UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

THE PARKSITE GROUP

and **Case No. 34-CA-11961**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 671

Jennifer Dease, Esq., Counsel for the General Counsel
Linda M. Doyle, Esq., Counsel for the Respondent

DECISION

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Hartford, Connecticut on August 19-22 and on September 15, 2008. The charge and amended charge were filed on January 28 and March 19, 2008. The Complaint was issued on May 30, 2008 and alleges as follows:

1. That since on or about November 1, 2007, the Respondent, The Parksite Group, has refused to hire certain individuals employed by Ryder Integrated Logistics Inc., in order to prevent it from becoming a "successor" employer. These were Brian Barber, Michael Beaulieu, Andrew Burleigh, Doug Davis, Benny Ingenito, Joseph Moyles, Evernard "Robbie" Roberts, Estaquio "Jay" Rodriguez, Jack Teske and Ivan Vasquez.

2. That in or about December 2007, the Respondent by Don Alamo interrogated employees about their union membership and activities.

3. That on or about January 1, 2008, the Respondent assumed the warehouse and distribution functions that had previously been performed by the employees of Ryder who were represented by Local 671.

4. That by virtue of the Respondent's discriminatory refusal to hire former Ryder employees, and because the complement of employees at the facility, in the absence of discrimination, would have consisted of a majority of those employees, the Respondent is a successor employer having an obligation to recognize and bargain with Local 671.

5. That since on or about January 1, 2008, the Respondent has failed and refused to bargain with Local 671.

6. That since January 1, 2008, the Respondent has unilaterally and without prior notice to the Union, established the rates of pay, benefits, hours and other terms and conditions of employment for the employees in the bargaining unit.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

I. Jurisdiction

The Respondent admits and I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is conceded and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

a. The Successorship Issue

The basic case defining successorship is *Fall River Dyeing & Finishing Corp. v. NLRB* 482 U.S. 27 (1987). In that case, the Supreme Court held that a purchasing employer is required to recognize and bargain with a union representing the predecessor's employees when there is a "substantial continuity" of operations after the transaction *and* if a majority of the new employer's work force, in an appropriate unit, consists of the predecessor's employees when the new employer has reached a "substantial and representative complement."

Successorship will not be found in the event that the new employer substantially changes the nature of the business and thereby disrupts the continuity of the enterprise. *CitiSteel USA Inc., v. NLRB*, 53 F.3d 350 (D.C. Cir. 1995). In *School Bus Services, Inc.*, 312 NLRB 1 (1993), the Board held that with respect to continuity, the questions are (1) whether the business of both employers was essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions, under the same supervisors; and (3) whether the new entity has the same production process, produces the same products and basically has the same customers. On the issue of continuity, see also *Sierra Realty Corp*. 317 NLRB 832, 836 (1995); *Systems Management*, 292 NLRB 1075 (1989) enf'd in part 901 F.2d 279 (3rd Cir. 1990); *Steward Granite Enterprises*, 255 NLRB 569, 573 (1991); and *Spruce-Up Corp*., 209 NLRB 194 (1974).

The Respondent is engaged in the wholesaling of building materials. It is based in Batavia, Illinois and currently operates eight facilities in the Eastern part of the United States. At these facilities, the Company employs a sales force, clerical employees, warehousemen and drivers. The facility involved in this case is located at South Windsor Connecticut and is one of the larger of these facilities.

The management structure of the Company is as follows. The CEO is George Patee. The President is Richard C. Heitzman. Dick Hill is the Employer's Director of Human Resources. Steve Schmidt is the Vice President of Logistics. James Coulter is the Director of Logistics and he works for Schmidt. Each facility has a sales manager and an operations manager. The Company also employees regional sales managers and the person in charge of the area in which South Windsor is located is Kevin Crotty.

For most of its history, the Respondent has directly employed warehouse employees and drivers. However, in 2005 it decided to outsource these functions. To that end, it contracted this work to Ryder Integrated Logistics and that company took over most of the employees who had previously been employed by Parksite, including the employees at a facility in New Jersey, where the employees were unionized. With respect to the New Jersey facility, it is noted that Parksite had taken over that facility from another company having a contractual relationship with a Teamster union and that it recognized that union when it hired a majority of the predecessor's

employees at the facility. When Ryder took over the New Jersey operation, it also recognized the Teamsters. [1]

In March 2006, Local 671 began an organizing campaign at the South Windsor facility. Employee Doug Davis testified that he was the person who contacted the Union and other evidence shows that he was the most active union supporter among the Ryder employees.

On April 27, 2006, Local 671 filed a petition for an election. On May 5, 2006, the parties executed a Stipulated Election Agreement whereby an election was held on June 8, 2006. (Doug Davis was the Union's observer at this election). In that election, there were 13 votes cast for the Union and 13 votes cast against union representation. As a consequence of objections filed by the Union, there was a hearing and some of the employees testified for the Union in that proceeding including Davis, Bernardino Ingenito and Brian Barber. On August 11, 2006, a Report on Objections was issued sustaining some of the Union's objections. The Regional Director issued a Direction of a Second Election on February 28, 2007 and another election was held on April 5, 2007. (At this election, Ivan Vasquez, a warehouse employee, was the Union's observer). This time the union won by a vote of 19 to 4. The Union was certified on April 13, 2007 and on September 24, 2007 a collective bargaining agreement was signed by Ryder.

The General Counsel points to a letter written by Parksite's president Heitzman on May 30, 2006 that demonstrates its active involvement in the first election. She further posits that this letter demonstrates an anti-union preference by Parksite and a willingness to take adverse actions in the event that Local 671 was elected. This letter, which was distributed by Ryder to the employees, stated:

> I understand that the Ryder associates in our South Windsor, CT location are evaluating representation by a union. I want to notify you that I am greatly troubled by that prospect.
>
> * * *
>
> I firmly believe that a union environment is incompatible with our operating culture and our competitive advantage. Introducing a third party will undoubtedly result in less direct communication, less operating flexibility, less teamwork and much less focus on the customer. That result is unacceptable to me, but more importantly, it will be unacceptable to our customers.
>
> * * *
>
> I want you to know that if the Ryder associates choose union representation, we will need to take steps to ensure that we do not lose the competitive advantage we have worked so hard to gain over the years. We will explore all alternatives.

The Respondent's witnesses testified that this letter was solicited by Ryder and essentially drafted by Ryder so that it could be used as a campaign tool in the first election. The General Counsel called Ryder officials who disputed this assertion. In either case, whether solicited or not by Ryder, the fact is that the letter that was signed by Heitzman speaks for itself and its sentiments were either made or adopted by him. Either this is what he believed at the time that the letter was composed or he was willing to adopt someone else's views for the purpose of defeating the Union in the election.

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[1] This transaction demonstrates that Parksite had prior experience in dealing with unions and in dealing with "successorship" situations.

After the second election was held and the Union was certified on April 13, 2007, Ryder employees Doug Davis and Ivan Vasquez participated in the bargaining as members of the Union's negotiating committee. They also were selected as the union shop stewards. Evanard "Robbie" Roberts was elected to be the alternative shop steward.

It is noted that during the negotiations, Ryder kept Parksite informed of developments. There is, however, no evidence that Parksite sought to influence Ryder in relation to the negotiations.

Parksite hired James Coulter in 2005 as its logistics manager. He testified that some time after he started, he came to the conclusion that contracting out the work to Ryder was not very effective, particularly as the relationship between Parksite and Ryder was based on a cost plus contract and there was little inducement for Ryder to more efficiently run these operations. He testified that he brought his opinions to other management and recommended that Parksite bring the warehouse and driving functions at every facility, back in-house.

According to Coulter's pretrial affidavit, it was in August 2007 that the Company "began engaging in a business case analysis about whether or not to continue to contract with Ryder for the distribution function of our business or whether to bring that function back in house." He states that on September 26, 2007, the decision was made to bring back all of the driving and warehousing functions at all eight facilities.

To state the obvious, Coulter's pretrial affidavit indicates that Parksite began the formal process of studying the ramifications of bringing back the delivery and warehousing functions at the same time that negotiations were occurring between Ryder and Local 671. It also shows that Parksite made its decision two days after a collective bargaining agreement was reached.

This is not to say that there were no legitimate business reasons for terminating the contract with Ryder. The decision affected all eight of the Company's facilities and not just South Windsor. The Respondent's witnesses testified that it was their belief that bringing the work in-house could reduce the number of managers and therefore reduce costs.

The decision to bring back the work involved more than 200 employees. And in relation to the change, the Respondent decided to have both Ryder employees and outside people apply for these jobs. That is, it was decided that the former Ryder employees would have to compete with outside applicants.

On November 1, 2007, the Union was notified by Ryder that its contract with Parksite would be terminated as of January 1, 2008.

On November 3, 2007, Ryder representatives told the employees at South Windsor that Parksite was cancelling the contract and would be taking over the distribution functions at all of its facilities. The employees were told that interviews would be held at the South Windsor facility between December 3 through 6 and that offers would be made by December 10, 2007. Handouts were given to the employees and General Counsel Exhibit 7 is a document that was prepared by Parksite in the form of questions and answers. It states:

> Q. If I am a union employee in New Brunswick or South Windsor, what will be my status with Parksite as of January 1, 2008?
>
> A. As with other employees in the warehouses, the yard and drivers we will be seeking to hire as many of Ryder/Kencos' current employees as possible. Parksite

will assume almost all the union contract with Ryder/Kenco. As with all associates, we will hire employees based on an interview; the passing of a drug test; a background check; for drivers, a Motor Vehicle Report; and the signing of a commitment to our ownership behaviors in the work place. Parksite will explore paying for the Union's Health and Welfare Benefit Plan versus enrollment In the Parksite Plan. We will enroll new associates in the Parksite 401k. The Medial Plan and the 401K will no longer be available from Ryder/Kenco. Other components of the Union contract will be honored as they stand today.

Q. If I work for Ryder/Kenco, will I be doing the same job that I am doing today?

A. The same work needs to be accomplished to complete warehousing, loading and delivery of inventory to customers. However, this work will be done under Parksite direction and supervision. This means you will be doing similar work. However, some tasks may be combined, managed with different systems or altered to increase efficiency and response to customer needs.

Q. Will I have benefits with Parksite?

A. In his trips to each location, Dick Hill will meet with affected staff and present the details of the Parksite benefits plan to associates. The benefits package of Ryder/Kenco is substantially comparable to Parksite's benefits offering. For union associates in New Brunswick and South Windsor, we will explore the cost of the Union medical plan. Parksite will either contribute to the cost of the union plan or enroll new associates in Parksite's plan. In addition, in line with the current contract, associates will be offered the Parksite 401K retirement plan.

As noted above, Parksite decided to open the hiring process at all facilities to both the former Ryder employees who had worked at each facility and to outside applicants. To this end, newspapers ads were placed. Also, an online advertiser, Career Builders was used. The General Counsel points to the fact that in some ads for the South Windsor facility, a $1,000 signing bonus was offered only to successful non-Ryder applicants. She persuasively asserts that this demonstrates Parksite's intention to induce more non-Ryder applicants to seek and accept employment at the South Windsor facility. [2]

The hiring process at all of the facilities involved an initial screening of non-Ryder applicants by Susan Davey who reviewed resumes and had phone interviews with those people. If an applicant passed through her, a second interview was set up with two interviewers who were hired for this purpose, one of whom was Don Alamo.

According to the testimony of Richard Hill, the Director of Human Resources, there were about 2000 applications received from non-Ryder employees of which only 46 received interviews after the initial screening process. A large percentage of the outside applicants were interviewed for the South Windsor facility.

Mr. Alamo conducted interviews at the South Windsor facility. This consisted of interviews with the former Ryder employees who worked at South Windsor and also with outside applicants who applied for that location. He testified that he utilized a form containing a

[2] It is unclear as to whether any of the non-Ryder job applicants at South Windsor actually received the signing bonus.

list of questions that had been prepared by Parksite, albeit he did not ask all of the questions on the form. Alamo also testified that he prepared a summary by which he rated the interviewees in six different categories. Each category was rated from 1-6 with 1 being the best score. Also, a total cumulative score was given with the lower the better.

The evidence shows that during some of the interviews, there was discussion about the Union between Alamo and some of the Ryder employees.

Ivan Vasquez, a warehouse leadman, testified that towards the end of the interview Alamo asked why everybody has such a problem with management. Vasquez states that he responded that there was a lack of communication between Parksite and Ryder and that this had caused problems with the employees, which was why the employees "entered" the Union. Vasquez testified that when Alamo then asked why the employees brought in the Union, he repeated that Parksite and Ryder were always fighting and that the employees needed someone else to protect them. Vasquez was one of the Ryder employees who was *not* offered a job by Parksite.

Jeff Ogren, a driver, testified that during his interview, he was asked if he was a member of the Union and that he responded that "we all were." He was offered a job and started working for Parksite on January 1, 2008.

Alamo testified that there were several employees who brought up the Union, but that these comments were volunteered by them and not made in response to any questions asked by him. And apart from the testimony of Jeff Ogren, there was no other person who testified that Alamo initiated the questioning of employees about the Union. Therefore, in the absence of any other corroboration, I am going to dismiss the interrogation allegation of the Complaint.

In the course of the interviewing process, Alamo made notes which he then typed up and turned over to the Company.

Alamo's notes regarding his interview with Erich Buelig, who was hired by Parksite and started working on January 1, 2008, contains the following:

> Erich made a point of <u>voluntarily</u> saying he was not a union supporter and went out his way to downgrade the union effort and said he walked out of one of the meetings. He said there were and are several drivers who are big complainers and were probably looking to bring in the union. BUT, he believes that PPW should have listened to the complaints to head off the problem – he doesn't think they did!
>
> He believes that PPW should start off having a written Mission Statement and making sure everyone knows what they stand for and solve the "attitudinal" problem which exists.
>
> Erich is well spoken, intelligent and appears to be firmly in support of PPW management if he is to be believed (and he honestly seems to be forthcoming).

Alamo's notes regarding John Saya, who was hired and started working on January 1, 2008 stated:

> John is well spoken and obviously knowledgeable about his job after 25 yrs. He said he was "shocked" and felt "let down" when he heard about the initial outsourcing. Now he believes it will be very positive to have Ryder gone even though he believes that Ryder does a good job with what it was handed. He said he want to make sure this doesn't happen again. He was very negative about the need for unionization. He also said he very, very much wants to keep his job because he likes the Parksite people, the location and his customers – and will do anything to keep his job.

Alamo's notes regarding Scott Rossi, who was hired and started working on January 1, 2008 states:

> Very personable: excellent knowledge and attitude about most co-workers and company, but not that happy about Ryder. Voluntarily said he stayed "under the radar with the whole union thing."

At South Windsor there were 42 people who were interviewed for driver and warehouse positions. Of these, 26 were former Ryder employees and 16 were non-Ryder applicants.

On December 11, 2007, the Company made its initial job offers. The evidence shows that at South Windsor, 15 out of the 16 non-Ryder applicants were offered jobs and that 14 out of the 26 Ryder applicants were offered jobs. Of the total jobs offered, five of the non-Ryder applicants did not accept the jobs. Of the people who started work on January 1 or 2, 2008, there were 25 employees who were hired, of whom 14 were former Ryder employees.

By letter dated December 11, 2007, the former Ryder employees who were offered employment at South Windsor were notified by Parksite that their wage rates would remain the same, (as set forth in the Ryder/Local 671 contract), but that health insurance and 401(k) plans would be Parksite company wide plans and not union contract plans. The remaining people were hired at starting rates that for the most part were lower.

The Company points out that at its New Brunswick, New Jersey facility, it recognized the Union that represented those employees because a majority of those hired were former Ryder employees who were represented by a union.

There is no question but that the operation at South Windsor, as it existed under Ryder, was carried on by Parksite with substantially no change. The functions of the unit were to warehouse the same types of building materials and to deliver those materials to the same customers. This was carried out in the same warehouse facility and was done with the same categories of workers. Indeed, Parksite rented the same trucks that Ryder had used for this process when it had performed these functions. The facts also show that Parksite hired three of the former Ryder managers to do the same jobs that they had done when they were employed by Ryder. (Charles Oliver, William Richards and Gary Scaramella).

It is my conclusion that the workforce that began working for Parksite at South Windsor on January 1 and 2, 2008, was a representative complement of employees. When the first election was held in June 2006, there were approximately 26 drivers and warehousemen. One year later, (and after some decline in business due to the beginning of the downturn in the housing market), there were 23 drivers and warehousemen who voted in the second election held on April 7, 2007. For the year 2007, the average number of drivers and warehousemen employed at South Windsor was 27. For the period of time between January 1 through July

2008, (just before the hearing in this case began), the Company's records indicate that the average complement of South Windsor unit employees was 26.

After making the job offers and by January 2, 2008, there were 25 drivers and warehousemen who were hired to work at the South Windsor facility. And although there were some people who left and were replaced during that first month, the number in the unit by the end of January 2008 was 26.

By letters dated December 19, 2007 and January 18, 2008, the Union requested recognition and bargaining. By letter dated January 22, 2008, the Respondent declined to recognize the Union, claiming that it was continuing to interview and hire drivers and warehousemen for South Windsor. [3]

Whether or not the evidence will ultimately show that Parksite made an effort to jury rig the hiring procedure to produce a different result, the outcome of the hiring process here was that the former Ryder employees made up a majority of Parksite's work force as of January 2, 2008, which is the effective date that it commenced operations. Because it is my conclusion that the work force as of January 2, 2008 constituted a substantial and representative complement of the new employer's work force, I conclude that Parksite is a successor at its South Windsor facility with respect to the drivers and warehousemen. I therefore conclude that Parksite had an obligation to recognize and bargain with the Union and that by failing to do so, it violated Section 8(a)(1) and (5) of the Act.

b. The Alleged Refusal to Hire

The General Counsel contends that the ten individuals listed as discriminatees in the Complaint were not hired because of their "open and notorious" union activities. Alternatively, she alleges that Parksite set up its hiring process at South Windsor so that there would be a probability that a majority of those hired would not be former Ryder employees

The Respondent denies that it refused to hire any individuals because of their union activities and denies that it engaged in a "plot" designed to result in the hiring of a minority of Ryder employees. It contends that the person responsible for making the hiring decision, (Coulter), did not even know who among the former Ryder employees were either union members or what their union activities were.

As a general rule where it is alleged that an employer has illegally refused to hire employees because of their union membership or activities, the legal test is the same as the one applied when it is alleged that an employee or employees have been illegally discharged or laid off. *Planned Building Services, Inc*., 347 NLRB No. 64 (2006). This test was enunciated in *Wright Line* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and was approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). Thus, when the General Counsel makes a prima facie showing that is sufficient to support an inference that protected or union activity was a motivating factor in the decision to discharge or take other adverse action against employees, the burden shifts to the Respondent to demonstrate that it would have taken the same action in the absence of the protected activity.

[3] The General Counsel points out that as of January 22, there were 23 bargaining unit employees on the payroll of whom, 13 were former Ryder employees.

In this case the General Counsel has two alternative but overlapping theories in support of the 8(a)(3) claim.

In the first, the General Counsel contends that the ten former Ryder employees who were denied employment were rejected because of their specific union membership or activities. In this regard, Parksite management was, at the very least, aware of which employees participated in collective bargaining between Ryder and the Union and who were elected to be the Union's shop stewards. (Davis, Vasquez and Roberts).

The Respondent claims that Coulter was the *only* person who made the hiring decisions and that he personally had no knowledge of which employees were active union supporters. The first of these claims is demonstrably not correct. And the second is dubious at best. While it may be that Coulter made the final hiring decisions, he admittedly relied on the recommendations of Jeffrey LaRusso. As a practical matter, LaRusso therefore had as much or more to say, at least as to the former Ryder employees, regarding who would be hired.

It was conceded by the Respondent that Jeffrey LaRusso knew the identities of the union stewards. Moreover, as LaRusso and Parksite's sales manager were constantly at the facility with the former Ryder employees, they had to have noticed that the chosen, (for non-hire), wore union clothing and pins and displayed union decals on their vehicles. Further, as the evidence shows that Coulter relied on LaRusso's recommendations as to which former Ryder employees to hire or not hire, and as such recommendations could easily have been based on LaRusso's "knowledge" of the employees' union activities, his knowledge and intent is transferrable to Coulter. And in this regard, it is significant to me that the Respondent chose not to present the testimony of LaRusso who could have testified about his conversations with Coulter and why he made the recommendations that he did.

Under the second theory, if I agree that the Respondent refused to hire former Ryder employees as a means to avoid a "successor" bargaining obligation, then it really makes no difference as to whether Coulter or anyone else in the Respondent's management had knowledge as to the union activities of each employee. All that the General Counsel would have to show is **(a)** that the Respondent knew that a union represented the former Ryder employees at South Windsor; **(b)** that Parksite's management knew what the law was and **(c)** that Parksite's intent was to hire a work force in which the former Ryder employees would not constitute a majority. For that scenario to work, the way to accomplish that result would be to make sure that only a minority of the new work force consisted of the predecessor's employees and to arrange the hiring process so that one did not get caught. [4]

The Respondent contends that although it used a uniform hiring procedure for all eight of its facilities, the outcome at South Windsor was different because of the circumstances at this location were different. It contends that the South Windsor operation was significantly worse in terms of delivery mistakes, a condition mainly attributable to the warehouse operation as opposed to the drivers. In this regard, the evidence does show that South Windsor, for a period of time before the transition, had a higher error rate than any of the other facilities. This was in fact acknowledged by employees who testified for the General Counsel. On the other hand, the evidence indicates that a good deal of this problem resulted from the high turnover rate of Ryder management at this facility and the continuing disputations between Ryder's managers and Parksite's local manager, Jeffrey LaRusso. In this regard, the evidence suggests that LaRusso

[4] As shown by the original recognition of the New Jersey facility, it seems to me that Parksite's Human Resource people were knowledgeable about the law regarding "successorship."

tended to interfere perhaps too much in the way that Ryder wanted to manage deliveries and this generated conflict which flowed down to the employees. [5] (This conflict was mentioned by some of the Ryder employees at the interviews that were conducted by Alamo).

So, what evidence has the General Counsel presented to support her theory that the hiring process was rigged in an effort, (that was inadvertently unsuccessful), to avoid an obligation to bargain?

As described above, Parksite's President, Richard C. Heitzman, interjected himself into the first election, urging the Ryder employees to vote against unionization and hinting that if they did so, Parksite might have to "explore all alternatives." To me this is a not too subtle statement that if the employees were to vote for Local 671, then Parksite might have to replace their employer and that they therefore could lose their jobs. [6] The Respondent, on the other hand, contends that this letter, even if representing Heitzman's true position, was sent more than a year before the decision to bring the work in-house and well before any decisions were made as to which employees would be hired or not hired.

From April 2006, Ryder sent monthly memoranda to Parksite. Each report has space for "Accomplishments," "Major Projects," "Opportunities" and "Concerns." The report encompassing South Windsor for April 1, 2006 states that one of Ryder's major projects was "Union avoidance." The report for May 2006, lists a major project as; "Union avoidance-Education." The report dated June 2006 lists a major project as; "Healing wounds from Union campaign." The reports for July, August, and September 2006 list a major project as; "Healing wounds from Union campaign. Improving morale." While these reports were generated by Ryder and not written by Parksite, it is reasonable to assume that the items listed in the reports were matters of interest to Parksite. And the comments that union avoidance was a major project for Ryder in April and May 2006 is consistent with the letter signed by Heiztman that was distributed to Ryder's employees. Also, the later reports concerning the necessity for "healing wounds from the Union campaign," clearly must have indicated to Parksite's management that the Union's campaign had affected employee morale.

In seeking non-Ryder applicants, Parksite advertised that a signing bonus of $1,000 would be paid to any non-Ryder applicant who was hired. Such a bonus was not offered at any

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[5] I note that LaRusso was rejected by Parksite to be the operations manager at South Windsor when the warehouse operation was brought back under its control.

[6] Under current law and pursuant to *Local No. 447 Plumbers* (*Malbath),* 172 NLRB 128 (1968), a company cannot be held to violate Section 8(a)(3) when the employees of a subcontracting employer lose their jobs because the contract is canceled, *even if the contract is canceled for anti-union considerations*. See also *Computer Associates* 324 NLRB No. 43 (1997). Curiously, *Malbath* did not involve an allegation of either Section 8(a)(1) or (3) of the Act. Instead it involved a situation where a union that had engaged in secondary boycott activity was charged with violations of Section 8(b)(1)(A) & (2) of the Act. It was alleged that by seeking to have one employer cease doing business with another, the Union was causing or attempting to cause an employer to discharge and discriminate against non-union employees. A majority of the Board, with chairman McCullogh dissenting, rejected this argument, holding that a general contractor and its subcontractors at a construction site are not joint employers and that an attempt to cause one to cease doing business with another is not the same as causing an employer to discriminate against employees. This is distinguishable from the situation where employer A, *while retaining its contractual relationship with employer B,* has been found to have violated 8(a)(3) with respect to employees not its own, when it urged or caused employer B to discharge specific individuals who were engaged in union activity. *Holly Manor Nursing Home*, 235 NLRB 426, 428 fn.4 (1978), *Central Transport, Inc*, 244 NLRB 656, 658-659 (1979) and *Georgia-Pacific Corp*., 221 NLRB 982, 986 (1975).

of the other seven locations and it is my opinion that the advertised bonus was offered as an inducement to enlarge the pool of possible applicants for the South Windsor facility.

Alamo, as part of his interviewing process, notified the Respondent's Human Resources Department, that three of the former Ryder employees were opposed to the Union. (Erich Buelig, John Saya and Scott Rossi). All three were offered employment.

Let's look at some more numbers.

At Apex, North Carolina, 15 Ryder employees were interviewed and 12 were offered jobs. There also were 6 non-Ryder applicants who were interviewed and one was offered a job.

At Louisville, Ohio, there were 15 Ryder employees who were interviewed and 13 who were hired. There were no non-Ryder applicants who were interviewed and none were hired.

At Baltimore, Maryland, there 20 Ryder employees who were interviewed and all were offered jobs. There were 11 non-Ryder applicants who were interviewed and none received offers of employment.

At West Chicago/Bensenville, there were 22 Ryder employees who were interviewed and 21 were offered jobs. There was one non-Ryder applicant interviewed and he was not offered a job.

At North Brunswick, New Jersey, which was and remains a unionized facility, there were 24 Ryder employees who were interviewed, of which 18 were offered jobs. There were no non-Ryder applicants interviewed or offered jobs. As noted above, Parksite recognized the Union at this location.

At Tampa, Florida, there were 42 Ryder employees who were interviewed and 27 were offered jobs. At this location there were 12 non-Ryder applicants who were interviewed but none were offered employment. (It seems that because of a severe downturn in housing construction, this necessitated a significant downsizing of this facility).

At Syracuse, New York, there were 21 Ryder employees who were interviewed and 17 were offered jobs. No non-Ryder applicants were interviewed or offered employment.

At South Windsor, all 26 of the Ryder employees were interviewed and 14 were offered jobs. Of the 12 who were not offered jobs, 10 were union supporters including the two shop stewards, Davis and Vasquez, plus the alternative shop steward, Roberts. The other seven had publicly demonstrated their union support by wearing union clothing or pins, or by utilizing union decals on their vehicles.

Of the 14 former Ryder employees who were offered jobs at South Windsor, the odds are that most voted for the Union at the April 5th election because the vote was 19 to 4. But included in the group that were hired were three individuals who expressed anti-union opinions during the interviewing process. Also hired were Richard Barrows who was a company observer at the first election and Jon Ruggles who was a company observer at the second election. A coincidence: Perhaps.

At South Windsor there were 16 non-Ryder people who were interviewed by Alamo. Of this group, 15 were offered jobs. (One more than the number of former Ryder employees who

were offered jobs). Within the non-Ryder group, there were numerous applicants who were hired but who scored below some of the former Ryder employees who were not offered jobs.

Even worse, there were individuals within the non-Ryder pool who were hired either against Alamo's recommendations or despite his very lukewarm recommendations. For example, Alamo made the following notation in the interview form for Shelton Eason; "I would not consider Shelton for hire unless you really needed to consider a replacement." Alamo made this note for Earl Brown; "I would not recommend Earl." As to Chaz Harris, Alamo wrote; "Chaz was a decent person and had some job stability but I wouldn't consider him a top tier candidate…." Regarding Cedric Avery, Alamo had this to say; "Not very communicative. I would not consider." As to Cedric Lanier, Alamo wrote; "Cedric says he's dependable, easy to train and reliable. He was a very nice guy, but I would not consider hiring." Regarding Robert Zigmond, Alamo wrote; "Robert would not stop talking! I honestly couldn't get a word in edgewise. Nevertheless, he is definitely not a fit at PPW." [7]

In my opinion, the evidence in this case demonstrates that Parksite set up a hiring process that as applied to the South Windsor facility, was intended to produce the result that the Respondent could avoid an obligation to bargain with the Union by making sure that it did not hire a majority of the predecessor's employees and therefore not being construed as a "successor" as that term is used in labor law. The details of that procedure have been highlighted above, and but for the fact that five of the non-Ryder applicants rejected job offers, the Respondent would have wound up on January 2, 2008 with a work force consisting of 14 former Ryder employees and 15 non-Ryder employees. This is a result that would be good enough to avoid majority representation by the predecessor's employees and *perhaps* good enough to persuade any outside reviewing body that the hiring process was neutral and non-discriminatory.

The Respondent has not convinced me that it would have refused to hire any of the ten rejected Ryder employees for legitimate reasons separate and apart from its motivation to make sure that the Ryder employees would not constitute a majority of the new work force.

For example, Coulter testified that based on LaRusso's recommendation, he did not offer a job to Davis, (a shop steward) because Davis was "abrasive" to his co-workers and did not go above the minimum in terms of work. He testified that Vasquez, (the other shop steward), was not hired because LaRusso described him as "insubordinate and disrespectful." Apart from the fact that these types of phrases have often been applied to people who actively support unions, the Respondent did not call LaRusso to testify in this proceeding and therefore we cannot say what LaRusso's opinions were based upon.

In fact most of the former Ryder employees who were not offered jobs were allegedly rejected by Coulter based solely on LaRusso's opinions of them. Thus, Coulter testified that LaRusso told him that Ingento was not a hard worker and was lazy. That LaRusso said that Testke had a bad attitude and was not productive. That LaRusso opined that Moyles and

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[7] In his pre-trial statement, Coulter stated; "Once Alamo finished his interview process and provided the results to Parksite, I made the final hiring decisions to fill all distribution function positions at our distribution centers, including deciding who to hire as our drivers and warehousemen at each location…. I relied on Alamo's results, any personal knowledge I had of each applicant, and on input from local Parksite personnel on their experience and opinion of the applicants that were former Ryder employees…. I also reviewed the "Interview questions" and answers as recorded by Alamo of all external candidates, as I had no previous knowledge or information on those candidates."

Barber had absentee problems. That LaRusso told him that Beulieu was careless and had, on one occasion, tossed a lap top computer in the air. (There is no suggestion that it fell).

And yet LaRusso never testified in this proceeding and therefore did not confirm that these opinions were true and accurate.

As to Burleigh and Rodriquez, Coulter testified that he independently was aware that these two individuals had problems with some customers who did not want them to come to their facilities. Burleigh admitted that in 2007, he did get into an altercation with a customer and was banned from that site. Rodriguez conceded that a customer had complained about him and banned him from its premises. But this was in 2000, quite a long time ago.

Notwithstanding the above, Jeff Ogren, a former Ryder truck driver who was offered employment by the Respondent, credibly testified that during his employment at Ryder he received disciplines for accidents and attendance problems. He also testified that he too received complaints from customers.

Based on all of the above, I conclude, contrary to the not-credited assertions of James Coulter, that the principle motivation in not hiring the former Ryder employees was to evade unionization and not because of the employees' alleged shortcomings. I therefore conclude that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire these individuals.

Conclusions of Law

1. The Parksite Group is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. International Brotherhood of Teamsters, Local Union No. 671, is a labor organization within the meaning of Section 2(5) of the Act.

3. The appropriate unit consists of all full-time and regular part-time drivers, warehouse employees and lead men employed at the South Windsor facility, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

4. By discriminatorily refusing to hire employees who had previously been employed by Ryder Integrated Logistics at Parksite's South Windsor, Connecticut facility, the Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By refusing to recognize and bargain with the Union as the collective-bargaining representative of its employees employed in the aforesaid unit, the Respondent has violated Section 8(a)(1) and (5) of the Act.

6. By unilaterally changing wages, hours, and other terms and conditions of employment of the employees in the above-described unit without first giving notice to and bargaining with the Union, the Respondent has violated Section 8(a)(1) and (5) of the Act.

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

The Remedy

Having found that Parksite has engaged in various unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as I have determined that Parksite illegally refused to offer jobs to former Ryder employees who worked at the South Windsor facility, I shall recommend that the Respondent offer them instatement to their former jobs, or if those jobs are no longer available, to substantially equivalent positions of employment and make them whole, with interest, for any loss of earnings they suffered as a result of the discrimination against them. The fact that the Respondent has hired other employees to do these jobs shall not be construed as meaning that the discriminated employees' job are no longer available. The Respondent can of course employ anyone it chooses, but it must nevertheless make job offers to the 10 former Ryder employees who were discriminated against.

I shall also recommend that Parksite be ordered to recognize and bargain with Local 671.

Further, as I conclude that the Respondent was obligated, under such cases as *Daufuskie Club, Inc. d/b/a Daufuskie Club and Resort*, 328 NLRB 415 (1999), *U.S. Marine Corp*., 293 NLRB 669, 670 (1989, *NLRB v. Advanced Stretchforming International Inc*., 165 LRRM 2870 and *NLRB v. Staten Island Hotel Limited Partnership*, 101 F.3d 858, 862 (2nd Cir. 1999), to bargain before changing the previously extant terms and conditions of employment, I shall recommend that the Respondent restore, to the extent possible, the wage rates and other terms and conditions of employment that were enjoyed by the predecessor's employees. See also *Planned Building Services, Inc*., 347 NLRB No. 64, slip opinion at page 5. [8] To the extent that employees have suffered any losses as a result of these unilateral changes, I shall recommend that the Respondent make them whole, with interest, for such losses.

The General Counsel argues that the Board should order that interest be paid on a compound basis instead of on the basis of simple interest. To date, this change in the interest rate has not been adopted by the Board. *Carpenters Local 687, Michigan Regional Council (Convention & Show Services, Inc*.); 352 NLRB No. 119.

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[8] When Parksite took over the operation, the employees who were formerly employed by Ryder and were hired by Parksite, were paid at the same wage rates that they were paid under the Ryder/Local 671 contract. The non-Ryder employees were paid at a lower rate, but under the aforesaid collective bargaining agreement, new hires were paid at lower rates and I therefore cannot determine in this preceding that the wages given to the new employees constituted a change. Under the Ryder/Local 671 contract, the employees were entitled to participate in Ryder's 401(k) plan and Ryder's health care plan. When Parksite took over, the employees were covered by Parksite's 401(k) plan and Parksite's health plan. From an economic point of view, the record does not show whether the benefits of either company's plans were better for the employees than the other company's plans. This can be reviewed in the Compliance stage of this proceeding. For example, it is hypothetically possible that under Ryder's plan a medical procedure might have been covered or reimbursed at a different level than the same procedure under Parksite's medical plan. If an employee who incurred a medical expense after being employed by Parksite would have received a greater benefit under the Ryder plan than under the Parksite plan, then he should be compensated for the difference.

As the General Counsel is contending that the Board should change its existing policy on interest, I shall defer that matter to the Board and make no recommendation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [9]

ORDER

The Respondent, Parksite Group Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a). Discouraging activity and support for International Brotherhood of Teamsters, Local 671 by refusing to hire or in any other manner discriminating against employees with respect to their hours, wages, or other terms and conditions of employment in order to avoid having to recognize and bargain with Local 671.

(b) Refusing to recognize and bargain with Local 671 as the exclusive collective bargaining representative of its drivers and warehousemen employed at the Respondent's facilities in South Windsor, Connecticut.

(c) Unilaterally changing the wages, hours and other terms and conditions of employment of the employees in the above described unit without first giving notice to and bargaining with Local 671.

(d) 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 collectively with Local 671 as the exclusive representative of its full-time and regular part-time drivers and warehousemen employed at its South Windsor, Connecticut facility with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document.

(b) Make whole, in the manner set forth in the remedy section of this decision, the unit employees for losses caused by Parksite's failure to apply the terms and conditions of employment that existed prior to its commencing operations at the South Windsor facility until such time as the parties have reached an agreement or until a valid impasse in bargaining has occurred. [10]

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

[10] In *Planned Building Services*, 347 NLRB No. 64, the Board concluded that it would permit the Respondent, in a compliance proceeding, to present evidence establishing that it would not have agreed to the monetary provisions of the predecessor employer's collective bargaining agreement and to establish either the date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals. While I am not sure how this speculative inquiry would be

Continued

(c) Within 14 days from the date of this Order, offer Brian Barber, Michael Beaulieu, Andrew Burleigh, Doug Davis, Benny Ingenito, Joseph Moyles, Evernard "Robbie" Roberts, Estaquio "Jay" Rodriguez, Jack Teske and Ivan Vasquez instatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against the employees named above and within three days thereafter, notify them in writing, that this has been done and that the refusals to hire, will not be used against them in any way.

(e) 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.

(f) Within 14 days after service by the Region, post at its facilities in South Windsor, Connecticut, copies of the attached notice marked "Appendix." [11] Copies of the notice, on forms provided by the Regional Director for Region 34, 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, or sold the business or the facilities involved herein, 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 Respondents at any time since January 1, 2008.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C., November 26, 2008.

Raymond P. Green
Administrative Law Judge

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reasonably adjudicated or what kind of objective evidence would be taken, this is the law and is recommended as part of this Remedy.

[11] 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."

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 discourage activity and support for International Brotherhood of Teamsters, Local 671 by refusing to hire or in any other manner discriminating against employees with respect to their hours, wages, or other terms and conditions of employment in order to avoid having to recognize and bargain with Local 671.

WE WILL NOT refuse to recognize and bargain with Local 671 as the exclusive collective bargaining representative of its drivers and warehousemen employed at its facilities in South Windsor, Connecticut.

WE WILL NOT unilaterally change the wages, hours and other terms and conditions of employment of the employees in the above described unit without first giving notice to and bargaining with Local 671.

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

WE WILL recognize and, on request, bargain collectively with Local 671 as the exclusive representative of its full-time and regular part-time drivers and warehousemen employed at its South Windsor, Connecticut facility with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document.

WE WILL make whole the bargaining unit employees for any losses caused by Parksite's failure to apply the terms and conditions of employment that existed prior to its commencing operations at the South Windsor facility until such time as the parties have reached an agreement or until a valid impasse in bargaining has occurred

WE WILL offer Brian Barber, Michael Beaulieu, Andrew Burleigh, Doug Davis, Benny Ingenito, Joseph Moyles, Evernard "Robbie" Roberts, Estaquio "Jay" Rodriguez, Jack Teske and Ivan Vasquez instatement to their former jobs, or if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole, with interest for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful actions against the employees named above and notify them in writing, that this has been done and that the refusals to hire, will not be used against them in any way.

Parksite Group Inc.
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1 Commercial Plaza, Hartford Ct 06103-3599.
Telephone 860-240-3004. Hours from
9:00 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 860-240-3004