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United Site Services of California, Inc. and Teamsters Local 315, IBT. Cases 20–CA–139280 and 20–CA–149509

July 29, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On April 3, 2017, Administrative Law Judge Dickie Montemayor issued the attached supplemental decision.¹ The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed cross-exceptions and a supporting brief, and all parties filed answering briefs and reply briefs.²

The National Labor Relations Board has considered the judge’s supplemental decision and the record in light of the exceptions,³ cross-exceptions, and briefs and has decided to affirm the judge’s rulings, findings,⁴ and conclusions only to the extent consistent with this Supplemental Decision and Order.⁵

I. OVERVIEW

This case arises from the Respondent’s permanent replacement of economic strikers and subsequent withdrawal of recognition from the Union. On March 17, 2016, the judge issued his initial decision in this proceeding, finding that the Respondent had an “independent unlawful purpose” within the meaning of *Hot Shoppes, Inc.*,

146 NLRB 802, 805 (1964), for hiring permanent replacements and, as a result, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to immediately reinstate the strikers upon their unconditional offer to return to work.⁶ The judge additionally found that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union.

After the judge issued his decision, the Board issued *American Baptist Homes of the West d/b/a Piedmont Gardens*, supra, 364 NLRB No. 13, in which it defined and applied the “independent unlawful purpose” exception of *Hot Shoppes*. On November 3, 2016, by unpublished Order, the Board remanded the judge’s decision for further consideration in light of *Piedmont Gardens*. The Board also instructed the judge to make credibility resolutions, findings of fact, and conclusions of law as to certain complaint allegations that were not addressed in the judge’s initial decision and could impact the analysis of the Respondent’s motive for hiring permanent replacements. Finally, the Board instructed the judge to reevaluate the withdrawal of recognition allegation in light of any violations found.

In his supplemental decision, the judge found that the Respondent effectively discharged 14 strikers in violation of Section 8(a)(3) and (1) of the Act by falsely claiming that 12 replacements were permanent, failing to recall a striker when a replacement failed a background check, and temporarily transferring a nonstriking unit employee into a new unit classification. The judge also found that the Respondent violated Section 8(a)(3) and (1) of the Act by removing five strikers from consideration for preferential

¹ On March 14, 2016, the United States District Court for the Eastern District of California issued a temporary injunction under Sec. 10(j) of the National Labor Relations Act, ordering the Respondent, inter alia, to resume recognizing and bargaining with the Union and offer reinstatement to former strikers who had not received valid offers. *Frankl v. United Site Services of California, Inc.*, 2016 WL 1237827 (E.D. Cal. Mar. 14, 2016). By order dated August 10, 2018, the court vacated the injunction order in light of the Union’s disclaimer of interest in representing the bargaining unit and the Respondent’s compliance with the affirmative provisions of the order.

² By joint motion dated January 24, 2020, the General Counsel and the Charging Party withdrew their cross-exceptions urging the alteration of extant Board law regarding the permanent replacement of economic strikers. See *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13 (2016), reconsideration denied 364 NLRB No. 95 (2016).

³ The Respondent has excepted to the judge’s failure to address its Motion to Strike Portions of the General Counsel’s Post-Hearing Brief. However, the Respondent provided no argument in support of this exception. Accordingly, we will disregard the bare exception under Sec. 102.46(a)(1)(ii) of the Board’s Rules and Regulations. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

The Respondent has requested oral argument and amicus briefing. The request is denied as the record, exceptions, cross-exceptions, and briefs adequately present the issues and positions of the parties.

⁴ The Respondent 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. In addition, some of the Respondent’s exceptions imply that the judge’s rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge’s supplemental decision and the entire record, we are satisfied that the Respondent’s contentions are without merit.

⁵ We shall amend the judge’s conclusions of law and remedy and modify his recommended Order to conform to the violations found and the Board’s standard remedial language, and in accordance with our decisions in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020), and *King Soopers, Inc.*, 364 NLRB No. 93 (2016). We shall substitute a new notice to conform to the Order as modified.

⁶ In *Hot Shoppes*, the Board held that an employer’s motive for permanently replacing economic strikers “is immaterial, absent evidence of an independent unlawful purpose.” Id. The Board did not address what would qualify as an “independent unlawful purpose.”

recall after tendering to them invalid offers of reinstatement.

Relying, in part, on these violations, the judge reaffirmed his earlier findings that the Respondent had an “independent unlawful purpose” for hiring permanent replacements and that it therefore violated Section 8(a)(3) and (1) of the Act by failing to immediately reinstate all of the strikers upon their unconditional offer to return to work. The judge also reaffirmed his earlier finding that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union.

We affirm, with some modifications and clarifications explained below, the judge’s findings that the Respondent violated Section 8(a)(3) and (1) of the Act by falsely claiming that three replacements were permanent, failing to recall a striker when a replacement failed a background check, temporarily transferring a nonstriking unit employee into a new unit classification, and removing three strikers from consideration for preferential recall for failing to respond to or rejecting invalid offers of reinstatement.⁷ We also affirm the judge’s finding that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union. However, for the reasons discussed below, we reverse the judge’s findings that the Respondent violated Section 8(a)(3) and (1) of the Act by falsely claiming that 9 replacements were permanent and by removing 2 strikers from consideration for preferential recall. Finally, we reverse the judge’s findings that the Respondent had an “independent unlawful purpose” for permanently replacing the strikers and that it therefore violated Section 8(a)(3) and (1) of the Act by refusing to immediately reinstate all of the strikers upon their unconditional offer to return to work.

II. UNFAIR LABOR PRACTICES

A. *Alleged Unlawful Discharge of Strikers by Hiring Sham Permanent Replacements*

1. Background

The Respondent is engaged in the rental and servicing of portable toilets and temporary fencing at multiple facilities throughout the United States. On January 7, 2014,⁸ the Union was certified as the collective-bargaining

representative of the Respondent’s service technicians, pick-up and delivery drivers, mechanics, laborers, and fence installers employed at its Benicia, California facility.⁹ From February 26 to July 9, the Union and the Respondent negotiated unsuccessfully for an initial collective-bargaining agreement. Frustrated with the lack of progress in negotiations, the unit employees commenced an economic strike on October 6. Twenty-one of the 25 unit employees participated in the strike. Before they voted to strike, the unit employees were informed that they could be permanently replaced.

The Respondent continued operations using supervisors, managers, and employees from other facilities. Additionally, on the first day of the strike, the Respondent began making verbal and written offers of employment as a permanent replacement for a striker to employees on loan from other facilities, employees referred by temporary employment agency Labor Finders, and new direct hires. The Respondent did not inform the Union that it was hiring permanent replacements until October 16. On that date, the Respondent notified the Union that all the strikers had been permanently replaced. On October 17, the Union made an unconditional offer on behalf of the strikers to return to work. On October 18, the Respondent advised the Union that no unit positions were available and that it had placed the strikers on a preferential recall list.

2. Legal Standard

In the absence of a “legitimate and substantial business justification,” strikers are entitled to immediate reinstatement to their prestrike or substantially equivalent positions upon making an unconditional offer to return to work.¹⁰ An employer that fails to prove that its failure to reinstate strikers was due to a legitimate and substantial business justification “is guilty of an unfair labor practice.”¹¹

An employer’s permanent replacement of economic strikers as a means of continuing its business operations is a legitimate and substantial business justification for declining to reinstate those strikers.¹² The employer, however, bears the burden of proving the permanent status of the replacements.¹³ In order to meet that burden, “the

⁷ In addition, we find that the Respondent violated Sec. 8(a)(3) and (1) by failing to timely recall a striker to fill a vacancy created by the departure of a permanent replacement. The judge failed to address this allegation in his supplemental decision.

⁸ All dates are in 2014 unless otherwise noted.

⁹ The parties stipulated that the Respondent also uses the following job titles to encompass work assignments in the unit: Service Driver, Senior Service Technician, Utility Driver, Yard Associate, Fence Driver, and Fence Helper.

¹⁰ *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970), *citing NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

¹¹ *Fleetwood Trailer*, 389 U.S. at 378.

¹² *Id.* at 379; *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938). See also *Piedmont Gardens*, 364 NLRB No. 13, slip op. at 3; *Hot Shoppes*, 146 NLRB at 805.

¹³ *Augusta Bakery Corp.*, 298 NLRB 58, 65 (1990) (“[I]t is Respondent’s burden to prove its affirmative defense, raised in its answer, that the alleged discriminatees were permanently replaced.”), *enfd.* 957 F.2d 1467 (7th Cir. 1992); *Hansen Bros. Enterprises*, 279 NLRB 741, 741

employer must show a *mutual* understanding between itself and the replacements that they are permanent.”¹⁴ Thus, the employer must present specific evidence of the circumstances of the replacements’ hiring to show that they “were regarded by themselves and [the employer] as having received their jobs on a permanent basis.”¹⁵ Absent such proof, the Board presumes that replacements are temporary.¹⁶ An employer that falsely informs strikers that they have been permanently replaced violates Section 8(a)(3) and (1) of the Act because the effect of that action is to withhold from the strikers “the right to return to their unoccupied jobs simply because they have gone out on strike.”¹⁷

3. Analysis

As discussed above, the judge found that the Respondent falsely claimed that 12 replacements were permanent, thereby effectively discharging an equal number of strikers. In its exceptions, the Respondent contends that the judge ignored extensive documentary and testimonial evidence that contradicts his findings of fact and conclusions of law. Specifically, the Respondent contends that the judge failed to discuss or adequately articulate his rationale for rejecting (i) a log created by Human Resources Manager Agueda Halley documenting the date and time that replacements accepted verbal offers of employment, and (ii) written offers of permanent employment signed by the replacements.

We find no merit in the Respondent’s exceptions based on the judge’s failure to consider the log. Human Resources Manager Halley testified that she created the log based on personal knowledge regarding verbal offers of permanent employment that she made and information reported to her by Regional Vice President Michael Witt and Area Manager Steve Gutierrez regarding verbal offers that they made. However, the Respondent presented very little evidence regarding the nature of the verbal offers. Halley did not describe, even in general terms, what she, Witt, or

Gutierrez said to the replacements when making verbal offers or how the replacements responded, and the Respondent did not call any of the replacements to testify.¹⁸ Moreover, the log itself does not indicate that the “offer[s]” were for permanent employment: the word “permanent” or a synonym of that word does not appear on the log. Unaccompanied by specific evidence establishing that there was a “mutual understanding” that the verbal offers were for permanent employment, the log is not probative of the replacements’ status.¹⁹

We do, however, find merit in the Respondent’s exceptions based on the judge’s failure to consider written offers of permanent employment. The Respondent placed into evidence letters offering and accepting permanent employment purportedly signed by all but three of the replacements at issue in this proceeding before the strikers unconditionally offered to return to work on October 17. The offer letters state:

You understand and agree that you have been advised that a strike or other active labor dispute exists between USS and Teamsters Local 315 at the Benicia location and that the position offered is as a permanent replacement for a striker who is presently on strike against USS at the Benicia location. You further understand that, as a permanent replacement, if the strike ends, you will not be displaced to make room for the returning strikers [Emphasis in original.]

The acceptance letters, titled “ACCEPTANCE OF OFFER OF EMPLOYMENT AS PERMANENT REPLACEMENT,” state that the replacement “immediately” accepts employment as a “permanent replacement” for a striker, and that the replacement “understand[s] that, as a permanent replacement, if the strike ends I will not be displaced to make room for the returning strikers” (Emphasis in original.)

The judge disregarded the offer and acceptance letters because he found that the Respondent “retroactively

(1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987); *Associated Grocers*, 253 NLRB 31, 31 (1980) (permanent replacement “is an affirmative defense and [r]espondent has the burden of proof”), enfd. 672 F.2d 892 (D.C. Cir. 1981), cert. denied 459 U.S. 825 (1982).

¹⁴ *Hansen Bros.*, 279 NLRB at 741 (emphasis in original).

¹⁵ *Consolidated Delivery & Logistics*, 337 NLRB 524, 526 (2002), enfd. 63 Fed. Appx. 520 (D.C. Cir. 2003) (quoting *Target Rock Corp.*, 324 NLRB 373, 373 (1997), enfd. 172 F.3d 921 (D.C. Cir. 1998)).

¹⁶ *Hansen Bros.*, 279 NLRB at 741; *Montauk Bus Co.*, 324 NLRB 1128, 1138 (1997) (presuming temporary status where testimony of employer’s witnesses was conclusory and lacked weight and was unsupported by testimony of replacements, and stating that “[w]here replacements are hired for striking employees, the Board has held that the presumption is that replacements are temporary”); *O.E. Butterfield, Inc.*, 319 NLRB 1004 (1995) (holding that in both representation and unfair

labor practice cases, presumption is that replacements for strikers are temporary, overruling cases to the contrary).

¹⁷ *American Linen Supply Co.*, 297 NLRB 137, 137 (1989), enfd. 945 F.2d 1428 (8th Cir. 1991).

¹⁸ Witt did not testify. Gutierrez testified that he made verbal offers of permanent employment to replacements Desiree Martinez, Greg Beddoes, and Nicolas Cermano-Hernandez. Gutierrez’ testimony is discussed below.

¹⁹ See *Consolidated Delivery*, 337 NLRB at 526 (holding that employer did not meet its burden of proving that replacements were permanent where neither the replacements nor the employer’s officials testified regarding their understanding of the nature of the replacements’ employment); *Montauk Bus*, 324 NLRB at 1138 (holding that employer did not meet its burden of proving that replacements were permanent where the testimony of employer’s witnesses was conclusory and unsupported by testimony of replacements).

dated” offer and acceptance letters for replacement Greg Beddoes in order to “obfuscate the true facts” of when Beddoes was hired permanently in Benicia. The judge further found that “[t]he evidence surrounding [Beddoes’ offer and acceptance letters] calls into question the veracity of all of the letters that purport to document acceptance of permanent positions.”

Contrary to the judge, we find that the evidence does not establish that the Respondent “retroactively dated” Beddoes’ offer and acceptance letters. The only dates on the letters are the typewritten date of “October 10, 2014” above the salutations, reflecting the date the letters were prepared, and the date in Halley’s handwritten note in the top right margin of the offer letter stating “Verbal Acceptance 10/10/14 @ 5:30 am,” neither of which purports to be the date on which Beddoes signed the letters. Area Manager Gutierrez testified, moreover, that Beddoes did not sign the letters when they were first presented to him, and the Respondent stipulated at the hearing that it did not receive the letters with Beddoes’ signature until “after November 29.” Finally, the offer log, which was last updated on November 29, contains a notation next to Beddoes’ name indicating that his offer and acceptance letters were unsigned. Accordingly, the record does not support the judge’s finding that the Respondent “retroactively dated” Beddoes’ offer and acceptance letters. Because the judge’s rationale for disregarding all the letters that purport to document acceptance of permanent positions rests on this flawed factual foundation, it must be rejected.

The judge cited an additional reason for disregarding offer and acceptance letters purportedly signed by replacements Richard Wilkerson and Nicolas Cermano-Hernandez. The judge found that because the Respondent did not call Wilkerson or Cermano-Hernandez to testify, there was insufficient credible evidence to establish that their signatures were genuine. We disagree. First, no party argued before the judge that the replacements’ signatures were not authentic or came forward with evidence at the hearing attacking the genuineness of their signatures. Second, the offer and acceptance letters were received into evidence on the testimony of Human Resources Manager

Halley and Area Manager Gutierrez. Halley testified that the letters were obtained from the replacements’ personnel files and that most of the letters were signed in front of her,²⁰ and Gutierrez testified that he witnessed Cermano-Hernandez signing his offer and acceptance letters.²¹ Counsel for the General Counsel conducted voir dire examination of Halley and Gutierrez, and the judge admitted the letters into the record without objection from any party on authentication or other grounds. Finally, no reason appears in the record or the arguments of counsel to conclude that the replacements’ signatures are not genuine. We therefore find that the letters were properly authenticated and should have been considered.²²

We now turn to an examination of the status of the individual replacements at issue in this proceeding.

Desiree Martinez and Greg Beddoes

Desiree Martinez and Greg Beddoes were employed by the Respondent at its Reno, Nevada facility before the strike.²³ They worked at the Benicia facility as service technicians from about October 7 to about October 30, and then returned to their previous positions at the Reno facility. Around November 10, they went back to the Benicia facility at the request of the Respondent. Martinez’ second period of employment in Benicia lasted only until November 14, after which she resumed her employment in Reno. Beddoes continued working alternately in Benicia and Reno until December, when he transferred to Benicia permanently.

The judge found, and we agree, that Martinez and Beddoes were not bona fide permanent replacements based on their credited testimony together with other evidence discussed below. Martinez testified that no one described her position in Benicia as permanent and she did not understand it to be permanent, either the first or the second time she agreed to work there. Martinez further testified that during her second period of employment in Benicia, Gutierrez asked her several times if she wanted to transfer to Benicia permanently. The first time he asked, she

²⁰ On voir dire, counsel for the General Counsel asked Halley, “What, if any, steps did you take to assure yourself that . . . the employees . . . actually signed [the letters] and this is their signatures?” Halley answered, “Most of [the letters] . . . were signed in our office in front of me. Other[s] . . . were signed in front of Steve Gutierrez.” The judge did not discuss Halley’s testimony, which was uncontroverted.

²¹ The judge did not discuss Gutierrez’ testimony, which was uncontroverted as to Cermano-Hernandez.

²² See Fed. R. Evid. 901(a) (“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”). Rule 901 provides a non-exhaustive list of ten methods of authenticating evidence, including “Testimony of a Witness with

Knowledge.” Fed. R. Evid. 901(b). See also *RC Aluminum Industries, Inc.*, 343 NLRB 939, 940 fn. 7 (2004) (finding that copy of paycheck was properly authenticated where it was introduced into evidence as a document from employee’s personnel file); *Amber Delivery Service, Inc.*, 250 NLRB 63, 65 (1980) (authorization cards authenticated by testimony of employees who witnessed their actual signing), enf. denied in part on other grounds 651 F.2d 57 (1st Cir. 1981).

Member Emanuel joins his colleagues in finding that the letters should be considered for the reasons set forth above. In addition, Member Emanuel notes that the Respondent provided evidence that most letters were received prior to the strikers’ unconditional offer to return to work.

²³ Martinez is Beddoes’ daughter.

thought he was joking, but he asked again and she told him “no” because her family lives in Reno.²⁴

Beddoes similarly testified that no one told him the position in Benicia was permanent. Beddoes further testified that “a couple of weeks” after he first arrived in Benicia or “maybe less,” Gutierrez asked if he wanted to transfer to Benicia permanently, and he responded that he “had to think about that.”²⁵ Gutierrez repeated the offer “several times” before Beddoes finally agreed and signed a letter in December accepting the position effective January 5, 2015.

The Respondent argues on exceptions that the judge erred by crediting Martinez’ and Beddoes’ testimony without considering countervailing evidence proffered by the Respondent, including testimony by Gutierrez that Martinez and Beddoes accepted verbal offers to transfer permanently to Benicia on October 8 or 9, and the offer log, which indicates that they accepted verbal offers on October 10.²⁶ We find no merit in the exceptions. Even though the judge did not explicitly address Gutierrez’ testimony that Martinez and Beddoes verbally agreed to transfer to Benicia permanently, we find that by crediting Martinez’ and Beddoes’ testimony, the judge implicitly discredited Gutierrez’ testimony.²⁷ Martinez’ and Beddoes’ testimony is corroborated by, among other things, (i) their pattern of alternating between Benicia and Reno, (ii) Gutierrez’ testimony that Martinez and Beddoes declined when asked to sign written offers to transfer permanently to Benicia, and (iii) the fact that the Respondent paid for Martinez’ and Beddoes’ food, transportation, and lodging while they worked in Benicia and that the Respondent was still paying Beddoes’ expenses at the time of the hearing, 10 months after the strike ended.²⁸ We thus affirm the judge’s findings that the Respondent failed to meet its burden of establishing a “mutual understanding” that Martinez and Beddoes were permanent replacements.

²⁴ We take administrative notice that Reno is located approximately 192 miles from Benicia. The distance is taken from Google Maps. See generally *Bud Antle, Inc.*, 359 NLRB 1257, 1257 fn. 3 (2013) (taking administrative notice of distance between two cities based on Google Maps), reaffirmed and incorporated by reference 361 NLRB 873 (2014).

²⁵ On redirect, Beddoes testified somewhat inconsistently that “in [his] mind” he accepted Gutierrez’ verbal offer “the first time [Gutierrez] asked.” Counsel for the General Counsel subsequently read into the record a portion of Beddoes’ December 2014 prehearing affidavit, in which Beddoes testified that “[Gutierrez] asked me several times if I would like to transfer. I thought at first he was kidding, but he kept asking me. This last time [Gutierrez] asked me again, and I agreed to transfer permanently. I signed th[e] paperwork this last [T]hursday.”

The Respondent argues on exception that the judge erroneously credited Beddoes’ prehearing affidavit over his testimony at the hearing. We find no merit in the exception. Under well-established Board precedent, a judge may properly credit a witness’s prehearing affidavit over his or her testimony at a hearing. See *Capehorn Industry, Inc.*, 336 NLRB 364, 366 fn. 7 (2001), and cases cited therein. In any event, Beddoes’

Richard Wilkerson

Before the strike, Richard Wilkerson was employed by the Respondent at its Santa Clara, California facility as a quality assurance specialist working in the San Jose, California Field Operations Support Division. He worked in Benicia as a pick-up and delivery driver from early October 2014 to early June 2015. The Respondent contends that Wilkerson was a permanent replacement based on offer and acceptance letters signed by him on October 14.

Neither Wilkerson nor the official who offered him permanent employment testified. The judge therefore found that there was “insufficient credible evidence to establish that . . . the person who signed the [offer and acceptance] letter[s] was in fact him.” The judge further found that Wilkerson himself understood that his assignment in Benicia was temporary, based on the testimony of former Lead Dispatcher Ana Flores that Wilkerson asked her several times “when he was going back to Santa Clara.”²⁹ The judge found additional support for the conclusion that Wilkerson was not a bona fide permanent replacement in his return to Santa Clara as a quality assurance specialist in June 2015. Finally, the judge observed that Wilkerson’s timecard records continued to indicate that he was working at his original site for months after he purportedly accepted a permanent transfer to Benicia.³⁰

We find, contrary to the judge, that the Respondent met its burden of establishing a “mutual understanding” that Wilkerson’s employment in Benicia was intended to be permanent. Wilkerson signed letters stating that he “immediately” accepted employment as a “permanent replacement” for a striker and acknowledging that he “[understood] that, as a permanent replacement, if the strike ends [he] will not be displaced to make room for the returning strikers” Although the judge found the evidence insufficient to establish that Wilkerson signed the letters, the Respondent properly authenticated the letters,

testimony that he accepted Gutierrez’ offer of permanent employment “in [his] mind,” without communicating his acceptance to Gutierrez, does not establish the required mutual understanding.

²⁶ For the reasons discussed above, the offer log is not probative of the replacements’ status.

²⁷ See, e.g., *Kankakee County Training Center for the Disabled, Inc.*, 366 NLRB No. 181, slip op. at 1 fn. 3 (2018); *Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems*, 366 NLRB No. 57, slip op. at 5 (2018), enfd. 781 Fed. Appx. 946 (11th Cir. 2019).

²⁸ We do not rely on the other factors cited by the judge in support of his determination that Beddoes was not a bona fide permanent replacement, including, inter alia, the judge’s findings that the Respondent backdated Beddoes’ offer and acceptance letters.

²⁹ Flores testified that she relayed Wilkerson’s question to Gutierrez two or three times and Gutierrez responded, “I don’t know.”

³⁰ The Respondent’s timecard reports continued to indicate that Wilkerson was working at the “SJO” site until January 5, 2015, when they were changed to indicate that Wilkerson was working as a “Service Technician” at the “BEN” site.

and no party came forward with evidence at the hearing attacking the genuineness of Wilkerson's signature. In our view, moreover, the countervailing evidence cited by the judge, including Flores' testimony,³¹ Wilkerson's eventual return to Santa Clara, and the Respondent's failure to update Wilkerson's timecard records,³² is insufficient to overcome the unambiguous language of the offer and acceptance letters. We thus find that Wilkerson was a permanent replacement.

Nicolas Cermano-Hernandez

For 5 years prior to the strike, Nicolas Cermano-Hernandez was employed by the Respondent as a seasonal temporary service technician. He worked in Benicia as a service technician from early October 2014 to early March 2015. The Respondent contends that Cermano-Hernandez was a permanent replacement based on offer and acceptance letters purportedly signed by him on October 16.

Cermano-Hernandez did not testify. The judge therefore found that "there is insufficient evidence in the record to establish that in fact he actually signed the acceptance letter." The judge further found that Cermano-Hernandez at all times remained a seasonal employee based on (i) the testimony of former lead dispatcher Flores that sometime in December, Cermano-Hernandez told her that "his work was done" and he was returning to Mexico, (ii) an Employee Separation Notice, which states that he voluntarily resigned due to "personal reasons" effective March 6, 2015, (iii) the fact that he was rehired as a seasonal employee in Sacramento, California, in June 2015, and (iv) the fact that, on his Sacramento application, he wrote "lay off" as his reason for leaving the position in Benicia. The judge found that "a reasonable and logical inference to be drawn from this evidence" is that Cermano-Hernandez worked in Benicia in the same capacity as he had worked in prior years, i.e., as a seasonal worker, and that he was laid off from Benicia because he was a seasonal worker.

Contrary to the judge, we find that the offer and acceptance letters are sufficient to establish a "mutual understanding" that Cermano-Hernandez' employment in Benicia was intended to be permanent. Although the judge found that there is insufficient evidence to establish that Cermano-Hernandez signed the letters, the letters were properly authenticated, no one challenged the authenticity of Cermano-Hernandez' signature, and Gutierrez testified that he witnessed Cermano-Hernandez signing the letters.

³¹ The record does not reveal whether Flores' conversations with Wilkerson about returning to Santa Clara occurred before or after he accepted the Respondent's written offer of permanent employment in Benicia on October 14.

³² Gutierrez testified that the Respondent's payroll department (which is located on the East Coast) was slow to update department designations and that his own payroll record erroneously listed his home department

The judge did not discuss Gutierrez' testimony, which was uncontroverted as to Cermano-Hernandez.

The judge's finding that Cermano-Hernandez at all times remained a seasonal employee is also undermined by Cermano-Hernandez' prior pattern of seasonal employment from early spring to late fall, which corresponds with the Respondent's busy season. In contrast, Cermano-Hernandez' employment in Benicia began in October, when his seasonal employment usually ended, and continued until March 6, 2015. Given that his employment in Benicia lasted until March, moreover, Flores' testimony that Cermano-Hernandez told Flores in December that "his work was done" and he was returning to Mexico does not support an inference that he was a seasonal employee. Rather, her testimony is consistent with the fact that Cermano-Hernandez took a 3-week vacation at the end of December, as shown in his employment records. We accordingly find that Cermano-Hernandez was a permanent replacement.

Lester Moreno

Lester Moreno was referred by Labor Finders during the strike, but he never worked for the Respondent. He became impatient while waiting for his background check to be completed and accepted other employment. The Respondent contends that Moreno was a permanent replacement based on the offer log, which indicates that he accepted a verbal offer for a yard associate position on October 16, and offer and acceptance letters signed by Moreno on October 18. Neither Moreno nor the official who offered him permanent employment testified.

The judge found that the Respondent failed to establish that Moreno was a permanent replacement. We agree. Aside from the offer log, which we have found is not probative, the Respondent failed to adduce any evidence that Moreno accepted an offer of permanent employment before the strikers unconditionally offered to return to work on October 17.³³ We therefore affirm the judge's finding that Moreno was not a permanent replacement.

Antoine Frazer

On October 17, at 7:20 a.m., Antoine Frazer accepted a written offer of permanent employment with a tentative start date of October 24. Consistent with the Respondent's practice applicable to all new hires, Frazer's offer letter stated that "[a]s a condition of employment . . . you are

and work location as Modesto, California—a branch he had not worked at for more than 2 years. The judge did not discuss Gutierrez' testimony, which is uncontroverted and corroborated in part by Halley.

³³ In discussing Moreno's status, the judge inadvertently stated that the strikers offered to return to work on March 17, rather than October 17.

required to pass a post-offer, pre-employment . . . background check.” Frazer’s initial background check revealed an outstanding warrant. On an unspecified date prior to November 18, the Respondent afforded him an opportunity to clear the warrant and pass a second background check. Frazer did not begin working for the Respondent until December 8, after the second background check was completed.

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to recall a striking yard associate when Frazer’s first background check revealed an active warrant. Although permanent replacements may be hired subject to certain conditions being met,³⁴ Frazer failed to meet a condition of his employment: “pass[ing] a post-offer, pre-employment . . . background check.” In its exceptions, the Respondent contends that there is no evidence that an active warrant disqualifies an applicant for hire. However, that fact may reasonably be inferred from the Respondent’s performance of a second background check and the fact that Frazer did not begin working until December 8, after the second background check was completed, even though his offer letter listed a tentative start date of October 24.³⁵ We thus affirm the judge’s finding that the Respondent was required to recall a striker to the vacancy created when Frazer failed to pass the initial background check.

Oscar Reyes-Perusquia

Unit employee Oscar Reyes-Perusquia was a fence driver who crossed the picket line and worked during the strike. The parties stipulated that Reyes-Perusquia was “claimed by [the Respondent] to have continued working during and after the October 2014 strike in [his] Benicia unit Position[]—Fence Driver.”³⁶ However, the Respondent’s own records reveal that between October 17, when the strike ended, and December 19, Reyes-Perusquia performed service technician work 38 out of 46 weekdays, and there is no evidence that he performed fence driving

or any other work during that period.³⁷ On these facts, we affirm the judge’s finding that the Respondent violated Section 8(a)(3) and (1) of the Act by continuing to assign Reyes-Perusquia service technician work instead of reinstating a service technician upon the strikers’ unconditional offer to return to work.³⁸

The Labor Finders Hires

As indicated above, the Respondent contracted with temporary employment agency Labor Finders to provide replacement employees during the strike. During the period of October 6 through 16, the following seven individuals referred by Labor Finders accepted written offers of employment as permanent replacements for strikers: Paul Barron, Chris Orr, James Matthews, Joshua Johnson, Jesse Hernandez, Maurice Espinoza, and Anthony Boatman. Consistent with the Respondent’s policy applicable to all new hires, their employment was conditioned on passing a posthire background check and drug screen. The replacements remained on Labor Finders’ payroll until their background check and drug screen were completed, and they were then transferred to the Respondent’s payroll.³⁹ While the replacements were on Labor Finders’ payroll, their timesheets included the following language: “All temporary employees assigned to Customer by LF (‘LF Personnel’) are employees of LF. LF is responsible for hiring, assigning, disciplining, terminating and/or reassigning LF Personnel; and, is solely responsible for establishing, providing, and paying wages and benefits to LF Personnel.”

The judge found that the Respondent failed to meet its burden of establishing that the Labor Finders hires were permanent replacements because their timesheets continued to state that they were “temporary employees” and they continued to be paid by Labor Finders after the strikers unconditionally offered to return to work. We disagree. Under longstanding Board precedent, the acceptance of an offer of permanent employment effectuates

³⁴ See generally *Solar Turbines Inc.*, 302 NLRB 14, 14–17 (1991), and cases cited therein, affd. mem. sub nom. *Machinists v. NLRB*, 8 F.3d 27 (9th Cir. 1993).

³⁵ The Respondent does not contend that it routinely allows applicants a second opportunity to pass a background check. As noted by the judge, moreover, the Respondent offered no evidence that Frazer in fact passed the second background check.

³⁶ In contrast, the parties stipulated that nonstriking unit employees Michael Knutsen and Javier Santiago permanently transferred to new unit classifications during the strike. Unlike Reyes-Perusquia, Knutsen, and Santiago signed letters acknowledging their acceptance of a position as a permanent replacement for a striker.

³⁷ The judge credited the testimony of former Dispatcher Flores that fence drivers do not typically perform service technician work. The Respondent contends that the judge erred by crediting Flores’ testimony and by failing to consider or credit Gutierrez’ contrary testimony that fence drivers are cross-trained to perform service technician work. We find it

unnecessary to resolve this conflict because the Respondent’s records show that Reyes-Perusquia performed service technician work on a fulltime or near fulltime basis for the first 9 weeks after the strike ended, not “strictly on a temporary, intermittent basis” as argued by the Respondent in its brief.

³⁸ See generally *MCC Pacific Valves*, 244 NLRB 931, 933-934 (1979); *H & F Binch Co.*, 188 NLRB 720, 723 fn. 4 (1971) (unlawful not to reinstate strikers to position occupied by temporary transferees at conclusion of strike), enf. denied in relevant part 456 F.2d 357 (2d Cir. 1972). The Second Circuit declined to enforce the Board’s order in *H & F Binch* because it found that the respondent had met its burden of establishing a mutual understanding that the transfers were intended to be permanent. *Id.* In this case, in contrast, the Respondent stipulated that Reyes-Perusquia was “claimed by [it] to have continued working during and after the October 2014 strike in [his] Benicia unit Position[]—Fence Driver.”

³⁹ The last transfer occurred on October 27.

the permanent replacement of a striker even if the striker requests reinstatement before the replacement actually begins to work. See, e.g., *Consolidated Delivery*, 337 NLRB at 526 fn. 5 (citing *Solar Turbines*, 302 NLRB at 15–16) (“[S]o long as the replacement workers and the respondent intended that the workers’ employment not terminate at the conclusion of the strike, the fact that the replacements had yet to complete . . . post interview tests at the conclusion of the strike did not render them temporary workers subject to discharge.”).

Harvey Manufacturing,⁴⁰ cited by the judge, is distinguishable. In *Harvey Manufacturing*, replacement employees referred by a temporary employment agency were told during job interviews that the openings were for permanent positions and that those hired would be converted to permanent employees on completion of a 30-day probationary period.⁴¹ However, they were subsequently required to sign a document titled “Temporary Agreement,” which began with the statement: “I will be working as a temporary”⁴² In addition, they received an explanation of terms and conditions of employment that began with the statement: “You will be working for us as a temporary employee”⁴³ The Board therefore found that the replacements “received an array of mixed signals: oral statements asserting to them their status as permanent employees, contradicted by documents given to them consistently stating that they were temporary hires.”⁴⁴

In this case, in contrast, the replacements referred by Labor Finders signed letters stating that they were “immediately” accepting employment as a “permanent replacement” for a striker, and acknowledging that, “as a permanent replacement, if the strike ends I will not be displaced to make room for the returning strikers” (Emphasis in original.) The letters also stated that their employment was conditioned on passing a background check and drug screen. Although the replacements remained on Labor Finders’ payroll and signed timesheets stating that “[a]ll temporary employees assigned to Customer by LF (‘LF Personnel’) are employees of LF” until their background check and drug screen were completed, this would not give rise to confusion regarding their status given the unequivocal language of the offer and acceptance letters quoted above. Rather, the Respondent and the replacements would have reasonably understood that the replacements’ employment was intended to be permanent and was conditioned only on successful completion of the Respondent’s post-hire screening process. Accordingly, we find that the Respondent met its burden of establishing that

the seven Labor Finders hires were permanent replacements.

Jorge Recinos

On October 6, Jorge Recinos accepted a written offer of permanent employment as a replacement for a striker. Recinos worked only 2 days, October 13 and 14. On the evening of October 14, Recinos emailed the Respondent that he was going to El Salvador to attend to a family emergency. The Respondent then placed him on “Unpaid Personal” leave. On October 29, Human Resources Manager Halley sent Recinos an email asking whether he was back in the United States and indicating that there was an immediate need for his services. On October 30, Recinos responded that he had returned to the United States but, for reasons he did not explain, he could not return to work until November 10. The Respondent then allowed Recinos to linger on “Unpaid Personal” leave for the weeks of October 27, November 3 and 10. On November 13, Halley sent Recinos an email stating that it was “urgent” that she know whether he was returning to work. On November 14, Recinos replied that he was not returning. Halley testified that she understood from his email that Recinos was resigning his employment. The Respondent nevertheless retained Recinos on “Unpaid Personal” leave through the week of November 17, and it did not recall a striking service technician to the vacancy created by his departure until January 9, 2015.

The judge did not address Recinos’s status in his supplemental decision. The General Counsel cross-excepts to the judge’s failure to find that the Respondent’s holding of Recinos’s position open for him after October 14 was a sham intended to avoid the obligation to reinstate a former striker. The General Counsel further contends that, at the very least, the record is clear that Recinos left the Respondent’s employ as of November 14 and that his departure created a vacancy under *Laidlaw*, 171 NLRB at 1368.

We find that the Respondent met its burden of establishing that Recinos was a permanent replacement. As discussed above, Recinos signed a letter accepting permanent employment before the strikers unconditionally offered to return to work. We agree with the General Counsel, however, that the Respondent was required to recall a striker to fill the vacancy created by Recinos’s departure. The Respondent contends that its business is “subject to seasonal fluctuations and other extraneous factors” that require it to “constantly readjust the staffing of its workforce” to accommodate changing customer needs and that “a striking worker was recalled in accordance with th[o]se

⁴⁰ 309 NLRB 465 (1992).

⁴¹ Id. at 467.

⁴² Id.

⁴³ Id.

⁴⁴ Id. at 468.

needs soon after Recinos resigned.” However, Halley’s October 29 and November 13 emails to Recinos and the Respondent’s continued assignment of service technician work to fence driver Reyes-Perusquia after November 14 demonstrate that the Respondent had an immediate need for a service technician.⁴⁵ The Respondent therefore violated Section 8(a)(3) and (1) of the Act by failing to timely recall a striker to the vacancy created when Recinos resigned.

B. Alleged Unlawful Removal of Strikers from Consideration for Preferential Recall

1. Background

As indicated above, on October 17 the Union, on behalf of the strikers, made an unconditional offer to return to work. By email on October 18, the Respondent advised the Union that no unit positions were available and that it had placed the strikers on a preferential recall list. In the same email, the Respondent requested up-to-date contact information for the strikers. Thereafter, on October 22, the Respondent provided the Union with the addresses and telephone numbers of record for each striker, and it requested that the Union “contact the employees . . . and let us know as soon as possible if there are any updates or corrections . . . or if there is a better way to reach them.” On October 23, the Union replied that it would “confirm the correct addresses and provide updates as necessary.” On October 27, the Union provided some updated contact information.⁴⁶

Thereafter, when a vacancy arose in a unit position, the Respondent identified the two strikers with the highest seniority who held the position or a substantially equivalent position prior to the strike. The Respondent then attempted to contact the two strikers using the telephone numbers and addresses confirmed by the Union. The Respondent also emailed copies of offer letters to the Union until it withdrew recognition from the Union on March 27,

2015. If both strikers accepted the offer, the striker with the most seniority was reinstated, and the less senior striker remained eligible for preferential recall. If the most senior striker declined or failed to timely respond to an offer, the Respondent removed that striker from consideration for preferential recall.⁴⁷

2. Legal Standard

“[E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.”⁴⁸ An offer of reinstatement need not take any particular form, but it must be reasonably calculated to communicate the offer. “In order for an employer to discharge his obligation to offer reemployment to a striking employee who has unconditionally requested reinstatement, the employer ‘must present probative evidence showing a good-faith effort to communicate such an offer [of reinstatement] to the employee . . . [and] must show that [it] has taken all measures reasonably available to [it] to make known to the striker that he is being invited to return to work.’”⁴⁹

3. Analysis

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by removing former strikers Walter Buckner, Robert Harris, Ernesto Pantoja, Jorge Rodriguez, and Daniel Ruiz from consideration for preferential recall for failing to respond to or rejecting invalid offers of reinstatement.⁵⁰ We affirm the judge’s findings regarding Buckner, Harris, and Pantoja. However, contrary to the judge, we find that the Respondent lawfully

⁴⁵ In any event, the Respondent’s bare assertion that it adjusted staffing to meet customer needs is not sufficient to establish a legitimate and substantial business justification for its failure to recall a former striker to the vacancy created by Recinos’s departure. See, e.g., *IMI South, LLC, d/b/a Irving Materials*, 364 NLRB No. 97, slip op. at 6 fn. 17 (2016).

⁴⁶ The Union’s witness testified that the strikers “were very diligently told” that “if you have any changes in your addresses, phone numbers to let us know, and [the Respondent] would be advised.”

⁴⁷ If a vacancy arose in a position for which the preferential recall list had been exhausted, the Respondent offered the position to an unrecalled striker who held a different position prior to the strike, with the understanding that the striker would still be eligible for preferential recall to his former position. In addition, when there were no more strikers on the preferential recall list, the Respondent began offering vacant positions to strikers it had earlier removed from consideration for preferential recall.

⁴⁸ *Laidlaw*, 171 NLRB at 1369–1370.

⁴⁹ *Carruthers Ready Mix, Inc.*, 262 NLRB 739, 749 (1982) (quoting *J. H. Rutter-Rex Manufacturing Co., Inc.*, 158 NLRB 1414, 1524 (1966), *enfd.* as modified 399 F.2d 356 (1968), modification reversed 396 U.S. 258 (1969)).

⁵⁰ At the time the Respondent removed these strikers from consideration for preferential recall, they were already victims, directly or through a ripple effect, of the Respondent’s earlier unlawful refusal to reinstate strikers to the positions occupied by Martinez, Beddoes, Moreno, and Reyes-Perusquia immediately upon the strikers’ offer to return to work and its failure to timely recall strikers to the vacancies created when Frazer’s background check revealed an active warrant and Recinos resigned. The parties did not litigate, and the judge did not decide, whether the Respondent’s subsequent attempts to recall these or other strikers terminated the strikers’ rights to reinstatement or tolled the Respondent’s backpay obligations arising from its earlier unfair labor practices. We leave those issues to be decided at the compliance stage of this proceeding.

removed Rodriguez and Ruiz from consideration for preferential recall.

Walter Buckner

Walter Buckner was employed by the Respondent for 21 years. He was the second most senior service technician on the preferential recall list. On January 9, 2015, the Respondent, by certified mail, sent Buckner an “unconditional offer of reinstatement” with a reporting date of January 20. The letter stated that the reporting date was “critical” and that the offer “may not be accepted” if Buckner was not able to start on that date. The letter also stated that the Respondent “must receive your response no later than 3:00 p.m. on 1/19/2015” or “the Company will assume you do not want the position.” (Emphasis in original.)

Buckner did not receive the letter until Saturday, January 24, because he had recently moved and his mail was being forwarded by the Postal Service.⁵¹ On January 24, Buckner called Human Resources Manager Halley and left a message on her voicemail indicating that he had moved but had received the letter and wished to accept the offer. On Monday, January 26, Buckner went to the Benicia facility and gave Gutierrez the signed offer letter, and Gutierrez faxed it to Halley. Later that day, Halley contacted Buckner and told him that his response was untimely and the position was closed. The parties stipulated that the Respondent removed Buckner from consideration for preferential recall on January 19, 2015.

For two reasons, the judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by removing Buckner from consideration for preferential recall. First, he found that the Respondent violated its duty to act in good faith by refusing to take into consideration the delay caused by mailing the offer to the wrong address.⁵² Second, the judge found that the lapsing language in the offer, stating that “the company must receive your response no later than 3:00 p.m. on 1/19/2015,” rendered the offer invalid.

⁵¹ Buckner testified that he notified the Respondent’s payroll department of his change of address sometime in early January, but the record does not reveal whether he did so before or after January 9, when the offer of reinstatement was mailed.

⁵² See *Esterline Electronics Corp.*, 290 NLRB 834, 835 (1982) (describing “requirement of good faith dealings” properly imposed on both employer and employee” with regard to reinstatement offers).

⁵³ *Toledo (5) Auto/Truck Plaza*, 300 NLRB 676, 676 fn. 2, 680 (1990) (finding offer invalid where letter stated that striker (Hollie) must report within 8 days, and reinstatement was conditioned on her reporting by that date). See also *Cassis Mgmt.*, 336 NLRB 961, 961 fn. 1 (2001) (finding offer invalid where letter contained 5-day response period and indicated that it would lapse if a response was not received by that date); *National Management Consultants, Inc.*, 313 NLRB 405, 405 fn. 6 (1993) (same, 5-day response period); *Toledo 5 Auto/Truck Plaza*, 291 NLRB 319, 319

We agree with the judge’s violation finding for the following reasons. Under Board precedent, an offer of reinstatement or preferential recall will be treated as invalid if the letter communicating the offer (1) contains an unreasonably short response period or unreasonably imminent report-back date, and (2) the letter indicates that the offer will lapse if the employee does not respond or report to work by the stated deadline.⁵³ There is no per se rule establishing what constitutes a reasonable period of time. Rather, what constitutes a reasonable period depends on the circumstances of the particular employee and the respondent’s existing policies.⁵⁴ An employee has no obligation to respond to an offer that is invalid under this standard, and the failure to respond will not terminate the employee’s right to reinstatement or preferential recall.⁵⁵

Applying these principles here, we affirm the judge’s finding that Buckner’s January 9 offer letter was invalid. The 10- and 11-day time limits for responding to the letter and reporting to work, respectively, were unreasonably short in light of Buckner’s change of address, which delayed his receipt of the letter, and the Respondent’s willingness to hold vacancies open for one or more months for replacement employees, including Frazer (2 months to clear active warrant), Moreno (2 months to finish employment contract with another employer), and Recinos (1 month for family emergency). The letter made clear that the offer would lapse if Buckner failed to respond by the stated deadline, and the Respondent did, in fact, remove Buckner from consideration for preferential recall when he failed to respond by January 19.⁵⁶ We thus affirm the judge’s finding that the Respondent violated Section 8(a)(3) and (1) of the Act by removing Buckner from consideration for preferential recall.

Robert Harris

Prior to the strike, Harris held the position of service technician. On June 11, 2015, the Respondent, by certified mail, sent Harris an “unconditional offer of reinstatement.” Like Buckner’s letter, Harris’s offer letter

fn. 2 (1988) (same, 3-day report-back period), enfd. mem. 933 F.2d 1010 (6th Cir. 1991).

⁵⁴ *Toledo (5) Auto/Truck Plaza*, 300 NLRB at 680; *Esterline*, 290 NLRB at 834-835. See also *Golden Stevedoring, Inc.*, 335 NLRB 410, 412-413 (2001) (employer was required to keep offer open for 3 months for injured striker).

⁵⁵ *Toledo (5) Auto/Truck Plaza*, 300 NLRB at 676 fn. 2.

⁵⁶ We also find it significant, as did the judge, that Buckner responded to the invalid offer within a reasonable time given his circumstances, even though he had no obligation to do so, and the Respondent, despite being advised that Buckner had received the letter late because he had moved, removed him from consideration for preferential recall. Even if the offer were otherwise valid, the Respondent’s decision to discharge Buckner, a 21-year employee, after his reasonable response violated Sec. 8(a)(3) and (1) of the Act. *Allied Mechanical Services, Inc.*, 346 NLRB 326, 328 fn. 15 (2006) (citing *Esterline*, 290 NLRB at 835).

contained lapsing language stating that “the company must receive your response no later than 3:00 p.m. on 6/19/2015.” (Emphasis in original.) Harris was working late hours and Saturdays, which prevented him from getting to the post office to pick up the letter during business hours.⁵⁷ He finally picked up the letter on June 23, 2015, but he did not respond because the deadline had already passed.

The judge found that the Respondent’s removal of Harris from consideration for preferential recall violated Section 8(a)(3) and (1) of the Act. We agree, but only for the following reasons. Harris’s letter, like Buckner’s, contained lapsing language. The letter on its face made clear that it would lapse if Harris did not respond within 8 days, and the Respondent did, in fact, remove Harris from consideration for preferential recall when he failed to respond by the deadline. The response date was unreasonably short in light of Harris’s work schedule, which interfered with his ability to retrieve the letter from the post office, and the Respondent’s willingness to hold offers open for months for replacements, as noted above.⁵⁸

Ernesto Pantoja

Prior to the strike, Ernesto Pantoja held the position of utility driver. As a utility driver, he covered all the positions in the company, including service, pick-up and delivery, transportation of machinery, assistance to the mechanic, and maintenance. He held a Class A professional driving license, which allowed him to perform the highest-level driving responsibilities, including dump runs. On June 11, 2015, by certified mail, the Respondent offered Pantoja reinstatement to a position as a service technician. He was removed from the preferential recall list on June 19, 2015, because he declined the position.

The judge found that the service technician position was not substantially equivalent to Pantoja’s former position of utility driver. He therefore concluded that the June 11 recall offer was invalid and that the Respondent violated

Section 8(a)(3) and (1) by removing Pantoja from consideration for preferential recall based on his rejection of the offer. We agree.

When Pantoja received the June 11 offer, he called Halley and told her that he would rather wait for his position as a utility driver, and she responded that the utility driver position was not currently available but that she would keep him in the system for when that position did come available.⁵⁹ The Respondent also recognized Pantoja’s position as a “utility driver” on its preferential recall lists and on a May 21, 2015 letter to Pantoja regarding a parts and delivery opening, which stated, “[Y]ou . . . will be contacted when a future Utility Driver position becomes available.” The record reflects, moreover, that the service technician position and the utility driver position are not substantially equivalent, and that the service technician position is more onerous and less desirable. Regarding the differences between the service technician and utility driver positions, Pantoja testified, “Utility driver covers all the positions. And service tech specifically goes to clean the bathrooms of the worksites.” He further testified that he only spent 25 to 30 percent of his time doing what would be classified as service technician work.⁶⁰ We therefore affirm the judge’s finding that by removing Pantoja from consideration for preferential recall, the Respondent violated Section 8(a)(3) and (1) of the Act.

Jorge Rodriguez

Prior to the strike, Jorge Rodriguez held the position of service technician. In February 2015, the Respondent offered Rodriguez a pick-up and delivery position, which he declined. In the same month, the Respondent offered him a service technician position, which he accepted, but another striker with more seniority was awarded the position. On about April 7, 2015, the Respondent, by certified mail, again offered Rodriguez a service technician position. The letter stated that the Respondent, through Halley, had attempted to contact Rodriguez by telephone and

⁵⁷ The offer letter stated that the Respondent, through Halley, had attempted to contact Harris by telephone and had left a voicemail message for him. However, Harris credibly testified that he did not receive any telephone calls regarding the recall offer.

⁵⁸ See *Allied Mechanical*, 346 NLRB at 328 fn. 15 (affirming judge’s finding that 9-day time limit to accept recall offer was unreasonable, where employee only checked his post office box every other week).

In its exceptions brief, the Respondent contends that it had no obligation to recall Harris because he had obtained substantially equivalent employment. We find no merit in this contention. Harris’s interim position was not equivalent to his prestrike position because it paid substantially less. In his prestrike position, Harris earned \$20.35 per hour, as reflected in the Respondent’s June 11, 2015 recall letter. In his interim position, Harris earned \$16 an hour until July 22, 2015, when he received a raise.

⁵⁹ On exceptions, the Respondent contends that Pantoja told Halley that he would not return unless the Respondent paid him \$25 per hour, instead of the \$15 per hour that he was paid before the strike. We find

no merit in this contention. Pantoja testified that after he received the Respondent’s June 11, 2015 letter offering him reinstatement to a service technician position, he called Halley and told her that “it was unfortunate that I wasn’t going to be able to receive the \$20 that I’d asked for. And that the company was only offering me \$15 an hour to which I told [Halley] that I would rather instead then wait for a position—my position as a utility driver.” He further testified that Halley told him that the utility driver position was not currently available but that she would keep him in the system for when that position did come available. The Respondent did not elicit testimony from Halley regarding this conversation. Pantoja’s testimony is therefore uncontroverted.

⁶⁰ See, e.g., *Laidlaw Waste Systems*, 313 NLRB 680, 681–682 (1994) (finding that positions were not substantially equivalent where drivers operated different vehicles subject to different licensing and training requirements, and they performed different collection services with different physical demands and job tasks).

had left two voicemail messages for him. The letter was returned as undeliverable, and the Respondent thereafter removed Rodriguez from consideration for preferential recall.

The judge found that the Respondent's removal of Rodriguez from consideration for preferential recall violated Section 8(a)(3) and (1) of the Act because the Respondent knew that Rodriguez was interested in reinstatement based on his response to the February offer, but it failed to make other efforts to contact him after the April offer letter was returned as undeliverable. We disagree.

Contrary to the judge, we find that the Respondent made reasonable efforts to notify Rodriguez that an opening existed in his prestrike position. The Respondent confirmed Rodriguez' contact information with the Union, left two voicemail messages at the telephone number confirmed by the Union, and sent a certified letter to the address confirmed by the Union.⁶¹ Moreover, as noted above, the Respondent had successfully contacted Rodriguez in February, and there is no claim or evidence that his telephone number or address had changed in the intervening 2 months.⁶² We therefore reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by removing Rodriguez from consideration for preferential recall.

Daniel Ruiz

Prior to the strike, Daniel Ruiz held the position of yard associate. On January 21, 2015, the Respondent, by certified mail, offered Ruiz reinstatement to his former position. The letter stated that the Respondent had attempted to call Ruiz and had left a voicemail message conveying the offer. The Respondent also sent a copy of the letter to the Union. Ruiz was removed from consideration for preferential recall because he failed to respond to the letter, although the Respondent never received a delivery receipt. The Respondent nevertheless reinstated Ruiz into a yard associate position on June 2, 2015, and on July 23, 2015, it promoted him to service technician.

The judge found that when the Respondent did not receive the delivery receipt and knew that the offer letter had not reached Ruiz, it did not take reasonable steps to inform him that he was being asked to return to work prior to considering him ineligible for recall. The judge noted that the Respondent had other available means to contact Ruiz,

such as through the Union, but it made no efforts to do so. The judge therefore found that the Respondent violated Section 8(a)(3) and (1) by removing Ruiz from consideration for preferential recall.

We disagree. The evidence establishes that the Respondent called Ruiz' telephone number of record as confirmed by the Union and left him a voicemail message conveying the offer of reinstatement. It also mailed a certified letter to his address of record as confirmed by the Union. Finally, the Respondent provided the Union a copy of the offer letter. On these facts, we conclude that the judge erred in finding that the Respondent failed to take reasonable measures to make known to Ruiz that he was being invited to return to work. We therefore reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) by removing Ruiz from consideration for preferential recall.

C. Alleged "Independent Unlawful Purpose" for Hiring Permanent Replacements

1. Background

As discussed above, from February to July the parties bargained unsuccessfully for an initial collective-bargaining agreement. On July 23, the employees rejected the Respondent's final contract proposal and voted to strike. Before they voted to strike, the unit employees were informed that they could be permanently replaced. In August, the Union notified the Respondent that it had received strike authorization. The Respondent then began considering options to assure continued operations during the anticipated strike. With regard to replacing the strikers, Vice President of Operations Mark Bartholomew testified that the Respondent's "senior team"—comprised of himself, Chief Executive Officer Ron Carapezzi, and Senior Vice President of Human Resources Randy Balin—decided to permanently replace the strikers rather than relying on temporary employees to perform bargaining unit work for the following reasons. First, in the past, temporary employees had only been used for certain positions on a limited basis. Second, the Respondent anticipated that the strike would be long, possibly lasting the rest of the year, because the parties were "miles apart" in the negotiations. Third, the Respondent was concerned that relying on temporary employees for the expected duration of the strike would expose it to unacceptably high turnover

⁶¹ Rodriguez did not testify, and the record does not reveal whether he received the Respondent's voicemail messages or notices from the Postal Service regarding the letter.

⁶² The judge cited *Alaska Pulp Corp.*, 326 NLRB 522, 528 (1998), *enfd.* in relevant part 231 F.3d 1156 (9th Cir. 2000), for the proposition that an employer must use all available means to contact strikers when jobs become available, including through the union. Although the Board in *Alaska Pulp* stated that it was the employer's burden "to make a good

faith effort to locate strikers when jobs became available," the Board's decision did not turn on that principle. Rather, the Board found that the employer prematurely terminated the striker's preferential recall rights when a letter notifying her that she must individually request reinstatement was returned as undeliverable because no job vacancy existed at that time, and by the time the striker's prestrike position did become available, she had notified the employer of her new address. 326 NLRB at 528.

due to the competitive job market, the unpleasant realities of the job (cleaning portable toilets), the lack of benefits, and the absence of a guarantee of a job when the strike ended. Fourth, the Respondent believed that the higher turnover rate among temporary employees would cause lost investment in training. In this regard, Bartholomew testified that it takes about 2 weeks of training before employees are able to drive the Respondent's trucks alone and up to 6 months before they become fully proficient. Finally, the Respondent was concerned that the higher turnover rate among temporary employees would cause customer service to suffer, given the time it takes employees to become fully proficient. Indeed, Bartholomew testified that the "primary consideration" driving the Respondent's decision to hire permanent replacements "was the customer and making sure that the services were done and done well." In light of these considerations, Bartholomew testified that the roughly \$15,000 fee that the Respondent paid to convert the replacements referred by Labor Finders was "nominal."

2. Legal Standard

In *Hot Shoppes*, the Board held that an employer's motive for hiring permanent replacements "is immaterial, absent evidence of an independent unlawful purpose."⁶³ While this matter was pending, the Board issued its decision in *Piedmont Gardens*, supra, 364 NLRB No. 13. In *Piedmont Gardens*, the majority held that the term "independent unlawful purpose" includes "an employer's intent to discriminate or to encourage or discourage union membership."⁶⁴ The majority further held that *Hot Shoppes* does not require the General Counsel to demonstrate the existence of an unlawful purpose unrelated or extrinsic to the parties' bargaining relationship or the strike but rather only that the hiring of permanent replacements was motivated by a purpose prohibited by the Act.⁶⁵ The *Piedmont Gardens* majority concluded that the employer's admitted motivation to hire permanent replacements to "teach the strikers and the union a lesson" and to "avoid any future strikes" constituted independent unlawful purposes, the first because it revealed an intent to punish employees for their protected conduct, and the second because it

demonstrated a desire to interfere with employees' future protected activity.⁶⁶ The majority therefore held that the employer's refusal to reinstate strikers upon their unconditional offer to return to work was unlawful.

3. The Judge's Decision

The judge found that the General Counsel sustained his "initial burden of showing that an independent unlawful purpose was a motivating factor in the [Respondent's] decision to permanently replace economic strikers." He relied on the Respondent's "Non-Union Philosophy" expressed in its Associate Handbook; its violations of Section 8(a)(3) and (1) discussed above, which the judge found "manifest[ed] 'intent to discriminate' and/or 'intent to discourage Union membership'"; and its failure to inform the Union that it was hiring permanent replacements until it had filled all positions. Indeed, the judge found that the timing of the Respondent's notification to the Union "standing alone" created a "logical implication" that the Respondent's decision was the product of an "illicit motive."

The judge then examined the Respondent's proffered reasons for hiring permanent replacements and found them to be pretextual. In so finding, the judge compared the relative costs, turnover rates, and skill levels of permanent replacements with those of reinstated strikers. He reasoned that it would have been less costly to reinstate the strikers than to permanently replace them, given the expense of training the replacements and converting the Labor Finders hires to permanent status. The judge also observed that "the strikers knew the work, knew the routes and had been performing the work in a satisfactory fashion." Finally, he found that the reasons advanced by the Respondent did not "address the critical issue of why it waited until it falsely claimed it had filled positions to disclose the hiring of permanent replacements." In this regard, the judge opined that if the Respondent was truly concerned about customer service and turnover, "it could have on the first day of the strike disclosed to the strikers its plan to replace them to induce them to abandon the strike and return to work." Accordingly, the judge concluded that the Respondent had an "independent unlawful

⁶³ 146 NLRB at 805. Reversing the trial examiner, the Board in *Hot Shoppes* held that unlawful motivation could not be inferred based merely on an employer's hiring or planning to hire permanent replacements. *Id.* However, because the Board in *Hot Shoppes* found no evidence of unlawful motivation, it did not address what would qualify as an "independent unlawful purpose."

⁶⁴ 364 NLRB No. 13, slip op. at 5.

⁶⁵ *Id.* Dissenting in relevant part, Member Miscimarra disagreed with the majority's expansion of the "independent unlawful purpose" exception to include any antiunion animus. *Id.*, slip op. at 9–19. In his view, the majority's decision effectively overruled the central holding of *Hot Shoppes*, which made an employer's motive for hiring permanent

replacements irrelevant; it invalidated an economic weapon that the Supreme Court declared lawful in *MacKay*; and it improperly changed the balance of interests among employees, unions, and employers struck by Congress when it chose to protect various economic weapons, including the hiring of permanent replacements.

Because we find below that the Respondent's hiring of permanent replacements was not motivated by an independent unlawful purpose as that term was defined by the *Piedmont Gardens* majority, we find it unnecessary to decide here whether the majority in *Piedmont Gardens* correctly defined the "independent unlawful purpose" exception. However, we would be willing to consider the issue in a future appropriate case.

⁶⁶ *Id.*, slip op. at 6–7.

purpose” for hiring permanent replacements and violated Section 8(a)(3) and (1) of the Act by failing to reinstate all the strikers immediately upon their unconditional offer to return to work.⁶⁷

4. Analysis

For the reasons explained below, we reverse the judge and dismiss the allegation. Although we find that the General Counsel presented some evidence of unlawful purpose,⁶⁸ we conclude, based on the record as whole, that the evidence is insufficient to establish that the Respondent hired the permanent replacements for an independent unlawful purpose.

To begin with, we disagree that the Respondent’s stated reasons for hiring permanent replacements were pretextual. As discussed above, Vice President of Operations Bartholomew testified that the Respondent decided to permanently replace the strikers instead of relying on temporary replacements in order to minimize training costs, reduce turnover, and maintain good customer service. In finding these justifications to be pretextual, the judge reasoned that they were “logically inconsistent with the hiring of replacements” because the Respondent would have incurred lower costs, experienced less turnover, and been

better able to maintain customer service standards if it had reinstated the strikers. The judge also reasoned that if the Respondent was truly concerned about turnover and customer service, it would have disclosed to the strikers, on day one of the strike, its plan to permanently replace them in order to induce them to return to work.

In our view, the judge’s reasoning is flawed and does not support a finding of pretext. “[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked”⁶⁹ Similarly, the Board does not engage in a *post hoc* analysis of an employer’s business decision to determine whether it was lawfully motivated. Rather, the Board considers the factors known to the employer at the time the decision was made.⁷⁰

Here, at the time the Respondent made the decision to permanently replace the strikers, reinstating the strikers was not an option. They were *on strike*, withholding their labor to exert economic pressure on the Respondent. And there was no reason to believe that the Respondent could induce them to return to work by notifying them that it was hiring permanent replacements. Indeed, the record establishes that before they voted to strike, the unit employees

⁶⁷ Excepting, the Respondent contends, among other things, that the judge applied the wrong analysis, and even assuming he applied the correct analysis, the judge misapprehended certain evidence and, thus, erred in finding that the Respondent’s conduct manifested an intent to discriminate and/or to discourage union membership and in finding that the Respondent’s stated reasons for hiring permanent replacements were pretextual. While we find merit in certain of the Respondent’s exceptions, we find it unnecessary to address them individually, in light of the grounds for dismissal of the “independent unlawful purpose” allegation set forth *infra*.

⁶⁸ Specifically, we rely on the unfair labor practices found above, which demonstrate that the Respondent bore animus towards the strikers’ protected activity.

Contrary to the judge, we do not rely on the Respondent’s “Non-Union Philosophy.” Sec. 8(c) of the Act provides that expressing views, arguments, or opinions “shall not constitute *or be evidence of* an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit” (emphasis added). The “Non-Union Philosophy” section of the Respondent’s employee handbook contains neither threat nor promise. It states that the Respondent “will do everything in its *legal power*” to remain nonunion (emphasis added). Accordingly, Sec. 8(c) protects the Respondent’s right to express its opposition to unionization and prohibits relying on that expression as evidence of an unfair labor practice. Despite this clear statutory command, the Board has relied upon noncoercive statements of opposition to unions or unionization as evidence of antiunion animus in support of unfair labor practice findings. See, e.g., *Overnite Transportation Co.*, 335 NLRB 372, 375 fn. 15 (2001); *Mediplex of Stamford*, 334 NLRB 903, 903 (2001); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999); *Lampi LLC*, 327 NLRB 222, 222 (1998); *Gencorp.*, 294 NLRB 717, 717 fn. 1 (1989). Several courts of appeals have rejected the Board’s position. See *Sasol North America Inc. v. NLRB*, 275 F.3d 1106, 1112 (D.C. Cir. 2002); *Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733, 744 (4th Cir. 1998); *BE & K Construction Co. v. NLRB*, 133 F.3d 1372, 1375–1377 (11th Cir. 1997) (per curiam); *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1345–1347 (2d Cir.

1990). We agree with these courts that Sec. 8(c) precludes reliance on statements of opinion that neither threaten nor promise as evidence in support of any unfair labor practice finding. To the extent Board precedent is to the contrary, it is hereby overruled.

Also contrary to the judge, we reject his finding that the timing of the Respondent’s announcement to the Union that it had permanently replaced the strikers evinced an illicit motive. An employer has no legal obligation to disclose its intention to permanently replace economic strikers. *Avery Heights*, 343 NLRB 1301, 1306 (2004) (“[T]he Board has never held that an employer is under a duty to disclose to a union its intention to hire permanent replacements.”), vacated and remanded *New England Health Care Employees Union v. NLRB*, 448 F.3d 189 (2d Cir. 2006), after remand 350 NLRB 214 (2007), *enfd. Church Homes, Inc. v. NLRB*, 303 Fed. Appx. 998 (2d Cir. 2008), cert denied 558 U.S. 945 (2009). Although the Second Circuit in *Avery Heights* found that the respondent employer’s intentional secrecy about its decision to hire permanent replacements supported a finding that the respondent had an illicit motive, the court did not hold that employers generally are required to notify strikers before permanently replacing them. 448 F.3d at 195 (accepting “Board’s premise that an employer has no legal obligation to inform striking workers before hiring permanent replacements”). Moreover, the facts in this case differ materially from those in *Avery Heights*. The respondent in *Avery* took “active measures” to conceal its hiring of permanent replacements, including placing blind ads and telling an agency supplying temporary employees that its plans regarding permanent replacements were “hush-hush”; and the respondent in *Avery* braggingly described its hiring of permanent replacements “as a well-executed surprise event the day before Christmas.” 343 NLRB at 1305. The court found that the “natural and logical implication[.]” of the respondent employer’s deliberate concealment was that the employer’s motive was to “break” the union. 448 F.3d at 196. There is no such evidence in this case.

⁶⁹ *Ryder Distribution Resources*, 311 NLRB 814, 816 (1993) (internal quotation marks omitted).

⁷⁰ *Ryder*, 311 NLRB at 816–817.

were informed that they could be permanently replaced. Moreover, the Respondent anticipated that the strike would be long because the parties were “miles apart” in the negotiations. Hence, from the Respondent’s perspective, it had two options: hire permanent replacements or rely on temporary employees. Given the anticipated duration of the strike, the Respondent could reasonably have believed that hiring permanent replacements would result in less turnover, reduced training costs, and better overall customer service.

Moreover, the record contains significant countervailing evidence that further undermines any inference of an unlawful motive. Thus, contrary to the judge’s finding that the Respondent “falsely claimed it had filled [strikers’] positions,” the evidence shows that the Respondent permanently replaced most of the strikers before they made an unconditional offer to return to work. Although some of the Respondent’s attempts to hire permanent replacements were unsuccessful (i.e., Martinez, Beddoes, Frazer, Moreno, and Recinos), the record as a whole does not support the judge’s finding that the Respondent engaged in a pattern of hiring sham permanent replacements in order to block the return of the strikers. There is no persuasive evidence that the Respondent demonstrated any intent not to hire legitimate permanent replacements or acted contrary to its usual employment practices. Furthermore, upon the strikers’ unconditional offer to return to work, the Respondent, in cooperation with the Union, established a preferential recall list and began reinstating the strikers as positions became available. The Respondent also offered interim reinstatement to strikers while they waited for vacancies to arise in their former or substantially equivalent positions. Finally, after the preferential recall list was exhausted, the Respondent offered reinstatement to strikers whom it had previously removed from consideration for preferential recall for failing to respond to reinstatement offers. Such actions are not illustrative of an unlawful motive to punish the strikers and break the Union.

For the foregoing reasons, we find that the judge erred in concluding that the Respondent had an “independent unlawful purpose” for hiring permanent replacements. We thus reverse the judge’s finding and dismiss the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to immediately reinstate

all the strikers upon their unconditional offer to return to work.

D. Alleged Unlawful Withdrawal of Recognition

1. Background

On March 27, 2015, the Respondent withdrew recognition from the Union based on an antiunion petition signed by 24 employees. The petition contained the following language: “We the employees of United Site Services at 1 Oak Road, Benicia CA 94510 are hereby giving notice to the Teamsters Local Union 315 that we do NOT want any association or Representation from the Teamsters Local Union 315 effective immediately.” Twenty-one employees signed the petition between January 5 and 7, 2015, at a time when only one former striker had returned to work; two employees signed the petition on February 11, 2015; and the last signature is undated.⁷¹

2. Analysis

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union. We find, as the judge did, that the Respondent’s unremedied unfair labor practices tended to cause employees to become disaffected from the Union and thus, under *Master Slack Corp.*, 271 NLRB 78 (1984), tainted the antiunion petition the Respondent relied on in withdrawing recognition.⁷²

The Board has held that an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union.⁷³ To determine whether there is a causal connection between an employer’s unfair labor practices and employees’ disaffection, the Board considers the following factors:

- (1) The length of time between the unfair labor practices and the withdrawal of recognition;
- (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees;
- (3) any possible tendency to cause employee disaffection from the union; and
- (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.⁷⁴

⁷¹ The judge mistakenly stated that three strikers had returned to work when the petition was first circulated in early January. The parties stipulated, however, that the first striker was recalled on December 18 (Marco Cervantez) and the second and third strikers (Benjamin Pantoja and Jose Orellana) were recalled on February 2 and 3, 2015, respectively. The judge also mistakenly stated that the first offer of reinstatement “went out on December 8, 2015,” rather than December 8, 2014. These inadvertent errors do not affect the disposition of this case.

⁷² We find it unnecessary to pass on the judge’s additional finding that the Respondent failed to establish that the Union had, in fact, lost majority support.

⁷³ *Denton County Electric Cooperative, Inc. d/b/a CoServ Electric*, 366 NLRB No. 103, slip op. at 2–3, 10–12 (2018), enfd. in relevant part ___ F.3d ___, 2020 WL 3249251 (5th Cir. June 16, 2020).

⁷⁴ *Ardley Bus Corp.*, 357 NLRB 1009, 1012 (2011) (citing *Master Slack*, 271 NLRB at 84).

All of these factors tend to establish the requisite connection between the Respondent's unfair labor practices and the Union's loss of support. As to the first factor, we have found that the Respondent engaged in the following conduct in violation of Section 8(a)(3) and (1) of the Act prior to the Respondent's withdrawal of recognition from the Union: (a) on October 17, falsely claiming that Martinez, Beddoes, and Moreno were permanent replacements and continuing to assign service technician work to fence driver Reyes-Perusquia, thereby blocking the return of four strikers; (b) on an unspecified date between October 17 and November 18, failing to recall a former striker when it learned that Frazer's background check revealed an active warrant; (c) on about November 14, failing to recall a former striker to the vacancy created by Recinos's departure; and (d) on about January 19, 2015, removing Buckner from consideration for preferential recall for invalid reasons. Employees signed the decertification petition between January 5 and February 11, 2015, and the Respondent withdrew recognition from the Union on March 27, 2015. The Respondent's unfair labor practices were unremedied and ongoing throughout this period.

As to the second factor—the nature of the Respondent's illegal conduct—between October 17, 2014, and March 27, 2015, the Respondent unlawfully failed to recall and/or tendered invalid offers of reinstatement to 7 out of 21 strikers. The Respondent's unfair labor practices thus directly affected nearly one third of the original unit. The unfair labor practices also had a ripple effect on an unknown number of other strikers whose reinstatement was delayed. Such violations would clearly encourage hostility toward the Union for a perceived failure to protect the strikers' interests and would have a detrimental impact on employee morale and support for the Union.⁷⁵

As to the third factor—whether the Respondent's misconduct tended to cause employee disaffection—viewed objectively, the Respondent's unremedied unfair labor practices would clearly encourage employees to lose faith in the Union's ability to protect them and would have an

obvious detrimental effect on employee support for the Union. Finally, as to the fourth factor, the effect of the unlawful conduct on employee morale and membership in the Union, there is no direct evidence establishing that the Respondent's unfair labor practices caused the employees' disaffection. However, in the circumstances presented here, it is reasonable to infer as much. The Union won the election and was certified as the bargaining representative of the unit employees in January 2014. There is no evidence of disaffection between that time and the Respondent's unfair labor practices, which started in October.⁷⁶ The lack of prior disaffection is strong evidence of a causal connection between subsequent disaffection and the Respondent's unfair labor practices.⁷⁷ The anti-Union petition drive began after the Respondent engaged in those unfair labor practices.

In sum, for the reasons discussed above, we affirm the judge's findings that a causal relationship existed between the Respondent's unfair labor practices and the union-disaffection petition, and therefore the Respondent could not rely on the petition to withdraw recognition from the Union.

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local 315, IBT is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct:

(a) failing and refusing to reinstate former economic strikers, upon their unconditional offer to return to work, to their former or substantially equivalent positions of employment where those positions had not been filled by permanent replacements;

(b) failing and refusing to timely recall former economic strikers to existing vacancies in their prestrike or substantially equivalent positions in the absence of a legitimate and substantial business justification; and

⁷⁵ We recognize that the Union's failure to negotiate a satisfactory contract, the permanent replacement of the strikers, and the fact that some of the employees in the unit were hired as permanent replacements and others crossed the picket line may also have given rise to disaffection. However, it is reasonable to infer that the Respondent's unremedied unfair labor practices contributed substantially to the disaffection, given their serious and widespread impact on the unit.

⁷⁶ In their first vote on the Respondent's contract proposal on June 28, the unit employees rejected the offer 15–0. The Respondent argues that this should be considered evidence of disaffection with the Union because it demonstrates that the employees were dissatisfied with the contract the Union negotiated on their behalf. The Respondent also points out that, one month later, the employees voted unanimously to reject the Respondent's final offer, but only 10 employees participated in the vote. The Respondent contends that the decline in participation is evidence of

disaffection predating the Respondent's unfair labor practices. The Respondent's arguments are effectively refuted, however, by the employees' subsequent participation in the strike. As discussed above, 21 of the 24-unit employees supported the Union by striking on October 17.

Conkle Funeral Home, Inc., 266 NLRB 295 (1983), cited by the Respondent, is inapposite. In *Conkle*, the issue was whether the respondent lawfully relied on the union's disclaimer of interest during the certification year to refuse to recognize and bargain with the union when the union subsequently demanded renewed bargaining during the certification year. There were no intervening unfair labor practices, and the cause of the employees' disaffection was not in dispute.

⁷⁷ See *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007) (holding causal connection established in part by lack of prior evidence of disaffection).

(c) removing former economic strikers Walter Buckner, Robert Harris, and Ernesto Pantoja from consideration for preferential recall because they failed to respond to or rejected invalid offers of reinstatement.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Teamsters Local 315, IBT as the bargaining representative of the employees at the Respondent's Benicia, California facility.

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

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate economic strikers, upon their unconditional offer to return to work, to their former or substantially equivalent positions of employment where those positions had not been filled by permanent replacements; failing and refusing to timely recall economic strikers to existing vacancies in their prestrike or substantially equivalent positions in the absence of a legitimate and substantial business justification; and removing former strikers Walter Buckner, Robert Harris, and Ernesto Pantoja from consideration for preferential recall because they failed to respond to or rejected invalid offers of reinstatement, we shall order the Respondent, if it has not already done so, to offer the affected employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.⁷⁸

Backpay shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest accruing at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Pursuant to *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall further compensate the affected employees for their reasonable search-for-work and interim employment expenses, regardless of whether those expenses

exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally, we shall order the Respondent to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each of them. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). We shall also order the Respondent to remove from its files any references to the unlawful failures to reinstate or timely recall former strikers and the removal of Buckner, Harris, and Pantoja from consideration for preferential recall and to notify affected employees in writing that this has been done and that the failures to reinstate or recall and the removals from consideration for preferential recall will not be used against them in any way.

We have also found that the Respondent violated the Act by withdrawing recognition from the Union. As indicated above, the Union has disclaimed interest in continued representation of the unit employees, thereby mooting any ongoing obligation the Respondent would have to bargain with the Union. We accordingly amend the judge's recommended remedy to delete the requirement that the Respondent recognize and bargain with the Union.

The judge's recommended remedy included an affirmative requirement that the Respondent make bargaining unit employees whole for losses suffered as a result of any unilateral changes in their terms and conditions of employment subsequent to the unlawful withdrawal of recognition. In the absence of any allegation of unilateral changes, we shall delete this requirement.

Finally, as recommended by the judge, the Respondent shall hold a meeting or meetings during working hours at its Benicia, California facility, scheduled to ensure the widest possible attendance of bargaining unit employees, at which the notice is to be read to unit employees by a high-ranking responsible management official of the Respondent, in both English and Spanish, in the presence of a Board agent, or, at the Respondent's option, by a Board agent in the presence of a high-ranking responsible management official.⁷⁹

⁷⁸ We leave to the compliance stage of this proceeding the determination of the number and identity of employees affected by the Respondent's failure and refusal to immediately reinstate strikers, upon their unconditional offer to return to work, to their prestrike or substantially equivalent positions, where those positions had not been filled by permanent replacements, and its failure and refusal to timely recall economic

strikers to existing vacancies in their prestrike or substantially equivalent positions.

⁷⁹ The judge included a notice-reading provision in his recommended remedy, but he inadvertently failed to include a corresponding provision in the Order. We shall modify the Order accordingly.

ORDER

The Respondent, United Site Services of California, Inc., Benicia, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate former economic strikers, upon their unconditional offer to return to work, to their former or substantially equivalent positions of employment where those positions have not been filled by permanent replacements.

(b) Failing and refusing to timely recall former economic strikers to existing vacancies in their former or substantially equivalent positions of employment in the absence of a legitimate and substantial business justification.

(c) Removing former economic strikers from consideration for preferential recall for failing to respond to or rejecting invalid offers of reinstatement.

(d) Failing and refusing to recognize and bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with any duly certified representative of the employees in the following appropriate unit:

All full time and regular part-time Service Technicians, Lead Service Technicians, Pick Up and Delivery Drivers, Mechanics, Laborers, and Fence Installers employed by the Employer at its 1 Oak Road, Benicia, California facility, but excluding Dispatchers, supervisors and guards as defined by the Act.

(e) 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) Within 14 days from the date of this Order, if it has not already done so, offer former economic strikers who were not permanently replaced and who were unlawfully denied reinstatement upon their unconditional offer to return to work full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole former economic strikers who were not permanently replaced and who were unlawfully denied reinstatement upon their unconditional offer to return to work for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(c) Within 14 days from the date of this Order, if it has not already done so, offer former economic strikers who

were not timely recalled to existing vacancies to which they were entitled based on the preferential recall list full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make whole former economic strikers who were not timely recalled to existing vacancies to which they were entitled based on the preferential recall list for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(e) Within 14 days from the date of this Order, if it has not already done so, offer Walter Buckner, Robert Harris, and Ernesto Pantoja full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Make Walter Buckner, Robert Harris, and Ernesto Pantoja whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(g) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(h) Within 14 days from the date of this Order, remove from its files any references to the unlawful refusals to reinstate or timely recall former economic strikers, and within 3 days thereafter, notify affected employees in writing that this has been done and that the refusals to reinstate or timely recall them will not be used against them in any way.

(i) Within 14 days from the date of this Order, remove from its files any references to the unlawful removal of Walter Buckner, Robert Harris, and Ernesto Pantoja from consideration for preferential recall, and within 3 days thereafter, notify them in writing that this has been done and that the removal from consideration for preferential recall will not be used against them in any way.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form,

necessary to analyze the amounts of backpay due under the terms of this Order.

(k) Post at its facility in Benicia, California, copies of the attached notice marked “Appendix”⁸⁰ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent 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 Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the 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 October 17, 2014.

(l) Hold a meeting or meetings during working hours at its facility in Benicia, California, scheduled to ensure the widest possible attendance of bargaining unit employees, at which the attached notice marked “Appendix” will be read to the employees in both English and Spanish by a high-ranking responsible management official of the Respondent in the presence of a Board agent or, at the Respondent’s option, by a Board agent in the presence of a high-ranking responsible management official of the Respondent.⁸¹

(m) 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 the Respondent has taken to comply.

Dated, Washington, D.C. July 29, 2020

John F. Ring, Chairman

⁸⁰ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notice may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 and refuse to reinstate former economic strikers who were not permanently replaced upon their unconditional offer to return to work.

WE WILL NOT fail and refuse to reinstate former economic strikers to existing vacancies in their former or substantially equivalent positions of employment in the absence of a legitimate and substantial business justification.

WE WILL NOT remove former economic strikers from consideration for preferential recall for failing to respond to or rejecting invalid offers of reinstatement.

WE WILL NOT fail and refuse to recognize and bargain collectively concerning rates of pay, wages, hours, and

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.”

⁸¹ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be read within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be read within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notice may not be read until a substantial complement of employees have returned to work.

other terms and conditions of employment with any duly certified representative of the employees in the following appropriate unit:

All full time and regular part-time Service Technicians, Lead Service Technicians, Pick Up and Delivery Drivers, Mechanics, Laborers, and Fence Installers employed by the Employer at its 1 Oak Road, Benicia, California facility, but excluding Dispatchers, supervisors and guards as defined by the Act.

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, within 14 days from the date of the Board's Order, offer former economic strikers who were not permanently replaced and who were unlawfully denied reinstatement upon their October 17, 2014 unconditional offer to return to work reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging if necessary any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer former economic strikers who were unlawfully denied timely recall to vacancies in their former or substantially equivalent positions of employment reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging if necessary any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Walter Buckner, Robert Harris, and Ernesto Pantoja reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging if necessary any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole all affected employees, including Walter Buckner, Robert Harris, and Ernesto Pantoja, for any loss of earnings and other benefits resulting from our unlawful conduct, less any interim earnings, plus interest, and WE WILL also make them whole for any reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful refusals to reinstate or recall economic strikers, and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that the refusals to reinstate or recall them will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful removal of Walter Buckner, Robert Harris, and Ernesto Pantoja from consideration for preferential recall, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their removal from consideration for preferential recall will not be used against them in any way.

UNITED SITE SERVICES OF CALIFORNIA, INC.

The Board's decision can be found at www.nlrb.gov/case/20-CA-139280 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.



Richard J. McPalmer Esq. and Elvira Pereda, Esq., for the General Counsel.

David S. Durham, Esq. and Christopher M. Foster Esq. (DLA Piper LLP), Jonathan E. Kaplan, Esq. and Erik Hult, Esq. (Littler Mendelson, P.C.), for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried before me on August 24–27, 2015, in San Francisco, California. Charging Party (Union) filed charges on October 20, 2014, and April 3, 2015, and an amended charge dated May 5, 2015, alleging violations by United Site Services of California Inc. (Respondent) of Sections 8(a)(3) and (1) and 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act). An amended consolidated complaint was filed on July 21, 2015. Respondent filed an answer to the amended consolidated complaint denying that it violated the Act. On March 17, 2016 I issued a decision finding that Respondent violated the Act. After the decision was rendered, the Board issued a decision in *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13 (2016), a case that analyzed and applied *Hott Shoppes* to

the permanent replacement of economic strikers, one of the central issues presented in this case. The Board On November 3, 2016, thereafter remanded this case for further consideration in light of its decision in Piedmont and further directed the analysis of other alleged violations of 8(a)(3) and (1) along with an evaluation of whether the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition of the Union after receiving a decertification petition. As directed by the Board in its remand the parties were given the opportunity to file supplemental briefs in the matter. After again considering the matter and based upon the detailed findings and analysis set forth below, I again conclude that the Respondent violated the Act essentially as alleged.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that

(a) At all material times, Respondent has been a corporation with a place of business at 1 Oak Road, Benicia, California (Respondent's facility), and has been engaged in the business of providing rental portable restrooms, temporary fencing, and sanitation facilities.

(b) In conducting its operations during the 12-month period preceding July 21, 2015, Respondent purchased and received at Respondent's facility goods valued in excess of \$50,000 directly from points outside the State of California.

(c) In conducting its operations during the 12-month period ending December 31, 2013, Respondent derived gross revenues in excess of \$250,000.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Steve Gutierrez	-	Area Manager
Aggie T. Haley	-	Human Resources Manager
Mark Bartholomew	-	Senior Vice President of Operations
Mike Kivett	-	Reno Area Manager
David Sattler	-	Supervisor/Lead Driver

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

United Site Services, Inc. is a company that provides portable toilet and temporary fencing rentals. The company has multiple facilities, but this case relates to the facility in Benicia, California. The company relies upon employees with varying job titles to perform the work. The company employs the following types

of employees:

(1) Yard associates- whose work at the employer's facility to wash, inspect, prepare, and repair equipment;

(2) Pick Up and Delivery (P&D) driver's-whose duties include picking up and delivering portable toilets, installing holding tanks, and completing any necessary repairs to equipment in the field. P&D drivers must hold a Class C drivers license.

(3) Fence drivers- whose duties include the delivery and installation of fence. Fence drivers must hold a Class C driver's license.

(4) Fence helper-whose duties are to assist the fence driver's with installation and delivery of fencing materials.

(5) Service technicians- whose duties are to drive from site to site pumping out toilets or holding tanks and to clean and restock the portable toilets. Periodically, after the trucks are filled they must return to the facilities to empty their tanks. They must also hold a Class C driver's license.

On September 23, 2013, the Union filed a petition to represent a bargaining unit of the employer's workers. (GC Exh. 2.) On November 21, 2015, the Union won the election. (Jt. Exh. 1.) On January 7, 2014, the Board certified the Union as representative of the following Unit:

All full time and regular part-time Service Technicians, Lead Service Technicians, Pick Up and Delivery Drivers, Mechanics, Laborers, and Fence Installers employed by the Employer at its 1 Oak Road, Benicia California facility, but excluding Dispatchers, supervisors and guards as defined by the Act. (GC Exh. 3.)

From February to July 2014, the parties engaged in negotiations for an initial contract. The parties held multiple bargaining sessions. In the course of this bargaining, unit employees twice voted on contract proposals. On July 16, 2014, the employer provided its Last Best Final Offer (LBFO). (R. Exh. 2.) On July 23, 2014, the employees unanimously rejected the proposal. (R. Exh. 11-17.) At this same meeting the employees voted to authorize a strike. Despite the authorization to strike the strike did not begin immediately. The employees directed the Union to investigate other options to put pressure on the employer before going on strike. The Union also needed to seek approval from the International Brotherhood of Teamsters for strike benefits. After the efforts by the Union to put pressure on the employer did not yield results satisfactory to the employees, they decided to go on strike. On October 5, 2014, the Union notified the employer that it would strike the next day. (GC Exh. 5.)

The strike at the Benicia facility began on October 6, 2014. It is undisputed that the strike was an economic strike. (Tr. 35:12-13.) At the time of the strike, the unit consisted of 25 active employees and a vacant P&D Driver position. Of the 25 employees 21 of them went out on strike with the majority picketing the entrance to the employer's facility every day of the strike.¹ The employer had in place a contingency plan for the strike which relied upon employees from other facilities to assist and cover the striker's positions. (Jt. Exh.1, GC Exh. 10.) The

¹ Michael Knutsen, Javier Santiago, Oscar Reyes Perusquia, and Richard Rotti did not join the strike. (Jt. Exh. 1.)

employer also used temporary employees to cover its Bencia operations who were hired through “Labor Finder’s” a temporary employment agency. Also, on the first day of the strike, the employer through its human resources manager, Augeda Halley, area manager, Steve Gutierrez, and vice president, Steve Wit

began hiring replacements. (Jt. Exh. 1 Stip. 21.) The offers were made for “permanent full-time position[s], and to work indefinitely even after the strike ended.” (R. Exh. 12–through 12–71.) The written offers included the following language

Permanent Position	Name	Offer and Acceptances	
		Verbal Acceptance Date and Time (See Resp. Exh. 14)	Written Acceptance Date and Time (See Resp. Exh. 12-1 through 12-74)
Mechanic	Michael Knutsen	10/14, 5:29 PM	10/14, 5:29 PM
Fence Driver	James Matthews	10/6, 4:15 PM	10/6, 4:50 PM
Service Technician	Christopher Orr	10/6, 9:30 AM	10/6, 9:30 AM
Service Technician	Martin Escobar Segura	10/7, 7:15 AM	10/6, 4:15 PM
Service Technician	Francisco Hernandez Rocha	10/7, 7:10 AM	10/6, 4:13 PM
Service Technician	Armando Martinez Saucedo	10/7, 8:40 AM	10/13, 6:00 PM
Service Technician	Alfonzo Meza	10/7, 7:55 AM	10/8, 11:19 AM
Service Technician	Jorge Recinos (or Racinos)	10/7, 9:30 AM	10/8, 9:30 AM
Service Technician	Desiree Martinez	10/10, 5:30 AM	N/A
Service Technician	Paul Barron	10/10, 5:00 AM	10/10, 5:00 AM
Service Technician	Greg Beddoes	10/10, 5:30 AM	N/A
Service Technician	Javier Santiago	10/14, 7:20 PM	10/10, 7:30 PM
Service Technician	Darryl Gaines	10/14, 6:43 PM	10/14, 6:43 PM
Service Technician	Brian Flores	10/16, 1:00 PM	10/16, 1:00 PM
Service Technician	Nicholas Cermeno- Hernandez	10/16, 5:00 AM	10/16, 8:15 AM
Service Technician	Alvin Williams	10/16, 1:29 PM	10/16, 12:29 PM
Service Technician	Kevin Murphy	10/16, 2:50 PM	10/16, 7:00 PM
Yard Associate	Joshua Johnson	10/6, 4:15 PM	10/6, 4:50 PM
Yard Associate	Jesse Hernandez	10/13, 2:15 PM	10/14, 2:41 PM
Yard Associate	Maurice Espinoza	10/16, 7:38 AM	10/6, 9:16 AM
Yard Associate	Julio Campos	10/16, 12:39 PM	10/16, 12:59 PM
Yard Associate	Lester Moreno ²⁵	10/16, 2:15 PM	10/18, 2:20 PM
Yard Associate	Antoine Frazer	10/16, 2:47 PM	10/17, 7:20 AM
Pick Up & Delivery Driver	Richard Wilkerson	10/8, 3:30 PM	10/14, 7:36 PM
Pick Up & Delivery Driver	Antony Boatmun	10/10, 3:45 PM	10/13, 8:10 AM
Pick Up & Delivery Driver	Michael Neitz	10/14, 1:22 PM	10/14, 1:22 PM

Pick Up & Delivery Driver	James Brown	10/15, 3:20 PM	10/15, 3:57 AM
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You understand and agree that you have been advised that a strike or other active labor dispute exists between USS and Teamsters Local 315 at the Benecia location and that the position offered is as a permanent replacement for a striker who is presently on strike against USS at the Benecia location. You further understand that, as a permanent replacement, if the strike ends, you will not be displaced to make room for the returning strikers. . . . (emphasis in original). (R. Exh. 12–1 through 12–74.)

Included among the written offer was a written offer of acceptance. The document was titled, “Acceptance of Offer of Employment as Permanent Replacement” and contained language similarly to the offer indicating that the employee would “immediately” accept employment as a “permanent replacement” and that the person would not be displaced once the strike ended. (Exh. 12–1 through 12–74.)

The Human Resources Manager Halley began to make offers and kept a log of the dates and times of offers and receipt of written acceptance. The log contained the following information:

Despite the employer’s ongoing efforts to hire replacements beginning on the first day of the strike, Respondent did not inform the Union of its hiring efforts until 3:40 p.m. on October 16, 2014. (GC Exh. 6.) The notification which arrived via email advised that the employer had, “hired permanent replacements to fill all of the positions vacated by the striking employees.” (GC Exh. 6.)

The next evening on October 17, 2014, the Union held a meeting and discussed the employer’s email of October 16, 2014, with the strikers. Upon learning of the employers’ efforts to hire replacements the strikers chose to return to work. (Tr. 141.) At 6:05 p.m. of that same evening, the Union emailed to Respondent a letter terminating the strike and making an unconditional offer of its employees to return to work. (GC Exh. 7.) On October 18, 2014, Respondent confirmed that there were no unit positions available and advised that the striking employees had been placed on a preferential recall list. The correspondence also requested up to date contact information for all of the strikers. (GC Exh. 8.) On October 22, 2014, the employer sent another email requesting up to date contact information for the strikers. (GC Exh. 9.) On October 23, 2014, the Union replied advising that it would “confirm the correct addresses and provide updates as necessary.” (GC Exh. 9.) On October 27, 2014, the Union provided some updated contact information. (GC Exh. 9.)

Respondent, thereafter, put in place its procedures for preferential recall. (R. Exh. 20.)

Under its process, the area manager, Steve Gutierrez would make a determination that a position was vacant he would then inform the Human Resources Manager Aggie Halley who would then refer to the preferential recall list and contact two former strikers with the highest seniority. She would contact them by both calling their phone numbers of record and also mailing letters to their address of record. If two employees accepted and

only one position was available the position would be offered to the person with the most seniority and the less senior person would remain eligible for preferential recall. If the person did not accept the position then the employer considered their employment relationship ended at that point in time. (Tr. 268, 270.) If Halley found there were no former strikers who held a position to be filled, then Halley would offer it to a former striker in another position with the understanding that they would still be eligible for preferential recall to their former or substantially similar position. (Tr. 265.)

The first offer of reinstatement went out on December 8, 2015, and continued through June 9, 2015. Sometime in mid-January (a time when only three of the former striking employees had returned to work) a petition was circulated among the employees. The petition contained the following language:

We the employees of United Site Services a 1 Oak Road, Benecia CA 94510 are hereby giving notice to the Teamsters Local 315 that we do NOT (emphasis in original) want any association or Representation from the Teamsters Local Union 315 effective immediately. (R. Exh. 9.)

The petition was signed by 24 employees and most signed with dates next to their names. Some signed on January 5, 2015, others, January 7, 2015, and two signed on February 11, 2015. Two employees that signed the petition did not indicate the date they signed. (R. Exh. 9.) The petition was delivered by Richard Wilkerson, a permanent replacement employee to the Senior Vice President of Operations Mark Bartholomew. Bartholomew sent the petition to the Human Resources Manager Halley and asked her to verify that the signatures on the petitions matched signatures in the employees’ records. (Tr. 433.) Halley conducted the verification process and reported back that in fact the signatures matched. (Tr. 433.) By email dated March 27, 2015, Bartholomew sent a letter to the Union which set forth the following:

We are in possession of objective evidence that your union no longer represents a majority of the employees at United Site Services a majority of the employees at the United Site Services bargaining unit. Accordingly United Site Services hereby withdraws recognition from your union in this unit effectively immediately. (GC Exh. 12.)

Despite the withdrawal of recognition, Respondent continued to offer reinstatement to former striker’s with the last offer being a Service Technician offer made to David Reeves who declined and chose to remain as a P&D driver on June 9, 2015. (GC Exh. 48.)

B. Analysis

1. The failure to recall striking workers

The court in *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 191–192 (2d Cir. 2006), succinctly set

forth the applicable legal standards as follows:

Section 7 of the Act, 29 U.S.C. § 157, grants employees the “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” See also 29 U.S.C. § 163 (“Nothing in this Act ... shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . .”). To implement this right, § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their § 7 rights. And § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), makes it an unfair labor practice for an employer to “discourage membership in any labor organization.” Under Supreme Court precedent, an employer that refuses to reinstate economic strikers violates § 8(a)(3) unless it can demonstrate that it acted to advance a “legitimate and substantial business justification [*192].” See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 88 S.Ct. 543, 19 L.Ed.2d 614 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967)). The hiring of permanent replacement workers amounts to one such legitimate and substantial business justification. See *NLRB v. Int'l Van Lines*, 409 U.S. 48, 50, 93 S.Ct. 74, 34 L.Ed.2d 201 (1972) (“[A]n employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements.”); *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 fn. 8, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983) (“The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement of [Fleetwood Trailer] that the employer have a legitimate and substantial justification for its refusal to reinstate strikers.”) (internal quotation marks omitted). Consequently, “[w]here employees have engaged in an economic strike, the employer may hire permanent replacements whom it need not discharge even if the strikers offer to return to work unconditionally.” *Belknap*, 463 U.S. at 493, 103 S.Ct. 3172.

It is the burden of the employer to demonstrate that the persons hired are in fact permanent replacements and further the employer must establish a mutual understanding between employer and employee that that they in fact are permanent. *Jones Plastic & Engineering Co.*, 351 NLRB 61, 64 (2007). On October 17, 2014, the Union made a written offer to return to work on behalf of all striking employees. Respondent advised that no Unit positions were available because it claimed it had hired 27 individuals who it contended were permanent employees. (Jt. Exh. 2.) As is discussed in more detail below, the evidence established that Respondent failed to meet its burden of establishing that many of the persons it designated as “permanent replacements” were in fact permanent.

a. Desiree Martinez

Desiree Martinez was identified as one of the “permanent replacements.” Her credible testimony and the documentary trail of evidence established the opposite. Ms. Martinez was a permanent employee of the company employed at the Respondent’s Reno Nevada facility. She was asked by her manager, Mike Kivett to go to work in Benicia to “help” during the strike. She

was unaware of the circumstances surrounding the request and assumed it was to help for a special event and did not know she was assisting with the strike. Thereafter, before she left, she was told that she would be crossing a picket line and would be just going there “temporarily.” (Tr. 52.) At no time did her manager describe the assignment as “permanent” to her. (Tr. 52.) At no time did he use the term “permanent replacement” to describe her assignment. (Tr. 52–53.) Ms. Martinez credibly testified that she worked in Benicia for a few weeks then returned to Reno worked in Reno for a week and then returned to Benicia. The first time she traveled to Benicia in a company vehicle, the second time the company paid for a car rental. While she was in Benicia she stayed in a motel at the company’s expense and received reimbursement for food expenses. When she returned to Benicia the second time, the job assignment was never described to her as “permanent” and she did not understand the job to be permanent in nature. (Tr. 56.) During her second period of assignment in Benicia she testified that Steve Gutierrez, a manager while in the yard in Benicia asked her if she wanted to permanently transfer. At the time she thought he was “just joking around.” (Tr. 58.) She then testified that he again asked her while in his office if she wished to permanently transfer. She testified that she told him “no.” (Tr. 59.) She elaborated that the reason she declined the offer to permanently transfer was that her family is in Reno. The documentary evidence of record corroborates her testimony. (See GC Exh. 10.) (See also GC Exh. 30) (showing her work after she returned to Reno). Her testimony is also in part corroborated by Respondent’s own witness Steve Gutierrez who testified that when given the offer he was told, “she had to think about what’s (sic) her husband going to do.” (Tr. 485.)

The above evidence paints a clear picture that Ms. Martinez was not a permanent replacement and there was no “mutual understanding” of her being a permanent replacement. More importantly, the evidence reveals that not only was she not a permanent replacement but that the employer knew that she was not. She testified that she directly told Gutierrez “no” and the inclusion of her on a list of permanent replacements is a knowing and intentional attempt to not only mislead but also to intentionally block the return of strikers who had requested reinstatement in violation of 8(a)(3) of the Act. The intentional misleading is probative of unlawful motivations and similarly calls into question Respondent’s assertions regarding other purported “permanent replacements.”

b. Greg Beddoes

Another of the claimed permanent hires was Greg Beddoes who happens to be the father of Desiree Martinez discussed above. Mr. Beddoes like his daughter lived and worked in Reno during the time of the strike. He was also approached by Mike Kivett to temporarily assist in Benicia. Like his daughter, when he was approached, he was never told the assignment would be permanent. (Tr. 70.) Upon arrival, he was also not told by anyone (including Steve Gutierrez, the manager of Benicia) that the assignment was permanent. (Tr. 70.) He also testified that Gutierrez never described his work as that of a “permanent replacement.” (Tr. 71.) He further testified that after he first reported to Benicia in October of 2014, he returned to work in

Reno every other week. (Tr. 71.) He further described his assignment as working back and forth between Reno and Benicia working 2 weeks in Benicia then returning to work a week in Reno. When he arrived in Benicia, he stayed in a hotel at the company expense and was provided reimbursement for food. He testified that his last day of work in the Reno facility was December 28, 2014. He asserted that he was offered permanent work by Gutierrez a couple of weeks after he arrived or “maybe less than a couple of weeks after he got there.” (Tr. 74.) His response to the offer was that he “had to think about that.” (Tr. 74.) He testified that eventually he accepted the offer and “signed papers and accepted the job for January 5, 2105.” (Tr. 74.) Respondent in direct contradiction to Beddoes’ testimony contends that he accepted a verbal offer on October 14, 2104, as is evidenced by a hand-written notation by Human Resources Manager Halley and signed a formal acceptance letter on that date. (GC Exh. 24.) I credit the testimony of Beddoes as truthful regarding his assertion that he told Gutierrez that he would have to think about it and did not accept until much later. It was not until late December and/or early January did Beddoes and Respondent have a “mutual understanding” that he was permanent. The documentary trail and the logical sequence of events also supports Beddoes’ version of events. His back and forth work in Reno resembled that of a temporary assignment and his last day of work in Reno on December 28, 2104, supports his version of events. His statement to the Board which was referenced during the trial further corroborates his version. (Tr. 94.) Of note is the fact that the purported Beddoes acceptance letter was dated October 10, 2014, and despite a line referencing date and time of signing was not dated by him. I find that given Beddoes’ testimony on this matter, a logical and reasonable inference from this evidence is that the letter was retroactively dated as was Halley’s note in a self-serving attempt to obfuscate the true facts of when Beddoes was actually hired in Benicia permanently. This is supported by the admission/stipulation that Halley did not even receive the signed letter until sometime after November 29, 2014. (Tr. 620–623.) The evidence surrounding this acceptance letter calls into question the veracity of all of the letters that purport to document acceptance of permanent positions.

It is clear from the above that Beddoes was not hired as a permanent employee until sometime in late December and didn’t actually sign paperwork until approximately January 5, 2014. It is also clear that Respondent knew that he was serving in a temporary capacity until that time. In fact the official company time card reports listed him as working for the Reno office up until at least 12/ 19/ 2104. (GC Exh. 11.) Respondent placing him on the list of permanent replacements when they knew he was serving in a temporary capacity was a knowing and intentional attempt to not only mislead but also to intentionally block the return of strikers who had requested reinstatement in violation of 8(a)(3) of the Act.

c. Richard Wilkerson

Richard Wilkerson was employed by Respondent prior to the strike at the Santa Clara facility. (Tr. 116.) He was employed as a Quality Assurance Specialist working in the SJO (San Jose) Field Operations Support Division. (Tr. 348.) Respondent contends that Mr. Wilkerson was a permanent replacement and point

to an offer letter dated October 8, 2014, and purportedly signed on October 14, 2014. Mr. Wilkerson was not called to testify so there is insufficient credible evidence to establish that in fact the person who signed the letter was in fact him. Nevertheless, the offer of employment clearly stated that his employment was for that of the position of Service Driver. Respondent’s own timecard records directly contradict the assertion that he assumed the position of Service Driver in October. In fact, the timecards show him assigned to the “San Jose Operations” until December 1, 2014, when his designation is changed from operations to “Service Tech.” Similarly, the site designated on the timecard as his permanent work site is “SJO” San Jose.

Ana Flores, the Lead Dispatcher, who acted as the supervisor in the absence of Steve Gutierrez overseeing all departments, credibly testified that prior to arriving at Benicia, Wilkerson worked in a quality control function and was “in charge of taking care of “major customers” doing site visits to make sure everything was ok and if the customers complained he would communicate with her about the problems. She testified that the Santa Clara office performed different type of work that the work performed at Benicia which she described as “office personnel.” (Tr. 117.) She also noted that when he came to Benicia Wilkerson was “helping us out with pickup and delivery. She further credibly testified that on several occasions she was asked by Wilkerson if she had heard “when he was going back to Santa Clara.” (Tr. 117.) She further testified that he indicated that he had talked to “the person that sent him” and “they weren’t telling him anything either.” (Tr. 118.) She further testified that she relayed Wilkerson’s questions to Gutierrez who responded he didn’t know when Wilkerson would be returned to Santa Clara. Wilkerson was thereafter returned to Santa Clara in June of 2015. Respondent’s timecard records confirm his return and show a change in his Service Tech title to that of Field Ops Support. (GC Exh. 34 p. 8.)

The reasonable inferences to be drawn from all of the above is that notwithstanding the “offer letter,” in fact Wilkerson was temporarily “borrowed” from Santa Clara to work in Benicia and was later returned to Santa Clara. The testimony of Ana Flores directly supports the conclusion that Wilkerson himself understood that the assignment was temporary and was anxious to return. The fact that he was returned to Santa Clara is even more compelling evidence that his tenure at Benicia was not that of a “permanent replacement.” In light of all of the above and specifically (1) the contradictions presented within Respondent’s own records which show Wilkerson didn’t even assume the position of Service Tech until December which directly contradicts the “offer letter”; (2) the Respondent’s noted permanent location of his assignments as SJO within the jurisdiction of the location of his initial assignment; (3) the credible testimony of Ms. Flores; and (4) Wilkerson’s return to Santa Clara, I find that Respondent failed to meet its burden of establishing the permanent replacement status of Wilkerson. Moreover, the fact that he was merely “borrowed” and the Respondent used the “offer letter” to cover up his real status when combined with the actions discussed above relating to Beddoes and Martinez demonstrates a pattern of willful mendacity calculated to block the return of striking employees in violation of Section 8(a)(3) of the Act. See *3D Enterprises Contracting Corp.*, 334 NLRB 57, 77–78 (2001),

see also *Dino & Sons Realty Corp.*, 330 NLRB 680, 684–685 (2000).

d. Nicolas Cermano-Hernandez

As was the case with Wilkerson, Respondent asserted that Cermano-Hernandez was a permanent replacement and signed an acceptance letter dated October 16, 2014. (Jt Exh. 2 R. Exh. 12–16 & 17.) Mr. Cermano-Hernandez did not testify and there is insufficient evidence in the record to establish that in fact he actually signed the acceptance letter. According to Respondent’s business records, Mr. Cermano-Hernandez was employed as a seasonal worker with the title of Seasonal Temporary Service Tech at the Respondent’s Santa Rosa facility. (GC Exh. 63 p. 5.) In the documents referencing his hiring in July of 2014, it was noted that he had been working with Respondent “every season for the last 6 years.” (GC Exh. 63 p. 5.) The actual Change of Status/Personnel Action Notification form references his status as “seasonal.” (GC Exh. 63 p. 6.) Respondent’s timecard records reflect that at all times he remained classified as a Santa Rosa Service Tech from at least October through December of 2014. (GC Exh. 11 p. 9–13.) The site location was identified in the records as “SRO.” (GC Exh. p. 9.) During the strike he worked at the Benicia yard and drove a truck which belonged to the Santa Rosa facility. (Tr. 114.) During this time frame he also worked in Santa Rosa. (Tr. 115–116.) Sometime in December, he advised the dispatcher that “his work was done” and he was returning to Mexico. (Tr. 115.) On February 23, 2015, an Employee Separation Notice was signed by Respondent’s management officials effective March 6, 2015, noting that Cermano-Hernandez voluntarily resigned due to “personal reasons.” (GC Exh. 63 p. 8.) In June of 2015, Cermano Hernandez reapplied for work in Sacramento noting that he had previously worked at Benicia until March of 2015, but the reason he gave for leaving was “lay off.” (GC Exh. 63 p. 11.) He was hired as a Seasonal Service Tech effective June 23, 2015, and a Change of Status/ Personnel Action Notification Form was filled out referencing his hire. (GC Exh. 63 p. 12.)

Again, Respondent’s own business records contradict its assertions that Cermano-Hernandez was a permanent replacement. The reason that appears in his application for reemployment directly contradicts the Respondent’s records which assert that he resigned due to personal reasons. A reasonable and logical inference to be drawn from the evidence is that in fact he served at the Benicia location in the same seasonal capacity (as he had previously served for the past 6 years) and that he was similarly laid off because he was a seasonal worker. This conclusion is bolstered by the fact that despite the presence of Change of Status/ Personnel Action Notification forms in the record none appear which would reference his change in status from a seasonal to a permanent employee. The conclusion is also bolstered by the fact that he was rehired in Sacramento as a seasonal employee.

Regardless, the inherent contradictions between Cermano-Hernandez’ application and the Respondent’s own timecard records (which do not show him permanently assigned to Benicia) make clear that Respondent failed to meet its burden of establishing that he was in fact a permanent replacement. Instead, the evidence points to Cermano’s own understanding that he was laid off as a seasonal employee and was not a permanent

replacement. As noted in *3D Enterprises Contracting Corp.*, 334 NLRB 57 (2001), “the law is that replacements for economic strikers are presumptively temporary employees, and the burden is on the employer to “show a mutual understanding between itself and the replacements that they are permanent.” (citing *Hansen Bros. Enterprises*, 279 NLRB 741(1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987). See also *Towne Ford Inc.*, 327 NLRB 193, 204 (1998). Thus, I find that the utilization of Cermano-Hernandez to block the return of striking employees violated Section 8(a)(3) and (1) of the Act.

e. Lester Moreno

Among those employees Respondent listed as a permanent replacement was Lester Moreno who Respondent claimed was hired in the position of Yard Associate. As referenced above, Respondent advised on October 16, 2014, that the company had hired “permanent replacements to fill all vacant positions.” (GC Exh. 6.) The hiring of Lester Moreno makes clear that this statement was not truthful. On March 17, 2014, the Union sent a letter indicating the termination of the strike and the unconditional offer to return to work. On October 18, 2014, at 11:21 a.m. counsel for Respondent acknowledged receipt of the letter and indicated “I have confirmed that all the positions have been filled with permanent replacements.” (GC Exh. 8.) The Respondent’s records regarding the hiring of Moreno indicate that he did not even accept a position until October 18, 2014, at 2:20 pm. (R. Exhs. 12–55.) Despite Respondent’s assertions on October 16, 2014, that “all vacant positions” had been filled, Respondent knew or should have known that this was not true. Indeed, Moreno didn’t even accept the position offered until after the Union sent and the Respondent had by its own admission received the striker’s unconditional offer to return to work. Respondent’s purposeful attempts to deceive when contradicted by its own records make clear that Moreno was not hired on October 16, 2014, nor was he hired prior to the Respondent’s receipt of the unconditional offer to return to work. Respondent failed to meet its burden to establish that this position had been filled by a permanent replacement prior to the unconditional offer to return to work in violation of Section 8(a)(3) of the Act. “See *Home Insulation Service*, NLRB 255 NLRB 311, 313 (1981), enfd. mem. 665 F.2d 352 (11th Cir. 1981).”

f. Antoine Frazer

Respondent contended Antoine Frazer was a permanent replacement hired as a Yard Associate as of October 17, 2014. (Jt. Exh. 2.) However, the undisputed evidence of record indicates that he did not start his employment until December 8, 2014. (GC Exh. 11, 64.) The reason for the delay in his start was a failed background check which was a condition of his employment. The initial background check revealed an outstanding active warrant. (Tr. 350–351, 591.) The Respondent thereafter afforded Frazer a second opportunity to pass a background check and in fact ran a new background check. (GC Exh. 64 p. 5.) He was hired after the second background check but it is unclear from the documentary evidence of record whether in fact he passed it a second time. (R. Exh. 12–27 GC Exh. 11 p. 64 p. 6.) I find that at the moment that Frazer failed his background check, Respondent had an affirmative duty to immediately offer the

vacant position to one of the striking employees. While in some employment contexts an employer might find it reasonable to leave vacant positions open after background check failures and give potential candidates multiple opportunities to pass background checks, the same is not true, when, as in this case, the employer has an affirmative legal duty to reinstate strikers. In the first instance, it is important to reiterate that striking employees remain employees. *NLRB v. Fleetwood Trailer, Co.*, 389 U.S. 375 (1967). Upon Frazer's failure of the background test striking employees with actual job experience and without any similar employment contingencies were waiting to be called back into vacant positions Respondent easily could have made efforts to recall one to fill the position but did not. Respondent's actions are further evidence of the pattern of demonstrated efforts to block retuning strikers. I find the failure to recall a striker to fill the position that became vacant by the failure of the background test violated Section 8(a)(3) of the Act.

g. Oscar Reyes-Perusquia ("Reyes")

Oscar Reyes-Perusquia was an employee who chose to "cross over" and work during the strike. He was employed as a Fence Driver. (Jt. Exh. 1.) Respondent contended that he remained in his position as Fence Driver during the strike. General Counsel argued that this assertion was false and that in fact Respondent effectively transferred Reyes into a Service Tech position to block the recall of a Service Tech person into that role. General Counsel's position is in fact borne out by the testimony and documentary evidence of record. The record reveals that instead of serving as a Fence Driver, Reyes worked almost exclusively on Service Route 6 performing Service Tech duties. (GC Exh. 10.) Further, it was established that the duties of the particular jobs were separated, and it was atypical for Fence Drivers to perform Service Tech work. Ana Flores testified as follows:

- Q. Did Service tech employees ever perform fencing work?
A. No.
Q. And did service tech employees ever perform yard work?
A. No.
Q. And what about pickup and delivery drivers did these employees perform service work?
A. No.
Q. Did the pickup and delivery drivers perform fencing work?
A. It was rare.
Q. And did the pickup and delivery drivers perform yard work?
A. No.
Q. The fencing employees do they perform service tech work.
A. No. (Tr. 105.)

A reasonable conclusion to be drawn from the lack of any clear documentation transferring Reyes into a Service Tech position permanently is that he was merely temporarily transferred into a Service Tech position and therefore Respondent failed to meet its burden of establishing that in fact he was a permanent replacement in violation of the Act. See *H. & F. Binch Co.*, 188 NLRB 720 (holding transferees not permanent therefore unlawful to reinstate strikers). See also *MCC Pacific Valves*, 244 NLRB 931, 933 (holding that employer was obligated to hire strikers at "initial" vacancies).

2. The labor finders hires

Among those whom Respondent contended were "permanent replacements" included seven individuals who Respondent contended were Labor Finders hires that were permanently converted from temporary positions. This assertion does not withstand scrutiny when the documentary evidence in the record is set against Respondent's assertion that all positions had been filled on October 16, 2014. The Labor Finders timecards and work order records show that after October 16, 2014, seven individuals continued to be employed and paid by Labor Finders (LF). (GC Exhs. 17, 18, 18, 19, 56.) Most significant is the fact that the timesheets signed by these employees contained the following language, "All temporary employees assigned to Customer by LF ("LF Personnel") are employees of LF. LF is responsible for hiring, assigning disciplining, terminating and/or reassigning LF Personnel; and, is solely responsible for establishing, providing, and paying wages and benefits to LF Personnel." (GC Exh. 73.) In as much as the Union set forth its unconditional offer to return to work on October 17, 2014, and the seven individuals were still being paid by Labor Finders, and by their own agreements set forth in the signed timecards were still employed by LF after this date, Respondent failed in its burden of establishing the permanence of these individuals and therefore violated Section 8(3) and (1) of the Act. See *Harvey Mfg.*, 309 NLRB 465 (1992).

3. The "Effective Discharge" of 14 strikers.

Longstanding Board precedent makes clear that an "effective discharge" results when an employer falsely claims to have permanently replaced economic strikers when in fact it has not. For example, in *American Linen Supply Co.*, 297 NLRB 137 (1989), the Board held that an employer who informed lawful economic strikers that they had been permanently replaced when in fact the employer had not obtained such replacements effectively terminated the strikers in violation of Section 8(a)(3) and (1) of the Act.

In this case, Respondent knew or should have known that the October 16, 2014, email in which it notified the Union that it had hired permanent replacements to fill "all of the positions vacated by the strikers" was false. It was false not only because of those employees it purposely attempted to masquerade as permanent replacement discussed above but also because of the additional seven individuals who were recruited through the temporary employment agency and were similarly not permanent at the time of the Union's unconditional offer to return to work. In addition, Respondent's own documents taken at face value reveal that both Antoine Frazer and Lester Moreno had not accepted permanent employment as of October 16, 2014, and were not bona fide permanent replacements. (R. Exh. 12-27 to 12-29, 12-53 to 12-55.) I find that Respondent effectively discharged 14 strikers as of the date of its October 16, 2014, pronouncement in violation of 8(3) and (1) of the Act. See *Consolidated Delivery & Logistics, Inc.*, 337 NLRB 524 (2002), *enfd.* 63 Fed. Appx. 520 (D.C. Cir. 2003). See also *W. C. McQuaide, Inc.*, 237 NLRB 177 (1978).

4. The 5 employees determined ineligible for recall

Economic strikers who maintain a right to reinstatement nevertheless can be removed from recall consideration if 1) the

employer made the striker a valid offer to return to work and the striker rejected the offer, or 2) where the employer can demonstrate that the former striker obtained regular and substantially equivalent employment and unequivocally intends to abandon the job he struck job. *Carruthers Ready Mix, Inc.*, 262 739 (1982), *Alaska Pulp Corp.*, 326 NLRB 522 (1998).

(a) *Walter Buckner*

Walter Buckner was placed on Respondent's preferential recall list on October 18, 2014. (Jt. Exh. 1.) No attempt was made to recall him until January 9, 2015. (GC Exh. 48.) On or about January 9, 2015, Human Resources Manager Halley claimed she tried to reach Buckner by phone but was unable to leave a message. (Tr. 277.) She thereafter sent a letter dated January 9, 2015 which noted that if Respondent did not receive a response by 3:00 p.m. 1/19/2015 the Company would "assume" he did not want the position. (R. Exh. 13-18.) The letter however was wrongly addressed to a former address despite the fact that Buckner credibly testified that he informed Respondent by telephone of a change in his address and in fact received correspondence at the new address subsequent to his conversation with Respondent's officials. (Tr. 239.) Because the letter from Halley was sent to his old address, he didn't receive it until Saturday, January 24, 2015, 5 days after the expiration noted on the letter by Halley. Upon receipt of the letter he contacted Halley and left a message on her voicemail indicating that he had moved but received the letter and that he wished to accept the job offer. (Tr. 242-243.) On Monday January 26, 2015, he then went to the Benicia facility and spoke directly with Steve Gutierrez about the job offer and explained that he wanted to accept the offer. While at the facility on January 26, 2015, he signed the job offer and Gutierrez faxed it back to Halley. (Tr. 244, GC Exh. 44.) Later that day Halley contacted him and advised him that his response was untimely and that the position was no longer available. (Tr. 247.) He fully explained that the letter was sent to the wrong address and the delay in his receipt and she indicated that she would speak with someone about it and get back with him. When she called him back approximately 30 minutes later, she advised him that his response was late and the "position was closed." (Tr. 247.) As of January 19, 2014, Buckner was declared ineligible for preferential hire and received no other recall offers. (Jt. Exh. 1, Tr. 248.)

In *Easterline Electronics Corp.*, 290 NLRB 834, 835 (1988), the Board (citing *NLRB v. Betts Baking Co.*, 428 F.2d 156, 158 (1970)) noted that in situations regarding the duty to respond to an offer "[B]oth the employer and employee are bound by the requirement of good faith dealings with each other." Unquestionably, Buckner made good faith efforts to accept the offer very soon after he became aware of it, not only did he call but also went to the facility in person and signed the actual offer. Respondent, on the other hand, violated its duty to act in good faith. Despite Buckner's evidence of the certified mail receipt card that in fact confirmed the truthfulness of his assertions about receipt date of the letter, Respondent refused to take into consideration the delay caused by the mailing of the offer to the wrong address. The time frame given Buckner to respond cannot be said to have been reasonable under the circumstances presented. See *Easterline Electronics Corp.*, supra at 835. I separately

find given the circumstances surrounding the offer, the lapsing language in the offer i.e. "the company must receive you[r] response no later than 3:00 p.m. on 1/19/2015" also renders the offer invalid. (GC Exh. 44.) See for example, *Martell Construction Inc.*, 311 NLRB 921 (1993) (concluding that offers were inadequate by virtue of the similar lapsing language). I find that Respondent's removal of Buckner from the recall list under the circumstances set forth above violated Section 8(a)(3) of the Act.

(b) *Robert Harris*

Robert Harris was placed on the preferential recall list on October 18, 2014. (Jt. Exh. 1.) On June 11, 2015, an offer letter was sent to Robert Harris regarding a Service Tech position. Like Buckner's letter the offer Harris received contained similar lapsing language i.e. "the company must receive you response no later than 3:00 p.m. on 6/19/2015." (GC Exh. 42.) Harris credibly testified that he did not receive any phone calls regarding the recall offer. (Tr. 203.) During this time frame Harris was working late hours and was not able to get to the post office during regular post office business hours. He finally received the offer on June 23, 2015. (R. Exh. 13-45.) After reading the lapse language in the letter, he did not respond to the offer. He credibly testified that he didn't respond because "because it was too late. The day I received it or picked it up would have been passed the date." (Tr. 203.) In view of his credible testimony regarding the difficulties he faced retrieving the letter, his credible testimony that he did not receive a phone call which was corroborated (Halley testified she didn't remember calling him the short response time frame given by Respondent (8 days), and his reliance on the lapsing language in not responding when he received the letter after the response date, I find the offer invalid. (Tr. 302.) In *Carruthers Ready Mix, Inc.*, 262 NLRB 739, 749 (1982), the Board considered whether an employer's telephone calls to strikers were sufficient to satisfy the requirements of a valid offer of reinstatement. The Board found that telephone calls alone were insufficient to communicate an offer of reinstatement" if they do not in fact reach the employee." In so holding, the Board noted that an employer is bound to take "all measures reasonably available to it to make known to the striker that he is being invited to work." Although the letter/ phone call facts in this case are juxtaposed to those of *Carruthers* similar reasoning applies. In this situation, Respondent had the correct contact information of Harris available to it and when it did not receive the delivery receipt and knew the letter had not reached him it did not take reasonable steps to inform him that he was being asked to return to work. I find the lapsing language rendered the offer invalid and in the absence of other reasonable steps to inform him rendered his disqualification from recall unlawful and in violation of Section 8(a) (3) of the Act.

(c) *Ernesto Pantoja*

Ernesto Pantoja was placed on the preferential recall list on October 18, 2014. During his tenure he held the position of Utility Driver. He held a Class A professional driving license which allowed him to perform the highest level driving responsibilities including dump runs. (Jt. Exh. 3; Tr. 369.) Pantoja was removed from the preferential recall list on or about June 19, 2015. (Jt. Exh. 1, GC Exh. 48.) The action that precipitated his

disqualification from recall was his receipt of a June 11, 2015 letter offering him a position as a Service Tech position. (R. Exh. 13–82.) He testified that upon receipt of the letter he called Halley immediately and told her “he would rather wait for a position—my position as a utility driver.” (Tr. 374.) When asked what the differences between the Service Tech and Utility driver he responded, “I think the name says it all. Utility Driver covers all the positions and Service Tech goes to clean the bathrooms of the worksites.” (Tr. 374.) He further testified that as a Utility Driver he only spent 25 to 30 percent of the time doing what would be classified as Service Tech work. (Tr. 375.) In as much as Pantoja was never offered his former or a substantially similar equivalent position his removal from consideration as eligible for recall was improper and violated Section 8(a)(3) of the Act. *Laidlaw Waste Systems Inc.*, 313 NLRB 680 (1994).

(d) *Jorge Rodriguez*

Jorge Rodriguez was placed on the preferential recall list on October 18, 2014. He was a Service Tech who was initially offered a pickup and Delivery position February of 2015, but declined it. Thereafter, late in February, he was offered a Service Tech Position which he accepted but was not placed into the position because another striker who had more seniority than he was awarded the position over him. (GC Exh. 48; Tr. 291.)

Another recall attempt was made on or about April 7, 2015. Respondent sent a certified letter to Rodriguez which was returned as undeliverable. (R. Exh. 13–109 to 13–110.) Despite the fact that in the past Rodriguez had expressed clear intent regarding his interest in returning to work and the fact that Respondent knew the letter hadn’t been delivered to him, Respondent decided to no longer consider him eligible for preferential recall without making any other efforts to contact him. (Tr. 295–296.) This decision was unlawful in violation of Section 8(a)(3) of the Act. See *Alaska Pulp Corp.*, 326 NLRB 522, 528 (1998), finding unlawful the termination of reinstatement rights when a letter offering reinstatement was returned as undeliverable and Respondent made no other efforts to contact despite other available means such as through the Union.

(e) *Daniel Ruiz*

Daniel Ruiz was placed on the preferential recall list on October 18, 2014. He had been employed with Respondent as a Yard Associate. (Jt. Exh. 1.) An offer of reinstatement was sent out to him on January 21, 2015. Respondent never received a delivery receipt for this offer. Halley never spoke to Ruiz regarding the offer and like Jorge Rodriguez was determined to be ineligible for preferential rehire when no response to the letter was received. No efforts were made to follow up on the letter and Halley never spoke to Ruiz. The reasoning set forth above in *Alaska Pulp Corp.* regarding Rodriguez applies equally to Ruiz. Respondent had other available means to contact Ruiz including through the Union but made no efforts to do so prior to considering him ineligible for recall and was therefore unlawful and violated Section 8(a)(3) of the Act. See *Alaska Pulp Corp.*, 326 NLRB 522, 528 (1998).

5. Laidlaw Violations

It is well settled that strikers who have been replaced by permanent replacements remain employees entitled to full reinstatement upon the departure of the replacements. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). After each of the five individuals above Buckner, Ruiz, Rodriguez, Harris, and Pantoja were unlawfully determined to be ineligible for recall in violation of Section 8(a)(3) of the Act Respondent continued to place persons into vacant positions that they could have been recalled into and again violated the Act. More specifically other Service Tech positions were filled after each was determined ineligible for preferential recall. (GC Exh. 48; Jt. Exh.1 R. Exh. 21.)

6. The application of Hot Shoppes

While this matter was pending, the Board issued its decision in *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13 (2016). In its decision, the Board analyzed and provided further guidance regarding the application of the legal principles espoused in *Hot Shoppes Inc.*, 146 NLRB 802, 805 (1964), as it relates to the permanent replacement of economic strikers. The Board noted that, “the permanent replacement of strikers is not always lawful. The Board will find a violation of the Act if it is shown that, in hiring permanent replacements, the employer was motivated by “an independent unlawful purpose.” (citing *Avery Heights*, 343 NLRB 1301, 1305 (2004). The Board after analyzing historical precedent concluded that, “the phrase independent unlawful purpose” includes an employer’s intent to discriminate or to encourage or discourage Union membership.” Id. The Board further clarified that “*Hot Shoppes* does not require the General Counsel to demonstrate the existence of an unlawful purpose extrinsic to the strike but, rather only that the hiring of permanent replacements was motivated by a purpose prohibited by the Act.”

Applying the Board’s reasoning to the facts of this case, I find that the evidence established that Respondent was motivated by an independent unlawful purpose. At the outset it worth mentioning that Respondent maintained what it characterized as a “Non-Union Philosophy.” Its Associate Handbook that contains the following passage:

Non-Union Philosophy: United Site Services will do everything in its legal power to prevent any outside, third party, who is potentially adversarial, such as a union from intervening or interrupting the one-on-one communications or operational freedoms that we currently enjoy with our associates. (GC Exh. 29 p. 7.)

Respondent’s clear pattern of intentional and unlawful actions described above were a reflection of its stated “Non-Union Philosophy.” Contrary to its written policy, the policy that was actually carried out in practice was implemented without regard to whether Respondent violated the law and done so with improper intentions.² The actual implementation of Respondent’s policy as it took form in Respondent’s actions was used and intended to punish strikers and discourage Union membership. As noted above, when Respondent notified the Union that it had filled “all

² In *American Baptist Home of the West*, the Board recognized what it characterized as, “the “widely accepted” principle that otherwise

lawful acts can be rendered unlawful when motivated by improper intentions.” Id. (citations omitted).

vacant positions” it knew or should have known that this was false. This knowledge in and of itself is sufficiently probative of “independent unlawful purpose.” The record is however replete with other indicia of unlawful purpose. For example, the affirmative efforts to mask sham replacements as “permanent” when Respondent knew, or should have known, that they were not “permanent” is substantial evidence of unlawful purpose and its efforts to implement its “Non-Union Philosophy.” The unlawful effective discharge of 14 employees also smacks of “independent unlawful purpose.” So too, the blocking of strikers from returning to the workplace and determining them ineligible for recall evidences unlawful purpose. All of the above referenced violations of the Act were in fact efforts which served to punish strikers by not allowing them to return to the positions which they could have immediately occupied after the strike and as will be discussed in more detail part of Respondent’s efforts to cause disaffection and cleanse its workplace of the Union. All of these actions when viewed independently and taken together manifest “intent to discriminate” and/or “intent to discourage Union membership” and thus establish “independent unlawful purpose” Applying the principles enunciated by the Board in *American Baptist Homes of the West d/b/a Piedmont Gardens* to the facts of this case, I find Respondent violated the Act.

Standing alone is the unlawful purpose which is evidenced in the timing of Respondent’s notification to the Union. Instead of acting in good faith and notifying the Union of its intentions to replace strikers Respondent worked behind the scenes gathering as many persons that it could attempt to pass as “permanent replacements” before providing the Union with any notification. The court in *New England Health Care Employees Union* addressed a question regarding whether the Board properly found that an employer’s decision to keep the hiring of permanent replacements secret until the employer could “get as many bodies hired before the union found out” could support the finding of an “independent unlawful purpose.” The court noted:

Absent such countervailing considerations, and even if one adopts the Board’s own analytic framework, logic suggests that an employer seeking to enhance its bargaining leverage by hiring permanent replacements would have every incentive to publicize the effort, and that an employer seeking only to prolong its ability to withstand the strike would be indifferent to whether the strikers and the union knew what it was doing. Conversely, it would appear that employers with an illicit motive to break a union have a strong incentive to keep the ongoing hiring of permanent replacements secret. The replacement of over half of a unionized workforce with nonunion workers would devastate the union’s power and credibility. An employer seeking to land such a blow cannot simply announce the hiring of large numbers of replacements, because in order to justify a refusal to allow striking workers to return to work under the “permanent replacement” safe harbor, the employer must have achieved an employment relationship with the permanent replacements somewhere between “a mere offer, unaccepted when the striker seeks reinstatement” and “actual arrival on the job.” See *H & F Binch Co. v. NLRB*, 456 F.2d 357, 362

(2d Cir.1972). So an employer seeking to punish strikers and break a union therefore needs enough time to establish an employment relationship with a large number of permanent replacements before the union can react by offering to return to work, and will therefore have a strong incentive to keep the replacement program secret for as long as possible.

Id. at 195–196.

An employer who waits until it has rounded up enough employees to falsely claim all of the positions are filled before notifying the Union of its decision to replace employees creates a “logical implication” that Respondent’s decision was the product of an “illicit motive.” See *American Baptist Homes of the West d/b/a Piedmont Gardens*, supra at fn. 15. An employer with an illicit motive of breaking a union has a strong incentive to wait until after it can claim to have hired all of its alleged permanent replacements to notify strikers because once the strikers find out about the decision to replace them they could immediately unconditionally offer to return to work. In this case, the employer began its striker replacement efforts on the first day. Had the strikers been informed on the first day they might have voted to unconditionally return that very same day, possibly even within hours. I find that given all of the evidence of other unlawful acts in this case, Respondent’s delay before notifying the Union of its decision to replace strikers was calculated to deny strikers the opportunity of returning to work and an attempt to punish strikers, “discourage union membership” and manifests a desire to interfere with protected activity.

I find examining the totality of the evidence including the evidence specifically referenced in the above paragraphs that General Counsel has sustained its initial burden of showing that an independent unlawful purpose was a motivating factor in the employer’s decision to permanently replace economic strikers. Thus, the burden shifts to show that it would have taken the same action even in the absence of unlawful purpose. I find that Respondent has failed in this regard. Moreover, I find its asserted reasons “to minimize training costs, reduce turnover, and maintain customer service levels” are mere pretenses. The reasons set forth by Respondent are simply logically inconsistent with the hiring of replacements. In the first instance, new employees would no doubt incur more training costs as well as the undisputed demonstrated additional costs to convert temporary Labor Finder’s employees to permanent status. Secondly, the strikers knew the work, knew the routes and had been performing the work in a satisfactory fashion. Had Respondent been concerned about customer service levels and “turnover” it could have on the first day of the strike disclosed to the strikers its plan to replace them to induce them to abandon the strike and return to work. The reasons advanced by Respondent are simply not credible and don’t even address the critical issue of why it waited until it falsely claimed it had filled positions to disclose the hiring of permanent replacements. Thus, I find, that Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate permanently replaced economic strikers upon their unconditional offer to return to work.³

³ Alternatively, I would find that the above described false claims and delay in providing the Union notice of the permanent replacement of

strikers is “inherently destructive” of employees’ right to strike. See *Great Dane*, 388 U.S. 26 (1967). The right to strike also includes

7. The Withdrawal of Recognition.

It is established law that “an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union.” *Broadway Volkswagen*, 342 NLRB 1244, 1247 (2004) (citations omitted). In determining whether a causal relationship exists between the unremedied unfair labor practices and the loss of union support, the Board considers the following factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employees disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984). See also, *Beverly Health & Rehab Services*, 346 NLRB 1319 (2006).

Applying these factors here, I conclude that the Respondent's violation of the Act by refusing to recall striking employees would likely cause the Union to lose support among employees. I find that the legion of unfair labor practices, discussed above, would, when viewed objectively, tend cause employee disaffection given that the withdrawal of recognition occurred a mere 10 weeks after the unfair labor practices were committed. I also find that the unlawful refusal to reinstate union strikers and instead employing others not sympathetic to the strike would, when viewed objectively, have the tendency to cause disaffection. Also, the effects of the unfair labor practices were both detrimental and lasted through the time the withdrawal petition was circulated. See *D&D Enterprises*, 336 NLRB 850, 859 (2001). I find strong and compelling objective evidence in the record to show that a mere 10 weeks prior to the unfair labor practices there was a lack of disaffection. The Union won a Board certified election, the union members were actively participating in union affairs and the majority chose to strike with only 4 choosing to cross the picket line. This lack of prior disaffection is strong evidence of the causal connection to the unfair labor practices. See *Bunting Bearings Corp.*, 349 NLRB 1070 (2007), holding that causal connection established in part by lack of prior evidence of disaffection. It is apparent that any Union loss of support among employees was causally related to the unfair labor practices discussed above.

In the alternative, I agree with General Counsel's assertion that in view of the fact that all of the replacements are regarded as illegitimate, Respondent cannot demonstrate an actual loss of majority. Discounting the illegitimate replacements, the Unit consisted of 25 employees only 7 of which constitute valid signatures. (GC Br. at 92–93, Jt. Exh. 1, ¶¶27, 33.) I therefore find that the Respondent's withdrawal of recognition of the Union violated the Act.

CONCLUSIONS OF LAW

The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

enmeshed within it not only the right to strike but also the right to end the strike and return to work.

⁴ General Counsel argued that “search for work” and “work related expenses” ought to be charged to Respondent regardless of whether the

(1) The Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate the economic strikers upon their unconditional offer to return to work.

(2) The Respondent violated Section 8(a)(3) and (1) of the Act by falsely claiming replacements were permanent when in fact they were not.

(3) The Respondent violated Section 8(a)(3) and (1) of the Act by “effectively discharging” 14 employees.

(4) The Respondent violated Section 8(a)(3) and (1) of the Act by declaring employees ineligible for recall.

(5) The Respondent violated Section 8(a)(3) and (1) of the Act by replacing strikers with an independent unlawful motive.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of Local 315 as the bargaining representative of the employees at Respondent's Benicia facility.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

(a) Respondent shall be required to reinstate all Unit employees who engaged in the strike and make whole in all respects for all losses whatsoever resulting from Respondent's unlawful actions and its failure to reinstate the strikers beginning October 17, 2014. Back pay shall be computed on a quarterly basis from the date of the failure to reinstate October 17, 2017, to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall file a report with the Regional Director for Region 20, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s). *AdvoServ of New Jersey*, 363 NLRB No. 143 (March 11, 2016). The Company shall also compensate employees for the adverse tax consequences, if any, of receiving one or more lump-sum back pay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).⁴

(b) Respondent will also be ordered to recognize and bargain in good faith with the Union as the exclusive bargaining representative of the Unit. Further, in the event that Respondent changed the units terms and conditions of employment following its withdrawal of recognition from the Union, upon the Union's request rescind such changes and restore the status quo ante and make whole the unit employees for losses in earnings and other benefits which they may have suffered as a result of such changes.

(c) Respondent shall upon resumption of bargaining, bargain in good faith with the Union on request for the period set forth in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

discriminate received interim earnings during the period. As the Board has yet to authorize such as part of make whole relief, I decline to award it as a remedy.

(d) Respondent shall schedule a meeting during work hours with its employees and in the presence of a Board Agent read the attached notice to employees in English and Spanish. In the alternative, the Respondent shall arrange for a Board agent to read the notice in English and Spanish to employees during work hours in the presence of Respondent’s supervisors.

(e) Respondent will be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, United Site Services of California, Inc. (Benicia, CA), its officers, agents, successors, and assigns, shall

1. Cease and desist from engaging in the following conduct

(a) Failing to reinstate the economic strikers upon their unconditional offer to return to work.

(b) Discharging strikers upon their unconditional offer to return to work.

(c) Failing and/or refusing to recall employees to their former or substantially equivalent positions of employment.

(d) Terminating employees’ reinstatement rights after tendering inadequate or invalid offers of reinstatement.

(e) Withdrawing recognition of Local 315 as the bargaining representative of the employees at Respondent’s Benicia facility and thus failing to bargain with the Union.

(f) 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) All strikers shall be offered reinstatement to their former positions if reinstatement has not already occurred and shall make the employees whole in all respects for any loss of earnings and other benefits suffered as a result of the unlawful conduct in the manner set forth in the remedy section of the decision. . Compensate the employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and shall file a report with the Regional Director for Region 20, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(b) Preserve and provide within 14 days at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(c) Recognize and bargain in good faith with the Union as the exclusive bargaining representative of the Unit. Further, in the event that Respondent changed the units terms and conditions of employment following its withdrawal of recognition from the Union, upon the Union’s request rescind such changes and restore the status quo ante and make whole the unit employees for

losses in earnings and other benefits which they may have suffered as a result of such changes.

(d) Within 14 days after service by the Region, post at its facility in Benicia County California copies of the attached notice marked “Appendix.”⁵ Copies of the notice, on forms provided by the Regional Director after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the 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 October 17, 2014.

(e) 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 the Respondent has taken to comply.

Dated, Washington, D.C. April 3, 2017

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.

The Teamsters Local 315, IBT is the employees representative in dealing with us regarding wages, hours or other working conditions of employees in the following unit:

All full time and regular part-time Service Technicians, Lead Service Technicians, Pick Up and Delivery Drivers, Mechanics, Laborers, and Fence Installers employed by the Employer

⁵ 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.

⁵ 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.”

at its 1 Oak Road, Benicia California facility, but excluding Dispatchers, supervisors and guards as defined by the Act.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT fire employees or otherwise discriminate against employees because of their participation in a lawful strike or because of their support for Teamsters Local 315, IBT, or any other labor organization.

WE WILL NOT fail or refuse to reinstate employees engaged in a lawful economic strike, upon their unconditional offer to return to work, where it is shown, as in this case that we were motivated by an independent unlawful purpose in hiring permanent replacements for the striking employees.

WE WILL NOT fail or refuse to reinstate employees engaged in a lawful economic strike to their former or substantially equivalent positions, following their unconditional offer to return to work where it is shown, as in this case that we were motivated by an independent unlawful purpose in hiring permanent replacements for the striking employees.

WE WILL NOT fail or refuse to recall unreinstated economic strikers to their former or substantially equivalent positions, following their unconditional offer to return to work, when vacancies exist in those positions.

WE WILL NOT terminate our employees reinstatement rights after tendering to them inadequate and invalid offers of reinstatement.

WE WILL NOT withdraw recognition from the Union or refuse to recognize and bargain with the Union as your bargaining representative.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL make all strikers whole for any loss of earnings and other benefits suffered as a result of our unlawful actions.

WE WILL, within 14 days from the date of the this Order, offer our employees who went on strike on October 6, 2014, and who have not yet been reinstated, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights

or privileges previously enjoyed, dismissing, if necessary any permanent and nonpermanent replacements hired during the strike.

WE WILL make whole the employees who went on strike on October 6, 2014, and who have not yet been reinstated, and the employees who may have been reinstated but whose reinstatement was delayed because a permanent replacement supposedly occupied their position on October 17, 2014, for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the this Order, remove from our files any reference to our unlawful termination, termination of reinstatement rights, and/or failure to reinstate the striking employees, and we will, within 3 days thereafter, notify each of them in writing that this has been done and that our unlawful failures will not be used against them in any way.

WE WILL, on request, bargain with the Union as your representative, and for 12 months thereafter as if the certification year had not expired, about your wages, hours, and other working conditions. If an agreement is reached with the Union, we will sign a document containing that agreement.

UNITED SITE SERVICES

The Administrative Law Judge's decision can be found at www.nlr.gov/case/20-CA-139280 by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

