicants at those new wage rates before they were hired). As such, Windsor lost any prerogative it may have had to lawfully make the changes without bargaining with the Union.

Windsor's effort to compare its situation to that of the employer in *Peters v. NLRB*, 153 F.3d 289 (6th Cir. 1998), is unavailing principally for the reasons set forth by the Sixth Circuit in *DuPont Dow Elastomers*. 296 F.3d at 503-506. A perfectly clear successor is not privileged to unilaterally set initial terms and conditions of employment, even where those changes are announced before commencing operations, if it has already represented to employees, directly or by "tacit inference," its intention to hire them without announcing changes. *DuPont Dow*, 296 F.3d at 505. In any event, unlike *Peters*, Windsor had ample time to announce any changes that it wanted to make prior to the Candlewood employees choosing to accept employment with Windsor. Windsor representatives were present at the facility several times from April to June. (A 1688; 559, 664, 878-79.) Leonard attended a Candlewood staff meeting in May, prior to the takeover. (A 1676; 879-882.) Additionally, Windsor conducted individual interviews with each Candlewood applicant before it began operations at the facility. (A 1671, 1688; 559, 904.)

Moreover, as the Board noted, Windsor has the obligation here, as an acknowledged (Br 2) *Burns* successor, to bargain over any changes that were not announced prior to the takeover, but subsequent to commencing operations, irrespective of its obligations as a perfectly clear successor.

*See Banknote Corp. of America*, 315 NLRB 1041 (1994), *enforced*, 84 F.3d 637 (2d Cir. 1996) (finding violation of Section 8(a)(5) and (1) where employer changed employees' hours of work, pensions, vacation and sick pay, health and welfare benefits, and holidays 4 days after assuming operations and without a prior announcement). In *Banknote*, the employer was not a perfectly clear successor. However, as a *Burns* successor, the employer was entitled to set initial terms and conditions of employment, but after commencing operations the employer had an obligation to bargain with the union over any changes that it wanted to make.

Windsor's argument (Br 30-31) that the Board's reference to *Banknote* could require the successor employer to adhere to each term of a collective-bargaining agreement is simply wrong. Thus, Windsor's argument (Br 31) that the Board's citation to *Banknote* turns *Burns* "on its head" because the Board made a "holding in a footnote" misstates the Board's analysis. Rather, the Board noted that even under the analysis of *Banknote*, and accepting arguendo that Windsor's June 30 letters expressed a sufficiently clear intent to change employment conditions, Windsor was still obligated to bargain over any unannounced specific changes occurring after July 1, including dismantling the bulletin board and issuing new handbooks. Contrary to Windsor's argument, the Board does not require that the

successor adopt the terms of the collective bargaining agreement, but must *bargain* with the union about those changes.

## CONCLUSION

The Board respectfully requests that the Court enter a judgment denying Windsor's petition for review and enforcing the Board's Order in full.

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National Labor Relations Board

June 2008

# STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.):

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) (29 U.S.C. § 158(a)(1)):

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.

Section 8(a)(3) (29 U.S.C. § 158(a)(3)):

It shall be an unfair labor practice for an employer –
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

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

It shall be an unfair labor practice for an employer –
(5) to refuse to bargain collectively with the representatives of his employees . . .

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(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice 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. . . .

Section 10(f) (29 U.S.C. § 160(f)):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia. . . .

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| S&F MARKET STREET HEALTHCARE, LLC | * | |
| D/B/A WINDSOR CONVALESCENT CENTER OF | * | |
| NORTH LONG BEACH | * | No. 07-1439 |
| | * | |
| Petitioner | * | Board No. |
| | * | 21-CA-36422 |
| v. | * | |
| | * | |
| NATIONAL LABOR RELATIONS BOARD | * | |
| | * | |
| Respondent | * | |

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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Dated at Washington, DC
this 9th day of June, 2008

UNITED STATES COURT OF APPEALS
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| | * | |
| NATIONAL LABOR RELATIONS BOARD | * | |
| | * | |
| Respondent | * | |

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,726 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 9th day of June, 2008