CASE NO.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SEIU UNITED HEALTHCARE WORKERS – WEST,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

NATIONAL LABOR RELATIONS BOARD
CASES: 32-CA-025247, 32-CA-025248, 32-CA-025366,
32-CA-025271, 32-CA-025308 and 32-CA-025498

364 NLRB NO. 13

PETITION FOR REVIEW

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Petitioner, **SEIU UNITED HEALTHCARE WORKERS – WEST,** hereby files this Petition for Review from the Decision and Order of the National Labor Relations Board entitled *American Baptist Homes of the West d/b/a Piedmont Gardens and Service Employees International Union, United Healthcare Workers-West*, 364 NLRB NO. 13, Cases: 32-CA-025247, 32-CA-025248, 32-CA-025366, 32-CA-025271, 32-CA-025308 and 32-CA-025498, issued on May 31, 2016. A copy of the Decision and Order of the National Labor Relations Board is attached as Exhibit A.

Date: June 8, 2016

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ DAVID A. ROSENFELD

By: DAVID A. ROSENFELD
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SEIU UNITED HEALTHCARE WORKERS – WEST

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing PETITION FOR REVIEW with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 8, 2016.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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I certify that the above is true and correct. Executed at Alameda, California,

On June 8, 2016.

/s/ Katrina Shaw_____

Katrina Shaw

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American Baptist Homes of the West d/b/a Piedmont Gardens *and* Service Employees International Union, United Healthcare Workers-West. Cases 32–CA–025247, 32–CA–025248, 32–CA–025266, 32–CA–025271, 32–CA–025308, and 32–CA–025498

May 31, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On August 9, 2011, Administrative Law Judge Burton Litvack issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. In addition, both the Respondent and the Charging Party filed cross-exceptions and supporting briefs. The General Counsel filed a brief answering the Respondent's cross-exceptions, and the Respondent filed a reply brief. The Respondent also filed an answering brief to the Charging Party's cross-exceptions.

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

The Board has considered the decision in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

I. FACTS

The Respondent operates a continuing care facility in Oakland, California. Since at least March 2007, the Union has served as the exclusive collective-bargaining representative of a unit of the Respondent's nonprofessional employees in various departments. The parties' most recent collective-bargaining agreement was effective from March 1, 2007, to April 30, 2010. In anticipation of the contract's expiration, the parties commenced negotiations for a successor agreement in February 2010.[3]

As of May, the parties remained at odds over several significant issues, including health care, pensions, and the Respondent's disciplinary policies. On May 25, the Union conducted picketing outside the Respondent's facility, and the employees carried signs bearing slogans such as "no healthcare reductions," "pension now," and "fair wages now." In mid-June, the employees authorized the bargaining committee to call a strike.

On July 9, the Union sent two letters to the Respondent. The first letter notified the Respondent that the employees would commence a strike on Monday, August 2 and continue "unless and until a mutually agreeable resolution has been reached." The second letter advised the Respondent that all of the striking employees "unconditionally offer to return to work at or after 5:00 a.m. on Saturday, August 7, 2010." On August 2, approximately 80 of the 100 unit employees went on strike.

To prepare for the anticipated strike, the Respondent engaged a staffing agency. The Respondent extended temporary employment offers to approximately 60 to 70 employees provided by the staffing agency, at a cost in excess of $300,000. The Respondent informed the staff-

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

[2] We shall modify the judge's conclusions of law and substitute a new remedy, order, and notice to conform to the violations found. We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11, 13–14 (2010), and to conform with our decision in *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016). We shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

In the absence of exceptions, we adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) by engaging in surveillance or creating the impression of surveillance of the employees' union activities. In so doing, however, we do not rely on the judge's finding that security guard Francisco Pinto acted at the Respondent's behest when he appeared to record the employees in the break room during the strike authorization vote.

Because we adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) by disparately enforcing Rule 33 when it evicted employees Nelson, Henry, and Eastman from its facility, we find it unnecessary to pass on the judge's alternative finding that the Respondent created and applied a new work rule when it evicted Nelson and Henry. In addition, Chairman Pearce and Member Hirozawa note that the General Counsel has not challenged the facial validity of Rule 33 in this proceeding or alleged that the Respondent's maintenance of the rule violates the Act. See, e.g., *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976); *Saint John's Health Center*, 357 NLRB 2078 (2011). The Board has subsequently found Rule 33 to be facially invalid. See *Piedmont Gardens*, 360 NLRB No. 100 (2014), motion for reconsideration denied 2014 WL 3778513 (2014).

Also, in adopting the judge's conclusion that the Respondent unlawfully failed to provide the Union with the names and addresses of the permanent strike replacements, we decline the Respondent's invitation to overrule well-established precedent holding that the names and addresses of permanent replacements constitute presumptively relevant information. See, e.g., *Tenneco Automotive, Inc.*, 357 NLRB 953, 954–955 (2011), enfd. in relevant part, 716 F.3d 640 (D.C. Cir. 2013); *NTN Bower Corp.*, 356 NLRB 1072, 1072 fn. 3 (2011).

[3] Unless otherwise indicated, all dates referenced herein are in 2010.

EXHIBIT A

ing agency that the length of the jobs would be 3 days.[4] Executive Director Gayle Reynolds testified that by the end of the first day of the strike, "we felt confident that we had enough people to get through a few days."

Despite having the temporary employees committed to work at least through August 5, the Respondent began permanently replacing the striking employees on August 3. From August 3 through 6, the Respondent made approximately 44 offers of permanent employment; some were made to temporary employees provided by the staffing agency, while others were made to some of the Respondent's on-call employees who had continued to work during the strike.

Executive Director Reynolds, who made the decision to hire the permanent replacements, was admittedly motivated by her desire to avoid a future strike at the facility. Her Board affidavit contained the following statement, which was credited by the judge:

> I knew that it would take time to acclimate the new employees to [the Respondent], but the more important consideration for me was that I knew that those replacements would come to work if there was another work stoppage. I assumed that because these people were willing to work during this strike, they'd be willing to work during the next strike.

Reynolds testified that she made the decision to hire the permanent replacements because if the bargaining unit employees decided to engage in future work stoppages, she did not believe that the Respondent could afford to repeatedly engage the staffing agency. She also testified that the cost to engage the staffing agency to supply the initial temporary employees had been $300,000; however, on cross-examination, she conceded that it would have cost the Respondent a lesser amount, $250,000 over the 3-year life of the contract, to fully implement the Union's proposals on wages, health insurance, and pensions—the remaining significant monetary issues of disagreement between the parties with respect to a new collective-bargaining agreement.

On August 6, almost 3 days after it began permanently replacing employees and less than 24 hours before employees were set to return to work, the Respondent began contacting the employees who had been permanently replaced, either by letters sent overnight mail or by telephone, notifying them of their status and informing them that they would be placed on a preferential rehire list. Also on August 6, the fifth and final day of the strike, the Union's attorney, Bruce Harland, placed a telephone call to the Respondent's attorney, David Durham. Harland asked Durham whether he could confirm a rumor that the Respondent was planning to lock out the strikers; Durham replied that he could not confirm the rumor. Later that evening, Durham called Harland and told him that the Respondent would not be locking out the employees, but that the Respondent had permanently replaced approximately 20 of them. Harland responded that such a course of action was "a pretty big deal," and asked why the Respondent was permanently replacing the employees rather than locking them out. Durham replied that the Respondent "wanted to teach the strikers and the Union a lesson. They wanted to avoid any future strikes, and this was the lesson that they were going to be taught."

On the morning of August 7, the striking employees who were scheduled to work that day (approximately 50 to 60 of the former strikers) reported to the Respondent's facility, consistent with the unconditional offer to return to work included in the Union's July 9 letter.[5] At that time, one of the Respondent's security guards advised the group that only some of the employees were permitted to return; others were told that they had been permanently replaced and would be placed on a preferential rehire list.

II. THE JUDGE'S DECISION

The General Counsel alleged that the Respondent violated Section 8(a)(3) and (1) of the Act by permanently replacing—and thereafter failing to reinstate, or belatedly reinstating—striking employees in order to restrain them from exercising rights protected by the Act. The General Counsel argued that the Respondent's decision to permanently replace the striking employees was motivated by an "independent unlawful purpose" within the meaning of *Hot Shoppes, Inc.*, 146 NLRB 802 (1964). The judge rejected this argument, finding that an "independent unlawful purpose" is established only when an employer's hiring of permanent replacements is "unrelated to or extraneous to the strike itself." The judge concluded that the Respondent's motivation for permanently replacing the strikers—to teach the strikers "a lesson" and ensure that employees would not strike again—was related to the underlying strike and, therefore, did not constitute an "independent unlawful purpose" under *Hot Shoppes*. For the reasons set forth below, we disagree and find that the

[4] The Respondent told the individuals to whom it extended offers of temporary employment that it expected to require their services for the week.

[5] During the strike, the Union sent to the Respondent a copy of the same letter that it had sent on July 9, advising the Respondent of the strikers' unconditional offer to return to work on August 7.

Respondent's permanent replacement of the strikers violated the Act.

III. ANALYSIS

The right to strike is protected by Section 7 of the Act. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967) ("The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms"). Congress and the courts have repeatedly recognized the legitimate use and protected nature of the strike. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234–236 (1963) (citing cases); NLRA Section 13, 29 U.S.C. § 163.[6] Accordingly, "an employer's discouragement of employee participation in a legitimate strike constitutes discouragement of membership in a labor organization within the meaning of Section 8(a)(3)." *Capehorn Industry*, 336 NLRB 364, 365 (2001). Because employees have the right to strike in support of economic demands, an employer violates Section 8(a)(3) by failing to immediately reinstate such employees upon their unconditional offer to return to work. In certain situations, however, an employer may establish a "legitimate and substantial justification" for failing to reinstate striking employees by showing that the strikers' positions have been filled by permanent replacements. See *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). However, the permanent replacement of strikers is not always lawful. The Board will find a violation of the Act "if it is shown that, in hiring the permanent replacements, the employer was motivated by 'an independent unlawful purpose.'" *Avery Heights*, 343 NLRB 1301, 1305 (2004) (quoting *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964)).

A. Interpretation of Hot Shoppes

This case turns on an interpretation and application of the principles articulated in *Hot Shoppes*. In *Hot Shoppes*, the respondent employer and the union representing its employees were engaged in negotiations for a collective-bargaining agreement. On several occasions during the negotiations, the union threatened to strike if the parties had not reached an agreement by a particular date, and the employer concomitantly advised its employees that, in the event of a strike, all of the strikers would be permanently replaced. When the union reiterated its strike threat at the final bargaining session preceding its previously expressed deadline, the employer—in anticipation of the strike and in order to insure uninterrupted service to its clients—enlisted temporary workers from its facilities in other cities and also began soliciting and processing applications for permanent replacements. The union commenced the strike approximately a week later. On the day the strike began, the employer continued its operations using temporary employees from its other locations who had been flown in over the course of the several preceding days. Beginning on the first day of the strike and for the next 3 days thereafter, however, the employer hired permanent replacements for all of the striking employees. The strikers made an unconditional offer to return to work nearly 2 weeks after the strike commenced.[7] Because the employer had permanently

[6] The Court stated in *Erie Resistor*: "While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant," and "the right to strike is to be given a generous interpretation" 373 U.S. at 234–235.

Citing two other Supreme Court decisions—*NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960) and *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965)—the dissent asserts that the Board may not "act as arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining position." That statement is correct but inapplicable to the instant matter. Here, unlike in those cases, the Respondent did not even purport to be acting in support of its bargaining position. To the contrary, the Respondent's admitted purpose was to punish employees for exercising a fundamental statutory right by going on strike. Both decisions are thus consistent with today's holding.

The Court's decision in *American Ship Building* addressed the question whether an employer, after bargaining to impasse, may temporarily lock out employees for the sole purpose of exerting economic pressure in support of its bargaining position. 380 U.S. at 308, 318. In answering that question in the affirmative, the Court emphasized the absence of any contention that the lockout was motivated by hostility to the union or to employees' protected activity. 380 U.S. at 308, 313. The question in *Insurance Agents* was whether the Board properly found that a union violated its duty to bargain in good faith by engaging in certain arguably unprotected pressure tactics away from the bargaining table. The Court emphasized that the Board's approach "involved an intrusion into the substantive aspects of the bargaining process . . . unless there is some specific warrant for its condemnation of the precise tactics involved here." 361 U.S. at 489. The Court found no such warrant. In the instant case, the issue is not either party's good faith in the bargaining process, but rather whether a purpose behind the Respondent's permanent replacement of employees was to punish them for exercising their statutory right to strike. Where, as here, there was such evidence, then there is "some specific warrant" for condemning the tactic and doing so does not make the Board an "arbiter of an economic weapon." In sum, neither *Insurance Agents* nor *American Ship Building* comes close to addressing the issue presented here.

Finally, we question the dissent's premise that the permanent replacement of strikers is a legally protected economic weapon on a par with the statutory right to strike. We note that *Insurance Agents*, which the dissent cites for this proposition, does not even mention permanent replacements. However, no party raises this issue, and we need not reach it in order to resolve this case.

[7] Although several employees had made individual requests for reinstatement prior to the group offer of reinstatement, the Board found that no such requests predated the period in which the employer hired the permanent replacements.

replaced all of the striking employees by that date, it refused to reinstate them.

On those facts, the trial examiner concluded that the employer violated Section 8(a)(3) and (1) of the Act by failing to reinstate the striking employees upon receipt of their unconditional offers to return to work. Specifically, the trial examiner concluded that, in hiring the permanent replacements, the employer acted pursuant to a discriminatory "contrived scheme" to defeat the economic strikers' rights to reinstatement. 146 NLRB at 835. As evidence of this contrived scheme, the trial examiner cited the employer's prestrike declarations that all strikers would be permanently replaced, "the careful planning in advance of the strike, including the securing of the tentative replacements, and the interviewing of applicants who in turn might replace them, and the elaborate, as well as unique, paper record manufactured subsequent to the strike to establish the 'permanency' of the replacements." Id.

The Board rejected the trial examiner's conclusion that the employer's plan to replace the economic strikers was improper, stating:

> We, however, disagree with the Trial Examiner's premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operations of his business. The Supreme Court's decision in *Mackay Radio & Telegraph Company*, and the cases thereafter, although referring to an employer's right to continue his business during a strike, state that an employer has a legal right to replace economic strikers at will. We construe these cases as holding that the motive for such replacements is immaterial, *absent evidence of an independent unlawful purpose*.

Id. at 805 (emphasis added) (internal citations omitted).

In analyzing the meaning of "independent unlawful purpose," we first consider the context in which the Board used the phrase in *Hot Shoppes*. As set forth above, the Board's analysis in that case focused on whether the trial examiner erred by inferring unlawful motivation from the mere act of hiring (or planning to hire) permanent replacements. See id. at 805 ("Therefore, we reject the Trial Examiner's conclusion that the plan to replace the economic strikers here was itself improper and that the strike was converted to an unfair labor practice strike on January 4 by [r]espondent's implementation of such plan."). Because the Board found that the alleged unlawful motivation was not established, it did not address whether the motivation at issue would have qualified as an "independent unlawful purpose."

We next consider the fact that the Board used the phrase "independent unlawful purpose" in *Hot Shoppes* in the context of discussing the Supreme Court's decision in *Mackay Radio*, 304 U.S. 333 (1938). Specifically, the Board stated that *Mackay* and its progeny establish that employers may permanently replace economic strikers at will, and that, accordingly, the motive for doing so is immaterial absent evidence of an independent unlawful purpose. In our view, the Board's reference to replacing economic strikers "at will" is consistent with the employment-at-will doctrine, pursuant to which an employer may discharge an employee for any reason or no reason at all, unless the discharge violates clearly mandated public policy. See, e.g., *Talley v. Washington Inventory Service*, 37 F.3d 310, 311 (7th Cir. 1994). This analogy serves as additional basis for the Board's holdings that an employer may hire permanent replacements for any reason at all, unless there is evidence that the employer was motivated by a purpose otherwise proscribed by the Act.[8]

In addition to the factual context of the *Hot Shoppes* decision itself, the broader context of the existing jurisprudence at the time of the decision's issuance sheds further light on the Board's intent. At the time of the *Hot Shoppes* decision, and as noted there by the Board, the Supreme Court had established that an employer possesses the right to permanently replace economic strikers to continue business operations during the strike. *Mackay Radio*, 304 U.S. 333. Nothing in that decision or subsequent decisions, however, suggested that the employer's right in that regard was absolute, i.e., that an employer could lawfully replace economic strikers even if it did so for a purpose prohibited by the Act. Indeed, the Court's language in *Mackay* recognized such a limitation:

> [I]t does not follow that an employer, *guilty of no act denounced by the statute*, has lost the right to protect and continue his business by supplying places left vacant by strikers.

Id. at 345 (emphasis added).

Subsequently, in *Erie Resistor*, the Court found that the employer was guilty of an act denounced by the statute when it hired permanent replacements during a strike and granted them 20 years superseniority. The Court explained that "[w]hen specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be

[8] *American Optical Co.*, 138 NLRB 681 (1962), cited in the dissent, is inapposite. In that case, the evidence showed that the employer's sole motive for replacing economic strikers was to compel the union to accede to its bargaining proposals. Id. at 689.

converted into unfair labor practices." 373 U.S. at 227. In these circumstances, the Court explained:

> Such proof [of discriminatory intent] itself is normally sufficient to destroy the employer's claim of a legitimate business purpose, if one is made, and provides strong support to a finding that there is interference with union rights or that union membership will be discouraged. Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights. The employer's claim of legitimacy is totally dispelled.

Id. at 227–228. Applying these principles, the Court held that although it had "no intention of questioning the continued vitality of the *Mackay* rule, [it was] not prepared to extend it to the situation" involving permanent replacements accompanied by superseniority—conduct which the Court found was inherently destructive of employees' right to strike. Thus, even assuming that the Court's holding in *Mackay* may be read—as the *Hot Shoppes* Board apparently read it—to presume that an employer's hiring of permanent replacements serves the legitimate business purpose of allowing the employer to protect and continue his operations during a strike, the Court's decision in *Erie Resistor* makes clear that a legitimate business purpose may be "wholly impeached by the showing of an intent to encroach upon protected rights." Therefore, notwithstanding the respondent's right under *Mackay* to continue operations with permanent replacements, the Court agreed with the Board that this business purpose "was insufficient to insulate [the] superseniority plan from the reach of § 8(a)(1) and Section 8(a)(3) . . . ." Id. at 231–232 [9]

Having considered *Hot Shoppes* in light of the foregoing precedent, we conclude that the phrase "independent unlawful purpose" includes an employer's intent to discriminate or to encourage or discourage union membership. Our conclusion is consistent with *Erie* and with the "widely accepted" principle that "otherwise lawful acts can be rendered unlawful when motivated by improper intentions." *RGC (USA) Mineral Sands, Inc., v. NLRB*, 281 F.3d 442, 449–450 (4th Cir. 2002), enfg. 332 NLRB 1633, 1636 (2001) (finding that even assuming that it acted pursuant to a contractual right, the employer could not "act with the intent to punish or discourage protected concerted activity" as to hold otherwise "would be to eviscerate both the rights found in Section 7 . . . and the protection afforded the exercise of those rights by Sections 8(a)(1) and (3)." Id. at 450). Cf. *Movers & Warehousemen's Assn. of D.C. v. NLRB*, 550 F.2d 962, 966 (D.C. Cir. 1977) (even if motivated in part to exert economic pressure in support of a legitimate bargaining position, a "lockout is nevertheless unlawful if also motivated by an intent to interfere with, and thus injure, a labor organization").

As stated above, the judge found that an "independent unlawful purpose" is established only when an employer's hiring of permanent replacements is unrelated to, or extrinsic to, the strike. The dissent would further narrow that definition by requiring that the unlawful purpose be "extrinsic to the parties' bargaining relationship or unrelated to the strike." The dissent's narrow interpretation of *Hot Shoppes* violates the most basic principles of the Act. It is axiomatic that an employer violates the Act when it retaliates against employees for engaging in union or other protected activity, and that the right to strike is fundamental. See, e.g., *Controlled Energy Systems, Inc.*, 331 NLRB 251 (2000); *Frank Leta Honda*, 321 NLRB 482 (1996). It is difficult to imagine that the Board intended the phrase "independent unlawful purpose" to exempt retaliation for exercising a fundamental right, and we decline to give it so strained a reading.[10]

Accordingly, we find that the phrase "independent unlawful purpose" does not require that the unlawful purpose be unrelated or extrinsic[11] to the parties' bargaining

[9] The dissent correctly observes that the Board in *Hot Shoppes*, contrary to the trial examiner, summarily stated that *Erie Resistor* was distinguishable. The Board did not, however, take issue with the underlying principle, nor does it preclude us from finding an "independent unlawful purpose" under different facts from those presented in *Hot Shoppes*.

Belknap v. Hale, 463 U.S. 491 (1983), discussed in the dissent, is not to the contrary. Citing *Hot Shoppes*, the Court pointed out that the Board does not require an employer to show that it was necessary to use permanent replacements in order to keep the business operating. That aspect of *Hot Shoppes*—the proper interpretation of *Mackay*—is not before us.

[10] Furthermore, the dissent's interpretation is contrary to the Supreme Court's holding in *Erie Resistor*, supra. Under the dissent's approach, granting superseniority to nonstrikers, as in *Erie Resistor*, would have been lawful because it was related to the strike.

[11] In support of this proposition, the judge cited *Cone Brothers Contracting Co.*, 135 NLRB 108 (1962), enfd. 317 F.2d 3 (5th Cir. 1963), where the employer provoked union supporters to refuse to cross a picket line so that it could use their refusal as a reason to discharge them in order to disqualify their votes in an upcoming union election. The judge reasoned that because the Board in *Hot Shoppes* cited *Cone Brothers* in discussing the independent unlawful purpose, the phrase should be understood to mean that the hiring of permanent replacements must have an unlawful objective extrinsic to the strike. But the Board made no such finding. The Board simply cited *Cone Brothers* as an example of an independent unlawful purpose that was not demonstrated in *Hot Shoppes*. Further, as the dissent acknowledges, *Cone Brothers* did not involve the permanent replacement of employees.

relationship or the underlying strike in order to fall within the *Hot Shoppes* exception.[12]

Finally, our interpretation is fully consistent with *Avery Heights*, the only post-*Hot Shoppes* Board decision to consider the phrase "independent unlawful purpose," and with the Second Circuit's opinions in that case.[13] *Avery Heights*, 343 NLRB 1301 (2004), vacated and remanded, *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 195 (2d Cir. 2006), after remand 350 NLRB 214 (2007), enfd. *Church Homes, Inc. v. NLRB*, 303 Fed.Appx. 998 (2d Cir. 2008), cert denied 558 U.S. 945 (2009). In that case, the Board reversed the judge's finding that the employer had possessed an independent unlawful purpose for hiring permanent replacements. In so holding, the Board rejected the judge's conclusion that the employer's act of concealing its intent to hire permanent replacements from the union demonstrated an unlawful motivation to punish the striking employees and break the union's solidarity. The Board did not, however, take issue with the judge's conclusion that at least one of the unlawful motives attributed to the employer—the desire to punish the strikers—would constitute an "independent unlawful purpose," regardless of the fact that it was not extrinsic to the strike. Indeed, the Board's opinion appears to assume that an intent to punish striking employees constitutes an independent unlawful purpose for purposes of *Hot Shoppes*.[14]

On appeal, the Second Circuit vacated the Board's decision and remanded the case, holding that the Board erred in finding that an employer's decision to keep the hiring of permanent replacements secret is not probative of whether the employer had an independent unlawful purpose for the hiring. *New England Health Care Employees Union*, 448 F.3d at 195. Like the Board, the court implicitly presumed that a desire to punish striking employees or to break the union would constitute an "independent unlawful purpose."[15]

For all of the foregoing reasons, we conclude, contrary to the judge, that *Hot Shoppes* does not require the General Counsel to demonstrate the existence of an unlawful purpose extrinsic to the strike but, rather, only that the hiring of permanent replacements was motivated by a purpose prohibited by the Act.[16]

B. Application of Hot Shoppes to the Facts of this Proceeding

The credited testimony establishes that the Respondent offered two reasons for its decision to permanently replace strikers: to punish the strikers and the Union and to

[12] The dissent argues that we have in effect eliminated the term "independent" from the analysis, and that we interpret the phase "independent unlawful purpose" to mean any antiunion or antistrike animus. This is incorrect. As explained, we interpret "independent unlawful purpose" to mean a motive prohibited by the Act. The dissent argues that during a strike or lockout, the parties are engaged in economic warfare, and "*intend to injure one another* in hopes of forcing the other side to surrender." (emphasis in original.) And, the dissent states, the Board gives the parties in a strike situation "wide latitude" to express "strong feelings": the expression of vituperative antiunion sentiment is not in itself unlawful. But the unlawful reasons the Respondent articulated here were not "stray" comments uttered in the heat of the moment. Ultimately, it is one thing for an employer to attempt to force the union to agree to its contract terms, and quite another to discriminate against employees for the express purpose of punishing them for striking. Such a punitive tactic finds no support in Board or court precedent.

[13] Although it was presented with the opportunity to address the issue in at least two other decisions—in which the respective judges concluded that the employers unlawfully permanently replaced striking employees with an "independent unlawful purpose"—the Board declined to do so and instead adopted the judges' alternative conclusions that the strikers were unfair labor practice strikers. See *Nicholas County Health Care Center*, 331 NLRB 970, 970 fn. 3 (2000), enfd. 13 Fed.Appx. 1 (D.C. Cir. 2001) (unpublished); *Pennsylvania Glass Sand Corp.*, 172 NLRB 514 (1968), enfd. *General Teamsters and Allied Workers Local Union No. 992 v. NLRB*, 427 F.2d 582 (D.C. Cir. 1970).

The dissent's dire prediction—that our decision today will eliminate an employer's ability to utilize permanent replacements—is unfounded. The fact that this is only the second time since 1964 that the Board has been required to interpret *Hot Shoppes* indicates that use of permanent replacements for unlawful purposes is not a frequent occurrence.

[14] In rejecting the judge's conclusions, the majority stated that the evidence in the case "simply does not establish some kind of nefarious scheme to punish striking employees by hiring permanent replacements." In addition, in concluding that a document cited by the judge in support of his finding of unlawful motive merely demonstrated the employer's desire to obtain an economic advantage in bargaining, the majority stated: "Conspicuously absent from this list is any reference at all to the strikers, much less a reference to a desire to punish them. That is a telling omission." Id. at 1307. The dissent contends that the *Avery Heights* Board cast doubt on the notion that it would be unlawful for an employer to permanently replace employees in order to punish them for striking. The decision is not susceptible of such a reading. Nor, obviously, is the dissent's position consistent with the decisions of the Second Circuit.

[15] On remand, the Board accepted as the law of the case the court's finding that the logical implication of the employer's secret hiring of permanent replacements was an illicit motive. *Avery Heights*, 350 NLRB 214, 215 (2007), enfd. *Church Homes, Inc. v. NLRB*, 303 Fed.Appx. 998 (2d Cir. 2008), cert. denied 558 U.S. 945 (2009). The Board found that the employer's evidence was insufficient to refute the court's inference and, accordingly, concluded that the employer hired the permanent replacements with an unlawful motive and thereby violated the Act.

[16] *Mrs. Natt's Bakery*, 44 NLRB 1099 (1942), cited in the dissent, is not contrary to our decision here. In that case, there was no evidence that the employer engaged in permanent replacement of employees with an independent unlawful purpose. Rather, the facts show only that the employer warned its employees, and then made good on its warning, that they would be permanently replaced if they went on strike. Id. at 1108. On those facts, the Board declined to find that the employer unlawfully refused to bargain and reinstate the economic strikers. Id. Nothing in our decision today mandates a different result.

avoid future strikes. We find that both reasons are independently unlawful within the meaning of *Hot Shoppes*.[17]

As stated above, the Respondent's counsel told the Union's attorney that the Respondent planned to hire permanent replacements because it wanted "to teach the strikers and the Union a lesson." This statement evinces an intent to punish the striking employees for their protected conduct, and plainly reveals a retaliatory motive prohibited by the Act.

In addition, the record establishes that the Respondent made the decision to permanently replace the strikers because Executive Director Reynolds assumed that the permanent replacements would be willing to work in the event of another strike and the Respondent wanted to avoid the cost of hiring temporary employees again in the future. The Respondent's motive is clear from attorney Durham's statement to the Union that the Respondent hired permanent replacements because it "wanted to avoid any future strikes, and this was the lesson that they were going to be taught." This evidence establishes an additional independent unlawful motive, specifically a desire to interfere with employees' future protected activity. See *Parexel International*, 356 NLRB 516, 519 (2011) (noting that actions to prevent employees from engaging in protected activity are generally unlawful and that "the suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity").[18]

We therefore conclude that the Respondent hired the permanent replacements for an independent unlawful purpose. Accordingly, its delay in reinstating certain strikers and its refusal to reinstate others violated Section 8(a)(3) and (1) of the Act. See *Erie Resistor*, 373 U.S. at 227–228.[19]

[17] Under the interpretation of *Mackay* espoused by the Board in *Hot Shoppes*, an employer is not required to articulate a reason for permanently replacing economic strikers. But if the employer does so (or if the evidence otherwise indicates a reason), the Board can and should determine whether that reason is an independent unlawful purpose. Here, the Respondent offered two reasons, both of which were unlawful.

[18] Even under the judge's limited view that an "independent unlawful purpose" is established only when an employer's hiring of permanent replacements is "unrelated to or extraneous to the strike itself," we would find that the Respondent violated the Act. Specifically, we find that the Respondent's motive of preventing future strikes is extrinsic to the employees' current strike activity, and similar to the example given by the judge of an employer who attempts to "unlawfully foment a decertification election." Both are attempts by an employer to thwart future protected activity.

The dissent asserts that Reynolds was "clearly" contemplating strike activity related to the ongoing labor dispute and that her motive therefore was not "independent" of the current strike. Nothing in the statements of Reynolds or Durham compels such a narrow interpretation, and we reject it.

[19] On August 12, 2015, the Respondent filed a motion to dismiss the complaint, arguing for the first time that at the time the underlying complaint was issued, Acting General Counsel Lafe Solomon was serving in violation of the Federal Vacancies Reform of 1998 (FVRA), 5 USC §§ 3345 et seq., and therefore lacked authority to issue the complaint. The Respondent did not raise any question about the authority of the Acting General Counsel (AGC) in its answer to the consolidated complaint or at any time during the extensive federal court litigation of the AGC's petition for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, 29 USC §160(j). Nor did the Respondent raise this issue during the hearing before the Administrative Law Judge, in its posthearing brief, or in its exceptions to the Board. Under these circumstances, we find that the Respondent has waived its right to challenge the AGC's authority to prosecute this case, and we reject the Respondent's motion to dismiss as an untimely effort to file additional exceptions. See *The Boeing Co.*, 362 NLRB No. 195, slip op. at 1 fn. 1 (2015).

Even if we were to consider the Respondent's challenge to the authority of the AGC under the FVRA, we would not find it appropriate to dismiss the complaint. On September 28, 2015, General Counsel Richard F. Griffin, Jr. issued a Notice of Ratification in this case which states, in relevant part,

> The prosecution of this case commenced under the authority of Acting General Counsel Lafe E. Solomon during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013.
>
> The United States Court of Appeals for District of Columbia Circuit recently held that Acting General Counsel Solomon's authority under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the position of General Counsel. *SW General, Inc. v. NLRB*, F.3d, 2015 WL 4666487, (D.C. Cir., Aug. 7, 2015). The Court found that complaints issued while Mr. Solomon's nomination was pending were unauthorized and that it was uncertain whether a lawfully-serving General Counsel or Acting General Counsel would have exercised discretion to prosecute the cases. *Id.* at *10.
>
> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in *SW General*. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by *SW General* are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. (Citation omitted.)
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

On October 8, 2015, the Respondent filed a supplement to its motion to dismiss arguing that General Counsel Griffin lacked the authority to ratify the actions taken by former Acting General Counsel Solomon because those actions were void under *SW General* and subject to "au-

AMENDED REMEDY

In addition to the remedies provided in the judge's Order as amended above, we shall require the Respondent to offer all of the strikers who have not yet been reinstated full reinstatement to their former jobs, discharging, if necessary, any employees currently in those positions or, if those jobs no longer exist, to substantially equivalent positions. We shall also order the Respondent to make the former strikers whole for any loss of earnings and other benefits, from August 7, 2010, to the date they receive valid offers of reinstatement, in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, in accordance with our recent decision in *Advoserv of New Jersey*, supra, the Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement of Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

ORDER

The National Labor Relations Board orders that the Respondent, American Baptist Homes of the West d/b/a Piedmont Gardens, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance or creating the impression that it was engaging in surveillance of its employees' union activities.

(b) Disparately enforcing its access rule (Rule 33) by evicting off-duty employees engaged in union activity from the facility.

(c) Refusing to reinstate, or delaying the reinstatement of, striking employees, who were permanently replaced with an independent unlawful purpose, and who made an unconditional offer to return to work.

(d) Failing and refusing to furnish the Union with the names and addresses of the permanent replacement employees whom it hired from outside the organization.

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

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

(a) Within 14 days from the date of this Order, offer all of the strikers who have not yet been reinstated full reinstatement to their former jobs, discharging, if necessary, any employees currently in those positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make all former strikers whole for any loss of earnings and other benefits suffered as a result of the refusal to reinstate them on August 7, 2010, in the manner set forth in the amended remedy section of this decision.

(c) Compensate employees entitled to backpay under the terms of this Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years for each employee.

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tomatic reversal." The Respondent also argues that even if the error were "harmless" under the Administrative Procedure Act, the error at issue is "indelible and permanently prejudicial" under 5 U.S.C §707. We reject the Respondent's arguments.

The Respondent has misstated the holding of *SW General*. In that case, the court recognized that the General Counsel of the National Labor Relations Board is one of several officers expressly exempted from the "void-ab-initio" and "no-ratification" provisions of the FVRA. 796 F.3d at 78–79, citing 5 U.S.C. § 3348(e)(1). Therefore, the court treated the actions of an improperly serving Acting General Counsel as "*voidable*, not void," id. at 79 (emphasis in original), suggesting that any statutory defect in actions could be cured through ratification by a properly appointed General Counsel. See id. at 78–79 (discussing 5 U.S.C. § 3348); see also *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir.1998); *Federal Election Commission v. Legi–Tech, Inc.*, 75 F.3d 704 (D.C. Cir.1996).

Nor is there merit to the Respondent's argument that any defect in Acting General Counsel Solomon's temporary appointment was "a structural error and thus 'subject to automatic reversal'" or "derivatively tainted" the General Counsel's ratification. The D.C. Circuit rejected a similar argument in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 796 F.3d 111, 121–124 (D.C. Cir. 2015). The court found that a Copyright Royalty Board decision issued by members appointed in violation of the Constitution's Appointments Clause did not "incurably taint" a validly appointed board from issuing a new decision based on an independent, de novo review of the written record in the earlier proceeding. The court concluded that the Copyright Board was not required to conduct a new hearing, and nothing in the Appointments Clause barred the board from reaching the same conclusion as its predecessor. Id. at 121. For these reasons the court found there was no error that could not be remedied by an independent consideration by a properly appointed board. 796 F.3d at 123–124. See also *Federal Election Commission v. Legi–Tech, Inc.*, 75 F.3d 704, 707 and 709 (D.C. Cir.1996) (finding lawful the newly constituted commission's ratification of a pending enforcement action that was decided by a prior commission that was unconstitutionally constituted); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, supra (same).

Here, we find that the General Counsel's ratification of the issuance and continued prosecution of the complaint, based on his independent review of the case record, remedied any alleged defect stemming from the Acting General Counsel's appointment under the FVRA.

The Respondent's motion to dismiss is denied.

(d) Within 14 days from the date of this Order, remove from its files any reference to its unlawful failure to reinstate the former strikers, and within 3 days thereafter notify the strikers in writing that this has been done and that the failure to reinstate them will not be used against them in any way.

(e) Provide the Union with the names and addresses of the permanent replacement employees who were hired from outside sources.

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

(g) Within 14 days after service by the Region, post at its facility in Oakland, California, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 17, 2010.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. May 31, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

When the Board addresses the legality of economic weapons under the National Labor Relations Act (NLRA or Act), there is a paradox that makes it important to differentiate between what one would prefer to see in collective bargaining, and what role Congress contemplated for economic weapons as part of the collective-bargaining process. The paradox is this: the NLRA was adopted to *eliminate* obstructions to commerce, but it accomplishes that objective by protecting the right of employees, unions, and employers to *utilize* strikes, lockouts, and other economic weapons.[1] What one hopes to see in any collective-bargaining dispute is its successful resolution without any party's resort to economic weapons. But what *Congress* intended was for the Board to preserve the balance of competing interests—including potential resort to economic weapons—that Congress devised as the engine driving parties to resolve their differences and to enter into successful agreements. As the Supreme Court stated in *NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 487–489 (1960), employers and unions in collective bargaining "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."

Congress did not empower the Board to pick and choose among economic weapons that parties might invoke in a collective-bargaining dispute. *Insurance Agents,* 361 U.S. at 497 (the Board may not act as "arbi-

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

[1] Sec. 1 of the Act states: "It is declared to be the policy of the United States to *eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions* when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" (emphasis added).

ter of the sort of weapons the parties can use in seeking to gain acceptance of their bargaining positions"). Nor does the Board have "general authority to define national labor policy by balancing the competing interests of labor and management." *American Ship Building Co. v. NLRB,* 380 U.S. 300, 316 (1965).

I do not favor the hiring of permanent replacements to resolve collective-bargaining disputes any more than I favor strikes, lockouts and other types of threatened or inflicted economic injury that are protected under our Act. The *statute* protects these types of economic weapons. Their availability, combined with their "actual exercise on occasion by the parties," *Insurance Agents,* supra, has produced virtually all of the agreements reached in the Act's 80-year history.

It is also clear that collective bargaining and labor-management disputes evoke extraordinarily strong feelings. There is often a sharp clash between seemingly irreconcilable positions. When unions and employees engage in a work stoppage or other industrial action, or when an employer operates during a strike or responds by hiring replacement employees, such tactics are indeed "weapons." *Insurance Agents*, supra. Nobody can be confused about their purpose: they are exercised with the intention of inflicting severe and potentially irreparable injury, often causing devastating damage to businesses and terrible consequences for employees. Congress *protected* such economic warfare—including the hostile emotions that it produces—as the only way bargaining could force parties to resolve intractable disputes based on the acceptance of terms they adamantly opposed, at least initially. Instructive is the court's description of strikes and lockouts, for example, in *NLRB v. Wire Products Mfg. Corp.*, 484 F.2d 760 (7th Cir. 1973):

> *The strike is a potent economic weapon which may, and often is, wielded with disastrous effect on its employer target.* Recognition was given to the lockout as a legitimate economic weapon on the part of the employer in *American Ship Building*: "*we cannot see that the employer's use of a lockout solely in support of a legitimate bargaining position is in any way inconsistent with the right to bargain collectively or with the right to strike.*"
>
> * * *
>
> The implicit recognition of some degree of equivalency between the respective weapons of economic leverage should not be thwarted via an artificially contrived but substantially unsupported factual basis. *Feelings are intense and deeply held by both parties when a lack of employment occurs, whether as the result of a strike or a lockout. The employees are denied their pay checks. The employer is denied the normal processes of production.* Statements and conduct which could be the basis for inferring animus, which the parties each entertain toward the other, are not difficult to detect. *The standard here, however, is not the existence of an inchoate animus but rather whether that feeling did in fact motivate.* In the legislative scheme, the courts serve some more worthwhile purpose than that of automatically rubberstamping approval of Board determinations. In the consideration of this particular issue, "[a]n unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one."[2]

The Supreme Court has long recognized that the hiring of permanent replacements is an economic weapon employers may lawfully deploy in response to an economic strike.[3] Thus, in *Mackay Radio*, the Supreme Court stated:

> Although section 13 of the act . . . provides, "Nothing in this Act . . . shall be construed so as to interfere with or impede or diminish in any way the right to strike," *it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.* The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.[4]

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[2] Id. at 765 (emphasis added) (quoting *American Ship Building Co. v. NLRB*, 380 U.S. at 310, and *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956)). See also *NLRB v. Brown Food Stores*, 380 U.S. 278, 284 (1965) ("[W]e do not see how the continued operations of respondents and their use of temporary replacements imply hostile motivation any more than the lockout itself; nor do we see how they are inherently more destructive of employee rights."); *Central Illinois Public Service Co.*, 326 NLRB 928, 930–931, 934 (1998) (same).

[3] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938); see also *Trans World Airlines v. Independent Federation of Flight Attendants*, 489 U.S. 426, 437 (1989); *Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 152 (1976); *American Ship Building Co. v. NLRB*, 380 U.S. at 316. In light of these precedents and others, I do not believe that whether the permanent replacement of economic strikers is a legitimate form of economic pressure is reasonably open to question.

[4] 304 U.S. at 345 (footnotes omitted; emphasis added).

In *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964), the Board adopted a rule disallowing any scrutiny into an employer's *motive* for hiring permanent replacements. The Board rejected a trial examiner's finding that the employer violated Section 8(a)(3) and (1) by hiring permanent replacements as part of what the trial examiner described as "a contrived scheme to make it possible for the Hot Shoppes management officials to penalize various of the strikers and to defeat their rights to reinstatement."[5] A unanimous Board held:

> We . . . disagree with the Trial Examiner's premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operation of his business. The Supreme Court's decision in *Mackay Radio & Telegraph Company*, and the cases thereafter, although referring to an employer's right to continue his business during a strike, state that *an employer has a legal right to replace economic strikers at will.* We construe these cases as holding that *the motive for such replacements is immaterial*, absent evidence of an *independent unlawful purpose*. Therefore, we reject the Trial Examiner's conclusion that the plan to replace the economic strikers here was itself improper and that the strike was converted to an unfair labor practice strike on January 4 by Respondent's implementation of such plan.[6]

In the instant case, Judge Litvack correctly applied the rule of *Hot Shoppes*: employers have the right to hire permanent replacements regardless of motive. The judge also correctly interprets the "independent unlawful purpose" exception. In his view, that exception applies only where the hiring of permanent replacements "is calculated to accomplish another, unlawful purpose, one *unrelated to or extraneous to* the strike itself" (emphasis added). Otherwise, he says, "the entire preceding clause"—i.e., that the employer's motive for hiring permanent replacements is immaterial—is rendered "a nullity." In my view, the judge's reading of *Hot Shoppes* is obviously correct.

My colleagues improperly adopt an interpretation of "independent unlawful purpose" to mean any antiunion or antistrike animus. What *Hot Shoppes* states as an exception, my colleagues make the rule. In their view, "motive is immaterial" means precisely the opposite: motive is material, and only certain motives are lawful. The majority performs a rehab of *Hot Shoppes* that leaves almost nothing standing. One piece of the structure remains intact—the phrase "independent unlawful purpose"—but the original builders would never recognize the place. Using Judge Litvack's apt phrase, the majority has rendered *Hot Shoppes* a nullity.

More is at stake here than the deformation of Board precedent, serious as that is. The predictable result is a substantial rearrangement of the competing interests balanced by Congress when it chose to protect various economic weapons, including the hiring of permanent replacements. Again, the hiring of permanent replacements necessarily occurs only when all parties have resorted to economic warfare: the union and striking employees have exercised their protected rights to inflict economic injury on the employer's business, and the employer has exercised a protected right to respond by measures that inflict economic injury on the union and employees. These are not circumstances for the faint of heart. During such times, parties almost invariably bear animus toward each other. It would be common for the union and employees to widely distribute accusations that the employer is treating employees unfairly because of greed and injustice. It would be equally common for the employer to respond—and believe—that the union and employees are being unreasonable and irresponsible. In most cases, the parties understand that their dispute may cause everybody to experience severe economic injury and, possibly, financial ruin.

The Act does not require parties to maintain Spock-like objectivity towards one another when resorting to economic weapons.[7] Nor is it realistic to believe that parties in these circumstances will remain in a dispassionate state of cool detachment. Yet, under the majority's decision today, if the employer hires permanent replacements, it appears that any evidence of antistrike animus will render unlawful the employer's actions, resulting in potentially debilitating backpay liability. This would represent a structural change in the competing

[5] Id. at 835.

[6] 146 NLRB at 805 (citing *Mackay Radio*, 304 U.S. at 333; *American Optical Co.*, 138 NLRB 681, 689 (1962)) (emphasis added).

[7] Mr. Spock—a main character in the well-known television and movie series *Star Trek*—was perhaps best known for his (largely successful) efforts to suppress emotion. His father was from the planet Vulcan, where beings were "noted for their attempt to live by reason and logic." However, even Spock, who had a human mother, experienced a "strained and often turbulent" relationship with his Vulcan father, though it was "rooted in an underlying respect and carefully restrained love." Wikipedia, Spock (http://en.wikipedia.org/wiki/Spock) (last viewed May 23, 2016); Wikipedia, Vulcan (Star Trek) (http://en.wikipedia.org/wiki/Vulcan_(Star_Trek)) (last viewed May 23, 2016). Like other Vulcan males, Spock also periodically experienced "pon farr," which seemingly resulted in a battle to the death between Spock and his friend and captain, James T. Kirk, in the Star Trek second season premiere. Wikipedia, Amok Time (https://en.wikipedia.org/wiki/Amok_Time) (last viewed May 23, 2016).

interests of employees, unions and employers that is contrary to what Congress intended, and what the Supreme Court has recognized, in the statute we are duty-bound to enforce.

Factual Background

On May 25, 2010,[8] at a time when the parties remained at odds in collective bargaining over several major issues (including health care, pensions, and disciplinary policies), the Union picketed the Respondent's facility. The pickets carried signs bearing slogans such as "no healthcare reductions," "pension now," and "fair wages now."

By two letters dated July 9 and delivered simultaneously to the Respondent, the Union notified the Respondent that it planned to call a strike. One letter informed the Respondent that the Union would commence a strike on Monday, August 2 and continue striking "unless and until a mutually agreeable resolution has been reached." The other letter advised that all of the striking employees "unconditionally offer to return to work at or after 5:00 a.m. on Saturday, August 7, 2010." The Respondent's Executive Director, Gayle Reynolds, testified that she found the letters "very ambiguous" as to when the strike would end and that "[she] didn't know really what to believe." In her mind, it was possible that the strike would end after 5 days and the employees would return to work without a contract, leaving open the possibility of further strikes. An alternative possibility, in her view, was that the strike would continue indefinitely, until the parties bridged their divide and negotiated a full collective-bargaining agreement.

To prepare for the strike, the Respondent engaged a staffing agency, Huffmaster, to furnish temporary replacements for its striking workers. This came at considerable expense, upwards of $300,000 for a 5-day period. Of course, this was the Union's purpose in calling a strike: to disrupt the Respondent's operations and inflict economic pain as a means to pressure the Respondent to accept the Union's bargaining demands. Several days into the economic strike, the Respondent decided to hire permanent replacements. Reynolds testified that she made that decision to avoid the expense of repeatedly hiring temporary workers through Huffmaster. She further testified that she was motivated in part by a desire to enable the Respondent to better weather the Union's strike activity.[9] In this regard, Reynolds assumed that, because the replacement workers were willing to work during this strike, they would be willing to work if the Union called another strike during the ongoing labor dispute. Finally, the judge credited testimony by the Union's attorney, Bruce Harland, that the Respondent's attorney, David Durham, told him over the telephone that the Respondent was hiring permanent replacements "to teach the strikers and the Union a lesson" and that the Respondent "wanted to avoid any future strike, and this was the lesson that they were going to be taught."[10]

On August 7, the Union ended its strike without having pressured the Respondent into accepting its demands. The Respondent declined to reinstate 44 of the strikers based on the fact that they had been permanently replaced.

Discussion

Section 8(d) of the Act imposes on employers and unions alike the duty to bargain in good faith over wages, hours, and other terms and conditions of employment. However, good-faith bargaining does not always produce a collective-bargaining agreement, and resort to economic weaponry "is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB v. Insurance Agents' International Union*, 361 U.S. at 489. One well-recognized legitimate economic weapon in the arsenal of employers is the right to permanently replace economic strikers. Supra fn. 3 (collecting cases); *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (invalidating, as in conflict with the NLRA, executive order barring federal government from contracting with employers who hire permanent replacements); *Avery Heights*, 343 NLRB 1301 (2004) ("[E]mployers have a right [to hire permanent replacements] to 'fight back' in the economic battle and the right to try to continue operations during a strike."), vacated and remanded on other grounds *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 195 (2d Cir. 2006), on remand 350 NLRB 214 (2007).

In *Hot Shoppes*, 146 NLRB at 805, the Board explained that an employer's motive in hiring permanent replacements "is immaterial, absent evidence of an independent unlawful purpose." In that case, a union threatened to strike an employer when their negotiations failed to produce an agreement. In response, the employer made several threats to hire permanent replacements. For example, on one occasion prior to the strike, manag-

[8] All dates are in 2010.

[9] Thus, the majority is incorrect when it asserts that "the Respondent did not even purport to be acting in support of its bargaining position." By attempting to reduce the costs imposed by the strike and to bolster its ability to weather this strike and potential future strikes, the Respondent acted in support of its bargaining position.

[10] Durham denied on the stand that he made any such statements. The judge credited Harland over Durham based on demeanor.

er Bank told employee Dorsainvil that the current strike, unlike a prior strike, would be "an economic strike and in that kind of strike, everyone is going to be replaced permanently if they go on strike." Id. at 812.[11] The employer's decision to hire permanent, rather than temporary, replacements was made on advice of counsel: "Counsel advised the management officials not only to hire replacements but *to hire them on a permanent basis*." Id. at 816 (emphasis in original). Relying on this advice, the employer departed from its standard hiring procedure and informed each replacement that he "was being hired on a permanent basis." Id. Shortly before the strike commenced, the employer "*boast*[*ed*] to various commissary employees that [the employer] had 40 or so people already in hotels ready to take their places . . . ." Id. at 814 (emphasis added). There is no suggestion in the trial examiner's extensive decision that Hot Shoppes considered the possibility of retaining temporary replacements for the duration of the strike before deciding to hire permanent replacements. Based on this evidence—and quoting the very language from *Erie Resistor*[12] on which my colleagues rely—the trial examiner found that Hot Shoppes was motivated by a desire to defeat the strikers' right to immediate reinstatement, not simply to continue operations during the strike's duration, and that it thereby violated the Act.

On exceptions, the Board reversed the trial examiner and dismissed the complaint. Importantly, the Board *did not disagree* with the trial examiner's factual finding, amply supported by the record there, that Hot Shoppes had hired the permanent replacements "pursuant to a 'contrived scheme' to defeat the economic strikers' right to reinstatement." Id. at 805. Rather, the Board disagreed with the trial examiner's legal premise that an employer may replace strikers only to preserve efficient operation of the business. According to the Board, the trial examiner's legal premise was inconsistent with *Mackay Radio*, which, "although referring to an employer's right to continue his business during a strike, states that an employer has a legal right to replace economic strikers at will." Id. The Board construed *Mackay Radio* and its progeny as holding that the motive underlying permanent replacement "is immaterial, absent evidence of an independent unlawful purpose," id.[13], and it rejected the trial examiner's conclusion that Hot Shoppes' motive constituted such an independent unlawful purpose. Id. ("[W]e reject the Trial Examiner's conclusion that the plan to replace the economic strikers here was itself improper.").

[11] A year earlier, in a separate case, the Board found that the Respondent had committed unfair labor practices in connection with a prior strike by the Union. *Hot Shoppes, Inc.*, 133 NLRB 3 (1961). In that case the trial examiner, whose decision the Board adopted, found that the strike was an unfair labor practice strike and ordered the Respondent to reinstate the strikers upon their application to return to work.

[12] 373 U.S. at 221. Like the majority in the instant case, the trial examiner in *Hot Shoppes* viewed *Erie Resistor* as materially limiting the holding of *Mackay Radio*. In this regard, the trial examiner quoted and relied on the following language from *Erie Resistor*: "'When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices.'" *Hot Shoppes*, 146 NLRB at 835 (quoting *Erie Resistor*, 373 U.S. at 227). The majority bases its expansive interpretation of "independent unlawful purpose" on this very language—disregarding the fact that the *Hot Shoppes* Board *rejected* the trial examiner's finding, based on *Erie Resistor*, that Hot Shoppes' hiring of permanent replacements violated the Act. Indeed, the *Hot Shoppes* Board expressly *distinguished Erie Resistor*. 146 NLRB at 805 fn. 7.

[13] As noted above, in support of its construction of *Mackay Radio*, the Board cited *American Optical Co.*, 138 NLRB at 681. In *American Optical*, the Board, adopting the trial examiner's decision, categorically stated that "[a]n employer's lawful right during a strike called for economic reasons to operate his business by hiring employees permanently to replace strikers *is not challengeable*." 138 NLRB at 688 (emphasis added). The majority finds *American Optical* "not helpful" because the employer there permanently replaced employees to compel the union to accede to its bargaining proposals, and they contend that "this is *not* a case in which the employer acted in support of its bargaining position." I believe the majority's attempt to distinguish *American Optical* is unconvincing. An employer (such as the Respondent) who hires permanent replacements to counter the strike weapon, wielded by the union to pressure the employer to abandon its bargaining position, *is* supporting its bargaining position. Cf. *Central Illinois Public Service Co.*, 326 NLRB at 932 ("[I]t makes little sense to say that the lockout was caused by the [union's] inside game strategy rather than by the respective bargaining positions of the parties.").

Supreme Court precedent supports the irrelevancy of an employer's motive in hiring permanent replacements. In *Belknap v. Hale*, 463 U.S. 491 (1983), the Supreme Court cited *Hot Shoppes* and quoted the passage in which the Board construed *Mackay Radio* as holding that the motive for hiring permanent replacements is irrelevant. Id. at 504 fn. 8. "There are no cases in this Court that require a different conclusion," the Court stated. Id. Significantly, the Court emphasized that *Erie Resistor*, in which my colleagues place such stock, involved a different issue—"an offer of super-seniority to replacements"—and that the *Erie Resistor* "opinion was careful to distinguish cases not involving that element." Id. Thus, *Belknap v. Hale* substantially undermines the majority's view that the holding of *Mackay Radio* was limited or modified by *Erie Resistor*. The Court rejected a similar effort to "expand *Erie Resistor*" in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. at 436–438.

The majority distorts my position. They assert that, under my approach, "granting superseniority to nonstrikers, as in *Erie Resistor*, would have been lawful because it was related to the strike." But the fact that a prohibited tactic is related to a strike does not lift the prohibition. The granting of superseniority to nonstrikers or crossovers is a prohibited tactic. The permanent replacement of economic strikers is a recognized, legitimate economic weapon.

In four ways, the *Hot Shoppes* decision provides substantial guidance regarding the Board's standards governing permanent replacements.

First, the *rule* of *Hot Shoppes* is that the employer's motive is irrelevant. The *exception* to that rule is where the employer has an "independent unlawful purpose." Obviously, any reasonable interpretation of *Hot Shoppes* must keep the rule the rule, and the exception the exception.[14]

Second, the Board in *Hot Shoppes*—in addition to relying on *Mackay Radio*, supra—cited another case, *American Optical Co.*, 138 NLRB at 689, for the proposition that regardless of motive, "an employer has a legal right to replace economic strikers at will." *Hot Shoppes*, 146 NLRB at 805. The Board cited with approval the findings of the trial examiner in *American Optical*, who stated:

> I deem wholly without merit the contention that the Respondent violated Section 8(a)(5) of the Act *by replacing economic strikers as a means of forcing the Union to accede to its bargaining proposals.* If the Respondent had a lawful right to operate its business by replacing its striking employees, which I found it had, *Section 8(a)(5) is not violated merely because the clear effect of this action was to weaken the Union's bargaining position and to make it more amendable* [sic] *to acceptance of the Respondent's proposals.* This was no more unlawful than would have been the successful conduct of the strike of the Union to weaken the position of the Respondent and thus to wring from it the concessions demanded by the Union.[15]

Third, the Board in *Hot Shoppes* distinguished two other cases—*Cone Brothers Contracting Co.*[16] and *NLRB v. Erie Resistor Corp.*[17]—which, according to the Board, did "not lend themselves to an analogy to the situation involved in the instant case." Both cases involved egregious employer misconduct that clearly went beyond merely hiring replacement employees. In *Cone Brothers*, the employer discriminatorily gave certain employees job assignments at a location where the employees were required to cross a picket line erected by one union (the Operating Engineers), and when the employees predictably refused to cross the picket line, the employer designated them "quits" so they would be ineligible to vote in a scheduled representation election involving a different union (the Teamsters).[18] In *Erie Resistor*, the employer unlawfully gave replacement employees and returning strikers a 20-year "super-seniority" credit, which effectively guaranteed that striking employees—unless they abandoned the strike—would always be laid off first.[19] According to the Supreme Court in *Erie Resistor*, even the Board recognized the "permanent replacement" of striking employees was "proper under *Mackay*."[20] Similarly, the Court likewise held: "We have no intention of questioning the continuing vitality of the *Mackay* rule, but we are not prepared to extend it to the situation we have here."[21]

Finally, when the Board in *Hot Shoppes* referred to a possible "independent unlawful purpose" (as an exception to the general rule permitting employers to hire permanent replacements without regard to motive), the Board cited *Cone Brothers*. Especially in conjunction with the other cases described above, the Board's reference to *Cone Brothers* reinforces two propositions: (i) the Board in *Hot Shoppes* meant to leave undisturbed the overriding principle that the hiring of permanent replacements is lawful without regard to motive, and (ii) an "independent unlawful purpose" could exist only if the employer had some unlawful objective involving something *other* than the hiring of permanent replacements and the parties' bargaining relationship. As explained above, in *Cone Brothers* the employer gave discriminato-

[14] *S&F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 361 (D.C. Cir. 2009) (court rejects Board exception that would improperly "swallow the rule" that predecessor employment terms are nonbinding on successor employers); *NLRB v. Great Atlantic & Pacific Tea Co.*, 340 F.2d 690, 694 (2d Cir. 1965) (court rejects Board finding that layoffs were "inherently" discriminatory because it "effectively reads the required showing of 'motivation' out of the statute"; court reasons that the "exception . . . cannot swallow the rule"); *Tennessee Shell Co.*, 212 NLRB 193, 196 (1974) (Board rejects arguments for more expansive employer waivers of secret ballot elections because otherwise the "exception might well swallow up the rule"), rev. denied mem. 515 F.2d 1018 (D.C. Cir. 1975).

[15] *American Optical Co.*, 138 NLRB at 689 (emphasis added).

[16] 135 NLRB 108 (1962), enfd. 317 F.2d 3 (5th Cir.), cert. denied 375 U.S. 945 (1963).

[17] 373 U.S. 221 (1963).

[18] 135 NLRB at 116–117, 127 fn. 29, 135–141. According to the Board, this was a "scheme of placing [the] employees . . . in the position of either crossing the picket line . . . or being placed in a 'quit' status," and the Board concluded that the employer "constructively discharged these employees for the purpose of discouraging union membership in violation of Section 8(a)(3) and (1) of the Act." Id. at 109. The Board upheld the findings of the trial examiner, who concluded the employer "acted throughout with discriminatory intent to utilize the shibboleth of Prestressed's picket line, not only to expose union adherents, but to disqualify them as quits from voting in the coming election." Id. at 140.

[19] The 20-year super-seniority credit was defined as "20 years' additional seniority both to replacements and to strikers who returned to work, which would be available . . . for credit against future layoffs." 373 U.S. at 223.

[20] Id. at 230.

[21] Id. at 232.

ry job assignments to employees to force them to refuse to cross one union's picket line so the employer could designate them as "quits" and later claim they were ineligible to vote in a *different* union's representation election.[22]

These cases demonstrate that the *Hot Shoppes* "independent unlawful purpose" exception is not triggered by an employer's desire to retaliate against union economic warfare with legitimate economic weapons of its own, even if the employer wants to teach strikers a lesson about a strike's lawful consequences. Rather, an "independent unlawful purpose" requires the General Counsel to prove that permanent replacements were calculated to accomplish an unlawful purpose extrinsic to the parties' bargaining relationship or unrelated to the strike itself.

My reading of *Hot Shoppes* is consistent with the Board's common understanding and customary usage of the term "independent," which means "not subject to control by others" and "not requiring or relying on something else: not contingent."[23] Board law has adhered to this definition—for example, when defining the term "independent judgment" for Section 2(11) purposes as "form[ing] an opinion or evaluation by discerning and comparing data" while "*free of the control of others*." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692–693 (2006) (emphasis added).[24] Also, "where [an administrative law judge's] credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an *independent* evaluation of credibility." *J. N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979) (internal quotations omitted; emphasis added). In this context, the Board's "independent" evaluation of credibility means without relying on the judge's analysis or determinations. Likewise, the phrase "independent unlawful purpose" in *Hot Shoppes* denotes an unlawful purpose "not contingent" on matters associated with the strike. Accordingly, to be unlawful under *Hot Shoppes,* the "independent" purpose must relate to something other than the employer's sentiments and objectives concerning the strike itself.

My reading is also consistent with *Mrs. Natt's Bakery*, 44 NLRB 1099 (1942). In that case, a union with majority support in a unit of bakers approached an employer for the first time at noon on a Friday, presented a first contract proposal, and threatened to strike if the employer did not accept by 3:30 p.m. that day. The employer's owner asked to be given to the following Monday to consider the union's proposal. In response, the union, after consulting with the employees, repeated that the employees would strike unless the employer signed by 3:30 p.m. The employer's owner then told the union's organizer that "the employees would lose their jobs if they went on strike, and [the union organizer] undertook 'to talk to the boys again'" about possibly delaying the strike. Id. at 1108. Around 3:30 p.m., the employer's owner addressed an assembly of employees. "He asked the employees to wait until Monday for his answer to the proposed contract and warned them that they would be replaced if they went on strike without granting his request." Id. The employees promptly struck. Making good on his threat, the employer hired permanent replacements and refused to reinstate the strikers when the union ended its strike approximately 6 weeks later.

It was clear in *Mrs. Natt's Bakery* that the employer hired permanent replacements as an economic countermeasure to its employees' strike activity, not simply to ensure efficient operation of the enterprise. Nevertheless, the Board dismissed allegations that the employer had refused to bargain in good faith by threatening to permanently replace the strikers and had discriminated against the strikers by following through on his threat and refusing to reinstate them upon the strike's termination. Citing *NLRB v. Mackay Radio & Telegraph Co.*, supra, the Board observed that an employer "may replace employees participating in a purely economic strike," and explained that "[s]ince an employer may in such a setting replace striking employees *with impunity*, it is not unlawful for him to state such an intention." Id. (emphasis added); see Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 548 (1990) (explaining that the Board in *Mrs. Natt's Bakery* viewed permanent replacement "as a bludgeon in a contest of economic strength" that is "unfettered by any

[22] Although the Board in *Hot Shoppes* cited *Cone Brothers* as an example shedding light on the phrase "independent unlawful purpose," the *Hot Shoppes* citation begins with the introductory signal "cf." See *Hot Shoppes*, 146 NLRB at 805 fn. 10. This suggests the Board regarded *Cone Brothers* as helpful to an understanding of the phrase "independent unlawful purpose," but *Cone Brothers* was nonetheless an imperfect illustration (no doubt because the alleged discriminatees were not permanently replaced). The introductory signal "cf." is used when "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support." *Lopez-Rodriguez v. Holder*, 560 F.3d 1098, 1104 fn. 12 (9th Cir. 2009).

[23] *Webster's Third New International Dictionary* 1148 (1971).

[24] In this connection, the Board will not find Sec. 2(11) supervisory authority to discipline unless the exercise of such authority "'lead[s] to personnel action[] without the *independent* investigation or review of other management personnel.'" *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 2 (2014) (emphasis added) (quoting *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002)). In other words, an employee only has authority to discipline where the issuance of such discipline is not contingent on higher managerial review.

requirement of demonstrable business necessity or the unavailability of less drastic means to resist the strike").[25]

I agree with the judge that the General Counsel failed to prove that the Respondent hired permanent replacements with an "independent unlawful purpose," i.e., an antiunion motive extrinsic or unrelated to the Union's strike activity. As noted above, the evidence indicates that three motives drove the Respondent's hiring of permanent replacements: (1) a desire to avoid the expense of continuing to contract with Huffmaster to furnish temporary replacements; (2) a desire to "teach the strikers and the Union a lesson" so as to "avoid any future strike"; and (3) a desire to enable itself to better weather continued strike activity (if future strikes were not avoided) during the course of an ongoing labor dispute. These motives are directly related to the strike, and they do not reflect antiunion animus independent of the parties' bargaining relationship.[26] Both sides were actively engaged in a contest of economic strength, and both used weapons that Congress has chosen to protect.

I believe the record fails to support my colleagues' conclusion that the Respondent's hiring of permanent replacements involved an "independent unlawful purpose" within the meaning of *Hot Shoppes*, based on a motive to "retaliate against" or "punish" employees for engaging in protected strike activity. The majority finds an "independent unlawful purpose" existed based on Attorney Durham's "teach them a lesson" statement and Executive Director Reynolds's testimony that she thought permanent replacements would likely "come to work if there was another work stoppage." In my view, the majority's holding suffers from several flaws.

First, as explained above, the majority's views are irreconcilable with *Hot Shoppes*, supra, which held that permanent replacement undertaken to oppose strike activity is lawful and that motive is irrelevant. Likewise, I believe the majority's views are contrary to the Board's careful analysis in *Hot Shoppes*—including its reliance on *Mackay Radio*, *Erie Resistor*, *American Optical*, and *Cone Brothers*, supra—which provides clear guidance regarding the contours of the rule (making motivation irrelevant) with only a limited exception (when there is an "independent unlawful purpose").

Second, motive *ought* to be irrelevant because the very nature of economic warfare makes it virtually impossible to distinguish self-preservation from antistrike motives in hiring permanent replacements. As the Supreme Court explained in *NLRB v. Insurance Agents' International Union*, 361 U.S. at 489, Congress fully expected, and sanctioned, the use of economic weapons, including permanent replacement.[27] Indeed, the structure of the Act allows for a variety of permissible economic weapons, each entailing different risks and potential consequences, which the parties are free to select. Under the majority opinion, the Board must attempt to divine whether an employer, in hiring permanent replacements, was acting based on economic self-interest or was instead impermissibly retaliating based on a visceral hostility toward strike activity. This ignores the reality that—when engaging in warfare, including economic warfare—the opposing camps *intend to injure one another* in hopes of forcing the other side to surrender; and absent surrender, one side or both may be annihilated. Given these realities, I do not believe my colleagues can properly disfavor a particular economic weapon merely because ill will may have existed when a party exercised its protected right to use it.[28] In short, the Act contemplates that some categories of economic weapons are permitted, and some are not permitted. The majority invents an additional prerequisite—the absence of strike-related hostility—that effectively renders unavailable an economic weapon that falls into the "permitted" category. By doing so, my colleagues upend the Act's structure and contravene Supreme Court precedent recognizing

[25] The majority's attempt to distinguish *Mrs. Natt's Bakery* is unconvincing. The employer in that case permanently replaced the striking employees precisely because they went out on strike: "Natt stated that the employees would lose their jobs if they went on strike." 44 NLRB at 1108. In other words, the employer permanently replaced the strikers in *retaliation* against them for striking. And the Board held he was free to do so "with impunity."

[26] I disagree with the majority's assertion that Executive Director Reynolds's stated motive of improving the Respondent's ability to weather continued strike activity constitutes an "independent unlawful purpose" unrelated to the strike. Reynolds was clearly contemplating further strike activity during the course of a single, ongoing labor dispute.

[27] Numerous legislative attempts have been made to prohibit the use of permanent replacements. See, e.g., Workplace Fairness Act, S. 55 103d Cong., 1st Sess. (1993). None of these initiatives has been enacted.

[28] Commentators have noted it would be virtually impossible to draw a line between permissible and impermissible motives in hiring permanent replacements. See Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 952 (1993) (explaining that the rational economic motives underlying permanent replacement "are not different in kind from the motives that underlie a straightforward discrimination discharge"); Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1204–1205 (1967) ("In short, an inquiry into the employer's state of mind in such situations [the hiring of permanent replacements] would be difficult and the probable results equivocal. The Board, in fact does not seek to evaluate the employer's state of mind in order to determine the legality of his conduct.").

permanent replacement as a permissible economic weapon. See *Mackay Radio*, supra at 345.[29]

Third, the majority's holding today is contrary to Board and court decisions that find the presence or expression of strong feelings does not render unlawful the exercise of protected rights.[30] In *Longview Furniture Co.*, 100 NLRB 301 (1952), enfd. in relevant part 206 F.2d 274 (4th Cir. 1953), the Board stated:

> It is common knowledge that *in a strike where vital economic issues are at stake, striking employees resent those who cross the picket line and will express their sentiments in language not altogether suited to the pleasantries of the drawing room or even to courtesies of parliamentary disputation.* Thus, we believe that to suggest that employees in the heat of picket-line animosity must trim their expression of disapproval to some point short of the utterances here in question, *would be to ignore the industrial realities of speech in a workaday world and to impose a serious stricture upon employees in the exercise of their rights under the Act.*[31]

To the same effect, the Supreme Court stated in *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966) (holding that the NLRA does not preempt defamation claims):

> *Labor disputes are ordinarily heated affairs*; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. *Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language* . . . . We note that *the Board has given frequent consideration to the type of statements circulating during labor controversies, and that it has allowed wide latitude to the competing parties.*[32]

Fourth, I believe the majority's subjective standard will effectively preclude many employers from using permanent replacement as a legitimate economic weapon, contrary to Supreme Court precedent stretching back almost to the enactment of the Wagner Act itself. Any stray comment that reflects negativity towards strike participants—whether made by an executive, manager or supervisor—could create a risk of potentially ruinous financial liability. The risk of such liability will no doubt sharply curtail the lawful use of permanent replacement as a legitimate economic weapon. Cf. Brendan Dolan, *Mackay Radio: If It Isn't Broken, Don't Fix It*, 25 U.S.F. L. REV. 313, 317–318 (1991) (asserting that fear of liability, contingent on whether the Board will find a strike is economic in nature, "is enough to preclude many employers from even considering permanently replacing employees on an across-the-board basis"). I believe such a rearrangement of the balance of power between employers and unions is contrary to the Supreme Court's decisions in *American Ship Building* and *Insurance Agents*.[33] I agree with the clear rule embraced by the judge: the hiring of permanent replacements has an "independent unlawful purpose" only if undertaken for an antiunion motive extrinsic to the strike. This is the only reading of *Hot Shoppes* that avoids nullifying its central holding (that motive is immaterial), and I believe this interpretation is required by Supreme Court precedent binding on the Board.

Fifth, as noted above, I disagree with the majority's finding that the facts in this case prove the Respondent hired permanent replacements in order to "punish" striking employees. By hiring permanent replacements, the Respondent was furthering its legitimate interest in countering the Union's potent strike weapon. In my view, the testimony by Executive Director Reynolds (that she believed permanent replacements would enhance Respondent's ability to weather the current strike and future strikes during the ongoing labor dispute) reasonably re-

[29] In arguing that a counter-strike motive constitutes an "independent unlawful purpose," the majority cites *Movers & Warehousemen's Assn. of D.C. v. NLRB*, 550 F.2d 962 (D.C. Cir. 1977). That case did not involve hiring permanent replacements to counter a strike. Rather, it involved a lockout undertaken in part to coerce a union to adopt a certain procedure for employee ratification of a contract offer—an internal union matter and hence a nonmandatory subject of bargaining. The court found the lockout unlawful based on the employers' motive "to interfere with, and thus injure, a labor organization in the exercise of its own internal operating procedures." Id. at 966. That case is obviously distinguishable from this one.

[30] *NLRB v. Wire Products Mfg. Corp.*, 484 F.2d at 760; *Central Illinois Public Service Co.*, 326 NLRB at 930–931.

[31] Id. at 304 (emphasis added).

[32] Id. at 58–60 (emphasis added; citations omitted).

[33] See *NLRB v. Insurance Agents' International Union*, 361 U.S. at 497–498 ("[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. . . . [T]his amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced."); *American Ship Building Co. v. NLRB*, 380 U.S. at 317 ("Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power.").

flects the fact that certain other measures (temporary replacements or using nonunit personnel) are predictably less effective in the face of potential recurring or intermittent strikes. Along similar lines, Attorney Durham's comment (that hiring permanent replacements would teach strikers "a lesson" in order to "avoid any future strike") does not reflect an unlawful motive, given that the Act contemplates that parties will inflict economic injury by resorting to permissible economic weapons, one of which is the hiring of permanent replacements. Every resort to economic leverage in response to a strike tends to dissuade employees and their union from resorting to the strike weapon again. I believe such an objective is lawful even in relation to potential future disputes, because companies and unions typically have relationships that span multiple negotiations over time; issues such as commitment, resolve and credibility play a major role in collective bargaining; and everyone understands that the handling and resolution of issues in one round of bargaining will predictably affect future negotiations. Cf. *Sociedad Espanola de Auxilio Mutuo Y Beneficencia de P.R.*, 342 NLRB 458, 460, 463 (2004) (manager's statement that lockout was "reprisal" against union, which had threatened to strike, did not establish that lockout was unlawfully motivated), enfd. 414 F.3d 158 (1st Cir. 2005); *Central Illinois Public Service Co.*, 326 NLRB at 928 (unreasonable to infer that lockout was motivated by antiunion motivation from employer's statement that it "was not going to put up with this shit," i.e., the union's "inside game" strategy of working to the rule, which the Board assumed was protected). Again, it bears emphasis that the Respondent here was exercising its own right to protect itself against the Union's strike weapon.[34]

Finally, contrary to the majority's suggestion, I do not believe *Avery Heights* supports an expansive view of the "independent unlawful purpose" exception. There, the theory of the General Counsel's case was that in hiring permanent replacements, the Respondent sought to punish the strikers and break the union's solidarity by replacing a majority of the unit employees—motives that constituted an "independent unlawful purpose," according to the General Counsel. 343 NLRB at 1305. The General Counsel urged the Board to infer such motive from the fact that the employer had concealed its hiring from the union, as well as documentary and testimonial evidence purportedly showing that the employer sought to break the union. The *Avery Heights* Board did not hold that a desire to punish the strikers and break the union's solidarity constitutes an "independent unlawful purpose" under *Hot Shoppes*. Rather, the Board found that the General Counsel's proof was insufficient to establish that the Respondent harbored those motives.

Moreover, my colleagues are incorrect when they claim that the *Avery Heights* Board did not take issue with the judge's conclusion that the unlawful motives attributed to the employer would constitute an "independent unlawful purpose." To the contrary, the Board expressly rejected the notion that a motive to "break the union," if proven, would make the hiring of permanent replacements unlawful. "[E]ven assuming . . . that the [r]espondent's motive was to break the [u]nion's solidarity in the economic battle," the Board stated, "*such an objective is not unlawful*." 343 NLRB at 1307 (emphasis added). Having found the evidence insufficient to establish "some kind of nefarious scheme to punish striking employees by hiring permanent replacements," id., the Board did not have to reach the judge's legal conclusion that such a motive would be an "independent unlawful purpose." The Board cast doubt on the judge's conclusion, however, by finding the hiring of permanent replacements lawful even if it "persuaded some employees that further striking was unwise." Id. Such persuasion was plainly what attorney Durham had in mind when he referred to teaching the strikers a lesson because the Respondent "wanted to avoid any future strike." Thus, the Board's decision in *Avery Heights* supports my finding that the Respondent's hiring of permanent replacements was lawful.[35]

[34] The majority relies on two cases that I believe are completely inapposite—*Controlled Energy Systems, Inc.*, 331 NLRB 251 (2000), and *Frank Leta Honda*, 321 NLRB 482 (1996)—to support their claim that finding the Respondent's hiring of permanent replacements lawful would "violate[] the most basic principles of the Act." Although the majority states "[i]t is axiomatic that an employer violates the Act when it retaliates against employees for engaging in union or other protected activity, and that the right to strike is fundamental," neither *Controlled Energy* nor *Frank Leta Honda* involved an employer who responded to a strike by hiring permanent replacements. In *Controlled Energy*, the employer *discharged* five employees for engaging in an unfair labor practice strike. In *Frank Leta Honda*, after an economic strike ended, the employer *disciplined* former strikers and adversely *changed their working conditions* in retaliation for their strike activity. Discharge, discipline, and adverse changes to working conditions are not legitimate economic weapons; hiring permanent replacements is.

[35] As noted by the majority, on appeal, the Second Circuit held that, absent an adequate explanation, the employer's secret hiring of permanent replacements implied "an illicit motive to break a union." 448 F.3d at 195. The court remanded the case to the Board to consider whether the record contained any evidence of such an explanation. On remand, the Board applied the court's decision as the law of the case and found that the record failed to provide an alternative rationale for the secret hiring, and thus the Board accepted the court's conclusion that the respondent had acted with the aforementioned illicit motive.

In sum, I disagree with the majority's interpretation of "independent unlawful purpose," which reads "independent" out of the phrase entirely. In so doing, I believe the majority effectively overrules the central holding of *Hot Shoppes*, which renders irrelevant an employer's motive in hiring permanent replacements. More fundamentally, I disagree with my colleagues' decision because they effectively invalidate an economic weapon that the Supreme Court declared lawful more than 75 years ago.

As noted previously, I do not favor the hiring of permanent replacements any more than I favor potentially ruinous strikes, lockouts and other economic weapons that Congress affirmatively protected when enacting the National Labor Relations Act. In my view, the majority gives inadequate consideration to the fact that Congress has made the decision to protect this weaponry, and the Board may not—at its initiative—fundamentally change the manner in which Congress has chosen to balance the interests of employees, unions and employers. *Insurance Agents,* 361 U.S. at 497; *American Ship Building,* 380 U.S. at 316. I believe the majority's decision improperly changes the balancing of interests that Congress struck in the Act, as articulated by the Board in *Hot Shoppes* and as recognized by the Supreme Court in *Mackay Radio*, *American Ship Building*, *Insurance Agents*, and other cases.

For these reasons, as to the above issues, I respectfully dissent.[36]

Dated, Washington, D.C. May 31, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[36] For the reasons stated by my colleagues, I agree that the complaint is properly before the Board for disposition. I also concur in the majority's remaining findings, including its finding that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish to the Union the names and addresses of the permanent replacements. I disagree with the Board's current "clear and present danger" standard and would adopt the Seventh Circuit's "totality of circumstances" standard, under which legitimate concerns about harassment and safety of replacements are balanced against the requesting union's legitimate need for this information. *Chicago Tribune v. NLRB*, 965 F.2d 244 (7th Cir. 1992). Under this standard, an employer does not act unlawfully if it offers reasonable alternatives to accommodate the union's need. In the present case, however, I would affirm the judge's finding of a violation even under the Seventh Circuit's standard.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT engage in surveillance or create the impression of surveillance of our employees' union activities.

WE WILL NOT disparately enforce our access rule (Rule 33) by evicting off-duty employees engaged in union activity from the facility.

WE WILL NOT refuse to reinstate, or delay the reinstatement of, striking employees, who were permanently replaced with an independent unlawful purpose, and who made an unconditional offer to return to work.

WE WILL NOT fail and refuse to furnish the Union with the names and addresses of the permanent replacement employees who were hired from outside the organization.

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

WE WILL offer all of the strikers who have not yet been reinstated full reinstatement to their former jobs, discharging, if necessary, any employees currently in those positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make all of the former strikers whole for any loss of earnings and other benefits suffered as a result of our refusal to reinstate them on August 7, 2010.

WE WILL compensate employees entitled to backpay under the terms of the Board's Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, wither by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful failure to reinstate the former strikers, and within 3 days thereafter, notify the strikers in writing that this has been done and that the failure to reinstate them will not be used against them in any way.

WE WILL provide the Union with the names and addresses of the permanent replacement employees who were hired from outside sources.

PIEDMONT GARDENS

The Board's decision can be found at www.nlrb.gov/case/32–CA–025247 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Jennifer E. Benesis, Esq., for the Acting General Counsel.
David S. Durham, Esq. and *Gilbert J. Tsai, Esq.* (*Howard Rice Nemerovski Canady Falk & Rabkin*), of San Francisco, California, for the Respondent.
Bruce A. Harland, Esq. and *Manuel A. Boigues, Esq.* (*Weinberg, Roger & Rosenfeld*), of Alameda, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charges in Cases 32–CA–25247 and 32–CA–25248 were filed by Service Employees International Union, United Healthcare Workers–West (the Union), on July 26, 2010; the unfair labor practice charges in Cases 32–CA–25266 and 32–CA–25271 through 32–CA–25308 were filed by the Union on August 9, 2010; and the unfair labor practice charge in Case 32–CA–25498 was filed by the Union on November 30, 2010.[1] After completion of investigations, on March 24, 2011, the Regional Director for Region 32 of the National Labor Relations Board (the Board), issued a consolidated complaint alleging that American Baptist Homes of the West d/b/a Piedmont Gardens (Respondent), engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of the alleged unfair labor practices. Pursuant to a notice of hearing, the above-captioned matters came to trial before the above-named administrative law judge in Oakland, California, on May 16 through 18, 2011. At the said hearing, all parties were afforded the right to call witness, to examine and to cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file posthearing briefs. Said briefs were filed by counsel for the Acting General Counsel, in which counsel for the Union joined, and by counsel for Respondent and have been carefully considered. Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the credibility of the several witnesses,[2] I make the following

FINDINGS OF FACT

JURISDICTION

At all times material herein, Respondent, a State of California nonprofit corporation, has been engaged in the operation of continuing care retirement communities, including a facility located in Oakland, California, known as Piedmont Gardens and a separate facility also located in Oakland known as Grand Lake Gardens. During the 12-month period immediately preceding the issuance of the instant consolidated complaint, which period is representative, Respondent, in the normal course and conduct of its above-described business operations, derived gross revenues in excess of $50,000 and purchased and received goods and services, valued in excess of $5000, which originated outside the State of California. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Labor Organization

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

The Issues

The consolidated complaint alleges that, on June 17 and 18, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by enforcing its no-access rule in such a manner as to require off-duty employees, who were present at the Piedmont Gardens facility to participate in a union strike authorization vote, to leave the said facility and by, through the actions of a security guard, engaging in surveillance of its employees, who were participating in a union strike authorization vote being conducted at the Piedmont Gardens facility. The consolidated complaint next alleges that, from August 2 through 7, certain of Respondent's bargaining unit employees, represented for purposes of collective bargaining by the Union,

[1] Unless otherwise stated, all events herein occurred during 2010.

[2] As is not unusual in these types of proceedings, some of the witnesses, including an attorney who should have known better, failed to heed my warning regarding the consequences of not testifying truthfully.

engaged in a concerted work stoppage and strike, caused in part by the aforementioned unfair labor practices, against Respondent; that, upon the conclusion of their concerted work stoppage and strike on August 7, all of said bargaining unit employees made unconditional offers to return to their former positions of employment; and that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act by belatedly reinstating 13 and refusing to reinstate 25 of said bargaining unit employees. Finally, the consolidated complaint alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act by falling and refusing to provide the Union with the names and contact information for permanent strike replacement employees, which information is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of Respondent's bargaining unit employees.

In its defense, Respondent denies the commission of the alleged unfair labor practices. Further, Respondent alleges that the concerted work stoppage and strike, in which certain of its bargaining unit employees engaged, was motivated by economic concerns and that certain of said employees, who were denied reinstatement at the conclusion of the strike, were lawfully permanently replaced. Finally, Respondent contends that, due to valid security concerns, it lawfully refused to provide the requested information to the Union.

The Alleged Unfair Labor Practices

The Facts

American Baptist Homes of the West, a California nonprofit corporation, maintains a corporate office in Pleasanton, California, and operates continuing care facilities,[3] such as Respondent, and affordable housing communities[4] throughout the western United States including in California, Washington, Nevada, Arizona, and Idaho. Respondent's facility, which is located on 41st Street in the Piedmont section of Oakland, California, provides three levels of care—independent living, assisted living, and skilled nursing[5]—for its 300 current residents and consists of three buildings connected by an inner, enclosed corridor. One, called the Crestmont building, is 16 floors high and consists entirely of apartments for independent living residents. The middle building, called the Garden Terrace building, is a three-story structure with the first floor being a public area and the second and third stories housing Respondent's skilled nursing area. The third building, called the Oakmont building, consists of 11 floors with the first through the seventh comprised of apartments for independent living residents, the eighth through the tenth floors housing the assisted living residents, and the eleventh floor being a public area. The main dining room is on the ground floor of the Garden Terrace building. There are two entrances to Respondent's facility—the main entrance is off 41st Street and a side entrance is off Linda Street, and employees and visitors may enter and exit through either entrance.[6] Gayle Reynolds has been Respondent's executive director and its highest ranking management official since May 1, 2009, and the various department heads report directly to her. The record establishes that since, at least, March 1, 2007, the Union has been the majority collective-bargaining representative of various classifications of Respondent's workers including its dietary department employees, nursing department employees, housekeeping department employees, resident services employees, and general/administration employees, among others, that there are approximately 100 bargaining unit employees, and that the collective-bargaining agreement between Respondent and the Union expired by its terms on April 30.[7]

In January, in anticipation of bargaining for a successor collective-bargaining agreement, the bargaining unit employees selected an 8- to 10-member bargaining committee,[8] and nego-

[3] A continuing care facility is a community where residents pay a substantial upfront fee for receipt of increased levels of care as needed.

[4] An affordable housing community only supplies housing for residents.

[5] Respondent's independent living residents come and go as they please, live in apartments, and pay a monthly fee to Respondent. There is no level of care for these individuals, and Respondent provides a package of mainly hospitality-type services for them and access to a wellness clinic. For meals, these residents' apartments contain kitchens in which they may eat their meals. Respondent maintains a main dining room, which is reserved for independent living residents and serves all meals.

Respondent's assisted living residents, who live in private rooms, also may come and go as they please but require some assistance in caring for themselves. In this regard, Respondent provides supportive services including help in dressing, bathing, and more frequent housekeeping and maintains a licensed vocational nurse and a certified nursing assistant on each work shift for said individuals if needed. The assisted living residents have their own dining room but also may use the main dining room.

Respondent's skilled nursing residents require 24-hour nursing care and reside in rooms for two or four people. They are either bedridden or not. If not bedridden, said residents may leave Respondent's facility in the care of a family member but the director of nursing must be advised of such. Respondent also provides rehabilitation services for those individuals who are recovering from surgery. The skilled nursing residents are permitted to take meals in the main dining room.

[6] A receptionist is stationed at the 41st Street doorway from 8 a.m. to midnight, and a security guard is stationed there during the night. A security guard is stationed at the Linda Street doorway throughout the day.

[7] The expired collective-bargaining agreement was effective from March 1, 2007, through April 30, 2010, and there is no record evidence of any prior bargaining history between the parties.

[8] The members of the bargaining committee team were Sheila Nelson, Sanjanette Fowler, Dapuma Miller, Pierre Williams, Faye Eastman, Matilda Imbukwa, Reginald Jackson, Ebony Harper, and one or two others.

The election of the bargaining committee was conducted in conjunction with a survey in which the bargaining unit employees were asked to rank the issues, which each employee felt important for the bargaining. Shop stewards, including Sheila Nelson, conducted the bargaining committee balloting and distributed and collected the bargaining surveys, all of which was done over a 2-day period in the employees' break room, which is located on the first floor of the Oakmont building. The record evidence is that employees and union officials utilize the break room to conduct all union activities including informational meetings, department meetings, grievance meetings, and other matters,

tiations on a successor contract commenced in February. During the parties' bargaining, which consumed 18 or 19 negotiating sessions and ended on July 9 without an agreement, Respondent's attorney, David Durham, and Myriam Escamilla, the Union's nursing home division director, were the chief spokespersons. As the bargaining progressed from February to early May, certain issues emerged as impediments to a final agreement. The bargaining unit employees' main concern was the discharge and discipline section of the expired agreement, particularly the provisions regarding Respondent's right to discharge employees for violating its rules and policies and its right to adopt or amend said rules and policies "in its sole discretion." In this regard, the Union objected to Respondent's seeming penchant for terminating union stewards or bargaining team members for violations of its chart of infractions[9] and demanded that Respondent agree to implement a progressive disciplinary system for such conduct. The latter constantly rejected the Union's proposals on discipline. Respondent's main concerns during the bargaining were the economic provisions for the successor agreement—specifically the contractual pension and health plans and wages. According to Reynolds, "we proposed to eliminate the SEIU pension plan and replace it with [a] 401(k) plan." The Union wanted to continue with its pension plan and rejected Respondent's proposal. As to health insurance coverage, the contract provided for a Kaiser plan, which Respondent proposed to eliminate and substitute a "health reimbursement" account plan. The Union wanted to continue the contractual Kaiser plan, and rejected Respondent's substitute as the said plan's deductible amounts were higher than the existing Kaiser plan. As to wages, Reynolds testified that Respondent had offered a "pool of money" for wages, healthcare, and pension "so depending on what we spent on pension and healthcare, that's what we had remaining for wages. So the wages could go up or down depending on what . . . we were working with." The Union rejected Respondent's proposal on wages and insisted on its own.

Reynolds was uncontroverted that, by early May, "the majority [of] the conversation was about [the above] issues," with each party being adamant in support of its positions. Then, prior to the scheduled May 12 bargaining session, Escamilla, on behalf of the Union, sent notice, pursuant to Section 8(g) of the Act, to Respondent that "the members of [the Union] will commence informational picketing at 2:30 pm on . . . May 25 . . . and will continue such activity unless, and until, a mutually agreeable resolution has been reached." In fact, Respondent's employees picketed outside Respondent's facility during the afternoon of May 25, carrying signs reading "no healthcare reductions," "no takeaways," "fair wages now," "pension now," and similar language.

The bargaining continued in the same posture subsequent to the May 25 picketing. Then, in early June, the Union and the bargaining committee published a strike vote flyer, which was posted on the bulletin board in the break room and copies of which were available to all bargaining unit employees in the break room. Said flyer was entitled "STRIKE VOTE" and read "Let's Show Management We Are United And Ready to Fight. 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. Our SEIU-UHW bargaining committee is recommending that we vote YES! to authorize a strike to show management that we're serious and won't settle for anything less than what we deserve." Beneath the above message, the negotiating committee requested that the bargaining unit employees vote, "YES," illustrating this with a checkmark in a box, announced that the strike vote would be held on Thursday and Friday June 17 and 18, and set forth the times for the vote. At a bargaining session on June 16, the Union submitted a counterproposal, including the existing wage rates, which Respondent rejected.

On June 17 and 18, a union representative, Donna Mapp, who was present for part of the first day and the entire second day, with members of the employee bargaining committee helping, conducted the strike authorization vote in the breakroom[10] on the announced dates.[11] Sheila Nelson, a day shift housekeeper, a shop steward, and member of the bargaining committee, volunteered to come to Respondent's facility and help with the strike vote during each of the voting periods on the first day of the voting—her day off.[12] The voting occurred without incident during the morning and early afternoon voting periods.[13] Then, according to Nelson, shortly before 3:00 and just prior to the time when employees were required to punch in before starting the afternoon shift,[14] she and Matilda Imbukwa were

and the Union maintains a bulletin board there on which union literature is posted. The record evidence is that it is the only area of Respondent's facility in which employees are permitted to meet and discuss union affairs.

[9] Respondent's work rules and policies are set forth in its so called chart of infractions, which is posted near the door to the employees' break room.

[10] According to Sheila Nelson, a shop steward for the Union and a member of the bargaining committee, the decision was made to have the vote in the break room as "it was the only place we can conduct Union . . . business. That's where the Union is supposed to report to when they enter the building."

The vote was a secret ballot election conducted throughout the 2 days with employees voting before or after their shifts or during break periods. Each bargaining unit employee voted by marking his or her ballot and depositing it into a sealed box. When each employee voted, a bargaining committee member would cross the person's name off a list of bargaining unit employees' names.

[11] The ballot, on which bargaining unit employees cast their votes, was created by the Union from an existing template. Employees were asked to place a check next to one of two questions—"Yes, I authorize the bargaining committee team to call a strike," and "No I do not authorize the bargaining committee team to call a strike." On top of the ballot are the words "Unfair Labor Practice Strike Vote". As to these words, Myriam Escamilla testified that "We always call for unfair labor practice strikes."

[12] The voting periods were 6 to 8 a.m., 12 to 2 p.m., and 4 to 6 p.m.

[13] Asked if any nonbargaining unit employees came into the break room during the afternoon, Nelson testified that, at approximately 12:30, Yuri Flores, an HR person and the assistant to the HR director, Lynn Morganroth, entered the room and asked her if she had seen Sherrita _____, an employee who had recently been terminated. They spoke, and Yuri left the break room.

[14] The timeclock is located next to the break room.

busy conducting the voting[15] when she had cause to turn and observed a facility security guard, identified as Francisco Pinto,[16] sitting at a table 5 to 10 feet behind her. He was "holding up a cell phone, [at eye level], and he was moving it slightly in [my] direction" and "back and forth" to the left and then the right. "So I stared at him, it seemed like about a minute . . . and I was thinking what was he doing. So I looked into the direction that he had the cell phone pointed to, and it was right there where the people were voting. It was like right next to me."[17] After a minute, but no longer than two, of staring at the guard and while he continued to hold the cell phone up, she turned back to helping with the voting. Asked what she believed the guard was doing, Nelson said, "I believed that he was videotaping the people in the room that was voting, and I thought that maybe he was going to use it to get somebody fired."

Matilda Imbukwa, who worked for Respondent as a certified nurse assistant from October 2006, through April 2011, when she was laid off for "reasons being that I was not doing my duties as obligated to," testified that, as a member of the bargaining committee, she helped on the "second day" of the strike vote. According to Imbukwa, who was scheduled to begin working at 3 p.m., she arrived at Respondent's facility at 1:00,[18] and "I . . . went to the break room, and I met with Sheila Nelson and was assisting her with the strike vote." In this regard, employees would come into the break room and she and Nelson gave them ballots on which they would mark off whether they wanted to authorize a strike. Imbukwa testified that, as she entered the break room, "there were a few other employees together with the security guard." She immediately noticed the guard as "he was dressed in his uniform and it had a badge on it and I knew it was him." Nevertheless, as the voting was on-going, she did not take much further interest in him except to notice that Nelson "was staring at him . . . on and off while passing out the [ballots]." Imbukwa further testified that, approximately 30 minutes after arriving, "Sheila Nelson pointed out the security guard, and, when I looked at him, [h]e was holding his phone up in a vertical position and just swinging it from side to side. And then he placed it down, and then a few minutes later he stood up and left." Asked what she believed the guard was doing, Imbukwa averred, "I thought he was taking a picture or video . . . of us to what we were doing."[19] Asked how long she observed the guard holding his cell phone and swinging it from side to side, she stated, "It took approximately 30 to 45 minutes." There is no record evidence that bargaining unit employees, other than Nelson and Imbukwa, observed the actions of the security guard.

Francisco Pinto, testified that he is employed by Guardsmark as a security guard and that he has been assigned to work in such a capacity at Respondent's facility, working the swing shift (4 p.m. to midnight) on Sunday through Tuesday and the day shift on Thursday and Friday. He testified further that he is stationed at the guard's desk at the Linda Street entrance and that his job duties mainly entail patrolling the entire facility inside and outside, checking employees' badges, and making sure that visitors sign in prior to entering the interior of the facility.[20] According to Pinto, he takes a 30-minute lunchbreak each workday in the break room. Asked what he does during his break period, Pinto stated, "I usually don't bring food, so I just go in there and check my phone because I'm not allowed [to do so] during business hours. So . . . I just go in there and check my phone . . ." for ". . . my messages, missed calls, or voicemail that I have." He added that his phone is a Verizon smartphone and described his method for checking for his messages and voicemails—"I just take it out and put it . . . on the table and just check messages or . . . go through my phone." He then demonstrated this by holding the phone in front of his face with his elbows on the witness table. Specifically on June 17, according to Pinto, he worked the day or 8 a.m. to 4 p.m. shift and relieved the receptionist at the 41st Street entrance at noon. She returned "around 1:00" and, "after 1:00 pm," he took his daily meal break. Pinto went to the break room and, when he entered, "it was a lot of employees there, and the Union rep, which is Donna Mapp," was in the room. He went to an empty table and, as always, checked his phone. He said, "employees would stare" at him, but ". . . I wasn't really paying attention to what they were doing, but they were with the Union rep." Pinto denied taking any photographs with his telephone that day, stated he has never done so, denied ever engaging in surveillance of employees at Respondent's facility, and denied being directed to go to the break room that day and take pictures of the employees' activities.[21] Finally, asked if he told anyone what he observed in the break room, Pinto testified, "Well, the guards . . . kind of talk to each other and say how uncomfortable it is when we go to the break room," and the union representative is there. During cross-examination, asked if, on June 17, he telephoned Lynn Morganroth, the HR director, and left a message that the union representative was in the breakroom, he first replied "I don't know" but then responded, "no." Also, he denied leaving such a message with Morganroth's assistant, Yuri Flores. In this regard, I note that

Nelson testified that it was a busy time in the break room as employees were there either on breaks or prior to the start of their work shift.

[15] I note that Nelson must have been incorrect about the time as the early afternoon voting period ended at 2 p.m.

[16] Nelson failed to notice the security guard when he entered the break room. Asked who is allowed to use the break room, Nelson testified, "All of the employees are allowed to use the break room. And the guards do come in there sometimes," eating their lunch.

[17] Nelson believed she pointed out the security guard's actions to Imbukwa.

[18] Imbukwa testified that she did not have permission to arrive 2 hours prior to the start of her work shift. However, "it was not the first time" she came in early before her shift. "When you're in your scrubs and you're scheduled to work that day, you can come in and . . . wait for your time to . . . clock in."

[19] According to Imbukwa, at least three employees voted while the guard manipulated his cell phone.

[20] Gayle Reynolds testified that Pinto "has the authority to stop [persons] at the guard desk before they move beyond the entrance. . . . He has the right to stop [someone] from coming through the door, as well."

[21] Gayle Reynolds corroborated Pinto's assigned duties at Respondent's facility, denied that the guard's duties included taking pictures of employees, and denied that he was authorized to do so. Further, she denied being aware of any pictures Pinto may have taken in the break room.

the Acting General Counsel Exhibit 12 is a June 18 email message from Flores to Morganroth in which the former informed Morganroth that "Yesterday . . . I had a message from the security guard that a union rep was in the break room"

Sheila Nelson next testified that, approximately 15 minutes after she noticed the security guard no longer in the break room and while she was continuing to help with the vote, Gayle Reynolds came into the break room and approached her. According to Nelson, Reynolds asked what she was doing. Nelson just replied "hello." Reynolds then sat down next to Nelson "and said, 'You're not supposed to be here.' And I said, 'Why?' She said, 'because you're not a rep.' I said, 'I'm a Union leader, and I was instructed to be here by Myriam to help with the strike vote.'" At that, Reynolds stood and said, "'You're a Piedmont Gardens employee, and I just checked with Lynn, and, according to the contract, you are not supposed to be in the building when you're not scheduled to work.'" After telephoning Donna Mapp and asking Mapp to inform Escamilla that Reynolds was "kicking" her out of the break room, Nelson gathered the election materials and departed from Respondent's facility.[22]

Gayle Reynolds conceded ordering Nelson to leave Respondent's facility on June 17. According to Reynolds, that afternoon, she received an email from Nelson's supervisor, stating that she was in the break room. Reynolds then decided to investigate whether Nelson was still there and went to the breakroom.[23] Upon entering the room, she observed Nelson "sitting at a table . . . with a laptop computer." She then approached Nelson, "and I said, Sheila, you know you're not supposed to be here when you're not scheduled to work; are you scheduled to work? No, I'm not. So I asked her to leave." At this point, Nelson pointed to the ballot box, and "she told me . . . what she was doing, I didn't know what she was doing before that."

The record reveals that, besides Nelson, Respondent evicted two other employees, who were assisting with the strike authorization vote, from its facility during the 2 days during which the aforementioned voting was conducted—Geneva Henry and Faye Eastman. Henry, who is employed by Respondent as a certified nurse assistant in the skilled nursing area and who works the night shift (11 p.m. to 7:30 a.m.), testified that she volunteered to help Donna Mapp with the strike vote and that, to do so, she arrived at Respondent's facility on June 17[24] at 6 p.m.[25] and went directly to the break room. She further testified that, later in the evening as she and Mapp were preparing to count the ballots, Gayle Reynolds came into the break room and approached her. "She asked me, what are you doing here? You're not on schedule . . . why are you here? And I told her I was taking care of Union business. She said, well, you're going to have to leave. I said, but I'm taking care of Union business. She said, well, you're still going to have to go, and she said you're going to have to take care of your Union business out there on the sidewalk. . . . I just got up, I didn't say nothing."[26]

While Gayle Reynolds did not dispute demanding that Henry leave Respondent's facility, she contradicted Henry as to when the incident occurred. According to her, "I did ask Geneva Henry to leave but it was in the morning, not in the evening, and it was the day after I had spoken to Sheila Nelson—"on Friday." In this regard, Reynolds was confronted with an email she sent to Lynn Morganroth on June 17 at 6:39 p.m., in which she wrote that two employees, one of whom was Geneva Henry, who were not scheduled to work, were at Respondent's facility earlier in the day and that their respective supervisors wanted to know the appropriate discipline for them. Notwithstanding the foregoing, Reynolds, who claimed not to recall "what generated this e-mail," and denied it concerned her conversation with Henry, insisted that "I asked Geneva to leave the day after I talked to Sheila Nelson . . . "and that said conversation occurred "around" 8 a.m., and "I saw her in the break room with another employee. I asked them if they had finished their shifts and they said yes, and I said you're not supposed to be here; you need to leave."[27] When asked if the other employee,

[22] Nelson testified that there were three or four other employees in the break room at the time.

[23] Reynolds denied being aware that the Union was conducting a strike vote on that day prior to entering the break room. She testified that she did not know about this until "when I walked in the break room and talked to Sheila." She added that the Union had not asked permission to conduct such a vote. While testifying she goes into the break room every week or every other week, Reynolds denied seeing the strike vote notice posted on the Union's bulletin board. In this regard, she admitted seeing R. Exh. No. 10, a union flyer, entitled "we'll do whatever it takes to win a good contract," posted on its bulletin board in the break room after the strike vote. The flyer states that 95 percent of the bargaining unit employees had approved a strike because, while the employees' bargaining committee had been working hard to achieve a contract with fair raises and overall improvements, management had "stalled and dragged things out." Also, she admitted seeing R. Exh. 11, another flyer posted on the same bulletin board after the strike vote. Said flyer discusses the bargaining in detail; notes that 96 percent of the bargaining unit had voted in favor of a strike; and states, "We are ready and will not let management scare us into a cheap deal that only benefits them."

[24] During cross-examination, Henry said the night, during which she helped with the strike vote was the last night of the voting.

[25] Henry could not recall whether she was scheduled to work that day.

[26] While Henry was unable to remember whether or not she was scheduled to work that night, she testified that she was habitually early when working and would spend the time before her shift in the break room. "I've been coming there early for years. I use the break room as a regular routine," arriving there between 6:30 and 7 pm. She does this because "I don't want to be out on the street late at night. . . . And I would come in there early and go straight to the break room." Until the start of her shift, she would eat, read books, or listen to music. According to Henry, Gayle Reynolds was well aware that she would come in early as "sometimes I would see her. . . . Everybody knew that I been coming in there for years.

Reynolds conceded being aware that Henry would be inside the facility early and spent her time before clocking in inside the break room. She had no problem with this as Henry did not want to be out on the street late at night.

[27] She recalled that Donna Mapp was present and the two employees were speaking to her. However, she denied being aware of what the employees were doing.

whom she asked to leave the facility on June 18, was Faye Eastman, Reynolds said, "I believe it was on Thursday, June 17th. It was the same time that Geneva was in the break room. She and Faye were together." On this point, she was confronted with an email she sent to Morganroth on June 19 regarding possible discipline for employees who were discovered inside Respondent's facility when not scheduled to be there. Reynolds wrote, "I think we should do courtesy notices. We also need to include Faye Eastman who was in the break room at 7:55 am on Friday morning. I asked her if she had clocked out and she said 'yes.' I reminded her that she was not supposed to be on the premises." There is no mention of Henry in said email. Upon viewing the latter email, Reynolds again insisted that she observed Eastman and Henry together in the breakroom at the same time.

With regard to the evictions of Nelson, Henry, and Eastman from Respondent's facility, the record establishes that Respondent's chart of infractions work rule 33, which is quoted in paragraph 7(a) of the consolidated complaint, is its rule, limiting access to its facility. Said rule reads:

> Employees may not clock-in for duty before their shift begins, nor are they to remain on the grounds after the end of their shift, unless previously authorized by their supervisor. Employees must have prior supervisor authorization before working/incurring overtime.

There is no dispute, and Respondent admitted, that, in maintaining said work rule, it has allowed off-duty employees, including shop stewards, to enter its facility under certain circumstances including to pick up paychecks or with its permission and to participate in grievance meetings and disciplinary meetings.. In addition to these instances, Sheila Nelson testified that, in her capacity as a shop steward, she often conducted union-related business with other employees or met with union representatives or other shop stewards in the breakroom prior to the start of her work shift, after the conclusion of her shift, and on her days off. With regard to her practices as a shop steward, she testified that, while her work shift normally started at 7 a.m., "I came in quite often early. Whether it was to pass out flyers or surveys or talk to members . . . I was . . . early a lot of times. I don't remember how many times." She added, "some times I would come in at 6:30, a quarter to 7, any meetings that I had with people would usually only last about 15 minutes before my scheduled time or after work." Nelson recalled two meetings with union agents or other shop stewards prior to the start of her shift and four or five such meetings after the conclusion of her shift and testified that, whenever entering Respondent's facility early prior to her shift or remaining in the building after her shift for union-related matters, she never was questioned as to why she was inside Respondent's facility and never was informed she required Respondent's permission. Further, Nelson recalled entering Respondent's facility on two or three occasions for union-related meetings in the breakroom on her days off. According to her, "as a Union member, we're supposed to enter the main entrance. We sign in and that's allowing either the security guard or the receptionist to know [she] is in the building . . . they would ask me, are you working? I'd say no, I'm here to do Union business today. So he would say okay and I know where to go. I proceed to the break room." Finally, Nelson denied ever asking permission to conduct union-related business inside Respondent's facility on her days off.[28]

Two other employees likewise testified with regard to access to Respondent's facility while off duty. Sanjanette Fowler, who worked as dietary cook for Respondent and was a shop steward, testified that she helped Union Agent, Donna Mapp, conduct the bargaining committee selection voting and the bargaining survey over the two-day voting period in January. According to her, "the second day was actually my day off . . . ," and "I think I was there basically all day." Asked how she gained access that day, Fowler testified, "I came in the normal 41st side. I sign in at the front desk, and I go to the break room." She added that she did not have permission to be inside the building that day; however, no management official questioned her presence that day. Fowler further testified that, on her days off, there were "numerous times" when she would come to Respondent's facility[29] and be in the breakroom "giving members a regular update of what was happening . . . in bargaining." These visits would last "like two hours, two hours or so" depending on how many people would be coming for breaks, and she never requested permission to be inside the building and never was asked to leave. Also, there were "numerous times" on days off when she and Mapp attended grievance meetings with Gayle Reynolds and Lynn Morganroth. Matilda Imbukwa testified that she entered Respondent's facility on June 17, 2 hours prior to the start of her work shift and that she was not required to have Respondent's permission in order to do so. "It was not the first time" she came in early before her shift. "When you're in your scrubs and you're scheduled to work that day, you can come in and . . . wait for your time to . . . clock in." She added that she would always arrive an hour early before her shift and that no supervisor ever informed her she was not allowed to do so.

Asked how chart of infractions rule no. 33 is enforced, Gayle Reynolds testified "if I'm made aware that somebody's in the building who's off schedule, then I will go and find out why they're in the building. But we don't generally police the employees; we expect them to follow the rules."[30] In this regard, she stated she had been unaware that, other than for grievance meetings, Nelson and Fowler had regularly entered and per-

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[28] During cross-examination, Nelson expanded the number of times she had been inside Respondent's facility on her days off for union-related matters to 20 or 30 times. However, she added that most of these were for grievances or for disciplinary meetings when asked to be present by management.

[29] Fowler would always sign the sign-in sheet upon entering Respondent's facility.

[30] Asked if prior to June 2010, she ever enforced Respondent's access policies by demanding that an employee leave the building, Reynolds conceded, "I can't think of any specific instance."

Respondent offered evidence that an employee had once been advised she should not be in an area of the facility while not on the clock. However, contrary to the events in these matters, the employee was found in a work area, and Reynolds testified that it was a shop steward who spoke to the employee and not a management official.

formed union business inside Respondent's facility on their days off. Finally, I note that the above work rule does not mention off-duty employees' access to Respondent's facility on their days off and that Respondent itself was uncertain as to whether Nelson or Henry, in fact, acted in violation of rule no. 33. Thus, on June 17, Reynolds was forced to consult with HR director Morganroth as to what work rule had been violated by Nelson and Henry, and, at 7:30 p.m., Morganroth sent an answering email to Reynolds, writing that rule 34, which concerns visitor access to the facility, rather than rule 33 is the "closest infraction" and "we have a practice of not permitting employees to be on premise without supervisor approval or business with HR. I looked through the handbook and couldn't find any helpful language other than the visitor language." In any event, other than being evicted from Respondent's facility, neither Nelson, Henry, nor Eastman was disciplined for being inside Respondent's facility, while off duty, on either June 17 or 18.

The record evidence is that in excess of 90 percent of the participating bargaining unit employees voted to authorize the employees' bargaining committee to call a strike.[31] Further, subsequent to the strike vote, given the language of the Union's poststrike authorization vote flyers, it appears that the bargaining unit employees were becoming increasingly perturbed over and frustrated with the on-going successor contract negotiations and what they perceived as Respondent's adamant and unacceptable positions on the economic and language issues, which, the employees believed, "only [benefitted] the company and not us." According to Sheila Nelson, with matters in this posture, pursuant to the bargaining unit employees' mandate, the bargaining team[32] reached its decision as to when the strike would commence on July 9 during a bargaining session that day before a Federal mediator. This "occurred during a . . . caucus . . . . The Employer was not in the room and the bargaining team was discussing several things. We were discussing what had happened at the strike vote with Gayle kicking me out of the building and kicking a couple other people out of the building that day. And we were discussing the surveillance with the security. We were discussing that they weren't willing to move on the language that would . . . give the employees job security. And Gayle and her union busting had been sending out memos contaminating the workers. So we kind of looked at our options. We had some ULP's already pending, and we . . . asked Myriam if we could go on a ULP strike."

More specifically, according to Nelson, "Sanjanette and myself, we talked about me getting kicked out of the building . . . and the security guard. Matilda spoke about the security guard also, the surveillance, and how we . . . would file charges . . . for what he had done."[33] Then, "Gloria and some of the people that had been there from the strike prior, because there had been a strike [during] their last bargaining . . . so they were talking about what happened with that. . . . They went on a one or two-day strike and got locked out. . . . I think it was 2007 they were talking about. So we were talking . . . and . . . I was asking Sanjanette . . . what are we going to do . . . because we felt like we were being put under a lot of pressure. We were frustrated . . . the members wanted to go on strike . . ." because of the contract negotiations, and ". . . they had their strike vote and so . . . it was on us, the bargaining team, to make a decision to . . . do something." Then, ". . . we asked if anyone felt that they didn't want to go on a strike vote, if anyone disapproved, because we asked if anyone approved, we asked if anyone disapproves, can you raise your hand. Then, nobody raised their hands. So we . . . asked Myriam if we could go on a . . . ULP strike. . . . And that's how we ended up going on strike." Nelson concluded, saying it was after the caucus ended that Escamilla informed Respondent that the bargaining unit employees would engage in a strike. Finally, during cross-examination, after denying the reason the bargaining committee called a strike was to place pressure upon Respondent to agree to contract terms Nelson was confronted with her pretrial affidavit wherein she stated, "The purpose of the strike is to put pressure on the Employer to reach an agreement with the Union for a new contract." Notwithstanding her pretrial affidavit admission, Nelson insisted that the strike was "a ULP strike, and the purpose . . . was to put pressure on the Employer."

Sanjanette Fowler testified that "the whole bargaining team" was involved in the strike discussions on July 9 and that ". . . one issue . . . the team discussed was the surveillance of the . . . security guard coming in the break room surveilling the strike vote. . . . We [were]' discussing . . . the contract language and the way the management was treating the workers." Asked if anything else was mentioned, Fowler said, "that's it." As to surveillance, "I remember Sheila was very upset when she was inside the break room during the strike vote when the security guard came inside there watching her during [the] strike vote." Concerning contract language, according to Fowler, "we just wanted more language inside the contract that . . . would give workers more job security," including the portion ". . . where the management could adopt and amend policies . . . whenever they felt like it." Also, they discussed management's unfair treatment of employees including ". . . when we went back to the facility and tried to talk to the workers . . . they threw us out of the building." Then, Fowler testified, "after we get finished discussing all the things that was going on, we just came to the

[31] While the ballot, upon which the bargaining unit employees cast their votes, may have had the words "unfair labor practice strike vote" at the top, given Myriam Escamilla's admission, said words appear to have been nothing more than union boilerplate language. Moreover, of course, the alleged unfair labor practices herein had not yet occurred at the time of the printing of the ballots. Further, given the language of R. Exh. No. 1, the union flyer establishing the strike vote, and R. Exh. Nos. 10 and 11, union flyers published subsequent to the strike vote, contract economic and language concerns seem to have been the only motivating factors underlying the bargaining unit employees' strike authorization vote.

[32] The bargaining committee members, who were in attendance at the July 9 bargaining session were Sheila Nelson, Sanjanette Fowler, Matilda Imbukwa, Faye Eastman, Pierre Williams, Dapuma Miller, Yordanos Sega, and Gloria McNeal.

[33] In fact, the unfair labor practice charge, relating to the alleged surveillance or creating the impression of surveillance, is Case 32–CA–25248, filed by the Union on July 26 or over 2 weeks subsequent to the asserted strike vote.

conclusion that we just going to go ahead and go on strike." There was no formal vote, just a general consensus. After this discussion, "we told [Escamilla] that the bargaining team had come to the conclusion that we want a strike."

During cross-examination, as to what the bargaining committee discussed during the caucus on July 9, Fowler denied that they spoke about Respondent's proposals on pensions, health insurance, and wages or the Union's proposal on employee discipline. Rather, "the discussion we talked about was the unilateral changes . . . and the way the employees was being treated and the contract language."[34] Asked if the reason for the strike was that the negotiations had broken down, Fowler said, "it could have been one of the reasons but that is not the exact reason why we called the strike." On this point, however, she admitted telling a Board agent in her pretrial affidavit that negotiations had not worked out, so we were on strike. Again, denying that the purpose of the strike was to place pressure upon Respondent to agree to the Union's demands, she admitted stating in her affidavit, "we began striking at the Piedmont Gardens. . . . The purpose of the strike is to put bargaining pressure on the Employer." Then asked if the bargaining committee sought authorization from the bargaining unit employees to call a strike in order to put pressure on Respondent, Fowler conceded saying this in her affidavit. Finally, Fowler admitted that, on July 9, after the bargaining committee decided to call the strike, the members returned to Respondent's facility and told a group of bargaining unit employees that mediation had not resulted in an agreement and ". . . [they] weren't getting anywhere so [they] had no other choice but to go on strike" and that a reason for the strike was the contract language.[35]

Also, regarding the bargaining committee meeting on July 9, Matilda Imbukwa testified that "we discussed a few issues. One . . . was . . . because they're going to put a cap on the healthcare, surveillance . . . used against the employees . . . amongst other things." As to surveillance, Imbukwa recalled that it was the breakroom incident and ". . . use of the phone to take pictures" by the security guard.[36] After initially stating she could not recall, Imbukwa remembered that other issues the committee members discussed were salary, Respondent's chart of infractions, and "the incidents of the Union members being whisked out of the building." She added that Sheila and Sanjanette spoke about this and that "Sheila was talking about the incident that happened during the strike vote. And Sanjanette was talking about an incident that happened early on . . . when we had left the meeting and we has gone to tell the employees what happened in the meeting . . . and then a few minutes later, the management came and told us to leave the building." Asked how they decided to go on strike, Imbukwa recalled, "we raised our hands, all of us, and said, yeah, we could go on strike." Finally, Imbukwa did not know how the other bargaining unit employees were informed of the decision of the bargaining committee members on July 9.

Regarding the Union's strike procedure, Myriam Escamilla testified that "the Union's procedure is to have the members to authorize bargaining committee to call a strike. And at some point, the members of the committee . . . at Piedmont Gardens decided to go on strike on July 9, that's when they made the final decision." Then, "when . . . they decided, they call us in the room. And we came back and they told us, 'we decided we're going to strike and for this many days.'" Thereupon, each member of the committee was charged with talking to specific people in their department "to see if they would support the strike or not." This involved "multiple" one-on-one sessions between July 9 and the start of the strike "to assess whether or not people will walk out and what days they will be at the picket line." Asked for the purpose of these conversations, Escamilla said "one was to understand if people will be comfortable waking out and . . . being on the picket line. . . . Second, figure out what time . . . they will picket. Third, if they had any questions about what was happening with the contract negotiations with all the issues that were remaining . . . leading to the strike." She added that, subsequent to July 9, the Union published nothing to the bargaining unit employees regarding what was discussed by the bargaining committee on that date and no other strike vote was taken.

Upon being informed by the bargaining committee members that they had decided to engage in a strike against Respondent, Myriam Escamilla sent two letters, dated July 9, to Respondent. In the first, she wrote, "Pursuant to Section 8(g) of the National Labor Relations Act, you are hereby informed that [your bargaining unit employees] will commence a strike at 9:00 a.m. on Monday, August 2, 2010, and continue such activity unless and until a mutually agreeable resolution has been reached." In the second letter, she wrote, "All employees participating in the Unfair Labor Practice strike and withdrawal of labor at Piedmont Gardens . . . scheduled to begin on . . . August 2, 2010, unconditionally offer to return to work at or after 5 a.m. on Saturday, August 7, 2010. This request is made . . . on behalf of all employees it represents as well as all employees who honor its picket lines at Piedmont Gardens on the above date." Subsequently, as scheduled, approximately 80 of the 100 bargaining unit employees, employed by Respondent, commenced their 5-day concerted work stoppage and strike against Respondent on August 2. Mostly, the strikers confined themselves to the 41st Street side of Respondent's facility.

With regard to the motivating factor, which, Nelson and Fowler admitted informing Board agents, was to put pressure on Respondent to bargain, or factors underlying the concerted

[34] Asked to describe the unilateral changes, Fowler stated, "we talked about the surveillance of when the security came inside the break room." Also, "kicking the steward out the building . . . during the strike vote. . . ."

[35] During redirect examination, counsel for the General Counsel asked Fowler a blatantly leading question—". . . When you went back to the facility on July 9 . . . do you remember telling employees that one of the reasons for the strike was that management was . . . telling employees to get out of the building—to which Fowler answered, "yes."

[36] Imbukwa testified that Sheila Nelson spoke about this, saying "there was a security guard in the break room and he was . . . swinging his phone from side to side and he left immediately."

During cross-examination, Imbukwa was confusing, stating that, when Union representatives voiced concerns about Respondent's "surveillance," they were discussing its use of security cameras throughout the building and that the discussion before the strike vote concerned this type of surveillance—"the security surveillance, yes . . . throughout the building, yes."

work stoppage and strike, the record evidence is that the picket signs, which employees carried, other than simply reading the Union's generic "ULP Strike," failed to specify any asserted unfair labor practices. Rather, according to Nelson, other picket signs read "one percent can't pay the rent," and "Union busting has got to go," and protested Respondent's healthcare proposals. In addition to the picket signs, according to Gayle Reynolds, strikers chanted slogans such as "one percent won't pay the rent;" "Piedmont Gardens, you're no good, you don't treat us like you should;" and "No peace, no contract." Further, a striking bargaining unit employee, Keiyana Kemp, was quoted in a local newspaper, stating "I'm struggling. I'm working hard and a 1.5 percent raise is not going to do 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." Of critical import as to motive is a letter, dated August 6, which the Union, on behalf of the bargaining unit employees, sent to Oakland Mayor Ron Dellums. Said letter states:

> We, the undersigned members of SEIU-UHW and employees of Piedmont Gardens, have been bargaining for a new contract since February with American Baptist Homes of the West. We have proposed common sense disciplinary rules as well as modest economic improvements. Management, however, has refused to move away from its harmful disciplinary policies and, instead, has sought to dramatically cut our healthcare and eliminate our pension fund entirely. As a result, this past Monday, we began a five-day ULP strike to protest [Respondent's] actions. . . .

At 5 a.m. in the morning of August 7, pursuant to their unconditional offer to return to work,[37] 50 to 60 of the former striking employees, who were scheduled to work that day, gathered at the 41st Street entrance to Respondent's facility in order to report for work. They were met by a security guard, who told them that "no one is entering the building." One employee, Bayou Zegenech, was scheduled to begin his work shift at that hour, and the guard announced that there was a list of employees, who would be allowed to return but that he needed to obtain an updated copy of the list. At that point, the guard and a union representative escorted Zegenech into the facility. A few minutes later, Zegenech returned with the following letter, which stated:

> Please be advised that your previous position at Piedmont Gardens has been filled by a permanent replacement employee, so we are not in a position to reinstate you to your former position at his time.
>
> All staff members who have been permanently replaced will be placed on a 'preferential rehire list." We will try to fill vacancies for substantially equivalent positions that become vacant in the future from this list. . . .[38]

In fact, the record discloses that 38 former strikers were permanently replaced by Respondent.[39] In the above regard, Gayle Reynolds testified that, having received advance notice of the bargaining unit employees' concerted work stoppage and strike, prior to August 2, Respondent had made arrangements for the hiring of temporary replacement employees. Thus, after having unsuccessfully attempted to do so itself, Respondent contracted with Huffmaster, "a strike management company," to supply temporary workers, and, by August 2, "we probably hired 60 to 70 people" to temporarily staff the jobs of its striking employees.[40] According to Reynolds, Respondent informed Huffmaster that the length of the jobs would be 3 days, and "when we were making offers to people on a temporary basis, we said we thought it would be for [a] . . . week." She added that, by the evening of the first day of the strike, "we felt confident that we had enough people to get through a few days."

Reynolds further testified that she was the management official who decided to hire permanent replacements and that, beginning on August 3 and continuing through August 6, Respondent made 44 offers of permanent employment to some of the temporary replacement employees and to "our employees who came to work during the strike who were largely on-call employees." As to the rationale for her decision, she stated that the cost of hiring temporary replacements was a burden to Respondent. On this point, Reynolds said that the cost to engage Huffmaster was in excess of $300,000 out of which sum, the latter paid the wages of the temporary replacements.[41] This cost was significant to Respondent as "our revenues come from our residents' monthly fees" and "in order to fund these kinds of things, we have to raise the monthly fees". According to Reynolds, the "economic reality" was that Respondent could not afford to operate in this manner whenever the bargaining unit employees decided to engage in a concerted work stoppage. Further, "I was concerned . . . that our residents were at risk and I was concerned that if the employees didn't come back from the strike, we wouldn't have the people we needed to

[37] There is no dispute that, during the strike, the Union sent to Respondent a copy of the aforementioned unconditional offer to return letter.

[38] Gayle Reynolds testified that, in anticipation of them offering to return to work on August 7, Respondent sent these letters out to the striking bargaining unit employees, as well as attempting to reach them by telephone, on the night of August 6.

[39] They are Shervin S. Amorsolo, Arturo Bariuad, Zegenech Bayou, Maggie Bellinger, Yuhanes Beraki, Donnita Bradley, Pacita Bumatay, Marieth Romero Carmona, Tamika Cato, Calvin Christian, Bonnie Conley, Judith Coston, Besima Ferhatovic, Sanjanette Fowler, Crystal Grayson, Elisa Haile, Monique Higgins, Keiyana Kemp,Brenda Lane, Kathlyn Largent, Johnny Lee, Linda Lee, Gloria McNeal, Salvador Miranda, Michael Morrow, Sheila Nelson, Janie Ragsdale, Michelle Reynolds, Josephine Santos, Yordanos Sega, Paramjit Sekhon, Palwinder Singh, Denesha Singleton, Carmen Smith, Mhret Weldeabzhi, Pierre Williams, Rose Zelaya, and Nebiat Zeray.

[40] According to Reynolds, "most of them" came from Huffmaster and were transported to work in a van.

[41] While Respondent expanded $300,000 on replacement workers utilizing Huffmaster, Reynolds admitted that implementing the Union's requests on economic items over the term of a successor collective-bargaining agreement would have cost only $250,000.

provide services to our residents. I was concerned that if they did [return] from the strike and went on strike again that we wouldn't . . . be able to recruit the people we needed to provide services to our residents." Asked, by counsel for the General Counsel, if it was true that one of the reasons that Respondent hired permanent replacements is that it wanted employees who would work in the event of another strike, Reynolds answered, "The people who had come to work that week had already demonstrated that they would come to work during a strike. . . . I had an expectation . . . but there was no guarantee. It was a probability." Then, asked was it true that her primary reason for hiring the permanent replacements was that they had demonstrated that they would work in the event of another strike, Reynolds averred, "I can't answer that yes or no." However, when confronted by her pretrial affidavit, in which she stated that, while she knew it would "take time" to acclimate the permanent replacements to Respondent, the latter had made offers to only those replacements who were qualified, and the "more important" consideration was that they would work during another work stoppage, Reynolds admitted it was a true statement as ". . . they had demonstrated that they were willing to work during the strike."

Finally, with regard to Respondent's rationale for deciding to hire permanent replacements, Bruce Harland, the Union's attorney, testified that, on the morning of August 6, he made a telephone call to David Durham, Respondent's attorney "because I had heard a rumor that the strikers would be locked out, and I wanted to verify that with him and work out some arrangement in terms of return to work." Harland asked whether Durham could confirm the rumor; the latter said that "he couldn't confirm it . . . that he had a conference call scheduled with [Respondent] . . . in the afternoon, and that he would call me after that conference call." That evening, at approximately 6:00 or 6:30, Durham called Harland and, according to the latter, said he had news for Harland but not the news he wanted to hear. "And he says . . . 'we're not going to lock out the . . . strikers. We're going to actually permanently replace about 20 or so employees.'" Harland responded that the news was serious and asked for the names of the replaced striking employees. Durham promised to get him a list later that night. Then, Harland testified, he said "'You know, this is a pretty big deal. What is the reason for permanently replacing them as opposed to locking them out,'" and Durham "told me . . . that Piedmont Gardens wanted to teach the strikers and the Union a lesson. They wanted to avoid any future strikes, and this was the lesson that they were going to be taught." Harland stated he replied "'okay.' And I hung up."

While confirming the contents of their initial conversation, Durham testified to a different version of their evening conversation. According to Durham, he telephoned Harland from outside of an Oakland restaurant and began by saying he had news for the Union's attorney. "And I said that Piedmont Gardens had permanently replaced a number of the strikers." Harland replied, asking if Durham meant "'locked them out,'" and Durham replied, "'No, permanently replaced.'" Harland responded that the news was "'pretty heavy'" and asked how many employees would be affected. Durham replied that he did not "know for sure, 20, 25, but I'd let him know more later." Harland then asked if Durham knew the names, and the latter said he would get him a list. "And then Bruce said, 'this is pretty heavy as I said. Why did the company permanently replace people?' And I said, 'Bruce, we all know permanent replacements happen in strikes.'" Durham then said he would get Harland the list of the permanently replaced employees,[42] and the conversation ended.

Twelve days after the conclusion of the strike, on August 19, on behalf of the Union, Myriam Escamilla sent a 5-page information request letter to Respondent's attorney Durham. Included amongst the requests was information pertaining to the names and addresses of the permanent replacement employees, their job classifications, and their hourly wage rates. In her letter, Escamilla explained that the Union "needs this information to effectively perform its duty as the exclusive representative of the workers employed at your [facility]" and "to permit the Union to bargain intelligently with the employer as to wages and benefits" Approximately 3 weeks later, in a letter dated September 6 to Escamilla, Respondent's attorney Durham wrote that the names and addresses of the permanent replacement employees, who were already employed by Respondent, were enclosed. However, as to those permanent replacements, who "came from the outside," he wrote, "the Employer has a legitimate concern that providing the information might lead to harassment or possibly violence by the Union or its supporters. As you know, some of their people were subjected to abuse and threats . . . during the strike. They also have legitimate privacy and confidentiality concerns that must be considered. So in lieu of providing the information in the form of your request, we have identified them by initials."[43] Regarding the job classifications and hourly wage rates of the permanent replacements, who were hired from outside sources, Respondent provided the information but with the employees identified by their initials. In fact, General Counsel Exhibit 5 is the document with the name and addresses of permanent replacement employees; 23 are indentified with just initials without their home addresses. Also, General Counsel Exhibit 6 is the document containing the job classifications and wage rates of the permanent replacements; 23 are identified with just their initials. For each of the documents, the parties stipulated that the permanent replacement employees, who were identified by their initials, were hired from outside sources. Escamilla testified that she did not respond to Durham's September 6 letter as "we felt that the allegations of violence and accusations of . . . threats of violence against . . . replacements were bogus and completely ridiculous. . . ," and "we felt that we would better by filing a charge with the NLRB." She added that the Union has received no other documents from Respondent, indentifying the permanent replacements, who were hired from

[42] There is no dispute that, since August 7, 13 of the permanently replaced individuals have been reinstated. They are employees Bariuad, Bradley, Cato, Grayson, Higgins, Lane, Largent, Lee, McNeal, Santos, Sekhon, Weldeabzghi, and Zeray.

[43] There is no record evidence of any harassment of the permanent replacements after the conclusion of the strike. Likewise, there is no record evidence of threats of violence or actual violence directed against them.

outside sources and that she is unaware of any threats to replacement workers, harassment of them, or picket line violence during the period of the strike.

Reynolds testified that, by the time Respondent responded to the Union's information request, the strike had been over for a month, and most of the strikers had been reinstated and were working alongside the permanent replacements. Asked if she observed any instances of harassment, she stated, "No, I would say that the employees did a good job of melding all the different areas from which they came. Whether they had gone on strike. Whether they were Union employees who hadn't gone on strike or if they were permanent replacements." Nevertheless, asked why Respondent only provided the initials of permanent replacements, who were hired from outside sources, Reynolds testified, "I was very concerned about how that information would be used . . . some of the employees have expressed . . . fears for their safety . . . . I didn't know what was going to happen to [the information]. We were just reluctant to hand it over." Therefore, "we decided to provide initials . . . and ask to bargain about . . . some other solution or . . . find some agreement about what would be done with that information." However, the Union never requested to bargain.

Respondent justified its response to the Union's request for the names and addresses of the permanent replacement employees by occurrences during the strike. According to Reynolds, several employees expressed safety concerns. She identified them as Janona, Moussa Sissoko, Liya Hagos, Alem Zewdu, and Ara Armstrong. "There were a couple others, but I don't remember their names. Janona is a nonstriking certified nursing assistant; she was "unhappy" with the Union and "concerned" for her safety as she was constantly "yelled at" for crossing the picket line. Sissoko, a nonstriking bargaining unit employee whose name and address Respondent gave to the Union, spoke to Reynolds "the week before the strike; how was he going to get to work safely, was his concern." Hagos "was afraid that people would bother her while she was walking to work." Zewdu, a nonstriking bargaining unit employee whose name and address Respondent gave to the Union, "had the same concerns that Liya did because they would walk together." Ara Armstrong was a temporary employee, and "she wanted to know how she was going to get to work." Besides these four workers, Jesus Navarez, a nonstriking bargaining unit employee who drives a van used to transport residents for medical appointments, reported to her that, on one occasion, pickets surrounded his vehicle and would not allow him to proceed up the street. Also, some replacements reported having to cover their faces as they crossed the picket line, and, as a result, Respondent allowed them to use another door as an entrance into the facility. For such employees, during the strike, Respondent offered to drive people to the nearest BART terminal and to escort them through the picket line and provided them with an emergency phone number. Finally, as justification for Respondent's failure to provide the aforementioned requested information, Respondent offered a series of anti-Semitic and death threats to Lynn Morganroth, the HR director, which were mailed in early 2010 to her home and her work addresses and one of which was related to the Union.

Legal Analysis and Findings

As set forth above, the consolidated complaint alleges that Respondent engaged in acts and conduct, violative of Section 8(a)(1) of the Act, by discriminatorily enforcing its no-access policy on June 17 and 18 by requiring off-duty employees, who were present at its facility to participate in a union strike authorization vote, to leave the facility and, through a security guard, by engaging in surveillance of employees, who participated in the strike authorization vote. Next, the consolidated complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act, by belatedly reinstating 13 employees and permanently replacing and refusing to reinstate 25 employees who, after participating in a concerted work stoppage and strike, caused, in part, by Respondent's unfair labor practices, had ended their strike and unconditionally offered to return to their former positions of employment. Finally, the consolidated complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to provide to the Union the names and addresses of permanent strike replacement employees.

Initially, regarding the Acting General Counsel's allegation that Respondent violated Section 8(a)(1) of the Act by engaging in unlawful surveillance of the bargaining unit employees' strike authorization vote on June 17, in comparison to Francisco Pinto, I found Sheila Nelson and Matilda Imbukwa to have been the more credible witnesses. Nelson impressed me as being a candid witness, and, while Imbukwa's account of the time she spent watching Pinto's activities obviously was implausible, I, nevertheless, believe she was an honest witness and truthful as to what she observed. Pinto, on the other hand, did not impress me as being a veracious witness; in particular, his demonstration as to how he held his cell phone (out in front of his face) seemed incompatible with his explanation for having his phone out—checking voicemail messages. Accordingly, I find that, at some point between 1 and 3, during the early afternoon voting period on June 17, while Nelson and Imbukwa were assisting bargaining unit employees in casting their strike authorization ballots, Pinto entered the break room, sat at a table behind Nelson and Imbukwa, took his cell phone out, held it out in front of him at eye level, and began moving it from side to side as if recording the voting activities. I further find that Nelson noticed Pinto's actions, observed him for approximately a minute, and pointed out the security guard's activities to Imbuka, who also observed Pinto for a short period of time.

The central issue, as to this allegation, is, of course, is whether Pinto's acts and conduct may be attributed to Respondent. At the outset, I believe that Respondent was well aware that, at specified times on June 17 and 18, its bargaining unit employees would be voting on whether to authorize their bargaining committee to call a strike. Thus, the vote was publicized by a flyer, which was posted on the Union's bulletin board in the break room. While she professed to have no knowledge as to the vote, Gayle Reynolds admitted entering the break room sometimes on a weekly basis and having observed other bargaining-related flyers posted on the bulletin board. In these circumstances, I do not believe that she failed to notice the strike vote flyer affixed to the bulletin board and believe that Pinto entered the break room and engaged in his actions at Respondent's behest. However, assuming Pinto had not been

directed to engage in his actions, the Board applies the common law principles of agency, and "apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the agent to perform the acts in question." Thus, "the test is whether, under all the circumstances, the employees 'would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management.'" *GM Electrics*, 323 NLRB 125, 125 (1997); *Southern Bag Corp.*, 315 NLRB 725, 125 (1994). Herein, the record establishes that Pinto was stationed at the Linda Street entrance to Respondent's facility, monitored access into the building through that entrance, and possessed the authority to prevent people from entering. In these circumstances, I believe that bargaining unit employees may reasonably have believed that Pinto acted as Respondent's agent when either recording or pretending to record the strike authorization voting inside the break room on June 17. *Poly-America, Inc. v. NLRB*, 260 F.3d 465, 483 (5th Cir. 2001); *Opryland Hotel*, 323 NLRB 723, 723 fn. 3 (1997).

As to whether Pinto's acts and conduct were unlawful, there can be no doubt, and I find, that he either actually recorded the strike authorization voting or, at least, created the impression that he was engaging in surveillance of Nelson's union activities and of those bargaining unit employees casting strike authorization ballots. While routine observation of Section 7 activity on an employer's property may not be violative of the Act, "an employer violates Section 8(a)(1) when it surveils employees engaged in [union activities] by observing them in a way that is 'out of the ordinary' and thereby coercive." *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005). Pinto's acts certainly comprised more than casual observation; the Board has long held that acts of "photographing and videotaping . . . clearly constitute more than mere observation . . . because such pictorial recordkeeping tends to create fear among employees of future reprisals." *National Steel & Shipbuilding Co.*, 324 NLRB 499, 499 (1997); *Fairfax Hospital*, 310 NLRB 299 (1993). Based upon the foregoing, I find that security guard Pinto's patently unlawful acts in the breakroom on June 17 were attributable to Respondent and that, therefore, the latter violated Section 8(a)(1) of the Act.

Next, concerning the Acting General Counsel's allegation that, acting on Respondent's behalf, Gayle Reynolds violated Section 8(a)(1) of the Act by discriminatorily enforcing Respondent's no access rule to evict employees who participated in the strike authorization vote, there is no dispute that, on June 17, Reynolds evicted employee, Sheila Nelson, from Respondent's facility while she was helping to conduct the strike authorization vote and that, subsequently, she also evicted employees, Geneva Henry and Faye Eastman, both of whom were also assisting with the strike vote. With regard to Nelson, there is also no dispute as to what occurred, and I find that Reynolds entered the break room shortly after security guard Pinto's unlawful surveillance, that she confronted Nelson, and that she demanded that Nelson immediately leave Respondent's facility.[44] As to Henry, as between the employee and Reynolds, I perceived Henry as being the more reliable witness. In other circumstances, I might have believed Reynolds merely was honestly mistaken in maintaining she acted against Henry's presence inside Respondent's facility on the morning of June 18; however, when, despite being confronted with her own conflicting emails, she obdurately insisted her testimony was correct, I think Reynolds was being disingenuous. Thus, I credit Henry and find that Reynolds discovered her helping with the strike authorization vote in the break room after 6 p.m. on June 17 and promptly demanded that Henry leave the building. Finally, in these circumstances, and again noting her own conflicting email, I find that Reynolds expelled Eastman from Respondent's facility on the morning of June 18, also because she helped with the strike authorization vote.

While paragraph 7 of the consolidated complaint assumes the facial validity of Respondent's chart of infractions rule 33 and clearly alleges only that Respondent unlawfully disparately enforced it against off-duty employees, who were inside its facility on June 17 and 18 assisting with the strike authorization voting,[45] given the record evidence, I think it may be more correctly argued that Respondent's actual unlawful acts and conduct involve applying a new work rule to Sheila Nelson, whose day off was June 17, and, perhaps, to Geneva Henry, who also may have been off-duty that day, in order to thwart their activities in support of the Union. Thus rule 33 does not, on its face, pertain to the access rights of employees on their days off or while off-duty for any other reason; on June 17, Reynolds was forced to consult with HR director Morganroth as to which chart of infractions rule Nelson and Henry had violated; and, in her reply email to Reynolds, Morganroth, who presumably should have known, expressed confusion and could not specify which, indeed if any, of Respondent's chart of infractions rules Nelson had violated earlier that day. Given the foregoing, the conclusion is warranted that Reynolds conjured and applied a new work rule to Nelson, and, since the former invoked this new rule for the first time in order to evict Nelson and later Henry from Respondent's facility upon discovering each was assisting with the strike authorization vote, Reynolds's actions were violative of Section 8(a)(1) of the Act. *Nashville Plastic Products*, 313 NLRB 462, 463 (1963).

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[44] I reiterate my belief that, notwithstanding her less than convincing denial, Reynolds was well aware that the bargaining unit employees were engaged in a strike authorization vote on June 17. Moreover, as I believe that it was not a coincidence Reynolds entered the break room just 15 minutes after Pinto's unlawful surveillance and, giving no credence to his denial, that he probably reported Nelson's presence there to Respondent's management, I think Reynolds entered the break room aware that Nelson was assisting the strike authorization vote.

[45] Nevertheless, in explicating her underlying theory for the allegation in her posthearing brief, citing *Tri-County Medical Center*, 222 NLRB 1089 (1976), counsel for the Acting General Counsel inexplicably asserts that Respondent's rule is "unlawful" on its face as it fails the third prong of the *Tri-County* test—a no-access rule is valid only if such "applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." Id. at 1089.

Moreover, regarding Respondent's alleged discriminatory enforcement of rule 33, assuming it applies to off-duty employees as well as to employees, who enter its facility prior to their work shifts or remain after their work shifts, Respondent admitted that it permits off-duty employees to enter its facility under certain circumstances including to obtain their paychecks and that off-duty shop stewards are permitted to enter in order to participate in grievance activities and disciplinary meetings. In addition, I credit shop stewards Nelson and Fowler that, on their days off, each has entered Respondent's facility in order to engage in union-related activities and has never been either questioned about her presence inside the facility or asked to leave despite having signed in with the receptionist or a security guard. Finally, there is no record evidence that Respondent previously had enforced chart of infractions rule 33 against any employee for being inside its facility while off-duty. Accordingly, as I believe Reynolds was acutely aware of the strike authorization voting in the break room on June 17 and 18, I find that she disparately invoked Respondent's chart of infractions rule 33 by evicting employees Nelson, Henry, and Eastman from the facility upon discovering each was assisting with the voting. In these circumstances, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act. *Benteler Industries, Inc.*, 323 NLRB 712, 715 (1997); *Opryland Hotel*, supra, at 731; *Baptist Memorial Hospital*, 229 NLRB 45, 45 fn. 4 (1977).

I next turn to the allegation that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (3) of the Act, by belatedly reinstating 13 employees and permanently replacing and refusing to reinstate 25 other employees for engaging in the August 2 through 7 concerted work stoppage and strike. An employer violates Section 8(a)(1) and (3) of the Act by failing to reinstate striking employees on their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for failing to do so. *NLRB v. Fleetwood Trailor Co.*, 389 U.S. 375, 378 (1967); *Capehorn Industry, Inc.*, 336 NLRB 364, 365 (2001). The employer establishes a legitimate and substantial business justification when the record evidence establishes that the positions, claimed by the strikers, are filled by permanent replacements. *Fleetwood Trailor*, supra; see *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938). Counsel for the Acting General Counsel presents alternative theories underlying the unfair labor practice allegations.

The first, of course, is that the said concerted work stoppage and strike was an unfair labor practice strike and that, therefore, upon the Union's unconditional offer to abandon the strike and return to work on behalf of each striker, Respondent was obligated to have immediately reinstated each to his or her former position of employment. As to this, in *Golden Stevedoring Co., Inc.*, 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 practices, even if economic reasons for the strike were more important than the unfair labor practice activity. . . . 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.*, 332 NLRB 1633, 1634 (2001). Concerning the latter conclusion, analysis of its decisions discloses that the Board has used numerous phrases[46] to emphasize the same point—the state of mind of strikers must be that their concerted work stoppage and strike was, at least, in part motivated by their employer's unfair labor practices. *Pennant Foods Co.*, 347 NLRB 460, 469 (2006). Put another way, whenever a reasonable inference may be drawn that an employer's unfair labor practices played a part in the decision of the employees to strike, said concerted work stoppage is an unfair labor practice strike. *Post Tension of Nevada, Inc.*, 352 NLRB 1153, 1162–1163 (2008); *Child Development Council of Northeastern Pennsylvania*, supra. Further, the burden is on the employer to establish that the strike would have occurred even if it had not committed unfair labor practices. *Post Tension of Nevada*, supra at 1163. Finally, once unfair labor practice strikers make unconditional offers to abandon the strike and return to work, they must be returned to their former positions of employment or, if said jobs no longer exist, to substantially equivalent positions even if permanent replacements must be discharged in order to do so. *Pennant Foods Co.*, supra at 470; *Cal Spas*, 322 NLRB 41 (1996).

Bluntly stated, contrary to the Acting General Counsel, for the below-stated reasons, I do not believe that Respondent's bargaining unit employees' August 2 through 7 strike against Respondent constituted an unfair labor practice strike. At the outset, there is no dispute that, on the afternoon of May 25, the bargaining unit employees engaged in informational picketing outside of Respondent's facility, carrying placards identifying the parties' contentious bargaining issues (healthcare, a pension plan, and wages); that, on June 17 and 18, the bargaining unit employees participated in a strike authorization vote, voting yes or no on whether to "authorize the bargaining committee team to call a strike,"[47] and that, in setting the strike authorization vote, the employees' bargaining committee identified successor contract bargaining issues ("Management still wants to take away our pension, make us pay . . . more for our health insurance, and is offering a raise that's a joke") as their motivation. In these regards, while over 90 percent of the bargaining unit employees voted to authorize their bargaining committee to call a strike and while the unfair labor practices, which I have found herein, occurred in the midst of the voting, there is no record evidence regarding whether any bargaining unit employees, other than members of the bargaining committee, witnessed or were cognizant of said acts or as to the dissemination of information pertaining to them. In these circumstances, I believe the

[46] Did the employer's unfair labor practices "have anything to do with" causing the strike? *Child Development Council of Northeastern Pennsylvania*, 314 NLRB 845, 845 fn. 5 (1994). Were they a "contributing cause" of the strike? *R & H Coal Co.*, 309 NLRB 28, 28 (1992). Was the unfair labor practice conduct "one of the causes" of the strike? *Boydston Electric*, 331 NLRB 1450, 1452 (2000).

[47] Given Union Agent Escamilla's admission that "we always call for unfair labor practice strikes," I find no significance to the words "unfair labor practice strike vote" on the top of the ballot or, indeed, to the Union's use of said words on any document or strike placard.

result of the strike authorization vote was that the bargaining unit employees authorized their bargaining committee to call an economic strike against Respondent.

Given the foregoing, the issue, then, is whether, at the time it commenced, Respondent's bargaining unit employees' concerted work stoppage and strike had metamorphosized into an unfair labor practice strike. On this point, there is no dispute that, during a break in the July 9 bargaining session between Respondent and the Union, with no prospect of an imminent breakthrough on a successor collective-bargaining agreement,[48] eight members of the bargaining unit employees' bargaining committee discussed engaging in a strike against their employer. Based upon their respective, uncontroverted testimony, I find that, during said conversation, in addition to bargaining concerns, committee members, Sheila Nelson, Sanjanette Fowler, and Matilda Imbukwa, each mentioned security guard Pinto's surveillance on June 17 and Reynolds' eviction of Nelson later that same day and that, at the conclusion of their discussions, the negotiating committee members decided to engage in a strike[49] against Respondent and informed Escamilla as to their decision. Finally, with regard to the asserted transformed rationale for the concerted work stoppage and strike, there is no credible record evidence[50] that, between July 9 and August 2, either union agents or the eight 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.

Although not explicitly stated in her posthearing brief, counsel for the Acting General Counsel's position appears to be that, as the bargaining unit employees' negotiating committee was authorized to call a strike and as the eight members discussed the above unfair labor practices in deciding whether to do so, the August 2 through 7 concerted work stoppage and strike was an unfair labor practice strike.[51] Taking a contrary position, counsel for Respondent argues that, while "members of the union bargaining committee testified as to why they decided to strike, this is no substitute for evidence that the general membership knew of, and was motivated by, the . . . unfair labor practices." I agree with counsel for Respondent. In this regard, I reiterate my view that Respondent's bargaining unit employees authorized their negotiating committee to call a strike against Respondent for economic reasons. Indeed, such was the recommended course of action by their bargaining committee. Moreover, while bargaining unit employees arguably may leave to the discretion of their majority bargaining representative or an authorized negotiating committee the decision as to the type of concerted work stoppage and strike in which the employees may eventually engage, the indisputable record evidence herein is that the specific grounds, which were recommended to the bargaining unit employees for authorizing their negotiating committee to call a strike, concerned Respondent's bargaining positions. Put another way, Respondent's bargaining unit employees did not vote in a vacuum. Further, there is no record evidence that, other than the eight members of the negotiating committee, the other 92 bargaining unit employees were aware of the acts, which constituted Respondent's unfair labor practices;[52] at no point prior to its commencement, did the members of the bargaining committee inform the entire bargaining unit that their concerted work stoppage and strike would be, at least, partially intended to protest unfair labor practices; and, of course, notwithstanding the magnitude, the entire bargaining unit never was asked to confirm the changed rationale for their concerted work stoppage and strike, which, arguably, had been adopted by the bargaining committee.. In my view, given that Respondent's unfair labor practices did not involve the collective-bargaining process and are not of the so-called hallmark variety, the entire bargaining unit's lack of knowledge of them and lack of an opportunity to vote to confirm them as rationale for the concerted work stoppage and strike left its original underlying economic rationale unchanged. *C-Line Express*, supra. Further, there can be no contention that knowledge of the negotiat-

[48] I note that, in almost a 3-week period between the strike authorization vote and the July 9 bargaining session, bargaining concerns, rather than asserted unfair labor practices, were the sole concern of the Union's published flyers for the bargaining unit employees.

[49] While Nelson testified that the committee members told Escamilla, they wanted to engage in an unfair labor practice strike, Fowler testified they told Escamilla only that they wished to engage in a strike, Imbukwa recalled only that the committee voted to engage in a strike, and Escamilla testified that she was only told the committee members voted to go on strike. Accordingly, I do not rely upon Nelson's testimony on this point.

[50] I give no credence to Fowler's response to a leading question by counsel for the Acting General Counsel.

[51] Notwithstanding that I expressed being "troubled" by the Acting General Counsel's contention, counsel for the Acting General Counsel ignored my concern, failing to discuss it in her posthearing brief.

[52] In analogous strike conversion cases, the Board and the courts require that the General Counsel establish bargaining unit employees' knowledge of the alleged unfair labor practices. Thus, in *C-Line Express*, 292 NLRB 638 (1989), the Board reversed an administrative law judge's finding that an economic strike had been converted into an unfair labor practice strike as there was no evidence "to indicate that the strikers were even aware of the Respondent's unlawful [behavior]." Id. at 639. Likewise, in *F.L. Thorpe & Co., Inc. v. NLRB*, 71 F.3d 282 (8th Cir. 1995), notwithstanding that the parties stipulated that the respondent had committed several serious unfair labor practices, including conditioning reinstatement of employees upon their resignation from the union, the court rejected the Board's finding that said acts and conduct converted an economic strike into an unfair labor practice strike as the record "lacked evidence of sufficient dissemination of the employer's unlawful condition among the striking employees." Id. at 290.

ing committee's discussions on July 9 may be imputed to the remainder of the bargaining unit employees. In an analogous strike conversion case, *Facet Enterprises, Inc.*, 290 NLRB 152 (1988), 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. The General Counsel argued that the said strike was an unfair labor practice strike from its inception. However, the Board determined that, at the time the bargaining unit employees gave authorization to the labor organization, which represented them, to commence a strike, the only grounds offered by the union were economic issues. Later, during bargaining, an unfair labor practice issue arose; nevertheless, the labor organization failed to inform the bargaining unit employees of said act prior to the commencement of their strike. Subsequently, after the commencement of the strike, the labor organization informed the membership of the employer's unlawful acts, and the employees voted to confirm the strike. In those circumstances, the Board held that the strike had not been an unfair labor practice strike at its inception and had been converted to such a status only when the unit employees were informed of the respondent's actions and, with that knowledge, voted to remain on strike. Id. at 154. In contrast, in the instant matters, the eight bargaining committee members never informed their fellow unit members of Respondent's asserted unfair labor practices or the changed rationale for their concerted work stoppage and strike and, of course, the bargaining unit employees never voted to confirm whatever decision the bargaining committee reached. The critical nature of these failings can not be emphasized more forcefully.

Besides the aforementioned, notwithstanding the respective, uncontroverted testimony of employees Nelson, Fowler, and Imbukwa regarding what was said on July 9 prior to the bargaining committee's decision to call the concerted work stoppage and strike against Respondent, I am not convinced that the bargaining committee actually was motivated by either Pinto's unlawful surveillance or Reynolds' unlawful evictions of employees in deciding to call for the August 2 through 7 concerted work stoppage and strike against Respondent. Thus, while asserting that bargaining committee members informed Escamilla they wanted to have an unfair labor practice strike and later denying the committee called the strike in order to place pressure upon Respondent to agree to new contract terms, Sheila Nelson was impeached by her pre-trial affidavit in which she stated "The purpose of the strike is to put pressure on the Employer to reach an agreement with the Union for a new contract." Likewise, after denying that the purpose of the strike was to put pressure on Respondent to agree to the Union's bargaining demands, Sanjanette Fowler was impeached by her pretrial affidavit in which she stated, "We began striking at the Piedmont Gardens. . . . The purpose of the strike is to put bargaining pressure on the Employer." Also, she admitted that, on July 9, after the bargaining committee's decision, she returned to Respondent's facility 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. Moreover, during the 5-day strike and picketing outside of Respondent's facility, strikers carried placards and chanted slogans identifying economic concerns as the basis for the concerted work stoppage and strike, and, other than a boilerplate "ULP Strike" message on one or more signs, no striker carried a placard specifying any unfair labor practice as the basis for the strike. *Mauka, Inc.*, 327 NLRB 803, 804 (1999). In this regard, of course, one striker told a reporter that economic concerns, a minuscule raise offer and health insurance, were the strikers' issues. Finally, and of critical import as to motivation, is the Union's August 6 letter to Oakland Mayor, Ron Dellums, seeking his support for the strike. Rather than identifying any unfair labor practices as underlying issues, the Union mentioned only the new contract bargaining, writing "We have proposed common sense disciplinary rules as well as modest economic improvements. Management, however, has refused to move away from its harmful disciplinary policies and, instead, has sought to dramatically cut our healthcare and eliminate our pension fund entirely." Based upon the above reasons, and the record as whole, I restate my conclusion that Respondent's bargaining unit employees voted to authorize their negotiating committee to call an economic strike against Respondent and that such remained the entire underlying basis for the August 2 through 7 concerted work stoppage and strike against Respondent.

Counsel for the Acting General Counsel's alternate theory, underlying the consolidated complaint allegation that Respondent violated Section 8(a)(1) and (3) of the Act by belatedly reinstating 13 former strikers and permanently replacing and refusing to reinstate 25 other former striking employees, is that "Respondent had an independent unlawful purpose for hiring the permanent replacements." As support for this theory for the violation, counsel relies upon the Board's decision in *Hot Shoppes, Inc.*, 146 NLRB 802 (1964), which concerned an economic strike and the hiring of permanent replacement employees by the employer. In reversing the trial examiner, who concluded that an employer may replace economic strikers only to preserve the efficient operation of his business, the Board held, "The Supreme Court's decision in *Mackay Radio & Telegraph Co.*, and the cases thereafter, although referring to an employer's right to continue his business during a strike, state that an employer has a legal right to replace economic strikers at will. We construe these cases as holding that the motive for such replacements is immaterial, absent evidence of an independent unlawful purpose." Id. at 805. There exists no Board acknowledgement of the *Hot Shoppes* exception to an employer's otherwise unfettered right to hire permanent replacement employees until *Avery Heights*, 343 NLRB 1301 (2004).[53]

[53] This is not to say that the Board had no occasion to do so. Thus, in *Choctaw Maid Farms*, 308 NLRB 521 (1992), responding to a contention of the General Counsel that the hiring of permanent replacements was discriminatory and unlawful, the administrative law judge wrote, "the law allows an employer to hire permanent replacements. What its state of mind might be in exercising that right is irrelevant." Id. at 528. The Board did not discuss the issue. Likewise, in *Nicholas County Healthcare Center, Inc.*, 331 NLRB 970 (2000), notwithstanding that, utilizing the *Hot Shoppes'* rationale, the administrative law judge found an unlawful purpose for the hiring of permanent replacements, the Board declined to pass on his findings.

Therein, the General Counsel argued to the Board that, in secretly hiring permanent replacement employees, an employer had an independent unlawful purpose—breaking the Union's solidarity and punishing a majority of the striking bargaining unit employees. After noting an employer may establish a business justification for failing to reinstate striking employees, who make an unconditional offer to return to work, by showing their jobs had been filled by permanent replacements, the Board held that "a violation will still lie if it is shown that, in hiring the permanent replacements, the employer was motivated by 'an independent unlawful purpose.' . . . Apart from such a purpose, the employer's motive for hiring permanent replacements is immaterial." Id. at 1305. While failing to explicate the meaning of the *Hot Shoppes* exception, the Board concluded that there was no record evidence of any independent unlawful motive underlying the Respondent's hiring of the permanent replacements at issue. Subsequently, the Second Circuit Court of Appeals reversed[54] the Board, and, in *Avery Heights*, 350 NLRB 214 (2007), the latter accepted the court's remand and, as the law of the case, found, in agreement with the court, that the respondent had an independent unlawful motive for hiring the permanent replacements at issue.

Counsel for the Acting General Counsel argues that there exists "compelling evidence" herein establishing Respondent's independent unlawful motive for hiring permanent replacements. Initially, counsel points to the telephone conversation between the Union's Attorney, Bruce Harland, and Respondent's attorney, David Durham on the evening of August 6. In this regard, having considered the credibility of each, Harland impressed me as being the more veracious witness. In contrast, Durham's demeanor was that of a witness, merely attempting to bolster his client's legal position, and, therefore, I shall rely upon Harland's account of their conversation. Accordingly, I find that, after Durham informed Harland that, rather than a lockout, Respondent would permanently replace approximately 20 of the striking employees and promised to furnish him with a list of the names of the striking employees, who had been permanently replaced, Harland asked for Respondent's reason for permanently replacing the strikers rather than imposing a lockout. To this, Durham replied "that Piedmont Gardens wanted to teach the strikers and the Union a lesson. They wanted to avoid any future strikes, and this was the lesson that they were going to be taught." Next, counsel for the Acting General Counsel points to Respondent's arguably discriminatory rationale for converting the status of strike replacement employees from temporary to permanent. Thus, Gayle Reynolds admitted that, in making offers to these individuals, rather than their qualifications for the work, the "more important" and, I think unlawful, consideration was that they would work during another work stoppage, and "they had demonstrated that they were willing to work during the strike." *Planned Building Services, Inc.*, 347 NLRB 670, 708 (2006); *National Fabricators, Inc.*, 295 NLRB 1095, 1096 (1989).

Absent from either the Board's decision in *Hot Shoppes, Inc.* or in the initial *Avery Heights* decision is any explanation for, or analysis of, precisely what the Board meant by the phrase "independent unlawful purpose" in the above-quoted *Hot Shoppes* language. In this regard, counsel for the Acting General Counsel intuits the Board as meaning that "an employer is free to hire permanent replacements for any non-discriminatory reason, but where anti-union discrimination is shown to be the reason for the hiring of permanent replacements, a Section 8(a)(3) violation is established." I disagree. At the outset, I think that the words, "independent unlawful purpose," obviously have significance or the Board would not have used them and note that the Board relied upon its decision in *Cone Brothers Constructing Co.*, 135 NLRB 108 (1962), for the above phrase. Thus, one portion of *Cone Brothers* involves a finding that the employer therein deliberately provoked pro-union drivers to refuse to cross a picket line and, thereby, engage in a sympathy strike, which the employer then exploited to unlawfully terminate the drivers with the ultimate goal of challenging their ballots as nonemployees in a scheduled representation election—an obvious unfair labor practice. I think, in *Hot Shoppes*, the significance of *Cone Brothers*[55] to the Board was that the employer's actions therein were ultimately designed to accomplish an unrelated, unlawful purpose extrinsic to the discharges. In these circumstances, I find compelling counsel for Respondent's contention that the "independent unlawful purpose" exception means that the hiring and use of permanent replacements by the employer is calculated to accomplish another, unlawful purpose, one *unrelated to or extraneous to* the strike itself. For example, by hiring permanent replacements, an employer actually may be attempting to unlawfully foment a decertification election. Indeed, if such is not the correct interpretation and one accepts counsel for the Acting General Counsel's interpretation, the words, "independent unlawful purpose," render the entire preceding clause a nullity, and the Supreme Court's summation of the *Hot Shoppes* language, in *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 fn. 8 (1983)—that an employer's motive for hiring permanent replacements is "irrelevant—" would be meaningless. Put another way, surely, if the Supreme Court meant that when evidence of discriminatory motive is established, the hiring of permanent strike replacements would be violative of Section 8(a)(3) of the Act, it would have so stated. Accordingly, I agree with the above-quoted ruling of the administrative law judge in *Choctaw Maid Farms*, supra, and conclude that, when, as in the instant matters, bargaining unit employees engage in an economic strike against their employer and the said employer exercises its right to hire permanent replacements in the striking employees' stead, whatever factors, lawful or unlawful, contributed to, or motivated, the employer's state-of-mind in reaching its decision, unless designed to accomplish an unlawful, extraneous purpose, are utterly irrelevant. In these circumstances, inasmuch as the factors involved

[54] The Second Circuit disagreed with the Board on the record evidence, finding that the employer's secret hiring of permanent replacements was probative of an "illicit" motive to break the union. *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 196 (2d Cir. 2006).

[55] *Cone Brothers* did not involve the hiring of permanent replacements by the employer.

in Respondent's decision to hire permanent replacements, its desire to teach its striking bargaining unit employees a lesson and its desire to hire individuals, who would cross a picket line in the event of future strikes, were directly related to its bargaining unit employees' August 2 through 7 economic strike, given Respondent's unquestioned right to do so, it's underlying motivation for hiring permanent replacement employees was, and remains, irrelevant. Accordingly, for all the above-stated reasons, Respondent did not violate Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate 25 of its bargaining unit employees, who engaged in the above economic strike and by belatedly reinstating 13 of said employees, and, therefore, I shall recommend dismissal of paragraphs 10 and 11 of the consolidated complaint.

Finally, I turn the consolidated complaint allegation that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (5) of the Act by failing and refusing to provide to the Union the names and home addresses of its newly hired permanent replacement employees. In this regard, there is no dispute, and I find, that 12 days after the conclusion of the August 2 through 7 strike, in a letter dated August 19, the Union sent an information request to Respondent for certain items, including the names and addresses of the permanent replacement employees, and that, in a letter dated September 6, Respondent's attorney replied, writing that, inasmuch as Respondent has a legitimate concern as to possible harassment and possible violence, in the pertinent wage rate and job classification documents it would identify the permanent replacement employees, who were hired from outside sources, only by their initials and without their home addresses. In fact, in the accompanying wage rates and job classification documents, Respondent indentified the permanent replacement employees, who were hired from outside sources, only by their initials and failed to set forth their respective home addresses. There is also no dispute that Respondent has continued to withhold the names and addresses of its permanent replacement employees, who were hired from outside sources.

It is, of course, well settled Board law that the names and addresses of bargaining unit employees constitute presumptively relevant information, which must be furnished to a labor organization upon request. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1326 (2006); *Stanford Hospital & Clinics*, 338 NLRB 1042, 1043 (2003). Likewise, the Board has also held that the names and addresses of permanent strike replacement employees is presumptively relevant information, which must be supplied to a requesting labor organization upon request. *Beverly Health & Rehabilitation*, supra; *Metta Electric*, 338 NLRB 1059, 1065 (2003); *Grinnell Fire Protection Systems Co.*, 332 NLRB 1257, 1257–1258 (2000).[56] However, an employer may withhold such requested information if it can establish that there is a clear and present danger that the information would be misused by the labor organization. Id. An employer may establish the existence of such a "clear and present danger" upon a showing of acts of bodily injury, acts of property damage, acts of intimidation, the throwing of rocks or other harmful objects, threats of violence, and similar acts and conduct not only at or near the picket line but also at the replacements' residences. *Brown & Sharpe Mfg. Co.*, 299 NLRB 586, 590 (1990). Herein, there is no record evidence of any such acts of misconduct directed against any replacement employees, who were hired from outside sources, and, other than strikers surrounding a vehicle on one occasion and some mild and typical strike argot, there exists no evidence of acts of arguable misconduct directed toward nonstriking bargaining unit employees. Further, Gayle Reynolds testified that, by the time Respondent replied to the Union's information request, the strike had been over for more than a month and that most of the strikers had been reinstated and were working alongside the replacement employees without any instances of harassment. Therefore, rather than objective concerns, it appears that, at the time it refused to give to the Union the names and addresses of certain of the permanent replacements, whatever concerns Respondent may have had were, at most, subjective in nature without factual support.

Nevertheless, citing *Good Life Beverage Co.*, 312 NLRB 1060 (1993), counsel for Respondent argues that, when the employer has legitimate and substantial confidentiality concerns regarding the information sought by a labor organization, it is "entitled" to discuss these concerns with the labor organization in order to "develop mutually agreeable protective conditions" for disclosure of the information. Id. at 1062. However, contrary to counsel, *Good Life Beverage* involves financial information, and, as the Board noted, ". . . requests for financial information frequently raise confidentiality questions," which, unlike herein, pertain to the nature of the information sought. In addition, Respondent relies upon two cases involving requests for information pertaining to strike replacement employees. Thus, in *Webster Outdoor Advertising Co.*, 170 NLRB 1395 (1968), the union requested to examine the employer's payroll records to determine the wage rates of strike replacements. While it is true that the employer did not "categorically" reject the union's request, expressing reluctance to turning over the information until receiving assurances had been given and legitimate need established, the Board noted "that replacements had been harassed, threatened, and assaulted by some of the striking employees," and one striker had been "convicted in state court for assaulting a replacement with a gun." Id. at 1396. Of course, no similar incidents of harassment, assaults, or threats occurred to Respondent's permanent replacement employees. Also, in *Page Litho, Inc.*, 311 NLRB 881 (1993), while it is true that, "given the facts of this case," the Board refused to find an unlawful refusal to transmit information to a union after the latter agreed to having the employer provide the requested payroll information with the strike replacements' names excised, the Board did find that the employer's subsequent refusal to provide the names of strike replacement employees was unlawful when the employer's refusal occurred 4 months after the conclusion of the strike and the last reported incidents of strike misconduct occurred. As the Board noted it would be an "unfortunate precedent" to hold "that on the basis

[56] Counsel for Respondent urges that the line of Board cases, holding such information as presumptively relevant, should be overruled. Such, of course, is the province of the Board, not that of an administrative law judge.

of past strike misconduct, an employer could foreclose for an indefinite length of time the opportunity for the bargaining representative to obtain the names of some of its bargaining unit members." Id. at 882–883. Herein, of course, not only were there, at worst, minor incidents of picket line misconduct but also the strike had concluded over for a month before Respondent replied to the information request and strikers and replacement employees were working well together in the jobsite. In these circumstances, I believe that Respondent's refusal to transmit the names and addresses of certain of its permanent replacement employees to the Union was violative of Section 8(a)(1) and (5) of the Act. *Beverly Health & Rehabilitation*, supra; *Page Litho*, supra.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By either enforcing its chart of infractions rule 33 in a disparate manner or implementing a new work rule and evicting off-duty bargaining unit employees from its facility in order to deter said employees from assisting the Union with a strike authorization vote, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

4. By, through a security guard, engaging in surveillance or creating the impression it was engaging in surveillance of its bargaining unit employees, who were assisting with or participating in a strike authorization vote, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

5. By failing and refusing to furnish the Union with the names and addresses of its permanent strike replacement employees, who were hired from outside sources, which information is presumptively relevant, Respondent has engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

6. Respondent's above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Unless specifically found above, Respondent engaged in no other unfair labor practices.

REMEDY

Having found that Respondent has engaged in, and continues to engage in, serious unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act and Section 8(a)(1) of the Act. I shall recommend that it be ordered to cease and desist therefrom and to engage in certain affirmative acts. As I have found that Respondent has unlawfully failed and refused to provide the Union with the names and addresses of permanent replacement employees, who were hired from outside sources, I shall recommend that it be ordered to do so. In addition, I shall recommend that it be ordered to post a notice, setting forth its obligations herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[57]

ORDER

The Respondent, American Baptist Homes of the West d/b/a Piedmont Gardens, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Either enforcing the chart of infractions rule 33 in a disparate manner or implementing a new work rule by evicting off-duty bargaining unit employees from its facility in order to deter said employees from assisting the Union with a strike authorization vote;

(b) Engaging in surveillance or creating the impression it was engaging in surveillance of its bargaining unit employees, who were participating in a strike authorization vote;

(c) Failing and refusing to furnish the Union with the names and addresses of permanent replacement employees, who were hired from outside sources, which information is presumptively relevant;

(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) Provide the Union with the names and addresses of its permanent replacement employees, who were hired from outside sources;

(b) Within 14 days after service by the Region, post at its facility in Oakland, California, copies of the attached notice marked "Appendix."[58] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 17, 2010;

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

[57] 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.

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

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges that Respondent violated Section 8(a)(1) of the Act by belatedly reinstating or refusing to reinstate former striking employees

Dated, Washington, D.C., August 9, 2011.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT either enforce the chart of infractions rule 33 in a disparate manner or implement a new work rule by evicting our bargaining unit employees from our facility in order to deter said employees from assisting Service Employees International Union, United Healthcare Workers–West, herein called the Union, with a strike authorization vote.

WE WILL NOT engage in surveillance or create the impression we are engaging in surveillance of our bargaining unit employees who participate in a strike authorization vote.

WE WILL NOT fail and refuse to furnish the Union with the names and addresses of permanent replacement employees, hired from outside sources, which information is presumptively relevant.

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

WE WILL furnish the Union with the names and addresses of permanent replacement employees, who were hired from outside sources.

AMERICAN BAPTIST HOMES OF THE WEST D/B/A PIEDMONT GARDENS