

DATE: April 10, 2016

TO: John J. Walsh, Jr., Regional Director
Region 1

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Ace & Acme, Inc.
Cases 01-CA-180274, 01-RD-162954

355-3300-0000
362-3312-5000
362-3381-5000
524-0150-2500
524-1783-0150
524-5012-3000
524-5012-4000
524-5012-5000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(3) and (1) of the Act when it failed to rehire known Union supporters it had laid off less than five months earlier when it informed their Union that it could not operate under a new contract and, thus, was closing the delivery part of its business. We conclude initially that the Section 8(a)(3) analytical framework from successorship cases involving discriminatory refusals to hire predecessor employees to avoid a bargaining obligation applies here. Pursuant to that framework, we conclude that the Employer violated Section 8(a)(3) and (1) when it failed to rehire the five former employees after reopening its delivery operation because there is substantial evidence creating the reasonable inference that the Employer's hiring practices were motivated by its discriminatory objective of avoiding a bargaining or contractual obligation with the Union. Thus, the Region should issue complaint, absent settlement.¹

¹ The Region also requested advice as to whether to defer ruling on the Union's motion for reconsideration of the Region's Supplemental Decision and Certification of Election Results in Case 01-RD-162954 until the relevant record evidence is developed in the hearing for the current unfair labor practice case. Based on that record evidence, the Region would determine whether to issue an Order to Show Cause why the certification of results should not be revoked. The Division of Advice is not aware of any reason why the Region should not proceed with its recommended

FACTS

Ace & Acme, Inc. (“the Employer”) is a high-end furniture delivery and storage business located in Medfield, Massachusetts. Prior to the events involved in the instant case, Teamsters Local 25 (“the Union”) represented the Employer’s drivers, helpers, and warehouse employees. During the relevant times, the bargaining unit consisted of about ten employees, including eight drivers or helpers and two warehousemen. The Employer and the Union had a collective-bargaining relationship since about 2012.

On March 30, 2015,² the parties’ collective-bargaining agreement expired. On April 1, the unit employees went on strike in support of their bargaining demands. On April 5, the Union and Employer signed a Closing Agreement stating that the Employer’s business would permanently cease operations and close no later than December 31, and that the Employer would give the Union 30-days’ written notice prior to the final day of operations. The Closing Agreement further stated that in the event the Employer continued its business beyond December 31, the Employer agreed to be bound by the terms of the new, five-year collective-bargaining agreement attached to the Closing Agreement. The parties also agreed that the terms of the expired collective-bargaining agreement would remain in effect until the Employer closed the business and that the Employer would pay employees severance amounts ranging from \$2,500 to \$3,500 at closure.

By letter dated April 7, the Employer informed the Union that it would be permanently ceasing all business operations no later than December 31.³ On the following day, April 8, the striking employees returned to work.

On August 31, after calculating that it would incur an estimated loss of \$128,000 for 2015 and an additional loss of \$460,000 under the terms of the new, five-year contract, the Employer sent a letter to the employees stating that it would cease operations at the end of the year. The letter stated that keeping the business open

course of action regarding the Union’s motion for reconsideration in the representation case.

² All subsequent dates in 2015 unless otherwise noted.

³ According to the Employer, the owner, being in his early 70s, felt compelled to close the business because the company was losing money and there was no succession plan.

would require reaching some accommodation with the Union regarding so-called “poison pill” provisions in the new contract that would go into effect on January 1, 2016. The letter also informed the employees that the Employer had reached out to the Union in this regard, but the Union replied that it was not interested in modifying the terms of the Closing Agreement, which included the new, five-year contract.

On October 13, a warehouseman (b) (6), (b) (7)(C) presented the Employer with a document of the same date that had been signed by seven unit employees stating they no longer wanted to be represented by the Union. The Employer acknowledged receipt of the anti-Union petition but decided not to withdraw recognition from the Union after being informed that two of the seven employees had “dropped off” the petition. Therefore, it no longer believed that a majority of its employees had signed the anti-Union petition.⁴ The Employer’s General Manager stated that he was aware of the two specific employees who had revoked their support for the petition. On October 29, the warehouseman who had presented the anti-Union petition to the Employer filed the decertification petition in Case 01-RD-162954.

On November 4, the Union filed a Section 8(a)(1) charge against the Employer in Case 01-CA-163355, alleging that the Employer actively had solicited support for the decertification petition. On November 9, the Region held a short hearing on Case 01-RD-162954 in which the Employer argued that the decertification petition should proceed to an election, and the Union argued that there was a contract bar to an election. On November 19, the Region notified the parties that it had decided to block further processing of the decertification petition pending further investigation of the alleged violations in Case 01-CA-163355.

On November 30, the Employer sent a letter to the Union providing 30-days’ notice that it would permanently cease only its furniture delivery operation effective December 30 and layoff only the drivers and helpers. The Employer would continue operating the storage part of its business and retain the two unit warehousemen.

On December 1, the Employer sent a letter to the Union stating that it would incur an additional \$567,000 in losses in 2016 under the new- five-year contract attached to the Closing Agreement and asked the Union to reconsider modifying that contract so the parties could move forward in 2016. On the same day, the Employer sent a letter to the unit employees informing them that it had sent a letter to the Union’s attorneys requesting that the Union agree to eliminate the “poison pill” provisions of the new, five-year contract so it could remain open in 2016. The

⁴ As previously noted, there were about ten unit employees.

Employer noted that the Union had stated it would prefer that the Employer close, but the Employer was making one last attempt to reach an agreement. The Employer included a document outlining the changes it sought to the new contract that would allow it to stay in business. The Employer concluded the letter by stating that it was not optimistic the Union would change its position.

On December 16, the parties' exchanged emails regarding the closing of the delivery operation during which the Union maintained that it was unwilling to discuss altering the new, five-year contract. The Employer stated that under the circumstances it would lay off all drivers and helpers at the end of the year and that only the two warehousemen would remain with the storage operation continuing indefinitely.

Between December 14 and 22, the five unit employees who had signed the anti-Union petition each filed Section 8(b)(1)(A) or (3) charges against the Union alleging, among other things, that the Union had failed to properly represent them in negotiations and had not bargained in good faith.⁵

By letter dated December 21, the Union informed the Employer that it understood the Employer would remain in business after December 31, and attached the new, five-year contract. The Union asserted that, based on the terms of the new contract, the two warehouse positions should be offered to current warehouse employees or drivers/helpers in order of their seniority. That same day the Employer responded by letter explaining that it was following the expired contract's language, which called for two seniority lists when conducting layoffs (i.e., one for the drivers/helpers and one for the warehousemen). The Employer again requested that the Union reconsider modifying the new contract so that the delivery operation could remain open in 2016. The Employer stated that, with a few tweaks and clarifications, none of the unit employees had to be laid off.

In an undated letter to the drivers and helpers, the Employer announced that it was ceasing its furniture delivery operation effective December 30. On December 30, the Employer also sent a letter to its customers announcing the closure of its furniture delivery operation effective December 30. The letter explained that it was a partial closure and did not affect the Employer's storage operation. The letter also explained that customers would have to arrange their own pick-up and delivery moving forward. On December 31, by email, the Employer notified the Union that the

⁵ In February 2016, all of these charges were either dismissed by the Region or withdrawn by the employees.

drivers and helpers had been laid off and any eligible employee would receive his severance payment.⁶

After December 30, the Employer continued its warehouse operation and retained the two warehousemen, each of whom who had signed the anti-Union petition and filed charges against the Union, and one of whom had filed the decertification petition. Although there was some evidence suggesting that the Employer's delivery operations had not ceased, it was inconclusive.⁷

On March 9, 2016,⁸ the Region issued a Decision and Direction of Election in Case 01-RD-162954. The Region concluded that the petition should not be dismissed either because the RD petitioner did not appear for the hearing or because there was a contract bar. An election was set for March 24 and unit employees (drivers, helpers, and warehousemen) employed during the payroll period ending March 5 were eligible to vote. On March 11, the Employer submitted a voter list containing two voters' names: the two warehousemen still working for the Employer who had signed the anti-Union petition and filed charges against the Union. On March 24, the decertification election took place and in addition to the warehousemen, six former drivers who had been laid off on December 30 also cast ballots. The ballots of the six laid off drivers were challenged because their names were not on the list of eligible voters. That same day the Board requested that the parties submit position statements explaining why the challenged ballots should or should not be counted.

On March 31, both the Employer and Union submitted position statements concerning the six challenged ballots in the decertification election. The Employer claimed that the six drivers that voted were permanently laid off at the end of 2015 because it permanently had ceased its furniture delivery operation and, therefore,

⁶ According to the Employer's payroll records, eight drivers/helpers were employed during the week ending December 31 and those employees were laid off and received a severance payment.

⁷ In support of its position that it had ceased its delivery operations, the Employer provided evidence that it had canceled its ferry service runs to Nantucket for the summer of 2016. The Employer had reserved numerous ferry tickets far in advance in order to deliver furniture via trucks to Nantucket, which had been a lucrative part of its business. The Nantucket work, much of which was for one client, had accounted for about 20% of the Employer's yearly business. The Employer lost that client when it closed its delivery operation on December 30.

⁸ Subsequently, all dates are in 2016 unless otherwise noted.

they did not have a reasonable expectation of recall. The Employer also pointed out that each of the former employees already had received their severance payments. The Union claimed that from the time that the Employer laid off the drivers and helpers, it had witnessed the less senior warehousemen performing the drivers' work. The Union also asserted that the Employer was required to recall the laid-off drivers pursuant to the parties' new, five-year contract. The Union further alleged that the Employer was engaged in a larger scheme to evade its obligation under the contract with the Union and that the Employer would reopen its delivery operation if it succeeded in ousting the Union.

On April 22, the Region issued a Supplemental Decision and Certification of Election Results in which it concluded that none of the six challenged voters were eligible to vote because they did not have a reasonable expectation of recall as of the election eligibility date. The Region first relied on the fact that the employees had received severance pay, information about unemployment, and health insurance under COBRA to support its conclusion that their layoffs were permanent. The Region also concluded that there was no credible evidence suggesting that the Employer had any plans to resume its delivery operation in the near future.⁹ Based on the votes the two eligible voters cast against Union representation, the Region decertified the Union as the unit employees' exclusive bargaining representative.

On May 11, less than 20 days after the Union had been decertified as the unit employees' exclusive bargaining representative, the Employer resumed its delivery operation.¹⁰ Between May 11 and June 27, the Employer rehired three former unit employees who had signed the decertification petition and filed charges against the Union. On May 15, the Employer sent out a flyer to its customers informing them of the reopening of its delivery operation. Then, between May 25 and June 30, the Employer hired two student/summer helpers and one regular employee for its delivery operation, none of whom had relevant work experience. On July 22, it hired a fourth new employee who was the brother of the anti-Union employee rehired on June 27. This individual had some work experience related to a moving company,

⁹ Regarding the Union's assertion in its position statement that if the challenged ballots were not counted and the Union was decertified, "we will see Ace and Acme trucks rolling again," the Supplemental Decision stated that if such speculation became a reality, the matter could be appropriately addressed by the filing of an unfair labor practice charge.

¹⁰ The Employer admits that once the "poison pill contract" was lifted by virtue of the decertification election, there was no reason not to resume its delivery operation.

however, it was part-time and he did not include the dates of that employment on his application.

Thereafter, the Employer sought applicants through online job postings. A July 29 email confirmed a Craigslist posting by the Employer seeking a “driver/mover” with no commercial driver’s license (“CDL”) required. An August 11 email showed a ZipRecruiter posting by the Employer for a “driver/furniture mover” with no CDL required and pay starting at \$16 per hour. On August 22, another Craigslist posting by the Employer sought a “driver/mover/helper” with no CDL required and pay starting at \$16 an hour. On September 6, the same posting appeared on Craigslist again.

The Employer did not rehire five of its former employees, all of whom the Employer knew had not supported the October 2015 anti-Union petition. These former employees did not apply for rehire. One of these individuals stated he would have applied if he thought the Employer would hire Union supporters. The Employer stated that it would not have hired three of the five even if they had applied. Regarding one of the three, the Employer asserted that it would not have hired him because he previously had worked only as a student for the company and not as a full-time driver. Regarding the other two former employees, the Employer stated they were ineligible for rehire because of their driving history. The Employer claims it would not have rehired one of these drivers because he lost his driving privileges in 2014, after he was involved in an at-fault accident in a company vehicle on December 11, 2013, and because he received two moving violations in his own vehicle in 2013. The Employer did not run the report looking into this employee’s moving violations until March 24, 2015, which was one week before the employees went out on strike. On the day the employees returned from the strike, April 8, 2015, the Employer told this employee he would no longer be driving. However, about two weeks later he returned to driving and continued to drive about one day a week until the layoff. The Employer further claims that it would not have rehired the other driver because he had lost his driving privileges due to at-fault accidents on November 24 and December 17, 2015. However, the employee testified that he was never told he had lost his driving privileges, and he drove until the last day of his employment before being laid off.

Regarding the remaining two employees not rehired, the Employer asserts that it would have considered them for rehire, but it believed they had taken jobs elsewhere shortly after being laid off because they did not file for unemployment compensation benefits. It did not seek them out based on that belief.

Finally, regarding the three former employees that it did rehire, the Employer asserts that these employees had kept in touch with it and inquired about possible job opportunities after the decertification election whereas the other employees did not.

In support of its claim, the Employer provided a phone record showing an incoming call from only one of the former employees on April 26 that lasted 1.8 minutes. The Employer claims that the employee said he and the other two employees that it rehired were interested in jobs with the Employer.

On July 15, the Union filed the charge in the instant case alleging that the Employer had engaged in an unlawful scheme to chill union activity and oust the Union by partially closing its business temporarily and then refusing to rehire unit employees who supported the Union. On October 6, the Union filed a motion requesting that the Region reconsider its Supplemental Decision and Certification of Election Results in Case 01-RD-162954 because the Employer had repeatedly and knowingly made material misrepresentations to the Region in regarding the permanent closure of its delivery operation. The Union noted that the Employer already had rehired at least two of the employees who had cast ballots, but previously had insisted did not have a reasonable expectation of recall.¹¹

ACTION

We conclude initially that the Section 8(a)(3) analytical framework from successorship cases involving discriminatory refusals to hire predecessor employees to avoid a bargaining obligation applies here. Pursuant to that framework, we conclude that the Employer violated Section 8(a)(3) and (1) when it failed to rehire the five former employees after reopening its delivery operation because there is substantial evidence creating the reasonable inference that the Employer's hiring practices were motivated by its discriminatory objective of avoiding a bargaining or contractual obligation with the Union. Thus, the Region should issue complaint, absent settlement.

I. The Section 8(a)(3) Analytical Framework from Successorship Cases Involving Discriminatory Refusals to Hire Predecessor Employees to Avoid a Bargaining Obligation Applies Here.

The evidence here creates the reasonable inference that the Employer's hiring practices beginning in May 2016 were motivated by its desire to avoid any possibility of incurring a bargaining obligation with the Union and, in particular, being obligated to implement the new, five-year contract it had agreed to apply if its business remained open in 2016. The relevant evidence showing the Employer's discriminatory motive includes its specific knowledge of which former employees

¹¹ In reality, the Employer already had rehired three of the six voters who had cast challenged ballots by the date of the Union's motion.

supported the Union, the Employer rehiring only known anti-Union employees, the Employer seeking applicants online rather than contacting its recently laid off and experienced employees, and the pretextual reasons the Employer provided for not contacting its former employees. Moreover, the Employer's intentional misrepresentation in the related R-case proceeding, i.e., that its delivery operation was permanently closed, further supports a finding that it took affirmative steps to avoid reestablishing a bargaining obligation with the Union.

In light of the Employer's apparent objective, we conclude that the proper Section 8(a)(3) analytical framework to apply here can be borrowed from successorship cases where an employer attempts to avoid incurring a successor's bargaining obligation by discriminatorily refusing to hire unionized predecessor employees as a majority of its workforce.¹² Thus, the additional elements that must be satisfied to prove a Section 8(a)(3) violation in a discriminatory refusal-to-hire case involving union "salts" are not applicable here.¹³

II. The Employer Engaged in an Unlawful Hiring Scheme to Avoid Returning Union Supporters to Its Workforce and Preclude Incurring a Bargaining or Contractual Relationship with the Union.

The Board considers several factors in determining whether a successor employer has engaged in discriminatory hiring practices to avoid incurring a bargaining obligation, including: substantial evidence of an employer's union animus; lack of a convincing rationale for refusal to hire predecessor employees; inconsistent hiring practices or other conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the employer conducted its staffing in a manner to prevent it from hiring predecessor employees as a majority of its

¹² See *Custom Leather Designers*, 314 NLRB 413, 418 (1994) (employer that was new incarnation of family business that had just closed and in bankruptcy held to be successor that discriminatorily refused to hire its former, unionized employees in favor of inexperienced strangers to prevent union from attaining majority status and reestablishing bargaining obligation). See also *Planned Building Services*, 347 NLRB 670, 673 (2006), overruled on other grounds *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 6 (Sept. 30, 2014); *Voith Industrial Services*, 363 NLRB No. 116, slip op. at 2, 5-8 (Feb. 17, 2016).

¹³ See *Planned Building Services*, 347 NLRB at 673; *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 985 & n.46 (2007), enf. denied on other grounds 570 F.3d 354 (D.C. Cir. 2009).

workforce.¹⁴ Once the employer's anti-union motive is established, "the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive."¹⁵ In establishing a defense, an employer may show that "it did not hire particular employees because they were not qualified for the available jobs," or it did not have as many unit jobs as there were former unionized employees.¹⁶ At the same time, an employer cannot successfully defend against an allegation that it discriminatorily refused to hire a former unionized employees by claiming that they never applied where the employer's conduct demonstrated that it would have been futile for union supporters to submit applications.¹⁷

Applying the preceding factors here, we conclude that the Employer engaged in a discriminatory hiring scheme to avoid returning Union supporters to its workforce. We also conclude that there is no merit to Employer's primary defense to the charge, i.e., that the former Union supporters did not apply for work, because the Employer's entire course of conduct informed them that applying would be futile.

A. There is Substantial Evidence Showing the Employer's Hiring Practices were Motivated by Union Animus.

Initially, the totality of the circumstances surrounding the Employer's closing and reopening of its delivery operation provide substantial evidence for a strong

¹⁴ See *Planned Building Services*, 347 NLRB at 673 (listing relevant factors to consider in determining whether a successor employer discriminatorily refused to hire unionized predecessor employees to avoid incurring a bargaining obligation), quoting *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989), *enfd.* 944 F.2d 1305 (7th Cir. 1991) (*en banc*), *cert. denied* 503 U.S. 936 (1992).

¹⁵ *Id.*, 347 NLRB at 674.

¹⁶ *Id.*

¹⁷ See, e.g., *State Distributing Co.*, 282 NLRB 1048, 1048 (1987) (finding successor employer had created "climate of futility" excusing the failure of some employees to submit applications"); *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 81 n.10 (1979), *enfd.* in relevant part *sub nom. Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981); *Crawford Container*, 234 NLRB 851, 860 (1978). See also *Wild Oats Markets*, 344 NLRB 717, 718 n.8 (2005) (applying principle in a discriminatory refusal-to-consider or hire case).

inference of the anti-Union motive behind the Employer's hiring practices.¹⁸ Since October 2015, the Employer has had knowledge of exactly which of its former employees either opposed or supported the Union. At that time, it received an anti-Union petition from the warehouseman (b) (6), (b) (7)(C) that had been signed by seven of the ten or so unit employees.¹⁹ Although two signers subsequently withdrew their support for the petition, the Employer's General Manager states he knew the identities of those two individuals. Moreover, in December 2015, the same five employees who continued to support the anti-Union petition each filed a charge against the Union for not properly representing them in negotiations or for bargaining in bad faith with the Employer. While having this knowledge, the Employer made abundantly clear that it would rather close its delivery operation than be bound to the new, five-year contract on which the Union had insisted. Indeed, the Employer sent letters to the unit employees in late August and early December 2015 stating that it would have to close because of the "poison pill" provisions in the new contract, and the Union had rejected its requests to bargain over adjustments to the contract that would have allowed it to stay in business. The Employer then closed its delivery operation so as not to operate under the new, five-year contract. In light of these circumstances, it strains credulity to believe that it was mere coincidence that the Employer was willing to rehire only known anti-Union employees while taking no steps to do the same with known pro-Union employees at a time when it needed additional employees to perform delivery work. The Employer's affirmative avoidance of the Union supporters whose work had proven satisfactory only five months earlier indicates that it deliberately implemented a discriminatory hiring process to ensure it had no bargaining or contractual obligation with the Union.²⁰

¹⁸ See, e.g., *Voith Industrial Services*, 363 NLRB No. 116, slip op. at 2, 31 ("Animus and discrimination may be inferred from the circumstances and need not be established directly."), citing *Sunshine Piping, Inc.*, 351 NLRB 1371, 1390 (2007).

¹⁹ It is not clear whether there were ten or eleven unit employees at the time. One employee who signed the petition, and then revoked his support for it, was not on the Employer's payroll during the last week of December 2015 before the closure of the delivery operation.

²⁰ See, e.g., *Custom Leather Designers*, 314 NLRB at 418 (finding successor, who was new incarnation of same business that had just closed because of financial problems, deliberately hired strangers with no experience through job service agencies rather than its former, unionized employees to deny union majority status); *Voith Industrial Services*, 363 NLRB No. 116, slip op. at 2, 32-33.

B. The Lack of a Convincing Rationale for the Employer's Hiring Practices Further Establishes the Employer's Anti-Union Motive.

The Employer's lack of a convincing rationale for its avoidance of its former, known pro-Union employees further supports finding an anti-Union motive here. Thus, regarding the (b) (6), (b) (7)(C) and one employee who revoked his signature on the anti-Union petition, the Employer asserts it did not contact them believing they were not interested in their former jobs because they had not filed unemployment compensation claims after being laid off. This explanation does not withstand scrutiny where the Employer was posting job openings online. The Employer exerted much more effort to avoid any contact with these two known Union supporters, who it admits it would still consider for rehire, than needed to simply call and ask if they wanted their old jobs. In other words, the Employer preferred to conduct a job search from scratch using online services and then hired inexperienced drivers or helpers off-the-street, most of whom did not have relevant work experience, rather than reach out to experienced employees it had employed only five months ago.²¹ Similarly, this lack of a convincing rationale for its hiring practices applies to a third known Union supporter who the Employer asserts it would not have considered for hire because he had been a student during his employment rather than a full-time driver or helper. That this defense is also a pretext is evident given that the Employer hired two students for its delivery operation in late May and early June 2016. Where, as here, an employer's stated motives for its hiring practices are false, the Board will infer that it was attempting to conceal its true, discriminatory motive.²²

Finally, the Employer asserts that it would not have rehired the remaining two known Union supporters because of their poor driving records while working for it. However, one employee's driving accident and moving violations occurred in 2013, and those incidents were never an issue before the strike in early April 2015. Even then, the Employer assigned the employee driving work after the strike, and he continued to perform that work until he was laid off at the end of 2015. The other employee's driving record reflected recent accidents in November and December 2015.

²¹ See, e.g., *Shortway Suburban Lines*, 286 NLRB 323, 325-26 (1987) (inferring successor's anti-union motive where, among other things, successor chose to hire initial workforce "off the street" rather than experienced, unionized predecessor employees it knew were competent to perform the work), *enfd. mem.* 862 F.2d 309 (3d Cir. 1987).

²² See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Windsor Convalescent Center of North Long Beach*, 351 NLRB at 983-84 & n.39.

However, those incidents did not prevent the Employer from continuing to assign him driving work until the time he was laid off. In any event, the Employer proffered no explanation for refusing to consider either of these former employees as helpers. It had advertised helper job openings and even filled that position with an inexperienced worker.²³ In short, the Employer's continued reliance on pretextual reasons for avoiding any contact with known Union supporters it recently employed bolsters the reasonable inference that the Employer harbored an anti-Union motive.²⁴

C. Additional Evidence Supports a Reasonable Inference that the Employer Conducted its Staffing in a Manner Precluding Known Union Supporters from Being Hired.

Finally, the Employer's material misrepresentations to the Region during the processing of the RD petition also demonstrate that its subsequent hiring practices were in furtherance of the discriminatory objective of avoiding any bargaining or contractual obligation with the Union. Specifically, in its March 31 position statement for the representation case, the Employer repeatedly assured the Region that, as set out in the parties' Closing Agreement, it permanently had closed its delivery operation and, therefore, the six laid off drivers who cast ballots at the election had no expectation of recall and should not have their ballots counted. Relying on the Employer's assurances of a permanent closure, the Region concluded that the laid off drivers were not eligible to vote in the decertification election because they had no expectation of recall.²⁵ Despite assuring the Region that it had permanently closed its delivery operation, on May 11, less than 20 days after the Union had been decertified and the Employer was no longer obligated to honor the

²³ See, e.g., *Concrete Co.*, 336 NLRB 1311, 1311-12 (2001) (successor hiring less experienced predecessor employees or new hires, who had less or no experience in comparison to discriminatees, undermined its asserted defense that it either did not have jobs for the discriminatees or that they were among the least experienced of the predecessor employees).

²⁴ See, e.g., *U.S. Marine Corp.*, 293 NLRB at 671 (finding successor had no convincing rationale to refuse hiring 34 predecessor employees where it "failed to prove its assertion that the employees who were not hired displayed employment histories, health, seniority, or allergenic characteristics that were substantially different from those of the employees who were hired").

²⁵ The Region also based its conclusion that the challenged voters had no expectation of recall on the parties' Closing Agreement and the fact that the Employer had provided the laid off employees with severance pay, information about unemployment, and health insurance under COBRA.

new, five-year contract that was part of the Closing Agreement, the Employer resumed its furniture delivery operation.

By concealing from the Region its intent to reopen its delivery operation on a non-Union basis, the Employer guaranteed itself that only two known anti-Union employees would vote in the decertification election, which would result in it being free of any bargaining or contractual obligation with the Union. Indeed, the Employer acknowledged that it reopened its delivery operation because of the results of the decertification election allowed it avoid the new, five-year contract. Therefore, the Employer knew prior to submitting its March 31 position statement to the Region that it would reopen its delivery operation if the challenged ballots were not counted and the Union was decertified. Yet it misrepresented its position so as to avoid disclosing to the Region its actual plan because doing so would have influenced the Region's decision regarding the challenged ballots.²⁶ By intentionally misleading the Region, the Employer has demonstrated that it will do anything to avoid the Union. Its hiring practices after it reopened its delivery operation in May 2016 are merely the next logical step in that discriminatory scheme.

D. The Employer Cannot Rely on the Five Union Supporters Not Applying for Jobs to Defend Against the Section 8(a)(3) Allegation Where Doing So Would Have Been Futile.

The Employer's primary defense here is that none of the alleged discriminatees applied or otherwise expressed an ongoing interest in working for it as a driver after it reopened its delivery operation. The Employer asserts that it rehired only the former unit employees who kept in touch with it after the closure. The Employer's defense has no merit.

Here, the Employer's entire course of conduct put its former pro-Union employees on notice that it would have been futile for them to ask for their old jobs back. The Employer sent letters to the unit employees in late August and early December 2015 blaming its announced closure on the Union's refusal to bargain modifications to the new, five-year contract. Then, when it reopened its delivery operation in May 2016,

²⁶ See, e.g., *American Can Co.*, 218 NLRB 102, 104 (1975) ("Undoubtedly, if Respondent had reported [a second union's] interest and claim, as it was dutybound to do, no election would have been held and no certification would have issued until the unit placement of lithographic production employees at the Regency plant had been resolved. Apparently it was to avoid this very possibility that information as to the [second union's] claim of representation was withheld.").

the Employer rehired only those employees who it knew had signed and continued to support the October 2015 anti-Union petition. Indeed, one of the five pro-Union employees who the Employer avoided specifically stated that he would have applied if he thought the Employer would hire Union supporters. In short, because it was apparent to the alleged discriminatees that their Union support made it futile for them to ask for their jobs back, their lack of applications is not a defense.²⁷

Moreover, the Employer's hiring practices undermine this attempt at providing a non-discriminatory explanation for its conduct. The Employer embellishes by stating that the known anti-Union employees it rehired had kept in touch with it. The Employer supported this assertion by providing evidence of a short phone call from only one of the three anti-Union employees it rehired. Allegedly, the former employee who called mentioned that the other two anti-Union employees the Employer rehired also wanted their jobs back. Nonetheless, when the Employer needed additional workers beyond these three individuals, it posted job openings online rather than contact any of the five known Union supporters it recently had laid off. By affirmatively avoiding any contact with experienced former employees in favor of off-the-street hires who, except for one new employee, had no relevant work experience, the Employer demonstrated the lengths to which it would go to avoid the Union and its supporters.²⁸

CONCLUSION

In sum, all of the relevant factors establish a reasonable inference that the Employer engaged in unlawful hiring practices to avoid any potential of reestablishing a bargaining or contractual obligation with the Union. In these circumstances, we

²⁷ See *Crawford Container*, 234 NLRB at 860 (“Nor may the rights of former unit employees be made to hinge on their failure to pursue the formal application process which many of their number had reason to believe would be futile, and which record proof manifests would, in fact, have been useless.”). See also *Wild Oats Markets*, 344 NLRB at 718, n.8; *State Distributing Co.*, 282 NLRB at 1048; *Love's Barbeque Restaurant No. 62*, 245 NLRB at 81, n.10.

²⁸ See, e.g., *Custom Leather Designers*, 314 NLRB at 418 (successor employer's failure “to hire experienced, unionized employees, whose work had proved satisfactory in the past, indicates at the very least that its selection process was deliberate and was aimed specifically” at avoiding those employees to preclude incurring a bargaining obligation with their union); *Shortway Suburban Lines*, 286 NLRB at 326 (same).

conclude that the Employer violated Section 8(a)(3) and (1) based on its discriminatory hiring practices. Accordingly, the Region should issue complaint, absent settlement.

/s/
B.J.K.

H://ADV.01-CA-180274.Response.ACE&ACME.  (b) (6), (b)