Creative Vision Resources, LLC *and* Local 100, United Labor Unions. Case 15–CA–020067

August 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On January 7, 2013, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order, to amend his remedy, and to adopt the recommended Order as modified and set forth in full below.[2]

We adopt the judge's findings, as to which there are no exceptions, that Creative Vision Resources, LLC (the Respondent), was a legal successor to single employer M & B Services, Milton Berry, and Berry Services, Inc. (Berry III or the predecessor), and that it violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain in good faith with the incumbent employees' bargaining representative, Local 100, United Labor Unions (the Union). For the reasons set forth below, however, we also find, contrary to the judge, that the Respondent was a "perfectly clear" successor and that it violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with notice or an opportunity to bargain before imposing initial terms and conditions of employment for the unit employees.

I. Facts

Richard's Disposal is a waste disposal company operating in the greater New Orleans, Louisiana area. Since 2007, the Union has represented a unit of employees, called hoppers, who ride on the back of the garbage trucks operated by Richard's Disposal and empty garbage cans into the trucks.[3] Prior to June 1, 2011, the hoppers were employed by Berry III, a labor supply company.

In 2010, Alvin Richard III (Richard), the vice president of Richard's Disposal and the son of its owner, decided to form the Respondent as a new labor supply company to provide hoppers to Richard's Disposal. The decision was prompted by concerns about Berry III's lax management practices, including, among other things, its treatment of the hoppers as independent contractors. The record shows in this respect that Berry III paid the hoppers a flat rate of $103 per day with no overtime, and made no deductions for taxes or social security.

The transition from Berry III to the Respondent was scheduled to take place on May 20, 2011.[4] In anticipation, Richard had an employee handbook and safety manual prepared in May. He also prepared applications for employment, which, along with Federal and State tax withholding forms, were to be distributed to current Berry III hoppers. Richard distributed applications to approximately 20 Berry III hoppers, and informed them of certain changes in their terms and conditions of employment, including that the Respondent would pay $11 per hour with overtime, and that it would deduct taxes and social security from their paychecks. Richard also asked Berry III hopper Eldridge Flagge to assist him in passing out applications. Between mid-May and June 1, Flagge passed out approximately 50 applications. Richard did not inform Flagge of the new terms and conditions of employment and, consequently, Flagge did not inform any of the hoppers to whom he gave applications that their terms and conditions would change under the Respondent.

Berry III hoppers who wished to retain their jobs after the transition were merely required to complete an application and a W-4 tax form. As found by the judge, "filling

[1] There are no exceptions to the judge's finding that the Respondent did not violate Sec. 8(a)(5) and (1) by unilaterally changing the way unit employees are assigned to trucks. Accordingly, we affirm the judge's dismissal of that allegation.

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

[2] We shall substitute a new Order and notice to conform to the violations found and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014), and *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

[3] The most recent collective-bargaining agreement between the Union and Berry III was effective by its terms from September 1, 2007 through August 31, 2010.

The bargaining unit originally included Berry III-employed hoppers who worked on garbage trucks both for Richard's Disposal and for Metro Disposal, another waste disposal company. At some point in time, Berry III lost its contract with Metro Disposal and ceased providing hoppers to that company.

[4] All dates are in 2011, unless otherwise stated.

out the application . . . was a formality, albeit a required one." The Respondent did not interview candidates for its hopper positions, review their qualifications, or check their references.[5] Indeed, Richard acknowledged that, by submitting applications, Berry III hoppers were agreeing to work for the Respondent and the Respondent was agreeing to hire them.

The transition did not occur on May 20, as initially planned, because the Respondent had not obtained sufficient applications from Berry III hoppers to fully staff the trucks. However, by June 1, the Respondent had approximately 70 completed applications from Berry III hoppers. On that date, Richard cancelled Berry III's agreement with Richard's Disposal.

Beginning on June 2, the Respondent began supplying hoppers to Richard's Disposal. At approximately 4 a.m., the hoppers assembled in the yard as usual, to await assignment to a truck. They were met by former Berry III supervisor, Karen Jackson, whom Richard had hired on June 1. Jackson informed all of the hoppers present that "[t]oday is the day you start working under Creative Vision." Jackson then explained to them the terms under which they would be working, including, among other things, the $11-per-hour pay rate, the deduction of Federal and State taxes, and a number of new employment standards and safety rules. Some of the hoppers refused to work upon learning of the new terms. A sufficient number of hoppers remained, however, to staff the trucks. Thus, on its first day of operations, the Respondent supplied 44 hoppers to Richard's Disposal, all of whom were formerly employed by Berry III.

On June 4, the Respondent distributed an employee handbook and safety manual to the hoppers, which set out a number of new rules and employment standards.

On June 6, after learning that the Respondent had replaced Berry III and retained the incumbent employees, the Union's State Director, Rosa Hines, hand delivered a letter to the Respondent demanding that it recognize the Union as the hoppers' exclusive representative for collective-bargaining purposes. The Respondent did not reply.

II. Discussion

In *NLRB v. Burns Security Services*, 406 U.S. 272, 281–295 (1972), the Supreme Court held that a successor employer is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally. The Court explained that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident whether the union will retain majority status in the new work force until after the successor has hired a full complement of employees. Id. at 295. The Court recognized, however, 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 and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Id. at 294–295.

The Board in *Spruce Up Corp.,* 209 NLRB 194, 195 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), addressed the "perfectly clear" exception, and found it was "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least 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." (Footnote omitted.) Acknowledging that "the precise meaning and application of the Court's caveat is not easy to discern," the Board reasoned that "[w]hen an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court," because of the possibility that many of the employees will reject employment under the new terms, and therefore the union's majority status will not continue in the new work force. Id.[6]

In subsequent cases, the Board has clarified that the perfectly clear exception is not limited to situations where the

[5] Richard testified that by soliciting applications from the Berry III hoppers, he was agreeing to hire them "if [he] needed them." The record establishes that the Respondent "needed" all 70 of the Berry III hoppers from whom it solicited applications. Richard's Disposal operates 6 days per week and sends out 20–22 trucks per day, with 2 hoppers on each truck. Because all of the hoppers do not show up for work every day, the Respondent employs more than the minimum number of hoppers (40–44) required to fully staff the trucks on a particular day. The Respondent's weekly payroll usually includes between 62 and 67 hoppers and, during in its first 6 months of operation, the Respondent employed over 100 hoppers.

[6] Although the Court in *Burns*, and the Board in *Spruce Up*, spoke in terms of a plan to retain *all* of the employees in the unit, the Board has subsequently clarified that the relevant inquiry is whether the successor plans to retain a sufficient number of the predecessor's employees so that the union's majority status will continue. See *Galloway School Lines*, 321 NLRB 1422, 1426–1427 (1996); *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977).

successor fails to announce initial employment terms before it formally invites the predecessor's employees to accept employment. Rather, a new employer has an obligation to bargain over initial terms when it displays an intent to employ the predecessor's employees without making it clear that their employment will be on different terms from those in place with the predecessor. *Canteen Co.,* 317 NLRB 1052, 1053–1054 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997).[7] Thus, in applying the "perfectly clear" exception of *Burns*, the Board scrutinizes not only the successor's plans regarding the retention of the predecessor's employees but also the timing and clarity of the successor's expressed intentions concerning existing terms and conditions of employment.

Here, the judge found that "[t]he record leaves no doubt that the Respondent[] . . . intended to employ the hoppers working in the Berry III bargaining unit, and made no efforts to hire hoppers from other sources." As set forth in Richard's testimony, cited by the judge, Richard agreed to hire the Berry III hoppers who submitted applications. Notwithstanding this clear intent, the judge found that the Respondent was not a "perfectly clear" successor within the meaning of *Spruce Up*, because it "did not fail to communicate candidly with the hoppers" about its intent to set its own initial terms. In so finding, the judge relied on the fact that, between mid-May and June 1, Richard "communicated at least some information" about initial terms "to at least some of the hoppers." Additionally, the judge cited evidence that an unknown number of hoppers heard a rumor while they were still employed by Berry III that the Respondent would be paying $11 per hour. Finally, the judge placed heavy reliance on Jackson's June 2 announcement of initial terms and conditions of employment to the hoppers who had assembled for work and were awaiting assignments. Accordingly, the judge concluded that "before it began operations, hoppers in the Berry III bargaining unit were aware that Respondent intended to make a number of significant changes." He therefore found that the Respondent was a regular *Burns* successor that lawfully exercised its prerogative to set initial terms and conditions of employment that differed from those established by the predecessor.[8] We disagree, for the reasons that follow.

As described above, by submitting applications, the Berry III hoppers were agreeing to work for the Respondent, and the Respondent was agreeing to hire them. The judge's reliance on Jackson's June 2 announcement that the hoppers were now working for the Respondent and under new terms and conditions of employment—made after the hoppers reported to work and were awaiting their truck assignments for the day—ignored Board decisions clarifying that, to preserve its authority to set initial terms and conditions of employment unilaterally, a successor must clearly announce its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees.[9] The Board has consistently held, moreover, that a subsequent announcement of new terms, even if made before formal offers of employment are extended or the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employees without making it clear that their employment is conditioned on the acceptance of new terms.[10]

In the present case, the judge's own factual findings establish that the Respondent expressed an intent to retain

[7] In *Canteen*, the Board found that a successor "effectively and clearly communicated . . . its plan to retain the predecessor employees" by expressing to the union its desire to have the employees serve a probationary period without mentioning any changes in employment conditions. Therefore, it became a perfectly clear successor at that point, and "was not entitled to unilaterally implement new wage rates" the next day, during employment interviews. Id., citing *Fremont Ford*, 289 NLRB 1290, 1296–1297 (1988); *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), enf. denied in relevant part sub nom. *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977).

[8] The judge also dismissed the complaint allegation that, even assuming the Respondent was a regular *Burns* successor, it violated Sec. 8(a)(5) and (1) by unilaterally implementing new work rules through the employee handbook and safety manual, after the bargaining obligation attached. The General Counsel has excepted. In light of our finding below that the Respondent was a "perfectly clear" successor, we find it unnecessary to pass on the General Counsel's alternate theory.

[9] See, e.g., *Elf Atochem North America, Inc.*, 339 NLRB 796, 807 (2003) (successor incurs "obligation to bargain over initial terms of employment when it displays an intent to employ the predecessor's employees without making it clear to those employees that their employment will be on terms different from those in place with the predecessor employer"); *Canteen*, 317 NLRB at 1053–1054; *Helnick Corp,* 301 NLRB 128, 128 fn. 1 (1991) (obligation to bargain over initial terms commenced when new employer informed employees that they could expect to be retained without mentioning changes in preexisting terms); *C.M.E., Inc.,* 225 NLRB 514, 514–515 (1976) (obligation to bargain over initial terms commenced when new employer informed the union that it intended to retain the predecessor's employees without mentioning changes in preexisting terms, rather than on later dates when applications for employment were solicited or when the union and the new employer met to discuss contract revisions).

[10] See, e.g., *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 5–7 (2016) ("the bargaining obligation attaches when a successor expresses an intent to retain the predecessor's employees without making it clear that employment will be conditioned on acceptance of new terms"; the subsequent announcement of new terms will not justify a refusal to bargain); *Adams & Associates, Inc.,* 363 NLRB No. 193, slip op. at 3–4 (2016) ("The Board has consistently held . . . that a subsequent announcement of new terms, even if made before formal offers of employment are extended, or before the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employees without making it clear that their employment is conditioned on the acceptance of new terms."); *DuPont Dow Elastomers, LLC*, 332 NLRB 1071, 1074 (2000) ("The Board has consistently found that an announcement of new terms will

the predecessor's employees between mid-May and June 1. Examining the events culminating with the June 1 cancellation of Berry III's agreement to provide hoppers to Richard's Disposal, the judge found that it was "perfectly clear," using those words in their ordinary sense, that the Respondent intended to retain the Berry III hoppers as its new work force and continue operations largely unchanged. The judge emphasized that the transition from Berry III to the Respondent would be an abrupt shift, and Richard had to be sure he had enough hoppers lined up to staff all of the trucks in advance. The judge additionally emphasized that the Respondent "made no efforts to hire hoppers from other sources,"[11] and he opined:

> If the Respondent had not intended to hire the members of the bargaining unit, en masse, Richard [] or someone working for him would have interviewed applicants, examined qualifications, and checked references. Instead, the Respondent chose merely to distribute applications, with W-4 forms attached, to the hoppers in the Berry III bargaining unit. Typically, a job applicant does not fill out a W-4 form until hired, so inclusion of the tax form with the application suggests that the Respondent had little doubt about whom it would hire.

Relying on these facts, and Richard's own testimony that he was agreeing to hire Berry III hoppers who submitted applications, the judge found that there was "no doubt" that the Respondent intended to retain the Berry III hoppers as its new work force and that "filling out the application and tax forms was a formality."[12] See *Cadillac Asphalt Paving Co.*, 349

not justify a refusal to bargain if . . . the employer has earlier expressed an intent to retain its predecessor's employees without indicating that employment is conditioned on acceptance of new terms."), enfd. 296 F.3d 495 (6th Cir. 2002); *Canteen*, 317 NLRB at 1053–1054; *Starco Farmers Market,* 237 NLRB 373, 373 (1978) ("[W]here the new employer's offer of different terms was simultaneous with the expression of intent to retain the predecessor's employees, the Board has found no duty to bargain over initial employment terms. However, where the offer of different terms was subsequent to the expression of intent to retain the predecessor's employees, the Board has regarded the expression of intent as controlling and has found that the new employer was obligated to bargain with union before fixing initial terms." (internal citations omitted)); *Roman Catholic Diocese of Brooklyn*, 222 NLRB at 1055 (obligation to bargain over initial terms commenced when the chairman of the new employer's board of trustees expressed an intent to retain the predecessor's employees without mentioning any changes in preexisting terms; obligation was not vitiated when promise to rehire was later disavowed and employees were specifically informed—before formal offers of employment were extended and operations began—that employment would be on new terms and that the new employer "has no intention of being bound by the terms and conditions of employment which prevailed" under the predecessor).

The dissent argues that the Board's case law holding that a new employer must announce its intent to establish new terms prior to or simultaneously with its expression of intent to retain the predecessor's employees to avoid "perfectly clear" successor status should not control in the "unique facts" of this case. Specifically, the dissent asserts that because the Respondent's hiring process "remained in a state of flux right up to the moment on June 2 when the hoppers accepted employment by boarding the garbage trucks to begin work," the "chronological endpoint" for determining whether the Respondent was a perfectly clear successor "was June 2, its first day of operations." This argument fundamentally misconstrues the "perfectly clear" exception. In *Burns*, the Supreme Court recognized that there will be instances in which it will perfectly clear *before* the hiring process is complete that the successor intends to hire the predecessor's employees as a majority of its initial workforce. In those circumstances, the Court stated that "it will be appropriate to have [the successor] initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. 294–295. The Court contrasted that situation with the more common situation where "it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit . . . ." Id. Although the Board in *Spruce Up* held that "[w]hen an employer who has not yet commenced operations announces new terms . . . we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,'" (209 NLRB at 195), the Board has consistently required that the announcement of new terms be made prior to or simultaneously with the expression of intent to retain. And it is irrelevant if, as is often the case, the hiring process is incomplete or "in a state of flux" at that point. See cases cited above and in footnote 9.

[11] The Respondent contends in its answering brief that it sought applicants from sources other than the predecessor's employees. However, the Respondent did not except to the judge's contrary finding. It is therefore procedurally foreclosed from raising the issue for consideration by the Board in its answering brief. See *Richmond District Neighborhood Center,* 361 NLRB No. 74, slip op. at 1, fn. 1 (2014), citing *White Electrical Construction Co.*, 345 NLRB 1095, 1096 (2005) and *Bohemian Club*, 351 NLRB 1065, 1067 fn. 6 (2007); see also the Board's Rules and Regulations Sec. 102.46(b)(2) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.").

[12] The Respondent and our dissenting colleague do not challenge the judge's finding that, by distributing job applications and W-4 forms to the Berry III hoppers, the Respondent was offering to hire them. However, they contend that the Respondent's inclusion of the W-4 forms with the job applications also signaled a fundamental change in the hoppers' terms and conditions of employment, namely, that if they accepted employment, they would cease being independent contractors with no taxes withheld. They argue, therefore, that the Respondent timely informed the hoppers that employment was being offered on different terms. We disagree. As discussed above, to avoid "perfectly clear" successor status, a new employer must "clearly announce its intent to establish a new set of conditions" prior to or simultaneously with its expression of intent to retain the predecessor's employees. 209 NLRB at 195; *Canteen,* 317 NLRB at 1053–1054. Although the announcement need not be made in any particular form, it must be sufficiently clear that a reasonable employee in like circumstances would understand that continued employment is conditioned on acceptance of materially different terms from those in place under the predecessor. The inclusion of W-4 forms with job applications, without explanation, let alone an express announcement that taxes would be withheld from the hoppers' pay, was too ambiguous to meet this standard. The record does not disclose whether the hoppers received W-4 forms when they applied to work for Berry III. Further, although the term "independent contractor" has been used in these proceedings to describe the hoppers' employment status under Berry III,

NLRB 6, 11 (2007) (finding that "by offering job applications and W-4 forms to [the predecessor's] employees . . . [the successor] invited the employees to accept employment"). Based on this compelling evidence, we find that Jackson's announcement of new terms on June 2 came too late to remove the Respondent from the "perfectly clear" exception.

Nor do we find that the word-of-mouth communication among the hoppers about the Respondent's new pay rate was legally sufficient notice to the hoppers or the Union of the Respondent's intent to establish new terms and conditions of employment. The judge found, and we agree, that "the record affords no way of quantifying how many of the hoppers had learned about the $11per hour wage rate or the other terms and conditions of employment before they reported for work . . . on June 2." Only one hopper, Anthony Taylor, testified that he learned about the new pay rate before June 2. However, he was not able to identify the source of the information, other than to state: "we all congregate out there in the morning. We been knowing that." In addition, Union director Hines testified that, in May, several hoppers told her that they heard a new company was taking over for Berry III, and at least one hopper told her that he heard the new company would be paying $11 an hour. Hines questioned the hoppers, but "no hopper . . . could confirm where he got it from" or "say that anyone in authority of their . . . new employer to be, had stated that [their pay] would be $11 an hour." From the perspective of the employees and the Union, then, the information about the Respondent's new pay rate was unsubstantiated rumor or gossip until it was confirmed by Jackson on June 2. Gossip, conjecture, and unsubstantiated rumors cannot take the place of the clear announcement of intent to establish a new set of conditions required by *Spruce Up*.[13]

Similarly, we find Richard's communications of new terms to approximately 20 Berry III hoppers between mid-May and June 1 did not remove the Respondent from the "perfectly clear" exception. The judge found that Richard "told some of the hoppers—those to whom he gave employment application forms—" of the planned changes in terms and conditions of employment. Richard testified that he distributed applications to only 20 hoppers. The only other person who distributed applications was Flagge, and the credited testimony establishes that Flagge did not inform any of the hoppers to whom he gave applications of the Respondent's new terms. Accordingly, the record clearly establishes that the Respondent failed to give notice of different initial terms to 50 of the approximately 70 Berry III hoppers from whom it solicited applications on or before June 1.

To hold that a successor can avoid the obligation to bargain over initial terms in these circumstances would invite abuse. A new employer, wishing to take advantage of the skill and experience of the incumbent employees while avoiding the bargaining obligation of a "perfectly clear" successor, would be encouraged to announce changes in preexisting terms to only a select few incumbent employees, while allowing the majority of the employees to be lulled by its silence into not seeking other work. Such a

there is no evidence that the hoppers considered themselves to be "independent contractors" rather than "employees" of Berry III in a bargaining unit represented by the Union. Furthermore, a number of hoppers wrote on their W-4 forms that they were exempt from paying taxes, suggesting that they did not understand that taxes would be withheld from their pay if they accepted employment with the Respondent, let alone that their terms and conditions of employment would be changed. Indeed, none of the hoppers testified that they understood that the Respondent planned to deduct taxes from their pay before Jackson's announcement on June 2.

The cases cited by our dissenting colleague are distinguishable. In *Ridgewell's, Inc.*, 334 NLRB 37 (2001), enfd. 38 Fed.Appx. 29 (D.C. Cir. 2002), the new employer, during one of its first contacts with the union and before the hiring process or operations began, expressly informed the union that it would utilize the predecessor's employees only on an independent contractor basis. The Board found that the announcement was both "timely" and "substantive, putting the union on notice that a new set of employment conditions would be in effect." Id. at 37. Similarly, in *S & F Market Street Healthcare, LLC v. NLRB*, 570 F.3d 354, 360–361 (D.C. Cir. 2009), denying enf. to *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975 (2007), the court found that by expressly informing the predecessor's employees that any employment would be "at will," the successor signaled a significant and material change from employment under the "just cause" provision of the collective-bargaining agreement between the predecessor and incumbent union. Here, in contrast, the Respondent did not expressly inform the Union or the hoppers that the hoppers would be treated as employees rather than as independent contractors. And it did not inform the majority of the hoppers that they would have taxes withheld from their pay until after the bargaining obligation had already attached.

[13] The judge found that Jackson notified some of the hoppers "in advance, while they were still working for Berry III," about the Respondent's initial terms and conditions of employment. In so finding, the judge relied on the testimony of hopper Kumasi Nicholas. However, the judge misconstrued Nicholas' testimony. Nicholas testified that he could not recall when Jackson told him about the initial terms. Asked on direct examination, "what happened on the very first day that [the Respondent] began operations," Nicholas testified, "Well, they told us ahead of time—Mrs. Jackson told us ahead of time, you know, might be switching over to another little company where—you know, a pay rate, and she just let us know ahead of time, and then that's when, you know, they started off." An effort to clarify whether Nicholas learned about the pay rate during Jackson's meeting with the hoppers on the morning of June 2 brought the response, "I'm not sure. It's been about a year. . . . . I know she told me that, but I'm not sure." Even assuming, moreover, that Jackson discussed the Respondent's pay rate with the hoppers before June 2, the record does not support a finding that she did so as an agent of the Respondent. Richard hired Jackson on June 1 (after she put the hoppers on the trucks), and she began working for the Respondent on June 2. There is no evidence that Richard, or anyone else in a position of authority with the Respondent, informed Jackson of the hoppers' initial terms and conditions of employment or authorized Jackson to speak on the Respondent's behalf before she was hired.

result would be at odds with the clear import of the Supreme Court's decision in *Burns* and the Board's decision in *Spruce Up*. See *S & F Market Street Healthcare*, 570 F.3d at 359 (holding that, "at bottom the 'perfectly clear' exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it . . . lulled into not looking for other work"); *International Assn. of Machinists and Aerospace Workers, AFL–CIO v. NLRB*, 595 F.2d 664, 674–675 (D.C. Cir. 1978) (approving the Board's imposition of an initial bargaining obligation on the basis that "unconditional retention-announcements engender expectations, ofttimes critical to employees, that prevailing employment arrangements will remain essentially unaltered . . . . [U]nless [the predecessor's employees] are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force."), cert denied, 439 U.S. 1070 (1979).

Thus, a new employer that expresses an intent to retain the predecessor's work force without concurrently revealing to a majority of the incumbent employees that different terms will be instituted, improperly benefits from the likelihood that those employees, lacking knowledge that terms and conditions will change, will choose to stay in the positions they held with the predecessor, rather than seeking employment elsewhere.

As the Board has observed, "[t]he *Spruce Up* test focuses on gauging the probability that employees of the predecessor will accept employment with the successor." *Road & Rail Services, Inc.*, 348 NLRB 1160, 1162 (2006) (citing *Spruce Up*; *Machinists*, 595 F.2d at 673 fn. 45 (observing that in applying the *Spruce Up* test "the relevant factor is the degree of likelihood that incumbents will work for the successor")). The Board explained in *Spruce Up*:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts. . . . . Since that is so, it is surely not "perfectly clear" to either the employer or to us that he can "plan to retain all of the employees in the unit" under such a set of facts. 209 NLRB at 195.

The Board theorized that a successor's plan to hire at least the majority of its employees from the work force of its predecessor is not likely enough to succeed when its offer of employment is coupled with an announcement of reduced wages and benefits, and in such circumstances no duty to bargain over initial terms and conditions of employment would arise. Applying that rationale here, Richard's announcement of new terms to approximately 20 Berry III hoppers did not negate the inference of probable continuity of employment of the remaining 50 Berry III hopper applicants, who lacked knowledge that their wages and benefits would be reduced. The Respondent's plan to hire at least a majority of its employees from the ranks of the Berry III hoppers was therefore reasonably certain to succeed. Moreover, by June 1, it was clear that the Respondent's plan had indeed succeeded.[14] The Respondent was therefore obligated as of that date to consult with the Union before imposing initial terms.

The Respondent, joined by our dissenting colleague, contends that, even assuming it was "perfectly clear" that the Respondent planned to retain the Berry III hoppers on June 1, the bargaining obligation was not triggered until the Union demanded bargaining on June 6 and, therefore, the Respondent lawfully established initial terms and condition of employment on June 2. We find no merit in that argument.

The rule invoked by the Respondent and our dissenting colleague—that a bargaining obligation is triggered only when the union has made a bargaining demand—developed in a very different context. In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court addressed the question when the bargaining obligation is triggered in circumstances where there has been a hiatus between the closing and reopening of an enterprise and/or a successor gradually builds up its work force over a period of time. The Court held that, in those circumstances, the successor's duty to bargain is not triggered until (1) the successor is engaged in normal operations with a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor, and (2) the union has demanded recognition or bargaining. Id. at 51–52. However, nothing in the language or the reasoning of *Fall River* supports the exten-

[14] As the judge found, by turning in their applications and tax forms to the Respondent, the Berry III hoppers were agreeing to work for the Respondent and the Respondent was agreeing to hire them. On June 1, the Respondent had approximately 70 completed applications from Berry III hoppers, a number sufficient to fully staff the trucks operated by Richard's Disposal; Richard therefore cancelled the contract with Berry III on that date.

sion of these criteria to the "perfectly clear" successor context. Indeed, application of these criteria would eviscerate the "perfectly clear" exception, which is intended to promote bargaining *before* the successor hires the predecessor's employees and fixes initial terms, in circumstances where the successor intends to retain as its work force a majority of the predecessor's employees.

The Respondent and our dissenting colleague have cited no case in which the Board or courts have applied the *Fall River* criteria in the "perfectly clear" successor context. To the contrary, in *Cadillac Asphalt*, 349 NLRB at 9–11, cited by the Respondent in its answering brief, the Board discussed the two-prong rule of *Fall River* but ultimately found that the new employer's obligation as a "perfectly clear" successor to bargain over initial terms arose before the union demanded bargaining. See also *C.M.E.,* 225 NLRB at 514–515, where the Board reversed the administrative law judge's finding that the successor's obligation to bargain commenced on the date the union demanded recognition, and found, instead, that the obligation commenced on the earlier date when the successor made it "perfectly clear" that it planned to retain all or substantially all of the predecessor's employees. *Cadillac Asphalt* and *C.M.E.* are consistent with a long line of cases where the Board, without addressing *Fall River*, found that a "perfectly clear" successor's obligation to bargain over initial terms commenced before the predecessor's employees were formally hired and normal operations began and/or before the union demanded recognition and bargaining. *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 5–9 (finding that obligation to bargain over initial terms commenced before successor hired employees and before union demanded bargaining); *Adams,* 363 NLRB No. 193, slip op. at 4–5 (same); *Canteen,* 317 NLRB at 1052–1054 (same); *Level, a Div. of Worcester Mfg., Inc.*, 306 NLRB 218, 218, 220 (1992) (same). See also *Elf Atochem North America, Inc.*, 339 NLRB at 796 (finding that obligation to bargain over initial terms commenced before successor hired employees); *DuPont Dow*, 332 NLRB at 1075 (same); *Helnick Corp,* 301 NLRB at 128 fn. 1 (1991) (same); *Spitzer Akron,* 219 NLRB at 23 (finding that obligation to bargain commended before union demanded bargaining).[15]

In sum, we find that the Respondent is a "perfectly clear" successor and that it violated Section 8(a)(5) and (1) of the Act by announcing and implementing unilateral changes in the unit employees' terms and conditions of employment on and after June 2, 2011.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 3 and 4:

"3. Beginning June 2, 2011, and continuing to date, the Respondent has failed and refused to recognize and bargain with Local 100, United Labor Unions, as the exclusive collective-bargaining representative of its employees in the appropriate unit described in paragraph 2, above, and thereby has violated Section 8(a)(5) and (1) of the Act."

"4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by announcing and implementing unilateral changes in the unit employees' existing terms and conditions of employment on and after June 2, 2011, including promulgating new work rules and changing the manner in which employees are paid. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act."

AMENDED REMEDY

We amend the judge's proposed remedy to address the additional violations that we have found. Having found that the Respondent is a perfectly clear successor and that it violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union prior to changing existing terms and conditions of employment for the unit employees, we shall require the Respondent, on request of the Union, to retroactively restore the terms and conditions of employ-

[15] The dissent contends that dispensing with the *Fall River* criteria in the "perfectly clear" successor context is impractical because: there is no certainty that the union will even seek to represent the predecessor's employees in the new work force; the employer may already have a work force represented by a different union; it is possible that none of the predecessor's employees will accept employment with the new employer; and there may be no evidence that the predecessor's union is supported by the predecessor's employees. At the root of these concerns is an elemental misunderstanding of the "perfectly clear" successor doctrine. The "perfectly clear" exception applies only in circumstances where the continuity of the existing work force and the union's majority status in the new work force are reasonably certain. See *Burns*, 406 U.S. at 294–295 (recognizing 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 and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms"); *DuPont Dow*, 332 NLRB at 1073 (interpreting *Spruce Up* as requiring "both a manifestation of intent on the part of the employer to retain all or substantially all of its predecessor's employees and also a substantial likelihood that those offered employment will accept it"). Moreover, under current law, when a business changes hands and the new employer is a successor, the union is entitled to an irrebuttable presumption of majority support for a reasonable period of bargaining, preventing any challenge to the union's status, whether by the employer's unilateral withdrawal of recognition or by an election petition. *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011). Accordingly, a successor (whether a regular *Burns* successor or a "perfectly clear" successor) must recognize and bargain with the union that represented its predecessor's employees for a reasonable period of time—even if it has affirmative evidence that the union is no longer supported by the predecessor's employees.

ment established by its predecessor and to rescind the unilateral changes it has made, except for the payroll deductions required by Federal, State, or local law.[16] The Respondent shall also be required to make employees whole for any loss of wages or other benefits they suffered as a result of the Respondent's unilateral changes in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), except for the changes in the unit employees' net pay resulting from the payroll deductions required by Federal, State, or local law.

Finally, the Respondent shall be required to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Creative Vision Resources, LLC, New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Unilaterally changing the terms and conditions of employment of its unit employees without providing the Union with notice and an opportunity to bargain.

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

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

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

> All full-time and part-time hoppers employed by Creative Vision Resources, LLC, who work on trucks in the collection of garbage and trash in the Greater New Orleans, Louisiana area, excluding all other employees, guards and supervisors as defined in the Act.

(b) Before implementing any changes in the bargaining unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

(c) On request of the Union, rescind any changes in the terms and conditions of employment for the unit employees that were unilaterally implemented on and after June 2, 2011, except for the changes implemented with respect to payroll deductions required by Federal, State and local law.

(d) Make the unit employees whole, with interest, for any losses sustained as a result of the unilateral changes in terms and conditions of employment in the manner set forth in the remedy section of this decision.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

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

(g) Within 14 days after service by the Region, post at its New Orleans, Louisiana, facility copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or

[16] The Order shall not be construed as requiring or authorizing the Respondent to rescind any improvements in the unit employees' terms and conditions of employment unless requested to do so by the Union.

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

other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 26, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

In this case, the judge found that, under *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972) (*Burns)*,[1] the Respondent was a legal successor to the unionized predecessor employer, Berry III,[2] and violated Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA or Act) by failing to recognize and bargain in good faith with unit employees' incumbent bargaining representative, Local 100, United Labor Unions (the Union), on and after June 6, 2011, the date the Union demanded recognition and bargaining. There are no exceptions to these findings.

The principal issue on exceptions arises from the judge's finding that, contrary to the General Counsel's further allegation, the Respondent was *not* a "perfectly clear" successor to Berry III, and therefore did not violate Section 8(a)(5) of the Act when it set initial terms and conditions of employment for unit employees without bargaining with the Union.[3] My colleagues reverse the judge's dismissal of this allegation and find that the Respondent was a "perfectly clear" successor. Applying the standard set forth in *Spruce Up*, supra, I would find, in agreement with the judge and contrary to my colleagues, that the facts establish that the Respondent was not a "perfectly clear" successor.[4]

[1] Under *Burns* and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), a legal successor—i.e., an employer that acquires and continues (in substantially unchanged form) the business of a unionized predecessor, and hires as a majority of its work force (or of a segment of its work force constituting an appropriate bargaining unit) the predecessor's union-represented employees—must, upon receiving a demand for recognition or bargaining, recognize and bargain with the unit employees' incumbent bargaining representative. However, the successor is not bound by the terms of the predecessor's labor contract and has the right to set its own different initial terms and conditions of employment. As the Supreme Court stated in *Fall River Dyeing*, the Court in *Burns* "was careful to safeguard the rightful prerogative of owners independently to rearrange their businesses" (internal quotations omitted). 482 U.S. at 40.

[2] As more fully explained in the judge's decision, Respondent's predecessor, Berry III, was a labor contractor in the business of furnishing individuals called "hoppers" to trash collection companies in the New Orleans area, including a company called Richard's Disposal. Richard's Disposal is owned by Alvin Richard, Jr. The owner and president of the Respondent is Alvin Richard III (Richard III). "Hoppers" ride on the rear of garbage trucks and load garbage from trash containers into the truck.

[3] The general rule, stated above in fn. 1, is that a successor employer has the right to set its own different initial terms and conditions of employment. However, the Court in *Burns* recognized a limited exception to this right in situations where "it is *perfectly clear* that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294–295. "The 'perfectly clear' exception is and must remain a narrow one because it conflicts with 'congressional policy manifest in the Act . . . to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.'" *S&F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 359 (D.C. Cir. 2009) (quoting *Burns*, 406 U.S. at 288). The Board interpreted the "perfectly clear" exception in *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975). See fn. 4, below.

[4] In *Spruce Up*, the Board interpreted the limited "perfectly clear" exception to the general rule of *Burns* to be "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment," or "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." 209 NLRB at 195; accord *Ridgewell's, Inc*., 334 NLRB 37 (2001), enfd. 38 Fed. Appx. 29 (D.C. Cir. 2002). And the Board in *Spruce Up* made clear that by "prior to," it meant "prior to or simultaneously with": "When an employer who has not yet commenced operations announces new terms *prior to or simultaneously with* his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court." 209 NLRB at 195 (emphasis added). Significantly, *Spruce Up* does not mandate that an employer announce its intent to establish new employment terms in any particular form to any specific number or percentage of its predecessor's unit employees. All that is required is a communication that "portend[s] employment under different terms and conditions." *Ridgewell's*, 334 NLRB at 37; see *S&F Market Street Healthcare*, 570 F.3d at 359 ("[A]t bottom the 'perfectly clear' exception

The key point of my disagreement with my colleagues concerns whether, as stated in *Spruce Up*, supra, the Respondent "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." My colleagues find that the Respondent failed to timely announce its intent to establish new employment terms. In this regard, I believe that my colleagues have erred by applying "perfectly clear" successor law in an excessively rigid and formalistic manner that does not do justice to the unique facts of this case, especially the nature of the Respondent's hiring process. In concluding, contrary to my colleagues, that the Respondent did *not* fail to announce, at the appropriate time, its intent to establish new terms and conditions of employment, I emphasize the following points.

As the judge's detailed recitation of the facts shows, Richard III decided to form the Respondent as a new labor supply company to replace Berry III as the provider of hoppers to Richard's Disposal. Richard III was, as the judge stated, "displeased with the laxity of Berry III and determined to run his company differently, in compliance with the law and with greater attention to workplace safety." Among other things, Richard III wanted to correct what he perceived to be Berry III's erroneous treatment of hoppers as independent contractors instead of employees, reflected in part by the fact that Berry III did not deduct income taxes from the hoppers' pay. To carry out the transition from Berry III to the Respondent without an interruption in trash-collection services, the Respondent had to ensure that it had a sufficient number of hoppers available to supply to Richard's Disposal to staff the latter's garbage trucks the day after Richard's Disposal terminated its labor-supply contract with Berry III. How the Respondent's hiring process unfolded is vital to determining whether the Respondent was a "perfectly clear" successor.

The Respondent's hiring process began on or about May 19, 2011,[5] but remained in a state of flux right up to the moment on June 2 when the hoppers accepted employment by boarding the garbage trucks to begin work.[6] Thus, in determining whether the Respondent fulfilled its obligation under *Spruce Up* to clearly announce to the hoppers its intention to set new terms and conditions of employment prior to or simultaneously with inviting them to accept employment, we must examine what the Respondent communicated to the hoppers *on or before June 2*.

As to that critical issue, the judge found that (1) prior to June 2, Richard III told a number of hoppers (but apparently not more than 20) about the Respondent's new terms and conditions of employment; (2) starting in May, the Respondent began distributing applications to Berry III hoppers with W-4 tax withholding forms attached; and (3) shortly before 4 a.m. on the morning of June 2, before work started and before hoppers boarded the trucks, the Respondent, through its supervisor, Karen Jackson, communicated to *all* the hoppers gathered in the yard its new terms and conditions of employment, which the hoppers were free to accept or refuse. Forty-four hoppers accepted those terms and boarded the trucks, which the judge found was a representative complement of the predecessor's hoppers. Accordingly, based on the credited evidence, I would find, in agreement with the judge, that the Respondent provided timely notice to the hoppers of its intention to set new terms and conditions of employment.[7]

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is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work.").

Only the second part of the *Spruce Up* gloss on *Burns*' "perfectly clear" exception—i.e., whether the Respondent timely notified the hoppers of its intention to set new terms and conditions of employment—is at issue here. The judge found that the credited evidence would not support a finding that the Respondent had misled employees, either actively or by tacit inference, to believe that they would all be retained without any changes in their terms and conditions of employment. My colleagues do not disagree with this finding.

[5] All dates are 2011.

[6] Although Richard's Disposal cancelled its contract with Berry III on June 1, I believe that the chronological endpoint for determining whether the Respondent, under *Spruce Up*, timely communicated its intention to set initial terms and conditions of employment was June 2, its first day of operations. As the judge described, Richard III testified that throughout the application process, he was hiring hoppers to work for him *if he needed them*. Thus, the Respondent would not know precisely which hoppers it needed until they showed up on June 2. Indeed, the record reflects that the Respondent was still handing out applications on that day. Moreover, on the morning of June 2, after the Respondent announced its employment terms to the hoppers gathered in the yard, some of them chose to accept employment on the offered terms by climbing onto a truck, and others decided not to accept employment on those terms and left the yard. Thus, hiring was an ongoing process that continued right up to June 2, when the Respondent spelled out in detail the terms on which it was offering employment.

[7] My colleagues cite several cases in support of their view that Jackson's June 2 announcement of initial terms and conditions came too late to prevent the attachment of "perfectly clear" successor status. I will not belabor my discussion by distinguishing those cases individually. Suffice it to say that none of them presents the unusual facts presented here, which demonstrate that the Respondent fulfilled its obligation under *Spruce Up* to clearly announce to employees its intention to set new terms and conditions of employment at the appropriate time in the circumstances of this case, namely, before inviting them to accept employment on June 2. Moreover, as explained more fully in the text, prior to June 2 the Respondent distributed a job application to each hopper with a W-4 tax withholding form attached, which was independently sufficient to "portend employment under different terms and conditions," *Ridgewell's*, 334 NLRB at 37, because the tax withholding forms placed the hoppers on notice that they would no longer be paid as independent contractors with no income tax withheld as they had been with predecessor Berry III. And in any event, by June 2, the Respondent had clearly informed hoppers of the new terms and conditions of employment: prior

Even assuming for the sake of argument that Jackson's June 2 announcement of new initial employment terms came too late to remove the Respondent from the "perfectly clear" exception, the Respondent's earlier actions clearly portended employment under different terms and conditions than those of Berry III and were thus independently sufficient to render the "perfectly clear" exception inapplicable. As the judge described in his recitation of the facts (but did not discuss in his legal analysis under *Spruce Up*), the Respondent attached a tax withholding form to the job application it provided to each of the hoppers. The inclusion of these tax forms is especially compelling evidence of the Respondent's intention to set new terms of employment different from its predecessor's. As mentioned above, one of Richard III's primary goals in establishing the Respondent was to correct what he saw as Berry III's allegedly lax management practices, including improperly treating hoppers as independent contractors with no taxes withheld from their pay. Among other things, Richard III was determined to treat hoppers as employees. Importantly, the tax withholding form provided to hoppers along with the application was the sort that an *employee* (as opposed to an independent contractor) receives. The tax forms thus signaled a fundamental change in hoppers' terms and conditions of employment, namely, that if they accepted employment by the Respondent, they would cease being independent contractors paid by the day with no taxes withheld and would become employees from whose paychecks taxes would be withheld. And because the hoppers received these withholding forms with their applications—and signed (and in virtually every case also dated) the withholding forms—it reasonably follows that they were on notice that the Respondent was offering employment on new and different terms.

The instant case is therefore similar to *Ridgewell's*, 334 NLRB at 37. In *Ridgewell's*, the employer, prior to hiring or commencing operations, announced that it would hire the predecessor's catering employees as independent contractors. The Board found that the employer was not a "perfectly clear" successor because its announcement of a shift to independent contractor status for the former employees "portended employment under different terms and conditions" and thus clearly signaled that Ridgewell's terms and conditions of employment would differ from its predecessor's. Id. at 37–38. Similarly, the inclusion of the tax forms with the job applications in the instant case portended an equally fundamental change in hoppers' terms and conditions: treatment as employees with income taxes withheld from their pay, as opposed to independent contractors with no income taxes withheld. See also *S&F Market Street Healthcare*, 570 F.3d at 354 ("perfectly clear" exception inapplicable where successor informed applicants that employment would be "at will," where under predecessor, unit employees employed for 90 days or more could be discharged only for cause; all that is required is "a portent of employment under different terms and conditions").

I am not persuaded by my colleagues' contrary position. First, they minimize the fact that, as described above, the inclusion of tax withholding forms with the applications portended to the hoppers that the Respondent was offering them employment under different terms and conditions.[8]

to June 2, Richard III had informed approximately 20 hoppers about the new terms and conditions, and on June 2, Jackson told all the assembled hoppers about the new terms and conditions of employment.

I am concerned that my colleagues have failed to fully recognize that, as the D.C. Circuit emphasized in *S&F Market Street Healthcare*, the "perfectly clear" exception "is and must remain a narrow one because it conflicts with 'congressional policy manifest in the Act . . . to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.'" 570 F.3d at 359 (quoting *Burns*, 406 U.S. at 288). As I stated recently in another case dealing with the "perfectly clear" exception, "the policies at issue here . . . should make the Board reluctant to find 'perfectly clear' successorship." *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 18 fn. 8 (2016) (Member Miscimarra, dissenting in part). "Perfectly clear" successor law is not a legal trap, and it does not require any particular form of communication. In short, I believe my colleagues take an excessively formalistic approach that does not adequately account for the reality that the Respondent's hiring process was in flux right up to the morning of June 2. As of June 1, Richard III believed he had a large enough pool of applicants for Richard's Disposal to cancel its contract with Berry III. But he did not know which of the hoppers from that pool would show up the next day. On the morning of June 2, Jackson announced in detail the new terms and conditions to the hoppers who showed up. Those who accepted were hired on the spot.

[8] In arguing that the hoppers would not have been on notice that employment was being offered on "significantly different terms" based on the inclusion of tax withholding forms with the job applications, the majority states that the "record does not disclose whether the hoppers received W-4 forms when they applied to work for Berry III." But the majority acknowledges that "[t]he record shows . . . that Berry III paid the hoppers a flat rate of $103 per day with no overtime, *and made no deductions for taxes* or social security" (emphasis added). Since the record establishes that Berry III did not deduct income taxes from the hoppers' pay, it is reasonable to infer that Berry III did not require hoppers to fill out a useless W-4 form, the sole purpose of which is to enable the employer to withhold the correct amount of income tax. The inclusion of W-4 forms by Richard III clearly indicated a change in employment terms.

Further seeking to minimize the significance of the W-4s attached to the applications, my colleagues assert that some hoppers may not have considered themselves to be "independent contractors" under Berry III or "underst[ood]" that taxes would be withheld. The issue, however, is not what the hoppers believed or understood, but what the Respondent communicated to the hoppers prior to or simultaneously with inviting them to accept employment. The inclusion with job applications of W-4 forms—which state, on their face, that they refer to tax withholding—signaled a fundamental change in hoppers' employment status from not having any money withheld from their pay to having money withheld. My colleagues speculate that because "a number" of hoppers wrote on

This act alone, however, was independently sufficient to remove the Respondent from the "perfectly clear" exception to the general rule of *Burns*. See *S&F Market Street Healthcare*, 570 F.3d at 360 ("a portent of employment under different terms and conditions" suffices to make "perfectly clear" exception inapplicable); *Ridgewell's*, 334 NLRB at 37 (same). Further, the Respondent did announce to *all* hoppers—not just the approximately 20 hoppers Richard III spoke to when he gave them their applications—the changed terms and conditions on which it was offering employment on the morning of June 2. After that detailed announcement, some of the hoppers accepted employment on the offered terms by climbing on a truck, and others rejected employment on the offered terms by leaving the yard. With that announcement, the "perfectly clear" exception, already inapplicable by virtue of the distributed tax withholding forms, was rendered doubly inapplicable. See *S&F Market Street Healthcare*, 570 F.3d at 360 ("[T]he 'perfectly clear' exception applies only to cases in which the successor employer has led the predecessor's employees to believe their employment status would continue unchanged after accepting employment with the successor.").[9]

As a final matter, the record establishes that the Union did not make any demand for recognition or bargaining until June 6, which makes June 6 the earliest point in time when the Respondent could be deemed a "successor" for purposes of Section 8(a)(5). I believe this independently precludes a finding that the Respondent was a "perfectly clear" successor on or before June 2, when the Respondent commenced operations after indicating, as explained above, that there would be different employment terms.

It is well established that, in successorship cases, the successor employer's obligation to recognize and bargain with the union commences only if and when two conditions are met: (1) the union demands recognition or bargaining, and (2) the successor is engaged in normal operations with a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor.[10] I respectfully disagree with my colleagues' position that they can dispense with these requirements. For good reasons, the Board and the courts have created well-established successorship principles that identify the precise point in time when a legal successor may be required to recognize and bargain with the union. For example, in *Fall River Dyeing*, supra, the Supreme Court indicated—consistent with longstanding Board and court cases—that a successor employer's obligation to recognize and bargain with the union does not attach "until the *moment* when the employer attains the 'substantial and representative complement,'" which is measured at the time the employer has received a "demand" from the union. 482 U.S. at 52 (emphasis added); cf. *Voith Industrial Services, Inc.*, 363 NLRB No. 116, slip op. at 18–19 (2016) (Member Miscimarra, concurring in part and dissenting in part).[11] Most importantly, if one dispenses with

their forms that they were exempt from paying taxes, this suggests "that they did not understand that taxes would be withheld from their pay if they accepted employment with the Respondent . . . ." Of course, many hoppers apparently understood this perfectly well, since a number of them filled out the forms in full. However, the issue again is not what the hoppers understood, but what the Respondent communicated to them; and the tax withholding forms attached to each application conveyed that hoppers would be accepting employment with the Respondent on terms that differed from Berry III's terms. Finally, my colleagues attempt to distinguish *Ridgewell's* and *S&F Market Street Healthcare* by arguing that, unlike the successors in those cases, the Respondent did not "expressly" notify the hoppers that they would be treated as employees rather than independent contractors. I believe the inclusion of W-4 forms with the job applications constituted sufficient notice in this regard. Moreover, Supervisor Jackson reiterated the point when she addressed the hoppers on the morning of June 2. My colleagues also distinguish these cases on the basis that the Respondent "did not inform the majority of the hoppers that they would have taxes withheld from their pay until after the bargaining obligation had already attached." However, the Respondent attached a W-4 form to each job application distributed to the hoppers, and the record shows that the first sentence in the instructions at the top of the W-4 form states: "Complete Form W-4 so that your employer can withhold the correct federal income tax from your pay." (The state tax withholding form has corresponding language.) I also reject the unspoken premise of the majority's statement, which is that the bargaining obligation had already attached before Jackson addressed the hoppers on June 2. As explained in the text, I find to the contrary.

[9] Any lack of precision in the record about who received notice and when is a failure of proof by the General Counsel, whose burden it was to establish that the Respondent violated Sec. 8(a)(5) of the Act by setting initial employment terms without bargaining with the Union, a violation that depends on proving the Respondent was a "perfectly clear" successor. Necessarily, therefore, the General Counsel has the burden of proving that the Respondent was a "perfectly clear" successor by showing that it "*failed* to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up*, 209 NLRB at 195 (emphasis added). Thus, it was for the General Counsel to prove that the Respondent *failed* to announce new employment terms to a sufficient number of hoppers, not on the Respondent to prove it did.

My colleagues say that to "hold that a successor can avoid the obligation to bargain over initial terms in these circumstances would invite abuse" because this would signal that successors could avoid "perfectly clear" status by informing "only a select few" of the predecessor's employees that different terms will be instituted. There is no basis for their stated concern. Here, the facts establish that the Respondent informed all the hoppers that it was offering employment on different terms. Prior to June 2, Richard III informed some 20 hoppers about the new terms, and on June 2, Supervisor Jackson told *all* the hoppers about the new terms. And in any event, the inclusion of tax forms with job applications given to all the hoppers "portend[ed] employment under different terms and conditions." *Ridgewell's*, 334 NLRB at 37.

[10] *St. Elizabeth Manor*, 329 NLRB 341, 344 fn. 8 (1999) (citing *Royal Midtown Chrysler Plymouth*, 296 NLRB 1039, 1040 (1989)).

[11] In line with numerous Board and court cases, the Supreme Court in *Fall River Dyeing* held that if the union makes a premature demand for bargaining, the employer at that time has no duty to recognize and bargain with the union. In these circumstances, however, the Board and the

the requirement of a demand for bargaining before a new employer can be deemed either a conventional or "perfectly clear" successor, the Board would impose bargaining obligations on the new employer even though (i) the employer has received no demand for recognition or bargaining from *any* union, and there is no certainty that the predecessor's union will even seek to represent employees who are hired or retained by the employer; (ii) the employer—for legitimate, nondiscriminatory reasons—may already have a work force represented by a *different* union, which may preclude lawful recognition of and bargaining with the predecessor's union; (iii) it is possible that the predecessor's employees, even though offered employment, will not accept employment with the new employer; and (iv) there may be no evidence that the predecessor's union is supported by any employees who work for the new employer. Moreover, when the employer does subsequently receive a bargaining demand from the predecessor's union, it may be that *none* of the predecessor's employees will have accepted offers of employment extended by the new employer. In these circumstances, under successorship case law that dates back decades, the new employer cannot be considered a legal "successor," and the new employer would *violate* the Act if it recognized and bargained with the predecessor's union.[12]

In sum, for the reasons stated above, I would find that the Respondent was not a "perfectly clear" successor under *Spruce Up*, and it did not violate the Act by unilaterally setting initial terms and conditions of employment. Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 26, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Local 100, United Labor Unions (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT unilaterally change your terms and conditions of employment without negotiating in good faith with the Union to agreement or to impasse.

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

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

courts have created a "continuing demand" rule, under which "a premature demand that has been rejected by the employer . . . remains in force." 482 U.S. at 52. Thus, as stated in the text, provided that the other prerequisites to successor status have been satisfied, the employer must recognize and bargain with the union if and when (1) it has received the union's demand for recognition or bargaining, and (2) the successor is engaged in normal operations with a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor. Id.

[12] Sec. 9(a) provides for union recognition and bargaining only if the union is supported by a "majority of the employees" in an appropriate unit. Under Sec. 8(a)(2) of the Act, an employer commits an unfair labor practice if it recognizes and bargains with a union that does not have majority employee support. Although the Board and the courts have held that the "majority" requirement may be satisfied in successorship cases if there is sufficient evidence of business continuity and the existence of a work force majority at the time the union has demanded recognition and bargaining (provided that the employer at such time has a "substantial and representative complement" of employees), the Act makes clear that the only basis upon which bargaining can be considered appropriate is evidence sufficient to establish that the new employer is a legal "successor"—again, that (1) the predecessor's union has demanded recognition or bargaining, and (2) the successor is engaged in normal operations with a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor.

Decades of case law establish that the prerequisites of successor status are not evaluated in the abstract. Rather, this evaluation is made only when the union demands recognition or bargaining (or later if the union made such a demand before the employer had a substantial and representative complement of employees). My colleagues cite cases to the contrary in the context of "perfectly clear" successorship. In none of these cases did the Board squarely address (or discuss in depth) the issue of whether a union must demand bargaining before "perfectly clear" successor status attaches. And insofar as these cases could be interpreted as indicating that a bargaining obligation could attach without a demand for bargaining, I reject their reasoning.

All full-time and part-time hoppers employed by Creative Vision Resources, LLC, who work on trucks in the collection of garbage and trash in the Greater New Orleans, Louisiana area, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of your employment, notify, and on request, bargain with the Union as the exclusive collective-bargaining representative of our unit employees.

WE WILL, on request of the Union, rescind the changes in the terms and conditions of employment for the unit employees that we unilaterally implemented on and after June 2, 2011, except for the changes we implemented with respect to payroll deductions required by Federal, State, or local law.

WE WILL make our unit employees whole for any losses they sustained due to the unlawfully imposed changes, except for the changes in net pay resulting from payroll deductions required by Federal, State, or local law, with interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

CREATIVE VISION RESOURCES

The Board's decision can be found at www.nlrb.gov/case/15–CA–020067 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Andrew Miragliotta, Esq. and *Kevin McClue, Esq.,* for the General Counsel.

Clyde H. Jacob III, Esq. (Coats Rose, PC), and *Ronald L. Wilson, Esq.,* for the Respondent.

Rosa Hines, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Respondent, a successor, violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the Union which was the exclusive representative of the predecessor's bargaining unit employees. However, Respondent did not violate the Act in other ways alleged in the complaint.

Procedural History

This case began on June 17, 2011, when Local 100, United Labor Unions (the Charging Party or the Union) filed the initial unfair labor practice charge against Creative Vision Resources, LLC (the Respondent). It amended this charge on November 9, 2011.

After an investigation, the Regional Director for Region 15 of the National Labor Relations Board issued a complaint against the Respondent on March 30, 2012. In doing so, she acted for and on behalf of the Board's Acting General Counsel (the General Counsel or the government). The Respondent filed a timely answer.

On May 23 and July 17, 2012, the Regional Director amended the complaint. Respondent filed timely answers to these amendments.

On August 15, 2012, a hearing opened before me in New Orleans, Louisiana. On that day, on August 16 and 17 and September 29, 2012, the parties presented evidence. After the hearing closed, counsel filed posthearing briefs.

Admitted Allegations

In its answer and by stipulation during the hearing, the Respondent admitted certain of the allegations raised in the complaint. Specifically, the Respondent has admitted the allegations raised in complaint paragraphs 1(a), 1(b), 2(a)—2(i), 3(a)—3(c), and 6. Based on these admissions, I find that the government has proven the allegations raised in these paragraphs.

Thus, I find that the unfair labor practice charge and amended charge were filed and served as alleged.

The Respondent has not admitted the allegations, raised in complaint subparagraphs 2(j) and 2(k), regarding the nature of its business operations. It also has not admitted the allegation, raised in complaint paragraph 4, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. However, it has admitted allegations sufficient to establish that it is such an employer.

Specifically, the Respondent has admitted that, based on a projection of its operations since about June 2, 2011, when it began business, it will annually provide services valued in excess of $50,000 to Richard's Disposal, Inc. The Respondent also has admitted that Richard's Disposal is an enterprise within the State of Louisiana which annually purchases and receives at its New Orleans, Louisiana facility, directly from outside the State of Louisiana, goods valued in excess of $50,000. Based on these admissions, I conclude that the Respondent is subject to the Board's jurisdiction and meets the Board's standards for the assertion of jurisdiction. Further, I conclude that at all material times, the Respondent has been an employer engaged in

commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent has admitted, and I find, that the following individuals are its supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Alvin Richard III, owner and president; Karen Jackson, administrator.

Status of the Parties

In May 2010, Alvin Richard III (Richard III) incorporated the Respondent to be a labor contractor providing workers to Richard's Disposal, a company operated by his father, Alvin Richard Jr. (Richard Jr.). At the time of incorporation, another entity, referred to here as Berry III, was performing this function, and continued to do so until June 2, 2011.

Richard III is the owner and president of the Respondent, and also is a vice president of Richard's Disposal. However, the complaint does not allege that Richard's Disposal and the Respondent are a single entity and the record would not establish such an identity. For purposes of this case, the two businesses are distinct and separate, notwithstanding Richard III's service in the management of both companies.

The employees furnished to Richard's Disposal by the Respondent (and previously by Berry III) are classified as "hoppers." As stated in the Respondent's posthearing brief, "Hoppers ride on the rear of the garbage trucks and load the garbage from trash containers into the truck."

Although the Respondent provides the same service that Berry III had performed furnishing hoppers to work on another company's garbage trucks at one point Berry III had more customers. At that time, Berry III furnished hoppers not only to Richard's Disposal but also to Metro Disposal, another trash collection company in the New Orleans area.

Before proceeding further, to avoid confusion, it should be noted that the entity referred to here as Berry III did business under the following names at various times: M&B Services, Berry Services, Inc., Milton Berry, and a second corporation also called Berry Services, Inc. At hearing, the parties stipulated that these businesses were a single entity and single employer. For simplicity, the complaint calls this entity Berry III, as I do here.

Berry III was furnishing hoppers to Richard's Disposal on May 8, 2007, when the Board conducted a representation election. On May 18, 2007, based on the results of that election, the Board certified that Local 100, Service Employees International Union was the exclusive representative, within the meaning of Section 9(a) of the Act, of the following appropriate unit of employees:

> Included: All full-time and part-time hoppers employed by the Employer who work as hoppers on trucks operated either by Metro Disposal, Inc. and/or Richard's Disposal, Inc. in the collection of garbage and trash in the Greater New Orleans area.
>
> Excluded: All other employees, guards and supervisors as defined in the Act.

The certification identified the employer as "M&B Services," the name which the entity, here called "Berry III," was using at the time. Berry III's various name changes did not affect its continuing duty to recognize and bargain with the certified union.

In October 2009, Local 100 severed its affiliation with the Service Employees International Union and began operating under the name "Local 100, United Labor Unions." Upon this disaffiliation, bargaining unit employees who had been members of Local 100, Service Employees International Union automatically became members of Local 100, United Labor Unions. They did not have to pay an initiation or transfer fee or complete any applications.

The constitution of Local 100, United Labor Unions did not change significantly from that of Local 100, Service Employees International Union. Local 100 continued under essentially the same leadership before and after the disaffiliation. Of the 10 individuals who were board members of Local 100, Service Employees International Union, 9 became board members of Local 100, United Labor Unions.

The disaffiliation did not affect the collective-bargaining agreements, which Local 100, United Labor Unions assumed and honored. It continued to represent employees in the bargaining unit described above as well as employees of other employers which had been parties to collective-bargaining agreements with Local 100, Service Employees International Union, and it has engaged in negotiations on behalf of such employees. Based on these facts, I conclude that Local 100, United Labor Unions is an organization in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Therefore, I conclude that it is a labor organization within the meaning of Section 2(5) of the Act.

Complaint subparagraph 8(f) alleges that Local 100, United Labor Unions is the successor to Local 100, Service Employees International Union, and succeeded to the bargaining rights of Local 100, Service Employees International Union with respect to the bargaining unit described above. The Respondent denies such successorship.

The Respondent's brief acknowledges the October 2009 disaffiliation but denies that there was continuity of representation. The Respondent characterizes Local 100, United Labor Unions as "not international in nature" and operating in only three States. The Respondent further states:

> The SEIU has another local in the New Orleans metropolitan area, SEIU Local 21, and it was operating when the ULU [United Labor Unions] began operations. Tr. 725-26. Judicial notice can be taken under Federal Rule of Evidence 201 that the SEIU is a larger, more influential and more economically successful union than the ULU. This may be gleaned from the unions' respective websites, U. S. Department of Labor filings by the unions, and news articles and reports.

Respondent's argument is not persuasive. Even assuming, solely for the sake of argument, that Local 100, United Labor Unions is smaller and less influential than the Service Employees International Union, the relevance of such a comparison escapes me. For example, historians might well regard Andrew Johnson as a less influential president than Abraham Lincoln, and Johnson certainly was shorter. However, under the law, he was

indeed Lincoln's successor. Relative political skill and physical size were not cognizable factors. Likewise, here I will stick to the criteria the Board has enunciated in its precedents.

The Respondent also points out that the hoppers represented by the SEIU did not have an opportunity to vote on whether they wished to disaffiliate from the SEIU and be represented by the ULU and argues that this absence of a vote is material and should be considered. In making this argument, the Respondent seeks to distinguish *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007), which stands in the way. Therein, the Board held that an employer is not relieved of its bargaining obligation merely because a merger or affiliation is accomplished without due process safeguards. In arguing that the same principle should not be applied to disaffiliation, the Respondent's brief states:

> The action of a union disaffiliating from another union is unique from a union merger or affiliation. With a merger or affiliation, unions typically decide to come together to augment their economic strength and power. This, by its very nature benefits the union membership that is merged. In contrast, a disaffiliation typically involves a new union formed by leaving a larger or more substantial one. That is what happened in the case at hand. In disaffiliations, there is not the likelihood, as in mergers, that the represented employees will be economically better off or better represented. In the case of disaffiliations, there is a greater need for the represented employees to be protected. That is why a due process election in which the affected employees vote is necessary.

However, the Board's rationale in *Raymond F. Kravis Center for the Performing Arts* did not depend on the likelihood that employees would retain or gain bargaining power. Rather, this decision rested on the Board's understanding of *NLRB v. Financial Institution Employees of America Local 1182 (Seattle-First)*, 475 U.S. 192 (1986). In that case, the Supreme Court held that the Board cannot discontinue a certified union's recognition without determining that its affiliation with another union raised a question of representation and, if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit. The Board held that the lack of a membership vote concerning union affiliation was insufficient to raise a question concerning representation, that is, to make it "unclear whether a majority of employees continue to support the reorganized union."

Following this logic, the appropriate inquiry here is not whether the change seems to increase or decrease a union's bargaining power. Rather, in weighing the Respondent's attempt to distinguish *Raymond F. Kravis Center for the Performing Arts*, the pivotal issue is whether the lack of a membership vote for disaffiliation is sufficient to raise a question concerning representation. Notwithstanding the Respondent's argument, I cannot conclude that a vote to disaffiliate is all that different from a vote to affiliate or merge. Where, as here, the local union leadership remains in place and continues to deal with an employer as before, very little has changed, particularly from the employees' point of view. In the present case, at least, no change has altered the local union's identity so much that it would raise a question concerning representation.

Indeed, the disaffiliation here appears little different from that in *Miron & Sons, Inc.*, 358 NLRB 647 (2012). There, the Board adopted the judge's finding that there was a substantial continuity of representation and, accordingly, that the employer had a continuing duty to recognize the union as the exclusive bargaining representative. The Respondent argues that in *Miron*, "the employer never challenged the union's status under the continuity of representation requirement. It is not an issue in the case." However, even were I to regard *Miron* merely as illustrative, it supports the conclusion I draw from the reasoning in *Raymond F. Kravis Center for the Performing Arts*. There, the Board stated:

> In determining whether there is a lack of continuity of representation after a merger or affiliation, the Board considers whether the merger or affiliation resulted in a change that is "sufficiently dramatic" to alter the union's identity. *May Department Stores*, 289 NLRB 661, 665 (1988), enfd. 897 F.2d 221 (7th Cir. 1990). This may occur where "the changes are so great that a new organization comes into being—one that should be required to establish its status as a bargaining representative through the same means that any labor organization is required to use in the first instance." *Western Commercial Transport, Inc.*, 288 NLRB 241, 217 (1988).

351 NLRB at 147. Applying this same principle to the present case, involving a disaffiliation rather than a merger or affiliation, and considering the totality of the circumstances, I conclude that there is a continuity of representation. The employer here called "Berry III" had a duty to recognize and bargain with Local 100, Service Employees International Union before the disaffiliation, and after the disaffiliation, it had a duty to recognize and bargain with Local 100, United Labor Unions, which it did.

If the Respondent is a successor to Berry III—an issue to be discussed and decided below—and if the bargaining unit remains in existence, then the Respondent now has the same duty to recognize and bargain with Local 100, United Labor Unions. However, the Respondent argues that the bargaining unit has changed in a manner which makes the present unit inappropriate. Respondent's brief states as follows:

> The SEIU and Berry III entered into a collective bargaining agreement on September 1, 2007. GCX-27. Article 1, Recognition, recognizes a unit of hoppers working on trucks operated by Richard's Disposal and Metro Disposal.
>
> At some time after Berry III and the SEIU entered their agreement, Berry III lost its contract to supply hoppers to Metro to another company—FastTrack. Tr. 151. The union has never filed a disclaimer of interest of representation of the hoppers at Metro Disposal. Tr. 252-53.
>
> In the instant case, the unit used to establish successorship was only the hoppers working on trucks operated by Richard's Disposal. Hoppers working at both Richard's and Metro were not counted to determine whether [the Respondent] hired a majority of employees in the Berry III's and SEIU unit.

With respect to the last sentence quoted above, it may be noted that in determining successorship the Board looks to whether a majority of the putative *successor's* bargaining unit employees

had worked for the predecessor. That question, whether a majority of the hoppers hired by the Respondent had worked in the Berry III bargaining unit, will be addressed below.

Here, I focus on whether Berry III's loss of the Metro Disposal contract affected the appropriateness of the bargaining unit. It is not unusual for the size of a bargaining unit to shrink when an employer loses an existing customer, just as it is not unusual for a bargaining unit to grow when an employer gains a new customer. Typically, such fluctuations do not affect either the appropriateness of the bargaining unit or the employer's duty to recognize and bargain with its exclusive representative. (An exception involves the permanent shrinking of a bargaining unit all the way down to one person, but that exception is not applicable here.)

Berry III's loss of the Metro Disposal contract did not reduce the bargaining unit to a single employee or otherwise render it inappropriate. It continued in existence at least until June 2, 2011, when the Respondent began its business operations.

Moreover, successorship may be found even when the bargaining unit of the putative successor differs in some respects from that of the predecessor. In *Specialty Hospital of Washington-Hadley, LLC*, 357 NLRB 814 (2011), the Board stated:

> *Bronx Health Plan*, 326 NLRB 810 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999), is illustrative of the extent the unit may be altered without eliminating successorship obligations. There, the predecessor employed workers in hundreds of job classifications in the recognized unit. The successor hired a tiny fraction (.05 percent) of the predecessor's bargaining unit employees (16 out of 3500), who were scattered among those many job classifications. The union sought to bargain over the 16 employees in a clerical unit. The Board found successorship because, among other things, all of the successor's unit employees had been employees of the predecessor. In short, in *Bronx Health Plan*, the successor's unit no longer contained the vast preponderance of the predecessor's bargaining unit job classifications and employee complement. But, as there was continuity both in the nature of the enterprise and the work force (within the contracted unit), successorship principles resulted in a duty to bargain.
>
> . . . .
>
> The Supreme Court has instructed that the question of substantial continuity must be considered from the employees' perspective. Viewed from that perspective, it makes no difference whether the successor acquired only a part of the unit or the union disclaimed interest in a part of the unit. In either case, there is no reason to believe that employees' views on union representation have changed. Put another way, a diminution of unit scope or unit inclusion, by itself, is insufficient to meaningfully affect the way that unit employees perceive their jobs or significantly affect employee attitudes concerning union representation.

357 NLRB 814, 814–815 (footnote omitted).

The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate. "Compelling circumstances" are required to overcome the significance of bargaining history. *Cadillac Asphalt Paving Co.*, 349 NLRB 6 (2007). Here, the Respondent has not shown such compelling circumstances. Accordingly, I reject the Respondent's inappropriate unit argument.

Was Respondent A Successor?

The Respondent denies the allegation that it is a successor to Berry III. However, the Acting General Counsel argues that the facts meet the standards for successorship regardless of whether they are examined using the analytical framework of *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), or that of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The facts satisfy both tests.

As stated above, Alvin Richard Jr. owns Richard's Disposal, providing trash collection services in the New Orleans area, and his son, Richard III, is the chief operating officer of that company. It had contracted with Berry III to provide the hoppers who ride at the back of the garbage trucks and load the trash into the trucks. However, problems arose and Richard III testified he "saw it as an opportunity to start a business for myself."

Richard III decided to form a company which would replace Berry III as the supplier of the hoppers. To that end, he incorporated the Respondent in May 2010, but this company did not begin operations right away.

With assistance from an employee of Richard's Disposal, Richard III prepared employment application forms. A Berry III employee, Eldridge Flagge, passed out the applications to others employed by Berry III in the hoppers' bargaining unit. Each application included the tax forms which an employee typically completes on being hired. The record indicates that Richard III gave Flagge the forms sometime around May 19, 2011.

Flagge distributed the applications soon after he received them. However, the record indicates that Flagge played little role in collecting the completed applications. Rather, after filling out an application, a hopper would give it directly to personnel working for Richard's Disposal.

For reasons discussed later in this decision, I credit Richard III's testimony that he, too, provided application forms to some of the hoppers employed by Berry III. The record reveals an obvious motivation for doing so: The change from Berry III to the Respondent was not something which would be phased in gradually. Rather, it would be an abrupt shift from one to the other. Therefore, Richard III needed to be sure he had enough hoppers lined up to staff all the trash trucks before the Respondent replaced Berry III. Moreover, it was not Richard III's policy to place any hopper on a truck until that person had submitted an application form, including the tax forms attached to it.

Richard III did not interview any applicants for employment. I infer that he presumed that all the hoppers working for Berry III were qualified, or else they would not be doing the work already. Therefore, filling out the application and tax forms was a formality, albeit a required one. Richard III testified, in part, as follows:

> Q. [I]sn't it also true at the time you started—isn't it also true at the time you started passing out the applications or gave Mr. Flagge the applications for him to pass out, it was your plan to start providing hoppers to Richard's Disposal on May 20,

2011?

A. Yes.

Q Okay. But you didn't start that day, because you didn't have enough applications returned to you. Correct?

A. Yes.

Q. Okay. So I'm assuming on June 1, you had enough applications.

A. Yes.

Q. Isn't it also true that by the hoppers turning in their applications, they were agreeing to work for Creative Vision, and you were agreeing to hire them if they wanted to work?
A. If I needed them, yes, sir.

By June 1, 2011, the Respondent had the applications of enough hoppers to staff the trash trucks, and on that date Richard's Disposal canceled its agreement with Berry III. The next day, the Respondent began providing to Richard's Disposal the same hoppers who had been doing the same work but receiving their pay from Berry III. From the hoppers' point of view, little had changed. They still reported for work at the same place, Richard's Disposal, and still rode on Richard's Disposal's trucks.

Moreover, their direct supervisor had not changed. Karen Jackson had been employed as a supervisor by Berry III, where she assigned each hopper to work on a specific truck. She continued to do the same thing.

A little before 4 a.m. on June 2, 2011, when the hoppers arrived at the Richard's Disposal facility to work, Jackson conducted a meeting to inform them that they were working for Creative Vision. In the words of one hopper, Shawn Lewis, "Ms. Jackson called a little brief meeting before any trucks drove out of the yard, and told us, 'Today is the day you start working under Creative Vision.'" Jackson also told the hoppers that they would be paid $11 per hour, would receive overtime, and that the Respondent would guarantee each hopper 8 hours of work per day.

On this first day, 44 hoppers worked for the Respondent. This number was sufficient to staff the trucks operated by Richard's Disposal. Specifically, Richard III testified that Richard's Disposal typically sends out 20 to 22 trucks per day and each truck has two hoppers. Thus, from 40 to 44 hoppers would be sufficient for Richard's Disposal to operate in the usual manner. Accordingly, although the record suggests that on some later days the Respondent provided, and Richard's Disposal used, more than 44 hoppers, I conclude that the 44 hoppers employed on June 2, 2011, constituted a representative complement of employees.

Under *NLRB v. Burns Security Services*, above, at least half of the employees in the representative compliment must have worked for the putative predecessor. Here, all 44 of the hoppers who worked for the Respondent on June 2, 2011, had been bargaining unit employees at Berry III. Clearly, Respondent is a *Burns* successor. Further, I conclude that the Respondent is also a successor under *Fall River Dyeing Corp. v. NLRB*, above.

In *Fall River Dyeing Corp.,* the Supreme Court articulated a "substantial continuity" test, which the Board applied in *Van Lear Equipment*, 336 NLRB 1059 (2001). The Board noted that the Supreme Court had identified the following factors as relevant:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers.

336 NLRB at 1063. The answer to each of these questions is "yes." The business of the Respondent is the same as that of Berry III, providing employees to work as hoppers on trucks operated by Richard's Disposal. The working conditions remained the same and the employees worked under the supervision of the same person, Karen Jackson. The production process remained unchanged. At one point, Berry III provided hoppers for two disposal services, Metro Disposal as well as Richard's Disposal, whereas it appears that the Respondent only provides hoppers to Richard's Disposal. Nonetheless, the Respondent has "basically the same body of customers" as Berry III.

These factors are assessed from the perspective of the employees, that is, "whether 'those employees who have been retained will . . . view their job situations as essentially unaltered.'" Id., quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973). From the perspective of the employees who appeared for work on June 2, 2011, nothing had changed. They would not have known that they were working for a different employer if their supervisor, Karen Jackson, had not told them.

One hopper, Booker T. Sanders, who testified as a witness for the Respondent, stated that he recalled a meeting at which Jackson "said Creative Vision was taking over, and she they're paying $11 an hour, and they're taking out taxes and Social Security." The Respondent also called to the witness stand another hopper, Harold Jefferson, who testified that Jackson "got all the hoppers, and she explained to us that, you know, Creative Vision was open, and we no longer worked for Berry." If Jackson had not called a meeting of the hoppers on June 2, 2011, and informed them that they were now working for the Respondent, they would not have known until they received their paychecks.

In sum, the evidence clearly establishes the "substantial continuity" required by the *Fall River Dyeing Corp.* test, as well as successor under *NLRB v. Burns Security Services*, above. I so find.

Is Respondent A "Perfectly Clear" *Burns* Successor?

In general, a *Burns* successor has a duty to recognize and bargain with the exclusive representative of the predecessor's employees but it remains free to set the initial terms and conditions of employment. However, there is an exception. In *Burns*, the Supreme Court stated that although a successor employer "is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate

to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294.

The Board has held that this "perfectly clear" exception to the general rule that a successor employer is free to set initial terms, while restrictive, should apply "to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least 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." *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975); see also *Grenada Stamping & Assembly, Inc.,* 351 NLRB 1152 (2007); *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 10 (2006).

The present record would not support any finding that the Respondent had misled employees, either actively or by tacit inference, to believe they would all be retained without any changes in the wages, hours, or conditions of employment. Rather, whether the Respondent is a "perfectly clear" *Burns* successor turns on whether it "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."

For example, in *Cadillac Asphalt Paving Co.*, above, the successor employer did not conduct job interviews and no evidence indicated that it sought applicants from any source other than the predecessor's work force. At a meeting with the predecessor's employees, the successor invited them to fill out job applications and W-4 forms but did not tell them it intended to set initial terms and conditions of employment. In these circumstances, the Board found that the hiring employer was a "perfectly clear" *Burns* successor.

The facts in the present case are rather similar to those in *Cadillac Asphalt Paving Co.* but certainly not identical. As described above, Richard III distributed application forms, with attached W-4 tax forms, to hoppers while they were employed by Berry III and he also enlisted the help of Eldridge Flagge, one of the hoppers in the Berry III bargaining unit. The record does not indicate that the Respondent sought employees from any other source.

To this extent, the facts here resemble those in *Cadillac Asphalt Paving Co.* However the credited evidence establishes that Richard III communicated at least some information about the contemplated wages and working conditions to at least some of the hoppers while they were still employed by Berry III. The question thus is whether the Respondent conveyed enough information to enough hoppers.

To preserve its authority to establish initial terms and conditions of employment, a successor must "clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.*, above, 209 NLRB at 195. What constitutes such a clear announcement? The information must be sufficient to allow the predecessor's employees to make an informed choice about whether to go to work for the Respondent.

In *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975 (2007), a successor sent a letter to the predecessor's employees offering them temporary employment. The letter stated that they were not eligible for certain benefits, and adding, "Other terms and conditions of your employment will be set forth in Windsor's personnel policies and its employee handbook."

Although the quoted statement seems to convey the successor's intent to establish a new set of working conditions, the Board held that it was insufficient to allow the predecessor's employees an informed choice concerning whether to accept the successor's employment offer or turn it down. The Board held that a general statement that new terms will subsequently be set is not sufficient to fulfill the Respondent's *Spruce Up* obligation to announce new terms prior to or simultaneous with the takeover.

In other words, applying the Board's *Spruce Up* standard faithfully requires digging deeper than might at first appear necessary from a narrow and literal reading of the test. A message sufficient to convey the successor's intention to establish new terms and conditions of employment may still lack enough detail to afford the predecessor's employees an informed choice. If so, the "perfectly clear" label sticks.

Thus, the doctrine has evolved since 1972, when the Supreme Court noted 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, and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Burns*, above, 406 U.S. at 294–295. Under the doctrine, as it has now ripened and matured, a successor employer's failure to provide sufficient information to the predecessor's employees proves that it is perfectly clear the successor intended to retain all the unit employees.

Therefore, it is important to distinguish between the ordinary meaning of the words "perfectly clear" and the import of this phrase as a term of art. When used in the everyday sense, the words "perfectly clear" take the analysis in a different direction. The record makes it perfectly clear that the Respondent intended to retain the employees in the bargaining unit, but this conclusion does not rest on the amount of communication between the Respondent and the hoppers.

If the Respondent had not intended to retain the employees in the Berry III bargaining unit, it would have been a remarkable coincidence that on the first day of the Respondent's operations all 44 hoppers had been employed by Berry III. Of course, it was not a coincidence. The record does not indicate that the Respondent sought to hire hoppers from any other source.

If the Respondent had not intended to hire the members of the bargaining unit, en masse, Richard III or someone working for him would have interviewed applicants, examined qualifications, and checked references. Instead, the Respondent chose merely to distribute applications, with W-4 forms attached, to the hoppers in the Berry III bargaining unit. Typically, a job applicant does not fill out a W-4 form until hired, so inclusion of the tax form with the application suggests that the Respondent had little doubt about whom it would hire.

Richard III already knew about the quality of the hoppers' work because they performed that work for Richard's Disposal, a company he managed. His dissatisfaction was not with the hoppers themselves, but rather with Berry III's lax management practices, which included treating the hoppers as independent

contractors rather than employees, failing to deduct taxes, and neglecting to follow such usual employment practices as issuing handbooks and implementing dress standards.

Moreover, the hoppers in the Berry III bargaining unit already were familiar with how Richard's Disposal operated. If the Respondent had decided to recruit through the State unemployment office or through "help wanted" advertisements, the process of selecting and training those chosen would have been a major undertaking. So it is hardly surprising that the Respondent would decide to use the same individuals who already were hopping on the trucks every morning.

The record leaves no doubt that the Respondent's owner, Richard III, intended to employ the hoppers working in the Berry III bargaining unit, and made no efforts to hire hoppers from other sources. Using the words "perfectly clear" in their everyday sense, that intent is perfectly clear.

Is such an intention "perfectly clear" when that phrase is a term of art? To answer that question, I return to the issue of what the Respondent communicated to the hoppers while they still worked for Berry III. On this point, witnesses delivered conflicting testimony.

Richard III testified that he gave job application forms to some of the hoppers who were working for Berry III, and that when he did so he described to them the terms and conditions of employment which would be instituted by the Respondent, stating, for example, that hoppers would earn $11 per hour. This testimony invites scrutiny because, although both the Respondent and the General Counsel called a number of hoppers to the witness stand, none testified that Richard III gave him a job application.

However, Richard III was not the only possible conduit of information from the Respondent to the hoppers. Both Richard III and hopper Eldridge Flagge testified that Richard III gave Flagge application forms which Flagge then distributed to other hoppers. According to Richard III, he gave Flagge a stack of about 15 to 20 applications and Flagge later requested more.

Although it is undisputed that Richard III gave Flagge application forms, their testimony conflicts regarding what Richard III told Flagge. Richard III's testimony, if credited, would establish that he informed Flagge of the initial terms and conditions of employment which he intended to implement when the Respondent began operations:

> Q. What did you tell Mr. Flagge, if anything about what the wages, benefits, and—would be?
> A. $11 an hour, eight hours guaranteed a day, overtime if they made it, and holidays—the four standard holidays.
> Q. Did you mention anything about taxes being withheld?
> A. Yes.

However, Flagge's testimony squarely contradicts Richard III on this point:

> Q. And during that conversation, did Alvin Richard III say anything about pay to you?
> A. No.
> Q. Did he tell you anything about holiday pay during that conversation?
> A. No.
> Q. Did he say anything about new work rules?
> A. No.
> Q. During that conversation, did he say anything about an employee handbook?
> A. No.
> Q. Did he say anything about a safety manual?
> A. No.

Before addressing this conflict in the testimony, I note that even if Richard III told Flagge about the contemplated terms and conditions of employment Flagge did not convey such information to other hoppers employed by Berry III. I credit Flagge's uncontradicted testimony that he told the other hoppers "they might have a job when they fill the application out, but they needed to have Social Security, ID to bring up in there, and I told them to bring it to Clayton, where he could make a copy of it."

Richard III's testimony, if credited, establishes that the hoppers had another source of information apart from Flagge, namely, Richard III himself. He testified that, in addition to providing Flagge application forms to distribute, he also gave out such forms to other employees in the Berry III bargaining unit:

> Q. Now, did you distribute applications during this time?
> A. Yes.
> Q. And how many applications would you say you might have distributed during this time period?
> A. Maybe 20.
> Q. What did you say to the hoppers as you gave them applications?
> A. They had to know about their wages, $11 an hour, 40-hour guaranteed—excuse me. Guaranteed eight, 40 hours, the overtime after the 40 hours, and I was going to have to do the taxes.
> Q. Did you say holidays, too? I'm sorry. I didn't.
> A. Yes. There's four guaranteed holidays in our business.

Richard III testified that he began distributing these applications sometime in May 2011. However, he could not name any individual, except Flagge and a hopper named Terry Hills, to whom he had given an application. Richard III also testified that he received completed applications from hoppers working for Berry III but, again, could not name any person who gave him one.

Richard III's inability to identify the hoppers to whom he had given and from whom he had received application forms does raise questions about the reliability of his testimony. However, in evaluating this testimony, I cannot simply assume that Richard III was so familiar with the hoppers that he knew all of them by sight and could associate faces with names. He was not their immediate supervisor and the hoppers spent almost all their work time away from the facility.

Eight hoppers testified at the hearing, six of them called by the Respondent. However, none of these witnesses testified that Richard III had informed him of the initial terms and conditions of employment before June 2, 2011. Indeed, none of the hoppers testified that he had received such information from any source before June 2, 2011.

This absence of corroboration, as well as Richard III's inability to name specific individuals to whom he had given applications, raises some doubt about the reliability of his

testimony. However, other considerations weigh in favor of crediting it.

From Richard III's testimony and that of other witnesses, I infer that he was not very happy with the way Berry III operated. Berry III treated the hoppers as independent contractors even though they clearly had the attributes of employees—for example, they were required to work at specific times and in a specific way—and did not withhold taxes from their pay. Berry III also did not provide employees with either an employee handbook or a safety manual, and it ignored an unfair labor practice complaint, resulting in a default judgment. See *M&B Services, Inc.*, 355 NLRB No. 136 (2010) (not reported in Board volumes).

Richard III testified that there had been problems with Berry III, a factor in his decision to start his own company. Although his demeanor as a witness was low key, I infer that he was displeased with the laxity of Berry III and determined to run his company differently, in compliance with the law and with greater attention to workplace safety.

Thus, he instituted work rules requiring hoppers to put on vests, which I assume were similar to safety vests worn by highway construction workers, before they could get on the trucks. Richard III also established a dress code. It required hoppers to wear shirts and belts at all times and to wear their pants pulled up rather than hanging low on the waist.

This impression of Richard III being meticulous, a stickler for detail, is consistent with a portion of his testimony which otherwise puzzled me. According to Alvin Richard Jr., who owns Richard's Disposal, his son, Richard III, is vice president and manager of that company. The son, however, was not so confident he held the second title. On cross-examination, he testified, in part, as follows:

> Q. Okay. Were you the vice president of Richard's Disposal on June 1, 2011?
> A. I'm a COO. If that's a vice president, I don't know.

The General Counsel then showed Richard III a letter bearing his signature and the title "vice president." This exchange followed:

> Q. And at the bottom it says, vice president. So does that refresh your recollection as to whether or not you're the vice president or not?
> A. No.
> Q. It doesn't?
> A. I said I signed it. What my title was at the time I don't remember.

Richard III's demeanor was not belligerent or hostile and I believe he was trying to give answers which were both accurate and precise. His reluctance to agree that he was vice president, even after seeing a letter referring to him by that title, did not advance his interest in any obvious way. If he had been trying to conceal his management position with Richard's Disposal, he would not have referred to himself as "COO," chief operating officer. In view of his willingness to acknowledge that title, his hesitation about the title of vice president is difficult to understand except as a reflection of scrupulousness in attention to detail.

The easier course, when confronted with a letter he signed which referred to him as "vice president," would have been simply to admit that "vice president" was his title. Instead, he testified that he did not remember what his title had been at the time of the letter, an answer he could not have expected to help his credibility. Thus, Richard III impressed me as being a meticulous witness even when his answers foreseeably might be contrary to his interest.

Moreover, even though no hopper testified that Richard III told him about the initial terms and conditions, the record does establish that some hoppers had heard that the Respondent would be paying $11 per hour. For example, a union official, Rosa Hines, reported that at least one hopper employed by Berry III had called the Union to ask about the $11-per-hour figure. Hines testified:

> What I received is a call, saying they heard a couple hoppers—I'm not sure of their names—and they heard that their wages was dropped to $11, and I questioned on that did the management or did this new company tell you that, and they said they just hear it. They had not heard from any authorized personnel.

The Respondent argues that the existence of this rumor—that hoppers hired by the Respondent would make $11 per hour—supports an inference that the Respondent did, in fact, announce this pay rate to the hoppers while they were still working for Berry III. Thus, the Respondent's brief asks: "How else could hoppers communicate to Hines the pay rate of $11/hour at [Creative Vision Resources] unless they learned it from Richard, from Flagge, or from other hoppers who learned it from Richard and/or Flagge?"

The testimony of Anthony Taylor confirms that a number of hoppers learned about the $11-per-hour wage rate while they were still working at Berry III. This same testimony illustrates the difficulty of tracking down the elusive source of this information:

> Q. Now, you mentioned $11 an hour. What, if any, conversations were the hoppers having before this meeting about the $11 an hour?
>
> A. We all congregate in the morning out there. They been knowing about the $11 an hour.
>
> Q. So the hoppers before this meeting in May knew about the $11 an hour?
>
> A. Sure, man. The application was passed out before. I think Flagge was passing out those applications.
>
> Q. Did Flagge know about the $11?
>
> A. I told you, we all congregate out there in the morning. We been knowing that.

The testimony of Kumasi Nicholas, who worked in the Berry III bargaining unit, provides further evidence that hoppers knew about the Respondent's initial terms and conditions of employment before the Respondent began operations:

> Q. Before you began work for Creative Vision, did you know you were going to make $11 an hour?

A. Yes, sir.
Q. Did you know you were going to be guaranteed eight hours a day?
A. Yes, sir.
Q. Did you know you were going to get overtime?
A. Yes, sir.
Q. Did you know you were going to get four holidays?
A. Yes, sir.

However, Nicholas' testimony does not indicate that he received this information from Richard III. Rather, he learned about the Respondent's contemplated terms and conditions of employment from Karen Jackson, who then was working for Berry III: "Well, they told us ahead of time—Ms. Jackson told us ahead of time, you know, might be switching over to another little company where—you know, a pay rate, and she just let us know ahead of time, and then that's when, you know, they started off."

Jackson did not testify that she informed the hoppers in advance, while they still worked for Berry III, about Respondent's replacing Berry III as the contractor providing hoppers to Richard's Disposal. Indeed, she stated in a pretrial affidavit, "I don't know who told the hoppers about [Respondent] CVR taking over. I was employed by Mr. Berry until June 3. The hoppers' first day was June 2. I don't know who did my job on June 2."

Jackson admitted in a subsequent affidavit, and acknowledged on the witness stand, that she erred in stating that her first day working for the Respondent was June 3 rather than June 2. For reasons discussed below, I have significant reservations about the reliability of her testimony. Therefore, crediting Nicholas, I find that Jackson, who was the hoppers' supervisor at Berry III, did inform them about some of the Respondent's contemplated initial terms and conditions of employment, including that $11 per hour wage rate.

This finding, that hoppers working for Berry III learned some information about the Respondent from Jackson, does not contradict Richard III's testimony that he informed hoppers about the Respondent's initial terms of employment. Although Richard III's testimony is uncorroborated, it is also uncontradicted. Moreover, it is consistent with the fact that at least some hoppers knew about the contemplated $11-per-hour wage rate.

Further, as discussed above, Richard III appeared to be a sincere and meticulous witness. For these reasons, I credit his testimony that he told some of the hoppers—those to whom he gave employment application forms—that the Respondent would be paying an $11-per-hour wage, would guarantee 8 hours of employment per day, would pay overtime for hours worked in excess of 40 per week, and would withhold taxes from their paychecks. Based on Richard III's credited testimony, I also find that he told these hoppers that the Respondent guaranteed four holidays.

The record does not establish exactly how many hoppers heard Richard III make these statements about the initial terms and conditions of the Respondent. At most, Richard III likely distributed applications to less than half the hoppers in the Berry III bargaining unit.

There is no evidence that the hoppers who got their application forms from Flagge rather than Richard III received the same information. I credit Flagge's uncontradicted testimony that he did not tell them. This testimony is consistent with that of hopper Booker Sanders, who received a job application form from Flagge but no information about the Respondent's initial terms and conditions of employment. Sanders did not learn that the Respondent would be paying $11 per hour until he attended a meeting called by Supervisor Karen Jackson on the day the Respondent began operations.

The record affords no way of quantifying how many of the hoppers had learned about the $11-per-hour wage rate or the other terms of employment by the time they reported for work, as usual, at the Richard's Disposal facility on June 2, 2011. There, again as usual, they encountered Karen Jackson, who had been Berry III's supervisor responsible for deciding which hoppers would work on which trucks. Jackson's job with Berry III had required her to be at the facility every workday around 3:30 a.m., to take the roll and make sure each truck was adequately staffed. She had held that position through June 1, 2011, when she resigned from Berry III and accepted an offer to do the same job for the Respondent. Early on June 2, sometime between 3:30 and 4 a.m., Jackson called a meeting of the hoppers, announced that they no longer were working for Berry III, and told them the new terms and conditions of employment.

Before describing that meeting, I will address how much weight should be given to Jackson's testimony. Two problems raise concerns about her credibility.

The first problem concerns conflicting statements Jackson made in pretrial affidavits about the date she began working for the Respondent. In the earlier pretrial affidavit, Jackson gave June 3, 2011, as the date she started working. If so, that would indicate that she was not present on the Respondent's first day of operations, June 2, and could not then have conducted a meeting with hoppers.

However, Jackson provided a second pretrial affidavit which corrected the date. In that second affidavit, Jackson stated that she had mistakenly believed that June 3, 2011, had been a Thursday. After someone showed her a calendar, she realized that her first day of work for the Respondent actually had been June 2, 2011.

Further, there is also a separate and more serious problem. Late in the hearing, Jackson resumed the witness stand and then admitted altering the dates on the copies of some employment applications which the Respondent furnished to the Board during the investigation of the charge. These applications had been dated June 8, 2011, presumably by the applicants submitting them, but Jackson had covered up that date with a correction fluid and typed June 2, 2011, in its place.

One of the altered documents was the employment application of a hopper, Damian Pichon, which originally bore the date June 8, 2011. Jackson admitted using a correction fluid such as Wite Out to cover up this date and substituting June 2, 2011. During cross-examination by the General Counsel, Jackson testified, in part, as follows:

Q. Ms. Jackson, why did you do that?

A Well, as I was copying information, I just happened to look at it and see that one page had one date, and I just changed it on

the front. I just changed it to try to make everything coincide, since he worked the first day. It was stupid. I didn't think it through when I did it. I just did it.

Q. Did anyone tell you to make those changes?

A. No.

Both Jackson's conduct and her explanation, which I do not find wholly persuasive, raise doubts about the reliability of her testimony. Nonetheless, based on the entire record, I believe it is highly likely that Jackson did begin work for the Respondent on June 2, 2011, and did conduct a meeting with the hoppers on that date, rather than at some later time.

Moreover, this misconduct does not compel a conclusion that every bit of Jackson's testimony should be rejected. Whatever might have been the motive for her changing the dates on the application forms, I do not believe it caused her to give an incorrect starting date in her affidavit. Rather, considering all the circumstances, it seems likely that Jackson made an innocent mistake when she stated, in her earlier affidavit, that she began work for the Respondent on June 3, 2011.

Moreover, a number of hoppers testified that Jackson was present at the Richard's Disposal facility on June 2, 2011. For example, hoppers Kumasi Nicholas, Anthony Taylor, and Jason Bertrand testified that they saw Jackson at the facility on the first day of the Respondent's operations. Hopper Eldridge Flagge also was present at the facility on June 2, 2011, and saw Jackson there.

Hopper Harold Jefferson testified as follows concerning the meeting Jackson conducted on June 2, 2011:

Q. When you began work on the very first day of Creative Vision, can you tell us what happened on that very first day?
A. Well, we went—she held a meeting one morning
. . . .
Q. Who is that, when you say, "she"?
A. Ms. Jackson.
Q. Ms. Jackson held a meeting?
A. Yes. She got all the hoppers, and she explained to us that, you know, Creative Vision was open, and we no longer worked for Berry, and we'll receive two checks, one from Berry and one from Creative Vision, and, you know, basically that was it.
Q. Did she tell you what you were going to get paid?
A. Yes. She said—she explained to us how we was going to get paid, and, you know, what day the time goes in and, you know, stuff like that.
Q. How much did she tell you you were going to get paid?
A. She said we was going to be started off with $11 an hour, and we was going to—you know, everything over 48 hours is 16.50 an hour, you know, and—
Q. So you get overtime is what she was telling you.
A. Right. And they was—they started taking taxes out, you know. They was going to start taking taxes out.
Q. Did she mention holidays to you?
A. No. She didn't mention nothing about holidays.
Q. Was safety discussed?
A. Yes. They discussed safety.
Q. Who gave you your application, if you recall, to work for Creative Vision?
A. Ms. Jackson.

In sum, a number of witnesses confirm that Jackson was present at the Richard's Disposal facility and met with the hoppers on the day the Respondent began operations. Of course, some of the witnesses remembered the meeting in greater detail than others. However, all of the testimony paints a consistent picture and generally corroborates the following testimony, given by Jackson, describing what she told the hoppers at this meeting:

It was approximately about 3:40, because everybody doesn't get there for 3:30, so I waited to let some of them get there, you know, so I could meet with them. Well, they had a good bit of them that were there. So I met with them. I explained to them that it was a new company taking over that was not Berry Services anymore. It was going to be called Creative Vision. They were going to be making $11 an hour, guaranteed eight hours, time and a half being paid to them for overtime. That's hours worked over 40 hours. I also told them that taxes would be taken out of their money. They would not receive 1099s like they did with Mr. Berry, that they would receive W-2 forms. I also discussed safety issues with them.

Q. What kind of safety issues?
A. They had to have on a vest to get on a truck. They had to wear their pants pulled up. They couldn't wear their pants, because that's the fashion now where they're wearing their pants hanging down. But we don't want that. We want them to be dressed properly. They needed to have on a shirt and a belt at all times.
Q. What, if anything, was mentioned about holidays?
A. Yes. I told them they had four holidays. They had to work 180 days to receive the pay for the holidays.
Q. About how long would you say that meeting lasted?
A. Maybe 20, 25 minutes at the most.
Q. Did it go past 4:00 p.m.—or 4:00 a.m.? Excuse me.
A. Yes.

In at least one respect, Jackson's testimony goes beyond that of the hoppers who described the June 2, 2011 meeting. Jackson testified that some of the hoppers were so unhappy about the announced terms and conditions of employment that they walked away:

Q. Now, when the meeting was over, were there some hoppers who weren't satisfied with the terms and conditions that—the wages, the terms and conditions that had been announced by you?
A. Yes.
Q. What did they do?
A. They left the yard. They started discussing it and then they left the yard. I'm not working with this bullshit; people try to—I'm sorry, but that was—that is what was said. Okay. This is what I heard them saying. I can't pinpoint who it was, because there was a lot of people out there, and it is dark out there in the mornings. So they left the yard. Some of them just didn't—some people did refuse to work.

Based on the evidence discussed above, I find that the Respondent's owner, Richard III, determined the initial terms

and conditions of employment before the Respondent began operations. Indeed, I infer that one reason Richard III established the Respondent was to correct problems in the terms and conditions of employment under which the Berry III hoppers worked.

Although Berry III employed the hoppers, it assigned them to work on Richard's Disposal's trucks. As chief operating officer of Richard's Disposal, Richard III thus was aware of the irregularities in the way the hoppers were treated but had no direct way to address the matter so long as the hoppers worked for someone else. However, the problems were serious and some, such as Berry III's treating the hoppers as independent contractors and failing to pay overtime, appear to have violated Federal law.

By creating the Respondent and hiring the hoppers, Richard III was able to put an end to the unlawful way they had been treated, but achieving this goal necessarily involved setting new terms and conditions of employment. Credited evidence reflects that the Respondent decided to pay the hoppers an hourly rate, with overtime, and communicated this intention well before it began operations. Similarly, the record establishes that the Respondent decided to withhold taxes from the hoppers' paychecks, and communicated this intention while the hoppers were still employed by Berry III.

In sum, the record establishes that it was "perfectly clear" (using these words in the everyday sense) that the Respondent was going to hire the predecessors employees and continue operations largely unchanged. However, the Respondent did not fail to communicate candidly with the hoppers who would become its employees and thus did not fall within the definition of "perfectly clear" successor which the Board set forth in *Spruce Up Corp*., above.

The reason for this apparent difference is that the Board, exercising caution, did not "push the envelope" but instead articulated a narrower standard than the Supreme Court's language arguably might support. "We concede that the precise meaning and application of the Court's caveat is not easy to discern," the Board wrote, "But any interpretation contrary to that which we are adopting here would he subject to abuse, and would, we believe, encourage employer action contrary to the purposes of this Act and lead to results which we feel sure the Court did not intend to flow from its decision in *Burns*." *Spruce Up Corp.*, 209 NLRB at 195.

On occasion, some Board members have expressed the viewpoint that the *Spruce Up* standard not only is more restrictive than required by the Supreme Court's language but is also, in their opinion, too restrictive. See, e.g., *Canteen Co.*, 317 NLRB 1052, 1054–1055 (1995) (Chairman Gould, concurring). However, the *Spruce Up* standard remains Board law and I apply it here.

In *Spruce Up*, after explaining its reasoning, the Board stated:

> We believe the caveat in *Burns*, therefore, *should be restricted* to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. [Id. At 195 (footnote omitted, emphasis added.)]

Here, the credited evidence does not suggest that the Respondent, either actively or tacitly, tried to mislead employees into believing they would all be retained without change in their wages, hours, or conditions of employment. To the contrary, the record establishes that before it began operations, hoppers in the Berry III bargaining unit were aware that Respondent intended to make a number of significant changes.

Moreover, before 4 a.m. on the very first day of the Respondent's operations, and before hoppers got on the trucks, the Respondent's supervisor, Jackson, described the changes to them in detail. As a result, some of the workers decided not to accept employment and left.

In these circumstances, I conclude that the Respondent's conduct does not meet the test for "perfectly clear" successor which the Board established in *Spruce Up*. Therefore, I further conclude that the Respondent did not violate the Act by setting its initial terms and conditions of employment.

Refusal to Bargain Allegations

Complaint paragraph 9(a) alleges that from about October 2009 until about June 2, 2011, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the unit employed by M&B Services, Inc. The Respondent has denied this allegation.

As discussed above, the record establishes that on May 18, 2007, the Board certified Local 100, Service Employees International Union, as the exclusive representative of a unit of hoppers employed by M&B Services. The entity referred to herein as "Berry III" was doing business as M&B Services at the time of this certification and I conclude that until June 2, 2011, it had a duty to recognize and bargain with Local 100, Service Employees International and, after Local 100 disaffiliated from the Service Employees International Union, with Local 100.

Also, for the reasons discussed above, I have concluded that Local 100, the full name of which is Local 100, United Labor Unions, is the successor to Local 100, Service Employees International Union. Accordingly, I conclude that the government has proven the allegations raised by complaint paragraph 9(b).

Complaint paragraph 9(b) alleges that at all times since about June 2, 2011, based on Section 9(a) of the Act, the Union (Local 100, United Labor Unions), has been the exclusive collective-bargaining representative of the Respondent's employees in the unit. The Respondent has denied this allegation.

For the reasons discussed above, I have concluded that the Respondent became a *Burns* successor to Berry III on June 2, 2011, the date on which it began operations and on which it hired a representative complement of employees. The Union became the Section 9(a) exclusive representative on that date.

Complaint paragraph 10(a) alleges that about June 6, 2011, the Union, by letter, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the bargaining unit. Although the Respondent's answer denied this allegation, the evidence is clear and uncontroverted that the Union did send to the Respondent a

June 6, 2011 letter requesting bargaining. Indeed, the Respondent's posthearing brief stated that "the union's state director, Rosa Hines, visited [the Respondent] on Monday, June 6, and delivered a letter demanding recognition and bargaining." Therefore, I conclude that the government has proven the allegations raised in complaint paragraph 10(a).

Complaint paragraph 10(b) alleges that since about June 6, 2011, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit. The Respondent's answer denied this allegation.

The record establishes that the Union did not receive a reply to the June 6, 2011 request to bargain. On June 17, the Union filed the unfair labor practice charge which began these proceedings.

The Respondent did not meet with the Union until February 14, 2012, when the Union's state director, Rosa Hines, and another union representative conferred with the Respondent's attorney, Clyde H. Jacob III. After their initial meeting on Valentine's Day, representatives of the Union and the Respondent met about four more times. Hines credibly testified that the last such meeting was in late May or early June 2012:

> Q. Have you scheduled any other meetings?
> A. No. We're still—we're waiting back—Mr. Jacob said that he would talk his client and get back, so we're still waiting for him to get back to us.

Hines also testified, credibly and without contradiction, that the Union and the Respondent had not reached any agreements.

Based on Hines' testimony, which I credit, I find that between June 6, 2011, and about February 14, 2012, the Respondent failed and refused to bargain with the Union. It appears that as of February 14, 2012, when the Respondent's attorney met with the union representatives, that the Respondent has given the Union at least de facto recognition. It may be noted, however, that the Respondent's answer to the complaint, dated April 12, 2012, denied the allegation in complaint paragraph 9(b) that at all times since June 2, 2011, based on Section 9(a) of the Act, the Union has been the exclusive representative of the hoppers.

The complaint does not allege "surface bargaining," that is, going through the motions of negotiating but with an intent not to reach agreement, and the General Counsel has not argued such a theory. Additionally, the government did not seek to elicit the sort of detailed testimony about the negotiating process which is needed to prove "surface bargaining" allegations.

It appears clear that the alleged violations of Section 8(a)(5) do not concern what happened at the bargaining table but rather the Respondent's tardiness in even coming to the table. A successor employer's obligation to recognize the union attaches after the occurrence of two events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the successor employer of a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor. *University Medical Center*, 335 NLRB 1318 (2001). Accordingly, the Respondent's obligation to recognize and bargain with the Union began on June 6, 2011, when it received the Union's letter demanding such recognition and bargaining.

Section 8(d) of the Act states that 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 there under, and the execution of a written contract incorporating any agreement reached if requested by either party." 29 U.S.C. § 158(d) (emphasis added). An unwillingness to meet at reasonable times breaches the duty to bargain in good faith.

In *Gitano Group, Inc.*, 308 NLRB 1172 fn. 2 (1992), a union requested bargaining in August but the employer did not schedule a meeting until late December. The employer did not offer evidence of any particularly unusual or emergency condition which would justify the delay. The Board found that the employer had violated the Act. Here, the Respondent delayed for twice as long as the employer in *Gitano Group, Inc.* and the record neither suggests nor supports a finding of any particularly unusual or emergency circumstance which might justify such a delay.

The Respondent certainly had sufficient opportunity to present evidence to explain the cause of the delay and to argue, if appropriate, that there were mitigating circumstances. Not only did the complaint allege a violative refusal to recognize and bargain, but the General Counsel clearly put the Respondent on notice that its delay in recognizing and bargaining with the Union was an issue in this case. Indeed, counsel for the General Counsel began his opening argument with the observation that "ignoring a responsibility won't make it go away, and the longer one ignores it, the worse the situation becomes." The General Counsel then stated:

> On June 6, 2011, the hoppers union, Local 100, requested to bargain with the Respondent. Since that time, Respondent has failed and refused to recognize and bargain in good faith with the union, a plain violation of Section 8(a)(5) of the Act. Respondent knows it has this duty; yet it continues to ignore it.

Nonetheless, neither the Respondent's opening argument nor its posthearing brief focused on the approximately 8-month delay between the June 6, 2011 demand for recognition and bargaining and the first meeting, on February 14, 2012. If the Respondent believed there were legitimate reasons to justify the delay, it has not broadcast them from the rooftops.

The record leaves little room to doubt that the Respondent is, indeed, a successor to Berry III and, therefore, has become heir to Berry III's duty to recognize the Union and bargain with it. Considering that all the employees initially hired by the Respondent had worked in the Berry III bargaining unit, that they continued their same work from the same location and under the same supervision, and that there was no gap between the end of their employment with Berry and their hire by the Respondent, the conclusion becomes inescapable that the Respondent has a successorship obligation under both the *Burns* and *Fall River Dyeing* analytical frameworks. Reaching that conclusion does not take 8 months.

Therefore, I conclude that the Respondent delayed unreasonably in replying to the Union's bargaining request and in meeting with the Union's representatives. It thereby breached

its duty to bargain in good faith, as described in Section 8(d) of the Act, and violated Section 8(a)(5).

Even though the Respondent met with union representatives on February 14, 2012, it still has not clearly and unequivocally recognized the Union's status as the hoppers' exclusive representative. Indeed, its answer to the complaint denied such status. Moreover, it has taken the position, elaborated in its post-hearing brief, that the Union is not the successor to the originally certified labor organization, Local 100, Service Employees International Union. Similarly, it continues to challenge the appropriateness of the bargaining unit.

Therefore, I conclude that, notwithstanding the five meetings at which the Respondent discussed with the Union the hoppers' terms and conditions of employment, it still has not recognized the Union as their Section 9(a) representative and, therefore, continues to violate Section 8(a)(5) and (1) of the Act.

Alleged Unilateral Changes

Complaint paragraph 11(a) alleges that about June 2, 2011, the Respondent changed the manner in which it pays its employees. As amended at hearing, complaint paragraph 11(b) alleges that about July 13, 2011, the Respondent changed the manner in which employees are selected for work. Complaint paragraph 11(c) alleges that about June 11, 2011, the Respondent promulgated new work rules in the form of an employee handbook.

The Respondent's answer denies all these allegations. Additionally, the answer raises, as an affirmative defense, that "Any unilateral change was either required by law or legally de minimis in nature."

In making these allegations, the General Counsel assumes that the evidence proves the Respondent to be a "perfectly clear" *Burns* successor, and therefore without the right to establish unilaterally its initial terms and conditions of employment. As discussed above, a "perfectly clear" *Burns* successor is an exception to the general rule that a successor employer may set its initial terms and conditions of employment without bargaining with the union.

However, for the reasons discussed above, I have concluded that the Respondent was not a "perfectly clear" *Burns* successor. Accordingly, it had no duty to bargain with the Union before establishing the initial wages and working conditions and did not violate the Act by doing so unilaterally.

Because I conclude that the Respondent did not violate the Act by establishing initial wages and working conditions, it is not necessary to reach the Respondent's "affirmative defense." However, I understand that the Respondent is raising it to argue that it could not continue the predecessors' practice of treating the employees as if they were independent contractors, that is, by paying them by the day without regard to the Fair Labor Standards Act and by failing to withhold taxes as required by the Internal Revenue Code. These arguments, I believe, clearly are nonfrivolous and would merit consideration had I concluded that the Respondent was a "perfectly clear" *Burns* successor. However, in view of my conclusion to the contrary, I need not and do not consider the Respondent's affirmative defense.

The unilateral change alleged in complaint paragraph 11(a) concerned the Respondent paying employees at $11 per hour, with taxes withheld. Because the Respondent was a successor, and not a "perfectly clear" *Burns* successor, it lawfully established such initial terms of employment.

The unilateral change alleged in complaint paragraph 11(c) concerns work rules promulgated in an employee handbook. Although the complaint alleges that the Respondent issued this handbook about June 11, 2011, the credited evidence establishes that many employees received their handbooks on June 4, 2011. However, I do not believe that the lawfulness of these new rules depends either on the exact date when the handbook was printed or the date when an employee received the handbook.

The rules took effect when the Respondent began its operations, not when the handbook was printed or distributed. The issue of whether an employee had notice of a rule—and, if so, when—is distinct from the issue of when the rule came into existence. Because I find that the Respondent promulgated these rules as part of the initial terms and conditions of employment it established at startup, I conclude that it had no duty to bargain with the Union and that it did not violate the Act.

The allegations in complaint paragraph 11(b) raise different issues. Originally, paragraph 11(b) of the complaint alleged that *about June 9, 2011*, the Respondent changed the manner in which employees were selected for work. At hearing, the General Counsel moved to amend the complaint to change the date to July 13, 2011. Over the Respondent's objection, I granted the amendment. In opening argument, the General Counsel described the allegation as follows:

> Lastly, under Berry, hoppers were regularly assigned to the same truck and had never been replaced by new employees for training. You will hear Respondent during July 2011, well after it had succeeded Berry, removed hoppers from their regular trucks and then replaced them with new employees, employees still in training. Respondent ignored its legal obligation to bargain with the union, and in doing so, further worsened the situation.

The General Counsel's posthearing brief shed further light on the scope and gravamen of the allegations. It stated, in part:

> [I]n July 2011, Respondent, through Supervisor Karen Jackson, began replacing experienced hoppers on trucks with inexperienced hoppers. While working for Berry III, Jackson always assigned experienced hoppers to trucks before inexperienced hoppers for safety reasons. However, Jackson changed this policy in July 2011, when she replaced hopper Eldridge Flagge with a rotation of three new and completely inexperienced hoppers. Jackson did the same with experienced hopper Booker Sanders. Flagge and Sanders continued to show up for work, but Jackson eventually simply stopped assigning them to work for Respondent, favoring the inexperienced hoppers over the veteran hoppers.

(Exhibit and transcript citations omitted.)

The General Counsel's argument, as set forth above, depends on the assumption that the Respondent is a "perfectly clear" *Burns* successor and therefore obligated to bargain with the Union before changing the terms and conditions of employment which the predecessor had established. However, I have concluded that the Respondent was not such a "perfectly clear"

successor and thus had the right to establish its own initial terms and conditions of employment without having first to bargain with the Union.

If the Respondent is not a "perfectly clear" *Burns* successor, then it doesn't matter whether Jackson's action changed one of the predecessor's terms or conditions of employment. Rather, the relevant question concerns whether her action changed a policy that the *Respondent* adopted when it lawfully set the initial terms and conditions of employment. A departure from the Respondent's initial terms and conditions of employment might trigger a bargaining obligation, but that would be the case only if the change affected some term or condition which was a mandatory subject of collective bargaining, and only if the change were material, substantial, and significant. See, e.g., *Ead Motors Eastern Air Devices,* 346 NLRB 1060 (2006).

The General Counsel's post-hearing brief argues that Jackson made a change in the "method used to assign hoppers" and that this change was unlawful even if the Respondent were not shown to be a "perfectly clear" *Burns* successor. This argument appears to be premised on the assumption that at the time Jackson supposedly made the change, in July 2011, the Respondent already had in place a policy or practice concerning the assignment of hoppers to trucks, and that Jackson changed it. Thus, the General Counsel's brief states:

> In either scenario [whether "perfectly clear" *Burns* successor or not] Respondent unilaterally changed the method used to assign hoppers to trucks without first providing the Union with notice and an opportunity to bargain regarding the change of a mandatory subject of bargaining, and therefore, violated Section 8(a)(5) of the Act.

Thus, argument assumes that there was an existing policy or practice—an established "method used to assign hoppers to trucks"—and that Jackson changed it. Proving that there was, in fact, such a method or practice is a necessary antecedent to proving that the Respondent changed it, and the General Counsel bears the burden of proof.

Indeed, to establish a violation, the government must prove a number of elements. It must show (1) the existence of a particular term or condition associated with the workers' current employment by the Respondent, (2) that this term or condition of employment concerns a mandatory subject of collective bargaining, (3) that the Respondent changed it, (4) that the change was material, substantial, and significant, and (5) that the Respondent made the change without affording the employees' exclusive representative notice and a meaningful opportunity to bargain.

The government has not carried its burden of proving that there was an extant practice or "method used to assign hoppers to trucks." The General Counsel elicited testimony from Jackson to the effect that when she worked for Berry III she chose to assign to the trucks experienced hoppers rather than inexperienced. However, because the Respondent is not a "perfectly clear" *Burns* successor and was not bound to retain the Berry III practices, Jackson's testimony about her work for Berry III is largely irrelevant.

Jackson may well have continued to prefer experienced hoppers over inexperienced, but I do not consider such a personal preference to be the same thing as an established practice. Rather, it seems likely that her opinion that experienced hoppers are safer was simply one factor she took into account in exercising her independent judgment as a supervisor.

In this regard, the complaint alleges that Jackson is a supervisor of the Respondent within the meaning of Section 2(11) of the Act. That subparagraph of the Act limits the definition of supervisor to those individuals who use independent judgment when they exercised authority on behalf of the employer. See 2 U.S.C. § 152(11). The government's allegation that Jackson meets the statutory definition of supervisor necessarily includes the allegation that Jackson must use independent judgment in performing her supervisory duties, and the Respondent has admitted it.

Jackson's supervisory duties include deciding which hoppers to assign to which trucks, decisions based not on one but a number of different factors, one of them being the relative experience or inexperience of the workers available for assignment. Jackson's testimony makes clear that when she was making such decisions as a supervisor for Berry III she took into account the relative experience of the hoppers available for assignment.

It would not be surprising if Jackson's belief that less experience hoppers are more likely to have accidents continues to influence how she exercises her independent judgment as a supervisor for the Respondent. However, even should she decide to give this factor less weight, or no weight at all, it does not change the "method used to assign hoppers to trucks." That method is to have the supervisor make the decisions, as need arises, using independent judgment.

Certainly, it is possible to imagine situations in which an employer promulgates a list of criteria to be used by the supervisor in making such choices or, going even further, assigns each criterion a specific weight. The present record does not suggest that the Respondent did so.

The government has not pointed to any document amounting to a statement of the Respondent's policy on how hoppers should be assigned to trucks. Likewise, the record does not suggest that Jackson, Richard III, or any other person speaking for the Respondent announced such a policy.

Compared to Berry III, the Respondent has demonstrated far more inclination to set policy, to memorialize such policies in employee manuals, and, more generally, to do things "by the book." Nonetheless, the General Counsel has not offered any document which reflects either the terms of a policy about assigning hoppers to trucks, or even the existence of such a policy.

Of course, a practice can come into existence and become established without any formal statement of policy. However, the present record does not persuade me that such a practice existed.

Moreover, this unilateral change allegation rests largely on Jackson's testimony. The General Counsel has argued forcefully that Jackson is not a credible witness but rather someone willing to alter the dates on documents submitted during a government investigation. Additionally, she initially erred concerning the date on which she began work for the Respondent.

Further, considering her testimony as a whole leads me to

suspect it was affected by a desire to place the Respondent, and herself, in a favorable light. Thus, it is difficult to evaluate how much of her professed concern about hopper safety reflected her actual practice as a supervisor and how much was exaggeration for the sake of appearance.

Other witnesses have corroborated some portions of Jackson's testimony, such as that pertaining to what she told the hoppers during the meeting on June 2, 2011, and, in view of that corroboration, I have credited those portions. However, Jackson's testimony about mental processes when assigning hoppers for Berry III stands by itself and I have little confidence in it.

For these reasons, I conclude that credible evidence does not establish that the Respondent had an established practice regarding how hoppers were to be assigned to trucks. Because the government has not proven the existence of such a practice, it also cannot prove there was a change in it.

In sum, with respect to the allegations raised in complaint paragraph 11(b), I find that the government has not carried its burden of proof. With respect to the other unilateral change allegations, I conclude that the Respondent, not being a "perfectly clear" *Burns* successor, acted lawfully in establishing the initial terms and conditions of employment unilaterally. Therefore, I recommend that the Board dismiss these allegations.

REMEDY

Beginning June 6, 2011, and continuing to the present, the Respondent's refusal to recognize and bargain with the Union has placed it in violation of Section 8(a)(5) and (1) of the Act. To remedy these violations, I recommend that the Board order the Respondent to recognize and bargain with the Union without further delay and, additionally, to post the ":Notice to Employees" attached to this decision as Appendix.

CONCLUSIONS OF LAW

1. The Respondent, Creative Vision Resources, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 100, United Labor Unions is a labor organization within the meaning of Section 2(5) of the Act and the exclusive representative, within the meaning of Section 9(a) of the Act, of the following employees who constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and part-time hoppers employed by Creative Vision Resources, LLC, who work on trucks in the collection of garbage and trash in the Greater New Orleans, Louisiana area, excluding all other employees, guards and supervisors as defined in the Act.

3. Beginning June 6, 2011, and continuing to date, the Respondent has failed and refused to recognize Local 100, United Labor Unions, as the exclusive representative of its employees in the appropriate unit described in paragraph 2, above, and thereby has violated and is violating Section 8(a)(5) and (1) of the Act.

4. The Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Creative Vision Resources, LLC, New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 100, United Labor Unions, as the exclusive representative of all full-time and part-time hoppers it employs in the New Orleans, Louisiana area.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Grant immediate and full recognition to Local 100, United Labor Unions, as the exclusive representative of its full-time and part-time hoppers and bargain with that labor organization in good faith.

(b) Within 14 days after service by the Region, post at its facilities in New Orleans, Louisiana, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 2011.

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

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

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

that the Respondent has taken to comply.

Dated Washington, D.C. January 7, 2013

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Local 100, United Labor Unions, as the exclusive representative of our full-time and part-time hoppers.

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

WE WILL grant immediate and full recognition to Local 100, United Labor Unions, as the exclusive representative of all hoppers we employ in the Greater New Orleans area, and will bargain in good faith with that labor organization.

CREATIVE VISION RESOURCES, LLC