UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION

HOOD RIVER DISTILLERS, INC.,
and
TEAMSTERS LOCAL UNION NO. 760,
and
BOARD OF TRUSTEES OF THE
OREGON PROCESSORS EMPLOYEES TRUST FUND

Case No. 19-CA-260013
19-CA-265595
19-CA-267920
19-CA-268290
19-CA-264083

RESPONDENT’S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE’S DECISION

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Pursuant to Section 102.46 of the National Labor Relations Board’s Rules and Regulations, Respondent, Hood River Distillers, Inc. (“HRD” or “Respondent”), hereby takes exception to the December 10, 2021 decision (“Decision” or “ALJD”) of Administrative Law Judge Geoffrey Carter, as follows:

I. STATEMENT OF THE CASE

1. The ALJ’s decision to grant the Acting General counsel’s request to amend the consolidated complaint and add certain allegations. ALJD 3:10-11. (And in contravention to the case cited by ALJ at ALJD 3:44-46 and the ALJ’s findings at ALJD 4:10-13)

2. The ALJ’s decision to deny Respondent’s Motion to Dismiss. ALJD 4:26-30.

II. FINDINGS OF FACT

 Alleged Unfair Labor Practices

A. December 4, 2018: The Union Requests Bargaining for a Successor Collective-Bargaining Agreement.

3. The ALJ’s finding that “[t]he Union’s bargaining team still had the authority to reach an agreement at the bargaining table.” ALJD 6:25-26.

B. February 27-28, 2019: The First Two Bargaining Sessions

4. The ALJ’s finding that HRD “had a different perspective.” ALJD 6:41-42.

5. The ALJ’s finding that “the parties were not yet in agreement on the time of day the shift differential would begin.” ALJD 7:24-25.

C. March-May 2019: Communications Before Next Bargaining Session

6. The ALJ’s finding that “[a]fter learning that Beranbaum would be attending bargaining as part of the Union’s negotiating team, Respondent arranged to have its attorney, Kristen Bremer Moore, also attend the upcoming sessions.” ALJD 8:12-19 (and including parenthetical about length of commute of Union representatives without reference to commute of HRD’s attorney or availability of hotels).

D. June 24-25, 2019: Third and Fourth Bargaining Sessions

7. The ALJ’s finding that “[t]he parties concluded bargaining for the day, with the Union having the impression that the parties had a deal unless the Board took
issue with the matching percentage for employee contributions to the 401 (k) plan.” ALJD 10:3-5.

E. **July 22, 2019: Respondent Rejects the Union’s What-If Proposal**

8. The ALJ’s finding that only “Bremer Moore did not reply further.” ALJD 10:26-28.

F. **August/September 2019: Communications and Developments before the Next Bargaining Session**

9. The ALJ’s finding “that the professed rule about escorting visitors to be an established past practice when union representatives visited the facility because the evidentiary record does not show that it was followed consistently” (including parenthetical) but failing to acknowledge lack of historic involvement of Union’s representatives. ALJD 11:fn 10; cf. ALJD 11:20-29.; ALJD 12:33-40.

G. **September 27, 2019: Fifth Bargaining Session**

10. The ALJ’s finding “[i]nitially, Respondent worked in Gaudreault’s office, which was next to the conference room where the parties were meeting for bargaining. Later, Respondent’s team moved to another office in a different part of the facility. The Union, meanwhile, decided that it could not bargain further that day because it needed more information about the health care plan and because it remained concerned that Respondent was bargaining regressively.” ALJD 14:7-13.

H. **October 2019 through February 2020: Communications and Developments before the Next Bargaining Session**

11. The ALJ’s finding that “Beranbaum relied on the administrator to request that information directly from Respondent.” ALJD 14:46.

12. The ALJ’s finding that “the Union reiterated that it would contact Respondent about bargaining dates after the Union completed its due diligence about the proposed health care plan and discussed it with the bargaining unit to gain their perspective.” ALJD 16:9-11. (emphasis added)

13. The ALJ’s finding that “[a]mong other topics, union representatives discussed the comparison between the OPET health insurance and the health care plan that Respondent proposed for the bargaining unit.” ALJD 17:2-5.

I. **Mid-March 2020: Covid-19 Pandemic**

14. The ALJ’s decision to “decline to do so [take judicial notice of precautions that various other entities took in response to the COVID-19 pandemic), among other
reasons, there is no evidence that Respondent relied on those other entities to craft its own responses to the pandemic in March/April 2020.” ALJD 19:fn 13.

15. The ALJ’s finding that HRD only “staggered the shifts of office staff…” ALJD 19:15.

J. March 30, 2020: Seventh Bargaining Session

16. The ALJ’s findings in footnote 14, including that “[t]he evidentiary record does not show that he parties delved into these types of calculations during bargaining, or what the numbers would look like if they factored in a fourth contract year (the Union’s March 10 proposal was only for a 3-year contract, and thus did not specify what wage increase, if any, would apply in 2022), or expenses/savings in other areas that relate to wages (e.g., 401(k) plan matching contributions, time loss payments that would no longer be needed if employees enrolled in Respondent’s health care plan).” ALJD 20:fn 14.

17. The ALJ’s finding that “Respondent suggested that it was not necessary to specify the 80 hour/month requirement.” ALJD 21:24-25.

18. The ALJ’s finding giving “little weight to that explanation because the health insurance provisions in the expired contract included the 80-hour/month eligibility language even though that contract also defined a regular employee as someone who worked 1,550 hours in a year.” ALJDO 21:fn 15. Compare “[w]e confirmed that all regular employees must work an average of at least 32 hours a week to achieve the 1,550 hour/year under Art. 4, Section 2 and, therefore, the 80 hour/month qualifier is not necessary.” ALJD 22:8-10.

19. The ALJ’s finding “that the Union was concerned that a 1,550 hour per year requirement for health care coverage, which equated to 129 hours per month, might disqualify a significant percentage of the bargaining unit.” ALJD 22:26-28.

K. March 31 through Mid-April 2020: Additional Communications related to Possible Further Bargaining

20. The ALJ’s finding “([] the Union understood that the mediator’s office was closed but it was not clear to the Union whether the closure would be brief or lengthy). Each party believed that the mediator endorsed its preferred method for bargaining.” ALJD 23:40-43.

21. The ALJ’s finding “(noting that the Union though that the COVID-19 pandemic would pass quickly.)” ALJD 24: 46.

22. The ALJ’s finding “[t]he Union agreed to see what it could do regarding Respondent’s information request to OPET.” ALJD 25:6-7.
L. April 23, 2020: Respondent Reiterates that the Parties are at Impasse and states that it Will Implement its Final Offer on May 1, 2020

23. The ALJ’s finding “(noting that the Union believed “that there is still bargaining to be had between the Parties”).” ALJD 26:5-6.

M. Late April 2020: Respondent Prepares to Implement Final Offer while Union Prepares for a Possible Strike

24. The ALJ’s finding “Respondent noted that two bargaining unit employees who attempted to enroll did not have enough hours to qualify for coverage.” ALJD 26:37-39.

25. The ALJ’s finding “Beranbaum attempted to contact Respondent’s president, Ron Dodge, to see if they could discuss a way to resolve the bargaining dispute.” ALJD 27:2-3.

26. The ALJ’s finding “replacing the formula for Respondent’s matching contributions under the 401 (k) plan with a more general requirement that Respondent provide “no less than a 230 percent match to employee contributions in an amount denied by the Company Plan.” ALJD 28:1-3.

N. May 6: 2020: Bargaining Unit Members go on Strike

27. The ALJ’s finding “and in protest of Respondent’s decision to unilaterally implement its final contract offer...” ALJD 28:12-13.

28. The ALJ’s finding “I do not credit Sumerfield’s testimony that the picket signs did not have “ULP” or “Unfair” handwritten on them for the first few days of the strike. That testimony is undermined by other evidence in the record, including photographs from the first day of the strike that show the handwritten “ULP” and “Unfair” language on strikers’ picket signs.” (emphasis added) ALJD 28:fn 16.

O. May 6 through August 31, 2020: Strike and Related Events

29. The ALJ’s finding that “Picketers followed a practice of picketing in a constant motion in front of driveways for a maximum of 2 minutes before they paused to allow waiting vehicles to enter or exit the driveways.” ALJD 29:15-17.


31. The ALJ’s finding “Respondent hired approximately 25 replacement workers, usually as temporary employees with a potential to move to permanent position (although some new hires started as permanent employees).” ALJD 29:30-32.
P. Ismael Marquez – Strike/Picketing Conduct

32. The ALJ’s finding “Through a combination of Marquez continuing to pause and Mitchell swerving, Mitchell exiting the driveway without hitting Marquez or anyone else on the picket line.” ALJD 31:16-17.

33. The ALJ’s finding “[t]hat difference in testimony is not material to my analysis. ALJD 31:fn 18.

34. The ALJ’s finding “Police officer Michael Martin responded to the scene and advised Cortes and Marquez that there was not a basis for a police report since, among other reasons, no one claimed injury. Officer Martin further advised Cortes and Marquez that they should not have any more physical contact. ALJD 31:31-33.

35. The ALJ’s finding “[[] provided by the Union to Respondent in or after September 2020 in connection with Marquez’ grievance proceedings).” ALJD 31:37-38.

36. The ALJ’s findings in footnote 20.

37. The ALJ’s finding “noting that for the incident to have occurred, he would have had to been on Respondent’s property because tanker trucks drive forward when entering and exiting the facility driveway located in the southwest corner of the property.” ALDJ 32:5-8.

38. The ALJ’s finding “[a]ccording to Mitchell, Marquez showed his middle finger to her as their cars passed each other.” ALJD 32:16-17.

39. The ALJ’s finding “I give little weight to this added detail, as there is no evidence that Mitchell’s children saw Marquez’ alleged gesture (to the extent that such a fact might have any relevance). (See Tr. 1980-1981 (Mitchell testimony that her kids overhead her talking about the gesture with her husband).” ALJD 32:fn 22.

40. The ALJ’s finding “Campbell saw a picketer hold his fingers…” ALJD 32:23-25.

41. The ALJ’s finding “(picketer Kelly Holmes, who Cortes stated was present at the time of the remark and gesture, testified that she never heard/saw Marquez make such a remark or gesture towards Cortes, Campbell or anyone else).” ALJD 33:5-7.

Q. Jaime Viramontes – Strike/Picketing Conduct

42. The ALJ’s finding “Armstrong testified unequivocally during trial that he wrote “brushed” on the report.” ALJD 33:fn 24.
43. The ALJ’s finding “I do not credit Armstrong’s testimony that he saw Viramontes brush his car with a picket sign... I also give little weight to Armstrong’s testimony that the picket sign brushing incident left a scratch on his car.” ALJD 34:fn 26.

44. The ALJ’s finding “[a]fter a few weeks.” ALJD 34:14.

45. The ALJ’s finding “Viramontes denies threatening replacement workers or making comments about coming to their homes and harming them.” ALJD 34:16-17; 31-33.

R. September 1, 2020: Respondent Notifies Strikers about Preferential Rehire List and Terminates Marquez and Viramontes

46. The ALJ’s finding “[a]t some point, Respondent also received handwritten statements from two picketers indicating that Cortes caused the physical contact with Marquez...” ALJD 37:34-35.

47. The ALJ’s finding “(R. Exh. 140 (pp.8-9 (statements of pickers [sic.] Kelly Holmes and Kelli Bell, attached to the corrective action report that Respondent prepared for Marquez’ termination)).)” ALJD 38:4-6.

48. The ALJ’s finding “[t]he evidentiary record does not including any documentation showing how Respondent meted out discipline in the past for misconduct similar to what Marquez and Viramontes allegedly engaged in (e.g., threats of violence, harassment of another employee based on sexual orientation, safety violations).” ALJD 39:13-16.

49. The ALJ’s findings in footnote 30. ALJD 39:fn 30

S. Fall 2020: Respondent Makes Changes to Certain Terms and Conditions of Employment


III. DISCUSSION AND ANALYSIS: “CA CASES”

A. Credibility Findings

51. The ALJ’s use of lack of rebuttal to bolster the credibility of the Union’s witnesses without applying the same standard to HRD’s witnesses. ALJD 40:25-37.
B. Did Respondent Violate the Act when it Unilaterally Implemented its Last, Best and Final Contract Offer on May 1, 2020?

Applicable Legal Standard

52. The ALJ’s finding “did not vary in kind or degree from what has been customary in the past.” ALJD 42:8.

Analysis – unilateral changes in the implemented final offer

53. The ALJ’s finding “I did not find that Respondent had an established past practice of requiring union representatives to be escorted by a member of management (or their designee) when visiting the production or warehouse areas of the facility.” ALJD 43:fn 35.

54. The ALJ’s finding “[i]n their March 10 and 40 bargaining sessions (the sixth and seventh bargaining sessions overall), the parties made significant progress in some challenging areas, particularly regarding health care.” ALJD 43:11-13.

55. The ALJ’s finding “opened up some new questions that needed to be cleared up through additional bargaining, including when the move to Respondent’s health care plan should take effect (e.g., on May 1 or in the month after the contract was ratified), the number of hours that employees would need to work to be eligible for health insurance coverage under Respondent’s plan (80 hours per month vs. approximately 129 hours per month), and whether some of the expected savings that Respondent would garner from the health care plan switch should be allocated to other parts of the contract, but in exchange for higher wage increases in the latter years of the contract. ALJD 43:15-24.

56. The ALJ's finding “It appears that due to “sticker shock” at the higher wage increase that the Union proposed for the latter years of the contract, Respondent did not understand that the Union was proposing a lower overall increase to wages (in dollar value) than in previous offers... the parties never discussed whether the Union’s proposed backloaded wage increases, or some variation thereto, might meet Respondent’s needs.” ALJD 43: fn 36.

57. The Union actually reduced its proposed wage increases towards the end of bargaining on March 30, thereby indicating that it had not yet reached the end of its rope on the issue. ALJD 43:24-26.

58. Given the state of negotiations, the parties were not at impasse when Respondent decided to unilaterally implement its last and final offer on May 1, 2020.” ALJD 43:26-28.

59. The ALJ’s finding “I do not find that the Board has recognized a defense that would permit an employer to implement its final offer based on a union’s alleged
bad-faith bargaining tactic (but in the absence of an impasse). To the contrary, when one party asserts that it may act unilaterally because another party has acted in bad-faith during bargaining, that issue is addressed in the context of evaluating whether the parties have reached a good-faith impasse and whether it would be futile to engage in additional bargaining.” ALJD 44:4-9.

60. The ALJ’s finding “I do not find that the Union engaged in any misconduct that prevented the parties from reaching an agreement or a good-faith impasse.” ALJD 44:21-22.

61. The ALJ’s finding “I disagree with that characterization.” ALJD 44:24.

62. The ALJ’s finding “it is a stretch for Respondent to assert that the Union’s mere suggestion of in person bargaining was tantamount to refusal to bargain and warranted a declaration of impasse.” ALJD 44:27-28.

63. The ALJ’s finding “[w]ith that backdrop, the Union’s position was that the parties should schedule an in-person bargaining session with the mediator for the first available date. Given the uncertainty at the time about just how long the Covid-19 pandemic would persist, I do not find that the Union’s position was unreasonable or designed to frustrate reaching an agreement.” ALJD 44:32-36.

64. The ALJ’s finding “the point is not that it was not unreasonable in March/April 2020 for the Union to seek an in person bargaining session with a mediator at the first available date.” ALJD 44:fn 37.

65. The ALJ’s finding “[s]ince the parties were not at a valid impasse and no other defenses apply, I find that Respondent violated Section 8 (a)(5) and (1) of the Act, within the meaning of Section 8(d), when Respondent unilaterally implemented its last and final offer on May 1, 2020, and thereby: changed rates from what they were under the expired agreement; replaced the formula for matching employee contributions to Respondent’s 401(k) plan with a more general requirement that Respondent provide no less than a 230-percent match to employee contributions...” ALJD 44:38-45:3.

C. Did Respondent Violate the Act by Making Additional Unilateral Changes to Terms and Conditions of Employment after Implementing its Final Offer on May 1, 2020?

Analysis

66. The ALJ’s finding “[u]nder the new policy, most employees earned a higher amount of compensated time off annually depending on their years of service, and all employees were subject to new rules governing how much compensated time off they could “bank” from year to year (among other differences).” ALJD 46:1-4.
67. The ALJ’s finding “the point is not that it was not unreasonable in March/April 2020 for the Union to seek an in person bargaining session with a mediator at the first available date.” ALJD 44:fn 37.

68. The ALJ’s finding “that complaint allegations relating to the additional unilateral changes addressed in this section are closely related to the allegations in the charge in Case 19-CA-260013.” ALJD 46:25-27.

69. The ALJ’s finding “[t]he allegations also arise from the same factual situation and sequence of events.” ALJD 46:29-30.

70. The ALJ’s finding “that the additional unilateral changes are closely related because they arise from the same sequence of events (i.e., after Respondent declared impasse, it made a series of unlawful unilateral changes to working conditions as part of an ongoing course of conduct).” ALJD 46:32-35.

71. The ALJ’s finding “the point is not that it was not unreasonable in March/April 2020 for the Union to seek an in person bargaining session with a mediator at the first available date.” ALJD 44:fn 37.

72. The ALJ’s finding “complaint allegations about the additional unilateral changes are procedurally valid, and I accordingly turn to the merits of those allegations.” ALJD 47:1-2.

73. The ALJ’s findings at footnote 41. ALJD 47:fn 41.

74. The ALJ’s finding “[b]y contrast, I find that Respondent did violate the Act when on September 18, 2020, it announced decisions to grant employees 4 additional paid holidays (to occur between December 24-31, 2020) and implement a new compensated time off policy (to take effect on January 1, 2021). By that time, the strike was over and Respondent was obligated to notify and bargain with the Union about these changes to the terms and conditions of employment. Respondent did not offer a viable defense about changing its compensated time off policy.” ALJD 47:20-25.

75. The ALJ’s findings at footnote 42. ALJD 47:fn 42.

76. The ALJ’s finding “[t]he evidentiary record does not show that Respondent had an established past practice of providing bonuses or extras such as paid holidays; at most, those types of benefits arose sporadically, such as when Respondent paid a one-time bonus to employees following the Pendleton Whisky sale. I also do not find merit to Respondent’s argument that the Union waived its bargaining rights after receiving notice about the paid holidays.” ALJD 47:28-33.

77. The ALJ’s finding “there is no evidence that Respondent subsequently notified the Union that it planned to offer additional paid holidays.” ALJD 48:1-2.
78. The ALJ’s findings at footnote 43. ALJD 48:fn 43.

79. The ALJ’s finding “that Respondent violated Section 8(a)(5) and (1) of the Act, within the meaning of Section 8(d), by failing to continue in effect the terms and conditions of the expired collective-bargaining agreement (CBA) through the following actions without the Union’s consent and without reaching a valid impasse: (a) on about September 18, 2020, changing its paid holidays by granting 4 additional paid holidays between December 24-31, 2020; and (b) on about September 18, 2020, changing its compensated time off policy by announcing a new compensated time off policy, effective on January 1, 2021.” ALJD 48:6-12.

D. Was the Strike an Unfair Labor Practice Strike?

Analysis

80. The ALJ’s finding “[b]argaining unit members, with the Union’s support, then began their strike on May 6, 2020, largely in protest of Respondent’s decision to unilaterally implement its final offer.” ALJD 48:36-49:1-2.

81. The ALJ’s finding “that the strike was an unfair labor practice strike from the start, on May 6, 2020.” ALJD 49:4-5.

82. The ALJ’s finding “that Respondent violated the Act when, in connection with implementing its final offer, it unilaterally changed various working conditions on May 1, 2020. ALJD 49:5-7.

83. The ALJ’s finding “[t]hose unfair labor practices in large part caused the strike, as bargaining unit members began the strike in protest of Respondent’s decision to unilaterally impose its final offer instead of continuing to bargain with the Union. Accordingly, the 25 strikers are unfair labor practice strikers and are entitled to the legal protections that come with that status.” ALJD 49:7-11.

E. Did Respondent Violate the Act when it Stated, During the Strike, that the Strikers Could Be or Had Been Permanently Replaced?

Analysis

84. The ALJ’s finding “that Respondent violated Section 8(a)(1) of the Act when it made the two statements.” ALJD 50:20-21.

85. The ALJ’s finding “[s]ince the bargaining unit members were engaged in an unfair labor practice strike, they could not be permanently replaced and were entitled to immediate reinstatement upon making an unconditional offer to return to work.” ALJD 50:21-23.
86. The ALJ's finding “Respondent’s statements had a reasonable tendency to interfere with the strikers’ union activities because the statements unlawfully warned strikers that their jobs were at risk regardless of their status as unfair labor practice strikers.” ALJD 50:23-26.


88. The ALJ’s finding “[w]hile that message was coercive and violated Section 8(a)(1) of the Act…” ALJD 50:fn 44.

89. The ALJ’s finding “[s]ince the strikers were unfair labor practice strikers who retained the right to immediate reinstatement, Respondent’s announcement was tantamount to a discharge on the day that Respondent made it and violated Section 8(a)(3) and (1) of the Act.” ALJD 50:31-33.

90. The ALJ’s finding “Respondent’s messages was that all strikers would likely be permanently replaced – indeed, 84 percent of the strikers were already replaced, and the remaining (unidentified) few would likely join them in that status. To the extent that Respondent left some ambiguity about which strikers had not yet been permanently replaced, that ambiguity is chargeable to Respondent.” ALJD 50:fn 45.

F. Did Respondent Violate the Act when it Refused to Reinstate the Unfair Labor Practice Strikers after Their Unconditional Offer to Return to Work?

Analysis

91. The ALJ's finding “[s]ince the 25 strikers were engaged in an unfair labor practice strike and made an unconditional offer to return to work, Respondent was obligated to immediately reinstate them with back pay. When Respondent refused to do so on September 1, 2020 (the date that the strikers identified for their return to work), Respondent violated Section 8(a)(3) and (1) of the Act.” ALJD 51:29-33.

G. Did Respondent Violate the Act when it Discharged Marquez and Viramontes for Alleged Strike Misconduct?

Applicable Legal Standard

92. The ALJ’s finding “since I have found that Respondent discharged all of the strikers through its statement on July 30, 2020, Respondent’s decisions to discharge Marquez and Viramontes on September 1, 2020 are based on after-acquired evidence in the form of alleged misconduct that Respondent articulated
after Marquez and Viramontes were already shown the proverbial door.” ALJD 52:fn 46.

93. The ALJ’s finding “I have applied the Wright Line standard since it can apply in a variety of circumstances, and because the questions that arise under Wright Line dovetail with the after-acquired evidence standard insofar as under either standard, a key question is whether the employer would have discharged the employee for the alleged misconduct even in the absence of the union or protected concerted activity.” ALJD 52:fn 46.

Analysis – Marquez

94. The ALJ’s finding “Respondent’s affirmative defense fails because the justifications for Marquez’ discharge do not hold up to scrutiny.” ALJD 53:20-21.

95. The ALJ's finding “First, Respondent departed from its usual practices and did not investigate the alleged misconduct... This created an echo chamber in which the uninvestigated allegations against Marquez received full and unquestioned credit, sometimes resulting in inflated characterizations of what Marquez allegedly did (e.g., the shoulder/arm bumping incident with Cortes became Marquez “physically [striking] an employee while walking on the picket line” in Marquez’ termination letter). Furthermore, Respondent’s failure to investigate shows that Respondent was more interested in discharging Marquez than it was in getting to the bottom of whether Marquez engaged in misconduct.” ALJD 53:20-31.

96. The ALJ’s finding “that an unduly narrow investigation may demonstrate that the employer was motivated to discriminate against the employee. This is what I find here, as Respondent’s limited investigations inevitably led it to conclude (unreasonably) that Marquez and Viramontes engaged in strike misconduct.” ALJD 53:fn 47.

97. The ALJ’s finding “[s]econd, Respondent delayed weeks (and sometimes months) in raising concerns about Marquez’ conduct. That delay suggests that Respondent did not believe the conduct warranted action. Further, the delay denied Marquez the opportunity to respond to the alleged misconduct in a timely manner (i.e., when he and other witnesses would have clearer memories) and, to the extent appropriate, change his behavior going forward.” ALJD 54:1-5.

98. The ALJ’s finding “[t]hird, Respondent did not show that discharge would be appropriate under its policies and practices for Marquez’ alleged misconduct. It was common for Respondent’s employees to use profanity in the workplace. There is no evidence that Respondent took disciplinary action against employees for using profane language or gestures (like showing the middle finger) when in casual conversation or in conflict with another employee. Similarly, there is no evidence that Respondent ever disciplined (much less discharged) an employee for bumping into a coworker.” ALJD 54:7-12.
99. The ALJ’s finding “[t]here is no evidence that Respondent ever took disciplinary action against an employee for a safety violation such as getting in the way of a delivery truck. And, the evidentiary record does not show how Respondent has handled comparable incidence of alleged harassment (based on sexual orientation or any other protected status).... Due to these shortcomings, the proposition that Respondent would have discharged Marquez for the alleged misconduct (even if it occurred) is speculative.” ALJD 54:15-21.

100. The ALJ’s finding “the [acting] General Counsel demonstrated that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Marquez on about September 1, 2020, because of his union and protected concerted activities.” ALJD 54:24-26.

Analysis – Viramontes

101. The ALJ’s finding “the [acting] General Counsel made an initial showing that Viramontes’ union and protected concerted activities were a motivating factor in Respondent’s decision to discharge him.” ALJD 54:30-32.

102. The ALJ’s finding “…by the fact that Respondent took issue with Viramontes’ behavior while he was on the picket line (such as yelling at Mitchell to ask, “when are you HRD scumbags going to get your shit together,” or yelling at replacement workers).” ALJD 54:34-37.

103. The ALJ’s finding “Respondent’s affirmative defense for its discharge of Viramontes fails for the same reasons that the defense failed for Marquez. ALJD 55:4-5.

104. The ALJ’s finding “[o]nce again, Respondent departed from its usual practices and did not investigate the alleged misconduct by interviewing Viramontes or any other individuals who were present at the time of the alleged incidents. ALJD 55:5-7.

105. The ALJ’s finding “[t]hus, the uninvestigated allegations against Viramontes received full and unquestioned credit, sometimes resulting in inflated characterizations of what Viramontes allegedly did (e.g., an incident in which Viramontes brushed a replacement worker’s car with his picket sign evolved into an allegation that Viramontes “struck the vehicle of an employee with a picket sign,” which Respondent characterized as a physical act of violence in Viramontes’ termination letter).” ALJD 55:8-13.

106. The ALJ’s findings contained in footnote 49. ALJD 55:fn 49.

107. The ALJ’s finding that “respondent delayed weeks (and sometimes months) in raising concerns about Viramontes’ conduct, thereby suggesting that Respondent did not believe that the conduct warranted action and denying
Viramontes the opportunity to respond to the alleged misconduct in a timely manner and, if appropriate, change his behavior going forward.” ALJD 55:15-19.

108. The ALJ’s finding “Respondent did not show that discharge would be appropriate under its policies and practices for Viramontes’ alleged misconduct. There is no evidence that Respondent ever discharged an employee for threatening to come to a coworker’s house or otherwise implying an intent to physically fight a coworker. Indeed, when Viramontes was involved in a dispute in which a coworker pushed him, Respondent only issued written warnings to Viramontes and his coworker. And, there is no evidence that Respondent ever took disciplinary action against an employee for a safety violation such as blocking the view of a delivery truck. Due to these shortcomings, the proposition that Respondent would have discharged Viramontes for the alleged misconduct (even if it occurred) is speculative.” ALJD 55:21-29.

109. The ALJ’s finding “the [acting] General Counsel demonstrated that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Viramontes on about September 1, 2020 because of his union and protected concerted activities.” ALJD 55:32-34.

IV. DISCUSSION AND ANALYSIS: CASE 19-RD-271944

A. Did Hood River Distillers Engage in Conduct that Affected the Outcome of the Election?

Analysis

110. The ALJ’s finding “[b]ased on my rulings in this decision, Hood River Distillers committed the following unfair labor practices before the decertification petition was filed on January 28, 2021: (a) between May 1 and September 18, 2020, unilaterally changing wage rates, 401(k) plan terms, employee health insurance, union access rules, paid holidays, and compensated time off without the Union’s consent and in the absence of a good-faith impasse; (b) unlawfully stating on June 30, 2020, that unfair labor practice strikers could be permanently replaced; (c) unlawfully stating on July 30, 2020, that 21 unfair labor practice strikers had been permanently replaced, and thereby discharging all 25 unfair labor practice strikers; (d) unlawfully discharging all 25 unfair labor practice strikers on September 1, 2020, after they made an unconditional offer to return to work; and (e) unlawfully discharging Marquez and Viramontes on September 1, 2020 because of their union and protected concerted activities.” ALJD 58:20-31.

111. The ALJ’s finding “a causal relationship between Hood River Distillers’ unfair labor practices and the employee disaffection expressed in the decertification petition. First, the unfair labor practices occurred steadily between May 1 and September 2020, such that the violations remained fresh in
employees’ minds in the 9 months between the first violations and the late-January 2021 filing of the decertification petition.” ALJD 59:5-9.

112. The ALJ’s finding “the illegal acts had a lasting effect on employees, as the violations communicated to the unfair labor practice strikers that the Union could not protect them and indicated to the replacement workers that they could rely on Hood River Distillers (and not the Union) to act in their best interest.” ALJD 59:11-14.

113. The ALJ’s finding “the violations had a reasonable tendency to cause employee disaffection from the Union, as the violations conveyed the message that the Union was ineffective as the representative of employees in the bargaining unit (as demonstrated by the various unlawful unilateral changes that Hood River Distillers made to terms and conditions of employment) and was powerless in its efforts to protect the rights of the employees who went on strike (as indicated by the unlawful discharges of unfair labor practice strikers).” ALJD 59:14-19.

114. The ALJ’s finding “the evidentiary record shows that union support declined during the relevant time period, as there were no union stewards working in the facility and few, if any employees expressed interest in communicating with union representatives when they attempted to contact them by phone in late 2020 and visited the facility in early 2021. ALJD 59:20-24.

115. The ALJ’s finding “[s]ince those circumstances did not arise before the unfair labor practices, I infer that the unfair labor practices caused the subsequent loss of union support.” ALJD 59:24-26.

116. The ALJ’s recommendation “that the Union’s objection to the election be sustained and that the decertification petition be dismissed.” ALJD 59:35-37.

B. Ballot Challenges

Analysis

117. The ALJ’s recommendation “that the Union’s 24 ballot challenges be sustained.” ALJD 60:22.

118. The ALJ’s finding “that the strikers were engaged in an unfair labor practice strike. The 24 individuals identified in the Union’s ballot challenges were hired as replacements for unfair labor practice strikers and, as such, were not eligible to vote in the election.” ALJD 60:22-25.

119. The ALJ’s finding “I note that I am not persuaded by Hood River Distiller’s argument that some of the replacement workers should be eligible to vote because they would have been hired irrespective of the strike... The Board has not recognized such a defense... Moreover, to the extent that Hood River Distillers
suggest that some of the replacement workers are “additional employees” that it hired to augment its pre-strike workforce, that argument fails on the facts. Hood River Distillers had 25 employees in bargaining unit positions who went on strike on May 6, 2020, and hired the 24 temporary replacement employees during the strike to perform generally the same jobs as the strikers. Under those circumstances, none of the temporary replacement employees can be deemed additional employees who are eligible to vote in the election.” ALJD 60:fn 56.

120. The ALJ’s recommendation “that Hood River Distiller’s 3 ballot challenges be overruled.” ALJD 61:2.

121. The ALJ’s finding “that Hood River Distillers unlawfully discharged Marquez, Morrison and Viramontes in 2020, their ballots are valid and should be counted. This is true as to Morrison even if Respondent eliminated her job position, as at a minimum she would be entitled to reinstatement to a substantially equivalent job position as part of the remedy for being unlawfully discharged.” ALJD 61:5-9.

122. The ALJ’s finding “there are only three additional ballots that warrant counting (the ballots of Marquez, Morrison and Viramontes.” ALJD 61:11-12.

123. The ALJ’s recommendation “finding that the Union has prevailed in the election if the decertification petition is not dismissed.” ALJD 61:14-15.

V. CONCLUSIONS OF LAW

124. The ALJ’s finding “[o]n May 6, 2020, the following 25 employees in the bargaining unit began an unfair labor practice strike: [individual names listed].” ALJD 61:24-29.

125. The ALJ’s finding “Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct: (a) on about June 30, 2020, stating that unfair labor practice strikers could be permanently replaced; and (b) on about July 30, 2020, stating that 21 (out of 25) unfair labor practice strikers had been permanently replaced.” ALJD 61:31-37.

126. The ALJ’s finding “Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct: (a) on about July 30, 2020, permanently replacing the final employees while they were engaging in an unfair labor practice strike: [individual names listed]; (b) in the alternative, on about September 1, 2020, failing and refusing to immediately reinstate the following unfair labor practice strikers after the made an unconditional return to work: [individual names listed]; (c) on about September 1, 220, discharging Ismael Marquez and Jaime Viramontes because they engaged in union and protected concerted activities.” ALJD 61:39-62:18.
127. The ALJ’s finding “Respondent violated Section 8(a)(5) and (1) of the Act, within the meaning of Section 8(d) of the Act, by engaging in the following conduct without the Union’s consent and in absence of a good-faith impasse:” (a) unilateral change to wage rates; (b) unilateral change to the language of Respondent’s 401(k) contributions; (c) unilateral ending of payments under the Union’s health care plan; (d) unilateral changes to language relating to union access to Respondent’s production floor; (e) unilateral changes to paid holidays; unilateral changes to compensated time off language. ALJD 62:20-43.

128. The ALJ’s finding “the unfair labor practices [] affect commerce within the meaning of Section 2(6) and (7) of the Act.” ALJD 62:45-46.

VI. REMEDY

129. The ALJ’s issued remedy that Respondent “cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.” ALJD 63:3-5.

130. The ALJ’s issued remedy based on the ALJ’s finding that Respondent violated Section 8(a)(3) and (1) of the Act through its discharge of all 25 unfair labor practice strikers and requiring Respondent to reinstate all 25 employees, requiring a make whole remedy for loss of earnings or benefits they may have suffered. ALJD 63:7-24.

131. The ALJ’s issued remedy relating to the reinstatement of James Brown, requiring a make whole with reinstatement and backpay notwithstanding evidence that he resigned his employment. ALJD 63:fn 58.

132. The ALJ’s issued remedy that Respondent expunge the disciplinary files of Marquez and Viramontes relating to their termination on September 1, 2020. ALJD 63:26-29.

133. The ALJ’s issued remedy that Respondent rescind unilateral changes put into effect when the Respondent implemented its contract and during the life of the contract. ALJD 63:31-35.

134. The ALJ’s issued remedy that Respondent make whole its employees for any loss of earning and other benefits that resulted from the unilateral changes, including employees’ expenses, and contributions to any fund under the expired collective-bargaining agreement. ALJD 63:35-64:11.

135. The ALJ’s issued remedy that Respondent compensate any former strikers for any search-for-work and interim employment expenses. ALJD 64:13-18.

136. The ALJ’s issued remedy that Respondent compensate all 25 unfair labor practice strikers for any adverse tax consequences of any lump-sum backpay
award, including filing reports with the Regional Director of Region 19. ALJD 64:20-31.

VII. ORDER

137. The ALJ’s order in its entirety.

RESPECTFULLY SUBMITTED: January 7, 2022.

BULLARD LAW

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2022 I served the foregoing on:

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☐ by mailing a true and correct copy to the last known address of each person listed. It was contained in a sealed envelope, with postage paid, addressed as stated above, and deposited with the U.S. Postal Service in Portland, Oregon.

☐ by causing a true and correct copy to be hand-delivered to the last known address of each person listed. It was contained in a sealed envelope and addressed as stated above.

☐ by causing a true and correct copy to be delivered via overnight courier to the last known address of each person listed. It was contained in a sealed envelope, with courier fees paid, and addressed as stated above.

☐ by faxing a true and correct copy to the last known facsimile number of each person listed, with confirmation of delivery. It was addressed as stated above.

☐ by emailing a true and correct copy to the last known email address of each person listed, with confirmation of delivery.

☐ by electronic means through the State Court’s Electronic Case File system, which will send automatic notification of filing to each person listed above at their email address as recorded on the date of service in the eFiling system, if they are registered users or, if they are not, by serving a true and correct copy at the address listed above.

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