

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

KAG WEST, LLC

AND

**MISCELLANEOUS WAREHOUSEMEN
DRIVERS AND HELPERS, LOCAL 986,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

**CASE NOS. 21-CA-39488
21-CA-39665**

**RESPONDENT KAG WEST, LLC'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE
DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE WILLIAM G. KOCOL**

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I. OVERVIEW

Respondent/Employer KAG West LLC (“KAG West” or the “Company”) submits this Brief in Support of Exceptions to the Decision and Order of Administrative Law Judge William G. Kocol (“ALJ”) in the above-captioned consolidated cases, pursuant to Section 102.46 of the National Labor Relations Board’s (“NLRB” OR the “Board”) Rules and Regulations. This sole issue involves KAG West’s August 24, 2010 decision to grant unscheduled and unanticipated wage increases to certain unrepresented employees while deferring action on wages for employees represented by the Miscellaneous Warehousemen, Drivers and Helpers, Local 986, International Brotherhood of Teamsters (“Teamsters Local 986” or the “Union”) to collective bargaining. In finding KAG West’s conduct violated Section 8(a)(3) of the Act, the ALJ misapplied applicable law under the Board’s longstanding *Shell Oil* line of cases.

The uncontroverted evidence was, and the ALJ found, that KAG West did not have a practice of granting regular or annual wage increases, and the disputed August 2010 wage increase was a new benefit. The evidence also established that KAG West acted on the advice of counsel to take no action on wages prior to the NLRB representation election on August 13 and 16, 2010 to avoid interfering with the election in violation of Section 8(a)(1), and post election deferred action on wages for represented employees to collective bargaining consistent with its obligations under Sections 8(a)(5) and 8(d) of the Act. There was no evidence of anti-union animus related to the decision on wages, no allegation the Company failed to bargain in good faith over wages or any other subject, and the wage action did not arise in the context of other unlawful conduct. The ALJ’s erroneous decision, in which he purports to apply the Board’s *Wright Line* analysis, rests entirely on the conclusion that different treatment, by itself, proves discriminatory motive. That is plainly wrong. Under the Board’s *Shell Oil* cases, which are controlling, KAG West was privileged to defer action on wages for represented employees to

collective bargaining. Moreover, even accepting the ALJ's factual findings as true for purposes of argument, the ALJ erred by finding a Section 8(a)(3) violation where he concludes the represented employees would have been treated the same absent their protected activity of seeking union representation, which the ALJ concluded motivated the Company to grant the August 2010 wage increases.

II. STATEMENT OF THE CASE

A. KAG West's Business.

KAG West is an operating subsidiary in the Fuels Delivery Group of parent company Kenan Advantage Group, Inc. ("Kenan"), whose corporate offices are located in Canton, Ohio. (Tr. 68-69, 73-74.)¹ A privately held company, Kenan is a transporter of bulk commodities, and a specialized logistics provider in the bulk commodity trucking market. (Tr. 69-70.) Bulk commodities are unpackaged products moved in tanks, and include petroleum products and chemicals. (Tr. 70.) Nationwide, Kenan operates about 4,200 trucks and 6,000 trailers in all 48 contiguous states, and employs about 7,200 people domiciled in 38 states. (Tr. 70.)

Kenan is organized into four different operating groups, or divisions, including the Logistics Group that specializes in supply chain management solutions (Tr. 71-72); the Specialty Products Group, which focuses on transporting bulk chemicals and bulk food products such as corn syrup to manufacturers (Tr. 72); the Merchant Gas Group, which is an industrial gases division that specializes in transporting cryogenic materials such as oxygen for hospitals and hydrogen for NASA to be used in rocket fuel (Tr. 72); and the Fuels Delivery Group, which is Kenan's largest division. (Tr. 73.) The Fuels Delivery Group itself is comprised of seven

¹ All citations to the ALJ's December 30, 2011 decision are designated by page and line number as follows: ("ALJD, [page]:[line]"). References to the hearing transcript are designated by page and line number as follows: ("Tr. [page]:[line]"). References to the General Counsel's Exhibits are designated by exhibit number as follows: ("GC-__"); Respondent's Exhibits are designated by exhibit number as follows: ("R-__").

operating subsidiaries, including KAG West, Kenan Transport, Advantage Tank Lines, Petro Chemical Transport (“PCT”), and others. (Tr. 73.) The typical customers for KAG West and the other Fuels Delivery Group subsidiaries include major oil companies, such as Exxon-Mobil, Chevron, Shell and British Petroleum, several smaller oil companies, airlines, and retail gas and convenience store chains like 7-Eleven and Circle K. (Tr. 78.)

KAG West grew out of the 2003 acquisition of the assets of what was then Beneto Bulk Transport, LLC (“Beneto”). (Tr. 75.) Today, KAG West operates in the five state area of Arizona, California, Nevada, Oregon, and Washington. (Tr. 74; 213-14.) As described in more detail below, in January 2010, the existing California operations of PCT, including approximately 130 PCT drivers, were integrated into KAG West, at which time PCT’s drivers became KAG West employees. (Tr. 214-15.) PCT’s operations in Arizona and Nevada were similarly integrated into KAG West four to five years ago. (*Id.*) In total, as Kenan President Bruce Blaise (“Blaise”) testified, KAG West has “probably nine or ten” terminals in Northern California with about 200 employees, two terminals in Nevada with about 50 employees, and two terminals in Arizona with “[p]robably 100” employees. (Tr. 125-26.) Employees in Northern California, Nevada, and Arizona are not represented by a union, nor are KAG West’s employees in Oregon and Washington, who joined the Company through an acquisition in 2010. (Tr. 126; *see also*, GC-3, Stipulation No. 3, at page 2.)

B. No History or Practice of Annual or Regular Pay Rate Adjustments or Reviews.

Blaise became President of Kenan on September 1, 2011 (Tr. 67.) Prior to being named President, Blaise was the Executive Vice President of Kenan’s Fuels Delivery Group from October 2008 through August 2011. (Tr. 68.) In that capacity, Blaise testified that he had responsibility for “[a]ny wage change ... by any of the seven operating subsidiaries in the Fuels

Delivery Group....” (Tr. 74-75.) Reporting directly to Blaise for KAG West was Doug Allen (“Allen”), who as the then Vice President and designated “business unit leader” for KAG West’s operations in California, Nevada and Arizona was the top ranking KAG West employee.² (Tr. 101, 105, 127, 177.)

Throughout this time, including not just at KAG West but across the different Kenan Fuels Delivery Group subsidiaries, Blaise testified there was not, nor had there ever been, a practice or policy of regular or fixed annual wage adjustments or reviews. (Tr. 75, 77, 78.) On the contrary, Blaise’s undisputed testimony confirmed that the timing of the discretionary process of reviewing wage adjustments was “erratic” and dependent “on the conditions in the market.” (Tr. 75.) Blaise was clear that KAG West never adopted a policy or practice of engaging in any regularly scheduled wage adjustments. (Tr. 78.) Nor has KAG West had in place any system of regularly scheduled evaluations followed by wage adjustments. (Tr. 78.)

During the hearing, two bargaining unit witnesses were called to testify. On this point, both confirmed without challenge that KAG West does not have a history of regular wage reviews or adjustments, and drivers had no expectation of any wage rate adjustment in 2010. Bargaining unit employee Walter Bingham (“Bingham”), the sole witness called by Counsel for the Acting General Counsel, that since he started working for KAG West in January 2007 he has never received an increase in his wage rate (Tr. 35-36, 62) has only experienced one wage change and that was a decrease in his wage rate. (Tr. 62.) The second bargaining unit employee to testify, Carlos Diaz (“Diaz”), was hired at KAG West as a driver on June 20, 2006 and works out of the Van Nuys terminal. (Tr. 247.) Diaz, who testified pursuant to subpoena, confirmed

² During the time Allen was the business unit leader, KAG West’s operations in Oregon and Washington reported to a different leader through the PCT organization. (Tr. 213-14.)

without challenge that the Company told him at his time of hire the only wage change he could expect was “when [he] completed a year, [he] would get the full pay of a [driver]” but nothing else was promised or expected. (Tr. 247.)

This is consistent with the testimony of Kenan’s Director of Employee Relations and Benefits, Ryan Walls, whose responsibilities include oversight of KAG West. (Tr. 258-59.) Walls explained the KAG West Policy Manual (R-15) contains no promise or schedule of regular wage reviews. The Policy Manual expressly states wage rates are subject to market conditions and dependent on the rates that can be charged to customers. The manual also clearly states “[t]he final decision of the amount and nature of an employee’s compensation is set at the discretion of management. Pursuant to the Policy Manual, increases are also given at the sole discretion of management and are not an entitlement.” (Tr. 260; R-15 at page 11, ¶¶ 1 - 2.)

Consistent with Diaz, Walls testified the only fixed or scheduled increases in the base wage rates at KAG West are those increases built into the existing rate structure, including when drivers reach their one-year anniversary date and move from being paid the less than one year experience rate to the full rate of a driver with more than one-year of experience. (Tr. 78; see GC-3, Stipulation No. 3 at page 5, setting forth the base hourly wage rates for the different KAG West driver classifications in Southern California that have been in effect since December 12, 2009.) Market driven approach to adjusting wages.

Blaise testified that the Fuels Delivery Group, including KAG West, relies on local market demands to drive the timing and amount of any employee wage rate increases. (Tr. 75; 77.) Within KAG West, the base hourly wage rates for drivers in Southern California are and have been different than the hourly rates paid to KAG West drivers in Northern California,

Arizona, and Nevada. (Tr. 184-85.) This was true before the wage rate increase for certain unrepresented employees in August 2010.

As confirmed in Stipulation No. 3 (GC-3, pages 2-5), before the wage increases announced on August 24, 2010 for certain unrepresented employees, the base wage rate for daytime drivers with greater than one-year experience (“full pay”) varied across the different KAG West markets that reported to Allen as follows:

Base Wage Rates for daytime driver with >1 year experience	Las Vegas, NV, and Sacramento, Fresno, Sparks, Bakersfield, and Corning, CA	Martinez, Brisbane, Richmond, Gilroy, and San Jose, CA	Phoenix and Tucson, AZ	Southern CA Bargaining Unit Locations
Before 8/21/10	\$19.35/hr	\$21.20/hr	\$18.45/hr	\$20.25/hr
After 8/21/10	\$21.26/hr	\$23.27/hr	\$20.25/hr	\$20.25/hr

(GC-3, Stipulation No. 3, at pages 2-5.) Further, as described in Stipulation No. 3 (GC-3), and as testified to by Allen (Tr. 199), within the San Jose and Bakersfield terminals there were groups of unrepresented drivers who were paid different rates of pay than those shown above and those drivers did *not* receive all or part of the wage rate increases announced on August 24, 2010.

Blaise testified, without contradiction, that Company past practice consisted of the several business unit leaders, whether for KAG West or other Fuels Delivery Group subsidiaries, requesting changes in wage rates on an *ad hoc* basis, based on market demands in one or more of the respective markets served by the various subsidiaries. Blaise would consider each request for a particular local market in the subsidiary’s operating area, and in some instances would approve increases of varying amounts across different markets. (Tr. 75, 77.) Market factors that were considered included the availability of qualified drivers and the ability to secure rate increases from customers to offset any pay increases. (Id.) Thin profit margins in the bulk commodity

trucking business, and the fact that driver pay represents about 50% of the total cost of doing business, required that any wage increases be covered by customer rates increases. (Tr. 77.) If Blaise felt driver wage increases were warranted, management “would go to the customers [in] the particular market where there was a need and [] would petition them for [rate] adjustments based on the need to ... secure long-term drivers for [the] company.” (Tr. 77.)

Not surprisingly, in a business dependent on increased customer rates as a condition to raising wages, adjustments to wage rates are infrequent. Prior to August 24, 2010, KAG West adjusted the base hourly wage rates of drivers only twice since 2005, and one of those adjustments was a wage *reduction* in December 2009. (Tr. 78-79.) The only wage increase was implemented in the fall of 2005 at “the peak of the driver shortage” when “the economy was booming.” (Tr. 79.) In response to a severe shortage of qualified drivers amid the booming economy, and the need to staff its trucks, management implemented a \$3 per hour increase in drivers’ hourly wage rates. (Tr. 81.) As Blaise testified, this significant wage increase was funded by management “going to all [] customers and working through the process, because it meant pretty significant [rate] increases for them.” (Tr. 81.) Ultimately, however, in the market conditions that existed at that time, management was “able to secure the funding [from customers] and 100 percent of that funding went directly to drivers.” (Tr. 81.)

1. Depressed business conditions and the December 2009 wage adjustments.

By December 2009, the economic pendulum had swung. Amid difficult market conditions, KAG West determined that it needed to reduce base hourly wage rates by approximately \$1.90³ per hour in California, Arizona, and Nevada. (Tr. 81-82.) The reduction

³ See the first page of R-4 for a chart showing the actual wage rate adjustments for each driver classification that went into effect on December 12, 2009 and were reflected in the paychecks distributed

was in direct response to the difficult market conditions experienced during the severe economic recession of 2007-2009. As Blaise explained, the run up in fuel prices in 2006 and 2007 led to gas prices in the California market of approximately \$5 per gallon. (Tr. 82.) As the economy entered what has been called “the great recession,” KAG West was left “out there” paying drivers “higher wages” and charging customers “higher rates” than the rest of the market. (Tr. 82.) At the same time, the major oil companies that previously owned all of the retail stations in California decided to exit the retail gas station business and to sell their stations to what are referred to as “jobbers”⁴ and other small retailers. (Tr. 83, 178.) Until this time, KAG West’s customers in California had been “almost exclusively major oil [companies].” (Tr. 83.)

As a result of these market forces, “a lot of [KAG West’s] customers were starting to come back to [the Company] asking for reductions [in rates], bidding their business, [and] getting lower rates from other competitors.” (Tr. 82.) At first, KAG West “refused any reductions [in rates] at the cost of some significant business losses.” (Tr. 82.) For example, Chevron took approximately \$15 million of business away from KAG West in the Southern California market, and Circle K took another \$1.5 to \$2 million worth of business away. (Tr. 82.)

Management initially took steps to reduce costs without affecting drivers’ wages “because we didn’t want to go backwards on any pay.” (Tr. 85.) These steps included reducing staff at KAG West’s corporate office in Sacramento, California, and relying more on resources

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December 26, 2009. The reference to a reduction of \$1.90 per hour reflects the adjustment in the base wage rate for drivers with greater than one-year of experience. The rate reduction for drivers with less than one-year of experience was \$1.80 per hour, and there was no reduction for trainee pay, which remained at \$17.00 per hour. (R-4.)

⁴ As Blaise explained, the term “jobber” refers to a marketer who owns some number of retail gas stations, or may have arrangements with groups of licensed dealers who own stores under the same brand. The jobber is much smaller than KAG West’s traditional major oil company customer. Some of the “jobber” owned stores are branded, selling gas purchased from a particular major oil company, while others are non-branded and may purchase gas from a number of different oil companies. (Tr. 84.)

available through Kenan's corporate office in Canton, Ohio. (Tr. 85.) Kenan also consolidated the California operations of PCT and KAG West, including their terminals, in order to run a greater volume of business through KAG West's existing fixed cost infrastructure. (Tr. 85-86.) As Allen explained, these efforts "took about two-and-a-half million dollars of costs out of the Company trying to streamline it to get ... back to profitability," but it was not enough as KAG West missed both its revenue and earnings projections for 2009. (Tr. 179.)

This left management with the difficult decision to either cut wages or cut jobs. (Tr. 179.) But reducing the headcount through layoffs alone "wasn't going to change the cost structure because [the Company] was overpaying [drivers] in the market." (Id.) As "the last resort," Blaise testified the Company decided it "had gone too far" with the large wage increase granted to drivers in 2005 because "the market was not supporting the [higher] labor rates" KAG West was paying. (Tr. 86.)⁵ The Company had become "uncompetitive from an ability to price ... against other companies." (Tr. 86, 180-82.)

The Company looked at different ways to do this, including eliminating incentive pay as a component of driver compensation. It was estimated this would save KAG West about \$1.85 per hour. However, it was decided that would "be detrimental to the overall productivity" of the drivers and incentive pay was left unchanged in favor of reducing base hourly wage rates. (Tr. 179-80, 184.) Accordingly, in December 2009, management "implemented a partial setback" at KAG West from the 2005 increase by reducing wage rates in order to try and "save the jobs, save...operations..., and try to, again, be able to compete in the jobber world that [the Company wasn't] really very well positioned to compete in." (Tr. 86.)

⁵ Allen similarly testified that reducing driver pay was the "only alternative" left. (Tr. 179.)

At the time, the wage reduction was applied to most, but not all, of KAG West's drivers in California, Arizona, and Nevada. (Tr. 180.) Not included in the December 2009 wage reduction was a group of eight drivers out of KAG West's San Jose, California terminal and twelve drivers at the Bakersfield, California terminal. (Tr. 180; GC-3, Stipulation No. 3, at page 3.) The San Jose and Bakersfield drivers had joined KAG West earlier in 2009 as part of two private fleet acquisitions and the Company had "made a commitment to those drivers [to] not make any changes" in their pay. (Tr. 180.) The December 2009 wage rate reductions were also not applied to KAG West's drivers in Washington and Oregon (Tr. 181.) In addition, the pay of polishers and mechanics, as well as the pay for administrative and clerical staff, was left unchanged. (Tr. 181.) For these non-driver groups, the Company believed their "wages were market level" and so no reduction were made. (Tr. 180-181; R-6 at Slide 6.)

The Company did restructure management pay in December 2009 for those at the terminal manager level and above by eliminating their participation in the "management incentive program." (Tr. 181-82.) There was no additional reduction in base salary of these salaried managers because the Company decided to integrate into KAG West approximately 130 additional PCT drivers without adding any additional staff, which dramatically increased the workload of the salaried staff. (Tr. 181-82.)

2. Summary of hourly wage rate adjustments since 2005 at the Southern California terminals in the bargaining unit.

This history of positive and negative wage adjustments since 2005 for KAG West drivers in the Southern California bargaining unit terminal locations⁶ is shown on the table below:

⁶ The wage rates listed are those applicable to all the terminals in Southern California. For example, the reference in R-4 to "Long Beach 26" is for the Long Beach profit center, which includes the Long Beach terminal as well as the Signal Hill, Montebello, Rancho Dominguez, Huntington Beach, and South El Monte terminals. (Tr. 187.)

Driver Class	2005 Wages Before Any Adjustment	After Fall 2005 Wage Increase	Since the Dec. 12, 2009 Wage Reduction (Current)
<1 year	\$18.00	\$21.00	\$19.20
>1 year	\$19.15	\$22.15	\$20.25
Trainer	\$19.90	\$22.15	\$21.00
<1 year PM	\$19.00	\$22.00	\$20.20
>1 year PM	\$20.15	\$23.15	\$21.25
Trainer PM	N/A	\$23.90	\$22.00
Trainee	\$17.00	\$17.00	\$17.00

(R-4.)

As Allen testified, a new hire driver starts at a training rate of \$17 per hour, before moving to the less than one-year experience rate (assuming no previous tanker experience). On the driver's anniversary date, he steps up in pay to the greater than one-year experience rate. In addition, there were (and are) additional increases or differentials in wage rates for drivers who work nights (denoted above as "PM") or who are engaged in training another driver. (Tr. 189; R-4.) For example, a driver hired without tanker experience, after completing training, would have been paid a base hourly wage rate of \$18 per hour before the 2005 adjustment, and \$21 per hour after the fall 2005 increase the wage increase. Then, effective December 12, 2009, the pay for the same class of driver was reduced to \$19.20. (Tr. 188-89.) The same pay structure remains in place today at KAG West for Southern California drivers. (Tr. 189-90.)

As with its drivers, KAG West has no history or practice of any fixed reviews or adjustments to wages for shop employees, which includes mechanics and a single polisher in the bargaining unit. (Tr. 186.) Instead, the undisputed evidence is that any pay adjustments for shop

(continued...)

The same is true for the other listed profit centers, some of which include additional terminals listed on the bottom half of the first page of R-4. (Tr. 187-88.)

employees have “always been discretionary” and done “on a case-by-case basis depending on what the market was doing at the time.” (Tr. 186, 190.) Moreover, unlike drivers, shop employees did not receive the same fall 2005 wage increase. Nor were shop employees affected by the reduction in wage rates implemented on December 12, 2009, which was limited to drivers. Rather, as illustrated at the second page of R-4, and as explained by Allen, the last adjustment of any kind to the wage rates of shop employees in Southern California was an increase implemented on July 28, 2007.⁷ (Tr. 190.)

C. Communicating the December 2009 Wage Reduction to Employees, and Start of the Union’s 2010 Organizing Campaign in Southern California.

In December 2009, Allen made a series of slide presentations at the terminals advising drivers of the wage reduction decision and the related reasoning. (Tr. 182; R-6.) For those locations where Allen could not appear personally, the responsible regional manager made the presentation. (Tr. 182.) A copy of the PowerPoint slides used in the presentations to drivers in Southern California was introduced at the hearing as R-6. (Tr. 183.) During the presentations, Allen explained the wage reduction would result in an approximate 8.5% reduction in base wages and would become effective for the pay period beginning on December 12, 2009. (Tr. 184; R-6 at slide 5.) Allen also predicted there would be no wage increases in 2010. (Tr. 185; R-6 at slide 6.) At the same time, Allen told employees the Company would “pursue pay increases as soon as the market allows.” (R-6 at slides 9, 10, and 11.) Finally, Allen informed drivers of certain new employee benefits, including the Vacation Incentive Program (“VIP”) (Tr. 185, R-6

⁷ The only change in any wage rates for shop employees in Southern California since July 28, 2007 was on December 13, 2008, when employees Mario Osuna and Donald Steward changed places as the designated lead mechanic, which position pays \$1 per hour more (\$21.60 versus \$20.60). (Tr. 190; R-4 at page 2.)

at slide 6-7), and the establishment of a hardship line for drivers to request an interest free Company loan to soften the impact of the reduced base wage rates. (Tr. 185-86; R-6 at slide 8.)

Similarly, in January 2010, the Company held a series of meetings with PCT employees who were being transitioned over to become employees of KAG West, to explain the decision and its effects. (Tr. 182-83, 229.) Attending the PCT employee meetings with Allen was current KAG West Director of Operations Calvin Kniffin (“Kniffin”), who at the time was the Director of Operations for PCT.⁸ (Tr. 228.) During the meetings, Allen and Kniffin informed employees a corporate decision was made in December 2009 to integrate PCT’s existing drivers and operations in California into KAG West. (Tr. 229-30.) The PowerPoint slides Allen and Kniffin used during the PCT employee meetings were introduced at the hearing as R-13. (Tr. 230-31; R-13.)⁹ During the slide presentation, it was explained that as part of the transition to KAG West “[t]he PCT drivers were being forced to take a pay cut” because “[w]e were in the midst of a very difficult recession, and we were trying to create security for all the drivers.” (Tr. 231.) At the same time, the Company told drivers who were transitioning to KAG West that “as soon as the market allows, we will seek to pay higher wages.” (R-13 at slide 18.) As Kniffin testified, he advised the drivers that “when the economy improves and we get the opportunity to increase rates with our customers” then the Company would seek to increase wages again. (Tr. 231-32.) However, if the market conditions did not improve the plans were “to keep running the way we were” because “you can’t increase wages when you can’t increase rates” to customers. (Tr. 232.)

⁸ Thereafter, Kniffin started working for KAG West as Director of Operations in March 2010, when he began reporting directly to Allen. (Tr. 183, 228.) Reporting directly to Kniffin were the respective KAG West General Managers, which in the summer of 2010 included Boyd Brown in Southern California and Steve Yeager in Northern California. (Tr. 222-23.)

⁹ The representative slides introduced as R-13 are from the meeting held with PCT drivers in San Diego. (Tr. 230; R-13.)

After the decision to reduce wage rates was communicated to drivers, including those transitioning over from PCT, Blaise testified the Company started getting feedback there was “frustration and disenchantment” from the drivers. (Tr. 87.) By about February 2010, the Company became aware of an active Teamsters’ organizing campaign directed at KAG West’s Southern California operations. (Tr. 191.) Allen also started receiving correspondence from the Union. (Tr. 191.) In addition, Allen learned “there were some things being posted on the Teamsters’ Internet website, and a second website emerged: KAGdrivers.com. (Tr. 191.)

Regularly posted on both websites were copies of correspondence by Allen and the Union, including correspondence from Union organizer Don Thornsburg (“Thornsburg”). As Allen explained it, he “would send letters to our employees” and Thornsburg “would send other correspondence out in response to my correspondence, which would normally be posted up on the Internet.” (Tr. 192.) In one such open letter signed by Thornsburg and dated March 24, 2010, the Union told KAG West’s Southern California employees: “The fact is that when we file for our first election *your wages and benefits are frozen by law*. So it would be illegal if the Company reduced your wages and/or benefits during the election *and throughout contract negotiations*.” (R-7, emphasis added; Tr. 192-93.)

D. Kenan Seeks Customer Rate Increases to Fund Pay Raises in Fuels Delivery Group Subsidiaries, Including KAG West.

After the wage reduction in December 2009, the economic situation improved for a period. The national economy appeared to begin to rebound in the spring of 2010 as the price of fuel dropped significantly and manufacturing activity started picking up. (Tr. 88.) In light of these developments, and in response to “hearing that our drivers [were] unhappy with the [December 2009] pay adjustment,” Blaise went to Southern California in March 2010 for a series of meetings with drivers to explain the business strategy to return KAG West to profitability, and

to try to “resolve the issue” of drivers’ discontent over the pay reductions. (Tr. 133-35.) Allen joined Blaise for these meetings. Part of the message Blaise and Allen delivered to drivers was the “tough decisions” made “to protect our employees and our company” after KAG West lost money in 2009 appeared to be “paying off and the numbers [were] improving.” (R-1; Tr. 88-89.)

During the March 2010 employee meetings, Blaise testified that several drivers asked him directly when the Company was going to make changes to wages. (Tr. 89.) Blaise responded the Company was “hopeful that the economic situation [was] improving, but cautioned drivers that in Southern California the Company first had to get through the successful renewal of its three-year contract with BP/Arco, which was due to expire in October 2010 and was the Company’s largest single account in Southern California. (Tr. 89-90.) Moreover, negotiations for the renewal of the BP/Arco contract would not be completed until “August/September, so late summer” of 2010. (Tr. 90.) Blaise told the drivers that “[i]f we could make it through that process,” then by late summer it looked like KAG West may be in position “to get the wages back up and we were going to do it just as quickly as we could.” (Tr. 90-91, 93-94.) Blaise expressed the same view in an internal email to Allen dated March 16, 2010 (R-1), in which Blaise discussed dates for his upcoming trip to Southern California to meet with drivers and stated that “if by late summer [of 2010] we feel confident we have weathered the storm and are on more solid footing, we plan to make positive adjustments in pay, etc.” (R-1.)

In the spring of 2010, the Company concluded that the economy had started to improve and there was a “tightening” in the labor market for qualified drivers. Blaise testified that in early spring of 2010 Kenan “proactively started the process” of examining whether it was “time to go back to customers” who had “asked for rate reductions or that forced us to hold our rates firm for two, two-and-a-half years ... and get some compensation [from them in order] to get the wages

back up.” (Tr. 88, 93.) This initiative to raise rates to potentially fund pay increases, not just at KAG West but across all seven subsidiaries that make up Kenan’s Fuels Delivery Group, started in about April 2010. (Tr. 140.) By June 8, 2010, the Company had moved far enough along in its examination of the tightening market conditions to issue a press release announcing that Kenan’s Fuels Delivery Group would “seek a rate increase of 3% for all non-contract customers effective July 1, 2010,” while “contractual customers,” who make up “95 percent give or take” of Kenan’s business, would be “addressed on an account by account basis” and “negotiated individually.” (Tr. 94-95, 141; R-2.)

As Blaise testified, the intent was to press customers to agree to a 3% increase in the rates they paid in order to secure the funding for a potential employee pay increase. (Tr. 94; R-2.) In Kenan’s June 8, 2010 press release, Blaise stated:

As the economy begins to rebound and capacity tightens in the marketplace, we expect to experience another onslaught of driver shortages throughout the country. Many drivers have permanently left the industry over the past couple of years after several transportation companies either closed or implemented severe layoffs due to decreased demand and high fuel costs.

To proactively prepare for this changing environment and ensure capacity for our valuable customers, we believe it is imperative that we continue to secure the employment of our drivers, who we consider to be the best drivers in the country. This requires providing competitive wages for our hard working men and women on the front lines of our business.

(R-2.)

E. Union Representation Petition, Pre-Election Period, and NLRB Election.

On July 2, 2010, the Union filed a petition in NLRB Case No. 21-RC-21215 seeking an election to certify it as the exclusive statutory bargaining representative for a unit of KAG West’s employee drivers, mechanics and polishers in Southern California. (Tr. 16) The Company did not contest the petitioned for bargaining unit of employee drivers, mechanics and polishers at

seventeen different KAG West terminals in Southern California. Instead, the Company entered into a stipulated election agreement that provided for a manual ballot election to be held across Southern California on August 13 and 16, 2010. (Tr. 261) Because many of KAG West's terminal facilities are located on the restricted premises of customers' oil refineries that maintain tight security, the Company rented conference rooms at nearby hotels, as well as a conference room at the Vernon City Hall, to make space available for the holding of an election at or near each terminal that was as convenient as possible for the employees. (Tr. 263.)

The Company did choose to exercise its Section 8(c) rights under the Act to express its opinion and preference that employees should vote "no" to representation by the Teamsters. (Tr. 263.) The Company communicated this message to employees through the use of flyers, letters to employees' homes, and by conducting three meetings with each employee group at the relevant terminals between when the petition was filed on July 2 and August 11, 2010. (Tr. 233, 264.) Blaise was not personally involved in the pre-election communications to employees in Southern California, and was only involved "[v]ery, very little" in KAG West's response to the Union organizing campaign. (Tr. 98, 150.) Beside the March 2010 meetings with drivers in Southern California, Blaise was otherwise occupied at the executive level with running all seven subsidiaries that make up Kenan's Fuels Delivery Group nationwide. (Tr. 150.) The Company relied on the KAG West management team, including Allen, Kniffin, and Walls to present its pre-election message to employees. (Tr. 150.) Walls and Kniffin attended every pre-election meeting with employees, while Allen attended some but not all of the meetings. (Tr. 264.)

For his part, Kniffin described his role at these meetings as one to "help educate the employees as to the process of collective bargaining" and to introduce himself to many of the drivers at KAG West, to whom Kniffin was new after joining KAG West from PCT in March

2010. (Tr. 233.) Kniffin testified that during “most every meeting,” the subject of future wage determinations in the event the Union won the election came up, and management “told [them] that would be decided within collective bargaining” and it “was a bargaining issue” to “be negotiated by their chosen negotiator; by, in this case, the Teamsters; that they would negotiate their wages going forward.” (Tr. 234.) Kniffin further explained that employees were told, either by him or by other management representatives in his presence at the pre-election meetings, that “what we had been told by our attorneys is that, terms and conditions of employment were locked in, that there could be no changes to the terms and conditions of employment. And ... their wages were locked in until they could be effected ... within collective bargaining in the event they voted in the Union.” (Tr. 234-35.)

Walls’ confirmed this, testifying that during the pre-election employee meetings the Company told employees that “wages and benefits would be frozen during the process of the campaign and ... if the Teamsters were to win the election, that wages and benefits would remain frozen through the collective bargaining process... And that message was consistent at every meeting.” (Tr. 265.) Likewise, bargaining unit driver Carlos Diaz described attending a pre-election Company meeting attended by Allen and Kniffin where the Union’s organizing efforts were discussed and “[i]t was made very clear to us” by the Company that “all wages would be frozen until the negotiation part of the Union, if they got voted in. That’s the only way we were going to get an increase in pay was through a contract.” (Tr. 248.) Diaz also remembered management said “they couldn’t tell us what was going to come out of negotiations” but “we could get more money, we could get less, or we could stay the same,” and the result was “depending on what they would negotiate.” (Tr. 248-49.)

The Union and the Company communicated the same message to the bargaining unit employees in pre-election correspondence. Union organizer Thornsburg's March 24, 2010 letter advised employees that once the Union filed for an election their "wages and benefits are frozen by law ... during the election and throughout contract negotiations." (R-7.) The Company's pre-election letter to employees dated July 28, 2010 (R-8), stated: "If the Teamsters are voted in, wages and benefits could be frozen in place until bargaining has concluded." (R-8; Tr. 194-95.)

The NLRB held a manual ballot election at numerous locations across Southern California on August 13 and 16, 2010, after which the ballots were tallied and the results announced in favor of Teamsters Local 986 on the morning of August 17, 2010. (Tr. 265-66.) The Company did not file any election objections or otherwise attempt to delay certification of the results. (Tr. 2565-66). The Company did send a letter to bargaining unit employees on August 17, 2010, the day the election results were announced. (R-9 at third page.) It was signed by Allen, Kniffin, and the General Manager for Southern California, Boyd Brown. (R-9; Tr. 196.) In the letter, KAG West reiterated to bargaining unit employees the same message it consistently stated during the pre-election period, that it would now move forward in good faith with the next steps in the process of dealing with the employees' chosen Union representative. (Tr. 197; R-9 at third page.) Allen instructed the KAG West terminal managers in Southern California to hand deliver the letter to all bargaining unit drivers and mechanics, and to post a copy of the letter at all terminals in Southern California. (Tr. 197, 225-26; R-9 at second page.)

F. Post Election Adjustments to Wages for Certain Unrepresented Employees.

After the election of the Union, wage increases were approved and implemented across the seven operating subsidiaries of Kenan's Fuels Delivery Group. As Blaise explained, although "[t]here were exceptions in certain markets based on [local] market conditions, ... for the most part, ... almost every [Fuels Delivery Group] subsidiary had changes [to wages] that, again,

varied by market.” (Tr. 96.) KAG West was no exception. As described above, employees within KAG West’s non-union operations in Oregon and Washington were excluded from the August 2010 wage increase. (GC-3, see Stipulation No. 3 at page 2.) Each business unit proposed a wage adjustment that was compared to the amount of funding the Company believed it could secure through customer rate increases. (Tr. 96-97.) Blaise had to “sign off” on the proposed increases in pay, and then “get final approval from our CFO and CEO.” (Tr. 97.) While Blaise testified that management determined generally that it would do something by mid-July 2010 when “it became clear that it look[ed] like we were going to be able to pull it off” in terms of customer rate increases, Blaise noted that “nothing was etched in stone as far as the exact increases for each area at that time. We were still in the formulation state.” (Tr. 97, 141-43.) Ultimately, senior management approved approximately \$8 million in wage increases across the seven subsidiaries that make up the Fuels Delivery Group. (Tr. 143.)

Blaise testified, without contradiction, that the increases were finally approved after the election in Southern California during an executive level strategy planning meeting at Kenan’s corporate offices in Canton, OH on August 24, 2010. (Tr. 98, 100-01, 153, 155.) In attendance at the August 24, 2010 meeting when “the final decision to go ahead” was made, were Blaise, Kenan Chief Financial Officer Carl Young (“Young”), Kenan Chief Executive Officer Dennis Nash (“Nash”), Executive Vice President Bill Downey, and Kenan General Counsel Jacqueline Musacchia (“Musacchia”). (Tr. 100-01, 155.) On the advice of counsel, no decision or announcement was made before the NLRB representation election. Counsel had advised the Company that any such announcement before the Board election “might affect the ... vote that was occurring, or would be occurring, here in Southern California” on whether “to accept Union

representation.” (Tr. 98, 148, 154.) The advice of internal and external legal counsel was “[t]hat we should do nothing until after the election.” (Tr. 99.)

Documentary evidence confirms Blaise’s testimony on the timing of the decision and the “final meeting on wage increases.” The first page of R-3 is an August 23, 2010 email from Kenan Director of Corporate Communications Patty Harcourt (“Harcourt”) to Blaise, Downey, Musacchia, and Walls, in which Harcourt attaches for comment “a draft memo regarding the wage increases to possibly be distributed by each [Business Unit Leader] as early as tomorrow.” (R-3; Tr. 102-03.) Harcourt’s internal email states in the second paragraph that “[n]o final decision will be made until after the strategy planning meeting tomorrow.” (R-3 at first page; Tr. 102.) The draft wage announcement memo that Harcourt attached to her August 23, 2010 email included a proposed release date of August 25, 2010 and contained a blank for the effective date of any yet to be approved wage increases. (R-3 at third page.) Following the August 24, 2010 meeting, the effective date of the approved wage increases was changed to be “for the pay period beginning August 21, 2010,” and the date of the memo was changed to August 24, 2010 as it was released the same day as the meeting approving the wage increases. The final August 24, 2010 wage memo was introduced at the hearing as GC-6 (see also GC-3, Exhibit A to Stipulation 1, and GC-4, Exhibit 13 to Statement of Position). (Tr. 103-04, 154-55.)¹⁰

The decision to grant a wage increase to certain unrepresented KAG West employees in California, Arizona, and Nevada was communicated to the affected employees through the final version of the August 24, 2010 memo prepared by Harcourt, which was distributed by email at

¹⁰ Similarly, GC-13, another internal email dated Thursday, August 19, 2010, from Harcourt to Allen and copying Blaise and Downey, confirms the Company acted on the wage changes *after* the election. Harcourt wrote there will be “a strategic planning meeting next Tuesday [August 24, 2010] which will determine many of the moves we will be making next.” (GC-13.) Blaise testified, the “strategic planning meeting” referenced in Harcourt’s email was the same August 24, 2010 meeting he testified to “where we made [the] final decision on the pay adjustments....” (Tr. 158-59.)

4:00 p.m. that day to the affected terminal managers with instructions to post it. (Tr. 198; R-10 at third page.) As Allen explained, notwithstanding the language of Harcourt's August 24, 2010 memo, not all KAG West drivers in Northern California received a wage increase. (Tr. 199; see also GC-3, Stipulation No. 3 at pages 2-3 for a description of the San Jose and Bakersfield drivers, also the drivers in Oregon and Washington were excluded from the August 2010 wage increase.) Also, the wage increase did not apply to KAG West employees in the Safety Department. (Tr. 199-200; R-10 at first page.)¹¹

G. Post Election, KAG West Deferred Action on Wages and Benefits for Represented Employees to the Collective Bargaining Process, and Maintained All Existing Terms of Employment.

1. Post election, the Company made no decision regarding wage rates of bargaining unit employees based on the advice of counsel.

During the August 24, 2010 strategy planning meeting Kenan executive management discussed the next steps in moving forward with the collective bargaining process. (Tr. 159-60.) Blaise testified the reason no decision was made regarding wage adjustments for bargaining unit employees at the August 24, 2010 meeting was because the Company had been advised by counsel that the law now required the Company to bargain with the Union as the employees' exclusive statutory representative before making changes to existing wage rates or other terms and conditions of employment. (Tr. 148, 156-57.) Blaise testified categorically that at the August 24, 2010 meeting the only decision made regarding adjusting the wages for employees represented by the Union, per the advice of legal counsel, was to "defer[] to the rule of law that

¹¹ While the KAG West pay increases for unrepresented employees were made effective as of the payroll period beginning August 21, 2010, the paychecks reflecting the increases were not issued until September 2010. (Tr. 201-02.) At the time the August 24, 2010 wage memo was distributed announcing approval of the increases, the actual amounts of the wage increases had not yet been finally decided. (Tr. 200-01.) Allen testified that he prepared the proposal on the amounts of the wage increases for unrepresented employees, and submitted his proposal to the payroll department on August 31, 2010. (Tr. 201.) The amounts of the wage increases for unrepresented employees were then finally approved by Blaise and Young sometime during the first week of September 2010. (Tr. 201.)

says we will have to negotiate with the representation and that we would handle that part of the inquiries through that process.” (Tr. 108-09.) Blaise testified the direction he received from legal counsel was that any wage adjustments for bargaining unit employees would need to be accomplished in good faith negotiation through the collective bargaining process. (Tr. 109, 148.) No decision was made at the August 24, 2010 meeting, or at any other time, that bargaining unit employees would not receive a wage increase because or in retaliation for employees voting in favor of representation by the Teamsters. (Tr. 109.)

Likewise, Kniffin testified the reason the August 24, 2010 wage rate adjustments were not applied to represented employees “was that, since Southern California was in collective bargaining, our attorneys told us that we were unable to change terms and conditions of employment” outside of the bargaining process with the Union. (Tr. 235.) And Walls, the senior management representative on the Company’s collective bargaining committee, also confirmed that no decision was ever made, from the time the Union filed its election petition to the present, to not provide a wage increase for bargaining unit employees if or because they voted in favor of the Union. (Tr. 280.) Walls testified, “[o]n the contrary, it’s been part of our bargaining strategy all along that we would offer a pay increase to our drivers, mechanics and one polisher here in Southern California. That’s something we’ve been talking about for months.” (Tr. 280.)

The parties started collective bargaining in October 2010, and, as of the date of the hearing, have held about fifty (50) meetings to negotiate the terms for a first labor contract. (Tr. 266-67.) As of the date of the hearing the Union had not yet made a contractual wage proposal to the Company. (Tr. 170, 280; see also offer of proof at Tr. 267-68.)

On August 25, 2010, the day after the Company approved and announced the wage increase for certain unrepresented employees, management provided talking points to terminal

managers on topics “to be discussed during regularly scheduled meetings (i.e., Safety Meetings, etc.)” with employees. (Tr. 236; R-14 at third and fourth pages.) The second bullet on the August 25, 2010 talking points directs terminal managers to again inform employees the Company respects the decision of the employees who voted and confirms that the Company “will move forward in good faith with the collective bargaining process that now begins in this area.” (R-14.) The talking points also included expected questions from employees and suggested answers for terminal managers, repeating that the Union now speaks for the bargaining unit employees and the collective bargaining process will determine any changes to their working terms and conditions. (Tr. 237-38; R-14.) As Kniffin explained, the management team reviewed these talking points with the terminal managers for the purpose of educating them on how they were to conduct themselves going forward, and terminal managers were instructed they could use these talking points in their conversations with employees. (Tr. 237.)

2. Post election, the Company expected and planned for a wage increase to result from the collective bargaining process.

On August 18 and 19, 2010, after the results of the election were known, Allen asked Blake Simpson (“Simpson”), a financial analyst in Kenan’s corporate office in Canton, Ohio, to do some financial modeling for KAG West’s operations in Southern California. (Tr. 129, 206-07.) Specifically, Allen asked Simpson to model the financial impact of different scenarios, including scenarios with a wage increase for the represented Southern California drivers and mechanics, as well as the unrepresented administrative staff. (Tr. 207-08, R-12.) The scenarios Allen asked Simpson to run included a wage increase of \$1.50 per hour for drivers in Arizona, Nevada, Northern California, and for the Union represented drivers in Southern California. They also included a wage increase of \$1.00 per hour for all shop employees, including for those represented by the Union in Southern California. (Tr. 208; R-12 at the first page and top of third

page, a spreadsheet entitled “KAG West Wage Model.”¹² Allen testified the reason Allen asked for the analysis was because:

I went on the assumption that, at some point during collective bargaining, there would be increases given.

And the reason that we ran these and we were looking at it is, we have to determine – our contracts we use with our customers are long-term; typically, three to five years. So I was trying to project out what an increase would be in Southern California. So as we had discussions with our customers, I would know exactly what to ask for, for these rate increases to be able to build into the request and also the new contracts that were coming up.

So this scenario, I ran an increase for the drivers across the board; I ran an increase for the shop employees, the maintenance employees at 5.75%, which should be about \$1 an hour; and then for all other administrative positions at three percent.... So we build in the scenario going on the assumption that we would be giving increases in Southern California because it was never decided we weren't, that I went ahead and build in a scenario at the 6.7%, \$1.50 an hour.

(Tr. 208-09.)

Allen and Walls both testified regarding a new tool allowance benefit that was implemented for unrepresented KAG West mechanics in August 2010 (R-11, GC-14), but on the advice of counsel was not implemented in Southern California pending the outcome of the election and the need to bargain over the same with the Union (Tr. 205-06.) The Company and Union in collective bargaining subsequently reached a tentative agreement on a new tool allowance benefit for mechanics represented by the Union in Southern California. (Tr. 271; also see offer of proof at Tr. 268.)

¹² Allen explained that the comparison to “original plan” referred to comparing the different proposed scenarios to the base case that was represented on the left hand side of the spreadsheet by the year-to-date financial results through June 2010 without any wage increases granted anywhere. (Tr. 210-11.) Against this, the “first scenario” that Allen had Simpson run assumed a \$1.50 increase in drivers’ base wage rates and \$1 increase for shop employees, including for represented drivers and shop employees in Southern California. (Tr. 210-12; R-12.)

3. Post election, the Company maintained all existing benefits for bargaining unit employees, including the existing wage structure, incentive pay, and health insurance premiums and coverage.

Following the election of the Union, KAG West did not freeze all bargaining unit employees at whatever pay rate they were making prior to the election. On the contrary, the Company continued to follow the existing rate table for bargaining unit drivers that was in effect in Southern California. The existing wage rate structure for drivers (that has been in effect in Southern California since December 12, 2009) provides that drivers start out at trainee pay when they are hired, which is \$17.00 per hour.¹³ As Kniffin explained, the training rate of pay generally lasts “anywhere from three to six weeks and it may be as much as two months in some cases.” (Tr. 239.) At the successful conclusion of training, a first year rate then applies. Then, at a driver’s one year anniversary from his or her date of hire, the driver moves up a step in base pay from the driver with less than one-year experience rate. (Tr. 239.) After the one year mark, drivers reach the top rate of pay. (Tr. 239, R-4, GC-3, Stipulation No. 3 at page 5.) Kniffin testified that after the election of the Union the Company has continued to apply the scheduled adjustments in base wages for the approximately twenty-four bargaining unit drivers who have reached their anniversary date and progressed to the established top rate of pay for drivers. (Tr. 239-40.) KAG West has also continued to pay bargaining unit drivers other existing differentials and premiums, including the \$1.00 per hour night shift differential and the \$0.75 per hour premium paid to driver trainers. (Tr. 37-38, 63-64; GC-3, Stipulation No. 3 at page 5; R-4.)

Similarly, KAG West has maintained at all times since the election its incentive pay system to enhance drivers’ base compensation. (Tr. 113-14.) Another benefit continued after the

¹³ The trainee pay rate has remained unchanged at \$17.00 per hour in Southern California since at least 2005. (R-4.)

election was the BP/Arco gas cards. These cash equivalent cards were issued by KAG West's former account, BP/Arco, as a reward for a driver's performance and safety record hauling BP's product. (Tr. 240-41.) The gas cards were worth between \$1,600 and \$2,100 per driver per year. (Tr. 241.)

KAG West also maintained its existing health insurance plan and benefits after the election. In December 2010, Walls directed legal counsel to send a communication to the Union with a copy of the health insurance annual enrollment information for 2011 that was being mailed to bargaining unit employees in Southern California. (Tr. 277.) Walls testified the annual enrollment information mailed to the bargaining unit employees stated that "[p]ending collective bargaining negotiations, there are no changes to the medical, dental, or vision carriers plan designs *or cost*." (Tr. 278.)¹⁴ While the 2011 health insurance contribution levels for bargaining unit employees were left unchanged from 2010 pending collective bargaining, Walls testified the health insurance contribution levels for unrepresented employees in Northern California were increased, though they are covered by the same plan as the bargaining unit employees. (Tr. 279.) As a result, since the start of 2011 KAG West's unrepresented employees have been charged higher medical contributions than represented employees. (Tr. 279.)¹⁵

III. QUESTION PRESENTED

1. Whether the ALJ erred in concluding that KAG West violated Section 8(a)(3), and derivatively Section 8(a)(1), of the Act by not unilaterally implementing an unscheduled wage increase for newly represented employees that the Company granted on August 24, 2010 to

¹⁴ The December 21, 2010 communication to the Union and enclosed 2011 Benefits Update packet mailed to the Southern California bargaining unit employees was offered as R-30 and rejected (see rejected Exhibit file).

¹⁵ The 2011 Benefits Update packet mailed to unrepresented employees in Northern California was offered as R-31 and rejected (see rejected Exhibit file).

certain unrepresented employees, where KAG West acted on the advice of counsel and deferred any action on wages for represented employees to collective bargaining. (Exceptions 1-30.)

IV. ARGUMENTS AND AUTHORITIES

The ALJ erroneously found KAG West's decision to grant certain of its unrepresented employees wage increases on August 24, 2010, while deferring action on wages for newly-represented employees to the collective bargaining process violated Section 8(a)(3) of the Act. As explained below, the ALJ's decision is wrong for a number of reasons. At the heart of the problems is that differential treatment between represented and unrepresented employees, by itself is not evidence of animus, an essential element to any 8(a)(3) violation. On the contrary, under the Board's longstanding *Shell Oil* line of cases, which the ALJ fails to apply, an employer is privileged to withhold the granting of new benefits to represented employees pending collective bargaining. That is precisely what the Company did in this case. The ALJ agreed the wage increase at issue in this case was a new benefit. Moreover, there is no allegation the Company has failed to bargain in good faith about wages or any other subject. Nor did the Company's decision take place in the context of any other unlawful conduct. Rather, the ALJ's decision rests entirely on the premise that different treatment, without more, proves unlawful discriminatory motive. As such, the ALJ's decision is contrary to well established Board law, and the Exceptions must be sustained.

A. The ALJ Misapplied Applicable Board Law.

- 1. The ALJ failed to properly apply the Board's longstanding line of cases under *Shell Oil*, which privilege an employer to withhold the granting of new benefits to represented employees pending collective bargaining over the same.**

Because, as the ALJ found, KAG West does not grant "regular, periodic, across-the board wage increases," the Board's well-established line of cases under *Shell Oil*, 77 NLRB 1306

(1948), are controlling, and the Acting General Counsel has the burden to prove KAG West’s decision to withhold the new benefit from represented employees pending collective bargaining was discriminatorily motivated, and was not merely done as part of the Company’s bargaining strategy.¹⁶ As the Board observed in *Arc Bridges, Inc.* 355 NLRB No. 199 (2010): “The *Shell Oil* cases ... stand for the general proposition that the Act does not require employers to afford represented and unrepresented employees the same wages and benefits. For example, an employer may, as part of a bargaining strategy, withhold from represented employees a wage increase granted to unrepresented employees, provided the withholding is not discriminatorily motivated. 355 NLRB No. 199 at *3; see *Shell Oil Co.*, 77 NLRB at 1309 (employer implemented new pay increase and hours only for unrepresented employees); see also *Sun Transp., Inc.*, 340 NLRB 70, 72 (2003) (employer offered lower severance pay to unrepresented employees); *B. F. Goodrich Co.*, 195 NLRB 914, 915 (1984) (employer granted new profit-sharing benefits only to unrepresented employees); *Empire Pac. Indus.*, 257 NLRB 1425, 1426 (1981) (employer granted new cost-of-living increase only to unrepresented employees).

In *Shell Oil*, at a time when collective bargaining negotiations “were impending,” the employer “decided to revert from a 48 to a 40-hour week in all their installations ... and to grant a 15-percent hourly wage increase to compensate for loss of overtime, thereby maintaining the same relative take-home pay.” 77 NLRB at 1309. The employer “unilaterally made this change with respect to the unorganized employees,” and “made no effort to discuss the matter with [the union].” *Id.* When the union requested the employer make the same wage and hour change applicable to its members, “provided such change would not foreclose further negotiation on

¹⁶ Counsel for the Acting General Counsel conceded as much during the hearing, stating under the Section 8(a)(3) theory of the case the Acting General Counsel has “to show discrimination and intention – intent to discriminate.” (Tr. 66.)

wages in the impending negotiations,” the employer “refused on the ground that the question of wages and hours was an integral part of the negotiations then in progress, and that they would make no changes in the wages and hours of employees represented by [the union] until a binding contract ... was concluded.” *Id.* at 1309-10. At trial, the Trial Examiner “concluded that the wage increases were purposely withheld from members of [the union] in order to penalize them for their attempt to bargain collectively ...” *Id.* at 1310. The Board reversed, concluding the Trial Examiner’s “finding of discrimination is without support” where the employer bargained in good faith, and “the record otherwise fails to establish that the wage increases were withheld for antiunion considerations.” *Id.* at 1310. Continuing, the Board observed:

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. Likewise, an employer is under no obligation under the Act to make such wage increases applicable to union members, in the face of collective bargaining negotiations on their behalf involving much higher stakes. In the present case, members of [the union] were seeking to attain the security inherent in a written agreement for a fixed term embracing all terms of the employment relationship. The record herein convinces us that the view taken by the respective parties on the question of interim wage increases in the amount granted to the unorganized employees was a part of the bargaining stratagem employed to improve their relative economic position in the negotiations. Consequently, the [employer’s] 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 [the union], was not in our opinion violative of the Act.

Id. at 1310.

In *B.F. Goodrich Co.*, 195 NLRB 914 (1972), the Board extended the *Shell Oil* principles to “apply equally to the granting of other new benefits, such as profit sharing benefits.” 195 NLRB at 915. There the Board concluded:

[T]he granting of new profit-sharing benefits to unorganized employees but not to represented employees is not, standing alone, prohibited discrimination. The Act does not impose upon an employer

the obligation to grant or confer upon represented employees the right to receive such benefits solely on the basis that like benefits were conferred elsewhere. Indeed, efforts by an employer to extend new benefits to represented employees would usually be in derogation of the contractually established benefits package. Such unilateral action may, indeed, constitute an unlawful refusal to bargain.

Thus, regarding the grant of new benefits to unrepresented workers, the most that can be said is that the Act may impose on the employer the duty to bargain with respect to providing the new benefits to represented employees Thus, in the absence of discriminatory motives in withholding a benefit from these employees in order to encourage or discourage their membership in or representation by a union, we find no merit in the General Counsel's contention that Respondent violated Section 8(a)(3) by granting the profit-sharing benefit only to unrepresented employees.

Id.

In *U.S. Postal Serv.*, 261 NLRB 505 (1982), the Board considered three wage increases the employer granted to all non-bargaining unit employees at the EAS-13 wage scale but withheld from registered nurses newly-represented by the union, who prior to certification had also been on the EAS-13 wage scale. 261 NLRB at 506. It was stipulated the registered nurses did not receive the pay raises solely because the parties were bargaining over an initial labor contract. *Id.* at 508. It was also stipulated that if the registered nurses had not been represented by the union, but had remained unrepresented employees on the EAS-13 pay scale, they too would have received the raises that other unrepresented employees at the EAS-13 level received. *Id.* at 508. The Board found no violation of Section 8(a)(3) of the Act, and observed that it “has long held that, absent an unlawful motive or a context of unfair labor practices, an employer is under no obligation to grant wage increases to organized employees which have been granted to unorganized employees.” *Id.* at 506. The Board also observed that “with respect to discretionary raises ‘[r]equiring [r]espondent during negotiations to continue giving raises to employees ... at times and in amounts unrestricted by a clearly established pattern, is tantamount to licensing it to grant them unilateral wage increases, contrary to *NLRB v. Benne Katz, etc. d/b/a Williamsburg*

Steel Products, Co., 369 U.S. 736 (1962).” *Id.* (quoting *The Ithaca Journal-News, Inc.*, 259 NLRB, 394, 395-396 (1981)).

In *Orval Kent Food Co.*, the Board found the employer did not violate Section 8(a)(3) by withholding merit increases to represented employees where “the record clearly shows that the [r]espondent had no consistent, uniform practice of granting merit increases but had only an irregular practice of granting merit increases on a discretionary basis.” 278 NLRB 402, 403 (1986). The Board also noted “[i]t is well established that discretionary merit increases are a mandatory subject of bargaining,” and “[t]here is no allegation here that the [r]espondent failed to meet its bargaining obligation on this matter.” *Id.* As such, the Board concluded “the evidence is insufficient to establish that [the employer’s] withholding of the merit increases is for any reason other than the parties’ failure to agree on this issue.” *Id.* See also, *American Mirror Co.*, 269 NLRB 1091 (1984) (adopting the decision of the ALJ) finding no Section 8(a)(3) violation where the employer withheld a discretionary wage increase on the advice of counsel during a union organizing campaign and thereafter pending negotiation of a final contract); *Chevron Oil Co. v. NLRB*, 442 F.2d 1067, 1074 (5th Cir. 1971) (“It has long been an established Board principle that, in a context of good 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”).

In a 1993 case, *Howard University* (Case 5-CA-23135),¹⁷ based on facts similar to this case, the General Counsel’s office issued an Advice Memorandum directing that the charge be dismissed. In *Howard University*, the union charged the employer with violating Sections 8(a)(1),

¹⁷ A copy of the Howard University Division of Advice Memorandum, dated March 31, 1993, was provided at the hearing to the ALJ by counsel for KAG West. It is also available through Westlaw at 1993 WL 142605 (N.L.R.B.G.C.).

(3) and (5) of the Act “by withholding a wage adjustment from a newly certified unit of employees.” The General Counsel, relying on the Board’s decisions in *B.F. Goodrich* and *U.S. Postal Serv.*, found the charge to be without merit because the wage increase was not an existing condition of employment, the employer had not refused to bargain over application of the wage increase to the unit, and there was “no evidence that the [e]mployer’s decision not to give the wage increase to the newly-certified unit was motivated by animus.”

Counsel for the Acting General Counsel tried unsuccessfully at the hearing to distinguish the *Howard University* case, stating “the distinction is that in *Howard University*, the [e]mployer’s decision to grant a wage increase was made after the bargaining relationship was.” (Tr. 31.) However, this distinction fails since the uncontroverted evidence was that the final decision regarding the granting of the unanticipated wage increases was made at the executive strategy planning meeting on August 24, 2010, and the announcement of the wage increases followed later that day. (GC-3 at Attachment A; GC-4 at Exhibit 13; GC-6.) This was clearly after the tally of ballots on August 17, 2010, when it was revealed that the Union had been elected as the employees’ exclusive collective bargaining representative.¹⁸ (Tr. 98, 100-101, 153, 155.) As such, the reasoning of the General Counsel’s Advice Memorandum in *Howard University* plainly applies, and the Board’s *Shell Oil* line of cases control.

The clear force of the *Shell Oil* line of cases is that under established Board law the mere existence of a difference in new benefits between unrepresented and represented employees is not in and of itself evidence that the employer’s actions were discriminatorily motivated. *See Sun Transp., Inc.*, 340 NLRB at 72 (finding no Section 8(a)(3) violation and noting “the mere fact

¹⁸ In her questioning of Blaise, Counsel for the Acting General Counsel stated her agreement with the obvious, that as of August 18, 2010, the day after the tally of ballots, “the Union was now the representative of your employees in Southern California.” (Tr. 147.)

that different offers are made or that different benefits are provided does not, standing alone, demonstrate unlawful motive”); *Dallas Morning News*, 285 NLRB 807, 808-09 (1987) (recognizing if a violation could be found based solely on the fact that benefits were granted to unrepresented employees but not to represented employees “an employer would effectively be required to grant its unionized employees any benefit that the nonunit employees possessed”); *Empire Pac. Indus.*, 257 NLRB at 1427 (“[a]bsent 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”); *Phelps Dodge Mining Co. v. NLRB*, 22 F.3d 149, 1498-99 (10th Cir. 1994) (recognizing the employer was privileged under the *Shell Oil* and *B.F. Goodrich* cases to withhold wage increases granted to unrepresented employees from represented employees pending bargaining absent an unlawful motive, and finding no violation of Section 8(a)(3) where the “inference of anti-union animus [is] not supported by substantial evidence in the record as a whole”).

As such, absent specific evidence of anti-union animus with some nexus to the Company’s decision not to unilaterally grant represented employees the wage increase announced on August 24 ,2010 for certain unrepresented employees, the Acting General Counsel cannot make a showing sufficient to establish a Section 8(a)(3) violation. The ALJ’s apparent reasoning was that the mere existence of different treatment (i.e., the granting of wage increases to the unrepresented employees while not unilaterally granting the same to represented employees), by itself constituted proof of animus. However, this ignores the settled Board law requiring the Acting General Counsel to present actual proof that unlawful animus motivated the Company’s decision on wages.

KAG West was privileged under the Board's well established *Shell Oil* line of cases to grant the unscheduled wage increase to non-bargaining unit employees while withholding the new benefit from bargaining unit employees pending collective bargaining with the Union. There is no evidence, or even an allegation, that KAG West has failed or refused to bargain in good faith about wages or any other term of employment. Accordingly, the Exceptions to the ALJ's decision should be sustained and the Complaint dismissed in its entirety.

2. Even accepting the ALJ's factual findings as true, under Board law KAG West could not have unilaterally granted the August 2010 wage increase to represented employees without violating the Act.

(a) Granting the wage increase to employees in the petitioned for bargaining unit prior to the election would have violated Section 8(a)(1) of the Act.

The ALJ concluded that "it was the union activity of drivers in southern California that motivated KAG [West] to begin the process of granting wage increases to employees." (ALJD 4:47-49 (footnote 3).)¹⁹ While KAG West disputes the ALJ's factual finding (see Exception 8), accepting the ALJ's factual findings as correct for purposes of argument, the Company could not have legally increased bargaining unit employees' wages prior to the representation election on August 13 and 16, 2010. In *NLRB v. Exch. Parts Co.*, the Supreme Court held that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with "the protected right to organize." 375 U.S. 405, 409 (1964). As such, if the ALJ's factual findings are accepted, KAG West would have

¹⁹ While the ALJ notes in footnote 3 of his decision, (ALJD 4:42-44) that there is no allegation in the Complaint that the decision to grant the wage increase to unrepresented drivers and mechanics outside of Southern California was designed to chill union activity, accepting the ALJ's factual findings as true for the sake of argument, under Board law, KAG West's decision to grant wage increases to unrepresented employees outside of Southern California to make unionization less appealing to them would be lawful absent evidence that KAG West was unaware of active, ongoing union organizing campaigns at those other operations (Northern California, Arizona, and Nevada). *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006) ("Where it cannot be established that the employer knew of union activity, the Board has not found unlawful the grant or announcement of economic benefits"). Here, there is no evidence of union organizing activity going on outside of Southern California.

violated Section 8(a)(1) of the Act and committed objectionable pre-election conduct had it granted a wage increase to drivers and shop employees in Southern California during the Union's organizing campaign. *See Curwood Inc.*, 339 NLRB 1137, 1147-48 (2003), *enfd.* in pertinent part 397 F.3d 548, 553-54 (7th Cir. 2005) (finding even a prepetition announcement and promise to improve benefits violated Section 8(a)(1) where the employer was reacting to knowledge of union activity among its employees).

(b) After the election, wages and other terms of employment must be resolved through the collective bargaining process.

“It is well established that discretionary merit increases are a mandatory subject of bargaining,” *Orval Kent Food Co.*, 278 NLRB 402 (1986). It is also well established Board law that an employer may not unilaterally change a mandatory subject of bargaining without going through the collective bargaining process. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Thus, after the representation election, wages and benefits for the represented employees were subject to the collective bargaining process between the Company and the Union.

Here, by deferring action on the wages of bargaining unit employees until after the election, KAG West complied with its bargaining obligations under Section 8(a)(5) and 8(d) of the Act. Nevertheless, the ALJ found a violation of the Act, creating out of thin air a finding of causal anti-union animus in order to nullify the right of the Company to defer action on wages for represented employees to collective bargaining over an initial labor agreement. The ALJ's decision was clearly erroneous because, as explained in greater detail above, under the Board's well established *Shell Oil* line of cases, KAG West was privileged to withhold the granting of such a new benefit to represented employees pending collective bargaining over the same. *See Shell Oil*, 77 NLRB at 1309; *Sun Transp.*, 340 NLRB at 72; *Empire Pac. Indus.*, 257 NLRB at 1426; *B. F. Goodrich*, 195 NLRB at 915.

In finding that KAG West's decision to not unilaterally grant a wage increase to represented employees violated Section 8(a)(3) of the Act, the ALJ relied singularly on *Aluminum Casting & Eng'g Co.*, 328 NLRB 8, 16 (1999), which is completely inapposite to this case. (ALJD 6:22-40.) In *Aluminum Casting*, the Board upheld the ALJ's finding that an employer violated Section 8(a)(3) when it withheld *a regularly scheduled wage increase* during a union organizing campaign. *Id.* The essential fact in *Aluminum Casting*, that is not present here, is the employer there had an established practice of granting annual wage increases. As the Seventh Circuit explained in upholding the Board's decision:

A critical factual question underlies this part of the Board's case: did ACE/CO have an established practice of granting annual across-the-board wage increases at the time the Union began its organizing campaign in late 1994? Both the ALJ and the Board found as a fact that it did Once we have resolved that point, the rest of this part of the case falls in place. ACE/CO's position is that it was between a rock and a hard place during the campaign: if it granted the wage increase, it would violate section 8(a)(1) by giving an impermissible benefit, if it did not, it would find itself where it does today. The dilemma was real, however, only if there was no established practice.

NLRB v. Aluminum Casting & Eng'g Co., 230 F.3d 286, 290 (7th Cir. 2000) (internal citations omitted).

Here, KAG West's dilemma was real because, as the ALJ was compelled to conclude: "KAG does not grant regular, periodic, across-the-board wage increases to its employees." (ALJD 3:30-31.) Thus, the entire rationale behind finding a violation of the Act in *Aluminum Casting* is absent in this case. Because KAG West had no established practice of granting wage increases, its choice whether or not to unilaterally grant bargaining unit employees a new benefit in the form of an unscheduled wage increase during the Union's organizing campaign or prior to collective bargaining falls squarely between the "rock" and the "hard place" described in *Aluminum Casting*. *Id.* As the Second Circuit recognized:

[T]he granting of economic benefits by the unilateral action of an employer while union organizational efforts are underway, or while a representation election is pending, is a violation of Sections 8(a)(1) and 8(a)(5) It would hardly be logical to hold the Company guilty of an unfair labor practice solely for withholding economic benefits under the same circumstances. Such a damned if you do, damned if you don't approach by the Board does not further the policies of the Act.

NLRB v. Dorn's Transp. Co., 405 F.2d 706, 714-15 (2nd Cir. 1969).

Based on the ALJ's factual findings, KAG West would have violated the Act had it unilaterally granted wage increases either during the Union's organizing campaign or prior to collective bargaining, and KAG West's decision on the advice of counsel to maintain the current wages and defer any action on wages to collective bargaining did not violate Section 8(a)(3) of the Act. The ALJ's conclusion otherwise was clearly erroneous and would leave KAG West in the "damned if you do, damned if you don't" situation referenced in *Dorns' Transp. Co. Id.* Accordingly, the Exceptions should be sustained and the Complaint dismissed in its entirety.

3. The ALJ erroneously applied the *Wright Line* analysis to reach a conclusion that KAG West violated Section 8(a)(3) the Act.

Under the Board's *Wright Line* analysis, it has long been held that:

A violation of § 8(a)(3) is established where General Counsel demonstrates that an employer's opposition to protected union activity was a motivating factor in a decision to take adverse action against an employee and the employer is unable to demonstrate that the adverse action would have been taken absent the protected activity.

NLRB v. U.S. Postal Serv., 906 F.2d 482, 486 (10th Cir. 1990) (emphasis added); *see also*, *Inductive Components*, 271 NLRB 1448 at *1 (1984) (holding that an employer's granting of a smaller wage increase to an employee engaged in protected activity than to other employees was not an 8(a)(3) violation where the employee would have received the same increase absent her union activity). It is well settled that "[i]f the [adverse action] would have occurred absent the

protected activity, it is clear no unfair practice existed since a bad motive without effect is no more an unfair labor practice than an unexecuted evil intent is a crime.” *Wright Line* 662 F.2d at 903. The adverse action complained of here is KAG West not unilaterally implementing a wage increase for bargaining unit employees. But, according to the ALJ’s findings, that would have happened whether or not the employees had sought union representation. The ALJ concluded that absent the employees’ protected activity of seeking union representation there would have been no wage increases for any KAG West employees.

In his decision, the ALJ explicitly concluded “that it was the union activity of the drivers in [S]outhern California that motivated KAG [West] to begin the process of granting wage increases to employees,” and that “had the employees in [S]outhern California not engaged in union activities KAG would not have begun to consider granting the wage increases” (ALJD 4:47-51 at footnote 3 (emphasis added).) Assuming for the sake of argument the ALJ’s conclusion was correct and the Union’s organizing campaign was the motivating factor behind the August 2010 wage increases, then “absent the protected activity” of employees seeking union representation no one, including the bargaining unit employees, would have received the August 2010 wage increases. Therefore, because the outcome of KAG West’s decision on wages with respect to the represented employees would have been unaffected by the absence of the protected activity which the ALJ finds was the motivating factor for the Company’s action on wages, there is no violation of Section 8(a)(3) of the Act. *Wright Line* 662 F.2d at 903.

B. An Employer May Lawfully Treat Represented Employees Differently than Unrepresented Employees; Different Treatment By Itself Is Not Proof of Anti-Union Animus.

The Acting General Counsel had the burden to prove every element of the violations alleged in the Complaint. A finding of anti-union animus is an essential element of any Section

8(a)(3) violation. As the Supreme Court observed: “Under that section both discrimination and a resulting discouragement of union membership are necessary, but the added element of unlawful intent is also required.... The discriminatory act is not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union; some element of anti-union animus is necessary.” *NLRB v. Brown*, 380 U.S. 278, 286 (1965) (citations omitted). To meet its burden, the Acting General Counsel needed to prove through a preponderance of the evidence that union animus was a motivating factor in the Company’s decision to defer action on wages for represented employees to collective bargaining. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F. 2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *FES*, 331 NLRB 9, 21 (2000). *See Crown Bolt Inc.*, 343 NLRB 776 (2005) (absent evidence a wage increase was wrongfully withheld, the General Counsel failed to prove respondent violated Sections 8(a)(3) and (1) of the Act); *Regal Recycling Inc.*, 329 NLRB 355, 356 (1999) (facts necessary to make out a Section 8(a)(3) violation of the Act must be established by preponderance of the evidence).

1. The ALJ’s finding of anti-union animus rests solely on the fact that KAG West provided wage increases to unrepresented employees while engaging in collective bargaining with Union represented employees.

The ALJ erred in ruling that KAG West’s decision to not unilaterally grant Union represented employees the same unscheduled and unanticipated wage increase announced for certain unrepresented employees on August 24, 2010 was discriminatorily motivated in violation of Section 8(a)(3) of the Act. The ALJ’s decision rests entirely on the existence of differing treatment by KAG West of its represented and unrepresented employees, and not on any actual evidence of animus. In fact, Counsel for the Acting General Counsel failed to call a single witness to support the 8(a)(3) wage allegation in the Complaint. Instead, the Acting General Counsel’s evidence on wages rested solely on the parties’ Stipulation No. 3 that KAG West did not unilaterally grant the same wage increase to represented employees that it did for certain

unrepresented employees but, instead, maintained the existing wage rates for represented employees that have been in place at all times since at least December 12, 2009 (GC-3); and the Company's November 8, 2010 Statement of Position (GC-4 at 14-15, 18-20). Neither provides any evidence to support the alleged discriminatory intent with respect to KAG West's decision to defer unscheduled and unanticipated action on wages for represented employees to collective bargaining with the Union over an initial labor agreement.

As explained in detail above, differential treatment of union and non-union employees, in and of itself, does not show anti-union animus. *See Shell Oil*, 77 NLRB at 1309; *Sun Transp.*, 340 NLRB at 72; *Empire Pac. Indus.*, 257 NLRB at 1426; *B. F. Goodrich*, 195 NLRB at 915. Perhaps recognizing that differential treatment itself does not make a case of unlawful 8(a)(3) conduct, the ALJ manufactured a determination of anti-union animus by relying on irrelevant, meaningless, and at times inaccurate findings. To establish a *prima facie* case of unlawful discrimination under Section 8(a)(3) of the Act, the ALJ's decision relied on his findings that: (1) the Company was aware of and hostile to employees' union organizing activities; (2) "[t]he timing of the decision to withhold the wage increase occurred near the end of the Union's successful campaign to become the employees' collective-bargaining representative;" (3) "only those employees voting for the Union did not receive the wage increase;" (4) that KAG West "withheld the wage increase because the employees chose to be represented by the Union;" and (5) that the KAG West wage increases granted to certain unrepresented employees occurred "in the context of KAG [West] suddenly deciding to reconsider the earlier [December 2009] wage reduction after employees began seeking union representation." (ALJD 5:32-41.) As explained below, these factual findings are irrelevant, inaccurate, or otherwise insufficient to make out a *prima facie* case of intentional discrimination in violation of Section 8(a)(3) of the Act.

First, the timing of the Company's wage decision was clearly established at the hearing to be for lawful reasons and does not support an inference of anti-union animus. The uncontroverted evidence at the hearing was that as early as March of 2010, more than three months before the Union filed its representation petition, management was considering potential positive wage adjustments for employees by the end of the summer of 2010 if the economy continued to improve and the Company could secure the renewal of its contract with BP/Arco, KAG West's largest customer in Southern California whose contract was due to expire in October 2010. (Tr. 89-91, 93-94; R-1.)²⁰ Moreover, the uncontroverted testimony of Blaise, Allen, Kniffin, and Walls was that, based on the advice of legal counsel, KAG West delayed action on wage adjustments for any employees until after the NLRB election on August 13 and 16, 2010 to avoid the risk of potential election objections and/or unfair labor practice charges accusing the Company of interfering with employees' Section 7 right to a free election. (Tr. 98-99, 148-149, 154, 205-206, 234-235, 259.) The timing of KAG West's wage increases was purposefully selected to comply with the Board's long standing prohibition on employers altering wages or other benefits during a union organizing campaign. *See NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964) ("the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union" interferes with "the protected right to organize"); *Curwood Inc.*, 339 NLRB 1137, 1147-48 (2003), *enfd.* in pertinent part 397 F.3d 548, 553-54 (7th Cir. 2005) (finding even a prepetition announcement and promise to improve benefits violated Section 8(a)(1) where the employer was reacting to knowledge of union activity among its employees).

²⁰ Allen and Kniffin testified they said as early as December 2009 and January 2010 in meetings with drivers to review the wage reduction that when the economy improves the Company would look to increase wages again. (Tr. 231-232; R-6 at slides 9, 10, 11, R-13 at slide 18.)

Second, the ALJ's assertion that "only those employees voting for the Union did not receive the wage increase" is beside the point and only partially true.²¹ As explained above, an employer is privileged to grant wage increases to unrepresented employees while bargaining over the wages of represented employees. *See Shell Oil*, 77 NLRB at 1309; *Sun Transp.*, 340 NLRB at 72; *Empire Pac. Indus.*, 257 NLRB at 1426; *B. F. Goodrich*, 195 NLRB at 915. Such conduct in and of itself does not constitute evidence of anti-union animus. This finding is also inaccurate. A number of non-bargaining unit employees did not receive the August 24, 2010 wage increase.

As described in the parties' Stipulation No. 3 (GC-3), certain unrepresented drivers in KAG West's operations in Northern California did not receive the August 2010 wage increase. (GC-3; Tr. 199.) Nor did KAG West's unrepresented drivers and shop employees in Oregon and Washington receive the August 2010 wage increase. (GC-3.) Moreover, the uncontroverted evidence, including the testimony of Blaise, Allen, and Kniffin was that no decision was ever made not to grant a wage increase to bargaining unit employees but, instead, the only decision made with respect to the newly represented employees was that any adjustment in their wages would be negotiated with the Union as part of the collective bargaining process over an initial labor agreement. (Tr. 108-109, 148-149, 167, 205-206, 234-235; R-3.)

Third, the ALJ's finding that KAG West "withheld the wage increase because the employees chose to be represented by the Union," (ALJD 5:37-38), was not only contrary to the uncontroverted evidence (Tr. 108-109), but was also inconsistent with the ALJ's finding

²¹ Presumably the ALJ was not intending to suggest that drivers and shop employees within the Southern California bargaining unit were treated differently based on whether they voted in favor or against Union representation. There was no differentiation in treatment among bargaining unit employees based on their support for or opposition to the Union. Instead, it appears the ALJ intended to say that only employees in the bargaining unit were excluded from the wage increase, which is also not accurate. (See GC-3, at Stipulation No. 3.)

elsewhere that “the decision to withhold the wage increase occurred” prior to the election “[i]n about early August” either “in the midst of the Union’s organizing effort among the drivers in [S]outhern California” or “near the end of the Union’s successful [organizing] campaign.” (ALJD 4:5-7, 5:34-38.) These findings are inherently inconsistent with a finding that KAG West decided to discriminate against employees based on the outcome of the election (i.e., a decision made after the election). Moreover, as discussed above, if the decision to grant the wage increase to unrepresented employees was made after the election of the Union, which was the uncontroverted testimony showed, then under well established Board law the Company was not obligated to unilaterally grant the same new benefit to represented employees but was obligated only, upon request, to bargain in good faith with the Union over the same. But if, as the ALJ erroneously and inconsistently finds here, the decision was made prior to the election, then it cannot be because the employees subsequently chose to be represented by the Union.

Fourth, the only Company statements to which the ALJ points in his decision as potentially showing general anti-union animus are selective quotes taken from two talking point documents that are unrelated to KAG West’s decision to not unilaterally increase wages for bargaining unit employees outside of the collective bargaining process. (ALJD 2:34-51, 3:1-21; R-3, R-14.) For example, not only are the talking points documents from which the ALJ quotes (R-3, R-14) not related to the decision on wages, but one of the documents (R-14) was distributed to terminal managers outside of the bargaining unit in KAG West’s non-union operations as well as to managers elsewhere in Kenan’s other Fuels Delivery Group subsidiaries around the country in the event they received questions from employees about the election in Southern California. (R-14 p. 1-2.) As such, the statements are not probative of KAG West’s decision on wages. *See Ultrastystems W. Constructors, Inc. v. NLRB*, 18 F.3d 251, 256 (4th Cir.

1994) (“Some nexus is necessary to link the anti-union animus with a hiring decision.”); *Gen. Battery Corp.*, 220 NLRB 1078, 1079 (1975) (“It is well settled that even though an employer evidences hostility towards a union and commits unfair labor practices, such facts do not by themselves establish discriminatory motive for a plant closure.”). Further undermining the ALJ’s reliance on the documents to show animus is the fact the ALJ selectively excluded from his quotation statements in the same two documents that KAG West “respect[s] the decision made by [their] employees who voted and will move forward in good faith with the collective bargaining process.” (R-3 p. 4, R-14 p. 3).

Accordingly, because there is no evidence of animus with a nexus to the Company’s decision on wages, and different treatment by itself does not constitute evidence of animus, the ALJ erred in finding a violation of Section 8(a)(3) of the Act. The Exceptions should be sustained and the Complaint dismissed in its entirety.

2. KAG West’s wage decisions were made without discriminatory intent and were privileged under long-standing Board law.

Contrary to the ALJ’s strained circumstantial finding of anti-union animus, the uncontroverted evidence demonstrated that KAG West’s decision to resolve the wages of bargaining unit employees through collective bargaining was based on the advice of counsel regarding the Company’s legal obligations under the NLRA, and was not discriminatorily motivated. Although the ALJ wrongly determined that “Blaise decided to grant wage increases to employees” in “about early August,” the record evidence establishes that, on the advice of legal counsel, no final decision was made regarding wage increases until after the election on August 24, 2010. (ALJD 4:5-6; Tr. 98, 100-01, 148, 153-55; R-3; GC-13.) Indeed, the amounts of the wage increases granted to certain unrepresented employees were not finalized until early September 2010. (Tr. 201.) As discussed above, the concern was that any decision or

announcement of a wage increase, even if only for employees outside the petitioned for bargaining unit, could potentially be the basis for unfair labor practice charges and post-election objections accusing the Company of interfering with employees' free exercise of their Section 7 rights. (Tr. 98-99, 148-149, 154, 205-206, 234-235, 259.) Blaise's uncontroverted testimony, confirmed by the Company's internal email correspondence at the time, was that on advice of counsel no final decision was made or communicated to employees regarding any wage adjustments until after the election, and final approval to go ahead with wage increases for unrepresented employees was not granted until an executive level strategy planning meeting with Nash and Young in Canton, Ohio on August 24, 2010. (Tr. 98, 100-101, 151, 155; R-3.)

Blaise also testified, and was corroborated by the testimony of Allen, Kniffin, and Walls, that the reason the new wage increase was withheld from the bargaining unit drivers and mechanics in Southern California was because legal counsel advised that any such changes were a mandatory subject of collective bargaining that had to be negotiated with the Union. (Tr. 108-109, 148-149, 167, 205-206, 234-235, 259; R-3.) Finally, Blaise and Walls were clear that no decision was ever made that drivers and shop employees in Southern California would not get a wage increase if or because they voted in favor of representation by the Union. (Tr. 109, 280.) Instead, the only decision that was made with respect to represented employees was to bargain with the Union over wages as part of the negotiation for a first labor contract. (Tr. 109, 148.) Moreover, Counsel for the Acting General Counsel conceded the reasonableness of the Company's caution and reliance on legal counsel in this area when in her opening statement she

observed “*the law on this issue involving wage increases, such as the one presented by this case, is a complex area with some discrepancy in it.*” (Tr. 16.)²²

KAG West’s actions in following the advice of legal counsel in this “complex area” of the law in an effort to comply with its legal obligations under Sections 8(a)(1), 8(a)(5), and 8(d) of the Act with respect to a new employee benefit, compels the finding that the Company’s conduct did not constitute unlawful discrimination under Section 8(a)(3) of the Act. *See Bowling Green-Warren County Cmty. Hosp. Corp. v. NLRB*, 756 F.2d 41, 43-44 (6th Cir. 1985) (finding no substantial evidence the employer intended to discriminate against employees to discourage union activity in violation of Sections 8(a)(3) and (1) of the Act where the General Counsel “stipulated that the only reason for the disparate treatment was advice of counsel” and “[t]here is simply no evidence tending to contradict this stipulation”); *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312, 1321-22 (5th Cir. 1995) (no substantial evidence to support finding the employer’s decision to delay wage increase was unlawfully motivated where “the unrefuted evidence establish[ed] the increase was not regularly scheduled and the employer was advised by outside legal counsel not to grant the wage increase to avoid the risk of unfair labor practice charges).

In short, Blaise’s unrefuted testimony demonstrated KAG West decided to not unilaterally grant wage increases for employees in the petitioned for unit during the organizing campaign as it would have violated Section 8(a)(1), and to defer after the election of the Union to the collective bargaining process so as not to violate Section 8(a)(5) of the Act. Acting on the advice of counsel in an effort to not commit unfair labor practices cannot serve as a basis for

²² Counsel for the Acting General Counsel further conceded in her repeated questioning of Blaise as to the motivation for the Company’s actions that “we all understand that you were trying to follow the letter of the law.” (Tr. 161-62.)

finding a Section 8(a)(3) violation. Not only was Blaise's testimony regarding KAG West's decision on wages uncontroverted, but it was also corroborated by the undisputed testimony of Allen, Walls, and Kniffin. (Tr. 98-99, 108-109, 148-149, 154, 165, 167, 205-206, 234-235, 240, 259.)

Additionally, there is no evidence of any antiunion statements by management in relation to the August 2010 wage increase. Nor did the decision regarding the August 2010 wage increase take place in the context of other unlawful conduct. None of the numerous other allegations in the instant charge (Case 21-CA-39488), which initially included Section 8(a)(3) and 8(a)(5) allegations, were found to have sufficient merit to go to complaint. (GC-1(a).) And the lone other allegation in the complaint, involving the alleged creation of the impression of surveillance by the San Diego terminal manager, was found to be without merit by the ALJ, and was, in any event, entirely independent of senior management's decision regarding the August 2010 wage increase. And, of course, there is no allegation the Company has violated Section 8(a)(5) by failing to bargain in good faith with the Union since the election. Walls testified that as of the date of the hearing the Company had met with the Union's bargaining committee approximately fifty (50) times, the parties' have reached a number of tentative agreements, including on new employee benefits. (Tr. 267-68, 271.)

Indeed, the evidence establishes that since learning of the Union's election on August 17, 2010, the Company has been prepared to bargain with the Union over wages. Allen testified regarding financial modeling he had done on August 18 and 19, 2010, that included scenarios with a wage increase for the bargaining unit drivers and mechanics, which he explained was based on his expectation there would be a wage increase agreed to in collective bargaining. (Tr.

206-07; R-11.) And Blaise testified about the Company's surprise that the Union had not as yet made a wage proposal or started to bargain over wages. (Tr. 170.)

Finally, the Company has maintained all existing benefits and other terms and conditions of employment since the election. This includes granting all scheduled increases in base wage rates when drivers reach their anniversary date under the existing wage structure (Tr. 239), continuing to pay incentive pay to drivers under the same formula in effect before the election (Tr. 113-14), distributing BP gas cards worth between \$1,600 and \$2,100 dollars each to bargaining unit drivers who serviced that account, and even sending the cards to drivers who had been laid off in October 2010 when the Company was unsuccessful in its bid to renew the BP contract. (Tr. 241-42.) The Company has also maintained bargaining unit employees' health insurance with no changes in plan design or benefits. This has included freezing bargaining unit employees' health care contribution rates at the 2010 level pending the outcome of collective bargaining, which Walls testified has resulted in the represented employees paying substantially less in monthly healthcare contributions than unrepresented employees, whose rates were increased at the start of 2011. (Tr. 275-79.)²³

Despite the ALJ's strained and unsupported findings otherwise, the overwhelming and uncontroverted record evidence confirms that KAG West elected to raise wages for unrepresented employees while collectively bargaining over wages for represented employees, that KAG West delayed action on increasing the wages for unrepresented employees on the advice of counsel so as to not interfere with the employees' free election, and thereafter to defer action on wages with respect to represented employees to collective bargaining to comply with

²³ Copies of the annual enrollment mailings sent to bargaining unit employees as well as unrepresented employees in Northern California showing the significantly lower contribution rates for Southern California employees pending collective bargaining were offered as R-30 and R-31 but were rejected by the ALJ and placed in the rejected exhibit file.

the Company's legal bargaining obligations under Section 8(a)(5) of the Act. As a result, there is no evidence that the differential treatment between represented and unrepresented employees in this case was motivated by anti-union animus in violation of Section 8(a)(3) of the Act.²⁴ *See Ithaca Journal-News, Inc.*, 259 NLRB 394, 396 (1981) (because "discontinuance of merit increases was alleged and litigated as discriminatory conduct in violation of Section 8(a)(3), rather than as a unilateral change in violation of 8(a)(5), the General Counsel also had to show that [r]espondent was motivated by animus toward employees' selection of the Union," which the General Counsel failed to do where the statements relied upon manifest only the employer's position "that it was precluded by law from granting merit increases because of its collective bargaining obligations").

V. CONCLUSION

For all the foregoing reasons, KAG West's Exceptions to Administrative Law Judge William G. Kocol's December 30, 2011 Decision and Order should be sustained, and the Complaint should be dismissed in its entirety.

Respectfully submitted,

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²⁴ Nor did the Acting General Counsel present any evidence sufficient to support a finding of pretext. *Merillat Indus.*, 307 NLRB 1301, 1303 (1992) (general counsel failed to carry burden to show that the respondent's stated reason was pretextual); *N.Y. Telephone*, 300 NLRB 894, 896 (1990) (finding of pretext may not be based merely on the absence of corroborating evidence).

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true and correct copy of the foregoing Respondent KAG West, LLC's Exceptions to Administrative Law Judge William G. Kocol's December 30, 2011 Decision was electronically filed with the National Labor Relations Board using the National Labor Relations Board's Internet website, which should automatically forward an electronic copy of the same to the Acting Regional Director of Region 21 of the National Labor Relations Board. In addition, the undersigned certifies that an electronic copy of Respondent KAG West, LLC's Exceptions to Administrative Law Judge William G. Kocol's December 30, 2011 Decision was served via email on the following parties of record:

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