

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-190736

TEFE KWAMI AMEWO, an Individual

**UNITED SERVICE WORKERS UNION,
IUJAT, LOCAL 1212**

and

Case No. 02-CB-199847

ARTHUR Z. SCHWARTZ, an Individual

**RESPONDENT EMPLOYERS' ANSWERING BRIEF TO THE GENERAL
COUNSEL'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

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Pursuant to Section 102.46(b) of the National Labor Relations Board’s (“NLRB”) Rules and Regulations, Respondents Twin America, LLC (“Twin America”), City Sights NY, LLC (“City Sights”), Gray Line New York Tours, Inc. (“GL”), and JAD Transportation, Inc. (“JAD”) (hereinafter collectively referred to as “Employers”), respectfully submit this Answering Brief in opposition to the General Counsel’s (“GC”) Exceptions and Brief in Support of Exceptions to Administrative Law Judge Jeffrey Gardner’s (“Judge Gardner”) March 20, 2019 decision.¹

I. INTRODUCTION

The GC’s exceptions in this matter are unsupported by the record facts – as set forth in Judge Gardner’s decision – and applicable Board precedent. The GC’s exceptions are solely grounded on the allegation that the Employers’ actions were only motivated by “union considerations” in negotiating and ultimately entering into an agreement with the United Service Workers Union, Local 1212 (“Local 1212”) addressing seniority, commissions, and benefits (“Consolidation Agreement”) for GL ticket agents (“Agents”).

The GC’s contention ignores the history of GL Agents and their former representative, Local 225, Transport Workers Union of America, AFL-CIO (“Local 225”), and the Employers’ compelling, legitimate business reasons for their actions. The GC misinterprets the facts and Board precedent to support the unfounded claim that the Consolidation Agreement – *i.e.*, GL Agents’ seniority being “endtailed,” as characterized by the GC² – was based solely upon

¹ Citations to Judge Gardner’s decision, the GC’s Exceptions Brief, record transcript pages, and exhibit numbers are as follows: Judge Gardner’s decision = “ALJD at ___”; GC Exceptions Brief = “GC Exc. Br. at ___”; Transcript = “Tr. at ___”; Joint Exhibit = “JTX ___”; General Counsel Exhibit = “GCX ___”; Respondent Employers’ Exhibit = “ERX ___”; and Respondent Local 1212 Exhibit = “UNX ___.”

² For purposes of this Answering Brief, the “Consolidation Agreement” referenced herein is synonymous with the GC’s references to “endtail,” “endtailed,” or “endtailing” in his Brief in Support of Exceptions.

“union considerations.”³ The credited evidence shows that the Employers’ actions were, in fact, devoid of any animus towards Local 225.

As established in the record, and correctly recognized by Judge Gardner, the Employers only concern was their business operations, *i.e.*, retaining all (or most) of their Agents and keeping them motivated to sell the Employers’ tickets, and not leave for the competition. This, however, would prove to be difficult due to the competing interests of two previously separate groups of employees historically represented by different unions operating under separate and distinct terms and conditions of employment.

The Employers, together with the now sole bargaining representative (Local 1212) for both GL and JAD Agents, determined that the Consolidation Agreement was the most fair and reasonable – and therefore lawful – compromise for all Agents under these circumstances. To address the concerns of two groups of employees, the Employers recognized that JAD Agents would receive nothing as a result of the runoff election; while GL Agents who had a much lower commission rate than the JAD Agents, were about to be placed in a markedly superior economic position. The Employers viewed the significant increase in commissions given to GL Agents under the Consolidation Agreement as driving the most evenhanded result: JAD Agents stayed the same in all respects, while the former GL Agents received a major increase in compensation. Indeed, the year-over-year financial evidence correctly relied upon by Judge Gardner confirms the Consolidation Agreement

³ The term “endtail” as used in our context means placing employees at the end of a seniority list. The GC’s “endtail” description here, however, is not factually accurate. The Consolidation Agreement granted GL Agents the highest seniority for all meaningful items driven by seniority under the Local 1212/JAD contract, except for work bid locations. While the “endtail” was alleged to also apply to layoffs and recall, unrebutted testimony confirmed Agents never experienced an involuntary layoff or recall. (Tr. at 267-70 and 305-08.) The “endtail” was, as a practical matter, limited to bid locations only.

allowed former GL Agents to earn more money as a group *despite working hundreds of fewer days and selling thousands of fewer tickets.*

The GC has also failed to accurately portray the factual circumstances involved in, and legal necessity associated with, the layoff of GL Agents as a necessary prerequisite to consolidating the two groups. The changes to Twin America's business operations, *i.e.*, outsourcing GL Agent labor to JAD and eliminating the GL payroll, was prompted by City Sights (one company) buying GL's interest (a different company) in the Twin America joint venture in February 2017. From an ownership perspective, this effectively turned Twin America into just City Sights, which, as explained further below, has always outsourced its entire labor force to JAD. To accomplish this outsourcing lawfully, Twin America had a legal obligation to issue federal and state Worker Adjustment and Retraining Notification ("WARN") notices to all GL Agents. Otherwise, Twin America would have violated those laws and been subject to substantial penalties and fines.

Lastly, GL Agents who voluntarily chose not to accept positions with JAD in 2017 were not subjected to a "Hobson's Choice" of waiving a supposed Section 7 right or foregoing employment with JAD. Neither the facts nor the law support the GC's constructive discharge theory. The credited record establishes the opposite by identifying the reasonableness of the Employers' actions and the GL Agents' primary motivation in not accepting continued employment with JAD. These Agents' deliberate choice was driven by their dissatisfaction with the outcome of earlier bargaining between Twin America and Local 225, which failed to provide GL Agents with the retroactive pay increases that Local 225 had, for years, promised to obtain for them.

In sum, the Board should uphold and affirm Judge Gardner's decision, which was informed by his credibility determinations, the GC's failure to produce reliable evidence of the Employers' actions being based solely on union considerations, and the Judge's approval of the Employers' legitimate business reasons for taking such action under the facts at hand.

II. THE GENERAL COUNSEL'S EXCEPTIONS

On May 17, 2019, the GC filed 11 exceptions, and a brief in support thereof, to Judge Gardner's decision. As described in the GC's Questions Presented, eight of his exceptions (#s 1 through 7 and # 10) challenge Judge Gardner's application of Board precedent in finding the Employers did not violate the Act by entering into the Consolidation Agreement that limitedly entailed GL Agents' seniority for purposes of bidding, layoff, and recall.⁴ Relatedly, these same exceptions also challenge the Judge's application of Board law when he concluded that the Employers lawfully laid-off GL Agents who declined to transition to JAD, and that GL Agents who willingly rejected employment with JAD were not constructively discharged under a Hobson's Choice theory. The GC's remaining exceptions (#s 8 through 11) concern Judge Gardner's factual findings and credibility determinations based upon record evidence in regard to the GC's employee witnesses and the Judge's alleged improper inferences drawn.

III. THE CREDITED FACTS AND RECORD EVIDENCE SUPPORT JUDGE GARDNER'S DECISION THAT THE EMPLOYERS' ACTIONS WERE NOT BASED ON UNION CONSIDERATIONS, BUT RATHER COMPELLING AND LEGITIMATE BUSINESS REASONS

The GC completely ignores the business and economic realities that confronted the Employers in this case. The Employers never considered GL Agents' prior Local 225

⁴ The GC's characterization of the entailing applied to GL Agents was more expansive than what actually transpired, as uncontested testimony showed these Agents never suffered an involuntary layoff or recall. See, supra, n. 3.

membership in entering the Consolidation Agreement; it only deliberated over legitimate business concerns. Local 225 was a non-factor as soon as the NLRB certified the November 2016 runoff election results. As accurately noted in Judge Gardner’s decision, “there was no evidence presented at the hearing demonstrating an overt preference on the part of the Employer for one union over the other.” (ALJD at 4.) In other words, the GC did not meet his burden of demonstrating the Consolidation Agreement was based solely on union considerations. This fact was repeatedly confirmed throughout the record.

The GC would find the Employers’ actions unlawful simply because they did not grant GL Agents everything they wanted. Nothing in the Act compels this outcome.

A. Background Leading up to the November 2016 Runoff Election

City Sights and GL were two rival double-decker hop-on/hop-off sightseeing tour companies operating in the New York City market. (Tr. at 265-66.) City Sights has existed since about 2005 and Local 1212 has represented its Agents and tour guides (“Guides”) throughout until present day. (Tr. at 323; JTX #2, ¶¶ 2 and 34.) As a preferred business method, City Sights outsources its entire labor force – Agents, Guides, and drivers – from JAD, an employee leasing company. (Tr. at 240-41, 323-24; JTX #2, ¶ 2.) Thus JAD, not City Sights, directly employs these workers. (Id.) GL has existed since at least 1994 and Local 225 has represented GL’s Agents and Guides throughout until November 28, 2016. (Tr. at 107-08; JTX #2, ¶¶ 4-5 and 33-34; ERX #4.) GL directly employed its workforce. (Tr. at 248.)

In March 2009, City Sights and GL entered into a joint venture agreement that established Twin America. (JTX #2, ¶ 7; Tr. at 235-36 and 322.) Local 1212 (JAD) and Local 225 (GL) continued to represent their respective, but wholly separate, bargaining units until November 28, 2016. (Tr. at 243, 367-68; JTX #2, ¶¶ 2, 5, and 33-34.) Soon after the inception of the joint venture, Local 225 repeatedly and unsuccessfully sought to be the sole

bargaining representative for all Agents and Guides working at Twin America. Local 225 filed several UC and RC petitions with Regions 2 and 22. (JTX #2, ¶¶ 8-14 and 23-25; JTX #3(g)-(j) and (q)-(r).) The NLRB rejected all of these efforts. (Id.)

Around March 2015, Twin America’s business operations were beginning to merge, *i.e.*, City Sights and GL were functioning as one integrated business operation, selling a single product, under the same management, rather than two separate companies as had been the case at the start of the joint venture. (JTX #2, ¶¶ 12-14.) Despite this unity, Twin America, through its Vice-President and General Manager James Murphy (“Murphy”), communicated to the unions that it did not want, nor did it intend, to merge the City Sights/JAD and GL workforces represented by Local 1212 and Local 225, respectively. (JTX #2, ¶ 19; Tr. at 235, 278-90, 329-30, and 336-338.) Twin America preferred having two unions. (Tr. at 279 and 336-37.)

In early-to-mid 2015, Murphy and Twin America’s Executive Vice-President Paul Seeger (“Seeger”) urged Local 1212 and Local 225 to meet and discuss a system whereby both unions could remain at Twin America. (Tr. at 265-66, 279-80, 329-30, and 336-38.) Jonathan Ames (“Ames”), Local 1212 National Vice-President, was willing to discuss the matter, but James Muessig (“Muessig”), lead representative for Local 225 and a Twin America employee (GL Guide), was not. (Tr. at 265-66, 329-330, and 336-38.) Judge Gardner correctly credited this uncontested testimony as further proof to substantiate his findings that there was no evidence presented at the hearing establishing a preference for one union over the other.⁵ (ALJD at 4.)

⁵ “[T]here does not appear to have been any allegation that the Employer favored one union or the other, or that it had animus toward Local 225 in particular. ... Indeed, Respondent Employer openly maintained its desire that both unions remain in place representing their respective units at that time, and readily acknowledged as much at the hearing.” (ALJD at 4.)

Unable to come to an agreement between both unions, Twin America nonetheless did not contest the RC petition filed thereafter by Local 225 in late August 2015 in Case No. 02-RC-159028 to determine which union would represent the entire workforce of Agents and Guides at Twin America. (JTX #2, ¶ 26; Tr. at 329-30.)

B. Twin America's Previous Bargaining and Labor History with Local 225 Evidences Lawful Conduct and Further Highlights the Absence of Union-Based Considerations or Unlawful Motivations

Up until Local 225 filed its 2015 RC petition, Twin America and Local 225 had for years bargained for a successor contract without coming to an agreement. (JTX #2, ¶ 6; Tr. at 145 and 265.) The last CBA expired November 15, 2014, but was extended by agreement until January 5, 2015. (JTX #3 (f); ERX #3.) It is undisputed that GL Agents were compensated at a significantly lower rate of commissions under the expired Local 225 CBA than their JAD counterparts under the Local 1212 CBA then in effect. (Tr. at 300-02; ERX #1 and #3; ALJD at 5, n. 9.)

During these negotiations, Twin America was willing to pay the GL Agents at the same commission rates as JAD Agents, but in return proposed a reduction of the more costly fringe benefits the GL Agents enjoyed. (Tr. at 300-02.) Local 225, however, did not want to compromise: they wanted GL Agents to retain their superior fringe benefits but still obtain significant increases in commissions. (Id.) Twin America lawfully rejected this one-sided proposal. (Id.) Similarly, Local 225's unfaltering demand for retroactive pay increases also prevented the parties from reaching an agreement. (Tr. at 145-47.) Local 225 insisted on retroactive pay from the expiration date of the prior CBA (November 15, 2014) until the date a new CBA was signed. (Id.; JTX #2, ¶ 6.) Twin America rejected this retroactive pay proposal. (Tr. at 145-47.)

Another issue relevant to the history between the parties that arose in the background around the same time of these successor contract negotiations, which involved Local 225 but was unrelated to GL Agents specifically, was the labor costs of GL Guides and a possible workforce reduction. (JTX #2, ¶¶ 20-21.) The expense of JAD Guides was less than GL Guides. Twin America therefore asked Local 225 to come as close as possible to the JAD labor costs in order to preserve the GL Guides' jobs. (*Id.*) Otherwise, Twin America would lay off most GL Guides and outsource that work to JAD. (*Id.*) After Local 225 refused to do this, Twin America exercised its lawful right to lay off most of the GL Guides in October and December of 2016. (JTX #2, ¶¶ 21, 32, 35, and 36.)

These actions, which included Twin America issuing federal and state WARN notices to GL Guides, led to a series of ULP charges filed by Local 225 asserting an unlawful refusal to bargain and discriminatory layoffs,⁶ and by individual GL Guides asserting discriminatory layoffs.⁷ (JTX #2, ¶¶ 32 and 36; JTX #3 (d), pgs. 4-6 and (f), pg. 2, n. 1.) Region 2 investigated these ULP charges and each one was either dismissed or withdrawn.⁸ (*Id.* at JTX #2, ¶36). Notably, when Twin America needed to hire more Guides in April 2017, it offered re-employment to laid-off former GL Guides, 11 of whom accepted and returned to work. (JTX #2, ¶37; JTX #3(dd).)

⁶ Cases 02-CA-146521, 148964, 148985, 184378 and 186153.

⁷ Cases 02-CA-189290, 189912, 190054 and 190039.

⁸ It should be noted that the GC, by way of Region 2's determinations, previously found Twin America's layoffs of, and issuance of WARN notices to, GL employees lawful. Similar to the GC's previous position, but contrary to its present contention, Judge Gardner correctly found that Twin America legally outsourced its GL Agent labor to JAD, *i.e.*, issuance of WARN notices and related layoffs.

C. The November 2016 Runoff Election Results, the Employers' Business Decisions Moving Forward, and the Employers' Substantial Concessions Made in Reaching the Consolidation Agreement (and Then a New Successor Contract for All Agents)

An election was held in Case No. 02-RC-159028 on September 18, 2015. After a series of stipulations, challenges, resolutions, hearings, objections, and issuance of several interim orders, a runoff election was held on November 18, 2016 between Local 225 and Local 1212. (JTX #2, ¶¶ 27-31 and 33; JTX #3 (t), (u), (v), (w), (x), (y), (z), (aa), and (bb).) Local 1212 won and the NLRB certified these election results on November 28, 2016. (JTX #2, ¶ 34; JTX #3 (cc).) This meant that Local 225 was no longer the bargaining representative of any GL employee. At that point, this also meant that GL Agents would not get the generous successor contract Local 225 had promised, and would not receive the retroactive pay increases they were assured that their years without an increase would remedy. (Tr. at 66-67, 146-47, and 193-94).

On December 16, 2016, Local 1212 National Vice-President Ames sent a letter to Murphy and JAD President Janet West (“West”) requesting to bargain over the consolidation of GL Agents into the JAD Agent bargaining unit (Tr. at 252-53; ERX #6.) The parties’ first substantive meeting concerning Agent seniority happened on December 28, 2016. At this meeting, Local 1212 Vice-President Ames was accompanied by a bargaining committee made up of both GL and JAD Agents and Guides. (Tr. at 76-79.) Vice-President/General Manager Murphy and Executive Vice-President Seeger represented the Employers at this meeting.

The GL Agents provided Ames with a document containing seniority proposals that the GL Agent contingent preferred.⁹ (UNX #1.) Local 1212, through Ames, adopted the GL

⁹ As Judge Gardner correctly noted, although Local 1212 now represented all Agents, “because of the prior history of there having been two separate units, the Union specifically included a contingent of former Gray Line employees (formerly represented by Local 225) on its bargaining committee.” (ALJD at 5-6.)

Agents' seniority proposals – (1) keeping two separate seniority lists or (2) basing seniority on GL Agents' date of hire – and presented them to Murphy and Seeger across the bargaining table. (Id.; Tr. at 190-92 and 318-20). Twin America rejected both proposals and Local 1212 made no other seniority offers.¹⁰ (Tr. at 142, 267-68, 318, 372-76, and 391-92; ERX #4 and #5.) The December 28, 2016 meeting ended with no agreement reached. But with the winter bid¹¹ fast approaching, Ames, Murphy, and Seeger engaged in several conversations and email exchanges over the next few days that resulted in the Consolidation Agreement.¹² (Tr. at 76-79, 261-64, and 330-32; ERX #1, #3, #7-#9.)

Under the terms, GL Agents' date of hire seniority would govern for everything under the then-current Local 1212/JAD contract, *e.g.*, commission rates, PTO pay, sick pay, holiday pay, vacation pay, and immediate eligibility for bonus benefits, but not for bid locations. (Tr. at 239-40, 263-64, 305, 307-08, 377-79, and 403-05; ERX #1.) The Employers also agreed to waive the 50-employee limit on incumbents under Tier A (top commission rate) in the Local 1212/JAD contract. (Id. at ERX #1, Article 24.) As a result, all 73 GL Agents were eligible to receive the highest level of commissions. (Id.; ERX #4.) GL Agents, however, would only receive these benefits if they transitioned to JAD prior to April 6, 2017 pursuant to Twin America's business

¹⁰ The Employers rejected maintaining two separate seniority lists, as this would have been unnecessarily cumbersome and inefficient given Twin America's business decision to outsource its GL labor to JAD and shut down the GL payroll. The Employers similarly rejected a GL Agent date of hire seniority resolution because most GL Agents would have gone to the top of a single list in all aspects of seniority notwithstanding their new JAD brethren. (ERX #4 and #5.)

¹¹ Twin America holds semiannual work location bids, one in the summer and one in winter, as part of its regular business operations. (Tr. at 164 and 298-99.) The sightseeing industry is seasonal and there are busy and slow periods. (Tr. at 239.) Generally, the busy period ranges from April to year-end. (Tr. at 239 and 357-58; ERX #10-#14.)

¹² Murphy and Seeger notified West of all these communications and her feedback was considered. (Tr. at 264-65, 327-28, 373-74, and 382.)

decision to outsource the GL labor and eliminate the GL payroll. (Tr. at 248-49 and 324-35; JTX #3 (a) and (ee).)

After reaching the Consolidation Agreement, 47 out of 73 GL Agents accepted positions at JAD between January 7 and April 6, 2017. (ERX #4 and #14.) Around this same time, the Employers and Local 1212 met on several occasions to negotiate a successor contract to the Local 1212/JAD CBA expiring on May 19, 2017 and reached an agreement on terms in March 2017. (Tr. at 79-81; GCX #2; ERX #1; ERX #2.) This successor contract saw additional significant commission rate increases for all Agents. (Tr. at 332; ERX #2.) No former GL Agent who was previously given the highest commission rate (Tier A) per the Consolidation Agreement was bumped down to a lower commission rate (Tier B) under the successor contract between the parties, notwithstanding the 50-person cap on Tier A. (Tr. at 405-07; ERX #2.) This special exception for the 47 former GL Agents remained intact. (Id.)

D. The Employers' New Obligation to Bargain with One Union for All Agents, Coupled with Changes to Twin America's Ownership, Resulted in the Reasonable Decision to Outsource the GL Labor to JAD and Laying off GL Agents, Which Required Issuance of Federal and State WARN Notices

1. Twin America Lawfully Decided to Outsource GL Labor to JAD

After the runoff election results were certified, Twin America lawfully decided to outsource the employment of its GL workforce to JAD. (Tr. at 248-49 and 324-35.) Up until that point, GL employees – mostly Agents and a small number of foreign language Guides that Twin America retained beyond the prior lawful Guide layoffs of October and December 2016 – were directly employed by GL and on a separate payroll from City Sights workers (Agents and Guides) who were directly employed by JAD. (Id.; JTX #3(ee) and (dd).)

Prior to the joint venture, and thereafter until February 14, 2017, Coach USA (“Coach”) owned the GL side of the Twin America joint venture. (Tr. at 236 and 248; JTX

#3(g) (Rider to UC Petition).) Coach, however, sold its interest in Twin America to City Sights in early 2017. (Tr. at 236, 248, and 324-25.) Twin America was thus effectively transitioning to City Sights, as it would be the sole owner and operator of this former joint venture. And since City Sights had always outsourced its labor to an outside leasing company – JAD – as a preferred business model, City Sights (*i.e.*, Twin America) reasonably sought to continue this approach following its buyout of Coach.

The GL employees had never been related in any way to JAD and had never been on the JAD payroll. A different company (GL), owned by Coach, employed them. Thus, for Twin America to outsource the GL labor to JAD, *i.e.*, change the direct employer and transition employees from one company to another, GL employees had to be “laid-off” and rehired by JAD. Because this situation qualified as a “mass layoff,” Twin America was obligated to issue WARN notices under federal and NY state law at least 60 and 90 days, respectively, prior to the proposed layoff date. See 29 U.S.C. §§ 2101(a) and 2102(a); N.Y. Lab. Law § 860-b(1). Twin America issued WARN notices to GL employees on January 3, 2017 that complied with these requirements. (Tr. at 249, 276, and 328-29; JTX #3 (ee).) These WARN notices advised GL Agents of their job opportunity at JAD, and that the GL payroll and their employment at GL would be terminated by April 6, 2017 if they elected not to transition to JAD. (Tr. at 249, 276, and 328-29; JTX #3 (ee).) In the absence of such notices, Twin America would have violated the WARN Acts.

2. *The GC’s Assertions Regarding GL Agent Layoffs are Incorrect*

While it is uncontested that the Employers were joint and single employers within the meaning of the Act, this did not change the fact that different entities (GL and JAD) separately employed these two groups of Agents establishing the Twin America joint venture. As Judge Gardner correctly noted, Twin America “employees still remained employed by separate

entities” as “City Sights employees were employed and paid by JAD while the Gray Lines employees remained employed and paid by Gray Lines.” (ALJD at 4 and n. 7.) Despite this clear fact, the GC challenges the legality of the layoff.

Judge Gardner accurately found that Twin America outsourcing GL labor to JAD “was much more significant than simply adding a list of names to the payroll.” (ALJD at 11.) The GC contests this finding. In doing so, the GC reluctantly admits to the fact of outsourcing, but claims this was in a “limited sense” as all Agents remained employed by Twin America. (GC Exc. Br. at 21-22.) The GC, however, fails to address other competing legal requirements rising from the underlying entities that make up the Twin America joint venture separately employing their respective Agents under different payrolls. Twin America could not have simply made an “administrative change” and transferred GL employees to the JAD payroll. Doing so would have violated the WARN Acts, as well as other legal requirements necessitating certain documents and notices be provided to new hires under federal, state and local laws.¹³ See 29 U.S.C. § 2104(a); N.Y. Lab. Law § 860-g(1).

The GC also cites in the record to part of one sentence within a previous submission by the Employers for further support that the outsourcing of GL labor to JAD could have happened without a layoff. (JTX #3 (gg).) Twin America admits that transitioning from GL to JAD was effectively “nothing more than a ministerial act” because all GL Agents were offered positions at

¹³ Murphy’s uncontested testimony confirms these other legal requirements: “Because they ended their employment with GL and they were being hired by JAD, [] there were certain forms; [for example,] I-9 forms, payroll, tax deduction forms, that all needed to be filled out in order to make it legal for them to be on that payroll of that company.” (Tr. at 276.)

JAD. (Id.) However, as also stated within that cited submission, “GL ticket agents had to be ‘laid-off’ and rehired by JAD” in order to abide by federal and state WARN Acts.¹⁴ (Id.)

The Employers and Local 1212 entered into the Consolidation Agreement, which incorporated the GL Agent layoffs as a lawful element, in response to the circumstances produced by the November 2016 runoff election. The Board should uphold Judge Gardner’s conclusion that “consolidating its workforce under one employing agency and payroll was a reasonable step for the Employer to take, with negligible impact on its employees.” (Id. at 11.) In agreement with Judge Gardner, and as the Employers demonstrate below, the GC’s position “ignores the reality of the situation the Employer faced and the legitimate business concerns” it had in negotiating and entering into the Consolidation Agreement.¹⁵ (Id.)

E. The Entire Record and Applicable Board Precedent Establish that The Consolidation Agreement is Lawful

The Consolidation Agreement was intended to benefit the GL Agents (and it did).

1. The GC’s Assertion that GL and JAD Agents were “Indistinguishable” Following the November 2016 Runoff Election, and Therefore the Consolidation Agreement was Unlawful, is Contrary to Board Law and Ignores the Reality of the Circumstances

The GC repeatedly claims throughout his Brief in Support of Exceptions that because GL and JAD Agents became members of a new bargaining unit at the same time, every Agent was

¹⁴ The GC’s other contention that the Employers’ layoff decision was unlawful because it “subjected only the Gray Line ticket agents to layoff” is misplaced. (GC Exc. Br. at 22.) The JAD Agents working for City Sights under the Twin America banner were already directly employed by JAD and on the JAD payroll, whereas the former GL Agents worked directly for GL/Twin America and were under a separate payroll. The GL Agent layoffs were necessary under these circumstances to legally effectuate the outsourcing; JAD Agent layoffs were unnecessary.

¹⁵ The assertion that GL Agents who transitioned to JAD “became probationary employees” is unsupported by the record. (GC Exc. Br. at 22.) Some transitioning GL Agents accidentally received a form outlining a 90-day probationary period as part of their JAD on-boarding paperwork, but un rebutted testimony by Murphy confirms this policy was not enforced as to any former GL Agent seeking employment with JAD. (Tr. at 276.) The GL Agents who sought to transition to JAD were all employed and remained employed at the time of the hearing.

thus equal in every respect, “indistinguishable” from one another, resulting in the Employers’ actions being unlawful. (GC Exc. Br. at 2, 3, 6, 9 and 12.) The GC’s assertion is simply wrong.

The November 2016 runoff election resulted in the consolidation of two groups of Agents historically represented by different unions operating under distinct terms of employment. It is beyond dispute that following the election, and until the Employers and Local 1212 negotiated what terms governed this consolidated group of Agents, the GL and JAD Agents’ existing contracts, *i.e.*, the expired Local 225 CBA and the then-current Local 1212 CBA, respectively, continued to apply to each group. Long-standing Board precedent required this course of action. See Federal Mogul, 209 NLRB 343, 344 (1974); UMass General Hospital, 349 NLRB 369, 370-71 (2007) (“Federal Mogul . . . properly balances the concerns of preventing unilateral application of contract terms to a group of employees who were not represented when the collective bargaining agreement was negotiated, on the one hand, and allowing for employee free choice, on the other”). The GC acknowledges the rule of Federal Mogul, but totally ignores its impact. (GC Exc. Br. at 10, n. 50.)

Indeed, Judge Gardner appropriately confirmed, and the GC admitted, that GL Agents’ terms of employment were governed by the expired Local 225 CBA until they chose to transition to JAD as part of the Consolidation Agreement, or voluntarily ceased employment altogether. (Tr. at 245-47; ALJD at 4, n. 6 and 5; GC Exc. Br. at 10.) Thus, as both groups of Agents needed to operate under different terms of employment to start, there is no support in the record for the GC’s self-serving claim that following the runoff election “the two groups of employees were indistinguishable.” (GC Exc. Br. at 6-7.) In fact, the opposite was true.

To be sure, treating both groups as the “same” and ignoring the status quo of each side, as well as the histories developed under each individual CBA, might have been easier. The

Employers could have lawfully insisted on starting negotiations with Local 1212 on a “clean slate.” However, this overlooks: (1) the Employers legal obligation under Federal Mogul as set forth above; and (2) the almost certain labor dispute with Local 1212, and business turmoil this would have created. Board precedent allows and endorses the respecting of pre-existing seniority rights of different groups in these circumstances.

In Interstate Bakeries Corp., 357 NLRB 15 (2011), the Board recognized that in a unit merger scenario such as this “parties do not unlawfully discriminate by *respecting preexisting, enforceable seniority rights* (usually, if not necessarily, linked to union representation), but not simple length of service not linked to any enforceable employment rights.” Id. at 18 (emphasis added). The Board stated that the parties “might lawfully have agreed that all employees would retain *any* preexisting enforceable seniority rights.” Id. (Emphasis added.) In this respect, the GC’s contention that neither GL nor JAD Agents preserved any seniority rights after the runoff election and were effectively the “same” is flawed.

The Consolidation Agreement observed Interstate’s direction by “respecting” GL Agents’ date of hire seniority and applying it to every seniority-driven item except bid location, a term of diminishing importance under the Local 1212 CBA. Id. at 18. This provided all 73 GL Agents with significantly higher commission rates, even higher for the group provided for in the Local 1212 CBA, which limited Tier A commissions to just the 50 most senior JAD Agents.¹⁶ Notably, acting in this manner was something Interstate suggested an employer did not have to do. An employer “might lawfully have sought to preserve existing wage rates (even if the

¹⁶ Twin America did not have to grant GL Agents such a substantial increase in compensation. Elevating GL Agents to Tier B would have still provided a significant increase to their then-current commission rates under the expired Local 225 CBA. However, in recognizing Local 1212’s insistence on wage parity and in the interest of reaching a fair and mutually satisfactory result, Twin America agreed to modify the then-current Local 1212 CBA and grant all 73 GL Agents the highest level of commissions available.

represented employees had higher or lower wages than the unrepresented employee).” Id. The Employers nevertheless granted this costly concession because they were committed to maintaining the stability of their business operations

2. *Endtailing GL Agents for the Limited Purpose of Bid Locations is Supported by Board Precedent as the Record Proves this Decision was Only Motivated by Legitimate Business Objectives*

Nothing in the record or Twin America’s bargaining history with Local 225 proves that this Consolidation Agreement was for unlawful reasons or meant to disadvantage GL Agents.

i. The Record Evidence Establishes the Employers’ Lawful Considerations

The Employers’ sole purpose in reaching this Consolidation Agreement with Local 1212 was to keep all Agents – GL and JAD – engaged and motivated to sell tickets and, most importantly, keep working for Twin America, and not a competitor. (Tr. at 92-93, 263-68, 304-06, 328, and 331-32.) Twin America was facing increased competition from other sightseeing companies in New York City and it could not afford to lose experienced Agents. (Id.; Tr. at 380-81 and 398.) As credibly testified to by JAD President West, Murphy and Seeger, an experience in Twin America’s past heightened this concern. It previously suffered a mass exodus by JAD Agents in October 2014 when they left in protest over a working condition. (Tr. at 226 and 368-70.) Most of these JAD Agents then went to work for the competition and Twin America’s business operations were gravely affected. (Id.; Tr. at 306 and 370.)

Twin America could not let history repeat itself and needed a resolution that addressed the interests of both GL and JAD Agents. (Tr. at 267-68, 328, and 330-32.) As a result, the Employers and Local 1212 agreed to the Consolidation Agreement, which, as a practical matter, only endtailed GL Agents’ seniority for bid locations. JAD Agents’ terms remained the same as before the November 2016 runoff election; they received no change in compensation or benefits.

(Tr. at 332.) As a consequence, the 47 former GL Agents that transitioned to JAD in 2017 earned more money as a group that year during the April-to-December busy period – \$34,110.95 or 2.84% – with supposedly “worse” bid locations than they had in 2016 with GL. (ERX #13 and #14.) These former GL Agents also worked 316 fewer days and sold 2,233 fewer tickets in 2017 than 2016. (Id.) This year-over-year increase in compensation for former GL Agents as a result of the challenged Consolidation Agreement took place while the earnings for the rest of the Agents as a group *declined* in 2017 as compared to 2016. (ERX #10 through #12.)

Additionally, Twin America as a company made \$2,773,721.43 less in overall sales revenue from Agents in 2017 than in 2016. (Id.) It therefore strains credulity for the GC to argue that the Consolidation Agreement unlawfully disadvantaged the former GL Agents.

Judge Gardner appropriately credited the Employers’ witnesses’ “credible business rationale for the actions taken by them, and the considerable efforts made to reach a reasonable compromise with [Local 1212] on the consolidation of the unit.” (ALJD at 7.) Murphy, Seeger, and West believed that acting otherwise would have likely lead to another JAD Agent mass exodus to the competition, especially considering JAD Agents had already communicated this sentiment to West and because they were receiving nothing as a result of this consolidation of Agents.¹⁷ (Id.; Tr. at 371-72 and 381.)

ii. Board Law has Long Endorsed the Employers’ Legitimate Actions under Similar Circumstances

Most analogous to the instant case, in Simon Levi Company Ltd., 181 NLRB 826 (1970), the Board adopted the ALJ’s decision and found an employer and union lawfully entailed the

¹⁷ For instance, if Twin America had agreed to a GL date of hire seniority arrangement – one of the two options proposed by the GL Agent contingent at bargaining – the vast majority of them would have obtained seniority over JAD Agents. This would have resulted in GL Agents filling 42 of the 50 slots available under Tier A commissions in the Local 1212/JAD contract. (UNX #1; Tr. at 268, 305, 328, and 376; ERX #4 and #5.)

seniority of certain bargaining unit members previously represented by different unions. There, the employer (Levi) bought out another company (Sterling), consolidated the workforces, and transferred the new employees to its own existing payroll for its other company. Id. at 827. At that point, Levi and the sole remaining union (Local 572) decided to enttail the seniority of Sterling employees' for vacation, layoff, and recall bid purposes while crediting their total years of service for amounts of sick leave and vacation days allotted. Id. at 827-28. Certain Sterling employees challenged the lawfulness of these actions. Id.

The Board ultimately rejected the General Counsel's argument that the parties' enttailing decision was because Sterling employees were previously represented by the "wrong" union and held respondents' action "resulted 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." Id. at 827-28 (emphasis in original.) The Board also found the General Counsel's case weak as it largely relied on embellished and self-serving testimony of a disgruntled employee. Id. at 828. In sum, the Board held "[t]here [was] no proof that Respondent Union and Respondent Employer did not have a reasonable basis for their position and the evidence [did] not preponderate that motivation existed to penalize Sterling employees because they belonged to the wrong labor organization or did not belong to the correct one."¹⁸ Id.

¹⁸ The business merger and resulting circumstances that occurred in Simon Levi is similar to our case. Around March 2015, the two previously separate companies that made up the Twin America joint venture – GL and City Sights – were beginning to merge for operational purposes. This was the impetus for the November 2016 runoff election resulting in the consolidation of two previously separate groups now solely represented by Local 1212. In the background, Coach – which owned the GL side of the operations in the Twin America joint venture – was selling, and ultimately sold, its share in the joint venture to City Sights. Thus, not only did Twin America's business operations merge but now its ownership was also merged and consolidated under one entity, *i.e.*, City Sights. In Simon Levi, a business merger led to the integration and consolidation of two previously separate groups of employees now represented by a single union. Likewise, Twin America's merger of business operations led to the same outcome for representational purposes. Relatedly, for ownership purposes, the merger that occurred when Coach sold its Twin America shares to City Sights, which effectively changed a former joint venture into a single one, was the reason for outsourcing the GL labor to JAD and consolidating the now unified workforce onto one

Similarly, the Board in Firemen & Oilers Local 320 (Phillip Morris, U.S.A.), 323 NLRB 89, 89 (1997), found no violation of the Act when a rational compromise addressing diverging seniority interests was negotiated by the parties. There, the union (Local 320) had historically represented one set of employees at the plant, while another union represented different employees. Id. Over the years, Local 320 began representing both groups of employees and, eventually, was in a situation similar to ours. Facing competing seniority interests of two groups, Local 320 needed a fair resolution that spread benefits of seniority more evenly between them.

In response, Local 320 negotiated and ultimately gave one group greater seniority over some rights, while giving the other group seniority preference over more critical items. Id. at 90. The Board found this compromise lawful. In doing so, it concluded that this was “a rational approach when one considers that the Respondent 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.” Id. While recognizing some employees would be unsatisfied because they no longer enjoyed every superior benefit conditioned on seniority, the Board found there was no “evidence of bad faith or invidious motivation” in coming to this resolution. Id. at 91.

In Barton Brands, Ltd., 228 NLRB 889, 892 (1977), the Board held an employer does not violate the Act when it demonstrates that it was “motivated by legitimate objectives” in reaching an endtail agreement. See also Strick Corp., 241 NLRB 210, 219 n. 31 (1979); Teamsters Local 42 (Daly, Inc.), 281 NLRB 974, 976 (1986); Newspaper & Mail Deliveries Union (New York Post), 361 NLRB 245, 249-50 and 275-77 (confirming there are instances where a seniority resolution agreement will be “justified by legitimate considerations”).

payroll. Similar to the legitimate business concerns unrelated to any union consideration that the Board found in Simon Levi, the same should be found here.

In the case at hand, the record evidence establishes that the Consolidation Agreement was a rational compromise for all Agents under these circumstances. Murphy, Seeger, and West all credibly testified to having “legitimate concern” over how to move forward with the business operations. (ALJD at 10.) As accurately described by Judge Gardner, a “past history of dealing with disgruntled employees” – JAD Agent mass exodus a few years back – heightened the Employers’ retention concern. (Id. at 7.) The overwhelming credited record shows the Employers held no “hostile motives” towards Local 225 or GL Agents’ prior membership therein. See Barton Brands, 228 NLRB at 892; Teamsters Local 42, 281 NLRB at 974-75. Board law does not require the “best” or most convincing resolution be reached under these circumstances; only that rational and reasonable considerations be taken in coming to a compromise. See Simon Levi, 181 NLRB at 828; Phillip Morris, 323 NLRB at 90; Reading Anthracite Company (United Mineworkers of America, Local 807), 326 NLRB 1370 (1988) (a respondent “need not satisfy the Board that the choices it makes are better or more logical than other possibilities” in coming to a seniority resolution). That is exactly what happened here.¹⁹

The Board should reject the GC’s related exceptions and affirm Judge Gardner’s findings that the Employers “described a credible business rationale for the actions taken by them” and had “legitimate reasons” for entering into the Consolidation Agreement.²⁰ (ALJD at 7 and 11.)

¹⁹ The “[v]arious lawful options” suggested by the GC make little sense. (GC Exc. Br. at 10.) Assigning bid locations randomly or alphabetically may have led to similar or worse dissidence among all Agents. This, coupled with a lack of control the Employers need – and are entitled to have – in operating their business, are only two reasons among several why these alternatives are flawed. Furthermore, following original hire dates, as proposed by a GL Agent contingent at bargaining, would have caused serious disorder for Twin America’s business as credibly explained by the Employers’ representatives at hearing. Judge Gardner appropriately relied on JAD President West’s testimony explaining this “legitimate concern” and not only found it “reasonable and credible” but also concluded that the Employers’ reasoning “had nothing to do with the union [(Local 225)] that formerly represented the former Gray Line employees.” (ALJD at 10.)

²⁰ It is respectfully submitted that if the Consolidation Agreement is found unlawful, the Employers and Local 1212 cannot be required to implement another type of seniority agreement, *e.g.*, dovetailing seniority. (Dovetailing is when there are two seniority lists and regardless of date of hire, the #1 name from each list is alternatively taken and

3. ***In Any Event, the GC Has Failed to Meet His Burden under Board Law of Proving the Consolidation Agreement was Solely a Result of GL Agents' Prior Local 225 Membership***

The record fails to substantiate in any way the GC's unfounded assertion that the Employers acted solely to disadvantage GL Agents due to their prior Local 225 membership.

In Newspaper & Mail Deliveries, the Board held that “the basic rule of law” in cases such as ours requires that the GC prove the alleged discrimination was “***based solely*** on union considerations.” 361 NLRB at 248-50 (emphasis added) (internal quotations omitted); see e.g., International Brotherhood of Teamsters, Local 727, 360 NLRB 65, 71, n. 1 (2013) (seniority system based solely on union considerations); Interstate, 357 NLRB at 18-19 (“not lawfully permitted to discriminate ... on the basis of [] previously unrepresented status,” as evidence – *e.g.*, statements and documents – established actions were based solely on union considerations); Reading Anthracite, 326 NLRB at 1370-71 (seniority resolution based solely on union considerations, *i.e.*, “only factor differentiating the two groups ... was that one group had belonged to [the union] and the other had not”). The GC claims to have met this standard when stating that it is clear the Consolidation Agreement “was based entirely on union ... considerations.” (GC Exc. Br. at 12.) The Board should reject this conclusory assertion.

First, Twin America, which came into being in 2009, successfully negotiated a CBA with Local 225 in 2011. Second, Murphy and Seeger testified without contradiction that they repeatedly asked Local 225 to sit down and talk with Local 1212 so both unions could maintain their jurisdiction. The uncontested record shows that Twin America wanted to

integrated onto a single list and the process repeats itself as to #2, and then again for #3, and #4, and so on.) The parties can only be required to return to the table and bargain over another seniority resolution. See Reading Anthracite, 326 NLRB at 1371 (the Board, in overruling the ALJ, ordered the parties back to the bargaining table because it could not “conclude that dovetailing the seniority lists [was] the only lawful method of resolving the conflicting legitimate interests of the employees involved”).

keep both unions in place and sought to structure some sort of agreement where they both remained. Third, in April 2017, Twin America recalled and/or rehired laid-off GL Guides formerly represented by Local 225 when it was under no obligation to do so. Fourth, on April 17, 2017, months after Tefe Kwami Amewo (“Amewo”) – the most vocal GL Agent – filed the instant ULP charges, Murphy personally called him to see why he was not at work and urged him to come in. (Tr. at 275-76.) Lastly, the Consolidation Agreement greatly enhanced GL Agents’ economic condition, and the Employers continue to maintain this costly benefit.

Twin America would not have done any of this if its decisions were driven solely by animus towards Local 225. As Judge Gardner recognized: “these employees were receiving lesser seniority not because of anything to do with their former union, but because they were receiving that significant increase in compensation that longtime JAD people were not, and the Employer was trying to keep its entire workforce reasonably satisfied.” (ALJD at 10.) *That is the essence of this case*, as there is no evidence establishing the Employers’ alleged unlawful disposition towards Local 225.²¹

²¹ Without support from the record, the GC attempts to prove his case by making conclusory statements regarding the Consolidation Agreement. These statements are contrary to the record evidence. For instance, the GC claims the Employers’ action are “explained only by [the Agents] having been represented by different unions,” and similarly states, “[t]hat leaves the Local 225 employees’ former membership in that union ... as the sole differentiating factor between the two groups of employees.” (GC Exc. Br. at 3 and 12.) The GC’s burden is to affirmatively establish the Employers’ actions were based solely on union considerations; reliance on these general, “can only be explained by” type of assertions, without any credited evidence as support, does not meet this burden.

i. The GC Has Failed to Establish that the Employers' Actions "Placated the Desires" of one Group of Agents over Another due Solely to Union Membership Considerations in Violation of the Act

The GC argues that the Employers unlawfully "placate[d] the desires" of JAD Agents historically represented by Local 1212 at the expense of GL Agents previously represented by Local 225 to prevent JAD Agents from leaving to work for the competition. (GC Exc. Br. at 8-11.) The GC's assertion completely ignores the circumstances of this case and the genuine caution the Employers' exercised in dealing with these separate groups of Agents. To resolve competing employment interests in favor of the legacy Local 1212 employees because of their union membership would have clearly been unlawful. However, to negotiate a compromise unrelated to union membership and solely in furtherance of meeting company objectives is not unlawful. See Simon Levi, 181 NLRB at 828.²²

At no time did the Employers seek to penalize GL Agents for their former Local 225 membership. Conversely, they strived to balance the interests of both groups. The record demonstrates that objective justifications, such as the Employers' ability to remain competitive with other companies, solely drove the legitimate business decision to enter into the Consolidation Agreement. Put simply, the Employers ensured that all GL Agents received premier seniority status as to all critical terms of employment. The Employers' only purpose

²² See also General Drivers and Helpers Local 229 (Associated Transport, Inc.), 185 NLRB 631, 631 (1970) (applying lower seniority to employees previously represented by a different union was "not motivated by a desire to penalize"); Barton Brands, 228 NLRB at 892 (entailing seniority is lawful if "some objective justification for [the] conduct beyond that of placating the desires of the majority ... at the expense of the minority" is shown) (internal quotations omitted); Daly, 281 NLRB at 976 (conduct was unlawful because the evidence established that the reason for entailing was based "solely" on the desire to "placate" one group over another due to their longevity in union membership and representation).

was to ensure it retained as many Agents as possible so that Twin America could operate efficiently; there was no unlawful preference for Local 1212 over Local 225.

ii. The GC Cannot Rely on Statements made by Employee Witnesses Who Were Properly Found Not to be Credible

Despite Judge Gardner finding the GC's employee witnesses not credible, the GC improperly attempts to rely on their testimony to support his assertion that the Employers' sole reason for entering the Consolidation Agreement was a discriminatory motive towards Local 225. (GC Exc. Br. at 12-13.) The GC is aware that his entire case is built on testimony concerning these alleged – but uncredited – stray remarks attributed to Murphy and Seeger. The GC cannot rely on this discredited testimony to prove the purported motivation, both for the reasons cited by Judge Gardner and because of other record testimony (and lack thereof) adduced at the hearing.

The GC must meet a high burden before the Board may overrule Judge Gardner's credibility assessments. One of the most basic and often-cited principles is that the Board will give great deference to an Administrative Law Judge's ("ALJ") credibility findings and will only overrule them if the clear preponderance of all the relevant evidence demonstrates that they are incorrect. Standard Dry Wall Products, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). The Board defers to an ALJ's credibility findings because "the demeanor of witnesses is a factor of consequence in resolving issues of credibility" and, since ALJs have "the advantage of observing the witnesses while they testified," the Board attaches great weight to an ALJ's findings. Id. In applying this deferential standard, a credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony and demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and

reasonable inferences that may be drawn from the record as a whole. Double D Construction Group, 339 NLRB 303, 303-305 (2003); Daikichi Sushi, 335 NLRB 622, 623 (2001).

Judge Gardner’s credibility determinations as to former GL and current JAD Agent Sarafa Sanoussi (“Sanoussi”) were properly informed by record testimony showing that statements concerning GL Agents’ lower bid seniority being attributed to membership in Local 225 were taken out of context. Seeger’s remark to Sanoussi at the first negotiation session (December 28, 2016) allegedly stating that “this” was the result of the election “you” called for must be viewed in context. (Tr. at 170-71.) At this meeting, GL Agents, through Local 1212, proposed either two separate seniority lists or a straight GL date of hire seniority system.

Seeger, in explaining Twin America’s position and rejecting both proposals, told Sanoussi that Twin America had approached Local 225 previously to discuss keeping both it and Local 1212 but that Local 225 representative Muessig refused to entertain this notion. Within this context, Seeger told Sanoussi that, “this is the result of the election,” a factually correct statement because if not for the election, all parties (Employers, Local 1212, and Local 225) would have stayed in place as before. (Tr. at 185-86.) Sanoussi conceded this description of events was accurate on cross-examination. (Id.)

Further, the word “this,” as used in that context, relates only to the situation the parties were in then – *i.e.*, having to negotiate a single seniority system for all Agents. In fact, when the GC tried to get his other employee witness, Rufai Mohammed (“Mohammed”), to corroborate Sanoussi’s testimony (*e.g.*, “[this is] the result of the election [you] called for”), Mohammed could not do so. (Tr. at 170.) As for the December 28, 2016 negotiations, Mohammed testified,

“I don’t remember them giving us any concrete reason” and as of the second negotiation session, Mohammed affirmed, “we didn’t get any response from them on that date.”²³ (Tr. at 201-02.)

The GC implicitly confirms these foregoing facts by only arguing that because two seniority lists were not mentioned at the second bargaining meeting, then Judge Gardner’s credibility determination must be rejected. This, however, completely ignores what transpired at the first bargaining session, which is what informed Judge Gardner’s credibility assessment. Two seniority lists not mentioned at the second meeting is inconsequential.

Judge Gardner similarly made the correct credibility determination with respect to GC employee witness Amewo. Contrary to the GC’s assertion, Amewo and Murphy spoke by telephone on more than two occasions (January 13, 2017 and April 17, 2017). (GC Exc. Br. at 15.) On April 1, 2017, Amewo testified that he called Murphy to discuss GL seniority and, specifically, Amewo confirmed that he “even suggested [] why don’t we have two seniority lists?”²⁴ (Tr. 118-19.) On cross-examination, Amewo further testified about his “number of conversations with Jim Murphy” and also claimed that Twin America had previously promised to keep two separate seniority lists.²⁵ (Tr. at 141-42.)

²³ The GC directly asked Mohammed, “[s]pecifically, did Mr. Seeger say anything about seniority at this meeting?” Mohammed clearly did not answer in the manner the GC had hoped.

²⁴ When discussing the conversation that transpired on April 1, 2017, Amewo testified that he “called him” on this date and, moments later when the GC asked Amewo to clarify who he meant by “him,” Amewo stated “Jim Murphy.” (Tr. 118-19.)

²⁵ Twin America never made such a promise to Amewo and no one has ever claimed otherwise. If such a significant promise had been made to GL Agents, it would have surely been brought up at some point. Yet neither Sanoussi nor Mohammed – the only other former GL Agents who testified – corroborated this allegation.

Since the proposal of two seniority lists was discussed between Amewo and Murphy, Judge Gardner had a proper basis to infer that, even if Murphy made²⁶ these alleged statements to Amewo, they were taken out of context. This was especially so given the similar misinterpreted communications that transpired between Sanoussi and Seeger. Judge Gardner's findings and conclusions encompassed his review and consideration of the entire record for this case. His findings in this respect is reasonable and supported by his conclusion that Murphy was a credible witness. Accordingly, Judge Gardner properly relied on accurate employee testimony (and lack thereof in terms of Mohammed) and reasoning in determining that such statements allegedly made by Seeger and Murphy were taken out of context and should not be attributed any unlawful consideration.

iii. The GC Has Failed to Establish that Bid Locations Adversely Affected GL Agents' Compensation and Judge Gardner Properly Further Discredited Employee Witnesses Who Falsely Claimed Otherwise

The GC's contention that bid locations were a major factor in an Agents' compensation is unsupported by the record. Bid locations are generally only significant for new Agents because these individuals are developing their sales experience and skills. (Tr. at 271, 292-94 and 380.) Further, Twin America developed a new bid policy rendering locations a less significant factor in an Agent's compensation. Under the policy, an Agent only needs to report to his or her location for the first two or three hours of a day and then may leave to sell tickets at any other Twin America location across New York City (except for 3 out of about 60 locations). (Tr. at 271-72 and 296-98.) This policy was in effect when Twin America and Local 1212 entered into the

²⁶ Murphy denied on the record ever telling Amewo that entdaling GL Agents for bid locations only was the result of GL Agents, or Local 225, losing the November 2016 run-off election. (Tr. at 280.)

Consolidation Agreement. (Tr. at 296.) Murphy's testimony on this policy was un rebutted by two current employees who testified for the GC.²⁷

Notably, under the Consolidation Agreement Sanoussi made about \$4,000 dollars more in 2017 as a JAD Agent than he did in 2016 with GL during the busy April to December period, even though he sold 236 fewer tickets and worked one less day in 2017. (ERX #13 and #14.) During the same period, Mohammed made almost the same amount in 2017 with JAD than he did in 2016 with GL, but amazingly sold 770 fewer tickets and worked 17 fewer days to achieve that mark. (Id.) Despite these improved circumstances, both Sanoussi and Mohammed falsely testified that they worked more days in 2017 during the busy period. (Tr. at 184-85 and 207-08.) Of significance, several other former GL Agents similarly benefitted from the Consolidation Agreement by earning more money in 2017 with JAD than in 2016 with GL.²⁸

While the Employers acknowledge Agents believed bid location was a significant factor affecting their earnings, the record evidence demonstrates that this was not the case.²⁹ Judge Gardner properly accepted this fact when he found GC witnesses Sanoussi and Mohammed not to be credible due to their testimony claiming that a lower bid location harmed their earning potential when authentic and un rebutted evidence showed otherwise. (ERX #13 and #14; ALJD

²⁷ Sanoussi admitted at hearing that he could go anywhere to sell tickets under the policy, including his prior bid location with GL. (Tr. at 179-80.) Mohammed, another former GL and current JAD Agent, also confirmed that his new bid location with JAD was only two blocks away from his prior bid location with GL. (Tr. at 207.)

²⁸ For example, Kokou Adjogble, Moustapha Kane, and Joseph Djaka all made thousands more dollars in 2017 working for JAD than they did in 2016 with GL, but had to sell fewer tickets and work fewer days to earn those amounts. (ERX #13 and #14.)

²⁹ Inexplicably, Amewo insisted that bid locations were the only relevant factor to an Agent's compensation and claimed that commission rates were "[v]ery irrelevant." (Tr. at 141-42.) Amewo made these proclamations despite never working under the terms of the Consolidation Agreement (he declined to transition to JAD in 2017). Amewo subsequently changed this unbelievable testimony on the GC's redirect examination, stating that an Agent's earnings are a product of both tickets sold and commission rates. (Tr. at 160.) This testimony, just as most of Amewo's other testimony, should be disregarded by the Board, as it was by Judge Gardner, and viewed for what it is: a self-serving account fabricated in an effort to buttress this meritless case.

at 7.) The credibility determinations made in this respect were proper and simple: employee witnesses gave sworn testimony that was proven to be false.

Based on the foregoing, the Board should affirm Judge Gardner's proper credibility determinations of the GC employee witnesses. The Board should further disavow of the GC's blanket assertion that Judge Gardner's assessments of Sanoussi and Mohammed were "wholly unsupported by the evidence upon which he relied." (GC Exc. Br. at 19.) Unrefuted evidence compels a contrary conclusion and fully supports Judge Gardner's credibility findings. Accordingly, the Board should deny all of the GC's related credibility exceptions and affirm Judge Gardner's conclusion that "[t]he General Counsel has not shown that prior union membership of the former Gray Line employees played any role in the decision to end tail their seniority." (ALJD at 10.)

iv. The GC Has Failed to Demonstrate that Animus is Not Necessary to Find the Employers Violated the Act

In the face of overwhelming credited evidence that the Employers' actions were based on legitimate business decisions and not the GL Agents' prior union status, the GC argues that "animus" is not a necessary element to finding that the Employers' violated the Act. The Board should reject the GC's efforts to create a strict liability standard. This assertion does not withstand even the slightest scrutiny. Board law clearly holds that the GC's burden under these circumstances is establishing that the Employers' actions were based *solely* on union considerations. See Newspaper & Mail Deliveries, 361 NLRB at 248-50. The Employers submit that discrimination "based solely on union considerations," at least in this context, is akin to "animus." Thus, evidence of animus is necessary.

Daly, which is the only case the GC cites as support for his unfounded proposition, is not to the contrary. In Daly, a CB case, the issue of animus was rendered irrelevant due to the direct,

unrebutted evidence of discrimination in the record. Daly dealt with a union insisting upon one group being favored over another solely due to union considerations. Id. at 976. In finding the violation, the ALJ, with Board approval, relied on testimony from a longtime union steward stating certain employees were endtailed only “because they had not been union members as long as their [] counterparts.” Id. at 975. Such evidence (which does not exist in the case at bar), and not the unproven assertion that animus is not necessary, informed the ALJ’s decision that the union violated the Act. Tellingly, the ALJ’s explanation of the applicable standard actually demonstrated how evidence of animus is necessary: “a union may not exercise its power to the disadvantage of a group for hostile motives or for other impermissible reasons.”³⁰ Id. at 976. To the contrary, in the instant case Judge Gardner found “there was no evidence presented at the hearing demonstrating an overt preference on the part of the Employer for one union over the other.” (ALJD at 4.)

In sum, the GC’s reliance on Daly is misplaced. The Board should reject his related exception (#5), as he has not established that animus is unnecessary to finding the Employers violated the Act.

³⁰ The allegations in Daly were also only against a union (CB case), resulting in animus being a less important factor for finding a violation of the Act. See Teamsters, Local 727, 360 NLRB at 72 (“good faith [(i.e., lack of animus)] on the part of a union is not a defense to a charge based on the duty of fair representation since arbitrary conduct without evidence of bad faith has been found to constitute a breach of the duty”). The Employers are not subject to the same standard.

IV. TWIN AMERICA DID NOT CONSTRUCTIVELY DISCHARGE GL AGENTS WHO VOLUNTARILY CHOSE NOT TO TRANSITION TO JAD

In the unlikely event the Board reverses Judge Gardner’s decision and finds the Consolidation Agreement unlawful, Board law and record testimony establish that the 26 former GL Agents who voluntarily chose not to transition to JAD in 2017 were not constructively discharged under a “Hobson’s Choice” theory.

A Hobson’s Choice constructive discharge theory holds that “an employee's voluntary resignation will be considered a constructive discharge when an employer conditions the employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition.” See Intercon I (Zercom), 333 NLRB 223, 223 (2001); Hoerner Waldorf Corp., 227 NLRB 612 (1976). As stated in ComGeneral Corp., 251 NLRB 653, 657-658 (1980), a Hobson’s Choice “must be clear and unequivocal and the employee's predicament not one which is left to inference or guesswork on his part.” Thus, a Hobson’s Choice must only be applied in narrow circumstances where the decision to voluntarily quit is directly related to a Section 7 right the employee is allegedly being forced to forgo. See Chartwells, Compass Group, USA, 342 NLRB 1155, 1157 n. 15 (2004).

In Lively Electric, Inc., 316 NLRB 471, 473 n. 8 (1995), the Board held that a Hobson’s Choice constructive discharge is not automatically found “whenever an employer has committed some unfair labor practice against an employee and the employee has decided to resign over it.” See also RCR Sportswear, Inc., 312 NLRB 513, 514 n. 7 (1993). There, the Board concluded that the employee had other options besides his “angry resignation,” including continuing to work while addressing his issue. 316 NLRB at 473. Similarly, in Easter Seals Connecticut, Inc., 345 NLRB 836, 838-39 (2005), the Board concluded the evidence failed to show the employee was constructively discharged, as it was clear she resigned for other subjective reasons. The

Board also held that her employer requesting she reconsider resigning was “inconsistent with a Respondent desire to force a choice on her.” Id. Further, despite an unlawful discipline, the Board found a “consideration of her testimony as a whole establishes that her unhappiness was not rooted in a concern that her employer was interfering with her ability to engage in protected conduct.” Id. Rather, her resignation “centered on a number of different complaints, none of which were related to a Hobson's Choice.” Id. (Internal quotations omitted.)

According to the GC, the Hobson's Choice here was GL Agents being forced to choose between accepting an alleged unlawful seniority system purportedly implemented solely to punish their past Local 225 membership (or lack of Local 1212 membership), and continued employment. Former GL Agents, however, never abandoned their right to be free from discrimination due to their union affiliation; they have always maintained this statutory right granted to them under the Act. The exercise of this right is evidenced by the ULP charges being litigated before the Board in the instant matter, which were filed either by former GL Agents or on their behalf. Regardless, the entire record confirms the GC has failed to meet his burden by not establishing the Employers’ actions were based solely on union considerations (a necessary conclusion to finding a Hobson's Choice constructive discharge occurred here).

Most significantly, the prior bargaining history and discontent of former GL Agents, as well as the statements and testimony by Amewo, demonstrate a myriad of other reasons these Agents had for not transitioning to JAD in 2017. It is un rebutted that Twin America and Local 225 were involved in unsuccessful contract negotiations for years preceding the November 2016 runoff election. During these negotiations, Local 225 insisted on receiving the highest commission rates available (best benefit from the Local 1212 contract), along with keeping the superior fringe benefits they had enjoyed under their own contract. Local 225 also promised GL

Agents years of retroactive pay as part of a successor contract and insisted on this as a condition to entering a new contract. Twin America rejected these proposals because it saw Local 225's bargaining stance as untenable. They were not willing to compromise.

After the results of the runoff election were certified, Local 225 was no longer the GL Agents' bargaining representative. GL Agents then realized they were not getting a new contract with the best of both the Local 1212 and Local 225 CBAs. GL Agents also realized they were not getting the big checks for years of retroactive pay increases that Local 225 had promised. At that point, it is fair to say that GL Agents felt frustrated with their circumstances. Amewo's own statements and testimony clearly show such frustration when he extensively described the parties' bargaining for a successor contract from his perspective and the fact that GL Agents were not receiving any retroactive pay. (Tr. at 65-67, 70-71 and 144-47.) Amewo even reluctantly admitted that his choice not to transition to JAD was "about the money" – and not a supposed Section 7 right – as confirmed by his previously given sworn NLRB affidavit that he was questioned about at the hearing. (Tr. at 148-150.)

Analogous to the employee in Easter Seals, it is clear that Amewo's decision not to work for JAD in 2017 was "not, in fact, based on any Hobson's Choice, either/or dilemma" but was actually "centered on a number of different complaints." Id. at 838-39 (internal quotations omitted); Lively Electric, 316 NLRB at 473 (the Board found it is "ill advised as a matter of policy to encourage employees to quit their jobs whenever they suffer *any* unlawful condition, at least if they have avenues for remedying that condition") (emphasis in original). Twin America could have developed a similar record showing that this deep-seeded resentment and concern

about money were the true and primary reasons for former GL Agents choosing not to take the job with JAD if not for the decision made not to hear this evidence.³¹

As Amewo admitted, his decision not to transition to JAD was all about the money. Despite the GL Agents' belief that the new bid locations meant they would earn less money, the entire record and credible witness testimony prove this was not true. See ComGeneral, 251 NLRB at 657-658 (an employee's Hobson's Choice predicament cannot be "left to inference or guesswork on his part"). Indeed, this subjective "feeling" of the importance of bid locations was shown to be incorrect by the fact that the 47 former GL Agents who transitioned to JAD in 2017 made more money than they did in 2016 with the new bid locations. These former GL Agents also remarkably sold thousands of fewer tickets and worked hundreds of fewer days to achieve that superior mark. This is also consistent with Murphy's unrebutted testimony that bid locations were of diminishing importance due to Twin America's new policy allowing Agents to sell tickets at practically any location.

Lastly, Murphy calling Amewo – months after Amewo filed his ULP charges against the Employers – urging him to come work for JAD also disproves the notion that Twin America was

³¹ The Employers respectfully submit that their Due Process rights were violated by not allowing them an opportunity to develop a more substantial record concerning the true motivations of former GL Agents choosing not to transition to JAD in 2017. A "judge 'must guard against expediting a hearing by limiting either party in the full development of its case.'" See Nat'l Labor Relations Bd. Div. of Judges, Bench Book: An NLRB Trial Manual, 7, §2-300 (2018), citing Indianapolis Glove Co., 88 NLRB 986, 987 (1950); Better Monkey Grip Co., 113 NLRB 938, 940-41 (1955) (the judge, in an attempt to expedite the hearing, improperly "cut off lines of inquiry and limited the response of witnesses to such an extent that the development of the case may have been hampered"). Here, the GC was ready to call most, if not all, of the former GL Agents who chose not to transition to JAD (many of whom were outside the hearing room), but Judge Gardner decided that this evidence was not necessary. The Employers disagree. Allowing the opportunity to cross-examine these former GL Agents would have likely resulted in similar statements of frustration and money as those made by Amewo regarding prior bargaining with Local 225, GL Agents not receiving retroactive pay increases, and moving forward under the changed circumstances here. Thus, if the Board overturns Judge Gardner's decision, finds the Consolidation Agreement unlawful, and also holds that former GL Agents were constructively discharged, the Employers respectfully submit the record should be re-opened and a Supplemental Hearing be conducted on the issue of why some former GL Agents elected not to transition to higher paying jobs at JAD. Conversely, if the Consolidation Agreement is found to be lawful, no further action is requested.

imposing a Hobson's Choice on him (and other GL Agents).³² (Tr. at 276); see Easter Seals, 345 NLRB at 838-39. Critically, the fact that none of the 47 former GL Agents who transitioned to JAD in 2017 left its employ is telling. If a Hobson's Choice had actually been imposed, then surely some Agents would have left for the competition. Rather, all former GL Agents who transitioned to higher paying jobs at JAD stayed because this Consolidation Agreement provided them significantly improved commission rates. See Smith Industrial Maintenance Corp., 355 NLRB 1312, 1317 (2010) (then-Member Hayes, dissenting in part) ("Federal courts have insisted on 'carefully cabin[ing] the theory of constructive discharge, '[b]ecause [such] claim[s] [are] so open to abuse by those who leave employment of their own accord.'").

Under these circumstances, Twin America cannot be found to have constructively discharged former GL Agents who voluntarily chose not to transition to JAD in 2017.³³

³² Murphy stated, "I know Mr. Amewo for 25 years, so I called and said, what's going? Where are you? Why aren't you here?" (Tr. at 276.)

³³ The GC's reliance on Borden, Inc., 308 NLRB 113 (1992) is overstated and our case is distinguishable in several respects. The crux of the Borden decision centers on the employer's unilateral action in violation of Section 8(a)(5) of the Act. Contrary to Federal-Mogul and its progeny, the employer unilaterally chose not to maintain the status quo terms of employment of two previously separate units being consolidated while it and the union bargained for a new agreement covering the merged group (or until reaching a good faith impasse). Id. at 114-15. As a result, the consolidated group's wages and benefits were severely effected. Id. at 114. Relatedly, the Board's constructive discharge finding was based on the reduced pension that employees knew they were going to receive due to the lower employer pension-benefit contributions applied moving forward. Id. at 115. Conversely, the Employers here followed the rule of Federal-Mogul. The Employers also did not take any unilateral action; they bargained and expended considerable efforts to reach a reasonable compromise following the November 2016 runoff election. Unlike the employer in Borden, the Employers here granted GL Agents the highest seniority for all critical employment criteria, resulting in GL Agents benefiting greatly. Most critically, while the employees in Borden subject to a constructive discharge knew they would receive a reduced pension under their new terms and thus chose to retire, GL Agents did not know they would earn less money under the parties' Consolidation Agreement. Indeed, un rebutted evidence (ERX #13 and #14) shows these Agents likely would have made more money. As such, the Board should reject the GC's application of Borden for support of this constructive discharge allegation.

V. CONCLUSION

Based on the foregoing, the Employers respectfully request the Board reject the GC's Exceptions and Brief in Support of Exceptions filed on May 17, 2019, and affirm Judge Gardner's March 20, 2019 decision in its entirety.

Dated: July 1, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

In accordance with the Board's Rules and Regulations, it is hereby certified that on this day Respondent Employers' Answering Brief to the General Counsel's Exceptions and Brief in Support of Exceptions to the Administrative Law Judge's Decision in Twin America, LLC, et al., Case Nos. 02-CA-190704, et al., was electronically filed with the Executive Secretary's Office.

It is further certified that on this day the same document was served via email on the following party representatives:

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