United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 10, 2001

TO : Gerald Kobell, Regional Director

Region 6

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Mail Contractors of America, Inc.

Cases 6-CA-31288; 6-CA-31492-1 (F-17-CA-20625); 6-CA-31431

(F-17-CA-20625);6-CA-31431512-5042-0116(F-18-CA-15592);6-CA-31518512-5042-0133

(F-12-CA-20769); 6-CA-31519 512-5042-0133-1100

(F-12-CA-20598); 6-CA-31488; 512-5042-0175

6-CA-31561; 11-CA-18650; 10-CA-32353; 512-5042-0183

14-CA-25973 (1-2); 4-CA-29178; 524-0150-5000 and 17-RC-11837 524-0150-7500

524-0167-1033-5000

524-6708-5600

625-2283

625-7728-1200

625-8883-2838

These cases were submitted for advice concerning whether the Employer, in the context of a companywide union organizing campaign, violated the Act by withholding new and improved benefits from its facilities at which representation petitions were pending and at facilities where the Union was newly certified, while conferring those benefits on employees at its facilities at which no petition had yet been filed.

FACTS

1. The Parties' Campaigns

Mail Contractors of America (Employer) is engaged in long distance mail hauling. Its headquarters and principal place of business are located in Little Rock, Arkansas, and it maintains 17 terminals and 40-50 relay points throughout the country. The United States Postal Service (USPS) is the Employer's exclusive customer. During the last few years, the Employer has experienced notable growth, primarily through the acquisition of its smaller competitors. Although the Teamsters have previously attempted to organize the Employer's drivers at some of its facilities, the Employer's employees have never been represented by a labor organization.

In April 1999, the American Postal Workers Union (Union) undertook an organizing campaign among the Employer's truck drivers on a companywide basis, beginning with employees at the Employer's Des Moines facility. The Employer responded, through both local company officials and top management, including the Employer's General Counsel, by distributing literature and holding meetings. The Employer's conduct at the Des Moines facility during this time did not result in the filing of any unfair labor practice charges. The Union filed a representation petition on June 1, 1999 and became the certified representative for the Des Moines drivers on September 15, 1999.1

In May 1999, the Union began to organize drivers at the Employer's W. Memphis facility. The Employer's response to the organizing campaign was similar to its response regarding the Des Moines facility and likewise did not result in any independent Section 8(a)(1) allegations. The Union became the certified representative in October 1999. The parties are engaged in bargaining, but have not yet reached an agreement.²

In October 1999, the Union began organizing drivers at the Employer's Jacksonville facility. The Employer initially responded by holding meetings conducted by company management, including the Employer's General Counsel, its then-CEO and the Jacksonville terminal manager. During these meetings, the Employer apologized to the employees for having neglected them and solicited from the employees reasons for their dissatisfaction. The employees set forth several complaints, including the cost of health insurance and truck maintenance. The Employer

¹ The parties have not yet reached a collective bargaining agreement covering the Des Moines drivers.

While the Union filed a charge alleging that the Employer violated Section 8(a)(1) and (3) by withholding benefits from the W. Memphis drivers as well as from employees at other organized facilities, that charge was later withdrawn because of a commitment made by the local union at the bargaining table. The only outstanding charge pertaining to the W. Memphis facility alleges that the Employer violated Section 8(a)(5) by unilaterally altering the insurance benefits of employees at the W. Memphis, Des Moines and Jacksonville facilities. The Region has found merit to this charge.

indicated that it would "look into" those concerns and would later respond to the employees.

The Employer had become aware that the Union was organizing on a companywide basis. 3 Admitting that the Union's victories in W. Memphis and Des Moines served as a "wake up call," the Employer stepped up its response to the Union's organizing drive after a representation petition was filed in Jacksonville on November 23, 1999. The Employer hired a consulting firm, Labor Relations, Inc. (LRS) to conduct a companywide "communication campaign" among its drivers. According to the Employer's General Counsel, the campaign had two purposes, "to provide employees with an explanation concerning the facts of unionization and to help the Employer determine how to improve communications with the employees." The campaign consisted of mandatory and voluntary employee meetings, 4 one-on-one discussions between managers and employees, cookouts, distribution of literature and presentation of antiunion videotapes. The Employer used the meetings to communicate its concerns about unionization, and at the nonunionized facilities, to solicit employees' concerns and suggestions for improvements within the company.

Despite the Employer's antiunion campaign, the Union became the certified bargaining representative of the Jacksonville drivers on February 18, 2000.⁵ The parties did not begin bargaining until May and have not yet reached a final agreement.

During this time, the Employer took its "communication campaign" to its Greensboro, Atlanta and Philadelphia

³ The Employer's General Manager sent a memorandum on July 2, 1999 to its employees informing them that the Union had filed a representation petition in Des Moines. The memo also stated that the Employer had "heard many rumors that the [Union] is making a variety of promises to Contract Drivers [its employees] throughout the Country to persuade them to sign union authorization cards."

⁴ Employer representatives were generally not present at these meetings other than to introduce the LRS consultant.

⁵ All subsequent dates are in the year 2000 unless otherwise indicated.

facilities.⁶ At the time the Employer began holding meetings in these facilities, the Union had not yet solicited authorization cards, although the Employer subsequently became aware of card solicitation at these facilities. The Employer continued to hold numerous employee meetings, and has acknowledged that employee suggestions solicited at the meetings largely formed the basis for the Employer's benefits announcements. The Union's organizing drive has since stalled in Greensboro, Atlanta and Philadelphia.

The parties each took their campaigns to the Employer's St. Louis facility, where the Union filed a representation petition on February 18. LRS consultants soon began holding meetings at the facility, although the Employer did not solicit employee grievances at this location. The representation election, originally scheduled for March 19 and 20, has been blocked by the pending charges. The Region has determined that support for the Union began to dissipate once the Employer issued its benefits announcements.

Finally, a representation petition was filed on March 1 at the Employer's Lincoln facility. The April 10 election resulted in a 5-11 loss for the Union. Many of the Lincoln employees have since requested the return of their signed authorization cards and have signed a petition stating that they no longer wish to be represented by the Union.

During its campaign, the Employer also distributed several fliers, companywide. The first flier entitled, "Union Update," referred to the postponed election in St. Louis and stated that the Union filed "blocking charges in order to prevent the election," because the Union knew that the St. Louis drivers would "soundly reject Union representation if allowed to vote." (Emphasis in the original.) The Employer distributed the flier to all of its facilities, including those recently unionized, allegedly in order to follow its practice "of keeping all of its employees informed as to representation matters within the company." The second flier stated, "[b]eware of the [Union's] true motivation in targeting Contract Drivers

⁶ The Employer also held similar mandatory meetings in Kansas City and Dallas during which it solicited employee grievances.

 $^{^{7}}$ The Union filed timely objections which are currently pending.

for the Union!" The Employer has asserted that distribution of this flier to the certified facilities was accidental. The third flier at issue, distributed to all locations in April, states that the Lincoln drivers "overwhelmingly voted against [Union] representation," and further, "[w]e see this as a vote FOR **Teamwork**, and we appreciate their trust, confidence and support." (Emphasis in the original.) The flier continued, "[w]e do not know if the [Union] plans to interfere with the Lincoln election like they did in the St. Louis election, but we can tell you that we will not file any objections." According to the Employer, it distributed this flier to inform all employees of the "status of the Union's organizing effort throughout the company."

- 2. The Employer's Benefits Implementation Plan
 - a. December 17, 1999 benefits announcement

The Employer made the first of three benefits announcements in a December 17, 1999 memorandum addressed to all of the Employer's terminals except its Des Moines, W. Memphis and Jacksonville facilities.8

The announcement, signed by the Employer's then-president, read, "I am proud to announce some new driver benefits for drivers reporting to the terminals listed above!" The new benefits were: (1) doubling of call out pay; 9 (2) expanding of premium pay; 10 (3) permitting use of vacation in daily, rather than weekly, increments; and (4) arranging for direct deposit of paychecks. The

⁸ At the time of this first announcement, the Union was the certified representative in the Des Moines and W. Memphis terminals and had filed a representation petition in Jacksonville.

⁹ Drivers would now receive compensation for four hours' work (increased from two hours), if they were "called out" for a run, even if the run amounted to less than four hours or was subsequently cancelled.

¹⁰ This benefit compensates drivers who are laid over for 24 hours or more longer than the usual layover due to a holiday. The benefit was retroactively effective in order to compensate drivers laid over during the previous month's Thanksqiving holiday.

announcement concluded, "[t]hanks for your hard work, and thanks for your teamwork."

The Employer claims that ideas for these benefits came from discussions held during the Employer's annual managers' meeting in September 1999, as well as from employee suggestions given to those managers. The Employer also claimed that while these benefits had been considered at an earlier time, they were not implemented until December 1999 because the Employer had been occupied with other activities, including a union election. Further, the Employer contends that its benefits plan was a continuation of an ongoing effort to give its drivers new and improved benefits in order to remain competitive at a time when there was a driver shortage in the industry.

The benefits announcement was distributed in employee mailboxes and posted on the Employer's bulletin boards at unorganized facilities. Although the Employer denied that the announcement was distributed to drivers at its Des Moines, W. Memphis and Jacksonville facilities, drivers at the Des Moines facility assert that they received the announcement in their mailboxes. Employees also learned of the announcement from other drivers stationed in the recipient facilities. When the Des Moines and Jacksonville Union locals demanded that the benefits be granted to their unit drivers, the Employer refused, arguing that the issue should be addressed in bargaining.

b. February 9 benefits announcement

At the time of the Employer's second benefits announcement, the Union had won an election in Jacksonville, ¹³ and it had begun soliciting authorization cards in several facilities, including St. Louis and

 $^{^{11}}$ Although it is unclear which union election the Employer is referring to, the Union became the certified representative at the Des Moines and W. Memphis facilities in fall 1999.

¹² Drivers from the Employer's locations frequently come into contact with one another, since they run "relays" between the various locations and facilities. Information is also shared on the road through CB radios.

¹³ Although the election was conducted on January 12, the Union was certified on February 18, after the benefits announcement had been distributed.

Lincoln. The Employer's flier, with the heading, "MCofA is Making a New Commitment to Employee Satisfaction," again was addressed to all of its facilities except those located in Des Moines, W. Memphis and Jacksonville.

The immediate benefits included: (1) the appointment of a new "Vice President of Employee Relations," to visit terminals in order to assist employees with work-related matters; (2) the establishment of a new 1-800 number Employee Hotline; 14 and (3) the establishment of a new-hire referral bonus policy. The announcement also stated that the Employer was considering additional new benefits, such as: (1) offering less expensive health insurance options; (2) reducing the critical notice period associated with vehicle accidents; 15 and (3) replacing the traditional holiday bonus of pecans with an alternative holiday bonus. As with the first announcement, drivers at the unionized facilities received copies of the announcement from other drivers. The W. Memphis local demanded these benefits for members of the bargaining unit but again the Employer refused, stating that it would withhold the benefits for use as "bargaining chips" in contract negotiations.

c. March 19 benefits announcement

Consistent with the two prior memoranda, the Des Moines, W. Memphis and Jacksonville facilities were not listed as recipients of this announcement. Although included in the prior two announcements, the St. Louis and Lincoln facilities, at which the Union had since filed representation petitions, were also excluded from the list of recipients of the third announcement.

The announcement listed new benefits and the dates they were to become effective. The new benefits included: (1) increase in Employer's contribution to 401(k) plans; (2) bereavement and jury duty leave; (3) reinstatement of previous health insurance options; (4) establishment of the position of Vice President of Employee Relations; (5) newhire referral bonus; (6) reduction in the vehicle accident

 $^{^{14}}$ Ultimately, the Employer did not set up a separate 1-800 number, but did offer direct extensions for the main 1-800 line. This was not done at the unionized locations, or at the St. Louis or Lincoln facilities.

¹⁵ The exact meaning of this benefit is unclear, although the idea for the benefit came from an employee who had received stiff discipline for a minor vehicle accident.

critical notice period; (7) increase in call-out pay; and (8) expansion of premium pay for longer holiday layovers. 16 The announcement stated that the direct deposit option and the incremental vacation benefit option, promised in the December 17, 1999 announcement, would be "coming soon." Finally, the announcement identified as still being evaluated: (1) changing drivers' vacation schedules; (2) a new holiday system allowing employees to "bank" days and use them later; (3) shopping for improved insurance options; (4) developing programs to pass the Employer's purchasing power onto employees; and (5) surveying employees' ideas for an alternative holiday bonus to replace the traditional pecans.

The announcement was again distributed through employee mailboxes, bulletin boards and directly to employees during meetings in Greensboro and Atlanta. As with the prior announcements, drivers at the excluded facilities received notice of the announcement from other drivers. The Jacksonville local again demanded that the benefits be granted to the unit employees, but the Employer again refused, contending that the benefits were an appropriate subject of bargaining. 17

The Region has concluded that until the events described above, the Employer had given employees improved benefits on a haphazard basis; the Employer had no established practice of improving benefits on a regularly scheduled basis. The Employer's overall benefits announcement plan has halted the Union's organizing drive because employees fear that they would be deprived of the new benefits if they select the Union as their representative. This fear apparently was created not only from the benefits announcements themselves which were not addressed to unionized locations, but also by the

¹⁶ Items four through eight had been listed in prior benefits announcements.

¹⁷ The parties have not yet begun bargaining over any of these benefits as the Union agreed to the Employer's request that the parties first bargain over non-economic issues. The parties at the W. Memphis facility have resolved almost all of those issues, but the Union claims that the Employer stated in off-the-record discussions between the negotiators there that it does not intend to agree in bargaining to any benefits other than those already provided to employees at the nonunionized facilities.

statements and actions of various Employer representatives. 18

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by granting benefits to employees at its facilities at which no representation petition had been filed, and Section 8(a)(3) and (1) by withholding them from employees at facilities at which the Union had filed a petition or was the newly certified representative, in the context of a companywide Union organizing campaign.

These charges involve the timing of the grant or denial of benefits in three distinct situations: (1) at facilities at which no election petition had been filed and employees received benefits; (2) at facilities at which the Union had petitioned for representation and where the employees were denied benefits (St. Louis, Lincoln and Jacksonville); and (3) at facilities at which the Union was the certified representative and where the employees were denied benefits (Des Moines, W. Memphis and Jacksonville¹⁹).

1. Grant of benefits to facilities at which no representation petition had been filed

The Board has held that absent a showing by an employer of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, it will infer an improper motive and interference with employee

18 The Region has concluded that the Employer committed numerous independent Section 8(a)(1) violations during the course of its campaign, including promises of benefits, solicitation of grievances, threats and interrogation. In particular, the Region alleges the Employer violated Section 8(a)(1) when it told employees during mandatory meetings held at its nonunionized facilities (and at its Jacksonville facility prior to the election), that they should "wait and see what happens in Des Moines," before

deciding whether to support the Union.

¹⁹ The first benefits announcement was issued during the critical preelection period at the Jacksonville facility. By the time the third and final announcement was issued, the Union was the certified representative there.

rights. 20 While an employer may lawfully grant unprecedented benefits in order to prevent loss of many experienced employees or to remain competitive in attracting qualified employees, 21 the evidence must show that the benefits would have been granted at the time they were absent the union's activities.

In <u>Springfield Jewish Nursing Home</u>, ²² in finding that evidence showed that the employer's wage increase to unrepresented nurses prior to an election was justified by its need to remain competitive, the Board specifically noted that wage increases had been granted earlier that year to other employees, and that those increases, as well as the one at issue, were the result of periodic wage surveys conducted by the employer. In addition, there was no evidence that the employer actively tried to disseminate news of the wage increase to the unit employees. ²³

Here, we note that while the Employer's announcements preceded any critical preelection period at the affected facilities, they did occur while the Union was engaged in a companywide organizing campaign. Indeed, the evidence indicates the campaign was the impetus for the announcements. As the Employer admits, the Union victories at W. Memphis and Des Moines were a "wake up call" that caused it to elicit employee suggestions that were the basis for the benefits announced. Given these circumstances and the unprecedented nature of the benefits, it is appropriate to infer the Employer's purpose was to forestall organizing at these facilities.

MOFY, Operator of KOFY TV-20, 332 NLRB No. 67, slip op. at 3 (September 29, 2000) (citing Yale New Haven Hospital, 309 NLRB 363, 366-67 (1992)); see also Overnite

Transportation Co., 329 NLRB No. 91, slip op. at 3, 23 (November 10, 1999) (Board affirming ALJ's finding that unprecedented wage increase given to unrepresented employees at the height of the union's organizing campaign was unlawful); Speco Corp., 298 NLRB 439, 439 n.2 (1990).

See, e.g., Craft Maid Kitchens, 284 NLRB 1042, 1043-44 (1987); Springfield Jewish Nursing Home, 292 NLRB 1266 (1989); Poultry Packers, Inc., 237 NLRB 250, 253 (1978).

²² 292 NLRB 1266, 1266 (1989).

²³ <u>Id.</u>

The disparate distribution of benefits reinforces this conclusion. Because the announcements were addressed only to those facilities where the Union had not filed a petition, the announcements themselves communicated to all employees that only those employees at those facilities would receive the benefits. Thus, the St. Louis and Lincoln facilities were listed as eliqible for benefits on the first two benefits announcements, but were omitted from the final announcement after representation petitions were filed at those facilities. The Employer's message conveyed by the benefits announcements is two-fold: (1) it informs employees at facilities where the Union has not yet filed a petition that they are better off without the Union, because the filing of a petition will subsequently render them ineligible for benefits; and (2) it informs represented employees (or employees at facilities where a petition has been filed), that they have become disadvantaged and ineligible for benefits because of their union activities. See, for example, American Telecommunications Corp., 24 in which the employer informed its unrepresented employees that they had received two paid holidays which the employees at the employer's newly represented facility had not yet received. The employer told the unrepresented employees that while enjoying their newly-granted Good Friday holiday, they could try calling their friends who worked at the represented plant, but that the represented employees would not be home because they would be working that day. 25 The Board concluded that such statements led to the:

[I]nescapable inference . . . that, if the employees at [the unrepresented facility] also selected the Union as their representative, they would be placed on par with the [represented] employees and also would be denied further improvements in benefits As a corollary, [the employer's] statement also indicated that if the [unrepresented] employees rejected union representation they would continue to receive all further benefits, such as additional holidays, which would be denied unionized employees.²⁶

Finally, as to the Employer's claim that the benefits were justified by a need to remain competitive, the Employer has not presented any evidence showing that its

²⁴ 249 NLRB 1135, 1135, 1136 (1980).

 $^{^{25}}$ <u>Id.</u> at 1136.

²⁶ Id. at 1137.

wages are uncompetitive, that drivers are resigning at an unusually high rate or that it is unable to attract qualified applicants.²⁷ Therefore, we conclude that the Employer announced and implemented new benefits because of the Union's victories in Des Moines, W. Memphis and Jacksonville and because the Employer desired to forestall the Union's companywide organizing drive. We therefore conclude that the Employer's business justification for the timing of the grant of benefits to these facilities is insufficient to establish that its decision was "governed by factors other than the union campaign."²⁸ Therefore, the Employer violated Section 8(a)(1) by granting benefits to its employees at facilities at which no petition had yet been filed.

2. Benefits withheld from facilities

As just explained, the evidence supports the conclusion that the Employer acted with a discriminatory purpose in excluding from eligibility for benefits the facilities where employees had petitioned for an election or voted for union representation. Its announcements of the benefits made clear to all employees that they would be better off by avoiding union activities. Specifically, it is reasonable to assume that the Employer knew that employees at facilities where benefits were denied would

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^{27 [}FOIA Exemption 5

Noah's Bay Area Bagels, slip op. at 4. The Board in Noah's Bagels found that the employer had established a legitimate business reason for the timing of the restoration of previous (and more attractive) health insurance coverage, including, "urgent expressions of companywide employee distress over their loss of the [] plan." Id. at 3. Notably, the plan itself was discontinued by the employer's parent company following its acquisition of the employer, rather than by the employer itself. Id. Further, the employer immediately began attempts to persuade its parent company to restore the plan after the announcement of the change, two months before the union filed a representation petition. Id.

receive notice of the Employer's benefits announcements, a situation which did in fact occur.²⁹

a. The facilities where petitions were pending

We reject the Employer's claim that it was precluded from granting the benefits at the facilities where petitions were pending because of the rule against granting benefits during the critical preelection period. To be sure, the Board has modified its general rule requiring an employer to grant benefits while a representation petition remains pending as if the petition had never been filed, 30 to deal with an employer which has a "haphazard"31 past practice of granting benefits. 32 Such an employer may lack objective evidence to bolster its claim that the benefits given during the critical period are the same as they would have been in the absence of the representation petition.³³ Thus, when faced with this dilemma, an employer may withhold benefits during the critical preelection period provided it truthfully tells its employees: (1) that it has merely postponed or deferred the benefits which will be retroactively granted to them after the election and regardless of its outcome; and (2) that it has postponed or deferred the benefits only to avoid the appearance that it interfered with the election. 34 The reason behind this

²⁹ This assumption is based on the nature of the Employer's operation, in which drivers from one location run "relays" to other locations, after which drivers from other locations pick up the load for continuation to its final destination. Therefore, drivers from different facilities frequently come into contact with one another during the normal course of the Employer's business.

^{30 &}lt;u>H.S.M. Machine Works</u>, 284 NLRB 1482, 1484 (1987) (citing <u>The Great A & P Tea Co.</u>, 166 NLRB 27, 29 n.1 (1967), <u>enfd.</u> in relevant part and remanded 409 F.2d 296 (5th Cir. 1969)).

³¹ "Haphazard" benefits are "fixed in neither time nor amount." <u>H.S.M. Machine Works</u>, 284 NLRB at 1483.

 $^{^{32}}$ Id. at 1484.

 $^{^{33}}$ Id.

^{34 &}lt;u>See id.</u>; <u>see also Noah's Bay Area Bagels</u>, slip op. at 4 (finding that the employer unlawfully withheld restoration of health insurance benefits from employees at one facility

requirement is to avoid placing the onus for the employer's decision on the union. 35

The Employer gave no such assurances to any of its employees where petitions were pending at any time. While the Employer argues that it refrained from directly placing the blame for its withholding of benefits on the Union, the Employer failed to inform employees at those locations that the benefits would be only temporarily deferred until after the elections at those facilities, 36 (and regardless of the outcome of those elections), in order to avoid an appearance of interference. Rather, the Employer's silence on this subject left the benefits announcements themselves to convey the message that the Jacksonville, St. Louis and Lincoln employees were and would remain ineligible for benefits because the Union had filed representation petitions at those facilities. This message was reinforced as to the St. Louis and Lincoln facilities, which, although listed on the first two announcements, were omitted from the third only after the Union filed petitions at those locations. Such conduct violates Section 8(a)(1) and (3) of the Act.

b. The union-certified facilities

The Board has held that when an employer which employs both represented and unrepresented workers grants a benefit

prior to an election, while lawfully restoring them to its other facilities, since those employees were given no "assurances that the withholding of the [health insurance] plan at that store was only temporary and that it would be restored retroactively to them following the election, regardless of its outcome"); Kauai Coconut Beach Resort, 317 NLRB 996, 996, 997 (1995) (in overruling an election objection, the Board found that the employer announced that it would defer announcing the amount of a wage increase until after the election, that it did so in order to avoid the appearance of interference with the election, and that the retroactive pay raise would be given irrespective of the outcome of the election).

³⁵ <u>H.S.M. Machine Works</u>, 284 NLRB at 1484.

³⁶ The Employer has not simply postponed the implementation of benefits, but rather continues to withhold them from the Jacksonville facility, even after the Union has been certified.

to unrepresented employees, the failure to give represented employees the same benefits that are made available to unrepresented employees violates Section 8(a)(3) when there is independent evidence that the employer had a discriminatory motive.³⁷ The Board has rejected the argument that withholding such benefits from the represented employees is "inherently destructive."³⁸

We conclude that the evidence is sufficient to demonstrate that the Employer withheld the new benefits from its represented employees in order to retaliate against them for their selection of the Union as their collective-bargaining representative. The Employer has demonstrated strong animus toward the Union by granting the benefits only to those employees who declined, or had not yet filed a representation petition, while at the same time systematically withholding the benefits from employees who were already represented or for whom petitions had been filed. In this sense, the Employer's unlawful motive is gleaned from its unlawful plan of granting benefits only to employees at those facilities at which no representation petition had been filed, in order to dissuade them from supporting the Union.

We emphasize that the Employer took these actions during and in response to a companywide organizing drive by the Union. The Employer's response is similar to the

Phelps Dodge Mining Co., 308 NLRB 985, 995-98 (1992), enf. denied, 22 F.3d 1493 (10th Cir. 1994). In denying enforcement, the Tenth Circuit in Phelps Dodge found insufficient evidence of union animus, 22 F.3d at 1498-1500. See also L & M Ambulance Corp., 312 NLRB 1153, 1156-57 (1993); Chevron Oil Company, 182 NLRB 445 (1970), enf. denied on other grounds, 442 F.2d 1067 (5th Cir. 1971) (granting benefits only to unrepresented employees violative of 8(a)(3) where employer engaged in bad faith bargaining and 8(a)(1) threats and coercion); Florida Steel Corporation, 226 NLRB 123, 124 n.9 (1976), enfd. mem. 562 F.2d 46 (4th Cir. 1977) (employer's withholding of benefits from union-represented employees independently violative of 8(a)(3) where withholding arose in context of flagrant 8(a)(1) and (3) violations).

³⁸ B.F. Goodrich Co., 195 NLRB 914, 915 and n.4 (1972); Empire Pacific Industries, Inc., 257 NLRB 1425 (1981) (reaffirming B.F. Goodrich, supra, and rejecting 8(a)(3) "inherently destructive" theory of violation).

"carrot and stick" campaign undertaken in <u>Overnite</u>

<u>Transportation Co.</u>³⁹ In <u>Overnite</u>, the employer, at the height of the union's companywide organizing campaign, unlawfully granted an unprecedented wage increase to its unrepresented employees while at the same time stating in the company newsletter that the represented employees would not receive the increase, but would "have to wait for negotiations." The Board stated that the employer's combined actions sent an "unmistakably clear" message to the employees that "they could choose to remain unrepresented and enjoy any pay increase the [employer] may grant in the future, or they could vote for union representation and forego such benefits." The Board found that the employer's misconduct directly affected all bargaining unit employees. 42

The Employer's message was equally clear and directly affected its represented employees. The benefits announcements themselves, which were not applicable to represented units, coupled with other allegations of Section 8(a)(1) conduct, including advising unrepresented employees to "wait and see what happens in Des Moines," 43

³⁹ 329 NLRB No. 91, slip op. at 3.

 $^{^{40}}$ <u>Id.</u> While the parties settled most of these allegations, they were considered for the purpose of determining whether bargaining orders under <u>NLRB v. Gissel Packing Co.</u>, 395 U.S. 575 (1969), were appropriate for several of the employer's locations. Overnite, slip op. at 2 n.12.

⁴¹ <u>Id.</u>, slip op. at 3.

⁴² Id.

This statement refers to negotiations between the Employer and the Union at the Des Moines location, where the Union had been certified. At some facilities the Employer said that "nothing" had happened as a result of the bargaining in Des Moines. The Region has concluded that in the context of the Employer's overall unlawful scheme, this statement is independently violative of Section 8(a)(1). Cf. Overnite, 329 NLRB No. 91, slip op. at 3, in which the employer's message that its represented employees would be ineligible for a wage increase, but would rather "have to wait for negotiations," also referred to its Chicago facility, where, despite 13 years of negotiations and a strike, the union had been unable to

before choosing the Union, were part of the Employer's overall unlawful plan to undermine employee support for the Union by placing the onus on whether employees would receive benefits on the Union.

The Employer's unlawful motive is further illustrated by its response to the Union's organization of the Jacksonville facility: the Employer first refused to grant the Jacksonville drivers benefits listed in the first announcement during the critical preelection period and then unlawfully withheld the benefits granted in all of the announcements by claiming that it could use those benefits as "bargaining chips" during contract negotiations. Relying on the Employer's treatment of the Jacksonville employees, and the Employer's failure to offer a legitimate and substantial business justification⁴⁴ for the disparate treatment of its represented and unrepresented employees, we conclude that the Employer violated Section 8(a)(1) and (3) by withholding the benefits from the employees at its represented facilities.

3. [FOIA Exemption 5]

[FOIA Exemption 5

secure a contract. In considering whether this conduct supported a <u>Gissel</u> order, the Board agreed with the ALJ that the employer's statement violated the Act by (1) giving employees the impression that bargaining would be futile; and (2) threatening that the only way for the union to pressure the employer was by striking. Thus, the employer conveyed the message that represented employees would not receive the increase because bargaining with the employer would not succeed. <u>Id.</u> Although the Union has not filed a bad-faith bargaining charge, the Employer's statements, particularly when taken together with its announcements, leave employees with the impression that the status of the negotiations in Des Moines demonstrates that they should not support the Union.

⁴⁴ See discussion at pages 9-12.

[FOIA Exemption 5 continued

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In <u>Aero-Motive Manufacturing Co.</u>, ⁴⁷ the Board, after finding that the employer had unlawfully granted a cash bonus to nonstrikers, stated:

Rescission would appear to be inappropriate and impractical and would, we believe, create greater discord among the employees than currently exists as a result of Respondent's illegal action. The only practical method, therefore, of restoring the statutorily required equality of treatment as between employees who engaged in concerted activity and those who refrained therefrom is to require the payment of an equivalent amount to the employees who did engage in the concerted activity and who were denied the payment. We shall therefore require Respondent to pay all employees . . . who did not receive the bonus payment [comparable sums] plus interest. . . .

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46 [FOIA Exemption 5

 47 195 NLRB 790, 793 (1972), enfd. 475 F.2d 27 (6th Cir. 1973).

^{45 [}FOIA Exemption 5

In <u>Swedish Hospital Medical Center</u>, ⁴⁸ the employer violated Section 8(a)(1), (3) and (5) by granting a compensatory day off to the one-sixth of the bargaining unit who never joined or who abandoned the union's economic strike. Rather than allowing the employer to rescind the unlawfully granted benefit, the ALJ followed the reasoning of the Board's decision in <u>Aero-Motive Manufacturing Co.</u>, <u>supra</u>, and required the employer to extend its compensatory day off benefit to those employees who participated in the strike. ⁴⁹

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 $^{^{48}}$ 232 NLRB 16 (1977), supplemental decision and order at 238 NLRB 1087 (1978), enfd. 619 F.2d 33 (9 $^{\rm th}$ Cir. 1980).

 $^{^{49}}$ 232 NLRB at 22, 23. The Board adopted the ALJ's decision without comment.

^{50 [}FOIA Exemption 5 .]

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the Board enforced an employerwide posting remedy against an employer which enforced its unlawful company policy restricting employees' exercise of Weingarten rights. 56 Although the violation occurred at only one facility, the Board found a nationwide posting appropriate, noting that, "[a]s long as the [employer's] policy remains in effect nationwide, the potential for similar violations to occur throughout the unit as a result of that policy still exists." 57

Similarly, in Raley's, Inc., 58 the Board upheld a notice posting at all locations where the employer's unlawful rule prohibiting employees from wearing unapproved union insignia had been or was in effect. 59 The Board in Kinder-Care Learning Centers, 60 also ordered a notice posting at all the locations where the employer's unlawful

^{53 [}FOIA Exemption 5

 $^{^{54}}$ [FOIA Exemption 5].

 $^{^{55}}$ 303 NLRB 463 (1991).

 $^{^{56}}$ Id. at 463 n.5, 470-72.

⁵⁷ Id. at 463 n.5.

⁵⁸ 311 NLRB 1244 (1993).

⁵⁹ <u>Id.</u> at 1244 n.2, 1251-52.

⁶⁰ 299 NLRB 1171 (1990).

employment rule had been or was in effect, noting specifically that the employer had maintained the rule as a companywide policy. 61

Finally, in <u>Heck's, Inc.</u>, ⁶² the Board was presented with an employer whose top officials engaged in a companywide pattern of antiunion conduct. On each occasion when a union attempted to organize employees at one of its stores, the employer responded with an antiunion campaign which was virtually identical from location to location. The Board had reviewed the employer's pattern of similar, unlawful conduct in a previous case, and concluded that the employer had "a policy in all its stores that is opposed to the policies of the Act." ⁶³ The Board ordered, among other things, nationwide notice postings. ⁶⁴

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 $^{^{61}}$ $\underline{\text{Id.}}$ at 1176. The Board also ordered the employer to rescind the unlawful portions of its employment policy. $\underline{\text{Id.}}$

^{62 191} NLRB 886 (1971), enfd. in relevant part sub nom. Food Store Employees Union, Local 347 v. NLRB, 476 F.2d 546 (D.C. Cir. 1973), rev'd on other grounds 417 U.S. 1 (1974).

Heck's, Inc., 172 NLRB 2231 n.4 and accompanying text (1968), enfd. sub nom. Food Store Employees Union, Local 347 v. NLRB, 433 F.2d 541 (D.C. Cir. 1970), rev'd on other grounds 417 U.S. 1 (1974).

⁶⁴ Hecks, Inc., 191 NLRB at 887-88.

^{65 [}FOIA Exemption 5

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In sum, we conclude that the Region should issue complaint in the above cases, absent settlement, alleging that the Employer violated Section 8(a)(1) by unlawfully granting benefits to its employees at facilities at which no representation petition had been filed, and Section 8(a)(3) and (1) by unlawfully withholding them from its represented employees and employees at those facilities awaiting a representation election. 67 [FOIA Exemption 5]

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B.J.K.

^{66 [}FOIA Exemption 5.]

^{67 [}FOIA Exemption 5