

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20**

UNITED SITE SERVICES OF CALIFORNIA, INC.

and

Cases 20-CA-139280; 20-CA-149509

TEAMSTERS LOCAL 315

**COUNSEL FOR THE GENERAL COUNSEL’S REPLY TO
RESPONDENT’S OPPOSITION AND ANSWER TO THE GENERAL
COUNSEL’S CROSS-EXCEPTIONS TO THE ALJ’S
SUPPLEMENTAL DECISION**

Respondent United Site Services of California, Inc.’s Opposition and Answer to the General Counsel’s Cross-Exceptions to the ALJ’s Supplemental Decision (“Resp. Ans.”) fails to rebut the facts and legal arguments advanced by the GC. Most of the issues raised by Respondent’s Answer have been thoroughly briefed. The GC will attempt not to reiterate points of fact and law adequately set forth in prior filings; where Respondent’s arguments are not addressed with specificity herein, the GC stands on his previous briefing.

Oral Argument and Amicus Briefing (Resp. Ans. at 2-3): The GC hereby OPPOSES Respondent’s request for oral argument and amicus briefing. Briefing by the three parties to this matter totals several hundred pages, and is now in its second round. It is unclear what the parties would communicate orally that has not already been communicated in writing. Likewise, it is unclear what outside party briefs will add to the extensive briefing on the issues that has already occurred. Because the record, exceptions, and briefs adequately present the positions of the parties and explore the issues presented, Respondent’s request for oral argument and amicus briefing should be DENIED.

The GC's Cross-Exceptions Do Not Establish that the Supplemental ALJD is Materially Deficient (Resp. Ans. at 3-5): A great number of the Cross-Exceptions referred to by Respondent relate to relatively minor errors associated with the ALJD's Remedy, Order and Notice to Employees. See GC Cr. Excs. 23-32.¹ It is not at all unusual for the Board to correct such errors (many likely inadvertent) when the record supports the underlying substantive determinations. Indeed, the Board has broad power to fashion remedies it sees fit to properly address the impacts of unfair labor practices. See, e.g., *Pacific Beach Hotel*, 361 NLRB No. 65, 2014 WL 5426174, at *1 ("We have broad discretion to exercise our remedial authority under Section 10(c) of the Act even when no party has taken issue with the judge's recommended remedies."); see also *Garwin Corp.*, 153 NLRB 664, 664-67 (1965).

In an abundance of caution, the GC has requested that the Board make some additional factual findings that were included in the ALJ's Initial Decision. See GC Cr. Excs. 5-9, 13. The GC also requested that some factual and legal conclusions be made that were absent from both of the ALJ's decisions. GC Cr. Excs. 1-3, 10-12, 14-20. Given the large number of issues in play, it is neither surprising nor fatal to the ALJ's ultimate conclusions that the ALJ failed to include mention of all facts or arguments considered pertinent to one party or another. In any event, and as demonstrated by the GC's briefing, the facts and conclusions sought are supported by the clear weight of the evidence, thus allowing the Board to make the required findings. See, e.g., *Williamson Mem. Hosp.*, 284 NLRB 37, 37 & n.3 (1987), citing *California Pellet Mill Co.*, 219 NLRB 435 (1975). Respondent's protestations to the contrary fail.

Indirect (Circumstantial) Evidence May Be Utilized to Infer Unlawful Motivation (Resp. Ans. at 7-10, GC Cr. Excs. 5-9, 13): Although thoroughly briefed, two points should be made again: (1) Board law accepts the introduction of circumstantial evidence to prove unlawful

¹ For the reasons already articulated on brief, these Exceptions in fact have substantive merit and should be granted. Cf. Resp. Ans. at 36-37.

motive (see, e.g., *Dresser-Rand Co.*, 362 NLRB No. 136, 2015 WL 4179682, at *2 & n.2 (June 26, 2015), enf. granted in part and denied in part 838 F.3d 512 (5th Cir. Sep. 23, 2016)), and (2) the *Piedmont Gardens* Board contemplated the introduction of evidence going to the employer's true motive behind the hiring of permanent replacements when that motive is placed in question. 364 NLRB No. 13, 2016 WL 3085826, at *8 n.17 (May 31, 2016); see also *Avery Heights (Avery II)*, 350 NLRB 214, 216-17 (2007) (rejecting the non-discriminatory reasons the employer proffered in explanation of its decision to permanently replace the strikers). The GC is not arguing that the instances of circumstantial evidence demonstrated in his Cross-Exceptions alone support the ALJ's findings of unlawful conduct. Rather, the GC seeks to add consideration of this evidence in support of the ALJ's analysis of the evidence as a whole regarding Respondent's motive and unlawful conduct. This approach is proper.

Respondent's Testimonial Explanations and Assertions in its Brief Relating to the Facts Proffered by Way of Cross-Exceptions 5-13 are Properly Rejected (Resp. Ans. at 10-16): Put simply, Respondent's reliance on Mr. Bartholomew's self-serving and unsupported testimony fails to overcome the documentary and other testimonial evidence relied on by the GC in advancing Cross-Exceptions 5 through 9.² See GC's Bf. in S. of Cr. Excs. at 9-13. The same can be said of the assertions made by Respondent in its Answering Brief regarding Cross-Exceptions 10 through 13, which are almost completely without record support. Compare Resp. Ans. at 12-16 with GC's Bf. in S. of Cr. Excs. at 14-16. As for the propriety of considering Respondent's anti-Union campaign in November 2013, Board case law demonstrates that Respondent's protestations lack merit. *Dresser-Rand Co.*, supra, at *2 ("Especially in cases

² In trying to support its claimed fear of a prolonged strike, Respondent emphasizes the Union having sought strike benefits for the Unit that would not begin until after two weeks of striking. See, e.g., Tr. 168-71. No record evidence, however, shows that the Respondent *knew* of these efforts. Cf. Resp. Exh. 3 (discussing seeking strike benefits without mentioning a waiting period duration).

where motive is at issue, we consider, when contained in the record, the preceding, contemporaneous, and postconduct words and deeds.”); *Monongahela Power Co.*, 324 NLRB 214, 214-15, 215 (1997); *Grimmway Farms*, 314 NLRB 73, 73-74 (1994). That the Fifth Circuit disagreed with the Board’s view of portions of the record in *Dresser-Rand* is beside the point. Respondent’s anti-Union campaign conducted not a year prior to the strike replacement (and even closer in time to when the replacement decision was made, in August 2014 (Tr. 413-14, 417)), is one more pertinent piece of record evidence shedding light on Respondent’s motive.

The Facts Proffered by Way of Cross-Exceptions 14-16 Support the ALJ’s Determination that Respondent Unlawfully Withdrew Recognition from the Union (Resp. Ans. at 16-18; GC Cr. Excs. 14-16): The ALJ carefully considered the record evidence and correctly determined that Respondent unlawfully withdrew recognition from the Union. ALJD at 20. The facts proffered by way of Cross-Exceptions 14 through 16 add limited, further factual details supporting the ALJ’s determination. Respondent’s argument that facts showing pre-ULP unit employee support for the Union followed by post-ULP unit employee disaffection are irrelevant to the *Master Slack*³ analysis is simply incorrect as a matter of law.⁴ The lone case that Respondent cites as authority, *Conkle Funeral Home, Inc.*, 266 NLRB 295 (1983), is inapposite. In *Conkle*, there was no strike, no intervening unfair labor practices, and the employer’s (lawful) refusal to bargain was predicated on a disclaimer by the union itself, which attributed its falling out with the unit employees to the employees’ “unreasonably high demands.” *Id.* at 298.

³ 271 NLRB 78, 84 (1984).

⁴ See, e.g., *D&D Enterprises*, 336 NLRB 850, 859 (2001) (“Absent any alternate explanation for the employees’ disaffection from the Union, we find it reasonable to infer that the Respondent’s misconduct contributed to that disaffection.”); see also *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007) (causal connection established between unlawful lockout and employee disaffection in part by lack of disaffection evidence prior to the lockout); *Columbia Portland Cement Co. v. NLRB*, 979 F.2d 460, 465 (6th Cir. 1992) (direct evidence of causation not required to show causal connection between unlawful conduct and disaffection).

Respondent quibbles as to whether a pre-ULP vote to reject a bargaining proposal may be viewed as supportive of the Union. Considering all the facts here—including a second unanimous vote to reject a further proposal and to strike, and the consistently strong turn-out for the strike itself—the first pre-strike vote is properly viewed as one fact in a string of facts showing consistent Unit support for the Union until the Respondent’s unfair labor practices took their toll. Respondent’s speculation regarding why the three Unit-strikers who were returned to work by February 2015 signed the anti-Union petition relies on subjective guesswork and ignores the obvious, objective inference to be drawn: the returned strikers, having been unlawfully removed from work for months, were motivated by fear of further unlawful retaliation.⁵ Respondent’s argument should be rejected.

The GC Did Not Waive His Argument Regarding the Sham Hire of Jorge Recinos (Resp. Ans. at 18-21; GC Cr. Excs. 17-20): The legality of Respondent’s hire of Jorge Recinos and its unlawful impact on the striking Unit employees has been fully briefed. Regarding Respondent’s argument that the GC somehow waived the issue by not briefing the matter on remand, the GC first notes that his supplemental brief to the ALJ was limited to the impact of the issuance of the *Piedmont Gardens* because the other ULPs had already been fully briefed:

In his initial submission to the ALJ, the GC fully briefed all allegations pursued in the pertinent Complaint, including the Section 8(a)(3) allegations separate and apart from the *Hot Shoppes* theory of violation (see GC Initial Bf. to ALJ at §§IV, V & VII) and the Section 8(a)(5) withdrawal-of-recognition allegation as potentially analyzed from multiple perspectives. GC Initial Bf. to ALJ at §VIII. Indeed, all parties did so. The GC stands by his initial briefing on these points—as he must, as the Board has allowed for supplemental briefing solely on the impact of the *Piedmont Gardens* case on the *Hot Shoppes* analysis applicable here. Therefore, this supplemental brief is limited to discussion of *Piedmont Gardens* in the context of this case.

GC Supp. Br. to ALJ (Jan. 18, 2017), at 2.

⁵ See, e.g., *AT Sys. West*, 341 NLRB 57, 60 (2004) (objective evidence of commission of unfair labor practices is relevant to *Master Slack* inquiry, not subjective state of mind of employees) (citing cases).

Respondent admits that the matter was fully briefed to the ALJ initially and on Cross-Exceptions. See GC Bf. to ALJ (Nov. 5, 2015), at p. 49-51; GC Cr. Exc. 13 & GC Br. in S. of Cr. Excs. (June 28, 2016), at p. 15-17. It is unclear how or why a waiver occurred. The argument fails.

Respondent's Arguments Against Overruling *Hot Shoppes* in Favor of a New Standard for Assessing the Legality of Permanent Strike Replacement Should be Rejected (Resp. Ans. at 21-36; GC Cr. Excs. 21-22): The question of whether the Board should overrule that portion of *Hot Shoppes*⁶ reading *Mackay Radio*⁷ to allow permanent replacement of economic strikers absent any connection to the continued operation of the business has been briefed extensively by the parties. The GC adheres to his prior arguments and, in addition, joins the Charging Party Union's Reply Brief in response to Respondent's arguments to the contrary. Specifically, the GC agrees that:

- *Piedmont Gardens* does not moot the *Hot Shoppes* question. See CP R. Bf. at 1-2; Resp. Ans. at 22-24. The Board in *Piedmont Gardens* noted explicitly: "That aspect of *Hot Shoppes*—the proper interpretation of *Mackay*—is not before us." 364 NLRB No. 13, 2016 WL 3085826, at *6 n.9.⁸ This is the very question the GC now seeks to place before the Board. Nothing in *Piedmont Gardens* precludes the Board from considering the GC's argument to overrule *Hot Shoppes*.

- The hire of permanent striker replacements is inherently destructive. Case law does not require another conclusion. See CP R. Bf. at 2-3; Resp. Ans. at 24-29. The GC has fully briefed the impact permanent replacement has on the Section 7 and 13 rights of employees, and has compared Board and the Supreme Court cases considering whether other conduct is

⁶ 146 NLRB 802, 805 (1964).

⁷ *NLRB v. Mackay Radio & Telegraph Company*, 304 U.S. 333 (1938).

⁸ The Charging Party Union appears to have incorrectly cited this quote as occurring at footnote 10 of the *Piedmont Gardens* decision.

inherently destructive. See, e.g., GC Bf. In S. of Cr. Excs. at 25-34; see also *NLRB v. Brown*, 380 U.S. 278 (1965) (use of temporary replacements during lockout not inherently destructive); *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967) (refusal to pay accrued vacation benefits to strikers while paying it to non-strikers, inherently destructive). It is frankly hard to imagine conduct more destructive to the right to concerted strike than permanently removing strikers from the employer's ranks.⁹

To the degree Supreme Court cases have cited back to *Hot Shoppes* for the proposition that employers have a free hand in permanently replacing economic strikers, such reliance does not preclude the Board from reconsidering *Hot Shoppes* itself. See, e.g., *Belknap v. Hale*, 463 U.S. 491, 504 n.8 (1983). Indeed, no cases Respondent relies on hold conclusively that the reading of *Mackay* advanced by the GC cannot be correct. See, e.g., *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967) (citing to *Mackay* in recognizing that a legitimate and substantial business justification for refusing to reinstate strikers exists “when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations.”) (emphasis added).

Respondent's press for the unchecked power to permanently replace economic strikers is impossible to square with the explicit protection of the right to strike enshrined in Section 13 of the Act and with the obvious and serious impact removal from active employment has on employees' Section 7 and 13 rights. The time is ripe for reconsideration of the Board's approach

⁹ That replaced strikers technically remain employees under Section 2(3) of the Act does not significantly lessen the inherently destructive nature of permanent replacement. For example, such employees experience diminishing rights under the Act over time. See, e.g., Section 9(c)(3) of the Act (limiting the voting rights of replaced economic strikers to twelve months from the commencement of the strike). On a more practical level, nothing conveys power quite like the ability of the employer to remove an employee's way of making a living. This is in part why the Board has recognized that discriminatory discharges “strike at the very heart of the Act.” *D&D Enterprises, Inc.*, 336 NLRB at 859 (internal quotations and citation omitted). It cannot be gainsaid that only one striker was returned before the end of 2014, and that only four were returned by the end of February 2015. Jt. Exh. 1 ¶33.

to the issue and to adopt an analysis requiring employers to demonstrate a legitimate and substantial business reason for choosing to permanently replace economic strikers.

- The use of permanent replacement is not an economic weapon explicitly protected by the Act and, therefore, is not on a legal par with the strike weapon. See CP R. Bf. at 3; Resp. Ans. at 29-31. Although Respondent argues that the hire of permanent replacements is a protected economic weapon on a par with the right to strike, the Board in *Piedmont Gardens* explicitly questioned the premise. See 364 NLRB No. 13, 2016 WL 3085826, at *3 n.6. Cases cited by Respondent, such as *Mackay* and *TWA World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 436-38 (1989), do not hold that permanent replacement is an economic weapon on the same par as the strike. In any event, simply because conduct may be considered a protected economic weapon does not mean that the Board or the courts are precluded from balancing the interests and burdens of the parties when those weapons are brought to bear. Indeed, the use of an economic weapon may itself be unlawful in certain circumstances. See, e.g., *Dresser-Rand Co.*, 362 NLRB No. 136, 2015 WL 4179682, at *2 (lockout).

- The balancing analysis advanced by the GC is not unworkable. See CP R. Bf. at 3-4; Resp. Ans. at 31-32. Many of the parade of horrors listed by Respondent at page 31 of its Answering Brief pose the kinds of questions that the Board answers often and in varied contexts. See, e.g., *Int'l Paper Co.*, 319 NLRB 1253, 1273-74 (1995) (considering the respondent's asserted business justification for its subcontracting). The questions that Respondent poses in relation to potential difficulties securing temporary employees have no applicability in the present case as the record shows the Respondent had a ready supply of suitable temporary staff. See, e.g., GC Bf. in S. of Cr. Excs. at 10-12, 38-40. Finally, the proposed standard does not require Board intrusion into managerial business judgment. Employers will simply be required

to demonstrate a credible legitimate and substantial business justification—something the Board already requires in numerous circumstances. See, e.g., *Bud Antle, Inc.*, 347 NLRB 87 (2006) (considering the delayed return of locked out employees); *Ohio Brass Co.*, 261 NLRB 137 (1982) (considering a Section 8(a)(1) allegation regarding employer inquiries of job applicants). Respondent’s claims fail.

In addition to the points on which the Charging Party and the GC explicitly agree on brief, the GC further responds to Respondent’s Answer as follows:

- Change in the use and availability of contingent workers is relevant to the question at issue. See Resp. Ans. at 33. The GC has thoroughly briefed the fact of these changes to our economy. GC Bf. in S. of Cr. Excs. at 35-37. The Board has recognized its duty to review its jurisprudence in order “to adapt the Act to the changing patterns of industrial life.” *Purple Communications*, 361 NLRB No. 126, slip op. at 1 (Dec. 11, 2014), citing *Hudgens v. NLRB*, 424 U.S. 507, 523 (1976). To argue otherwise ignores fact and law.

- Respondent has failed to demonstrate a legitimate and substantial business justification for its decision to permanently replace the Unit strikers. See Resp. Ans. at 33-34. The record and prior briefing support the conclusion that Respondent has not and cannot show a legitimate and substantial business justification for its decision to hire permanent replacements. Importantly, the ease with which Respondent maintained its operation through inter-facility temporary transfers and temporary agency employees demonstrates that Respondent could have withstood a longer strike. Respondent’s additional explanations are likewise unsupported in the record and are revealed as pretextual, post-hoc justification for its unlawful activity—precisely what the ALJ concluded. ALJD at 19; see also GC Bf. in S. of Cr. Excs. at 9-13, 38-40; GC Ans. Bf. to Resp. Excs. at 39-43. Again, the self-serving, unsupported assertions of Mr. Bartholomew cannot overcome the raft of evidence to the contrary.

- The balancing test advanced by the GC should be applied in this case. Resp. Ans. at 34-36. The Board’s usual practice is to apply new policies and standards “to all pending cases in whatever stage.” See *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 16-17, quoting *Aramark School Services*, 337 NLRB 1063, 1063 n.1 (2002) and *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958). Respondent had the opportunity to put on evidence going to its business justifications for hiring permanent strike replacements and thereafter briefed the issue extensively—twice. See, e.g., GC Exh. 1(s):¶11; Tr. 12-20, 412. Respondent has therefore not demonstrated that it would be manifestly unjust to apply the GC’s proposed test in this litigation.

Conclusion: For the reasons stated here and in the GC’s prior briefing, Respondent’s Exceptions should be overruled; the GC’s Cross-Exceptions should be granted; the ALJ’s findings should otherwise be adopted; and an appropriate order issued to remedy Respondent’s serious violations of the Act.

DATED AT San Francisco, California, this 27th day of July, 2017.

Respectfully Submitted,

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