

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 2

-----X
TWIN AMERICA, LLC AND CITY SIGHTS NY
LLC, AS A SINGLE EMPLOYER, AND JAD
TRANSPORTATION., AS JOINT EMPLOYERS,

and

Case No.: 02-CA-190704
Case No.: 02-CA-196228
Case No.: 02-CA-198436

TEFE KWAMI AMEWO, an Individual

UNITED SERVICE WORKERS UNION, IUJAT,
LOCAL 1212

and

Case No.: 02-CB-190736

TEFE KWAMI AMEWO, an Individual

UNITED SERVICE WORKERS UNION, IUJAT,
LOCAL 1212

and

Case No.:02-CB-199847

ARTHUR Z. SCHWARTZ, an Individual

CHARGING PARTY.

-----X

**RESPONDENT UNITED SERVICE WORKERS UNION, LOCAL 1212's
ANSWERING BRIEF IN OPPOSITION TO
GENERAL COUNSEL'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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STATEMENT OF THE CASE

Respondent United Service Workers Union, Local 1212, IUJAT (“Local 1212” or “Union”) submits this Answering brief in opposition to the General Counsel’s Exceptions to the Decision of the Administrative Law Judge (“ALJ”) pursuant to Section 102.46(b) of the National Labor Relations Board’s Rules and Regulations. This matter was tried before Hon. Andrew Gardner in New York City on June 18 and 19, 2018 and decided on March 20, 2019.¹

The consolidated complaint in this case alleged, in relevant part, the Respondent Employers, Twin America, LLC, City Sights NY LLC and Gray Line New York Tours, Inc. as a single employer (collectively, “Twin America”) and JAD Transportation, Inc., as joint employers (collectively, “Employers”), violated Sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act (“Act”) by (1) endtailing the seniority dates of former Gray Line ticket agents who transitioned to become JAD employees, because of their union membership; (2) and by requiring the former Gray Line ticket agents to accept their end-tailed seniority dates as a condition of being rehired by JAD. The consolidated complaint also alleged the Respondent Local 1212 violated Section 8(b)(2) and 8(b)(1)(A) of the Act by agreeing to the unlawful endtailing.

The ALJ accurately characterized this case by stating:

The driving thrust of this case is whether the Respondents violated the Act by agreeing to a consolidation of two previous seniority lists into one list that for purposes of job location bids and layoffs only, was based on the date an employee joined the JAD payroll, rather than based on their original date of hire by a Twin America entity. Because employees formerly employed by Gray Line did not join the JAD payroll until they transitioned from Gray Line to JAD between January and April 2017, this agreement had the effect of “end tailing” or placing all of the former Gray Line employees behind the existing JAD employees on the new seniority list.¹¹

¹ References to the ALJ’s Decision will be indicated as “ALJD: _ - _” referencing page and line numbers. References to the transcript of the trial will be indicated as “TR- _” referencing page numbers.

ALJD:8:30-36. The ALJ noted, “Had the parties agreed to seniority based on original dates of hire by their respective employers, it would have had the opposite effect, placing all of the former Gray Line employees ahead of the existing JAD employees. ALJD:8-fn.11.

Having surveyed the applicable law and considered the credible testimony of the witnesses and documentary evidence presented at the trial, the ALJ concluded the General Counsel did not prove that the agreement between the Employers and the Union was motivated by antiunion animus against the former Gray Line employees because the Respondent Employer articulated a legitimate business justification for the seniority plan and the Union lawfully agreed to the plan as a compromise to secure pay parity that it deemed to be of primary importance for the very same employees whose seniority was affected by the agreement. Accordingly, the ALJ held the Employers did not violate Sections 8(a)(3) and (1) and the Union did not violate Sections 8(b)(1)(A) and 8(b)(2). ALJD:10-23 to 11-11.

All of General Counsel’s exceptions to the ALJ’s Decision fail once it is recognized that ALJ’s decision properly answered its first Question Presented, *to wit*, the ALJ correctly applied Board law when he concluded the Employer Respondents and Local 1212 “lawfully discriminated against the Local 225 ticket agents”² in making them junior to the Local 1212 ticket agents for purposes of bidding, layoff and recall. General Counsel’s brief is notable for his obvious omission and failure to recount the detailed negotiations process between the Respondent Employer and the Union that yielded substantially higher wage increases for the prior Gray Line ticket agents than for the JAD ticket agents and the preservation of date of hire seniority for all benefit purposes (i.e.: sick days, vacations and holiday entitlement) other than

² General Counsel’s Brief, at 3

bid location and layoffs. General Counsel’s brief is also notable for its omission of references to the testimony by Respondent Employer’s witnesses that its positions on wage increases and seniority were designed to achieve 100% retention of all ticket agents and prevent an exodus of ticket agents to its competitors³. General Counsel, instead, presents a stark before and after shot of the former Gray Line ticket agents’ seniority relative to their coworkers, because to acknowledge the pathway to the agreement and lawful motivations of the Respondents, as recognized by the ALJ, exposes the legal and factual infirmity of its exceptions.

FACTS

This case concerns the consolidation of two business operations, Gray Line New York Tours, Inc. (“Gray Line”) and City Sights NY, LLC (“City Sights”), both of which are controlled by Respondent Twin America, LLC, and the treatment of the street ticket agents employed in the merged, albeit historically separate bargaining units. There is no dispute about the ALJ’s description of the background of how Gray Line and City Sights, once separately operated companies whose employees were represented by different unions, became merged; that Respondent Local 1212 became the representative of the complete bargaining unit of the merged company as a result of a Board certified election on November 28, 2016; and that in December 2016 the Respondents began to bargain for a first collective bargaining agreement to cover the formerly separated groups of employees under a new consolidated agreement. General Counsel

³ Respondent Employer ultimately acquiesced to the Union’s demand that all prior Gray Line ticket agents be given wage parity with the highest paid ticket agents under the Local 1212-JAD agreement and date of hire seniority recognition for all benefit purposes, which resulted in pay raises of over 33% and the highest level of paid time off for the affected ticket agents under the new agreement.

does not except to the ALJ's description of the background and the parties' negotiations for a consolidated agreement. ALJD 3-7.⁴

General Counsel recognizes that as of November 28, 2016 both groups of employees were then working in a single bargaining unit represented by a single labor organization – Local 1212. General Counsel's brief, at 6-7. Then, in a manner that illustrates General Counsel's pervasive failure to recognize the business reality of the circumstances, he states, "Notwithstanding that the two groups of employees were indistinguishable – except to the extent that they had previously been represented by different unions and covered by different collective bargaining agreements – the Employers [took the three actions complained of as alleged in the consolidated complaint]." The first such distinction, that they were represented by a different union, was immutable. But the second, that they were covered by a different collective bargaining agreement and had very different terms and conditions of employment, was the essence of what had to be addressed in negotiating a new collective bargaining agreement. While they may all have been doing the same work, contrary to General Counsel's characterization of these groups as "indistinguishable", this difference was what made these component groups of the new bargaining unit very distinguishable and which required the bargaining parties to address the sensitive topics they did in their negotiations in good faith and without animosity to their former Union membership.

⁴ Except that General Counsel excepts to the ALJ's conclusions that General Counsel's witnesses, Sarafa Sanoussi's and Rufai Mohammad's testimony regarding the effect of their seniority placement and alleged anti-union statements by Respondent Employer representatives Murphy and Seeger, were not as credible, or "less credible" (exceptions 8-11) than Respondent Employer's witnesses' testimony concerning these topics and Respondent Employer's "credible business rationale for the actions taken by them, and the considerable efforts made to reach a reasonable compromise with the Union the consolidation of the unit." ALJD:7:20-41.

In the effort to negotiate a new agreement in good faith and without hostility to the former Gray Line members of the new bargaining unit, in December 2016 the Union immediately demanded wage parity for the former Gray Line ticket agents at the higher prevailing JAD wage rates. ALJD:5:36-38. At an in-person meeting on December 28, 2016, the Union was accompanied by an employee bargaining committee on which two former Gray Line employees were included, ALJD:6:3-4, and the Union presented a list of specific demands those members provided to the Union, which included a proposal to keep separate seniority lists or to establish a new list based on date of hire with the company. ALJD:6:9-16.⁵ The Employer rejected both of these seniority proposals and proposed that the seniority list be consolidated with the former Gray Line ticket agents following the JAD ticket agents on the seniority list “for purposes of layoff and schedule/location bids.” ALJD:6:18-21. The Employer also proposed giving the Gray Line ticket agents the JAD “B” wage rate, one that would give them a raise, but still leave them earning less than their JAD counterparts. The Union rejected that wage proposal, maintaining its demand for wage parity for all ticket agents in the bargaining unit. ALJD:6:26-32.

The ALJ found and General Counsel does not contest, over the holiday weekend, the Union and Employer representatives exchanged e-mails on their positions regarding compensation and seniority. ALJD:6:34-35. Union and Employer representatives also spoke with each other on the telephone about the proposals.⁶ The Employer ultimately consented to the

⁵ See also, Union Ex.1, “We also proposed keeping the two seniority lists separate; otherwise it must be based on hiring dates....”

⁶ On December 30, 2016, Ames had a telephone conversation with Paul Seeger, the Executive Vice-President of Twin America, concerning the wages and seniority issues following up on the December 28, 2016 bargaining session. (TR-92-93.) Regarding the seniority issue, Seeger told him the Employer (“both he and Janet West” the President of JAD) “[h]ad grave concerns about retaining JAD ticket agents...if they were displaced.” (TR-93.) Ames testified,

Union's wage parity demand and granting the former Gray Line workers' date of hire seniority for calculating wages and all other benefit purposes, except with respect to job bids and layoffs. ALJD:6:34-40. Following a series of e-mails with the Employer, recognizing the reasonableness of the Employer's rationale for its position and that some portion of the membership would differ with whatever resolution to the seniority issue was reached, in order to achieve its priority for wage parity⁷ for this component of its new bargaining unit, the Union accepted the Employer's proposal on January 2, 2017. ALJD:6:45-48.⁸

At the hearing, Respondent Employer's General Manager, James Murphy explained, based on conversations he had with Respondent JAD President, Janet West, her reasons for wanting to preserve the JAD ticket agents' seniority. (TR-265-268.) The sum and substance of it was that West and the Employer were afraid of a "severe exodus" of JAD employees to

"They said there was a retention issue." (TR-92.) Based on his experience, he added, that seemed to be "very much" a reasonable concern. (TR-93.) Still, at this point, there was no agreement on either wages or seniority for the Gray Line ticket agents. On re-direct examination by Counsel for the General Counsel, Ames was asked and answered the following question:

Q: And was the – was it your understanding that Paul Seeger and Janet West were concerned about the effect [of a reduction in seniority for JAD ticket agents relative to the Gray Line agents if all agents retained their date of hire seniority for bid purposes] that would have on whether those ticket agents remained employed by JAD?

A: That is correct.

(TR-98.)

⁷ As of the date of these negotiations, the Gray Line agents were being paid about \$11.60 for selling an "all around" ticket, while the JAD ticket agents were making \$14.25 for an "A" tier ticket agent. (TR-255.)

⁸ On January 2, 2017, Ames accepted the Employer's offer. (Employer Exhibit 9.) Ames wrote to Murphy, in relevant part:

We realize that this represents a significant financial commitment by the Employer, but in the end, we believe it is fair. While we may not necessarily agree that the mechanism you propose to deal with seniority for layoffs and bid picks is the best one possible, we recognize these negotiations will require important compromises on both sides and no matter how this issue is dispensed with some portion of the group will prefer a different result.

competitors (TR-268) if they lost ground to the Gray Line agents in connection with their seniority. A group of about 40 JAD agents had left “in one shot” about 2-3 years beforehand, making the Employer believe they would do it again. (TR-266-267.) And, while the former Gray Line employees were loyal, as demonstrated by the fact that they stayed despite not having a contract for three years, they were making less wages than the JAD employees. (TR-268.)

Murphy testified:

So, the Employer took it upon itself to try to figure out how we are going to appease all these people, get them motivated to stay with us, and go out and sell. So the only solution we could figure out was to – ok, Gray Line agents haven’t received a raise in three, four years, let’s give them the highest rate of pay, let’s grant them everything we possibly can with the seniority.

The JAD employees, they were receiving a smaller amount of raise, part and parcel because the Union’ request was for parity among wages for all employees doing the exact same job. So we can match the parity on the financial side, then we match the parity on vacation, holidays, everything else based on their seniority where you would fit so they could get the higher rate.

The only thing we couldn’t figure out is, who is going to pick first or how they are going to pick first into it. We were afraid that if we turned them around and we said, okay, we’re going to go by date of hire, then everybody with Gray Line at that point in time would supersede everybody that was with JAD, and we might have a severe exodus of employees because it was already – past practice has shown us that this did occur when these people became upset, all right?

(TR-267-268.)

The ALJ also heard from Twin America’s Vice President Paul Seeger and JAD’s President, Janey West, each of whom explained the rationale that informed their contract proposals and in particular, the Employer’s position on seniority. Janet West testified about the factors influencing her to advocate for the retention of the JAD ticket agents’ seniority in connection with the integration of the merged workforce. “[T]he whole idea here”, she said, “[was] how to blend two groups of employees; number one, the key – the key piece of all this is how do we make –or get to 100 percent retention? And so with that being the main task, you know, it’s a matter of taking all the different components and analyzing them and seeing what’s

the best mix to accomplish that.” (TR-381.) She recalled in or about October 2014 there was a mass walkout of JAD ticket agents who were protesting their ability to not give discounts to customers. (TR-369.) Despite her entreaties to stay on the job because she was in Florida and hold the issue until she could return, 46 or 47 ticket agents walked out that day. A majority of them went to work for Big Bus, a competitor of City Sights and Gray Line. (TR-369, 370.) In 2016 there was still a lot of competition for labor in the industry, with very aggressive recruiting campaigns being done by two major competitors of the Employer, Big Bus and Top View. (TR-371.) In addition, she was told by some of her ticket agents that they would never stay, they would leave the Employer before they were put at the bottom of the seniority list. (TR-381.) On cross examination by Arthur Schwartz, counsel for the charging parties, Ms. West confirmed her belief during this critical time frame that the JAD ticket agents would have “walked out” if they were lower on the seniority list than the former Gray Line employees, (TR-395), and that the Employer’s goal was to make sure it retained every ticket agent. “We weren’t in a position, giving (sic) the competitive environment, to lose anyone.” (TR-398.)

Against this clear and convincing evidence, General Counsel produced no credible evidence of a discriminatory motive or hostility on the part of either the Employer or the Union toward the Charging Parties in the negotiations or the agreement ultimately reached. Based on all of this testimony and the documents underlying it, the ALJ concluded, “All three of Respondent Employer’s witnesses described a credible business rationale for the actions taken by them, and the considerable efforts made to reach a reasonable compromise with the Union on the consolidation of the unit.” ALJD:7:24-26.

In a memorandum dated January 5, 2017 to “All Twin America and JAD Ticket Agents” regarding the “Winter Bid”, (Joint Exhibit 3A), the Employer notified the tickets about the agreement that had been negotiated with the Union and how the Winter bid would operate. Ticket agent Tefe Amewo testified the Memorandum was posted in the ticket agents’ office for all employees to see. (TR-112.) Amewo also testified, which was credibly denied by Murphy, he confronted Murphy on January 13, 2017, after submitting his bid, and “accused” Murphy of being the one who wanted to put the former Gray Line agents at the bottom of the JAD seniority list. He claimed Murphy’s response was, “[T]hat you people have lost the election.” (TR-114-115.) In another conversation with Murphy that allegedly occurred in April when Amewo came in to apply for, and then rejected a job with JAD, he claimed Murphy again told him that the Employer was putting the Gray Line agents at the bottom of the JAD seniority list because “...you guys lost the election.” (TR-127.) Murphy, for his part, categorically denied these conversations and ever telling Amewo that the former Gray Line employees’ seniority was because he lost the election. (TR-280.) The ALJ found Amewo’s testimony less credible than that of the Employer’s witnesses. ALJD:7:27-28 and that determination was well founded in the record and in common sense.⁹

⁹ As discussed in Local 1212’s Post Trial Brief to the ALJ, at page 11, “First, why would he have waited until January 13, 2017 to first confront Murphy, if he did at all? He knew no later than January 3, 2017, when he signed the charge in 2-CB-190736 and the Employer’s Winter Bid memo (Joint Exhibit 3A) was posted, that the Employer and the Union had already agreed to entail the Gray Line agents on the JAD seniority list for the Winter bid. Second, why wouldn’t he have reported Murphy’s comment to Sanoussi or Mohammed so that they could confront the Employer with it at a subsequent negotiating session, or report it to Local 1212 so that it could consider whether its view of the Employer’s asserted business justification on the topic should change? And why would Murphy, a principal in the negotiations with the Union, who was keenly aware of the Employer’s concern about avoiding a JAD ticket agent “exodus” and had personally written to the Union conveying the Employer’s wage and seniority proposal and setting forth its justifications therefore (Employer Exhibit 8), deviate from that position in a personal discussion with Amewo?”

Sarafa Sanoussi testified he was present at negotiation sessions where seniority was discussed. (TR-166.) At the first negotiation session, which he stated was held on January 9, 2017 he claimed his colleague, Rufai Mohammad, presented the Gray Line ticket agents' proposals (Union Exhibit 1). In response to the seniority proposal for "two seniority lists or to go according to the date of hiring", he alleged Twin America Executive Vice President Paul Seeger kept saying "No. No." and Seeger justified his position by saying "That's the result of the election we called for." (TR-170, 171.) But the ALJ also found, with good reason, his testimony was also less credible than the Employer's witnesses, ALJD:7:28-29, 36-39.¹⁰

It makes absolutely no sense and therefore cannot be credited. For all these reasons, Amewo's version of Murphy's alleged statements is not credible."

¹⁰ As discussed in Local 1212's Post Trial brief to the ALJ, at 11-13, it became clear that Sanoussi's recollection of these events was vague and spotty at best, and totally unbelievable. He couldn't accurately remember when the negotiations were held. (TR-185.) Sanoussi offered alternative contexts for Seeger's remark – that it was made to the former Local 225 business representative, James Musick (sic) in connection with some discussions about maintaining two unions. (TR-186). He ultimately backed off of his claim that Seeger made any such remark at the negotiating sessions with Local 1212. When shown his signature on the sign in sheet from that meeting, he acknowledged the first negotiating session was on December 28, 2016, not January 9, 2017. (TR-188.) Then, he could not recall Union Exhibit 1 being presented to the Employer that day. (TR-189, 190) ("Q: And the Union...handed these proposals to the Employer, right? A: I can't say yes and I can't say no.") But Rufai Mohammed clearly testified, "We gave it out, and then it was like, photocopied and then given out." (TR-211.) In contrast with his earlier testimony about the proposal being presented at the table, (TR-188). Sanoussi said on cross examination that he did not know if the Vice-President of the Union discussed it with the Employer or not. He didn't remember anything about the proposal after it was given to the Vice-President (TR-192-193). But he did remember, in response to specific questions about the proposal, that the Employer came back and rejected the proposal in Union Exhibit 1 for retroactive pay, and the proposal for seniority by saying there was going to be one Employer and one seniority list. (TR-193.) Amid these many inconsistencies and errors, the ALJ was well grounded in discrediting this witness's testimony.

ARGUMENT

I.

THE ALJ PROPERLY CONCLUDED THERE WAS NO UNLAWFUL DISCRIMINATION BY THE RESPONDENTS IN AGREEING TO THE SENIORITY PROVISION

A. The union negotiated the seniority provision consistent with its duty of fair representation to all bargaining unit members.

The definition of a Union's duty of fair representation in contract negotiations is well established and set forth in *Ford Motor Co. v. Huffman*, 354 U.S. 330 (1953). In *Ford Motor Co.*, the Supreme Court said the bargaining representative is responsible to, and owes complete loyalty to, the interests of all it represents. With respect to the exercise of that obligation, the Court observed,

Inevitably differences arise in the manner and degree to which the terms of a negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining agent in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Compromises on a temporary basis, with a view to long term advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables.

Ford Motor Co. v. Huffman, 345 U.S. 330, 338-339 (1953)

Once the Twin America-JAD bargaining unit was consolidated, it is acknowledged, the Union was obligated to bargain "on the basis of relevant considerations, and not on considerations that are arbitrary, discriminatory, or in bad faith." *Reading Anthracite Co.*, 326 NLRB 1370 (1998). Absent evidence that it was unlawfully motivated, however, a Union's negotiations for end-tailing seniority based on unit considerations has been recognized as lawful. *Riser Foods, Inc.*, 309 NLRB 635 (1992); *International Brotherhood of Fireman and*

Oilers, Local No. 320, AFL-CIO (Phillip Morris, U.S.A.), 323 NLRB 89, 197 NLRB Lexis 147* (1997); *Simon Levi Company Ltd.*, 181 NLRB 826 (1970); *Local 471, Rochester Regional Joint Board, Workers United (Sodexo, Inc.)*, 359 NLRB No. 166, 2013 NLRB Lexis 529.

Where, however, a Union is unable to demonstrate a legitimate basis for negotiating away contractually established seniority rights of a portion of its bargaining unit, the change of seniority from company date of hire to unit seniority that worked a disadvantage to a portion of the bargaining unit, has been held to be unlawful. *Barton Brands*, 228 NLRB 889 (1977) (the union failed to show any objective justification for its conduct other than placating the desires of the majority of unit employees at the expense of the minority).

General Counsel asserts, at page 8 of its Brief:

[T]he Employers and Local 1212 cited no lawful reason for entailing the 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 and 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.

It should be noted that General Counsel cites no reference to the record to support this allegation, because it is false. The ALJ found the Employers and the Union each enunciated legitimate reasons for proposing and accepting the Employer’s seniority proposal (ALJD:10:15-42; 11:1-2); and those reasons abound in the record.

General Counsel asserts, at page 9 of its Brief, that after the election results were certified on November 28, 2016, “there was no integration or consolidation to accomplish” in the bargaining unit. That statement is contradicted by General Counsel’s acknowledgement on page 10 of its Brief, that there remained two groups of employees in the bargaining unit covered by different contractual terms that could bring them into conflict with each other; that one such term was “who would receive preference for bidding on sales sites”; and that there was an urgency to

resolving this conflict because there was a winter bid-pick scheduled for January 3, 2017. This was the imminent business reality facing the negotiating parties and was, notwithstanding General Counsel's failure to recognize it as such, a serious question concerning the integration and consolidation of the bargaining unit.

General Counsel then suggests the lawful options available for the Respondents to solve the problem of seniority for bidding were (a) to assign bidding positions randomly; (b) alphabetically; or (c) according to their original date of hire. According to General Counsel, then, no other lawful option was available to the Respondents. Such a position departs from decades of established Supreme Court and Board law acknowledging that, subject to good faith and honesty of purpose, "a wide range of reasonableness must be allowed a statutory bargaining agent" and that given legitimate reasons, end-tailing the seniority of certain bargaining unit members does not violate the Act. Cf.: *Ford Motor Co. v. Huffman*, 354 U.S. 330 (1953); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Airline Pilots v. O'Neill*, 499 U.S. 65 (1991); *Riser Foods, Inc.*, 309 NLRB 635 (1992); *International Brotherhood of Fireman and Oilers, AFL-CIO (Phillip Morris, U.S.A.)*, 323 NLRB (1997). General Counsel's position suggests it is unlawful for an Employer and a Union to consider employee retention and the potential for widespread loss of employees to competing businesses in such circumstances. It also suggests that a Union cannot lawfully, no matter the economic gains directed at the workers affected by the topic of seniority, negotiate a change in that term of employment. That is not and has never been the law; and it is not a change the Board should entertain in this case.

General Counsel's reliance on *Barton Brands* and similar cases is clearly misplaced in this matter. There, the Board found that the non-discriminatory rationales advanced by the Union and Employer were "self-serving afterthoughts". 228 NLRB, at 892. Thus, *Barton* does not

stand for the rule that negotiating a seniority clause that works a disadvantage to a minority group of the bargaining unit is *per se* illegal. It stands for the proposition when a Union negotiates a change in seniority provisions that deprives a minority group of employees in the bargaining unit of previously vested seniority, the Board will ask the Union to demonstrate an “objective justification for its conduct.” 228 NLRB 892. Applying this holding of *Barton*, its result is clearly distinguishable from our case. Here, the Union had clear and unmistakable legitimate justifications for agreeing to the Employer’s seniority proposal that were manifest during the negotiations and clearly asserted at trial. (TR-92, 93.) Thus, the facts demonstrated beyond cavil, a course of conduct by Local 1212 designed to achieve an important unit objective (wage parity) and extract the greatest benefit possible for the very employee group from Gray Lines for which it compromised on the seniority proposal. Such is the give and take of collective bargaining. From the very beginning of its negotiations over terms and conditions for these new employees Local 1212 sought – and ultimately won – parity for the former Gray Line employees in wages and benefits that resulted in earnings increases of \$6.00 per ticket, over a 50% increase, and enhanced vacation and sick time benefits with credit for their years of prior service with Gray Lines. While seeking this parity objective for the former Gray Line contingent, the Union always proposed to maintain either a separate seniority list or the merger of the seniority lists for the Gray Line and JAD employees. (Union Exhibit 1.) In response to the Union’s wage and seniority proposals the Employer ultimately, although not initially, agreed to its wage demand, but gave voice to a “very reasonable” legitimate business concern in support of its counter proposal on seniority – retaining the JAD ticket agents and preventing their exodus to the

Employer's competition. (TR-93.¹¹) Unlike the respondent in *Barton*, the Union here had a palpable objective justification that was evident from beginning for agreeing to the Employer's seniority proposal. It follows, under the teaching of *Barton*, the Union did not violate its duty of fair representation and no 8(b)(2) or 8(b)(1)(A) violation was committed.

International Brotherhood of Fireman and Oilers, Local No. 320, AFL-CIO (Phillip Morris, U.S.A.), 323 NLRB 89, 197 NLRB Lexis 147* (1997) and *Simon Levi Company*, 181 NLRB 826 (19070), are more aligned with the instant matter. In *Phillip Morris*, the Union represented a unit of 10 oilers and 4 firemen at Employer's power plant. Another union represented the production employees at the plant. Historically, senior members of the production unit could bid into the oilers and firemen unit. When they did so they accumulated unit or craft seniority from their date of transfer into the oilers/firemen unit. After a period of time the previous production workers in the unit, who were then represented by the Firemen and Oilers Union, asked the Union to negotiate a change in the application of seniority from craft entry date to plant entry date for all purposes.¹² During the negotiations the Union achieved a change from craft seniority to plant seniority as it applied to shift preference and vacation

¹¹ Having given voice to what Local 1212 believed was a reasonable concern for the retention of its JAD ticket agents and the prevention of their exodus to the competition, and the Employer's agreement to the significant wage increases that came with its wage parity demand, the Union had no good strategies to play if it wanted to settle a contract and achieve the important unit objectives of wage parity for all ticket agents and unit preservation. It could not in good faith assert the Employer was not bargaining in good faith, as it had no reason to believe the Employer's stated reasons for its seniority proposal were not genuine and were a ruse to discriminate against the former Gray Line agents. It could hold off reaching an agreement on a contract, which would only deprive all the unit members of significant wage increases. Indeed, the Employer had already demonstrated in its negotiating history with Local 225 its willingness to simply maintain existing terms and conditions on an expired contract rather than accepting a contract with which it did not agree.

¹² Seniority determined layoffs, curtailment days (days in which there was less than 8 hours of available work), shift preference, bumping rights, and vacation scheduling and polling (the order in which employees were asked for their vacation preferences.)

scheduling/polling. This change benefitted 6 prior production workers and disadvantaged 4 oilers who had more craft seniority but less plant seniority. “The Respondent proposed and negotiated the change in these seniority provisions solely at the request of the oilers who were previously employed as production workers and for no other reason” and over the objection of the 4 senior craft unit oilers. 323 NLRB, at 89-90.

The issue presented to the Board was whether Respondent violated Section 8(b)(1)(A) of the Act when it negotiated this change of seniority at the request of the oilers who were previously employed as production workers. 323 NLRB, at 90. General Counsel asserted Respondent violated its duty of fair representation toward the 4 original unit members by the change from craft seniority to plant seniority. Like in the case at bar, General Counsel asserted the change in seniority benefitted the numerically larger group at the expense of the smaller group, and the change was not justified by objective considerations.¹³ General Counsel also asserted the negotiated change substantially impaired the 4 oiler’s seniority rights under the predecessor agreements. *Id.*, at 90.

The Board dismissed the complaint, finding the Union did not violate Section 8(b)(1)(A) and its duty of fair representation in negotiating the seniority changes requested by the larger group of former production workers who were now oilers. 223 NLRB 89, 91. Relying on *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), *Humphrey v. Moore*, 375, U.S. 335, 349 and *Airline Pilots v. O’Neill*, 499 U.S. 65 (1991) the Board found that the Union’s actions did not fall outside the “wide range of reasonableness” in the absence of bad faith that is allowed to Unions in its negotiations of collective bargaining agreements. 327 NLRB, at 91. The Board found no merit in General Counsel’s contention that the Union violated its duty of fair representation

¹³ General Counsel’s Brief, p.9.

simply because it acted on the basis of a request from the oilers previously employed as production workers. *Id.* Citing the reasoning from *Ford Motor Co., infra.*, 345 U.S. 330, 338-339, the Board observed the Firemen and Oilers Union, like Local 1212 in the instant case, was confronted with differences between the interests of two groups of unit employees regarding the application of seniority. The solution ultimately negotiated, the Board found, is, “[O]n its face, a rational approach when one considers that the [Union] was faced with a request from one group of unit employees whose interests were not wholly compatible with the interests of another group of unit employees.” In the absence of bad faith, it was neither “irrational” or “arbitrary”. 327 NLRB, 90.

The Board also found there was no evidence of bad faith or invidious motivation, notwithstanding that it negotiated the change in seniority “solely at the request of the oilers who were previously employed as production workers and ‘for no other reason’.” 223NLRB, at 91. The Board cited *Humphrey v. Moore*, 375 U.S. 335, 349 (1964):

[W]e are not ready to find a breach of the collective bargaining agent’s duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another.

The Board explained further:

Indeed, in the absence of bad faith or hostile motive, it would be anomalous to hold that a union breaches its duty of fair representation because it takes into account the interests of a group of represented employees (even if they are a numerical majority) and then partially satisfies that request in achieving a collective-bargaining agreement. After all, a labor organization can be expected to be responsive to its membership. That is what the Respondent did here. Although it is true that the altered seniority provisions partially benefited one group to the detriment of another group, when viewed in comparison to the historical seniority application which benefited one group exclusively, we find that the Respondent’s compromise solution was well within the wide range of reasonableness accorded a union in the circumstances that the Respondent confronted here.

Id.

Moreover, the Board also specifically found this case was in accord with *Barton* and similar cases, noting that here, the Union considered the legitimate interests of both groups in the unit and therefore did not act arbitrarily or irrationally. *Id.*, footnote 4.¹⁴ Accord, *Simon Levi Company, Ltd.*, 181 NLRB 826, 827-228 (1970)(Upholding negotiated endtailing of a new group of employees in a merged bargaining unit “result[ing] from a difficult decision, non-discriminatory in nature, which was predicated upon a *bona fide* attempt to resolve a problem frequently arising from business mergers.”)

The instant case, like *Philip Morris and Simon Levi*, is also barren of any evidence of bad faith or hostile motive on the part of the Union in its negotiations of the seniority provision as it affected the charging parties. The Union included the affected members on the bargaining committee; it made but failed to achieve its proposal for separate seniority lists or date of hire seniority as requested by the former Gray Line members (Union Exhibit 1); but it did secure date of hire seniority for all benefit purposes exclusive of bid and layoffs. It also sought and achieved, in exchange for its limited compromise on seniority, wage enhancements for the former Gray Line members of the unit that was far in excess of those gotten for the former JAD ticket agent members and full date of hire seniority for all other benefit purposes. The ALJ credited the Union’s explanation for its decisions ALJD:10:23-30; 11:1-2. This result advanced important unit considerations. It considered the Employer’s stated concern, also credited by the ALJ, about retention of ticket agents advanced in support of its seniority counterproposal and believed, it was a very reasonable concern. (TR-93). The ALJ credited all three of Respondent Employer’s

¹⁴ Indeed, Chairman Gould, at the time, opined that the holding in *Firemen and Oilers (Phillip Morris)* was correct on the law of fair representation, that competing positions on seniority may appropriately be resolved on the basis of political considerations and to the extent the *Barton* case held otherwise it was in error. 327 NLRB, 90, at footnote 4.

witnesses who testified about their grave concerns regarding employee retention if the former Gray Line employees' seniority overrode the JAD employees. ALJD:7:20-26; 10:34-41. These considerations evidence a purity of purpose, a concern for unit interests and an absence of bad faith or hostility on the part of the Union and the Employer toward the Charging Parties. Unlike the Union in *Barton*, there is no evidence in the record that its decisions were based on a political determination, that it was merely pandering to the majority, nor a self-serving afterthought that laid bare arbitrary or irrational actions. And General Counsel presented no other credible evidence of bad faith or hostility by the Union.

While the compromises reached with the Employer by the Union may not have been the exact result desired by the former Gray Line members, it is surely not outside the wide range of reasonableness accorded a union in the circumstances that it confronted here. “[T]he wide range of reasonableness accorded a union in its negotiating capacity does not *require* a union to achieve a ‘Solomonic’ solution or to precisely split the differences between legitimate competing demands.” *Firemen & Oilers Local 320 (Philip Morris, USA)*, 323 NLRB at 91.

General Counsel's reliance on *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974 (1986) is misplaced as that case is inapposite to the one under review. In that case the Board held, after the consolidation of two groups of workers, the union advocated for endtailing of one group of employees to the other on the impermissible basis that the employees in that group had not been represented by a union as long as the employees in the other group. See also, *Teamsters Local Union No. 435 (Super Value, Inc.)* 317 NLRB No. 95 (1995), fn.3. But that critical factor is not present in our case. There is no evidence in the record that either Local 1212 or the Respondent Employers ever said that the length of time either group of employees were represented by Local 1212 was the motivation for either the Employer's seniority proposal or the Union's

acquiescence thereto in their new collective bargaining agreement. Indeed, the record established that rather than the length of time either group had been represented by the Union, it was a desire to retain as many workers as possible in a very competitive business and to prevent workers from leaving to go to work for the competition that informed the Employer's proposal and an understanding of the reasonableness of that concern and an opportunity to achieve wage parity – a major Union negotiating objective that resulted in substantial wage increases for that same group of members – that informed the Union's acceptance of the proposal. Thus, *Teamsters Local 42* does not compel a different decision in the instant case.

For all of these reasons, the Union did not violate section 8(b)(1)(A) of the Act.

II.
THERE WAS NO 8(b)(2) VIOLATION BY THE UNION
BECAUSE THERE WAS NO 8(a)(3) VIOLATION BY THE EMPLOYER

The Union is alleged to have committed a violation of Section 8(b)(2) of the Act “[b]y providing the agreement and cover” that enabled the Employer to discriminate against its employees in violation of Section 8(a)(3) of the Act with respect to entailing the former Gray Line employees and their subsequent, April 2017 layoffs. (General Counsel's Brief, p. 12-13.) Because the ALJ properly concluded there was no Section 8(a)(3) violation by the Respondent Employers in negotiating the seniority provision, it follows there was no 8(b)(2) violation by the Union.

A. The Respondent-Employer's actions did not violate Section 8(a)(3)

Having analyzed the law and considered the evidence, the ALJ concluded the Employer did not violate Section 8(a)(3) of the Act in this case. Thus, ALJ observed:

All three the Respondent Employer's witnesses described a credible business rationale for the actions taken by them and the considerable efforts made to reach a reasonable compromise with the Union on the consolidation of the unit.

ALJD: 7:24-26

The ALJ found JAD President, Janet West's, testimony to be credible. She recognized that "pretty much any agreement regarding seniority... would negatively affect someone, and that there was no way to make 100 percent of the unit happy." ALJD:7:14-17. As described by the ALJ, West "explained in detail her past history dealing with disgruntled [JAD] employees that helped inform her concerns about employee retention and her efforts to manage that" which was consistent with the testimony of the Employer's other witnesses. ALJD:7:21-24.¹⁵ West testified the Employer was not in a position, "given the competitive environment, to lose anyone." TR-398. Thus, the ALJ observed:

Facing that challenge, she testified that by honoring the Gray Line employees' seniority with regard to all but two items while giving them substantial raises -was her best effort to keep most of the people reasonably happy.

ALJD: 7:16-19.

Thus, the ALJ concluded that the Employer did not violate Section 8(a)(3) because the evidence established its seniority proposal was motivated by a legitimate objective – the retention of as many ticket agents as possible and the avoidance of an exodus of JAD ticket agents to the competition.

The ALJ found the statements of Amewo and Sanoussi to the contrary to be less credible than the Employer's testimony. ALJD:7:28-29. Even assuming *arguendo* the seniority provision

¹⁵ West testified there was an aggressive recruiting campaign in process by two major competitors (TR-371) and described a mass walkout by disgruntled JAD ticket agents in October 2014 despite her entreaties to stay on the job while they worked out their issues (TR-369). She affirmed her belief that at that critical time, just before the Winter bids, the former JAD ticket agents would have "walked out" had they been put lower on the seniority list. (TR-381)

ultimately agreed to actually disadvantaged the charging parties earning potential¹⁶, or that the Employer commented that the situation the parties found themselves in was because of the election between Locals 225 and 1212, the ALJ still properly concluded there was no 8(a)(3) violation, and consequently no 8(b)(2) violation, because the Employer was motivated by legitimate objectives. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 1967.

B. The ALJ Properly Discounted the Credibility of General Counsel's Witnesses

General Counsel excepts to the ALJ's finding that its two witnesses' testimony on two matters – 1) alleged statements by two Employer representatives that its actions were being taken because Local 225 lost the election; and 2) that the effect of their new seniority status harmed their earning status – was less credible than the Employers' witnesses testimony. General Counsel's exceptions 8-11. ALJD:7 24-41. It is, of course, the Board's policy not to overrule an ALJ's credibility determinations unless a clear preponderance of the evidence convinces the Board that they are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enf'd*. 188 F. 2d 362 (C.A.3, 1951).

There was abundant evidence in the record supporting the ALJ's findings that General Counsel's witnesses were less credible than the Employer's witnesses, in addition, of course, to the ALJ's ability to observe the demeanor of the witnesses while testifying. And characterizing the ALJ's credibility conclusions as "inferences", does not alter the outcome properly reached by the Judge.

¹⁶ Respondents did not concede the contract provisions agreed to disadvantage the former Gray Line employees earning potential. The Employer showed, and the ALJ found that in fact, the former Gray Line employees made more money as a class in the 2017 season following implementation of the contract than did the former JAD employees and more than the former Gray Line employees themselves made in the same period in 2016. Employer Exhibits 10-14. ALJD:7:30-34.

In a memorandum dated January 5, 2017 to “All Twin America and JAD Ticket Agents” regarding the “Winter Bid”, (Joint Exhibit 3A), the Employer notified the tickets about the agreement that had been negotiated with the Union and how the Winter bid would operate. Amewo testified the Memorandum was posted in the ticket agents’ office for all employees to see. (TR-112.) Amewo also testified he confronted Murphy on January 13, 2017, after submitting his bid, and “accused” Murphy of being the one who wanted to put the former Gray Line agents at the bottom of the JAD seniority list. He claimed Murphy’s response to his accusation was, “[T]hat you people have lost the election.” (TR-114-115.) In another conversation with Murphy that allegedly occurred nearly three months later, in April, when Amewo came in to apply for, and then rejected a job with JAD, he claimed Murphy again told him that the Employer was putting the Gray Line agents at the bottom of the JAD seniority list because “...you guys lost the election.” (TR-127.) Murphy, for his part, categorically denied these conversations and ever telling Amewo that the former Gray Line employees’ seniority was because he lost the election. (TR-280.)

The ALJ properly discounted Amewo’s testimony and viewed the comments alleged to have been made by Murphy as taken out of context, that is, not supportive of unlawful animus. They were just as properly viewed as a mere statement of why the parties were in the situation they were and why they had to deal with the issues they were confronted. As to whether the statements were actually made, why did Amewo wait until January 13, 2017 to first confront Murphy, if he did at all? He knew no later than January 3, 2017, when he signed the charge in 2-CB-190736 and the Employer’s Winter Bid memo (Joint Exhibit 3A) was posted, that the Employer and the Union had already agreed to enttail the Gray Line agents on the JAD seniority list for the Winter bid. Second, why didn’t he report Murphy’s comment to Sanoussi or

Mohammed so that they could confront the Employer with it at a subsequent negotiating session, or report it to Local 1212 so that it could consider whether its view of the Employer's asserted business justification on the topic should change? And why would Murphy, a principal in the negotiations with the Union, who was keenly aware of the Employer's rationale for its seniority proposal and had personally written to the Union conveying the Employer's wage and seniority proposal and setting forth its justifications therefore (Employer Exhibit 8), say something different in a personal discussion with Amewo? It made no sense and therefore was not credible.

But even assuming, *arguendo*, Murphy made the statements in mid-January and early April, after the consolidation agreement was finalized and the employees were being informed of the manner in which the January location bid would be conducted, the statements are properly viewed not as a statement of Union animus by Murphy, but as a way of telling Amewo to stop complaining already, the issue has been resolved. For all these reasons, Amewo's version of Murphy's alleged statements was not credible and properly viewed by the ALJ as, if said, taken out of context.

Sarafa Sanoussi's testimony, if possible, was even weaker than Amewo's. He was present at negotiation sessions where seniority was discussed. (TR-166.) At the first negotiation session, which he stated was held on January 9, 2017 (*Id.*) he claimed his colleague, Rufai Mohammad, presented the Gray Line ticket agents' proposals (Union Exhibit 1). In response to the seniority proposal for "two seniority lists or to go according to the date of hiring", he alleged Twin America Executive Vice President Paul Seeger kept saying "No. No." and Seeger justified his position by saying "That's the result of the election we called for." (TR-170, 171.) While even on its face it is unclear what this testimony meant, on cross examination it became clear that Sanoussi's recollection of these events was vague and spotty at best, and totally unbelievable.

First, in questioning by the Respondent Employer’s counsel, regarding the first negotiating meeting, which Sanoussi referred to as occurring on January 9, 2017, Sanoussi was asked if Seeger talked about the seniority issue. He answered, “Really, he doesn’t talk about it. We raised seniority.” (TR-185.) Sanoussi then offered an alternative context for Seeger’s remark – that it was made to the former Local 225 business representative, James Musick (sic) in connection with some discussions about maintaining two unions. (TR-186). So, the context of these alleged statements was very much in doubt. In any event, Sanoussi backed off of his claim that Seeger made any such remark at the negotiating sessions with Local 1212. On further cross-examination by Local 1212, Sanoussi’s abysmal recollection of the negotiations he attended became even more evident. First, even his recollection of the date of the first negotiating session at which he claimed Seeger made this remark was clearly wrong. When shown his signature on the sign in sheet from that meeting, he acknowledged the first negotiating session was on December 28, 2016, not January 9, 2017. (TR-188.) Then, he could not recall Union Exhibit 1 being presented to the Employer that day. (TR-189, 190) (“Q: And the Union...handed these proposals to the Employer, right? A: I can’t say yes and I can’t say no.”) But Rufai Mohammed clearly testified, “We gave it out, and then it was like, photocopied and then given out.” (TR-211.) In contrast with his earlier testimony about the proposal being presented at the table, (TR-188) Sanoussi said on cross examination that he did not know if the Vice-President of the Union discussed it with the Employer or not. He didn’t remember anything about the proposal after it was given to the Vice-President (TR-192-193). But he did remember, in response to specific questions about the proposal, that the Employer came back and rejected the proposal in Union Exhibit 1 for retroactive pay, and the proposal for seniority by saying there was going to be one Employer and one seniority list. (TR-193.)

Significantly, Sanoussi's testimony about alleged comments by Seeger were not corroborated by Mohammed's version of the negotiations. Mohammed testified he attended the first two negotiating sessions at which seniority was discussed. (TR-199-200.) Contrary to Sanoussi, Mohammed maintained it was Sanoussi, not him, who took up the issue of seniority at the first negotiating session (the first of which he also incorrectly asserted was in January 2016) (TR-200.) Mohammed's direct testimony about the discussions concerning seniority at the two negotiations stands in stark contrast with Sanoussi's. At the first negotiating session, the relevant colloquy between Mohammed and Mr. Rucker concerning Seeger's comments on seniority was:

MR. RUCKER: Did Mr. Seeger say anything about why that was happening? Why the seniority would be end-tipped?

A: We tried to get an explanation to them, and so the get -- and like a reason why they were doing that but, they didn't give us any concrete reason and during that time.

Q: They didn't say anything about what the reasons were at that meeting?

A: We tried to find out, but I mean, I don't remember them giving us any concrete reason.

Q: Did Mr. Seeger say anything about speaking from Local 225 in connection with seniority at that meeting?

A: I can't remember.

(TR-201.) (Emphasis added.)

Mohammed testified the issue of seniority was also addressed at the second negotiating session he attended, which was held in Connecticut. (TR-201.) The Union's Vice-President was there, as were Seeger and Murphy. Janet West was not there. (TR-202.) The issue of seniority for the Gray Line ticket agents was brought up again. Mohammed testified concerning Seeger's comments about it as follows:

Q Again, did the issue of seniority come up at this meeting?

A It did.

Q *Specifically, did Mr. Seeger say anything about seniority at this meeting?*

A Yeah. We tried to because it was one of the core issues of like, what concerned as the -- one of the most important issues was the seniority issue. So we -- I remember Sanoussi took it up again, *but we were told that the issue had already been addressed*, so we didn't understand because we didn't agree to it during the first meeting at -- in Queens. So when they told us that it had been addressed, we did not agree to it. We tried our best to make them change their mind, but we didn't get any response from them on that date.

Id.

Thus, the ALJ did not err in discounting the testimony of Amewo and Sanoussi or fail to draw inferences of discriminatory motive therefrom in contrast with the credible evidence of lawful motives by the Respondent Employer's witnesses. Accordingly, the 8(b)(2) charge against the Union was properly denied along with the denial of the 8(a)(3) charge against the Respondent Employers.

C. The ALJ properly found the Employer did not constructively discharge the former Gray Line ticket agents who refused employment with JAD.

While this action is not directly attributable to the Union, the ALJ specifically found that since the Respondents did not engage 8(a)(3) and (1) or 8(b)(1)(a) or 8(b)(2) activity with respect to the negotiation of the seniority agreement, the Employer did not violate the Act in "terminating those employees who declined to transition to JAD under the parties' "agreed upon terms" or "requiring the former Gray Line employees to accept their end tailed seniority dates as a condition of rehire." ALJD:10:32-35. To the extent that the Union may be jointly liable with the Employer for these actions should the ALJ's decision be vacated in this regard, the Union

asserts the Employer did not constructively discharge former Gray Line ticket agents who refused employment with Respondent JAD under the Hobson's Choice doctrine. The Union respectfully directs the Board to the Employer's post trial brief to the ALJ at pages 34-38 on this issue.

D. The ALJ properly found the Employer did not violate the Act by laying off the former Gray Line ticket agents as they transitioned to employment with JAD.

While this action is not directly attributable to the Union, the ALJ properly perceived no improper motive from the Respondent-Employer's process of laying off the former Gray Lines employees.¹⁷ With respect to General Counsel's objections to that process, the ALJ observed, "I find this ignores the reality of the situation the Employer faced and the legitimate business concerns it articulated" (ALJD:11:24-26) and "the process of laying off the former Gray Line employees was essentially no different than the simple administrative process that the General Counsel suggests ... might have been used to transition those employees. The Respondent Employers credibly explained the need to comply with the WARN statutes to the ALJ in its post hearing brief at page 2. Local 1212 respectfully refers the Board to that lawful explanation on this issue.

Based on the Respondent-Employer's lawful compliance with the WARN statutes, the ALJ properly declined to find evidence of an improper motive in the manner in which it separated ticket agents from Respondent-Gray Line and transitioned them to Respondent-JAD.

¹⁷ Respondent- Employer Gray Lines issued statutory WARN notices to its ticket agents on January 3, 2017 informing them of a layoff date effective April 6, 2017. All employees were offered continuing employment with JAD without interruption that they could have availed themselves of at any time prior to or after that date.

CONCLUSION

For the reasons discussed above and, in his Decision, the ALJ properly found the Union and Employer in this case negotiated in good faith for a new collective bargaining agreement after the merger of two bargaining units previously represented by different unions. The Union bargained without hostility toward its new members who were previously represented by another labor organization, achieving significant economic improvements and the preservation of their seniority for all benefit purposes except location bid and layoffs. The Employer established its non-discriminatory motive in making its seniority proposal – preservation and retention of its workforce in a very competitive market. The Employer’s reasoning was recognized by the Union as reasonable given the economic and competitive market conditions in the industry. General Counsel failed to establish an improper motive for the agreement reached between the negotiating parties. Accordingly, the ALJ properly found General Counsel failed to prove violations of Sections 8(b)(1)(a) and 8(b)(2) of the Act by the Union and 8(a)(1) and (3) by the Employer.

For all of these reasons, General Counsel’s exceptions to the decision of the ALJ should be denied and the Administrative Law Judge’s Decision should be affirmed and adopted by the Board.

Dated: July 1, 2019
Elmsford, New York

Respectfully Submitted,
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By: *s/Gary Rothman*

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CERTIFICATION OF SERVICE

Pursuant to Section 102.46(h) of the National Labor Relations Board Rules and Regulations the undersigned hereby certifies that a true and correct copy of Respondent United Service Workers Union, Local 1212's Answering Brief In Opposition To General Counsel's Exceptions To The Decision Of The Administrative Law Judge was filed with the National Labor Relations Board via ECF and served on the following parties via electronic mail:

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s/ Gary Rothman

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