

**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**

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

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## I. INTRODUCTION

An employer does not violate Section 8(a)(3) of the Act by deferring to collective bargaining the subject of unscheduled wage adjustments for newly represented employees, where the employer bargains in good faith and is not otherwise guilty of unlawful conduct.

Notwithstanding this well established principle, the Acting General Counsel (“General Counsel”) in his Answering Brief in opposition to Respondent’s Exceptions,<sup>1</sup> erroneously relies on inapposite cases involving employers who acted unlawfully by withholding scheduled, across-the-board wage increases from bargaining unit employees out of union animus. The arguments of the General Counsel, in addition to ignoring controlling Board precedent, misrepresent the evidence presented at the hearing of this case. For the reasons set forth in KAG West’s Opening Brief and this Reply, Respondent’s Exceptions should be sustained and the Complaint dismissed.

## II. ARGUMENTS

### A. The ALJ Erred in Finding KAG West’s Actions Were Motivated by Union Animus.

The General Counsel offered no evidence of unlawful motivation at the hearing. The ALJ’s finding of union animus is based solely on the timing of KAG West’s wage adjustments for non-bargaining unit employees and its August 24, 2010<sup>2</sup> memo advising those employees of the same. While the General Counsel argues “it is the timing of Respondent’s conduct that categorically reveals its unlawful motive” (AB:13), the timing alone of KAG West’s complained of conduct cannot establish unlawful motivation as a matter of Board law.

KAG West became aware of the Union’s organizing campaign in February 2010 (ALJD 3:38-40). The uncontroverted testimony of Respondent’s witnesses Blaise, Allen, Kniffin, and Walls established that KAG West’s deferral of unscheduled wages adjustments during the

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<sup>1</sup> Hereafter cited to as “AB:[page number].”

<sup>2</sup> Hereafter, all references to dates are to 2010 unless otherwise indicated.

organizing campaign, and for newly represented employees after the election, was based on the advice of counsel about its legal obligations under the Act. (Tr. 98:13-99:12, 108:20-109:21, 206:1-3; 234:1-235:20, 265:1-16, 280:2-21.) KAG West acted on counsel's advice to make no unilateral changes in the existing terms and conditions of employment for unit employees to avoid interfering with the election, and, after the election, to address the subject of wages for unit employees as part of the collective bargaining process. As such, the timing of the complained of conduct (KAG West not granting an unscheduled wage increase to unit employees after the election) cannot, as a matter of law, under the Board's *Shell Oil* line of cases, establish unlawful motivation. See also *Wegman's Food Markets, Inc.*, 351 NLRB 1073, 1078 (2007) (timing does not show unlawful motivation where a reasonable explanation exists); *Raysel-IDE, Inc.*, 284 NLRB 879, 880-81 (1987) (reversing "flawed, circular analysis" based "solely on the timing" that was unsupported by "independent evidence of the ... alleged union animus"); *Briarwood Hilton*, 222 NLRB 986, 991 (1976) (timing of May 13 discharge, 8 days after representation petition filed, did not establish unlawful motivation where "[a]ccording to the General Counsel, as early as February" the employer knew of the employee's union interest).<sup>3</sup>

The critical issue is whether, when it granted wage increases to non-represented employees, Respondent withheld wage increases from the newly represented employees *because* of union animus. The ALJ's finding of animus towards the newly represented employees conflicts with his specific findings as to the Respondent's reasons for granting the wage

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<sup>3</sup> Cases cited by the General Counsel are not contrary and are distinguishable on their material facts. See *Kankakee Valley Rural Elec. Membership Corp.*, 338 NLRB 906, 910 (2003) (adverse inference based on timing where employer also violated Section 8(a)(5) by discontinuing "its established practice of making annual wage and benefit adjustments," and told employees if the union was not voted in the employer had a "sweet package for them"); *Masland Indus., Inc.*, 311 NLRB 184, 197 (1993) (finding unlawful discharge where employees were terminated on April 27 after receiving the union's recognition demand on April 23, and the employer "engaged in unlawful interrogation and made unlawful promises and threats to the drivers" in the period ending April 23).

increases to drivers and mechanics outside of the Southern California unit. The ALJ concluded that KAG West’s motivation for *granting* the wage increases was the union organizing activity in Southern California, *and not* animus towards unit employees in Southern California. (ALJD: 4:1-7-40, 4:42-51.) The ALJ reasoned that the grant of these increases to non-represented employees was to forestall possible union organizing activity outside of Southern California. While recognizing there is no allegation that the August 24 wage increases to unrepresented employees were unlawful,<sup>4</sup> the ALJ, nevertheless, concluded “that it was the union activity of the drivers in southern California that motivated KAG [West] to begin the process of granting wage increases to employees” and “had the employees in southern California not engaged in union activities KAG [West] would not have begun to consider granting the wage increases.” (ALJD 4:42-52.)

The ALJ then improperly relied on his conclusion as to why KAG West *granted* the unscheduled increases to non-bargaining unit employees to make the unsupported leap of assuming animus motivated KAG West’s decision to *withhold* unscheduled wage increases from newly represented employees after the election, pending collective bargaining with the Union. (ALJD 4:47-51, 5:34-40; AB:14-15.) That conclusion is unsupported and inconsistent with the ALJ’s specific findings that the motivation for the increases granted to employees outside Southern California was to forestall union organizing elsewhere. It also conflicts with the Board’s well established *Shell Oil* cases, which privilege KAG West to withhold an unscheduled wage increase from newly represented employees pending bargaining where it does not change an existing practice, bargains in good faith, and engages in no other unlawful conduct.<sup>5</sup>

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<sup>4</sup> See *Hampton Inn NY – JFK Airport*, 348 NLRB 16, 17 (2006) (not unlawful to grant benefit “to stay ‘one step ahead’ ... by diminishing the appeal of unionization;” it must be shown employer “intended to interfere with actual union organizational activity”). There is no evidence of union organizing activity outside Southern California.

<sup>5</sup> The Union’s Section 8(a)(5) allegation in the Charge was dismissed. At the hearing, the ALJ noted the absence of any 8(a)(5) allegation and that “bargaining has gone in good faith.” (Tr. 268:20-270:20; GC-1(a), GC-4.)

After ignoring established Board law privileging Respondent to defer wage adjustments for newly represented employees to collective bargaining, the General Counsel erroneously argues that unlawful motivation should be inferred from the Company not informing the Union or unit employees before the election about the “positive development” of a potential wage increase. (AB:14.) This is no substitute for evidence of union animus, particularly since no such obligation exists for increases not reasonably expected or promised to employees “with any degree of certainty when a wage increase would have been given.” *Great Atl. & Pac. Tea Co.*, 192 NLRB 645-46 (1971); *see U.S. Postal Serv.*, 261 NLRB 505, 507 (1982).<sup>6</sup>

Next, the General Counsel misrepresents the Company’s August 24 memo addressed to certain unrepresented employees.<sup>7</sup> (GC-6.) The memo was not to unit employees, nor does it reference them or suggest they are not to receive wage increases. It does not reference the Union or the election. Rather, it advises certain unrepresented employees that wage increases have been approved in their area. Moreover, unit employees were told before the election (by the Company and the Union) that if the Union prevailed wages for the new bargaining unit would be determined through collective bargaining. (Tr. 192:17-195:12, 234:7-235:6, 265:1-16.) Post election, the Company told unit employees separately, including after the ballots were tallied on August 17, that management respected their decision and would “move forward in good faith

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<sup>6</sup> Cases relied on by the General Counsel are not to the contrary. *See H.S.M. Mach. Works, Inc.*, 284 NLRB 1482, 1484, FN 9 (1987) (finding violation only because employer blamed union when reinstating a withheld merit raise); *Aluminum Casting & Eng’g Co.*, 328 NLRB 8, 9, 16 (1999) (notice obligation applies to increases reasonably expected by employees because of the employer’s established practice or promise); *NLRB v. Aluminum Casting & Eng’g Co.*, 230 F.3d 286 293 (7<sup>th</sup> Cir. 2000) (notice obligation exists when “an expected raise is to be deferred”).

<sup>7</sup> The memo was not a “company-wide announcement.” (AB:15). In addition to unit employees, the memo was not directed to KAG West’s non-union employees in Oregon and Washington, who also did not receive wage increases. The General Counsel erroneously argues Oregon and Washington are not relevant (AB:4), citing Allen’s testimony that operations in Oregon and Washington reported to a different business unit leader in December 2009. It is undisputed that at the time of the August 24 wage increase Oregon and Washington were part of KAG West’s operations and reported to Blaise, as well, of course, to Nash and Young, who approved the wage adjustments.

with the next steps in the process.” (Tr. 197:17-22, 235:21-237:16; R-9.) There simply is no evidentiary basis for inferring unlawful motivation from the memo. *See NLRB v. Curwood Inc.*, 397 F.3d 548, 557 (7th Cir. 2005) (merely announcing increased benefits to non-unit employees cannot violate the Act); *Phelps Dodge Mining Co., Tyrone Branch v. NLRB*, 22 F.3d 1493, 1500 (10th Cir. 1994) (describing benefits as “union free” does not “indicate that union-represented employees are prohibited from gaining coverage through collective bargaining”).

Nor does the ALJ’s adverse “credibility finding[]”<sup>8</sup> as to Blaise’s economic explanation for the August 24 wage increases support an inference the Company’s complained of action was motivated by Union animus. *See Raysel-IDE, Inc.*, 284 NLRB at 880-81 (“mere suspicion” of the “weakness of an employer’s explanation” is not sufficient to establish unlawful motivation); *Assoc. Musicians of Greater New York*, 212 NLRB 645, 646 (1974) (disbelief of denial “does not ... convert a denial into affirmative evidence”); *Briarwood Hilton*, 222 NLRB at 991 (8(a)(3) requires evidence permitting a positive finding that union activity motivated decision).

The ALJ and General Counsel also improperly rely on Section 8(c) statements unrelated to the wage increases to infer discriminatory motive. *Wegmans Food Markets, Inc.*, 351 NLRB 1073, 1078 (2007) (antiunion video not evidence of unlawful motive where it was not alleged to be unlawful, had no nexus to the complained of conduct, and did not suggest employer’s “hostility towards unions was such that it would be willing to violate the law by discriminating against employees to keep unions out”); *NLRB v. Gotham Indus., Inc.*, 406 F.2d 1306, 1314 (1st Cir. 1969) (unlawful motivation decision unsupportable if based on lawful 8(c) statements).<sup>9</sup>

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<sup>8</sup> The General Counsel presented no witness on the wage allegation, and the only witness the ALJD referenced was Blaise. There is no indication the ALJ considered the testimony of Allen, Kniffin, and Walls.

<sup>9</sup> 29 U.S.C. 158(c): “The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.”

**B. The ALJ Failed to Properly Apply the Required Second Stage of *Wright Line*.**

The ALJ and the General Counsel misapplied the second stage of the *Wright Line* analysis by asking the wrong question. In *Wright Line*, 251 NLRB 1083, 1089 (1980), for cases turning on motivation, the Board adopted the Supreme Court’s two stage burden shifting causation test in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429, U.S. 274 (1977). The Board’s task “is to determine whether a causal relationship existed between the employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees’ employment.” 251 NLRB at 1089. In *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), the Supreme Court upheld the Board’s *Wright Line* test, explaining “the unfair labor practice consists of a[n] ... adverse action” for which “the employee’s protected conduct was a substantial or motivating factor.” 462 U.S. at 401. While the General Counsel has the burden of proving these elements under Section 10(c) of the Act, “the Board’s construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. *Id.*”

In *Arc Bridges, Inc.*, 355 NLRB No. 199 (2010), the judge found the General Counsel failed his *Wright Line* burden of proving “the employees’ protected activity was a motivating factor for [r]espondent’s withholding of the wage increase” from represented employees. *Id.* at \*11. Applying *Wright Line* and *Shell Oil*, the judge found that, “assuming arguendo that such a burden has been sustained,” the employer “met its *Wright Line* burden of proof to demonstrate it would have taken the identical action for legitimate, nondiscriminatory reasons.”<sup>10</sup> *Id.*

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<sup>10</sup> On appeal, the Board reserved judgment on the *Wright Line* theory, and, reversed the judge’s conclusion based on his finding the employer unilaterally changed an established practice of annual wage reviews, which it found meant the inherently destructive framework under *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) applied, instead of *Wright Line*. 355 NLRB No. 199 at \* 2. The D.C. Circuit denied enforcement and remanded the case for further proceeding. *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235 (D.C. Cir. 2011).

This is the question the ALJ should have asked, but failed to, in the second stage of his *Wright Line* analysis. That is, regardless of any alleged Union animus, would KAG West have for lawful reasons taken the identical action of withholding the unilateral grant of the August 24 wage increase from newly represented unit employees? Instead, the ALJ erred by asking “whether KAG [West] has met its burden of showing that it would not have granted the wage increase to unit employees *even if they had rejected the Union.*”<sup>11</sup> (ALJD: 6:4-5.) But the point under *Wright Line* is that, after the election of the Union, regardless of any alleged union animus, KAG West would have deferred the subject of unscheduled wage adjustments for unit employees to collective bargaining. This is clear given the evidence and the legitimate collective bargaining objectives for new benefits recognized in the *Shell Oil cases*, the employer’s obligations under the Act pertaining to unilateral changes in mandatory terms and conditions of employment pre and post-election, and the ALJ’s factual finding that it was the employees’ union organizing in Southern California that motivated the Company on August 24 to grant unscheduled wage increases to non-bargaining unit drivers and mechanics outside of Southern California.

Alternatively, given the ALJ’s factual finding that wage increases for unrepresented employees outside of Southern California were motivated by the Union’s organizing campaign in Southern California, the ALJ should have asked whether absent the organizing campaign KAG

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<sup>11</sup> The ALJ and the General Counsel mischaracterize Blaise’s testimony as an admission the Company “would have granted these employees the wage increase if they had rejected the Union.” (ALJD 6:5-7; AB:24.) Blaise’s testified no such decision was actually made. (Tr. 99:25-100:5, 153:8-155:20, 280:2-11.) Responding to a hypothetical, Blaise stated that if the unit employees had been unrepresented, like other unrepresented drivers and mechanics, he believed it was “likely” they would have received a raise because there would not have been a different legal process required to adjust their wages. (Tr. 156:5-157:-17, 161:23-162:19.) But had the Union lost the election, KAG West would not have been free to unilaterally adjust wages for unit employees until any and all post-election objections were resolved, which may take months or years. Further illustrating the unreliability of such a speculative “what if” inquiry is that in the first week of September KAG West lost its BP/Arco contract, who rejected the proposed rate increase. (GC-4) BP/Arco had been the largest customer in Southern California, and the loss resulted in substantial layoffs of unit employees in October. (Id.) This too would “likely” have affected consideration of wage increases in Southern California had the Union lost the election and objections were resolved.

West would have granted the unscheduled increases to unit employees on August 24. Again, accepting for purposes of argument the ALJ's finding that the increases outside of Southern California were motivated by the organizing in Southern California, the clear answer is "no." Absent the organizing campaign, no employees would have received an increase on August 24. Proper application of the second step of the *Wright Line* analysis confirms that alleged Union animus *did not cause* KAG West to withhold the August 24 wage increase from unit employees.

**C. The ALJ Failed to Properly Apply the Board's Controlling *Shell Oil* Line of Cases.**

For the reasons set forth in KAG West's Opening Brief, the *Shell Oil* line of cases clearly control here. The General Counsel is wrong in arguing the ALJ did not find the wage increase at issue was a new benefit. (AB:10.) Under applicable Board law a "new benefit" refers to one that is not an existing term or condition of employment. Included among existing terms and conditions of employment are those benefits employees have a reasonable expectation of receiving in the future based on either the employer's promise or past practice. Here, the ALJ specifically found that KAG West "does not grant regular, periodic, across-the-board wage increases to its employees." (ALJD 3:30-31.) And the funding for the August 24 increases was subject to less than certain negotiations with customers. (Tr. 97:15-21, 141:23-143:3.)

As the Board explained in *Arc Bridges*, in considering Section 8(a)(3) allegations involving the withholding of wage increases or other benefits, the Board applies two different analytical frameworks. The *Shell Oil* cases apply where the wages or benefits withheld from represented employees are "new." In analyzing *Shell Oil* new benefit cases, the Board applies its *Wright Line* causation test to determine if the employer acted with intent to discriminate. In contrast, "where an employer withholds from its represented employees an *existing* benefit (i.e., an established condition of employment)," the Board applies its inherently destructive analysis under *Great Dane Trailers*. 355 NLRB No. 199, \*2 (emphasis original).

Here, the ALJ correctly concluded the *Wright Line* causation test applied to this new benefit case, notwithstanding his incorrect application of it. (ALJD 5:29-46; 6:1-11.) The ALJ also discussed the *Shell Oil* cases and cited the Board's discussion in *Arc Bridges* (ALJD 6:10-20). It is clear the ALJ concluded this case involves the granting of a new benefit that properly falls under the *Shell Oil* line of cases and a *Wright Line* analysis.

The General Counsel is wrong in arguing the August 24 wage increases were a "systemwide" benefit. As the ALJ found, and as described in Respondent's Opening Brief, KAG West does not have a history of granting systemwide increases. (ALJD: 3:30-31.) The August 24 increases did not go to all unrepresented employees, or even to all the non-bargaining unit drivers in Northern California. Excluded from increases were non-union employees in Washington and Oregon, and certain non-union drivers in Bakersfield and San Jose, CA. Further, the amounts of the increases and revised driver wage scales differ by market. (GC-3.)

The General Counsel incorrectly asserts "the uncontroverted evidence [is] that Respondent merely restored employees (other than in Southern California) to their pre-existing compensation level of December 2009, before their systemwide wage cut." (AB:21-22.) In fact, no mechanics received a reduction in December 2009 but unrepresented mechanics in Northern California, Arizona and Nevada received a \$1 per hour increase on August 24. (Tr. 181:10-16; GC-3.) The only evidence about the relative size of the August 24 adjustments compared to the December 2009 reductions for drivers outside Southern California was the Company's position statement (GC-4 at 15) that the August 24 increases "generally equated to a 0.5% increase *over* what the employees' wages had been before the December 2009 wage reduction."<sup>12</sup>

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<sup>12</sup> During opening statements, Counsel for the General Counsel assured Respondent and the ALJ that she was not contending there was a practice of granting increases or that the disputed wage increases were due to unit employees based on any history of pay adjustments. (Tr. 22:7-12, 23:8-17, 24:5-6.) Counsel for the Union alluded to

Having failed to distinguish the Board's controlling *Shell Oil* line of cases discussed in KAG West's Opening Brief, the General Counsel is left to rely on inapposite cases where employers broke with longstanding practice to withhold from only unit employees across-the-board wage increases developed free of any union organizing consideration to try to influence pending representation elections, and usually in the context of other unlawful conduct. See *Pa. Gas & Water Co.*, 314 NLRB 791 (1994); *Assoc. Milk Prod., Inc.*, 255 NLRB 750 (1981); *Russell Stover Candies, Inc.*, 221 NLRB 441 (1975). Significantly, the General Counsel also relies (AB:23) on the Board's decision in *Chevron Oil Co.*, 182 NLRB 445 (1970), *enf. denied* 442 F.2d 1067 (5<sup>th</sup> Cir. 1971). But there too, the Board specifically noted that but for "the unfair labor practice setting in which the withholding action occurred" it would have found no Section 8(a)(3) violation under the "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." 182 NLRB at 449 (citing *Shell Oil Co.*, 77 NLRB 130).

### III. CONCLUSION

For all of the reasons set forth in KAG West's Opening Brief, and in this Reply, Respondent's Exceptions should be sustained and the Complaint dismissed in its entirety.

Respectfully submitted,

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(continued...)

a purported practice of giving raises to drivers and mechanics in Southern California when raises were given in Northern California, Arizona, and Nevada, but no supporting evidence was offered into the record. (Tr. 24:10-16.)

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that a true and correct copy of the foregoing Respondent KAG West, LLC's Reply Brief in Support of Exceptions to Administrative Law Judge William G. Kocol's December 30, 2011 Decision was electronically filed with the National Labor Relations Board on this date 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 the same was served via email on the following parties of record:

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