

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TWIN AMERICA, LLC, CITY SIGHTS
NY, LLC, AND GRAY LINE NEW YORK
TOURS, INC., AS A SINGLE EMPLOYER,
AND JAD TRANSPORTATION, INC., AS
JOINT EMPLOYERS

and

Case Nos. 02-CA-190704
02-CA-196228
02-CA-198436

TEFE KWAMI AMEWO, an Individual

UNITED SERVICE WORKERS UNION, IUJAT, LOCAL 1212

and

Case No. 02-CB-190376

TEFE KWAMI AMEWO, an Individual

UNITED SERVICE WORKERS UNION, IUJAT, LOCAL 1212

and

Case No. 02-CB-199847

ARTHUR Z. SCHWARTZ, an Individual

GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE

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The General Counsel of the National Labor Relations Board (General Counsel) submits this brief in support of his exceptions to the decision of the Administrative Law Judge in this matter, dated March 20, 2019 (“ALJD”).¹

I. Statement of Case

Pursuant to Section 102.46(a)(2)(i) of the National Labor Relations Board’s Rules and Regulations, the General Counsel sets forth the following statement of the case in the form of a concise summary of the facts material to the questions presented by the General Counsel’s Exceptions to the Decision of the Administrative Law Judge.

The Amended Consolidated Complaint in the matter (“Complaint”) alleged, *inter alia*, that Respondent Employers Twin America, LLC (“Twin America”), Gray Line Tours New York, Inc. (“Gray Line”), and City Sights NY, LLC (“City Sights”),² violated Sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act (“Act”) by (1) laying off the ticket agents historically represented by Transit Workers Union, Local 225 (“Local 225”) because of their union membership, (2) entailing the seniority dates of the Local 255 ticket agents³ because of their union membership,

¹ Citations to the record transcript and ALJD will be of the form “Tr. x:y–w:z” or “Tr. x:y–z” and “ALJD x:y–w:z” or “ALJD x:y–z” where *x* and *w* denote page numbers and *y* and *z* designate line numbers. Citations to exhibits will be of the form “G.C. Exh. *x*,” “Er. Exh. *y*,” “U. Exh. *z*,” or “Jt. Exh. *w*,” for exhibits from, respectively, General Counsel; Respondent Employers Twin America, LLC, Gray Line Tours New York, Inc., City Sights NY, LLC, and JAD Transportation, Inc.; Respondent Union United Service Workers Union, IUJAT, Local 1212; or all parties; and *x*, *y*, *z*, and *w* stand in for natural numbers.

² Those Respondents stipulated to facts admitting that they constitute a single employer and admitted they compose a single employer in their Answer. ALJD 2:30–38; G.C. Exh. 1(y) (First Amended Answer of Respondents Twin America, et al.) (“Er. Ans.”), ¶¶ 2(d)–(e).

³ As explained below, representation of both these two groups of ticket agents was assigned to Local 1212 on November 28, 2016, when that labor organization was certified “as the collective bargaining representative of the tour guides, ticket agents, and customer service agents working for the integrated operations of Twin America, Gray Lines, and JAD Transportation in the new, combined bargaining unit.” Jt. Exh. 2, ¶ 34; Jt. Exh. 3(cc). However, to avoid using even clunkier phrasing, such as “formerly-Local-225-represented ticket agents,” “previously-Local-1212-represented ticket agents,” “ticket agents historically employed by Gray Line,” or “ticket agents historically employed by City Sights and JAD

and (3) forcing the Local 255 ticket agents to choose between loss of employment and unlawfully imposed working conditions, namely discriminatory endtailing of their seniority.⁴ The Complaint further alleged that Respondent United Service Workers Union, IUJAT, Local 1212 (“Local 1212”) violated Section 8(b)(2) and 8(b)(1)(A) of the Act by agreeing to the unlawful endtailing.⁵

The Local 225 ticket agents and Local 1212 ticket agents all worked for a single, integrated company with common supervision and labor relations,⁶ sold the same products (for one set of buses operating out of one garage at one set of bus stops),⁷ wore the same uniform,⁸ reported to the same work location,⁹ worked under the same managers,¹⁰ were tracked and paid through the same payroll system,¹¹ used the same ticketing system,¹² and were managed by the same human resources department.¹³ The Local 225 and Local 1212 ticket agents both became members of a newly created bargaining unit on the same date, November 28, 2016, when Local 1212 was certified as the collective bargaining representative of that new unit. The Respondent Employers and Respondent Local 1212 negotiated an agreement that the newly-Local 1212-represented ticket

together,” references in this brief to “Local 225 ticket agents” or “Local 225 employees” denote that group of ticket agents who were represented by Local 225 before November 28, 2016 and references to “Local 1212 ticket agents” or “Local 1212 employees” denote that group of ticket agents who were represented by Local 1212 before November 28, 2016.

⁴ G.C. Exh. 1(v), ¶¶ 8–10 and 12.

⁵ G.C. Exh. 1(v), ¶¶ 9 and 13.

⁶ Jt. Exh. 1.

⁷ Jt. Exh. 3(j), pp. 1–2.

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Tr. at 360:1–361:8 (admission of JAD president Janet West).

¹² Tr. at 354:10–20 (admission of JAD president Janet West).

¹³ G.C. Exh. 3(d) (company policies for ticket agents bearing logos of Gray Line, City Sights, and JAD); G.C. Exh. 3(e) (employment documents stating that Gray Line/City Sights ID card belongs to JAD); G.C. Exh. 3(g)–3(h) (letters to Amewo from Human Resources General Manager on letterhead for Gray Line, City Sights, and JAD).

agents¹⁴ would be junior to all the previously-Local 1212-represented ticket agents for purposes of bidding on assignments, layoff, and recall. Thus, though both groups of employees were working in the same job for the same integrated employer and had been members of the same bargaining unit for the same length of time, the Respondents discriminated against the Local 225 ticket agents on the basis of their union membership. The ALJ erred in concluding that the disparate treatment of the two groups of workers—which is explained only by their having been represented by different unions—is permitted under Board law.

II. Questions Presented

Pursuant to Section 102.46(a)(2)(ii) of the Board's Rules and Regulations, the General Counsel sets forth the following specification of the questions involved and argued herein:

1. Whether the Administrative Law Judge correctly applied Board law when he concluded that the Employer Respondents and Local 1212 lawfully discriminated against the Local 225 ticket agents in making them junior to the Local 1212 ticket agents for purposes of bidding, layoff, and recall, as challenged by Exceptions 1, 3–6, and 10;
2. Whether the Administrative Law Judge correctly applied Board law when he concluded that the Employer Respondents lawfully discriminated against the Local 225 ticket agents by laying them off, as challenged by Exceptions 1–3, 5–6, and 10;
3. Whether the Administrative Law Judge correctly applied Board law in concluding that the Local 225 ticket agents who did not accede to being entailed to the Local

¹⁴ The previously described naming convention has been dropped here to emphasize that Local 1212 was, in this context, representing the two sets of employees as part of a single bargaining unit and owed the same duty of fair representation to both groups.

1212 ticket agents were not constructively discharged, as challenged by Exceptions 1, 3–7, and 10;

4. Whether the Administrative Law Judge correctly inferred from the record evidence that statements by Employer representatives regarding Local 225’s loss of the election were taken out of context, as challenged in Exceptions 10–11; and
5. Whether the Administrative Law Judge correctly inferred from the record evidence that the earning potential of some Local 225 ticket agents was not harmed by the Respondents’ endtailing decision, as challenged in Exceptions 8–9.

III. Facts

Gray Line, a hop-on/hop-off, sightseeing, double-decker tour bus company, began operating before 1994.¹⁵ The ticket agents working for that company were represented by Local 225.¹⁶ Those Local 225 ticket agents, the affected employees in this case, worked outdoors selling sightseeing trip tickets¹⁷ from assigned locations for which they bid twice a year.¹⁸ Bidding was determined by seniority because a ticket agent’s assigned location affected his or her earnings, which were commission-based.¹⁹ (That is, more senior ticket agents were given the opportunity to work from those locations at which it was easier to sell more tickets.) Even Gray Line Operations Vice President James Murphy (“Murphy”) admitted that it was easier to sell tickets at some sites than at others.²⁰

¹⁵ ALJD 3:37–41; Tr. 104:22–105:4 (Amewo testimony).

¹⁶ ALJD 3:37–41; Tr. 107:15–108:8 (Amewo testimony); Jt. Exh. 2, ¶¶ 5–6; Er. Exh. 3.

¹⁷ Tr. 104:22–106:5 (Amewo testimony); Tr. 197:2–22 (Rufai Mohamed testimony).

¹⁸ Tr. 106:10–17:14 (Amewo testimony); Tr. 197:21–198:4 (Rufai Mohamed testimony).

¹⁹ Tr. 106:6–17 (Amewo testimony); Tr. 164:4–18 (Sanoussi testimony).

²⁰ Tr. 295:14–20 (Twin America VP Murphy testimony).

In 2005, City Sights began operating a competing hop-on/hop-off sightseeing bus service.²¹ City Sights recognized Local 1212 as the collective bargaining representative for its full-time and regular part-time drivers, ticket agents, and tour guides.²² Because City Sights arranged to have an employee leasing company, JAD Transportation, Inc. (“JAD”), jointly employ its ticket agents, tour guides, and drivers, that recognition was embodied in collective bargaining agreements between Local 1212 and JAD, the most recent of which continued into March 2017.²³

In 2009, Gray Line and City Sights combined their operations into a joint venture known as Twin America.²⁴ In late 2012, the U.S. Justice Department and New York State sued that joint venture as an illegal combination.²⁵ By the end of 2014, the Employers had agreed to settle with those two entities and by mid- March 2015, agreed to relinquish all of the City Sights bus stops to the New York City Department of Transportation.²⁶

At the same time that the Employers were being forced to give up all of the City Sights stops, the collective bargaining agreement with Local 225 was expiring.²⁷ In those circumstances, in mid- and late December 2014, the Employers began a full merger/integration of their operations.²⁸ By late May 2015, Twin America admitted that the operations of Gray Line and City

²¹ Jt. Exh. 2, ¶¶ 4 and 1.

²² Jt. Exh. 2, ¶¶ 2–3.

²³ Jt. Exh. 2, ¶¶ 2–3; Er. Exhs. 1–2; Tr. at 323:15–324:4 (testimony of Twin America Exec. VP Paul Seeger that City Sights employees were employed by an employee leasing company); Tr. 97:8–22 (Local 1212 representative Jonathan Ames testimony that Local 1212 collective bargaining agreement covered working conditions for City Sights employees).

²⁴ ALJD 3:43–44; Jt. Exh. 2, ¶ 7.

²⁵ Jt. Exh. 2, ¶ 16; Jt. Exh. 3(b).

²⁶ Jt. Exh. 2, ¶¶ 17 and 22; Jt. Exhs. 3(k) and 3(p), Secs. II and IV(e).

²⁷ Er. Exh. 3; Jt. Exhs. 3(d) at p. 5 and 3(f) at p. 2, n.2 (position statements from Twin America counsel stating that Local 225 collective bargaining agreement expired Nov. 15, 2014 and was extended through January 5, 2015).

²⁸ Jt. Exhs. 3(d), p. 3 and 3(f), pp. 2–4 (position statements from Twin America counsel admitting that Twin America informed Local 225 of its intent to form Gray Line and City Sights “into a combined brand” or “single brand” with just “one set of stops”); Jt. Exh. 3(l) (Dec. 24, 2014 e-mail from Murphy forwarding

Sights had been integrated into a single, merged business and claimed that notwithstanding City Sights' loss of all its bus stops, "the City Sights operation[,] staffed by the JAD employees[,] ha[d] not been put out of business."²⁹ According to the Employers, Gray Line and City Sights were equal aspects of a single operation, Twin America.³⁰ The Employers thereby admitted that there was but one employer which employed both groups of ticket agents, *viz.*, the Local 225 ticket agents and the Local 1212 ticket agents (though that latter group was also employed by JAD by virtue of the leasing arrangement between JAD and City Sights).

Local 225 filed an RC petition seeking to represent the employees of a new, larger, combined unit of the two historical units.³¹ Although the parties reached a stipulated election agreement and an election was held September 9, 2015, no party obtained a majority of the votes.³² There then followed a series of compromises, supplemental decisions, and revised ballot counts, none of which fully resolved the question of who would represent the employees in the new, expanded bargaining unit.³³ Finally, on November 28, 2016, more than fourteen months after the initial election, Region 2 of the NLRB certified Local 1212 as the collective bargaining representative of the new unit (pursuant to an election held ten days earlier).³⁴

At that point, the Local 225 ticket agents and the Local 1212 ticket agents were working for the same single, integrated employer, in a single bargaining unit represented by a single labor

letter from Twin America Exec. VP Paul Seeger to Local 225 President Carlos Padilla).

²⁹ Jt. Exh. 3(j) (internal quotation marks omitted; May 26, 2015 position statement from Twin America counsel and further stating that "most, if not all[,] of the factors supporting the determination [in 2010]...that the City Sights and Gray Line operations had not then been merged now compel the opposite conclusion").

³⁰ *Id.*

³¹ Jt. Exh. 2, ¶¶ 25–26.

³² Jt. Exh. 2, ¶¶ 27–28.

³³ Jt. Exh. 2, ¶¶ 29–32.

³⁴ Jt. Exh. 2, ¶¶ 33–34.

organization, Local 1212. Notwithstanding that the two groups of employees were indistinguishable—except to the extent they had previously been represented by different unions and covered by different collective bargaining agreements—the Employers thereafter proceeded to (i) make the Local 225 ticket agents junior to all the Local 1212 ticket agents (on January 5, 2017), (ii) layoff and rehire the Local 225 ticket agents (on April 6, 2017), and (iii) force the Local 225 ticket agents to agree to the unlawful diminution of their seniority or be fired (also on April 6, 2017).³⁵ The ALJ’s failure to find that this conduct violated the Act was plain error, as demonstrated below.

IV. Argument

A. Seniority

1. The Employers’ Unlawful Discrimination

Once the Local 225 and Local 1212 ticket agents became members of the new bargaining unit, which occurred no later than November 28, 2016, when the Regional Director for Region 2 certified Local 1212 as the bargaining representative for a new bargaining unit that comprised, *inter alia*, both the (former) 225 ticket agents and the (previous) Local 1212 ticket agents. Local 1212 was obligated to take action affecting the employment status of any bargaining unit employee(s) only “on the basis of relevant considerations, and not on considerations that are arbitrary, discriminatory, or in bad faith.”³⁶ While a union or employer may distinguish between groups of employees on the basis of skills,³⁷ or job duties, assignments, classifications, or work

³⁵ Jt. Exh. 3(a) (Jan. 5, 2017 memo from Twin America VP Murphy to all ticket agents).

³⁶ *Reading Anthracite Co.*, 326 NLRB 1370, 1370 (1998) (internal quotation marks omitted).

³⁷ *Newspaper and Mail Deliverers’ Union of New York*, 361 NLRB 245, 249–250 (2014).

locations,³⁸ differentiation based on the length of time as a union member is unlawful,³⁹ even when such discrimination is made because it is politically expedient or for the benefit of a stronger, more politically favored group over a minority.⁴⁰ A union’s lack of “objective justification for its conduct beyond that of placating the desires of the unit employees at the expense of the minority” violates the duty of fair representation that union owes its represented employees.⁴¹ In concluding that employees were endtailed unlawfully, the Board has relied upon a variety of factors, including: language in collective-bargaining agreements,⁴² the parties’ statements,⁴³ and whether the endtailing decision was made before or after the affected employees became part of the relevant bargaining unit.⁴⁴

In the present case, the Employers and Local 1212 cited no lawful reason for endtailing the

³⁸ *Reading Anthracite*, supra, 326 NLRB at 1370.

³⁹ *Interstate Bakeries Corp.*, 357 NLRB 15, 17 (2011).

⁴⁰ *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974, 976 (1986) (citing *Barton Brands v. NLRB*, 529 F.2d 793 (7th Cir. 1976)).

⁴¹ *Barton Brands*, 228 NLRB 889, 892 (1977), cited in *Teamsters Local 42*, supra, 281 NLRB at 976.

⁴² *Compare Woodlawn Farm Dairy Co.*, 162 NLRB 48, 49-52 (1966) (concluding that parties’ application of their collective-bargaining agreement, which called for dovetailing only those incoming employees who were already members of respondent union, violated Act), and *Whiting Milk Corp.*, 145 NLRB 1035, 1036-37 (1964) (same), *enforcement denied*, 342 F.2d 8 (1st Cir. 1965), with *Fleet Carrier Corp.*, 201 NLRB 227, 228 (1973) (layoff based on contractual provision denying retroactive seniority to newly-added classification of employees to bargaining unit, lawful, absent other evidence of unlawful motivation).

⁴³ *Teamsters Freight Local No. 480*, 167 NLRB 920, 920 n.1, 923-24 (1967) (statements of union business representative and arguments presented by union’s counsel demonstrated that otherwise permissible endtailing was unlawfully motivated by union-membership considerations), *enforced*, 409 F.2d 610 (6th Cir. 1969).

⁴⁴ *Interstate Bakeries Corp.*, 357 NLRB 15, 17-18 (2011) (ruling that decision to endtail a previously unrepresented employee was based on unlawful union-membership considerations, rather than legitimate unit-protection considerations, because decision was made *after* bargaining units merged into one new unit and the parties had not preserved unit seniority in either unit before the merger), *aff’d*, 488 F. App’x 280 (10th Cir. 2012); *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974, 975-76 (1986) (endtailing recently-organized employees after their unit was consolidated with unit of long-time union-represented employees was unlawful discrimination based on length of union membership, rather than unit protection, because merger created a new bargaining unit; therefore, amount of time employees were represented in prior units was irrelevant), *enforced*, 825 F.2d 608 (1st Cir. 1987).

former Local 225 ticket agents to the previously-Local-1212-represented ticket agents and in fact admitted that they did so to “placate the desires” of the Local 1212 workers who had previously been members of that union at the expense of the Local 225 ticket agents, even though all were members of the same bargaining unit for the same length of time and equally owed a duty of fair representation.

The ALJ accepted the Respondent Employers’ argument that the endtailing was part of integrating or consolidating the two groups of workers into a single bargaining unit.⁴⁵ But by no later than November 28, 2016, prior to the endtailing agreement, there was no integration or consolidation to accomplish. A new bargaining unit had been produced by operation of law upon the conclusion of the November 2016 election; simultaneous with that event, the prior Local 225 and Local 1212 bargaining units ceased to exist.⁴⁶ Nor was there any operational integration to accomplish. All the ticket agents already worked for the single integrated employer comprising Twin America, Gray Line, and City Sights and had been since mid-2015.⁴⁷ While Twin America decided to begin leasing the Local 225 ticket agents through JAD,⁴⁸ that decision plainly didn’t

⁴⁵ ALJD 8:27–28; Jt. Exh. 3(gg), p. 2 (letter from S. Goodman to A. Eveillard (Dec. 22, 2017)). Counsel for the Employers wrote, “After Local 1212 was chosen as the bargaining representative for all ticket agents, a decision was made by Twin to consolidate all of the ticket agents into the existing JAD bargaining unit that Local 1212 had historically represented,” but that was wrong on at least two counts: (1) The consolidation had already occurred and (2) the historical Local 1212 bargaining unit had ceased to exist.

⁴⁶ See Jt. Exh. 3(cc) (Nov. 28, 2016 certification of representative), which describes the new unit as “All full-time and regular part-time Sidewalk Sales Agents, Tour Guides, and Double Decker Sightseeing Bus Customer Service Agents employed by the Employers at and out of the facility located at 777 8th Avenue, New York, NY.”

⁴⁷ The ALJ’s description of the Local 225 and Local 1212 ticket agents as “employed by separate entities,” ALJD 4:38, is therefore at best misleading. His footnote explanation that the Local 1212 ticket agents “were employed and paid by JAD while the [Local 225 ticket agents] remained employed and paid by Gray Lines,” ALJD 4 at n.7, at least obscures the fact that all the ticket agents were employed by Gray Lines and City Sights and Twin America (or by the conglomerate Gray Lines/City Sights/Twin America) and at worst betrays a failure to appreciate the operational integration of those businesses.

⁴⁸ Tr. at 324:20–325:2 (testimony of Twin America Exec. VP Paul Seeger).

require any particular adjustment of employee seniority or that employees be laid off. Counsel for the Employers admitted as much when he wrote that the Local 225 “ticket agents were not actually...separated from their employment” and that the change “was nothing more than a ministerial act.”⁴⁹

What did have to be resolved, however, were the contractual terms setting employment conditions for the employees in the new bargaining unit. Until that happened, the two groups of employees were covered by the terms of the respective collective bargaining agreements applicable to the historical bargaining units⁵⁰ and it was possible for the claims of the two groups of workers to come into conflict. The Respondents recognized the potential for conflicting claims as to who would receive preference for bidding on sales sites: The negotiator for Local 1212 explicitly testified that the reason he and the Employers were bargaining about seniority over the New Year’s weekend was because the “winter bid pick” was scheduled for January 3, 2017.⁵¹

Various lawful options were available to the parties to solve the problem of who would bid when. For instance, employees could have been assigned bidding positions randomly, alphabetically, or according to their original hire dates. Instead, however, Respondents chose to discriminate on the basis of union membership, purportedly to placate the ticket agents previously

⁴⁹ Jt. Exh. 3(gg), p. 2.

⁵⁰ *Federal Mogul Corp.*, 209 NLRB 343, 343–344 (1974); *Borden, Inc.*, 308 NLRB 113, 114–115 (1992) (where two bargaining units merged to create new unit, different from either preexisting unit, the employer was required to continue employment conditions that previously existed for each group of employees until the parties negotiated a new contract covering all employees in the new, combined unit). The Local 225 contract had expired back in 2015 and the Local 1212 contract was set to expire in March of 2017. ALJD 4 at n.6.

⁵¹ Tr. 93:10–14 (testimony of Local 1212 negotiator Jonathan Ames); Tr. 97:23–98:14 (Ames testimony on cross-examination that Twin America Exec. VP Seeger and JAD President West were concerned that maintaining seniority of Local 225 agents would diminish seniority rights of Local 1212 ticket agents, with result that those latter workers would be moved to different selling sites and then quit).

represented by Local 1212: Twin America VP Murphy admitted on cross-examination that those ticket agents were given greater seniority than ticket agents previously represented by Local 225 because he was afraid employees in the former group, *i.e.*, the long-term Local 1212 ticket agents, would quit otherwise.⁵² Local 1212 negotiator Ames testified that the Employers said they wanted to give ticket agents previously represented by Local 1212 greater seniority because they were concerned those employees would quit otherwise;⁵³ and JAD President Janet West said she was concerned the previously represented Local 1212 ticket agents would “be distressed by moving down the seniority list.”⁵⁴

The legality of “end tailing”—placing a group of employees at the bottom of an employer’s seniority list—depends on whether it is the result of “unit considerations” or “union considerations.”⁵⁵ Thus, a union and employer may lawfully discriminate against newcomers to a bargaining unit and enttail them in order to protect the wages, tenure, and other working conditions of current bargaining unit employees.⁵⁶ But if a decision to place employees at the bottom of the seniority list is based on union considerations—e.g., membership in a particular union or a lack of prior union membership—it violates the Act.⁵⁷

⁵² Tr. 305:22–306:10.

⁵³ Tr. 92:7–93:7.

⁵⁴ Tr. 380:25–381:19.

⁵⁵ *Reading Anthracite Co.*, 326 NLRB 1370, 1377 (1998).

⁵⁶ See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338–39 (1953) (discussing permissible characteristics that can be used to calculate unit seniority); *General Drivers & Helpers, Local 229*, 185 NLRB 631, 631 (1970) (bargaining representative has the “right to give inferior seniority to employees transferred from another unit”).

⁵⁷ See *Teamsters Local 727 (Global Experience Specialists, Inc.)*, 360 NLRB 65, 65 n.1, 71–73 (2013) (application of CBA provision that calculated seniority based on an employee’s date of membership in the union violated the Act when it caused employees who had been members of another union to be enttailed following a consolidation of facility locations); *Reading Anthracite Co.*, 326 NLRB at 1370 (union discriminatorily encouraged union membership in violation of Section 8(b)(2) by assigning seniority dates to employees based on the date they became union members); *Interstate Bakeries Corp.*, 357 NLRB 15, 17–18 (2011) (decision to enttail a previously unrepresented employee was based on unlawful union-

The foregoing facts make it clear that the endtailing in this case was based entirely on union rather than unit considerations. Any assertion that the decision to endtail the Local 225 ticket agents was done to protect *unit* employees fails because the (former) Local 225 ticket agents were already a part of the same unit the Employers claim the parties were acting to protect. Further, the Respondent witnesses cited no differences in skills, job classifications, work assignments, facilities, duties, or the like that would have supported granting the Local 225 ticket agents lower seniority. (Indeed, the fact that all the ticket agents worked out of the same facility doing the same job for the same managers precluded any such claims.) That leaves the Local 225 employees' former membership in that union (and their relatively brief time as Local 1212 members) as the sole differentiating factor between the two groups of employees.⁵⁸ The Board has previously held that seniority decisions based on membership in previous bargaining units were based on impermissible union considerations rather than unit considerations because those prior units no longer existed and the employee(s) discriminated against were members of the same unit as those favored. Thus, in *Interstate Bakeries Corp.*, the Board ruled that a decision to endtail a previously unrepresented employee was based on unlawful union-membership considerations, rather than legitimate unit-protection considerations, because that decision was made *after the* bargaining units had been merged, along with other employees, into one new unit and the parties had not

membership considerations, rather than legitimate unit-protection considerations, because decision was made *after* bargaining units had been merged into new one; *compare Woodlawn Farm Dairy Co.*, 162 NLRB 48, 49–52 (1966) (concluding that parties' application of their collective-bargaining agreement, which called for dovetailing only those incoming employees who were already members of respondent union, violated Act), and *Whiting Milk Corp.*, 145 NLRB 1035, 1036–37 (1964) (same), *enforcement denied*, 342 F.2d 8 (1st Cir. 1965), with *Fleet Carrier Corp.*, 201 NLRB 227, 228 (1973) (layoff based on contractual provision denying retroactive seniority to newly-added classification of employees to bargaining unit, lawful, absent other evidence of unlawful motivation).

⁵⁸ See *Interstate Bakeries Corp.*, 357 NLRB at 17-18; *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB at 975-76.

preserved unit seniority in either unit before the merger.⁵⁹ Similarly, in *Teamsters Local 42 (Daly, Inc.)*, the Board held that endtailing recently-organized employees after their unit was consolidated with another unit of long-time union-represented employees was unlawful discrimination based on length of union membership, rather than unit protection, because the merger created a new bargaining unit and thus the amount of time employees had been represented in the prior units was irrelevant.⁶⁰

Thus, the fact that the parties failed to preserve the historical units or the seniority of the employees therein prior to the elimination of those units entails that the Respondents were not acting to protect unit seniority. Because the Respondents admitted that they were diminishing the seniority of the Local 225 ticket agents in favor of the Local 1212 ticket agents and cited no lawful basis for distinguishing between those groups, the ALJ erred in failing to find that the Respondent Employers violated Sections 8(a)(3) and (1) of the Act by endtailing the Local 225 ticket agents.

Further, while General Counsel demonstrates below that the ALJ erred in finding the Employers harbored no animus toward Local 225, the above-cited cases make clear that evidence demonstrating animus is not necessary. As the ALJ noted in the *Teamsters Local 42 (Daly, Inc.)* case, “Local 42 clearly was on the horns of a dilemma: no matter what seniority system it proposed, one group of Daly employees would be adversely affected and discontented...I nevertheless conclude that the Union could not lawfully resolve its problem by conduct which placated the Lynnfield employees because of their greater numbers and lengthier union membership.”⁶¹ And in a finding relevant to the present case, the *Local 42* ALJ rejected the claim that the favored group

⁵⁹ 357 NLRB at 17-18.

⁶⁰ 281 NLRB at 975-76.

⁶¹ 281 NLRB at 976.

had longer unit seniority, noting that a new unit had been formed when the two units were merged at a new facility.⁶² That case and its reasoning is applicable to the present matter, which differs only in the number of facilities involved.

2. The Union's Unlawful Discrimination

In most endtailing cases, the union is the party that advocates for its original members' seniority and demands that new employees be endtailed. Nonetheless, when the employer agrees to endtail employees at the behest of the union, the employer violates Section 8(a)(3).⁶³ Here, during the negotiations over how to combine the seniority of the two groups of ticket agents, it was the Employers—rather than Local 1212—that advocated for endtailing the Local 225 ticket agents. Moreover, it was Employer representatives who made subsequent statements attributing the endtailing decision to Local 225's election loss. Thus, the instant case presents the inverse of the typical fact pattern.

Notwithstanding that, Local 1212 violated Section 8(b)(2) and 8(b)(1)(A) by agreeing to discriminate against the Local 225 ticket agents based on union-membership considerations. Only by obtaining the agreement of Local 1212 (or negotiating to overall impasse) could the Employers lawfully change the working conditions of the Local 225 ticket agents, including reduction of their seniority.⁶⁴ Thus, Local 1212's agreement was necessary to allow the Employers to avoid violating Section 8(a)(5) of the Act. By providing that agreement and cover, Local 1212 enabled—and

⁶² *Id.* (“[T]he represented employees at both locations formed one new unit at the time that they simultaneously moved into the [new] facility.”)

⁶³ *Interstate Bakeries*, supra, 357 NLRB at 16, 18 (concluding that the employer violated Section 8(a)(3) by agreeing to endtail a previously non-union employee, even though employer argued that the employee, one of its best, should be dovetailed because it did not want to lose him).

⁶⁴ *Borden, Inc.*, supra, 308 NLRB at 115 (“an employer is obligated to preserve the status quo with respect to each of the two groups until it reaches either a new agreement or a bargaining impasse”).

thereby caused—the Employers to discriminate against the Local 225 ticket agents in violation of Section 8(a)(3). That conduct thereby violated Sections 8(b)(1)(A) and 8(b)(2) of the Act.⁶⁵

B. Unsupported Inferences

The ALJ drew two inferences that were unsupported by any evidence in the record. First, he concluded that certain statements made by Employer Representatives were “taken out of context,” though no evidence supports that conclusion. Second, the ALJ found that the endtailing decision had no effect on the earnings potential of the Local 225 ticket agents, but his conclusion did not follow from the evidence upon which he relied.

On the first point, the ALJ erred in concluding that the testimony of Tefe Amewo and Sarafa Sanoussi recounted statements “taken out of context.” Mr. Amewo testified about telephone conversations with Twin America Vice President James Murphy on January 13, 2017 and April 17, 2017.⁶⁶ In both discussions, Mr. Amewo objected to having his seniority reduced; in neither account was there any mention of maintaining two seniority lists; and in Mr. Amewo’s account of the second conversation, he described switching payrolls, his feeling that what the Employers were doing wasn’t fair, and the absence of any connection between merger of payrolls and seniority.⁶⁷ In short, nothing in Mr. Amewo’s testimony supports an inference that either conversation included discussion of maintaining two seniority lists.

When prompted to specifically deny that he had said anything to Mr. Amewo about losing the election, James Murphy did so, but neither then or in his testimony about the April 17, 2017

⁶⁵ See *Teamsters Local 42 (Daly)*, 281 NLRB at 976 (finding that union’s conduct in endtailing employees “clearly did not spring from hostile motives” but nonetheless violated Section 8(b)(2)); *Interstate Bakeries*, 357 NLRB at 19 (holding employer liable for violating Sec. 8(a)(3) for agreeing with union’s request to endtail employee).

⁶⁶ Tr. 114:14–115:5 and 125:22–127:5.

⁶⁷ *Id.*

conversation did he mention any discussion of maintaining two seniority lists.⁶⁸ Thus, none of the testimony regarding the telephone conversations between the two witnesses provides any basis for the ALJ to infer that the statements to which Mr. Amewo testified were made in such a context.

Sarafa Sanoussi testified about attending two negotiation sessions, both of which he said occurred in January 2017.⁶⁹ Mr. Sanoussi's testimony noted that the issue of two seniority lists was discussed at the first of those two meetings as one of two proposals, the other being to set seniority by date of hire, and that Paul Seeger rejected both of those proposals.⁷⁰ In his testimony about the second meeting, there was no mention of two seniority lists; to the contrary, Mr. Sanoussi's testimony was that he objected to the Local 1212 claim that the seniority issue had been resolved.⁷¹ And in fact, there was no testimony that two seniority lists was discussed at that meeting by any Respondent witnesses, either. Rather, Mr. Sanoussi testified that at both meetings Paul Seeger attributed the change in seniority for the Local 225 ticket agents to the election results and Mr. Seeger did not deny that testimony. Thus, while it is theoretically possible to interpret Mr. Sanoussi's testimony about the earlier meeting as conflating Mr. Seeger's stated reason for rejecting two seniority lists with an unstated reason for rejecting seniority by date of hire—though nothing in Mr. Sanoussi's or Mr. Seeger's testimony supports that inference—there is absolutely no evidence that maintenance of two seniority lists was mentioned at the second meeting. Thus, any conclusion that the reported statement was taken out of context is entirely speculative, *i.e.*,

⁶⁸ Tr. 280:10–13 (denial) and Tr. 275:16–276:6 (phone conversation).

⁶⁹ Tr. 168:19–170:17 (Sanoussi testimony regarding first meeting) and 171:18–175:4 (Sanoussi testimony concerning second meeting) and Tr. 187:2–195:1 (Sanoussi cross-examination regarding first meeting) and U. Exh. 1.

⁷⁰ Tr. 170:7–17 (Sanoussi testimony).

⁷¹ Tr. 172:7–173:23 (Sanoussi testimony).

baseless. The ALJ therefore again erred in concluding that Mr. Sanoussi took Mr. Seeger's statements "out of context."

In short, the testimony of both employees and the Respondent Employer witnesses is that only one of the four conversations contained any mention of two seniority lists. Consequently, the ALJ had no basis for concluding that Messrs. Amewo and Sanoussi were taking the other three statements of Messrs. Murphy and Seeger out of context and he plainly erred in so finding. Notably, this is not a credibility issue but a matter of inferences the ALJ drew from the record evidence; the *Standard Dry Wall Products* "clear preponderance of the evidence" standard is therefore not applicable.⁷² Since the record provides no basis for the ALJ's conclusion that at least three of the four statements were "taken out of context," the ALJ failed to explain his conclusion, which is unsupported by the evidence. And because the evidence does not support any conclusion that the statements to which Messrs. Amewo and Sanoussi testified were taken out of context, the same evidence *a fortiori* fails to impugn their credibility. Finally, because the ALJ plainly erred in finding that the statements to which Messrs. Amewo and Sanoussi testified were "taken out of context," those statements reveal the Respondent Employers' reasons for endtailing the Local 225 ticket agents.

As discussed above, the ALJ erred in accepting the Respondent Employers' arguments that they had a credible business justification for the decisions to endtail the Local 225 ticket agents and lay them off. In so doing, the ALJ noted that he found the Respondent Employers' witnesses

⁷² See *Plaza Auto Center, Inc.*, 360 NLRB 972, 980 (2014) (concluding that the standard provided in *Standard Dry Wall Products*, 91 NLRB 545 (1950), does not apply to a judge's factual findings or the judge's derivative inferences or legal conclusions); *Bronco Wine Co.*, 256 NLRB 53, 54-55 n.8 (1981) (overruling ALJ's findings that were "couched in conclusionary terms" that failed to adequately describe the evidence or testimony he relied on to reach his result).

credible. General Counsel has already demonstrated that the veracity of the rationale is irrelevant because that rationale is unlawful: It relied on union membership considerations. However, the ALJ compounded his error by finding that the General Counsel's witnesses were not as credible as the Employers', because his conclusions were not based on credibility resolutions but instead on erroneous inferences from the evidence in the record.

The ALJ also plainly erred in finding that employees Sarafa Sanoussi and Rufai Mohammed did not suffer any harm to their earnings potential by virtue of having their seniority diminished. There was no dispute that bidding seniority determined where a ticket agent was allowed to sell tickets.⁷³ Tefe Amewo and Sarafa Sanoussi testified it was easier to sell more tickets at some sites than at others⁷⁴ and (eventually) Twin America VP James Murphy admitted that as well.⁷⁵ There was no dispute that earnings were the product of commission and number of tickets sold,⁷⁶ so there can be no dispute that if a ticket agent had been assigned to a better sales site, s/he could have made more money than s/he in fact made at the site to which s/he was assigned. Thus, assignment to a less desirable location, one where it was harder to sell tickets, affected a ticket agent's earning potential.⁷⁷ While the ALJ seemed to understand this during the hearing,⁷⁸ he lost sight of it in his decision, writing that Sarafa Sanoussi and Rufai Mohammed

⁷³ Tr. 263:4–264:2 (testimony of Twin America VP Murphy); Tr. 379:12–15 (testimony of JAD President West).

⁷⁴ Tr. 106:6–107:14 (Amewo testimony); Tr. 164:4–18 (Sanoussi testimony);

⁷⁵ Tr. 293:22–295:20 (Murphy cross-examination testimony admitting “it’s easier to issue a greater number of tickets if you’re assigned to [certain spots] because customers want them there”).

⁷⁶ Tr. 160:2–5 (Amewo redirect testimony); see also Er. Exh. 1, Art. 24 and attached schedule of commissions (commission per ticket) and Er. Exh. 2, Art. 24 (commission per ticket).

⁷⁷ Recognition of this fact is also implicit in the “trade-off” Local 1212 negotiated to increase the commission rate paid to the Local 225 ticket agents in exchange for their reduced seniority. Tr. 91:14–92:6 (testimony by Local 1212 representative Ames); Tr. 48:21–49:9 (Employer counsel characterizing reduction in seniority as “quid pro quo” for increase in commission rate for Local 225 ticket agents and

⁷⁸ Tr. 183:22–184:4 (ALJ noting that ticket agents “might have earned more if they had better seniority”).

“claimed to have had their earning potential harmed by the seniority provision of the new CBA, yet...actually made more money in 2017...[or] made nearly as much money in 2017...despite working...fewer days.”⁷⁹ Thus, the ALJ made plain error in finding that Sarafa Sanoussi and Rufai Mohammed were unaffected by the diminution of their seniority. Again, this error does not involve a credibility resolution but simply a conclusion the ALJ incorrectly drew on the basis of the evidence. That is, the ALJ drew an inference that was (again) wholly unsupported by the evidence upon which he relied.

That erroneous inference in turn fails to support his conclusion that the witnesses who testified about the effect of the reduction in seniority were thereby less credible. Plainly, accurate testimony cannot by itself serve to make a witness less credible, yet that is the result of the ALJ’s determination, which relied on nothing more than his incorrect assertion that the employees were not adversely affected by the changes to their seniority.

C. Constructive Discharge

The Board recognizes two forms of constructive discharge, which it has labeled (i) the traditional constructive discharge theory and (ii) the Hobson’s Choice doctrine.⁸⁰ “[U]nder the Hobson’s Choice line of cases, an employee’s voluntary resignation will be considered a constructive discharge when an employer conditions the employee’s continued employment on abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition.”⁸¹ The Board has found such Hobson’s Choices where an employer has made employment contingent upon (1) relinquishment of union membership,⁸² (2) abandonment of

⁷⁹ ALJD 7:30–33.

⁸⁰ *Intercon I (Zercom)*, 333 NLRB 223, 223 (2001).

⁸¹ *Id.* (citing *Hoerner Waldorf Corp.*, 227 NLRB 612, 613 (1976)).

⁸² *E.E.C., Inc.*, 297 NLRB 943, 950 (1990); *Fairmont Foods Co.*, 245 NLRB 915, 923 (1979).

support for a union and discussion of the same,⁸³ (3) compliance with an unlawful no-solicitation rule,⁸⁴ and (4) acceptance of unilaterally imposed working conditions (in violation of Section 8(a)(5) of the Act).⁸⁵

The present case falls into the last category and is analogous to the *Borden* decision. There, the employer had purchased two separate facilities at which employees were represented by the same union, in separate units under separate contracts.⁸⁶ The employer recognized the union at both facilities and applied the contracts in effect at those plants.⁸⁷ The employer also told the union it intended to consolidate the operations of the two facilities.⁸⁸ It subsequently moved employees from one facility to the other, kept many of the current employees, and hired some new workers.⁸⁹ The employer applied the terms of the contract that had been in effect when it commenced operations at that facility to all those workers.⁹⁰

The Board held that by so doing, the employer had made an unlawful unilateral change in the transferred employees' working conditions.⁹¹ In so concluding, the Board held that the consolidated unit was new a bargaining unit, different from either pre-consolidation unit.⁹² More important to the present issue, however, is that the Board found that those employees who resigned rather than accept the unilaterally imposed working conditions had been constructively discharged

⁸³ *Intercon I*, supra, 333 NLRB at 224.

⁸⁴ *Hoerner Waldorf*, supra, 227 NLRB at 612–613.

⁸⁵ *Borden*, supra, 308 NLRB at 115 (constructive discharge where employees had to accept unilaterally imposed reduction in seniority rights and pension benefits); see also *Superior Sprinkler, Inc.*, 227 NLRB 204, 210 (1976).

⁸⁶ 308 NLRB at 113.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 114.

⁹⁰ *Id.*

⁹¹ *Id.* at 114–115.

⁹² *Id.* at 114.

under the Hobson's Choice doctrine.⁹³

Here, the Employers made continued employment dependent on acceptance of working conditions which unlawfully punished the Local 225 ticket agents for their past membership in Local 225 (or alternatively, for their lack of membership in Local 1212). The Employers thereby forced the Local 225 ticket agents to choose between continued employment and assertion of their Section 7 rights.⁹⁴ As in *Borden*, the Employers' decision regarding the bidding and layoff seniority of the Local 225 ticket agents was unlawfully implemented, in violation of the National Labor Relations Act. It cannot be plausibly argued that the Local 225 ticket agents could continue working without accepting the Employers' unlawful elimination of their bidding seniority. Thus, the Local 225 ticket agents had to abandon their right to be free of discrimination against them for their union affiliation in order to keep their jobs. Abandonment of such a central Section 7 right as a condition of employment plainly constitutes a constructive discharge under the Hobson's Choice doctrine.

D. Layoff

The ALJ found that "the outsourcing of labor from Gray Line to JAD was much more significant than simply adding a list of names to the payroll."⁹⁵ This is error for at least two reasons. First, Twin America did not outsource its labor in any but the most limited sense. The Local 225 ticket agents who "transition[ed] to the JAD payroll"⁹⁶ continued to work at Twin

⁹³ *Id.* at 115. It is worth noting that the Board there reversed the ALJ's dismissal of the constructive discharge allegation but rather than remand the case for findings about which employees were in that group, the Board left such determination to the compliance stage of the case. *Id.* at 115, n.12.

⁹⁴ Jt. Exh. 3(a) (explaining that those employees who "transition to the JAD payroll... will be credited with their date[s] of hire at JAD for purposes of seniority/bids," while for those who do not, "their employment will end... April 6, 2017").

⁹⁵ ALJD 11:19-20.

⁹⁶ Jt. Exh. 3(a).

America, as admitted by the Employers.⁹⁷ Second, the ALJ erred in finding that making the Local 225 ticket agents jointly employed by JAD “was much more significant than adding a list of names to the payroll.” The Employers admitted that the change “was nothing more than a ministerial act”⁹⁸ and the ALJ also concluded that the layoffs were “essentially no different from the simple administrative process that the General Counsel suggests the Employer might have used to transition those employees.”⁹⁹

However, the layoffs had at least two effects that were visited upon the Local 225 ticket agents but not the Local 1212 ticket agents. First, as discussed above, the Local 225 ticket agents were made junior to the Local 1212 ticket agents because they were treated for some purposes as new hires. Second, the Local 225 ticket agents became probationary employees.¹⁰⁰ The Employers thereby caused the Local 225 ticket agents to suffer adverse employment consequences not visited upon the Local 1212 ticket agents. Because the Employers were fully aware that the discriminating against the Gray Line ticket agents was discrimination against the Local 225 ticket agents and the Employers subjected only the Gray Line ticket agents to layoff, there is no real dispute about the Employers’ motivation:¹⁰¹ the Employers’ layoff decision was based on the union membership of the Local 225 ticket agents. Thus, the layoffs were also unlawfully discriminatory and the ALJ erred in failing to so find.

⁹⁷ Jt. Exh. 3(gg), p. 2 (asserting that the Local 225 “ticket agents were not actually...separated from their employment”).

⁹⁸ *Id.*

⁹⁹ ALJD 11:25–26.

¹⁰⁰ G.C. Exh. 3(b) (part of JAD transition packet).

¹⁰¹ *See, e.g., Radio Officers’ Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 45 (1954) (applying “common law rule that a man is held to intend the foreseeable consequences of his conduct”).

V. Conclusion

For the foregoing reasons, the Board should reverse the Administrative Law Judge and find:

1. On about April 6, 2017, Employers Twin America, Gray Line, and City Sights unlawfully terminated the employment of all the ticket agents who had, until November 28, 2016, been represented by Local 225 because of their affiliation with and representation by Local 225, in violation of Sections 8(a)(3) and 8(a)((1) of the Act;
2. On about January 2, 2017, Employers Twin America, Gray Line, City Sights, and JAD unlawfully “endtailed” (for layoff, recall, and bidding purposes) the ticket agents who had, until November 28, 2016, been represented by Local 225 because of their affiliation with and representation by Local 225, in violation of Sections 8(a)(3) and 8(a) (1) of the Act;
3. On about January 2, 2017, Local 1212, unlawfully agreed to “endtail” (for layoff, recall, and bidding purposes) the ticket agents who had, until November 28, 2016, been represented by Local 225 because of their affiliation with and representation by Local 225, in violation of Sections 8(b)(1)(A) and 8(b)(2) of the Act; and
4. On about April 6, 2017, Employers Twin America, Gray Line, and City Sights constructively discharged those ticket agents who chose not to apply for employment with JAD rather than accept unlawfully imposed working conditions, specifically the unlawful reduction of their seniority described above, in violation of Sections 8(a)(3) and 8(a)(1) of the Act; and

General Counsel further requests that the Board order:

5. Respondents to cease and desist from those unfair labor practices;

CERTIFICATE OF SERVICE

The undersigned, an attorney for the General Counsel, hereby certifies that he caused a true and correct copy of General Counsel's Brief In Support of Exceptions to the Decision of the Administrative Law Judge to be electronically filed with the Executive Secretary of the National Labor Relations Board on May 17, 2019 and served on the same date via electronic mail at the following addresses:

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