

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HACIENDA HOTEL, INC. GAMING)
CORPORATION D/B/A HACIENDA)
RESORT HOTEL AND CASINO,)

Respondent,)

AND)

SAHARA NEVADA CORPORATION)
D/B/A SAHARA HOTEL)
AND CASINO)

Respondent,)

AND)

LOCAL JOINT EXECUTIVE BOARD)
LOCAL 226, AND BARTENDERS UNION,)
LOCAL 165, AFFILIATED WITH HOTEL)
EMPLOYEES AND RESTAURANT)
EMPLOYEES, AFL-CIO)

Union.)

No. 28-CA-13274 & -13275

STATEMENT OF POSITION OF
ARCHON CORPORATION,
INTERVENOR ON BEHALF
OF RESPONDENTS.

On May 11, 2018, the National Labor Relations Board (the “*Board*”) requested statements of position from the parties in the above-captioned case following the Ninth Circuit Court of Appeals’ ruling in *Local Joint Executive Board of Las Vegas v. NLRB*, 883 F.3d 1129 (9th Cir. 2018) to remand the Board’s decision in *Hacienda Resort Hotel & Casino*, 363 NLRB No. 7 (Sept. 10, 2015). Please accept this brief as the position statement submitted by Archon Corporation (“*Archon*”), intervenor on behalf of Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino (the “*Hacienda*”) and the Sahara Nevada Corporation d/b/a Sahara Hotel and Casino (the

“*Sahara*”) (collectively, the Hacienda and the Sahara will be referred to herein as the “*Hotels*”).

I. INTRODUCTION

This case arises from the Hotels’ decision to terminate union dues checkoff following the expiration of the collective-bargaining agreements between the Hotels and Local Joint Executive Board Local 226 and Bartenders Union, Local 165 (the “*Union*”). Despite the fact that the Hotels’ decision was consistent with 50 years of precedent, the Ninth Circuit Court of Appeals held that make-whole relief was appropriate. *Local Joint Executive Board of Las Vegas v. NLRB*, 883 F.3d 1129, 1140 (9th Cir. 2018) (“*LJEB IV*”). However, the Ninth Circuit left “the specific contours of make-whole relief for the Board to determine on remand.” *Id.* at 1140 n. 8.

On May 11, 2018, the Board invited the Parties to “file statements of position with respect to the issues raised by the remand.” Archon submits this position statement to address three issues. *First*, Archon submits that any award must be cut off as of the date the Hotels were sold. *Second*, Archon submits that it is entitled to an off-set of any dues actually collected by the Union during the relevant time period. *Third*, additional analysis is needed to determine whether the entities that purchased the Hotels are *Golden State* successors.

Because these issues generally require an evidentiary record that has not yet been developed, Archon requests that this matter be remanded to the Region and that a Notice of Hearing before an Administrative Law Judge be issued.

II. HISTORY OF THE CASE

A. Factual Background

After the Hotels' collective-bargaining agreements with the Union expired on May 31, 1994, the Hotels unilaterally ceased deducting employees' union dues from their paychecks effective June 8, 1995 pursuant to Article 3.03 of the collective-bargaining agreements. (ER 1, 9.)¹

The Hotels' parent corporation (known at the time as "Santa Fe Gaming" and subsequently renamed as Archon Corporation) sold the Hacienda effective August 31, 1995 and the Sahara effective October 2, 1995. The fact and effective date of the sales are not genuinely in dispute. Both deeds of sale are matters of public record with the Clark County Recorder's Office and are thus subject to judicial notice. The Administrative Law Judge found that the Hotels had been sold as part of his original decision in 1996. (ER 10, 16, 47, 113, 120.) As the Union conceded in its Opening Brief to the Ninth Circuit, the Hotels "are defunct and no longer have a contract with the Union or any other union" and that Archon "no longer maintains any union contracts in Las Vegas or elsewhere." (LJEB IV Pet. Br. 17.)

Nor is there any doubt that the sale was an arms-length transaction between unrelated parties. The Union conceded that the purchasers "*are not successors to the [Hotels]*" and are not "*in any way connected to the [Hotels].*" (LJEB IV Pet. Br. 18.)

¹ "ER" references are to the Excerpts of Record the Union filed with its Initial brief to the Ninth Circuit, followed by the applicable page number. References to Santa Fe Gaming Corp., intervenor in the Union's first petition for review in *Local Jt. Ex. Bd. of Las Vegas v. NLRB ("LJEB I")*, 309 F.3d 578, 580, 586 (2001), will be denoted as "SER," followed by the applicable page number. References to the Union's opening brief filed in *LJEB I* will be denoted as "LJEB I Pet. Brief," followed by the applicable page number. References to the Union's opening brief filed in *LJEB IV* will be denoted as "LJEB IV Pet. Brief.")

As stated below, the question of whether the purchasers qualify as successors is a matter in dispute that requires further analysis in compliance proceedings. *See* Sections III(C) and (D), *infra*.

The entities that purchased the properties at issue signed successor collective-bargaining agreements with the Union shortly after the sale, which specifically provided for dues checkoff. (SER 9; LJEB I Pet. Brief, 29.)

B. Procedural Background

On three separate occasions, the Board ruled that the Hotels did not violate Sections 8(a)(1) and (5) of the National Labor Relations Act (“*NLRA*” or “*Act*”) by terminating union dues checkoff upon expiration of the collective bargaining agreements with the Union. *See Hacienda Hotel Inc. Gaming Corp.*, 331 NLRB 665 (2000); *Hacienda Hotel, Inc. Gaming Corp.*, 351 NLRB 504 (2007); *Hacienda Resort Hotel & Casino*, 355 N.L.R.B. No. 154 (2010).

Each time, the Ninth Circuit reversed the Board’s decision and remanded the case for further proceedings consistent with the Court’s opinion. *Local Jt. Ex. Bd. of Las Vegas v. NLRB (“LJEB I”)*, 309 F.3d 578, 580, 586 (2001). *Local Jt. Ex. Bd. of Las Vegas v. NLRB (“LJEB II”)*, 540 F.3d 1072, 1082 (2008); *Local Joint Executive Board of Las Vegas v. NLRB (“LJEB III”)*, 657 F.3d 865 (9th Cir. 2011).

Following the Ninth Circuit’s remand order in *LJEB III*, the Board accepted the Ninth Circuit’s decision on the merits as the law of the case and, pursuant to the Court’s instructions, the Board determined the following relief was appropriate given the unusual circumstances of the case: the Hotels were ordered to cease and desist unilaterally

terminating dues checkoff upon the expiration of their agreement with the Union, to bargain with the Union before making unilateral changes to unit employees' terms and conditions of employment, to restore dues checkoff, and to post a remedial notice. And citing its "broad authority" under Section 10(c) of the Act to devise remedies that "effectuate the policies of the Act" and its "broad discretion to fashion 'a just remedy' to fit the circumstances of each case it confronts," the Board declined to require the Hotels to reimburse the Union for any dues Employers did not check off. (ER at 5.) In support of its decision not to impose retroactive "make whole" relief, the Board offered the following rationale:

Properly rationalized or not, the rule in *Bethlehem Steel* had been in place for over 50 years until it was recently overruled in *Lincoln Lutheran of Racine*. Employers, like the Respondents here, have relied upon that rule when considering whether to cease honoring dues-checkoff arrangements following contract expiration. Although the validity of *Bethlehem Steel* had been called into question, the Respondents ceased checking off dues in 1995--approximately 16 years before the court's decision in this case. At that time, the Respondents could not have foreseen the protracted litigation of this issue before the Board and the Ninth Circuit, culminating in a decision by the court finding, contrary to *Bethlehem Steel* and its progeny, that the Respondents committed an unfair labor practice when they ceased dues checkoff upon contract expiration. In these circumstances, we find that it would not be appropriate to order make-whole relief, which would carry with it a requirement that compound interest be paid on all amounts due. In addition, we find that such relief is not necessary to effectuate the purposes of the Act; **the Respondents believed, correctly, that they were following settled Board law at the time they acted,** and there is no reason to believe that they will not continue to abide by Board law. For these reasons--which are consistent with the Board's recent decision in *Lincoln Lutheran of Racine* to apply the overruling of

Bethlehem Steel only prospectively [citation omitted] --we decline the General Counsel's and the Charging Party's requests for dues reimbursement, as well as the Charging Party's request that the Respondents reimburse the employees for any additional expenses they incurred by reason of the Respondents' repudiation of the dues-checkoff agreements (emphasis added).

363 NLRB No. 7 at *13.

The Ninth Circuit reversed this ruling as well and remanded the case to the Board “to award the standard remedy of make-whole relief.” 883 F.3d at 1140. The Ninth Circuit specifically left “the specific contours of make-whole relief for the Board to determine on remand.” *Id.* at 1140 n. 8. The Ninth Circuit also stated that “[a]ny disputes that arise concerning the calculation or amount of relief should be resolved promptly in compliance proceedings.” *Id.* at 1140.

III. ARGUMENT

A. Any Make-Whole Award Must be Cut Off As of the Date the Hotels Were Sold.

As a general rule, a “make-whole” remedy is intended “to return [the aggrieved party] to the status quo that would have existed absent the unfair labor practice.” *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *Sever v. NLRB*, 231 F.3d 1156, 1167 (9th Cir. 2000) (“Clearly, the Board’s goal in proceedings like this must be to do its best to restore the status quo ante by reconstructing the circumstances that would have existed but for the labor abuses.”). However, a make-whole remedy is not intended to afford an aggrieved party greater rights than those to which he or she would have been

entitled otherwise. *Memphis Truck & Trailer*, 284 NLRB 900 (1987); *Steelcon*, 266 NLRB 881 (1983).

In accordance with this general rule, the Board has consistently held that an employer's backpay liability ends when the employer lawfully discontinues its operations. *See, e.g., G&T Terminal Packaging Co.*, 356 NLRB 181 (2010) (holding that because the employer's potato-packaging machine would have been dismantled for legitimate economic reasons by January 31, 1996, the period of time for which the employer was liable for backpay ended on that date); *Williams Motor Transfer, Inc.*, 284 NLRB 1496 (1987) (holding that under normal circumstances, an employer's backpay liability ceases as of the closing of the facility where the aggrieved employee worked).

Courts across the country have reached the same result. *NLRB v. Master Slack Corp. and/or Master Trousers*, 773 F.2d 77, 83 (6th Cir. 1985) (holding that Board erred in extending backpay award past the point when employer shut down the facility where the improperly-discharged employees worked); *Bales v. NLRB*, 914 F.2d 92 (6th Cir. 1990) ("It is improper, however, to award back pay if an employer can show that even if employees had been treated with total fairness they would have been discharged at some later date."); *M.S.P. Indus. v. NLRB*, 568 F.2d 166 (10th Cir. 1977) ("Back pay is awarded only for the period during which the worker would have worked in the absence of discrimination.")

Similarly, where an employer is found to have unlawfully terminated contributions to a pension or health and welfare trust fund, the resulting "make whole" remedy is cut off when the employer lawfully ceases doing business. *See Emsing's Supermarket, Inc.*,

284 NLRB 302 (1987) (requiring employer to pay all delinquent contributions to a pension fund and health and welfare fund through the date the employer closed its business); *Laimbeer Packaging Co.*, 339 NLRB 177 (2003) (“In as much as the Flint facility was closed on the same date as the Respondent ceased paying contractually required benefits (December 11, 2001), the Respondent shall only be required to make whole the employees at that facility and the funds for benefits that had accrued prior to the date of closure.”).

Using the same rationale, it follows that an employer’s obligation to remit dues that should have been withheld pursuant to a dues checkoff provision ends when the obligation to deduct dues ends. *See, e.g., Plymouth Court*, 341 NLRB 363, 363 (2004) (fashioning make-whole remedy to end upon “the expiration of the July 8, 2002-July 8, 2005 collective-bargaining agreement, with interest” because that is the date the duty to withhold dues ended).

In this case, any make-whole remedy assessed against Archon must be cut off as of the respective sale dates of the Hotels. There is (or at least should be) no dispute that the sale of the Hotels was the result of bona fide, arm’s length negotiations between unrelated entities.² Accordingly, as of the effective date of each sale, Archon ceased

² There is no evidence that Archon was an alter ego or single employer with the Hotels’ purchasers and, as stated above, the Union has previously conceded that the entities are not “in any way connected” to the Hotels. At a minimum, though, questions concerning the status of Archon’s ongoing business operations as an alter ego, single employer, or successor employer are most appropriately addressed during an evidentiary compliance hearing. *Williams Motor Transfer, Inc.*, 284 NLRB 1496 (1987) (citing *Hopkins Hardware*, 271 NLRB 175 (1984); *Southern Envelope Co.*, 246 NLRB 423 (1979); *Coast Delivery Service*, 198 NLRB 1026 (1972)).

employing the Hotels' employees and its duty to withhold dues and remit them to the Union expired. To hold that Archon's liability for unremitted dues continued even after its business operations closed for legitimate business reasons would afford the Union with greater rights and relief than it would have otherwise received irrespective of the unilateral cessation of dues checkoff.

To avoid such an unjust and result, any make whole award issued by the Board should be cut off effective August 31, 1995 for employees who worked at the Hacienda and effective October 2, 1995 for employees who worked at the Sahara.

B. Archon is Entitled to a Set Off In an Amount Equal to The Dues Collected by the Union During the Relevant Period of Time.

Furthermore, any make whole remedy assessed by the Board must include an offset in an amount equal to the dues the Union actually collected from its members. *A.W. Farrell & Son*, 361 NLRB No. 162 n. 3 (2014) ("In order to avoid a double recovery by the Union, payment shall be offset by dues the Union collected for the compliance period on behalf of employees covered by the dues payment order."); *Remgrit Corp. & Retail*, 297 NLRB 803 (1990) ("These dues payments ... may be offset by the amount of dues voluntarily paid to IMOWU by the employees during this period) (citing cases); *Ogle Protection Servs.*, 183 NLRB 682 (1970) ("To insure against a windfall to the Union, we shall specify that the Respondents' dues reimbursement obligation, with accompanying right to offset, is not applicable to employees, if any, who voluntarily paid dues to the

Union during any or all of the pertinent period.”). The undersigned is not aware of any authority to the contrary.

The same outcome is warranted here. To prevent a windfall to the Union, Archon is entitled to offset its make-whole liability by the amount of dues the Union actually collected from the Hotels’ employees for the period of time between the date the Hotels terminated dues checkoff thru the date the Hotels were sold. The precise amount of the offset may be determined during compliance proceedings.

C. Further Analysis Is Required As to Whether the Entities that Purchased the Hotels are Golden State Successors.

“Under *Golden State [Bottling Co. v. NLRB]*, 414 U.S. 168 (1973)], a successor employer with notice of an existing unfair labor practice charge against its predecessor can be held accountable to remedy those past wrongs.” *Amersig Graphics, Inc.*, 334 NLRB 880, 882 (2001). “It is the burden of the successor employer to establish that it lacks knowledge of unfair labor practices pending at the time of purchase.” *Id.* (citing *Proxy Communications*, 290 NLRB 540 fn. 2 (1988), *enfd.* 873 F.2d 552 (2d Cir. 1989); *Robert G. Andrew, Inc.*, 300 NLRB 444 (1990)).

In this case, the Hacienda was sold to Pinkless, Inc., a subsidiary of Circus Circus Enterprises. Shortly after the sale, Pinkless, Inc. entered into a successor collective-bargaining agreement with the Union that specifically provided for dues-checkoff. Pinkless, Inc. continued to operate the Hacienda Resort Hotel and

Casino for a period of time but ultimately determined to demolish the casino on December 31, 1996 and to build the Mandalay Bay in its place.

Likewise, the Sahara Hotel and Casino was sold to Gordon Gaming Corporation, a Nevada corporation belonging to William Bennett. Gordon Gaming also contracted with the Union to allow dues-checkoff and continued to operate the casino substantially the same workforce as Respondent Sahara Nevada Corporation. The property has since been sold two times and currently operates as the SLS.

Both Pinkless, Inc. and Gordon Gaming knew about the instant dispute when it purchased the respective Hotels and thus qualify as *Golden State* successors.

D. Archon Requests an Evidentiary Compliance Hearing to Determine the "Contours" of the Make-Whole Award.

Admittedly, the issues raised in this position statement depend, at least in part, on evidentiary issues for which no record has been developed. In particular, to determine the precise contours of the relief, the Board must determine (1) the amount of fees the Union actually collected during the relevant period of time; and (2) which union members actually executed and submitted dues checkoff authorizations and (3) the period of time during which each person was employed. Furthermore, to the extent the Union seeks a windfall by extending the scope of the make-whole remedy beyond the sale of the Hotels, the Board must examine (1) the date the sales were effective; (2) whether the purchasers continued to operate the Hotels, each with a substantially identical workforce and to what extent the employees of each workforce continued to pay dues to the Union;

and (3) whether the purchasers constituted joint employers with the Hotels. *See NLRB v. Master Slack and/or Master Trousers Corp.*, 773 F.2d 77 (6th Cir. 1985) (“Questions relating to the exact amount of back pay owing (including whether ... at some reasonably determinable date employment with [the company] would not have been available because [company] operations would have ceased for independent, non-discriminatory reasons) are prematurely raised in [an] enforcement petition. Those issues may be explored in a compliance proceeding.”) (citing *Great Chinese American Sewing Co. v. NLRB*, 578 F.2d 251, 255-256 (9th Cir. 1978)); *Darlington Mfg. Co. v. NLRB*, 397 F.2d 760 (4th Cir. 1968) (“The Board also recognized that the petitioners might have a superseding, lawful reason for terminating or reducing back pay liability, such as showing that as of a particular date Darlington would have closed its mill or laid off employees even if they had not voted for the union. Provision is made in the Board's order for an opportunity to show mitigating circumstances at the compliance stage of the proceeding.”)

For these reasons, Archon respectfully requests that this matter be remanded, with instructions consistent with the arguments set forth above, to compliance and that a hearing be set before an administrative law judge to take evidence on the foregoing issues.

IV. CONCLUSION

For the reasons set forth above, Archon Corporation respectfully requests the following relief:

1. That the Board enter a remedial order requiring Archon to reimburse the Union for all dues it failed to deduct and remit pursuant to the dues-checkoff provision of the collective-bargaining agreement between the date the company unilaterally ended dues checkoff on June 8, 1995 and the date the relevant Hotel was sold (August 31, 1995 for employees employed at the Hacienda and October 2, 1995 for employees employed at the Sahara), minus any amounts actually collected by the Union for the relevant period of time;

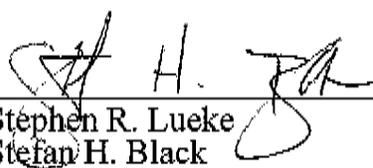
2. That the Board include in the remedial order that Archon is permitted to recoup from the relevant employees any dues it is required to pay pursuant to the Board's remedial order;

3. That the Board remand this case and set an evidentiary hearing to resolve the anticipated disputes regarding the calculation or amount of relief to be paid.

Dated: June 7, 2018

Respectfully submitted,

FORD & HARRISON LLP

By: 

Stephen R. Lueke
Stefan H. Black
Attorneys for Archon Corp.,
Intervenor on Behalf of
Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Archon Corporation, Intervenor on behalf of Respondent's Statement of Position on Remand was filed by e-filing with the Board and that the original plus 8 copies were served by Federal Express overnight on the following:

The Hon. Farah Z. Qureshi Associate Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

In addition, copies were duly sent by facsimile and overnight mail (via Federal Express) to all parties listed below on July 7, 2018. The partes were notified telephonically of this electronic filing.

Andrew J. Kahn, Esq. Richardson G. McCracken, Esq. McCracken, Stemerma & Holsberry, LLP 595 Market Street, Suite 1400 San Francisco, CA 94105 Tel: (415) 597-7200 Fax: (415) 597-7201	Cornele A. Overstreet, Regional Director NLRB, Region 28 2600 N. Central Avenue, Suite 1400 Phoenix, AZ 85004 Tel: (602) 640-2160 Fax: (602) 640-2178
Kimberly C. Weber, Esq. Unite Here, Local 100 595 Market Street, Suite 800 San Francisco, CA 94105-2813	

June 7, 2018

FORD & HARRISON LLP

By: _____

Stephen R. Lueke
Stefan H. Black
Attorneys for Archon Corp.,
Intervenor on Behalf of Respondents.