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**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 Tefe Kwami Amewo**

**United Service Workers Union, IUJAT, Local 1212 and Tefe Kwami Amewo**

**United Service Workers Union, IUJAT, Local 1212 and Arthur Z. Schwartz.** Cases 02–CA–190704, 02–CA–196228, 02–CA–198436, 02–CB–190736, and 02–CB–199847

December 18, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

On March 20, 2019, Administrative Law Judge Jeffrey P. Gardner issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent Joint Employers and the Respondent Union each filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>1</sup> There are no exceptions to the judge’s finding that the Respondent Joint Employers modified the collective-bargaining agreement with the Respondent Union, in violation of Sec. 8(a)(5) within the meaning of Sec. 8(d), by requiring employees to agree, as a condition of employment, to a dispute resolution procedure that differed from the procedure contained in the collective-bargaining agreement.

<sup>2</sup> The General Counsel has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel argues that the judge improperly found certain testimony concerning the Respondent Joint Employers’ statements to employees regarding the endtailing of their seniority to have been taken out of context and therefore to be “less credible.” The General Counsel’s argument is unavailing because, even if fully credited, this testimony would be insufficient to establish that the endtailing, discussed below, was unlawfully related to employees’ union membership or support.

We adopt the judge’s dismissal of the allegation that the Respondent Joint Employers violated Sec. 8(a)(3) and (1), and the Respondent Union violated Sec. 8(b)(1)(A) and (2), by endtailing the former Gray Line employees, formerly represented by Local 225, Transport Workers Union of America, AFL–CIO, behind the existing JAD employees for layoff and job-location-bidding purposes. Endtailing does not violate the Act when it is based on unit seniority instead of union seniority. See, e.g., *Interstate Bakeries Corp.*, 357 NLRB 15, 17 (2011), *enfd.* sub nom.

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and briefs and has decided to affirm the judge’s rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

ORDER

The National Labor Relations Board orders that the Respondents, Twin America, LLC, City Sights NY, LLC, and Gray Line New York Tours, Inc., as a single employer, and JAD Transportation, as joint employers, New York, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to continue in effect all the terms and conditions of their collective-bargaining agreement with United Service Workers Union, IUJAT, Local 1212 (the Union) without the Union’s consent by requiring employees to agree to individual arbitration as a condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent it has not already done so, rescind the requirement that employees agree to individual arbitration as a condition of employment.

*NLRB v. Teamsters Local 523*, 488 Fed.Appx. 280 (10th Cir. 2012), cert. denied 568 U.S. 1193 (2013). Here, the record shows that the Respondents sought to resolve a unit-seniority issue—arising after an election that resulted in the certification of the Respondent Union as the representative of a newly combined unit of employees—based on permissible unit-related concerns rather than on union membership considerations. Further, as noted by the judge, the General Counsel has not shown that the endtailing was otherwise coercive along Sec. 7 lines. See, e.g., *Teamsters Local 896 (Anheuser-Busch)*, 296 NLRB 1025, 1028–1029 (1989) (even where seniority preference arguably appeared to facially discriminate along union lines, no basis to infer discriminatory motive because facts showed it was based on considerations carrying over from a defunct multi-employer unit).

Having found that the endtailing of the former Gray Line employees was not unlawful, we also adopt the judge’s finding that the Respondent Joint Employers did not violate Sec. 8(a)(3) and (1) by constructively discharging employees who declined to accept the endtailing as a condition of continued employment. We further find no merit to the General Counsel’s argument on exception that the Joint Employers unlawfully required employees formerly represented by Local 225 to sign a form indicating that they would be probationary for 90 days following their transition to the JAD payroll. Because the General Counsel did not raise this allegation in the complaint or before the judge, it is deemed waived. See, e.g., *Laborers’ Local 91 (Scarfari Construction Co.)*, 368 NLRB No. 40, slip op. at 1 fn. 2 (2019).

<sup>3</sup> We shall modify the judge’s recommended Order and substitute a new notice to conform to the judge’s findings and to the Board’s standard remedial language.

(b) Notify all current and former employees who were required to agree to individual arbitration as a condition of employment that the requirement has been rescinded.

(c) Within 14 days after service by the Region, post at each of its New York, New York facilities copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If any of the Respondents has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 5, 2017.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 18, 2019

\_\_\_\_\_  
John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail to continue in effect all the terms and conditions of our collective-bargaining agreement with United Service Workers Union, IUJAT, Local 1212 (the Union) without the Union's consent by requiring our employees to agree to individual arbitration as a condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, to the extent we have not already done so, rescind the requirement that our employees agree to individual arbitration as a condition of employment.

WE WILL notify all current and former employees who were required to agree to individual arbitration as a condition of employment that the requirement has been rescinded.

TWIN AMERICA, LLC, CITY SIGHTS NY, LLC,  
GRAY LINE NEW YORK TOURS, INC., AND JAD  
TRANSPORTATION, INC.

The Board's decision can be found at <https://www.nlr.gov/case/02-CA-190704> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



*Jamie Rucker, Esq.*, for the General Counsel.  
*Stanley Goodman, Esq.* and *Carlos Torrejon, Esq.*, for the Respondent Employers.  
*Gary Rothman, Esq.* and *Eric LaRuffa, Esq.*, for the Respondent Union.  
*Arthur Z. Schwartz*, for the Charging Parties.

#### DECISION

##### STATEMENT OF THE CASE

JEFFREY P. GARDNER, Administrative Law Judge. The multiple charges in this case were filed by Tefe Kwami Amewo, an individual, and Arthur Z. Schwartz, an individual, between January 3 and September 13, 2017.<sup>1</sup> An amended consolidated complaint was issued on April 20, 2018 against the Respondent Employers, Twin America, LLC, City Sights NY LLC and Gray Line New York Tours, Inc. as a single employer, and JAD Transportation, as joint employers; and against the Respondent Union, United Service Workers Union, IUJAT, Local 1212.<sup>2</sup>

The complaint alleges Respondent Employers violated Section 8(a)(3) and (1) by terminating the former Gray Line ticket agents; by end-tailing the seniority dates of those Gray Line ticket agents; and by requiring those former Gray Line ticket agents to accept their end-tailed seniority dates as a condition of rehire. The complaint further alleges Respondent Employer JAD Transportation, Inc. violated Sections 8(a)(5) and (1) and 8(d) of the Act by unilaterally requiring the former Gray Line ticket agents to agree to an “alternative dispute resolution” procedure as a condition of rehire. (GC Exh. 1(v)).<sup>3</sup>

In addition, the complaint alleges Respondent United Service Workers Union violated Sections 8(b)(1)(A) and (2) of the Act by agreeing to end-tail the seniority dates of the former Gray Line ticket agents.

On June 18 and 19, 2018, I conducted a trial at the Board’s Regional Office in New York, New York, at which all parties were afforded the opportunity to present their evidence. After the trial, the General Counsel, Respondent Employers and Respondent Union filed timely briefs, which I have read and considered.<sup>4</sup>

<sup>1</sup> Arthur Z. Schwartz is an attorney who has represented Local 225, Transport Workers Union of America, AFL–CIO (hereinafter “Local 225”), which is not a party to these proceedings. It appears that he did not intend to be an individual charging party, but rather, intended to file on behalf of the affected employees. Nevertheless, the General Counsel chose not to amend the case caption.

<sup>2</sup> In the interest of clarity, the various Respondents will be referred to in this decision at times individually, or as Respondent Employers, the Respondent Union, “the Employer(s)” or “the Union” where appropriate.

Upon consideration of the briefs, and the entire record, including the testimony of witnesses and my observation of their demeanor, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent Employers Twin America, LLC, City Sights NY, LLC and Gray Line New York Tours, Inc. admit, and I find, that they are, respectively, a Delaware limited liability corporation (Twin America), a New York limited liability corporation (City Sights), and a New York corporation (Gray Line), all with a principal place of business at 1430 Broadway, New York, New York. These Respondents also admit, and I find, that they are a single-integrated business enterprise engaged in the business of operating sightseeing tour buses with a “Visitor’s Center” open to the public located at 777 Eighth Ave., New York, New York, out of which its tour guides and ticket agents work, and are a single employer within the meaning of the Act.

Respondents Twin America, City Sights and Gray Line further admit, and I find, that in conducting their business operations during the most recent 12-month period, they collectively derived gross revenue in excess of \$500,000 from ticket sales directly to the general public, and purchased and received at its New York facilities, goods valued in excess of \$5000 directly from suppliers located outside the state of New York.

Respondent Employer JAD Transportation, Inc. admits, and I find, that it is a New York corporation with an office and principal place of business at 105 Cedar Drive West, Plainview, New York, and has been engaged in the business of providing employees to other companies, including Twin America and City Sights. Respondent JAD further admits, and I find, that in conducting its business operations during the same period, it derived gross revenue from its business operations in excess of \$50,000 from other companies which are themselves directly engaged in interstate commerce. It further admits that it is a joint employer of the unit of tour guides and ticket agents at issue.

Therefore, I find that Respondent Employers are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, that Respondents Twin America, City Sights and Gray Line are a single employer within the meaning of the Act, and that they are joint employers with JAD of the employees involved herein.

Respondent Employers admit, and I further find, that James Murphy and Paul Seeger have been supervisors and agents of Twin America and that Janet West has been a supervisor and agent of JAD within the meaning of Section 2(11) and (13) of the Act.

Finally, it is undisputed and I also find that the Respondent Union, United Service Workers Union, IUJAT, Local 1212

<sup>3</sup> Abbreviations used in this decision are as follows: “Tr.” for the transcript, “GC Exh.” for the General Counsel’s exhibits, “ER. Exh.” for Respondent Employers’ Exhibits, “U. Exh.” for Respondent Union’s exhibits, and “Jt. Exh.” for Joint exhibits. Specific citations to the transcript and exhibits are included only where appropriate to aid review, and are not necessarily exclusive or exhaustive.

<sup>4</sup> Neither of the individual charging parties filed a brief.

(Local 1212 or the Union) is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### Background

Respondent Employers are in the sightseeing tour bus industry, and each has a slightly different history leading them to the current status quo. City Sights began operating hop-on/hop-off sightseeing tour bus service in New York City in about 2005, and since May 2005, City Sights has recognized the Union as the collective-bargaining representative of its employees.<sup>5</sup> This recognition was embodied in a series of collective-bargaining agreements (CBAs) between Local 1212 and JAD dating back to 2005.

Since at least 1994, Gray Line also operated a hop-on/hop-off sightseeing tour bus service in New York City, and from at least November 2008 until November 28, 2016, Gray Line recognized a different union, Transport Workers Union, Local 225 (hereinafter Local 225), as the collective-bargaining representative of its tour guides and ticket agents. That recognition was embodied in a series of CBAs dating from November 15, 2008 through January 5, 2015.

In March 2009, pursuant to a joint venture agreement, City Sights and Gray Line began operating together under the name “Twin America.” However, at that time, and for nearly a decade after, the employees working for Twin America remained separated into two bargaining units, represented by two separate unions: the former City Sights employees represented by Local 1212, and the former Gray Line employees represented by Local 225, each subject to those unions’ respective CBAs.

In April 2010, Local 225 filed a unit clarification petition seeking to add the City Sights employees represented by Local 1212 to its Gray Line bargaining unit, although that petition was subsequently withdrawn. Thereafter, later in 2010, Local 225 filed an RC petition seeking to represent all the tour guides and ticket agents working at Twin America. That petition was opposed by both Local 1212 and Twin America on the grounds that it was barred by the existence of the respective CBAs in place at City Sights and Gray Line. Although Local 225 maintained that a contract bar should not apply because, it argued, City Sights and Gray Line had merged into one entity, the Regional Director found in favor of the Union and Twin America and dismissed the petition.

Local 1212 and Local 225 continued representing their respective bargaining units over the next few years while Twin America was engaged in litigation with federal, state and city authorities relating to the combination of these various entities. Over that same period of time, Twin America also began further integrating the City Sights and Gray Line operations, though it

declined to actually merge the two work forces. Indeed, even upon resolution of the litigation in March 2015, there continued to be two separate bargaining units represented by their respective unions and with two distinct working conditions deriving from what had been separate CBAs.<sup>6</sup>

During that entire background, there 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. And there was no evidence presented at the hearing demonstrating an overt preference on the part of the Employer for one union over the other. 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.

On May 12, 2015, Local 225 again filed a unit clarification petition seeking to add the Union-represented tour guides and ticket agents to the Local 225 bargaining unit, which was again opposed by Twin America, and again Local 225 withdrew that petition. Finally, on August 31, 2015, Local 225 filed a new RC petition seeking to represent all of the tour guides, ticket agents and customer service agents working for the integrated operations of Twin America, Gray Line and JAD.

By this point, the Gray Line and City Sights operations had been fully merged, although the employees still remained employed by separate entities.<sup>7</sup> In light of the status of the employers’ merged operations, in September 2015, the parties and the Region agreed to an election among the tour guides, ticket agents and customer service agents working for the integrated operations of Twin America, Gray Line and JAD, with the choices being representation by Local 225, by Local 1212 or no union.

That initial election took place on September 18, 2015, with no party obtaining a majority, and the two unions each receiving more votes than there were votes against union representation. As such, after lengthy post-election proceedings spanning over a year, on November 18, 2016, a runoff election was held to determine which of the two unions would represent the unit.

As a result of that runoff election, on November 28, 2016, the Board finally certified the Union (Local 1212) as the collective-bargaining representative for all of the tour guides, ticket agents and customer service agents working for the integrated operations of Twin America, Gray Lines and JAD in a new combined bargaining unit. Shortly after the Union’s certification, the parties began negotiations for an initial CBA for the newly combined unit.

In the meantime, with the new obligation to negotiate with the Union for a new contract covering all of the bargaining unit employees, Twin America determined that it would outsource all of the Gray Lines labor to JAD and eliminate the Gray Lines payroll to have one common employer and payroll for the entire unit.<sup>8</sup>

<sup>5</sup> Specifically, its full-time and regular part-time drivers, ticket agents, and tour guides in New York City, who are supplied to City Sights by JAD.

<sup>6</sup> Local 225’s CBA expired after an initial extension in January 2015, and although there was bargaining between Twin America and Local 225 for a successor CBA, no such agreement was ever reached. Local 1212’s most recent prior CBA had been in effect through May 2017. It is not disputed that Twin America continued applying the terms of those

respective CBAs until the current agreement covering all of the employees went into effect in May 2017.

<sup>7</sup> The former City Sights employees were employed and paid by JAD while the Gray Lines employees remained employed and paid by Gray Lines.

<sup>8</sup> Although it is disputed whether the manner in which the Employers accomplished the transition of Gray Lines employees to the JAD payroll was lawful or required, it has not been argued that the Employers were not entitled to outsource the former Gray Line employees to JAD.

Despite that impending transition to the JAD payroll, and pending negotiations with the Union for a new CBA covering all employees, Twin America was still applying to the employees who were then on the Gray Lines and JAD payrolls, respectively, the terms and conditions of their previous unions' two separate CBAs.

#### The Parties' Negotiations

The Union and Twin America held collective-bargaining sessions for a new contract beginning in December 2016, as well as communicating in writing over some proposals. The Union was represented in negotiations by United Service Workers Union National vice president, Jonathan Ames, who testified at the hearing for the General Counsel. The Employers were represented in negotiations by Twin America's Executive Vice President Paul Seeger and Vice President James Murphy, and at times JAD President Janet West, all three of whom also testified at the hearing for the Respondent Employers.

The parties' first negotiation took place in person in mid-December 2016 at one of the Union's offices with Ames, Seeger, and Murphy present. The meeting did not include employee bargaining committee members and did not address ticket agent seniority. Rather, the focus was regarding a different group of employees.

Prior to the next in-person meeting, by letter dated December 16, 2016, the Union demanded immediate parity in wages between the former Gray Line ticket agents and the JAD ticket agents at the prevailing JAD wage rates.<sup>9</sup> The Employer did not agree to the Union's demand, though the parties began discussing through telephone conversations, emails and additional in-person meetings what the remuneration would be for the ticket agents.

The second in-person meeting took place later that month at another of the Union's offices, and again included Ames, Seeger and Murphy. This time, Ames was accompanied by an employee bargaining committee. Although the Union had been certified as the exclusive bargaining representative of the entire unit, 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. Indeed, the Union included as part of its initial bargaining position at this meeting a list of specific demands that those employees had provided to the Union. These demands were presented to the Employer in writing at this second in-person bargaining session, the first with the employee bargaining committee members present.

Included in that list of demands, requested by the former Gray Line employees and presented by the Union, was a proposal on how to reconcile what had been two separate preexisting seniority lists now that the two bargaining units had been consolidated. The Union's proposal, in accordance with the former Gray Line employees' request, was to keep the two then-existing seniority lists separate. In the alternative, also at the former Gray Line employees' request, the proposal was that if the two separate

seniority lists were not maintained, then seniority should be based on hiring dates at whichever company for which employees had worked.

Respondent Employer rejected both of those seniority proposals. Instead, while they proposed that the two seniority lists be consolidated into one, Respondent Employer's position was that the former Gray Line agents must follow all JAD agents on the seniority list for purposes of layoff and schedule/location bids. This demand, from which the Employer never departed, was attributed to Janet West's belief that because JAD was effectively the "surviving" member of the two employer entities, seniority for job bidding should be based on the date of hire onto the JAD payroll.

At this point, Respondent Employer had also proposed that rather than raising the commission rates of the Gray Line employees to parity with the JAD ticket agents, it would offer to raise the commission rates of the Gray Line employees to the lower "B" rate. This would represent a jump in compensation for the Gray Line employees, but nevertheless leave them still earning less than their JAD counterparts. The Union rejected this proposal, repeating its initial demand that the entire new bargaining unit must be paid at the same commission rate structure based on their dates of hire, a demand from which it never departed.

Over the holiday weekend that followed, the parties exchanged emails on their positions regarding compensation and seniority, and the Employer consented to providing the Gray Line employees with the highest rates payable to the JAD employees, granting them the higher "A" rate, and recognizing their prior Gray Line seniority in calculating wages, benefits and all other purposes. However, the Employer continued to insist that with regard to layoffs and job bids, the Gray Line employees transitioning to JAD would be placed behind the existing JAD employees.<sup>10</sup>

The Union, in its own words in a January 2, 2017 email from Ames to Murphy, recognized the "significant financial commitment" from the Employer that this rate change represented, and the resulting significant increase in compensation for those of its members who had been Gray Line employees. As such, the Union agreed to the Employer's demand on seniority in furtherance of reaching an overall contract, and specifically to secure the commission rate parity which it felt was of utmost importance.

Following that agreement on seniority, the parties continued negotiations and ultimately reached a full agreement on a new CBA effective March 9, 2017. It is undisputed that Respondent is bound by this most recent CBA, and that its terms now apply to all of Twin America's unit employees.

The concept of placing employees transitioning from Gray Line to JAD on the seniority list based on the date they entered the JAD payroll was not entirely new. Prior to the election that consolidated the two units, there were Gray Line employees who had transferred to JAD, and they did not keep their Gray Line seniority. Janet West testified she believed JAD employees would be distressed by moving down the seniority list,

<sup>9</sup> It is undisputed that the former Gray Line employees were earning substantially less under the terms of their expired Local 225 contract than the JAD employees were earning under the terms of the Local 1212 contract then in effect.

<sup>10</sup> It was undisputed at the hearing that no ticket agent has ever been involuntarily laid off.

particularly those who had been with her company from the beginning. But, she also recognized that Gray Line employees would not be happy to receive lower seniority than their JAD counterparts.

West testified to her belief that pretty much any agreement regarding seniority that was reached would negatively affect someone, and that there was no way to make 100 percent of the unit happy. Facing that challenge, she testified that the compromise proposed—honoring Gray Line employees' seniority with regard to all but two items while giving them substantial raises—was her best effort to keep the most people reasonably happy.

I found West's testimony to be credible. Her demeanor was straightforward and unhesitating, and she explained in detail her past history dealing with disgruntled employees that helped inform her concerns about employee retention and her efforts to manage that. Her testimony was also consistent with that of Murphy and Seeger, both of whom I also found credible. All three of Respondent Employer's witnesses described a credible business rationale for the actions taken by them, and the considerable efforts made to reach a reasonable compromise with the Union on the consolidation of the unit.

I did not find the individual employee witnesses offered by the General Counsel to be as credible. The two current JAD employees who had previously been Gray Line employees, Sarafa Sanoussi and Rufai Mohammed, both claimed to have had their earning potential harmed by the seniority provision of the new CBA, yet Sanoussi actually made more money in 2017 than he had in 2016, and Mohammed made nearly as much money in 2017 than in 2016 despite working as many as 17 fewer days. And as a group, the former Gray Line employees working for JAD collectively made well more money in 2017 than they had in 2016 as well.

I also found the employee witnesses, including Charging Party Tefe Kwami Amewo, less credible when testifying to having been told by Murphy and Seeger that the seniority agreement reached by Twin America and the Union was because "you people have lost the election" or because Local 225 had called for the election. These comments appear to have been taken out of context in discussions about why the Employer would not entertain the Union's initial proposal to maintain two separate seniority lists.

#### Respondent Employers' Additional Disputed Actions

Following the parties' agreement on the issue of seniority, Respondent Employer took a number of additional actions to which the Charging Party objects. On January 5, 2017, Twin America notified all of its Gray Line employees in writing that they would be required to transition to employment by JAD effective no later than April 6, 2017. All 73 Gray Line employees were offered employment, and 47 of them accepted the offer, and transitioned to JAD by the effective date. The remaining 26 employees declined to transition.

Charging Party Amewo was among the employees who declined to transition to JAD. As late as April 17, 2017, Twin America continued to offer Amewo a position with JAD

pursuant to the terms of the parties' new CBA, but Amewo declined. Since that time, those Gray Line employees who did transition to JAD, along with the existing JAD employees, have worked under the terms and conditions of the parties' most recent CBA.

At all times between the January 5, 2017 notice and the April 6, 2017 transition date, it is undisputed a collective bargaining agreement was in place between Twin America and the Union—either the one Twin America had with the Union covering the City Sights/JAD ticket agents prior to March 9, 2017, or the new CBA covering all ticket agents beginning March 9, 2017. It is also undisputed that both those contracts contained a dispute resolution procedure that applied to disputes "between the Employer and the Union, or any group of employees covered by this Agreement." There was no inclusion or mention of any separate procedure, and specifically no mention of individual arbitration as a mechanism for dispute resolution.

Finally, it is undisputed that the former Gray Line ticket agents who transitioned to JAD were required to complete certain paperwork, including "agreeing to individual arbitration of disputes" which was a term of employment that was a part of the parties' CBA, and was not agreed to by the Union. The Employer concedes that it gave these individual arbitration agreements to employees and required them to sign the package of paperwork in order to transition to JAD. However, its position is that these arbitration agreements were included by mistake, that it later ceased including those forms in its hiring packet, and that no employee was actually denied employment for refusing to sign an individual arbitration agreement.

#### Analysis

##### *A. Respondents Lawfully Negotiated an Agreement Consolidating Units Based on Legitimate Business Reasons and not on the Basis of Union Membership*

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

As an initial matter, the issue of seniority rights is typically one negotiated between an employer and a union, stemming from the principle that "seniority arises only out of contract or statute," and thus is "not an incident of employment." *NLRB v. Whiting Milk Corp.*, 342 F.2d 8, 10 (1st Cir. 1965). Although seniority is not a right specifically provided for in the Act, the Act does prohibit an employer and/or a union from discriminating against employees in the application of seniority for unlawful discriminatory reasons, or in the case of a union for merely arbitrary reasons.

placing all of the former Gray Line employees ahead of the existing JAD employees.

<sup>11</sup> Had the parties agreed to seniority based on original dates of hire by their respective employers, it would have had the opposite effect,

While seniority is not an absolute right of employment, the right to end tail a portion of employees when two units consolidate is also far from absolute. During a merger of two sets of employees that were previously represented by different unions, as here, it would be unlawful under the Act to determine the seniority of the merged employees based on their union representation alone. In contrast, an employer and union may come to a seniority agreement that distinguishes employees based upon “a *bona fide* attempt to resolve a problem frequently arising from business merger.” *Simon Levi Co.*, 181 NLRB 826, 827 (1970). In other words, it must be based upon legitimate business considerations such as skill, unit seniority, changes in the job description or work environment and preexisting seniority rights. The Board has found unlawful discrimination in seniority agreements where membership in one union over another is encouraged and where irrelevant and discriminatory considerations are present. For example, requesting and agreeing to a seniority system based solely on the date employees became members of a specific union is clearly unlawful conduct. *International Brotherhood of Teamsters, Local 727*, 360 NLRB 65, 71 (2013). In that case, the Board specifically found that “preferences granted on the basis of any membership considerations [are] unlawful.” *Id.* at 71.

In finding such unlawful conduct, the Board noted that the union would violate 8(b)(1)(A) of the Act even if there was no proof of bad faith “since arbitrary conduct without evidence of bad faith has been found to constitute a breach of the duty” of fair representation. *Id.* at 72. Thus, if employees were end tailed for arbitrary reasons, rather than based on the status of their union membership, the Union could still be found to have violated the Act.

When deciding whether a factor in determining seniority is unlawful under the Act, the Board also prohibits conduct that “discriminatorily encourages membership in one local over another.” See *Reading Anthracite Co.*, 326 NLRB 1370 (1998). In *Reading*, the Board found that the choice to end tail seniority based on the date that employees received their transfer cards from one union to another was unlawful because that was an “irrelevant and discriminatory consideration.” *Reading Anthracite Co.*, 326 NLRB at 1371.

The Board in *Reading Anthracite Co.* pointed out that this date “did not coincide with any change in the employees’ job duties, assignments, classifications, or work locations.” *Id.* at 1370. The Board’s language in *Reading* suggests that, had the employer opted to delegate seniority according to some change in the work environment, the choice to end tail seniority might not have been unlawful. See *Reading Anthracite Co.*, 326 NLRB at 1370.

Indeed, end tailing seniority may be lawful where there are legitimate considerations that justify the disparate treatment. For example, the Board has held that an alleged discrimination in seniority by an employer was lawful conduct where the preferences were “skill based.” *Newspaper and Mail Deliverers’ Union of New York*, 361 NLRB 245, 249–250 (2014). The Board has further suggested that an employer may lawfully end tail a

set of employees where the objective of such an approach is to respect preexisting, enforceable seniority rights which were not based on length of service alone. *Interstate Bakeries Corp.*, 357 NLRB 15, 18 (2011).

The Board has also held that discrimination on the basis of unit seniority, as opposed to union seniority, is allowable. See *Interstate Bakeries Corp.*, 357 NLRB at 17 (“A union and an employer do not discriminate in a manner prohibited by the Act by contracting to vest certain employment rights based on seniority in a represented unit.”). Under this distinction, where an employee has worked for another employer and then has been placed into an existing unit after his company has been purchased, this employee may be lawfully end tailed based on his lack of unit seniority. *Id.* However, it would be unlawful for parties to place employees at the end of the seniority list because they were unrepresented by a particular union, or any union, in their prior employment.

When negotiating seniority rights during a merger, a union must bargain for employee benefits within the units it represents without simultaneously relegating non-union employees to an inferior status. See *NLRB v. Whiting Milk Corp.*, supra, 342 F.2d at 11. Significantly, a union also cannot balance competing interests among different groups of employees it represents for mere political reasons or to placate the majority at the expense of a minority. *Teamsters Local 42 (Daily, Inc.)*, 281 NLRB 974 (1986).

Finally, the Supreme Court has held that even where there may be legitimate business reasons for challenged conduct, and in the absence of anti-union animus, the Board can still find an unfair labor practice if the actions taken by an employer are inherently destructive of employee rights. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

The General Counsel maintains that by agreeing to the end tailing of seniority here, even though only for job location bids and layoff, the Employer and the Union were unlawfully discriminating against employees because of their former union membership in Local 225 while employed by Gray Lines.

The Employer denies that employees’ former membership in Local 225 played any role in its position. It takes the position that because commission rates in the JAD agreement were significantly higher than commission rates in the Gray Line agreement, the former Gray Line employees would be receiving substantial increases in compensation while the JAD employees would not.<sup>12</sup> As such, 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.

The Union takes the position that it is not uncommon for unions to try to reach a balance between conflicting interests of different groups of employees it represents. It argues this is the case whether it involves the same bargaining unit that has existed in the past between employees of different classifications with different interests, or under the circumstances that are presented

<sup>12</sup> JAD apparently had those higher commission rates because Gray Line, due to its long history in the industry and not having had a contract or raise for 3 years, had fallen behind.

here. It also denies that employees' former membership in a different union played any role in its decision. Instead, it maintains that it agreed to the seniority plan as a compromise to secure the pay parity that it deemed to be of primary importance to those very same employees.

I find the General Counsel's argument that the agreement between Respondent Employers and the Respondent Union was motivated by antiunion animus to be unpersuasive. The 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. Rather, every indication is that the Employer's desire to end tail the seniority of those employees was based on its legitimate concern that using straight seniority would result in the entire former Gray Line work force leapfrogging past the JAD employees in seniority.

Janet West's assertion that she did not want to have the JAD employees who had been with her since the founding of City Sights all be placed below the former Gray Line employees in seniority is reasonable and credible. And, I find it had nothing to do with the union that formerly represented the former Gray Line employees.

In the absence of anti-union animus, and given the legitimate reasons articulated by the Respondents for their seniority agreement, the only remaining question is whether that agreement was inherently destructive of important employee rights under *Great Dane*. I find that it was not. This is not a situation where an employer has favored one union over another, or union members over non-union members. All of the Respondent Employer's unit employees are represented by the same union, and had been for months when the new seniority agreement went into effect. There is no competing union or other employee concerted activity that is being chilled or has otherwise been interfered with.

Accordingly, Respondent Employers did not violate Section 8(a)(3) and (1) by end tailing the seniority dates of Gray Line ticket agents, and Respondent Union did not violate Sections 8(b)(1)(A) and (2) by agreeing to the same.

*B. Respondent Employers Lawfully Separated Employees Who Declined to Transition to JAD Under the Parties' Agreed-Upon Terms*

The General Counsel argues that Respondent Employer did not need to take any specific action upon the elimination of the Gray Line payroll and the resulting transition of the former Gray Line employees to the JAD payroll. Instead, the General Counsel asserts that by requiring that transition, Respondent was demonstrating anti-union animus and motive.

I find this ignores the reality of the situation the Employer faced and the legitimate business concerns it has articulated. The outsourcing of labor from Gray Line to JAD was much more significant than simply adding a list of names to the payroll, as evidenced by the years of past litigation over which employees worked for which entities. And, consolidating its workforce under one employing agency and payroll was a reasonable step for the Employer to take, with negligible impact on its employees.

Indeed, the process of laying off the former Gray Lines employees in this case was essentially no different from the simple administrative process that the General Counsel suggests the Employer might have used to transition those employees. Every

employee was offered continuing employment under the terms of the new collective bargaining agreement covering all JAD employees. A majority of those employees accepted their offers and continued working without interruption. Those who declined to work for JAD because they objected to the CBA negotiated between their Union and their Employer were in no different position than any other JAD employee who might decline to work because of objections to their contract.

Accordingly, I find that Respondent Employers did not violate Section 8(a)(3) and (1) by requiring the former Gray Line ticket agents to accept their end tailed seniority dates as a condition of rehire, or by terminating those agents who declined to transition to JAD under the parties' agreed upon terms.

*C. Respondent Unlawfully Modified the Collective-Bargaining Agreement with the Union to Require Employees to Agree to Individual Arbitration as a Condition of Employment*

Section 8(a)(5) of the Act establishes an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." An employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good-faith impasse in bargaining. See *St. Vincent Hospital*, 320 NLRB 42, 45 (1995).

Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to "modif[y] . . . the terms and conditions contained in" the contract. In such instances, the employer must obtain the union's consent before implementing the change. In order to prove that a respondent violated Section 8(d), the General Counsel must identify a specific term "contained in" the contract that the respondent has acted to modify. *Milwaukee Spring Division*, 268 NLRB 601 (1984).

Here, both the collective-bargaining agreement Twin America had with the Union covering the City Sights/JAD ticket agents prior to March 9, 2017, and the new CBA covering all ticket agents beginning March 9, 2017, contained a dispute resolution procedure that applied to disputes "between the Employer and the Union, or any group of employees covered by this Agreement." There was no inclusion or mention of any separate procedure, and specifically no mention of individual arbitration as a mechanism for dispute resolution.

It is undisputed that the former Gray Line ticket agents who transitioned to JAD were given certain paperwork to complete, including agreeing to individual arbitration of disputes. Dispute resolution was a term of employment that was already a part of the parties' CBA, and a change to that was not agreed to by the Union. This was not an insignificant issue, as the resolution mechanism for disputes is at the heart of a union's role as the collective-bargaining representative of the unit.

As such, I find that Respondent Employers unlawfully modified the collective-bargaining agreement with the Union to require employees to agree to individual arbitration as a condition of employment.

CONCLUSIONS OF LAW

1. Respondent Employers, Twin America, LLC, City Sights NY, LLC, Gray Line New York Tours, Inc. and JAD Transportation, Inc. are employers engaged in commerce within the

meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents Twin America, LLC, City Sights NY, LLC and Gray Line New York Tours, Inc. are a single employer, and are joint employers with Respondent JAD Transportation, Inc.

3. The Union, United Service Workers Union, IUJAT, Local 1212, is a labor organization within the meaning of Section 2(5) of the Act and represents a bargaining unit comprised of workers employed by the Respondents.

4. Since in or about January 2 through April 6, 2017, Respondent Employers have committed unfair labor practices within the meaning of Section 8(a)(5) and (1) and (d) of the Act by unlawfully modifying the collective bargaining agreement with the Union to require employees to agree to individual arbitration as a condition of employment.

5. The Respondent Employers' above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The above violation is an unfair labor practice within the meaning of the Act.

7. Respondents have not otherwise violated the Act.

#### REMEDY

Having found that the Respondent Employers engaged in conduct in violation of Section 8(a)(5) and (1) and (d) of the Act, I shall recommend that it cease and desist from engaging in such conduct and take certain affirmative action designed to effectuate the policies of the Act.

In particular, I shall recommend that, to the extent it has not already done so, Respondent Employers shall cease and desist from soliciting individual arbitration agreements from employees, and that it cease and desist from using signed individual arbitration agreements previously obtained from employees for any purpose.

I shall also recommend that Respondent Employers be required to notify employees that they will not alter the dispute resolution procedure provided for in the parties' CBA, which does not require employees to arbitrate disputes with the Respondent Employers individually.

As to the remainder of the complaint, I recommend dismissal.

Therefore, Respondent will be ordered to post and communicate by electronic post to employees the attached Appendix and notice. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>13</sup>

#### ORDER

Respondents, Twin America, LLC, City Sights NY LLC and Gray Line New York Tours, Inc. New York, New York, as a single employer, and JAD Transportation, as joint employers, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Soliciting individual arbitration agreements from unit employees and/or using signed individual arbitration agreements previously obtained from unit employees for any purpose.

<sup>13</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Notify unit employees that the Respondent Employers will not alter the dispute resolution procedure provided for in the parties' CBA, which does not require employees to arbitrate disputes with the Employer individually, and that any previously signed individual arbitration agreement is rescinded.

(b) Within 14 days after service by the Region, post at each of its New York locations copies of the attached notice marked "Appendix."<sup>14</sup> Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since January 2, 2017.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. March 20, 2019

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

<sup>14</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT make unilateral changes to terms and conditions of employment without first bargaining with the Union, United Service Workers Union, IUJAT, Local 1212.

WE WILL NOT alter the dispute resolution procedure provided for in the parties' collective-bargaining agreement without the consent of the Union.

WE WILL NOT in any like or related manner fail and refuse to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of our employees in the unit or otherwise interfere with your rights under Section 7 of the Act.

WE WILL cease soliciting individual arbitration agreements from unit employees.

WE WILL cease using previously obtained individual arbitration agreements for any purpose, pending bargaining with the Union.

TWIN AMERICA LLC, CITY SIGHTS NY, LLC, AND  
GRAY LINE NEW YORK TOURS, INC.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/02-CA-190704](http://www.nlr.gov/case/02-CA-190704) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

