

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

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

TEFE KWAMI AMEWO, an Individual

UNITED SERVICE WORKERS UNION, IUJAT, LOCAL 1212

and

Case No. 02-CB-190376

TEFE KWAMI AMEWO, an Individual

UNITED SERVICE WORKERS UNION, IUJAT, LOCAL 1212

and

Case No. 02-CB-199847

ARTHUR Z. SCHWARTZ, an Individual

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

The General Counsel of the National Labor Relations Board (General Counsel) submits this reply brief in support of his exceptions to the decision of the Administrative Law Judge in this matter and in opposition to the answering briefs filed by Respondents. Respondents' briefs conflate and confuse the concepts of *union considerations* and *union animus*. They therefore fail to appreciate that even in the absence of the latter, their decision to make the Local 225 ticket agents junior to the Local 1212 ticket agents for the purposes of bidding, layoff, and recall¹ was plainly—indeed admittedly—based on union considerations.

The crux of this matter is the principle that Respondents could not legally set working conditions for employees *based on their prior union membership*.² Yet that is precisely what happened in this case. Indeed, there is no dispute on this point: Respondent Employers wrote Respondent Union to “insist that all former [Local 225] agents follow all [Local 1212] agents on the seniority list for purposes of layoff and schedule/location bids”³ and Local 1212 answered that they “agree[d] to that proposal.”⁴ That is, Respondents assigned seniority to employees based on their union membership rather than on any lawful consideration such as job duties, assignments,

¹ The Respondent Employers assert that the Local 225 ticket agents were not made junior to the Local 1212 ticket agents for layoff and recall “as a practical matter,” (Er.’s Ans. Brf., n.3) because employees have, supposedly, not previously been involuntarily laid off. However, Respondent Employers do not guarantee there will be no such layoffs in the future, making their assertion empty. The correspondence between the Respondent Employers and Respondent Union—entered into evidence by counsel for the Employers—plainly establishes that the Local 225 ticket agents were made junior for purposes of layoff (and recall) under the agreement reached by Respondents. Er. Exhs. 8 and 9. It was also admitted by Twin America VP James Murphy. Tr. 305:22–306:4.

² *Newspaper & Mail Deliverers (New York Post)*, 361 NLRB 245 (2014), *enfd. sub nom. NLRB v. Newspaper and Mail Deliverers’ Union of New York and Vicinity*, 644 Fed.Appx. 16 (2d Cir. 2016) (unpublished summary order), *cert. denied* 137 S.Ct. 1063 (2017). In that case, the Board held that giving preference to employees who had worked for an employer which was a signatory to an agreement with the charged union amounted to unlawful discrimination. “We agree with the judge that the basic rule of law applicable here is that discrimination in hiring and promotion based solely on union considerations (i.e., union membership and/or prior employment with union-signatory employers) is unlawful.” *Newspaper & Mail Deliverers*, *supra*, 361 NLRB at 248.

³ Er. Exh. 8.

⁴ Er. Exh. 9.

classifications, or work locations.⁵

Respondent Employers attempt to distinguish this matter from the controlling precedent, namely *Newspaper & Mail Deliverers*, supra; *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974 (1986); *Interstate Bakeries Corp.*, 357 NLRB 15 (2011); and *Reading Anthracite Co.*, 326 NLRB 1370 (1998), but wholly fail to do so. For instance, Respondent Employers assert that the General Counsel has not met the standard enunciated in *Newspaper & Mail Deliverers* to show that the endtailing was “based solely on union considerations.”⁶ However, the very passage from which counsel for the Employers quotes clarified that a preference based on “prior employment with union-signatory employers” was unlawfully based. Precisely the same kind of circumstances exist here: Respondents placed all and only the ticket agents who had been employed by the company where Local 225 was the bargaining representative at the bottom of the seniority list.⁷ Thus, it was the Local 225 ticket agents’ prior employment with the company that was not a signatory with Local 1212 which resulted in those ticket agents being made junior to the Local 1212 agents. The Board has made it plain that when the only difference between groups of employees treated differently by an employer is their union membership, that amounts to unlawful discrimination.⁸

⁵ *Reading Anthracite Co.*, 326 NLRB 1370, 1370 (1998). The fact that the Local 225 agents could also be identified as former Gray Line ticket agents (and Local 122 agents as former City Sights agents) is no different than the discrimination on the basis of employment with signatory employers found unlawful in *Newspaper & Mail Deliverers*, supra. The set of Gray Line ticket agents is identical (co-extensive) to the set of Local 225 ticket agents because Local 225 was the collective bargaining representative for the Gray Line ticket agents.

⁶ Er. Ans. Brf., p. 22.

⁷ Alternatively, it can likewise be said the Employers placed all and only the employees who had previously been represented by Local 1212 at the top of the seniority list.

⁸ E.g., *Reading Anthracite*, supra, 326 NLRB at 1370–71 (“The only factor differentiating the two groups of employees was that one group had belonged to Local 807 and the other had not. By using this discriminatory basis for determining seniority, Respondent Unions breached their duty of fair representation.”). As pointed out by General Counsel in his brief in support of his exceptions, differentiating between groups of employees based on their union membership is unlawful regardless of whether that discrimination is the result of hostility toward a union. (GC Exc. Brf., pp. 7–14.) It is the discrimination that is unlawful. *Id.*; *Newspaper & Mail Deliverers*, supra, 361 NLRB at 249–50; *Interstate Bakeries*, supra, 357 NLRB at 17. Respondent Employers apparently fail to understand that animus is normally *evidence* of unlawful discrimination, not an additional requirement. *See, e.g.*,

Similarly, Employers' counsel admits that *Teamsters Local 42* did not require any evidence of animus but contends that case differs from the instant matter because it included an admission that the two groups of employees were being treated differently based on the length of their membership in the union. But a direct admission is also present in the instant matter, as noted above: The Respondent Employers proposed to discriminate against the Local 225 ticket agents by making them junior to the Local 1212 ticket agents and the Respondent Union agreed. Thus, the undisputed evidence establishes that the Respondents treated the two groups of ticket agents differently based explicitly on whether they had been employed under a contract with Local 1212.

The Employers imply that the *Interstate* decision rests on evidence not available in the present matter.⁹ But in fact the Board in that case relied on precisely the same facts which are present here, namely the creation of an entirely new bargaining unit, the extinction of the previous units, and the lack of any permissible difference between the disadvantaged employee(s) and the favored group.¹⁰ Based on those factors, the Board found that the employer had unlawfully

Midland Ross, Inc., 239 NLRB 1205, 1208 (1979) (“It does not matter that Respondent did not act out of animus toward the Union in the usual sense of that phrase.”); *see also Ace Foods, Inc.*, 192 NLRB 1220, 1223, n.11 (1971) (employer “did not engage in any antiunion campaign or express hostility toward union organization” but concluding that only plausible motive for discharge was employee’s union activity). The cases cited by the General Counsel in brief in support of exceptions and above all rely on evidence of discrimination *other than animus*. *E.g. Reading Anthracite*, supra, 326 NLRB at 1370–71 (“The only factor differentiating the two groups of employees...”); *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974, 976 (1986) (citing lack of objective justification beyond desire to placate one of two groups of employees); *Interstate Bakeries*, supra, 357 NLRB at 17–19 (citing lack of unit to which unit considerations could attach).

⁹ Er. Ans. Brf., p. 22, describing *Interstate* decision parenthetically as follows: “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*” (emphasis added).

¹⁰ *Interstate Bakeries Corp.*, 357 NLRB 15, 18–19 (2011). The Employers also both (i) treat the *Interstate* Board’s discussion of the First Circuit decision in *NLRB v. Whiting Mile Corp.*, 342 F.2d 8 (1st Cir. 1965) as a holding by the Board, Er. Ans. Brf., p. 16, and (ii) misunderstand the discussion therein. On the first point, the *Interstate* Board did not “direct[]” that “parties...respect[] preexisting, enforceable seniority rights.” Rather, the Board was there discussing a way to make Board law consistent with the First Circuit decision, though the Board did “not fully accept the First Circuit’s logic.” *Interstate Bakeries*, supra, 357 NLRB at 18. On the second point, to the extent the Local 1212 ticket agents had preexisting, enforceable seniority rights, so did the Local 225 ticket agents. Indeed, the conflict between those different seniority rights was precisely the issue Respondents resolved by discriminating on the basis of prior representation.

discriminated. The same conclusion is inescapable here.

Finally, just as in *Reading Anthracite*, the Employers cannot point to any change in the Local 225 ticket agents' job duties, assignments, classifications, work locations, etc. The "only factor differentiating the two groups of employees"¹¹ in this case is their prior union status, *i.e.*, what union represented each group, and that difference was explicitly the basis for determining the seniority of the ticket agents. Using such a basis for determining seniority is unlawfully discriminatory.¹²

In short, the controlling case law in this matter fully supports the General Counsel's exceptions.

The Respondent Employers and Union are also confused about the significance of the fact that the Local 225 and Local 1212 ticket agents previously had their employment terms set by different collective bargaining agreements. While it is true that the terms of a new agreement (covering both sets of workers) could legally differ from either or both prior agreements, that new agreement Respondents' reliance on *Federal Mogul* misconstrues its significance. That case prohibits an Employer from unilaterally deciding upon contract terms for workers placed in a new or newly-expanded unit. It does *not* privilege an employer to bargain a new agreement for employees *based on their prior union membership*, as Employers appear to contend.¹³ While the Employers and Union were free to consider the effects various proposals or positions might have on the employees and Employers, they were *not* free to set working conditions based on the employees' prior representational history. The prohibition against such discriminatory contract

¹¹ *Reading Anthracite*, supra, 326 at 1370.

¹² *Id.* at 1370–71.

¹³ Er. Ans. Brf., pp. 15–16.

terms does not require “a clean slate” but does require the Employers and Union to treat like employees as alike.

The crux of the matter in this case is that the Respondents’ decision to end-tail the Local 225 ticket agents was based on the fact that they had been represented by Local 225 or, equivalently, not represented by Local 1212. Respondents repeatedly admitted this fact yet refuse to acknowledge the significance of these admissions. As set forth in General Counsel’s initial exceptions brief, Twin America VP Murphy admitted on cross-examination that Local 1212 ticket agents were given greater seniority than Local 225 because he was afraid employees in the former group, *i.e.*, the long-term Local 1212 ticket agents, would quit otherwise.¹⁴ Local 1212 negotiator Ames testified that the Employers said they wanted to give Local 1212 ticket agents greater seniority because they were concerned those employees would quit otherwise.¹⁵ JAD President Janet West said she was concerned the Local 1212 ticket agents would “be distressed by moving down the seniority list.”¹⁶ Respondent Employers cite this same evidence (and more to the same effect) in their Answering Brief and admit the end-tailing decision was driven by concern about what the Local 1212 ticket agents would do if they weren’t given greater seniority than the Local 225 ticket agents.¹⁷ It is hard to imagine a more clear expression of “placating the desires”¹⁸ of a politically-favored group over the less-favored Local 225 ticket agents.¹⁹

¹⁴ Tr. 305:22–306:10.

¹⁵ Tr. 92:7–93:7.

¹⁶ Tr. 380:25–381:19.

¹⁷ Er. Ans. Brf., p. 17.

¹⁸ *Barton Brands*, 228 NLRB 889, 892 (1977), cited in *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974, 976 (1986).

¹⁹ It is notable and revealing that the Employers expressed such concern for the Local 1212 ticket agents but not for the loss of Local 225 ticket agents who refused to accept the unlawful endtailing decision as the price of continued employment. See Tr. 398:3–11 (Janet West testimony that she left it to others to worry about how the Local 225 ticket agents would feel about losing their seniority); Tr. 268:7–16 (Jim Murphy testimony that Twin America was hoping that Local 225 ticket agents would stay) 306:25–307:13 (cross-exam admission of Jim Murphy that he rewarded what he called Local 225 loyalty by making them junior to the Local 1212 ticket agents forbidding, layoff,

Respondents attempt to shoehorn this case into the contours of others where the Board has not found a violation. But each such attempt ignores a critical difference between this case and supposed analog upon which Respondents rely.

Thus, for instance, *Firemen & Oilers Local 320 (Phillip Morris, U.S.A.)*, 323 NLRB 89 (1997) involved a bargained-for agreement to use plant rather than craft seniority for certain decisions in an existing bargaining unit. The newly negotiated definition of seniority applied equally to *all unit* employees regardless of prior representational history. Thus, each unit employee who had had worked for length of time *x* at the plant were given the same seniority, regardless of whether all or only part of that time had been as a member of the respondent union there. Thus, rather than support Respondents' position in this matter, that case illustrates what the Respondents in this case *ought* to have done, *viz.*, define seniority without reference to the employees' prior representational history. Instead, Respondents agreed to define seniority for bidding, layoff, and recall by first determining whether the employee had been represented by Local 1212 before. All such employees were granted greater seniority than employees who had not been so represented.

Similarly, *Simon Levi Co. Ltd.*, 181 NLRB 826 (1970) involved the transfer of employees who used to work in a different bargaining unit (at a different facility) into an *existing* bargaining unit. *Id.* at 826–827. End-tailing of the new employees into the existing unit therefore was on the basis of *unit* rather than *union* considerations, unlike the instant matter, where two previously-existing bargaining units were *eliminated* and a new unit created (in which both groups of employees had the same seniority). Thus, unlike *Simon Levi*, the instant matter involves no unit

and recall).

considerations which differ between the two groups of employees.

The foregoing establishes that Respondent Employers violated the Act by end-tailing the Local 225 ticket agents. But Respondents make further errors in their answering brief, some of which General Counsel addresses below.

For instance, Respondent Employers mischaracterize the evidence regarding the merged operations of Twin America.²⁰ There is no evidence of a stock sale in the record testimony and, in any event, a stock sale by itself has no effect on the operations of a company or the identity of the employer.²¹ But further, City Sights and Gray Lines were not “beginning to merge.” As admitted in factual stipulations, the Employers’ Answer, and position statements submitted by counsel for the Employers, the City Sights and Gray Line operations began merging no later than December 2014 and such integration was complete before May 16, 2015, when counsel for the Employers used the completion of that integration as the basis for his argument to dismiss Local 225’s unit clarification petition.²²

Respondent Employers also misunderstand the evidence about Amewo’s testimony that Murphy said the end-tailing was because the Local 225 ticket agents had lost the election. Counsel for the Employers notes that Amewo spoke to Murphy on more than two occasions and concludes that General Counsel misrepresented the record by discussing only the January 13 and April 17,

²⁰ Er. Ans. Brf., p. 19, n.18.

²¹ *E.g.*, *Hendricks-Miller Typographic Co.*, 240 NLRB 1082, 1082–83 (1979); *Miller Trucking Service, Inc.*, 176 NLRB 556, 556 (1969); *Gateway Service Co.*, 209 NLRB 116, 1167 (1974). The Employers’ brief cites pages 236, 248, and 324–5 of the transcript as evidence that “Coach...sold its interest in Twin America to City Sights.” Er. Ans. Brf., p. 12. The closest any of those parts of the record come to supporting that assertion is James Murphy’s assent to the question, “Has Coach since left the joint venture?” at Tr. 236:9–10. Page 248 contains only a vague assertion by Murphy that “Coach USA was separating from Twin America” and pages 324–25 contains no mention at all of Coach, much less a stock sale.

²² Jt. Exh. 3(j).

2017 telephone conversations.²³ But the April 1, 2017 conversation to which the Employers point did not include any remark by Murphy about the election. Thus, that conversation cannot shed light on whether Amewo’s testimony about what Murphy said in those other two conversations was “taken out of context.” The fact remains that the record contains no evidence to suggest that either of the two conversations at issue included discussion of maintaining two seniority lists. Because no evidence supports the conclusion that the two conversations included “discussions about why the Employer would not entertain the Union’s initial proposal to maintain two separate seniority lists,”²⁴ there is no evidence to support the conclusion that Amewo’s testimony about Murphy’s comment was taken out of such context. The ALJ therefore committed plain error in so concluding because his inference was not based on any record evidence.

Respondent Employers also misunderstands the significance of the evidence that some Local 225 ticket agents earned more in 2017 than in 2016. The fact that an employee earned amount x in 2017 is consistent with the claim that the same employee would have earned more in 2017 ($x + y$) *had s/he sold more tickets*. Because it was easier to sell tickets at some locations than at others—which Employers witness James Murphy admitted²⁵—and seniority determined where a ticket agent was assigned to sell tickets,²⁶ a ticket agent would likely have sold more tickets had s/he been able to successfully bid for that better location.²⁷ Thus, the record fully supports the

²³ Er. Ans. Brf., p. 27.

²⁴ ALJD 7:40–41.

²⁵ Tr. 293:22–295:20 (Murphy cross-examination testimony admitting “it’s easier to issue a greater number of tickets if you’re assigned to [certain spots] because customers want them there”).

²⁶ Tr. 106:6–17 (Amewo testimony); Tr. 164:4–18 (Sanoussi testimony); Jt. Exh. 3(a) (explaining that Local 225 ticket agents who remain employed will be end-tailed to Local 1212 ticket agents for purposes of bidding seniority).

²⁷ The conceit that those bids and locations did not matter is disproved by the facts that (i) Respondents worked to ensure that the Local 1212 ticket agents would be senior to the Local 225 ticket agents for that purpose and (ii) Respondents were concerned that the Local 1212 ticket agents would quit if they had to accept the selling assignments they would have received if the Local 225 ticket agents were credited with full seniority for bidding

conclusion that Local 225 ticket agents could have earned more in 2017 if they had been assigned to better locations. Nor is there any dispute that Local 225 ticket agents would have received different, better ticket sales sites had they not been made junior to the Local 1212 ticket agents. Those agents' 2016 earnings—or the difference between the 2017 and 2016 earnings—are irrelevant to that determination. Thus, the Employers' evidence that employees earned more in 2017 than 2016 are beside the point and do *not* show that the earnings potential of the Local 225 ticket agents was unharmed. In fact, Employer counsel notes that both Sanoussi and Mohammed *sold fewer tickets in 2017 than in 2016.*²⁸ Because it is reasonable to conclude that at least part of that drop in sales was due to having been assigned to less productive selling sites, it is equally reasonable to conclude that the ticket agents' reduced seniority negatively affected their earnings. Thus, the Employers' own evidence supports the conclusion that (at least) those two Local 225 ticket agents had their earnings adversely affected by being assigned to less desirable ticket selling sites.

Finally, the Employers misunderstand the significance of the fact that the Twin America employers constituted a single employer and were joint employers with JAD. These facts entail that Twin America employed all the ticket agents, both before and after the election. Consequently, the Employers' decision to lay off the Local 225 ticket agents on April 6, 2017 was a condition imposed on those employees not suffered by the Local 1212 ticket agents. Further, the joint employment of the Local 1212 ticket agents by both Twin America and JAD demonstrates that those employees did not have to end their employment relationship with the former to be employed by the latter. At any rate, there can be no dispute that the Employers terminated the

purposes.

²⁸ Er. Ans. Brf., p. 29.

CERTIFICATE OF SERVICE

The undersigned, an attorney for the General Counsel, hereby certifies that he caused a true and correct copy of General Counsel's Reply Brief In Support of Exceptions to the Decision of the Administrative Law Judge to be electronically filed with the Executive Secretary of the National Labor Relations Board on July 12, 2019 and served on the same date via electronic mail at the following addresses:

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Dated: July 12, 2019

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