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Covanta Energy Corporation and Covanta Semass LLC, single employers and/or joint employers and Local 369, Utility Workers Union of America, AFL-CIO. Case 1-CA-45233

February 25, 2011

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

On March 26, 2010, Administrative Law Judge David I. Goldman issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, to modify his recommended remedy,² and to adopt the recommended Order as modified.³

¹ The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondents violated Sec. 8(a)(3) and (1) by eliminating the existing corporate bonus and the corporate recommended annual wage increase for bargaining unit employees, we also rely on the Board's recent decision in *Arc Bridges, Inc.*, 355 NLRB No. 199, slip op. at 3-4 (2010) (the employer's decision to withhold a regular annual wage increase from its newly unionized employees while continuing the same for its nonunion employees was "inherently destructive" of employees' rights).

In adopting the judge's finding that the Respondents violated Sec. 8(a)(5) and (1) by eliminating the existing corporate bonus and the corporate recommended annual wage increase for bargaining unit employees, Member Hayes relies only on the Respondents' failure to give the Union reasonable advance notice and an opportunity to bargain over these changes.

In adopting the judge's findings of violations, we find it unnecessary to pass on the General Counsel's request, in its answering brief, that we strike portions of the Respondents' exceptions brief.

² In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

³ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents Covanta Energy Corporation and Covanta SEMASS LLC (an integrated enterprise and single employer), West Wareham, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 2(e):

"(e) Within 14 days after service by the Region, post at its W. Wareham, Massachusetts facility, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since February 9, 2009."

Dated, Washington, D.C. February 25, 2011

Craig Becker, Member

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Elizabeth M. Tafe, Esq. and Robert J. Debonis, Esq., for the General Counsel.

Raymond J. Carey, Esq. (Foley & Lardner LLP), of Detroit, Michigan, for the Respondents.

Louis A. Mandarinini, Esq. and Burton E. Rosenthal, Esq. (Segal Roitman, LLP), of Boston, Massachusetts, for the Charging Party.

DECISION

Introduction

DAVID I. GOLDMAN, Administrative Law Judge. This case involves an employer that, during collective bargaining for a first contract with its employees' union, ended its practice of paying an annual wage increase and semi-annual bonus to bargaining unit employees. The amount varied every year, but together the wage increase and bonus could amount to 10–15 percent of each employee's annual pay. In a memo sent to bargaining unit employees' homes, the employer explained that it would no longer pay the wage increase and bonus because (1) the bonus was a corporate bonus, and the employer—a subsidiary company—"does not have its own bonus program"; (2) "the corporate bonus you have received in the past is not available to employees who are in bargaining units represented by unions"; and (3) "wages . . . and other benefits for employees in bargaining units represented by unions are the result of negotiations."

The Government alleges that the employer's failure—beginning in February 2009—to provide the annual wage increase and bonus to unit employees violates the National Labor Relations Act (Act). Specifically, the Government contends that the announcement of the refusal to pay the bonus and wage increase violated employees' rights under the Act, and further, that the elimination of these monetary benefits constituted an unlawfully motivated and unlawful unilateral change in terms and conditions of employment. Finally, the Government contends that the subsidiary employer and its corporate owner constitute single employers, or, alternatively, joint employers, under applicable precedent.

The employers—both the corporate employer and the subsidiary—deny the substance of the Government's contentions. However, as explained herein, I find that the Government has proven, overwhelmingly, that the employers have, as alleged, violated the Act, and further, that the corporate and local employer constitute single employers under the Act.

Statement of the Case

Local 369, Utility Workers Union of America, AFL–CIO (Union) filed an unfair labor practice charge with Region 1 of the National Labor Relations Board (Board) on February 17, 2009, docketed as Case 1–CA–45233. The charge alleged violations of the Act relating to the cancellation of the bonus against Covanta Energy Corporation (Covanta Energy) and Covanta SEMASS LLC (SEMASS or Covanta SEMASS), individually and as single and joint employers (collectively, Covanta). On June 30, 2009, the Board's General Counsel, by the Region 1 Regional Director, issued an amended consolidated complaint in, inter alia, Case 1–CA–45233, alleging violations of the Act related to elimination of the bonus and wage increase. The amended consolidated complaint also alleged

numerous other violations of the Act in eight additional cases against Covanta entities. The amended consolidated complaint also alleged that Covanta Energy and SEMASS, and other subsidiaries, were single and joint employers.

On July 1, 2009, the Union amended the charge in Case 1–CA–45233 to include allegations relating to the cancellation of the annual wage increase.

The General Counsel issued an amendment to amended consolidated complaint on August 11, 2009, and a second amendment to consolidated complaint on September 23, 2009, referring, inter alia, the Union's filing of an amended charge in Case 1–CA–45233. The General Counsel issued a third amendment to consolidated complaint on October 13, 2009, alleging additional violations related to the failure to pay bonuses.

A trial in this case, and the eight other cases comprising the consolidated complaint, with amendments, was conducted before me on October 19–22, and December 1–3, 2009, in Plymouth, Massachusetts. At trial, counsel for the General Counsel moved, and I granted his motion, to further amend paragraph 12 of consolidated complaint, to allege an unlawfully motivated and unilateral change in practice by Covanta SEMASS with regard to the payment of annual wage increases.¹

Counsels for the General Counsel, the Union, and the Employer filed briefs in support of their positions on January 21, 2010. For the reasons set forth in the Order Severing Case, issued by me March 19, 2010, this case has been severed from the eight other cases with which it was tried for purposes of issuing a decision and recommended Order in this case. On the entire record, I make the following findings, conclusions of law, and recommendations.²

Jurisdiction

The complaint³ alleges, SEMASS admits, and I find that SEMASS has been engaged in the operation of an energy-from-waste facility at its offices and principal place of business in West Wareham, Massachusetts. The complaint alleges, Energy admits, and I find that Covanta Energy is a corporation with its office and principal place of business in Fairfield, New Jersey. I further find, based on the record evidence that Covanta Energy is the owner and operator of a network of businesses for the conversion of waste to energy and conducts its operations through its subsidiaries.

¹ In addition, at trial, counsel for the General Counsel moved, with my approval and with the consent of counsel for the Respondents, to withdraw an allegation of the consolidated complaint related to the motivation for a change in employee handbook language, a matter unrelated to the issues in Case 1–CA–45233.

² On my own motion, I amend the transcript to correct two minor errors. On page 781, line 14, the reference to "Mr. Debonis" is changed to "Mr. Carey." On page 137, line 20, the word "to" is changed to "for." These changes accord with my recollection of what was stated, by whom, and make sense in context.

³ References to the complaint are to the extant consolidated complaint, as amended, including pretrial amendments and oral amendments at trial.

The complaint alleges, Covanta Energy admits, and I find that Covanta Energy has gross revenues in excess of \$500,000.00 per year, and I find they are derived from its business operations. The complaint alleges, Covanta Energy admits, and I find that Covanta Energy purchases and receives goods within the State of New Jersey, valued in excess of \$50,000 directly from points outside the State of New Jersey. The complaint alleges, Respondent SEMASS admits, and I find that Covanta SEMASS in conducting its business operations derives gross revenues in excess of \$500,000 and purchases and receives goods within the Commonwealth of Massachusetts, valued in excess of \$50,000 directly from points outside of the Commonwealth.

The complaint alleges, Covanta Energy and SEMASS admit, and I find that at all material times they have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At trial, counsel for the General Counsel moved to amend the complaint to allege that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act, an allegation admitted by Respondents' counsel. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

Unfair Labor Practices

I proceed in two parts. In Part I, I consider the allegations regarding the elimination of the corporate bonus and across-the-board annual wage increase for bargaining unit employees. In Part II, I turn to the issue of whether, as alleged, SEMASS and Covanta Energy constitute single employers under the Act, and, thus, are jointly and severally liable for any unfair labor practices found.

Part I

Allegations Related to Elimination of the Bonus and Wage Increase

Findings of Fact

A. Background

Covanta Holding is the 100 percent owner of Covanta Energy.⁴ Covanta Energy is the 100 percent or majority owner of approximately 40 Covanta subsidiaries in the United States.⁵ The Covanta subsidiaries are primarily engaged in the business of providing waste disposal services and using that waste as a fuel source to generate energy (primarily electricity and steam). Other subsidiary facilities are biomass projects relying on

wood-fired generation, and two are hydroelectric facilities. A handful of these subsidiaries are unionized facilities.

SEMASS is one of these subsidiaries. It is composed of the main waste-to-energy facility located in West Wareham, or Rochester, Massachusetts,⁶ a landfill approximately eight miles away in Carver, Massachusetts, and a transfer station in Braintree, Massachusetts.

The SEMASS facility has gone through a number of corporate owners. Bechtel Corporation managed the facility until the plant was bought by American Re-Fuel in 1996. Covanta Energy acquired American Re-Fuel in the summer of 2005.

A significant part of employees' compensation since Covanta assumed ownership of the SEMASS facility has been a corporate bonus program implemented and designed by Covanta Energy. As SEMASS Facility Manager Mark Davis put it, "[o]ur employees were used to receiving bonuses." The program includes a bonus paid annually in late February or early March based on financial performance or productivity, and a safety, health, and environmental bonus, paid semiannually, in late February or early March, and again in August. The calculations for determining the amount of the bonus payments are fairly complicated (see, e.g., GC Exh. 25), but for hourly employees at SEMASS the financial performance bonus turns largely on facility (80 percent) but also, to some extent, on regional (10 percent) and corporate (10 percent) financial performance measured by goals and formulas ultimately approved by a committee of the Covanta Energy board of directors. The amount of the safety, health, and environmental bonus turns on the facility's performance with regard to designated safety and health, and environmental criteria. Both the financial performance and safety, health, and environmental bonuses are calculated for each individual employee as a percentage of their individual hourly wage rate.

These bonuses were paid each year, and, for the safety, health, and environmental bonus, on the half year, from the time Covanta Energy acquired the SEMASS facility, until February 2009, at which time, as discussed below, the bonuses ceased to be paid to bargaining unit employees, and they have not been paid since.

The corporate bonus program applies to employees, hourly, salaried, and even executives, across the country, employed at the time the bonus is awarded. The exception within the United States, according to the Covanta Energy Corporation 2008 Cash Bonus Program, is that

Employees covered by a collective bargaining agreement are not eligible to participate.

In addition to the bonus program, the terms and conditions of employment at SEMASS included an annual wage increase. This across-the-board wage increase had been granted to employees at SEMASS, and the other Covanta facilities around the country, for many years. There was a standard amount allotted or recommended by Covanta Energy, although facility managers would sometimes give a little less or more to a cer-

⁴ At trial, Covanta Energy's director of human resources generalists, David Anechiarico, was, at first, unsure whether he was employed by Covanta Holding or Covanta Energy, explaining, "they're one in the same. I may be mistaking the corporate entity." In later testimony he declared that his employer was Covanta Energy.

⁵ At trial, counsel for Respondents, in describing a stipulation entered into regarding the ownership of the Covanta subsidiaries, explained that although the percentage of direct ownership by Covanta Energy of the subsidiaries varied due to the creation of various partnerships and other intermediary forms of ownership, "there's no question that the financial control of those facilities is Covanta Energy."

⁶ While the facility's mailing address is in West Wareham, employee witnesses referred to the facility as being in and called Covanta SEMASS Rochester. Rochester abuts W. Wareham.

tain subset of employees, although there is no evidence this ever occurred at SEMASS. At SEMASS, the wage increases tended to be uniform within the plant and in accord with the increases recommended by Covanta Energy for facilities throughout the country. Typically, the wage increase was announced in late February and implemented soon thereafter. This occurred every year, except in 2009.⁷

*B. Union Certification and Commencement of Bargaining;
Payment of the Midyear Bonus*

On May 12, 2008, after a representation campaign and a May 2 election, the Union was certified by the Board as the collective-bargaining representative for the SEMASS production and maintenance employees, a unit of approximately 140.⁸

Days after the election, on May 5, 2008, SEMASS Facility Manager Davis issued a memo to SEMASS employees on the subject of the "Results of NLRB Election." In it he reported the election results and expressed the "management team's . . . disappoint[ment] that slightly over half of the nonexempt employees believe that 3rd party representation will make SEMASS a better place to work." Davis thanked employees "who voted no" for "your support" and "apologize[d] that you will no longer have an individual voice in the workplace that you recognized as important." Davis thanked "all employees

for the professionalism and conduct that was demonstrated during the campaign period prior to the election." He then wrote:

What happens next? Covanta and the (UWUA) must negotiate in good faith towards the ratification of a contract. In the mean time it will be business as usual at SEMASS, all pay and benefits that you presently have will remain in effect until a contract is ratified. All policies and procedures that are presently in place will not change.

The parties' first postcertification meeting was in June 2008. This first meeting was a "get-to-know-each-other" meeting at a restaurant in Wareham, at which some ground rules for negotiations were discussed. Present for the Union was the Covanta bargaining unit's lead negotiator, David Leonardi,⁹ Local 369 President Gary Sullivan, and Robert Mahoney, a national representative for the Utility Workers Union. Present for SEMASS was David Anechiarico, Covanta Energy's "director of human resources generalists," who provides human resources services to Covanta subsidiaries in the New England area, including SEMASS, and John Walker, Covanta Energy's vice president of operations for the New England region.

In early July, the Union requested a variety of information from SEMASS, including information relating to historic and projected bonus payments to employees. Leonardi received a spreadsheet from John Walker that projected the 2008 bonus that would be available to each SEMASS employee at the end of 2008.

Bargaining between the parties began July 9, 2008. The Union's bargaining team was composed of Leonardi, Mahoney, Gerry Fabich, the chief union steward for the SEMASS unit, Joe Candy, a union steward, Ed Peirce a union steward, and Paul Doyle, an employee for another employer represented by Local 369, who served as notetaker for the Union during negotiations.¹⁰

For SEMASS, the bargaining team was composed of Anechiarico, who initially served as chief negotiator for SEMASS, Walker, and Mark Davis the SEMASS facility manager. In mid-September, Attorney Ray Carey joined the SEMASS bargaining team and assumed the position as chief spokesperson for the SEMASS bargaining team. Anechiarico began to attend bargaining sessions less frequently at this point. Also present as a notetaker for the Employer was an employee identified in the record as Lynne (perhaps Lynne Kuczewski, the record is unclear).

On July 10, 2008, Covanta Energy Vice President John Walker provided Union negotiator Leonardi with a copy of the Covanta Energy Corporation 2008 Cash Bonus Program. This document (GC. Exh. 25) set forth the parameters and program details for the 2008 bonus, to be paid in August (the midyear

⁷ Two employees provided testimony and compensation documents from Covanta Energy and SEMASS showing bonus and wage increase information. Employee Michael Keogh received a letter from John Walker, dated July 24, 2006, stating that the total safety, health, and environmental 1st half of the year bonus for 2006 would be 3.96 percent of eligible earnings. According to a memo sent by Davis to bargaining unit employees February 27, 2007, the 2006 financial performance bonus amounted to 8 percent of eligible earnings. This was confirmed by the testimony and compensation documentation provided to Keogh and employee William Amaral, showing this amount payable March 1, 2007. In addition, Keogh and Amaral's 2nd half of the year safety, health, and environmental bonus, payable March 1, 2007, amounted to 4 percent of their 2nd half of the year "bonus eligible earnings." There was also, according to Davis' memo, a 2.7 percent across-the-board wage increase effective January 1, 2007. July 25, 2007 memos from Davis to the employees indicated that the first half of the 2007 safety, health and environmental bonus would be 3.83 percent of eligible earnings. The 2007 2nd half of the year safety, health, and environmental bonus (payable February 29, 2008) was 3.45 percent of eligible earnings, and the 2007 financial performance bonus (payable February 29, 2008) was 3.7 percent of eligible earnings. Davis announced a 3 percent across-the-board wage increase effective January 1, 2008. In July 2008, the memo to employees announced that the 1st half 2008 safety, health, and environmental bonus was 3.44 percent of eligible earnings.

⁸ The bargaining unit certified by the Board was composed of:

All operations, power block, process and maintenance employees employed by Covanta SEMASS at its 141 Cranberry Highway, West Wareham, MA location, at its transfer station located at 257 Ivory Street, Braintree, MA and its landfill located at 118 Federal Road, Carver, MA, including storekeepers, maintenance mechanics, electrical and instrument techs, mobile equipment mechanics, utility operators, equipment operators, auxiliary operators, control room operators, assistant control room operators, truck drivers, ash systems operators, transfer station operators, transfer station scale attendants, and laborers, but excluding all office and clerical employees, professional employees, guards and supervisors as defined in the NLRA.

⁹ Leonardi was an executive board member/vice president of Local 369's nuclear unit, and, as of October 2008, a business agent for the Local. Without regard to his position or title with the Local, Leonardi has remained the Union's lead negotiator in SEMASS negotiations at all times since June 2008.

¹⁰ In addition, the Union brought a hired human resources consultant, Martha McCabe, to some of the bargaining sessions.

safety, health, and environmental bonus), and in February 2009 (the financial performance bonus and the 2nd half of 2008 safety, health, and environmental bonus).

At the July 10, 2008 bargaining session, Leonardi directly asked Covanta bargainers about the bonus. He referenced what he viewed as the disruptive elimination of the bonus at another facility and asked if the bonus would continue at SEMASS. Leonardi's credited testimony was that Anechiarico commented that the bonus was "not applicable to people under a collective bargaining agreement."¹¹ At that point, "vice president, John Walker, said that the bonus program will continue throughout the bargaining process. And, then, he said that there's actually one coming up in a few weeks and we're going to pay that."¹²

¹¹ Anechiarico endorsed stating during July bargaining that corporate bonuses were not available for employees "in collective bargaining," but I believe Leonardi more accurately captured the comment. His version, that Anechiarico said that employees under "collective bargaining agreements" did not get the bonus, is: first, consistent with the language of the actual corporate bonus document, which Anechiarico claimed he relied upon to come to his conclusion; second, consistent with Walker's followup statement that the bonuses would continue to be provided throughout bargaining; third, consistent with the apparent lack of reaction or concern by the Union about the payment of bonuses during bargaining, and (as detailed below) with the Union's surprise in February 2009, at the announcement that the bonus would not be paid to bargaining unit employees. Fourth and finally, Leonardi was an excellent witness, who appeared to take care to endorse only statements he remembered—regardless of the questioner—and who remembered and described events in bargaining with great detail, assurance, and consistency. Anechiarico was far less sure—he often appeared unsure—and his memory of events was obviously less vivid. Davis was asked about this meeting and comments made, but his recollection generally, and specifically in this instance, was vague, obviously involved reliance on "safe" generalities about the duty to bargain rather than independent recollection, shifted based on leading questioning (by all parties), and cannot be credited where there is a dispute. I credit Leonardi's version.

¹² Walker would have been an obvious candidate to refute this testimony, if untrue. He did not testify, and no explanation for his absence was offered. Anechiarico first testified that he did not recall Walker saying this, but his testimony was—both in terms of the transcript but also the distinct impression it left me with—framed as a lack of recollection, and not testimony that the statement was not made. Testifying later, after a 5-week break in the hearing in this matter, at a time when Anechiarico described himself as "distracted" and Respondents' counsel expressed concern that he was not "focused," Anechiarico testified that Walker had said that the July payment would be made "and that was that." Anechiarico claimed that he, Anechiarico, then said, "as far as any other payments in the future, I mean that was a subject of bargaining." I don't believe that. This testimony, which emerged, tentatively, with interruptions of Anechiarico's answers by counsel whenever he mentioned the bonus issue (see, Tr. 840, 841, 842), after a long break in the hearing, did not impress me as accurate. Indeed, a few minutes later Anechiarico testified about his recollection of discussion at the meeting December 18, 2008, at which the Employer provided the Union with its economic proposal, and then, testifying the next morning, Anechiarico corrected himself and stated that he was not, actually, at the meeting. Under the circumstances, I do not credit his testimony about Walker's or his own comments at the July 10 bargaining session. Nor did Davis corroborate the assertion that Anechiarico stated that "any other payments" were subject to bargaining. As to other bonus payments, Davis offered only that Leonardi had "reminded us of our

That half-year bonus, was, in fact, paid to employees in August 2008, and amounted to 3.44 percent of an employee's eligible earnings (base pay plus overtime).

C. Bargaining Continues

The Union offered a comprehensive proposal, minus schedules and benefits on July 16, 2008. On August 14, 2008, the Union offered a complete proposal for a new labor agreement, including benefits. The Union's proposed agreement was retroactive to August 1, 2008, and was for a minimum of one year. The Union's offer included a specific proposal for the Covanta Energy Corporation 2008 Cash Bonus Program to continue to be applied to bargaining unit employees during the term of the new collective-bargaining agreement. The Union's offer also included a proposal for a wage increase. Davis' subsequent costing of the proposal indicated to him that acceptance of the Union's proposal would require a significant increase in labor costs.

On August 14, during a bargaining session at a hotel in Middleboro, Leonardi had a one-on-one discussion with Anechiarico in the hallway. The talk was candid. As they discussed the Employer's proposal, Leonardi mentioned that the way the bonus was structured "it seemed like an obstacle to organizing and I was surprised that the unit had voted for the union because of he concern that they might not get the bonus." Anechiarico called the bonus "a union avoidance tool" and added, "obviously, it didn't work this time."¹³

SEMASS responded to the Union's economic proposal on December 18, 2008. SEMASS' proposal for a collective-bargaining agreement included the rejection of the Union's proposal to include the bargaining unit employees in the Covanta Energy Bonus Program. At the bargaining table, Attorney Carey told the Union that SEMASS was not proposing a bonus as part of its proposal for a contract. It was proposing a 2 percent across-the-board wage increase to be effective January 2009. Its contract proposal was, like the Union's, for a one year term from August 2008 to August 2009. Leonardi told the SEMASS bargainers that the proposal to eliminate the bonus constituted a significant wage reduction. Carey told the Union that SEMASS was open to considering proposals from the Union that would be an alternative or substitute for loss of the Covanta Energy corporate bonus eligibility.

At bargaining on January 20, 2009, the parties discussed the bonus. Leonardi said that the failure of the Employer to in-

responsibility to bargain over changes or such things, which we were aware of, and we acknowledged it." As noted, that paraphrasing, which witnesses repeatedly fell back as a "safe" account of what they said, is not the same as saying that future payments will only occur during bargaining if they are bargained. Further, bargaining notes from the meeting, taken by Paul Doyle and introduced into evidence, corroborate Leonardi's, not Anechiarico's, testimony. Finally, as discussed in the preceding footnote, I found Leonardi's demeanor to be that of a particularly credible witness.

¹³ Leonardi's credited testimony about this conversation is undisputed. Anechiarico testified extensively but did not dispute Leonardi's testimony as to this conversation. He did agree that "union avoidance" was a significant part of his responsibilities and the term was used—albeit "[n]ot technically"—by Covanta officials.

clude the bonus in a new collective-bargaining agreement would constitute “a substantial reduction in the compensation for the employees” and “that gap was going to need to be filled because it was a large portion of their salary.” Again, Carey indicated that the company would consider proposals for alternatives or substitutes for the bonus. He reiterated this in a private meeting with Leonardi on January 26, 2009.

D. The Elimination of the Bonus and Annual Wage Increase for Bargaining Unit Employees

On February 9, 2009, SEMASS Facility Manager Davis distributed the following “Covanta SEMASS Bargaining Brief[]” to employees at the facility and at their homes:¹⁴

Many of you have raised questions about the status of bargaining between the Covanta SEMASS and Local 369 bargaining teams during the past few weeks. Some of you have asked whether you should expect announcement of and receipt of an annual increase and corporate bonus payments sometime this month or next. This memo is intended to update you about the status of bargaining from the perspective of the Covanta SEMASS bargaining team.

At a bargaining session held on December 18, 2008, the Covanta SEMASS bargaining team presented a comprehensive proposal for a collective bargaining agreement to govern the terms and conditions of employment for Covanta SEMASS bargaining unit employees. This included the Company’s offer with respect to wages, retirement, health and other benefits. [It] is intended to apply, to the one year period between August, 2008, and August, 2009, consistent with a proposal also made by Local 369.

Covanta SEMASS proposed a two percent wage increase retroactive to January 1, 2009. The Covanta SEMASS proposal did not include continuation of or payment of any corporate bonus. There were three reasons for this; (1) Covanta SEMASS does not have its own bonus program; (2) the corporate bonus you have received in the past is not available, to employees who are in bargaining units represented by unions; and (3) wages, retirement, health and other benefits for employees in bargaining units represented by unions are the result of negotiations between management representatives of the applicable facilities and union representatives of employees at those facilities.

The Covanta SEMASS bargaining team told the Local 369 bargaining team on December 18, 2008, and reiterated this during bargaining sessions held on January 20 and 21, 2009, that all matters related to wages, retirement, health and other benefits for all Covanta SEMASS bargaining unit employees are subject to and dependent upon the outcome of bargaining for an initial collective bargaining agreement to govern your employment here at the facility. This means that Covanta SEMASS bargaining unit em-

ployees should not expect a wage increase of any kind until and unless it is negotiated and included in a collective bargaining agreement ratified by the Covanta SEMASS bargaining unit. Likewise, Covanta SEMASS bargaining unit employees should not expect to receive corporate bonus payments of any kind. Whether any alternative will be part of a collective bargaining agreement at Covanta SEMASS will be dependent upon the outcome of bargaining between the Covanta SEMASS and Local 369 bargaining teams.

After Leonardi learned of Davis’ memo (around Feb. 11), he called Attorney Carey on February 12 and told him that “the memo was causing a disruption; that we were getting a lot of concerns from our members; and that I thought that we were going to file an unfair labor practice charge on it.” Leonardi told Carey that the “the memo was inappropriate and that we had been promised by John Walker that the bonus was going to continue while we were in the process of collective bargaining, bargaining for a contract.” Carey responded that “John Walker doesn’t speak for the company.”

The parties met again for bargaining on February 18, 2009. The Employer’s bargaining notes, taken by the designated notetaker for the SEMASS bargaining team and distributed to management representatives after each bargaining session, record the following interchange at this meeting:¹⁵

**Minutes of Meeting between Covanta
and Utility Workers Union
February 18, 2009**

In attendance:

Covanta—Raymond Carey
Mark Davis

UWU—David Leonardi
Phil Canedy
Edward Pierce
Jerry Fabich

* * * * *

DL [. . .]

You sent a notice out on 2/9 - we never got one - we got it from the employees - who got it at home. As we said in July, and JW agreed to - we expect you to pay and perform by Status quo.

Your memo describes—

On July 10th we specifically asked about bonuses and I spoke specifically at the table that bonus would be paid. JW agreed and immediately thereafter they paid the Health and Safety bonus.

¹⁴ Testimony suggested that as a general matter, “bargaining briefs” were periodically issued by Covanta SEMASS to employees on topics relating to the bargaining. Copies were sent to employees’ homes and also “tailgated”—i.e., discussed in daily morning small group “tailgate” meetings with employees.

¹⁵ SEMASS’ bargaining notes for this session were introduced into evidence without objection. There was no testimony about the discussion at this meeting. In reconstructing events at the bargaining table, I rely on these contemporaneous notes of bargaining intended to record discussion and events at the bargaining table. I accept these as evidence of what was stated at the bargaining table and of what transpired in bargaining. *Allis-Chalmers Mfg. Co.*, 179 NLRB 1, 2 (1969); *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 483 (5th Cir. 1963).

- Needless to say, your memo caught us unaware—It doesn't relieve you of your obligation.
- RC We see it as a bargaining issue. I don't believe JW said what you quoted. Only the Safety portion was discussed. We're here for a contract.
- No decision has been made at the corporate level, they have not made that decision.
- DL So, the ultimate decision to pay or not pay the unit for 2008 has not been made.
- RC No decision has been made for anyone at this time.
- DL There is a current plan
- RC An unrepresented plan
- DL It says "not covered by collective bargaining agreement" they are not covered by one
- RC Our memo accurately covers the issue. We're prepared to discuss the issue when we see a proposal.
- DL I want comments about the corporate decision—Is the decision to honor 2008 made or not made.
- RC With respect to SEMASS we will bargain for anything – We're maintaining the status quo for benefits and wages, for annual reviews. Bonuses are at the table.
- DL We're scheduled for March – you're saying JW didn't say that
- RC It doesn't matter what JW said. Things change – Our proposal in December reflects those changes.
- DL What were the changes
- RC They impact costing. I don't have to tell you
- DL What were the change of circumstances between July and December
- RC All that was taken into account
- DL How
- RC I'm not discussing state of mind with you. There were changes of circumstances that we addressed.
- We're open to any proposal you want to make. If that's the bonus okay. We understand it's a change
- DL You don't have a right to make that change—its very disturbing.
- RC It was discussed here. The contract is retro to 8/1/08
- DL At no time did anyone say—it won't be paid—you didn't say that in your proposal
- RC I was here in December—No bonuses was addressed. We recognize it's a change—We're open to discussion—we will recognize your proposal. Corporate bonus is not available to SEMASS. SEMASS is a stand alone facility. Corporate bonus is inconsistent with that.
- Our goal is to achieve an agreement. Our concern is fair—consistent with business staying at SEMASS
- Right now we're waiting to hear your version of how we can get there.
- DL Putting up this kind of notice straight to the employee is troubling to us—An unfair labor practice is filed.
- No indication here that you want to make a deal
- RC I disagree
- DL Your memo is not factual
- RC I disagree
- DL You can't disagree 0 [sic] you weren't there—you can't say JW doesn't represent the company.
- RC The memo from 2–9 is factual. There is no mention of JW. I've investigated the issue. I'm not going to tell you the result of that investigation since you've filed charges.
- DL Did you pay the Safety and Health bonus in July
- RC Yes
- DL Wasn't that part of the corporate bonus
- RC I'm not going to discuss anything that involves charges. No more discussion on charges.
- DL 2008 bonus—is required to be paid at the end of February.
- RC There is no requirement at all
- DL At the end of February it will be paid or not paid
- RC No bonus
- DL Just saying that doesn't alleviate your obligation
- RC I'm not going to comment
- Not answering if you filed a charge
- I think we ought to be bargaining
- One thing I will tell you—the reason it was an issue was due to questions being asked at the plant—We posted this so they'll understand.
- DL They understand now—this is the first I've heard
- Shortly after learning of the Davis memo, the Union posted on its website the following, undated, "Notice" to employees on the subject of "Mark Davis memo dated February 9, 2009":
- The Local has received a copy of the Mark Davis memo dated February 9, 2009, which was mailed to you. The Bargaining Committee is disgusted at the bad faith exhibited in the shameful and unlawful memo distributed by Plant Manager Davis.
- The Local has filed an Unfair Labor Practice (ULP) charging:
1. That the Company's Statements in the Memo Amount to Coercion Against Bargaining Unit Members for Union Activity
 2. That the Company's Decision to Cancel the Bonus Payment Constitutes a Unilateral Change to Working Conditions

3. That the Company Has Bargained In Bad Faith By Rescinding Its Promise Across the Bargaining Table To Continue Bonus Payments During Contract Negotiations

As You are aware, your Bargaining Committee has constantly demanded that Covanta SEMASS and Covanta Entergy Corporation adhere to labor laws and honor its promises to each of You. The disdain in which Covanta holds each of You and this Union is crystal clear through this latest action of cancelling bonus payments.

Rest assured that We will challenge each and every illegal act Covanta commits and collectively we will succeed in holding Covanta accountable. Covanta will be made to pay what it has promised.

On February 17, 2008, Covanta SEMASS issued another “bargaining brief” from Davis responding to the Union’s notice:

In a NOTICE recently distributed to you by Local 369, it falsely accused Covanta SEMASS of bad faith and unlawful behavior. This was in reaction to the memo I sent to you on February 9, 2009, updating you about the current status of bargaining between the Covanta SEMASS and Local 369 bargaining teams. Contrary to Local 369’s false and malicious accusations:

- On December 18, 2008, the Covanta SEMASS bargaining team presented the Local 369 bargaining team with a comprehensive proposal for a collective bargaining agreement to govern terms and conditions of employment for Covanta SEMASS employees represented by Local 369. This included the Company’s initial offer with respect to wages and benefits.
- Under the December 18 bargaining proposal, Covanta SEMASS bargaining Unit employees are ineligible for the 2008 corporate bonus and the Local 369 proposal to continue bonus eligibility was rejected.
- The December 18 proposal was made in good faith and in recognition that both the Covanta SEMASS and Local 369 bargaining teams should continue to negotiate in good faith over wages and benefits and other terms and conditions of employment for Covanta SEMASS employees represented by Local 369.
- Contrary to what Local 369 has alleged, the Covanta SEMASS bargaining team never promised that bonus eligibility will be continued and that bonus payments would be made to bargaining unit members until a collective bargaining agreement is achieved.
- In reaction to the December 18 proposal, the Local 369 lead negotiator inquired about whether the Company will consider any alternative proposal or substitute for the bonus if presented by Local 369. The Covanta SEMASS bargaining team responded that it will consider all proposals made by Local 369.
- Although the Covanta SEMASS and Local bargaining teams met on January 20 and 21, 2009, the Local 369 bargaining team made no counter proposals related to wages and benefits or the bonus on either of

those days.

- The Covanta SEMASS bargaining team intends to continue bargaining in good faith in an attempt to achieve a fair and equitable collective bargaining agreement to govern the terms and conditions of employment for Covanta SEMASS employees represented by Local 369.

Under these circumstances, Covanta SEMASS is acting in accordance with the law. It will continue to do so. Local 369’s statements to the contrary are simply wrong. Unfortunately, Local 369 and the UWUA continue to engage in conduct intended to disparage Covanta and interfere with its business and the jobs of Covanta employees around the country and around the world. Don’t you think it is time that they stop and instead focus on bargaining?

Neither the 2008 performance bonus nor the second 2008 safety bonus, each of which was to have been paid in late February 2009, was paid to SEMASS bargaining unit employees.¹⁶

Similarly, the annual across-the-board wage increase was not paid to employees in 2009. More specifically, a 3 percent wage increase was provided in paychecks issued the first week of March 2009. But by Friday, March 6, SEMASS had posted a notice from Mark Davis to “Local 369 bargaining unit employees” regarding “Payroll error.” It stated:

You all probably noticed an increase in your paycheck this week. It occurred because the Payroll Department mistakenly provided a retro increase to your check.

Since this was our mistake we will not be asking you to return the amount that was mistakenly paid to you.

Instead, Payroll will correct the error by returning your hourly pay to its original rate prior to the mistake.¹⁷

As noted, the performance bonus “target” for the 2008 bonus was 8 percent, the withdrawn pay raise was worth 3 percent, and the record does not speak to the amount of the 2nd half of 2008 safety, health, and environmental bonus. (The first half of the year was paid in August 2008 at 3.44 percent.) Accordingly, between foregone bonus and foregone annual wage increase, the amount at stake likely amounted to well over 10 percent of an individual’s straight time plus overtime pay.

¹⁶ April 2008 correspondence sent to employee Keogh, on Covanta Energy letterhead, from SEMASS Manager Davis, stated that the 2008 target for the performance bonus, to be paid in February 2009, was 8 percent of annual base pay and estimated overtime. Similarly, in August 2008, a new employee, Mark Feilhauer, received an offer of employment letter from SEMASS Facility Manager Davis and Covanta Energy Senior Director Human Resources Anechiarico, describing the bonus program and explaining that the target bonus for 2008 “is 8% of your base compensation which may be higher or lower based on the factors previously stated.” This was a typical letter, received by all employees upon hire as part of their employment package.

¹⁷ That the withdrawn pay raise was 3 percent is based on a comparison of employee William Amaral’s paychecks, entered into evidence, which show a 3 percent increase in hourly pay for March 6 payday and the return to his previous rate of pay in the following week’s paycheck. In addition, Leonardi testified that the withdrawn pay raise was 3 percent.

E. Subsequent Bargaining

In April 2009, the Union proposed a three-year agreement. The proposal included a request for a 9 percent wage increase, and retention of the corporate bonus, but the union negotiators indicated that if SEMASS accepted the 9 percent wage hike the Union would withdraw the proposal on retaining the bonus. In subsequent bargaining the Employer proposed “pay for performance” and other items that would serve as a type of bonus available to employees.

The Employer did not pay the midyear bonus in August 2009.

As of the time of the hearing in this case the parties were continuing to meet and bargain, but had failed to reach agreement on an overall bargaining agreement. Numerous tentative agreements have been reached, particularly in the summer of 2009, but no agreements were reached on wage or bonus issues.

Analysis

The issues are whether Respondents (a) violated Section 8(a)(1) of the Act by the announcement to unit employees in February 2009 that they would no longer receive the corporate bonus or corporate-recommended annual wage increase; (b) violated Section 8(a)(3) of the Act by eliminating the bonus and wage increase for unit employees to discourage the employees’ union activity; and (c) violated Section 8(a)(5) of the Act by unilaterally ending the participation of unit employees in the corporate bonus program and the practice of paying the annual wage increase to unit employees as existing terms and conditions of employment for unit employees. The General Counsel and the Union contend that by these related actions, the Respondents violated distinct aspects of the Act.¹⁸

A. Section 8(a)(1): the Announcement to Unit Employees That They Would Not Receive the Corporate Bonus or Annual Wage Increase

Section 7 of the Act grants employees, among other rights, “the right to self-organization, to form, join, or assist labor organizations.” 29 U.S.C. § 157. Pursuant to Section 8(a)(1) of the Act, it is “an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” 29 U.S.C. § 158(a)(1).

Two distinct lines of Board precedent interpreting Section 8(a)(1) are relevant here.

First, in reasoning adopted and expressly approved by the Board in *First Student, Inc.*, 341 NLRB 136, 141 (2004), the administrative law judge (ALJ) reviewed Board precedent regarding an employer’s announcement to employees that forth-

coming wages and benefits increases would be withheld during bargaining:

In *More Truck Lines, Inc.*, 336 NLRB 772 [2001], enfd. 324 F.3d 735 (D.C. Cir. 2003), the Board summarized the law regarding an employer’s threat to withhold wages and benefits during collective bargaining:

It is settled law that when employees are represented by a labor organization their employer may not make unilateral changes in their terms and conditions of employment, such as their wages. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). This duty to maintain the status quo imposes an obligation upon an employer not only to maintain that which has already been given to employees, but also to “implement benefits which have become conditions of employment by virtue of prior commitment or practice.” *Alpha Cellulose Corp.*, 265 NLRB 177, 178 fn. 1 (1982), enfd. mem. 718 1088 (4th Cir. 1983). Accord: *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997) (employer unlawfully told employees “wages and benefits would be frozen at current levels for the period of negotiation” and unlawfully withheld annual wage increases for this reason). As the judge explained, once promised, future nondiscretionary wage increases are such existing terms and conditions of employment. See *Liberty Telephone & Communications*, 204 NLRB 317, 318 [1973] (a promised wage raise that induces employees to accept or continue their employment is an “established” condition of employment); cf. *McDonnell Douglas Aerospace Services Co.*, 326 NLRB 1391 fn. 2 (1998).

Based on this analysis, the Board in *First Student*, supra, found that the employer’s announcement to employees that there would be no wage increase during negotiations (notwithstanding the history of providing annual wage increases) violated Section 8(a)(1) of the Act. Along the same lines, as set forth in *Jensen Enterprises*, 339 NLRB 877 (2003), and quoted approvingly in *Wal-Mart Stores, Inc.*, 352 NLRB 815, 816 (2008):

[F]ollowing its employees’ selection of an exclusive bargaining representative, an employer may not unilaterally discontinue a practice of granting periodic wage increases. . . .

Hence, an employer’s statement that wages will be frozen until a collective-bargaining agreement is signed violates Section 8(a)(1) of the Act if the employer has a past practice of granting periodic wage increases. Such an announcement suggests to employees that the employer intends to unilaterally take away benefits and require the union to negotiate to get them back. (citations omitted)

(footnote omitted). See also, *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 114 (1997) (in the context of a practice of an annual wage increase “the statement that wages would be frozen until a contract is negotiated to be [is] an unlawful threat of

¹⁸ The complaint alleges only SEMASS committed the Sec. 8(a)(5) bargaining violation (¶27), and alleges that SEMASS and Covanta Energy committed the Sec. 8(a)(1) and Sec. 8(a)(3) violations at issue in this case (¶¶25–26). However, the complaint also alleges that SEMASS and Covanta Energy are single employers. While I distinguish, as appropriate, between the Respondents with regard to certain factual findings, at other times it is unnecessary, and impossible to distinguish them, particularly given my determination below, that SEMASS and Covanta Energy are single employers, and both liable for all violations found.

loss of benefits and less favorable treatment if the Union were voted in”).

The facts in this case also implicate a second line of 8(a)(1) precedent. It is settled that it is a violation of Section 8(a)(1) for an employer to tell employees that they will be losing a benefit because their status as union represented makes them ineligible for the benefit. *Goya Foods of Florida*, 347 NLRB 1118, 1131 (2006) (comments that employees would be unable to participate in the company’s pension plan if they were union members); *VOCA Corp.*, 329 NLRB 591 (1999) (employer violates Section 8(a)(1) by announcing corporate bonus program that automatically excludes union-represented employees); *Niagara Wires, Inc.*, 240 NLRB 1326, 1327 (1979) (it is a per se violation of Section 8(a)(1) for employer to maintain pension plan that by its terms excludes from coverage employees who are “subject to the terms of a collective bargaining agreement”).

In this case, the General Counsel and the Union point to the February 9 “bargaining brief” issued in the name of SEMASS Facility Manager Davis, as violative of Section 8(a)(1) of the Act. This memo, styled as an “update” on the status of bargaining, sets out to answer the question the memo attributes to employees: “whether you should expect announcement of and receipt of an annual increase and corporate bonus payments sometime this month or next.” With the collective-bargaining process interposed as part of the rationale, the memo delivers to bargaining unit employees the news that they will not be receiving the corporate bonus “you have received in the past” and will not be receiving “a wage increase of any kind until and unless it is negotiated and included in a collective bargaining agreement ratified by the Covanta SEMASS bargaining unit.”

As to the corporate bonus that employees had received in the past—as recently as August 2008, while bargaining was ongoing—the memo states that the “the corporate bonus you have received in the past is not available to employees who are in bargaining units represented by unions” and goes on to state that “Covanta SEMASS bargaining unit employees should not expect to receive corporate bonus payments of any kind.” The memo holds out that possibility that an “alternative” to the corporate bonus could be part of a subsequently-agreed to collective-bargaining agreement, but that “will be dependent upon the outcome of bargaining between the Covanta SEMASS and Local 369 bargaining teams.”

As to the wage increase received by employees annually at this time of year, the memo explained that the reason bargaining unit employees “should not expect a wage increase of any kind until and unless it is negotiated and included in a collective bargaining agreement” was because “all matters related to wages . . . are subject to and dependent upon the outcome of bargaining for an initial collective bargaining agreement.” Thus, the memo made clear that the only way there would be a wage increase “of any kind” was if the Union and SEMASS reached a collective-bargaining agreement providing for it.

The conclusion that the February 9 memo violated the Act is unavoidable given the controlling Board precedent.

As a threshold matter—and this is of relevance for all of the General Counsel’s contentions regarding the bonus and wage increase, not just the 8(a)(1) allegation—there is no doubt that

the corporate bonus and corporate-recommended annual wage increase were existing terms and conditions of employment for the SEMASS employees.

Periodic wage increases or payments (such as bonuses) become conditions of employment if they are “an established practice . . . regularly expected by the employees.” *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997).¹⁹

In this case, the annual wage increases occurred regularly, at the same time every year, and throughout Covanta’s plants around the country. Anechiarico agreed that there was an “annual wage increase routine” in place “year in and year out” at Covanta facilities across the country. He agreed that the terms and conditions at Covanta SEMASS included annual raises. There *could* be some variation within a facility, or between facilities, in the amount of the wage increase, but there is no evidence that at SEMASS employees ever received anything other than the standard Covanta nationally-approved and “recommended” annual wage increase. The corporate bonus was also a regular feature for Covanta employees that had been received regularly and consistently. As SEMASS Facility Manager Mark Davis put it, “[o]ur employees were used to receiving bonuses.” A detailed explanation of its format, methodology of calculation, objectives, and anticipated schedule had been generated by February of 2008, governing bonus payments for midyear and early 2009 (based on 2008 criteria). (See, GC Exh. 25.) The “target” calculations for the 2008 mid-year bonus were communicated to employees early in 2008. The 2008 Covanta Energy Cash Bonus Program could hardly be more formalized, and it is hard to imagine that the payments were not expected or anticipated. Indeed, according to the February 9 memo, it was employee anticipation and questions as the time for the annual wage increase and corporate bonus payment drew near that prompted Davis’ memo explaining that they would not be paid. Notably, the Respondents do not argue in their brief, or otherwise, that the annual wage and corporate bonus were not existing conditions of employment. Rather they contend it is within their rights to announce the elimination of these terms and conditions under the circumstances.

Together the wage increase and semiannual corporate bonus payments comprised a significant percentage of the employees’ incomes each year and were an established term and condition of employment. They were part of the status quo of wages and benefits received by employees. The ramifications of this are

¹⁹ As the Sixth Circuit Court of Appeals explained in *NLRB v. Talsol Corp.*, 155 F.3d 785, 794 (1998):

The critical inquiry is whether there existed an established practice or status quo. In conducting such an inquiry, the court looks to whether “a practice [was] longstanding . . . whether the employer has created an expectation on the part of employees, [and] whether an employer has announced a policy or taken other action consistent with a formal policy change.” *Hyatt Corp. v. NLRB*, 939 F.2d 361, 371 (6th Cir. 1991). In addition, even if some discretionary components are involved in a wage increase, when the criteria for determining discretionary wage increases are fixed, the company must “continue to apply the same criteria and use the same formula for awarding increases” as done previously. See *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 412 (1996); see also *Hyatt Corp.*, 939 F.2d at 369.

substantial. It means, most simply put, that to fail to pay employees the corporate bonus or annual wage increase was to take something away from employees. It was a change, and an adverse one, for employees in their terms and conditions of employment.

The February 9 memo tells employees that this loss in terms and conditions is the consequence of their selection of union representation. According to the memo, the corporate bonus is not available to them precisely because they have chosen to be union represented: “the corporate bonus . . . is not available to employees who are in bargaining units represented by unions.” For this reason, according to the memo, “Covanta SEMASS bargaining unit employees should not expect to receive corporate bonus payments of any kind.” Under controlling precedent, this is a straightforward violation of the Act. While the memo suggests the possibility that some other type of bonus could, at some point, be negotiated by the Union and SEMASS, the penalty for choosing union representation is straightforward: the bonus program that continues to be available to Covanta employees across the country, the program under which SEMASS employees have always received payments every six months, and as recently as August 2008, is no longer available because the employees are union represented.

The memo also tells employees that the annual wage increase—indeed, “a wage increase of any kind”—is unavailable unless and until the Union and the Employer reach agreement on a collective-bargaining agreement. In other words, “wages will be frozen until a collective bargaining agreement is signed,” a pronouncement that the Board recognizes as “violat[ive of] Section 8(a)(1) of the Act if the employer has a past practice of granting periodic wage increases. Such an announcement suggests to employees that the employer intends to unilaterally take away benefits and require the union to negotiate them back.” *Jensen Enterprises*, supra. That is precisely the message conveyed to employees here: the status quo of wages is reduced and collective bargaining is the only way to return to the status quo. The message is that “until and unless it is negotiated and included in a collective bargaining agreement ratified by the Covanta SEMASS bargaining unit” you will forego wages and bonus payments that are part of your current terms and conditions of employment.

Respondents defend the memo with the assertion (R. Br. at 118) that, read “in context and in conjunction with the February 17, 2009 Bargaining Brief” it conveys nothing unlawful, only the fact that SEMASS does not have its own bonus plan, that bonus and wage increases are matters to be collectively bargained, and that Covanta is open to proposals to bargain over such matters. This defense does not quite join the issue. First, the February 17 Bargaining Brief, while more cryptic than the February 9 memo—it claims that employees are ineligible for the corporate bonus under SEMASS’ bargaining proposal, not directly because they are union represented—does not disavow or in any way cure the statement to that effect in the February 9 memo. Moreover, read “in conjunction” with the February 9 memo, the new memo reasserts that the status quo—annual wages increase and corporate bonus—will be lost unless and until a new bargaining agreement providing those benefits is negotiated. That is, Covanta’s arguments notwithstanding, the

nub of the violation. Relying on the claim that everything is negotiable does not explain or excuse the reasonable impression on the part of employees that—since wage increases and the bonus were part of the status quo—employees were losing wages and benefits precisely because they chose union representation and the path of collective bargaining.²⁰

I find that Respondents violated Section 8(a)(1) of the Act through the February 9 announcement to employees that, because they were union represented, they were ineligible to receive the corporate bonus, and would not receive the forthcoming annual wage increase unless and until a collective bargaining agreement providing for it was reached.²¹

B. Sec. 8(a)(3): The Elimination of the Corporate Bonus and Annual Wage Increase for Bargaining Unit Employees

Section 8(a)(3) of the Act provides, in relevant part, that it is “an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).²²

²⁰ I recognize, as discussed below, that Covanta contends that the change in the status quo on the wage increase and bonus was in accordance with a Board-recognized exception to the general duty to maintain the status quo during the negotiation of an initial labor agreement. However, nothing in Covanta’s memo to employees explains that. Employees were not provided with information that reasonably would lead to them conclude anything but that they were being punished because they chose the collective-bargaining route. In fact, as discussed, below, I conclude that conveying that retaliatory message was the very point of the memo. In any event, even assuming, arguendo—and wrongly, as I conclude below—that Covanta could have lawfully ceased paying the bonus or increase, it would not excuse this section 8(a)(1) violation of the Act.

²¹ The complaint alleges (¶¶11(b) and 25) that the Respondents violated Sec. 8(a)(1) of the Act when SEMASS announced to employees in a February 9 memorandum that the bonus was not available to union-represented employees. On brief (G.C. Br. at 2, 36), the General Counsel also contends that the announcement, in the same memorandum, that employees would not receive the annual wage increase similarly violated Sec. 8(a)(1). The Board may find an unalleged violation “if the issue is closely connected to the subject matter of the complaint and has been fully litigated.” *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enf’d. 920 F.2d 130 (2d Cir. 1990). In this case, both prongs of this test are easily met with regard to the 8(a)(1) allegation regarding the announcement to employees regarding the wage freeze. The issue of the wage freeze was a central part of this litigation, as was the February 9 memo, which announced SEMASS’ intentions with regard to wages (and the bonus). Indeed, the Respondents’ brief defends the 8(a)(1) implications of the wage and bonus announcements in the February 9 memo. (R. Br. at 118-119.) Thus, the allegation is “closely connected” to the pled 8(a)(1) case. The “determination of whether a matter has been fully litigated rests in part on whether . . . the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made.” *Pergament*, supra at 335. In this case, the evidence relevant to the violation for announcing the wage freeze is identical to the evidence at issue with regard to the 8(a)(1) bonus announcement. Both violations are based on the same announcement to the employees at the same time. There is no dispute of fact with regard to any of the key issues in either matter.

²² Any conduct found to be a violation of Sec. 8(a)(3) would also discourage employees’ Sec. 7 rights, and thus, is also a derivative viola-

The General Counsel and the Union allege that the elimination of the bonus and annual wage increase for bargaining unit employees violated Section 8(a)(3), as it was undertaken to penalize employees for their decision to be union represented.

The rationale offered to employees in the February 9 memo by SEMASS for discontinuing the corporate bonus program for bargaining unit employees was the following. First, SEMASS did not have its own bonus program, the corporate program emanated from Covanta Energy. Second, the Covanta Energy bonus program was not available to union-represented employees. This was echoed in bargaining on February 18 when SEMASS negotiator Carey referred to the corporate plan as an “unrepresented plan,” and was consistent with Anechiarico’s candid admission to Leonardi in August 2008 that the bonus plan was a “union avoidance tool” that had not worked in this case. Third, the memo stated that bonuses, and other wages and benefits for “employees . . . represented by unions” are a matter to be determined by negotiations. This last rationale, along with the statement that “Covanta SEMASS bargaining unit employees should not expect a wage increase of any kind until and unless it is negotiated and included in a collective bargaining agreement,” provided the explanation to employees for the elimination of the annual wage increases. By this statement Covanta signaled that the annual wage increase was being eliminated from the current ongoing terms and conditions of employment and the Union would have to bargain it in a new collective-bargaining agreement if employees were to have it.

Given this explanation, we are left with the fact, essentially admitted and announced to employees in the February 9 memo, that they were ineligible for and would not receive the corporate bonus or the annual wage increase, *because* of the employees’ decision to select union representation. Pursuant to the rationale set forth in Covanta’s memo, it was the decision to select union representation that caused SEMASS to deem the bargaining unit employees ineligible for the corporate bonus they had long received and eligible only for bonus programs generated independently by SEMASS (yet to be negotiated or created). It was the decision to select union representation that made the SEMASS, as Attorney Carey told the Union, “a stand alone facility. Corporate bonus is inconsistent with that.” It was the decision to obtain representation to bargain collectively that, according to the February 9 memo, permitted Covanta to claim to employees that it would no longer provide the annual wage increase and that the only way to get any wage increase was if it was bargained by the Union.

Covanta, on brief (R. Br. at 114–117), asserts that by eliminating the employees’ entitlement to the corporate bonus and the corporate-recommended wage increase, it was simply engaging in a legitimate bargaining tactic to induce concessions from the Union, and there was no unlawful motive at work. It asserts that when it confronted union proposals for a collective-bargaining agreement that it found too rich for its taste, Covanta strengthened its hand at the bargaining table by announcing that the employees’ union-represented status meant they were being denied the upcoming annual wage increase and

meant they were ineligible for the upcoming corporate bonus payment.

The problem with Covanta’s argument, in the first instance, is that its conduct manifestly is not a legitimate bargaining tactic. Indeed, the Board, with court approval, has found very similar conduct by an employer to be inherently destructive of employee rights, with a consequence of discouraging union activity that is unavoidable, foreseeable and may be presumed to have been intended without further evidence of antiunion motive. *United Aircraft Corp.*, 199 NLRB 658, 662 (1972) (“Respondent contends that there is no proof that its decision to withhold the April 20 increase was unlawfully motivated. None was needed” as “Respondent’s conduct was ‘inherently destructive of important employee rights’”), *enfd.* in relevant part 490 F.2d 1105, 1109–1110 (2d Cir. 1973) (“it is difficult to imagine discriminatory employer conduct more likely to discourage the exercise by employees of their rights to engage in concerted activities than the refusal to put a scheduled [3 percent] wage increase into effect because the employees, four days before, selected a union as bargaining representative”); *Eastern Maine Medical Center*, 253 NLRB 224, 241–243 (1980) (withholding of annual wage increase from bargaining unit employees because of the fact that Respondent was in negotiations with union over wages is both inherently destructive and specifically found to be unlawfully motivated), *enfd.* 658 F.2d 1 (1st Cir. 1981); *Harowe Servo Controls, Inc.*, 250 NLRB 958, 959, 1035–1036 (1980) (suspension of wage increases, defended by employer on grounds that union must bargain over wages, constitutes unlawful employer reprisal against employees for voting for union representation based on independent finding that conduct is inherently destructive of employee rights and, independently, based on specific evidence that suspension of wage increases was motivated by an effort to punish employees for choosing union representation); *KDEN Broadcasting Co.*, 225 NLRB 25, 26 (1976) (withholding of wage increases that would have been given in absence of vote for union violate Sec. 8(a)(3)).

Notably, in all of these above-cited cases, the employers contended, as Covanta does here, that the withheld wage or bonus should be bargained. However, the cases do not view that defense as an excuse, but rather, as supporting the view that the refusal to implement the planned wage or benefit was due to the employees’ decision to unionize. *KDEN Broadcasting*, *supra* at 25–26; *Harowe Servo Controls*, *supra* at 1035; *Eastern Maine Medical*, *supra* at 243; *United Aircraft*, *supra* at 662. See, also *Illiana Transit Warehouse Corp.*, 323 NLRB at 119 (bonuses and wage increases unlawfully withheld in retaliation for election of union; employer told employees they would not receive wage increase until contract reached with union).

The decision in *United Aircraft*, *supra*, is illustrative. In that case, a promised wage increase was cancelled by the employer after the union was certified as the employees’ bargaining representative. The employer’s explanation was very similar to that offered by Covanta here: it sent a letter to employees in which it “expressed Respondent’s belief that such increase had become subject to negotiations as a result of the Union’s certification.” Moreover, the employer’s representative testified that the employer anticipated that in bargaining compensation

tion of Sec. 8(a)(1) of the Act. *Chinese Daily News*, 346 NLRB 906, 934 (2006), *enfd.* 224 Fed. Appx. 6 (2007).

issues would be “one of the major items in dispute and that we would be bargaining on the basis of an entire pay package of some sort or other.” The employer contended that the anticipated wage increase had been “based on the assumption that other matters of compensation would remain as established.” With compensation now bargainable, the employer in *United Aircraft* refused to pay the wage increase and took the position that everything was now bargainable.

The Board found that the employer’s rationale constituted, in effect, an admission that the wage increase had been withheld because the employees selected union representation. 199 NLRB at 662. The Board pointed out that, while the employer spoke in economic terms, the fact of union representation and the duty to bargain did not change any matter of compensation, and neither the union’s bargaining demands nor the employer’s desire to gain bargaining leverage provided a legitimate justification for eliminating the anticipated wage increase. *Id.*

Covanta rests its view that its conduct constitutes a legitimate bargaining tactic on its reading of *Sun Transport*, 340 NLRB 70 (2003), and similar cases holding that an employer may offer or provide less benefits to union employees than to unrepresented employees.²³ This contention is misplaced. Indeed, it misses the point of the Government’s case.

In *Sun Transport*, the Board dismissed an 8(a)(3) allegation based on an employer offering less severance pay to union-represented employees during collective bargaining than it was offering at the time to unrepresented employees. The Board explained that

the mere fact that different offers are made or that different benefits are provided does not, standing alone, demonstrate unlawful motive. Although an employer is not free to discriminatorily afford represented employees less benefits than unrepresented employees, i.e., in order to discourage support for the union, the record does not establish that the Respondent engaged in such conduct here. . . . Rather, the Respondent’s offer was made in an effort to induce concessions as part of the give-and-take during negotiations over a comprehensive successor agreement. [340 NLRB at 72 & fn. 12.]

The proposition that an employer need not propose the same wages or benefits to union-represented employees that it offers unrepresented employees is settled and sound. But that is not

this case. The General Counsel has not challenged Covanta’s proposal to end the unit employees entitlement to the corporate bonus and annual wage increase in a new collective-bargaining agreement, even if unrepresented employees continue to receive these benefits. Indeed, this case is not about giving new better benefits to unrepresented employees while maintaining existing inferior benefits for union employees and forcing the union to negotiate for those new and better benefits. Rather, this case is about Covanta’s *termination of existing benefits for represented employees while bargaining*. That—and not the fact that that Covanta proposed, for the future, something different for unit employees than it was offering or providing to other Covanta employees—is the challenged conduct. The elimination of current benefits as a bargaining tactic may have worked to “induce concessions,” but it is not a legitimate bargaining tactic or a defense.

I add, that in this case, in order to find a violation under Section 8(a)(3), it is not necessary to rely on precedent finding this conduct to be “inherently destructive” of employee rights. Even assuming, arguendo, that this discriminatory bargaining tactic is not inherently destructive of employee rights, in this case Covanta went out of its way to make sure that employees did not miss the discriminatory antiunion motivation for the decision to withhold the bonus and wage increase. It actually advertised the antiunion rationale of its decision to employees. In its February 9 memo, Covanta explained to employees that the loss of the existing benefits was the direct result of choosing union representation. According to Covanta, the change in status to union represented, and nothing else, rendered the employees ineligible for the corporate bonus they had long received. It was the change in status to union represented that meant that there would be no wage increases “of any kind” unless and until a collective-bargaining agreement providing for a wage increase was reached. Clearly, it wanted employees (and the Union) to understand, and not to miss, that it was the selection of union representation that resulted in this significant loss of the existing pay scheme. The February 9 memo made sure that this was front and center in employees’ minds.

Moreover, in understanding Covanta’s attitude toward the bonus, it is difficult to ignore Anechiarico’s admission that the bonus was a “union avoidance tool” that had, in this instance at least, failed to ward off the selection of union representation. Thus, the corporate bonus plan was not only viewed by Covanta as “an unrepresented plan,” as Attorney Carey referred to it in negotiations, but, in the case of these employees who had selected union representation, the bonus plan had outlived its usefulness as a union avoidance tool. The obvious corollary is that having failed to ward off the Union, the employees would lose it. Indeed, the February 9 memo leaves no doubt that the employees are not receiving the corporate bonus *because* of, and only because of their represented status, a matter confirmed by Attorney Carey at February 18 bargaining. As explained in *Eastern Maine Medical Center*, *supra*, in reference to very similar comments made by the employer one day after the union’s election win, “[i]nherent in this explanation was the idea that it was the presence of the Union which made necessary the exclusion of the [bargaining unit employees] from the wage increase.” 253 NLRB at 243.

²³ See e.g., *Empire Pacific Industries*, 257 NLRB 1425 (1981) (absent unlawful motive, and if willing to bargain, employer may grant benefits to unrepresented employees that it does not grant to its union-represented employees); *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948) (“Absent an unlawful motive, an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain collectively through a statutory representative. . . . Consequently, the Oil Companies’ refusal, while a comprehensive contract was under consideration, to change the hours and wages of employees in the units here involved, even at the request of Local 904, was not in our opinion violative of the Act.”) (emphasis in original); *Chevron Oil Co. v. NLRB*, 442 F.2d 1067 (5th Cir. 1971) (in the absence of bad-faith bargaining, and absent other proof of unlawful motive, an employer is privileged to withhold from organized employees wage increases granted to unorganized employees or to condition their grant upon final contract settlement).

Finally, the baselessness of Covanta's claim that SEMASS employees were ineligible for the corporate bonus suggests that SEMASS' position was more than simply misguided, but an affirmative effort to discriminate based on the decision to choose union representation. No credible explanation for why union-represented employees could not continue to receive a benefit maintained by Covanta Energy has been articulated. Contrary to the assertion implicit in the February 9 memo, and Carey's statements at bargaining, the written terms of the Covanta Corporate bonus plan *do not* exclude union-represented employees from participation in the bonus plan. Rather, by its terms, the plan excludes from eligibility "[e]mployees covered by a collective bargaining agreement." Without regard to whether such a clause is, itself, problematic, nothing in the Covanta Corporate Bonus Plan required SEMASS or Covanta Energy to terminate the corporate bonus plan for the represented employees during bargaining. Indeed, in August 2008, these same union-represented employees received corporate bonus payments from the same Covanta Energy corporate bonus plan, and Walker told the Union that the status quo would continue during the bargaining process. The fact that Covanta went out of its way—contriving an openly discriminatory explanation for eliminating the corporate bonus, and one that highlighted to employees that its elimination was the consequence of choosing union representation—reveals much about Covanta's motives. Indeed, it is an admission.

I find that the Respondents violated Section 8(a)(3) and (1) of the Act by eliminating the existing corporate bonus and by eliminating the corporate-recommended annual wage increase for bargaining unit employees, on grounds that the employees were union-represented employees.

C. Sec. 8(a)(5): the Unilateral Elimination of the Annual Wage Increase and Corporate Bonus for Bargaining Unit Employees

Section 8(a)(5) of the Act makes it "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representative of his employees. . . ." 29 U.S.C. § 158(a)(5).²⁴ Section 8(d) of the Act explains that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder . . ." 29 U.S.C. § 158(d).

Since at least the seminal case of *NLRB v. Katz*, 369 U.S. 736 (1962), Board precedent has been settled that the general rule is that during negotiations for a collective-bargaining agreement an employer may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. "[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. at 743. Unilateral changes are a per se breach of the section 8(a)(5) duty to bargain, without regard to the employer's subjective bad faith.

NLRB v. Katz, 369 U.S. at 743 ("though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. . . an employer's unilateral change in conditions of employment under negotiation is [] a violation of § 8(a)(5)"). See also, *Litton Financial Printing v. NLRB*, 501 U.S. 190, 198 (1991) ("The Board has taken the position that it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations. The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment").

While negotiations for a collective-bargaining agreement are ongoing "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, *unless and until an overall impasse has been reached on bargaining for the agreement as a whole.*" *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (emphasis added) (footnote omitted), *enfd. mem.* 15 F.3d 1087 (9th Cir. 1994).

"The vice involved in [a unilateral change] is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge." *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (bracketing added) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court's emphasis)), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997).

Of central significance to this case, "the duty to maintain the status quo imposes an obligation upon the employer not only to maintain what it has already given its employees, but also to implement benefits that have become conditions of employment by virtue of prior commitment or practice." *More Truck Lines, Inc.*, 336 NLRB 772 (2001) (quoting *Alpha Cellulose Corp.*, 265 NLRB 177, 178 fn. 1 (1982), *enfd. mem.* 718 F.2d 1088 (4th Cir. 1983)). As the Board explained in *Jensen Enterprises*, 339 NLRB at 877, "[b]y withholding customary increases during the potentially long period of negotiations for an agreement covering overall terms and conditions of employment, an employer, in effect, changes existing terms and conditions without bargaining to agreement or impasse, in violation of Section 8(a)(5)."

Accordingly, under the general rule, an employer's unilateral change in these terms and conditions, during the bargaining process, without reaching overall impasse, is a clear violation of Section 8(a)(5) of the Act. *Burrows Paper Corp.*, 332 NLRB 82, 84 (2000) (employer violated Section 8(a)(5) by failing to continue practice of paying annual wage raise 11 months after union election); *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155 (1998), *enfd.* 208 F.3d 214 (6th Cir. 2000); *Dynatron/Bondo Corp.*, 323 NLRB 1263 (1997), *enfd.* 176 F.3d 1310 (11th Cir. 1999). See, *Rural/Metro Medical Services*, 327 NLRB 49 (1998).

Covanta recognizes (R. Br. at 98–99) the general rule prohibiting unilateral changes of employment practices, including wage increases or other payments, during the bargaining proc-

²⁴ In addition, an employer who violates Sec. 8(a)(5) derivatively violates Sec. 8(a)(1). *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

ess. However, the Respondents' defense involves the claim that the elimination of the corporate bonus and annual wage increase for bargaining unit employees fell within "an exception to the general requirement of an overall bargaining impasse prior to implementation of a proposal." *TXU Electric Co.*, 343 NLRB 1404 (2004); *Stone Container Corp.*, 313 NLRB 336 (1993). "Under this exception, if a term or condition of employment concerns a discrete recurring event, such as annually scheduled wage review, and that event is scheduled to occur during negotiations for an initial contract, the employer may lawfully implement a change in that term or condition if it provides the union with a reasonable advance notice and an opportunity to bargain about the intended change." *Neighborhood House Ass'n*, 347 NLRB 553, 554 (2006).

In order to rely on this exception, the employer cannot propose elimination of the annual practice and must be willing to bargain over the amount of the annual payment for that particular year. *Neighborhood House Association Ass'n*, 347 NLRB at fn. 4 and 556. Thus, the employer is "obliged to maintain the fixed elements of the [practice or program] and to negotiate with the Union over the discretionary element of the [practice or program]—the amount." *Mission Foods*, 350 NLRB 336, 337–338 (2007).

In this case, the Respondents cannot rely on the *Stone Container* exception to justify the unilateral change to the existing to the terms and conditions of employment regarding the corporate bonus and annual wage increase.

First, and dispositively, contrary to the requirement of the *Stone Container* exception, in this case Covanta made clear to employees that the corporate bonus previously provided to employees was "not available." Attorney Carey reaffirmed this to the Union in the February 18 meeting: "Corporate bonus is not available to SEMASS." Offering to hear out the Union on some other plan for bonuses that might be created or developed is not the same as offering to bargain over the amounts to be paid under the existing corporate bonus program, payment under which was upcoming. Nor is there any evidence that Covanta's wage offer of 2 percent was based on the corporate-recommended and approved annual pay increase program that would soon be applied to all Covanta facilities.

I note the statements of Attorney Carey in the February 18 bargaining notes, to the effect that "[n]o decision ha[d] been made at the corporate level," presumably about the payment of bonuses. But that is not believable. In the same conversation Carey explained that the corporate bonus plan was an "unrepresented plan" and stated that "Corporate bonus is not available to SEMASS. SEMASS is a stand alone facility. Corporate bonus is inconsistent with that." These comments, along with the explicit declaration to employees in the February 9 memo leave no doubt that while the Respondents were suggesting they would discuss an "alternative" to the established bonus program, the existing corporate bonus program was "not available to employees who are in bargaining units represented by unions," and "Covanta SEMASS bargaining unit employees should not expect to receive corporate bonus of any kind." Thus, the Respondents unilaterally eliminated the bargaining unit employees' eligibility for the corporate bonus program. Period. They were not declaring that the program was available

but that they wanted to negotiate the amount employees would receive this year.

The Board has termed this refusal to apply the existing system for payments "the critical distinction" from cases such as *Stone Container* and *American Packaging*, 311 NLRB 482 (1993), where the employer lawfully failed to provide the recurring payments after offering to bargain. In those cases, the outcome "flowed from the employers' application of their merit review program, not, as here, from the Respondents' unilateral decision to withhold raises even if the raises would have been given under an application of the preexisting merit raise program." *Daily News*, 315 NLRB at 1240. Here, by all evidence, Covanta announced February 9, and remained wedded thereafter, to the elimination of eligibility for the existing corporate bonus program for unit employees and the abandonment of the corporate-approved annual wage hike as a program in effect for unit employees. The Respondents took the position that, having selected union representation, the SEMASS employees were, as a result, a "stand alone facility" not eligible for the portion of their wage and bonus increases that were Covanta corporate-generated. This fundamental unilateral change is far beyond the freedom to negotiate the amount of existing program benefits granted employers by the *Stone Container* exception. *Neighborhood House Ass'n*, 347 NLRB at 554 fn. 4 and 556 (employer cannot propose elimination of the annual practice and must be willing to bargain over the amount of the annual payment for that particular year); *Mission Foods*, 350 NLRB at 337–338 (employer "obliged to maintain the fixed elements of the [practice or program] and to negotiate with the Union over the discretionary element of the [practice or program]—the amount").

A second problem for the Respondents' effort to rely on the *Stone Container* exception is the timing and method of Covanta's notification to the Union that it would not continue the existing bonus and pay practices. I credit Leonardi's testimony that he took the position, and conveyed it to the SEMASS bargaining team throughout bargaining, that SEMASS was legally required to maintain the status quo with respect to bonuses, and other matters, unless and until an agreement was achieved with the Union.

As to Respondents, I find that, until February 12, 2009, the Employer did not disabuse the Union of the presumptive notion that, consistent with the maintenance of the status quo of the terms and conditions of employment, the bonus and annual wage increases would be paid during the process of bargaining. Indeed, beginning in May 2008, immediately after the election, Davis suggested the bonus would be paid. Thus, in May 2008, Davis issued a memo declaring to employees that while the parties negotiated "all pay and benefits that you presently have will remain in effect" and "[a]ll policies and procedures that are presently in place will not change." On July 10, 2008, Covanta Energy Vice President John Walker provided Union negotiator Leonardi with a copy of the Covanta Energy Corporation 2008 Cash Bonus Program. This document (GC. Exh. 25) set forth the parameters and program details for the 2008 bonus, to be paid in August (the midyear safety bonus), and in February 2009 (the financial performance bonus and the 2nd half of 2008 safety bonus). The distribution of the program to the Union,

without mentioning an intent to cancel it, is, at a minimum, suggestive that the Respondents intended to continue to honor the program for bargaining unit employees. But any uncertainty on that score was dispelled when Leonardi directly asked Covanta bargainers at the July 10 bargaining session about the bonus. At the bargaining table, “Walker, said that the bonus program will continue throughout the bargaining process. And, then, he said that there’s actually one coming up in a few weeks and we’re going to pay that.” And a few weeks later, Covanta did pay the midyear component of the corporate bonus to the bargaining unit employees in August 2008.²⁵

Through the fall and winter of 2008 and into 2009, there is no evidence, prior to the issuance of the February 9 “bargaining brief,” that anyone from the Union knew that Covanta would be ceasing its practice of paying the bonus or annual wage increase. There is no documentary evidence, no credited testimony about discussion at meetings, or any other credible evidence that supports the view that Covanta told the Union, or said even one word to the Union at any time in bargaining (prior to Feb. 18, 2009) suggesting that the bonus or wage increase would not be paid in the event bargaining was ongoing when they came due.

The ubiquitous testimony, attributed to various people, asserting that the parties discussed that bonuses and wages would be subjects of bargaining, does not constitute notice that the bonus and wage increase would not be paid as planned. Those subjects are, and were, for sure, subjects of bargaining, but this does not show that it was stated or suggested that bonuses would not continue to be paid during bargaining until a new agreement—which might or might not include bonuses—was made effective. In short, to bargain over whether bonuses or wage increases should be in a new collective-bargaining agreement, and recognize that those are bargainable subjects, is not evidence that the Respondents intended to alter the status quo and eliminate the bonus or wage increase while bargaining continued.

The Union first learned of the Employer’s intentions to eliminate these benefits for bargaining unit employees from another employee, who forwarded and reported on Davis’ February 9, 2009 “bargaining brief” to the Union. Attorney Carey then confirmed the accuracy of the bargaining brief to the Union in a February 12 telephone conversation with Leonardi, and again in negotiations on February 18, 2009.²⁶

²⁵ The Employer contends on brief (R. Br. at 49) that at bargaining in July and August 2008 it notified the Union “on numerous occasion” that “only the semi-annual safety bonus for the first half year of 2008, would be disbursed,” and that it “repeatedly and emphatically” told the Union that the “bargaining unit employees would not be eligible for annual increases or additional bonuses of any kind unless an agreement concerning these subjects was achieved during bargaining.” The record evidence does not support these assertions. I reject them. To the extent the record, in one instance only, contains testimony asserting that something like this allegedly was said—on one occasion—I have discredited it, for sound reason, as explained in fn. 12 of this decision, *supra*.

²⁶ In addition to the lack of affirmative evidence that the Union was told about the Employer’s plans prior to mid-February, the surprise expressed by Leonardi to Carey during the February 18 meeting strongly supports the conclusion that the Union first learned about the

Covanta lacks evidence that it previously told the Union that the wage increase and bonus would not be paid while the parties bargained. Alternatively, Covanta relies upon the fact that its bargaining proposals for a new collective-bargaining agreement, offered for the first time in December 2008, did not propose a bonus and (somewhat inconsistently as to its argument) did propose a wage increase of 2 percent to begin in January 2009. Covanta takes the position that its bargaining proposal for a new collective-bargaining agreement constituted notice that it was not going to maintain the terms and conditions of employment and not going to pay the February bonus and wage increase if bargaining continued through their due date.

This argument is incorrect. As discussed, *supra*, it is factually incorrect: the bargaining proposals did not convey notification to the Union, and the surprise of the Union at the February 9 memo to employees, evident in Leonardi’s credited testimony and contemporaneous reaction, demonstrates this. See fn. 26, *supra*. But equally to the point, as a legal matter, it must be incorrect. To accept the Respondents’ argument would turn the presumptions of *Katz* and *Bottom Line*—that existing terms and conditions, including recurrent pay practices, continue in effect absent overall impasse or agreement—on their head. It would transform the *Stone Container* “exception” into a rule presuming the end of recurring pay practices as part of the existing status quo in terms and conditions unless their continuance was explicitly reaffirmed in a proposal for a new collective-bargaining agreement. Wages and pay plans are virtually always—perhaps it is more accurate to say always—a subject of bargaining to be included in collective-bargaining agreements. Under Covanta’s concept of notice, unless an employer’s collective-bargaining proposal expressly reaffirms and repropose an upcoming existing pay practice or policy, the employer is free to fail to implement the recurring pay practice when it comes due. But the *Stone Container* exception is an exception precisely because it requires employers to take some unambiguous step to remove the recurring pay practice from the presumptive ambit of terms and conditions that will be maintained throughout bargaining until agreement (or overall impasse) is reached. The employer relying on the *Stone Container* excep-

Employer’s plan to eliminate the bonus and wage increase from reports about the February 9 bargaining brief. The notes of the February 18 bargaining session include the following reaction by Leonardi to the Employer’s February 9 announcement:

You sent a notice out on 2/9—we never got one - we got it from the employees—who got it at home. As we said in July, and JW agreed to—we expect you to pay and perform by Status quo. . . .

On July 10th we specifically asked about bonuses and I spoke specifically at the table that bonus would be paid. JW agreed and immediately thereafter they paid the Health and Safety bonus.

Needless to say, your memo caught us unaware -It doesn’t relieve you of your obligation. . . .

You don’t have a right to make that change—its very disturbing. . . .

At no time did anyone say—it won’t be paid—you didn’t say that in your proposal. . . .

[Attorney Carey:] One thing I will tell you—the reason it was an issue was due to questions being asked at the plant—We posted this [the February 9 memo] so they’ll understand.

[Leonardi:] They understand now—this is the first I’ve heard.

tion has to tell the Union that it is not going to continue the specified terms and conditions of employment. See, *TXU*, supra (at first bargaining session in May and again in July, employer advised union that current wages “would not change until and unless [the parties] reached an agreement on such change”); *Neighborhood House Ass’n*, supra (notice in October that employer did not intend to implement annual COLA in December if no agreement reached).²⁷

At bottom, Covanta contends that even if it failed to give previous notice to the Union, the February 9 memo to employees, followed by the discussion at the bargaining table February 18, put the Union on notice that it did not intend to pay the bonus or the wage increase. The difficulties with this contention are many.

First, of course, there is still the dispositive problem, discussed above, that the *Stone Container* exception requires a willingness to bargain over the amount to be paid under the existing bonus and wage program. As discussed, that is absent here. Moreover, it is also necessary to point out that a two-week notice of elimination of a bonus payment scheduled to be paid “late February 2009,” and an annual across-the-board-pay increase that was paid retroactively to January 1 (but then withdrawn) on March 6, does not provide reasonable advance notice to the Union. The Union protested when it learned of the Covanta’s intentions, issuing a response to employees and insisting in the February 18 bargaining that “we expect you to pay Needless to say, your memo caught us unaware—It doesn’t relieve you of your obligation.” Under the time restraints, that is enough to preserve its position. *Washoe Medical Center, Inc.*, 348 NLRB 361, 364 (2006) (no violation where union received 30-day notice of employer’s decision to end merit pay increase but union acquiesced in decision and did not protest). That is particularly true where a member of Co-

vanta’s bargaining team had indicated in July 2008 that the bonus would continue to be paid during bargaining and, in fact, it was paid during bargaining in August 2008. The *Stone Container* exception is not about “gotcha.”

Even more critically, the February 9 memo to the employees explained that “the corporate bonus you have received in the past is not available” and that employees “should not expect a wage increase of any kind” unless contained in a new collective-bargaining agreement. This notice with its finality about the prospects of receiving a corporate bonus, and the scheduled wage increase in the absence of a full collective bargaining agreement, is inconsistent with good-faith bargaining and suggests a *fait accompli*, not a meaningful proposal. *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994) (distinguishing *Stone Container* because “[i]n this connection, we rely on the fact that by the time the Union was apprised of the contemplated changes, the Respondent had already announced them to the employees”).²⁸

Finally, the *Stone Container* exception is not available because the unilateral implementation was unlawful on numerous independent grounds. It is important to emphasize that “the statutory obligation is to deal with the employees through the union rather than to deal with the union through the employees.” *Hartford Head Start Agency, Inc.*, 354 NLRB No. 15, slip op. at 23 (2009). Although not alleged in this case, the Board has long recognized that an employer violates Section 8(a)(5) by bypassing the union and communicating a new proposal to employees before adequately presenting proposal to the union in bargaining. *Pavilions at Forrestal*, 353 NLRB No. 60, slip op. at 1 fn. 3 and slip op. at 26–27 (2008); *Armored Transport, Inc.*, 339 NLRB 374, 376–377 (2003) (employer violated Sec. 8(a)(5) by providing proposal to employees where proposal was not provided to union until later that day); *Detroit Edison Co.*, 310 NLRB 564 (1993); *Storer Communications, Inc.*, 294 NLRB 1056, 1080 (1989) (employer unlawfully communicated directly to employees its withdrawal from an understanding regarding wage increase retroactivity). See, *NLRB v. Roll and Hold Corp.*, 162 F.3d 513, 519–520 (7th Cir. 1998) (upholding Board finding of unlawful unilateral imple-

²⁷ The best case for Covanta is *Alltel Kentucky, Inc.*, 326 NLRB 1350 (1998). There, a Board majority, with one member dissenting on this point, agreed that “under the particular circumstances of this case,” an employer’s proposal of a wage freeze effectively notified the union that the employer did not intend to increase wages in January as it had routinely done in past: However, in that case,

the Respondent informed the Union that, based on the survey, it did not intend to propose an increase in wages and that its position on a wage freeze would not change. . . . [D]uring negotiations [the employer] articulated to the Union that no wage increases would be forthcoming and this served as sufficient advance notice that it intended to discontinue the annual cost of living wage increase normally given in December and January. . . . Given the unqualified breadth of this proposal, it is irrelevant that the Respondent made not concurrent reference to its prior practice [of paying an annual wage increase].

326 NLRB at 1350 (footnote omitted).

In this instant case, by contrast, there was no discussion that would signal to the Union that Covanta’s proposal was intended to eliminate the upcoming bonus and wage increase even before and without regard to whether a collective-bargaining agreement was agreed upon. Certainly, the payment of the corporate bonus in August, in the midst of negotiations, along with Walker’s assurance that it would be paid throughout the bargaining process, would lead the Union to believe that Covanta’s proposal for a new collective bargaining agreement was just that, and not notification of the elimination of current terms and conditions of employment.

²⁸ See also, *Burrows Paper*, 332 NLRB at 84 (after . . . announcement of the wage increase to employees, we find that the Union could reasonably conclude that the matter at this point was a *fait accompli*, i.e., that the Respondent had made up its mind and that it would be futile to object to the pay raises”); *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1017 (1982) (“Concededly, some months remained before the implementation of the cancellation decision. However, where implementation is not imminent, an employer’s announcement of a change concerning a mandatory subject of bargaining is still nothing more than notice of a *fait accompli* if the employer has no intention of changing its mind”), *enfd.* 722 F.2d 1120 (3d Cir. 1983); *Wal-Mart Stores*, 352 NLRB at 816, quoting *Jensen Enterprises*, 339 NLRB at 877 (“an employer’s statement that wages will be frozen until a collective-bargaining agreement is signed violates Section 8(a)(1) of the Act if the employer has a past practice of granting periodic wage increases. Such an announcement suggests to employees that the employer intends to unilaterally take away benefits and require the union to negotiate to get them back’ If the employer follows through with its announcement, it violates Sec. 8(a)(5) and (1).”

mentation where union learned of proposed change from employees to whom employer first presented proposal).²⁹

As I have found, the first announcement of the intended unilateral change was to employees in the February 9 memo, not to the Union. To the extent Covanta maintains that it was making a proposal that the Union thereafter had the opportunity to bargain over, its notice, by itself, was a violation of Section 8(a)(5).

Because the General Counsel does not allege or press this violation, I do not find it as an independent violation. However, it does serve to further undermine the Respondents' contention that the subsequent unilateral action was lawfully undertaken. In this regard, it is worth adding that in this case, in addition to the 8(a)(5) bypassing violation that I note, but do not find, the unilateral change has been found to be unlawfully motivated in violation of Section 8(a)(3) of the Act. See discussion, *supra*. Moreover, as discussed and found, *supra*, the February 9 announcement to employees independently violates Section 8(a)(1). When an implementation violates the Act three ways, it is not redeemable as a legitimate bargaining tactic that is an "exception" to general Board rules prohibiting unilateral implementation during bargaining.

As alleged, the unilaterally-implemented elimination of the practice of paying bargaining unit employees an annual wage increase and corporate bonus violated Section 8(a)(5) and (1) of the Act.³⁰

²⁹ The Seventh Circuit's explanation on this point warrants full consideration:

[N]o opportunity for meaningful negotiation existed here: [] by presenting the plan directly to employees before notifying the Union, the Union's negotiating role was significantly undermined. *Detroit Edison Co.*, 310 NLRB 564, 565–566 (1993). One of the purposes of early notification is to allow a union the opportunity to discuss a new policy with unit employees so it can determine whether to support, oppose or modify the proposed change. When an employer first presents a policy to its employees without going through the Union, the Union's role as the exclusive bargaining agent of the employees is undermined. Under these circumstances it is more difficult for the Union to present a unified front during negotiations. Also, if the change proves popular among employees, direct dealing may convince them that union representation is unnecessary.

The ALJ found, and Roll and Hold does not dispute, that the Union only learned of the proposed attendance policy change during the process of [management] explaining it to the general workforce. The NLRB has previously held that this does not satisfy the special notice requirement.

163 F.3d at 519–520 (citations omitted).

³⁰ At the hearing, the Union questioned the Respondents' compliance with their subpoena obligations and asked for an adverse inference that additional documents, had they been provided, would have been adverse to Covanta's case. In this regard, the contention appears to have been focused chiefly on the failure of anyone at the Employer, as of October 22, 2009, the fourth day of the hearing, to ask Anechiarico, the Covanta Energy human resources official, to search his files for requested documents, in a subpoena directed to the Covanta Energy and SEMASS custodian of records, "relating or referring to Local 369, UAWA, union organizing campaigns or elections or Michael Keogh or other union officials or stewards." Anechiarico testified that he "evaluated" the subpoena and "made a general judgment" that he "had nothing to contribute." He also testified that no such documents existed. It is the Respondents' position that all responsive, nonprivileged documents were produced. While it is noteworthy that someone as central to the union campaign as Anechiarico was not asked to review his paper and email files for documents related to the campaign, given my resolution of this case I do not deem it necessary to rule on the subpoena dispute. I may, however, return to the matter as part of the decision in the remaining cases affiliated with this matter.

Part II

Single-Employer Allegations

Findings of Fact

Some of the relationship between Covanta Energy and SEMASS has already been discussed, incidentally, as part of the consideration of the elimination of the corporate bonus and annual wage increase.

For instance, the SEMASS bargaining committee was composed initially of SEMASS Facility Manager Davis, Covanta Energy Vice President Walker, and Covanta Energy human resources director of generalists, Anechiarico. They were joined later by Attorney Carey, who had been selected by Covanta Energy to be involved in the collective bargaining. Similarly, it was noted, above, Covanta Holding is the 100 percent owner of Covanta Energy, and Covanta Energy is the 100 percent or majority owner of the U.S. Covanta subsidiaries, including SEMASS. Although the corporate forms and ownership interests may vary, and can be complex, as counsel for the Respondents acknowledged, "there's no question that the financial control of those facilities is Covanta Energy."

Additionally, the discussion in Part I of this decision makes clear that the corporate—i.e., Covanta Energy—bonus has long played a significant role in SEMASS employee income, as did the annual wage increase that was systemwide, the amount of which was recommended at a corporate level. For the regional and local components of the bonus, the amount of the bonus target is decided each year by the facility manager working "in some relationship with the regional vice-president of operations" (i.e., Walker).

There is far more to the relationship between SEMASS and Covanta.

It is not only the bonus portion of SEMASS compensation that is designated by Covanta Energy. SEMASS employees' medical benefits, dental, health insurance, disability, and 401(k) are designated and administered across the company by Covanta Energy or a third-party administrator working with the Covanta Energy plan. With some State-by-State variation regarding providers, and state insurance regulations, the benefits are standardized across the country. Thus, Covanta Energy (or Covanta Holding) is the sponsor of the retirement and health care plans offered to SEMASS employees, and those plans are used across the Covanta Energy system of subsidiaries. Several years ago, Covanta Energy switched employees to a defined contribution retirement plan, freezing the existing defined benefit plan. Individual plant managers had no discretion about this change. This was a corporate wide change affecting employees at Covanta-owned facilities across the country.

ing to contribute." He also testified that no such documents existed. It is the Respondents' position that all responsive, nonprivileged documents were produced. While it is noteworthy that someone as central to the union campaign as Anechiarico was not asked to review his paper and email files for documents related to the campaign, given my resolution of this case I do not deem it necessary to rule on the subpoena dispute. I may, however, return to the matter as part of the decision in the remaining cases affiliated with this matter.

Covanta Energy is deeply involved in the administration of pay for employees. The weekly pay statements and benefits information are available to SEMASS employees, and to employees of other Covanta subsidiaries, through a corporatwide intranet system that employees log into. Employees receive yearly compensation statements from Covanta Energy that include a letter from Covanta Energy's vice president of human resources. The letter begins,

Did you realize your paycheck from Covanta does not represent all of your compensation? Your total compensation actually consists of your cash compensation as well as Covanta's contributions to your comprehensive benefits package.

The letter concludes by stating, "[w]e appreciate your continued contribution to the success of Covanta Energy." SEMASS is not mentioned in the letter or on the compensation statement.

SEMASS uses the Covanta Energy employee handbook as its employee handbook and rules. SEMASS does not generate its own handbook. In September 2008, revisions to the handbook were initiated by Covanta Energy and emails were sent to all facility managers by a Covanta Energy human resources department colleague of Anechiarico's. The emails notified facility managers to distribute the updated manual to all employees and to review the changes with employees. Then, in February 2009, in conjunction with another handbook revision, Covanta Energy personnel requested that employees sign an acknowledgement and return the acknowledgement for filing in their individual personnel files. The acknowledgement, on Covanta Energy letterhead and addressed to "all employees" from "human resources" attached a copy of the "Covanta Employee Handbook for Covanta Energy Corporation and its subsidiaries." The acknowledgement stated:

This Handbook is intended to answer questions frequently asked and to advise you about the Company's benefits and practices as they presently exist. . . . If you should have a question about any policy, you should discuss the matter with your supervisor, or with the manager, if any identified in the policy as the person to who question should be addressed. If your question is not answered in this way, you should refer your question to the Human Resources Department.

The acknowledgement provided a place for employees to sign. The facilities sent the batches of signed acknowledgments through interoffice mail to the HR generalists, such as Anechiarico. Anechiarico had the signed employee acknowledgments scanned into the employees' individual personnel files. This was done for Covanta subsidiaries across the country. Direction was given to facility managers and Covanta Energy regional personnel from the senior human resources director telling them to post the handbook changes and to discuss the information with hourly employees, a process Anechiarico characterized as part of a "rigorous communication" process at Covanta.

Covanta Energy's engagement with employees at SEMASS (and other subsidiaries) is not a new development. Upon Covanta's assumption of Re-Fuel operations in the mid-1990s,

SEMASS employees received a packet of information from Covanta Energy regarding the "Covanta family." The packet included a letter to the employees from the Covanta Energy CEO, in which he offered a "special welcome" and said that he "look[ed] forward to seeing you soon." The packet also contained an extensive "welcome" from the Covanta Energy human resources department, which explained to employees that "[w]e are looking forward to working together to combine the best of both of our corporate cultures." It described how "teams" composed of Re-Fuel and Covanta employees had been formed to work on making "integration as smooth and beneficial as possible." Information was then provided from the "payroll team," "bonus and compensation team," "policies and procedures team," and the "benefits team." An extensive name and phone list was provided in the packet to permit employees with questions to call the relevant Covanta Energy office with questions regarding human resources, information services, accounting, building services/stationery, engineering, environmental, legal, mailroom, operations, risk management/workers' compensation, safety, supplemental waste, travel, and treasury/investor relations. The packet included photos of Covanta employees from facilities around the country welcoming the newly acquired facility employees and a corporate organizational chart for Covanta Energy.³¹

When new employees are offered positions at SEMASS, it is "not uncommon" for the letter offering employment and setting forth the employment details to be signed by Davis and by Anechiarico.³²

While denying that he signed every offer of employment, Anechiarico testified that he was aware of every offer of employment made at SEMASS. Background checks and references on potential hires at SEMASS are performed by a private company that performs this service for most Covanta facilities. The cost of this third-party's investigation is billed to the individual facility but the firm is retained and selected by Covanta Energy. Similarly, a drug screen and physical is performed on potential hires and Covanta Energy retains the firm that performs that work.

As stipulated by the parties at the hearing, Covanta SEMASS has a board of directors composed of the same people who compose the Covanta Energy board of directors. There is significant, if not total overlap in the officers of Covanta Energy

³¹ At the hearing, the parties stipulated that Covanta Energy makes various support services available to its subsidiaries, including SEMASS, such as services relating to human resources, payroll administration, benefit administration, information technology, accounting, legal risk management and workers' compensation. It was further stipulated that these corporate services would be the first source for these services for the subsidiaries.

³² Anechiarico asserted that he could not recall this happening at SEMASS, but that it is "not uncommon if it has happened," and that he could recall it happening at other facilities. The only SEMASS hiring letter in evidence shows that it has happened at SEMASS, although when confronted with this letter Anechiarico asserted that Walker's administrative assistant had signed his name. He then identified her as an employee of SEMASS, and added that she did nothing wrong by signing his name. Anechiarico asserted that he would have been representing SEMASS when he signed such a letter.

and SEMASS (e.g., the president of Covanta Energy is the president of SEMASS).

Notably, SEMASS Facility Manager Davis, testified that as far as he was aware, SEMASS did not have a board of directors. When he learned that there was one, at least on paper, he called it a “corporate formality” and reemphasized that “[t]here’s nobody that I report to other than John Walker. I don’t report to any board of directors.” Davis declared that SEMASS had no corporate officers. He asserted that he had no knowledge that the president of Covanta Energy, Tony Orlando, was also the president of SEMASS, and declared that if that was so it was “a business formality and it may be in business documents that quite frankly I don’t pay any attention to.” Davis testified that when he deals with the public he identifies himself as working for Covanta SEMASS, but it is also true that his business card prominently lists “Covanta Energy Corporation” and lists as its address the address for the SEMASS facility.

A number of Covanta Energy employees (as reflected on a Covanta organizational chart) work out of SEMASS. These include Walker, whose office is at SEMASS. His administrative assistant, Monica Maranhas is listed as part of a Covanta Energy block of employees on the organizational chart, but she is paid out of SEMASS, while working primarily for Walker. (She also performs some work for Davis if “she’s not busy” with Walker’s work.) Maranhas is also used by SEMASS managers to consult with on benefits questions. Larry Swartz, the Covanta Energy regional engineer works out of SEMASS, is paid out of SEMASS, but has regional responsibilities. Before assuming the position of regional engineer Swartz was the maintenance manager for SEMASS. Similarly, Mark Skiba, the regional safety administrator works from SEMASS, is paid by SEMASS, but divides his work equally among the ten Covanta regional facilities. A separate SEMASS organizational chart shows Tom Cipolla as the business manager. He reports to Steve Diaz, the Covanta Energy regional business manager.

At trial, the Respondents’ witnesses (particularly, Davis and Anechiarico) were quick to adopt and endorse certain positions related to the single-employer issue: these included that SEMASS paid for everything it received from Covanta Energy, and that Facility Manager Davis was the ultimate authority for all SEMASS-related operations (including labor-related) decisions. These assertions were offered repeatedly, with slight variation. However, with additional questioning by the General Counsel and the Union, these broad assertions gave way and different picture was painted.

For instance, on direct testimony Davis testified that he had full authority over SEMASS budgeting, labor costs, determining the budget for bonus, benefits, taxes, and overtime. Davis explained that while he consults with the other members of the bargaining committee he has final authority for what gets presented. He testified that he has the “authority to act on the recommendations of the SEMASS bargaining committee.” In other words, he claimed repeatedly that he runs SEMASS, and has final authority there.

However, with a little probing through cross-examination, Davis presented a different picture of his place in the hierarchy and SEMASS’ relationship to Covanta Energy. He was hired

to run SEMASS, after running another smaller Covanta facility, by Covanta Energy officials, Walker and Ted Hoefler. Davis described how earlier in his career he had worked at SEMASS, when Walker was the SEMASS facility manager, and after that had kept in touch with Walker, currently vice president for the North East Region of Covanta Energy, who assumed that position after “moving up in position” from SEMASS facility manager.

In his current position, Davis testified that he reports to Walker. The SEMASS budget that, on direct examination, he said he created, is, he explained on cross-examination, submitted to Walker, who can, and does, involve himself in the budget process. As Davis explained it,

We . . . recently went through the budget process. So its always, you know, I want the world, . . . I want to spend all kinds of money in the facility and that’s just not reality. So we sit down and, you know, kind of tell me what reality is and I have to make decision on what I can and can’t do.

In the end, the SEMASS budget is approved by the Covanta Energy board of directors.

Notably, while Davis claimed ultimate authority for SEMASS bargaining positions, Davis also explained that the other members of the bargaining team, Covanta Energy official Walker, to whom Davis reports, and Attorney Carey, who was selected by Covanta Energy, had input into bargaining briefs. Davis ultimately approved what went out, but it was a collaborative effort to put together a bargaining brief.

Notably, Covanta Holding’s 10(k) form, filed March 2, 2009, and entered into evidence, describes itself as “operating” the Covanta Energy subsidiaries, including SEMASS. The 10(k) states that “[c]urrently, we are party to seven collective bargaining agreements” and adds that “[i]n 2008, approximately 140 employees at a facility located in Rochester, Massachusetts elected to be represented by organized labor. *We are engaged in good faith bargaining with the union representing these employees.*” (GC Exh. 78 at p. 24) (emphasis added).³³

A consistent theme of Davis and Anechiarico was that services provided by Covanta Energy to SEMASS were paid for or “budgeted” to SEMASS. (As Davis put it, eventually costs to SEMASS “hit the SEMASS books”.) I accept this as true. At the same time, according to Davis, while the funds for the budget come from revenues of SEMASS, any profit that SEMASS makes is returned to Covanta Energy. Davis, never having had deal with a year in which there was a loss, did not know how that would be handled.

Davis talks weekly with Walker about SEMASS’ production, operations, financial, environmental, and safety issues. According to Davis, “I keep him apprised as to how we’re doing.” Walker travels a lot, but, as referenced, above, his office is at the SEMASS facility, in a separate building from Davis’, about 2/10 of a mile away. Although Davis testified that didn’t know for sure whether Walker worked for Covanta Energy Corp. (“I don’t know where that distinction is”), he indicated

³³ The 10(k) defines the term “we” to “refer to Covanta Holding Corporation and its subsidiaries,” which, by definition refers to “our subsidiary Covanta Energy Corporation.”

that Walker “reports up through Covanta Energy at some point.” Covanta Energy’s organizational chart shows that Walker is the regional operations manager for Covanta Energy’s northeast region. According to Anechiarico, Walker has frequent calls with the facility managers in his region. Anechiarico also testified that Davis and Walker’s relationship as to plant operations was mirrored on the financial side by a facility business manager at each facility who was accountable to a regional business manager for Covanta Energy. In the case of the Northeast region, this was Steven Diaz. The business plans and all budgeting for each facility get reviewed and approved by the corporate office.

Anechiarico also testified extensively, repeatedly stressing his lack of authority over SEMASS. When questioned by the Respondents’ counsel, Anechiarico, like Davis, answered leading questions with statements about Facility Manager Davis’ responsibility for operations, supervision, and labor cost decisions, and similarly, about his own lack of authority at SEMASS. According to Anechiarico, Davis was the highest management official within the SEMASS organization. Similar questions elicited similar answers regarding facility managers at other Covanta facilities. However, these broad assertions gave way under more detailed questioning.

Anechiarico reports to the senior human resources director for Covanta Energy. He described his role and an advisor and consultant to the Covanta subsidiaries. Formally, he provides support for Covanta’s New England region of companies, but his assignments can take him to Covanta-owned facilities across the country. He described his work as “advis[ing] facility manager and facility management team on the day-to-day employee relations issues that may arise, the corrective disciplinary action, team building issues within the management team. Those kind of related issues.” Anechiarico told Leonardi that “he handled labor relations for Covanta Energy and that he traveled across the country” performing this work.

Anechiarico has been involved in Covanta’s opposition to numerous union drives on behalf of Covanta, approximately 14 since 2001, including the SEMASS union campaign, where he was involved “almost on the day [] that the petition was filed.”

Anechiarico was brought into the New England region, and to SEMASS in particular, for the first time [a]s part of the union avoidance campaign” mounted against the union drive in the spring of 2008. At that time he was, formally, the New York/New Jersey region HR person, but “in practice” he “was being used throughout all the different entities throughout the country.” At that time, Anechiarico reported to Jerry Crofford who “was senior director of Human Resources for the corporate entity” as well as human resources head for the New England region. When Crofford resigned in the weeks before the union election, Anechiarico took over his position as New England HR director. After some period of time, Sandra Jackson took over as senior director of employee relations and Anechiarico reported to her on “union avoidance” and other issues. Anechiarico described the decisionmaking about the union avoidance campaign at SEMASS as “very much a part of a collaboration between myself and local management.” He and Davis, in particular worked on the campaign, and Anechiarico began to visit the SEMASS facility about every other week. Anechi-

arico denied that he held the final decision over disciplinary matters. He characterized the situation as him “wield[ing] persuasion, not authority.” But he agreed that is recommendations were usually followed by plant managers.

Anechiarico plays a singular role in Covanta’s peer grievance review process. This process, which Covanta Energy adopted from American Re-Fuel, provides employees with an opportunity to bring a grievance over their discipline before a committee composed of three employees and two supervisors or managers. The panel members are picked randomly (with some exceptions for individuals that the employer feels may be interested parties) and after hearing the grievance the panel votes by secret ballot to affirm, modify, or reject the discipline. When an employee at SEMASS chooses to invoke the peer grievance review panel, Anechiarico travels to SEMASS and briefs the committee. He serves as the “facilitator” and provides guidance to the panelists, rank and file and supervisory. He sits in on the hearing. After panelists hear the grievance, Anechiarico is the only nonpanelist who sits in with the panel as they deliberate. As facilitator, Anechiarico decides, where the situation does not fall under explicit guidelines, on a case-by-case basis whether a panel member should not participate because of a conflict of interest of one kind or another (such as being too close personally to the grievance events). Anechiarico characterized his authority regarding determining when there is conflicts of interest as only a recommendation, but he could not recall a situation where his advice to local management on this issue had not been followed. Anechiarico agreed that Covanta facilities were not free to use some other sort of investigative or dispute resolution mechanism. Covanta Energy decided that this mechanism, which had begun at American Re-Fuel plants purchased by Covanta, would be utilized at all the Covanta Energy subsidiaries.

Anechiarico maintained that facilities have the choice to use his HR services or to use an outside labor agency. However, SEMASS used him extensively. He estimated that he visited the facility approximately twice a week between May and September 2008 and had a dozen formal meetings with supervisory staff.

Analysis

A single-employer analysis is appropriate where two ongoing businesses are coordinated by a common master. See, *APF Carting, Inc.*, 336 NLRB 73 fn. 4 (2001) (citing *NYP Acquisition Corp.*, 332 NLRB 1041 fn. 1 (2000), enfd. 261 F.3d 291 (2d Cir. 2001)). “Stated otherwise, the fundamental inquiry is whether there exists overall control of critical matters at the policy level.” *Emsing’s Supermarket, Inc.*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989) (footnotes omitted). In *Radio & Television Broadcast Technicians v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965), the Supreme Court, in considering which factors determine whether nominally separate business entities should be treated as a single employer, stated:

The controlling criteria set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.

In *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1181–1182 (2006), the Board explained:

In determining whether two entities constitute a single employer, the Board considers four factors: common control over labor relations, common management, common ownership, and interrelation of operations. *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987), enf.d. 872 F.2d 1279 (7th Cir. 1989).

The Board has held that the factors of common control over labor relations, common management, and interrelation of operations are “more critical” than the factor of common ownership or financial control, and that “centralized control of labor relations is of particular importance because it tends to demonstrate ‘operational integration.’” *RBE Electronics of S.D.*, 320 NLRB 80 (1995). However, “[n]o single factor in the single-employer inquiry is deemed controlling, nor do all of the factors need to be present in order to support a finding of single-employer status.” *Flat Dog Productions, Inc.*, supra; *Bolivar-Tees, Inc.*, 349 NLRB 720, 722 (2007). *RBE Electronics*, supra. “Rather, single-employer status depends on all the circumstances, and is characterized by the absence of the arm’s-length relationship found between unintegrated entities.” *Dow Chemical Co.*, 326 NLRB 288 (1998). Indeed, the Board has recently explained that “[t]he hallmark of a single employer is the absence of an arm’s-length relationship among seemingly independent companies.” *Bolivar-Tees, Inc.*, 349 at 720.

Based on record evidence, the single-employer status of Covanta Energy and SEMASS is not in doubt. SEMASS’ operations, labor policies, management, and financial arrangements are inextricably intertwined with and dependent on Covanta Energy.

There is, of course, the fact that Covanta Energy owns and financially controls SEMASS. By itself, this does not create a single-employer relationship. But in addition to this financial control, there is the “more critical” deep, pervasive entanglement in and influence of Covanta Energy on the labor relations strategy, compensation, rules and regulations, organization, and operations of SEMASS. The insistent assertion throughout trial that Davis is in charge of SEMASS may have some truth: he is the facility manager. But it is demonstrably false to suggest that he runs or operates SEAMASS without the ubiquitous involvement, oversight, and control, of Covanta Energy. And there is no indication that this is a choice he has made. He was hired by Walker of Covanta Energy, he forthrightly admits that he reports to Walker of Covanta Energy (who himself, “mov[ed] up in position” from SEMASS to Covanta Energy regional responsibilities), and he was unaware that he reported to anyone but Walker of Covanta Energy. Walker, whose office is located at SEMASS, works with Davis to create the budget for SEMASS—Walker “tell[s] me what reality is”—a budget that must be approved by Covanta Energy. Davis’ business card suggests that he works for Covanta Energy, and lists the SEMASS address as a Covanta Energy address.

The fact that Davis was unaware that SEMASS, even formally, had a board of directors, speaks volumes about the lack of independence of SEMASS from Covanta Energy. There is not too much left of Respondents’ assertions of SEMASS’ in-

dependence when the chief manager of SEAMASS admits he “reports” to a Covanta Energy official and is unaware of the existence of his own entity’s corporate board. The confusion is understandable: the SEMASS board of directors is composed of the same people who compose the Covanta Energy board and there is significant, if not total overlap of the officers of both companies. The fact that the SEMASS officers and directors operate and are known only as Covanta Energy officers and directors only adds to the case for single-employer status. On top of this, SEMASS is the office for a number of Covanta Energy supervisors and employees, including Walker’s administrative assistant, who works primarily for Walker of Covanta Energy, but is paid by SEMASS, and is considered by SEMASS Supervisor Paula St. Louis to be a “local HR” official who can answer questions about Covanta Energy-sponsored benefits plans.

This is what managerial and operational integration looks like. Even Davis opined that “I don’t know where that distinction is.”³⁴

SEMASS’ labor relations is deeply intertwined with Covanta Energy’s. Its collective-bargaining team is dominated by Covanta Energy. Covanta Holding, which is Covanta Energy’s publicly traded 100-percent owner, openly assumes responsibility in its 10(k) report for the bargaining between it and the Union at SEMASS. Anechiarico provided the guiding hand, not only to the union avoidance efforts at SEMASS, but plays a unique insider role in the peer review disciplinary process which is used at SEMASS and the other Covanta Energy subsidiaries. He signs offers of employment to SEMASS employees. It is also highly relevant to the single-employer inquiry that SEMASS’ compensation for employees is largely composed of Covanta Energy administered and designed programs. Even the employee handbook is a Covanta Energy document. Most importantly, Covanta Energy communicates directly with SEMASS employees regarding their compensation and benefits, makes itself available to SEMASS employees for assistance and information with pay and benefits questions, and holds itself out to SEMASS employees as the source of compensation, benefits, and most other employment-related services.

In light of this evidence, it is meaningless that Covanta Energy officials declared in bargaining and at trial, that they are there representing SEMASS and that SEMASS is a stand alone facility, not related for labor relations purposes to Covanta Energy. These statements and positions do not create facts that overcome the reality of Covanta Energy’s involvement in SEMASS affairs.

³⁴ This was Davis’ response to a question about whether Walker works for Covanta Energy. He stated that he knows that he “report[s] up through John Walker. And I know that eventually he reports up through Covanta Energy. . . . I don’t know the distinction of what you call them.” When pressed about seeming to not know the distinction between Covanta Energy and SEMASS, Davis retreated to his prepared position that “[n]o, I understand that all the subsidiaries are separate. I mean I’m separate from all other business units.” But despite this assertion, repeatedly advanced, the overall testimony tells a different story.

The Respondents also claims that a lack of a single-employer relationship between these two corporate entities should be found based on the assertion that SEMASS is charged for and pays for the panoply of services provided to it by Covanta Energy. This may be correct, as a budgeting matter, but of course, SEMASS' budget is one more item that must be approved by Covanta Energy. The fact that Covanta Energy chooses to run its "network" (as Covanta Holding's 10(k) refers to its subsidiary operations) by making sure that SEMASS costs "hit the SEMASS books" proves nothing about SEMASS' independence from, lack of control by, or lack of integration with Covanta Energy.

SEMASS' labor relations, operations, and management decisionmaking are inextricably interwoven with Covanta Energy. Covanta Energy exercises common control with SEMASS over operations, management, and labor relations.

Finally, I address a legal argument raised by the Respondents against a finding of single employer status. Respondents contend that because the Board certified the Union as the bargaining representative for a bargaining unit of SEMASS employees, the Board is precluded, as a matter of law, from litigating and finding that SEMASS is a single employer with Covanta Energy. This contention lacks tincture. The very point of a single-employer finding is that the two allegedly independent entities are, for purposes of the Act, the same employer. To find single-employer status means "there is in fact only a "single employer." *NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982). Because that is the case here, with regard to the SEMASS bargaining unit, Covanta Energy is SEMASS and there is no grounds, precedent, or rationale, for limiting liability or obligations stemming from the Board's order to the corporate form referenced on the certification.

Covanta points to two court cases in support of its argument: *Alaska Roughnecks & Drillers Ass'n v. NLRB*, 555 F.2d 732 (9th Cir. 1977), cert. denied, 434 U.S. 1069 (1978), and *Central Transport Inc. v. NLRB*, 997 F.2d 1180 (7th Cir. 1993). Putting aside whether these cases are otherwise inapposite, both cases involve, and their rationale limited to, the Board's imposition of a bargaining obligation on an employer found to be a *joint employer* with another employer that was certified as the employer through Board representation proceedings. This is all the difference in the world. "The 'joint employer' and 'single employer' concepts are distinct." *Browning-Ferris Industries, Inc.*, 691 F.2d at 1122. The point of the single-employer doctrine is to "treat[] two or more related enterprises as a single employer for purposes of holding the enterprises jointly to a single bargaining obligation or for the purpose of considering liability for any unfair labor practices." *Iowa Express Distribution v. NLRB*, 739 F.2d 1305, 1310 (8th Cir. 1984), cert. denied, 469 U.S. 1088 (1984). Joint employer status, on the other hand, does not involve a finding that the two companies are actually an integrated enterprise or are the same employer for purposes of the Act. "Rather, a finding that companies are 'joint employers' assumes in the first instance that companies are 'what they appear to be'—independent legal entities that have merely 'historically chosen to handle jointly . . . important aspects of their employer-employee relationship.'" *Browning-Ferris Industries, Inc.*, 691 F.2d at 1122 (quoting *NLRB v.*

Checker Cab. Co., 367 F.2d 692, 698 (6th Cir. 1966), cert. denied, 385 U.S. 1008 (1967)). That assumption is not warranted in this case. Given my finding regarding single-employer status, it is unnecessary to pass on the General Counsel's alternative contention that Covanta Energy and SEMASS are joint employers. Covanta Energy and Covanta SEMASS are part of a single-integrated enterprise, not truly separate companies that have chosen to handle some aspects of the employer-employee relationship jointly. They are a single employer for purposes of the Act.

CONCLUSIONS OF LAW

1. The Respondents Covanta Energy Corporation and Covanta SEMASS LLC (hereinafter referred to collectively as Respondent) are single-integrated enterprises and single employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party Local 369, Utility Workers Union of America, AFL-CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of SEMASS constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All operations, power block, process and maintenance employees employed by Covanta SEMASS at its 141 Cranberry Highway, West Wareham, MA location, at its transfer station located at 257 Ivory Street, Braintree, MA and its landfill located at 118 Federal Road, Carver, MA, including storekeepers, maintenance mechanics, electrical and instrument techs, mobile equipment mechanics, utility operators, equipment operators, auxiliary operators, control room operators, assistant control room operators, truck drivers, ash systems operators, transfer station operators, transfer station scale attendants, and laborers, but excluding all office and clerical employees, professional employees, guards and supervisors as defined in the NLRA.

4. Since on or about May 12, 2008, the Union has been the certified, exclusive representative of the foregoing unit of SEMASS' employees.

5. On or about February 9, 2009, the Respondent violated Section 8(a)(1) of the Act by announcing to employees that they were no longer eligible to receive the corporate bonus and would not receive the upcoming annual wage increase.

6. In or about February 2009, the Respondent violated Section 8(a)(3) and (1) of the Act by eliminating the unit employees' participation in the corporate bonus program, and eliminating the practice of paying unit employees the corporate-recommended annual wage increase, to discourage employees' union activity.

7. In or about February 2009, the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the unit employees' participation in the corporate bonus program, and the practice of paying unit employees the corporate-recommended annual wage increase, as existing terms and conditions of employment for bargaining unit employees, without providing the Union with advance notice and an opportunity to bargain to a lawful impasse.

8. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent Covanta Energy Corporation, and the Respondent Covanta SEMASS LLC (an integrated enterprise and single employer, collectively referred to herein as the Respondent), have engaged in certain unfair labor practices, I find that they are joint and severally liable for the unfair labor practices and must be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall reinstate the unit employees' participation in the corporate bonus program and the practice of paying unit employees the corporate-recommended annual wage increase as existing terms and conditions of employment for bargaining unit employees. The Respondent shall notify the Union, and, on request, bargain with the Union before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees. The Respondent shall make bargaining unit employees whole, with interest, for losses suffered as a result of the elimination of the unit employees' participation in the corporate bonus and the elimination of the practice of providing annual wage increases since February 2009, with such sums to be calculated in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971). Interest on all sums shall be with interest, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³⁵

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 1 of the Board what action it will take with respect to this decision.

Extension of the Certification Year

The General Counsel and the Union contend that the remedy in this matter should include an extension of the "certification year."

³⁵ In an appendix to his brief, the General Counsel sets forth an extensive argument contending that the Board should drop its practice of assessing simple interest on monetary remedies in favor of compound interest computed on a quarterly basis. The Board has repeatedly considered this proposition in recent months and repeatedly declared that "we are not prepared at this time to deviate from our current practice of assessing simple interest." *Holcomb & Hoke Mfg. Co.*, 355 NLRB No. 4 fn. 3 (2010); *American Benefit Corp.*, 354 NLRB No. 129 fn. 3 (2010). Given these, and many other recent such pronouncements, I am not inclined at this juncture to depart from the Board's traditional interest formula with regard to computation of backpay in this matter.

After the Board certifies a union as employees' representatives, Section 9(c)(3) of the Act provides that that the union's presumption of majority status cannot be challenged by a new election (from a rival union or a decertification petition filed by employees) for a period of 12 months. 29 U.S.C. § 159(c)(3). As the Board explained in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962):

One of the purposes of Section 9(c)(3) of the Act, which bars a petition filed within 12 months from the date of the last election, is to insure the parties a reasonable time in which to bargain without outside interference or pressure, such as a rival petition. In accordance with this purpose, the Board has, with judicial approval, adopted a rule requiring that, absent unusual circumstances, an employer will be required to honor a certification for a period of 1 year. Among the reasons supporting the adoption of this rule is to give a certified union "ample time for carrying out its mandate" and to prevent an employer from knowing that "if he dillydallies or subtly undermines, union strength" he may erode that strength and relieve himself of his duty to bargain.

(footnotes citing to *Ray Brooks v. NLRB*, 348 U.S. 96 (1954), omitted).

"The Board has long held that where there is a finding that an employer, after a union's certification, has failed or refused to bargain in good faith with that union, the Board's remedy therefore ensures that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned." *Mar-Jac Poultry*, *supra*. This is not an extraordinary Board remedy. It "is a standard remedy where an employer's unlawful conduct precludes appropriate bargaining with the union." *Outboard Marine Corp.*, 307 NLRB 1333, 1348 (1992); *Accurate Auditors*, 295 NLRB 1163 (1989) ("The law is settled that when an employer's unfair labor practices intervene and prevents the employees' certified bargaining agent from enjoying a free period of a year after certification to establish a bargaining relationship, it is entitled to resume its free period after the termination of the litigation involving the employer's unfair labor practices"). The Board's remedy usually takes the form of an extension of certification for one year, although it may be for a shorter period of time, or even for a "reasonable" time." *Alan Ritchey, Inc.*, 354 NLRB No. 79, slip op. at 50-51 (2009); *G.J. Aigner Co.*, 257 NLRB 669 fn. 4 (1981); *San Antonio Portland Cement Co.*, 277 NLRB 309 (1985).

Notably, the Board's concern with providing this insulated period of bargaining is not limited to situations where the unfair labor practices caused bargaining to cease altogether. Other unfair labor practices, such as the failure to provide information have provided a basis for extending the bargaining obligation. See, e.g., *Accurate Auditors*, 295 NLRB 1163 (1989). Indeed, even when the parties have, notwithstanding serious unfair labor practices, managed to sign a collective-bargaining agreement, the Board is still willing to extend the certification as a remedy if the bargaining was marred by serious unfair labor practices. *Outboard Marine*, *supra* at 1348.

In considering the appropriateness, and length of any extension of the certification period, the Board has explained:

it is necessary to take into account the realities of collective-bargaining negotiations by providing a reasonable period of time in which the Union and the Respondent can resume negotiations and bargain for a collective-bargaining agreement “without unduly saddling the employees with a bargaining representative that they may no longer wish to have represent them.” Various factors are considered in making such an evaluation, including the nature of the violations found, the number, extent, and dates of the collective-bargaining session’s held, the impact of the unfair labor practices on the bargaining process, and the conduct of the Union during negotiations.

Wells Fargo Armored Services Corp., 322 NLRB 616, 617 (1996) (footnotes omitted).

In this case, the extension of the protected bargaining period involves a number of additional considerations. First, this remedial issue is being considered based only on the violations found in this case, Case 1–CA–45233. There are additional cases that were consolidated for trial with Case 1–CA–45233. This case was severed from the remaining cases, upon the motion of the General Counsel, joined by the Union. Obviously, when those cases are considered, violations might be found, and if they are, that could heighten the appropriateness of a remedy that extending the certification. In that sense, the recommended remedy in this case might be appropriate for reconsideration in light of the outcome of the remaining cases that are related to these matters. However, at this stage, I consider the remedy based on the violations I have found: and that is only those discussed in this decision.³⁶

I do think, indisputably, the violations at issue here are significant and damaging to the collective-bargaining and representation process. These are not, it must be said, “bloodless” bargaining violations. These unfair labor practices involved highly coercive conduct directed to employees (not just union bargainers). In the middle of negotiations, the employees were subjected to a significant loss of expected and anticipated income, plainly told that the loss was a consequence of their decision to choose union representation, and that it was up to their Union to bargain back something equivalent. This unlawful conduct, as I have found, was, in addition to being a bargaining violation, designed to discriminate against employees for choosing union representation, and designed to make sure they understood the discriminatory impetus for the Respondents’ actions. See, *United Electrical Contractors Association*, 347 NLRB 1, 3 (2006) (declining to extend certification year by a full year, in part because unlawful conduct at issue, a failure to

provide information, did not involve “coercive conduct directed to employees”). And while it is important to consider that the extension of the certification year risks “unduly saddling” employees with a bargaining representative they would like to vote out, this is not a case where the selection of the bargaining representative was an event from years ago. The employees selected the Union in 2008, less than 2 years ago. See, *United Electrical Contractors*, supra (declining to extend certification for a full year, in part, because “more than 11 years have passed since the certification”).

Moreover, viewed as bargaining violations, the changes in terms and conditions at issue here are significant. It is true, of course, that the unilateral changes at issue here did not involve refusal of the Respondent to meet to bargain or to recognize the Union. Indeed, as the Respondent stresses, the parties continued meeting, bargaining, and making progress in negotiations for many months after these events. A significant number of tentative agreements were reached in the summer of 2009 on a variety of issues, although not on wages or bonuses. I hasten to add that the damage to the collective-bargaining process cannot be measured, or minimized, merely by the fact that the bargaining soldered on notwithstanding the unfair labor practices. That is a factor that cuts, to an extent, against the length of time that the certification should be extended. But it would be perverse, and provide all the wrong incentives, to rely on the Union’s willingness to continue the bargaining process in the face of the Respondents’ unlawful conduct as grounds to reject an extension of the certification.³⁷

Notwithstanding the continued bargaining, the detriment to the Union and the bargaining process of the unilateral changes is easy to see. Union negotiator Leonardi explained it succinctly: “The importance is that . . . we’re in a significant hole. We’re bargaining uphill. And I mean that’s the significance.” The Board has considered the likely effect of such unfair labor practices on bargaining in the different, but not entirely unrelated context of determining whether unfair labor practices precluded a lawful impasse. The Board explained that an employer’s unlawful implementation of three new terms and conditions that affected take home pay, and limited overtime opportunities,

were not isolated or insignificant matters, but rather were areas in which the entire bargaining unit was affected adversely in the most fundamental way—in their paychecks. These actions would likely place the union at a serious bargaining disadvantage in terms of maintaining the support and trust of the employees. This would serve to undercut the Union’s authority at the bargaining table.

Intermountain Rural Elec. Ass’n, 305 NLRB 783, 789 (1991), enf’d. 984 F.2d 1562 (10th Cir. 1993) (no lawful bargaining

³⁶ Having said that, both the General Counsel and the Union’s arguments for an extension of the certification period focus almost exclusively on the elimination of the corporate bonus and wage increases as the basis for an extension of the certification year. See, G.C. Br. at 68 (“In particular [the Respondent’s] unilateral and discriminatory denial of wage increases and bonuses to employees—compensation it had promised employees and compensation employees expected as a significant portion of their annual salaries—have made meaningful bargaining over economic issues impossible”); see, U. Br. at 48 (“the most coercive, pervasive and harmful violations in the entire case involved unit-wide deprivations of wage increases and very large bonuses”).

³⁷ The Union’s conduct is a factor to be considered in evaluating the need for an extension. In this case, the Union bears no responsibility for the unfair labor practices found, or for the adverse effect of the unfair labor practices on bargaining. Thus, the Union’s conduct is not a factor militating against imposition of an extended certification period. To the contrary, the Union persevered in bargaining despite the burden imposed by Covanta’s unfair labor practices.

impasse in view of employer's unremedied unlawful unilateral changes in terms and conditions that adversely affected bargaining).

That is a precise description of the problem here. The Respondents' unfair labor practices affected the entire bargaining unit, in the most fundamental way and "would likely place the union at a serious bargaining disadvantage in terms of maintaining the support and trust of the employees," thus "serv[ing] to undercut the Union's authority at the bargaining table." In fact, while the record shows the parties continued to bargain, they did not reach agreement (tentative or otherwise) on wages or bonuses by the time of the hearing. This kind of unilateral change during bargaining is not in accord with the 12 months of irrebuttable presumption of majority support to which the Board's certification entitles the Union.

Having said that, it also must be recognized that these unfair labor practices did not occur until late February 2009, more than nine months after the Union's certification. And while, the length of a certification extension "is not necessarily a simple arithmetic calculation," (*Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004)), it is relevant to the determination.³⁸

In this situation, I believe that the General Counsel's request for a six month extension of the certification period is an appropriate period of time to extend the certification. A full year extension is unwarranted given the fact that bargaining contin-

³⁸ In this regard, I note that I do not accept the Union's contention (U. Br. at 48) that the February 2009 unilateral changes "infected the bargaining" as early as August 14, 2008, when the Union made its first full economic proposal. The Union's claim is premised, in the first place, on its contention that the decision not to pay the February 2009 bonuses was made even before the election in May 2008. The Union's theory is that Covanta made this decision before the election but hid it until February 2009, and actively misled the Union through Walker's statement that the bonuses would continue while the parties bargained (and, I guess, by paying the bonus in August, which certainly did lead the Union to think that the bonuses would be paid during bargaining). Thus, the Union's theory is that the bargaining was held under false pretenses about Covanta's plans.

I do recognize that Anechiarico appeared to admit, at points in his testimony (Tr. 649, 655-656), that he had decided before the election that union-represented employees would not be eligible for the bonus during the negotiating period, even before a collective-bargaining agreement was reached. But he also denied this (Tr. 648, 839), and my distinct impression was that his testimony on this point was not reliable. Moreover, many of the questions, and Anechiarico's answers on this score were ambiguous. To say that the employees' receipt of the bonus was a bargainable issue does not establish that it will be denied, absent agreement, during the period collective bargaining is ongoing. Somewhat at odds with portions of both the Union and Respondents' respective positions: I do not believe it has been shown that the Respondents knew months in advance that they planned to make the unilateral changes they did. I think Covanta probably "crossed that bridge" (as Anechiarico explained about the wage increases) when it came to it, spurred on, as the Respondents suggest, by their desire to strike back against what they viewed as the Union's "pricey" bargaining proposal. I do agree, that the Employer did not tell the Union in advance about an intention not to pay the bonus (or the wage increase). That silence is consistent with the Union's theory of a plan to deceive, but also with a lack of advance planning, and it is the latter that I believe the evidence supports.

ued unabated through the date of the hearing, and given that most of the certification year was completed by the time these unfair labor practices unfairly shifted the bargaining terrain. At the same time, a mechanical three-month extension is too limited, particularly given the centrality of wages and bonuses to the income of employees and the bargaining that has occurred so far. In other words, the unfair labor practices impacted central bargaining issues, and the Union and the employees deserve adequate time to bargain free of the influence of unfair labor practices.³⁹

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁰

ORDER

The Respondent Covanta Energy Corporation and Covanta SEMASS LLC (an integrated enterprise and single employer) W. Wareham, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Informing bargaining unit employees that they are ineligible for the corporate bonus program and will not receive the annual wage increase because the employees chose to be union represented.

(b) Eliminating participation of unit employees in the corporate bonus program and eliminating the practice of paying the corporate-recommended annual wage increase for unit employees in order to discourage union activity.

(c) Refusing to bargain by with the Union as the representative of its employees by making unilateral changes in unit employees' terms and conditions of employment, including eliminating the participation of unit employees in the corporate bonus program and eliminating the practice of paying unit employees the corporate-recommended annual wage increase, without providing the Union advance notice and an opportunity to bargain to a lawful impasse.

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

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

(a) Reinstate the unit employees' participation in the corporate bonus program and the practice of paying a corporate-

³⁹ Of course, after this period of time, the Respondent is not excused from the duty to bargain. Rather, after this time period, the Union will not be secured against decertification efforts and rival petitions. I note that this remedy may be ripe for reconsideration if I should find, in a forthcoming decision, that there were additional bargaining violations or even troubling bargaining behavior during the first nine months of the certification. (*Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004) ("Based on the bargaining behavior of the Respondent in the 6 months immediately after certification and its unfair labor practices in the 6 months after that, we affirm the judge's 12-month extension of the certification year").

⁴⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

recommended annual wage increase as existing terms and conditions for bargaining unit employees.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify, and on request, bargain with the Union to a lawful impasse as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All operations, power block, process and maintenance employees employed by Covanta SEMASS at its 141 Cranberry Highway, West Wareham, MA location, at its transfer station located at 257 Ivory Street, Braintree, MA and its landfill located at 118 Federal Road, Carver, MA, including storekeepers, maintenance mechanics, electrical and instrument techs, mobile equipment mechanics, utility operators, equipment operators, auxiliary operators, control room operators, assistant control room operators, truck drivers, ash systems operators, transfer station operators, transfer station scale attendants, and laborers, but excluding all office and clerical employees, professional employees, guards and supervisors as defined in the NLRA.

(c) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this decision and order, for the loss of earnings resulting from the elimination of their participation in the corporate bonus program and the elimination of the practice of paying unit employees an annual wage increase.

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

(e) Within 14 days after service by the Region, post at its facility in W. Wareham, Massachusetts, copies of the attached notice marked "Appendix."⁴¹ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 9, 2009.

⁴¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

The Union's certification is extended 6 months from the date the Respondent complies with this Order.

Dated, Washington, D.C. March 26, 2010

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT tell you that you are ineligible for the Covanta Energy bonus program or that you will not receive the annual wage increase because you selected union representation.

WE WILL NOT eliminate the Covanta Energy bonus program and the annual wage increase as terms and conditions of employment in order to discourage union activity.

WE WILL NOT refuse to bargain with the Union by unilaterally changing existing terms and conditions of employment without providing the Union with advance notice and an opportunity to bargain to a lawful impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, reinstate the Covanta Energy bonus program and the annual wage increase as part of your existing terms and condition of employment.

WE WILL notify, and on request, bargain with the Union before implementing any changes in wages, hours, or other terms and conditions of employment for our employees in the following bargaining unit:

All operations, power block, process and maintenance employees employed by Covanta SEMASS at its 141 Cranberry Highway, West Wareham, MA location, at its transfer station located at 257 Ivory Street, Braintree, MA and its landfill located at 118 Federal Road, Carver, MA, including storekeepers, maintenance mechanics, electrical and instrument techs, mobile equipment mechanics, utility operators, equipment operators, auxiliary operators, control room operators, assistant control room operators, truck drivers, ash systems operators, transfer station operators, transfer station scale attendants, and laborers, but excluding all office and clerical employees, professional employees, guards and supervisors as defined in the NLRA.

WE WILL make all affected employees whole, with interest, for any loss of earnings resulting from our elimination of the Covanta Energy bonus program and the annual wage increase as part of your terms and condition of employment.

COVANTA ENERGY CORPORATION AND COVANTA
SEMSS LLC