

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

In the Matter of:

AMERICAN BAPTIST HOMES OF  
THE WEST d/b/a PIEDMONT  
GARDENS,

Employer,

Case No. 32-CA-35247,  
32-CA-25248, 32-CA-25266,  
32-CA-25271 through 32-CA-25308,  
32-CA-25498

and

SERVICE EMPLOYEES  
INTERNATIONAL UNION, UNITED  
HEALTHCARE WORKERS-WEST,

Union.

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**RESPONDENT'S BRIEF ANSWERING THE SEIU, UNITED HEALTHCARE  
WORKERS—WEST'S CROSS-EXCEPTIONS TO THE DECISION AND  
RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE**

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## TABLE OF CONTENTS

	Page
I. PRELIMINARY STATEMENT.	1
II. FACTS.	2
A. The Employer And The Union Commenced Negotiations Over The Contract In February 2010.	2
B. The Parties Reached A Stalemate On Three Key Economic Issues: Pensions, Health Insurance And Wages As Well As Disciplinary Procedures.	2
C. The Union Announced A Strike Vote In The Piedmont Gardens Break Room To Be Held From June 17 To June 18, 2010.	3
D. The Employees Authorize The Bargaining Committee To Call An Economic Strike.	4
E. Union's Flyers After The Strike Vote Discussed Economic Issues, And Did Not Mention Any Unfair Labor Practices.	4
F. At A Bargaining Session On July 9th, 2010, The Union Bargaining Committee Decided To Call For A Strike.	5
G. After The Union Bargaining Committee Provided Formal Notification Of A Strike, The Union Did Not Inform The Union Members As To The Reasons For Striking.	6
H. The Union Filed Two Unfair Labor Practices After Deciding To Go On Strike.	8
I. There Was No Evidence That The Union Members Were Striking Over Anything Besides Economic Issues.	8
III. ARGUMENT.	9
A. The ALJ Correctly Found That Bargaining Unit Members Could Not Have Been Motivated To Strike By Unfair Labor Practices Because There Was No Evidence That Union Members Even Knew About Them.	10

## TABLE OF CONTENTS

(continued)

	<b>Page</b>
B. The ALJ Correctly Found That The Bargaining Committee Members Were Not Motivated To Call A Strike Based On The Alleged Unfair Labor Practice.	13
C. Acting General Counsel's Alternative Theory That Evidence Of Knowledge And Motivation Of the Striking Employees Can Be Dispensed With Was Properly Rejected By The Judge As It Faulty And Contrary To the Law.	16
IV. CONCLUSION.	19

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alvin J. Bart and Co.</i> , 236 NLRB 242 (1978)	19
<i>Brooks &amp; Perkins, Inc.</i> , 282 NLRB 976 (1987)	17
<i>C-Line Express</i> , 292 NLRB 638 (1989)	15, 16, 18
<i>F.L. Thorpe &amp; Co. v. NLRB</i> , 71 F.3d 282 (8th Cir. 1995) <i>denying enf.</i> 315 NLRB 147 (1994)	12, 13
<i>Facet Enters.</i> , 290 NLRB at 154	13, 18, 19
<i>Gatliff Bus. Prods.</i> , 276 NLRB 543 (1985)	15
<i>Golden Stevedoring Co.</i> , 335 NLRB at 411	11, 12
<i>KSM Indus., Inc.</i> , 336 NLRB 133 (2001)	1, 15
<i>Mauka, Inc.</i> , 327 NLRB 803, 804 (1999)	13
<i>Soule Glass Co. v. NLRB</i> , 652 F.2d 1055 (1st Cir. 1980)	15
<i>Standard Drywall Products</i> , 91 NLRB 544 (1950), <i>enf'd</i> , 188 F.2d 362 (3rd Cir. 1951)	14
<i>Times Union</i> , 356 NLRB No. 169 1 (2011)	19
<i>Titan Tire Corp.</i> , 333 NLRB 1156 (2001)	14

## I. PRELIMINARY STATEMENT.

The ALJ correctly found that the Employer, Piedmont Gardens, acted fully within its rights when it hired permanent replacements during the August 2010 strike. The ALJ found that the Acting General Counsel failed to establish either of its two theories on this issue—first, that the August 2010 strike was motivated by unfair labor practices; and second (in the alternative), that even if the strike were motivated by economic issues, the Employer had permanently replaced 26 economic strikers based on an “unlawful independent purpose.” The General Counsel excepted to the ALJ’s finding on its alternative theory, but abandoned its first theory.

Now, the SEIU, United Healthcare Workers—West (the “Union”), which declined to even file a post hearing brief with the ALJ, cross-excepts to the ALJ’s conclusions with respect to General Counsel’s first theory, that the strike was an unfair labor practice strike. In making its arguments, the Union misstates the record, ignores the vast bulk of the record evidence which decimates its arguments, and would have the Board reverse, without foundation, amply-supported factual findings made by the Judge. This is not a close case. The Union’s exceptions to the ALJ’s well-reasoned decision that the strike was an economic one at all times relevant herein are baseless and should be rejected.<sup>1</sup>

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<sup>1</sup>As a threshold issue, before any argument that the strikers were unfair labor practice strikers can be considered, one must first establish that the Employer actually engaged in unfair labor practices as alleged in the Consolidated Complaint. *KSM Indus., Inc.*, 336 NLRB 133, 134, 145 (2001). The ALJ concluded that the Employer engaged in two non “hallmark” ULP’s prior to the conclusion of the strike, including the alleged discriminatory enforcement of its access rule against off-duty employees assisting in the strike vote June 17 and 18, and the alleged surveillance (or creating the perception of surveillance) in the break room on June 17. The Employer has filed cross exceptions to those portions of the ALJ’s decision. Accordingly, it is the position of the Employer that the strike could not possibly be an unfair labor practice strike as no unfair labor practices were committed. However, for the purposes of responding to the Union’s cross exceptions, we are assuming *arguendo* that those ULP’s have been established.

## II. FACTS.

### A. **The Employer And The Union Commenced Negotiations Over The Contract In February 2010.**

American Baptist Homes of the West operates retirement facilities throughout the United States, including Piedmont Gardens, located in Oakland, California. Piedmont Gardens is separated into three interconnected buildings: independent living, assisted living, and skilled nursing. (ALJD at 3:16-22).

SEIU, United Healthcare Workers-West (the "Union") represents approximately one hundred Piedmont Gardens employees for collective bargaining purposes. (Tr. at 40:8-10). These employees are dietary department workers (cooks, cook helpers, wait staff); nursing department workers (certified nursing assistants and activity assistants); housekeeping department workers (housekeepers, janitors and laundry workers); resident services workers, and general/administration workers (receptionists), among others. (ALJD at 4:4-10; Resp. Exh. 17).

The parties' collective bargaining agreement was set to expire on April 30, 2010. (ALJD at 4:4-10). In anticipation of the contract's expiration, the parties began bargaining in February 2010. (ALJD at 4:12-14).

### B. **The Parties Reached A Stalemate On Three Key Economic Issues: Pensions, Health Insurance And Wages As Well As Disciplinary Procedures.**

It was undisputed that as negotiations progressed, several important contractual issues began to dominate the discussions. First, the Union proposed changes, which the Employer rejected, to the discharge and discipline section of the collective bargaining agreement. (ALJD at 4:18-25). Second, the Employer proposed withdrawing from the SEIU pension plan and substituting participation in ABHOW's contributory 401(k) plan. (Tr. at 364:22-365:13). The Union would not agree to this request, insisting on maintaining the SEIU Pension Plan. (ALJD at 4:28-29; Tr. at 365:14-18). Third, the Employer proposed changing the health

care plan, due to increased costs that had been proposed by the health care provider. The changes would result in a higher deductible for plan participants but would also provide for an Employer-paid HRA to offset the cost. (Tr. at 365:19-366:13). The Union also would not agree to this proposal. (ALJD at 4:29-5:3; Tr. 366:14-15). Fourth, the parties also could not agree on an amount for the wage increase. (ALJD at 5:3-7; Tr. 366:22-367:3).

The Union does not dispute, in its Brief in Support of Cross-Exceptions, the ALJ's finding that disagreements over these critical economic issues were the impediments to a final agreement. (ALJD at 4:17-18; 5:9-10). At the May 12 bargaining session, the Union provided notice of informational picketing to take place on May 25, 2010 at Piedmont Gardens. (ALJD at 5:10-14; Resp. Exh. 7). The purpose of the Union's informational picketing was to put pressure on the Employer "until a mutually agreeable resolution" had been reached. (ALJD at 5:10-14; Resp. Exh. 7). At the May 25 picket line, employees held signs which protested the Employer's bargaining positions, e.g., "No to Healthcare Reductions"; "Pension Now!"; "We are United for a Fair Contract"; "Fair Wages Now!!!"; and "Fair Healthcare for Healthcare Workers." (ALJD at 5:14-17; Resp. Exh. 15).

Following the picketing, the parties met for more bargaining sessions but made no progress. (ALJD at 5:19; Tr. at 399:11-400:6). The Union's bargaining team, interested in putting bargaining pressure on Piedmont Gardens, decided to call for a strike vote. (ALJD at 5:20-22; Tr. at 114:13-18; 167:1-168:11).

**C. The Union Announced A Strike Vote In The Piedmont Gardens Break Room To Be Held From June 17 To June 18, 2010.**

The Union circulated a flyer encouraging its members to vote for a strike, in order to "show management that we're serious and won't settle for anything less than what we deserve." (ALJ at 5:22-27; Resp. Exh. 1). The flyer stated:

“Management still wants to take away our pension, make us pay a lot more for our health insurance and is offering a raise that’s a joke.” (ALJ at 5:22-27; Resp. Exh. 1). The flyer informed members that a strike vote would take place on June 17 and June 18. It did not mention any unfair labor practices, or even the words “unfair labor practices.” (Resp. Exh. 1).<sup>2</sup>

**D. The Employees Authorize The Bargaining Committee To Call An Economic Strike.**

The result of the June 17-18 strike vote was to authorize the Union’s Bargaining Committee to call a strike. However, as there was no evidence that any of the voters (other than a few members of the bargaining committee) were even aware of<sup>3</sup>, much less motivated by the alleged unfair labor practices, the ALJ determined that the result of the strike authorization vote was to authorize the bargaining committee to call an economic strike against the Employer. (ALJD at 22: 23-29).

**E. Union’s Flyers After The Strike Vote Discussed Economic Issues, And Did Not Mention Any Unfair Labor Practices.**

Following the strike vote on June 17 and 18, the Union distributed two flyers in the break room which publicized a “successful strike vote.” (Tr. at 408:1-10; 409:21-410:8; Resp. Exh. 10 and 11). One flyer bore the heading “We’ll Do Whatever It Takes to Win a Good Contract” and stated that the Union had been “working hard to negotiate a good contract with fair raises and overall

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<sup>2</sup>In its Brief in Support of Cross-Exceptions, the Union makes much of the fact that during the strike vote, the Union members used ballots which referred to the strike as an “unfair labor practice strike” (which, according to the Union, “surely goes to the motivation of those who cast a ballot.”). See Union Brief, p.4 (ALJ Exh. 1). However, Union representative Myriam Escamilla admitted that the reference to an “unfair labor practice strike” on the ballot was boilerplate, and that the Union “always calls for unfair labor practice strikes” even when the employer has committed no unfair labor practices. (Tr. at 561:11-15).

<sup>3</sup>The Union’s brief points to no facts in the record to support any argument that the Judge was incorrect in concluding that the voters were not aware of the alleged ULP’s at the time of voting.

improvements, but management has stalled and dragged things out.” (Resp. Exh. 10). One of the Union stewards was quoted on the flyer: “Join our strike for quality health care, wages, and pension. This is our right, our fight!” (Resp. Exh. 10). The flyer also stated that the parties would have another bargaining session on July 9th, and that if the parties did not reach an acceptable agreement, the Union was “united and ready to strike.” (Resp. Exh. 10).

The second flyer, also posted in the break room after the strike vote, bore the heading: “We’re fighting for a fair contract with the benefits, pension, and wages we deserve.” (Tr. at 409:14-21; Resp. Exh. 11). The flyer outlined the parties’ proposals regarding wage increases, health insurance, and disciplinary rules, and stated: “We are ready and will not let management scare us into a cheap deal that only benefits them . . . We have the right to strike and to fight back.” (Resp. Exh. 11).

Neither of the flyers mentioned any alleged unfair labor practices.

**F. At A Bargaining Session On July 9th, 2010, The Union Bargaining Committee Decided To Call For A Strike.**

Despite the parties’ continuing disagreement on key economic issues, the Union and the Employer made a last ditch effort to bridge the huge gap between them. But at the July 9 session, the parties were still far from agreement. (Tr. at 412:12-413:3).

The Union bargaining committee members made the decision to notice the strike during a break in negotiations on July 9. (Tr. at 62:19-21). The ALJ found that, while discussing reasons to go on strike, bargaining committee members Sheila Nelson, Sanjanette Fowler, and Matilda Imbukwa discussed an incident on June 17 where a security guard allegedly appeared to conduct surveillance in the break room, and incidents on June 17 and 18 where the Employer’s Executive Director Gayle Reynolds enforced a no-access rule to require three off-duty

employees to leave the break room. (ALJD at 22:37-42). However, the ALJ correctly made the factual finding that the members of the bargaining committee were not actually “motivated by either Pinto’s unlawful surveillance or Reynolds’ unlawful evictions of employees in deciding to call” a strike. (ALJD at 24:35-37). In making this finding, he relied on the pre-trial affidavit of bargaining committee member Sheila Nelson who testified under oath that: “The purpose of the Strike was to put pressure on the Employer to reach an agreement with the Employer on a new contract.” (ALJD at 24: 38-42; Tr. at 168:5-15). Bolstering this conclusion was a similar affidavit from another committee member, Sanjanette Fowler, who testified: “We began striking at Piedmont Gardens. . . . The purpose of the strike is to put bargaining pressure on the Employer.” (ALJD at 24:44-46; Tr. at 243:24-244:4). He also noted that Fowler admitted that on July 9, after the bargaining committee’s decision, she returned to Piedmont Gardens “ and informed co-workers that the earlier bargaining session had not resulted in any agreement, that the employees had no choice but to strike, and that a reason for the strike was contract language.” (ALJD at 24: 46-49; Tr. at 246:18-24; 247:23-248:8).

The Union’s strike notice, delivered on July 9th, 2010, stated that the Union would commence striking on August 2, 2010, and would “continue such activity unless and until a mutually agreeable resolution has been reached.” (Tr. at 411:7-18; G.C. Exh. 10). The Union also delivered a second letter which stated that the strikers “unconditionally offered to return to work at or after 5:00 a.m. on Saturday, August 7, 2010.” (G.C. Exh. 11). Neither of these letters mentioned any unfair labor practices. (G.C. Exh. 10, 11).

**G. After The Union Bargaining Committee Provided Formal Notification Of A Strike, The Union Did Not Inform The Union Members As To The Reasons For Striking.**

After making the decision to strike on July 9, the Union bargaining committee members did not inform the other Union members why they had

decided to strike. The only meetings with Union members that took place after the July 9 strike notice were one-on-one meetings to discuss the logistics of the strike (*i.e.*, assessing willingness to strike, strike shifts, and to address questions about the contract negotiations). (ALJD at 14:3-9). No further information was given to Union members as to what was discussed on July 9. (ALJD at 14:9-12).<sup>4</sup>

All indications were that the Union members who were not on the bargaining committee thought the strike was economic in nature. Indeed, Union bargaining committee member Sanjanette Fowler admitted that after the July 9 meeting, she told a group of Union members that because bargaining with the Employer wasn't "getting anywhere," the Union had "no other choice but to go on strike." (ALJD at 13:11-15).<sup>5</sup> The only evidence in the record of any attempt to communicate with the rank and file as to any reasons behind the committee's decision to call a strike as why the committee had called a strike, other than economic reasons, was the uncorroborated testimony of committee member Sheila Nelson who answered "Yes" to a leading question by Counsel for the General Counsel: "... [D]o you remember telling employees/members that one of the reasons for the strike was that management was making unilateral changes by telling employees to get out of the building?" (Tr. at 249: 20-24). The Judge discredited this testimony, noting that it was a "blatantly leading question." "I give no credence to Fowler's

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<sup>4</sup>On this later point, the testimony of Union agent Myriam Escamilla provided: "Q. I'm talking about did you publish anything for the employees as to what was discussed on July the 9th? A. No."

<sup>5</sup>Union Agent Escamilla described the content of the meetings with the rank and file after the strike vote was given: "No, it was to assess whether or not people will walk out and what days they will, you know, be at the picket line and their shifts for the picket line. (Tr. at 564: 22-25; ALJD at 14:1-9).

response to a leading question by counsel for the Acting General Counsel.” (ALJD at 13:42-45; 23: 37-38).<sup>6</sup>

**H. The Union Filed Two Unfair Labor Practices After Deciding To Go On Strike.**

On July 26, 2010, several weeks after the bargaining committee members decided to go on strike, the Union filed two unfair labor practice charges. (G.C. Exhs. 1(mmm) and 1(ooo) [Charges 32-CA-25247 and 25248, filed on July 26, 2010]). The charges alleged that a security guard had conducted unlawful surveillance in the break room on June 17 during the Union strike vote, and that the Executive Director had disparately enforced a no-access rule on June 17 and 18 by asking three off-duty Union members to leave the break room while they were allegedly helping to conduct the strike vote. *Id.*

**I. There Was No Evidence That The Union Members Were Striking Over Anything Besides Economic Issues.**

The Union commenced its strike on August 2, 2010. All of the evidence supports the ALJ’s factual finding that the Union members were striking over economic issues, not to protest the unfair labor practices. For example, Union member Keiyana Kemp was interviewed by the media on August 2nd regarding her reasons for striking. She stated: “I’m struggling. I’m working hard and a 1.5 raise is not going to pay anything for me and my family and on top of that they want me to pay for my medical expenses out of pocket. Now, with three kids and the money we are making—I can’t even live right now.” (ALJD at 14:37-41; Resp. Exh. 18).

The strikers’ pickets and chants also indicated an economic motivation for the strike. Strikers carried picket signs that stated: “One percent can’t pay the rent”

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<sup>6</sup>One should note that an unlawful unilateral change was not alleged in the Complaint nor was it litigated below.

and “Affordable healthcare” (Tr. at 172:23-173:4; 174:16-20), and chanted “One percent won’t pay the rent” and “No peace, no contract.” (ALJD at 14:33-34; Tr. at 413:13-20). Two members of the Union’s bargaining committee provided pretrial Board affidavits which indicated an economic motivation for the strike, and which did not mention that the strike was motivated by any unfair labor practices. (ALJD at 12:20-24 (“The purpose of the strike is to put pressure on the Employer to reach an agreement with the Union for a new contract.”); ALJD at 13:7-8 (“The purpose of the strike is to put bargaining pressure on the Employer.”))

The strikers even sent a letter on official Union letterhead to Oakland Mayor Ron Dellums, asking for his support, and stating the purpose for the strike in economic terms. (ALJD at 14:41-51). The strikers explained that the Union had been bargaining for a new contract and had proposed “common sense disciplinary rules as well as modest economic improvements” and that the Employer had “refused to move away from its harmful disciplinary policies” and sought to “dramatically cut our healthcare and eliminate our pension fund entirely.” (Resp. Exh. 14). The strikers cited these economic reasons for their strike, without mentioning any alleged unfair labor practices. (Resp. Exh. 14).

### **III. ARGUMENT.**

Even though the ALJ, based on overwhelming evidence, correctly found that economic reasons motivated the August 2-7 strike, the Union excepted to the ALJ’s findings and conclusions. The ALJ findings of fact and law on this issue should be affirmed for three reasons. First, the ALJ’s conclusion that when the rank and file employees authorized a strike during the June 17 and 18 balloting, they were authorizing an economic strike, was amply supported by the facts and law. As the Judge correctly found (and there is no basis to overturn this finding) the employees had no knowledge of the alleged surveillance or disparate

enforcement ULP's when they voted to authorize a strike on June 17 and 18 or at any time thereafter. Second, the ALJ's factual finding that even the bargaining committee members themselves were not motivated by the alleged unfair labor practices in calling the August 2010 strike was supported by ample evidence in the record. Third, the Union's alternative theory, that even if bargaining unit members were not aware of any unfair labor practices allegedly committed by the Employer, they "delegated" the decision to strike to bargaining committee members based on whatever issues they wanted, fails as a matter of law.

**A. The ALJ Correctly Found That Bargaining Unit Members Could Not Have Been Motivated To Strike By Unfair Labor Practices Because There Was No Evidence That Union Members Even Knew About Them.**

In order to be characterized as an unfair labor practice strike, the strike must have been actually caused by the ULP's. In *Golden Stevedoring Co.*, 335 NLRB 410 (2001), the Board held that "a work stoppage is considered an unfair labor practice strike if it is motivated at least, in part, by the employer's unfair labor practice . . . . It is not sufficient, however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events . . . . In sum, the unfair labor practices must have contributed to the employees' decision to strike." *Id.* at 411; *RGC (USA) Mineral Sands, Inc.*, 324 NLRB 1633, 1634 (1997).

In the instant case, there is no evidence that the rank and file employees were even aware of these alleged unfair labor practices, much less that they cared enough about them to cause them to go on strike. There was no evidence that the bargaining committee members (Ms. Nelson, Ms. Fowler, or Ms. Imbukwa) ever told any other bargaining unit members that they had been asked to leave the building. Similarly there was no evidence of dissemination of the alleged "break room surveillance" to the rank and file. The only "evidence" that the Union cited

to support its contention that the bargaining unit members even knew about the unfair labor practice charges consisted of language on a strike ballot that the union representative admitted was boilerplate, a response to a leading question that the ALJ properly disregarded, and the Union representative's testimony that after July 9, the bargaining committee members held "one-on-one" meetings with the rank and file to gauge their support for the strike—not to inform them about the bargaining committee members' alleged reasons for striking. In light of this insufficient evidence, the ALJ correctly found:

There is no credible record evidence that, between July 9 and August 2, either Union agents or the [] members of the bargaining unit employees' negotiating committee, ever informed Respondent's other bargaining unit employees that the economic strike, which they had authorized their bargaining committee to call, had morphed into a strike to, at least, partially protest and redress their employer's unfair labor practices. In this regard, the Union published no materials on the subject; while bargaining committee members did meet individually with fellow bargaining unit employees, the subject of these meetings appears to have concerned procedural matters pertaining to each employee's participation in the strike; and, after June 17 and 18, bargaining unit employees never again voted on the rationale for their concerted work stoppage and strike against Respondent. (ALJD at 23:2-12).

This failure of proof compels adoption of the ALJ's finding that the strike was not motivated by unfair labor practices. Well-established Board law requires evidence that the strikers themselves were motivated by the employer's unfair labor practices. *See Golden Stevedoring Co.*, 335 NLRB at 411-12 (finding it "most significant" that General Counsel failed to offer evidence that unfair labor practices were discussed at strike meeting and rejecting employees' generalized complaints about management "harassment" as proof that unfair labor practices motivated strikers); *C-Line*, 292 NLRB at 639 (noting lack of evidence that strikers "were even aware" of alleged refusal to answer information requests or

that unlawful statements to some of their co-workers on the picket line prolonged the strike); *F.L. Thorpe & Co. v. NLRB*, 71 F.3d 282, 290-91 (8th Cir. 1995) *denying enf.* 315 NLRB 147 (1994) (reinstating the administrative law judge's conclusion that employer's unfair labor practices did not motivate strike when abundant evidence showed that employees were motivated by economic issues, evidence of dissemination was limited to small number of employees, and picket signs never referenced the unfair labor practices).

The chronology of events also negates any possible conclusion that the strike was an unfair labor practice strike. The incidents that allegedly gave rise to the unfair labor practice charges were not alleged to have taken place until well after the strike vote was underway. The unfair labor practice charges were not even filed until July 26, over a month after the strike vote. No charges were pending on June 16-June 17, when the bargaining unit members decided whether to strike. This was an economic strike from its conception through its conclusion. *See Facet Enters.*, 290 NLRB at 154 (holding that strike was not converted to unfair labor practice strike until union members learned of the employer's unfair labor practices).

In determining the true motivation for a strike the Board has often looked at objective evidence of motivation such as picket signs or other admissions regarding the strikers' motivation. *Compare Mauka, Inc.*, 327 NLRB 803, 804 (1999) (finding proof of strike motivation in striking employee's statements to manager and content of picket signs) *with F. L. Thorpe*, 71 F.3d at 290-91 (citing lack of change to picket signs as evidence refuting alleged conversion of ULP strike). In the instant case all of the evidence points to a workforce that was frustrated with the lack of progress at the bargaining table and struck to (hopefully) break the log jam. The parties had bargained since February and had reached a stalemate regarding the critical issues of the Union pension plan and the

Employer's proposed substitution with the 401(k) plan, health insurance deductibles, and wages. The Union had previously attempted to apply bargaining pressure through its informational pickets and by publicizing its "successful strike vote." As the ALJ noted, the Union had even written a letter to the Oakland mayor, explicitly citing economic motivations as reasons for their strike. In light of these significant economic issues, it is improbable that a reasonable person would have been persuaded to strike over issues as trivial as the use of a cell phone by a security guard and the enforcement of an access rule over two days in June. *See Titan Tire Corp.*, 333 NLRB 1156, 1157 (2001) ("Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context.")

The state of mind of the employees is a question of fact. The ALJ made the factual finding, based on the evidentiary record, that the rank and file were not motivated by any acts of the Employer, except perhaps its failure to agree to the Union's positions in bargaining. Under the Board's oft-cited case *Standard Drywall Products*, 91 NLRB 544, 545 (1950), *enf'd*, 188 F.2d 362 (3rd Cir. 1951): "Hence we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." The Union points to no evidence, and there is no evidence in the record, supporting any other finding than the one made by the Judge, much less the "clear preponderance of all relevant evidence" which would be required to overturn this finding.

**B. The ALJ Correctly Found That The Bargaining Committee Members Were Not Motivated To Call A Strike Based On The Alleged Unfair Labor Practice.**

Three members of the union bargaining committee (Ms. Nelson, Ms. Fowler, and Ms. Imbukwa) testified that they had discussed being evicted from the facility

on June 17-18 and the alleged surveillance on June 17, during a break from contract negotiations on July 9. The ALJ correctly found that despite this testimony, he was “not convinced that the bargaining committee actually was motivated by either [the] unlawful surveillance or [the] unlawful evictions of employees in deciding to call for the August 2 through 7 concerted work stoppage and strike against Respondent.” (ALJD at 24:35-37). The ALJ noted that the bargaining committee members were impeached by their pre-trial affidavits which stated that the purpose of the strike was to put bargaining pressure on the employer. (ALJD at 24:40-46).

As stated above, in order for a strike to be deemed an unfair labor practice strike, the strike must be *motivated* by unfair labor practices. *KSM Indus, Inc.*, 336 NLRB 133, 145 (2001) (emphasis added); *Gatliff Bus. Prods.*, 276 NLRB 543, 563 (1985). Moreover, not every ULP is sufficient. Even if the conduct was unlawful, it must be of “such frequency or magnitude” so as to have motivated the strike. *C-Line Express*, 292 NLRB 638, 639 (1989). As stated by the Board in *C-Line Express, supra*: “The Board has long held that an Employer’s unfair labor practices during an economic strike do not *ipso facto* convert it into an economic strike into an unfair labor practice strike.” 229 NLRB at 638.<sup>7</sup> Moreover any characterization of the strike as an unfair labor practice strike made by union leadership is inherently unreliable and suspect. “However, in examining the union’s characterization of the purpose of the strike, *the Board and the court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context.*” *Id.* (emphasis added) (citing with

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<sup>7</sup>*C-Line* involved the issue of whether an economic strike was “prolonged” by the employer’s unfair labor practices, thus converting an economic strike into an unfair labor practice strike. The legal analysis is the same in our case where the issue is whether the strike was an unfair labor practice strike from its inception.

approval the First Circuit's opinion in *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1980)).

Applying these standards to the instant case results in the unmistakable conclusion that *the* motivation for the strike was the lack of agreement on the contract terms. It is also manifest that the alleged unfair labor practices did not and could not transform the strike into an unfair labor practice strike. The alleged unfair labor practices were minor and isolated to two days in June 2010, hardly the type "frequency or magnitude" that could reasonable be expected to motivate Union members to strike. They pale in comparison to the serious economic issues or pension, health insurance and wages that so deeply separated the parties in the negotiations.

In *C-line Express*, the employer was found to have committed unfair labor practices far more serious than those alleged (much less proven) here.<sup>8</sup> Nonetheless, the Board reversed the ALJ and concluded that these ULP's did not convert the strike into an unfair labor practice strike. In reviewing Board cases in which the Board determined that the ULP's were serious enough to convert the strike into an unfair labor practice strike, the Board noted: "The common thread running through these cases is the judgment of the Board that the employer's conduct *is likely to have significantly interrupted or burdened the bargaining process.*" *C-Line Express*, 292 NLRB at 638 (emphasis added). Applying this standard to the facts of the case, the Board determined that the General Counsel had failed to sustain her burden of proving a "causal nexus" between the employer's unfair labor practices and the continuation of the strike. *Id.* at 639.

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<sup>8</sup>Specifically, the employer was found to have violated Section 8(a)(1) by threatening strikers with discharge and informing them that it would not sign a contract with the union, and further violated Section 8(a)(1) and (5) by refusing to provide the union with requested information regarding the alleged sale of its trailers to another company.

Comparing those facts to the instant case, it is clear that the unfair labor practices alleged against the Employer, even if true, did not represent “conduct [which is] likely to have significantly interrupted or burdened the course of the bargaining process.” First of all, the allegations are isolated and minor. Moreover, as the Union never mentioned these allegations during the remaining sessions after they allegedly occurred, it is hard to imagine a cogent argument that they could have had any impact on the bargaining process, much less the “interruptions” or “burdens” required by the Board in *C-Line*. (Tr. 414:23-415:10). Moreover, as the ALJ correctly recognized, these alleged unfair labor practices were hardly the kind of “hallmark” violations where the Board has found an unfair labor practice strike. (ALJD at 24:7). Compare, *Brooks & Perkins, Inc.*, 282 NLRB 976 (1987) and cases cited therein where the Board concluded that the employer’s unlawful withdrawal of recognition from the union was sufficient to conclude that the strike was an unfair labor practice strike.

**C. Acting General Counsel’s Alternative Theory That Evidence Of Knowledge And Motivation Of the Striking Employees Can Be Dispensed With Was Properly Rejected By The Judge As It Faulty And Contrary To the Law.**

The Union, apparently aware of the weakness of its evidence demonstrating any knowledge by bargaining unit members of the alleged unfair labor practices, alternatively allege that when the Union members voted to strike on June 17 and 18, they “delegated” not only the *decision* to go on strike to the Union bargaining committee, but also the *motivation* for the strike activity. Under this theory, the strike would be an unfair labor practice strike even if the rank and file had no clue that such was the reason for their actions, and even in the face of communications from the Union and the Committee that the reasons for the strike were purely economic and even in the face of undisputed evidence that the strikers themselves were motivated by a lack of progress at the bargaining table. This novel theory,

completely unsupported by the case law (of which the Union cites none in its brief) was initially advanced by the Acting General Counsel, but was abandoned in its exceptions. The Union's cross exceptions resurrect this curious theory.<sup>9</sup>

This theory fails for a number of reasons. First, Board law does not allow an elite group of nine employees to "decide" the strike reasons for the remaining 90 percent of the strikers. As stated above, in order to be considered an unfair labor practice strike, strikers must be *motivated* by unfair labor practices that are of such "frequency or magnitude" so as to have motivated the strike. *C-Line Express*, 292 NLRB at 639. In reaching its decision that the strikers were not motivated by alleged unfair labor practices, the *C-Line* Board found particularly persuasive the lack of evidence that strikers were even aware of the alleged unfair labor practices. *See also Facet Enters.*, 290 NLRB at 154 (strike was not converted to unfair labor practice strike until union members learned of the employer's unfair labor practices).

Here, as explained in detail above, the strikers were not even told about the reasons for the bargaining committee's July 9 decision to strike. Myriam Escamilla testified that the only discussions with the Union members after July 9 were about logistical issues, not the Union's reasons for striking. Indeed, the only evidence of substantive issues discussed with strikers after July 9th was from Sanjanette Fowler's testimony and her sworn Board affidavit. She testified that after the committee formally noticed the strike on July 9, she returned to Piedmont

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<sup>9</sup>At the hearing, the Judge expressed his skepticism of the viability of the theory that a strike could be a ULP strike even if the rank and file employees had no knowledge of the ULP's and solicited argument and case law in support, which was not forthcoming. (ALJD at 23:39-41; Tr. at 552:7-15; 554:9-555:4. The Union's brief in support of its cross exceptions merely hints at this theory and offers no case law or cogent arguments in its support.

Gardens and told employees there that they had called a strike to put bargaining pressure on the Employer.

Second, also as explained above, the Judge made a factual finding that not even the committee itself was motivated by anything other than economic reasons when it called the strike. (ALJD at 24:32-25: 13).

Third, all of the documentary evidence supports a finding that the strike was not motivated by any unfair labor practices. Keiyana Kemp's statements in the newspaper article (the only evidence from strikers regarding their motivation for striking, outside of the bargaining committee members) are clearly focused on economic issues.<sup>10</sup> No witnesses testified to seeing or hearing any striker pickets or chants which specifically referenced any unfair labor practices. And the documentary evidence from after the strike vote uniformly shows that the Union claimed to have economic strike goals, with nary a reference to alleged employer unfair labor practices. (Resp. Exh. 10, 11, 14 [Letter on Union letterhead to Oakland Mayor Ron Dellums regarding the Union's strike over "disciplinary rules," "modest economic improvements," "healthcare" and "pension fund."])

Fourth, as pointed out by the ALJ, knowledge of the negotiating committee's discussions on July 9 may not be "imputed" to the remainder of the bargaining unit employees. In an analogous case, the Board required *explicit evidence* of the bargaining unit employees' knowledge of their employer's alleged unfair labor practices in order to find that an existing strike was, in fact, an unfair labor practice strike. *Facet Enterprises*, 290 NLRB 152 (1988).

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<sup>10</sup>Ms. Kemp's statements in the newspaper article are an exception to the hearsay rule pursuant to Federal Rules of Evidence Rule 801(d)(2)(D) because they are an admission against interest. In any event, it is well-established that the Board and administrative law judges are not required to exclude hearsay statements, even if they do not fall within an exception. *Times Union*, 356 NLRB No. 169, \*2 n.1 (2011) (citing *Alvin J. Bart and Co.*, 236 NLRB 242 (1978)).

The Union's attempt to distinguish *Facet Enterprises* is unsurprisingly weak, given the record.<sup>11</sup> The Union notes that in *Facet*, the Board found "no evidence that [] generalized authority [to call a strike for its own reasons] was ever given by the rank-and-file employee to the Local's officers . . . the only grounds offered by the Local's officials dealt with economic reasons." *Id.* at 154. Notwithstanding the fact that that description is amazingly applicable to the record in this case, the Union's attempts to distinguish *Facet* on the facts rely on trivial differences, which, of course, can be identified whenever two cases are compared. Nothing in the Union's brief undermines the basic holding of *Facet* that evidence of knowledge of the unlawful conduct and a causal nexus between that activity and the strike must be shown before a strike can be deemed an unfair labor practice strike. The law does not allow a select group of strikers to make after-the-fact claims that they "decided" the reason for the strike. Such an outcome would turn decades of well-established Board law on its head. The Judge properly found this argument non-persuasive. As he astutely observed at the conclusion of the administrative hearing:

Eight or nine and making a decision for 100 [bargaining unit members], . . . even assuming that what occurred was that the voters authorized the negotiating committee to call a strike, [] I would be really hard pressed to find an unfair labor practice strike on nine people deciding and not giving information to the 90 percent of the bargaining unit as to [] the purpose of the strike . . . . I'm really troubled by that. (Tr. at 552:7-15).

#### IV. CONCLUSION.

For the foregoing reasons, the ALJ's finding and conclusion that the strike was an economic strike are amply supported by the law as well as the record

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<sup>11</sup>The Union makes no attempt effort to distinguish the other cases cited by the Judge for the proposition that in order to be a ULP strike, at as minimum, the employees must have knowledge of the alleged unlawful conduct. (*See*, ALJD at 23: 22-24:11).

evidence. Accordingly the Union's Cross-Exceptions thereto should be denied and the Judge's decision adopted.

DATED: November 1, 2011.

Respectfully submitted,

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