

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: February 24, 2017

TO: William B. Cowen, Regional Director  
Region 21

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

SUBJECT: Star Fisheries 524-5056-1200  
Case No. 21-CA-178541 524-5056-1400  
524-5079-2831  
524-8365-2000  
524-8372-5033

This case was submitted to Advice regarding whether Star Fisheries (“the Employer”) hired permanent replacements during an economic strike with an independent unlawful purpose under the Board’s decision in *Hot Shoppes*.<sup>1</sup> We agree with the Region, applying the Board’s reasoning in *American Baptist Homes of the West d/b/a Piedmont Gardens*,<sup>2</sup> that the Employer hired permanent replacements with an independent unlawful purpose, and, therefore, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(3).<sup>3</sup> The Region should also use this case to urge the Board to overrule *Hot Shoppes* and conclude that an employer’s permanent replacement of economic strikers is inherently destructive of employees’ statutory rights absent the employer’s legitimate and substantial business justification.

FACTS

The Employer processes and ships fresh and frozen seafood from its San Pedro, California facility to grocery stores and other merchandisers throughout Southern California. The Employer and Teamsters Local 572 (“the Union”) have a longstanding bargaining relationship, with the Union having represented a unit of drivers and a

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<sup>1</sup> 146 NLRB 802, 805 (1964).

<sup>2</sup> 364 NLRB No. 13 (May 31, 2016).

<sup>3</sup> The Region will also allege that the strike converted to an unfair labor practice strike soon thereafter due to the Employer’s unlawful conduct.

unit of dockworkers<sup>4</sup> at the facility for over twenty years. Prior to the expiration of the most recent contracts, the Employer and the Union had not had any major issues in their collective-bargaining relationship.

In 2011, after the Employer's previous long-term owner died, his wife became president and co-owner of the company. In December 2013, after the Union requested to open negotiations on the near-expired contracts, the Employer sent the Union a "Notice of Termination of Agreement," in an attempt to terminate each of the collective-bargaining agreements and end the Employer's legal obligation to bargain with the Union. Specifically, the Employer noted that it regretted terminating the Union contracts but that "the current business environment dictate[d] such action" and the Employer thanked the Union "and [its] team for [their] past service." Although the Union convinced the Employer to meet on or around January 22, 2014, the Employer stated that it was not interested in bargaining with the Union, as the Employer was not going to renew the Union contracts. Only after the Union explained the Employer's legal bargaining obligation did the Employer appear to understand its duty to bargain and take negotiations seriously, meeting multiple times throughout 2014 and 2015. However, in May 2015, in-person negotiations broke down, and, after the Employer sent proposals in September 2015 that the Union contends were made in bad faith, no further bargaining took place.

A few months later, around Thanksgiving 2015, the Employer's annual busy season began. The Employer often employs temporary employees to help with the excess work during the busy season, which ends after New Year's Day at which time business drops off considerably. At the height of the 2015 season, on December 18, the Union went on strike over the failure to reach contracts with the Employer. Approximately 22 drivers and three employees from the dockworkers unit (two telephone salesclerks and one dockworker) participated in the strike.

That same day, the Employer began using replacement drivers sent from two separate temporary staffing agencies.<sup>5</sup> Although the Employer now asserts that the replacement drivers were permanent from the beginning of their assignments, they remained employees of their respective temporary agencies when they commenced working at the Employer's facility. Accordingly, the replacement drivers were not placed on the Employer's payroll, did not fill out any Employer new hire paperwork, and did not receive an employee handbook or other Employer policy information. Nor did the Employer's (b) (6), (b) (7)(C)—who was responsible for the replacement

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<sup>4</sup> The dockworkers unit includes merchandisers, telephone sales representatives, and other employees.

<sup>5</sup> There is no evidence that the Employer replaced the (b) (6), (b) (7)(C) or the (b) (6), (b) (7)(C).

drivers in the early days of the strike—say anything to the temporary agency drivers about permanent employment when they began working for the Employer. During the first few weeks of the strike, there was significant turnover among the temporary replacements due to no shows, poor job performance, and quits and the (b) (6), (b) (7)(C) noted that the Employer struggled to make sure it got all of its deliveries out.

Throughout the strike, the Employer repeatedly made appeals to strikers to abandon the Union and the strike in exchange for their jobs and enhanced wages and benefits. For instance, the Employer told a striker in December 2015, shortly after the strike began, “[y]ou have your job here if you want it. Just go to the Union and sign the form that you renounce the Union, and bring it back to me.” The Employer reiterated this message to the striker in February 2016.<sup>6</sup> The Employer similarly told another striker in February, “I can give you your job back. Everything will be the same. Same benefits, same vacation, as long as you come to work without the Union.” The Employer told other strikers that they would receive even better pay and benefits if they abandoned the Union. For example, the Employer told a striker in January that, “[w]e can offer you benefits here at the company” and that the Union was “lying to you guys about the benefits that we are offering you.” The Employer promised another striker in February that it would give (b) (6), (b) (7)(C) a \$2 raise if (b) (6) abandoned the strike and returned to work.

The Employer blamed the Union for lost business it suffered during the early days of the strike, specifically, the loss of two of its main clients, Trader Joe’s and Stater Brothers. The Employer contended that the loss was “thanks to the Union” and a direct result of the strikers’ “despicable” conduct. Indeed, the Employer later told two strikers that they had abandoned their jobs by striking and had “done a lot of damage to the company. Because of this damage, the owner isn’t willing to offer any of you your jobs back.” When one of the employees asked whether the two strikers had personally caused damage to the business, the Employer clarified, “[n]o, I mean all of you, the drivers and the Union.”

Things settled down when the Employer’s busy season ended in early January and the same temporary drivers were seen showing up to work each day. At that time, and despite the seasonal downturn in business, the Employer began “buying out” temporary replacement drivers from their staffing agency contracts, at considerable cost to itself, and converting those temporary replacements to permanent hires with the Employer. In total, the Employer converted 17 temporary agency drivers, placing them directly on its own payroll, at a cost of approximately \$63,000—the amount that was required to buy out the employees’ temporary contracts before they had worked the minimum number of hours with the Employer.

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<sup>6</sup> Herein, all dates are in 2016 unless noted.

The Employer continued to buy out temporary drivers for much of the duration of the strike despite the fact that it would have incurred no fee had it waited for the temporary drivers to work the requisite number of hours per the staffing agency contracts. Notably, on January 18, when several temporary drivers expressed reservations about permanent employment status because of anxiety about having to work alongside the strikers, the Employer assured them they need not worry about the strikers returning to work. The Employer also offered the permanent replacements a higher wage scale than what it had provided under the Union contracts because, it reasoned, it was no longer bound by the Union's pension and insurance plans. The Employer filed an RM petition in June.<sup>7</sup>

On July 7, after approximately eight months on strike, the Union made an unconditional offer, on behalf of 18 striking employees, to return to work. The Employer had not told the Union that it intended to permanently replace the strikers nor had it established a preferential hiring list. Thus, although the Union was aware that the Employer was initially using temporary drivers, it had no knowledge or way of knowing that the Employer had hired permanent replacements for any or all unit employees, since the replacement drivers were first hired as temporaries, experienced high turnover, and did not initially wear Employer uniforms. And, although the Employer initially represented to the Region and the Union that it was no longer employing temporary agency employees, it later admitted to the Union in a letter dated October 21 that it was, in fact, still using two temporary staffing agency drivers at that time. Both of those temporary drivers were performing unit work on the date the Employer refused reinstatement to former strikers and through the date of the Region's submission to Advice.

### ACTION

We agree with the Region that the Employer violated Section 8(a)(1) and (3) of the Act by permanently replacing and refusing to reinstate striking employees with an independent unlawful purpose, i.e., in retaliation for their strike activity and to prevent employees' future protected concerted activity by ridding itself of the Union. Thus, the Region should issue complaint, absent settlement.

The right to strike is protected by Section 7 as repeatedly recognized by Congress and the courts.<sup>8</sup> Thus, "an employer's discouragement of employee participation in a

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<sup>7</sup> The RM petition is currently blocked by the Employer's unfair labor practices.

<sup>8</sup> See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967) ("[t]he economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234-36 (1963) (citing cases).

legitimate strike constitutes discouragement of membership in a labor organization within the meaning of Section 8(a)(3).<sup>9</sup> Moreover, an employer's refusal to replace strikers upon their unconditional offer to return to work would tend to discourage employees' participation in a strike.<sup>10</sup>

An employer violates Section 8(a)(3) when it refuses to immediately reinstate economic strikers upon their unconditional offer to return to work unless it can demonstrate that it has a "legitimate and substantial justification" for doing so, including its need to continue its business by permanently replacing the strikers.<sup>11</sup> In *Hot Shoppes*, the Board held that during an economic strike, an employer cannot permanently replace striking workers when the hiring was motivated by an "independent unlawful purpose."<sup>12</sup> Recently, in *Piedmont Gardens*, the Board clarified what it meant by an "independent unlawful purpose," finding that term to include "an employer's intent to discriminate or to encourage or discourage union membership," and that it "does not require that the unlawful purpose be unrelated or extrinsic to the parties' bargaining relationship or the underlying strike in order to fall within the *Hot Shoppes* exception."<sup>13</sup> In *Piedmont Gardens*, the Board found that the employer's purposes for hiring permanent replacements—to punish the strikers and to avoid future strikes—were unlawful under the Act; thus its refusal to reinstate the striking workers violated Section 8(a)(1) and (3).<sup>14</sup> Specifically, the Board in that case considered the employer's statements that it had hired permanent replacement employees in order "to teach the strikers and the Union a lesson" and because it "wanted to avoid any future strikes, and this was the lesson that they

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<sup>9</sup> *Capehorn Industry*, 336 NLRB 364, 365 (2001).

<sup>10</sup> *See id.*

<sup>11</sup> *See American Baptist Homes of the West d/b/a Piedmont Gardens, Inc.* 364 NLRB No. 13, slip op. at 3 (May 31, 2016). In contrast, strikers who have been engaged in an unfair labor practice strike are entitled to reinstatement to their former jobs upon an unconditional offer to return to work. *See, e.g., NLRB v. Int'l Van Lines*, 409 U.S. 48, 50-51 (1972); *Dorsey Trailers, Inc.*, 327 NLRB 835, 856-57 (1999) (ordering reinstatement of unfair labor practice strikers who made unconditional offer to return to work), *enforced in relevant part*, 233 F.3d 831 (4th Cir. 2000).

<sup>12</sup> *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964).

<sup>13</sup> *Piedmont Gardens*, 364 NLRB No. 13, slip op. at 5-6, 7.

<sup>14</sup> *See id.*, slip op. at 6-7.

were going to be taught.”<sup>15</sup> The Board found these statements established the employer’s independent unlawful motive—retaliation against striking employees and a desire to interfere with employees’ future protected activity.<sup>16</sup>

An employer’s conduct during a strike could also establish its purpose for permanently replacing economic strikers. For instance, an employer’s secrecy in hiring replacement employees can be indicia of an employer’s unlawful motive.<sup>17</sup> Additionally, an employer’s setting of improved terms and new wages for permanent replacements—an independent violation of the Act if done to undermine the union,<sup>18</sup> could also establish the employer’s intent to retaliate against the strikers and discourage union membership.

Here, there is ample evidence that the Employer’s decision to permanently replace the strikers was motivated by an independent unlawful purpose to punish the employees for striking and interfere with their future protected activity by eliminating its bargaining obligation to the Union. Indeed, the Employer has been attempting to rid itself of the Union since contract negotiations began in December 2013.

First, the Employer’s Section 8(a)(1) statements and conduct to the strikers themselves, including its appeals to abandon the Union, demonstrate its intent to use the strike to rid itself of employees’ future protected concerted activity and the Union. For instance, the Employer repeatedly told strikers that they could return to their jobs if they resigned from the Union. The Employer also tried to entice the strikers to

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<sup>15</sup> *See id.*, slip op. at 7.

<sup>16</sup> *Id.*

<sup>17</sup> *See Church Homes Inc.*, 350 NLRB 214, 215-16 (2007) (accepting as law of the case on remand from circuit court that “logical implication” of employer secrecy was unlawful motive where employer hired a large number of permanent replacements as quickly as possible without informing the union), *enforced*, 303 F. App’x 998 (2d Cir. 2008).

<sup>18</sup> *Service Elec. Co.*, 281 NLRB 633, 639 n.11 (1986). To find a violation of Section 8(a)(1), the Board will look at, among other factors, whether the employer has committed other unfair labor practices. *See, e.g., Beverly Health & Rehab Services*, 335 NLRB 635, 638 (2001) (finding employer violated Section 8(a)(1) by placing an advertisement offering higher wages to replacements where the employer committed ULPs before and shortly after the ad was placed and ad was designed to undermine union), *enforcement denied*, 317 F.3d 316 (D.C. Cir. 2003).

abandon the Union by offering them better benefits and wages, including offering one striker a \$2 raise, if they abandoned their Union activity and returned to work. At the same time, the Employer sought to punish the strikers for their Union activity. The Employer blamed the loss of two of its main customers, Trader Joe's and Stater Brothers, on the Union and the strikers' "despicable" conduct and told two strikers they would not be reinstated because of the strikers' "damage to the company."

Second, the Employer's decision to permanently replace the strikers only after its busy season and loss of two large clients further establishes the Employer's motive to punish them for going out on strike and to break the Union and not, as it claims, to keep its business going. Indeed, the Employer utilized temporary employees through its busy season and only later converted them to permanent status by buying out the drivers' contracts with the temporary staffing agencies. We reject the Employer's after-the-fact claim that its replacements were permanent when they began work at the beginning of the strike. The Employer's assertion that it told the temporary agency drivers they were permanent employees is belied by the (b) (6), (b) (7)(C)'s denial of such statements, as well as the fact that, at the time their assignments with the Employer commenced, the temporary agency drivers were employees of their respective temporary staffing agencies and not of the Employer. Moreover, the Employer's need to assuage several replacement drivers' reservations about working with former strikers before those drivers would accept permanent positions further disproves the Employer's assertion that the replacements were always permanent. Thus, despite the Employer's argument to the contrary, the drivers assigned to perform unit work at the beginning of the strike were temporary employees who became permanent only after the Employer decided to punish the strikers for supporting the strike and the Union.

Third, the Employer incurred considerable costs by buying out its temporary workforce and converting them to permanent status, which is also indicative of the Employer's unlawful motivation for permanently replacing the strikers.<sup>19</sup> The Employer converted 17 temporary agency drivers, placing them directly on its own payroll, at a cost of approximately \$63,000. The Employer continued to buy out employees through March—yet the contracts with each agency show that if the Employer had waited long enough, it would have been able to bring the employees from each agency onto its payroll without incurring a fee.

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<sup>19</sup> See, e.g., *Bernard Dalsin Mfg. Co.*, Case 18-CA-18797, JD-27-09, ALJD slip op. at 28-29, 2009 WL 1886693 (2009) (employer had independent unlawful purpose under *Hot Shoppes* because it offered no legitimate rationale for its quick conversion of temporary replacements to permanent status at considerable financial cost to itself) (adopted by the Board pro forma in absence of exceptions).

Fourth, the Employer offered striker replacements a higher wage scale than what it had provided to the striking employees, thereby committing an independent violation of Section 8(a)(1) and further establishing its unlawful motive. Although the Employer would normally have discretion to set new terms and conditions of employment for permanent replacements it lawfully hired, here, the Employer's numerous unlawful statements to striking employees in violation of Section 8(a)(1) demonstrate that its offer of higher wages to permanent replacements was designed to undermine the Union.<sup>20</sup> Indeed, the Employer's reasoning that it could offer higher wages because it was no longer bound by the Union's pension and insurance plans exposes its ultimate aim to get rid of the Union.

Fifth, the Employer made misrepresentations, meant to hide its continued use of temporary agency employees, to both the Region and the Union. The Employer misrepresented to the Region that it had ceased using temporary agency drivers and, after the Union made an unconditional offer on behalf of 18 striking employees to return to work, the Employer concealed from the Union that it was still using temporary agency drivers. Only later, after multiple information requests from the Union because of the Employer's factual discrepancies, did the Employer reveal that it was, in fact, still using two temporary staffing agency drivers at that time. The fact that the Employer tried to hide this information from both the Region and the Union supports the conclusion that the Employer did not want the Union to know that there were any positions that could have been filled by former strikers.<sup>21</sup>

Finally, in addition to its failure to reinstate any employees despite having two positions staffed by temporary drivers, the Employer failed to establish a preferential hiring list in violation of Section 8(a)(1).<sup>22</sup>

For all of these reasons, we agree with the Region that the Employer permanently replaced the striking employees with an independent unlawful purpose under *Hot Shoppes* as interpreted and applied in *Piedmont Gardens*. Therefore, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(3) of the Act by refusing to reinstate its employees who went on strike.

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<sup>20</sup> See *Service Elec. Co.*, 281 NLRB at 639 n.116. See also *Beverly Health & Rehab Services*, 335 NLRB at 638.

<sup>21</sup> See, e.g., *Church Homes Inc.*, 350 NLRB at 215-16.

<sup>22</sup> See *Laidlaw Corp.*, 171 NLRB 1366, 1369-70 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969).

The Region should also use this case as a vehicle to urge the Board to overturn *Hot Shoppes* and conclude that permanently replacing strikers is inherently destructive of statutory rights absent an employer's legitimate and substantial business justification.<sup>23</sup> Thus, if the Board were to adopt this test and apply it retroactively, the permanent replacement of these employees was inherently destructive.<sup>24</sup>

The Employer has not demonstrated a substantial and legitimate business justification for permanently replacing the strikers. Thus, the Employer has not provided any evidence that it needed to hire permanent replacements in order to continue operating, and it was able to easily procure sufficient temporary workers to operate its business during the strike through two temporary staffing agencies, which it routinely used during the busy season to supplement its own workforce. In these circumstances, where there was an abundance of qualified temporary labor available, such that the hiring of permanent replacements was clearly not necessary to carry on the operation of its business during the strike, the harm to employee rights outweighs the Employer's business interests, and its conduct violated Section 8(a)(3). Accordingly, the Region should issue a Section 8(a)(3) complaint, absent settlement, urging the Board, in the alternative, to overrule *Hot Shoppes* consistent with the analysis set forth in *United Site Services* and articulated herein.

/s/

B.J.K.

ADV.21-CA-178541.Response.StarFisheries (b) (6), (b) (7)

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<sup>23</sup> See generally (b) (7)(A)  
(b) (7)(A)

<sup>24</sup> See, e.g., *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 16-17 (Dec. 11, 2014) (Board's usual practice is to apply new policies and standards "to all pending cases in whatever stage[;]" remanding to ALJ for further proceedings and allowing parties to introduce evidence relevant to new standard concerning employee use of email).