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Subject:	Chedraui USA, Smart & Final et al, Case Nos. 21-CA-320939 et al., Case Closing Email
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These cases were submitted for Advice regarding whether the manner in which the Employer structured its hiring process for its new facility violated the Act. The evidence suggests that the Employer's decision to terminate employees at its five existing distribution centers and utilize an "open hiring" process for a much larger single distribution center was made before the Union began organizing at any of the preexisting distribution centers. Therefore, there is insufficient evidence to conclude that the open hiring decision was a result of animus against employees' Union activities. Accordingly, the Region should not allege that the Employer's hiring protocol violated Section 8(a)(3).[1]

Facts

The Employer is a conglomerate of grocery store chains operating throughout Southern California and Arizona. In 2021, as a result of an acquisition, the Employer began exploring options for creating a more efficient distribution system for its various grocery stores. The Employer initially had a single distribution center that managed dry, chill and frozen products, but as part of the acquisition gained four additional distribution centers that each serviced different products or temperature categories. Thus, to reduce leasing and transportation costs, simplify logistical networks, and allow for store growth, the Employer made the decision to integrate the five smaller, disbursed distribution centers into one new, massive, multi-temperature distribution center.

Around the same time, the Employer's CEO determined that the company should staff the new distribution center through an "open hiring" process, rather than transfer employees directly from the smaller facilities.[2] The Employer believed that, given the need to open the new facility in various stages and cut parts of the preexisting workforce at different times, along with the varied work rules, operating methods, and pay and benefits schedules at the different facilities, any staffing process that involved transferring current employees to the new facility would be costly and logistically challenging. Thus, in 2021, the Employer envisioned phased termination of employees at the preexisting distribution centers in tandem with a job fair process that permitted members of the public, as well as then-current distribution center employees, to apply for jobs at the new facility. After these decisions were made, but before informing employees about the integration plan, the Employer began searching for a location for

the new distribution center.

In mid-to-late-2022, the International Brotherhood of Teamsters Local 630 ("the Union") began organizing at two of the Employer's five distribution centers—one located in Commerce, CA ("Commerce DC") and the other in Riverside, CA ("Riverside DC"). The Commerce DC employees voted for Union representation on February 10, 2023 and the Union was certified shortly thereafter. On April 24, 2023, a stipulated election agreement was approved for the Riverside DC unit setting an election for May 18, 2023.

Meanwhile, the distribution center integration plan was proceeding, and on May 8, 2023, the Employer signed a twenty-year lease securing the location that would eventually become the new distribution center. The Employer claims that, as a result of the lease signing, its plans were both firm and public enough that it was necessary to communicate them to distribution center staff. Accordingly, on May 9 and 10, 2023, the Employer held meetings with the staff at all five distribution centers during which it shared certain details about its integration plan along with a general explanation of its open hiring procedure. These announcements included the requirement that current employees who wanted to work at the new distribution center must apply and undergo an interview in the same manner as the general public.

On May 18, employees in the Riverside DC unit voted in favor of the Union, which was certified as bargaining representative thereafter. Since that time, the Employer has refused to bargain about the decision to close the five facilities and terminate employees, but it has bargained about the effects of that decision. In bargaining, the Employer has refused to agree to transfer employees directly from the Commerce and Riverside DCs and has instead insisted on maintaining its open hiring plan, though it has moved on severance payments and certain other issues related to the closures.[3]

Analysis

An employer violates Section 8(a)(3) when it makes staffing decisions in retaliation for employees' union activities. Thus, for example, an employer violates Section 8(a)(3) when, as part of an ownership change, consolidation, or location change, the employer creates a hiring scheme for the purpose of ridding itself of a union. *See, e.g., Allied Mills, Inc.*, 218 NLRB 281, 287-88 (1975) (finding that employer, in refusing to transfer union-represented employees to a new factory thirty miles away because they were "too union oriented" and "too militant," unlawfully used the move as "a vehicle to rid itself of the [u]nion"), *enforced*, 543 F.2d 417 (D.C. Cir. 1976) (table); *Waterbury Hotel Management LLC*, 333 NLRB 482, 550-51 (2001) (in which evidence supported finding that employer

used a "job fair" hiring process to surreptitiously screen out former union members in violation of Section 8(a)(3)). In analyzing purportedly unlawful hiring practices, the applicable framework is the Board's standard from *Wright Line*, with the Board considering evidence such as the employer's "lack of convincing rationale" for failing to hire union-represented employees; "inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive"; and "evidence supporting a reasonable inference" that the employer "conducted its staffing in a manner" to preclude union-represented employees from being hired. *Planned Building Services*, 347 NLRB 670, 673 (2006) (discussing discriminatory hiring in the successorship context), *overruled on other grounds, Pressroom Cleaners*, 361 NLRB 643 (2014). Once the General Counsel shows that the employer's hiring scheme was motivated by antiunion animus, the burden then shifts to the employer to prove that it would have made the same decision "even in the absence of its unlawful motive." *Id.* at 674.

Here, even if the Acting General Counsel were able to demonstrate that the Employer has animus against employees' Union activity, the Employer will be able to meet its rebuttal burden as to the implementation of its open hiring protocol. In particular, the Employer will likely present uncontested testimony that it created the hiring protocol before the Union began organizing. The preponderance of the evidence will therefore demonstrate that it would have implemented the same plan regardless of any Union animus, and the Region should thus not allege that the Employer's hiring protocol violated Section 8(a)(3).

This email closes these cases in advice. Please contact us with any questions.

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[1] There are 22 open charges filed by the Union against the Employer for a total of approximately 112 additional outstanding allegations of unlawful conduct. We note that those other issues were not submitted to Advice.

[2] The Employer insists that this decision occurred in 2021 in conjunction with the decision to close the Employer's existing distribution centers and open a single new, larger distribution center. While the Employer has provided ample documentary evidence to support its contention that the integration decision occurred in 2021, it claims that no documentary evidence exists to support its contention that the open hiring process was also settled upon in 2021. However, the Employer suggests that its CEO would testify to that timing. Further, the Union has not provided evidence to suggest the decision occurred later, such as after the Union's organizing campaign began, nor has the Region uncovered any. Accordingly, the Employer's contention in this

regard is uncontested.

[3] Advice takes no position on the open allegation of whether the Employer has bargained in good faith over the effects of its integration decision.

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