Galloway School Lines, Inc. *and* District 1199, New England Health Care Workers, Service Employees International Union, AFL–CIO. Cases 1–CA–28418 and 1–CA–28590

August 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On December 1, 1992, Administrative Law Judge George F. McInerny issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed both a brief in support of, and limited cross-exceptions to, the judge's decision.

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 and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] consistent with our explanations below, and to adopt the recommended Order as modified and set forth in full below.[3]

I. OVERVIEW

This case involves the successorship doctrine under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and more specifically, the Respondent's unlawful hiring plan designed to avoid having to recognize the collective-bargaining representative of the predecessor's employees, and the remedial ramifications of such an unfair labor practice.

The predecessor employer, a division of Laidlaw Transit, Inc. (Laidlaw), had a contract with the school committee of the town of Coventry, Rhode Island, for the schoolbus transportation of the town's children for the school year 1990–1991. Laidlaw also had a collective-bargaining agreement with the Union effective from September 1, 1990, until August 31, 1993, covering its schoolbus drivers and monitors. In February 1991,[4] the Respondent outbid Laidlaw for the busing contract for the 1991–1992 school year and was awarded the franchise. The Respondent was to take over Laidlaw's bus routes in September. In late February, the Union contacted the Respondent by letter, identifying itself as the collective-bargaining representative of the drivers and monitors for the Coventry routes, and expressing its understanding that the Respondent had been awarded the contract for the upcoming school year. The letter stated further that the drivers and monitors wished to continue their employment and requested that the Respondent keep the Union informed concerning the transition from Laidlaw to the Respondent. The Respondent did not reply to the Union's letter.

At the Union's encouragement, on May 24, a group of 12–14 Laidlaw drivers and monitors went to the Respondent's office to request employment applications. The Respondent's president, Don Galloway, told them, inter alia, that job openings would be advertised subsequently in the local newspapers. According to the credited testimony, he also told them that his Company was not union, would never be union, that he would not hire union, and that he would do whatever he could to stay nonunion.

In mid-July, after placing newspaper advertisements concerning its driver and monitor positions, the Respondent began its hiring program. Drivers were hired first; the Respondent followed its customary procedure, checking applicants' driving records and references, and conducting police checks and personal interviews. When the employment of drivers was completed in early August, the Respondent had hired 28 drivers, 14 of whom were former Laidlaw drivers. Between 11 and 16 applicants who were Laidlaw drivers were not hired.

The Respondent then focused on filling its monitor positions. As more fully detailed in the judge's decision, the Respondent assertedly used a new procedure—a ''random selection'' of applicants—to hire its monitors. Thus, according to the Respondent, it isolated the monitor applications on receipt and stored them without any logical order. When it determined that 27 monitor positions needed to be filled, according to the Respondent it randomly selected 27 monitor applications from the accumulated batch. Further according to the Respondent, it listed the names and telephone numbers of these 27 applicants from the application documents and, without further reference to the documents, hired the 27 applicants after completing

[1] 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] In affirming the judge's conclusion that the Respondent is a *Burns* successor employer, we find it unnecessary to rely on the judge's use of a *Wright Line* analysis in part III,D of his decision.

[3] We affirm the judge's finding of the appropriate bargaining unit; see the judge's decision, fn. 4. Accordingly, we deny the General Counsel's cross-exception requesting conformance of the bargaining unit found by the judge with that alleged in the complaint. Otherwise, the General Counsel's cross-exceptions addressing errors in the judge's recommended Order and notice are granted. The Board's Order set out at the end of this decision corrects those inadvertent errors and otherwise sets forth provisions more appropriate to remedy the violations committed by the Respondent, as explained below.

We shall further modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] All dates hereafter are in 1991 unless otherwise noted.

only the state-mandated age and police checks. These 27 were hired from a pool of 55 monitor applicants. Of the 27 hirees, 9 were Laidlaw monitors and 18 were not. Fourteen Laidlaw monitor applicants were not hired.

Overall, the Respondent filled 55 positions—both drivers and monitors. Of these 55 employees, 23 had been Laidlaw employees (14 drivers and 9 monitors) and 32 had not worked for Laidlaw (14 drivers and 18 monitors).

The Union filed unfair labor practice charges alleging unlawful discrimination with respect to both the Laidlaw drivers and monitors who had applied with the Respondent and had not been hired. On investigation of the Respondent's hiring of its drivers, the Regional Director declined to issue a complaint, concluding that there was insufficient evidence to find that the Respondent unlawfully refused to hire the Laidlaw driver applicants; the General Counsel upheld the Regional Director's determination on appeal. The Regional Director did issue a complaint alleging, inter alia, that the Respondent had engaged in a discriminatory plan concerning the hiring of its monitors in order to avoid employing a sufficient number of Laidlaw monitors to require that it recognize and bargain with the Union as the majority representative of its new employee complement. The complaint, as ultimately amended, alleged that there were 10 discriminatees, i.e., 10 Laidlaw monitor applicants whom the Respondent unlawfully failed to hire, although, as noted above, there were 14 Laidlaw monitor applicants who were denied employment with the Respondent. There is no explanation in the record for this discrepancy.

The judge concluded that Don Galloway's May 24 remarks to the Laidlaw employees concerning the hiring of union workers violated Section 8(a)(1), as alleged. He also found that the Respondent's ''random selection'' of applicants for the hiring of monitors was a subterfuge designed to limit unlawfully the hiring of Laidlaw monitor applicants and thus avoid collective-bargaining obligations under the *Burns* successorship doctrine. In light of this 8(a)(3) violation and other relevant evidence, the judge found that the Respondent was a *Burns* successor to Laidlaw with a statutory obligation to bargain with the Union as the majority representative of its employees. He concluded, therefore, that the Respondent violated Section 8(a)(5) by failing to recognize and bargain with the Union. He also found, implicitly relying on the Respondent's unlawful discriminatory hiring plan, that the Respondent was required to follow the Union's collective-bargaining agreement with Laidlaw in setting initial terms and conditions of employment. He concluded that the Respondent independently violated Section 8(a)(5) by unilaterally changing its employees' terms and conditions from those established by the agreement prior to bargaining over these matters with the Union. His recommended Order included restoration of the contract's terms and conditions and a make-whole remedy for all unit employees consistent with the agreement. The Respondent has excepted, inter alia, to the judge's 8(a)(3) finding and his 8(a)(5) failure to recognize the Union and unilateral-change findings and the accompanying remedy.

We affirm without further comment the judge's findings concerning the Respondent's May 24 8(a)(1) violation, its successorship status under *Burns*, and its unlawful refusal to recognize and bargain with the Union. In addition, we agree with the judge, to the extent consistent with our discussion below, that the Respondent's hiring of the monitors—both in plan and in execution—violated Section 8(a)(3), that the Respondent thereafter violated Section 8(a)(5) by, inter alia, its unilateral changes in the bargaining unit's terms and conditions of employment, and that the judge's recommended status quo ante and make-whole remedies are appropriate for the 8(a)(5) violations as to all of the unit employees.

II. THE UNLAWFUL HIRING PLAN

Wright Line[5] provides the appropriate overall analytical framework for violations like the Respondent's discriminatory hiring plan, which in this case was implemented to avoid Burns bargaining obligations.[6] See, e.g., *Weco Cleaning Specialists*, 308 NLRB 310 (1992); *Honda of Hayward*, 307 NLRB 340, 350 (1992). This is so because the alleged successor employer's motive is the critical issue. Within the *Wright Line* framework, there are several factors which the Board has considered in analyzing the lawfulness of the alleged successor's motive: expressions of union animus; absence of a convincing rationale for the failure to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct demonstrating a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its hiring in a manner precluding the predecessor's employees from being hired as a majority of the new

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] Chairman Gould concurs in his colleagues' findings and conclusions in this case that a violation has been established under the standards set forth in *Wright Line*. However, as Chairman Gould stated in *Paper Mart*, 319 NLRB 9, 12 (1995), the appropriate motive analysis is not *Wright Line*. Unlawful discrimination may be evidenced where the General Counsel proves ''by a preponderance of evidence that an employer's adverse action against an employee because of his protected activity is based in whole or in part on antiunion animus.'' For the reasons set forth in *Paper Mart*, *Wright Line* standards are relevant to the remedy fashioned by the Board.

Chairman Gould has stated in *Paper Mart* that he would not adopt ''the practice of citing this opinion in future cases.'' However, he finds it necessary to reiterate his views in this case given the Board's explicit expression of support for that rationale.

owner's overall work force. See, e.g., *U. S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1315–1319 (7th Cir. 1991), enfg. 293 NLRB 669 (1989); *Lemay Caring Center*, 280 NLRB 60, 69–70 (1986), enfd. mem. sub nom. *Dasal Caring Centers v. NLRB*, 815 F.2d 711 (8th Cir. 1987).

The General Counsel made a convincing prima facie showing under *Wright Line* in this case, i.e., a showing that antiunion considerations were a motivating factor in its hiring decisions regarding the monitors. Don Galloway's unlawful remarks on May 24—that the Respondent was not and would never be union, that he would not hire union workers, and that he would do whatever he could to remain nonunion—provide a strong demonstration of union animus. Further, knowledge of each individual Laidlaw monitor applicant's employment with the predecessor—and therefore knowledge of his or her union-represented status—was available from the employment applications submitted to the Respondent. In addition, such knowledge may be otherwise imputed to the Respondent: Cindy Primrose, formerly the terminal manager for Laidlaw's schoolbus operation at Coventry and hired to be the Respondent's Coventry terminal manager, received the applications in the first instance and would easily have recognized by name which of the applicants had worked for Laidlaw.

The Respondent also engaged in inconsistent hiring practices. According to Keith Galloway, Don Galloway's son and the Respondent's assistant general manager, in other school districts where the Respondent had busing contracts the terminal manager alone would be responsible for the hiring of bus monitors. In the Coventry situation, however, Keith Galloway himself was admittedly in charge of the monitor hiring. Also according to Keith Galloway, the Respondent had never before used a ''random-selection'' process to hire monitors; in fact, he effectively conceded that the assertedly ''random'' process was a specifically-tailored response to the fact that union-represented Laidlaw monitors would be applying. In addition, it is noteworthy that the Respondent, by its asserted use of the ''random-selection'' method, admittedly took no account of the relevant employment information in the monitor applications, for example, the experience of the Laidlaw monitor applicants with regard to the Coventry bus routes.

Overall, it is apparent that the evidence was more than adequate to support an inference that the union-represented status of the Laidlaw monitor applicants—and the related fact that the hiring of a certain percentage of them would result in a statutory bargaining obligation—was a motivating factor in the Respondent's denial of employment to the alleged discriminatees in this case.

Given that showing of antiunion motive, it was the Respondent's burden to establish that the alleged discriminatees would not have been hired even in the absence of their protected status. The Respondent's defense is that its asserted ''random-selection'' method of hiring the monitors was a ''fair,'' nondiscriminatory hiring practice in the circumstances. However, in light of the judge's discrediting of Keith Galloway, the Respondent in effect has provided no creditable evidence generally in defense of its hiring decisions and particularly with respect to the ''random-selection'' process. Moreover, the Respondent cannot show that it would have used a ''random-selection'' process in the absence of the alleged discriminatees' union-represented status, in view of the fact that it conceded that this method was chosen *because* the unionized Laidlaw monitors would be applying for positions with the Respondent.

Finally, even if we were to assume that the Respondent, as it contends, randomly selected the monitor applications, it did not establish *when* it chose to utilize this procedure. As set forth above, the Respondent was in a position to know, on receipt, which of the monitor applications were from Laidlaw employees. Accordingly, it was in a position to know how many in the pool of monitor applicants were Laidlaw employees, i.e., 23 out of 55. In these circumstances, and particularly in light of the Respondent's burden to overcome the General Counsel's prima facie case, we would infer that the Respondent did not choose a ''random-selection'' process *until* it knew that the number of Laidlaw applicants represented less than 50 percent of the applicant pool. At that point, a random selection from the pool would foreseeably result, on the basis of mathematic probability, in the employment of a corresponding percentage of Laidlaw applicants such that they would be less than 50 percent of the total number of monitors hired. It would therefore be likely to assure that the Respondent would not have a bargaining obligation under *Burns*[7]—the unlawful goal the Respondent is alleged to have sought.

Therefore, consistent with the above discussion, we agree with the judge that the Respondent's asserted ''random-selection'' process was a subterfuge, that its failure to hire the alleged discriminatees in this case was part of a plan to avoid bargaining obligations respecting the entire driver/monitor unit under the *Burns* successorship doctrine, and that it violated Section 8(a)(3) and (1).

[7] At the time that the monitors were hired, exactly 50 percent of the Galloway drivers were former Laidlaw drivers. Thus, the Union's majority status was dependent on whether a majority of the monitors were former Laidlaw employees.

III. THE UNLAWFUL UNILATERAL CHANGES AND THE APPROPRIATE REMEDY

In light of the Respondent's 8(a)(3) hiring plan and other relevant factors, the judge found that it was a *Burns* successor and that it violated Section 8(a)(5) by refusing to recognize and bargain with the Union. Also because of the Respondent's unlawful hiring plan, he found that, from the initiation of its successor operation, the Respondent was required to follow the terms and conditions of the collective-bargaining agreement between the Union and Laidlaw, the Respondent's predecessor—the implication being that the contract provisions constituted the status quo for employment conditions and the starting point for the Respondent's bargaining obligations with the Union. In effect, the judge found that it was inappropriate in the circumstances to permit the Respondent to set initial terms and conditions of employment unilaterally—normally the privilege of a successor employer under *Burns*. He concluded that the Respondent violated Section 8(a)(5) by varying from the contractual conditions without bargaining with the Union, and he ordered that it restore the status quo ante and that it make whole all bargaining unit employees consistent with the contract's provisions.

In *Burns*, as discussed in more detail below, the Supreme Court stated in dictum that there might be instances in which it was clear that the successor would be retaining all of the predecessor employees, so that it would be appropriate to require bargaining with the union before fixing the employees' terms and conditions of employment. Hence, changing their terms and conditions unilaterally at the start would violate Section 8(a)(5). The issue we consider here is whether such an 8(a)(5) unilateral-change violation, and corresponding order requiring a successor employer to restore the predecessor's contractual terms and conditions of employment, is appropriate when a successor employer discriminatorily failed to hire some, but not ''all,'' predecessor employees in order to avoid a bargaining obligation, i.e., when some of the predecessor employees who applied but were *not* hired by the successor were not unlawfully denied employment by the successor. For the reasons set forth below, we find that such an order is appropriate.

It is clear that the 8(a)(3) violation in this case warrants a finding that the Respondent would have employed a sufficient number of predecessor employees to be a successor employer had it acted lawfully. For remedial purposes, the Respondent is considered to have hired 33 of these employees (all of the 10 alleged discriminatees and the 23 other Laidlaw employees actually hired) in a unit of 55 employees. It is less clear, however, whether these findings warrant an order requiring the Respondent to reinstate the predecessor's terms and conditions of employment, and to make the unit employees whole for any variance to their detriment from those employment conditions.

The Board, with court approval, has found such an order to be an appropriate remedy in prior cases involving new employers that discriminated in hiring in order to avoid a bargaining obligation. See *U. S. Marine Corp*., 293 NLRB 669 (1989), enfd. en banc 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992); *Shortway Suburban Lines*, 286 NLRB 323 (1987), enfd. 862 F.2d 309 (3d Cir. 1988); *State Distributing Co*., 282 NLRB 1048 (1987); *American Press*, 280 NLRB 937 (1986), enfd. 833 F.2d 621 (6th Cir. 1987); *Love's Barbeque Restaurant*, 245 NLRB 78 (1979), enfd. in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). As a factual matter, in those cases the Board found 8(a)(3) violations with respect to all or virtually all of the predecessor employees not hired or retained. In the instant case, however, the General Counsel alleged, and we have found, 8(a)(3) violations only with respect to 10 predecessor employees—10 of the 14 applicants who had worked for Laidlaw as monitors and were denied employment by the Respondent. In addition, as noted previously, the Regional Director investigated unfair labor practice charge allegations regarding the failure to hire between 11 and 16 former Laidlaw *drivers* who had applied with the Respondent. The allegations were administratively dismissed because of insufficient evidence that the Respondent's denial of employment to them was discriminatory. Thus, we cannot find that the Respondent unlawfully discriminated against 15–20 Laidlaw employees who sought and were denied employment with the Respondent.

Previous cases have not addressed the precise factual scenario presented in the instant case. In addition, there is language in prior Board cases arguably supporting both sides of this difficult issue. Some cases articulate the governing standard in terms of whether the new employer intended to retain all or substantially all of the predecessor employees. See, e.g., *Boeing Co*., 214 NLRB 541 (1974), affd. 595 F.2d 664, 671 (D.C. Cir. 1978), cert. denied 439 U.S. 1070 (1979). Other cases speak in terms of an intent to retain enough predecessor employees to make it evident that the union's majority status will continue. See, e.g., *Spitzer Akron, Inc*., 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976). In our view, a proper understanding of the Supreme Court's decision in *Burns* is critical to the resolution of the issue presented here. A careful study of *Burns* and its progeny leads us to the conclusion that the Respondent was required to adhere to the predecessor's terms and conditions of employment and should be ordered to restore that situation as a precondition for bargaining with the Union. Accordingly, we shall begin with an examination of

Burns and shall then apply its principles to the facts of the instant case.

A. *The Supreme Court's Burns Decision*

Burns involved a new employer (Burns) that replaced another employer (Wackenhut) in performing security services for a third employer. Burns hired 27 Wackenhut employees in June, and, in offering them employment, explained that Burns ''could not live with'' the existing contract between Wackenhut and the union. In addition, Burns transferred 15 of its own guards from other locations. Thus, the former Wackenhut employees constituted a majority of the new Burns work force. Burns commenced operations on July 1. On July 12, the union that had represented the Wackenhut employees demanded recognition. Burns refused to recognize the union. There was no allegation that Burns had discriminated in its hiring.

The Supreme Court's opinion contains three key holdings. First, the Court agreed with the Board that Burns was a successor employer that violated Section 8(a)(5) of the Act by failing to recognize the union as the representative of its employees. The Court stated that ''where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of Section 8(a)(5) and Section 9(a) by ordering the employer to bargain with the incumbent union.'' 406 U.S. at 281.

Second, the Court held, contrary to the Board, that Burns was not bound as a matter of law to observe the substantive terms of the collective-bargaining agreement negotiated with Wackenhut but not agreed to or assumed by Burns. Therefore, the Court set aside the Board's finding of an 8(a)(5) violation based on Burns' failure to honor the existing contract between the union and Wackenhut. 406 U.S. at 281–291.

Finally, in the last section of its opinion, the Court addressed the issue of whether the Board's order requiring Burns to make whole its employees for any losses suffered by reason of Burns' refusal to honor the Wackenhut contract could be sustained on the alternative ground that Burns had unilaterally changed existing terms and conditions of employment. It is this portion of the *Burns* opinion that is of greatest relevance to our decision today. The first sentence of the last paragraph of *Burns* states:

> 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 294–295.]

Viewed in isolation, this sentence may be interpreted to mean that a new employer is free to set its own initial terms unless it hires all or virtually all of the predecessor's employees. However, the very next sentence in *Burns* reads as follows:

> In other situations, however, 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 as required by Section 9(a) of the Act, 29 U.S.C. § 159(a). [Id.]

We believe that these two sentences must be read together and in harmony with the Court's decision as a whole. In our view, the above-quoted sentences mean that a duty to bargain over initial terms can arise not only in situations where the new employer's plan is to retain virtually every predecessor employee, but also in cases where, although the plan is to retain a fewer number of predecessor employees, it is still evident that the union's majority status will continue.[8]

Significantly, this reading of *Burns* is supported by the Court's application of its principles to the facts of that case. Under an interpretation isolating the first sentence above, the Court would have simply looked to see whether Burns had retained all or virtually all of the Wackenhut employees. However, the Court's inquiry was not focused along those lines. Instead, the Court searched for the point at which it was ''apparent'' that Burns had an obligation to bargain. 406 U.S. at 295. The Court selected ''late in June'' as that key date because that was the point at which Burns had ''selected its force of guards.'' Id. Finding no evidence of any unilateral changes after that date, the Court held that the Board's make-whole order could not be sustained on the theory that Burns had committed an unfair labor practice by unilaterally changing existing terms and conditions of employment.

Furthermore, our reading of *Burns* finds solid support in the statutory policies underlying that decision. At the outset of its analysis (406 U.S. at 277) and again in the final paragraph of its opinion (406 U.S. at 295), the Court relied on the majority rule principle embodied in Section 9(a) of the Act. Requiring a new employer to bargain over initial terms in situations where there is a virtual certainty that the union's majority status will continue is wholly consistent with that fundamental statutory policy.

[8] Although it focused on a different point—the significance of the term ''full complement''—the Court in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 47 fn. 14 (1987), also emphasized the importance of reading the two sentences together.

Finally, we note that the two *Burns* sentences must be read together to avoid results that the Court clearly did not intend. For example, under an interpretation relying on the first sentence alone, a new employer ''planning to retain all'' predecessor employees would be required to bargain with the union over initial terms, even if it were apparent that the union's majority status would not continue because the new employer also planned to dramatically increase the size of the predecessor's work force. In addition, a new employer *not* ''planning to retain all'' predecessor employees would not be required to bargain with the union over initial terms, even if it were apparent that the union's majority status would continue because the new employer also planned to employ a smaller work force consisting solely of predecessor employees. Accordingly, we find that a new employer's ''plan to retain all'' predecessor employees is not the exclusive factor for determining whether there is an obligation to bargain over initial terms. Instead, it is necessary to consider all the circumstances of the case, including the planned size of the new employer's work force.

To summarize, the duty to bargain may not arise when initial employment terms are set because it may not be evident at that time that the union's majority status in the old work force will continue in the new one. However, in other situations, it may be apparent from the new employer's hiring plan that the union's majority status will continue, and then the new employer is required to bargain over initial terms. One example of the latter scenario is a new employer that anticipates taking over the predecessor's work force as its own (''plans to retain all the employees in the unit'') with no change in the size of the employee complement. However, this is not the sole circumstance when it is evident from the new employer's hiring plan that the union's majority status will continue.

B. *Burns Principles Applied to the Instant Case*

The instant case does not involve a successor employer that had lawful hiring plans with respect to the predecessor employees. Rather, this case involves a successor whose only *plan* was to avoid recognizing and bargaining with the Union by discriminating in hiring in order to ensure that a majority of the employees in the new unit were *not* employees of the predecessor.

Burns principles cannot be neatly applied to such an employer because we simply do not know what its hiring plan would have been had it acted lawfully. In other words, it is uncertain whether, absent the Respondent's unlawful conduct, it would have planned to retain a sufficient number of predecessor employees to make it evident that the Union's majority status would continue.

Under these circumstances, we find applicable the *Love's Barbeque-U. S. Marine* line of case law cited above.[9] These cases involved new employers that discriminated in hiring in order to avoid successorship. The Board recognized that the unlawful conduct made it uncertain whether the new employer, absent its unlawful conduct, would have been entitled to set initial employment terms. The Board reasoned that this uncertainty must be resolved against the wrongdoer because it cannot be permitted to benefit from its unlawful conduct.

Similarly, we resolve the uncertainty in the instant case against the Respondent and infer that, but for its unlawful scheme, the Respondent would have planned from the outset to employ a sufficient number of Laidlaw employees to make it evident that the Union's majority status would continue. Thus, we find that the Respondent was obligated to consult with the Union prior to setting initial terms that were different from the predecessor's terms.

Therefore, because the Respondent unlawfully refused to hire certain of the predecessor's employees in order to avoid recognizing and bargaining with the Union, it is appropriate to find that the Respondent had a statutory obligation to adhere to the employment conditions of the collective-bargaining agreement between the Union and Laidlaw from the initiation of its successor operation, and a statutory obligation to bargain with the Union before making changes in that status quo. We further find that the Respondent violated Section 8(a)(5) not only by refusing to recognize the Union as the majority representative of its employees, but by making unilateral changes in employment conditions without first bargaining with the Union. Finally, we find that the appropriate remedy for these 8(a)(5) violations is to require the Respondent to recognize and bargain with the Union, and to retroactively restore the terms and conditions of employment that existed under the predecessor's contract with the Union until such time as the Respondent and the Union bargain to agreement or to impasse, and to make whole the bargaining unit employees in a manner consistent with the contract's provisions.

[9] Of course, as we noted above, the facts in this line of cases involved discrimination against virtually all predecessor employees not retained. Therefore, the Board had no occasion to address the issue of whether a successor employer must bargain over initial terms when it discriminatorily fails to hire certain predecessor employees, but others are lawfully not retained.

Today, that question is squarely before us. We hold that under *Burns* a duty to bargain over initial terms is not limited to situations where the new employer plans to retain, or hire, virtually all predecessor employees. Accordingly, under our analysis, it is irrelevant that in the instant case certain Laidlaw employees were lawfully not hired. As discussed in the text infra, what is relevant is that the Respondent's unlawful plan has made it impossible to determine when its bargaining obligation would have matured under lawful circumstances.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Galloway School Lines, Inc., Coventry, Rhode Island, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees or prospective employees that it is not and never will be a union operation, that it will not hire union workers, and that it will do whatever it can to remain a nonunion operation.

(b) Refusing to hire bargaining unit employees of Town and Country Transportation & Leasing Corporation, a Division of Laidlaw Transit, Inc., the predecessor employer, because of their union-represented status in the predecessor's operation, or otherwise discriminating against employees to avoid having to recognize District 1199, New England Health Care Workers, Service Employees International Union, AFL–CIO (the Union).

(c) Refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full time and regular part time School bus drivers and monitors employed by the Company located on Wood Street in Coventry, Rhode Island, including spare school bus drivers, spare monitors, and spare charter drivers, but excluding office clerical employees, professional employees, casual employees, mechanics, managerial employees, and guards and supervisors as defined in the Act.

(d) Unilaterally changing wages, hours, and other conditions of employment without bargaining about these changes with the Union.

(e) 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) Within 14 days from the date of this Order, offer to the following employees of the predecessor, who would have been employed by the Respondent but for the illegal discrimination against them, employment as monitors in the Coventry operation, or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place. In addition, make whole these employees for any loss of earnings and other benefits they may have suffered by reason of the Respondent's unlawful refusal to employ them. Backpay shall be computed as in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Barbara Antril	Robin Lavoie
Elizabeth Bate	Theresa Musco
Denise Ethcells	Denise Nagy
Judy Kelly	Cheryl Lee Parrott
Christine Kreckel	June Riley

(b) Recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondent's employees in the unit above, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

(c) On request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to the Respondent's takeover of the predecessor's Coventry, Rhode Island schoolbus operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from on or about September 1, 1991, until it negotiates in good faith with the Union to agreement or to impasse. The remission of wages shall be computed as in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, supra.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Coventry, Rhode Island location copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 1, 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 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

[10] 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.''

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 July 1, 1991.

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

MEMBER COHEN, dissenting in part.

I agree with my colleagues that Respondent discriminatorally refused to hire some of the predecessor's employees. I also agree that Respondent has a bargaining obligation under *Burns*.[1] However, I do not agree that this obligation extended to the setting of the initial terms of employment. Thus, Respondent did not violate Section 8(a)(5) in this respect. Similarly, the discriminatees should be made whole at the rates initially established by the Respondent, rather than the rates of the predecessor.

In *Burns*, the Supreme Court set forth the general rule that ''a successor employer is ordinarily free'' to set the initial terms of employment. As explained by the Court in *Burns*, where a successor employer's initial terms vary from those of the predecessor, that does not mean that the successor has changed *its* terms. Rather, the successor has changed the terms of its predecessor. Thus, the successor can unilaterally set its initial terms.

The Court explained how this general rule applied to Burns (which took over from Wackenhut):

> It is difficult to understand how Burns could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed *its* terms and conditions of employment when it specified the initial basis on which employees were hired on July 1. [Id. at 294, emphasis in original.]

To repeat, the general rule is that the successor employer can unilaterally set its initial terms. However, there is a narrow exception to the general rule. If it is ''perfectly clear that the new employer plans to retain all'' of the predecessor's employees, an obligation to bargain over initial terms can attach. In such circumstances, it is virtually certain that, after the actual hiring is completed, the union will have majority status.[2]

Immediately after the Court's articulation of the ''plan to retain all'' situation, the Court set forth a *contrasting* situation, i.e., a situation where there is *no* plan to retain all of the predecessor's employees. In such circumstances, the bargaining obligation will not arise until the actual date of hire, for it will not be known until then whether the union has majority status. Further, although the general bargaining obligation will arise at that time, the employer is nonetheless free to unilaterally set the *initial* terms of employment. Thus, for example, although Burns' general bargaining obligation arose in late June when the guards were hired, it was nonetheless free to set the initial terms of July 1, even though those terms ''differed from those specified in the [predecessor's] collective bargaining agreement.''[3]

In sum, the general rule is that a new employer is free to set initial terms. There is an exception where it is ''perfectly clear'' that the successor ''plans to retain all'' of the predecessor's employees.

In the instant case, the exception does not apply. In this respect, I note that the predecessor's unit consisted of 60–65 employees. The successor hired 23 of them (14 drivers and 9 monitors) and discriminatorily refused to hire 10 others (monitors). There is no allegation that the Respondent discriminatorily refused to hire the 27–32 other employees of the predecessor. A charge was filed with respect to 11–16 of them (drivers) but was dismissed. No charges were filed with respect to the remainder.[4] In sum, even if Respondent had hired the 10 discriminatees, there was no ''plan to retain all'' of the predecessor's employees.

My colleagues assert that there was uncertainty about Respondent's plans, and that such uncertainty is to be resolved against the wrongdoer (Respondent). I find no such uncertainty. The figures speak for themselves. The General Counsel's dismissal of the charges concerning the 11–16 employees (drivers) shows that, irrespective of Respondent's unlawful conduct, there was no plan to retain all.[5]

[1] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[2] If the plan is to retain all of the predecessor employees, but the plan also envisages hiring a greater number of additional employees, the above principle would not necessarily apply, for it cannot be said that the union will have majority status.

[3] *Burns*, supra at 295. If Burns had set terms when it hired the employees in late June, and then decided to implement different terms on July 1, that would be subject to bargaining, for that would be a change by Burns of *its* terms of employment. Id.

[4] The Respondent's unit consisted of 55 employees.

[5] I do not reach the issue of whether a different result would obtain if there were uncertainty about Respondent's plans. See *Love's Barbeque Restaurant*, 245 NLRB 78 (1979), enfd. in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981); and *U. S. Marine Corp*., 293 NLRB 669 (1989), enfd. en banc 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992).

Accordingly, I find that the *Burns*' general rule applies here. Under that general rule, the Respondent was free to set initial terms at the beginning of the school year. The Respondent did not violate the Act by doing so. In addition, those initial terms control the backpay in this case.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees or prospective employees that we are not and never will be a union operation, that we will not hire union workers, and that we will do whatever we can to remain a nonunion operation.

WE WILL NOT refuse to hire bargaining unit employees of Town and Country Transportation & Leasing Corporation, a Division of Laidlaw Transit, Inc., the predecessor employer, because of their union-represented status in the predecessor's operation, or otherwise discriminate against employees to avoid having to recognize District 1199, New England Health Care Workers, Service Employees International Union, AFL–CIO.

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All full time and regular part time School bus drivers and monitors employed by us located on Wood Street in Coventry, Rhode Island, including spare school bus drivers, spare monitors, and spare charter drivers, but excluding office clerical employees, professional employees, casual employees, mechanics, managerial employees, and guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours, and other conditions of employment without bargaining about these changes with the Union.

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

WE WILL, within 14 days from the date of the Board's Order, offer to the following employees of the predecessor, who would have been employed by us but for our illegal discrimination against them, employment as monitors in our Coventry operation, or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place. In addition, WE WILL make whole these employees for any loss of earnings and other benefits they may have suffered by reason of our unlawful refusal to employ them, with interest.

Barbara Antril	Robin Lavoie
Elizabeth Bate	Theresa Musco
Denise Ethcells	Denise Nagy
Judy Kelly	Cheryl Lee Parrott
Christine Kreckel	June Riley

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of our employees in the unit above, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

WE WILL, on request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to our takeover of the predecessor's Coventry, Rhode Island schoolbus operation, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and WE WILL make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from on or about September 1, 1991, until we negotiate in good faith with the Union to agreement or to impasse.

GALLOWAY SCHOOL LINES, INC.

Joseph Griffin, Esq. and *Karen Hickey, Esq.*, for the General Counsel.

Thomas J. McAndrew, Esq., of Providence, Rhode Island, and *Mr. Keith Galloway*, of Wood River Junction, Rhode Island, for the Respondent.

Mr. Patrick Quinn, of Providence, Rhode Island, for the Charging Party.

DECISION

GEORGE F. MCINERNY, Administrative Law Judge. Based on a charge filed on July 1, 1991, in Case 1–CA–28418 by District 1199, New England Health Care Workers Union, Service Employees International Union, AFL–CIO (the Union or District 1199), the Regional Director for Region 1 of the National Labor Relations Board (the Regional Director and the Board), issued a complaint on August 14, 1991, al-

leging that Galloway School Lines, Inc. (Galloway, the Company, or Respondent) had violated certain provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. (the Act). On August 15, 1991, the Company filed an answer to the complaint, denying that it had committed any unfair labor practices.

Then, on August 23, 1991, the Union filed a new charge in Case 1–CA–28590, and subsequently amended this charge on August 29 and October 15, 1991, and on March 16, 1992, alleging further violations of law by the Company. On March 31, 1992, the Regional Director issued an order consolidating Cases 1–CA–28418 and 1–CA–28590 and issued an amended complaint, alleging that the Company had violated the Act. The Company filed a timely answer to this amended complaint, denying the commission of any unfair labor practices.

Pursuant to notice contained in the amended complaint, a hearing was held before me at Providence, Rhode Island, on June 16 and 17, 1992, at which all parties were represented, and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. Following the conclusion of the hearing, the Company and the General Counsel filed briefs, which have been carefully considered.[1]

Based on the entire record in this case including my observations of the witnesses, and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The amended complaint alleges that the Company is a corporation which has an office and place of business in Wood River Junction, Rhode Island, and an office and garage in the town of Coventry, the location involved here. The Company is engaged in the business of supplying schoolbus services to various municipalities and employers from which it derives income of more than $250,000 annually, and purchases goods valued at over $50,000 directly from points outside the State of Rhode Island. The answer admits these allegations and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Patrick J. Quinn is a representative for District 1199 which succeeded Local 76 of the Service Employees International Union as the collective-bargaining representative for a union of employees of Town and Coventry Transportation & Leasing Corporation, a Division of Laidlaw Transit, Inc.[2] (Laidlaw). Laidlaw had a contract with the school committee of the town of Coventry, Rhode Island, to transport children in that town. Quinn testified that he had negotiated a collective-bargaining agreement with Laidlaw effective from September 1, 1990, though August 31, 1993.[3]

The bargaining unit described in the collective-bargaining agreement includes:

> All full time and regular part-time school bus drivers and monitors employed by the Company at its facility located on Wood Street in Coventry, Rhode Island, including spare school bus drivers, spare monitors, and spare charter drivers, but excluding office clerical employees, professional employees, casual employees, mechanics, managerial employees, and guards and supervisors as defined in the Act.[4]

In February 1991, the Coventry school committee received new bids for schoolbus service for the school year beginning in September 1991 and awarded the new contract to the Respondent here, Galloway School Lines, Inc. Galloway has been in business in the state of Rhode Island for some years and, according to President Don Galloway, currently holds schoolbus service contracts in the towns of Exeter, West Greenwich, Foster, North Smithfield, Cumberland, and the Consolidated School District (Chariho) (an acronym for the towns of Charlestown, Richmond, and Hopkinton) as well as in the town of Coventry.

B. *The May 24 Incident*

After the award of the 1991–1992 bus contract to Galloway, the employees of Laidlaw became concerned about their jobs for the coming school year. They met in groups or individually with Union Representative Patrick Quinn, who advised them that if they were interested in continuing to work in Coventry they would have to apply to Galloway.

Acting on this suggestion, and their own concerns, a group of 12 to 14 women, all Laidlaw employees,[5] got together on May 24, a nonschool day because of a teachers' curriculum meeting, and drove down to Galloway's main office at a place called Wood River Junction.[6] The women entered Galloway's offices and one of them asked for some employment applications. The receptionist in the office left and told Keith

[1] I want to thank counsel for the parties, who filed thoughtful, scholarly and well-written briefs, which were of real assistance in the writing of this decision.

[2] As described in a certification of representative dated June 12, 1989, by the National Labor Relations Board in Case 1–RC–19238.

[3] This agreement was not formally executed until February 28, 1991, but Quinn testified without contradiction, and I find, that the agreement was finalized and ratified in September 1990. A copy of the written agreement was sent by Quinn to Laidlaw in October, but Laidlaw and the Union did get around to executing the written agreement until February 28, 1991.

[4] The unit as alleged in the complaint herein omits references to space employees, and makes some other changes. I think it is more appropriate to find, and I do find, that the appropriate unit here is the same as set out in the certification and the collective-bargaining agreement, even though, in fact, there may have been no spare employees actually employed during the year the collective-bargaining agreement was in effect.

[5] Most were busdrivers, but a few were bus monitors.

[6] This location is also referred to the record as Chariho since it also serves as the terminal for the Chariho school district bus operation.

Galloway, the Company's assistant general manager and owner, Don Galloway's son, that these people were here and were asking for employment applications for Coventry. Keith went out to the yard and got his father. Father and son come into the office, called General Manager Steve DeSousa from upstairs, and the three of them went into the foyer where the Laidlaw employees were waiting.[7]

Karlene Peterson, a busdriver and president of the local union, testified that after brief introductions, one or two women introduced themselves, Don introduced himself and DeSousa, and began by saying that he was not union, and he would never be union. He told the group that they knew ''how hard he fought and won in Chariho.''[8] According to Peterson, Don went on to say that if they worked for him they would not need a union since he was a very fair person. He then said that benefits would be discussed later if they were hired. Someone asked about people who may have already filed applications and Don replied that no one who had been there earlier would get preference. He said he was going to advertise in the Kent County Times and the Providence (Journal) Bulletin.

Mary Jane Doran, a driver, told pretty much the same story. She did say, though, that Don said he was waiting until he ''set up'' in Coventry to accept applications. Don also said, as well as announcing that he would never be union, that he would ''never hire union.''

Elizabeth Ann Hames, another driver, echoed the testimony of Peterson and Dorans,[9] quoting Don as saying that he was not and would never be union. Hames also added that Don said that if the employees chose a union he would fight them ''tooth and nail.''

Don Galloway's testimony reflected that of these three Laidlaw employees as to the beginning of the meeting. When he started talking, Don said he gave the people there a brief description of his Company. He said he as a ''front forward'' individual; he treated people honestly; and most people who worked for him would testify to that. He did admit that he said that he was a nonunion company, and had gone through a hard-fought campaign in the Chariho district, and had won.

In his testimony, Don stated that he told the people on May 24 that he ''would do what he could within the meaning of [the] law to maintain that status.'' He did admit, however, that in his affidavit to the Board in the course of the investigation of this case he had said that he ''would do whatever he could do to stay non-union.'' Later in his testimony, Don stated that he did not really recall what he had said about this subject.

Keith Galloway recalled most of what the other witnesses testified to, but he described his father as stating that they had not yet obtained a contract with Coventry, and that when they had a location they would advertise for job applicants. Keith also quoted Don Galloway as explaining that the jobs were part-time positions, 180 or 190 days, 4 or 5 hours a day, with layoffs during school vacations. They could obtain unemployment benefits in the summer but the jobs could not support a family.

Keith did advert to Don's mention of unions. He denied that his father said he would never be union, or that he would not hire union. He admitted that Don said that he would do what he had to do to keep unions out, but added that this would be ''under law.''

Both Don Galloway and his son, Keith, were hesitant in their answers, and on the critical points of what Don said about the Union and his reaction to it, they needed to be led to their responses. Keith seemed to be talking about another meeting than that described by Don and by the three women who testified about the May 24 meeting. Through his whole testimony Keith appeared to me to be hesitant and uncomfortable with his testimony on critical points, such as the May 24 meeting, and, later, the hiring process in August. Don Galloway shifted his story on what he said about his opposition to unionization, finally confessing that he could not really recall what he said. In the end, he did not deny that he said he would do whatever he could to prevent the Union coming in.

The testimony of the three former Laidlaw drivers was brief, to the point, and struck me as straightforward and credible. I, therefore, credit their testimony and I find that Don Galloway did say that his Company was not union; that it would never be union; that he would not hire union; and that he would do whatever the could to stay nonunion.

As the Board stated in *Williams Enterprises*, 301 NLRB 167 (1991), a statement that an employer intends to operate nonunion ''tends to interfere with employees' Section 7 rights because the Respondent announced to prospective employees its firm intention to remain non-union,'' and, thus, any conduct by these prospective employees which was inconsistent with the stated policy ''may jeopardize their employment possibilities or security.'' This goes further than statements of desire or hope expressed by an employer which are protected free speech under Section 8(c) of the Act.[10]

C. *The Random Selection Procedure*

The evidence in this case shows that the award of schoolbus contracts in the State of Rhode Island is competitive. It undoubtedly calls for the careful application of a ''sharp pencil'' in the preparation of bids since, I must assume, the lowest bidder gains the advantage in most cases.

This factor, of course, influences that attitudes of most employers toward any condition or factor, including the presence or absence of a labor union, which can raise basic costs.

[7] Up to this point, there is no dispute about the facts. From here on, in the conversation between Don Galloway and the Laidlaw people, there is substantial agreement by all those who testified, except for Keith Galloway, who recalled things a little differently.

[8] This has reference to a prior case involving Galloway and arising out of a drive by Local 76 to organize the Galloway employees in the Chariho district. A complaint issued by the Board's Region 1 was dismissed by the Board on July 28, 1992, 308 NLRB 33. The hearing in that case was held from June 4 though 8, 1990, and the administrative law judge's decision recommending dismissal was not issued until October 23, 1991. I do not know how Don Galloway could assert on May 24, 1991, that he had won, unless he was referring to the results of an election held on October 6, 1989, in which the employees rejected the Union by a vote of 44 to 32.

[9] Since no party moved to sequester the witnesses, they were all present, both the General Counsel's and the Respondent's witnesses, through the whole hearing. From my observations of the witnesses, and from their demeanor, I do not find that any witness was influenced by the testimony of prior witnesses.

[10] See e.g., *Heck's, Inc.*, 293 NLRB 1111 (1989), and cases cited by Respondent in its brief, including *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d. 666 (1st Cir. 1979), a case with which I have had some familiarity.

I cannot tell how much the question of costs influenced the Galloway Company here, but the testimony and arguments of counsel, showed that the Galloways strongly resented the actions of their employees, and the attempt by those employees, aided by Local 1199s predecessor, Local 79, to organize the Chariho district. Further resentment was caused I think by some charges in the Coventry situation which had been dismissed (Case 1–CA–28590). The expenses of time and money, and the aggravations perceived, particularly by Don Galloway regarding these matters, showed clearly in his remarks to the Coventry applicants on May 24, 1991, and in his testimony at this hearing.[11]

While this analysis may be based on some speculation, there is no speculation in my findings that Don Galloway made it clear in his remarks on May 24 that he was not union, would never be union, and that he would do whatever he could to prevent unionization of his Company.

With this in mind, we will consider the hiring process which Galloway conducted in order to staff its Coventry operation, scheduled to begin with the school year in September.

There is no question in my mind that Don Galloway told the applicants from Coventry on May 24 that the contract between Galloway and the Coventry school committee was still unsettled. Nor is there any question about Keith Galloway's testimony that this contract was not finally concluded on or about June 28.

On July 1, the first charge in this matter, Case 1–CA–28418, was filed by the Union. This fact, based on their experience with the Union's predecessor at Chariho, moved the Galloways, as stated in testimony of both Don and Keith, to consult with their lawyer, Thomas J. McAndrew, who had represented them in Chariho, and continued to represent them at least through the filing of briefs in this case. As a result of this consultation, it was determined that the Company would follow its customary procedure in the hiring of drivers, checking driving records and references, and conducting personal interviews and police checks. A new employment application form was devised by Attorney McAndrew and was used throughout the hiring process. On July 12 the Company purchased advertisements in a local paper, Kent County Daily Times, and a newspaper of general circulation in the State, Providence Journal Bulletin soliciting applications from both drivers and monitors.

The hiring of drivers was the first priority and this proceeded apace. Keith Galloway was in charge of this process, assisted by Cindy Primrose, the terminal (or area) manager at Coventry.[12] By the first part of August the selection of drivers had been completed. Keith Galloway estimated that there were 50 ''or so'' ''outside'' applicants (people who had not worked for Laidlaw) and 25–30 former Laidlaw employees, who had filed for driver positions.[13] Of these, 14 former Laidlaw employees, and 9 outside applicants together with 5 transfers from other Galloway locations.

The hiring of monitors, which did not take place until after the driver complement was hired, was handled differently, primarily because the criteria for qualifying monitors are so different from those applicable to drivers. Rhode Island State law mandates the assignment of monitors to all schoolbusses carrying pupils in kindergarten through fifth grade (K–5). The statute specifies only that persons employed as monitors be at least 16 years old, and that their employment be subject to a check by local police departments. As may be inferred from these rather rudimentary requirements, the duties of monitor positions require only that monitors assure that the children boarding or alighting from the busses are clear of danger zones around busses when they arrive or leave. Monitors have no set responsibility for discipline of the children, but some responsibilities may be worked out between the drivers, who are the commanders of the busses and their passengers, and the monitors. An assistant to the terminal manager is responsible for overall discipline of children on the busses.

The experience Galloway had had with the Union and the Labor Board in the Chariho situation, together with a lack of firm, objective, standards for the employment of monitors led the Galloways, in consultation with their lawyer, to adopt a plan for a ''random'' selection of applicants to be hired. Keith Galloway, who was in charge of administering this plan, was unsure whether the decision to adopt the plan was made about July 1 or nearer to August 1. However, I note that most of the employment applications received in evidence here executed in mid-July, which would have been consistent with a decision to adopt the application forms made about the first of July, and executed by applicants following the publication of solicitations for applications on July 12.

Keith Galloway testified that he handled the monitor hiring process in the following manner. The applications were received at the Company's new Coventry location, which had been Laidlaw's location and which in fact, belonged to the Coventry school department. The terminal manager then sent the applications along to Keith in Wood River Junction. Keith then, as he put it, ''stuck'' them into a file drawer in his office, in no chronological order of receipt, or alphabetically, or in any other orderly fashion. They were just ''stuck'' in the drawer. Sometime in August, when it had been determined that they needed 26 monitors,[14] Keith stated that he ''stuck'' his hand in the drawer and pulled out the requisite number of applications. He took the name and telephone number of each applicant from the first page of the application, and sent the list of people to Cindy Primrose up

[11] Even though, at the time of the hearing, he had won the first round in the Chariho case (the judge's decision in Cases 1–CA–26744 and 1–RC–19303 had issued on October 23, 1991, and the Board's General Counsel's denial of the appeal in portions of Case 1–CA–28590 involving the drivers at Coventry had been issued on May 29, 1992.

[12] Primrose had been the terminal manager for the Laidlaw operation at Coventry. She was not called to testify here.

[13] Keith stated at another point in his testimony that there was a total of 70 applicants for driver's jobs rather than 75–80 as noted above.

[14] Here, again, Keith Galloway was wrong about the figures. While he stated several times that 26 monitors were selected, the chart submitted in evidence by the Respondent shows that 27 were hired. Another exhibit purporting to show the ''complete application pool for moniter's [sic] in Coventry September 1991 shows 28 hired, of whom one was marked 'did not show.''' Eliminating that one application, the totals show 18 outside applicants and 9 former Laidlaw employees hired.

in Coventry with instructions that she was to call each applicant to find out if they were still interested in the jobs, then, on receiving affirmative answers, to call the local police departments in the towns where the applicants lived to find out if there was any reason they should not be hired. Primrose was then to hire those who passed inspection by the police.

As it turned out, the applicant pool used by the Company held 55 persons at the time the random selection was made. Of these, 32 were outside applicants, and 23 former Laidlaw employees. Put another way, the applicant pool contained 58.2-percent outside people, and 41.8-percent Laidlaw people. The random hiring process resulted in 18 outside hires, or 66.7 percent of the 27 employee total, with 9 Laidlaw people hired, or 33.3 percent.[15]

As a result of this, in the former Laidlaw bargaining unit consisting of drivers and monitors, the figures showed 55 employees at the beginning of the school year in September, made up of 14 drivers and 9 monitors formerly employed by Laidlaw, and 14 drivers and 19 monitors of outside applicants plus the 5 drivers transfers from other Galloway locations. The totals, then was 23 former Laidlaw employees, and 32 outside people plus transfers, or in percentages, 41.8-percent Laidlaw and 58.2-percent outside plus transfers.[16]

I have two questions about this random selection policy. The first concerns the policy itself, and the second, the execution of the policy by Keith Galloway.

With regard to the random hiring process itself, the reasons advanced by the Respondent for adopting this plan are, first, that the Company had just (1989) gone through an organizing drive in the Chariho district with the predecessor of this Union, culminating in a 5-day unfair labor practice, and objections to election, trial before my colleague, Administrative Law Judge Robert T. Wallace. Second, new charges had been filed in this case by the Union, and the Company wanted not only to avoid expensive and aggravating litigation, but wanted to show an effort to be ''fair'' to all applicants, including those who were working for Laidlaw and who might choose to apply. Before the first part of July, the Company knew that a substantial number of former Laidlaw employees would be applying for jobs with Galloway. This would have been evident from the visit of 12 to 14 Laidlaw employees to Wood River Junction on May 24, as well as inquiries which must have been made by other Laidlaw employees either at Wood River Junction or Coventry.[17] The Company also knew that they were going to advertise for employes once they had finalized the contract with Coventry. And, more importantly, by the first part of July, the Company knew that the monitor's jobs were unskilled, uncertified, and required only that the occupant of the position be 16 years of age and not known to the local police as a person of bad character. In effect, then, there are no qualifications for this job, except for experience with the particular children to be transported and the nature of the routes, places where it would be dangerous for children to be picked up or dropped off, and the general nature of the town of Coventry and its customs. The Company chose completely to ignore these factors in devising an employment procedure which disregarded everything, experience, references, record, information contained on the employment application, considering only the name and telephone of the person and the State mandated police check.

The question then comes: if the Company cared so little about the background, experience, references, and overall record of the people it hired, what then did it care for? The ''fairness'' argument is rather thin, since the only ones treated ''fairly'' in this plan would be persons who had no existence relative to the Company until their applications were received. If no qualifications were needed for the jobs, and no references were checked, no records reviewed, no physical examinations or mental tests required, what was the Company looking for? It could have been looking for a method by which it could assure itself that only a minority in the bargaining unit of drivers and monitors was composed of former Laidlaw employees.

My second question regarding this procedure goes to its execution as shown by the testimony in this case. I do not mean to say in this decision that the use of a random method of selection is inherently violative of the Act. But the way Galloway went about it leaves too much room for unilateral actions which could affect the results of the random selection and end up with a result favorable to the expressed desire of the Company to operate nonunion in Coventry.

Keith Galloway testified in some detail about his implementation of the random selection plan. According to this testimony, applications were received by Cindy Primrose at Galloway's new Coventry terminal. This place, as the record shows, was Laidlaw's terminal, and Cindy Primrose was Laidlaw's terminal manager. Primrose would have known all of the former Laidlaw employees, and would not have had to look at the second page of the new employment applications to know who had worked for Laidlaw, and who was an outside applicant. In this situation, is it realistic, or even logical, to believe that Primrose, a new employee of an employer whose owner and president has exhibited his determination to remain nonunion, would just send these applications over to Keith Galloway without any indication of who was a former union employee, and who wasn't? Does it make any more sense to believe that Keith held the applications for a month or so, then just reached blindly into a file drawer and pulled out 27 applications, then, without looking at the second page, sent the names and telephone numbers to Cindy Primrose for a final check and hiring.

Since Keith Galloway was the key figure here, I observed him closely while he testified about his procedures in the selection process. I found him to be hesitant in his answers, obviously nervous, and unsure of himself. I was and am convinced by his demeanor that he was not telling the truth about the hiring procedure. The conclusion is consistent with the illogic of the Respondent's position that result of the procedure was a matter of pure chance in accordance with the laws of random. Now, if in this matter the procedures were handled by an impartial third party, or under conditions where interested parties, either the Company or the Union,

[15] Another chart submitted by the Company shows that these numbers resorted in 59-percent outside hires and 41-percent Laidlaw people hired. I think this was an honest mistake and I do not believe there was any intentional effort to deceive.

[16] The Respondent submitted a chart on this breakdown but eliminated the transferred employees from the total of non-Laidlaw employees, making the figures somewhat different. Again, I think this was an honest mistake.

[17] See testimony of Union Representative Patrick J. Quinn that he had met with the Laidlaw employees, and advised them to apply to Galloway.

did not have total control and unlimited opportunity to skew the results, then I would agree that the random selection process could be fair to all concerned.

But, considering Don Galloway's statement that he would do what was necessary to remain nonunion; my disbelief of Keith Galloway's testimony on the procedures followed by the Company; and, finally in the result of the random selection, which out of 41.8 percent former of Laidlaw employees in the applicant pool, produced a percentage of 33.3 of Laidlaw employees hired, a difference of 8.5 percent; I find that the Respondent's intention in choosing and implementing the random selection method was in fact a subterfuge designed to assure that a majority of its employees would be nonunion, and no obligation to bargain with the Union would arise.

If the Respondent here is a successor employer, the Board has held that a successor employer is not obliged to hire the predecessor's employees, but may not refuse to hire the predecessor's employees solely because they were represented by a union or to avoid having to recognize the union. *American Press*, 280 NLRB 937 (1986); *NLRB v. Burns Security Service*, 406 U.S. 272 (1972); *Howard Johnsons v. Detroit Local Joint Executive Board*, 217 U.S. 2149 (1974). In *U.S. Marine Corp*., 293 NLRB 669 (1989),[18] the Board laid down some criteria to be used in establishing whether a successor employer unlawfully refused to hire the predecessor's employees. There are: ''substantial evidence of union animus, lack of a convincing rationale for the refusal to hire the predecessors employees; inconsistent hiring practices or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall workforce to avoid the Board's successors doctrine.'' *U.S. Marine Corp*., supra at 670.

Here there was substantial evidence of union animus in the May 24 meeting; a lack of a convincing rationale for the refusal to hire the predecessors employees, the fact that Respondent ignored the experience of the Laidlaw employees, and went onto hire a workforce without checking references, background, or records of 27 employees who would be working with school children on a daily basis; inconsistent hiring practices, again, the hiring of a workforce allegedly in total innocence as to the quality or character of its members; and evidencing a discriminatory motive, as I have found above, by the use of a sham selection procedure.

The Board has said, in connection with a successorship situation, that the new employer ''does not know whether it will be union or nonunion before it hires its employees. When an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against the seller's employees to ensure its non-union status.'' *Kessell Food Markets*, 287 NLRB 426, 429 (1987). I find, then, in the light of Don Galloway's remarks to the Laidlaw people on May 24, and on the basis that there was no logical reason to institute a random selection process in this situation, that the way the random selection process was used here was intended to produce a nonunion majority in the unit, and I find the Respondent's failure to hire the employees named below, in the section entitled the remedy, is a violation of Section 8(a)(1) and (3) of the Act, *American Press*, supra.

[18] Another case with which I have had some slight connection.

D. *The Successorship Issue*

As I have previously found, Galloway was awarded the contract for transporting school children to and for the schools of Coventry in February 1991. The contract had previously been held by Laidlaw. In September 1991 Galloway began to operate the busses.

The complaint here alleges that ''Since about September 1, 1991, Respondent has engaged in the same business operations as Laidlaw, selling the same services to the same customers, and since then has continued to operate the business of Laidlaw in basically unchanged form.'' The complaint continues, alleging that but for alleged violations of Section 8(a)(1) and (3) of the Act, the Respondent ''would have employed, as a majority of its employees, individuals who were previously employees of Laidlaw,'' and is a successor employer to Laidlaw.

In sections III,B and C of this decision, I have analyzed the allegations relating to violations of Section 8(a)(1) and (3), and I have found them to be meritorious. Thus, if the remaining allegations as to successorship are proven, then it would follow that Respondent is a successor to Laidlaw, with all of the obligations rising out of that relationship.

The Respondent denied the allegations quoted above, and as has been noted above, introduced testimony and documentary evidence treating the 8(a)(1) and (3) sections of the complaint. The Respondent did not, however, introduce any evidence concerning the facts that it was awarded the bus contract about February 15, and that, commencing in September, it began performing the same services as Laidlaw had provided, in the same manner, by using schoolbusses, over the same routes, except for kindergarten routes, which vary because of the fact that the homes where kindergarten children live are scattered throughout the Town. The Respondent assumed the Wood Street location in Coventry which had formerly been used by Laidlaw, and hired Laidlaw's terminal manager as its own area, or terminal, manager.[19]

On the basis of all the evidence here, and with my findings above on the hiring question, I find that the General Counsel has established a prima facie case that Galloway is a successor to Laidlaw;[20] that Respondent has not met its burden of rebutting that prima facie showing; and I find that the Respondent is a successor employer to Laidlaw.[21]

E. *The Refusal to Bargain*

The complaint alleges that the Respondent has unlawfully refused to bargain with the Union since on or about September 1, 1991, and has failed to maintain terms and conditions of employment to which employees were entitled under the collective-bargaining agreement between Laidlaw and the Union.

[19] See testimony of Don Galloway, Keith Galloway, and Barbara DiPetrillo, a driver who worked both for Laidlaw and Galloway.

[20] *Wright Line*, 251 NLRB 1083 (1980).

[21] *Burns*, supra; *Houston Distribution Service*, 277 NLRB 960 (1977); *Lemay Caring Centers*, 280 NLRB 60 (1986).

The evidence here shows that Patrick Quinn sent a letter to Don Galloway, president of Respondent on February 26, 1991, claiming to represent the drivers and monitors at Coventry, and requesting that Galloway keep the Union informed as to procedures in the transition from Laidlaw to the successor Company. There was to reply to this letter, and we have seen what Galloway did in the transition period from February 15 to September 1. Since Galloway is a successor to Laidlaw, Galloway was required to bargain with the Union representing its new employees. Since it did not bargain with the Union, Galloway has violated Section 8(a)(1) and (5) of the Act. *American Press*, supra.

Finally, the complaint alleges that the Respondent failed to maintain the terms and conditions of the contract between Laidlaw and the Union, and established his own wages, hours, and other terms and conditions of employment. The Respondent's answer admitted this allegation, so I find that by altering wages, hours, and working conditions I have found it was obliged to continue in effect, the Respondent has violated Section 8(a)(1) and (5) of the Act. *Harvard Industries*, 294 NLRB 1102 (1989); *U.S. Marine Corp*., supra.

IV. THE REMEDY

Having found that the Respondent has violated the National Labor Relations Act, as amended. I shall recommend that it cease and desist therefrom, and that it shall take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully and discriminatorily refused employment to certain former employees of Laidlaw. I shall recommend that these following-named employees:

Barbara Antril	Robin Lavoie
Elizabeth Bate	Therese Musco
Denise Ethcells	Denise Nagy
Judy Kelly	Cheryl Lee Parrott
Christine Kreckel	June Riley

be immediately offered reinstatement to the positions of monitors in the Respondent's Coventry operation, together with seniority and other rights and privileges which they have unlawfully been denied, together with backpay to make these employees whole for any loss of earnings they may have suffered due to the discrimination practiced against them as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950); and *New Horizons for the Retarded*, 283 NLRB 1173.[22]

[22] See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

In addition, I shall recommended that the Respondent restore the working conditions that existed under the contract with the predecessor employer, Laidlaw, and that all employees, both drivers and monitors be awarded backpay under the terms noted above, for any losses they may have suffered due to Respondent's failure to observe the contractual provision of the Union's contract with Laidlaw; *Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979); *State Distributing Co*., 282 NLRB 1048 (1987); *Harvard Industries*, supra.

CONCLUSIONS OF LAW

1. Galloway School Lines, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. District 1199, New England Health Care Workers, Service Employees International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. A bargaining unit composed of:

> All full time and regular part time School bus drivers and monitors employed by the Company at its facility located on Wood Street in Coventry, Rhode Island, including spare schoolbus drivers, spare monitors, and spare charter drivers, but excluding office clerical employees, professional employees, casual employees, mechanics, managerial employees, and guards and supervisors as defined in the Act.

is an appropriate unit for collective bargaining.

4. By informing prospective employees that it was nonunion and that it intended to stay nonunion, by whatever means it took, Respondent has violated Section 8(a)(1) of the Act.

5. By failing and refusing to hire applicants because of their union affiliation, the Respondent had violated Section 8(a)(1) and (3) of the Act.

6. The Respondent is a successor employer to Laidlaw Transit, Inc.

7. By failing to recognize the Union as the representative of its employees at its Coventry location, the Respondent had violated Section 8(a)(1) and (5) of the Act.

8. By changing wages, hours, and other working conditions of its employees at its Coventry location, Respondent has violated Section 8(a)(1) and (5) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]